

Federal Court



Cour fédérale

**Date: 20150826**

**Docket: IMM-3579-15**

**Citation: 2015 FC 1012**

**Ottawa, Ontario, August 26, 2015**

**PRESENT: The Honourable Mr. Justice Boswell**

**BETWEEN:**

**AHMED, AHMED ALI**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

**I. Introduction**

[1] Mr. Ahmed is a 26 year old citizen of Yemen. He and his family left Yemen in 1994 due to war and his father's political actions; they were refugees under the auspices of the United Nations High Commissioner for Refugees in Ethiopia for ten years. In 2004, they were relocated to Canada where Mr. Ahmed became a permanent resident on June 22, 2004.

[2] Since his arrival in Canada, the Applicant has been convicted of several offences under the *Youth Criminal Justice Act*, SC 2002, c 1, and the *Criminal Code*, RSC 1985 c C-46: notably, assault causing bodily harm; sexual assault; break and enter; theft under \$5000; possessing forged documents; robbery; uttering threats to commit violence; obstruction of a peace officer; failure to comply with a probation order; and various institutional offences during his incarceration.

[3] Based on these convictions, an inadmissibility report was issued against the Applicant in January, 2013; subsequently, a deportation order was issued on March 26, 2013. Upon completion of his criminal sentence in October, 2013, Mr. Ahmed was transferred to immigration detention where he remains to this day, awaiting deportation to Yemen due to serious criminality.

[4] On September 9, 2014, the Minister of Citizenship and Immigration [Minister] issued an opinion pursuant to s 115(2)(b) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the *IRPA*], stating that Mr. Ahmed was a danger to the public [the Danger Opinion]. Attempts by the Canada Border Services Agency to deport the Applicant in December, 2014, and again in April, 2015, have been unsuccessful because his safe passage could not be assured due to ongoing conflict in and about Yemen.

[5] Since November 2013, Mr. Ahmed's continued detention has been the subject of numerous detention review hearings before the Immigration Division of the Immigration and Refugee Board [the Board]; these hearings are required every 30 days pursuant to s 57(2) of the

*IRPA*. Pursuant to s 72 of the *IRPA*, Mr. Ahmed has recently sought judicial review of two Board decisions denying his release from detention.

[6] In *Ahmed v Canada (Minister of Citizenship and Immigration)*, 2015 FC 792 [*Ahmed 1*], Justice LeBlanc set aside the Board's decision of May 28, 2015, and ordered it to explicitly consider the length of time the Applicant had already been detained, and the length of time he was expected to remain in detention, at the next detention review. Consequently, on June 26, 2015, the Board determined that Mr. Ahmed's detention had become indefinite, but it was nonetheless continued.

[7] In *Ahmed v Canada (Minister of Citizenship and Immigration)*, 2015 FC 876 [*Ahmed 2*], Justice Fothergill determined that the Board's decision of June 26, 2015 was reasonable and had appropriately weighed and assessed the matters noted by Justice LeBlanc in *Ahmed 1*. Justice Fothergill held that the Board had complied with Justice LeBlanc's Order and Reasons (*Ahmed 2*, at paras 23-4). Justice Fothergill did, however, state that: (1) inasmuch as the Applicant's detention had been found to be indefinite, the Board is “under a heightened obligation to consider alternatives to detention;” (2) the National Parole Board had found that Mr. Ahmed could be released under strict conditions; and (3) the Board should keep these considerations “at the forefront when Mr. Ahmed's detention is next reviewed” (*Ahmed 2*, at para 34).

[8] Now, Mr. Ahmed again asks this Court, pursuant to s 72 of the *IRPA*, for judicial review of the Board's most recent decision of July 30, 2015.

## II. The Board's Decision

[9] In its oral reasons rendered on July 30, 2015, the Board upheld previous findings that the Applicant is unlikely to appear for removal and that he is a danger to the public who has not been rehabilitated.

[10] The Board found that, although the Applicant has spent a lengthy time in detention, the detention was no longer indefinite. In making this determination, the Board stated as follows:

The new information that was provided to me today by Minister's Counsel is that the airport has re-opened; that removal may take place from mid to late August of this year, 2015. That the visas for the escorts have been applied for. And that once the visas are received, an itinerary will be provided, and therefore, at this point, they're just waiting for the visas for the escorts to be issued. ...

...My previous colleague, Member Adamidis, has found that your [Mr. Ahmed's] detention has been indefinite because, and I am quoting him. "Previously scheduled removals have fallen through because primarily of the situation in Yemen is so volatile and there is no indication that these circumstances will change any time in the near future."...

But today, Minister's counsel has asked me to defer from that finding, believing that it exists, clear and compelling reasons to do so...based on the fact that, number one, the airport in Yemen has re-opened. Number two, your removal may take place from mid to late August, 2015. So within one month from today. Number three, that the visas for the escorts have been applied for, and number four, once the visas will be provided, an itinerary will be provided.

...I do find that based on the evidence before me, I will defer from Member Adamidis' decision and find that your detention is no longer to be considered as indefinite. This finding is based on Minister's Counsel's updates which...were not in front of Member Adamidis for his consideration...In fact, not only that the airport has re-opened and that a timeframe for your removal is provided...it is to take place within the next month. The Minister has also indicated that the flight...will fly to Yemen. And as I understand it, despite any security conditions, ...

III. Issues

[11] The parties disagree as to the nature of the issues raised by this application. For the Applicant, the issues are as follows:

1. Was the Board incorrect in determining that there was no legal impediment to the removal of the Applicant from Canada?
2. Was the Board's decision unreasonable in finding that the Applicant's continued detention was (a) no longer indefinite, and (b) not cruel and unusual treatment?
3. Should the Court render a directed verdict requiring the Applicant's release?
4. Are there special reasons such that the Court should order costs?

[12] The Respondent argues that no new evidence or issues have been raised by the Applicant since the last judicial review and, therefore, the application should be dismissed. As to the Applicant's issues, the Respondent states that the Board's decision was correct and reasonable, and no special reasons exist for costs in this case.

[13] In my view, however, the determinative issue is whether the Board's decision was reasonable, and for the reasons that follow, it was not.

IV. Analysis

[14] It is well established that decisions of the Board respecting immigration detention are subject to review by this Court against a standard of reasonableness. This being so, it was not reasonable for the Board to depart from previous decisions of the Board and this Court which

found that the Applicant's detention was indefinite. This is particularly so because there was no evidence whatsoever to show that the airport in Yemen was now accepting civilian flights or that the situation of unrest in and around Yemen had undergone significant change. Furthermore, the Minister did not, at the time of the hearing on July 30, 2015, have a confirmed itinerary or visas for those persons who would escort the Applicant to Yemen.

[15] It was neither justifiable nor reasonable for the Board to conclude that Mr. Ahmed's continued detention was no longer indefinite because the facts upon which this conclusion was based were dependent upon uncertainties: notably, securing a flight to Yemen, something which may or may not be possible, and the issuance of visas which had been applied for but had yet to be, and may never be, issued. I agree with the Applicant that the Board's finding that Mr. Ahmed's detention is no longer indefinite is contrary to the Federal Court of Appeal's decision in *Canada (Citizenship and Immigration) v. Li*, 2009 FCA 85, [2010] 2 FCR 433, which called for length of future detention to be based on the proceedings as they existed at the time of the review, rather than based on anticipated but not yet available future processes.

[16] Moreover, it was not reasonable for the Board to ignore Justice Fothergill's admonition in *Ahmed 2*, which bears repeating in full in these reasons:

[34] ...given the finding that Mr. Ahmed's detention is indefinite, both the Board and the Minister are under a heightened obligation to consider alternatives to detention, specifically release upon conditions. The National Parole Board previously determined that Mr. Ahmed could be released subject to stringent conditions. It is open to the Board to require a psychological assessment as a condition of release (*Canada (Minister of Citizenship and Immigration) v Romans*, 2005 FC 435 at para 74). Counsel for Mr. Ahmed informed the Court that she has initiated the process to update the Minister's Danger Opinion. These are all considerations

that should be at the forefront when Mr. Ahmed's detention is next reviewed on July 24, 2015.

[17] These considerations were not appropriately addressed by the Board on July 30, 2015, because of its unreasonable finding that Mr. Ahmed's detention was no longer indefinite, a finding which infected its whole reasoning process and resulted in, at best, a cursory assessment of the alternatives to detention and whether Mr. Ahmed's detention should be continued.

[18] As to the Applicant's submission that this is an appropriate case for the Court to make a directed verdict, considering the length of the detention and the Applicant's need for surgery, I reject this request. It may well be that if this matter comes before the Court again such a verdict will then be necessary. It is not the role of this Court to substitute its own view of a preferred outcome or to reweigh the evidence (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 [*Khosa*] at para 59, 61). Whether the Applicant poses a danger to the public or is unlikely to appear for removal falls within the core expertise of the Board and it, rather than this Court, should address these issues, as well as the imposition of conditions of release, directly at the next detention review hearing presently scheduled for August 27, 2015.

[19] Lastly, as to the Applicant's argument that this matter warrants an award of costs against the Respondent, I do not see, at this time, sufficient special reasons to make an award of costs. Nevertheless, if this matter comes before the Court again, there may well be at that time special reasons to justify an award of costs pursuant to Rule 22 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*.

[20] In the result, therefore, the Applicant's application for judicial review is allowed, the decision of the Board on July 30, 2015, is set aside, and the next review of the Applicant's detention must be determined in accordance with this judgment and reasons.

[21] Neither party raised a question of general importance for certification, so none is certified.



**JUDGMENT**

**THIS COURT'S JUDGMENT is that:** the application for judicial review is allowed; the decision of the Board on July 30, 2015, is set aside: the next review of the Applicant's detention by the Board must be determined in accordance with this judgment and reasons; no question of general importance is certified; and there is no award of costs.

"Keith M. Boswell"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-3579-15

**STYLE OF CAUSE:** AHMED, AHMED ALI v THE MINISTER OF  
CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** OTTAWA, ONTARIO

**DATE OF HEARING:** AUGUST 24, 2015

**JUDGMENT AND REASONS:** BOSWELL J.

**DATED:** AUGUST 26, 2015

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