Federal Court  Cour fédérale

Date: 20230515

Docket: IMM-5061-23

Citation: 2023 FC 681

Ottawa, Ontario, May 15, 2023

PRESENT: Madam Justice Sadrehashemi

BETWEEN:

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Applicant

and

FOREIGN NATIONAL KNOWN AS
WIHIIB ABDILLAHI WEHEL
OR ZAKARIA XUSEEN ALLALE
OR ZAKARIA ALAALE XUSEEN
OR ALAALE CABDILAAHI XUSEEN

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Respondent is detained at the Calgary Remand Centre, a provincial correctional facility. After a five-sitting detention review hearing that took place between April 5 and 17, 2023, the Respondent was ordered released on terms and conditions by a Member of the Immigration Division at the Immigration and Refugee Board ("the Member") on April 17, 2023.

[2] The Respondent is a refugee claimant from Somalia. He has been detained for approximately four and a half months. The basis for his detention has been the same throughout: the Minister of Public Safety and Emergency Preparedness ("the Minister") was of the view that the Respondent's identity has not been, but may be established, and the Minister was making reasonable efforts to establish the Respondent's identity (*Immigration and Refugee Protection Act*, SC 2001, c 27, s 58(1)(d) [*IRPA*]). The Member ordered the Respondent's release, noting a number of factors favoured release including: that while the Minister had made reasonable efforts to establish identity, the identity investigation was lacking due to the Minister's delays and a lack of diligence; that the length of detention had been long and the future length was uncertain given the difficulties in verifying identity documents for nationals of Somalia; that the Respondent had cooperated with the Minister by providing relevant information for the purpose of establishing his identity; and that there was a viable alternative to detention.

[3] The Minister brought an urgent motion before this Court for a stay of the Release Order pending an application for leave and judicial review of the Immigration Division's release decision. The Minister argued that there are serious issues with the Member's assessment of the Respondent's cooperation, the Minister's efforts, and the appropriateness of the bondsperson. Underlying these arguments is the Minister's view that the Member failed to justify their departure from previous detention review decisions and that the Member unreasonably shifted the onus onto the Minister to establish the Respondent's identity.

[4] I do not find that the Minister has shown a serious issue on any of the grounds raised on this stay motion. The Minister's assertions are not supported by the evidence in the record,

including the transcripts of the previous detention review hearings and the Member's reasons. The Member issued a thorough decision that clearly sets out the basis for their findings on the delays and lack of diligence in the Minister's identity investigation, the Respondent's cooperation, and the appropriateness of the alternative to detention, including the bondsperson. At best, the Minister's arguments ask this Court to reweigh the evidence and submissions before the Member, which is not the Court's role on judicial review (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 125).

[5] There is no basis for this Court to stay the Immigration Division's Release Order. The stay motion is dismissed. Given the liberty interests at stake, I issued an Order dismissing the stay motion, with detailed reasons to follow, on April 25, 2023. These are the reasons for my decision.

II. Background

[6] The Respondent arrived in Canada on December 8, 2022. He sought to enter Canada on a Canadian passport carrying the name Zakaria Hussein ALLALE. He was examined by a Canada Border Services Agency [CBSA] officer upon arrival. During this examination, following suspicions raised by the CBSA officer, the Respondent admitted that the passport was not his own and that he used the services of a smuggler to escape Somalia and come to Canada. The Respondent indicated at that time that he wished to make a refugee claim.

[7] In subsequent interviews with CBSA, the Respondent first provided his name as Wihiib ABDILLAHI WEHEL. The following day, he clarified that Wihiib and WEHEL were nicknames and that his complete name was Alaale ABDILLAHI HUSEEN.

[8] The use of a false passport, the exchanges about his name, and the failure to produce identity documents at that time were the basis for the Minister's view that the Respondent's identity had not yet been established. The Respondent was detained on this basis. The Immigration Division held five detention review hearings on December 12, 2022, January 16 and 17, 2023, February 13, 2023, March 13, 2023, and the last detention review hearing was held over the course of five sittings on April 5, 6, 11, 13, and 17, 2023.

