Federal Court Cour fédérale

Date: 20150624

Docket: IMM-2572-15

Citation: 2015 FC 792

Ottawa, Ontario, June 24, 2015

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

AHMED ALI AHMED

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

ORDER AND REASONS

I. Introduction

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act), of a decision of a member of the Immigration Division of the Immigration and Refugee Board of Canada (the Member), dated May 28, 2015,

ordering the continued detention of the Applicant until the next detention review hearing scheduled for June 25, 2015.

[2] The Applicant claims that he was not afforded a meaningful review of his detention and that the Member's decision was based on an erroneous application of the factors set out in section 248 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the Regulations). He further claims that this constitutes a breach of sections 7 and 9 of the *Canadian Charter of Rights and Freedoms* (the Charter).

[3] On June 5, 2015, the Applicant sought that his leave application be decided on an expedited basis by the Court and if granted, that the judicial review application be heard and decided before June 25, 2015. This request was allowed on June 12, 2015 and leave was granted on June 22. The judicial review application was heard on June 23, 2015.

II. Background

[4] The Applicant is a 26 year-old citizen of Yemen. In 1994, due to the war, he and his family left Yemen for Ethiopia, where they lived for 10 years as refugees under the care of the United Nations High Commissioner for Refugees (UNHCR). The Applicant was separated from his father at that time and has not heard from him since.

[5] In 2003, his mother requested the UNHCR to relocate them and on July 21, 2004, his mother, his younger brother and himself, arrived in Canada as refugees. At some point following his arrival in Canada, the Applicant began to have problems with the law. Between 2009 and

2012, he was convicted for a series of offences, both under the *Young Offenders Act* and then the *Criminal Code*. These offences included sexual assault, break and enter, causing bodily harm and forgery. In particular, on June 18, 2012, the Applicant was convicted of two counts of robbery and one count of robbery and uttering threats to commit violence in relation to three bank robberies. He received a sentence of two years' incarceration for each robbery to be served concurrently. While in custody, he was found guilty of a number of institutional misconducts.

[6] In January 2013, an admissibility report was issued against the Applicant for reasons of serious criminality, which resulted in a deportation order being issued by the Immigration Division. In May 2013, the Applicant was ordered to be removed from Canada and a further warrant was issued with respect to his removal. A few months later, a Danger Opinion was sought from Citizenship and Immigration Canada pursuant to paragraph 115(2)(*b*) of the Act.

[7] In the meantime, that is in the fall of 2013, the Applicant was released on probation from his 2-year imprisonment term but was immediately transferred to Immigration detention on the basis that he was a danger to the public and unlikely to appear for removal from Canada.

[8] The Danger Opinion requested from Citizenship and Immigration Canada was issued in September 2014 and concluded that the Applicant did constitute a danger to the public in Canada.

[9] Since his transfer to Immigration detention, the Applicant has received detention reviews every 30 days. On each occasion, he was found by the Immigration Division to be both a flight risk and a danger to the public.

[10] On May 28, 2015, the Applicant received his most recent detention review. He unsuccessfully sought his release on the basis of a plan that included access to a psychologist, two proposed sureties, a daily supervision schedule, residence with his family and a $10,000.00 bond. The Applicant also unsuccessfully argued that his detention has become indefinite and that if it were to be continued, this would offend sections 7 and 9 of the Charter. His detention was therefore continued until the next review scheduled for June 25, 2015.

[11] Attempts to remove the Applicant were made between December 2014 and April 2015 but they had to be cancelled due to the evolving crisis situation in Yemen.

III. Legislative Framework for Detention Reviews

[12] Section 55 of the Act permits enforcement officers to detain a permanent resident or a foreign national only when there is reasonable ground to believe that he or she is inadmissible, and is either a danger to the public or unlikely to appear for an examination, for an admissibility proceeding or for removal.

[13] The Act provides for an independent and impartial review of detention by the Immigration Division. According to section 57 of the Act, detention reviews occur at 48 hours, seven days and thirty days after removal, with continuing reviews every thirty days thereafter.

[14] The circumstances in which the Immigration Division is required to order the release of a detained permanent resident or foreign national are set out in subsection 58(1) of the Act:

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 are inadmissible on grounds of security or for violating human or international rights; or	c) le ministre prend les mesures voulues pour enquêter sur les motifs raisonnables de 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.

