Federal Court  Cour fédérale

Date: 20110803

Docket: IMM-4391-11

Citation: 2011 FC 974

Vancouver, British Columbia, August 3, 2011

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

JOHN DOE

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Detention is an extraordinary restraint in Canadian society. Not surprisingly, subsection 58(1) of the *Immigration and Refugee Protection Act*, SC 2000, c 27, as amended (the Act), prescribes that the Immigration Division (ID) of the Immigration and Refugee Board shall order the release of a permanent resident or foreign national from immigration detention unless it is satisfied, taking into account prescribed factors, that they are a danger to the public or are unlikely to appear for examination or removal; if the ID orders release, it may impose any conditions it considers

necessary pursuant to subsection 58(3) of the Act. The legality of one such decision is challenged today by the Minister.

[2] Since November 30, 2010, the respondent has been in immigration detention for the purpose of his removal from Canada on the ground that he poses a danger to the public. At all of his previous detention reviews, any proposed alternatives to detention were found by the ID to be inadequate to address the risk of re-offending. However, on July 11, 2011, despite the fact that the respondent continues to be a danger to the public, ID Member Tessler ordered the release of the respondent on the basis that there was new evidence of continued efforts to rehabilitate and of good behaviour in custody, and that the residential treatment facility for substance-addicted individuals offered by the VisionQuest Recovery Society (VisionQuest) provided an adequate alternative to detention (the Release Order).

[3] The standard of review for decisions of the ID on detention reviews, which are primarily fact-based, is reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190; *Canada (Minister of Public Safety and Emergency Preparedness) v Karimi-Arshad*, 2010 FC 964, [2010] FCJ No 1194; *Canada (Minister of Citizenship and Immigration) v B004*, 2011 FC 331, [2011] FCJ No 428). That said, all existing factors relating to custody must be taken into consideration including the reasons for previous detention orders being made. If a member of the ID chooses to depart from prior decisions to detain, clear and compelling reasons for doing so must be set out; the best way is to expressly explain what has given rise to the changed opinion (*Canada (Minister of Citizenship and Immigration) v Thanabalasingham*, 2004 FCA 4, [2004] 3 FCR 572 (FCA) at paras 10-13).

[4] The inquiry into whether a person poses a danger to the public involves a "consideration of whether, given what [the Minister] knows about the individual and what that individual has had to say on his own behalf, [he] can form an opinion in good faith that he is a possible re-offender whose presence in Canada creates an "unacceptable" risk to the public (*Williams v Canada (Minister of Citizenship and Immigration)*, [1997] 2 FC 646 (FCA). Once the Minister has made out a *prima facie* case, the onus shifts to the detainee to provide grounds for release (*Canada (Minister of Citizenship and Immigration) v Sittampalam*, 2004 FC 1756, [2004] FCJ No 2152, at para 27).

[5] Pursuant to section 248 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, as amended (the Regulations), if it is determined that there are grounds for detention, the following factors shall be considered by the ID before a decision is made on detention or release:

(a) the reason for detention;

(b) the length of time in detention;

(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;

(d) any unexplained delays or unexplained lack of diligence caused by the Department or the person concerned, and

(e) the existence of alternatives to detention.

[6] Even in cases of extended periods of detention (which has not been the case here), the Supreme Court of Canada has recognized that the fundamental rights mentioned in sections 7 and 12 of the *Canadian Charter of Rights and Freedoms* are not breached if accompanied by a process that provides regular opportunities for review of detention, taking into account relevant factors,

including the factors similar to the ones listed in section 248 of the Regulations (*Charkaoui v Canada (MCI)* 2007 SCC 9, [2007] 1 SCR 350 at paras 110 to 118.

[7] In the case at bar, the Minister submits that Member Tessler erred by failing to consider and weigh all of the factors in section 248 of the Regulations, or otherwise acted unreasonably by failing to provide clear and compelling reasons for departing from the previous decisions to continue the respondent's detention; by exceeding his jurisdiction in considering the respondent's rehabilitation and reintegration into society as part of the alternative to detention; by failing to assess whether VisionQuest is an effective alternative to detention; and by making other unreasonable findings.

