Federal Court  Cour fédérale

Date: 20150608

Docket: IMM-1655-15

Citation: 2015 FC 720

Ottawa, Ontario, June 8, 2015

PRESENT: The Honourable Madam Justice Gagné

BETWEEN:

ZHENHUA WANG
and
CHUNXIANG YAN

Applicants

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Defendant

JUDGMENT AND REASONS

[1] The applicants seek judicial review of a decision dated April 2, 2015, whereby a Member of the Immigration Division [ID] of the Immigration and Refugee Board ordered their continued detention on the ground that they are unlikely to appear for removal pursuant to subsection 58(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act] and section 245 of the

Immigration and Refugee Protection Regulations, SOR/2002-227 [Regulations]. The Member further found that the factors enumerated in section 248 of the Regulations favoured detention.

[2] This is the second application for judicial review submitted by the applicants in the matter of their continued detention. The first decision was quashed and remitted to a different ID Member by Justice Phelan. The applicants argue the impugned decision presently before me is tainted with the same errors committed by the first Member, which are: i) his failure to consider the likelihood to appear at the next proceedings; and ii) his failure to properly consider the release plan as an alternative to detention.

[3] I am of the view that the application should be granted on the grounds of the first issue raised by the applicants; the Member did not consider the applicants' refugee hearing as an important consideration in analyzing whether there were alternatives to detention that could attenuate their flight risk.

I. Background

[4] The applicants are wealthy citizens of China and the Dominican Republic. They are currently under conditional removal orders and have been detained since March 7, 2014. The ID has continued their detention in what amounts to a total of six detention reviews.

[5] The applicants first entered Canada under temporary resident visas and subsequently applied for and were issued visitor extensions. They have intended to seek permanent residence status through the Provincial Nominee Program. However, the Canada Border Services Agency

[CBSA] arrested the applicants after receiving information that they were wanted in China for operating an investment company which defrauded thousands of people of approximately RMB1 billion - equivalent to $180 million Canadian dollars.

[6] The applicants were first detained pursuant to section 55 of the Act on the basis that they would not appear for an inadmissibility hearing under paragraphs 58(1)*(b)* and *(c)* of the Act, for allegations of criminality.

[7] On March 23, 2014, the Minister issued reports under section 44 of the Act alleging they were inadmissible for misrepresentation. The reports were subsequently referred for an admissibility hearing.

[8] In June 2014, the applicants made claims for refugee protection. The Minister then requested that the admissibility hearing be withdrawn.

[9] In July 2014, conditional departure orders were issued on the ground that the applicants did not comply with the requirements of the Act. The only reason for detention remained flight risk under paragraph 58(1)*(b)* of the Act.

[10] In January 2015, the refugee hearings commenced and are still ongoing; the Minister has intervened in the case. The applicants and respondent do not anticipate the hearings will conclude until June 2015.

[11] The applicants were granted judicial review on January 21, 2015 of a decision dated December 11, 2014 whereby Justice Phelan quashed and remitted the ID's decision to continue detention; *Wang v Canada (Minister of Public Safety and Emergency Preparedness)*, 2015 FC 79 [*Wang*].

[12] Justice Phelan found the ID made errors with respect to three issues, two of which resurface in the present application. The first is the Member's refusal to consider the likelihood to appear at the next proceeding (the continuation of their refugee hearings) and to instead, only consider the likelihood to appear for removal. The second is the Member's rejection of the release plan proposed by the applicants.

II. Statutory Framework

[13] As a question of statutory application is raised in this case, a brief discussion of the applicable provisions is useful. When faced with the present case, a Member of the ID must employ the following analytical framework in a detention review. It consists of generally two parts.