[15] Section 246 of the Regulations sets out a number of factors that must be considered when determining whether the detained permanent resident or foreign national is a danger to the public. The portions relevant to the present detention review are as follows:

246. For the purposes of paragraph 244(b), the factors are the following:	246. Pour l'application de l'alinéa 244b), les critères sont les suivants :
(a) the fact that the person constitutes, in the opinion of the Minister, a danger to the public in Canada or a danger to the security of Canada under paragraph 101(2)(b), subparagraph 113(d)(i) or (ii) or paragraph 115(2)(a) or (b) of the Act;	a) le fait que l'intéressé constitue, de l'avis du ministre aux termes de l'alinéa 101(2)b), des sous-alinéas 113d)(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) conviction in Canada under an Act of Parliament for	d) la déclaration de culpabilité au Canada, en vertu d'une loi fédérale, quant à l'une des infractions suivantes :
(i) a sexual offence, or	(i) infraction d'ordre sexuel,
(ii) an offence involving violence or weapons;	(ii) infraction commise avec violence ou des armes;
[…]	[…]

[16] Section 248 outlines additional factors that are to be considered before a decision is rendered on detention or release. That provision codifies the Charter-based factors developed in *Sahin v Canada (Minister of Citizenship and Immigration)* (T.D.), [1995] 1 FC 214, 85 FTR 99 – and confirmed by the Supreme Court of Canada in *Charkaoui v Canada (Minister of Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 SCR 350, at paras 110 to 117. These factors are aimed at striking a fair balance between the State's right to control who remains in Canada and the liberty interests of the individual. Section 248 reads as follows:

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.

[17] Each detention review must be decided afresh although there must be compelling reasons to deviate from decisions of previous Immigration Division members. The Minister always bears the onus to demonstrate that continued detention is warranted, but this burden can shift if previous decisions to continue the detention are found compelling by the Immigration Division member presiding the review *(Canada (Minister of Citizenship and Immigration) v Thanabalasingham*, 2004 FCA 4 [Thanabalasingham], at paras 9-10 and 16). However, as reminded by Justice Donald Rennie (as he was then), in *Canada (Minister of Citizenship and Immigration) v B147*, 2012 FC 655, 412 FTR 203 [B147] at para 33, "an independent and fresh exercise of discretion is integral to the purpose and object of the detention review". Otherwise, as warned Justice Rennie, "the requirement that the detention be reviewed fairly, openly and with a fresh perspective to evolving facts would be easily and frequently, if not invariably, defeated".

IV. Standard of Review

[18] A number of cases have established that the Immigration Division's detention review decisions are primarily fact-based decisions which attract deference (*Thanabalasingham*, above; *Canada (Minister of Citizenship and Immigration) v B004*, 2011 FC 331, 387 FTR 79 [*B004*] , at

para 18; *Tursunbayev v Canada (Minister of Public Safety and Emergency Prepardness)*, 2012 FC 504, 409 FTR 176*; Canada (MCI) v B046*, 2011 FC 877, [2013] 2 FCR 3; *Canada (Minister of Citizenship and Immigration) v Li*, 2008 FC 949, 331 FTR 68, at para 16). The standard of review, therefore, is that of reasonableness. On such a standard, the Immigration Division's detention review decision should stand unless the reasoning process was flawed and the resulting decision falls outside the range of possible, acceptable outcomes which are defensible in respect of the facts and the law (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, at para 47).

[19] However, given that an individual's liberty interests are engaged in a detention review process, detention decisions must be made with section 7 Charter considerations in mind (*Thanabalasingham*, above at para 14; *B004*, above at para 20).

V. Decision Under Review

[20] First, the Member found that there were no reasons to depart from previous reviews holding that the Applicant was both a flight risk and a danger to the public. The Member considered in this regard some facts of the case, namely the Applicant's previous convictions, his previous statement about wanting to remain in Canada, his authority-adverse attitude at the time of his incarceration and during previous detention reviews, and his continued denial of his culpability.

[21] The Member then examined the Applicant's release plan. She first noted that the Applicant's mother had been proposed in the past as a suitable bond person but was rejected due to the fact that there was no evidence she had a positive influence on the Applicant and that it was unlikely she would send her son for removal to Yemen. As for the other surety, who was proposed for the first time at this detention review, the Member found that there was nothing of note suggesting that this person would be different from any other authority figures. As for the proposed release plan in general, the Member found that it did not sufficiently address the danger to the public concerns.

[22] The Member then reviewed the factors set out in section 248 of the Regulations with a view of determining whether the Applicant was subject to indefinite detention. She concluded that it was not the case. She found that there was a stronger case for detention, considering that the Applicant is a danger to the public. As for the length of time in detention, the Member first acknowledged that when the probable length of detention cannot be determined, the person's detention becomes indefinite. However, she found that the closure of airports in Yemen was a recent development and therefore, she was not satisfied that removal cannot occur in a way that would render the situation indefinite. The option given by the Minister to remove the Applicant to Ethiopia to reunite with his estranged father was however deemed as unrealistic by the Member.

VI. Issue

[23] The sole issue to be determined in this case is whether the Member's findings are reasonable.

VII. Analysis

[24] As indicated at the outset of these reasons, the Applicant claims that he was not afforded a meaningful review of his detention and that the Member's decision was based, as a whole, on an erroneous application of the factors set out in section 248 of the Regulations, resulting in a breach of sections 7 and 9 of the Charter.

[25] Here, I find that the main problem with the Member's decision lies with the weight and consideration given to the length of the detention, past and future, and suffices to overturn the decision under review. In a context where the detention is now exceeding 20 months, which is a considerable amount of time from a liberty interest perspective, this factor, in my view, was just not given the consideration it deserved in the particular circumstances of the case.

[26] On that issue, the Respondent claims that the review process in place is robust, that it complies with the requirements of the Charter, and that the detention is only pending deportation. Its length is only one factor that owed to be considerate in a detention review process.

[27] The Respondent's argument does not convince me. I find that when reading the impugned decision, nowhere did the Member weighted the length of the detention. Not only did she not consider that the Applicant had been in detention for 20 months, she did not consider how long the Applicant would have to remain in Immigration detention.

[28] In my view, the discussion at paras 17-24 of Justice Rennie's decision, in B147, above, is of great assistance here. In that case, the Member had found the Minister's silence on the delay and his failure to provide a timeframe for the processing of a Pre-Removal Risk Assessment (PRRA) an indicator of uncertainty, which led to a finding of indefinite detention. Justice Rennie thus concluded that, in the absence of any reasonable certainty as to when a process might conclude or an event may occur, the existence of 30-day detention reviews could not save the detention from being characterized as indefinite.

[29] This, according to me, is consistent with the Federal Court of Appeal's decision in *Canada (Minister of Citizenship and Immigration) v Li,* 2009 FCA 85, [2010] 2 FCR 433, where the issue of the appropriateness of making estimates of anticipated future length of detention on a mere anticipation of available processes under the Act and the Regulations, was at stake. The Federal Court of Appeal concluded that "the basis of the estimation of anticipated future length of detention should be the proceedings as they exist at the time of each monthly review and not on an anticipation of available processes but not yet underway" (at para 81).

[30] When reading the decision in the case at bar, it is clear that no estimation of the length of detention was made. I believe that if the Member would have embarked on such analysis, she would have soon realized that it qualified as a mere "anticipation of available processes not yet underway". The thrust of the Member's finding in this regard reads as follows:

> (…) The federal court (sic) also wrote in Sahin, "when any number of possible steps may be taken by either side and the times to take each step are unknown, I think it is fair to say that a lengthy detention at least for practical purposes approaches what might be reasonably termed indefinite.
>
> In order to characterize detention as indefinite, I must be satisfied that removal cannot be arranged based on all the evidence in the record and taking into account all relevant factors.
>
> (…)
>
> The inability at the present time to use the airports in Yemen is a recent development.
>
> I have no reason to conclude that this situation will continue indefinitely or that removal to Yemen cannot occur through other means.

[31] This, read in parallel with the Member's finding that the other alternatives to remove the Applicant (routing options bypassing airports or removal to Ethiopia) offered by the Minister were unrealistic, clearly shows, in my view, that the decision was rendered based on an anticipation of available processes and not, as required, on the concrete existing processes at the time of the detention review, after 20 months of detention.

[32] In *Charkaoui*, at para 113, the Supreme Court held that the lengthier the detention, the heavier the onus is on the government to show that detention is still required. I agree with the Applicant that even if airports were to re-open, there would be no reason to think that the Respondent would be able to find a stable and safe route to deport him to Yemen as there is evidence on record of security factors, beyond the airport closures that have inhibited - and that are likely continue to inhibit - the removal.

[33] There is no real discussion in the Member's decision on the realistic prospects for the Applicant to be removed to Yemen and the time this would require, given the situation prevailing in that country at the moment. In my view, this undermined her analysis of the section 248 factors regarding the length of time in detention, past and future. Her decision on these important factors reveals an absence of any reasonable certainty as to when removal may occur, and, more importantly, when the Applicant may be released from detention. In a context where significant liberty interests are at stake and Charter considerations are integral to the detention review analysis, this error , in my view, is fatal to the Member's decision as it brings it outside the range of possible, acceptable outcomes which are defensible in respect of the facts and the law (*Dunsmuir*, above at para 47).

[34] The Applicant's judicial review application is granted. Considering that the next detention review is imminent, it would serve no purpose to send the matter back for re-determination. The Member's decision is therefore set aside, and the next detention review will have to be determined in accordance with the present Order and Reasons.

[35] Counsel may file submissions within five days of the date of these Reasons concerning the certification of a serious question.

JUDGMENT

THIS COURT ORDERS that:

1. The judicial review application is granted;
2. The decision of the Immigration Division, dated May 28, 2015, is set aside;
3. The next review of the Applicant's detention must be determined in accordance with the present Order and Reasons; and
4. Counsel may file submissions within five days of the date of these Reasons concerning the certification of a serious question.

"René LeBlanc"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2572-15
STYLE OF CAUSE:	AHMED ALI AHMED v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	JUNE 23, 2015
ORDER AND REASONS:	LEBLANC J.
DATED:	JUNE 24, 2015

APPEARANCES:

Ms. Arghavan Gerami	FOR THE APPLICANT
Ms. Jyll Hansen	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Gerami Law Professional Corporation Barristers and Solicitors Ottawa, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT