Federal Court  Cour fédérale

Date: 20120503

Docket: IMM-2367-12

Citation: 2012 FC 523

Ottawa, Ontario, May 3, 2012

PRESENT: The Honourable Madam Justice Snider

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

B001

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] The Respondent (referred to as B001 or the Respondent) is a citizen of Sri Lanka who arrived in Canada on the *MV Sun Sea* on August 13, 2010. The Respondent made a refugee claim. He has been held in immigration detention since August 13, 2010 on three different grounds: (a) until November 8, 2010, on the basis of identity; (b) between November 8, 2010 and May 5, 2011, on grounds of security; and (c) since May 5, 2011, on the basis that he posed a

flight risk. His detention was reviewed and affirmed in 20 decisions by members of the Immigration Division, Immigration and Refugee Board (the ID). Upon conclusion of the Respondent's 21st detention review hearing, in a decision dated March 7, 2012 (the Release Decision), a member of the ID (the Member or Board) determined that he should be released. The Minister of Citizenship and Immigration (Minister) seeks to quash the Release Decision.

[2] While the Respondent was in detention, he was reported to be inadmissible to Canada due to the existence of reasonable grounds to believe that he had been engaged in people smuggling (see s. 37(1)(b) of the *Immigration and Refugee Protection Act*, S C 2001, c 27 [*IRPA*]). After an admissibility hearing in August 2011, the Respondent was found to be inadmissible to Canada. A Deportation Order issued on September 8, 2011, and the Respondent became ineligible to have his refugee claim referred to the Refugee Protection Division. As permitted under s. 112(1) of *IRPA*, the Respondent applied for protection in Canada pursuant to a pre-removal risk assessment (PRRA). The PRRA application has been outstanding since September 2011, and, as acknowledged by the Member, "there [is] no timeline available for when a decision might be forthcoming".

[3] For the reasons that follow, I conclude that the Release Decision is not reasonable and will be quashed.

[4] I also note that my task in this judicial review is not to determine whether B001 should be detained or released from detention or to comment on the propriety of the applicable legislation.

Rather, my task is to ensure that the law related to detention reviews is applied fairly to both the Minister and the Respondent.

II. Issues

[5] In my view, there are two determinative issues:

1. Did the Board fail to consider the factors listed in s. 248 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*Regulations*], specifically, whether the imposition of the proposed security deposit was an alternative to detention, in light of the fact that the Respondent was a "flight risk"?

2. Did the Board err by engaging in speculative analysis concerning the PRRA decision?

III. Standard of Review

[6] The standard of review of the Release Decision is reasonableness. This is consistent with the decision in *Canada (Minister of Public Safety and Emergency Preparedness) v Karimi-Arshad*, 2010 FC 964 at para 16, 373 FTR 292 [*Arshad*], where Justice Zinn observed that, following *Canada (Minister of Citizenship and Immigration) v Panahi-Dargahloo*, 2010 FC 647 at para 25, 369 FTR 301, the standard of review for a decision by a member of the ID to release a

foreign national from detention is reasonableness. Justice Zinn set out the following additional principles at paragraph 16 of *Arshad*, which are also useful in this case:

> [….]
>
> (ii) Deference is owed to the member's findings of fact and assessment of the evidence: *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12, para. 59.
>
> (iii) The role of this Court is not to substitute its opinion for that of the member: *Walker v. Canada (Minister of Citizenship and Immigration*, 2010 FC 392, paras. 25-26.
>
> (iv) If a member departs from prior decisions that maintained the detention, then the member must set out clear and compelling reasons for so doing: *Canada (Minister of Employment and Immigration) v. Thanabalasingham*, 2004 FCA 4.

[7] However, a standard of correctness is applicable where the Board "fails to consider the appropriate factors altogether" (*Canada (Minister of Citizenship and Immigration) v B004*, 2011 FC 331 at para 17, 387 FTR 79).

