Federal Court  Cour fédérale

Date: 20150928

Docket: IMM-3915-15

Citation: 2015 FC 1125

Ottawa, Ontario, September 28, 2015

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

CHUNXIANG YAN AND ZHENHUA WANG

Applicants

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision of a member [the Member] of the Immigration and Refugee Board, Immigration Division [the ID], dated August 24, 2015, wherein the Member ordered the continued detention of the Applicants, Zhenhua Wang and Chunxiang Yan on the ground that they are unlikely to appear for removal pursuant to s. 58(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] and s. 245 of the *Immigration*

and Refugee Protection Regulations, SOR/2002-227 [Regulations] and that the factors enumerated in s. 248 of the Regulations favoured detention.

[2] For the reasons that follow, this application is allowed.

I. Background

[3] This is the third application for judicial review by the Applicants in the course of their continued detention. The hearing of this application was conducted on an expedited basis on September 24, 2015, as the Applicants' next detention review is scheduled to be heard on September 30, 2015. The reasons for this decision are therefore necessarily somewhat brief, to allow this decision to be issued prior to the next detention review.

[4] The Applicants are citizens of China. On September 25, 2012, they were granted temporary resident visas to visit their children, who were studying in Canada, and to explore business opportunities. They entered Canada on September 30, 2012. The Applicants have substantial financial means. They intended to seek permanent residence status in Canada through the Provincial Nominee Program.

[5] On November 26, 2013, the Canada Border Services Agency [CBSA] received information that Ms. Yan had multiple identities and that Mr. Wang is a fugitive from justice. Specifically, it is alleged that Mr. Wang is accused of entering into a multi-level marketing and pyramid scheme, with Ms. Yan, to defraud 60,000 people of $180,000,000 Canadian dollars. Ms. Yan obtained a Malaysian visa on October 18, 2011, six days after the first interrogation of

her company's employee/associate, and she left China on October 23, 2011. Mr. Wang left China on January 17, 2012, eleven days after he is alleged to have been released on bail, and he entered Malaysia the next day.

[6] On March 7, 2014, the Applicants were detained by CBSA under s.55 of IRPA on the basis that they would be unlikely to appear for an admissibility hearing (s.58(1)(b)), as well as under s. 58(1)(c), on the basis of the Minister's ongoing investigation into allegations of criminality in China. The ID has continued detentions since March 7, 2014. At the May 27, 2014 detention review hearing, continued detention was sought solely on the ground of flight risk under s. 58(1)(b) of IRPA. The ID held that the Applicants should be detained on the basis of this flight risk and unlikelihood to appear.

[7] On May 23, 2014, the Minister issued reports under section 44 of IRPA alleging that the Applicants were inadmissible to Canada for misrepresentation, as they failed to disclose facts to the Minister which induced or could have induced an error in the administration of IRPA. The reports were referred to the ID for an admissibility hearing. On June 27, 2014, the Applicants filed claims for refugee protection, as a result of which the admissibility hearing could not proceed.

[8] In July 2014, the Minister issued removal orders against the Applicants on the ground that they did not comply with the requirements of IRPA, as they were seeking to establish permanent residence in Canada without obtaining the required visas. Pursuant to IRPA, the

removal orders are conditional departure orders due to the refugee claims. The refugee hearings commenced in January 2015 and are anticipated to continue into 2016.

[9] The Applicants have been the subject of a number of previous detention reviews. On January 21, 2015, Justice Phelan quashed the detention review decision issued on December 11, 2014, finding that the ID had erred in not considering the Applicants' likelihood of appearing at their next proceeding (their refugee hearing), in its rejection of the release plan proposed by the Applicants, and in its rejection of the evidence of the Applicants' expert.

[10] The next detention review was held on February 11, 2015, and that decision was issued on April 2, 2015. On June 8, 2015, Justice Gagne quashed that decision, again finding that the ID erred in failing to consider the refugee proceeding in assessing the Applicants' flight risk. The ID's decision dated August 24, 2015, which resulted from the Applicants' next detention review, is the subject of the present judicial review application.

