Federal Court  Cour fédérale

Date: 20180713

Docket: IMM-2809-18

Citation: 2018 FC 729

Ottawa, Ontario, July 13, 2018

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Applicant

and

DAMIR MEHMEDOVIC

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision dated June 15, 2018, by the Immigration Division [ID] of the Immigration and Refugee Board of Canada, ordering the Respondent's release from immigration detention subject to certain conditions [the Decision]. The Applicant is the Minister of Public Safety and Emergency Preparedness [the Minister].

[2] As explained in greater detail below, this application is granted, because I have found that the Immigration Division erred in the Decision, by overlooking evidence relevant to, or failing to intelligibly analyse, the extent to which the proposed alternative to detention could mitigate the risk presented by the Respondent as a danger to the public and a person unlikely to appear for removal from Canada.

II. **Background**

[3] The Respondent, Damir Mehmedovic, is a citizen of Bosnia and Herzegovina who was granted permanent residence in Canada in 1994 in the Convention refugee category. Between 2006 and 2017, Mr. Mehmedovic has been convicted of multiple offenses under the *Youth Criminal Justice Act* and the *Criminal Code*, including offences involving violence and failure to comply with probation orders and other legally imposed terms and conditions.

[4] In February 2013, the ID found Mr. Mehmedovic inadmissible to Canada for serious criminality. His appeal to the Immigration Appeal Division, which temporarily resulted in a stay, was terminated after he was convicted of subsequent criminal offences. Thereafter, following his failure to report to the Canada Border Services Agency [CBSA] on June 1, 2017, Mr. Mehmedovic was arrested on June 6, 2017. He was later released but, in October 2017, was subsequently found to constitute a danger to the public under s 115(2)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], and was arrested and detained.

[5] Mr. Mehmedovic remained in detention and received several statutorily mandated detention reviews before the ID. On May 7, 2018, Member Fader of the ID ordered Mr.

Mehmedovic released from detention into the custody of the New Vision Society [New Vision], a residential treatment facility [the Release Order]. Following an unsuccessful motion by the Minister to stay the Release Order, Mr. Mehmedovic was released into the custody of New Vision on May 29, 2018. However, on June 6, 2018, New Vision contacted CBSA to advise that Mr. Mehmedovic was being evicted for breaching house rules, as he had broken out of the house during curfew, caused damage to property, appeared to have taken drugs, and then had a positive urine test for methamphetamine.

[6] The ID convened a 48 hour detention review on June 8, 2018, and Member Fader continued Mr. Mehmedovic's detention on the grounds that he was a danger to the public and posed a flight risk [the Detention Order]. He next appeared before ID Member Cikes on June 15, 2018, for his seven-day detention review. This hearing resulted in the Decision that is the subject of this application for judicial review, ordering that Mr. Mehmedovic be released to another residential treatment facility, named It's Up to You Recovery Society/Into Action Recovery Society [Recovery Society]. On June 19, 2018, Justice Mactavish issued a stay of the release pending disposition of this application for judicial review.

[7] Also on June 19, 2018, Mr. Mehmedovic was convicted of failing to comply with a probation order, contrary to s 733.1 of the *Criminal Code*, related to an incident on October 13, 2017. He was given a custodial sentence and is scheduled to be discharged on July 20, 2018.

III. **Issues and Standard of Review**

[8] The Minister submits the following issues for the Court's determination:

A. Is this judicial review moot, given that Mr. Mehmedovic is now serving a criminal sentence and cannot be released pursuant to the Decision?

B. Was the Decision to release Mr. Mehmedovic into another recovery house reasonable?

[9] The parties agree, and I concur, that the standard of review applicable to the Decision is reasonableness. I also accept Mr. Mehmedovic's submissions that the ID has particular expertise in interpreting and applying the detention and release provisions of IRPA and that it is entitled to considerable deference, particularly on questions of fact (see *Canada (Public Safety and Emergency Preparedness) v Ismail*, 2014 FC 390 at para 31, and *Canada (Citizenship and Immigration) v Thanabalasingham*, 2003 FC 1225 at para 42).

IV. **Analysis**

A. *Is this judicial review moot, given that Mr. Mehmedovic is now serving a criminal sentence and cannot be released pursuant to the Decision?*

[10] The parties have raised the mootness issue because, subsequent to the ID's issuance of the Decision, Mr. Mehmedovic was incarcerated for a criminal offense that occurred in the fall of last year. As such, while he is scheduled to be released on July 20, 2018, a decision in this application for judicial review will not immediately affect his liberty. However, both parties take the position that this application is not moot, as Mr. Mehmedovic's immigration detention status will again become relevant after his release from incarceration.

[11] Mr. Mehmedovic refers the Court to *Kippax v Canada (Citizenship and Immigration)*, 2014 FC 429 at para 7, where Justice Mosley held that an application for judicial review of a detention review decision was moot, as the decision was spent because there had been several other subsequent review hearings and orders for continued detention, but nevertheless exercised the Court's discretion to hear the application. Justice Mosley arrived at this decision based on the principles set out in *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 [*Borowski*] at 353, and the fact that the issues raised in the application would continue to be live issues in ongoing detention reviews.

[12] In the present case, there have been no further detention reviews since the Decision. I agree with the parties that this application is not moot and, even if it was, this would be an appropriate case for the Court to exercise its discretion, in accordance with the *Borowski* principles, to decide the application nevertheless.

B. *Was the Decision to release Mr. Mehmedovic into another recovery house reasonable?*

[13] While each of the parties made submissions on the legal principles surrounding detention review decisions, I would characterize the disagreement between them as relating not to the principles themselves but to their application to the particular facts of this case and the evidence before the ID.

[14] Section 58(1) of IRPA requires the ID to order a permanent resident released from detention unless it is satisfied that certain circumstances exist. Those circumstances include the

person being a danger to the public or being unlikely to appear for removal. In the present case, the ID clearly found in the Decision, and in the previous Detention Order, that Mr. Mehmedovic falls into both these categories.

[15] The ID was therefore required to consider the factors prescribed by s 248 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR], before making a decision on detention or release. These factors are (a) the reason for detention, (b) the length of time in detention, (c) whether there are elements that can assist in determining the length of time the detention is likely to continue and, if so, that length of time, (d) any unexplained delays or lack of diligence caused by either the Applicant or the Respondent, and (e) the existence of alternatives to detention. Consistent with the interaction of the above provisions of the IRPA and IRPR, having found in the Decision that Mr. Mehmedovic was clearly a danger to the public and a clear flight risk, the ID stated that the only way his release would be permitted would be through consideration of the section 248 factors.

[16] Turning to the jurisprudence surrounding the consideration of these factors, the Minister emphasizes the decision of Chief Justice Crampton in *Canada (Public Safety and Emergency Preparedness) v Lunyamila*, 2016 FC 1199 [*Lunyamila*] at para 66 and 85, to the effect that, when a person constitutes a danger to the public, there is a stronger case for continuing detention, the danger to the public should be given considerable weight, and such weight should vary directly with the extent to which alternatives to detention can mitigate the danger.

[17] In contrast, Mr. Mehmedovic relies on the conclusions in *Sahin v Canada (Citizenship and Immigration)*, [1995] 1 FC 214 [*Sahin*] at paras 26 and 31, that a lengthy detention of unknown duration may be characterized as indefinite and that significant weight should be given to the anticipated timeline for when a final decision can be made as to whether or not a person will be removed from Canada. Similarly, *Ahmed v Canada (Citizenship and Immigration)*, 2015 FC 876 [*Ahmed*] at para 34, states that, where detention is found to be indefinite, there is a heightened obligation to consider alternatives to detention, specifically release upon conditions.

[18] The parties disagree on whether Mr. Mehmedovic's circumstances can be characterized as presenting a prospect of indefinite detention and whether the ID made such a finding. However, the Decision clearly states that it is not currently possible to determine the amount of time Mr. Mehmedovic may be in detention, and it considers the Minister's evidence that removal may take from 3 to 9 months after certain steps have been taken by Global Affairs and concludes that this is a factor that therefore has to be looked at seriously. In my view, the Decision demonstrates significant weight being given to both the reasons for Mr. Mehmedovic's detention (danger to the public and flight risk) and the currently indeterminate period of detention. The ID therefore proceeds to consideration of an alternative to detention and the extent to which such an alternative can mitigate the risks Mr. Mehmedovic presents. This is all consistent with the guidance in *Lunyamila*, *Sahin*, and *Ahmed* and, thus far, I find no error in the ID's analysis.

[19] However, I agree with the Minister's position that the Decision does not demonstrate clear and compelling reasons for departing from the Detention Order made on the 48 hour review following Mr. Mehmedovic's eviction from New Vision. As explained by the Federal Court of

Appeal in *Canada (Citizenship and Immigration) v Thanabalasingham*, 2004 FCA 4 at para 10, if the ID chooses to depart from a prior ID decision to detain, clear and compelling reasons for doing so must be set out. In the Detention Order, the ID found that Mr. Mehmedovic would require a very structured alternative to detention to mitigate the risk he presented. It held that he cannot be relied upon to follow the rules of a structured residential facility and abide by terms and conditions, and that, without a supervised or structured program which addressed his addiction, the danger his release poses to the public will not be sufficiently mitigated.