IV. Statutory Framework

[8] The Respondent has had 21 detention review hearings, all of which resulted in his continued detention, except for this last hearing, which is the subject of this judicial review. As required by s. 57(2) of *IRPA*, the ID must review the Respondent's continued detention at least once every 30 days.

[9] The statutory framework with respect to detention and detention reviews has been described in many decisions of this Court; see, for example, *Canada (Minister of Citizenship and Immigration) v B157*, 2010 FC 1314 at paras 20-21, 379 FTR 251 [*B157*]. I will not repeat it here. Suffice it to highlight that, where the ID finds that a detained foreign national is unlikely to appear for removal or other immigration proceeding, the person may be held in detention. Section 245 of the *Regulations* specifies the factors to be considered for a determination of whether a foreign national is unlikely to appear or, as commonly described, is a "flight risk".

[10] Where grounds for detention are found to exist, s. 248 of the *Regulations* requires that the ID consider certain factors before deciding to detain or release the individual. This statutory provision is central to this judicial review application; it provides 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) les retards inexpliqués ou le manque inexpliqué de diligence de la part du ministère ou de l'intéressé;

(*d*) any unexplained delays or unexplained lack of diligence caused by the Department or the person concerned; and

(*e*) the existence of alternatives to detention.

e) l'existence de solutions de rechange à la détention.

V. Decision under Review

[11] In deciding to offer release on terms and conditions, the Member indicated that she was basing her decision in part on her finding that the risk of flight was not as great as previous members had found, and, "even more significantly" because any risks were outweighed by an analysis of the factors listed under s. 248 of the *Regulations*.

[12] With respect to the issue of flight risk, the Member reviewed the factors listed under s. 245 of the *Regulations* and concluded that she did "not find the risk of flight to be as great as what [her] colleagues have perceived in the past, partly because of the change in circumstances of [the Respondent's] case". The Member noted that she was persuaded by the Respondent's argument that the "relevant point of analysis" was not whether he would report for removal, but rather whether he would be available to receive the PRRA decision. The Respondent argued that he could be arrested by Canada Border Services Agency (CBSA) at that point if he received a negative decision and there were concerns that he would not appear for removal. In particular, the Board explained that:

> The admissibility hearing has now concluded and a Deportation Order is outstanding. He has applied for a pre-removal risk assessment and I find that it is more likely than not that he will appear to receive the PRRA decision and, as previously indicated,

> CBSA at that time would have the authority to re-arrest him if the PRRA decision was negative and they were concerned that he was unlikely to appear for removal.

[13] Having found that there was some – albeit reduced – flight risk, the Member turned to the s. 248 factors. The Member made the following observations:

- the reason for detention was the fact that the Respondent was unlikely to appear;
- the Respondent's detention had already exceeded 18 months;
- it was difficult to determine the length of ongoing detention because there was no longer any timeline for finalization of the PRRA; and
- the delays in completing the PRRA were "somewhat explained" and could partially be attributed to the unusual nature of the arrival of the *Sun Sea* and the "complex nature of this particular case".

[14] In concluding her assessment of the s. 248 factors, the Board also noted that, although hundreds of migrants had been released from the *Ocean Lady* and *Sun Sea*, she had yet to hear of anyone breaching release conditions.

[15] Noting that alternatives to detention had not been addressed at the hearing aside from the Minister's submission that there were no reasonable alternatives, the Member invited the parties to make further submissions, and provided the parties with a five-minute recess to discuss that

issue. The Board then ordered release on a $10,000 security deposit, plus other conditions (the Release Order).

VI. Analysis

[16] Having considered the materials filed and the arguments of the parties, I am persuaded that the Member made material errors with respect to: (1) the security deposit; and (2) the effect of the outstanding PRRA application.

A. *Issue #1: Security Deposit*

[17] The Minister argues firstly that the Member failed to assess the capacity of the proposed bondspersons to control the Respondent. Of course, there was no bond or guarantee put forward. Rather, the outcome of the detention review was a term of the Release Order that required a security deposit of $10,000. Under the terms of the Release Order, CBSA was to have oversight over the security deposit.

