Federal Court  Cour fédérale

Date: 20140506

Docket: IMM-8164-13

Citation: 2014 FC 429

Ottawa, Ontario, May 6, 2014

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

ALAN NEIL KIPPAX

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

JUDGMENT AND REASONS

[1] The applicant, Mr. Kippax, a citizen of the United Kingdom, has been detained since January 2013 on an immigration warrant. He is subject to a deportation order issued on the basis of a report against him under s 44 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*) for serious criminality. Execution of the deportation order is currently stayed pursuant to s 50(a) of the *IRPA* pending the resolution of outstanding criminal charges that are currently scheduled for trial in December 2014.

I. **BACKGROUND:**

[2] The background to this situation is set out in the reasons for judgment of my colleague Justice Gleason in *Kippax v Canada (Citizenship and Immigration)*, 2013 FC 655 at paras 4 -16 and need not be repeated here in detail.

[3] Material to this application is a decision by the Immigration Division of the Immigration and Refugee Board of Canada (the ID or the Board) on April 30, 2012 that the applicant be released from detention on terms and conditions including a $10,000 cash bond and a $20, 000 performance bond. At that time, the Member described the case that the applicant was a flight risk as "fairly weak", and that the main danger posed was related to the operation of a motor vehicle, which would be controlled through the release conditions.

[4] Mr. Kippax's freedom was short lived as he was charged on June 26, 2012 with offences in relation to a marijuana grow operation. The charges were stayed in November 2012 and it appears from the record that a factual basis for those charges was not substantiated. However, in a decision rendered on December 30, 2012, the Parole Board of Canada imposed additional conditions on the applicant, including residence in a half-way house, having concluded that the applicant's behaviour demonstrated "the enduring nature of [his] criminal attitudes". This decision was made in the absence of the applicant and his counsel due to factors that appear to have been beyond their control. An attempt to appeal the decision did not proceed due to the brief period remaining in the applicant's sentence before warrant expiry. Nor was there any attempt to seek judicial review of the Parole Board decision.

[5] When the criminal warrant expired on January 11, 2013, the applicant was placed in immigration detention. Justice Gleason's decision, issued on June 14, 2013, upheld an April 15, 2013 order that Mr. Kippax be detained on the grounds that he constitutes a danger within the meaning of paragraph 58 (1) (a) of the *IRPA* and section 246 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*Regulations*], and a flight risk within paragraph 58 (1) (b) of the *IRPA* and section 245 of the *Regulations*.

[6] Subsequent to Justice Gleason's decision there have been a series of ID orders maintaining Mr. Kippax's detention. An order issued on August 8, 2013 was also the subject of an application for leave and for judicial review. Leave was granted. The matter was settled by a judgment on consent on the basis that "the Immigration Division erred in stating that it had no jurisdiction to revisit the National, Parole Board Decision".

[7] This application for judicial review concerns the detention review decision made on December 19, 2013. Since then, there have been several other review hearings and orders for continued detention. This matter is, therefore, moot as the decision being reviewed is spent. However, the parties are agreed that the Court should exercise its discretion to decide the application as the applicant is unlikely to be deported in the near future and the issues raised in the present application will continue to be live issues in his ongoing detention reviews. In arriving at the conclusion that I should hear the matter notwithstanding its mootness I have considered the principles set out in *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 at 353.

[8] When the review was heard on December 19, 2013, the applicant proposed that he be released on conditions including deposit and performance bonds from his fiancée, Ms. Marivic Protacio, and his former guardians, Mr. and Mrs. Wollett, together with electronic monitoring and house arrest.

[9] Mr. Kippax has no status in this country. He would return to the United Kingdom were it not for the pending criminal charges in this country. He presently faces the prospect of continued detention until trial barring a favourable decision from the Board.

II. **DECISION UNDER REVIEW:**

[10] On the issue of danger, the Board Member held that there had been no significant changes since the prior detention decisions and that all the ID's concerns remained valid. On this basis, the Member found that there was no reason to depart from past decisions to continue detention, noting that "once that finding is made it stands unless it is overturned by the federal court". The Member also noted that passage of time did not diminish the danger the applicant presented to the public.

