Federal Court  Cour fédérale

Date: 20100416

Docket: IMM-3719-09

Citation: 2010 FC 392

Ottawa, Ontario, April 16, 2010

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

ANDREA J. WALKER

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to section 72 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) of a decision of the Immigration Division of the Immigration and Refugee Board of Canada dated July 10, 2009 wherein it was ordered that the applicant remain in detention.

[2] Although the applicant has had several detention review hearings since the July 10, 2009 date which have resulted in his continued detention, he has chosen to seek judicial review of that decision, arguing that the Board made several errors in assessing his case and asserting that his rights under sections 7 and 12 of the *Canadian Charter of Rights and Freedoms* have been violated.

[3] These are my reasons for determining that the application will be allowed.

Background

[4] Mr. Walker, the applicant, is not a Canadian citizen or a permanent resident.

[5] The applicant was arrested, charged and found guilty of possession of crack cocaine in September, 2006. Through this criminal conviction, he was brought to the attention of Canadian immigration authorities and was found to be criminally inadmissible to Canada.

[6] The applicant has been held on an immigration warrant since September 20, 2006 and has been granted periodic detention reviews in accordance with the IRPA.

[7] The applicant claims to be an American citizen born in the State of Delaware. Following his arrest and detention, he was interviewed by American officials with a view to arrangements being made for his deportation to that country. He had in his possession a Delaware birth certificate and a United States passport. U.S. officials have determined that the applicant is not a U.S. citizen.

[8] According to a U.S. State Department memorandum in the record, it was noted that the applicant spoke with a “thick Caribbean or French sub-Saharan accent,” that he appeared older than the 33 years of age claimed in his birth certificate, and that there were no records of earnings for him in US social security databases. He was unable or unwilling to provide verifiable details of where he purports to have lived in the U.S. as a child and youth. As an adult, he claims to have worked in the merchant marine “all over the world”. The applicant has acknowledged using an alias, and admitted to another conviction for a drug offence in the U.S. under a different name. He is fluent in French, an ability for which he has offered various implausible explanations.

[9] Canadian officials share the view of their U.S. counterparts that the applicant is not whom he claims to be. They have made numerous attempts to ascertain the applicant’s identity, including contacting Haitian authorities with the applicant’s finger prints and making inquiries as to whether he could be a citizen of an African country. Without the applicant’s cooperation, immigration officials have not been successful in confirming the applicant’s identity.

[10] The applicant has been detained for three years on the ground that he is unlikely to appear for immigration proceedings.

[11] At issue is the July 10, 2009 decision ordering that the applicant remain in detention. Since then, the applicant has had several more detention review hearings. Every 30 days, another detention review hearing takes place and another detention decision is rendered.

Decision Under Review

[12] In the detention review under consideration, the applicant's 38th review, the member determined that the applicant's continued detention was required.

[13] The member noted that detention in this case is pursuant to paragraph 58(1)(b) of the IRPA and is maintained in order to ensure compliance. It was stated that a person is released normally when an alternative to their detention is put forward that ensures their compliance. The member accepted that indefinite detention under the IRPA can, in some cases, amount to a violation of section 7 and section 12 of the *Charter*.

[14] Noting that he was not in a position to go behind the decision of the U.S. Government finding that the applicant was not a U.S. citizen, the member accepted that decision as the most persuasive evidence that the applicant is not a national of the U.S. and is being untruthful with regards to his identity.

[15] Under section 7 of the *Charter*, the member found that an argument could be made if the applicant had revealed his true identity and was fully cooperating with obtaining travel documents. The member was of the view that the applicant purposely hid his true identity to prevent his removal from Canada and has done so for the past three years. The member further found that the applicant

demonstrated quite clearly that he was unwilling to comply with the removal order which has been issued against him. As such, the grounds of detention that he is a flight risk are firmly established.

[16] The member also found that the applicant's detention was not indefinite. It was stated that if the applicant was to reveal his true identity and work with the authorities to get a travel document, then his removal could possibly be administered. In this case, it was found that the applicant has the power to make a decision, cooperate with the authorities, and shorten the length of time in detention. By not cooperating, the delay which is being caused – and the increased time in detention - rests with the applicant, and this factor was found not to favour his release from detention.

[17] The member also noted that even as the applicant does not cooperate, he still has liberty rights. However, the primary concern of the member when issuing a release order for someone who is in detention as a flight risk is to ensure compliance. In this case, it was found that the applicant is in front of the Immigration Division without clean hands and is the primary cause of his lengthy period of time in detention.

[18] Given the level of non-compliance exhibited by the applicant, the member did not believe that imposing the condition of electronic monitoring proposed by counsel would be enough to ensure compliance.

[19] The member found that the applicant has no intention of ever being removed from Canada. It was determined that the applicant could remove the electronic monitoring bracelet at any time if he wished and thwart the Canada Border Services Agency's (CBSA) attempts to remove him.

[20] As such, the member found the alternative of electronic monitoring insufficient to ensure compliance.

Issues

[21] In this case, while sections 7 and 12 of the *Charter* have been invoked, there is an insufficient factual record on which to determine whether these provisions have been infringed or whether the infringement would be justified under section 1: *Mackay v. Manitoba*, [1989] 2 S.C.R. 357, [1989] S.C.J. No. 88, at pages 361 and 362. It is also well-established that the Court should avoid making any unnecessary constitutional pronouncement when the matter may be otherwise disposed of: *Tremblay v. Daigle*, [1989] 2 S.C.R. 530, [1989] S.C.J. No. 79, at page 571.

[22] Thus, in my view, the sole issue is whether the Immigration Division member erred as a matter of administrative law when he ordered the applicant's continued detention on July 10, 2009?

Analysis

[23] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] S.C.J. No. 9, the Supreme Court of Canada abandoned the patent unreasonableness standard leaving only two standards of review, correctness and reasonableness. The Supreme Court also held that a standard of review analysis need not be conducted in every instance. Where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review.

[24] As Justice Mandamin explained in *Panahi-Dargahlloo v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 1114, [2009] F.C.J. No. 1670, at paras. 21-22, I am also of the view that detention review decisions are fact-based decisions which attract deference. As such, the standard of review is reasonableness. For questions of law, the standard is correctness.

> **21** In *Canada (Minister of Citizenship and Immigration) v. Thanabalasingham*, 2003 FC 1225 at paras. 38 to 59, Justice Gauthier considered the standard of review for immigration detention reviews by the Immigration Division. She conducted a pragmatic and functional analysis and found the standard of patent unreasonableness applied. Justice Rothstein writing for the Federal Court of Appeal in *Canada (Minister of Citizenship and Immigration) v. Thanabalasingham*, 2004 FCA 4, at para. 10 (*Thanabalasingham* FCA) confirmed that detention review decisions are fact-based decisions which attract deference.
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> **22** Other than questions of law, the standard of review applicable to this case is that of reasonableness.

[25] The Immigration Division's analysis is central to its role as a trier of fact. As such, the Division's findings are to be given significant deference by the reviewing Court. The Division's findings should stand unless its reasoning process was flawed and the resulting decision falls outside the range of possible, acceptable outcomes which are defensible in respect of the facts and the law: *Dunsmuir*, above, at para. 47.

[26] In a case such as this one, there might be more than one reasonable outcome. However, as long as the process adopted by the Immigration Division and its outcome fits comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome: *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] S.C.J. No. 12, at para. 59.

[27] In this case, I am of the opinion that the member erred as he did not consider the question of the length of detention choosing instead to focus on the cause for the continuing detention: *Panahi-Dargahlloo*, above, at para. 49.

