Federal Court  Cour fédérale

Date: 20190712

Docket: IMM-5714-18

Citation: 2019 FC 932

Ottawa, Ontario, July 12, 2019

PRESENT: Mr. Justice Norris

BETWEEN:

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Applicant

and

GREGORY GEORGE ANCEL ALLEN

Respondent

JUDGMENT AND REASONS

[1] The background to this matter is set out in my decision refusing to stay an order for the respondent's release made by a member of the Immigration Division [ID] of the Immigration and Refugee Board of Canada (*Allen v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 1194). That release order is the subject of the present application for judicial review, brought by the Minister under section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

[2] Briefly, the respondent, a citizen of Jamaica, was born in October 1978. He arrived in Canada in 1999 under a spousal sponsorship application. However, the respondent lost his permanent resident status as a result of convictions for serious criminal offences. A deportation order was made on October 13, 2016.

[3] In March 2017, the respondent was transferred from a federal penitentiary (where he had been serving his sentence for his most recent convictions) to a provincial correctional institution where he was detained under the *IRPA* pending his removal from Canada. This detention was the subject of regular reviews as required by the *IRPA*. Up until the decision at issue here, the ID continued the respondent's detention. The delay in the respondent's removal was due to a lack of travel documentation from Jamaica.

[4] On November 19, 2018, the ID member ordered the respondent's release from detention on terms and conditions. On November 20, 2018, Justice Fothergill granted the Minister's motion for an interim interlocutory stay of the release order. On November 27, 2018, I heard the Minister's motion for an interlocutory stay of the release decision pending the determination of an application for leave and judicial review brought by the Minister. For reasons released on November 28, 2018, I dismissed that motion.

[5] On December 12, 2018, I granted the Minister's application for leave to proceed with judicial review of the release order. The hearing of that application took place on February 6, 2019. I reserved my decision.

[6] In a letter dated June 26, 2019, counsel for the Minister wrote to advise the Court that the respondent had been re-arrested and detained because he had breached the terms of his release. In a follow-up letter dated June 28, 2019, counsel for the Minister provided additional details concerning the alleged breach and the respondent's detention. Counsel advised that the respondent had been re-arrested on June 25, 2019, and his detention had been ordered continued following a 48-hour detention review conducted on June 27, 2019. On June 24, 2019, one of the respondent's bondspersons (his common law partner) alleged that the respondent assaulted her while on release and left her home despite a term requiring him to reside there. The bondsperson asked to be relieved of her obligations. The respondent was arrested the next day.

[7] Counsel also advised that a travel document for the respondent has been obtained and that the respondent's removal is scheduled for July 16, 2019.

[8] Two questions now arise as a result of the respondent's re-arrest and continued detention. First, is the Minister's application for judicial review of the November 19, 2018, order for the respondent's release moot? Second, if the application is moot, should I nevertheless render a decision on its merits? The Minister submits that the application is moot but should be decided on its merits despite this. The respondent agrees that the application should be decided on its merits (albeit for slightly different reasons than those advanced by the Minister) but takes no position with respect to mootness in the event that he is removed from Canada before a decision is rendered on the application for judicial review.

[9] I have concluded that the Minister's application for judicial review is moot and that, notwithstanding the positions of the parties, I should not exercise my discretion to decide the application on its merits despite its mootness.

[10] The doctrine of mootness "reflects the principle that courts will only hear cases that will have the effect of resolving a live controversy which will or may actually affect the rights of the parties to the litigation except when the courts decide, in the exercise of their discretion, that it is nevertheless in the interest of justice that the appeal be heard" (*Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 SCR 3 at para 17).

[11] As is well-known, a mootness analysis proceeds in two stages. The first question is whether a live controversy remains that affects or may affect the rights of the parties. If this question is answered in the negative, the proceeding is moot but the court must still consider whether it should exercise its discretion to decide the matter on the merits nevertheless (*Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 at 353-63 [*Borowski*]; *Democracy Watch v Canada (Attorney General)*, 2018 FCA 195 at para 10).

[12] The Minister submits that the application for judicial review is moot because the release order it concerned has now been overtaken by a new detention order by the ID. In support of this position, the Minister cites *Mazzei v British Columbia (Director of Adult Forensic Psychiatric Services*, [2006] 1 SCR 326 at para 15; *Mission Institution v Khela*, [2014] 1 SCR 502 at paras 13-14; and *Canada (Public Safety and Emergency Preparedness) v Ismail*, 2014 FC 390 at para 20. The Minister also cites my decision in *Fomenky v Canada (Public Safety and*

Emergency Preparedness), 2018 FC 1160 at paras 18-22, where I held that an application for judicial review of a detention order was rendered moot by the applicant's release from custody at a subsequent detention review. I agree that these cases are directly on point. In the present case, the "tangible and concrete" dispute between the parties was over whether the ID's release order should be upheld or overturned. With the respondent's re-arrest and detention under a new order of the ID, "the substratum of [the proceeding] has disappeared" (*Borowski* at 357). A decision on the issues raised in the application for judicial review would have no practical effect.

[13] Having determined that the application for judicial review is moot, I must still consider whether I should exercise my discretion to address the merits of the application despite this.

[14] In *Borowski*, the Supreme Court of Canada formulated guidelines for the exercise of this discretion. Three factors were identified: (1) whether there is an adversarial context; (2) the concern for judicial economy; and (3) whether deciding the case on its merits would be consistent with the court's adjudicative role relative to that of the legislative branch of government (at 358-63). The Court emphasized that this is not an exhaustive list: "more than a cogent generalization is probably undesirable because an exhaustive list would unduly fetter the court's discretion in future cases" (at 358). This discretion is "to be judicially exercised with due regard for established principles" (*ibid.*). Further, the application of these factors is not a "mechanical process" (at 363). The factors may not all support the same conclusion in a given case, and the presence of one or two may be overborne by the absence of a third, and vice versa (*ibid.*). The ultimate question is what is in the interests of justice.

[15] The Minister challenged the release decision on three principal grounds: (1) the ID member's conduct at the hearing gives rise to a reasonable apprehension of bias; (2) the ID member failed to give clear and compelling reasons for departing from previous decisions of the ID to detain the respondent; and (3) the decision is unreasonable, particularly in its approval of the bondspersons notwithstanding indications of domestic abuse in the past.

[16] I agree that the first of the *Borowski* factors favours deciding this case on its merits. There is no question that an adversarial context is still present here. The parties remain fully engaged and both sides have advanced their positions on the merits of the judicial review application very ably.

[17] I find the third of the *Borowski* factors to be a neutral consideration in the circumstances of this case. As the Supreme Court of Canada has noted, a court "must demonstrate a measure of awareness of its proper law-making function" and "must be sensitive to its role as the adjudicative branch in our political framework" (*Borowski* at 362). The Court continued: "Pronouncing judgments in the absence of a dispute affecting the rights of the parties may be viewed as intruding into the role of the legislative branch" (*ibid.*). The danger of such an intrusion was clear in *Borowski*, which concerned a moot challenge to the constitutionality of legislation governing abortion. There is no such danger here. At the same time, it would not be an abdication of this Court's proper law-making function to decline to decide this case on its merits.

[18] In my view, the determinative consideration is the second of the *Borowski* factors. There is no question that declining to decide the case on its merits at this late stage would mean that the resources expended to date by the Court (not to mention the parties) would be thrown away. This is highly regrettable. However, the concept of "judicial economy" is more nuanced than this. It recognizes that it can be an effective use of judicial resources to decide a moot case on its merits when it raises important issues that are evasive of review (*R v Penunsi*, 2019 SCC 39 at para 10). It also recognizes, conversely, that it will not be an effective use of judicial resources when these conditions are absent.

[19] In my view, none of the grounds raised by the Minister are evasive of review. Moreover, the importance of the issues relating to bias and the need for clear and cogent reasons for departing from previous decisions of the ID does not extend beyond the confines of this case. The law in both of these areas is clear and well-settled. To be fair, the Minister did not press either of these grounds strongly in the mootness context. Rather, the Minister emphasizes the issue of the reasonableness of the ID member's decision to approve the bondspersons. The Minister submits that "it is in the public interest that the Court render a decision on whether it was reasonable for the ID Member to accept bondspeople when there were previous allegations of domestic abuse and when they had previously been rejected by another Member of the Immigration Division." The Minister goes on to submit that a determination of these issues is of great importance given the reasons for the respondent's recent re-arrest and detention.

[20] The Minister does not seek the admission of any new evidence relating to events subsequent to the respondent's release with respect to the merits of the judicial review

application. Instead, the Minister submits that those events call for the exercise of discretion in favour of determining the reasonableness of the release order on the basis of the record that was before the ID member. While I agree with the Minister that any question of domestic abuse is a matter of the utmost seriousness, I cannot agree that this is sufficient to warrant a determination of the reasonableness of the release decision in this case. The evidence relating to domestic abuse that was before the ID member was equivocal at best. It provides a poor foundation for the sort of broad pronouncements the Minister appears to be asking me to make.

[21] For his part, the respondent offers an additional consideration in support of the position that I should decide the application for judicial review on its merits despite its mootness – "the cumulative nature of detention review decisions means that a determination on the reasonableness of the October 2018 release will bear on the circumstances of his detention today."

[22] I understand the respondent to be alluding to the principle that generally an ID member should provide clear and compelling reasons for departing from previous decisions of the ID *(Minister of Citizenship and Immigration) v Thanabalasingham*, 2004 FCA 4 at paras 10-14). As the Supreme Court of Canada has noted, this can mean that periodic detention reviews under the *IRPA* "are susceptible to self-referential reasoning, instead of constituting a fresh and independent look at a detainee's circumstances" (*Canada (Public Safety and Emergency Preparedness) v Chhina*, 2019 SCC 29 at para 62).

[23] In my view, this problem does not arise here. Under the best case scenario for the respondent if I were to decide the application on its merits, I would uphold the release order. But even if I were to do so, the assistance that release order could give to the respondent at future detention reviews would arguably be diminished significantly, if not entirely, by the respondent's conduct while on release under that order. Put another way, there is little, if any, risk of self-referential reasoning here because of the intervening events that occurred while the respondent was on release. The respondent's conduct could well provide clear and compelling reasons for ordering his continued detention despite a decision upholding the order for his release. Even if the risk of self-referential reasoning could entail that a judicial review application is not moot in some circumstances, I find that it does not do so here. That being said, the question of the significance of the respondent's conduct while on release is not before me and I make no findings about it.

[24] Balancing all of the foregoing considerations, I decline to exercise my discretion to decide the Minister's application for judicial review on its merits despite its mootness.

[25] Accordingly, the application for judicial review is dismissed as moot.

[26] At the hearing of this application, the parties were in agreement that the application for judicial review did not give rise to a serious question of general importance for certification under section 74(d) of the *IRPA*. Since they have not had an opportunity to address this issue in the mootness context, the parties are asked to advise the Court of their respective positions in writing no later than July 19, 2019.

JUDGMENT IN IMM-5714-18

THIS COURT's JUDGMENT is that

1. The application for judicial review of the decision of the Immigration Division dated November 19, 2018, is dismissed as moot.

2. The parties shall advise the Court of their respective positions concerning whether a serious question of general importance should be certified under section 74(d) no later than July 19, 2019.

"John Norris"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5714-18
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