Federal Court  Cour fédérale

Date: 20110121

Docket: IMM-2529-10

Citation: 2011 FC 76

Montréal, Quebec, January 21, 2011

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Applicant

and

SHO-SILVA NOSA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant challenges the legality of the Immigration Division of the Immigration and Refugee Board (the Tribunal)'s decision dated April 9, 2010 (the Decision), to release Sho-Silva Nosa/Nosa Sho-Silva (Nosa) from detention, on the grounds that the Decision is based on irrelevant factors, ignores relevant factors and previous detention review decisions, and that the Tribunal substituted its own opinion for that of the Minister.

[2] Nosa arrived in Ottawa on December 9, 2009, on an American passport with the name Mavis Idemudia and the birth date February 17, 1982. In response to questioning, Nosa gave his name as Noah Sho-Silva, date of birth July 28, 1980. He had no supporting documents confirming that name.

[3] Nosa informed the Canadian authorities that he had left Nigeria on December 1, 2009, and flew to San Francisco. He went by car to Sacramento and then flew from Los Angeles to Chicago and then to Ottawa. He used his Nigerian travel documents for the flight to the United States and then purchased supplementary documents for approximately $4,000 to come to Ottawa.

[4] Nosa claimed asylum at the Canadian border on the basis that his house had burnt down and his family was killed in the fire. However, Nosa had a cell phone on him with text messages making reference to a wife giving birth or about to give birth in Italy. He claimed that the cell phone was not his.

[5] As a result of the above, Nosa was detained for 48 hours due to serious doubts as to his identity.

[6] At the 48-hour detention review, the Tribunal determined that Nosa was somewhat helpful with the investigative efforts and that the Canadian Border Services Agency (CBSA) was making reasonable efforts to establish Nosa’s identity, in the context of a 48-hour detention. Nosa was detained for a further seven (7) days.

[7] On December 18, 2009, the Tribunal found that the Minister had made reasonable efforts and that Nosa was co-operating as best he could. Given the Minister's reasonable efforts, detention was continued.

[8] On January 14, 2010, the Tribunal found that CBSA had made some efforts to establish Nosa's identity. The Tribunal also found that it had seen "a lot better" than Nosa's collaboration and that within this context, CBSA's efforts were reasonable. For example, at this point, Nosa was still alleging that he had never been in Italy. Furthermore, when asked to provide his Facebook account password, he provided one that did not work.

[9] On February 11, 2010, the Tribunal reviewed evidence that Nosa had been in Italy and had made conflicting visa applications. The Tribunal concluded that the Minister should have been more diligent since the last hearing but that the Minister's efforts were reasonable, given Nosa's lack of collaboration.

[10] On March 11, 2010, the Tribunal concluded that Nosa's collaboration had improved since the last hearing but that he still was only divulging information in a piecemeal fashion, which was hindering CBSA's efforts. For example, Nosa revealed that his family name was Nosa, rather than Sho-Silva, as previously thought. On this basis, CBSA's efforts were found to be reasonable and the detention was continued.

[11] Finally, on April 9, 2010, the Tribunal found that Nosa had been co-operating as of late to establish his identity, namely in providing his Nigerian passport. The passport had been determined

to be genuine on April 8, 2010, but there was no conclusion as to whether it had been properly issued. The Tribunal discussed the 4-month delay in getting the verification of Nosa's fingerprints from the American authorities and found that it had not been adequately explained. The Tribunal also discussed the delay in hearing back from Interpol regarding Nosa's presence in Italy. Consequently, the Minister's efforts were deemed unreasonable.

[12] The Tribunal ordered Nosa's release on April 9, 2010, subject to three (3) conditions:

a. The Respondent was to report to the CBSA office nearest his residence within 72 hours of release;
b. The Respondent is to report to the CBSA office nearest his residence once per month thereafter;
c. A bond of $3,000 was to be deposited by Norman Griffiths.

[13] The Minister was dissatisfied with these conditions, but chose to seek leave for judicial review rather than request that the conditions be modified. The Minister then requested on July 7, 2010, that the conditions be modified. However, on November 17, 2010, the request to change the release conditions was rejected, on the basis that the release order was not the subject of a stay before the Federal Court and that there was no reason to modify the conditions.

[14] It is the Tribunal's Decision of April 9, 2010, that is before this Court today.

[15] Before addressing the substance of the application for judicial review, the Court addresses the respondent's claim that the application for judicial review was filed out of time and that as no motion was filed for an extension, it should be rejected.

[16] The respondent bases his argument on subsection 72(2) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (*IRPA*). This argument clearly fails, however, as per its own wording. The provision provides that:

Application for judicial review	Demande d'autorisation
72. (1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.	*72. (1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.*
Application *(2) The following provisions govern an application under subsection (1):*	*Application* *(2) Les dispositions suivantes s'appliquent à la demande d'autorisation :*
(a) the application may not be made until any right of appeal that may be provided by this Act is exhausted;	a) elle ne peut être présentée tant que les voies d'appel ne sont pas épuisées;
(b) subject to paragraph 169(f), notice of the application shall be served on the other party and the application shall be filed in the Registry of the Federal Court ("the Court") within 15 days, in the case of a matter arising in Canada, or within 60 days, in the case of a matter arising outside Canada, after the day on which the applicant is notified of or otherwise becomes aware of the matter;	*b) elle doit être signifiée à l'autre partie puis déposée au greffe de la Cour fédérale — la Cour — dans les quinze ou soixante jours, selon que la mesure attaquée a été rendue au Canada ou non, suivant, sous réserve de l'alinéa 169f), la date où le demandeur en est avisé ou en a eu connaissance;*

(c) a judge of the Court may, for special reasons, allow an extended time for filing and serving the application or notice;	c) le délai peut toutefois être prorogé, pour motifs valables, par un juge de la Cour;
(d) a judge of the Court shall dispose of the application without delay and in a summary way and, unless a judge of the Court directs otherwise, without personal appearance; and	d) il est statué sur la demande à bref délai et selon la procédure sommaire et, sauf autorisation d'un juge de la Cour, sans comparution en personne;
(e) no appeal lies from the decision of the Court with respect to the application or with respect to an interlocutory judgment.	e) le jugement sur la demande et toute décision interlocutoire ne sont pas susceptibles d'appel.

(Emphasis added).

[17] Paragraph 169(f) of the *IRPA* states as follows:

Decisions and reasons	Décisions
169. *In the case of a decision of a Division, other than an interlocutory decision*:	169. *Les dispositions qui suivent s'appliquent aux décisions, autres qu'interlocutoires, des sections* :
(a) the decision takes effect in accordance with the rules;	a) elles prennent effet conformément aux règles;
(b) reasons for the decision must be given;	b) elles sont motivées;
(c) the decision may be rendered orally or in writing, except a decision of the Refugee Appeal Division, which must be rendered in writing;	c) elles sont rendues oralement ou par écrit, celles de la Section d'appel des réfugiés devant toutefois être rendues par écrit;

(d) if the Refugee Protection Division rejects a claim, written reasons must be provided to the claimant and the Minister;	d) le rejet de la demande d'asile par la Section de la protection des réfugiés est motivé par écrit et les motifs sont transmis au demandeur et au ministre;
(e) if the person who is the subject of proceedings before the Board or the Minister requests reasons for a decision within 10 days of notification of the decision, or in circumstances set out in the rules of the Board, the Division must provide written reasons; and	e) les motifs écrits sont transmis à la personne en cause et au ministre sur demande faite dans les dix jours suivant la notification ou dans les cas prévus par les règles de la Commission;
(f) *the period in which to apply for judicial review with respect to a decision of the Board is calculated from the giving of notice of the decision or from the sending of written reasons, whichever is later*.	f) *les délais de contrôle judiciaire courent à compter du dernier en date des faits suivants : notification de la décision et transmission des motifs écrits.*

(Emphasis added).

[18] Section 2 of the *IRPA* defines "Board" as "the Immigration and Refugee Board, which consists of the Refugee Protection Division, Refugee Appeal Division, Immigration Division and Immigration Appeal Division". The Decision was issued by the Immigration Division, so the decision is subject to section 169 of the *IRPA*, unless the decision is interlocutory.

[19] A decision is either final or interlocutory. Subsection 2(1) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, stipulates that a final judgment is any judgment or any decision that determines in whole or in part any substantive right of any of the parties in controversy in any judicial proceeding. An interlocutory decision, which is not defined, is thus one that does not determine any substantive right.

[20] The right to release from detention is a substantive right, and as such, the Decision is a final one, rather than an interlocutory one. This analysis is confirmed by the *Guide to Proceedings Before the Immigration Division*, which stipulates that following a detention review hearing, a member must render a decision under section 58 of the *IRPA* and provide reasons in accordance with paragraph 169(b) of the *IRPA*, a provision which does not apply to interlocutory decisions.

[21] The written reasons for the Decision were received by the Minister on April 21, 2010. The application for judicial review was filed on May 6, 2010. In light of the above, section 169 of the *IRPA* applies, meaning that the application was filed in the appropriate timeframe. The respondent's argument is thus rejected.

[22] Turning to the substance of the application, the standard of review of the Decision would be reasonableness with respect to the Tribunal's assessment of the evidence, and correctness with respect to the Tribunal's interpretation of section 58 of the *IRPA* (*Canada (Minister of Public Safety and Emergency Preparedness) v Iyile*, 2009 FC 700 at para 31).

[23] However, such an analysis is unnecessary, as the question before the Court is moot and the Court declines to exercise its discretion to decide the matter regardless. The application for judicial review is thus dismissed for the following reasons.

[24] The leading authority on whether or not an application for judicial review is moot is *Borowski v Canada (Attorney General)*, [1989] 1 S.C.R. 342 at para 16, in which the Supreme Court establishes the test to be undertaken when confronted with the possibility thereof:

> The approach in recent cases involves a two-step analysis. First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case (…).

[25] As mentioned previously, the Tribunal ordered Nosa's release on April 9, 2010, subject to three (3) conditions:

a. The Respondent was to report to the CBSA office nearest his residence within 72 hours of release;
b. The Respondent is to report to the CBSA office nearest his residence once per month thereafter;
c. A bond of $3,000 was to be deposited by Norman Griffiths.

[26] While the Minister submits that these conditions are disproportionate to the Minister's opinion as to Nosa's identity and the fact that the Tribunal found Nosa to be a flight risk, the Minister did not seek to have Nosa's release stayed, nor to have the conditions altered to make them more restrictive until after Nosa had been released. The result is that Nosa was released over nine (9) months ago, subject to the aforementioned conditions.

[27] The Minister would now have this Court grant the motion for judicial review of the Tribunal's decision to release Nosa. The applicant's reasons in support of this request pertain to the process taken by the Tribunal member and her evaluation of the evidence before her, which would be reasonable, were Nosa still in detention. However, given the Minister's failure to have Nosa's release stayed, this approach is insufficient.

[28] Paragraph 58(1)(d) of the *IRPA* provides that a foreign national shall be released "unless the Minister is of the opinion that the identity of the foreign national has not been, but may be, established and they have not reasonably co-operated with the Minister by providing relevant information for the purpose of establishing their identity, or the Minister is making reasonable efforts to establish their identity". This passage is written in the present tense: the foreign national shall be released unless the above conditions are met at the specific moment in time.

[29] Given the language of the paragraph, evidence of the Minister's position nine months ago is no longer relevant: it is current information that is required. Nonetheless, the Minister's memorandum provides no information as to the Minister's investigation into Nosa's identity that would allow this Court to judge that Nosa's identity is still not established to the Minister's satisfaction, and that his detention is required.

[30] Furthermore, if there were still a problem with Nosa's identity, or if Nosa were to violate the conditions of his release, the CBSA could obtain a warrant for his arrest and detain him. However, there is no evidence submitted that Nosa has violated the conditions of his release, nor that the CBSA has had any further dealings with Nosa.

[31] It is common practice in such situations for the Minister to obtain a stay of the Tribunal's decision to release the person (see *Canada (Minister of Public Safety and Emergency Preparedness) v Ouerk*, 2008 FC 167; *Canada (Minister of Citizenship and Immigration) v Zhang*, [2001] F.C.J. No. 795, 2001 FCT 522). The Minister failed to obtain a stay of release, and, in consequence, is now asking for something of no practical use. In other words, the issue has become academic.

[32] The Court also declines to exercise its discretion to hear the application, as the second stage of the *Borowski* test is not met. The three (3) criteria are as follows:

1. The presence of an adversarial context;
2. The concern for judicial economy; and
3. The need for the Court to be sensitive to its role as the adjudicative branch in our political framework.

[33] The application does not satisfy the first or the second criterion. First, there is no evidence before the court of a continuing adversarial relationship between Nosa and the Minister. Second, there is no compelling reason for the Court to hear this application that trumps the concern for judicial economy. It is not a question of general importance, nor a question that is unlikely to ever arise without being moot, due to an inherently short time duration (as the release order can be stayed). Therefore, the application for judicial review is dismissed on the basis of mootness.

JUDGMENT

THE COURT'S JUDGMENT IS that the application for judicial review is dismissed. No question is certified.

"Luc Martineau"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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