[28] In *Sahin v. Canada (Minister of Citizenship and Immigration)* (T.D.), [1995] 1 F.C. 214, [1994] F.C.J. No. 1534, Mr. Justice Rothstein listed four factors that may trigger section 7 of the *Charter* in such a case. At paragraph 30, he states the second factor entitled "length of time in detention and length of time detention will likely continue:"

> **30** I expect that as precedents develop, guidelines will emerge which will assist adjudicators in these difficult decisions. To assist adjudicators I offer some observations on what should be taken into account by them. Both counsel for the applicant and respondent were helpful in suggesting a number of considerations. The following list, which, of course, is not exhaustive of all considerations, seems to me to at least address the more obvious ones. Needless to say, the considerations relevant to a specific case, and the weight to be placed upon them, will depend upon the circumstances of the case.
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> …
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> (2) Length of time in detention and length of time detention will likely continue. If an individual has been held in detention for some time as in the case at bar, and a further lengthy detention is anticipated, or if future detention time cannot be ascertained, I would think that these facts would tend to favour release. [My Emphasis]

[29] This second factor enumerated by Justice Rothstein is now reflected in section 248 of the Regulations. Section 248 requires the member, after finding that there are grounds for detention, to consider the length of detention and alternatives to detention. In this case, Member Adamidis considered the proposed alternative to detention in this case, an electronic monitoring bracelet, and found Mr. Walker's proposal inadequate: *Panahi-Dargahlloo*, above, at para. 46.

[30] I accept the respondent's submissions that the applicant is not whom he claims to be and that he has been uncooperative in refusing to reveal his true identity, that his detention has been caused by his failure to reveal his true identity, and that to find the member's decision unreasonable in this case could be said "to encourage deportees to be as uncooperative as possible as a means to circumvent Canada's refugee and immigration system:" *Canada (Minister of Citizenship and Immigration) v. Kamail*, 2002 FCT 381, [2002] F.C.J. No. 490, at para. 38.

[31] However, section 248 of the Regulations adds the length of detention as a consideration to be taken into account even if the person detained is considered to be a flight risk, as in this case. The length of the applicant's detention has to be considered against other factors besides his refusal to cooperate with Immigration Officials and to reveal his true identity. These other factors would include the immigration status of the applicant, the fact that this was the 38th detention review, the passage of time since his last criminal conviction, etc. I am of the view from a close reading of the member's reasons that the 3-year detention of the applicant was not considered against these factors: *Panahi-Dargahlloo*, above, at para. 50.

[32] Reaching a conclusion similar to that of my colleague Justice Mandamin in *Panahi-Dargahlloo*, above, at para. 51, I find that the member's failure to consider the length of the applicant's detention in his assessment of whether or not to continue with detention was unreasonable and outside of the range of possible and acceptable outcomes: *Dunsmuir*, above, at para. 47.

[33] As I find the decision to be unreasonable, it is open to this reviewing court to substitute its own view of a preferable outcome: *Dunsmuir*, above, at para. 47; *Khosa*, above, at para. 59. Accordingly, this application will be allowed.

[34] The parties were given an opportunity to propose questions for certification. As set out in paragraph 74(d) of the IRPA and Rule 18(1) of the *Federal Courts Immigration and Refugee Protection Rules* / SOR 93-22, as amended, there can be no appeal of this decision if the Court does not certify a question. In *Zazai v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 89, [2004] F.C.J. No. 368, the threshold for certification was articulated by the Federal Court of Appeal as: "is there a serious question of general importance which would be dispositive of an appeal" (paragraph 11).

[35] In *Kunkel v. Canada (Minister of Citizenship and Immigration)*, 2009 FCA 347, [2009] F.C.J. No. 170, at para. 8, citing its 2006 decision in *Boni v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 68, [2006] F.C.J. No. 275, at para.10, the Federal Court of Appeal

determined that a certified question must lend itself to a generic approach leading to an answer of general application. That is, the question must transcend the particular context in which it arose.

[36] The applicant submitted the following question for certification:

> Where identity cannot be established, can a person be indefinitely detained?

[37] The respondent opposes certification of this question on the ground that it does not arise from the facts of this case as the applicant has not been indefinitely detained and the question would not be dispositive of an appeal. The respondent does not propose a question for certification.

[38] I agree with the respondent that on the facts of this case it has not as yet been determined that the applicant is being indefinitely detained. I am also of the view, as indicated above, that the question would not be dispositive of an appeal in this matter on *Charter* grounds as an adequate foundation has not been established. Accordingly, I decline to certify the question.

JUDGMENT

IT IS THE JUDGMENT OF THIS COURT that this application is allowed and the matter is remitted to the Board for consideration by a differently constituted panel. No question is certified.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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