[9] Throughout this period, the Respondent has been detained in a provincial correctional facility. During his interviews with CBSA and at his detention review hearings, he frequently expressed concerns about the conditions of his detention, including that he is co-mingled with those who are detained because of criminality.

Decision under Review

[10] The Immigration Division can order a person's detention on the basis of identity where the "Minister is of the opinion that identity of the foreign national… has not been, but may be, established" and where the person detained has "not reasonably cooperated" with the Minister's identity investigation or the Minister is making "reasonable efforts to establish their identity" (*IRPA*, s 58(1)(d)).

[11] In its April 17, 2023, decision, the Immigration Division found a ground for detention because i) the Minister was of the opinion that identity has not been, but may be, established; and ii) the Minister was making reasonable efforts to establish the Respondent's identity. The Member found, as the Immigration Division had consistently determined at every detention review except the initial 48-hour review, that the Respondent had reasonably cooperated with the identity investigation.

[12] Though the Member commented on the delays and lack of diligence in the Minister's identity investigation, I do not read their decision as concluding that the Minister had not made reasonable efforts and that therefore there was no ground for detention under subsection 58(1) of *IRPA*. The Member stated, "the Minister has made reasonable efforts to establish identity… However, I find the identity investigation has been lacking in several respects." The Member then goes on to consider the factors in section 248 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*IRPR*], which the Immigration Division only considers if it determines that there are grounds for detention. It is in this section 248 analysis that the Member relies on their findings about the CBSA's delays and lack of diligence in the identity investigation. The Member found that this factor—unexplained delays or lack of diligence caused by the department—weighed in favour of release, as did the length of time in detention, the uncertain length of time that detention is likely to continue because of the difficulties of verifying the identity of Somali nationals, and the existence of an alternative to detention through a bondsperson.

Procedural History of Stay Motion

[13] On April 18, 2023, the Minister wrote to this Court requesting a stay of the Immigration Division's Release Order on an interim basis while the Minister prepares the record for a full stay motion. Justice Gascon ordered an interim stay of the Release Order on April 19, 2023, setting the hearing of the stay motion for April 24, 2023. When this Court ordered the interim stay, two days after the Respondent was ordered released by the Immigration Division, the Respondent was in fact still in detention because one of the conditions of release remained outstanding.

[14] Following correspondence from the Minister regarding difficulties in obtaining the transcript of the detention review hearing from the Immigration Division and in serving the Minister's motion record on the Respondent, I rescheduled the hearing to April 25, 2023. The Respondent did not have counsel for the stay motion hearing and filed no responding motion record. On the morning of the stay motion hearing, on April 25, 2023, the Court received a letter from a counsel, advising that she had received confirmation from Legal Aid Alberta that morning that she had funding to represent the Respondent at the stay motion hearing. The Respondent's counsel was the same counsel who had last represented the Respondent before the Immigration Division. The Respondent's counsel asked that the stay motion be adjourned for approximately one week so that she could prepare a motion record.

[15] I addressed the Respondent's counsel's adjournment request at the beginning of the hearing. I noted that all of the detention review transcripts from the five proceedings before the Immigration Division were before me and that I had reviewed them all. I also noted that much of

the evidence that was before the Immigration Division was also before me and that counsel for the Respondent was familiar with the record as she had acted previously for the Respondent at the detention review hearing. Given the liberty interests at stake, I decided to hear from the Applicant, who was prepared to proceed, and proposed that we could address whether I needed submissions from the Respondent's counsel or whether the Respondent's counsel needed more time to prepare a response following the Applicant's submissions. The parties agreed with this approach.

[16] Following the Applicant's submissions, the Respondent's counsel advised that she felt prepared to respond to the submissions the Applicant made. I heard from the Respondent and from Applicant in reply. I advised the parties that I would reserve my decision. Later that day, on April 25, 2023, I issued an Order dismissing the Minister's motion for a stay of the Release Order. I advised the parties that detailed reasons for this decision would follow.

