Date: 20081202

Docket: IMM-2059-08

Citation: 2008 FC 1337

Ottawa, Ontario, December 2, 2008

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Applicant

and

ANDRAL LOISEAU

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Preliminary

[1] The applicant has filed numerous documents that were not in evidence before the Immigration Division of the Immigration and Refugee Board (Immigration Division) on April 10, 2008.

II. Introduction

[2] This Court has already determined that where the Immigration Division does not order continued detention of a person because it erroneously believes that the person is already detained, the order must be quashed:

> [12] In my view, I need not deal with the interpretation of section 128 of the CCRA. It is clear that the tribunal member did not order continued detention because he was of the view that the respondent would be detained in a federal penitentiary in any event. That was not the case. In arriving at his finding, the tribunal member ignored the initial approval of the respondent's day parole. He ignored the January 25, 2003 day parole eligibility document. He chose to ignore the evidence as to the manner in which CSC approached the issue of day parole for those sentenced prior to June 28, 2002. He ignored the contents of the case management bulletin that was before him. He ignored the fact that, despite his own views as to the interpretation of section 128 of the CCRA, the respondent would be day paroled on January 25th. He erroneously concluded that the respondent would be detained by CSC despite the overwhelming evidence to the contrary that was before him.
>
> [13] Having reached this erroneous finding of fact, the tribunal member then based his decision upon it. I conclude that the finding was patently unreasonable and was made in a perverse or capricious manner. The finding taints the decision. I therefore allowed the application for judicial review and remitted the matter back for redetermination before a different member of the Immigration Division of the Immigration and Refugee Board by order dated July 8, 2003.

(*Canada (Minister of Citizenship and Immigration) v. Ambrose*, 2003 FC 865, 124 A.C.W.S. (3d) 757, by Madam Justice Carolyn Layden-Stevenson)

[3] It is recognized that new evidence that was not before a tribunal or court cannot be used in a judicial review of a decision of the tribunal or court in question:

> [15] In my respectful view, the same principle is applicable in this Court. The essential purpose of judicial review is the review of decisions, not the determination, by trial de novo, of questions that were not adequately canvassed in evidence at the tribunal or trial court. The latter is what the applicant is inappropriately proposing for this judicial review. This is not the necessity to which Lord Sumner was referring in *Nat Bell Liquors, supra*. The Court will not entertain new evidence in these circumstances.

(*Gitxsan Treaty Society v. Hospital Employees Union*, [2000] 1 F.C. 135 (F.C.A.), [1999] F.C.J. No. 1192 (QL).)

[4] In *Basha v. Canada (Minister of Citizenship and Immigration)* (1999), 86 A.C.W.S. (3d) 394, [1999] F.C.J. No. 207 (QL), Mr. Justice Jean-Eudes Dubé set out the principle as follows:

> [2] The Order in question of McGillis J. is the standard order used by the Court when granting leave to commence an application for judicial review. It does not mean, of course, that any and all affidavits may be served and filed by either the applicant or the respondent. The affidavits must be relevant and must not be used by the applicant for the purpose of introducing into the record evidence which was not before the tribunal when it rendered its decision. And the affidavits may not relate to events which took place in the country of origin, or elsewhere, after the hearing by the board. Nadon J. of this Court explained in a nutshell the rationale for that basic principle in *Asafov c. M.E.I.*, (IMM-7425-93) dated May 18, 1994
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> > The purpose of the judicial review process is to examine the tribunal's decision in the light of the evidence adduced before it at the hearing and to decide whether or not there are grounds for review. From that perspective, the evidence which the Applicants now seek to introduce is irrelevant. By granting this application, I would be transforming the judicial review process into that of an appeal.

(Also, *Asafov v. Canada (Minister of Employment and Immigration)* (1994), 48 A.C.W.S. (3d) 623, [1994] F.C.J. No. 713 (QL); *Zolotareva v. Canada (Minister of Citizenship and Immigration)*, 2003 F.C. 1274, 241 F.T.R. 289; *Naredo v. Canada (Minister of Citizenship and Immigration)*, [1997] 3 F.C. 468, 132 F.T.R. 281; *Lemiecha (Litigation Guardian of) v. Canada (Minister of Employment and Immigration)* (1994), 72 F.T.R. 49, 24 Imm. L.R. (2d) 95)

[5] The applicant is claiming that, in the case at bar, the evidence thus adduced by the respondent is not admissible and cannot be considered by the Court in this judicial review.

III. Legal proceeding

[6] This is an application for judicial review of a decision dated April 10, 2008, by the Immigration Division (Record of Proceedings (decision part only) (RP) dated April 10, 2008: Applicant's Record (AR) at pp. 6-11; Release Order dated April 10, 2008: AR at pp. 11A-11B).

[7] By this decision, the Board ordered the release of the respondent subject to the conditions set out in its order, including the condition of remaining at the Institut Philippe-Pinel de Montréal, the condition of submitting his medical reports to the applicant through his designated representative, and the condition of notifying the applicant, through his designated representative, of the end of his treatment. It should be noted that the respondent is currently being treated at the Institut Philippe-Pinel de Montréal for psychotic schizophrenia and is inadmissible on grounds of serious criminality (Release Order dated April 10, 2008, *supra*; RP dated April 10, 2008, *supra*).

[8] The mandate of the representative designated by the Immigration Division under subsection 167(2) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA), ended with the proceedings for which he was designated.

[9] Consequently, since the designated representative no longer has a mandate under the IRPA, he has no obligation to keep the applicant informed of the end of the respondent's treatment.

[10] Finally, since the defendant is not being "detained" at the Institut Philippe-Pinel but rather is an "inpatient", the Immigration Division could not order him to remain there because only the Superior Court has the jurisdiction to order forced treatment, and the Superior Court can vary its order at any time without notifying the applicant.

[11] The conditions imposed by the Immigration Division on April 10, 2008, are therefore not valid and must be modified.

IV. Facts

[12] On September 2, 2007, the respondent, Mr. Andral Loiseau, was arrested for investigation because there were reasonable grounds to believe that he was a permanent resident inadmissible on grounds of serious criminality for having been convicted of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least ten years (Notice of Arrest: Exhibit A of the affidavit of Francine Lauzé: AR at p.15; RP dated September 4, 2007: Exhibit B of the affidavit of Francine Lauzé: AR at pp. 17-19).

[13] The description of Mr. Loiseau's criminal record in the Record of Proceedings (decision part only) dated September 4, 2007, which covers a period of five years (2002 to 2007), reveals an escalation in offences and convictions (RP dated September 4, 2007, *supra*; RP dated October 2, 2007: Exhibit E of the affidavit of Francine Lauzé: AR at pp. 32-34).

[14] At the detention reviews that followed Mr. Loiseau's arrest, the panel reviewing the applicant's reasons for the detention continued the detention because Mr. Loiseau posed a flight risk and a danger to Canadian society if released (RP dated September 4, 2007, *supra*; RP dated September 11, 2007; Exhibit C of the affidavit of Francine Lauzé: AR at pp. 21-28; RP dated October 2, 2007, *supra*).

[15] After the hearing of September 11, 2007, a representative was automatically designated under subsection 167(2) of the IRPA to represent Mr. Loiseau (RP dated September 11, 2007, *supra*; RP dated October 2, 2007, *supra*).

[16] On October 2, 2007, the Immigration Division issued a deportation order against Mr. Loiseau (deportation order; Exhibit D of the affidavit of Francine Lauzé: AR at p. 30).

[17] On October 16, 2007, the respondent filed with the Immigration Appeal Division a notice of appeal from the deportation order and, on January 16, 2008, the Immigration Appeal Division prepared a notice ordering Mr. Loiseau to appear on April 11, 2008 (Notice of Appeal: Exhibit F of the affidavit of Francine Lauzé: AR at pp. 36-37; Notice to Appear: Exhibit G of the affidavit of Francine Lauzé: AR at p. 39).

[18] On February 1, 2008, Mr. Loiseau, who was then being detained for immigration purposes at the Rivière-des-Prairies detention centre, was admitted as a patient at the Institut Philippe-Pinel de Montréal further to the psychiatric assessments of Dr. Louis Morissette and Dr. Jacques Talbot

(letter of Dr. Jacques Talbot dated March 12, 2008: Exhibit J of the affidavit of Francine Lauzé: AR at pp. 49-51).

[19] On February 12, 2008, the Institut Philippe-Pinel de Montréal obtained from the Superior Court of Quebec a judgment ordering

a. that the respondent submit to psychiatric treatment;
b. that the treatment be initially started on an inpatient basis at the Institut Philippe-Pinel de Montréal;
c. that the suggested treatment be established in a generalized manner with regard to the entire hospital environment and any physician treating the respondent;
d. that eventually the treatments continue in any other health institution in the province of Quebec that accepts the respondent for the entire duration of the order, whether on an inpatient or outpatient basis.

