Federal Court Cour fédérale

Date: 20140127

Docket: IMM-6933-13

Citation: 2014 FC 98

BETWEEN:

ARSHAD MUHAMMAD

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT

MCVEIGH J.

FURTHER to a final judgment in this file, rendered on November 2013, in Toronto, dismissing this application, my reasons are as follows.

I. Facts

[1] The following facts are taken from the October 16, 2013 decision of Justice Michel Beaudry:

- The Applicant is a citizen of Pakistan and a Sunni Muslim. On August 2, 1999, he arrived in Montreal with a stolen Italian passport. His claim for refugee status was

denied by the Board pursuant to Articles 1F(a) and (c) of the *UNHCR 1951 Convention Relating to the Status of Refugees* (the "Refugee Convention") because of his membership in a terrorist organization banned by the Pakistani government. This decision was made on the basis of declarations made by the Applicant at the Port of Entry that he was a member of the Sunni party in Pakistan. An application for leave for judicial review of this decision was denied on February 6, 2002, and the Applicant's removal order became enforceable;

- The Applicant applied for permanent residency on humanitarian and compassionate grounds. This was refused on November 5, 2002. He subsequently made a Pre-Removal Risk Assessment (PRRA) application which was refused on March 19, 2003. He was scheduled to attend an interview with the Canada Border Services Agency ("CBSA") in January 2003, but failed to appear. A warrant was issued for his arrest in July 2003;
- The Applicant moved from Montreal to Toronto and remained in Canada illegally. He worked in the construction industry and lived with acquaintances seemingly in an effort to evade detection. In July 2011, CBSA placed the Applicant on their "Most Wanted List" along with 29 other individuals. This led to the Applicant's arrest and detention on July 22, 2011. Since that time, the Applicant has continually been found by the Board to be unlikely to appear for removal. Following 32 detention reviews, he remains in detention;
- On August 3, 2011, the Applicant submitted a second PRRA application claiming that new facts had arisen. His position was that due to the media interest surrounding the publication of the CBSA's "Most Wanted List", he was now a person in need of protection. The list publicly stated that the Applicant has links to an Islamist organization involved in terrorist attacks against Pakistan. The Applicant claimed that if

he is returned to Pakistan, possible risks from sectarian groups or vigilantes would include extreme physical abuse, unlawful detention and extrajudicial killings;

- The Applicant's claim for refugee status was rejected on the basis of section F of Article 1 of the Refugee Convention. As a result, the Applicant is eligible only for a Restricted PRRA, which considers only the factors set out in Section 97 of the Immigration and Refugee Protection Act, SC 2001, c 27 (the "IRPA"). The Applicant's August 2011 PRRA application received a positive opinion from the PRRA Officer on October 7, 2011. The PRRA Officer found that the Applicant would be a person of interest to Pakistani authorities and that it was more than likely that he would face risk if returned;
- Following the procedures for a Restricted PRRA set out in Chapter 9 of the *Citizenship and Immigration Canada Procedural Manual*, the Officer's opinion was then sent to the CBSA National Security Division for a security assessment of the danger the Applicant constitutes to the security of Canada. The CBSA assessment provided the opinion that there was insufficient evidence to establish the Applicant posed a danger to the security of Canada or that he was directly involved in international crimes. The CBSA concluded that there may not be justification for his removal from Canada;
- On December 15, 2011, the PRRA report and CBSA security assessment were disclosed to the Applicant. The Applicant was given the opportunity to provide comments before these were sent to the Minister's Delegate for a final decision;
- The Minister's Delegate rendered a negative decision on February 16, 2012. On February 17, 2012, the Applicant was served with a Notification for Removal Assessment. The Applicant applied for judicial review of the decision of the Minister's Delegate and received a stay of removal on February 27, 2012;

