Federal Court Cour fédérale

Date: 20130227

Docket: IMM-844-13

Citation: 2013 FC 203

Toronto, Ontario, February 27, 2013

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

ARSHAD MUHAMMAD

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant has been under immigration hold since his arrest on July 22, 2011. There have been several detention reviews and numerous bondsmen have been proposed, but each detention review found the applicant to be unlikely to appear for his removal. Today, he attacks the legality of a decision rendered on January 31, 2013 by the Immigration Division of the Immigration and Refugee Board [Board] ordering his continued detention, again based on the finding that he is unlikely to appear for removal.

[2] This is an expedited judicial review caused by the fact that the present application will become moot if it is not heard or decided prior to the next detention review which is scheduled to take place before March 1, 2013. The relevant facts are not in dispute.

[3] The applicant is a failed refugee claimant from Pakistan who is excluded from the definition of Convention refugee, based on his alleged membership in the Sipah-e-Sahaba. As far back as February 2002, the respondent has instituted proceedings to remove the applicant from Canada. The applicant was arrested in July 2011 a few days after the Canada Border Services Agency [CBSA] released his name, photograph, and last known whereabouts on its website under the heading “Wanted by the CBSA”. The applicant now fears a risk that, upon return to Pakistan, he would face extreme physical abuse while in custody, unlawful detention, extrajudicial killings, and a risk from sectarian groups or vigilantes. On February 16, 2012, the Minister’s delegate nevertheless rejected his most recent Pre-Removal Risk Assessment [PRRA] application, but the latter decision was set aside on December 18, 2012 and the matter was remitted back to a different Minister’s delegate for redetermination: *Muhammad v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1483 [*Muhammad*].

[4] Before the Court, the applicant asserts that the Board has failed to consider the impact of the *Muhammad* decision and to properly evaluate both the elapsed and expected length of time in detention, and has also arbitrarily rejected the proposed alternatives to detention. The respondent argues, to the contrary, that the Board considered the totality of the evidence and that, while the elapsed length of time weighed in the applicant’s favour, no clear and compelling reasons justified a

departure from prior decisions since the proposed alternatives to detention were not sufficient to address the valid concerns raised by the Board.

[5] The parties agree that the applicable standard of review is that of reasonableness. Despite the able presentation of the applicant's learned and experienced counsel, I am unable to find any reviewable error on the part of the Board. While a different decision maker may have come to a different result, this is not the test, and overall, I must find that the continued detention of the applicant, until the next detention hearing, is an acceptable outcome in light of the law and the evidence on record.

[6] The applicable law and legal principles are not in dispute in this case. It is not challenged that, in addition to the mandatory factors found in section 248 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [Regulations], the Board may also consider other relevant factors in balancing the competing interests of a detainee not to be unduly deprived of his freedom with the public interest in upholding the law. Indeed, the Board's responsibility is an "onerous" one since it calls for an assessment of future behaviour based on past events. Accordingly, there is rarely one correct answer to cases like this one (see *B072 v Canada (MCI)*, 2012 FC 563 at para 34). It is also accepted that in order for the Board to depart from previous decisions, "clear and compelling reasons for doing so must be set out.": *Thanabalasingham v Canada (MCI)*, 2004 FCA 4 at paras 6,10, 247 FCR 572 and *B147 v Canada (MCI)*, 2012 FC 655 at para 38 [*B147*].

[7] I find that the Board considered all relevant factors. Here, the ground for the continued detention has not changed. While there are no reasonable grounds to believe that the applicant is a

danger to the public, the Board strongly believes that he is unlikely to appear for removal and that the proposed bonds persons will not be in a position to exercise influence on the applicant, despite the amounts of the bonds. Such factual determinations come within the ambit of the exclusive and specialized functions of the Board and should not be disturbed unless they are found to have been made in a perverse or capricious manner or without regard for the material before it. This is not the case here and it is not the function of the Court to re-weigh the evidence and various factors set out in section 248 of the Regulations.

[8] I find the Board's reasoning well articulated and I dismiss any suggestion made by the applicant that the Board did not consider the totality of the evidence, including the new features of the proposed alternatives to detention. The Board also refers to the reasons for refusing the bonds in the past and sees no reason to come to a different conclusion. While the Board notes that it is free to take a fresh look at the case, the Board maintains that it is still concerned (1) that the proposed individuals for posting bond did not seem to have a relationship with the applicant, and (2) that the applicant had not adhered to prior CBSA proceedings, which the Board takes as an indication that he would not appear for removal. Again, this finding is reasonable in the circumstances.

[9] On the one hand, there is evidence on record that in 1999 the applicant lied to the immigration authorities about his true identity, that he did not attend his removal interview with the CBSA in January 2003, and that he told his lawyer that he was leaving Montreal to return to Pakistan, but then instead moved from Montreal to Toronto. A warrant having been issued for his arrest in July 2003; the applicant thereafter remained in Canada illegally. The applicant retained counsel in December 2010 and his counsel scheduled an interview with the CBSA for the applicant

on January 25, 2011, but again he did not appear for the interview. The Board could reasonably conclude that the applicant is someone "who has absolutely no desire, whatsoever, to appear for removal" and that his history demonstrates that he is "willing to do things, whether legal or illegal, to stay in Canada."

