Federal Court Cour fédérale

Date: 20161104

Docket: IMM-4554-16

Citation: 2016 FC 1239

[ENGLISH TRANSLATION]

Ottawa, Ontario, November 4, 2016

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Applicant

and

ALEXANDRE CHIPOVALOV

Respondent

JUDGMENT AND REASONS:

[1] A decision-maker should be cautious when concluding on clear-cut evidence without having anticipated the consequences of that decision, given compelling overall evidence leading to an unreasonable decision. Furthermore, such a decision is likely to be set aside by the *Toth v. Canada (Citizenship and Immigration)* (1988), 86 NR 302 (FCA) and *R.J.R. MacDonald Inc. v*

Canada (Attorney General), [1994] 1 SCR 311 [*R.J.R. MacDonald*] conjunctive three-part test, vindicating the successful party.

[2] The applicant appears before this Court with an application for suspension of the release order issued by a member of the Immigration Division (ID) of the Immigration and Refugee Board.

[3] The respondent did not meet the previous conditions in respect of his criminal record. Starting in 1999, the respondent was convicted of criminal acts, robbery, assault, possession of stolen property, obstruction, possession of property obtained by crime, breach of conditions, failure to comply with a recognizance, etc. In addition, the respondent was arrested on the ground that he was considered a flight risk based on his history.

[4] The ID has kept the respondent in detention since 2013, following at least 35 detention reviews for flight risk, and no reasonable alternatives were seen based on the circumstances of the case.

[5] No justification of the ID's decision is considered reasonable based on the facts of the case.

[6] In order to set aside an earlier reasoning of the ID concerning a release from custody, there is an obligation to provide a rationale for its departure from previous decisions, only if the situation has changed to in fact provide a reasonable justification for a release from custody. This

is in no way reasonable way considering the facts supported by the evidence in his record; and even during the current detention period, the respondent's actions show the opposite. The Court also notes about 60 charges of breach of an undertaking or breach of probation; in the past, the ID concluded that the alternative did not offset the flight risk since the respondent did not cooperate. Overall, the situation has not changed.

[7] The Court points out the importance of *Canada (Minister of Citizenship and Immigration) v. Thanabalasingham*, 2004 FCA 4, [2004] 3 FCR 572 at para. 24:

> [24] The reasons given by Judge Gauthier are logical and clear. I am fully satisfied that she correctly applied the proper standards of review to Mr. Iozzo's findings and that she correctly interpreted the relevant law. I would dismiss the appeal. I would answer the certified question as follows:
>
> At each detention review made pursuant to sections 57 and 58 of the *Immigration Refugee Protection Act*, S.C. 2001, c. 27, the Immigration Division must come to a fresh conclusion whether the detained person should continue to be detained. Although the burden of proof might shift to the inmate once the Minister has established a *prima facie* case, the Minister always bears the ultimate burden of establishing that the detained person is a danger to the Canadian public or is a flight risk at such reviews. However, previous decisions to detain the individual must be considered at subsequent reviews and the Immigration Division must give clear and compelling reasons for departing from previous decisions.

[8] The applicant fully satisfied the requirements specified in this decision.

[9] The ID has ignored clear-cut evidence.

[10] A decision-maker cannot speculate rather than analyze evidence in the docket that the decision-maker must consider (see *Canada (Citizenship and Immigration) v. Li*, 2009 FCA 85 at para. 62).

> [62] With respect, I do not think that it was appropriate for the Board, at the September 11, 2008 review hearing, to base its assessment of the anticipated future length of detention on a mere preliminary opinion when the final decision would come only a month later and a detention review is held every month. The Board was led by this opinion to assume that judicial review proceedings would be authorized by the Federal Court and that an appeal would necessarily be heard by the Court of Appeal. It then felt justified to review its previous time estimate to include the additional time which would result from its assumption.

[11] The applicant has satisfied the conjunctive three-part test of the Supreme Court of Canada's decision in *R.J.R. MacDonald Inc.*, supra.

[12] The Court orders that the respondent's release order be stayed until the respondent completes a new detention review with a supporting decision and until the Court has ruled on the application for leave to apply for judicial review.

JUDGMENT

THE COURT ORDERS THAT the respondent's release order be stayed until the respondent completes a new review of its detention with a supporting decision and until the Court has ruled on the application for leave to apply for judicial review.

"Michel M.J. Shore"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4554-16
STYLE OF CAUSE:	THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS v. ALEXANDRE CHIPOVALOV

MOTION HEARD BY CONFERENCE CALL ON NOVEMBER 4, 2016, BETWEEN OTTAWA, ONTARIO AND MONTRÉAL, QUEBEC

JUDGMENT AND REASONS:	SHORE J.
DATED:	NOVEMBER 4, 2016

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