- Justice Richard Boivin found that the Minister's Delegate failed to adequately justify, on the basis of the evidence, why she concludes that the Applicant will likely not be at risk. The matter was remitted back for re-determination. The PRRA application was again rejected on May 17, 2013, on the basis that the Applicant had not established the risk he alleged on the required standard. That decision is the subject of an application for judicial review that was heard before Justice Cecily Strickland on September 19, 2013. As of the date of these reasons, no decision has been released;
- The Applicant made proposals for release during detention reviews before the Board in January 2012, February 2012, August 2012 and January 2013. At each of these reviews, the positive outcomes of the PRRA Officer and the CBSA security assessment were available to the Applicant. At each of these reviews, the Applicant remained in detention as it was determined he would be unlikely to appear for removal;
- The Applicant did not raise the issue of the non-disclosure of the October 7, 2011 PRRA Officer assessment until the September 13, 2013 detention review. The Board released its decision continuing the Applicant's detention on September 26, 2013. The Applicant applied for judicial review of that decision;
- On October 16, 2013, Justice Beaudry allowed the application and found the evidence established that CBSA officials had failed to disclose all information pertaining to the Applicant's positive PRRA assessment to the detention review board. Relying on *Cardinal v Kent Institution*, [1985] 2 SCR 643 and *B135 v Canada (Minister of Citizenship and Immigration)*, 2013 FC 871, at para 30, he determined the Minister's conduct amounted to a denial of natural justice for which the remedy is to refer the matter for a fresh determination;

- Justice Beaudry annulled the detention review decision of September 26, 2013, and ordered "The next reviewing detention Board is directed to consider as an important element the abuse of process committed, in its determination."

[2] On October 25, 2013, the Board heard the Applicant's detention review and determined the Applicant's continued detention was warranted. That decision is now under review in this proceeding.

II. Preliminary Issue

[3] The Applicant filed an affidavit of Krassina Kostadinov and one by Adrienne Smith. Adrienne Smith represented the Applicant on his September 13, 2013 detention review and Krassina Kostadinov represented him on his October 25th, 2013 hearing. Both affiants swear to what occurred at the respective detention hearings and have attached exhibits in support of this Judicial Review. This is contrary to Rule 82 of the *Federal Courts Rules*, SOR/98-106. No leave was sought by the parties but the Court referred counsel to this issue. After discussion with counsel it was decided that as we now have a transcript of the hearing, the affidavits would be admitted but only for the unchallenged exhibit attachments and not for the content of the affidavits. This practice was discouraged in the future and allowed only out of necessity for this expedited hearing.

III. Decision and Analysis

[4] Justice Beaudry ordered the next reviewing detention Board to consider "as an important element" the abuse of process committed by the CBSA officials in failing to disclose the PRRA

Officer's positive opinion of October 2011 to the reviewing detention board during October 2011 and November 2011. His order reads:

> Considering that where there has been a denial of natural justice, it is not up to the Court to determine what the decision would have been if all relevant information had been placed before the Board but rather the recourse is to refer the matter back for a fresh determination.
>
> Considering that the Court does not need to address the reasonableness of the decision concerning the bondpersons or electronic monitoring suggested by the Applicant. The reviewable error made by the Board is sufficient to quash the contested decision and direct the next reviewing detention Board to consider the abuse of process mentioned above as **an important element in its determination** (emphasis added)

[5] The Applicant's counsel argued at the hearing that the breach found by Justice Beaudry was the most egregious disregard of natural justice he had seen in his 30 years of practise. The Applicant submits that it is an affront to justice that the Board looked at whether the breach was serious or what the effects were as "a breach is a breach and it was the worst".

[6] The Applicant submits that for the Respondent to continue to argue at the detention hearing and at this Judicial Review that the breach found by the court is justified since the Board followed their policy is outrageous. The court notes that the Respondent submits that is not their argument. The Applicant submits this disregard for the breach by the Respondent is perpetuating the harm and the only alternative is for me to stay the proceeding, direct a verdict, or release with or without conditions and award costs on a solicitor client basis.

[7] Justice Beaudry did not determine that the remedy for the breach of natural justice was a stay, or a release with or without conditions, or for solicitor client costs. Justice Beaudry determined

that the remedy for the breach was to send it back and that the breach was to be considered an important element but not the only element. This was to be an important factor among the enumerated factors that are applicable to detention reviews under (section 248) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227s (Regulations). I find that the order was the remedy for the breach and that this is a judicial review of the detention Board's decision dated October 25, 2013, and is not an appeal of Justice Beaudry's decision. I think too much has been read into the order or that this is a veiled attempt for me to re-decide the remedy of the judicial review proceedings before Justice Beaudry. In order to do this the member had to analyze the breach and the effect and prejudice to the Applicant. To do so the decision maker had to look at the breach. The weighing of and looking at the effect of a breach is within the purview of the Board.

A. *Remedy*

[8] The Applicant argued that the Board and the Respondent in their Memorandum have each misconstrued the Applicant's submission as seeking a stay of proceedings at the October 25, 2013 hearing. The Applicant claims he was not seeking a stay as the Respondent implied in their memorandum and this makes the matter reviewable.

[9] I disagree with the Applicant's submissions on this point.

[10] I reviewed the transcript of the October 25, 2013 detention hearing. The transcript shows the Applicant's counsel using the word "stay" and "release with no conditions" interchangeably in argument at the detention hearing.

[11] At the hearing, the Applicant's counsel made a lengthy submission regarding stays of proceedings. She relied in part on Supreme Court authority that where state conduct infringed an applicant's Charter rights in the context of a search of a computer for child pornography that the remedy in that case was a stay of proceedings. Specifically, the Applicant's counsel submitted "So what we can take from this is even though there was no deliberate attempt in that case they will ordered the stay of proceedings."

[12] The Applicant's counsel then went on to equate the stay of proceedings awarded in that case with the remedy sought at the detention review, namely a release: "If the Member is really concerned about the integrity of the detention review process and wants to send a message that this kind of conduct is unacceptable then the only remedy that the Member should grant is release."

[13] And later the Board says "Now as I indicated at the outset Mr. Muhammad has taken the position that the abuse of process committed by the minister was so egregious that it meets the standard that has been expressed by the Supreme Court of Canada such that the appropriate remedy in this case is a stay of the proceedings which would mean that I would order the unconditional release of Mr. Muhammad."

[14] The result the Applicant's counsel was seeking at the October 25, 2013 detention hearing of releasing on no conditions would result practically for the Applicant the same as a stay although of course, the court understands there are different legal ramifications. This confusion of terms is all over the transcript of the October 25, 2013 detention hearing. Where counsel has used the terms "stay" and "release" in relation to the relief sought, it is unfair for counsel now to claim the Respondent and the Board misconstrued the Applicant's submissions. Moreover, in my view, the

Board in making their decision understood the relief sought was a release and the Applicant was asking to use the stay test to determine whether the abuse justified a release with no conditions or if the abuse was not at a sufficient level then to release with condition.

[15] In the transcript of the decision the Board said:

> Mr. Muhammad's arguments today primarily centred on the abuse of process issue arguing that the minister's abuse was of a degree that was so egregious that the appropriate remedy is a stay of the proceedings meaning that Mr. Muhammad should be unconditionally released from detention. Alternatively he should be released on the same bonds that were proposed at the last detention review.

[16] It is clear from the transcript that the Board, in fact, understood that the remedy being sought by counsel was a release with or without conditions (also termed as a stay by the Applicant's counsel).

B. *Looking at the seriousness of the breach and considering it an element*

[17] At the re-determination detention hearing that is the subject of this Judicial Review, the Applicant's counsel argued that the conduct of the Minister was a deliberate conscious decision to withhold information and mislead the Board that was sufficiently serious, such that the appropriate remedy was a release without conditions. In the alternative, counsel submitted that where such a deliberate decision was not found to be sufficiently serious to merit a full release without conditions, then the appropriate remedy was the previously proposed plan for release with four bondspersons, significant cash bonds, and more strict conditions.