(Superior Court judgment: Exhibit H of the affidavit of Francine Lauzé: AR at pp. 41-43)

[20] At the detention review of February 13, 2008, the Immigration Division was informed of the steps taken by the Institut Philippe-Pinel de Montréal to obtain a judgment from the Superior Court of Quebec (RP dated February 13, 2008: Exhibit I of the affidavit of Francine Lauzé: AR at pp. 46-47).

[21] On March 13, 2008, the Immigration Division refused to review the detention on the ground that it had lost jurisdiction further to the Superior Court order (RP dated March 13, 2008: Exhibit K of the affidavit of Francine Lauzé: AR at pp. 53-56).

[22] Further to the order dated April 1, 2008, of Mr. Justice Orville Frenette of the Federal Court in docket IMM-1239-08 stating that the Immigration Division had not lost jurisdiction and ordering it to review the detention of Mr. Loiseau on April 10, 2008, the Division ordered Mr. Loiseau's release on the following conditions:

a. the respondent must remain at the Institut Philippe-Pinel de Montréal for inpatient treatment;
b. the respondent must advise a Canada Border Services Agency (CBSA) officer, through **his designated representative**, Mr. Robert Naylor, as soon as the attending physician decides to terminate his inpatient treatment at the Institut Philippe-Pinel;
c. the respondent must submit to a CBSA officer, **through his designated representative**, any written medical report available on the treatments administered and the effects of the said treatment on Mr. Loiseau;
d. the respondent must comply with the order of the Superior Court issued on February 12, 2008 (500-17-041014-088).

(Release Order dated April 10, 2008, *supra*)

[23] On April 11, 2008, the appeal brought by Mr. Loiseau before the Immigration Appeal Division was heard, but no decision has yet been made (e-mail dated June 2, 2008: Exhibit L of the affidavit of Francine Lauzé: AR at p. 58).

[24] On April 17, 2008, Mr. Naylor, designated representative of Mr. Loiseau, sent to the Immigration Appeal Division a letter indicating what, in his opinion, was his mandate for a period of one year starting from April 11, 2008 (letter dated April 17, 2008: Exhibit M of the affidavit of Francine Lauzé: AR at pp. 60- 61).

[25] The applicant claims that Robert Naylor, who was designated as the respondent's representative by the Immigration Division, has no legal mandate to represent the respondent since the proceedings before the Division are ended. Consequently, the conditions imposed on April 10, 2008, by the order of the Immigration Division became null and void when the Immigration Division made its decision.

[26] In addition, the undertaking of the designated representative filed with the Immigration Appeal Division will also be null and void with respect to the Immigration Appeal Division when it disposes of the respondent's appeal.

[27] The Immigration Division does not have jurisdiction to order the respondent to remain at the Institut Philippe-Pinel de Montréal for inpatient treatment.

[28] Finally, the Immigration Division released the respondent, erroneously believing that the respondent was being detained at the Institut Philippe-Pinel de Montréal.

V. Analysis

A. Relevant provisions

[29] Under the IRPA, the Immigration and Refugee Board has the discretion to automatically designate a representative for a person who is unable to appreciate the nature of the proceedings before one of the Board's divisions:

PART 4	PARTIE 4
IMMIGRATION AND REFUGEE BOARD	COMMISSION DE L'IMMIGRATION ET DU STATUT DE RÉFUGIÉ
…	[...]
PROVISIONS THAT APPLY TO ALL DIVISIONS	ATTRIBUTIONS COMMUNES
…	[...]
Right to counsel	**Conseil**
167. (1) Both a person who is the subject of Board proceedings and the Minister may, at their own expense, be represented by a barrister or solicitor or other counsel.	**167.** (1) L'intéressé peut en tout cas se faire représenter devant la Commission, à ses frais, par un avocat ou un autre conseil.
Representation	**Représentation**
(2) If a person who is the subject of proceedings is under 18 years of age or unable, in the opinion of the applicable	(2) Est commis d'office un représentant à l'intéressé qui n'a pas dix-huit ans ou n'est pas, selon la section, en mesure

Division, to appreciate the nature of the proceedings, the Division shall designate a person to represent the person.	de comprendre la nature de la procédure.

B. Application of the IRPA

1. Designated representative

[30] When at the hearing of September 11, 2007, the Immigration Division noted that the Mr. Loiseau was unable to appreciate the nature of the proceedings before the Division, **primarily the detention review**, the Immigration Division designated Mr. Naylor to represent Mr. Loiseau for the purposes of the proceedings.

[31] It follows that the only mandate that the Immigration Division could confer on Mr. Naylor is that of representing Mr. Loiseau during the proceedings before the Immigration Division.

[32] Mr. Naylor is not a curator to a person of full age appointed under the *Civil Code of Québec*, S.Q. 1991, c. 64.

[33] In addition, the undertakings set out in the letter sent by Mr. Naylor to the Immigration Appeal Division on April 17, 2008, cannot confer, with respect to the Immigration Division, a jurisdiction that is not provided for in the IRPA.

[34] At most, this letter enables the Immigration Appeal Division to recognize Mr. Naylor as the representative designated for the purposes of the proceedings pending before the Immigration

Appeal Division, namely, the appeal from the removal order, and for as long as the Immigration Appeal Division has not determined the appeal.

[35] Consequently, the Release Order does not provide any valid mechanism to ensure that the interested stakeholder is kept informed of the progress of Mr. Loiseau's treatment, including the possibility of his physicians deciding that his treatment could be continued on an outpatient basis.

2. Jurisdiction of the Immigration Division

[36] The Immigration Division has no jurisdiction to order Mr. Loiseau to remain at the Institut Philippe-Pinel de Montréal or to submit to any treatment.

[37] This jurisdiction lies exclusively with the Superior Court of Quebec under the *Civil Code of Québec*.

[38] In addition, the decision to keep Mr. Loiseau in treatment at the Institut Philippe-Pinel de Montréal is the responsibility of his attending physicians, the institute and the Superior Court.

[39] Neither the Superior Court nor his physicians are obliged to keep the applicant informed in the event of a variation in the treatment order, which the Immigration Division recognized when it found that it could not impose obligations on the attending physician.

3. Respondent is not being detained at the Institut Philippe-Pinel

[40] The Immigration Division erred in believing that Mr. Loiseau is being detained at the Institut Philippe-Pinel, even if he is not free to come and go.

[41] The Superior Court judgment is not a confinement order within the meaning of articles 26 and following of the *Civil Code of Québec* or of the *Act respecting the protection of persons whose mental state presents a danger to themselves or to others*, R.S.Q., c. P-38.001, nor a detention of Mr. Loiseau for immigration purposes.

[42] Moreover, when Mr. Loiseau was admitted to the Institut Philippe-Pinel de Montréal on February 1, 2008, he was under a detention order for immigration purposes and was being detained at the Rivière-des-Prairies detention centre. This order was continued on February 13, 2008. This obviated the need to obtain a confinement order under the *Civil Code of Québec* or the *Act respecting the protection of persons whose mental state presents a danger to themselves or to others*.

[43] This Court has already determined that where the Immigration Division does not order continued detention of a person because it erroneously believes that the person is already detained, the order must be quashed:

> [12] In my view, I need not deal with the interpretation of section 128 of the CCRA. It is clear that the tribunal member did not order continued detention because he was of the view that the respondent would be detained in a federal penitentiary in any event. That was not the case. In arriving at his finding, the tribunal member ignored the initial approval of the respondent's day parole. He ignored the January 25, 2003 day parole eligibility document. He chose to ignore the evidence as to the manner in which CSC approached the issue of day parole for those sentenced prior to June 28, 2002. He ignored the contents of the case

> management bulletin that was before him. He ignored the fact that, despite his own views as to the interpretation of section 128 of the CCRA, the respondent would be day paroled on January 25th. He erroneously concluded that the respondent would be detained by CSC despite the overwhelming evidence to the contrary that was before him.
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> [13] Having reached this erroneous finding of fact, the tribunal member then based his decision upon it. I conclude that the finding was patently unreasonable and was made in a perverse or capricious manner. The finding taints the decision. I therefore allowed the application for judicial review and remitted the matter back for redetermination before a different member of the Immigration Division of the Immigration and Refugee Board by order dated July 8, 2003.

(*Ambrose*, *supra*, by Layden-Stevenson J.)

VI. Conclusion

[44] For all of these reasons, the application for judicial review is allowed. The decision made by the Immigration Division of the Immigration and Refugee Board is set aside and the matter is referred to a differently constituted panel.

JUDGMENT

THE COURT ORDERS that the application for judicial review is allowed and the matter is referred to a differently constituted panel for redetermination.

"Michel M.J. Shore"

Judge

Certified true translation
Susan Deichert, LLB

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2059-08
STYLE OF CAUSE:	THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS v. ANDRAL LOISEAU
PLACE OF HEARING:	Montréal, Quebec
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