Federal Court  Cour fédérale

Date: 20160930

Docket: IMM-615-16

Citation: 2016 FC 1097

Ottawa, Ontario, September 30, 2016

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Applicant

and

PAUL ROONEY

Respondent

JUDGMENT AND REASONS

I. Background

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c-27 [the Act or IRPA] of a February 9, 2016 release order [Reasons] of the Immigration Division of the Immigration and Refugee Board [ID or the Board].

[2] The Respondent's nationality, exact date and place of birth, date of entry into Canada, and legal status are unknown, or, at best, unclear. As Justice Harrington noted at page 2 of his March 2, 2016 decision dismissing the Minister's earlier stay motion in this matter [Stay Order]:

> Mr. Rooney [the Respondent] seems to have a complicated life story. He may or may not have been born in Toronto. He may or may not have been born in St. Vincent and the Grenadines. He may or may not have been born in England […] In other words, he may or may not be Canadian.

[3] The Respondent maintains that his biological parents were originally from St. Vincent and the Grenadines, and they died when he was very young; he does not know their age, date or place of death, or their legal status in Canada. While he maintains that he was informally adopted as a child, and raised by adoptive parents in Birmingham, he does not remember where he was born – whether in Canada, England or elsewhere. Efforts to uncover his birthplace have not borne fruit to date.

[4] The Respondent alleges that at some point during the 1980s, during his late teenage or early adulthood years, he moved to Toronto with his adoptive parents, on a British passport which he no longer has. The Respondent states that he attended high school in Toronto.

[5] Shortly after he arrived in Canada, the Respondent says that a family member provided him with a social insurance number [SIN] card. The SIN card belonged to a Canadian citizen and Ontario resident, Mr. Paul Lawrence Rooney. It was stolen in 1992. Shortly thereafter, the Respondent moved out of his adoptive family's household due to what he described as drugs in the house and other criminal activity.

[6] Between January 1994 and October 1997, the Respondent made use of the SIN card in order to receive social assistance.

[7] He was convicted for theft and fraud over $5,000 in November 1997, being processed as a foreign national under his biological father's name. He served concurrent sentences of 3 months for the fraud and 2 months for the theft, for which he paid restitution.

[8] The Respondent has not been convicted of or charged with any criminal offences since 1997, although in September 2013, he was investigated by the Vancouver Police Department for using the same SIN as Mr. Paul Lawrence Rooney, the Ontario resident mentioned above. The Respondent used the SIN for employment purposes for several years. Ultimately, no charges were laid in connection with the 2013 investigation.

[9] On September 18, 2013, the Respondent was interviewed at his workplace by Canada Border Services Agency [CBSA], at which time he explained his birth to parents from St. Vincent and the Grenadines, their early deaths, his childhood in England, and his later move to Toronto. He also explained that he had never been deported from Canada, and did not hold any identification papers. Finally, he advised that his common law spouse had recently died.

[10] On October 25, 2013, CBSA further questioned the Respondent after learning of his criminal record, and being unable to verify his birth information with Ontario Vital Statistics. The Respondent advised that his memory was not good and if he was not born in Canada, he was most likely born in Birmingham, England.

[11] The Respondent was subsequently detained by a CBSA officer under the Act, because "based on ROONEYS own statements that he was born in England, [the officer] formed the opinion that he was inadmissible to Canada for being an overstay and Immigrant Without a Visa, in addition to his in-Canada criminality […]" (Applicant's Record, p 41 [AR]).

[12] On October 28, 2013, a deportation order was issued against the Respondent pursuant to subsection 44(2) of the Act because he was deemed inadmissible under paragraph 36(1)(*a*) of the Act, for having been convicted in Canada of an offence punishable by a maximum term of imprisonment of at least 10 years. However, given the Respondent's unknown nationality, CBSA has not deported him to date.

[13] Between October 2013 and February 2016, the Respondent appeared monthly before members of the ID for his mandatory 30-day detention reviews. The ID members, in turn, consistently ordered his continued detention on identity grounds. In general, the ID members rejected release on the basis of credibility issues with respect to his claims of memory loss, citing the Respondent's conflicting, lacking or inconsistent information.

II. The Member's Decision

[14] At the Respondent's February 2016 detention review, held over two days, the Member referred to, but decided not to follow the rationale provided in the prior ID decisions, including her own, to keep the Respondent detained. The Member noted the length of the Respondent's cumulated detention finding that continued detention could only be described as indefinite. She also considered a number of other statutory factors in ordering his release, which included the

Respondent's: medical history; cooperation with CBSA; lack of danger to the public given that his only criminal convictions were in 1997; and employment up until his 2013 detention. The Member ordered the following conditions of release:

> Prior to his release, the Respondent must report his residential address to a CBSA officer, and report any changes of his address, in person […] before moving;
>
> Report in person to a CBSA officer, at the above noted address, within 72 hours of his release and once of month thereafter as directed by a CBSA officer. A CBSA officer may, in writing, reduce the frequency or change of the reporting location;
>
> Not use the Social Insurance Number of Paul Lawrence Rooney for any reason. (AR, p 5)

[15] The Member, in spite of the Minister's objection, opted not to include a reporting condition to an officer "at a date, time and place requested by CBSA", concluding that if CBSA had further questions, it could either ask them during the Respondent's monthly reporting meetings, or seek a future change in conditions before the ID.

[16] The Applicant Minister filed to have the Member's order stayed. On March 2, 2016, Justice Harrington dismissed the Applicant's motion, ruling that while the Respondent may have a criminal record, he was not a danger to the public or a flight risk -- given his application to remain in Canada on humanitarian and compassionate grounds. Justice Harrington went on to note, "[i]ndeed, he cannot be called up for removal because the Minister does not know whether or not he is a foreigner, and if so where he could be sent. This is not clearly an issue of someone gaming the system" (Stay Order at 3).

III. Issues and Analysis

[17] The Applicant argues that the ID erred by:

A. not providing clear and compelling reasons for departing from prior ID decisions which had consistently upheld continued detention on identity grounds;

B. reversing the onus for establishing the Respondent's identity, i.e. placing the onus on the Minister; and

C. imposing unreasonable terms and conditions of release.

[18] Two preliminary items merit comment. The first concerns the standard of review. This Court, in *Shariff v Canada (Minister of Public Safety and Emergency Preparedness)*, 2016 FC 640 [*Shariff*], comprehensively examined the standard for ID detention reviews. Justice Boswell concluded that, primarily being fact-based decisions, they attract the deferential reasonableness standard (*Shariff* at paras 14-15).

[19] Justice LeBlanc, in *Ahmed v Canada (Minister of Citizenship and Immigration)*, 2015 FC 792 at para 19, added that "given that an individual's liberty interests are engaged in a detention review process, detention decisions must be made with section 7 *Charter* considerations in mind."

[20] Applying these principles to this case, the first and third issues are factual in nature and must be reviewed on a reasonableness standard. As the second issue involves mixed questions of

fact and law, it will also be reviewed on a standard of reasonableness (*Canada (Minister of Citizenship & Immigration) v X*, 2010 FC 1095 at para 22 [*X*]).

[21] The second preliminary observation is that the Respondent's nationality has not been established. To date, both the U.K. and St. Vincent and the Grenadines have declined to recognize the Respondent as a national of their respective countries. If the Respondent is indeed Canadian, then IRPA does not apply to him, and he would have no reason to be detained – at least not from an immigration standpoint. This analysis, then, proceeds on the assumption that the Respondent is indeed a foreign national. Given the absence of definitive evidence on this point, I make no finding of fact on his nationality, but need not do so to decide the matter.

A. Issue 1: Did the Member err by failing to provide clear and compelling reasons?

[22] The Applicant contends that the Member had no legal basis to depart from prior detention reviews, which question the Respondent's credibility. I find that despite previous Board decisions requiring continued detention, the Member, at the final detention review hearing (presently under review), provided sufficiently clear and compelling reasons to release the Respondent.

[23] A brief review of the Board's legislated responsibilities in considering detention or release is necessary to understand the context of the Member's decision.

[24] First, the ID, pursuant to subsection 58(1) of the Act, must order release from detention unless it is satisfied that the permanent resident or foreign national:

(a) is a danger to the public;

(b) is unlikely to appear for examination or removal;

(c) is suspected of inadmissibility for major criminality, war crimes, etc.;

(d) has not established identity (but could), and is not cooperating with the Minister -- and/or the Minister is making reasonable efforts to establish identity;

(e) is a designated foreign national whose identity as not been established;

[25] Under subsection 58(1.1) of the Act, the Board must order continued detention if paragraphs 58(1)(a),(b),(c) or (e) apply. Notably, paragraph 58(1)(d) – which addresses identity - is excluded from this prescriptive list, which provides a measure of discretion to the Board when identity is the major issue.

