Federal Court  Cour fédérale

Date: 20130417

Docket: IMM-9448-12

Citation: 2013 FC 387

[UNREVISED ENGLISH CERTIFIED TRANSLATION]
Montréal, Quebec, April 17, 2013

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Applicant

and

ROSA CHINCHILLA RAMIREZ

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Preliminary remarks

[1] This is an application by the Minister of Public Safety and Emergency Preparedness for judicial review of a decision of the Immigration Division of the Immigration and Refugee Board [panel] by which the panel decided, after a detention review hearing held on August 28, 2012, to release the respondent, on certain conditions.

II. Introduction

[2] Section 58 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] provides that the panel shall order the release of a foreign national or a permanent resident unless it is satisfied of certain facts. However, where these facts have been established, the panel may order detention.

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 public;	*a*) le résident permanent ou 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 designation in question has not been established.	*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 été prouvée.

[3] Section 244 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [Regulations] states as follows:

244. For the purposes of Division 6 of Part 1 of the Act, the factors set out in this Part shall be taken into consideration when assessing whether a person	**244.** Pour l'application de la section 6 de la partie 1 de la Loi, les critères prévus à la présente partie doivent être pris en compte lors de l'appréciation :
(*a*) is unlikely to appear for examination, an	*a*) du risque que l'intéressé se soustraie

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) of the Act;	vraisemblablement au contrôle, à l'enquête, au renvoi ou à une procédure pouvant mener à la prise, par le ministre, d'une mesure de renvoi en vertu du paragraphe 44(2) de la Loi;
(*b*) is a danger to the public; or	*b*) du danger que constitue l'intéressé pour la sécurité publique;
(*c*) is a foreign national whose identity has not been established.	*c*) de la question de savoir si l'intéressé est un étranger dont l'identité n'a pas été prouvée.

[4] Section 245 lists the factors that are to be used to assess the flight risk of a detainee who may be subject to any proceeding that could lead to the making of a removal order by the Minister under subsection 44(2) of the IRPA:

245. For the purposes of paragraph 244(*a*), the factors are the following:	**245.** Pour l'application de l'alinéa 244*a*), les critères sont les suivants :
(*a*) being a fugitive from justice in a foreign jurisdiction in relation to an offence that, if committed in Canada, would constitute an offence under an Act of Parliament;	*a*) la qualité de fugitif à l'égard de la justice d'un pays étranger quant à une infraction qui, si elle était commise au Canada, constituerait une infraction à une loi fédérale;
(*b*) voluntary compliance with any previous departure order;	*b*) le fait de s'être conformé librement à une mesure d'interdiction de séjour;
(*c*) voluntary compliance with any previously required appearance at an immigration or criminal proceeding;	*c*) le fait de s'être conformé librement à l'obligation de comparaître lors d'une instance en immigration ou d'une instance criminelle;

(*d*) previous compliance with any conditions imposed in respect of entry, release or a stay of removal;	*d*) le fait de s'être conformé aux conditions imposées à l'égard de son entrée, de sa mise en liberté ou du sursis à son renvoi;
(*e*) any previous avoidance of examination or escape from custody, or any previous attempt to do so;	*e*) le fait de s'être dérobé au contrôle ou de s'être évadé d'un lieu de détention, ou toute tentative à cet égard;
(*f*) involvement with a people smuggling or trafficking in persons operation that would likely lead the person to not appear for a measure referred to in paragraph 244(*a*) or to be vulnerable to being influenced or coerced by an organization involved in such an operation to not appear for such a measure; and	*f*) l'implication dans des opérations de passage de clandestins ou de trafic de personnes qui mènerait vraisemblablement l'intéressé à se soustraire aux mesures visées à l'alinéa 244*a*) ou le rendrait susceptible d'être incité ou forcé de s'y soustraire par une organisation se livrant à de telles opérations;
(*g*) the existence of strong ties to a community in Canada.	*g*) l'appartenance réelle à une collectivité au Canada.

