Federal Court  Cour fédérale

Date: 20190726

Docket: IMM-3531-19

Citation: 2019 FC 1006

Ottawa, Ontario, July 26, 2019

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Applicant

and

IRSHAD MOHAMED AHMED

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application brought by the Minister of Public Safety and Emergency Preparedness [the Minister] for judicial review of the Order of Release by a member [the Member] of the Immigration Division of the Immigration and Refugee Board of Canada [the ID] in respect of the Respondent, which was rendered June 3, 2019 and amended June 5, 2019.

II. Background

[2] The Respondent, Irshad Mohamed Ahmed, is a citizen of Somalia. He came to Canada in 1990 at the age of seven, and was granted permanent resident status in 1995. He is now married and has two young children.

[3] Beginning in 1998, the Respondent accumulated over 30 criminal convictions, including extortion, forcible confinement, trafficking in drugs and firearms, assault, breach of court orders and probation, obstructing a peace officer, public mischief, firearm possession, and conspiracy to commit an indictable offence.

[4] On February 7, 2003, the Respondent was convicted of forcible confinement, extortion, and pointing a firearm. He was subsequently reported under section 44 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the IRPA] for serious criminality, and a deportation order was issued.

[5] In December 2005, Canada Border Services Agency [CBSA] initiated a danger opinion process under paragraph 115(2)(a) of the IRPA.

[6] In November 2010, a Minister's delegate, rather than issue a danger opinion and seek to remove the Respondent from Canada, issued the Respondent a warning letter.

[7] In January 2014, the Respondent was sentenced to 7 years and 5 months in federal custody for a number of convictions relating to the trafficking of firearms and prohibited substances.

[8] As a result, the Respondent was again reported under section 44 of the IRPA for serious criminality. In 2015, CBSA began a second danger opinion process.

[9] In 2017, a delegate of the Minister found that the Respondent was inadmissible on grounds of serious criminality as someone who constitutes a danger to the public in Canada, and further found that the Respondent would not be at risk upon return to Somalia.

[10] In *Ahmed v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 471, having found a procedural fairness violation, this Court allowed the Respondent's judicial review and remanded for redetermination the portion of the Minister's delegate's decision which concluded that the Respondent would not be at risk upon return to Somalia.

[11] The results of this redetermination are not in evidence before this Court.

[12] In December 2018, the Respondent was eligible for parole from his 2014 criminal sentence. On December 21, 2018, CBSA took the Respondent in to immigration custody.

[13] The Respondent's continued detention was reviewed by different members of the ID on six separate occasions – December 27, 2018, January 3, 2019, January 28, 2019, February 25,

2019, March 18, 2019, and April 15, 2019. On each occasion, the members ordered the Respondent's continued detention. I note that the Respondent did not have counsel at these reviews, nor was any meaningful release plan presented to the ID.

III. Decision Under Review

[14] The Respondent's most recent detention review hearing was held over five days between May 8, 2019 and June 3, 2019 [the Hearing]. The Respondent retained counsel, who is also counsel before this Court. Eight witnesses testified, including the Respondent, and the Hearing transcript spans over 300 pages.

[15] Per the Order for Release dated June 3, 2019, and amended June 5, 2019 [the Order], the Member ordered that the Respondent be released from detention subject to a number of conditions, including:

(i) that his mother, Madina Bassei, and sister, Mona Ahmed, each pay deposits of $5000, and that his sister, Nyeme Ahmed, post a guarantee of $5000 (the bond persons);

(ii) to reside at all times with his mother, Madina Bassei;

(iii) to remain in good standing with CBSA's electronic monitoring program (wearing an ankle bracelet for monitoring);

(iv) to be on house arrest unless in the presence of a bond person, or Fatima Ahmed or Chaoeum Chea (the Respondent's wife); and

(v) to comply with his parole conditions.

[16] The Member gave detailed oral reasons for the Order on June 3, 2019 [the Reasons]. The Member reviewed in considerable detail the Respondent's criminal and personal history, as well

as incidents of institutional misconduct; the transcript of this review spans over 12 pages. Early in the Reasons, the Member found that the Respondent was both a flight risk and a danger to the public. However, the Member's analysis continued, and the Member reviewed the testimony of the Respondent, his family members, and a community worker.

[17] The Member concluded that, in the circumstances and in light of the various conditions outlined in the Order, the Respondent should be released from immigration detention.

IV. Issues and Standard of Review

[18] The issues are:

(i) Did the Member err by failing to consider paragraphs 245(d) and 245(e) of the Regulations?

(ii) Did the Member err by concluding that the Respondent is rehabilitated?

(iii) Did the Member err by failing to ensure that the terms of release virtually eliminated the risk the Respondent posed to the public?

(iv) Should costs be awarded?

[19] Detention review decisions of the ID are to be reviewed on the standard of reasonableness (*Canada (Public Safety and Emergency Preparedness) v Lunyamila*, 2016 FC 1199 at paras 20-21 [*Lunyamila*]).

V. Relevant Provisions

[20] Under subsection 58(1) of the IRPA, the ID shall order the release of a permanent resident or foreign national unless it is satisfied, taking into account certain prescribed factors, of at least one of a number of things relating to such persons:

> Release — Immigration Division
>
> 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
>
> (a) they are a danger to the public;
>
> (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);
>
> (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;
>
> (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
>
> (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.
>
> [Emphasis added]

[21] Subsections 58(2) and 58(3) of the IRPA outline the ID's ability to order the detention or release of a permanent resident or foreign national, as well as the ability to impose conditions upon release:

> Detention — Immigration Division
>
> (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.
>
> Conditions
>
> (3) If the Immigration Division orders the release of a permanent resident or a foreign national, it may impose any conditions that it considers necessary, including the payment of a deposit or the posting of a guarantee for compliance with the conditions.

[22] Pursuant to section 244 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [the Regulations], the factors outlined in sections 245 to 247 of the Regulations "shall be taken into consideration when assessing whether a person" is a flight risk, a danger to the public, or a foreign national whose identity has not been established.

[23] Section 245 of the Regulations outlines the factors related to determining whether an individual is a flight risk:

> Flight risk
>
> 245 For the purposes of paragraph 244(a), the factors are the following:
>
> > (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;

> (b) voluntary compliance with any previous departure order;
>
> (c) voluntary compliance with any previously required appearance at an immigration or criminal proceeding;
>
> (d) previous compliance with any conditions imposed in respect of entry, release or a stay of removal;
>
> (e) any previous avoidance of examination or escape from custody, or any previous attempt to do so;
>
> (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
>
> (g) the existence of strong ties to a community in Canada.
>
> [Emphasis added]

[24] Section 246 outlines the factors to consider when determining whether a detained person constitutes a danger to the public:

> 246 For the purposes of paragraph 244(b), the factors are the following:
>
> (a) the fact that the person constitutes, in the opinion 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;
>
> (b) association with a criminal organization within the meaning of subsection 121(2) of the Act;
>
> (c) engagement in people smuggling or trafficking in persons;
>
> (d) conviction in Canada under an Act of Parliament for
>
> (i) a sexual offence, or

> (ii) an offence involving violence or weapons;
>
> (e) conviction for an offence in Canada 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);
>
> …

VI. Analysis

A. *Did the Member err by failing to consider paragraphs 245(d) and 245(e) of the Regulations?*

[25] The Minister argues that when analysing flight risk, the Member unreasonably failed to consider paragraphs 245(d) and 245(e) of the Regulations. Under paragraph 245(d) the Member must consider "previous compliance with any conditions imposed in respect of entry, release or a stay of removal". Under paragraph 245(e) the Member must consider "any previous avoidance of examination or escape from custody, or any previous attempt to do so".

[26] In particular, the Minister argues that the Member erred by ignoring evidence of the Respondent's past criminal convictions for breaching release conditions, his past three releases from immigration detention and subsequent breaches of release conditions, and his institutional misconducts during his most recent term of imprisonment.

[27] However, the Member acknowledges at several points in the Reasons the Respondent's past institutional misconducts and criminal convictions. While the Member may not have explicitly acknowledged the Respondent's past breaches of the conditions stemming from his past immigration releases, the Member was presiding over a Hearing which spanned five days, involved testimony by numerous witnesses, and resulted in over 300 pages of transcript.

[28] In *Canada (Minister of Citizenship and Immigration) v Thanabalasingham*, 2004 FCA 4 [*Thanabalasingham*], the ID had released the Respondent from immigration detention. This Court dismissed an application for judicial review brought by the Minister of Citizenship and Immigration. On appeal to the Federal Court of Appeal, Justice Rothstein dismissed the Minister's appeal and affirmed the following language of the Federal Court (*Thanabalasingham*, above at para 21):

> [The ID] could have described in more detail his reasoning, but his failure to do so does not constitute a reviewable error when it is clear from the decision itself that he had considered all the evidence relating to the context of those convictions and, nevertheless, declared himself not satisfied that they alone could support a detention order.
>
> [Emphasis added]

[29] Similarly here, it is clear from both the ID's Reasons and the Hearing's transcript that the ID was alive and sensitive to the factors outlined in paragraphs 245(d) and 245(e). There is no reviewable error.

