Federal Court Cour fédérale

Date: 20130614

Docket: IMM-2864-13

Citation: 2013 FC 655

Ottawa, Ontario, June 14, 2013

PRESENT: The Honourable Madam Justice Gleason

BETWEEN:

ALAN KIPPAX

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant is presently in immigration detention and in this application for judicial review seeks to set aside the April 15, 2013 decision of the Immigration Division of the Immigration and Refugee Board of Canada [the ID or the Division] finding his continued detention to be warranted under section 58 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the IRPA or the Act]. He also requests that I order his release from immigration detention and set terms for his release.

[2] By Order of my colleague, Justice Kane, this hearing has been expedited. Following the April 15th detention review, another review was conducted by the ID, which continued the applicant's immigration detention. The day after this application was argued, a further detention review was scheduled, in accordance with subsection 57(2) of the IRPA, which requires that ongoing reviews be held at no more than 30 day intervals. Given these subsequent events, this judicial review application is technically moot as the decision being reviewed is spent. That said, the parties concurred that I should exercise my discretion to nonetheless decide the application given that the applicant is unlikely to be deported in the near future and the issues raised in the present application will therefore be relevant to his ongoing detention reviews.

[3] I concur that it is appropriate that I exercise my discretion in this manner and have accordingly decided to rule on the merits of the applicant's application. There is ample authority for doing so in circumstances like the present (see e.g. *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 at 360, 57 DLR (4th) 231; *Cuskic v Canada (Minister of Citizenship and Immigration)*, [2001] 2 FC 3, [2000] FCJ No 1631 at paras 2-4 (CA); *Rootenberg v Canada (Attorney General)*, 2012 FC 1289 at para 24; *Es-Sayyid v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1415 at paras 26-29). For the reasons set out below, I have determined that this application should be dismissed, without costs.

Background

[4] The applicant was born in the United Kingdom but has lived in Canada for the past 43 years. He claims to have missed his Canadian citizenship swearing-in ceremony when he was a teenager and therefore did not become a Canadian citizen. On January 7, 2013, the Division found him to be

inadmissible to Canada on the basis of criminality and ordered him deported, thereby stripping him of his permanent residence status. He has not yet been deported because criminal charges related to section 206 of the *Criminal Code*, RSC 1985, c C-46 (illegal lottery) are pending against him. Proceedings in respect of these charges are likely to take some time; the respondent's understanding is that the trial may only begin in 15-18 months. The applicant has also filed an Application for Leave and Judicial Review in respect of the January 2013 inadmissibility decision that is still pending.

[5] The applicant has a lengthy criminal record, involving 14 criminal convictions. Many of these date from the 1987 to 1994 timeframe and include narcotics offenses, possession of a restricted weapon, impaired driving, driving while disqualified, assault causing bodily harm, failure to appear, obstruction of a peace officer and dangerous operation of a motor vehicle. The majority of these offences resulted in fines, but the applicant was sentenced to three months imprisonment for driving while disqualified.

[6] The applicant was convicted of his most serious offense in April 2010, when he was found guilty of the dangerous operation of a motor vehicle causing death and of two counts of dangerous operation of a motor vehicle causing bodily harm, for which he was sentenced to three years imprisonment. A 10-year driving ban was also imposed. These convictions resulted from the applicant's driving at excessive speeds, on a rainy night, when he was essentially street racing with his cousin. The cousin's car spun out of control and crashed into another vehicle. The applicant's cousin was killed and the passengers of the other car were seriously injured. The applicant left the scene of the accident, parking on a cross street, and did not call for assistance. In imposing sentence,

Justice Baltman of the Ontario Superior Court, in *R v Kippax*, [2010] OJ No 2021 at para 33, noted that the applicant:

> […] shows little appreciation or regret for the horrific injuries that followed his driving that night. As the author of the pre-sentence report observed, he requires the structured environment of a correctional institution to drive the point home.