[5] Section 246 of the Regulations states the factors which the panel shall take into consideration when assessing whether a person is a danger to the public. Where there are grounds for detention, the factors generally taken into consideration before a decision is made on detention or release are listed in section 248 of the Regulations:

246. For the purposes of paragraph 244(*b*), the factors are the following:	**246.** Pour l'application de l'alinéa 244*b*), les critères sont les suivants :
(*a*) the fact that the person constitutes, in the opinion	*a*) le fait que l'intéressé constitue, de l'avis du

of the Minister, a danger to the public in Canada or a danger to the security of Canada under paragraph 101(2)(*b*), subparagraph 113(*d*)(i) or (ii) or paragraph 115(2)(*a*) or (*b*) of the Act;

ministre aux termes de l'alinéa 101(2)*b*), des sous-alinéas 113*d*)(i) ou (ii) ou des alinéas 115(2)*a*) ou *b*) de la Loi, un danger pour le public au Canada ou pour la sécurité du Canada;

(*b*) association with a criminal organization within the meaning of subsection 121(2) of the Act;

b) l'association à une organisation criminelle au sens du paragraphe 121(2) de la Loi;

(*c*) engagement in people smuggling or trafficking in persons;

c) le fait de s'être livré au passage de clandestins ou le trafic de personnes;

(*d*) conviction in Canada under an Act of Parliament for

d) la déclaration de culpabilité au Canada, en vertu d'une loi fédérale, quant à l'une des infractions suivantes :

(i) a sexual offence, or

(i) infraction d'ordre sexuel,

(ii) an offence involving violence or weapons;

(ii) infraction commise avec violence ou des armes;

(*e*) conviction for an offence in Canada under any of the following provisions of the Controlled Drugs and Substances Act, namely,

e) la déclaration de culpabilité au Canada quant à une infraction visée à l'une des dispositions suivantes de la Loi réglementant certaines drogues et autres substances:

(i) section 5 (trafficking),

(i) article 5 (trafic),

(ii) section 6 (importing and exporting), and

(ii) article 6 (importation et exportation),

(iii) section 7 (production);

(*f*) conviction outside Canada, or the existence of pending charges outside Canada, for an offence that, if committed in Canada, would constitute an offence under an Act of Parliament for

(i) a sexual offence, or

(ii) an offence involving violence or weapons; and

(*g*) conviction outside Canada, or the existence of pending charges outside Canada, for an offence that, if committed in Canada, would constitute an offence under any of the following provisions of the Controlled Drugs and Substances Act, namely,

(i) section 5 (trafficking),

(ii) section 6 (importing and exporting), and

(iii) section 7 (production).

. . .

248. If it is determined that there are grounds for

(iii) article 7 (production);

f) la déclaration de culpabilité ou la mise en accusation à l'étranger, quant à l'une des infractions suivantes qui, si elle était commise au Canada, constituerait une infraction à une loi fédérale :

(i) infraction d'ordre sexuel,

(ii) infraction commise avec violence ou des armes;

g) la déclaration de culpabilité ou la mise en accusation à l'étranger de l'une des infractions suivantes qui, si elle était commise au Canada, constituerait une infraction à l'une des dispositions suivantes de la Loi réglementant certaines drogues et autres substances:

(i) article 5 (trafic),

(ii) article 6 (importation et exportation),

(iii) article 7 (production).

[…]

248. S'il est constaté qu'il existe des motifs de détention,

detention, the following factors shall be considered before a decision is made on detention or release:	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.

[Emphasis added.]

[6] In the present case, the application has become moot, and the applicant concedes this, given that the respondent voluntarily left Canada before the scheduled date for the enforcement of the removal order. The respondent was later arrested and detained in the United States. However, the applicant is asking the Court to nevertheless exercise its discretion to rule on the merits of the application, considering the urgency and seriousness of the situation. Even though resolving the issues in dispute will have no practical consequences in the present case, the applicant argues that he is challenging what he describes as a [TRANSLATION] "constant" practice of the panel, and he asks that the Court assume its role in the development of the law and

intervene to sanction the unreasonable decisions made by decision makers in detention reviews while defining the limits of their powers, thereby ensuring, among other things, that similar decisions are not rendered in the future.

[7] After reviewing the record and hearing the parties' arguments, and after carefully considering the issues raised by the applicant in light of the test laid down by the Supreme Court in *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342, the Court is of the opinion that it must intervene in this case.

