Federal Court  Cour fédérale

Date: 20160907

Docket: IMM-2549-16

Citation: 2016 FC 1014

Ottawa, Ontario, September 7, 2016

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Applicant

and

SAMAR SALIM SIGAR

Respondent

ORDER AMENDED TO JUDGMENT AND REASONS

[1] **UPON** motion by the Applicant for:

a) The Applicant seeks leave for judicial review of the decision of Immigration Division Member Laura Ko, dated June 15, 2016, whereby the Member released the Respondent from detention pursuant to section 58 of the Immigration and Refugee Protection Act , SC 2001 , c. 27 (*IRPA*) on terms and conditions.

b) The Applicant submits the Member erred by failing to consider the Minister's Danger Opinion and evidence of the context of the sexual assault conviction as required by ss 246 (a) and (d) of the *IRPA* Regulations; erred in finding Parole Conditions mitigated public risk in the absence of any independent documentary evidence setting out these conditions; failed to provide "clear and compelling" reasons for departing from previous detention release decisions that found the Respondent was a danger to the public and unreasonably ordered Respondent's release despite finding he had committed the robbery offences while under community supervision. The Applicant submits this application for leave raises an arguable issue upon which the proposed judicial review might succeed.

[2] **AND UPON** reviewing and considering all materials filed and hearing counsel on behalf of the Applicant, and the Respondent, who represented himself.

[3] **AND UPON** considering the following:

1. This hearing took place on a very compressed timetable, and for that reasons these reasons are necessarily shorter than might otherwise have been the case. The object of the fast hearing in this case is to decide not only leave to apply for judicial review, but the judicial review itself and to do so within 30 days, i.e., before the Respondent becomes entitled to a further detention review and the matters now before the Court become moot. The hearing took place on July 12; the further detention review is scheduled for July 15, 2016.

2. The test on leave for judicial review is well-known: whether the Applicant has a fairly arguable case. On judicial review, the decision at issue is tested against the standard of reasonableness, noting that detention review decisions are the kind of essentially fact-based decision to which deference is usually shown: *Canada (Canada (Minister of Citizenship and Immigration)) v Thanabalasingham*, 2004 FCA 4 [*Thanabalasingham*]; *Dunsmuir v New Brunswick*, 2008 SCC 9 explains what is required of a court reviewing on the reasonableness standard of review:

> A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

3. The Respondent is a Somali national. He became a permanent resident on March 2, 2006, upon his entry into Canada at Lester B. Pearson Airport in Toronto. He obtained his permanent resident status through the Convention Refugee Category. He is 25 years old.

4. On September 30, 2010, the Respondent was convicted of 5 separate counts of Robbery (ss. 344(1)(B) of the *Criminal Code*) perpetrated on young 13 to 15 year old teenage boys who were riding Edmonton Public Transit, and sentenced to 22 months incarceration. These thefts involved violence and threats including death threats made to the victims should they report to the police. At the time of these

offences, which he committed as an adult, he was under a Community Supervision Order following three youth robbery convictions.

5. On December 3, 2012, the Respondent was convicted of Sexual Assault with a Weapon (ss. 272 (2) (a) *Criminal Code*) for anally raping his cellmate while holding a weapon to his neck, which assault took place in 2010 when the Respondent was incarcerated awaiting trial on the five robbery charges. This very serious criminal assault was violent and caused considerable trauma both physical and mental to the victim. He was sentenced to 6 ½ years as a result of this conviction although his sentence was reduced for time served. The Criminal Profile Report - Grande Cache Institution [CPO], notes the sentencing judge's findings rejecting Respondent's claim of consensual sex, finding his version of events "preposterous and incredible" in light of the evidence. That same report also notes this offence "represents a considerable escalation in offending severity". The CPO also notes: "He scored 6 on the STATC 99R placing him at a HIGH RISK to sexually reoffend. There were also concerns of violence based on his past history of robbery".

6. On January 24, 2013, Calgary Inland Enforcement formed an opinion by way of a section 44 report that alleged the Respondent was inadmissible pursuant to paragraph 36(1)(A) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] This report was founded on the rape conviction.

7. This report was reviewed by the immigration division and a deportation order for serious criminality was issued June 24, 2013, which is the basis for the Respondent's removal.

8. On March 15, 2016, a Danger Opinion [DO] was issued by the Minister in which the Respondent was declared a danger to the public and as a result he may now be removed to Somalia.

9. On May 11, 2016, the Respondent was released from prison on the sexual assault conviction because it was his statutory Release Date. His actual Warrant Expiry Date isn't until January 28, 2018. On May 11, 2016, the Respondent was arrested on a warrant for removal, and placed in immigration detention.

10. On May 13, 2016, at the Respondent's 48 hour detention review Member Cikes ordered the continued detention of the Respondent. Member Cikes stated the following: "I'm satisfied that you are a danger to public and that there is a risk you will reoffend if released". He further stated: "Your offences have escalated so there is a real concern that if released, that pattern would be continued. There is a report to that effect that was referenced by Minister's Counsel and that I have to take very seriously". Member Cikes noted credibility concerns based on the fact the Respondent had argued that the sexual assault victim had consented.

11. The Respondent had his 7 day detention review on May 20, 2016. Further material was entered onto the record before Member A. Tang [Member Tang] as

exhibit C2, being May 19 2016 removal instructions. Member Tang ordered the continued detention of the Respondent stating in part:

> ….When I look at the fact that you have these convictions in Canada, along with having had the issuance of the Danger opinion and looking at the details of the criminal acts that lead to the criminal convictions, I do find that you are a danger to the public.
>
> I also assess and have looked at whether you are, present and future danger to the public, to the Canadian public, and I rely on looking at the history and circumstances of your conviction in making that determination, whether or not you would a risk (*sic*), if you were to be released in Canada. And all I can look at is that in your instance - your past behaviour and the circumstances of the events and what I draw the inferences that you are likely to be a danger if you were released.
>
> In terms of conditions because of the types of criminality and the duration, and the future duration of detention, I don't find any particular set of conditions that I could craft would mitigate the risks sufficiently of you reoffending if I were to release you.

12. The 30 day detention review was held June 15, 2016. Further material was entered onto the record before Member Ko including email correspondence to CBSA from Air Qatar refusing to transport the Respondent to Somalia due to his criminal record. This resulted in an unforeseen change to his scheduled removal date. CBSA has since engaged other airlines for assistance. The Minister submitted July 22 as a new potential removal date.

13. Member Ko ordered the Respondent released on conditions. Justice Zinn ordered an interim stay by Order June 15, 2015, and Justice Russell by Order June 23, 2016, further stayed the Respondent's release pending the determination of the

application for judicial review and judicial review and set an expedited timeline so that each might be determined at a hearing July 12, 2016.

14. In doing so, Justice Russell noted three issues:

i. Whether the Member adequately addressed the undisputed evidence found in the Minister's Danger Opinion that the Respondent is a danger to the public;

ii. Whether the Member considered the prescribed statutory factors set out in the *Immigration and Refugee Protection Regulations*, SOR/2002-227;

iii. Whether the Member failed to provide clear and compelling reasons to depart from the two (2) previous detention decisions.

15. I will deal with each.

16. In my view, Member Ko adequately addressed the Danger Opinion such as was provided to her. It was in fact only the cover page. The Member did not have the full danger opinion presumably because the Minister did not file it, notwithstanding it is dated March 15, 2016. The cover page bears a signature and an opinion that the named individual "constitutes a danger to the public in Canada". That is all. I would add that the Danger Opinion was not filed at either the 48 hour or 7 day review.

17. In my respectful view, in these circumstances, the Member may not be criticized for not saying more about the Danger Opinion, although certainly the existence of the Danger Opinion was noted by the Member. In this connection, I note that the Member did have the CPO which contained some of the same information about past convictions. I am concerned that the Member focussed too narrowly in noting that the CPO was three years old; the review should be on its contents not its age. That said, his past criminal record as such was recorded and considered by the Member.

18. As to the statutory *IRPA* conditions, they are:

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	c) le ministre prend les mesures voulues pour enquêter sur les motifs raisonnables de

inadmissible on grounds of security or for violating human or international rights; or	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 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.	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;
…	…
(2) The Immigration Division may order the detention of a permanent resident or a foreign national if it is satisfied that the permanent resident or the foreign national is the subject of an examination or an admissibility hearing or is subject to a removal order and that the permanent resident or the foreign national is a danger to the public or is unlikely to appear for examination, an admissibility hearing or removal from Canada.	(2) La section peut ordonner la mise en détention du résident permanent ou de l'étranger sur preuve qu'il fait l'objet d'un contrôle, d'une enquête ou d'une mesure de renvoi et soit qu'il constitue un danger pour la sécurité publique, soit qu'il se soustraira vraisemblablement au contrôle, à l'enquête ou au renvoi.