[20] Turning to the reasons for the Decision, I agree with Mr. Mehmedovic's characterization of those reasons as twofold. First, the ID considered New Vision to have "perhaps failed in their duty" to him. While the Decision itself contains little explanation of that point, I agree with Mr. Mehmedovic's argument that, applying the guidance of *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paras 12 and 18, a reviewing court can look to the record before an administrative decision-maker to assist in understanding and assessing the reasonableness of the decision-maker's reasons.

[21] The transcript of the hearing before the ID includes the oral submissions made by Mr. Mehmedovic's counsel immediately before the ID orally issued the Decision. The transcript demonstrates counsel arguing her disappointment with the fact that New Vision offered an assurance of a 14 day lockdown period and then allowed Mr. Mehmedovic to leave the residence within 14 days of arriving, as a result of which he met someone he knew who was in possession of crystal meth. In my view, taken in the context of the submissions received by the ID, its reference to New Vision failing Mr. Mehmedovic relates to the recovery facility having failed to

enforce the intended 14 day lockdown in a manner which would have prevented him from having access to drugs. I find this aspect of the Decision intelligible.

[22] However, the second, and it appears more significant, reason for the ID ordering Mr. Mehmedovic's release to the Recovery Society was its analysis of the difference between the programming available to him at that facility in comparison to that which was available at New Vision. The paragraphs containing this analysis are as follows:

> The one thing that I looked to in their materials that I did not find, and perhaps I may have missed it, but I did not find in the New Vision materials is that they devote a session as an educational group. This is in the last page of Exhibit P-2.
>
> Session Three is an educational group in which a staff member facilitates a pre-planned lesson such as anger management, which would be of benefit to you, communication skills - you're able to communicate, but I think you need to work on that in terms of engaging in more constructive communication. And, specifically, relapse prevention as well as goal setting. So, that is the key that I am hopeful distinguishes this program from the previous one.

[23] The ID noted earlier in the Decision that the Recovery Society provided restrictions similar to those that were imposed at New Vision, which had proven to be an effectual, and that the ID was therefore considering why it should give Mr. Mehmedovic another opportunity. It then referred to material provided by Mr. Mehmedovic's counsel, related to the cycle of chronic relapse, which it found applied to him. The ID subsequently arrived at the conclusion quoted above, that the programming at the Recovery Society, which included relapse prevention, distinguished it from the programming at New Vision and supported the decision to order Mr. Mehmedovic's release. The ID describes this as key to distinguishing between the programming

at the two facilities, and I read this analysis as underpinning the Decision's departure from the conclusions in the Detention Order.

[24] It is this analysis which, in my view, undermines the reasonableness of the Decision. As the Minister points out, the material before the ID from New Vision explained that its program was based on cognitive behavioural therapy and the 12 step program, with particular emphasis on unresolved grief and loss, anger management, boundary issues, codependency issues and relapse prevention. Anger management and, more importantly, relapse prevention, were clearly part of the programming at New Vision. The Decision therefore does not intelligibly explain why, in considering the alternative to detention, programming of this sort at the Recovery Society would mitigate the risks presented by Mr. Mehmedovic, when it had been ineffective at New Vision.

[25] Mr. Mehmedovic argues that the ID's analysis should be understood as focusing upon the substantive content of the Recovery Society's programming, which distinguished it from that of New Vision. However, the evidence upon which he relies is a statement in the Recovery Society's materials that "Residents participate in 3 one hour group sessions per week day" and that "Session 3 is an educational group in which a staff member facilitates a pre-planned lesson such as Anger management, Communication Skills, Relapse Prevention, Goal Setting." I find no detail as to substantive content in this description which serves to distinguish it from the description of the programming in the New Vision materials.

[26] Rather, the ID's statement that "perhaps I may have missed it," when referring to whether the New Vision materials identify educational group sessions, supports the Minister's argument that the ID overlooked the evidence of the programming provided by New Vision. While I am conscious of the considerable deference to which the ID is entitled, and I have considered Mr. Mehmedovic's argument that the wording of decisions given orally should not be scrutinized as closely as written decisions, my conclusion is that either this evidence was overlooked or the ID failed to intelligibly analyse how the programming at the Recovery Society was distinguishable from that of New Vision in mitigating the risks of flight and danger to the public. As such, the Decision is unreasonable and must be set aside, with the Respondent's future detention status to be redetermined by the Immigration Division.

[27] Neither party proposed any question for certification for appeal, and none is stated.

JUDGMENT IN IMM-2809-18

THIS COURT'S JUDGMENT is that this application for judicial review is granted, the Decision is set aside, and the matter of the Respondent's future detention status is to be redetermined by the Immigration Division. No question is certified for appeal.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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