[8] For the reasons that follow, the Court finds that this is indeed not an isolated case. It is becoming an increasingly common practice for panels to favour releasing detainees on conditions that are completely unreasonable in their circumstances, when no reasonable alternative supports release. Even though the respondent did not represent a danger to the public according to the factors under section 246 of the Regulations, and even though the Court's intervention would probably not be necessary in this case had it not become moot, the Court is of the opinion that the current situation requires its intervention. Judicial passivity sometimes carries a heavy price, particularly where security constraints and imperatives are at stake.

III. Relevant facts

[9] The respondent is a citizen of Guatemala without status in Canada. She is unmarried and has two minor children. She arrived in Canada on August 21, 2005, and made a claim for refugee protection, which claim was rejected on June 2, 2006, essentially because of her lack of

credibility. The respondent's application for judicial review of that decision was dismissed on September 7, 2006.

[10] The respondent then applied for a pre-removal risk assessment [PRRA], but the application was rejected on April 30, 2008. On September 22, 2009, the negative PRRA decision was hand-delivered to the respondent. On that same occasion, she was summoned to attend an interview on October 19, 2009, to prepare for her removal. The applicant did not attend that interview.

[11] On October 26, 2009, a warrant for the respondent's arrest was issued.

[12] In the meantime, the respondent had obtained a work permit valid until December 15, 2009. On December 29, 2009, the respondent applied to have her work permit extended. However, she did not report for the two interviews scheduled successively for that application, on October 5, 2010, and February 3, 2011.

[13] On August 25, 2012, Montréal police arrested the respondent for shoplifting. From that moment on, the respondent was detained by the Canada Border Services Agency [CBSA] because of the outstanding warrant against her, from October 26, 2009. However, no criminal charges were laid against her.

[14] On August 27, 2012, during an interview with an enforcement officer, the respondent was notified that her removal had been scheduled for September 3, 2012. According to the officer's

notes, the respondent said at that time that she did not report for her interview on October 19, 2009, because she feared being deported from Canada; that she was still working full time even though her work permit had expired and had not been renewed; that she was the mother of two children, one of whom was a Canadian citizen; and that she could not go back to Guatemala.

IV. Impugned decision of the panel

[15] On August 28, 2012, a hearing was held before the panel to review the reasons for detaining the respondent. The CBSA essentially argued that the respondent's failure to comply with three previous notices to appear and the reasons she gave for failing to do so justified keeping her in detention until her removal, which at the time was scheduled for September 3, 2012. The respondent argued that despite her failure to honour her previous commitments, there was still a reasonable alternative to detention which would allow her to be released without bond, under the usual release conditions.

[16] The panel acknowledged that the respondent had on three occasions failed to appear for an interview to try to regularize her status and that she had lived without status in Canada for three years. However, the panel decided to make an order releasing the respondent under the usual conditions, considering among other factors that the respondent had been living at the same address all this time, that she answered her telephone and that the CBSA should therefore have been able to reach her, although it had not tried to locate or arrest her. Moreover, the panel noted that the respondent was aware that she had to renew her driver's licence and had applied to do so.

[17] In the end, the panel concluded that the respondent's attitude did not indicate an intention to flee and that her refusal to appear for her appointments was motivated by her fear of being removed from Canada. The panel added that there was a sufficient alternative in the circumstances and that the onus was on the applicant to take the necessary steps to enforce the removal and on the respondent to report for removal.

[18] The respondent's release conditions included the following:

- present herself at the time and place that the CBSA or the Immigration Division requires her to appear to comply with any obligation imposed on her under the Act, including removal, if necessary;
- provide the CBSA, prior to release from the detention centre, with her address and advise the CBSA in person of any change in address prior to the change being made;
- starting August 29, 2012, report every working day to the CBSA offices in Montréal;
- confirm her departure with the CBSA before leaving Canada; and
- not work without a work permit.

[19] Pursuant to the panel's decision, the respondent's removal was postponed to September 24, 2012, to give the applicant time to obtain a travel document from the Guatemalan consulate for the respondent's Canadian son.

