Federal Court Cour fédérale

Date: 20110302

Docket: IMM-4982-10

Citation: 2011 FC 252

Ottawa, Ontario, March 2, 2011

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

RAJWANT SINGH DHALIWAL

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. INTRODUCTION

[1] The matter under judicial review is a decision of a member of the Immigration Division of the Immigration and Refugee Board (Tribunal) dated August 12, 2010 to order the Respondent released from detention upon terms principally of the obligation to report to CBSA every two weeks.

II. BACKGROUND

[2] The Respondent is a citizen of India who over the last 15 years has had a checkered immigration history of misrepresentation and deceit. He is currently living in Canada with his common-law spouse and two children.

[3] His immigration history included lying about his relationship with his common-law wife and her first husband – his uncle; fraudulently obtaining a school certificate and passport by using a false name; obtaining a work visa under his false name and continuing to use his false passport and work permit.

[4] Finally, in March 2010, the CBSA, as a result of an anonymous “tip”, was informed of the Respondent’s true identity.

[5] Before the CBSA investigation was completed, the Respondent’s common-law wife filed a spousal sponsored permanent resident application under the Respondent’s false name.

[6] When confronted by CBSA with the truth of his identity, the Respondent continued to lie until he finally conceded his false identity. At that time the Respondent informed CBSA that (a) he had no fear of returning to India (he had been there a few months before); (b) he would defy Canadian law so as to remain in Canada; and (c) he would resist removal. He was arrested on June 15, 2010.

[7] A s. 44 inadmissibility report was issued and at a hearing on June 17, 2010, the admissibility issue was put over to August 9, 2010. The Respondent was released upon terms. He was ordered to attend the August 9, 2010 hearing.

[8] On the Friday before the August 9 admissibility hearing, the Respondent filed a refugee claim. The effect of a refugee claim is to render an admissibility determination moot.

[9] The Respondent failed to attend the admissibility hearing.

[10] The next day, August 10, 2010, the Respondent was arrested at home. The grounds of arrest were the obtaining and use of fraudulent documents. At the detention hearing that day the Tribunal granted release and in so doing noted the following key points:

- obtaining and using false documents;
- strong motivation to stay in Canada;
- attendance at a June 15 interview and absence of any removal order;
- failure to appear at the August 9 hearing was unimportant due to mootness.

[11] As a result, the Tribunal ordered the Respondent's release from detention because the risk of flight was minimal.

III. LEGAL ANALYSIS

[12] Section 58(1) of the *Immigration and Refugee Protection Act* governs the release and detention of persons:

58. (1) The Immigration Division shall order the release of a permanent resident or a foreign national unless it is satisfied, taking into account prescribed factors, that

(*a*) they are a danger to the public;

(*b*) they are 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 under subsection 44(2);

(*c*) the Minister is taking necessary steps to inquire into a reasonable suspicion that they are inadmissible on grounds of security or for violating human or international rights; or

(*d*) 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 cooperated 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.

58. (1) La section prononce la mise en liberté du résident permanent ou de l’étranger, sauf sur preuve, compte tenu des critères réglementaires, de tel des faits suivants :

a) le résident permanent ou l’étranger constitue un danger pour la sécurité publique;

b) le résident permanent ou l’étranger se soustraira vraisemblablement au contrôle, à l’enquête ou au renvoi, ou à la procédure pouvant mener à la prise par le ministre d’une mesure de renvoi en vertu du paragraphe 44(2);

c) le ministre prend les mesures voulues pour enquêter sur les motifs raisonnables de soupçonner que le résident permanent ou l’étranger est interdit de territoire pour raison de sécurité ou pour atteinte aux droits humains ou internationaux;

d) dans le cas où le ministre estime que l’identité de l’étranger n’a pas été prouvée mais peut l’être, soit l’étranger n’a pas raisonnablement coopéré en fournissant au ministre des renseignements utiles à cette fin, soit ce dernier fait des efforts valables pour établir l’identité de l’étranger.

[13] Section 244*(a)* of the *Immigration and Refugee Protection Regulations* establishes the factors referred to in s. 58(1) relevant to this matter:

244. (*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 under subsection 44(2) of the Act;	**244.** *a*) du risque que l'intéressé se soustraie vraisemblablement au contrôle, à l'enquête, au renvoi ou à une procédure pouvant mener à la prise, par le ministre, d'une mesure de renvoi en vertu du paragraphe 44(2) de la Loi;

Section 245 lists the factors to be considered:

245. For the purposes of paragraph 244(*a*), the factors are the following:	**245.** Pour l'application de l'alinéa 244*a*), les critères sont les suivants :
(*a*) being a fugitive from justice in a foreign jurisdiction in relation to an offence that, if committed in Canada, would constitute an offence under an Act of Parliament;	*a*) la qualité de fugitif à l'égard de la justice d'un pays étranger quant à une infraction qui, si elle était commise au Canada, constituerait une infraction à une loi fédérale;
(*b*) voluntary compliance with any previous departure order;	*b*) le fait de s'être conformé librement à une mesure d'interdiction de séjour;
(*c*) voluntary compliance with any previously required appearance at an immigration or criminal proceeding;	*c*) le fait de s'être conformé librement à l'obligation de comparaître lors d'une instance en immigration ou d'une instance criminelle;
(*d*) previous compliance with any conditions imposed in respect of entry, release or a stay of removal;	*d*) le fait de s'être conformé aux conditions imposées à l'égard de son entrée, de sa mise en liberté ou du sursis à son renvoi;
(*e*) any previous avoidance of examination or escape from custody, or any previous attempt to do so;	*e*) le fait de s'être dérobé au contrôle ou de s'être évadé d'un lieu de détention, ou toute tentative à cet égard;

(*f*) involvement with a people smuggling or trafficking in persons operation that would likely lead the person to not appear for a measure referred to in paragraph 244(*a*) or to be vulnerable to being influenced or coerced by an organization involved in such an operation to not appear for such a measure; and	*f*) l'implication dans des opérations de passage de clandestins ou de trafic de personnes qui mènerait vraisemblablement l'intéressé à se soustraire aux mesures visées à l'alinéa 244*a*) ou le rendrait susceptible d'être incité ou forcé de s'y soustraire par une organisation se livrant à de telles opérations;
(*g*) the existence of strong ties to a community in Canada.	*g*) l'appartenance réelle à une collectivité au Canada.

[14] The standard of review for detention hearings was confirmed in *Walker v Canada (Minister of Citizenship and Immigration)*, 2010 FC 392, as reasonableness with deference owed in so far as the decisions are fact-based.

> **25** The Immigration Division's analysis is central to its role as a trier of fact. As such, the Division's findings are to be given significant deference by the reviewing Court. The Division's findings should stand unless its reasoning process was flawed and the resulting decision falls outside the range of possible, acceptable outcomes which are defensible in respect of the facts and the law: *Dunsmuir*, above, at para. 47.
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> **26** In a case such as this one, there might be more than one reasonable outcome. However, as long as the process adopted by the Immigration Division and its outcome fits comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome: *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] S.C.J. No. 12, at para. 59.

[15] The issue in this case is the reasonableness of the determination that the Respondent does not present a flight risk – that he is not a person who will not attend immigration proceedings or

otherwise comply with immigration orders. The Respondent's long standing use of deceit is only relevant to the extent that it touches upon his likelihood of such non-compliance. Also not relevant to that risk analysis is his late filing of a refugee claim except to confirm the obvious, and what he has stated, that he intends to stay in Canada by any means – fair or foul.

[16] However, the strength of the intention to stay in Canada is not evidence of likelihood of compliance. The desire to stay in Canada must be a given (otherwise the Respondent would leave and render proceedings moot) but it also provides a powerful motive to avoid any immigration proceeding which can lead to or does result in removal. The Tribunal's reliance on this factor as assurance of attendance is misplaced.

[17] There are a number of problems with the Tribunal's decision; however, the most fundamental was the Tribunal's failure to consider the Respondent's admissions that he would break the law to stay in Canada and that he would not report to removal to India if so ordered. There is not one word about this evidence nor is there any evidence to suggest that either he did not say what was reported or that it was taken out of context.

[18] These admissions are important here given the background of the Respondent's past efforts to avoid compliance with Canadian law from the use of false identities, uttering misrepresentations and false documents, to non-attendance at immigration proceedings. It is no answer to assume (because no evidence was led) that the Respondent did not appear because the August 9 hearing would not proceed.

[19] The greater the importance of the evidence, the greater the obligation of a decision maker to address that evidence (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* (1998), 157 FTR 35). Relevant to the issue of whether the Respondent would appear at subsequent immigration proceedings is not only his past behaviour but also his past words. Those words are consistent with his past behaviour.

[20] Therefore, the Tribunal erred in failing to consider critical evidence and rendered an unreasonable decision.

IV. CONCLUSION

[21] Therefore, this judicial review will be granted, and the decision to release is quashed. There is no need to refer the matter back as the issues of his flight risk may come again if the Respondent is arrested.

[22] There is no question for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is granted, and the decision to release is quashed.

"Michael L. Phelan"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4982-10
STYLE OF CAUSE:	THE MINISTER OF CITIZENSHIP AND IMMIGRATION and RAJWANT SINGH DHALIWAL
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	February 25, 2011
REASONS FOR JUDGMENT AND JUDGMENT:	Phelan J.
DATED:	March 2, 2011

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