Federal Court  Cour fédérale

Date: 20110216

Docket: IMM-3740-10

Citation: 2011 FC 185

Ottawa, Ontario, February 16, 2011

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Applicant

and

COLLINS KWESI GYEKYE

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application by the Minister for judicial review of a decision of the Immigration Division of the Immigration and Refugee Board (the Board), dated June 29, 2010, ordering the respondent's release from immigration detention pending deportation, pursuant to section 58 of the *Immigration and Refugee Protection Act*, S.C. 2001, c.27 (the Act).

[2] The application is now moot because the respondent was deported on November 9, 2010. Nevertheless, the applicant requests that this Court exercise its discretion to hear the application.

FACTS

Background

[3] The respondent is a citizen of Ghana who arrived in Canada in 1994, at the age of 11, and became a permanent resident. In the ensuing years he amassed a substantial record of criminal convictions, including for theft, assault, and failing to comply with probation, recognisance and appearance orders.

[4] On January 5, 2005, an inadmissibility report was written pursuant to section 44(1) of the Act based on the respondent's conviction of the crime of mischief over $5000, under section 430(3) of the *Criminal Code of Canada*. On November 24, 2005, the respondent was found inadmissible in his admissibility hearing and a deportation order was issued.

[5] The respondent appealed the deportation order. On April 25, 2008, the Immigration Appeals Division of the Immigration and Refugee Board found that the order was valid in law but granted a four-year stay, with conditions, on the basis of humanitarian and compassionate considerations.

[6] On January 12, 2010, the respondent was convicted and incarcerated under section 348(1)(b) of the *Criminal Code of Canada* for breaking and entering with intent.

[7] Section 68(4) of the Act provides that a stay of the Immigration Appeal Division will cancel by operation of law if the subject is convicted of one of the offences referred to in subsection 36(1)

of the Act. On April 28, 2010, the stay was terminated by operation of law as a result of the respondent's conviction, and his appeal was terminated. The 2005 deportation order therefore became enforceable and reactivated.

[8] The respondent was incarcerated as an "immigration hold" on June 19, 2010. On June 22, 2010, the Board held a detention review hearing at which the respondent was ordered to be held in custody because he was a flight risk.

[9] On June 29, 2010, a second detention review hearing was held, at which the Board ordered that the respondent be released from custody pending his removal. It is this decision that is before this Court.

[10] The applicant immediately sought and received a stay of the June 29 release order, which was subsequently extended three times, to last until August 24, 2010.

[11] On July 27, 2010, a third detention review hearing was held and the Board determined that the respondent should be kept in custody.

[12] The Board conducted three more detention review hearings, on August 24, September 22, and October 20, 2010. At all three hearings the respondent was ordered to remain in custody.

[13] The respondent was removed on November 9, 2010.

LEGISLATION

[14] Section 58 of the Act provides for the release or detention of persons detained under Part 1, Division 6 of the Act:

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 or for violating human or international rights; or (d) the Minister is of the opinion that the identity of the foreign national 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.	58. (1) La section prononce la mise en liberté du résident permanent ou de l'étranger, sauf sur preuve, compte tenu des critères réglementaires, de tel des faits suivants : a) le résident permanent ou l'étranger constitue un danger pour la sécurité publique; b) le résident permanent ou l'étranger se soustraira vraisemblablement au contrôle, à l'enquête ou au renvoi, ou à la procédure pouvant mener à la prise par le ministre d'une mesure de renvoi en vertu du paragraphe 44(2); c) le ministre prend les mesures voulues pour enquêter sur les motifs raisonnables de soupçonner que le résident permanent ou l'étranger est interdit de territoire pour raison de sécurité ou pour atteinte aux droits humains ou internationaux; d) dans le cas où le ministre estime que l'identité de l'étranger n'a pas été prouvée mais peut l'être, soit l'étranger n'a pas raisonnablement coopéré en fournissant au ministre des renseignements utiles à cette fin, soit ce dernier fait des efforts valables pour établir l'identité de l'étranger.
(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	(2) La section peut ordonner la

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.	mise en détention du résident permanent ou de l'étranger sur preuve qu'il fait l'objet d'un contrôle, d'une enquête ou d'une mesure de renvoi et soit qu'il constitue un danger pour la sécurité publique, soit qu'il se soustraira vraisemblablement au contrôle, à l'enquête ou au renvoi.
(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.	(3) Lorsqu'elle ordonne la mise en liberté d'un résident permanent ou d'un étranger, la section peut imposer les conditions qu'elle estime nécessaires, notamment la remise d'une garantie d'exécution.

[15] Section 245 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the Regulations), sets out the prescribed factors to be taken into account regarding whether a detained person constitutes a flight risk:

245**.** For the purposes of paragraph 244(*a*), the factors are the following:	245**.** Pour l'application de l'alinéa 244*a*), les critères sont les suivants :
(*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;	*a*) la qualité de fugitif à l'égard de la justice d'un pays étranger quant à une infraction qui, si elle était commise au Canada, constituerait une infraction à une loi fédérale;
(*b*) voluntary compliance with any previous departure order;	*b*) le fait de s'être conformé librement à une mesure d'interdiction de séjour;
(*c*) voluntary compliance	*c*) le fait de s'être conformé

with any previously required appearance at an immigration or criminal proceeding;	librement à l'obligation de comparaître lors d'une instance en immigration ou d'une instance criminelle;
(*d*) previous compliance with any conditions imposed in respect of entry, release or a stay of removal;	*d*) le fait de s'être conformé aux conditions imposées à l'égard de son entrée, de sa mise en liberté ou du sursis à son renvoi;
(*e*) any previous avoidance of examination or escape from custody, or any previous attempt to do so;	*e*) le fait de s'être dérobé au contrôle ou de s'être évadé d'un lieu de détention, ou toute tentative à cet égard;
(*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	*f*) l'implication dans des opérations de passage de clandestins ou de trafic de personnes qui mènerait vraisemblablement l'intéressé à se soustraire aux mesures visées à l'alinéa 244*a*) ou le rendrait susceptible d'être incité ou forcé de s'y soustraire par une organisation se livrant à de telles opérations;
(*g*) the existence of strong ties to a community in Canada.	*g*) l'appartenance réelle à une collectivité au Canada.

[16] Section 248 of the Regulations sets out further factors that should be considered before deciding between ordering detention or release:

248**.** If it is determined that there are grounds for detention, the following factors shall be considered before a decision is made on detention or release:	248**.** S'il est constaté qu'il existe des motifs de détention, les critères ci-après doivent être pris en compte avant qu'une décision ne soit prise quant à la détention ou la mise en liberté :
(*a*) the reason for detention;	

(*b*) the length of time in detention;	*a*) le motif de la détention;
(*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;	*b*) la durée de la détention;
(*d*) any unexplained delays or unexplained lack of diligence caused by the Department or the person concerned; and	*c*) l'existence d'éléments permettant l'évaluation de la durée probable de la détention et, dans l'affirmative, cette période de temps;
(*e*) the existence of alternatives to detention.	*d*) les retards inexpliqués ou le manque inexpliqué de diligence de la part du ministère ou de l'intéressé;
	e) l'existence de solutions de rechange à la détention.

ISSUE

[17] The Court considers the following issues relevant in this case:

1. Should the Court exercise its discretion to hear a moot case?

ANALYSIS

Issue 1: Should the Court exercise its discretion to hear a moot case?

[18] Because the respondent was removed from Canada on November 9, 2010, the issue of whether the June 29, 2010, detention review decision of the Board should be upheld is moot.

[19] The applicant submits, however, that an alleged error committed by the Board warrants consideration by this Court despite being moot.

[20] The applicant requests the Court exercise its discretion regarding the following issue:

> The Minister is very concerned about the Immigration Division's decision to refuse to allow the representative for the Minister at the detention review hearing an opportunity to cross-examine the bondsperson and wishes to obtain guidance from the Federal Court on this issue.

[21] The test for when a court should consider a moot case was stated by the Supreme Court of Canada in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342. The Supreme Court set out a two-step test to determining whether a case is moot. First, the Court must determine whether the court's decision will affect the rights of the parties. In this case, the applicant acknowledges that this element is not present, because the respondent's rights will not be affected by this Court's decision. Second, the court must determine whether it should nevertheless exercise its discretion to hear the case:

> ¶16. The approach in recent cases involves a two-step analysis. First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case. The cases do not always make it clear whether the term "moot" applies to cases that do not present a concrete controversy or whether the term applies only to such of those cases as the court declines to hear. In the interest of clarity, I consider that a case is moot if it fails to meet the "live controversy" test. A court may nonetheless elect to address a moot issue if the circumstances warrant.

[22] In *Borowski*, the Court said a court should consider the following factors:

1. If the dispute is rooted in the adversary system. *Per Borowski* at paragraph 31:

   > . . . It is apparent that this requirement may be satisfied if, despite the cessation of a live controversy, the necessary adversarial relationships will nevertheless prevail. . . .

2. If hearing the case is in the interests of judicial economy:

i. cases where the "court's decision will have some practical effect on the rights of the parties notwithstanding that it will not have the effect of determining the controversy which gave rise to the action" (*Borowski* at paragraph 35);

ii. cases which

> are of a recurring nature but brief duration. In order to ensure that an important question which might independently evade review be heard by the court, the mootness doctrine is not applied strictly. . . . The mere fact, however, that a case raising the same point is likely to recur even frequently should not by itself be a reason for hearing an appeal which is moot. It is preferable to wait and determine the point in a genuine adversarial context unless the circumstances suggest that the dispute will have always disappeared before it is ultimately resolved." (*Borowski* at paragraph 36); and

iii. cases which "raise an issue of public importance of which a resolution is in the public interest. The economics of judicial involvement are weighed against the social cost of continued uncertainty in the law" (*Borowski* at paragraph 37).

[23] The applicant submits that the Court should exercise its discretion in this case because detention review decisions are evasive of review.

[24] The applicant submits that "whether the minister has a right to cross-examine a potential bondsperson" is a question of general public importance.

[25] The Court does not accept the applicant's submissions. Most significantly, the dispute before this Court is not rooted in the adversarial system. To the contrary, the respondent has made no representation whatsoever before this Court. This Court also lacks the benefit of any submissions made by the respondent at earlier hearings, because the respondent has never been represented by counsel and has consistently demonstrated a misunderstanding of the operation of the legal system. Nor are there any interveners or other parties before this Court who may offer submissions. As a

result, the Court is asked to determine the questions before it having representations of only one party.

[26] Second, the Court accepts that detention review hearings often occur prior to anticipated removals that most detainees are removed before judicial review applications of their detention hearings have time to proceed.

[27] However, the Court is aware that the Federal Court has been able to judicially review a detention decision on an expedited basis within 30 days so that the Court could rule on the detention decision before it became moot. In *Canada (Citizenship and Immigration) v. B157*, 2010 FC 1314, Justice de Montigny conducted a judicial review of a decision to release the applicant in that case, and granted the application. The judicial review application was heard on an expedited basis as a result of an order made at the time that a stay of the detention release decision was granted.

[28] Finally, the question that the Court is asked to decide – "whether the applicant had a right to question the potential bondsperson" has already been decided by this Court in *Canada (Minister of Citizenship and Immigration) v. Ke* (2000), 188 F.T.R. 91 (F.C.) per Reid J. In that case an adjudicator under the old Act had refused to allow the Minister to cross-examine a potential bondsperson. The Court found that a breach of natural justice occurred with respect to the denial of the right to cross-examine a bondsperson on the facts of that particular case:

> ¶6. As I understand the Minister's argument, it is that a breach of natural justice occurred in failing to allow for cross-examination of the bondsperson because a decision-maker is required to base his or her decision on the best evidence available, and because a party to an adjudication is entitled to test the evidence, central to the decision, presented by the opposing party.

> ¶7. I am not prepared to accept the proposition that in all cases an adjudicator is required to allow for cross-examination of a bondsperson. I am prepared, however, to accept that in this particular case, the failure to do so did constitute a breach of the rules of fairness and natural justice.

[29] Thus, this Court has previously determined this issue. In the case at bar, the potential bondsperson was the detainee's mother, who was according to the evidence of the detainee prepared to put up $2000, which was, sadly, her life's savings. In the end, the release from detention order was stayed and the detainee was deported. No bond was required. A decision about whether to allow cross-examination is for the hearing officer to make on the facts which this Court will only review on a standard of reasonableness. This issue is not any more involved than this, and does not warrant the Court's discretion to hear a moot application. Accordingly, this application for judicial review will be dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that:

The application for judicial review is dismissed.

"Michael A. Kelen"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3740-10
STYLE OF CAUSE:	*The Minister of Public Safety and Emergency Preparedness v. Collins Kwesi Gyekye*
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	February 7, 2011
REASONS FOR JUDGMENT AND JUDGMENT:	KELEN J.
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APPEARANCES:

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No appearance	FOR THE RESPONDENT

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