19. Paras 58(1)(c) and (d) are not relevant, and in my respectful view it may not be said that the other matters were not considered by the Member. I wish to add that unlike my colleagues I had the benefit of reviewing the transcript of the hearing and also had the benefit of the Member's reasons which were also not available to my colleagues given the very compressed timetable in this case. Danger was assessed by the Member albeit briefly which of course was all that could be done in the absence of a detailed Danger Report. The Member considered danger and in doing so placed considerable reliance on the Respondent's verbal evidence of rehabilitation which however was largely uncorroborated. The Member also considered whether the Respondent was likely to appear, noting there was no evidence on this. I am concerned with the reliance on the Respondent's testimony on as crucial a matter as rehabilitation in the absence of corroborating material.

20. In my respectful view, while the Member did speak to the previous decisions at both the 48 hour and 7 day reviews, I am not persuaded that the Member's reasons amount to "clear and compelling reasons" to depart from the previous decisions as required by *Thanabalasingham*.

21. Specifically while the Member noted the absence of evidence of improper behaviour by the Respondent in the past 6 years since the sexual assault and multiple robberies, and while the Member had the benefit of the testimony of the Respondent and his assurances of good behaviour, the Member's reasons do not directly address or identify either clear or compelling reasons why the previous decisions should be disregarded. In this connection, the Respondent made a

number of representations about what he had done in prison towards rehabilitation, but did so without documentation. The Member dealt with credibility without answering the credibility concerns of Member Cikes. The CPO was addressed but primarily as to its age as opposed to its contents.

22. On judicial review the Respondent provided a copy of his ESL report, which is very positive, but the proper place for that and the other supporting evidence is before the Member not before this Court where it is improper as new evidence; this Court proceeds on the same record as was before the original tribunal as a rule which I do not believe should be departed from in this case. He also filed a number of certificates supporting his allegation of rehabilitation; they too must be assessed by a Member and are not properly before this Court.

23. By the same token, the proper place for the Minister's full Danger Opinion, which apparently was filed in this Court in at least one of the prior proceedings, notwithstanding which was not before the Member, is also before the Member to be newly charged with decision-making in this case, not here where it is inadmissible as new evidence.

24. I have the same comment respecting the terms and conditions of the Respondent's parole which he also filed here – that belongs before the Member charged with deciding this case (I note that parole conditions filed appear to confirm what the Applicant said in his oral evidence).

25. In addition, in my view the Member failed to adequately consider the context of the sexual assault which in my respectful view was not only a sexual assault per Regulation 246(d)(i) of *IRPA* and which also constituted an offence involving violence or a weapon per Regulation 246(d)(ii). Both are matters the Member was required to address; the Member stating: "[t]he details of this offence are in the evidence", was not enough.

26. This Court is not asked to and does not decide whether or not release from detention is justified in the circumstances of this case. If the Respondent's documentary evidence is accepted it may show he was truthful before the Member and help demonstrate he has rehabilitated over the past 6 years. The Minister's Danger Opinion would also have to be assessed.

27. Judicial review involves a review of the decision as a whole; it is not a piecemeal review of its many components. While I am persuaded that leave to apply for judicial review should be and is therefore granted, I am unable to find that the decision falls within the range of reasonable outcomes that are defensible in terms of the facts and law. Therefore the Member's decision must be set aside.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The Applicant is granted leave to apply for judicial review;

2. The application for judicial review is granted; the decision of the Immigration Officer is set aside; and the matter is remitted for redetermination at a new hearing.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2549-16
STYLE OF CAUSE:	THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS v SAMAR SALIM SIGAR
PLACE OF HEARING:	MOTION HEARING HELD VIA TELECONFERENCE IN OTTAWA, ONTARIO
DATE OF HEARING:	JULY 12, 2016
ORDER AMENDED TO JUDGMENT AND REASONS:	BROWN J.
DATED:	SEPTEMBER 7, 2016

APPEARANCES:

Maria Green	FOR THE APPLICANT
Samar Salim Sigar	FOR THE RESPONDENT (ON HIS OWN BEHALF)

SOLICITORS OF RECORD:

William F. Pentney Deputy Attorney General of Canada Ottawa, Ontario	FOR THE APPLICANT
Nil	SELF-REPRESENTED RESPONDENT