[18] Whether a bond (or other guarantee) or a cash deposit, I believe that the issue is more properly described as whether the Member assessed the effectiveness of such deposit in reducing the flight risk as required under s. 248 of the *Regulations*. In other words, was the risk of loss of $10,000 likely to be an effective incentive for the Respondent to comply with the other conditions of his release?

[19] In *Canada (Minister of Citizenship and Immigration) v Zhang*, 2001 FCT 521 at paras 19, 22, [2001] FCJ No 796, the Court explained the obligation to assess the effectiveness of a security deposit or performance bond as follows:

> [19] It appears that the theory behind the requirement for a security deposit or a performance bond is that the person posting the bond or deposit will be sufficiently at risk to take an interest in seeing that the releasee complies with the conditions of release including appearing for removal. From the point of view of the person who is to be released, the element of personal obligation to the surety is thought to act as an incentive to compliance[….]
>
> [22] In my view, the effect of a security deposit must be considered as part of the consideration of the question as to whether the detainee is likely to appear for removal. This in turn requires consideration of the character of the person posting the security since it is possible that the posting of security by certain elements will reduce the likelihood of the detainee appearing for removal. Consequently it was unreasonable for the adjudicator to order that the security deposit in this case could be posted by anyone. If he thought that security was required to ensure the appearance of the respondents for removal, he was required to direct his mind to the issue of the circumstances of the person putting up the deposit and their relationship to the respondent [….]

[20] Although that case was decided under immigration legislation that preceded *IRPA*, the principles are equally applicable today.

[21] In defending the Member's decision, the Respondent points to the difference between a bond and cash deposit set out by Parliament in ss. 47(1) and 47(2) of the *Regulations*.

47. (1) A person who pays a deposit or posts a guarantee	**47.** (1) La personne qui fournit la garantie d'exécution :
(*a*) must not have signed or co-signed another guarantee that is in default; and	*a*) ne doit pas être signataire ou cosignataire d'une autre garantie en souffrance;

(*b*) must have the capacity to contract in the province where the deposit is paid or the guarantee is posted.	*b*) doit avoir la capacité légale de contracter dans la province où la garantie d'exécution est fournie.
(2) A person who posts a guarantee must	(2) La personne qui fournit une garantie d'exécution, autre qu'une somme d'argent, doit :
(*a*) be a Canadian citizen or a permanent resident, physically present and residing in Canada;	*a*) être citoyen canadien ou résident permanent effectivement présent et résidant au Canada;
(*b*) be able to ensure that the person or group of persons in respect of whom the guarantee is required will comply with the conditions imposed; and	*b*) être capable de faire en sorte que la personne ou le groupe de personnes visé par la garantie respecte les conditions imposées;
(*c*) present to an officer evidence of their ability to fulfil the obligation arising from the guarantee.	*c*) fournir à un agent la preuve qu'elle peut s'acquitter de ses obligations quant à la garantie fournie.

[22] It is clear from these provisions that heightened requirements are in place for a guarantee. Only in s. 47(2) of the *Regulations* is there specific reference to a requirement that the guarantor be in a position to ensure compliance with any conditions imposed. The argument of the Respondent appears to be that, absent such a specific requirement for cash deposits, the Member can rely on an implicit inference that someone who puts up cash will be motivated to ensure compliance.

[23] The Respondent's reliance on the decision of the British Columbia Supreme Court in *R v Saunders*, 2001 BCSC 1363, 159 CCC (3d) 558, to explain this difference is unhelpful; that case

dealt with a *Charter* challenge to a provision of the Criminal Code that incidentally considered sureties in a bail proceeding.

