Federal Court Cour fédérale

Date: 20171017

Docket: IMM-4024-17

Citation: 2017 FC 918

Ottawa, Ontario, October 17, 2017

PRESENT: The Honourable Mr. Justice Lafrenière

BETWEEN:

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Applicant

and

SERGIO RIGOBERTO SORIA TORRES

Respondent

<u>JUDGMENT AND REASONS</u>

I. <u>Overview</u>

[1] This is an application for judicial review on behalf of the Applicant, the Minister of Public Safety and Emergency Preparedness [the Minister], of a decision of a member [the Member] of the Immigration Division [ID] of the Immigration and Refugee Board [IRB] dated September 19, 2017 wherein the Member ordered the release of the Respondent, Sergio Rigoberto Soria Torres, from immigration detention. The Member ordered that the Respondent

be released on certain conditions, including that a CDN$1600 cash bond be posted by his cousin who resides in the United States of America [US] and that the Respondent report bi-weekly in person to the Canada Border Services Agency [CBSA].

[2] For the reasons that follow, I find that the Member's decision to release the Respondent from detention must be set aside as no clear or compelling reasons were provided by the Member for departing from his own earlier decision rejecting a similar cash bond as inadequate. The Member also failed to reasonably consider whether there were any elements that could assist in determining the length of time that the Respondent's detention was likely to continue, as required by section 248 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRP Regulations]. Moreover, the Member failed to explain how the fact that the Respondent had appealed his negative refugee claim to the Refugee Appeal Division [RAD] of the IRB was a mitigating factor that somehow lowered the Respondent's flight risk. The application is accordingly granted.

II. Facts

[3] The Respondent is a citizen of Mexico. In 1995, at the age of 18, he entered the US by avoiding examination and remained in California as an undocumented alien until he was arrested on June 3, 2010, by agents of the US Drug Enforcement Agency. The Respondent stated that he had agreed to a friend's offer to water and harvest marijuana plants in a large-scale outdoor grow operation for $10,000 a month. The CBSA received information that this was a grow operation with upwards of 4600 plants. In accordance with a plea agreement, the Respondent was convicted of the offence of using a communications facility in the commission of drug

trafficking. He was sentenced to 48 months in a US federal prison, with credit for time served, and served 42 months before being deported to Mexico in December 2014.

[4] On April 28, 2017, the Respondent arrived at the Vancouver International Airport from Mexico and immediately sought protection in Canada. In several subsequent interviews, the Respondent answered all questions without evasion, providing information involving his undocumented status in the US, his criminal conviction there, and his subsequent deportation to Mexico.

[5] The Respondent was detained upon his entry to Canada. His first detention review was on May 2, 2017, at which time an ID member made an order for his release with terms and conditions. The Minister sought a stay of the release order pending disposition of the application for leave and for judicial review of the detention release decision in Court File No. IMM-1988-17. Madam Justice Catherine Kane granted an interim stay on May 2, 2017 and the stay was continued on May 5, 2017 pending a final determination of the application for judicial review.

[6] Justice Kane concluded that the Minister has established that he would suffer irreparable harm between now and the time that the application for judicial review was finally determined in that the integrity of the immigration system would be jeopardized given the Respondent's immigration history in the US, that the Respondent had no ties to Canada, no family or other contacts in Canada, and that the Respondent may have access to modest resources, which could result in his leaving the area.

[7] The leave application was not determined as the Respondent's detention was continued by a subsequent decision of an ID member on May 9, 2017 on the ground that the Respondent was unlikely to appear for his admissibility hearing.

[8] The Respondent became the subject of a report under section 44 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], stating he was inadmissible to Canada under paragraph 36(1)(*b*) of IRPA due to his conviction in the US. The report was referred to the ID for determination. On May 15, 2017, an ID member found that the Minister had not established that the Respondent was inadmissible for the reason given in the Section 44 report and that he was therefore not inadmissible to Canada for serious criminality. The Respondent was thus eligible to make a protection claim to the Refugee Protection Division [RPD] of the IRB. This ID decision has been appealed by the Minister to the IAD, which has set a timeline for written submissions, with a final reply from the Minister due by November 1, 2017.

[9] On May 30, 2017, an ID member ordered the Respondent's detention to continue on the ground that he was unlikely to appear for removal.

[10] The next detention review was held on June 27, 2017 by the same member who made the decision that is the subject of the present application for judicial review. The Member heard oral evidence from the Respondent, as well as from his cousin living in the US, who offered to put up a cash bond of US$1400 or CDN$1800 to secure the Respondent's release. The Respondent was again ordered detained on the ground that he remained a flight risk. The Member expressed concern that while the cash bond offered was a reasonable amount of money from the perspective of the Respondent's cousin, it was not a significant amount that would make the

Respondent "think twice about walking away from conditions and not showing up for [his] removal."

[11] Thirty-day detention reviews were conducted on July 25 and August 22, 2017, and the Respondent was ordered detained on the same grounds as before.

