Federal Court  Cour fédérale

Date: 20170629

Docket: IMM-4554-16

Citation: 2017 FC 623

[ENGLISH TRANSLATION]

Montréal, Quebec, June 29, 2017

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Applicant

and

ALEXANDRE CHIPOVALOV

respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], of the release order issued on October 31, 2016, by a member of the Immigration Division [ID] of the Immigration and Refugee Board, following a review of the respondent's detention.

II. Facts

[2] The respondent, a 37-year-old citizen of Russia, became a permanent resident upon his arrival in Canada on May 2, 1994, when he was 14 years old. He has been detained since November 2013 as a flight risk.

A. *Respondent's history of addiction, mental health and criminality*

[3] Since the age of 12, the respondent has experienced substance abuse problems. He developed an addiction to various drugs and eventually to heroin. He has attempted numerous therapies in the past, including a detoxification program at the Saint-Luc Hospital starting in 1998, a stay at Le Sentier du Nouveau Jour social reintegration centre beginning in November 2008, and therapy at the Portage drug rehabilitation centre from September 2009 to February 2010. In the past, the respondent has relapsed several times after completing his treatments. He is currently treating his addiction with methadone and is attempting to withdraw from this drug.

[4] Along with his substance abuse problems, the respondent suffers from psychiatric problems. Various psychiatrists have diagnosed him with depression and anxiety and have tried various treatments: Prozac to treat depression and anxiety symptoms at Saint-Luc Hospital in 1998; Effexor XR to treat depression and anxiety at the Hôtel-Dieu de Saint-Jérôme Hospital in 2000; and Zyprexa to treat anxiety and anger crises at the Hôtel-Dieu de Saint-Jérôme Hospital in September 2002. In October 2002, a psychiatric assessment at the Cormier-Fontaine clinic, confirmed in February 2005, led to a vague diagnosis of dysthymia (chronic minor depression),

an Axis I disorder, as well as a vague diagnosis of antisocial and schizotypal personality traits, an Axis II disorder. Prozac was again chosen as the treatment. However, the respondent alleges that the prison authorities are currently refusing to provide him with this medication, which would explain his instability and his erratic and disrespectful behaviour.

[5] Between 1999 and 2014, the respondent was convicted of various offences. On May 11, 2000, he pled guilty to violent offences committed on December 7, 1999 (theft and assault), for which he was sentenced to fines with a two-year probation order. On September 26, 2014, he pled guilty to theft charges related to offences committed on September 25, 2011, and was sentenced to four months' imprisonment and two years' probation.

B. *Immigration history, removal efforts and detention of the respondent*

[6] On May 2, 1994, the respondent arrived in Canada with his family and became a permanent resident.

[7] On January 22, 2002, the ID issued a deportation order against the respondent due to inadmissibility on grounds of serious criminality under paragraph 36(1)(a) of the IRPA.

[8] On June 9, 2004, an appeal to the Immigration Appeal Division was refused for abandonment. Since then, the Canada Border Services Agency [CBSA] has been attempting to remove the respondent to Russia.

[9] On April 30, 2007, a negative decision was rendered under the pre-removal risk assessment application, terminating the stay of execution of the removal order.

[10] Between 2007 and 2016, the CBSA attempted to obtain a travel document in order to enforce the respondent's removal. It was impeded by a lack of cooperation from the respondent and the refusal of the Russian Consulate to issue such a document without the respondent's specific request.

[11] On July 5, 2010, the respondent was arrested by the CBSA for removal on the basis that he was considered a flight risk, had not appeared for his hearing on July 5, 2010, was not cooperating with the CBSA for his removal, and did not wish to return to Russia. On July 15, 2010, the respondent was released from custody by the ID on a $1,000 bond provided by his mother and on condition that he cooperate fully with the CBSA to obtain a travel document.

[12] Between September 26 and 30, 2013, the respondent was again detained because of his failure to work with the CBSA to obtain a travel document. He relapsed into drug use. On November 8, 2013, he did not report for his hearing with the CBSA. On November 30, 2013, he was arrested by the police for shoplifting.

[13] The respondent has been detained by the CBSA since December 3, 2013, at the Rivière-des-Prairies Detention Centre (with the exception of the period from September to December 2013 during which he served a sentence for offences committed in 2011). The respondent's detention has been reviewed monthly by the ID. The respondent's detention was

maintained each time because of the flight risk. The respondent still refuses to sign the request required by the Russian authorities to issue the necessary travel document to the CBSA so that it can proceed with his removal.

III. Decision

[14] After taking the matter under advisement on October 28, 2016, the ID member rendered a decision orally on October 31, 2016. The panel first reviewed the respondent's entire record, the history of his situation in Canada and the reviews of his detention since December 2013. It then reviewed the applicable law and case law.

[15] The member then analyzed the factors set out in section 248 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR], to assess the need to continue to detain the respondent.

[16] The ID ordered the respondent's release under several conditions: proof of acceptance of the respondent in a detoxification program of at least six months; a $5,000 bond by his parents; an obligation to keep in touch with immigration authorities and to report to all appointments fixed by the Agency; the obligation to reside with his mother or at the place of detoxification; and no new criminal convictions.

IV. Issues

[17] In this case, the Court must determine whether the ID committed a reviewable error in its decision. The standard of review applicable to detention review decisions by the ID is that of reasonableness. Since detention review decisions are based on facts, restraint must be exercised in judicial review. The Court will intervene only if the reasoning of the decision is flawed and the decision falls outside the range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47; *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708 at para 16; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at paras 59, 61 (*Khosa*).

[18] The parties believe, and the Court agrees, that the case has not become moot since the respondent is still being detained since a stay of his release being granted pending judicial review (*Borowski v Canada (Attorney General)*, [1989] 1 SCR 342).

V. Relevant provisions

[19] Subsection 58(1) of the IRPA deals with the circumstances of release by the ID:

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 :
(a) they are a danger to the	a) le résident permanent ou

public;

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, violating human or international rights, serious criminality, criminality or organized criminality;

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, pour atteinte aux droits humains ou internationaux ou pour grande criminalité, criminalité ou criminalité organisée;

(d) the Minister is of the opinion that the identity of the foreign national — other than a designated foreign national who was 16 years of age or older on the day of the arrival that is the subject of the designation in question — 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; or

d) dans le cas où le ministre estime que l’identité de l’étranger — autre qu’un étranger désigné qui était âgé de seize ans ou plus à la date de l’arrivée visée par la désignation en cause — 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;

(e) the Minister is of the opinion that the identity of the foreign national who is a designated foreign national and who was 16 years of age or older on the day of the arrival that is the subject of the

e) le ministre estime que l’identité de l’étranger qui est un étranger désigné et qui était âgé de seize ans ou plus à la date de l’arrivée visée par la désignation en cause n’a pas

designation in question has not been established.	été prouvée.

[20] Section 248 of the IRPR sets out the factors to be considered before deciding whether to maintain a detention or to release someone:

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.

VI. Analysis

A. *Parties' arguments and analysis*

[21] The applicant argues that the ID's decision is unreasonable because the member erred in analyzing the factors in section 248 of the IRPR and in choosing the alternative.

(1) IRPR 248(a) – reason for detention

[22] The ID identified the reason for detention as a risk of flight, not a risk of danger:

> [43] Therefore, because we have the reason of flight risk, the Agency is asking me to uphold Mr. Chipovalov's detention to ensure he is present for removal from Canada. However, it must be clarified that there is no planned date for removal. There is an obstacle to enforcing the removal and that is obtaining a travel document. To be clear. It is Mr. Chipovalov who is the obstacle, yes. However, the fact remains that although the removal is enforceable under the legislation, it is not enforceable in reality. Therefore, this is an important factor that I took into account throughout my assessment.

[23] The applicant argues that the member ignored the evidence in the respondent's criminal record when she noted that the respondent had a criminal history dating back several years for theft and a robbery. As noted by the respondent, the record shows offences of theft and assault in 1999 as well as theft offences committed in 2011. This is theft under paragraph 334(b)(i) of the *Criminal Code*, RSC 1985, c C-46, and not robbery (section 343 of the *Criminal Code*).

[24] In light of the evidence before the ID and before the Court, the Court finds that the member's decision on this matter is not tainted by any error that requires its intervention.

(2) IRPR 248(b) – length of time in detention

[25] The ID characterized the detention as long-term, considering that the respondent had been detained since November 30, 2013, that is, for three years. Based on *Shariff v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 640 at paragraphs 34–35, the member

determined that the period from September to December 2014 could not be considered a period of release.

[26] The applicant challenges the ID's decision, considering that the period during which the respondent refused to cooperate should not be counted in calculating the length of time (*Canada (Minister of Citizenship and Immigration) v Kamail*, 2002 FCT 381 at para 46; *Canada (Public Safety and Emergency Preparedness) v Lunyamila*, 2016 FC 1199 [*Lunyamila*]). The respondent argues that the member properly concluded, like all other ID decision-makers seized of this case before her, relying on the case law, that this was a long-term detention.

[27] The Court finds that the ID did not err in considering the respondent's detention to be long-term and that it relied sufficiently on the case law to make that finding (*Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 SCR 350; *Warssama v Canada (Citizenship and Immigration)*, 2015 FC 1311 [*Warssama*]). The Court notes that the member noted on several occasions that the length of the detention was due, at least in part, to the respondent's refusal to cooperate with the CBSA and that she addressed this factor in analyzing the subsequent factors in section 248 of the IRPR. Therefore, there is no need for the Court to intervene.

(3) IRPR 248(c) – determining the length of time that detention is likely to continue

[28] The ID assessed the probable length of detention:

> [49] I can conclude at this stage with the facts before me that removal has become illusory. It is hypothetical. The removal order exists, the legislation is clear, but the actual removal order cannot

> be executed and enforced. Again, I repeat, this is because of Mr. Chipovalov's behaviour, this is because of Mr. Chipovalov's position. This is clear. My colleagues have stated it many times. Mr. Chipovalov is obstructing his removal. However, I will make a distinction here because I must note the fact that the removal cannot take place without Mr. Chipovalov's cooperation. And it is clear that Mr. Chipovalov is not cooperating and so there is no removal.

[29] The member noted that the CBSA did not inform the panel of new steps taken to enforce the respondent's removal order based on his lack of cooperation. She then addressed the relevance of maintaining detention to mitigate the risk of flight:

> [56] Detention at this stage seems to serve no concrete purpose and is never-ending. Certainly, the case law mentions the issue of rewarding Mr. Chipovalov for his lack of cooperation and that is another element that I have considered. Does releasing Mr. Chipovalov in the present circumstances set a dangerous precedent? However, I do not think the situation should be looked at from that angle. The panel must focus on the case before it. Each case must be examined individually. The panel must apply the legislation to the circumstances and the facts that were established in the case before them, and the recent case law that has been submitted by Mr. Chipovalov's representative describes similar cases in which the persons concerned refused to cooperate with the Canada Border Services Agency, and the panel gave certain instructions with respect to the fact that we cannot simply state that Mr. Chipovalov is not cooperating and therefore the detention is maintained. This is not sufficient. And in the present circumstances, add to this the fact that it is a long-term detention . . . and that, in *Warssama*, it is made clear that the passage of time worsens the situation with each monthly review. [Emphasis added.]

[30] The applicant submits that the ID erred in its weighing of this factor, giving it too much weight (*Brown v Canada (Ministry of Public Safety and Emergency Preparedness)*, 2016 ONSC 7760). He argues that it was insufficient to simply assume that the respondent's removal would not be imminent and that, in doing so, the panel rendered a decision based on speculation. In

contrast, the respondent argues that the ID's conclusion is based on facts: no stay has prevented the respondent's removal since 2007; the respondent refuses to sign any document that would make it possible to obtain a travel document; the Russian authorities have repeatedly stated that they will not issue a travel document to the respondent without his consent; the alternative to the diplomatic steps presented by the Minister since January 2014 is no longer available (decision of May 12, 2016); a removal that was to have taken place on May 29, 2015, was cancelled on May 25, 2015, without explanation; the CBSA has stated since April 2016 that it is now relying on the respondent's cooperation to move the case forward; and no removal date is scheduled at this time.

[31] The Court notes that the ID considered all the facts in the file when assessing the likely length of the respondent's detention in the future. Again, it should be noted that the member pointed out several times that the length of the detention was due, in large part, to the respondent's refusal to cooperate with the CBSA. After analyzing the available facts, it was open to the member to conclude that the length of the detention was indeterminate, considering all of the CBSA's past efforts. It is not up to the Court to reweigh the evidence (*Khosa*, supra).

(4) IRPR 248(d) – unexplained delays or unexplained lack of diligence caused by the parties

[32] Throughout its decision, the ID repeatedly emphasized that the length of the respondent's detention was caused by his lack of cooperation with the CBSA and his refusal to sign the necessary documents to obtain travel documents from the Russian authorities:

> [50] Subsection (d) mentions any unexplained delays or unexplained lack of diligence caused by the Department or the

> person concerned. With regard to the diligence of the Border Services Agency, there is nothing to criticize. It acted in good faith. It has taken every possible step to date. It tried to work with the needs of Mr. Chipovalov, all with a view to enforcing its mandate. However, the fact remains that it was unsuccessful, and Mr. Chipovalov is still in Canada.
>
> . . .
>
> [52] Mr. Chipovalov, however, in my opinion, has not always acted in good faith. The case law indicates that, in these circumstances, Mr. Chipovalov's hands are not clean and I agree with it. He wants to dictate to the Canadian government how his file should be processed and, through his behaviour, he shows that he does not respect the decision—decisions that concern him made by the Canadian government. He was confronted on many occasions with the fact that he has no status in Canada and that he no longer has the right to be here, but Mr. Chipovalov insists that, for him, it is not a matter of helping the Agency send him back to Russia . . . .

[33] Nevertheless, the member questioned the relevance of extending the detention in the hope of obtaining a signature from the respondent:

> [55] So, Mr. Chipovalov's detention will not help the Agency obtain a travel document and it will not incite Mr. Chipovalov to sign something that would lead to obtaining a travel document. Thus, I do not see signs of anything that might happen in the next 30 days that would change the situation before us today.

[34] The applicant argues that the member erred in placing little weight on the factor of the delays and lack of diligence by the respondent in refusing to cooperate with the removal order (*Lunyamila*, above, at paras 106–112). The respondent, on the other hand, argues that the member conducted a thoughtful and detailed analysis of each of the factors in section 248 of the IRPR, while taking into account the case law (*Sahin v Canada (Minister of Citizenship and Immigration)*, [1995] 1 FC 214, 85 FTR 99).

[35] The Court notes that the ID considered all of the elements unfavourable to the respondent's release by weighing each of the factors in the legislation. Nevertheless, despite the respondent's lack of cooperation with the CBSA, the member concluded that this element alone did not support continued detention. In doing so, the ID used its discretion and did not commit any reviewable error.

(5) IRPR 248(e) – existence of alternatives to detention

[36] Lastly, the ID assessed whether there were alternatives to detention. It decided to grant the respondent's release under certain conditions without requiring signing of the document required to obtain a travel document:

> [56] Given that I concluded that there is a flight risk, it is clearly unreasonable to consider releasing Mr. Chipovalov without certain conditions. Here, despite the fact that Mr. Chipovalov has not cooperated until now, I consider that an alternative to detention is necessary for the simple fact that further detention in this case will be detention, as I described earlier, that serves no purpose because, at this time, there is no hope that Mr. Chipovalov will cooperate and, at this time, there is no hope that the Agency can remove Mr. Chipovalov through other means.

[37] The member determined that the release of the respondent under conditions did not terminate the removal order, but that it was an alternative considering that detention had become unreasonable. Since the requirement to sign a form or to cooperate to obtain a travel document has been problematic in the past, it was not one of the conditions.

[38] The applicant criticizes the fact that the conditions on the respondent's release were unreasonable because they did not offset the risk of flight. It believes that the alternative chosen

by the member is neither effective nor appropriate: it was imperative that the respondent be required to cooperate for his eventual removal before considering a release; it was necessary to analyze the guarantors' ability to ensure compliance with the conditions of release; the $5,000 bond was unreasonable because in the past a $1,000 bond had been lost by the respondent's mother when the respondent had failed to comply with a previous condition; and it was not required that the detoxification cure take place in a closed centre.

[39] The respondent submits that the ID member used her discretion and that the conditions required were reasonable. He denies that obtaining a travel document is a statutory requirement.

[40] The Court finds that the conditions of release established by the ID do not have reviewable errors. The member reviewed all the elements of the case and relied on the law and the case law before deciding on the respondent's conditions of release.

B. *Conclusion*

[41] In conclusion, as Justice Russell W. Zinn observed:

> [27] At some point, long before this March 2015 review, the whole process became completely unreasonable. The burden of proof is upon the Minister at each and every detention review. While it may often be that it is appropriate for the Minister to simply rely upon earlier decisions (*Canada (Minister of Citizenship and Immigration) v Thanabalasingham*, 2004 FCA 4, [2004] 3 FCR 572, the passage of time cumulates with each monthly review. [Emphasis added.]
>
> (*Warssama*, above, at para 27)

[42] Therefore, given the comprehensiveness of the decision rendered by the ID member, the aggravation of the detention situation by the passage of time, and the conditions established for the respondent's release, the decision is reasonable and the intervention of the Court is not warranted.

VII. Conclusion

[43] For the reasons set out above, the application for judicial review is dismissed.

JUDGMENT in IMM-4554-16

THE COURT'S JUDGMENT is that the application for judicial review is dismissed. There is no question of general importance to be certified.

OBITER

The Court notes that, according to the respondent's affidavit, and it is important to note it, the respondent asked for treatment in a program where he will be treated without the possibility of leaving before meeting the objectives of the program in question.

"Michel M.J. Shore"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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