[24] The main problem with the Respondent's reliance on the difference between a security deposit and a bond or guarantee is that he ignores the explicit direction of Parliament that the ID, where there is a flight risk, must consider all of the factors in s. 248 of the *Regulations*. The provisions of ss. 47(1) and 47(2) are noted as "General requirements" that apply to a number of sections of the *Regulations* and *IRPA* where guarantees and deposits may be required. These requirements may add to the obligations that arise elsewhere in *IRPA* or the *Regulations* but they cannot replace or reduce specifically-targeted or explicit provisions.

[25] In this case, the Member was clearly obliged to consider all of the factors set out in s. 248. One of those factors is s. 248(e), which requires the Member to consider alternatives to detention. There is no question that a security deposit, bond or guarantee can reduce the risk that a detainee will not turn up for removal or meet the conditions of his release. However, regardless of the form of financial incentive, there must be a meaningful analysis by the Member of whether such financial incentive is more likely than not to achieve the desired "control". If the Member does not review the source of the funds, I cannot see that this obligation is met.

B. *Issue #2: Speculative finding on PRRA*

[26] In past detention reviews, other members of the ID consistently referred to the Respondent's lack of credibility. His entry into Canada and subsequent interactions with officials

have been fraught with lies and misrepresentations. It is naïve and perverse of the Member to now say that, since the Respondent has been found inadmissible, his lies will stop and he will no longer have any motivation to flee. Indeed, logic would dictate that the reverse is more likely. Having been declared inadmissible and thus likely to be returned to Sri Lanka, what incentive does he have to show up to receive a PRRA? A positive PRRA will be in place whether or not he shows up to an appointment with CBSA officials whereas, faced with a negative PRRA, he will surely be arrested pending removal. I see no upside for the Respondent whatsoever in reporting in person for his PRRA. The Member's reliance on this logic, put forward by the Respondent, is lacking in common sense and rationality.

[27] As a result, I conclude that the Member did not, in this case, provide clear and compelling reasons for departing from the 20 earlier decisions.

[28] I would make one further comment about the troubling reasoning of the Member with respect to the PRRA. The Member appears to have relied on the inability of the Minister to provide a timeline for the completion of the PRRA decision to conclude that the length of the detention was now "indefinite". However, there is little reference in the Member's reasons to the fact that the PRRA process is at this time likely controlled by the Respondent, who is seeking further information upon which to make further submissions. In my view, the reasons for the delay in the processing of the PRRA application are a relevant factor that may weigh against the Respondent. This is a matter that should be considered by the next member who hears the detention review.

VII. Conclusion

[29] In conclusion, the Board committed two reviewable errors, either of which warrants the intervention of this Court.

[30] I wish to make it clear that I am not saying that there are no terms or conditions upon which the Respondent could be released. As the reviewing judge, I must review each decision against the proper standard of review and the obligations imposed by the relevant legislative. On exactly the same facts, a different member of the ID could come to the same decision to release the Respondent. Hopefully, however, the reasons of that member would demonstrate that: (a) all factors of s. 248 of the *Regulations* have been analyzed; and (b) that the member has provided "clear and compelling" reasons for departing from previous detention decisions.

[31] Because the Respondent will almost immediately have a new detention review hearing, as required by s. 57(2) of *IRPA*, no purpose would be served by remitting this matter to a different member of the Board for re-consideration.

[32] Neither party proposed a question for certification.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. the application for judicial review is allowed;

2. the Release Decision is quashed; and

3. no question of general importance is certified.

"Judith A. Snider"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2367-12
STYLE OF CAUSE:	THE MINISTER OF CITIZENSHIP AND IMMIGRATION v B001
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	APRIL 24, 2012
REASONS FOR JUDGMENT AND JUDGMENT:	SNIDER J.
DATED:	MAY 3, 2012

APPEARANCES:

Mr. Edward Burnet	FOR THE APPLICANT
Mr. Peter Edelmann	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Myles J. Kirvan Deputy Attorney General of Canada Vancouver, British Columbia	FOR THE APPLICANT
Peter Edelmann Barrister and Solicitor Vancouver, British Columbia	FOR THE RESPONDENT