[12] In a decision communicated to the Respondent on or about August 18, 2017, the RPD refused his protection claim. The Respondent subsequently appealed the decision to the RAD and the appeal is still outstanding. The departure order made against the Respondent is not enforceable unless and until the RAD dismisses his appeal.

[13] The Respondent appeared again before the ID at the next detention review on September 19, 2017, which resulted in the decision that is the subject of the present application. The Respondent was not represented by counsel at the hearing. At the hearing, when asked by the Member if Minister's counsel knew the timelines for the RAD, counsel replied that he did not know what length of time it would be for the RAD to render a decision.

[14] The Member stated that it was known at the last detention review that the Respondent's refugee claim had failed, however it was not known at the time whether or not the Respondent would apply to the RAD. The Member observed that the Respondent had since applied to appeal the negative decision and that submissions were due within a week. He added that he too was not familiar with the RAD timelines.

[15] The Member noted that the Minister was also appealing the favourable ID decision concerning the paragraph 36(1)(*b*) of *IRPA* allegation and that the appeal to the IAD was ongoing. The Member added that it was not clear when the IAD would issue a decision.

[16] In light of these “new circumstances”, and in particular because it was unknown when the refugee appeal process would be completed, the Member indicated that he would look more favourably on the US$1400 bond that was previously proposed to be paid by the Respondent’s cousin, which he converted to a CDN$1600 bond. The Member stated that he believed the amount would be a financial difficulty for the Respondent’s cousin and that it would increase the responsibility on the Respondent to ensure that the bond is not forfeited. The Member also ordered that the twice-weekly reporting requirements to CBSA would reduce the likelihood that the Respondent would not appear for removal.

[17] The Member explained that the Respondent has an interest in seeing the refugee appeal go forward as it has the potential to either have the matter sent back for re-determination and the possibility of a positive claim, “[b]ut more importantly, it’s simply unknown when the refugee appeal will be completed, it’s better for all parties that you [the Respondent] live outside of detention and that you remain in regular contact with the Canada Border Services Agency.”

[18] On September 27, 2017, Madam Justice Cecily Strickland issued an interim order staying the Respondent’s release pending the determination of this application for judicial review. Justice Strickland concluded that a serious issue existed as “while the Member might reasonably consider the increased length of the detention, the length of detention has no apparent bearing on whether the Respondent would respect the bond which the Member, as well as another member,

had previously found to be insufficient and the amount of which had not changed." She further added that the Member did not provide clear and compelling reasons to support this reversal in position regarding the sufficiency of the bond.

III. Analysis

[19] The applicable law and legal principles are not in dispute in this case. It is well established that detention review decisions of the ID attract deference and are reviewed on the standard of reasonableness (see *Yan v Canada (Citizenship and Immigration)*, 2015 FC 1125 (CanLII) at para 15).

[20] Although prior decisions to detain an individual are not binding, clear and compelling reasons must be set out if an ID member departs from prior decisions to detain (see *Canada (Minister of Citizenship and Immigration) v Thanabalasingham*, 2004 FCA 4 (CanLII) at paras 9-10 [*Thanabalasingham*]).

[21] Section 248 of the IRP Regulations lists the factors that the ID must consider before making an order for detention or release if it is determined that there are grounds for detention:

(a) the reason for detention;

(b) the length of time in detention;

(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;

(d) any unexplained delays or unexplained lack of diligence caused by the Department or the person concerned; and

(e) the existence of alternatives to detention.

[22] In addition to the mandatory factors found in section 248 of the IRP Regulations, the ID may consider other relevant factors in balancing the competing liberty interests of a detainee and the public interest in upholding the law.

[23] I preface my analysis by noting that the Member's decision is not laid out in the same order as his prior decision or those of the other ID members who conducted detention reviews. The usual pattern is to lay out reasons why, in cases where flight risk is alleged, that a flight risk is found. The member then proceeds to deal with the factors set out in section 248 of the IRP Regulations.

[24] The Member did not expressly deal with the grounds for determining that there was a flight risk or the length of the existing detention in his reasons. The Respondent submits that it is implicit that the Member made a determination that a flight risk exists. He further submits that the Member implicitly dealt with the length of time that the Respondent had been in detention and that his focus was on the uncertainty of when the RAD might render a decision on the Respondent's appeal. While that may be, these types of gaps in the reasons are indicative of other gaps in the analysis by the Member in this case.

A. *The bondsperson and bond*

[25] At the June 27, 2017 hearing, the Member found the proposed bondsperson, the Respondent's cousin, to be credible after having heard him in order to assess the influence that

the cousin and his putting up a bond may have on the Respondent. Although he considered the cousin to be appropriate and his relationship to the Respondent to be “not insignificant”, the Member concluded that the proposed cash bond was insufficient. He now concludes, three months later, that the cousin and the proposed bond should be looked at in a more favourable light based on “new circumstances”.

[26] The Member failed, however, to provide clear and compelling reasons for departing from his earlier finding. In his decision dated June 27, 2017, the Member found that although the proposed amount of bond money (US$1400 which he equated to CDN$1800), was a reasonable amount of money from the Respondent’s cousin, it was not a significant amount. The Member concluded that if forfeit, the proposed bond was not such a great amount that the Respondent would not eventually be able to pay it back and not enough to cause the Respondent “to think twice about walking away from conditions and not showing up for [his] removal.” The Member voiced concerns about the time spent by the Respondent without status in the US and the fears he expressed of returning to Mexico.