III. Issue

[17] The only issue raised on this stay motion is whether the Respondent has met the test for interlocutory injunctive relief: should the Court stay the Respondent's release from detention pending the Minister's application for leave and judicial review of the detention review decision that ordered his release?

[18] The well-established test for an interlocutory injunction, set out in *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311, requires the party seeking injunctive relief to demonstrate that: i) there is a serious issue to be tried; ii) a refusal to grant relief could

irreparably harm the moving party's interests; and iii) the balance of convenience favours granting the injunction. To succeed on a motion for an interlocutory injunction, a moving party needs to establish all three elements of the test (*Janssen Inc v Abbvie Corporation*, 2014 FCA 112 at para 14). The three factors are not "watertight compartments" operating independently of each other. Instead, motions judges are to take a flexible approach in considering the three factors, recognizing that in some cases the strength of one factor may compensate for the weakness of another (*Monsanto v Canada (Health)*, 2020 FC 1053 at para 50).

[19] The overall question that I need to decide is whether "granting the injunction would be just and equitable in all the circumstances of the case" (*Google Inc v Equustek Solutions Inc*, 2017 SCC 34 at para 1).

IV. Analysis

A. *Serious Issue*

[20] There is debate in our Court as to the legal test for serious issue where the Minister is seeking to stay an order releasing someone from detention. Justice Norris's decisions in *Canada (Minister of Public Safety and Emergency Preparedness) v Allen*, 2018 FC 1194 and *Canada (Minister of Public Safety and Emergency Preparedness*) *v Mohammed*, 2019 FC 451 apply an elevated threshold, requiring the applicant to show that they are likely to succeed in the underlying application for judicial review. Justice Zinn's decision in *Canada (Minister of Public Safety and Emergency Preparedness) v Asante*, 2019 FC 905 applies the usual lower threshold, requiring the applicant to show a serious issue that is not frivolous and vexatious.

[21] It is not necessary for me to decide this issue. Even on the low threshold, I do not find the Minister has established that there is a serious issue with the Member's decision.

(1) Justification for Departing from Previous Detention Review Decisions

[22] In *Brown v Canada (Minister of Citizenship and Immigration)*, 2020 FCA 130 [*Brown*], the Federal Court of Appeal clarified that the dicta in *Canada (Minister of Citizenship and Immigration) v Thanabalasingham*, 2004 FCA 4 to give "clear and compelling reasons" when departing from previous detention review decisions is not a "special rule for ID [Immigration Division] reviews," nor an excuse for a member to not consider afresh at each review whether continued detention is warranted as they are obligated to do (*Brown* at para 134). The Federal Court of Appeal held:

> The requirement to give reasons when departing from a prior decision is directed to the well-understood requirement, essential to the integrity of administrative and judicial decision making, that if there is a material change in circumstances or a re-evaluation of credibility, the ID is required to explain what has changed and why the previous decision is no longer pertinent (*Brown* at para 134).

[23] The Minister argues that the Member failed to justify departing from previous detention review decisions with respect to two issues: i) the suitability of the bondsperson; and ii) the Respondent's cooperation. There is no merit to this argument on either issue. The Member provided transparent, responsive, and intelligible justification on each of these issues.

(a) *Suitability of the Bondsperson*

[24] The bondsperson is the executive director of Somali community organization in Calgary. The CBSA put the Respondent in contact with this organization to assist with obtaining identity

documents from family members in Somalia. In January 2023, at the Respondent's first 30-day review, the bondsperson testified. At that time, the bondsperson had known the Respondent for a short period and proposed a $1,000 bond from a community fund at the organization. At the subsequent detention reviews in February 2023 and March 2023, the Respondent proposed the same bondsperson but the bondsperson did not testify. The Immigration Division members at both of those detention reviews found that the bondsperson was not a suitable alternative to detention because of the short time he had known the Respondent in these circumstances where the Respondent's identity had not yet been established.

[25] The bondsperson testified at length on April 5, 2023, as part of the five sittings of the April 2023 detention review. The bondsperson testified that he has been in contact with the Respondent since December 2022 and that he speaks to him approximately twice a week. He testified about his interactions with the Respondent's sister in Somalia. He also testified about his understanding of the confusion that has arisen about the Respondent's name and the use of nicknames. The bondsperson testified that, if the Respondent is released, he would bring the Respondent with him to the community centre everyday when he was working. He also testified that the Respondent could live with him and his family and that if the Respondent disappeared, he would notify the authorities.

[26] The bondsperson proposed a $3,000 bond using his own funds and a $2,000 guarantee. I note in the Minister's interim stay submissions and written motion record, the Minister argued that the bondsperson had proposed funds from a community fund at the organization where he worked. This is not accurate and in fact the increase of funds, the addition of a guarantee, and the

source of the funds were substantial differences between what was initially proposed at the first 30-day review and what was later proposed at the review before this Member. Further, more time had passed and accordingly there was evidence before the Member that the relationship between the bondsperson and the Respondent had further developed.

[27] There is no basis to find that the Member did not justify their decision to accept the bondsperson. The Member found the bondsperson's testimony to be credible. There were no previous negative credibility findings made against the bondsperson. The basis on which the Member found the bondsperson suitable is very clear from the decision. These findings are supported by the record and the transcript, including the lengthy testimony provided by the bondsperson on April 5, 2023.

(b) *Respondent's Cooperation*

[28] The Minister also argues that the Member did not explain their view that the Respondent reasonably cooperated, which departs from findings made on this issue by previous decision makers. There is no basis in the record for this argument. Other than the first 48-hour detention review, where the member did not specifically comment on the Respondent's level of cooperation, each of the subsequent reviews have consistently held that though the Respondent initially concealed his identity, he had since been cooperative. This is not a new finding made by this Member. This Member also had more evidence of the Respondent's continued cooperation with the Minister's identity investigation throughout March and part of April 2023.

(c) *Other Issues*

[29] I note that, in the Minister's written submissions on the stay motion, the Minister also argued that the Member did not explain what had changed when they ordered the continued detention of the Respondent on April 11, 2023, and then his release on April 17, 2023. In oral submissions, the Minster abandoned this argument, agreeing that there were no separate order or reasons for detention issued on April 11, 2023, but rather, as is very clear on the record, the April 2023 detention review took place over five sittings. April 11, 2023, was the third sitting and the matter resumed on April 13, 2023, and April 17, 2023, for further evidence and submissions. The Member issued the decision to release with detailed reasons on April 17, 2023.

(2) Shifting the Onus to Establish Identity

[30] The Minister argues that the Member's decision unreasonably shifts the onus on the Minister alone to determine the Respondent's identity. There is no merit to this argument. The Member sets out the relevant legal principles related to detention on identity grounds, including that "the obligation to establish one's identity rests first and always with the foreign national, and not the Minister." The Member explains in detail the various steps that the Respondent has taken to establish his identity, including consenting to CBSA's search of his electronic devices, participating in every interview with CBSA, contacting family members in Somalia, and having identity documents sent from Somalia to Canada.

[31] The Member notes that the Minister does not believe the Respondent's explanations about the use of nicknames or the reason the district instead of the small village is listed as his place of birth on one of the birth registrations. The Member finds that the Respondent can do

nothing more on those points given that CBSA has not provided any documentary evidence to contradict the Respondent's explanations for these alleged discrepancies. The Member also notes that the country condition evidence confirms the difficulties in confirming identity for Somali nationals. The Member cited the following evidence in their reasons: "Access to documentation is severely limited, prohibitive financially, and unclear administratively," that there is "no national system of registration, including birth registration or identity documents that may serve as documentary proof of national – nationality of Somalia," and that "authenticating documents [in Somalia] is impossible."

