Federal Court  Cour fédérale

Date: 20111228

Docket: IMM-7972-11

Citation: 2011 FC 1527

Ottawa, Ontario, December 28, 2011

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

KEMEL HAZIME

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] At the conclusion of the hearing I informed the parties that the application would be dismissed. These are my reasons for that decision.

[2] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27, of a decision of the Immigration Division of the

Immigration and Refugee Board (Immigration Division) ordering that Mr. Hazime continue to remain in detention.

[3] Mr. Hazime was born in Venezuela. He and his family entered Canada in 2003 and claimed refugee protection. The claim was dismissed and a Pre-Removal Risk Assessment application was refused. The applicant and his family did obtain their permanent resident status in 2006 on humanitarian and compassionate grounds.

[4] On August 4, 2009, the applicant pled guilty and was convicted of conspiracy to export a scheduled substance, trafficking of a scheduled substance and exporting a scheduled substance, namely 20,000 pills of ecstasy. The applicant was sentenced to four years in prison for each of the counts to run concurrently, in addition to a mandatory prohibition order. After serving approximately one and a half years in a minimum security prison, the applicant was approved for day parole.

[5] Due to his criminal convictions, the applicant lost his permanent resident status. On February 9, 2010 a deportation order was issued and on December 6, 2010 he was detained on immigration hold. He has since had several detention review hearings, all of which, until the date of the present application, found that there were reasonable grounds to believe that he is a "danger to the public" and "is unlikely to appear for ... removal from Canada."

[6] In the decision under review, dated November 7, 2011, the Member found that since there were no real submissions on the flight risk concern, there was no reason to depart from the previously made findings.

[7] The Member noted that a new document dated October 26, 2011 highlighted different facts relating to the applicant which favoured a finding that he was at a low risk to reoffend. According to the Member, this was not "new" evidence because it merely repeated what other assessments had already said about the applicant.

[8] The Member stated that the concern with the danger to the public finding was that the evidence submitted "offers little insight as to why crimes were committed and what changes have taken place since then." The Member said to the applicant:

> You come from a good family. You had a good upbringing. And for some unknown reason, you suddenly turned to crime after you started working as a bouncer. You came into contact with some bad influences.
>
> To me this doesn't make sense. Just coming into contact with some bad influences isn't something, in and of itself, for someone that has your type of background that would automatically lead you to criminal behaviour.
>
> And so, I - - this new evidence really doesn't give me any new insight into why the crimes were committed.
>
> There's no doubt the crimes were committed. You were convicted of those crimes. And once you're convicted, there has to be some sort of rehabilitation which takes place after the conviction.
> …
>
> I have no evidence of any real changes.

[9] The Member found that the new assessment did not provide him with a meaningful basis to depart from the previous danger to the public finding.

[10] The Member then rejected all the bondspersons suggested by the applicant. The Member found that regardless of the amount of money provided by these persons, the danger to the public concern was not offset. He provided an analysis of the bondspersons because he found that the danger concern could possibly be offset by the relationship and the ability of the bondsperson to control the person who is detained. The Member determined that, in light of the circumstances surrounding the past conviction, there was nothing to suggest that the applicant's father and cousin could control the applicant. The Member found that the new bondspersons suggested at the hearing – the applicant's friend – was insufficient to offset the danger concern given that his relationship was not any closer or more meaningful than his father's, which had already been rejected by the previous Members. Accordingly, the Member ordered the continued detention of the applicant.

[11] After the present application was filed, at the applicant's next detention review on November 23, 2011, the applicant was ordered released from detention.

[12] The applicant raises three issues with respect to the decision under review:

1. Did the Member err in his conclusion that the applicant poses a danger to the public?
2. Did the Member err in his conclusion that the applicant poses a flight risk?

3. Did the Member err in his assessment of the proposed alternative to detention as presented by the applicant?

[13] The applicant also raised the issue of mootness in his Further Memorandum of Fact and Law in light of his release. He cites *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 [*Borowski*] and submits that the application is not moot. He argues that this Court should decide on the merits of this case because:

i There exists a live controversy between the parties; that being whether the applicant is a danger to the public and a flight risk;

ii The decision will have an impact on the applicant's rights since he was released on very strict conditions, i.e. payment of cash bonds in the amount of $71,000 which were based on previous detention reviews such as the one being reviewed; and

iii The decision is part of the applicant's immigration record which could have an impact on future immigration determinations will have an impact on the applicant's

[14] The applicant further submits that Justice Rothstein's reasoning in *Ramoutar v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 547 [*Ramoutar*] applies to the present matter:

> In this case, a decision very damaging to the applicant is now part of the applicant's record for immigration purposes. That decision could have an adverse effect on the applicant in any further proceedings he may wish to bring under Canada's immigration laws.
> …
> Even if the case were moot, I would exercise my discretion to decide it. The adversarial relationship between the parties continues. There are collateral consequences to the applicant if the decision appealed from is allowed to stand. And this is not a case

> in which a decision by this Court could reasonably be considered to be an intrusion into the functions of the legislative branch of government.

[15] Finally, the applicant submits that "the decision was made in the context of a case where decisions were of a recurring nature but of brief duration, which militates against a strict approach to the doctrine of mootness."

[16] In response, the respondent starts from the proposition stated by the Federal Court of Appeal in *Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81 at paras 26-38 [*Baron*], that the Court must properly characterize the issue in dispute. In its submission, this requires the Court to determine what the parties were seeking in their initial request to the Minister. The respondent says that what the applicant was seeking both at his detention review and in the present judicial review was to be released from detention. Since the applicant has been released, the respondent submits that there is no live controversy between the parties. The respondent also submits that the applicant has not shown that judicial economy would be served by this Court hearing the application for leave.