[7] In March 2011, the applicant was convicted of obstructing a police officer, after he pled guilty to the charge. (The more serious charge of assaulting a peace officer was stayed.) These charges stemmed from the applicant's behavior at a party held during the period between the street racing incident and his incarceration.

[8] In making the decision under review, the ID had before it a copy of the Arrest Report for this incident, which indicted that the applicant was repeatedly defiant of direct police orders and had engaged in a physical altercation with a police officer when the officer intervened to try to quiet the party. It appears that this Report, as well as evidence of the March 2011 conviction, itself, was not before the ID on the applicant's first detention review (which occurred on April 30, 2012 and is discussed below).

[9] Following his conviction and a period of incarceration in a federal penitentiary, on April 26, 2012 the applicant was granted statutory release from custody, with terms and conditions. These included a prohibition against owning or operating a motor vehicle, a requirement that he not travel outside set boundaries within the Toronto area without the authority of his parole officer and that he not associate with those whom he knew or had reason to believe were involved in criminal activity.

[10] On April 29, 2012, the applicant was placed in immigration detention. On April 30, 2012, the Division issued an order, releasing him from detention on terms and conditions, which included the requirement that he abide by the terms imposed in connection with his statutory release. A $10,000.00 cash bond and a $20,000.00 performance bond were also required (and furnished by two different bondspeople). In its reasons for the order initially releasing the applicant from immigration detention the Division noted that "the case about whether or not [the applicant] would appear is fairly weak" (Applicant's Judicial Review Application Record at p 16). The ID also determined that the main danger the applicant posed was related to the operation of a motor vehicle, which could be mitigated through the bonds and release conditions.

[11] On June 26, 2012, the applicant and one of his bondspersons were charged with criminal offences related to the operation of a marijuana grow operation at a warehouse owned by the applicant. The warehouse is located outside the boundaries the applicant was allowed to visit under his terms of release. As a result of these charges, the applicant's statutory release was revoked and recalculated to January 14, 2013.

[12] On November 7, 2012, the charges against the applicant, stemming from his suspected involvement in the grow operation, were stayed. (The charges against the bondsperson were also subsequently stayed.) The transcript of the hearing before Justice Gorewich of the Ontario Court of Justice indicates that the applicant committed to testifying as part of the Crown's case against others charged in connection with the grow operation. The applicant filed an affidavit with the Ontario Court of Justice indicating that he had no knowledge of the grow operation.

[13] On December 30, 2012, the Parole Board of Canada [PBC] imposed additional conditions on the applicant's release, following a paper review of the file. Although the applicant wished the opportunity to make representations at an oral hearing, he was denied this opportunity as the first scheduled hearings were adjourned to allow the PBC to collect evidence and due to a snow storm. Thereafter, there was insufficient time before the applicant's mandatory release date to schedule an in-person hearing.

[14] In making its decision, the PBC concluded that the applicant had violated the terms of his statutory release order by going to the warehouse in Mississauga, in contravention of the travel permit his parole officer had issued, and had also associated with individuals he knew or had reason to believe were engaged in criminal activities in violation of his release conditions. The PBC based these determinations on police reports related to the observations that led to the charges in connection with the grow operation. The PBC also expressed a series of concerns related to the danger the applicant posed, noting that he was not frank with his parole officer about the reasons for his attendance at the warehouse or regarding where he went after visiting the warehouse, thereby demonstrating "the enduring nature of [his] criminal attitudes" (Certified Tribunal Record [CTR] at p 47). The PBC also noted that it had concerns about the applicant's potential for violence due to reports regarding his activities while in prison, where he attacked another offender, causing him to bleed profusely from the head. The PBC concluded as follows (CTR at p 48):

> In short, [the applicant's] persistently violent behavior, when viewed in concert with [his] lack of treatment for the risk factors that contribute to this negative conduct and a record of poor performance during past periods of community supervision, signals a clear need for the highest level of structure, supervision and support that is presently available in the community setting.