[8] The respondent submits on the contrary that the decision of the ID, ordering the release of the respondent on terms and conditions, is reasonable. Member Tessler did not ignore prescribed factors. There was new evidence of good behaviour in custody and continued efforts to rehabilitate, and the new alternative to detention (VisionQuest) provided to Member Tessler gave him a reasonable basis upon which to differ from previous ID decisions. The factual findings made by the ID are entitled to the greatest deference and it is not the role of this Court to determine whether VisionQuest is an effective alternative. Thus, the present application should be dismissed.

[9] Having considered the submissions of the parties, read the impugned decision and the previous decisions of the ID, and reviewed the evidence on record, the present judicial review application must be allowed. The Court agrees with the Minister that Member Tessler failed to provide clear and compelling reasons for departing from previous decisions, and that overall, the

decision to order the release of the respondent on the terms and conditions mentioned in the Release Order is not reasonable.

[10] The relevant facts in this case are not seriously disputed by the parties and it is worthwhile to highlight some key elements of the evidence of danger that remained unchanged and that were before Member Tessler and previous members of the ID.

[11] The respondent, a citizen of a South American country, is 46 years-old. In 1979, he became a permanent resident as a dependent child. The respondent has lost his permanent resident status and is under a removal order that was issued to him on January 24, 2001, because he was inadmissible on the ground of serious criminality. At the end of his last sentence (2002-2010), the respondent went directly from incarceration into immigration detention.

[12] Between November 2010 and the making on July 11, 2011 of the Release Order, there have been ten (10) detention reviews by ID members. In the course of immigration detention, there was also a Pre-Removal Risk Assessment (PRRA). This resulted in a positive opinion should the respondent return to his home country, based on the risk of harm for being openly homosexual. However, because the respondent was found inadmissible for serious criminality, the Minister must now weigh his risk against the harm he poses to the public in Canada before a final decision is made on his PRRA application (see subsection 112(3) and paragraph 113(*d*) of the Act).

[13] The respondent's convictions in Canada date back to 1982, when he was 16 years-old. It is not challenged that the respondent has committed numerous offences involving violence,

including robbery, forcible confinement, and sexual assault causing bodily harm. Reviewing his criminal history, he has been described as “an aggressive homosexual with violent predatory tendencies.” In 1998, the Minister issued an opinion that the respondent poses a danger to the public and thereby took away his right to appeal his removal order to the Immigration Appeal Division. Following the removal process, the respondent, who was detained by immigration, was released by the ID on terms and conditions on January 25, 1999.

[14] At the time of his first release from immigration detention in January 1999, a claim to citizenship was actually pending and the respondent was making the point that he had displayed good behaviour while in prison. ID Member King had noted that while “the description of [the respondent] in the psychological reports [was] disturbing and raises a serious concern about [his] future conduct”, however “there [was] no indication that [the respondent] had engaged in misconduct while institutionalized.” However, the ID’s assumption that the respondent would not reoffend proved to be wrong. Indeed, the respondent re-offended four months later by attempting to procure juvenile (male) prostitution and was convicted of these offences on September 14, 2000. While on bail for these offences, the respondent committed another set of violent acts within a sexual subtext against men and for which he was sentenced in 2002 to eight years in prison.

[15] Accordingly, it has been asserted by the Minister throughout the detention reviews in 2010 and 2011 that, despite the respondent’s apparent good behaviour during the last prison sentence and the personal development courses he may have taken, he continues to be at high risk of re-offending. Indeed, the Minister relies heavily relies on the independent opinion of the Correctional Service of Canada (CSC) who has already described the respondent as “an untreated violent sex

offender who is at high risk to reoffend" [my emphasis]. Moreover, it has also been stressed by the Minister that the RCMP has notified that if the respondent is released, they intend to obtain from a Provincial Court judge a recognizance order under section 810.2 of the *Criminal Code*, because the respondent "poses a high risk to reoffend sexually and violently."

