Federal Court  Cour fédérale

Date: 20181107

Docket: IMM-4969-18

Citation: 2018 FC 1116

Vancouver, British Columbia, November 7, 2018

PRESENT: The Honourable Mr. Justice Campbell

BETWEEN:

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Applicant

and

JW AKA JH

Respondent

JUDGMENT AND REASONS

[1] The present Application is a judicial review of a highly detailed 43-page decision rendered by a Member of the Immigration Division [ID] in which reasons are provided for releasing the Respondent from detention.

[2] The Minister objects to the Respondent's release because the Respondent is a flight risk. The Minister argues that the decision must be set aside because the Member failed to provide clear and compelling reasons for departing from the previous ID decisions.

[3] The standard of review of the decision is reasonableness. To be reasonable, the decision must conform to the standard in *Dunsmuir* at paragraph 47:

> In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.
>
> *(Dunsmuir v New Brunswick, 2008 SCC 9)*

[4] For the reasons that follow, I find that the decision under review meets the *Dunsmuir* standard. In particular, the decision is defensible in respect of the facts and law.

[5] With respect to the law, the Federal Court of Appeal in the decision *Thanabalasingham* held that an ID Member must provide clear and compelling reasons for departing from a previous decision of the Division:

> Detention review decisions are the kind of essentially fact-based decision to which deference is usually shown. While, as discussed above, prior decisions are not binding on a member, I agree with the Minister that if a member chooses to depart from prior decisions to detain, clear and compelling reasons for doing so must be set out. There are good reasons for requiring such clear and compelling reasons.
>
> Credibility of the individual concerned and of witnesses is often an issue. Where a prior decision maker had the opportunity to hear from witnesses, observe their demeanour and assess their credibility, the subsequent decision maker must give a clear explanation of why the prior decision maker's assessment of the evidence does not justify continued detention. For example, the admission of relevant new evidence would be a valid basis for departing from a prior decision to detain. Alternatively, a reassessment of the prior evidence based on new arguments may also be sufficient reason to depart from a prior decision.

> The best way for the member to provide clear and compelling reasons would be to expressly explain what has given rise to the changed opinion, i.e. explaining what the former decision stated and why the current member disagrees.
>
> However, even if the member does not explicitly state why he or she has come to a different conclusion than the previous member, his or her reasons for doing so may be implicit in the subsequent decision. What would be unacceptable would be a cursory decision which does not advert to the prior reasons for detention in any meaningful way.
>
> *(Canada (Minister of Citizenship and Immigration) v Thanabalasingham, 2004 FCA 4 at paras. 10-13)*

[6] The Respondent submitted two further decisions where the Federal Court discussed the standard that must be met for an ID Member to find that there is an appropriate "alternative to detention.":

> *Canada (PSEP) v Ali, 2018 FC 552 at para. 47:*
>
> > Once the Minister has made out a *prima facie* case that an individual constitutes a danger to the public or a flight risk, the onus shifts to the individual to demonstrate why his or her release from detention is warranted: *John Doe*, above, at para 4. This principle applies equally to the conditions of release. That is to say, the individual in such circumstances bears the onus of demonstrating that any conditions of release are sufficiently robust to ensure that the general public will not be exposed to any material risk of harm, and will provide a reasonable degree of certainty that the individual will report for removal from Canada, if and when required to do so.
>
> *Canada (PSEP) v Berisha, 2012 FC 1100 at para. 85:*
>
> > The Court concurs with the Member: one cannot examine the alternative to detention expecting perfection. However, a reasonable alternative must be examined with the specific circumstances at front of mind and, on the balance of probability, be an alternative that is likely to result in the person appearing for removal. That determination requires, in the context of this decision, not just an examination of the technology of electronic monitoring, but also a serious examination of the likelihood that a

> detained person who has been determined to be a serious flight risk will be motivated by virtue of the electronic monitoring to comply and not bypass that technology and flee.

[7] With respect to the facts, no dispute exists with respect to the credibility of the evidence supporting the facts found by the Member.

[8] The Member provided clear reasons for why she was departing from the previous decisions of the ID, including her own. In regards to the electronic monitoring plan proposed, she states:

> So, in summary, I find that with the technology contained in the tamper resistant bracelets, two of which would be worn by you, I do find it unlikely that you would be successful in removing both bracelets before Hilton Security or a bondsperson or the RCMP or the CBSA were able to attend your location. I find that with the technology of the bracelet, which makes it very difficult to cut off, the alerts, sirens, and a response plan that would involve multiple parties, CBSA, police, security, and bondspersons responding to a breach, that all combined it makes it unlikely that you would breach in condition or the condition that requires you to maintain a presence with in your home at all times.
>
> So, again, I think that it's important to reiterate that the electronic monitoring is not — is not just a condition or a release plan in isolation but it’s a mechanism to help ensure compliance with conditions that will ensure that you are available to the CBSA for the continuation of your immigration proceedings.
>
> I think that it's also relevant to note that there is - there was a previous proposal for electronic monitoring in your detention review proceedings. It was first mentioned on the 5th of March, 2018 and then more detail was provided before me in your hearing in June 2018. I rejected the proposal for electronic monitoring at that time because the technology that was being proposed by you or through the company that was proposed, Tratek, T-r-a-t-e-k, was a more basic rubber bracelet that was determined to be more easily removed than the technology that is being proposed at present. Also, the Minister's representative at the hearing in June 2018 had stated in reply that the CBSA did not have staff on shift between midnight and 8:00 am to respond to any breaches. And I had stated

> at that time in my decision that if different technology became available then electronic monitoring could, be reconsidered, and I also suggested that someone from the CBSA needed to testify about the agency's staffing levels and ability to respond to breaches. That has since happened. So the information that's before me now is significantly different than was before me in June and which leads me to a different conclusion on the likely effectiveness of electronic monitoring.
>
> (Decision, pp. 20-21)

[9] The Member also provided clear reasons for accepting a bondsperson who the ID had previously rejected. She states:

> So his role now would not be to exercise moral suasion over you but to act in conjunction with the electronic monitoring to deter you from breaching conditions. [...] You will know that if you try and cut the bracelets off or if you leave the approved geographical zone then Mr. Sikorski, Hilton Security, the police or the CBSA will respond. Mr. Sikorski is part of the larger plan that requires you to remain in your residence where the CBSA can make contact with you while your immigration processes are underway.
>
> (Decision, p. 22)

[10] I find that the Member's reasons for decision meet the *Dunsmuir* test for reasonableness because the decision is transparent, intelligible, and falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. The Member correctly applied the law outlined above in reaching the decision to release the Respondent, and the Member's reasons for ordering the release are clear and compelling.

[11] As a result, the present Application must be dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is hereby dismissed.

There is no question to certify.

"Douglas R. Campbell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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