

Federal Court



Cour fédérale

Date: 20150717

Docket: IMM-3022-15

Citation: 2015 FC 876

Ottawa, Ontario, July 17, 2015

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

AHMED ALI AHMED

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] Ahmed Ali Ahmed has brought an application for judicial review pursuant to s 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the IRPA]. Mr. Ahmed challenges a decision of the Immigration Division of the Immigration and Refugee Board [the Board] to continue his detention until the next review hearing, currently scheduled for July 24, 2015.

[2] This is the second time in as many months that Mr. Ali has sought judicial review of a decision of the Board to continue his detention. On the previous occasion (*Ahmed v Canada (Minister of Citizenship and Immigration)*, 2015 FC 792 [*Ahmed*]), Mr. Ahmed's application for judicial review was allowed by this Court. Justice LeBlanc set aside the decision of the Board and directed it to conduct the next detention review in accordance with his Order and Reasons.

[3] When the next detention review took place on June 26, 2015, the Board held that Justice LeBlanc's decision did not amount to a directed verdict requiring Mr. Ahmed's release. The Board then found that Mr. Ahmed's detention continued to be justified, given the likelihood that he would not appear for removal and the danger that he posed to the Canadian public.

[4] Mr. Ahmed says that the Board failed to comply with Justice LeBlanc's Order and Reasons, and that his continued detention is unconstitutional. For the reasons that follow, I have concluded that the Board complied with Justice LeBlanc's Order and Reasons, which required only a reconsideration of Mr. Ahmed's detention and a re-balancing of the factors favouring or militating against his release. I have also concluded that the Board's decision to continue Mr. Ahmed's detention was reasonable. The application for judicial review is therefore dismissed.

II. Background

[5] Mr. Ahmed is a citizen of Yemen. He left Yemen together with his family in 1994 due to the outbreak of war. They settled in Ethiopia, where they lived as refugees under the auspices of the United Nations High Commissioner for Refugees [UNHCR] for ten years. The family was

relocated by the UNHCR to Canada and Mr. Ahmed was granted permanent residence status on June 22, 2004.

[6] Between 2009 and 2012, Mr. Ahmed was convicted of a number of offences under the *Youth Criminal Justice Act*, SC 2002, c 1 and the *Criminal Code*, RSC 1985, c C-46. These included assault causing bodily harm; sexual assault; break and enter; theft under \$5,000; forgery; two counts of robbery; one count of robbery and uttering threats to commit violence; failure to comply with a probation order; and obstruction of a peace officer. During his incarceration Mr. Ahmed was also found guilty of a number of institutional offences.

[7] An inadmissibility report was issued against Mr. Ahmed in January, 2013 on the ground of serious criminality. A deportation order was issued in May, 2013. In September 2014, the Minister of Citizenship and Immigration issued an opinion pursuant to s 115(2)(b) of the IRPA that Mr. Ahmed was a danger to the public [the Danger Opinion]. Mr. Ahmed has remained in immigration detention pending deportation since the completion of his criminal sentence in October, 2013.

[8] The Canadian Border Services Agency [CBSA] has twice attempted to remove Mr. Ahmed to Yemen: once in December, 2014, and again in April, 2015. These efforts proved unsuccessful because Mr. Ahmed's safe passage could not be assured due to ongoing conflict in the region.

[9] Mr. Ahmed has undergone detention review hearings before the Board every 30 days pursuant to s 57(2) of the IRPA. On June 3, 2015, he filed an application for leave and for judicial review of the Board's decision dated May 28, 2015. Leave was granted on an expedited basis and the application for judicial review was heard on June 23, 2015.

[10] Justice LeBlanc allowed the application the following day, finding that the Board had failed to properly consider the length of Mr. Ahmed's detention (more than 20 months at the time). Combined with the lack of consideration given to the period that he would likely remain in detention before he could be removed to Yemen, this undermined the Board's analysis of the factors prescribed by s 248 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [the Regulations] (*Ahmed* at para 33). Subsections 248(b) and 248(c) specifically require the Board to consider the duration of detention, both past and future.

[11] In reaching his conclusion, Justice LeBlanc referred to the decision of Justice Rennie in *Canada (Minister of Citizenship and Immigration) v B147*, 2012 FC 655 [B147]. In that case, Justice Rennie found that the failure of the Minister to provide a time frame for the processing of a Pre-Removal Risk Assessment, and his silence regarding the delay, were sufficient to support the Board's finding of "indefinite detention", despite the statutorily prescribed 30-day detention review. Justice LeBlanc set aside the Board's decision and ordered that the next detention review "be determined in accordance with the present Order and Reasons" (*Ahmed* at para 34).

III. The Board's Decision

[12] At the detention review that took place on June 26, 2015, the Board acknowledged Justice LeBlanc's Order and Reasons and concluded that Mr. Ahmed's detention had indeed become indefinite. The Board nevertheless held that Mr. Ahmed continued to pose a danger to the Canadian public, and that he was unlikely to appear for removal. The Board was not satisfied that the release plan proposed by Mr. Ahmed mitigated these risks.

[13] The Board considered the factors enumerated in s 248 of the Regulations, and observed that the characterization of Mr. Ahmed's detention as indefinite was a factor that "strongly favours release". However, this factor was outweighed by the danger he posed to the public and the risk that he would not appear for removal. The Board noted that the rights protected by s 7 of the *Canadian Charter of Rights and Freedoms*, Part I of *The Constitution Act, 1982*, Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [*Charter*] are not paramount, and that a deprivation of liberty may be justified "if done in accordance with the principles of fundamental justice". Although the Board found that Mr. Ahmed's *Charter* rights were infringed, it was not satisfied that the release plan proposed by Mr. Ahmed would prevent him from reoffending and it would therefore be unjust to release him given the danger that he posed to the Canadian public.

[14] The Board also remarked that Mr. Ahmed appeared to be suffering from an undiagnosed mental condition and that a full psychological assessment would be necessary before he could be released. The Board acknowledged Mr. Ahmed's proposal that a psychological assessment be done following his release, but considered this to be unreasonable.

IV. Issues

[15] The following issues are raised by this application for judicial review:

- A. What is the applicable standard of review?
- B. Did the Board comply with Justice LeBlanc's Order and Reasons?
- C. Was the Board's decision to continue Mr. Ahmed's detention reasonable?

V. Analysis

A. *What is the applicable standard of review?*

[16] As Justice LeBlanc found in *Ahmed* at para 18, decisions of the Board respecting immigration detention are subject to review in this Court against a standard of reasonableness.

Mr. Ahmed argues that, given the particular circumstances of his case, the applicable standard of review should be correctness. This is because the Board was required to implement Justice LeBlanc's Order and Reasons, and also because it was dealing with constitutional issues that were beyond its expertise.

[17] Whether an administrative tribunal's decision is subject to review against the standard of reasonableness or the standard of correctness is a function of whether the decision concerns a question of law, a question of fact, or a mixed question of law and fact. The Supreme Court of Canada has explained the difference as follows: "...questions of law are questions about what the

correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests” (*Canada (Director of Investigation and Research) v Southam Inc.*, [1997] 1 SCR 748 at para 35).

[18] Ordinarily, only questions of law that are of central importance to the legal system and fall outside an administrative decision-maker’s expertise will attract a standard of correctness (*Dunsmuir v New Brunswick*, 2008 SCC 9 [Dunsmuir] at paras 55 and 60; see also *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at para 30). Questions of fact and mixed questions of law and fact will typically attract a reasonableness standard of review (*Dunsmuir* at para 53).

[19] Whether the Board properly reconsidered the nature of Mr. Ahmed’s detention and gave due consideration to his liberty interests, as required by Justice LeBlanc, both concern questions of mixed law and fact (*Canada (Minister of Public Safety and Emergency Preparedness) v Berisha*, 2013 FC 1100 at paras 57, 58; *Muhammad v Canada (Minister of Citizenship and Immigration)*, 2014 FC 448 at paras 52, 162; *Wang v Canada (Minister of Public Safety and Emergency Preparedness)*, 2015 FC 720). The same is true of whether the Board’s decision to continue Mr. Ahmed’s detention was reasonable. The fact that *Charter* interests are implicated does not produce a different standard. An administrative decision-maker who is exercising a discretionary power under his or her home statute has, by virtue of expertise and specialization, a particular familiarity with the competing considerations at play in weighing *Charter* values

(*Doré c Québec (Tribunal des professions)*, 2012 SCC 12 at paras 45, 47; *Loyola High School v Québec (Attorney General)*, 2015 SCC 12 at para 4).

[20] It is not the role of this Court to substitute its own view of the preferred outcome or to reweigh the evidence (*Khosa v Canada (Minister of Citizenship and Immigration)*, 2009 SCC 12 [Khosa] at para 59, 61). It is only where the Board has come to a conclusion that is not transparent, justifiable and intelligible, or that does not fall within the range of acceptable outcomes that are defensible in respect of the facts and law, that this Court will intervene (*Dunsmuir* at para 47; *Khosa* at para 59).

B. *Did the Board comply with Justice LeBlanc's Order and Reasons?*

[21] Justice LeBlanc's decision of June 24, 2015 was not a directed verdict requiring a particular result at the detention review hearing on June 26, 2015 (*Rafuse v Canada (Pension Appeals Board)*, 2002 FCA 31 at para 14). The scope of his ruling was comparatively modest. He found that the Board had erred by failing to consider both the length of time that Mr. Ahmed had spent in detention and the anticipated future length of his detention. Justice LeBlanc concluded that the failure of the Board to properly consider Mr. Ahmed's liberty interests meant that the decision fell outside the range of possible outcomes that were defensible in respect of the facts and law. The Board's decision was set aside and it was instructed to conduct the next detention review in accordance with Justice LeBlanc's Order and Reasons (*Ahmed* at paras 33, 34).

[22] In the course of oral submissions, counsel for Mr. Ahmed conceded that Justice LeBlanc's decision did not amount to a directed verdict. She acknowledged that his judgment did not address the criteria of fundamental justice within the meaning of s 7 of the *Charter*. She did not claim that Justice LeBlanc's decision represented a departure from existing law or jurisprudence, but only its application to the facts of Mr. Ahmed's case.

[23] The sole requirement in Justice LeBlanc's Order and Reasons was that the Board reconsider the nature of Mr. Ahmed's detention and re-balance the factors in s 248 of the Regulations in accordance with existing law. At the next detention review, the Board acknowledged that Mr. Ahmed had been in detention since October 17, 2013 and that this was "a lengthy period of time". The Board also found that there was no indication that the circumstances in Yemen would ease in the near future so as to permit his removal to that country. It is therefore clear that the Board considered the length of Mr. Ahmed's detention, both past and future, and concluded that it had become indefinite – something that was implied but not specifically ruled upon in Justice LeBlanc's decision.

[24] I am satisfied that the Board's detention review on June 26, 2015 complied with Justice LeBlanc's Order and Reasons. Once the Board had reconsidered the nature of Mr. Ahmed's detention and found it to be indefinite, the remainder of its analysis was governed by existing law and jurisprudence.

C. *Was the Board's decision to continue Mr. Ahmed's detention reasonable?*

[25] Mr. Ahmed takes the position that his continued detention is unconstitutional, specifically because it does not conform to the principles of fundamental justice, it is arbitrary, and it amounts to cruel and unusual punishment. However, he has not identified anything that would distinguish his circumstances from those considered in other cases that deal with indefinite detention (e.g., *Sahin v Canada (Minister of Citizenship and Immigration)*, [1995] 1 FC 214 (TD); *Re Charkaoui v Canada (Minister of Citizenship and Immigration)*, 2007 SCC 9 [*Charkaoui*]; *B147*; *Canada (Minister of Public Safety and Emergency Preparedness) v Okwerom*, 2015 FC 433 [*Okwerom*]). A finding of indefinite detention is a serious matter, but it is not without precedent.

[26] The indefinite nature of an individual's detention is only one factor to be considered when conducting a detention review. Indeed, it is an error of law to treat the indefinite nature of detention as a determinative factor (*B147* at paras 53-56; *Okwerom* at para 8). It was therefore reasonably open to the Board to arrive at the conclusion that it did (*Charkaoui* at paras 107-110).

[27] The Board recognized that indefinite detention compromised Mr. Ahmed's rights under s 7 of the *Charter*, but found that his continued detention was justified. The Board weighed Mr. Ahmed's indefinite detention against the risk that he would not appear for removal and the danger that he presented to the public.

[28] In support of its conclusion that Mr. Ahmed was unlikely to appear for removal, the Board observed that this finding had been made in all of the previous detention reviews. The Board noted Mr. Ahmed's serious criminal record and found that his demonstrated lack of respect for the law meant that he could not be trusted to appear for removal. The Board also noted that Mr. Ahmed had expressed his fear of returning to Yemen, and was highly motivated not to appear for removal.

[29] In support of its conclusion that Mr. Ahmed continued to pose a risk to the public, the Board referred to his long pattern of anti-social and violent criminal behaviour. The Board was not persuaded that Mr. Ahmed had been rehabilitated during his incarceration and detention, and concluded that he was likely to reoffend. The Board noted that Mr. Ahmed had been convicted of serious crimes including sexual assault and robbery. Mr. Ahmed had also yelled obscenities at members of the Board on previous occasions and threatened a CBSA officer while in detention.

[30] The Board properly reviewed its factual findings against the five factors contained in s 248 of the Regulations: the reasons for detention, the length of detention, the reasons for delay in deportation, the anticipated future length of detention, and alternative measures to detention.

[31] In its consideration of alternative measures to detention, the Board held that the release plan proposed on behalf of Mr. Ahmed was insufficient. The Board was not satisfied that the two proposed sureties would be capable of managing Mr. Ahmed if he was released. Both individuals had known Mr. Ahmed since his arrival in Canada, and his criminality had escalated despite their presence in his life. The Board also referred to an institutional assessment contained in the

evidentiary record which recommended that Mr. Ahmed undergo a full psychological assessment and commented that it “would be unreasonable” to release Mr. Ahmed into the community prior to the assessment taking place; something that his counsel suggested could instead be done following his release.

[32] A review of the transcript reveals that Mr. Ahmed, through his counsel, expressed a willingness to be bound by any other conditions of release that the Board might consider appropriate, and suggested that the conditions of release previously imposed by the National Parole Board could serve as an example. It appears that the Board was unmoved by this suggestion, and limited its consideration to the release plan submitted on Mr. Ahmed’s behalf.

[33] As mentioned previously, it is not the role of this Court to substitute its own view of the preferred outcome or to reweigh the evidence. A determination of whether an individual poses a danger to the public or is unlikely to appear for removal falls within the core expertise of the Board. The same holds true for the imposition of conditions of release.

[34] Nevertheless, given the finding that Mr. Ahmed’s detention is indefinite, both the Board and the Minister are under a heightened obligation to consider alternatives to detention, specifically release upon conditions. The National Parole Board previously determined that Mr. Ahmed could be released subject to stringent conditions. It is open to the Board to require a psychological assessment as a condition of release (*Canada (Minister of Citizenship and Immigration) v Romans*, 2005 FC 435 at para 74). Counsel for Mr. Ahmed informed the Court that she has initiated the process to update the Minister’s Danger Opinion. These are all

considerations that should be at the forefront when Mr. Ahmed's detention is next reviewed on July 24, 2015.

[35] Despite my reservations regarding the Board's cursory treatment of alternatives to detention, I am satisfied that its decision to continue Mr. Ahmed's detention was justified, transparent and intelligible, and that it fell within the range of possible outcomes that were defensible in respect of the facts and law (Dunsmuir at para 47). The Board's decision was therefore reasonable.

VI. Conclusion

[36] For the foregoing reasons, the application for judicial review is dismissed. Neither party proposed the certification of a question for appeal, and none arises in this case.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

No question is certified for appeal.

"Simon Fothergill"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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