[14] First, the Member must determine whether there are grounds for detention. Subsection 58(1) of the Act provides that the ID shall order the release of a detained person unless it is satisfied that one of the grounds enumerated in paragraphs *(a)* to *(e)* of the same provision exists. Relevant to the applicants' continued detention is paragraph *(b)* which considers whether a person is unlikely to appear for examination, an admissibility hearing, removal from Canada or a proceeding that could lead to the making of a removal order:

Release — Immigration Division	**Mise en liberté par la Section de l'immigration**
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 :
. . .	**[…]**
(*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); [Emphasis added]	(*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); [Mon soulignement]

[15] In determining whether a person is unlikely to appear—in other words, are a flight risk in any of the types of proceedings contemplated under paragraph *(b)*, the ID must consider the factors enumerated under sections 244 and 245 of the Regulations:

Factors to be considered	**Critères**
244. For the purposes of Division 6 of Part 1 of the Act, the factors set out in this Part shall be taken into consideration when assessing whether a person	**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) is 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	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

under subsection 44(2) of the Act; [Emphasis added]

renvoi en vertu du paragraphe 44(2) de la Loi; [Mon soulignement]

. . .

[…]

Flight risk

Risque de fuite

245. For the purposes of paragraph 244(*a*), the factors are the following:

245. Pour l'application de l'alinéa 244*a*), les critères sont les suivants :

(*a*) being a fugitive from justice in a foreign jurisdiction in relation to an offence that, if committed in Canada, would constitute an offence under an Act of Parliament;

a) la qualité de fugitif à l'égard de la justice d'un pays étranger quant à une infraction qui, si elle était commise au Canada, constituerait une infraction à une loi fédérale;

(*b*) voluntary compliance with any previous departure order;

b) le fait de s'être conformé librement à une mesure d'interdiction de séjour;

(*c*) voluntary compliance with any previously required appearance at an immigration or criminal proceeding;

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*) previous compliance with any conditions imposed in respect of entry, release or a stay of removal;

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;

(*e*) any previous avoidance of examination or escape from custody, or any previous attempt to do so;

e) le fait de s'être dérobé au contrôle ou de s'être évadé d'un lieu de détention, ou toute tentative à cet égard;

(f) involvement with a people smuggling or trafficking in persons operation that would likely lead the person to not appear for a measure referred to in paragraph

f) l'implication dans des opérations de passage de clandestins ou de trafic de personnes qui mènerait vraisemblablement l'intéressé à se soustraire aux mesures visées à

244(*a*) or to be vulnerable to being influenced or coerced by an organization involved in such an operation to not appear for such a measure; and	l'alinéa 244*a*) ou le rendrait susceptible d'être incité ou forcé de s'y soustraire par une organisation se livrant à de telles opérations;
(*g*) the existence of strong ties to a community in Canada.	*g*) l'appartenance réelle à une collectivité au Canada.

[16] Second, where the ID determines grounds exist for the detention, under subsection 58(1) of the Act, the second part of the analytical framework requires a Member of the ID to consider other factors—those listed under section 248 of the Regulations, before making a decision:

Other factors	**Autres critères**
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. [Emphasis added]	*e*) l'existence de solutions de rechange à la détention. [Mon soulignement]

III. Impugned Decision

[17] The Member ordered the continued detention of the applicants on the ground that they were unlikely to appear for removal. Taking into account the detention review history, the position of the parties and the background of the case, the Member stated as follows:

- The applicants did not want to make arguments on the issue of being a flight risk and that the question was conceded; they wanted the ID to focus on the proposed alternative to detention;
- That "[i]n any case", the Member "considered as required what ha[d] been put forward at this and previous detention reviews, as well as previous decisions, other than the most recent one quashed by the Federal Court";
- That the applicants were in the midst of their hearing before the RPD and that the parties indicated the first question which will be determined is the issue of exclusion - dispositive of their case;
- That the applicants were under conditional departure orders.

[18] The Member then turned her mind to the first part of the paragraph 58(1)*(b)* analysis, noting the conditional departure orders depended on the outcome of the refugee hearings. The Member recognized how the applicants previously argued that the ID should consider whether they were unlikely to appear for their refugee hearings.

[19] However, she did "not find this persuasive". She wrote as follows under the heading "Appearance for removal vs. refugee hearing":

> [14] This provision requires the Immigration Division to consider whether a person is unlikely to appear for one of four things, none of which are a refugee hearing. It would be improper then to determine under 58(1)(*b*) whether Mr. Wang and Ms. Yan are unlikely to appear for their refugee hearing.
>
> [15] Mr. Wang and Ms. Yan relied on the Federal Court decisions in *Canada (Citizenship and Immigration) v. B157* and *(Citizenship and Immigration) v B188* (the latter followed *B157*). In *B157* the court clarified that "the Member is not obliged to consider each of the different types of immigration proceedings that are mentioned in that section [58(1)(*b*)], but rather that a consideration of which immigration proceeding is relevant to the circumstances is sufficient." These cases do not interpret paragraph 58(1)(*b*) to include refugee hearings.
>
> [16] Mr. Wang and Ms. Yan are under removal orders and I have therefore considered whether they are unlikely to appear for removal from Canada.

[20] After going through the factors in section 245 of the Regulations, the Member then considered section 248 factors. In considering the reason for detention (section 248*(a)* of the Regulations), the Member considered the unlikelihood to appear for removal as the reason for which the applicants were detained. She concluded as follows at paragraph 67:

> If they are found to be excluded from refugee protection on this basis, ensuring that they appear for removal is consistent with the objective in paragraph 3(2)(*h*) of the *IRPA* which is "to promote international justice and security by denying access to Canadian territory to persons, including refugee claimants, who are security risks or serious criminals." The factor weighs in favour of detention.

[21] In analyzing the release plan under factor *(b)* of section 248, the Member then summarized the essential features which the applicants would purchase: (i) electronic monitoring

services; (ii) video surveillance for the exterior of the home; and (iii) an alarm system monitored by a company called Investigative Solutions Network Inc. [ISN] This company would put in place two security guards who would accompany the applicants on outings. There would also be consent of physical force by the applicants and a personal bond of $10,000 deposited by the CEO of ISN.

[22] The Member then reasoned:

> [69] I do not believe that this alternative to detention adequately ensures that Mr. Wang and Ms. Yan will appear for removal as directed. To be clear, what it means for someone to appear for removal involves that person taking a number of positive steps. They must organize themselves to travel to the airport, arrive there on time in order to check whatever luggage they might have, confirm their departure with CBSA and catch their scheduled flight. They must board the plane without incident. Anything less does not constitute appearing for removal. It requires good faith on the part of the person being removed.

[23] The analysis continues by employing the concept of a bondsperson:

> [70] This is why meaningful bonds are an effective alternative to detention. The bond actually gives the bonded person a desire to act in good faith. When a person with a close and trusting relationship with the bonded person posts a significant deposit or guarantee, the bonded person feels a desire not to jeopardize that relationship, a desire to honour the trust the bondsperson has placed in them, and they do not wish the bondsperson to incur painful financial loss. Even though the bonded person may hate to leave Canada, the bond in fact ultimately makes them prefer to appear for removal.
>
> [71] Mr. Wang and Ms. Yan do not have any desire to act in good faith for all of the reasons I already set out above. Nothing in the proposed alternative alters their motivations. The $10,000 bond from Mr. Wretham is meaningless to them. They have no personal relationship with him that would motivate them to comply with conditions.

[24] The Member then found electronic monitoring and outdoor camera surveillance and alarms on the window and doors as "passive means of tracking and observation" particularly in light of the applicants' disregard for the law and Ms. Yan's suicidal intentions (she stated that she preferred to commit suicide rather than return to China).

[25] Finally, the Member was uncomfortable with the idea that the consent to the use of force could be revoked. Counsel for the applicants suggested a condition preventing withdrawal, which would amount to a breach, but the Member found it would be completely inappropriate to prohibit someone from choosing that they no longer wished to be physically assaulted; and thus, the consent to use of force was without real effect.

IV. Preliminary Remarks

Mootness

[26] At the close of the hearing, the Respondent mentioned that unless this decision is rendered by May 12, 2015, the application will be moot in view of the next scheduled detention review hearing. However, it seemed generally agreed that this Court can exercise its discretion to determine the application notwithstanding that it may become moot.

[27] The Respondent mentioned a recent case released by the Federal Court of Appeal, *Sherman v Pfizer Canada Inc*, 2015 FCA 107 [*Sherman*], which dealt with the question of discretion to hear an appeal from a Prothonotary notwithstanding mootness. It is clear that the proper approach is to consider each of the factors enumerated by the Supreme Court of Canada

in *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 [*Borowski*] (see paras 7 and 15 of *Sherman*, above). This echoes in Justice Mosley's most recent decision in *Kippax v Canada (Minister of Citizenship and Immigration)*, 2014 FC 429:

> [7] This application for judicial review concerns the detention review decision made on December 19, 2013. Since then, there have been several other review hearings and orders for continued detention. This matter is, therefore, moot as the decision being reviewed is spent. However, the parties are agreed that the Court should exercise its discretion to decide the application as the applicant is unlikely to be deported in the near future and the issues raised in the present application will continue to be live issues in his ongoing detention reviews. In arriving at the conclusion that I should hear the matter notwithstanding its mootness I have considered the principles set out in *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 at 353. [Emphasis added]

[28] In the case at bar, the Court should exercise its discretion notwithstanding mootness. The issues raised will continue as live issues in ongoing detention reviews, particularly in light of the release plan, which was insignificantly changed, prior to and after re-determination of the matter by Justice Phelan. Further, the question of considering "likelihood to appear at a proceeding" seems largely unsettled since the Member in the impugned decision explicitly rejected Justice Phelan's direction. Nevertheless, for a more critical discussion of the issue, where both parties disagreed over the question of mootness, in the context of a detention review, see *Canada (Minister of Citizenship and Immigration) v B046*, 2011 FC 877 at para 24, and for a thorough application of the *Borowski* factors in an immigration context, see *Alfred v Canada (Minister of Citizenship & Immigration)*, 2005 FC 1134 at para 19.

Justice Phelan's Decision and Judicial Comity

[29] At the hearing, it became clear that the applicants are seeking judicial review by raising some of the same issues already discussed in their previous judicial review before Justice Phelan. It was agreed that the principle of judicial comity ought to be considered, but that Justice Phelan's decision was not a directed verdict (*Ali v Canada (Minister of Employment & Immigration)*, [1994] 3 FC 73; *Xie v Canada (Minister of Employment and Immigration)*, [1994] FCJ No 286 at para 18).

[30] The applicants assert that no new evidence was heard at the re-determination hearing, except some documentary evidence was entered onto the record. At the hearing before me, they admitted that there were some differences in the proposed release plan. The applicants therefore assert that I should grant their application by simply relying on Justice Phelan's reasons.

[31] On the other hand, the respondent submits that this is a fresh judicial review application and that I should only be concerned with determining if the decision demonstrates "justification, transparency and intelligibility".

[32] On the notion of judicial comity, in *Alyafi v Canada (Minister of Citizenship and Immigration)*, 2014 FC 952, Justice Martineau recently discussed the purpose of the principle and reviewed some authorities on its meaning:

> [45] I repeat: the principle of judicial comity aims therefore to prevent the creation of conflicting lines of jurisprudence and to encourage certainty in the law. Generally, a judge should follow a decision on the same question of one of his or her colleagues,

> unless the previous decision differs in the facts, a different question is asked, the decision is clearly wrong or the application of the decision would create an injustice. Judicial comity requires much humility and mutual respect. If the rule of law does not tolerate arbitrariness, judicial comity, its loyal companion, relies on reason and the good judgement of each person. Failing a final judgment from the highest court, respect for the other's opinion can speak volumes. In short, judicial comity is elegance incarnate in the person of the magistrate who respects the value of precedents. [Emphasis added]

[33] At paragraph 15 of *Alfred v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1134 , this Court relies on *Hansard Spruce Mills Ltd., Re*, [1954] BCJ No 136, the leading authority cited in *Ziyadah v Canada (Minister of Citizenship & Immigration)*, [1999] 4 FCR 152, aff'd [2000] FCJ No 1073, whereby Justice Pelletier was faced with a case rendered by his own Court, which could not be distinguished on the facts—he stated, "[w]ere I deciding this at first instance, I might not have come to the same conclusion as my learned colleague" (at para 6). Implicitly endorsed by the Federal Court of Appeal, Justice Pelletier adopted the approach articulated by Justice Wilson in *Hansard Spruce Mills Ltd.*, listing the circumstances a trial judge will depart from his colleague's decision in respect of judicial comity:

> But, as I said in the *Cairney* case, I think the power or rather the proper discretionary duty, of a trial judge is more limited. The Court of Appeal, by overriding itself in *Bell v. Klein*, has settled the law. But I have no power to override a brother judge, I can only differ from him, and the effect of my doing so is not to settle but rather to unsettle the law, because, following such a difference of opinion, the unhappy litigant is confronted with conflicting opinions emanating from the same court and therefore of the same legal weight. That is the state of affairs which cannot develop in the Court of Appeal.
>
> Therefore, to epitomize what I have already written in the *Cairney* case, I say this: I will only go against a judgment of another judge of this court if:

> (a) Subsequent decisions have affected the validity of the impugned judgment;
>
> (b) It is demonstrated that some binding authority in case law or some relevant statute was not considered;
>
> (c) The Judgment was unconsidered, a *nisi prius* judgment given in circumstances familiar with all trial judges, where the exigencies of the trial require an immediate decision without opportunity to fully consult authority.
>
> If none of these situations exists, I think a trial judge should follow the decisions of his brother judges.

V. Issues and Standard of Review

[34] The applicants submit the following issues for consideration:

1. Did the Member err in considering only the likelihood to appear for removal and not the likelihood to appear for the continuation of their refugee hearings?
2. Did the Member err by failing to properly consider the alternatives to detention proposed by the applicants?

[35] Both parties have agreed that the standard of review applicable is reasonableness, the same applied in the previous judicial review which had raised the same issues (*Wang* at para 15).

[36] These are questions of mixed fact and law and attract a reasonableness standard (*Dunsmuir v New Brunswick (Board of Management)*, 2008 SCC 9).

[37] As I find there is a fatal reviewable error on the first issue raised, I do not find it necessary to consider whether the Member committed a reviewable error in her assessment of the

release plan. Incidentally, I see no reasons to depart from Justice Phelan's reasons with respect to that first issue.

[38] As to the second issue raised by the applicants, the ID will have to reassess the proposed alternative to detention (step 2 of its analysis contemplated in paragraph 16 above), in light of its findings on flight risk (step 1 of the analysis foreseen in paragraphs 14 and 15 above).

VI. Analysis

Likelihood to appear for the next proceeding under paragraph 58(1)(b) of the Act and section 248 of the Regulations

[39] The applicants submit that the Member erred in making no finding in relation to the sustained interest the applicants have in appearing for their refugee hearings. If the Minister is unsuccessful on the question of exclusion, the applicants will thereafter have a refugee claim which could be heard on its merits. Subsequently, if unsuccessful on that claim, the applicants will have a right to appeal to the Refugee Appeal Division. In the alternative, should exclusion be successful, the applicants will have a right to a Pre-Removal Risk Assessment. The applicants argue that the Member "[paid] no heed to Justice Phelan's clear instruction to consider the Applicants' likelihood of appearing at their refugee hearings."

[40] The respondent argues that the applicants conceded the issue of flight risk at the detention review hearing and therefore are precluded from raising the issue on judicial review.

[41] In their reply, the applicants submit that the argument fails to appreciate when a tribunal determines a person is a flight risk, legislation and jurisprudence requires the Member to consider whether or not there are alternatives to detention that can attenuate that risk. For example, if the flight risk exists in connection to the attendance of a refugee hearing, then the Member must assess whether or not the proposed plan will ensure attendance at the hearing. In short, "[l]ogically when considering whether or not the proposed alternative is reasonable, the tribunal must also consider what proceeding the [a]pplicant is required to appear at"; they rely on *Wang*, at paras 17-19 and 23-24; *Canada (Minister of Citizenship and Immigration) v B157* [*B157*], 2010 FC 1314 at paras 44 - 45; and *Sittampalam v Canada (Minister of Public Safety and Emergency Preparedness)*, 2006 FC 1118 at para 22.

[42] Therefore, the applicants argue that the error in the first part of the analysis is crucial because it also had an impact on the Member's decision on the question of whether the alternative to detention proposed was adequate. She was required to evaluate whether the release plan could ensure the applicants' appearance for not just removal, but also for their refugee hearings.

[43] I agree with the applicants.

[44] First, I am not fully convinced that the applicants even made a "real concession" in the sense advanced by the respondent and asserted by the Member. At pages 98 to 100 of the transcript of the hearing, the applicants' counsel explains why he will not be making submissions on flight risk. The Member then said as follows (Applicants' Record, at p 99):

> . . . so I just want you to know that I am.. I am required to go through a complete analysis in coming to a decision on detention or release.
>
> . . .
>
> . . . I am not saying that you should or should not make submissions on flight risk, I am just making absolutely clear to you that that is something that I will be required by law to do in coming to my overall decision and so there is not any misunderstanding about what we are doing here today, this is a detention review.

[45] This passage resonates in the decision under review. If the Member is required by law to consider the question of flight risk and if the Member had before her the specific fact that the applicants' were in the midst of refugee hearings, she was required to explain why, or why not, she did not see them as having a considerable interest in the proceedings in such a way that it would affect her assessment of flight risk. Concession or not, the Member explicitly said she was going to consider a full flight risk analysis and the applicants had a reasonable expectation that she would do so.

[46] The transcript shows a discussion of Justice Phelan's decision and the errors of the previous Member, and there is mention of *B157* (Applicants' Record at p 64). The reasons do not show an intelligible consideration of the jurisprudence:

> [15] Mr. Wang and Ms. Yan relied on the Federal Court decisions in *Canada (Citizenship and Immigration) v. B157* and *(Citizenship and Immigration) v B188* (the latter followed B157). In *B157* the court clarified that "the Member is not obliged to consider each of the different types of immigration proceedings that are mentioned in that section [58(1)(*b*)], but rather that a consideration of which immigration proceeding is relevant to the circumstances is sufficient." These cases do not interpret paragraph 58(1)(*b*) to include refugee hearings.

> [16] Mr. Wang and Ms. Yan are under removal orders and I have therefore considered whether they are unlikely to appear for removal from Canada. [Emphasis added]

[47] I find it unreasonable that the Member did not explain why the applicants' refugee hearings were not relevant to the circumstances particularly in light of her factual finding and acknowledgment that the applicants' were under conditional removal orders; the logic is unclear. The Member then quotes from paragraph 44 of *B157* but in the next paragraph she states that "there were good reasons for the Member to focus on the next immigration proceeding rather than removal"; in the case at bar, the Member did not explain why there was no good reason to consider the "next immigration proceeding", the refugee hearing.

[48] I further note there is a remarkable similarity between the impugned paragraph before Justice Phelan (*Wang*, at para 20) and that before this Court. It is arguable, with the record before me, whether or not the jurisprudence was meaningfully considered.

[49] If the nature of a flight risk varies with the facts and circumstances of a case, it logically includes the type of proceeding the applicant is required to appear at. The ongoing RPD hearings were an important feature of the circumstances of the applicants in detention, including their detention history. The Member acknowledged it. It was open to her to conclude that the proceeding in this case had little weight in view of other facts and circumstances particular to the applicants in their risk assessment (e.g. their lack of respect for the law), but she was required to at least consider it in the analysis. I find that her failure to consider the RPD proceeding, jointly in assessing flight risk and in assessing alternatives to detention which can attenuate that risk, in any part of her statutory analysis whatsoever, fatal.

VII. Conclusion

[50] For the foregoing reasons, I find that the application should be granted and that the matter be remitted for re-determination before a different member of the ID.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted and the file is remitted back to a different member of the Immigration Division of the Immigration and Refugee Protection Board for a new determination; and

2. No question of general importance is certified.

"Jocelyne Gagné"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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