[32] The Member also reviewed the Minister's efforts as required both to evaluate the reasonableness of the Minister's efforts under subsection 58(1) of *IRPA* and whether there have been any unexplained delays or lack of diligence under section 248 of *IRPR*. The Member's findings about the Minister's lack of diligence and unexplained delays in the investigation is not evidence of the Member shifting the onus of proving identity to the Minister. There are no examples to support the Minister's broad assertion that the Member has unreasonably shifted the onus of proving identity on the Minister. This argument amounts to an assertion with no substance to support it.

(3) Other Arguments

[33] The Minister's other arguments taking issue with the Member's decision are simply framed as disagreements with how the Member chose to weigh a particular factor, with the Minister suggesting that more weight should have been placed on the Respondent's initial use of a fraudulent passport. For example, the Minister argues: "The Member's focus on the

Respondent's later cooperation detracts from the fact that the Respondent knowingly sought to defraud the immigration system." The Minister also argues: "the Member's reasoning in the April 17 transcript appears to be somewhat dismissive of the four months of diligent efforts by the Minister and unreasonably credits the Respondent for now cooperating despite his efforts to obfuscate the Minister at the outset." These are simply disagreements about the way the Member balanced the factors they had to consider. This is not a basis on which to seek judicial review.

[34] As set out above, the Member explained the basis for their finding that Respondent had been reasonably cooperative after initially providing false information. Moreover, the Member's evaluation of the Respondent's cooperation is consistent with the decisions made in the last three detention reviews. The Member also justified their findings with respect to delays and lack of diligence on the part of the Minister. There is no basis to find a serious issue on these arguments.

V. Conclusion

[35] Based on the evidence before me, which includes the transcripts of all of the previous detention reviews, I do not find that there is any serious issue raised with the Member's decision. Even if the Minister had established a serious issue, the Minister's arguments on irreparable harm are speculative. The Minister has failed to "adduce clear and non-speculative evidence that irreparable harm will follow if the stay is refused" (*Canada (Minister of Public Safety and Emergency Preparedness) v Erhire*, 2021 FC 908 at para 36 [*Erhire*]).

[36] For example, the Minister noted twice in their interim stay submissions and again in their stay motion materials and oral argument that there may be a connection between the Respondent

and the terrorist group Al-Shabaab. The Minister suggested that this possible connection is a basis for finding that dismissing the stay could result in irreparable harm. As the Minister confirmed at the stay motion hearing, the Minister's only basis for this concern is a CBSA interview with the Respondent one day after his arrival, where he explained that the agent of persecution he fears is Al-Shabaab because they killed his father and his brother. The Respondent has been detained for over four months and interviewed on numerous occasions by CBSA. The issue of his connection to Al-Shabaab is not pursued in any of these interviews. The Minister's reasoning suggests that merely mentioning a terrorist group, even as an agent of persecution in your asylum claim, is a basis to speculate about a possible connection, and that this speculation is a sufficient basis to find irreparable harm if the stay of a release order is not granted. This highly speculative exercise that is not grounded in evidence cannot be a sufficient basis to find irreparable harm.

[37] Further, in considering the balance of convenience, in addition to the public interest in ensuring the integrity of immigration proceedings, I also have to consider the public interest in the enforcement of the release order and the Respondent's own liberty interests. As noted by Justice Norris, "a loss of liberty for any amount of time is still a weighty consideration: see R v Hall, 2002 SCC 64 at para 47; and R v Penunsi, 2019 SCC 39 at para 68" (*Erhire* at para 45). The Respondent's liberty interests carry significant weight, both as a private interest in ending his detention and as part of the public interest in "ensuring that any deprivation of liberty is justified" (*Erhire* at para 44; *Canada (Minister of Public Safety and Emergency Preparedness) v Kalombo*, 2020 FC 793 at paras 57-62; *Canada (Minister of Public Safety and Emergency Preparedness) v Santiago Cruceta*, 2022 FC 1629 at para 7).

[38] Accordingly, I find that granting a stay would not be “just and equitable in all the circumstances of the case”. I am not satisfied that the Minister has established that a stay ought to be ordered.

THIS COURT’S JUDGMENT is that:

The Applicant’s motion for stay of release is dismissed.

"Lobat Sadrehashemi"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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