B. *Did the Member err by concluding that the Respondent is rehabilitated?*

[30] The Minister argues that the Member unreasonably determined that the Respondent was rehabilitated, for the following reasons:

(i) The Member should not have given weight to the fact that the Respondent has no criminal convictions since entering prison in January 2014, as his institutional convictions during that period suggest he is not rehabilitated;

(ii) The Member's finding of rehabilitation is inconsistent with the evidence from Corrections Canada linking the Respondent to the institutional subculture, in particular a 2018 report by the Respondent's parole officer;

(iii) The Member unreasonably considered the presence of the Respondent's children when addressing rehabilitation.

[31] The Minister mischaracterizes the Member's finding. At no point in the Reasons does the Member determine that the Respondent is rehabilitated. Rather, the Member states at various places that the Respondent has "moved towards rehabilitation", is "in the path of rehabilitation", and is engaged in a "rehabilitation process". The Member even clarifies at one point in the Reasons - "I'm not saying that you have rehabilitated because even yourself you have acknowledged that, you know, you still need some help and assistance."

[32] Moreover, there was considerable, conflicting evidence before the ID as to the extent of the Respondent's rehabilitation and alleged links to institutional subculture. The ID considered this evidence in depth and reasonably weighed it. The Minister invites this Court to intervene and reweigh the evidence that was before the Member, but that is not the role of this Court (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 61).

[33] The ID was also reasonable to note that the presence of the Respondent's young children present a motivation for him not to reoffend.

[34] The Member reasonably found that the Respondent was on a path towards rehabilitation, having reviewed in detail the Respondent's circumstances.

C. *Did the Member err by failing to ensure that the terms of release virtually eliminated the risk the Respondent posed to the public?*

[35] As the Member found the Respondent to be a danger to the public, a requirement was triggered that any release conditions must "virtually eliminate" the risk to the public (*Lunyamila*, above at paragraph 45).

[36] The Minister argues that that release plan imposed on the Respondent was unreasonable, as it does not come close to virtually eliminating the risk to the public, citing in particular:

(i) the lack of restrictions on the Respondent's use of a cell phone, which he has used in the past to engage in gun and drug trafficking;

(ii) the evidence that the Respondent's mother works at night, and therefore may not be effectively supervising him during portions of the day;

(iii) the evidence that there may be gaps in the supervision by other sureties; and

(iv) past judicial comments on the limitations of electronic monitoring systems.

[37] The Minister is again asking this Court to reweigh the evidence that was before the Member. The Member reviewed the evidence in detail, and concluded that a release plan involving five sureties, a significant amount of money being posted as bond by the Respondent's

family members, and an electronic monitoring system, was an appropriate alternative to the Respondent's continued detention. This determination was reasonable.

D. *Should costs be awarded?*

[38] Rule 22 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22 state that "No costs shall be awarded to or payable by any party in respect of an application for leave, an application for judicial review or an appeal under these Rules unless the Court, for special reasons, so orders."

[39] The Respondent asks for costs on a solicitor and client basis, or in the alternative for tariff costs. The Respondent argues that the Minister violated their disclosure obligations at the Respondent's first six detention review hearings, and that the Minister overstates the Respondent's incidents of institutional misconduct.

[40] The Respondent highlights in particular documents which were not disclosed by the Minister at the Respondent's first six detention hearings:

(i) A report by the Respondent's parole officer dated June 23, 2017, which is largely positive and outlines the Respondent's efforts to rehabilitate;

(ii) Two letters by employees of Correctional Services Canada which clarify that past allegations of institutional misconduct against the Respondent were overstated or unfounded.

[41] This Court has consistently held that "special reasons" may exist if one party has engaged in conduct which is unfair, oppressive, improper or actuated by bad faith or has

unnecessarily or unreasonably prolonged proceedings (*Kargbo v Canada (Citizenship and Immigration)*, 2011 FC 469 at para 32).

[42] The circumstances of this matter do not constitute special reasons. Having reviewed the recent decision of Justice Mosley in *Allen v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 486, which comprehensively reviews disclosure obligations in detention review hearings, it is not clear on the record before me that the Minister did not meet his disclosure obligations. Additionally, as the evidence of the Respondent's institutional misconduct is decidedly mixed, the Minister's arguments on this point do not show conduct which is unfair, oppressive, improper or actuated in bad faith, nor has the Minister unreasonably prolonged these proceedings. No costs are awarded.

JUDGMENT in IMM-3531-19

THIS COURT'S JUDGMENT is that

1. The application is dismissed.

2. There is no question for certification.

"Michael D. Manson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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