[16] Objective evidence of risk also includes the following. The respondent's lengthiest periods of incarceration were two eight-year periods from about December 6, 1990 to January 1999 and from about December 2, 2002 to November 30, 2010. Both times, the respondent served his full sentence because he did not participate in recommended programs and was determined to be at high risk to commit another violent offence. Moreover, his only crime-free periods have been when he was incarcerated, and he has committed offences when he was out on bail as aforesaid. The documentary evidence also shows that the respondent tends to minimize, deny, displace blame and also display a lack of empathy or remorse for his victims. Notes in the record indicate that in an effort to obtain money, for sexual gratification, for power and control and for excitement, the respondent has notably been perpetrating robberies of homosexual men, a pattern of conduct that has repeated itself over time.

[17] External factors which indicate the respondent is at risk to reoffend include any involvement with alcohol. While programming that targets his other criminogenic needs (e.g. abuse of alcohol) was recommended, the psychologist at the correctional institution where the respondent served his last sentence highly recommended further treatment and risk management, including sex offender programming. The respondent claimed that he did attempt to attend sex offender treatment during his sentence, but "was screened out due to an argument with the program facilitator". Be that as it

may, he believed there were better ways to heal and change. Painting and spiritual development through prison chaplaincy programs and counselling were the paths chosen by the respondent.

[18] Starting with the first detention review on December 1, 2010, ID Member Shaw Dyck found that the documentary evidence was mostly negative regarding the respondent's insight into his offences, the degree of violence he exhibited, and the offences he committed. Member Shaw Dyck found that the respondent, who represented himself at the time, was unlikely to appear and posed a danger to the public.

[19] Afterwards, the respondent consented, through his lawyer, to remain in detention at his second and third detention reviews held on December 8, 2010 and December 16, 2010. ID members reviewed the evidence at each detention review and continued the respondent's detention on the ground that he poses a danger to the public.

[20] On January 11, 2011, the respondent and his witness, Major Dyke of the Salvation Army, testified at his fourth detention review. The respondent asserted that Major Dyke would provide support to him. The respondent's counsel argued that the respondent was motivated not to reoffend and proposed that, as an alternative to detention, he had been accepted into the Belkin House personal development program (PDP), which is dispensed by the Salvation Army. Situated in the heart of Vancouver, the Belkin House is dedicated to "breaking the cycle of homelessness". The PDP is particularly beneficial as a continuum of support for men and women who have just completed a residential addiction treatment program.

[21] On January 14, 2011, Member Ko rendered her decision continuing the respondent's detention on the ground that he posed a danger to the public, and provided numerous and articulated reasons to support this finding. Member Ko was not satisfied that the arrangements that had been made would mitigate the danger he posed. Member Ko noted that Belkin House required a willingness to actively participate in the program, and that over the eight years of his sentence the respondent had declined to participate in programs that were recommended to him. Member Ko was also not satisfied that his supporters could provide a sufficient level of control over the respondent to outweigh the risk that he would reoffend. Member Ko also found that the respondent's length of detention had not been very long nor that his future detention would be very long. Member Ko was also not satisfied that the respondent would comply with conditions imposed on him.

[22] On February 11, 2011, ID Member King reviewed the evidence from previous detention reviews and concluded that "there is a significant risk that [the respondent] would reoffend by committing a violent crime against another person." Moreover, Member King noted that this is because the respondent "was untreated as far as the sexual nature of [the respondent] previous violent offences." Reviewing past history, Member King noted that "in 2010, at the end of [the respondent] most significant incarceration, [he was] in the same place as [he was] in 1999." Again, the respondent had shown his willingness to change and raised his good behaviour in prison as proof of his good intentions, but to no avail. Member King also concluded that Belkin House did not provide an effective alternative, notably because the respondent had been "unwilling to face directly the root issues with respect to the crimes" that he had committed.