[18] The Applicant and Respondent each submit that *Minister of Citizenship and Immigration) v Tobiass*, [1997] 3 SCR 391 (*Tobiass*), is authority for determining when state conduct amounts to

an abuse of process. In *Tobiass*, above, at paras 91-93, the SCC discusses requirements to issue a stay of proceedings in response to state misconduct. However, in applying those factors the Supreme Court went on to acknowledge that other remedies are available depending on the facts and the abuse that was found (*Tobiass*, at paras 94-97).

[19] The Respondent's argument is that the Board did not go behind the order and say there was no abuse of process but the Respondent does argue that the Board did need to look at the severity of the abuse when they were considering it as an important element. What I find is that the Board did what Justice Beaudry ordered and what the SCC in *Tobiass* said to do. The Board looked at the breach to see what happened to ensure there was no further abuse of process and "prevent the perpetuation of a wrong that, if left alone, will continue to trouble the parties and the community as a whole in the future" (*Tobiass,* at para 91). It makes sense if a board is to consider the abuse as an important element in a re-determination they need to have a look at it on a spectrum to determine the level of abuse.

[20] The Board relied on *Tobiass*, as submitted by the parties, as authority for determining when state conduct rises to the level of abuse of process. Specifically, that a finding of abuse of process required the past misconduct to be "so egregious that the mere fact of going forward in light of it will be offensive but such cases should be relatively rare".

[21] In applying *Tobiass* on the re-determination before me, the Board found the degree of abuse that occurred did not rise to the serious degree required for a stay or other remedy sought by the Applicant. Specifically, the Board considered the Applicant's submission that the Minister was obliged to disclose the PRRA Officer's positive report at the October 2011 hearing. However, the

Board found that disclosure in the manner the Applicant sought would have amounted to speculation that would have been inappropriate weight as a factor in determining his release. Moreover the Board determined that based on its reading of the manual and applicable legislation, section 172 of the Regulations, obliges the Minister to disclose information in a risk application only subsequent to the second stage of the assessment process, meaning following the CBSA security assessment.

[22] The Board found the evidence established that disclosure had in fact occurred as required under the Regulations because the PRRA report and CBSA security assessment were both disclosed to the Applicant in December 2011, the same day the security assessment was signed. The Board found that, in any event, any prejudice the Applicant may have suffered as a result of disclosure of the risk assessments in this manner was remedied when he put forward submissions based on both reports at his January 13, 2012 detention review.

[23] Further the Board also acknowledged the October 16, 2013 direction of the Federal Court. It is clear from the transcript that the Board understood the direction and did consider the abuse as an important element in the detention hearing.

[24] Specifically, in doing this analysis the Board said:

> So Mr. Muhammad has argued that the abuse of process identified by the Federal Court meets this threshold of this degree of exceedingly serious abuse and misconduct that is 'so egregious' as stated by the court.
>
> I do not find that the abuse of process identified by the Federal Court meets this degree of seriousness.
>
> Now Mr. Muhammad has argued that the minister made a conscious and deliberate decision not to disclose the outcome of the first stage of the risk decision.
>
> Excuse me…prior to going there I should note that the Federal Court in its decision from October 16 made a finding of an abuse of process however the court did not speak to the degree of the abuse committed. And also as the minister pointed out the court did not do an analysis of the prejudice that flowed for the abuse of process.

