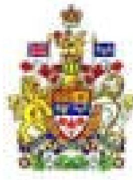
Federal Court of Appeal



Cour d'appel fédérale

Date: 20110524

Docket: A-392-10

Citation: 2011 FCA 175

CORAM: **NOËL J.A.**
NADON J.A.
EVANS J.A.

BETWEEN:

Mahmoud JABALLAH

Appellant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION and THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

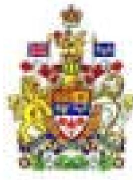
Heard at Toronto, Ontario, on May 17, 2011.

Judgment delivered at Ottawa, Ontario, on May 24, 2011.

REASONS FOR JUDGMENT BY: NOËL J.A.

CONCURRED IN BY: NADON J.A.
EVANS J.A.

Federal Court of Appeal



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REASONS FOR JUDGMENT

NOËL J.A.

[1] This is an appeal from the order of Hansen J. of the Federal Court (the Federal Court Judge), dismissing the appellant's application to "review" the conditions of his release under subsection 82(4) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) and, in the alternative, to "vary" the terms and conditions of his release under subsection 82.1(1). The Federal Court Judge certified the following two questions:

(a) Did the learned Federal Court Judge err in her interpretation of subsection 82.1(2) of the IRPA?

(b) Did the learned Federal Court Judge err in her interpretation of subsection 82.1(1) of the IRPA?

[2] For the reasons which follow, I am of the view that both questions should be answered in the negative and that the appeal should be dismissed.

BACKGROUND

[3] The appellant is subject to a security certificate. In April of 2007, he was released from detention subject to terms and conditions which have since been reviewed by the Federal Court on a regular basis (see *Jaballah v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 379; *Jaballah v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FC 9; *Jaballah (Re)*, 2009 FC 284; *Jaballah (Re)*, 2010 FC 507). When the appeal was launched, the terms and conditions of the appellant's release were governed by the amended order issued on May 11, 2010 (the last review order or decision).

[4] This last review order has since been replaced more than once, a development which led the respondent to seek the preliminary dismissal of the appeal on grounds of mootness. After considering the matter, we ruled that although the appeal is moot, we should nevertheless exercise our discretion to hear it given that the issues raised by the appellant are likely to recur and would otherwise be elusive of appellate review.

[5] Under the IRPA, a person such as the appellant is entitled to apply for a review of the reasons for continuing the conditions of his or her release provided that a period of six months has expired since the conclusion of the preceding review:

82. (4) A person who is released from detention under conditions may apply to the Federal Court for another review of the reasons for continuing the conditions if a period of six months has expired since the conclusion of the preceding review.	**82.** (4) La personne mise en liberté sous condition peut demander à la Cour fédérale un autre contrôle des motifs justifiant le maintien des conditions une fois expiré un délai de six mois suivant la conclusion du dernier contrôle.

A similar right, subject to the same time restriction, is provided for the review of the reasons for a person's continued detention before a security certificate has been determined to be reasonable (subsection 82(2)), and after (subsection 82(3)).

[6] The remedies which a Judge may grant upon such reviews are set out in subsection 82(5):

82. (5) On review, the judge	**82.** (5) Lors du contrôle, le juge :
(*a*) shall order the person's detention to be continued if the judge is satisfied that the person's release under conditions would be injurious to national security or endanger the safety of any person or that they would be unlikely to appear at a proceeding or for removal if they were released under conditions; or	*a*) ordonne le maintien en détention s'il est convaincu que la mise en liberté sous condition de la personne constituera un danger pour la sécurité nationale ou la sécurité d'autrui ou qu'elle se soustraira vraisemblablement à la procédure ou au renvoi si elle est mise en liberté sous condition;

(*b*) in any other case, shall order or confirm the person's release from detention and set any conditions that the judge considers appropriate.	*b*) dans les autres cas, ordonne ou confirme sa mise en liberté et assortit celle-ci des conditions qu'il estime indiquées.