[20] The respondent did not report for her removal on that date, and another warrant for her arrest was issued on September 25, 2012. On September 27, 2012, the respondent was arrested in the United States.

V. Issues

[21] (1) Could the panel release the respondent immediately even though she offered no alternative to her detention?

(2) Given that the respondent presented a flight risk, were the conditions imposed by the panel reasonable, in that they adequately countered this risk?

(3) Did the panel breach the principles of natural justice in not giving sufficient reasons for its decision?

[22] The case law has established that the issue of whether a panel has failed to consider relevant factors, as well as its assessment of the evidence presented to it, must be reviewed on a standard of reasonableness. However, although the adequacy of reasons has not been approached from the angle of procedural fairness since *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708, the case law is to the effect that if the panel fails to consider the appropriate factors altogether, the correctness standard applies (see *Canada (Minister of Citizenship and Immigration) v B001*, 2012 FC 523, 409 FTR 74 at paras 6-7, and *Canada (Minister of Citizenship and Immigration) v B004*, 2011 FC 331, 387 FTR 79 at paras 17-19).

[23] However, it is common ground that this case raises first and foremost a moot issue, such that the Court must consider whether, having regard to the facts of the case and the basis for the impugned decision, it must nevertheless exercise its discretion to hear the matter even though the outcome of this application for judicial review will have no real and present repercussions on the parties.

VI. Analysis

Preliminary issue: Should the Court exercise its discretion and hear this case even though it is now moot?

[24] The two-part test for determining whether the Court may rule on a moot case, as laid down by the Supreme Court of Canada in *Borowski*, above, is well known:

> 16 The approach in recent cases involves a two-step analysis. First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case. The cases do not always make it clear whether the term "moot" applies to cases that do not present a concrete controversy or whether the term applies only to such of those cases as the court declines to hear. In the interest of clarity, I consider that a case is moot if it fails to meet the "live controversy" test. A court may nonetheless elect to address a moot issue if the circumstances warrant.

[25] First, the Court must determine whether its decision will affect the rights of the parties. In the present case, the applicant concedes that there is no live controversy between the parties, owing to the fact that the respondent has left for the United States, but submits that the respondent's challenge of the reasonableness of the decision to release her shows that the parties continue to have opposing interests in an adversarial context.

[26] The fact that the outcome of this matter would have no practical effect on the respondent, since she is no longer in Canada, is not determinative in and of itself under the test in *Borowski*, above. The Court must decide whether it is appropriate for it to exercise its discretion to hear the case, having regard to the following factors, as laid down in *Borowski*.

[27] First, the Court must consider whether, despite the cessation of a live controversy, the necessary adversarial relationships will nevertheless prevail (*Borowski*, at para 31). Second, it must be determined whether hearing the case is in the interests of judicial economy. Such is the case for example in (i) cases where the Court's decision will have some practical effect on the rights of the parties notwithstanding that it will not have the effect of determining the controversy which gave rise to the action (*Borowski* at para 35); (ii) cases which are of a recurring nature but brief duration. In order to ensure that an important question which might independently evade review be heard by the courts, the mootness doctrine is not applied strictly. The mere fact, however, that a case raising the same point is likely to recur even frequently should not by itself be a reason for hearing an appeal which is moot. It is preferable to wait and determine the point in a genuine adversarial context unless the circumstances suggest that the dispute will have always disappeared before it is ultimately resolved (*Borowski* at para 36); or (iii) cases which raise an issue of public importance of which a resolution is in the public interest. The economics of judicial involvement are weighed against the social cost of continued uncertainty in the law (*Borowski* at para 37).

[28] The first factor is not neutral in the present case. It is true that despite the cessation of a live controversy, the parties are still locked in an adversarial context because the respondent has

retained counsel to defend her case before the Court and, moreover, it is not impossible that she may one day try to return to Canada.

[29] The practical concerns for judicial economy also support the applicant's position. The applicant submits that he is challenging what he calls a [TRANSLATION] "constant" practice of the panel and argues that this is the only way for the Court to put an end to it, by setting limits. According to the applicant, the Court must assume its role in the development of the law and intervene to sanction the unreasonable decisions made by decision makers in detention reviews while defining the limits of their powers, thereby ensuring that similar decisions are not rendered in the future.