[17] The respondent cites various cases which dealt with similar circumstances and found the application to be moot: *XXXX v Canada (Minister of Citizenship and Immigration)*, 2011 FCA 27; *Canada (Minister of Citizenship and Immigration) v B031*, 2011 FC 878; *Ameli v Canada (Minister of Citizenship and Immigration)*, IMM-297-11 dated May 10, 2011, unreported; and *Ismail v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1679 [*Ismail*].

[18] Additionally, the respondent submits that the issues raised in the application relate only to factual issues and that a decision on the merits would provide little guidance to other cases: *Halm v Canada (Minister of Employment and Immigration) (TD)*, [1995] FCJ No 1565.

[19] I have concluded that this application is moot and the Court should not exercise its jurisdiction to hear the case on its merits. The Supreme Court of Canada in *Borowski* in discussing the doctrine of mootness stated:

> The doctrine of mootness is part of a general policy that a court may decline to decide a case which raises merely a hypothetical or abstract question. An appeal is moot when a decision will not have the effect of resolving some controversy affecting or potentially affecting the rights of the parties. Such a live controversy must be present not only when the action or proceeding is commenced but also when the court is called upon to reach a decision. The general policy is enforced in moot cases unless the court exercises its discretion to depart from it.
>
> The approach with respect to mootness involves a two-step analysis. It is first necessary to determine whether the requisite tangible and concrete dispute has disappeared rendering the issues academic. If so, it is then necessary to decide if the court should exercise its discretion to hear the case. (In the interest of clarity, a case is moot if it does not present a concrete controversy even though a court may elect to address the moot issue.)

[20] I agree with the respondent that the issue in dispute, properly characterized, was the applicant's release. As he has since been released that dispute has disappeared.

[21] However, as noted by the applicant, decisions of immigration authorities may have a lasting impact on applicants and their future endeavours. The Federal Court of Appeal in *Baron*, above at para 44, reiterated three factors that had been identified in *Borowski* and should be considered by a Court when deciding if a moot application should be heard: "(1) the existence of

an adversarial relationship between the parties; (2) the concern for judicial economy; and (3) the need for the court not to intrude into the legislative sphere."

[22] The applicant submits that this Court should intervene because: (1) he does not want a decision that says he is a danger to the public or a flight risk; and (2) he wants the conditions of his release to be amended.

[23] These are not matters in which this Court can intervene. Even if this Court were to find that the Member's decision is unreasonable and set it aside, it could not find that the applicant is not a danger to the public or a flight risk. It could only send the matter back to be determined by another Member. Moreover, the present application does not relate to the unreasonableness of all the other 11 detention review hearings which found the applicant to be a danger to the public and a flight risk. Those decisions will remain on the applicant's file and record with the immigration authorities. This alone distinguishes the present case from *Ramoutar* where there was but one decision that affected the applicant and not a series of similar decisions.

[24] As for the applicant's submission that he wants the conditions for release amended, I agree with the respondent that the applicant is free to apply to the Immigration Division to vary the terms of his release. That is the proper avenue to seek that remedy, not this Court.

[25] There are also significant similarities between the case at bar and *Ismail*. At paragraph 7 Justice Harrington wrote:

> I am satisfied the case is moot. The relief sought in the application was certiorari quashing the 5 May 2005 decision relating to

> continued detention and an order for Mr. Ismail's release. That issue is no longer live, and Mr. Ismail has been released. If he did not like the conditions of his release, his recourse was to seek leave to have that distinct decision judicially reviewed.

At paragraphs 11-12 he wrote:

> If the Court were to look at the merits, and grant judicial review, the matter would be referred back to the Board for redetermination. The redetermination would be whether or not Mr. Ismail should be continued to be held in detention, a pointless exercise since he has been released. It is not up to this Court to order the Board to carry on an investigation to determine whether or not his reputation has been sullied by the Israeli Secret Service who he says have made "vague allegations associating me with violence".
>
> In my view, it would not be appropriate for the Court to deal with this moot case. If Mr. Ismail considers that his Charter rights have been violated, and his reputation besmirched, perhaps he has other recourses. The granting of judicial review would do nothing for his cause, and certainly would do nothing for judicial economy.

[26] I agree with Justice Harrington and believe that the same conclusion is warranted in the present matter. Further, the factor of judicial economy must be weighed against the impact on the applicant. In my assessment, any finding open to this Court would not have a significant impact on the applicant and thus there is little or nothing that outweighs the loss of judicial resources which would be required if the Court were to hear the application on its merits. Lastly, I see nothing of general importance in the case and therefore a decision on the merits would provide little or no guidance to others in the future.

[27] For these reasons, this application is dismissed.

[28] The applicant was provided with a brief period of time to consider whether he wished to propose a question for certification. He has proposed the following question: “When an

applicant seeks judicial review of a decision made at a detention review, does that judicial review become moot upon a subsequent decision to release the applicant which relies on the findings of the decision under review?"

[29] The respondent opposes certification, stating that the proposed question "fails to meet the test for certification because it deals with an issue of well-established law – namely, that release from detention renders moot an application for judicial review that continues detention, as the release from detention gives the applicant the concrete remedy he was seeking in the detention review."

[30] No decision has been put to the Court where it was found, in the circumstances here, that the application was not moot. There have been instances where, notwithstanding there being no concrete controversy the Court has decided to deal with the matter on the merits. I agree with the respondent that the mootness issue in the circumstances faced by the applicant is well-established. As such, the question proposed does not meet the test for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that this application is dismissed and no question is certified.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Naseem Mithoowani	FOR THE APPLICANT
Asha Gafar	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Waldman and Associates Toronto, Ontario	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENTS