Federal Court Cour fédérale

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SUBJECT / OBJET : IMM-7805-14

COMMENTS / REMARQUES :

Order of Russell, J. dated 16-DEC-2014

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Federal Court Cour fédérale

Date: 20141216

Docket: IMM-7805-14

Toronto, Ontario, December 16, 2014

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

MARINE BERDZENADZE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT

UPON APPLICATION by the Applicant for judicial review (leave having been granted) under s. 72(1) of the *Immigration and Refugee Protection Act* (Act) of a decision of the Immigration Division of the Immigration and Refugee Protection Board (Board) made by Member Nupponen dated November 19, 2014 refusing to release the Applicant from detention;

AND UPON reviewing and considering all materials filed and hearing counsel for the Applicant and the Respondent;

AND UPON noting, concluding and finding as follows:

1. Although a range of grounds for review are set out in the Notice of Application, the Applicant only argues one issue:

> Did Member Nupponen err in law by refusing to consider alternatives to detention even though the Applicant's identity has yet to be determined?

2. The Board was satisfied with the steps that the Minister was taking to verify the Applicant's identity, but then goes on to conclude that "without identity not off the table, it is premature to consider alternatives to detention." Does this mean, as the Applicant asserts, that the Board failed to consider s. 58 of the Act and 247 and 248 of the *Regulations*, as well as the guidance provided by Justice Snider in *Canada (Minister of Citizenship and Immigration)* v. *B047*, 2011 FC 877, (*B047*) that once it is determined that there are grounds for detention then the Board must weigh all of the factors set out in s. 248. As Justice Snider said at para 61 of *B047*, "while lack of identity is obviously an important consideration for a s. 248 analysis, it does not mean that the ID may not consider alternatives to detention":

> Indeed, s. 58(1) of (the Act) requires the ID to take into account the prescribed factors. "Alternatives to detention" is wasted as a factor under s. 248 of the *Regulations*. There is no exception for an identity question under s. 58(1)(d).

3. In the present case the Board says that "without identity off the table, it is premature to consider alternatives to detention". The Board then goes on to consider why alternatives to detention should not be determined at this time.

4. The Board agrees with the Applicant that it is possible to consider alternatives to detention even though identity has not been determined, but then points out that

there are a number of important factors in this case that prevent the Board from reaching a conclusion on alternatives:

[19] Now as I pointed out at the outset, a person can be released even though identity has not been confirmed by the Minister. Members of this Division do occasionally do that when the circumstances warrant. However, I will point out that before members release in those circumstances the flight risk issue is nevertheless addressed. So I'll just point out to counsel that that issue can come up really at any point in the process, but counsel and his client obviously need time to address that issue when it does fully arise.

[20] So from my point of view in this case, I will grant it to counsel that he does have very strong arguments for saying that the identity of his client is, as he says it is. However, it is not me that needs to determine that. The Minister needs to make the final determination on that. However, on the other hand I believe fairly strongly, I would say on this case, that without identity not off the table, it is premature to consider alternatives to detention. So I will very briefly point out why I believe that would be so and these are, I believe, issues that a member in future may well address to one degree or another.

[21] So Ms. Berdzenadze obviously has had a strong desire to be in North America. She has made visa applications to Canada and the United States. It appears that she, according to her own statement, has lived for a long time in the United States. She was in Canada for a fairly long period before she made the refugee claim. The attempted refugee claim was made only after her arrest. She was in possession of several pieces of documentation during her arrest.

[22] The circumstances of her arrest are, I would say, nebulous. There is obviously I would expect a lot of information which is not available at this point. She was arrested in the company of two other gentlemen. There was a question of payments being made to at least one of the other gentlemen. There are issues of charges outstanding with respect to circumstances around the arrest. Ms. Leblanc pointed out that there are charges of possession of marijuana and charges respecting the uttering of forged documents and also two other charges dealing with property over $5,000. So I'll point out that at this stage that for me it is very unclear as to what the exact nature of those other charges respecting property

over $5,000 might be and Minister's counsel might provide more information on things like those matters I the future.