II. Immigration Division Decision

[11] In the impugned decision, the Member canvassed the factors prescribed by section 245 of the Regulations and concluded on a balance of probabilities that the Applicants are highly unlikely to appear at relevant immigration proceedings, including all required refugee proceedings, and that they pose a very serious flight risk. The Member's findings related to the section 245 factors, upon which this conclusion is based, include findings that the Applicants are fugitives from justice, that they have multiple and false identities, that they lack credibility and

are not trustworthy, and that they possess the abilities and resources to elude government detection and avoid removal.

[12] The Member then canvassed the factors prescribed by section 248 of the Regulations to be considered once a determination has been made regarding the ground for detention, following which the Member concluded that such factors did not offset the concerns regarding the Applicants being unlikely to appear for their refugee proceedings and removal. The Member's consideration of the section 248 factors included consideration of the release plan proposed by the Applicants as an alternative to detention but resulted in a conclusion that the proposal did not offset the flight risk concerns.

III. Issues Raised by the Parties

[13] In this judicial review application, the Applicants raise concerns about procedural fairness, arguing that the Member made findings that the parties did not make submissions on, and that the Member made many unreasonable findings of fact that either were not supported by reliable evidence or ignored relevant evidence. The Respondent disputes that there were breaches of the Member's procedural fairness obligations and submits that, in any event, the determinations to which the Applicants' procedural fairness arguments relate were not material to the result. The Respondent argues that the Member's evidentiary and credibility determinations were based on the evidence and available to the Member to make and that the Applicants are merely disagreeing with the weight the Member placed on the evidence.

[14] However, the parties' arguments focused most significantly on the Member's assessment of the release plan proposed by the Applicants as an alternative to detention. It is that component of the decision on which I consider this application to turn.

IV. Analysis

A. *Standard of Review*

[15] The ID's detention review decisions are fact-based decisions which attract deference and are to be reviewed on a standard of reasonableness. On such a standard, the ID's decisions 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 *(Bruzzese v Canada (Minister of Public Safety and Emergency Preparedness)*, 2014 FC 230 at para 43).

B. *Release Plan*

[16] As noted in the decision, the proposed release plan includes house arrest, electronic monitoring using ankle bracelets by a private company called Jentec Inc, a video surveillance system installed on the outside of the Applicants' residence, and a door/window alarm system monitored by a private company hired by the Applicants called Investigative Solutions Network Inc [ISN]. ISN would also post two security guards outside the home. The Applicants would be accompanied by these guards on any permitted outings and have consented to the guards using physical force against them. Mr. Ronald Wretham, partner and CEO at ISN, would also personally provide a $10,000 cash deposit bond.

C. *Cash Deposit Bond*

[17] The Member's analysis of the alternative to detention commences with a consideration of the bond and finds it incapable of ensuring or assisting with the Applicants' compliance, because there is no relationship of trust and closeness between the Applicants and Mr. Wretham that would motivate the Applicants to comply with the terms and conditions of their release. The Applicants argue that the Member erred in the analysis of the bond by failing to understand the role of the bondsman. The Applicants note that this issue was raised by Justice Phelan in his decision following their first judicial review. In *Wang v Canada (Minister of Public Safety and Emergency Preparedness)*, 2015 FC 79, Justice Phelan held as follows at para 27:

> [27] The bondsman is involved to assure compliance with the terms of a release order. The assurance that they will fulfil the task, aside from the usual requirements of good character, is that they are "at risk" if the release person fails to comply with the terms of release. The monetary element is the "at risk" aspect of the bondsman's commitment.
>
> Therefore, unless the Applicants were putting up their own money, the issue is not whether their failure to comply hurts them financially but whether it would hurt the bondsman sufficiently that the risk of non-compliance is minimalized. The Member asked the wrong question and focused on the wrong person.

[18] While I agree that the Member's analysis of the bond does not focus on the impact that forfeiture of the bond would have upon Mr. Wretham, the Member nevertheless goes on to state as follows:

> I do not doubt the integrity of Mr. Wretham and his willingness to have ISN do anything legally permissible to make the proposed released plan work, if for no other reason than the resulting financial and reputational benefits for his company. There are, however, three things that Mr. Wretham, ISN and Jentec cannot control and that ultimately lead to the downfall of this release plan.

[19] As such, the Member has focused on whether Mr. Wretham is sufficiently motivated to ensure the Applicants' compliance with the release plan and has concluded that he is. Logically, the Member's decision would not have been different if it had focused on the bond as an additional factor motivating Mr. Wretham, as the decision turns not on an analysis of his motivation but on concerns that, notwithstanding Mr. Wretham's best efforts, the release plan does not sufficiently offset the flight risk. I therefore find that the Member's treatment of the bond does not represent a basis to interfere with the decision.

[20] The three concerns that do result in the Member concluding that the release plan is not sufficient relate to (i) the Applicants' consent to the use of force, (ii) the possibility of the Applicants cutting off the monitoring bracelets, and (iii) the Applicants' credibility and character.

D. *Character and Credibility*

[21] Turning first to the concern relating to credibility and character, I note that the Member considered the successful release of another detainee, Mr. Tursunbayev, on a similar plan, but distinguished that case and found on a balance of probabilities that the Applicants' personal characteristics were such that they would not act in good faith and voluntarily abide by the bond and the ISN/electronic monitoring control functions.

[22] In distinguishing the Tursunbayev case, the Member noted that Mr. Wretham, whose company had administered the release plan in that case as well, had testified that Mr. Tursunbayev was a model client and that the success of the plan was due to "a collaborative

effort between Mr. Tursunbayev and [ISN]". The Member observed that, unlike the Applicants, Mr. Tursunbayev did not have a history that includes an extensive list of lies and misrepresentations to government bodies, or an ongoing use of alternate identities, or a high level of disregard for law in general. The Member further stated that Mr. Tursunbayev's credibility and trustworthiness had not been impugned and that he had not expressed a fear of return or suicidal ideations (as had the Applicant, Ms. Yan).

[23] The Member also considered the use of release plans with similar control features in national security cases. The Member noted that Justice Phelan's decision had questioned the reasonableness of the ID having previously rejected a similar release plan for the Applicants and had noted the fact that individuals who were facing allegations of being a threat to national security were released on plans with less control features. However, the Member distinguished those cases as not involving individuals with significant histories of lies and misrepresentations to government officials or who had demonstrated a high level of disregard for the law, fled justice, or actively concealed their whereabouts. The Member stated that a viable release plan must have controls that address the specific concerns regarding the specific individuals in question and, given the concerns with credibility and trustworthiness in the case of the Applicants, concluded that control features similar to those used in national security cases would not have the same effectiveness with the Applicants.

[24] While not mentioned by the Member, it is noteworthy that Justice Phelan's decision expressed concern not only about the ID's earlier detention review decision failing to consider that the proposed release plan contained features of control exceeding those in national security

cases. Justice Phelan also commented that this case has unfortunate parallels to that in *Tursunbayev v Canada (Minister of Public Safety and Emergency Preparedness)*, 2012 FC 504 [*Tursunbayev*] and that the ID had unreasonably distinguished the present situation from that decision.

[25] The Applicants argue that Justice Phelan has made an express ruling that the Applicants' situation should not be distinguished from the situation in *Tursunbayev*. I do not read Justice Phelan's decision as suggesting that it is not possible for the Applicants' situation to be distinguished from that of Mr. Tursunbayev, rather that the ID had done so unreasonably in the decision the Court was then reviewing. However, I am conscious of the similarities between the Tursunbayev case and that of the Applicants and, particularly given Justice Phelan's comments in the previous judicial review decision, I consider it to be particularly important for the Member to have considered similarities and differences between these cases very carefully.

[26] In that respect, I agree with the Applicants' argument that the Member has failed to take into account the available information on Mr. Tursunbayev. Justice Mactavish's decision in *Tursunbayev* upheld the ID's findings that:

A. Mr. Tursunbayev was a fugitive from justice, having fled Kazakhstan knowing that the authorities were investigating offences involving the state-owned uranium company of which he had been the Vice-President;

B. In the context of Mr. Tursunbayev's vast and unexplained wealth, it was reasonable to conclude that he had benefited greatly from his participation in the Kazakhstani

system and that it was not credible that a person could have benefited so much from a corrupt system without having facilitated and contributed to it; and,

C. Mr. Tursunbayev's past flight from Kazakhstan, the mobility afforded to him by his considerable wealth, and the resourcefulness that he had shown through his acquisition of citizenship in St. Kitts and Nevis were indicators of his potential flight risk.

[27] The Member's decision makes no mention of any of this information, noting only that Mr. Tursunbayev had been a "model client" of ISN in his participation in his release plan. It is difficult to reconcile the information contained in Justice Mactavish's decision with the Member's conclusion that Mr. Tursunbayev's credibility and trustworthiness have not been impugned and that he does not have a history that includes a high level of disregard for the law in general. I am not reaching a conclusion that the Applicants' case is incapable of being distinguished from that of Mr. Tursunbayev. However, at a minimum the Member's analysis falls into the category of concerns identified in *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425 at para 17:

> [17] However, the more important the evidence that is not mentioned specifically and analyzed in the agency's reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact "without regard to the evidence": Bains v. Canada (Minister of Employment and Immigration) (1993), 63 F.T.R. 312 (F.C.T.D.). In other words, the agency's burden of explanation increases with the relevance of the evidence in question to the disputed facts. Thus, a blanket statement that the agency has considered all the evidence will not suffice when the evidence omitted from any discussion in the reasons appears squarely to contradict the agency's finding of fact. Moreover, when the agency refers in some detail to evidence supporting its finding, but is silent on evidence pointing to the opposite conclusion, it may be easier to infer that the agency

> overlooked the contradictory evidence when making its finding of fact.

[28] I find that in this respect the Member's reasoning process in distinguishing the Applicant's situation from that of Mr. Tursunbayev was flawed and that the resulting decision falls outside the range of possible, acceptable outcomes, which necessitates this application being allowed and the decision revisited.

E. *Use of Force / Removal of the Electronic Monitoring Bracelet*

[29] The other two concerns, which result in the Member concluding that the release plan is not sufficient, are very much related. The Member concludes that, notwithstanding that the document in which the Applicants consent to the ISN guards' use of force against them states that such consent is irrevocable, such consent could be withdrawn and therefore is of no real effect. The Member concludes that the Applicants can and likely will cut off the electronic monitoring bracelets, revoke their consent to the ISN guards' use of force, and flee. While cutting off the bracelets would cause the devices to send an immediate notification message, there will be no further monitoring, and the guards would have no legal authority to engage in a car chase or engage any third party. They can only report the breach to the CBSA. The Member stated that there was no evidence that the CBSA has any kind of emergency response capabilities.

[30] However, as argued by the Applicants, the submissions before the Member referred to notification of any breach by the Applicants being sent not only to CBSA but also to the police. The Member's decision does not refer to the involvement of the police, and their emergency

response capability, in considering the sufficiency of the release plan to address flight risk concerns. I consider the decision to be unreasonable in failing to take this factor into account.

[31] There is an additional argument, explained by the Applicants in oral submissions at the hearing of this application, which relates to the Member's concerns about withdrawal of consent to the use of force and cutting off the monitoring bracelet in an effort to thwart the release plan and escape custody. The Applicants argue that this would represent a breach of the conditions of their release and an offence under section 124 of the IRPA, potentially punishable on indictment under section 125 of IRPA. The Applicants argue that section 494 of the Criminal Code, RSC 1985, c C-46 would in turn entitle the ISN guards to arrest the Applicants, as that section entitles anyone to arrest without warrant a person whom he finds committing an indictable offence. The Applicants' position is that this addresses the Member's concerns, because this statutory right of arrest would apply notwithstanding a revocation of the consent to the use of force.

[32] The Respondent submits that this argument was not raised by the Applicants in the detention review hearing before the Member or in the Applicants' written submissions prior to the hearing before the Court. The Respondent accordingly asks that, if the Court were inclined to dispose of this matter based on this argument, it afford the Respondent an opportunity to make supplementary submissions on the point The Applicants submit that this argument was raised, with the exception of referencing the particular section of the Criminal Code upon which the arguments depends.

[33] I have reviewed the record, including the transcript of the hearing before the Member, and have been unable to identify an argument having been advanced before the Member that the ISN guards have a statutory right of arrest in the circumstances described above. As such, I am not prepared to consider this argument in reviewing the reasonableness of the Member's decision. However, given that this application is being allowed and referred back to the ID for other reasons, there will be an opportunity for this argument to be fully canvassed before the ID when the detention review is revisited.

[34] The parties confirmed that neither wished to propose a question of general importance for certification for appeal.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is allowed and the matter is referred to the Immigration and Refugee Board, Immigration Division for re-determination by a different member. No question is certified for appeal.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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