[25] In the alternative, she submitted that should the Board find the breach does not amount to an egregious level, then the appropriate remedy would be release with conditions: "In case you find that this breach alone is not sufficient, it does not rise to that most egregarious (sic) of cases, then we already proposed a plan which was last time, a comprehensive plan for a release with four bondspersons with large amounts of money and with more strict conditions"

C. *Release Plan*

[26] The Applicant argued that the Board erred when they did not consider a new proposal that included supervision but instead incorrectly relied on the Applicant's previously submitted release plan. Again the transcript assists us in what the Applicant's counsel submitted was the release plan:

> Counsel: "….In case you find that this breach alone is not sufficient, it does not rise to that most egregious of cases, then we already proposed a plan which was last time, a comprehensive plan for a release with four bondspersons with large amounts of money and with more strict conditions.

> Member: Okay so it the same bonds that were proposed the last review.
>
> Counsel: It is the same bonds, the same plan that was proposed with monitoring. And in the transcript all the information is found (inaudible) from page fifty-three.

[27] I disagree. The proposed plan that was before the Board is provided by the Applicant in their material.

[28] Based on my review of the materials, it is apparent that the Board considered this plan in relation to the requirements in section 248 of the Regulations.

[29] The Board reviewed elements of the plan and concluded that the Applicant was "someone was who is unlikely to appear for removal…" and determined that the Applicant could not be released.

[30] The Board considered each of the factors set out in section 248 of the Regulations as being applicable to detention reviews. In particular, the Board found the Applicant had not established he had sufficiently close relationships with his proposed bond persons so as to amount to an effective bond. Among the findings underlying it's conclusion, the Board found Jaffar Ullah Usmani (Mr. Usmani) and the other proposed bondsmen did not amount to suitable alternatives to detention required under Section 248(d) of the Regulations. With respect to Mr. Usmani, the first proposed bondsperson, the Board found that contrary to his proposal to provide "$65,000 case deposit as well as $100,000 performance bond", based on his financial information submitted he really only qualified for a $33,000.00 performance bond. Second, the Board also found that the Applicant had been untruthful "In particular he in fact was untruthful with Mr. Usmani saying that he was in fact

still waiting for the outcome of his refugee decision and unbeknownst to Mr. Usmani Mr. Muhammad was in fact living in his home as a way…part of his scheme in order to avoid detention by Canada Border Services Agency."

[31] These are reasonable findings supported by my review of the release plan that was submitted. Included in the plan is a statement that Mr. Usmani is the first proposed bondsperson and a statutory declaration from Mr. Usmani stating he had known the Applicant for 10 years while the Applicant had lived with his brother in law but during that time Mr. Usmani was not aware of the Applicant's immigration status. In my view it was reasonable for the Board to infer from this statement that the Applicant had not been truthful to Mr. Usmani about his status as avoiding detention, and thus find the relationship between the Applicant and Mr. Usmani was not sufficient to amount to an effective bond.

[32] The Board made the decision on the material before it and found that the Applicant was "someone was who is unlikely to appear for removal…" and determined that the Applicant could not be released.

[33] Moreover, the Board found that the Applicant had not established that the proposed alternatives to detention were suitable, and the length of detention was a factor that weighed in favour of release. Specifically, the Board found that the proposed ankle bracelet had limitations and did not amount to an effective alternative to detention. Further, the Board found that the length of detention was a neutral factor owing to the ongoing matters before the Federal Court.

[34] I find the Applicant, in his submissions, has failed to persuade me that the Board's assessment with respect to its evaluation of the bonds persons or the ankle bracelet, as alternatives to detention was unreasonable. Moreover, the Applicant has failed to persuade me that the Board's assessment of the length of detention as a neutral factor was unreasonable.

[35] I see no error in the Board's consideration. In sum, I cannot conclude that the decision is unreasonable. The Board applied the correct test, considered all of the evidence and submissions of the Applicant and rendered a decision that falls "within the range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9, at para 47). There is no reviewable error and I dismissed this judicial review.

[36] No certified question was presented and none arose.

"Glennys L. McVeigh"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Mr. Lorne Waldman Ms. Adrienne Smith	FOR THE APPLICANT
Ms. Sharon Stewart Guthrie Mr. Jamie Todd Ms. Jane Stewart	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Waldman & Associates Toronto, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT