Date: 20000711

Docket: A-160-99

CORAM: LINDEN J.A.

ROTHSTEIN J.A.

MALONE J.A.

BETWEEN:

MANSOUR AHANI

Appellant

- and -

THE MINISTER OF CITIZENSHIP & IMMIGRATION

and **THE SOLICITOR GENERAL OF CANADA**

Respondents

Heard at Toronto, June 6, 2000

Judgment delivered at Ottawa, Tuesday, July 11, 2000

REASONS FOR JUDGMENT BY: LINDEN J.A.

CONCURRED IN BY ROTHSTEIN J.A.

MALONE J.A.

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REASONS FOR JUDGMENT

LINDEN J.A.

[1] The issue on this appeal is whether the Trial Judge erred when he refused the appellant's request for release under subsections 40.l(8) and (9) of the *Immigration Act* which read:

(8) Where a person is detained under subsection (7) and is not removed from Canada within 120 days after the making of the removal order relating to that person, the person may apply to the Chief Justice of the Federal Court or to a judge of the Federal Court designated by the Chief Justice for the purposes of this section for an order under subsection

(9).

(8) La personne retenue en vertue du paragraphe (7) peut, si elle n'est pas renvoyée du Canada dans les cent vingt jours suivant la prise de la mesure de renvoi, demander au juge en chef de la Cour fédérale ou au juge de cette cour qu'il délègue

pour l'application du présent article de rendre l'ordonnance visée au paragraphe (9).

(9) On an application referred to in subsection (8) the Chief Justice or the designated judge may, subject to such terms and conditions as the Chief Justice or designated judge deems appropriate, order that the person be released from detention if the Chief Justice or designated judge is satisfied that

(a) the person will not be removed from Canada within a reasonable time; and

(b) the person's release would not be injurious to national security or to the safety of persons.

(9) Sur présentation de la demande visée au

paragraphe (8), le juge en chef ou son délégué

ordonne, aux conditions qu'il estime indiquées, que l'inéressé soit mis en liberté s'il estime que:

a) d'une part, il ne sera pas renvoyé du Canada dans un délai raisonnable;

b) d'autre part, sa mise en liberté ne porterait pas atteinte à la sécurité nationale ou à celle de personnes.

[2] It was contended by the appellant that the Trial Judge's refusal to allow his request for release was legally wrong and also in violation of section 7 of the *Canadian Charter of Human Rights and Freedoms* which reads:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with principles of fundamental justice.

7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut etre porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

There was also an issue of apprehension of bias raised.

FACTS

[3] The appellant, who has been found to have been a member of the Iranian Ministry of Intelligence and Security, (MOIS) which sponsors or undertakes terrorist activities, has been detained since 1993 by virtue of a subsection 40.l(l) certificate. Before that, he had been declared to be a refugee, but then was arrested after being observed meeting abroad, in various places, with a former colleague, a known assassin from the MOIS. The appellant, in a separate case, unsuccessfully challenged the constitutional validity of this subsection 40.l(l) certificate. In February 1998, after a two week hearing, the certificate was held by the Trial Division of this Court to be reasonable. The Minister then issued a "danger opinion" pursuant to subsection 53(l) on April 12, 1998 and made a removal order on April 28, 1998. The removal was stayed on September 28, 1998 by order of Mr. Justice Campbell pending a determination of his separate constitutional challenge to the removal provisions. The appellant was unsuccessful in that challenge in the trial and appeal divisions of this Court, but has been granted leave to appeal by the Supreme Court of Canada. This appeal should be heard in due course.[1]

[4] The appellant then applied for release under subsection 40.l(8), which provides that a person detained pursuant to a certificate issued under subsection 40.l(l) may apply to the Chief Justice of this Court or a judge designated by him to be released from detention if his removal has not been effected within 120 days of the issuance of the removal order. Subsection 40.l(9) permits a Court to order a person's release if it is satisfied that: l) the applicant will not be removed from Canada within a reasonable time and 2) that his release would not be injurious to national security or to the safety of persons. In conjunction with this application for release the appellant filed notice of a constitutional question challenging the validity of paragraph 40.l(9)(a) and (b) of the Act. The appellant claims a violation of his right to liberty contrary to section 7 of the Charter, but counsel did not press

the argument that the section was unconstitutional; it was mainly contended that the interpretation of the subsection by the Trial Judge and the conduct of the Government pursuant to it was not in accordance with the Charter's principles.

THE ARGUMENT OF COUNSEL IN BRIEF

[5] There were four main arguments advanced by the appellant. First, it was argued that the Trial Judge wrongly placed the onus of proof on the appellant. Second, it was contended that the standard of proof on the Crown should be the balance of probabilities, not the reasonable grounds to believe standard, which was applied by the Trial Judge. Third, it was suggested that an irrelevant consideration was taken into account by the Trial Judge in that he blamed the delay on the appellant on the basis that he exercised his legal rights to challenge his removal which has been taking considerable time. Fourth, because the Trial Judge had been the same one who heard the reasonableness issue covering the original subsection 40.l(l) certificate in which he made negative credibility findings against the appellant, there was concern that he might not be impartial in this second hearing concerning the release of the appellant.

[6] The respondents say that the Trial Judge correctly placed the onus on the appellant. Second, they suggest that no error was made on the standard of proof issue. Third, no irrelevant matter was taken into account; the Trial Judge was bound to take into account all the circumstances surrounding the delay, including the fact that the appellant had employed many time-consuming legal proceedings in his battle to remain in Canada. Fourth, as for bias, it is suggested that an appeal should have been launched of the order of the Trial Judge not to recuse himself. In the alternative, it is said that no bias has been shown in the conduct or the language of the Trial Judge. I shall deal with each of these four issues, starting with the last one involving bias.

ANALYSIS

1. Apprehension of Bias

[7] The impartiality of the Trial Judge has been challenged in this Court, but I am of the view that there is no merit in the arguments raised. Merely because the Trial Judge was involved in an earlier decision involving this appellant did not

impair his ability to be impartial. Justice MacGuigan, of this Court in *Arthur v. Canada,* [1993] l F.C.R. 94, at p.102, stated:

> Where the double participation in decision-making has been on the part of a judge, the principle has not seemed to have any great difficulty.

His Lordship relied on earlier authority to the same effect in this Court. (*Nord-Deutsche Versicherungs Gesellschaft v. The Queen,* [1968] l Ex. C.R. 443, at 457 *per* Jackett P.); See also Mullan, Administrative Law, l C.E.D. (3d) "54, p.3-130). At page 105, MacGuigan J.A. stated:

> The most accurate statement of the law would thus appear to be that the mere fact of a second hearing before the same adjudicator, without more, does not give rise to reasonable apprehension of bias, but that the presence of other factors indicating a predisposition by the adjudicator as to the issue to be decided on the second hearing may do so. Obviously one consideration of major significance will be the relationship of the issues of the two hearings, and also the finality of the second decision. If, for instance, both decisions are of an interlocutory character, such as two decisions on detention (as in *Rosario*), it may be of little significance that the matter in issue is the same, but where the second decision is a final one as to a claimant's right to remain in the country, the avoidance of a reasonable apprehension of bias may require greater distinction in the issues before the tribunal on the two occasions.

[8] While a finding of lack of credibility in an earlier case on the same factual issues may create problems, the situation here is different. The issues before the Trial Judge here were mainly legal, along with factual ones that, save for the discussion in *obiter* in paragraph [24], did not depend on the findings of credibility of the appellant in the earlier case. The appellant says that in the decision under appeal, the Trial Division Judge made pejorative remarks relating to the steps that the appellant has taken in an attempt to remain in Canada and the time that this has taken. In particular, counsel pointed to references of the learned Judge's reasons at paragraph 3:

> However, rather than immediately availing himself of his right to be heard pursuant to paragraph 40.l(4)(c), the applicant launched a challenge to the constitutional validity of the statutory scheme provided in section 40.l of the Act.

and at paragraph 23:

> With respect to the first criteria found in paragraph 40.l(9)(a), I am satisfied that the applicant's removal could and will be effected within a reasonable time as long

as he does not make use of redundant and endless recourse for which he himself is responsible. In fact, the evidence shows that it is not the Minister's fault that removal was not effected within 120 days, but rather because of the applicant's desperate actions to avoid deportation. The evidence further reveals that the Minister remains ready to remove the applicant and will do so once there are no more legal roadblocks.

While some of the Judge's language may have been blunt, I am of the view that his words describe the many legal steps taken by the appellant and the passage of time that has occurred. The Judge was obviously familiar with the many prior proceedings either because he heard them himself, or because he was made aware of them by submissions of the parties. This is clear from his review of the steps by the appellant as set out in his reasons. Given the Judge's familiarity with the prior proceedings, his description of them is based on his own observations. One must trust Judges to do their duty according to the law and the evidence, unless there is good reason to be concerned. In my view, there has been no evidence presented in this case that should concern an informed, reasonable and right-minded person, familiar with the legislation and the facts, that there might be bias on the part of the Trial Judge here. Consequently, there has been no violation, of the principles set out in *R. v. R.D.S.,* [1997] 3 S.C.R. 484.

2. Onus

[9] There is nothing express in subsection 40.l(9) concerning the burden of proof. The Trial Judge decided that the words and context of the provision indicated that the onus should rest on the appellant. He explained:

In my view, a quick and simple reading of subsections 40.l(7),(8) and (9) of the Act establishes that it is the applicant who bears the onus of showing that his removal will not occur within a reasonable time and that his release would not be injurious to national security or to the safety of persons. First, the right to apply encompassed in subsection 40.l(8) clearly belong to "...a person...detained under subsection (7)...". So the applicant is the one entitled to bring the application for release and therefore he bears the onus of demonstrating why his release complies with the statutory criteria.

Second, while I agree that subsection 40.l(9) does not specifically state on whose shoulders the burden rests, the plain reading of the subsection indicates that it is on the applicants since the provision stipulates that the detained person may be released from detention if the judge is satisfied that the person will not be removed within a reasonable time and that his release would not be injurious to national security or to the safety of persons. Had Parliament intended to put the onus on the respondents, it would have put the obligation in a positive instead of a negative form. Had the sentence read "...if the Chief Justice of designated judge is satisfied that (a) the person will be removed from Canada within a reasonable

time; and (b) the persons release would be injurious to national security or to the safety of person", the burden would then clearly have been on the Ministers' shoulders. Since this is not the case, it clearly belongs, in my view, to the applicant to show that his release complies with the statutory criteria.

I am in agreement with this interpretation of the language of the provision. This view has also been adopted in *Singh v. Canada,* [1999] F.C.J. No. 970 (Q.L.) *per* Rothstein J. (as he then was).

[10] The appellant argues that an interpretation which places the onus upon him violates his rights under section 7 of the Charter. I do not agree. A reverse onus, even when an individual's liberty is at stake, will not automatically amount to a violation of section 7. In order to establish that the reverse onus in this case violates section 7, the appellant must show that it is inconsistent with the principles of fundamental justice.

[11] The Supreme Court of Canada in *Chiarelli v. Canada (M.E.I.),* [1992] 1 S.C.R. 711 reaffirmed that principles of fundamental justice cannot be defined in the abstract and must be interpreted in the context of the alleged violation of section 7. The context in the case at bar is similar to that in *Chiarelli* as described by Sopinka J.:

Thus in determining the scope of principles of fundamental justice as they apply to this case, the Court must look to the principles and policies underlying immigration law. The most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in the country. At common law an alien has no right to enter or remain in the country. (At 733 footnotes omitted)

To this I would add that in the present case we are dealing with a context where the Minister has already discharged the onus placed upon him to establish grounds for detention and wherein it has already been held that the procedures initially used here to detain the appellant were not in violation of the Charter. (See *Ahani v. Canada,* 100 F.T.R. 26l, at p.268 (F.C.T.D.) affd (1996) 201 N.R. 233 (F.C.A.) leave denied [1997] 44 C.R.R. (2d) 376 S.C.C.) Moreover, to place the burden on the Crown in this matter would require largely repeating all the lengthy proceedings that have gone before in this case.

[12] It is clear that, subject to two exceptions, Parliament meant people who are subject to these certificates to remain in custody until removed. Subsection 40.l(7) says that when a certificate has been reviewed by the Federal Court and has not been quashed, the certificate is "conclusive proof" that a person is one described in section 19 and that he shall "continue to be detained until the person is removed from Canada." One exception is that the person may be released "in order to permit the departure from Canada" (section 7.l), that is, if the person arranges to leave Canada he or she may be released in order to do so.

[13] The other exception is the one at issue here. It seems to me that release under subsection 40.l(9) cannot be an automatic or easy thing to achieve. It is meant to be available "only in the very limited circumstances" outlined in the legislation. (See McGillis J. in *Ahani, supra,* at p. 274). After all, persons to whom subsections 4l.1(8) and (9) apply have been found to be inadmissible for reasons relating to the security or interests of Canada or whose presence endangers the lives or safety of persons in Canada (paragraph 38.l(a)) and have been placed in custody for those reasons. Release, in these particular circumstances, is not to be routinely obtained.

[14] Such custody cannot, of course, be of indefinite duration, at least not without good reason. Hence, provision for review is permitted after 120 days and release is allowed but only if "the person will not be removed within a reasonable time" and if the "person's release would not be injurious to national security or to the safety of persons". Normally, one would expect that an individual would have to show some significant change in circumstances or new evidence not previously available to obtain his release.

[15] To hold otherwise would be to accord the appellant a hearing *de novo*, something the legislation does not envision. The case of *R. v. Pearson* ([1992] S.C.J. No. 99), relied on by counsel for the appellant, is an entirely different situation in that an accused person was being held in custody prior to a criminal trial in derogation of the presumption of innocence. Here a certificate is conclusive proof that the appellant is inadmissible for egregious reasons and, hence, cannot be considered to be entitled to any presumption of innocence. (See also *Ahani v. Canada* (1996), 20l N.R. 233 (F.C.A.) *per* Marceau J.A.).

3. Standard of Proof

[16] There was much debate over the proper standard of proof to be met. The appellant, arguing that the onus was on the Crown to prove the facts upon which the release might be denied, urged a standard of balance of probabilities because the reasonable grounds to believe standard would be too easy for the Crown, given

an individual's section 7 rights. As I have concluded above, however, the onus of proof in this release application is on the person applying to be released. In my view, that onus must be met on the ordinary standard of proof in civil cases, the balance of probabilities. While Parliament has changed the normal standard of proof in the subsection 40.l(l) proceedings to "reasonableness" in paragraph 40.l(3)(d) and to "reasonable grounds" in section 19, it has not done so with regard to the release proceedings under subsections 40.l(8) to (10). Further, the word "satisfied" is used. Hence, in my view, there is no reason to think that the standard of proof should be anything other than the usual balance of probabilities standard. The Judge should not order the release unless he or she is satisfied by the applicant on a balance of probabilities that the applicant has met the statutory criteria. The balance of probabilities standard in these circumstances does not violate section 7. There is no need to consider section l of the Charter as there has been no demonstration of any violation of section 7. Quite the contrary, the appellant is receiving full judicial consideration of his various challenges to the proceedings being used to remove him.

[17] The Trial Judge was not entirely consistent in describing the standard of proof in this case. He correctly stated in paragraph [20] that the Judge must "assess the probability that actual harm will be done to national security or to the safety of persons, not simply that there are reasonable grounds to believe that there is a risk of harm." Further in paragraph [23], he rightly concludes, on the delay issue, that he is "satisfied that the applicant's removal could and will be effected within a reasonable time...". The Judge then goes on, in paragraph [24] in *obiter*, to discuss the safety issue which is not necessary to the decision. He expresses himself in a somewhat inconsistent manner. First, he employs the correct language to the effect that "the applicant's evidence failed to convince me that his release, even on terms and conditions, would not injure the safety of persons in Canada." Inexplicably, for emphasis perhaps, he went on to say "the respondent's evidence has persuaded me that there are reasonable grounds to believe that his release would in fact be injurious to the safety of persons in Canada, particularly Iranian dissidents." As I have indicated, this was not a correct formulation of the standard of proof. However, I am not persuaded that the Trial Judge misunderstood the standard of proof, or utilized the wrong standard of proof. Except for this latter incorrect statement, in the context of an *obiter dictum*, he seems to have understood fully that the standard of proof was the balance of probabilities. Adding that one incorrect and unnecessary sentence, in my view, is not a sufficient ground to overturn the entire decision.

4. Irrelevant Considerations

[18] It is contended that the Trial Judge considered irrelevant considerations in his decision concerning whether the appellant would be removed "within a reasonable time". Counsel implied that the Trial Judge was improperly "blaming" the appellant for the delay in his removal merely because he was exercising his

legal rights. No one can deny the appellant his right to exhaust every legal avenue open to him. But neither can one say that the removal is not taking place in a reasonable time, when the time necessary to hear all of the applications and appeals stretches into months and years. In *Singh, supra,* Rothstein J. stated in paragraph 7:

> Paragraph 38.l(c) of the Act provides that one of the purposes of section 40.l is: (c) to provide a process for the expeditious removal of persons found to be members of an inadmissible class referred to in section 39 or 40.l
>
> In this contet, subsection 40.l(9) is a relieving provisions for individuals who, through no fault or action of their own, are not being removed by the Minister expeditiously. That is not the case here. An individual is free to take the steps available to him at law to remain in Canada. If he does so, however, he may not claim that on the basis of his own actions, that he will not be removed from Canada within a reasonable time for purposes of paragraph 40.l(9)(a).

[19] The appeal will be dismissed with costs.

"A.M. Linden"

J.A.

"I agree Marshall Rothstein J.A."

"I agree Brian Malone J.A."