The PBC therefore determined that the applicant was required to live in a halfway house until his sentence ended and imposed this term in addition to the other release conditions that were originally imposed.

[15] The applicant made a timely appeal of the PBC's decision to the Appeal Division of the PBC, but the Appeal Division did not hear it by virtue of paragraph 147(2)(d) of the *Corrections and Conditional Release Act*, SC 1992, c 20 because the applicant had less than 90 days to serve before reaching his warrant expiry date. The applicant has not sought to judicially review the PBC's decision.

[16] The applicant was released from criminal custody on January 11, 2013. He was then placed in immigration detention, and has been there ever since, with several decisions having been issued finding the applicant to be both a danger, within the meaning of paragraph 58(1)(a) of the IRPA and section 246 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [the Regulations], and a flight risk, within paragraph 58(1)(b) of the IRPA and section 245 of the Regulations. The bonds have also been forfeited (but the decision doing so is subject to an Application for Leave and Judicial Review to this Court).

The Decision under Review

[17] As noted, the decision under review in this application was made by the Division on April 15, 2013 and ordered the applicant's continued detention. The decision is comprised of two separate analyses: the first, considering whether the applicant is likely to fail to appear for removal (or is a

flight risk), and the second, considering the extent to which the applicant poses a danger to Canadian society.

[18] With respect to the first part – whether the applicant is a flight risk – the Division noted its general concern that, having lived his whole life in Canada, the applicant would be unlikely to want to leave and thus might be hesitant to report for deportation. The Division then considered the applicant's criminal history, including the offenses that occurred between 1987 and 1994, and the more recent ones, namely the dangerous driving convictions from 2010 and the 2011 conviction resulting from obstructing a peace officer. The ID found that there had been "a pattern of ongoing criminal behaviour, an indication that [the applicant does] not respect the law." The Division continued, noting that, while disputed by the applicant, the record indicated that the terms of the immigration bonds and statutory release were violated, and the bonds thus forfeited. The ID determined that it was "not in a position to go behind the Parole Board and make a different decision" regarding whether the conditions of the applicant's statutory release had actually been violated and stated that the Federal Court is presently reviewing whether the PBC's decision is reasonable. The Division continued, stating that, "If that decision is successfully appealed, then Mr. Kippax will be in a stronger position to argue that he should have never been rearrested for immigration purposes". The ID however concluded that in light of the PBC decision the applicant had violated the terms of his release order and was thus unlikely to appear for removal.

[19] With respect to the second part of the Division's decision – whether the applicant would pose a danger to the public if released – the ID again considered the applicant's extensive criminal record, focusing on the recent convictions and, in particular, the seriousness of the driving offence

from 2010. The Division was particularly concerned with the lack of apparent remorse or rehabilitation on the part of the applicant, as demonstrated through his attitude at the hearing and through his 2011 conviction for obstructing a peace officer. However, in finding the applicant to be a danger to the public, the Division did not rely upon any of the circumstances related to the statutory release violation.

Submissions of the Parties

[20] The applicant disputes having violated the conditions of his statutory or immigration release. He submits that the ID erred in failing to consider the evidence he submitted to this effect, which he argues demonstrates the incorrectness of the PBC's decision, and submits that the Division thereby breached his rights to procedural fairness and improperly failed to exercise its jurisdiction. The applicant asserts that the Division hearing violated his section 7 rights under the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, in that he is being detained through a process that does not respect fundamental fairness. He further submits that the Division should have followed its April 2012 detention review decision (in which it found that any danger the applicant posed was related to his driving and could be offset by conditions), and that it failed to provide "clear and compelling" reasons for departing from this decision, as is required by the case law. The applicant submits that the issues he raises should be reviewed on the correctness standard as they involve constitutional and jurisdictional issues.

[21] The respondent, on the other hand, submits that the decision must be reviewed on the reasonableness standard and that it is fully reasonable. The respondent argues that the ID was right

to not "go behind" the PBC decision as the appropriate channels for review of that decision are appeal and judicial review and that the applicant is seeking to collaterally attack the PBC decision before the Division. In the alternative, the respondent submits that even if the Division erred in not reconsidering the PBC decision, the Division's decision remains reasonable on the grounds of its independent finding that the applicant poses a danger to the public.

[22] In response to the respondent's argument that he is inappropriately seeking to collaterally attack the PBC decision in another forum and failed to pursue the proper review, the applicant notes that he was not permitted to appeal the PBC decision and argues that if the respondent wants to rely on that decision to demonstrate whether the applicant would be a flight risk, the applicant should be allowed to challenge the merits of the decision before the ID.

Issues and Standard of Review

[23] This application raises two issues. The first is whether the ID should have inquired into the basis of the PBC's decision or, to use the words of the Division in its decision, whether it had the authority to "go behind the Parole Board and make a different decision." In my view, this issue is one of the elusive "true questions of jurisdiction" that the Supreme Court of Canada has indicated should be considered on the correctness standard (see *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 at para 30 [*Alberta Teachers*]; *Nor-Man Regional Health Authority Inc v Manitoba Association of Health Care Professionals*, 2011 SCC 59 at para 35; *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53 at para 18; *Smith v Alliance Pipeline Ltd*, 2011 SCC 7 at para 26; *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 59 [*Dunsmuir*]). In making this finding, I am cognizant of the

caution of the Supreme Court that the category of true questions of jurisdiction is narrow and that a court should not "brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so" (*Canadian Union of Public Employees, Local 963 v New Brunswick Liquor Corp*, [1979] 2 SCR 227; cited in *Alberta Teachers* at para 33 and *Dunsmuir* at para 59; see also *Rogers Communications Inc v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35 at para 62). However, the Division's determination as to whether it can properly reconsider the decision of the PBC is one on which it must be correct. To use the words of the Supreme Court of Canada in *Dunsmuir*, "[A] tribunal must interpret the grant of authority correctly or its action will be found to be *ultra vires* or to constitute a wrongful decline of jurisdiction" (at para 59) [emphasis added]. Thus, I find that the first issue must be assessed on the correctness standard of review.

[24] The second issue involves consideration of whether the Division's danger finding is reasonable, and if so, whether this provides sufficient basis for the decision to be upheld.

[25] The jurisprudence of this Court establishes that the ID is generally entitled to deference in respect of its detention review decisions, which are typically to be reviewed on the reasonableness standard of review (see e.g. *Canada (Minister of Citizenship and Immigration) v John Doe*, 2011 FC 974 at para 3; *Canada (Minister of Citizenship and Immigration) v B046*, 2011 FC 877 at para 32; *Walker v Canada (Minister of Citizenship and Immigration)*, 2010 FC 392 at paras 24-25). As recently stated by my colleague Justice Martineau in *Muhammad v Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 FC 203 at para 5:

> While a different decision maker may have come to a different result, this is not the test, and overall, I must find that the continued

> detention of the applicant, until the next detention hearing, is an acceptable outcome in light of the law and the evidence on record.

In considering the second issue raised by this application – the reasonableness of the danger determination – I must consider whether the decision reached is transparent, justified and intelligible and whether it falls within the permissible range of outcomes in light of the facts and law (*Dunsmuir* at para 47).

Issue 1: Inquiring into the Parole Board's Decision

[26] With respect to the issue of whether and the extent to which the Division should have reconsidered the PBC's decision, I need not reach a final conclusion on this issue because the Division made a critical factual error in its consideration of the issue. As indicated, in addressing the applicant's concerns with its relying on the PBC's finding that he had violated his release conditions, the Division noted that the Federal Court was presently considering a challenge to the PBC's decision (the Division refers to a pending "appeal", although it would technically be a judicial review).

[27] However, as noted above, no such judicial review is pending before the Federal Court. The PBC Appeal Division refused to hear the applicant's appeal due to the imminent end to his sentence, and the applicant never challenged that decision. At the hearing into the present case, counsel for the respondent conceded that judicial review of the Appeal Division's decision may still be possible, as the Federal Court can grant an extension to the normal time limits for seeking such review.

[28] The (incorrect) fact that review of the PBC decision was pending before the Federal Court was central to the Division's conclusion to not consider evidence challenging the PBC's decision. Having based itself on an erroneous finding of fact, the Division failed to properly assess the issue of whether it should reconsider the PBC's decision. Its treatment of the first issue was thus incorrect.

[29] I do not find it necessary to settle the issue of whether the Division ought to determine if the applicant violated his release conditions, as this is a factually-dependent determination that, amongst other things, raises institutional interests that the Division is the best placed to consider. The Court should have the benefit of these considerations before it rules on this issue.

[30] I would, however, note, that if it examines this issue in the future, the ID should be guided by the doctrine of abuse of process, as discussed by the Supreme Court of Canada in *Toronto (City) v CUPE*, Local 79, 2003 SCC 63 and *British Columbia (Workers' Compensation Board) v Figliola*, 2011 SCC 52 (as arguably nuanced by *Penner v Niagara (Regional Police Services Board)*, 2013 SCC 19). In my view, the necessary inquiry into this issue involves consideration of the fairness of allowing the applicant to challenge the findings of the PBC in proceedings before the Division and the circumstances of the PBC's determination in this case, which must be balanced against institutional interests in finality of PBC decisions and the respective jurisdictions and roles of the PBC and the ID.

Issue 2: The Reasonableness of the Danger Basis for the Decision

[31] In my view, the Division's finding that the applicant presented a danger to the public is severable from its findings regarding whether the applicant was likely to appear for future proceedings and/or removal. It is evident that the Board considered the two issues separately. Under the IRPA, only one of the determinations is required for a detention order to be made. The issue therefore becomes whether the Division's danger finding is reasonable.

[32] In my view, the Division's danger finding was grounded in the evidence before it and is wholly reasonable.

[33] The Division considered the applicant's attitude and lack of remorse, as demonstrated at the hearing, and through his continuing criminality, and most particularly through his interactions with police in the 2011 obstruction incident, and concluded that he was not rehabilitated. Given the lack of rehabilitation, the Division reasoned that the applicant was "likely [to] engage in similar high risk behaviour if released" and thus found that he presents a danger to the public.

[34] The applicant is correct in submitting that jurisprudence dictates that the ID is not to depart from previous decisions without cogent evidence (see *Canada (Minister of Citizenship and Immigration) v Thanabalasingham*, 2004 FCA 4 at paras 10-13 [*Thanabalasingham*]). However, such evidence existed here: unlike the Division decision to release the applicant on April 12, 2012, in the decision under review, the Division had evidence of the lack of remorse and rehabilitation on the part of the applicant as well as subsequent criminal charges (namely those from 2011). In my opinion, this provided sufficient basis for the Division to depart from its April 30, 2012 finding and

resulted in a decision that was well within the range of permissible outcomes with regard to the facts and law.

[35] This application will therefore be dismissed as the Division's danger determination is reasonable.

Certified Question

[36] The applicant suggested that a question should be certified regarding the ability of the Division to look into the reasons for the PBC decision and to make its own determination as to whether there has been a violation of release conditions. The respondent noted that any certified question would have to be determinative of the case, and indicated that this would not be the case if I were to rule as I have done. The respondent is correct in this regard. To be appropriately certified, a question must be both of general importance and determinative of the application (*Zazai v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 89 at para 11). Neither branch of this test is satisfied in the present circumstances as my decision turns on well-settled law and rests on the particular facts of this case.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed;

2. No question of general importance is certified under section 74 of the IRPA; and

3. There is no order as to costs.

"Mary J.L. Gleason"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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