[11] With respect to the alternatives to detention that had been presented, the Member noted that the fact that the applicant had entertained the idea of acquiring a passport from another country had not been explained by counsel or by one of the proposed bondspersons. The Member had previously determined that Ms. Protacio would be unsuitable as a bondsperson because she had been found to have engaged in misrepresentation on the applicant's behalf. The Member also found Mrs. Trudy Woollett, who had come forward with her husband, Mr. Glen Woollett, to be

unsuitable on the basis that she did not have a close relationship with the applicant; that the nature of their relationship is "sporadic"; that she "has no idea what kind of person he is"; that she contradicted herself a number of times and acknowledged that a lot of information about the applicant had been given to her recently; that she was not familiar with the facts of the serious crime which had led to the applicant's incarceration; that the couple was not in a position to supervise the applicant effectively; and that the applicant had only recently approached the couple for help.

III. **ISSUES:**

[12] The applicant raises the following issues:

1. Did the Member err in finding that she had no jurisdiction to reconsider the danger and appearance findings?
2. Did the Member err in finding that she had no jurisdiction to reconsider the Parole Board findings?
3. Did the Member err in finding that the proposed terms of release, including significant bonds and electronic monitoring, did not offset concerns about danger to the public and likelihood of appearing?

IV. **ANALYSIS:**

A. *Standard of review*

[13] The applicant herein submits that the issues involving the jurisdiction of the ID to review prior danger and flight risk determinations are questions of law that should be reviewed on the correctness standard. In a recent decision, *Tursunbayev v Canada (Minister of Public Safety and Emergency Preparedness*), 2014 FC 9, in the context of a variation decision by the ID, I noted

that there was some support for this proposition in the jurisprudence. I concluded, however, that such decisions are inherently fact-based and should therefore, in general, attract deference.

[14] As was noted in *Canada (Minister of Citizenship and Immigration) v Thanabalasingham*, 2003 FC 1225 at para 42, [2003] FCJ no 1548; aff'd 2004 FCA 4, members of the ID have more knowledge and expertise than this Court in dealing with certain of the criteria set out in the *Regulations*. Justice de Montigny reached a similar conclusion in *Bruzzese v Canada (Minister of Public Safety and Emergency Preparedness)*, 2014 FC 230 [*Bruzzese*] at paras 42-45.

[15] In my view, the matters at issue in this proceeding are mixed questions of fact and law. I do not see them as true questions of jurisdiction or matters outside the specialized area of expertise of the administrative decision maker: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paragraph 55. As discussed by Justice de Montigny at para 44 of *Bruzzese*, above, in interpreting the relevant criteria governing detention reviews, ID Members are expert tribunals applying their home statute and regulations and are, therefore, deserving of deference. Accordingly, the appropriate standard of review is reasonableness.

(1) Did the Member err in finding that she had no jurisdiction to reconsider the danger and appearance findings?

[16] I agree with the applicant that the Member erred by finding that she had no jurisdiction to reconsider the danger and appearance findings. Section 57 of the *IRPA* requires the Immigration Division to "decide afresh whether continued detention is warranted" at each hearing: *Canada (Minister of Citizenship and Immigration) v Thanabalasingham*, 2004 FCA 4

[*Thanabalasingham FCA*], at para 8. This is also reflected in the language of s 162 of the *IRPA* which confirms that all Divisions of the Immigration and Refugee Board have jurisdiction to determine "all questions of law and fact". Thus, the ID members have jurisdiction to reconsider findings leading to detention and continued detention.

[17] While prior decisions are not binding on a member, the member must also base any decision to depart from prior decisions to detain on "clear and compelling reasons": *Thanabalasingham FCA*, above, at para 10. This does not mean, however, as the Member appears to have believed in this case, that prior decisions stand until overturned by this court. Reconsideration of the grounds for detention falls squarely within the Board's jurisdiction, and not that of the Federal Court. The availability of judicial review does not permit the Board to escape that responsibility. Further, as suggested by the Federal Court of Appeal at para 13 of *Thanabalasingham*, this reconsideration must not be conducted in a cursory manner.