[23] So another preliminary concern without fully going into the flight risk issue is that Ms. Berdzenadze appears to have told the immigration officers that after her arrival in Canada she went to the United States and then returned to Canada. So in the context of somebody coming to Canada to make a refugee claim at this point in dealing only with the identity issue, I would say it does pose certain questions which I would expect might be addressed further when the flight risk issue is further addressed.

[24] Counsel suggested an alternative in spite of the fact that identity has not been confirmed. As I said, that is a possibility. However, I will point out that while we did not deal with the suggested alternative in great detail today, counsel was not able to provide a clear idea as to how there is any family or other relationship between Ms. Berdzenadze and her proposed bondsperson and how well the two parties might know each other.

BY COUNSEL FOR PERSON CONCERNED (to presiding member)

[25] Mr. Member, you did not ask those questions. I am just stating it for the record.

BY PRESIDING MEMBER (to counsel for person concerned)

[26] Yes, well that's correct.

BY COUNSEL FOR PERSON CONCERNED (to presiding member)

[27] You don't need to go there because that was ---

BY PRESIDING MEMBER (to counsel for person concerned)

[28] Well, that's correct, and I am pointing out that those are the types of questions that counsel should be ready to address in the future, I would expect if the same alternative is proposed in the future.

BY PRESIDING MEMBER (to person concerned)

[29] So there are a number of reasons why, in my view, considering release as an alternative at this point without identity being established is premature and the flight risk issue will best be

addressed when the identity issue is no longer on the table and the parties provide full submissions on the flight risk issue.

5. It is clear from these reasons that Applicant's counsel did raise alternatives to detention but the Board declined to deal with them at this stage.

6. As the jurisprudence of the Court has made clear, even if identity has yet to be determined the Board must still examine the grounds under s. 248 of the *Regulations* which include alternatives to detention. Regulation 248 is very clear that "If it is determined that there are grounds for detention, the following factors shall be considered before a decision is made on detention or release ..." Justice Snider provided the following guidance on point in *Canada (Minister of Citizenship and Immigration)* v. *B047*, 2011 FC 877:

> **59** The Minister posits that it is inconsistent with the scheme of *IRPA* to assess alternatives to detention if identity has yet to be determined. The Minister argues that, once detention is maintained on the ground of identity, the scheme of *IRPA* is clear that the ID cannot look at the question of alternatives to detention.
>
> **60** I do not agree. All of the factors of s. 248 are to be weighed. The Minister's interpretation of s. 248 would have identity issues trump all other factors in s. 248. The regulation is not drafted in that manner and the scheme of *IRPA* does not require such an interpretation.
>
> **61** I acknowledge that identity should be a very important consideration. However, while a lack of identity is obviously an important consideration for a s. 248 analysis, it does not mean that the ID may not consider alternatives to detention. Indeed, s. 58(1) of *IRPA* requires the ID to take into account the prescribed factors. "Alternatives to detention" is listed as a factor under s. 248 of the *Regulations*. There is no exception for an identity question under s. 58(1)(d).

7. In the present case, the Board does not say that identity trumps all other factors, and the Board alludes to alternatives to detention and concedes that they could be considered at this time. However, it is clear that the Board postpones such a consideration as being premature. In my view, this is a legal error. The alternatives must be considered. The Board has its own view of how the system works, but that view does not accord with the jurisprudence on point.

8. The Board's reasoning if faulty. For example, it raises the issue of flight risk, but there is no indication that this is a matter of concern to the Respondent. If the Board had followed the clear requirements of Regulation 248, the matter could have been given a full airing together with the Applicant's submissions on alternatives to detention. Regulation 248 does not give the Board a discretion not to address the full range of factors and to leave it for a subsequent occasion. At any time the Board considers there are grounds for detention, then Regulation 248 must be considered.

9. In the present case, the Board perhaps felt that the exercise would be futile, but unless the Board allows a full hearing on what the law says has to occur no safe decision can be made in this regard. The *Regulations* do not allow for short-cuts.

THIS COURT'S JUDGMENT is that:

1. The application is allowed. The Decision is quashed and the matter is returned for reconsideration by a different Member;

2. There is no question for certification.

"James Russell"
Judge