[7] The person may also, at any time (*i.e.* without regard to the six-month period), seek a variation of the order setting out those conditions if he or she can show that there has been a material change in the circumstances that led to the order :

82.1 (1) A judge may vary an order made under subsection 82(5) on application of the Minister or of the person who is subject to the order if the judge is satisfied that the variation is desirable because of a material change in the circumstances that led to the order.	**82.1** (1) Le juge peut modifier toute ordonnance rendue au titre du paragraphe 82(5) sur demande du ministre ou de la personne visée par l'ordonnance s'il est convaincu qu'il est souhaitable de le faire en raison d'un changement important des circonstances ayant donné lieu à l'ordonnance.

[8] In order to integrate this type of review into the six-month review cycle, subsection 82.1(2) provides :

82.1 (2) For the purpose of calculating the six-month period referred to in subsection 82(2), (3) or (4), the conclusion of the preceding review is deemed to have taken place on the day on which the decision under subsection (1) is made.	**82.1** (2) Pour le calcul de la période de six mois prévue aux paragraphes 82(2), (3) ou (4), la conclusion du dernier contrôle est réputée avoir eu lieu à la date à laquelle la décision visée au paragraphe (1) est rendue.

[9] The appellant brought the application which is the subject of this appeal on July 13, 2010. In it, he sought a review of the conditions of his release pursuant to subsection 82(4) of the IRPA despite the fact that six months had yet to elapse from the day on which the last review order had been issued. The appellant took the position that he was entitled to apply for a review of his release conditions as six months had elapsed since the "conclusion of the preceding review" which in his view refers to the conclusion of the evidence and submissions leading to the review decision rather than the date on which this decision was rendered. Alternatively, if not entitled to a review because the six-month period had yet to elapse, the appellant sought an order pursuant to subsection 82.1(1) of the IRPA varying the conditions of his release due to a material change in the circumstances leading to the last review order.

[10] The Federal Court Judge rejected the contention that the "conclusion of the preceding review" could refer to anything other than the date on which the last review order or the reasons therefore are issued. Accordingly, she held that the appellant's review application was premature as the six-month period had yet to elapse and certified the questions set out above (para.1). She went on to dispose of the appellant's variation application pursuant to subsection 82.1(1) on the basis that he had failed to demonstrate a material change in the circumstances which led to the last review order.

[11] On appeal, the appellant challenges both conclusions reiterating essentially the arguments made before the Federal Court Judge as to the first conclusion and arguing that she applied the wrong test as to the second.

ANALYSIS AND DISPOSITION

[12] The first issue which must be addressed is one of pure statutory construction, *i.e.* whether the Federal Court Judge correctly construed section 82.1 and the phrase "conclusion of the preceding review" in subsection 82(4). As in all such instances, (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, para. 21):

> … the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[13] The gist of the argument raised by the appellant is that the absence of a deeming provision similar to subsection 82.1(2) in relation to the other release or detention reviews under section 82 suggests that Parliament intended the date of "the conclusion of the preceding review" to be computed otherwise than by reference to the date of the last review order (memorandum of the appellant, para. 22).

[14] With respect, there is no basis for any such inference. The reason why the deeming provision in subsection 82.1(2) has a limited application is that although a variation on the basis of a material change in circumstances may be sought at any time, *i.e.* without regard to the six-month limitation applicable to reviews, it was thought logical, given the close connection between the review and variation proceedings, to compute the six-month time period for the next review by reference to the date of this order. This was achieved by deeming the preceding review under

subsection 82(2), (3) or (4) to have concluded on the day on which the variation decision is made, rather than the earlier date when the decision on the preceding review was in fact made.

[15] The suggestion by the appellant that "the decision" referred to in subsection 82.1(2) is not the one made under "subsection (1)", but under subsection 82(1) is also without foundation (memorandum of the appellant, para. 20).

[16] In this respect, subsection 41(3) of the *Interpretation Act*, R.S.C. 1985, c. I-21, provides:

41. (3) A reference in an enactment to a subsection, paragraph, subparagraph, clause or subclause shall be read as a reference to a subsection, paragraph, subparagraph, clause or subclause of the section, subsection, paragraph, subparagraph or clause, as the case may be, in which the reference occurs.	**41.** (3) Dans un texte, le renvoi à un élément de l'article – paragraphe, alinéa, sous-alinéa, division ou subdivision – constitue, selon le cas, un renvoi à un paragraphe de l'article même ou à une sous-unité de l'élément immédiatement supérieur.