[26] In a related set of factors contained in s. 248 of the *Immigration and Refugee Protection Regulations,* SOR 2002-227 [the Regulations], ID members must consider the following factors in contemplating 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.

[27] Furthermore, under s. 244 of the Regulations, the Board must take into account three overriding considerations in contemplating continued detention, namely that the person:

> (a) is 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;
>
> (b) is a danger to the public; or
>
> (c) is a foreign national whose identity has not been established.

[28] In considering identity, the root issue here - Regulation 247(1) requires the member to consider the following factors:

> (a) the foreign national's cooperation in providing evidence of their identity, or assisting the Department in obtaining evidence of their identity, in providing the date and place of their birth as well as the names of their mother and father or providing detailed information on the itinerary they followed in travelling to Canada or in completing an application for a travel document;
>
> (c) the destruction of identity or travel documents, or the use of fraudulent documents in order to mislead the Department, and the circumstances under which the foreign national acted;
>
> (d) he provision of contradictory information by a foreign national with respect to identity during the processing of an application by the Department; and
>
> (e) the existence of documents that contradict information provided by the foreign national with respect to their identity.

[29] I do not find any obvious faults in the Member’s Reasons, in light of her obligation to consider various provisions in the Act and Regulations concerning detention or release. I also

find her rationale reasonable in light of the leading jurisprudence. The Federal Court of Appeal set out important principles with respect to detention reviews in *Canada (Minister of Citizenship & Immigration) v Thanabalasingham*, 2004 FCA 4 [*Thanabalasingham*], which held that under s. 58, while past detention decisions must be considered, each subsequent decision must "come to a fresh conclusion whether the detained person should continue to be detained" (at para 24). Moreover, the Act does not require new evidence to be brought forward in order for a member to depart from past decisions; rather, the member must give clear and compelling reasons for doing so, and this Court should show deference in such circumstances (at paras 8 and 10). *Thanabalasingham* also underlined the initial onus of establishing the need for continued detention rests with the Minister (at paras 15 and 16).

[30] In the present case, the Board departed from past detention orders due to (a) the medical evidence; (b) the Respondent's cooperation with CBSA; (c) the length of detention and low likelihood of establishing identity in a reasonable time frame; and (d) his character and ties to the community. I find the Member's Reasons for his release to intelligible, including why this outcome differed from those of past detention reviews. The Member clearly took into account and applied the factors outlined in s. 58 of the Act, as well as in ss. 244, 247 and 248 of the Regulations. Specifically, I find her justifications to be clear and compelling for the following four reasons.

[31] First, the Member reviewed the medical evidence before the ID. She noted that a possible side effect of the Respondent's antiviral medication is memory loss. She also considered a recent medical report stating that the Respondent is likely suffering from early onset dementia. She was

of the view that past decision-makers had improperly weighed and erroneously dismissed this evidence. This finding was open to the Member, based on objective medical documentation: Mr. Rooney's 2015 Folstein mini mental examination results revealed some cognitive impairment, including a 25% decrease in functioning over the past 9 months. Furthermore, while previous members had found the Respondent not to be credible regarding his purported memory loss, this Member reassessed credibility, and provided sufficient justification for concluding on a balance of probabilities that he was suffering from memory loss.

[32] Second, the Member's Reasons comprehensively address the key considerations for release – all of them supported by the legislative regime. She gave ample examples where the Respondent had cooperated with CBSA. Although this conclusion differed from previous detention decisions, including the Member's own prior ruling, time can change circumstances surrounding detention. Even without any fresh evidence regarding the detained individual - medical or otherwise - there is a proportional relationship between ongoing detention and a detainee's liberty interests: the longer the period of detention, the greater the need to justify what may become an indefinite detention, particularly when the Applicant is cooperating in the efforts to ascertain identity.

[33] The analysis may, of course, differ where a criminally inadmissible detainee refuses to cooperate with the authorities. This can occur, for instance, when the detainee refuses to sign paperwork required to ascertain or facilitate identity, or otherwise cooperate with the authorities, using the convenient shield of "indefinite detention" against the sword of his own criminal past. As the Court has said and since repeated, condoning such conduct would "encourage deportees

to be as uncooperative as possible as a means to circumvent Canada's refugee and immigration system" (*Canada (Minister of Citizenship and Immigration) v Kamail*, 2002 FCT 381 at para 38).

[34] Returning to the Respondent's detention review, there were important factors that this Board weighed differently to Boards which had conducted prior detention reviews. These include the fact that the Respondent: answered all CBSA questions to (what he states was) the best of his knowledge; allowed CBSA access to his medical records; granted CBSA access to his apartment for a search; and was willing to submit to DNA testing. In other words, the Respondent cooperated with the authorities in this case.