[27] Notwithstanding, the Member ordered the Respondent’s release at the September 19, 2017 hearing with an even smaller bond from the same bondsperson. The Member gave no analysis of any change in circumstances regarding the amount of money or eligibility of the bondsperson. His change of heart regarding the suitability of the bondsperson and the amount of the bond is unexplained and the reasons lack the necessary justification, transparency, and intelligibility required for the Court to understand why the Member so concluded.

[28] At the hearing of this application, I questioned whether the Respondent's cousin, a non-Canadian citizen who is not a permanent resident or residing in this country, was eligible to post a cash bond pursuant to paragraph 47(2)(*a*) of the IRP Regulations. Counsel for the Respondent submitted that this provision applies only to performance bonds, or guarantees. However, in *Canada (Citizenship and Immigration) v B147*, 2012 FC 655 (CanLII) at para 50, Mr. Justice Donald Rennie found that paragraph 47(2)(*a*) would preclude a bondsperson from posting a bond as they were neither a Canadian citizen nor a permanent resident physically residing in Canada. However, as the Minister did not raise the issue before the Member, I express no view on this matter.

[29] In a judicial review, there is often a question of how far a reviewing court can look into the record for reasons that were not stated by a decision maker. Reasons may not include all of the arguments, statutory provisions, jurisprudence, or other details a judge may have preferred, but that does not impugn the validity of the reasons or the result under a reasonableness review (see *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 (CanLII) at para 16).

[30] According to *Dunsmuir v New Brunswick*, 2008 SCC 9 (CanLII) at paras 46-51 [*Dunsmuir*], a decision will fail to meet the requirements of the reasonableness standard of review where it lacks the "existence of justification, transparency and intelligibility within the decision-making process" and does not fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[31] The reasons must allow a reviewing court to understand why a tribunal made the decision and permit a court to determine whether the conclusion is within a range of acceptable outcomes. As the Member's reasons do not permit the Court to understand how the Member made material findings of fact and law in assessing the suitability and eligibility of the bondsperson, the decision must accordingly be quashed and set aside.

[32] The Member committed two other significant errors that render his decision unreasonable.

B. *Level of flight risk arising from the Respondent's appeal to the RAD*

[33] First, the Member concluded that the fact that the Respondent had appealed the negative RPD decision to the RAD and that submissions were due shortly constituted new circumstances which justified revisiting alternatives to detention. The Member failed to explain, however, how the Respondent's appeal of a negative decision could be interpreted as reducing his flight risk. The level of risk was at least the same as when the Respondent was awaiting determination of his protection claim before the RPD.

[34] The Member noted that the Respondent would not be removable until the RAD process was completed. However, the removal order was also not in force while the Respondent's refugee claim was pending at the RPD. If his RAD appeal is denied, the Respondent will be the subject of an enforceable removal order. Given that the Respondent was found to be a flight risk at his detention reviews on May 30, June 27, and July 25, 2017, despite not being removable due to his refugee claim pending before the RPD, it is difficult to understand how the Member

concluded that the subsequent appeal to the RAD somehow militated in favour of the Respondent.

C. *Refugee Appeal Division timelines*

[35] Second, the Member stated that he was not familiar with the RAD timelines in justifying his decision to release the Respondent from detention. The absence of information regarding the timelines for completion of the RAD process appears to have been a determinative factor for the Member.

[36] Unlike in previous detention reviews, the Minister's counsel was unable to provide a specific timeframe within which the next step in the protection claim would be completed. However, as noted by Madam Justice Strickland in her September 27 Order, the Respondent's appeal to the RAD was perfected on September 23, 2017. Subsection 159.92(1) of the IRP Regulations clearly states that "the time limit for the RAD to make a decision on an appeal is 90 days after the day on which the appeal is perfected." It follows that the RAD had a statutory obligation to render a decision by December 23, 2017, subject to the exception set out in subsection 159.92(2).

[37] In my view, the Member unreasonably found that the RAD timelines were unknown. If the law assumes, as it does, that the ordinary citizen is deemed to know the law, it can be fairly assumed that ID members charged with the administration of IRPA and its regulations should be deemed to know the law which they are directly and specifically charged with administering.

[38] In the end, the Member failed to properly consider the factor in section 248(c) of the *IRP Regulations*. By ignoring a substantive provision of his home statute, the IRP Regulations, in making a determinative finding as to the length of time that detention is likely to continue, the Member made an error with respect to the facts and the law that cannot stand.

IV. Conclusion

[39] For the above reasons, the application for judicial review is granted. As the next detention review is imminent, no purpose would be served by remitting the decision back to the Member for re-consideration. No question for certification has been proposed.

JUDGMENT

THIS COURT'S JUDGMENT is that:

The application for judicial review is granted.

"Roger R. Lafrenière"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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