It follows that absent a clear indication to the contrary, the reference to "the decision made under subsection (1)" in subsection 82.1(2) is to the decision made under the provision in which the reference occurs, *i.e.* subsection 82.1(1). In my view, nothing in the IRPA displaces this interpretative presumption.

[17] Confronted with this, the appellant made the novel argument that this leads to an absurd result as, in his view, the conditions of detention under subsection 82(2) or (3) – as opposed to the

conditions of release under subsection 82(4) – can never be varied. There is no basis for this submission. For example, a detention order which provides for limited visiting rights in order to prevent contact with specified individuals could be varied pursuant to subsection 82.1(1) upon it being shown that the restriction is no longer necessary based on a change in circumstances.

[18] Finally, there is no basis for the appellant's suggestion that "the conclusion of the preceding review" would ordinarily be understood as the close of evidence and the pleadings (memorandum of the appellant, para. 22). Nothing was advanced in support of that view. As was held by the Federal Court Judge, a proceeding is concluded at the time the decision is rendered (reasons, para. 17).

[19] Applying a standard of correctness, I cannot detect any error in the Federal Court Judge's finding that the "conclusion of the preceding review" means the date on which the review decision is rendered, that the six-month period set out in subsection 82(4) runs from that date, and that the appellant's application was accordingly premature.

[20] With respect to the further conclusion that the appellant had failed to demonstrate a "material change in circumstances" within the meaning of subsection 82.1(1), the Federal Court Judge conducted her analysis by asking whether there had been a change in the circumstances which led to the order sought to be varied (reasons, paras. 41 to 49). The appellant appears to accept the correctness of this approach (reasons, para. 24).

[21] However, the appellant contends that the Federal Court Judge erred by restricting her analysis to the threat or the risk which he posed, thereby excluding any other relevant circumstance which, if it had existed at the time and been brought to the attention of the judge issuing the original order, might have led to a different order (memorandum of the appellant, para. 33).

[22] In my respectful view, the Federal Court Judge committed no such error.

[23] The changed circumstances on which the application to vary was based largely arose from the appellant's difficulties in finding a supervisor to accompany him during specified activities which he had to conduct under supervision. However, the variation which he proposed was not to provide for additional supervisors or alternative modes of supervision, but to eliminate supervision for those activities altogether (see para. 11 of the memorandum of the appellant, and the evidence referred to therein).

[24] It is clear from the reasons that the Federal Court Judge would have been willing to entertain a variation by adding supervisors, or to explore alternatives (reasons, para. 44). However, as she explained, supervision could not be removed as a condition of the appellant's release without some demonstration of a material change in the risk to national security which he posed.

[25] It is apparent from the record that the appellant would not have been released from detention without the imposition of measures capable of ensuring that this risk was contained, and that supervision, as ordered, was designed to achieve this result. If for any reason, supervision cannot be

organized in circumstances where the risk remains unchanged, the solution cannot possibly lie in the removal of the supervision.

[26] That is the context in which the Federal Court Judge held that although other forms of variations might be available to the appellant, he could not ask for the removal of supervision without first addressing the risk that he posed. I can detect no error in this regard.

[27] I would accordingly answer the certified questions in the negative and dismiss the appeal with costs.

"Marc Noël"
J.A.

"I agree
M. Nadon J.A."

"I agree
John M. Evans J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-392-10

APPEAL FROM AN ORDER OF THE HONOURABLE MADAM JUSTICE HANSEN OF THE FEDERAL COURT DATED OCTOBER 5, 2010, DOCKET NO. DES-6-08.

STYLE OF CAUSE:	Mahmoud JABALLAH and The Minister of Citizenship and Immigration and the Minister of Public Safety and Emergency Preparedness
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	May 17, 2011
REASONS FOR JUDGMENT BY:	NOËL J.A.
CONCURRED IN BY:	NADON J.A. EVANS J.A.
DATED:	May 24, 2011

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