[35] It is true that the Respondent may not have answered some of CBSA's questions to its complete satisfaction. However, whether a failure to recall or remember facts (because of a medical condition, forgotten childhood memories, old age or other reasons) amounts to a lack of cooperation, or is rather a factor amplified by the passage of time and memory loss, remains a factual determination of the Board which should be reviewed deferentially. This Court should not intervene unless the result goes beyond the range of reasonable outcomes. In this instance, it does not.

[36] Third, the Member considered the length of past and possible future detention. She found that CBSA had persistently asked the Respondent the exactly same six questions for months in successive detention reviews, and that he repeatedly gave the same answers to those six questions. The Member, observing that for over two years the Respondent had informed CBSA

that he simply could not remember some dates, places and other facts of his birth and childhood, wrote “the Minister is unable to make any further investigative efforts at the current time because they are not receiving or do not have the information that they usually use to pursue their investigation” (AR, p 26). She concluded that the Respondent’s detention was “likely to persist indefinitely” (AR, p 26).

[37] In the circumstances, the Member had every right to observe the diminishing return of CBSA asking the same questions repeatedly over such a lengthy period of time, and to end what she found to be an indefinite immigration-based detention.

[38] It is true that length of time alone is not a determinative factor in detention cases. It is nonetheless a factor that must be carefully considered – even in detention cases where identity has not been established (*Walker v Canada (Minister of Citizenship & Immigration*, 2010 FC 392 at para 32).

[39] Viewed as a whole, the Member gave clear and compelling reasons why in this case -- after 27 months of detention and in light of the unlikelihood of establishing identity in the foreseeable future -- the length of detention was of particular concern. She was entitled to weigh the concern heavily among the various statutory factors considered.

[40] Fourth and last, the Member took the view that the Respondent was not a flight risk, including his pending application on humanitarian and compassionate grounds. In light of the circumstances, she found reasonable alternatives to detention, noting the Respondent’s good

character and ties to the community (including a friend who had offered him a place to stay and a not-for-profit organization that had also offered its assistance.)

[41] In short, the Board's justifications to depart from past decisions are clear and compelling. I find that the Member's reasons are well within the ambit of possible outcomes.

B. Did the Member err in reversing the onus of proving identity onto the Minister?

[42] The Applicant argues that the Member displaced the onus of proof to establish identity from the Respondent onto the Applicant.

[43] I agree with the Applicant that establishing identity remains central to the legislative scheme, and indeed that under paragraph 58(1)(d) of the Act, the Respondent must first assist the Minister in that regard. The Minister must then make reasonable efforts to ascertain identity. Both parties therefore have a role to play. As such, this Court in *X* at para 24, reasoned that "neither [the Minister or the detainee] has the complete onus of proof, neither can sit back and do nothing." Indeed, Justice Phelan went on to note at paragraph 31 that "[u]nder s. 58 both parties have obligations and the fulfillment of one party's obligations […] is influenced by the other party's conduct."

[44] I disagree with the Applicant's contention that in this case the Member unreasonably applied paragraph 58(1)(d). Rather, the Member concluded, based on the evidence before her, that the Respondent is sick and has provided CBSA with the information he knows or recalls. Further, she explicitly found that while CBSA's actions were not unreasonable; the investigation

had not been progressing and would not foreseeably progress, an impasse she deemed to be a standstill. Finding that CBSA has no more to investigate with the information provided does not amount to reversing the onus.

[45] In certain cases, an ID member may make a factual determination on memory including that a detainee does not remember early childhood events which makes it extremely difficult and in some cases impossible to prove identity. Here, the Board said that requiring the Respondent to prove his inability to remember details of his birth or childhood, in turn prove that he is not lying, creates an obligation to prove a negative. In the Member's view, such an obligation should not stand in Canadian immigration law.

[46] Imposing an obligation to prove a negative in these circumstances may give rise to a Catch-22 situation for the stateless, nameless, mentally ill, and other vulnerable individuals who may not be able to establish identity. While I do not contest the Member's finding that the Respondent may not be *de jure* stateless as understood by international instruments, the issue of statelessness and persons unable to establish nationality merits comment.