[10] On the other hand, if we consider the "pull of bail", to use a criminal analogy, "the real effective force that it exerts, is that it may cause the offender to attend his trial rather than subject his nearest and dearest who has gone surety for him to undue pain and discomfort" (*Canada (Attorney General) v Horvath*, 2009 ONCA 732 at para 40, citing with approval this statement made by Lord Widgery CJ in *R v Southampton Justices*, *ex parte Corker* (1976), 120 SJ 214). In the present instance, the Board was simply not persuaded that "the trust that [the proposed bondsmen] put in [the applicant] is well founded" since "history has demonstrated that [the applicant] can't be trusted." Thus, the Board could reasonably conclude that the proposed bonds are a factor that does not sufficiently outweigh the other considerations: "[B]ecause you are someone who essentially believes that your life is on the line, I have great difficulty seeing what amount of money you would consider to be worth your life."

[11] The applicant also focuses on the Board's alleged refusal to consider the four bondsmen that came forward, expressed their trust in the applicant, their awareness of his situation, and, notably, that they were willing to post bonds that represented significant sums of money considering their financial records. The applicant asserts that the Board did not look at all of these "changed circumstances" and did not adequately consider the influence the four individuals would have, together, over the applicant. The Board doubted their belief that the applicant would comply with

the conditions imposed on him; however, the Board did not cross-examine the bondsmen. As a result, the applicant suggests that this constitutes an assumption that is not based on the evidence presented.

[12] The Board did not say that no bonds would be acceptable but that they would have to be "quite particular" in order to alleviate the Board's concerns. The Board was not convinced that four bondsmen would collectively assert more of an influence on the applicant than simply one of them. Although another decision maker may have come to a different conclusion, I nonetheless find that it was open to the Board to find the alternatives proposed insufficient based on the past behaviour of the applicant and the fact that the bondsmen are not closely related to the applicant. The point is that an increased length of detention "does not transform an unsuitable bondsperson into a suitable one. Nor does it mitigate the assessment of the respondent's flight risk from extremely high to that of assured compliance." (*B147* at para 57).

[13] The Board did not ignore the other factors mentioned in section 248 of the Regulations. In terms of the length of time the applicant had spent in detention and the anticipated future length of detention, the Board notes that a year and a half is a long time to be in detention, but finds that the length is outweighed by other relevant factors. The Board also notes in reference to a portion of the prior argumentation of the applicant's counsel, that detention is not any kind of punishment and that it is simply to ensure availability when the time comes to remove the applicant.

[14] The length of time required for a matter to be dealt with by the Federal Court is generally a "neutral" factor. As it has been stated by the Federal Court of Appeal in *Canada (Minister of Citizenship and Immigration) v Li,* 2009 FCA 85 at para 38, 308 DLR (4th) 314:

> Obviously, the multiplicity or challenges increases the length of the foreign nationals' detention. However, to the extent that detainees or the Government are diligently exercising recourses under the IRPA that are reasonable in the circumstances or resorting to reasonable Charter challenges, the ensuing delays should not count against either party: see *Charkaoui v Canada*, above, at para 114.

[15] The applicant relies heavily on statements made last December 2012 by my colleague Justice Boivin in *Muhammad*, where the decision of the Minister's delegate was judged unreasonable. The applicant suggests, on the part of the Minister's delegate, that such behaviour amounts to a lack of diligence "since the applicant is now in the same position as he was 18 months ago when he made his new PRRA application." However, Justice Boivin made no finding of bad faith against the Minister's delegate, and I have no evidence before me that the other Minister's delegate, who will be called to re-determine the matter, will have a closed mind or will simply give lip service to the Court's decision in *Mohammad* and ignore its actual content.

[16] While the Board notes in its decision that it took four months for the Minister's delegate to make a decision the last time, the applicant also argues that the Board did not make an explicit finding on this issue. I kindly disagree with the applicant. The impugned decision was rendered orally and naturally does not have the perfection of written reasons. It must be read as a whole and in a comprehensive manner to give it effect (*Construction Labour Relations v Driver Iron Inc*, 2012 SCC 65 at para 3, 352 DLR (4th) 487; *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708). Clearly, the Board found that

the expected length of time of the future detention was not indefinite. The Board was not obliged to come to a precise finding in terms of the exact time that the Minister's delegate will take to make a new decision.

[17] Therefore it is premature to suggest, at this point in time, that the other delegate will not act diligently in re-determining the matter. Should the situation change, there are remedies to force the Minister's delegate to act promptly in re-determining the matter (see *Canada (Minister of Public Safety and Emergency Preparedness) v Lebon*, 2013 FCA 18 (stay) and *Canada (Minister of Public Safety and Emergency Preparedness) v Lebon*, 2013 FCA 255 (merit), aff'g *Canada (Minister of Public Safety and Emergency Preparedness) v Lebon*, 2012 FC 1500).

[18] For the above reasons, the application shall be dismissed. Counsel agrees that there is no question of general importance raised in this case.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed and that no question is certified.

"Luc Martineau"
Judge