[30] The Court agrees. The criteria for the second component of the *Borowski* test have been met in this case. Not only will the resolution of the case have tangible future effects on the rights of the parties, but this is also a case of a recurring nature arising from an increasingly frequent practice of the panel. Finally, the public interest, too, requires that the Court rule on the merits of this case.

(1) Could the panel release the respondent immediately even though she offered no alternative to her detention?

[31] The applicant submits that there was no alternative to detaining the respondent in the circumstances, since in the past she had not complied with the only release conditions that she proposed. He submits that the panel did not assess the respondent's flight risk or the risk that she would once again refuse to report for her removal, given that she was subject to a warrant for her arrest for already having failed to report for her removal and that she ignored two notices to

appear in order to avoid her arrest. The applicant further submits the respondent's explanations to the effect that she feared being removed from Canada and therefore refused to report when summoned by the immigration authorities should not have been accepted by the panel as a justification for the respondent's behaviour.

[32] The Court agrees that the panel based its decision solely on less relevant factors that favoured the respondent's immediate release, such as the fact that she had not tried to hide by changing her home address. In doing so, the panel ignored the respondent's flight risk, her repeated failures to appear for interviews to regularize her status in Canada, and the true ground for her detention, namely, the outstanding warrant for her arrest issued on October 26, 2009.

(2) Given that the respondent presented a flight risk, were the conditions imposed by the panel reasonable, in that they adequately countered this risk?

[33] According to the applicant, had it not been for the immediate release of the respondent, the applicant would have immediately brought before the Court an urgent motion to stay her release. The lack of adequate release conditions, such as the payment of a sum of money or the posting of a bond, prevented the Minister from appealing to the Court before the respondent was released.

[34] The Court recognizes that it was unreasonable for the panel not to impose any conditions on the respondent other than ones she had already failed to comply with in the past and was unlikely to be able to comply with in the circumstances. Indeed, upon reading these conditions, it is difficult to see what practical and enforceable conditions the panel used as a basis for ending her detention. More importantly, none of the conditions imposed by the panel were likely to

oblige the respondent to comply with the plans for her removal or to reduce the chances of her fleeing. In deciding as it did, the panel erred in its assessment of the criteria set out in sections 245 and 248 of the Regulations. Such a decision cannot fall within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law" and is therefore unreasonable (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47).

(3) Did the panel breach the principles of natural justice in not giving sufficient reasons for its decision?

[35] The applicant submits that the panel did not give adequate reasons for its decision, such that the parties and the Court could assess the decision's reasonableness.

[36] According to the teachings of the Federal Court of Appeal in *Ralph v Canada (Attorney General)*, 2010 FCA 256, at paras 17-19, the reasons for decision must contain enough information about the decision and its bases so that, first, a party can understand the basis for the decision and decide whether or not to apply for judicial review, and second, the supervising court can assess, meaningfully, whether the panel met minimum standards of legality. A decision is therefore justified and intelligible when its basis has been given and the basis is understandable, with some discernable rationality and logic.

[37] In light of these factors, the Court is satisfied that the reasons for decision at issue are insufficient and inadequate because they do not allow the parties, or the Court, to understand the panel's reasoning and the precautions taken to reduce the respondent's flight risk. The fact that the panel should have developed its reasons further is particularly relevant because the respondent had to understand the rationale for and the nature and scope of her release conditions

so that she would feel obliged to comply with them. The panel did not rule on whether the alternative proposed by the respondent was sufficient and appropriate and gave no justification for it in relation to the circumstances. Nor did the panel rule on whether the conditions imposed were adequate and enforceable or explain how they could reasonably counter the respondent's flight risk.

VII. Conclusion

[38] For all the reasons given above, this application for judicial review is allowed. Counsel for the parties did not propose any questions for certification, and the Court agrees that this case does not raise any.

JUDGMENT

THE COURT ORDERS that the application for judicial review be allowed. There is no question of general importance to be certified.

"Michel M.J. Shore"

Judge

Certified true translation
Michael Palles

FEDERAL COURT

SOLICITORS OF RECORD

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