[47] In a 2010 paper on *de facto* statelessness, Senior Legal Adviser to the United Nations High Commissioner for Refugees [UNHCR] Hugh Massey explains that the inability to prove nationality may be linked to a number of causes, including the fact that "[s]ome people may have never been registered in the civil registration system of the country of their nationality." Mr. Massey further notes the difficulty to establish nationality in the case of unaccompanied children, especially if the "child is so young as to be unable to provide any information at all about his or

her origins, e.g. if the child is a foundling" (Hugh Massey, "UNHCR and De Facto Statelessness" (2010) United Nations High Commissioner for Refugees Legal Protection Policy Research Paper at 41-42).

[48] And in a 2012 discussion paper written for UNHCR, referenced at pages 543-544 of the Respondent's Record, author Andrew Brouwer highlights the consequent difficulties created by the dilemma:

> In Canada, as elsewhere, stateless persons who do not have authorization to stay in the country live in a condition of legal limbo. Some stateless persons are refugees and, once recognized as such, enjoy the full set of rights which attach to refugee status. However, non-refugee stateless persons are in an extremely precarious situation. These are persons who are not recognized as nationals by any country but also do not have a well-founded fear of persecution in any country […] Whether they were stateless before arrival or lost their nationality while in Canada […], it is this group of individuals, albeit small, who face the greatest problems in Canada and elsewhere. They are vulnerable and marginalized. [emphasis added]
>
> Andrew Brouwer, "Statelessness in the Canadian Context" (2012) United Nations High Commissioner of Refugees Discussion Paper at 12.

[49] Mr. Brouwer goes on to explain at page 14 of his paper the impact of being caught in this "legal limbo" on persons unable to establish nationality, which, as the Respondent's case demonstrates, is so intimately linked to identity:

> […] non-refugee stateless persons in Canada who cannot acquire a legal status are subject to removal from the country, and may be detained pending removal. However, because removal is often impossible what should be short-term detention in preparation for removal may become long-term or even indefinite, as Canadian officials try to convince another country to accept a non-national. The issue of lengthy detention, particularly for administrative reasons is a key concern for UNHCR, which could be avoided if

> alternative protection mechanisms for this group were to be put in place.

[50] Under subsection 2(1) of IRPA, a "foreign national means a person who is not a Canadian citizen or a permanent resident, and includes a stateless person." This is the only mention of the word "stateless" in the Act; the Regulations also offer few provisions addressing the notion, without any definition of statelessness. There is an equal dearth of guidance in the jurisprudence regarding stateless persons or persons such as the Respondent, who are unable to establish nationality or are of undetermined nationality, whether found to be stateless in fact (*de facto*) or in law (*de jure*).

[51] As currently constructed, Canada's immigration framework provides minimal, if any, legal guidance for those who are in Canada, but do not know who they are or where they come from. This legislative void can result in what has happened in the Respondent's case, namely a reality where someone unable to prove legal status is told that he does not belong in Canada, but is also unwanted abroad, and as a result remains in detention for a prolonged period. Neither the Act nor Regulations assist in a situation akin to the Respondent's, who finds himself betwixt and between Canadian and foreign nationality, caught by the factual and legal complexities of his situation.

[52] Given the Respondent's unique circumstances, and until Parliament provides further guidance on the issue, I find the Board's reasoning to be entirely reasonable.

C. Did the Member err in imposing unreasonable terms and conditions?

[53] The Applicant's final argument, citing *Canada (MCI) v Li*, 2008 FC 949 [*Li*], is that the Member imposed unreasonable, nominal conditions because they fail to mitigate the grounds for detention. *Li*, however, involved two individuals accused of serious crimes who were considered to be flight risks by the ID. In that case, Justice Martineau held that electronic monitoring was not a reasonable condition and alternative to detention.

[54] Here, on the other hand, there are no pending criminal charges, nor is there any indication that he is a danger to public. As mitigating terms, the Member released the Respondent having CBSA reporting requirements within 72 hours and monthly thereafter, along with notification of any change of address. The Respondent also undertook never to use the impugned SIN again.

[55] While the Member's refusal to impose the condition of reporting to CBSA "at its request" may not be standard, and while characterizing CBSA's past questioning as "harassment" may be debatable, the conditions imposed are nonetheless reasonable.

[56] Considering the factors in this case as a whole, coupled with the deference owed to the Board, I find the conditions as ordered fall within the scope of possible and acceptable outcomes, just as I find with respect to the Member's broader conclusions justifying the Respondent's release from detention.

IV. Conclusion

[57] In light of all of the above, this application for judicial review is dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed;

2. Counsel raised no questions for certification, nor do any arise;

3. No costs will be issued.

"Alan S. Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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