[18] I am not persuaded by the respondent's argument that the Federal Court of Appeal's reasoning in *Thanabalasingham FCA*, above, applies only to ID members' departures from prior detention decisions by ordering the release of the individual. While the *IRPA* must be interpreted and applied in light of its stated objectives, which include an intent to prioritize security, that does not mean that the liberty interests of the individual may be disregarded: *Medovarski v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51 [*Medovarski*]; *Charkaoui v Canada (Minister of Citizenship and Immigration)*, 2007 SCC 9 at para 17-18.

[19] As stated by the Supreme Court in *Medovarski*, above, at para 10, the objective of prioritizing security is given effect by, among other things, emphasizing the obligation of residents to behave lawfully while in Canada. Detention under *IRPA* is not a substitute for a detention order issued by a criminal court to a person facing criminal charges in this country. The purposes of detention under *IRPA* are to ensure that the individual appears for any immigration proceedings and to protect the public while those proceedings are pending.

[20] Clear and compelling reasons to depart from the prior detention decisions could include the proposal of an acceptable alternative to detention as well as changes in circumstances that could lead the ID to find that the factors set out in s 58 are no longer present. As I will discuss below, notwithstanding the Member's error at the first stage of the analysis, she proceeded to consider whether the proposed sureties and conditions would be adequate to protect the public and ensure the applicant's continued appearance at immigration proceedings.

(2) Did the Member err in finding that she had no jurisdiction to reconsider the Parole Board findings?

[21] This argument stems from the Member's statement that she was adopting her previous reasons for maintaining detention. If taken literally, this would include the Member's finding on August 8, 2013 that she could not look behind the Parole Board decision. That decision was relevant to whether or to what extent the applicant had breached the terms of his statutory release, which had been incorporated into the terms of his immigration release in April 2012. The alleged breach of these terms had been grounds for detaining and continuing the applicant's detention. The issue was raised before Justice Gleason but not settled in her June 14, 2013

decision. However, at paragraph 30 of her reasons she had commented on the necessary inquiry as involving consideration of the competing interests of the finality of tribunal decisions and fairness to the applicant.

[22] It was open to the Board to conclude that the applicant had had a full opportunity to contest the grounds for the Parole Board's factual findings and that it should not revisit the issue. This would apply particularly where the other tribunal's decision had not been appealed and/or judicial review was not sought. It would be a rare occasion when the Board would be justified in questioning the outcome of a proceeding before another administrative tribunal acting within its own jurisdiction. However, in this instance the Parole Board decision had been made in the absence of both the applicant and his counsel for justified reasons. Moreover, extensive evidence and argument was led by the applicant in the August 2013 detention review proceedings to demonstrate that the Parole Board's findings were based, at least in part, on unfounded criminal charges that were withdrawn by the Crown. The Parole Board's decision was also made in part, I note, because the Parole Board also appeared to be concerned about the applicant's continued association with criminal elements.

[23] The ID Member had previously refused to consider the evidence and argument led by the applicant to challenge the Parole Board findings in the August 2013 proceedings on the ground that reconsideration of those findings was not within her jurisdiction. On application for leave and for judicial review the respondent accepted that this constituted an error of law and agreed to consent judgment overturning that decision.

[24] In this proceeding, the respondent concedes that if the Member meant to adopt her August 2013 jurisdictional finding it would again constitute a reviewable error. The respondent contends, however, that the Member's reference to her previous reasons was merely poorly expressed and could not be taken to include the earlier error.

[25] I agree that there is nothing in the Member's decision, apart from her overly broad general adoption of the prior reasons that indicates she was continuing to hold that she had no jurisdiction to reconsider the Parole Board's findings. Without a clear indication to the contrary, I am unable to conclude that she failed to consider the applicant's evidence and arguments on this issue.

(3) Did the Member err in finding that the proposed terms of release, including significant bonds and electronic monitoring, did not offset concerns about danger to the public and likelihood of appearing?

[26] Under paragraph 248(e) of the *Regulations*, where the ID finds that there are grounds for detention it is required to consider a number of factors including the length of time in detention and whether there are alternatives:

[…]	[…]
(b) the length of time in detention;	*b)* la durée de la détention;
(c) whether there are any elements that can assist in determining the length of time that detention is likely to continue and, if so, that length of time;	c) l'existence d'éléments permettant l'évaluation de la durée probable de la détention et, dans l'affirmative, cette période de temps;
[…]	[…]
(e) the existence of alternatives to detention.	e) l'existence de solutions de rechange à la détention.

[27] In the proceedings under review, the applicant proposed release on the posting of bonds by a couple who had been close to him when he was young, the Woolletts, and his fiancée, Ms. Protacio. He also proposed electronic monitoring at his own expense, and house arrest, including a curfew.

[28] The applicant contends that the Member erred in not considering that these terms provided clear and compelling reasons to depart from the previous detention decisions, particularly in light of the length of his continued detention. He relies on the determination of another Member in April 2012 that a reasonable alternative to detention did exist and ordered release on the posting of a bond. As noted above, the Member at that time had concluded that the case as to whether the applicant would appear was fairly weak, and that the danger he presented to the public was mitigated if he was prohibited from operating a motor vehicle.

[29] The most significant change in circumstances since the April 2012 decision was the alleged violation of the statutory release terms, as found by the Parole Board and adopted by the ID. As discussed above, this finding was open to question and consideration of the evidence and argumentation submitted by the applicant. There was no clear and compelling reason, the applicant submits, to depart from the April 2012 decision that he could be released on terms and conditions.

[30] On the merits of the proposed bondspersons, the applicant submits that the Member unreasonably rejected Ms. Protacio on the basis that she was "too involved" with the applicant and his activities and conversely rejected the Woolletts, persons of impeccable character,

because they had not had a close relationship with the applicant since his teenage years when they were his guardians some twenty years earlier. Moreover, they had a clear plan to monitor the applicant. In rejecting them as bondspersons, the Member had resiled from the position she had taken in November 2013 that the applicant could be released with a suitable bondsperson.

[31] The respondent points out that there have been numerous detention review decisions since April 2012 that have resulted in the applicant's detention being continued. At the April 2012 hearing the ID was not aware of a March 2011 incident which resulted in the applicant being convicted of offences arising from an altercation with the police. At the time of his arrest, he was found in possession of a fraudulent passport from an African state. In January 2013, the applicant was found criminally inadmissible to Canada, lost his permanent resident status, and was issued a deportation order. In March 2013, the bonds posted in April 2012 were forfeited. The applications for judicial review brought by the bondspersons were both dismissed.

[32] As the respondent submits, the suitability of bondspersons is within the jurisdiction and expertise of the Immigration Division. While the Court may have arrived at a different conclusion with respect to the suitability of the Woolletts, it cannot substitute its view for that of the ID. It was open to the Member to conclude that the relationship between the applicant and the Woolletts had been sporadic and that they would not be in a position to supervise him effectively. With respect to Ms. Protacio, concerns had been expressed about misrepresentations she allegedly made at the hearing of November 28, 2013. Those concerns were not alleviated at the December 19, 2013 hearing.

[33] It was also open to the Member to conclude that, in the absence of a suitable bondsperson, electronic monitoring would not be a sufficient alternative to detention. See for example, *Bruzzese*, above at para 78, and *Muhammad v Canada (Minister of Public Safety and Emergency Preparedness)*, 2014 FC 98 at para 33.

V. **CONCLUSION:**

[34] The Member's findings with respect to the alternatives to detention were reasonable in the sense that they were justified, transparent and intelligible and within the range of acceptable outcomes. But prior to considering those alternatives, the Member was required to first determine whether there were grounds for detention. As discussed above, the Member erred in finding that she had no jurisdiction to reconsider the prior danger and appearance findings. The application will therefore be granted and remitted to the Immigration Division for reconsideration in accordance with these reasons.

[35] No serious questions were proposed and none will be certified.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is granted and the matter is remitted for reconsideration by a different Immigration Division Member in accordance with these reasons. No questions are certified.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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