[23] On March 11, 2011 and April 8, 2011, the respondent consented to remaining in detention. On both dates, ID Member Schwartz ordered that the respondent's detention be continued.

[24] At the respondent's eighth detention review held on May 5, 2011, the Minister's counsel estimated that it would take three to five months for CIC to complete the balancing of the respondent's danger to the public against his PRRA risk. ID Member Del Duca reviewed all of the transcripts, reasons and documentary evidence and determined that the alternative of Belkin House would not outweigh the risk posed by the respondent. Member Del Luca completely agreed with the assessment made by Member Ko. Member Del Duca did not find that the length of detention had been unduly lengthy. ID Member Del Luca ordered the respondent's continued detention on the ground that he poses a danger to the public.

[25] On May 27, 2011, the respondent was given a copy of the Restriction Assessment completed by the Minister's Case Management Branch in Ottawa, which reviewed the evidence and stated the opinion that, "the Respondent constitutes a present and future danger to the public of Canada." The respondent was given 15 days to respond to this assessment. At the request of his counsel, he was given a 30-day extension to July 13, 2011 to provide submissions.

[26] On June 2, 2011, the respondent again consented to remain in detention while his counsel looked for another alternative to his detention. ID Member Ko continued the respondent's detention.

[27] ID Member Tessler presided over the respondent's tenth detention review hearing which took place on June 28, 2011. The only new evidence at that hearing was documentary

evidence submitted on behalf of the respondent. These documents included information about the VisionQuest Recovery Society; more letters of support, a letter from the detention centre confirming information submitted at the last detention review regarding courses the respondent had taken in April 2011, while in immigration custody, and his request to take further courses.

[28] The Minister provided revised recommended conditions from the RCMP regarding the section 810.2 *Criminal Code* order they intended to apply for upon the respondent's release, because they believe he is at high risk to commit another violent offence. The Minister also submitted that it would take one to three months from the date of the respondent's submissions on the Restriction Assessment to complete the balancing process.

[29] ID Member Tessler found that the respondent poses a danger to the Canadian public, noting that very little had changed in that respect since the last detention review. Member Tessler apparently adopted Member Ko's reasoning from the January 14, 2011 detention review, but at the same time, he appears to accept arguments which had not been found by other ID members to justify release.

[30] Member Tessler noted the courses that the respondent had taken and that the respondent had a spotless prison record between 2001 and 2010. With respect to the respondent's failure to take or complete any programming identified for him by Correctional Services, Member Tessler found that the respondent had designed his own rehabilitation program which "included introspection through painting and spiritual guidance and course work through chaplaincy". Member Tessler did not explain how the course taken in April 2011 for a ten-day period can compare to the sex offender

program to be taken over a four-month period, and which the respondent apparently refused to take in prison.

[31] With respect to the length of detention, Member Tessler made no finding that the respondent's detention had been too long or that it was becoming indefinite. However, Member Tessler questioned the Minister's estimation of the time needed to complete the process of balancing the respondent's risk on return to his home country against the risk he poses to Canadian society. That said, Member Tessler did not explicitly mention the one-month extension granted to respondent's counsel to complete submissions and which naturally had an impact on the length of delay.

[32] That said, it is obvious that the main reason why Member Tessler decided to depart from previous ID members' decisions is because, in his opinion, VisionQuest provided an adequate alternative to detention that was more comprehensive than the previously proposed Belkin House alternative and apparently addressed the issues of concern to the previous ID members: control and supervision.

[33] The terms and conditions of the respondent's proposed stay at a VisionQuest Recovery House would require that for the first 30 days he only leave the residence for approved purposes and if accompanied. After 30 days, he could leave the residence on his own as long as the activity was approved, or for a medical emergency. While in residence at VisionQuest, the respondent would be under a curfew from 10 p.m. to 7 a.m. daily. Under the agreement with VisionQuest, the respondent would be required, among other things, to attend in-house Narcotics Anonymous/Alcoholics

Anonymous meetings daily, as well as three times/week in the community. Member Tessler also assumed that the respondent "would also be subject to a recognizance under 810(2) of the *Criminal Code* imposed by a Provincial Court judge", and Member Tessler included, as a term and condition of the release, that the respondent also comply with all terms and conditions imposed by the Provincial Court of British Columbia "if imposed".

[34] Objectively speaking, there are a number of problems associated with those conditions, which Member Tessler has not really addressed in the impugned decision.

[35] First, in finding VisionQuest adequate, Member Tessler seems to have missed the point made by the Minister that VisionQuest is not a detention facility, compliance is voluntary, and that after 30 days the respondent would be permitted to leave the residence unescorted. This poses the question whether VisionQuest constituted an effective alternative since all parties agreed that the respondent would be residing at VisionQuest for a much longer period.

[36] Second, Member Tessler did not address the point made by the Minister that VisionQuest "is for people who genuinely desire to heal from the ravages of addiction". VisionQuest does not have the internal resources to deal with issues of sexual abuse outside programs. The agreement with VisionQuest does not require the respondent to attend any programs to address his propensity to commit violent or sexual offences. Although VisionQuest may refer residents to other such outside programs, the resident has to first demonstrate for a period from 30 to 90 days that the resident is following their rules.

[37] Third, as was already noted by Member Ko, the respondent's victims were typically individuals that he had become acquainted with. Although alcohol was often a factor, Member Ko had noted that the programs that had been taken by the respondent were always the ones that he wanted to participate in. They were not necessarily the ones that could have successfully reduced the risk of re-offending, like a sex offender program.

[38] Fourth, Member Tessler also found that releasing the respondent to VisionQuest would allow him to demonstrate his ability to control his antisocial behaviours and allow him to slowly reintegrate into the community. However, rehabilitation of a detained person within the community is not a prescribed factor and constitutes an irrelevant consideration insofar as it is not directly related to the issue of whether an alternative to detention exists.

[39] Fifth, Member Tessler's condition restricting the respondent from entering the City of Vancouver (except for confirmed medical or legal or immigration-related appointments) amply demonstrates that the Member still had concerns about the respondent re-offending while residing at VisionQuest. However, the respondent also committed offences in other communities, including the Vancouver suburb of Burnaby; in addition, the respondent's victims were homosexual men. There are certainly reasons to believe the respondent could find victims elsewhere in the greater Vancouver area or Lower Mainland of British Columbia. It is also troubling that Member Tessler was counting on the fact that following release, the RCMP would be seeking to have further conditions imposed by the Provincial Court.

[40] Overall, the Court finds that the decision to release the respondent on the terms and conditions mentioned in the Release Order does not constitute an acceptable and defensible outcome in light of the law and the facts of this case. There were simply no compelling reasons to depart from previous decisions and the terms and conditions of the Release Order do not completely address the continued risk of re-offending.

[41] In the present case, there is an obvious public interest in detaining a person who would pose a danger to the public. This Court held that in weighing this public interest against the liberty interest of the individual, in many cases the most satisfactory course of action will be to detain the individual, but expedite the immigration proceedings (*Sahin v Canada (MCI)*, [1995] 1 FC 214 (TD) at para 31). This seems to be the path that should be followed in this case, unless other alternatives to detention in the case of an untreated sexual offender exist and are presented to the ID at another detention review hearing.

[42] For these reasons, the application for judicial review is allowed and the Release Order is set aside by the Court. Counsel indicated at the hearing that there were no serious questions of general importance raised in this case.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review by the Minister is allowed;

2. The Release Order made on July 11, 2011, is set aside; and

3. No questions are certified.

"Luc Martineau"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	THE MINISTER OF CITIZENSHIP AND IMMIGRATION v. JOHN DOE
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