Federal Court  Cour fédérale

Date: 20190903

Docket: IMM-4822-19

Citation: 2019 FC 1130

Vancouver, British Columbia, September 3, 2019

PRESENT: Mr. Justice Diner

BETWEEN:

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Applicant

and

RAED AROOK

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This application judicially reviews an order made by the Immigration Division [ID] releasing Mr. Arook from detention. Mr. Arook has been detained since June 27, 2019. The Minister argues for Mr. Arook's continued detention on the grounds that he is unlikely to appear for removal and that he is a danger to the public.

[2] For the reasons that follow, I find that the order to release the Mr. Arook is reasonable. The application for judicial review is accordingly dismissed.

II. Background

A. *Mr. Arook's Immigration History in Canada*

[3] Mr. Arook is a 43-year-old citizen of Israel who obtained refugee protection in Canada in 2003.

[4] In 2007, Mr. Arook entered the United States illegally. He was deported to Israel in 2008. There, he obtained an Israeli passport using a false identity and re-entered Canada. In 2010, Canadian authorities issued a deportation order for serious criminality against him. He has recently stated that he does not want to return to Israel.

[5] Mr. Arook has a consistent history of offending in Canada, spanning from 2003 to 2014. Nineteen of his convictions relate to non-compliance, such as failure to attend court and failure to comply with a recognizance.

[6] In 2014, his most serious misconduct occurred: while on trial for a sexual offence involving a person under the age of 16, Mr. Arook fled to the United States. He was ultimately convicted in 2016 and sentenced to six years' imprisonment for his crime.

[7] On September 12, 2018, while Mr. Arook was serving his sentence, the Canada Border Services Agency [CBSA] notified him that they would seek the Minister's opinion as to whether he constituted a danger to the public [Danger Opinion] under paragraph 115(2)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. Mr. Arook's counsel received an extension until the end of August 2019 to make further submissions on the Danger Opinion.

[8] On June 27, 2019, Mr. Arook was granted statutory parole subject to special conditions imposed by the Parole Board (Parole conditions, reproduced at Annex A to these Reasons). However, he was then transferred directly into immigration custody. He attended two ID review hearings in July, which both resulted in the continuation of his detention. In refusing the release on July 3, 2019, the first member cited repeated failures to comply with conditions imposed in both the criminal and immigration contexts to support the finding that Mr. Arook would be unlikely to appear for removal. The member did not feel that an adequate alternative to detention was in place at the time, but made several recommendations, including a supervised residence which, if implemented, could support such an alternative at future detention reviews. Further, the first member recommended that the imam mentioned by Mr. Arook be interviewed.

[9] On July 10, 2019, a second ID member ordered Mr. Arook's continued detention for similar reasons to the first, although he acknowledged improvements made by Mr. Arook. However, he expressed concern that, given Mr. Arook's history of substance abuse and desire not to return to Israel, an enforceable Danger Opinion might lead to relapse absent firm safeguards in the community.

[10] Regarding the proposed alternative to detention, the member explained that although the "makings of an alternative to detention" might be in the preliminary stages, more evidence on this factor was required. The member recommended that the community parole officer involved in the release plan and the imam discuss the type of temporary accommodation available to Mr. Arook. The member also recommended that the imam be available for an interview at Mr. Arook's detention review.

[11] The imam appeared at the third detention review hearing, held August 2, 2019 before a third ID member [Member]. Her decision of the same date [Decision] forms the subject of this judicial review.

III. Decision under Review

[12] On August 2, 2019, the Member ordered Mr. Arook's release from detention subject to conditions. She heard submissions from counsel for Mr. Arook and the Minister, as well as oral testimony from the imam, who focused primarily on his knowledge of Mr. Arook from the institutions he had been in, and his apparent good conduct and reformed ways in those settings.

[13] In terms of the specifics of the alternative to detention, the imam introduced himself as the Muslim chaplain for Corrections Canada in the Lower Mainland and testified that he had known Mr. Arook a little over a year in the context of group counselling, one-on-one interviews, and prayer/chaplaincy sessions. The imam said that he could offer Mr. Arook accommodation if the need arose, as well as support in finding a job though connections in the Muslim community.

He further committed to personally driving Mr. Arook to the CBSA office for purposes of fulfilling his reporting requirement, if need be.

[14] Turning to housing, the proposed alternative to detention was a personal development [PD] bed at the Salvation Army's Belkin House, with all reporting requirements to his parole officer, according to his Parole conditions for release, as well as other conditions that the Member imposed. The Member wished to ensure that since Mr. Arook was not a candidate for the highest level of supervision at Belkin House, the PD section of the building would be sufficient to mitigate the danger to the public and the flight risk posed by Mr. Arook.

[15] In her oral decision at the conclusion of the August 2 hearing, the Member accepted the Minister's argument that two grounds for detention were present. First, she found Mr. Arook unlikely to appear for removal, in light of Mr. Arook's significant history of non-compliance in the criminal and immigration contexts, his decision to flee to the United States when facing a criminal offence, his desire not to return to Israel, and the fact that he had previously obtained an Israeli passport with a false identity.

[16] Second, the Member, like her colleagues had concluded at the two preceding detention reviews, stated that Mr. Arook is a danger to the public, emphasizing the seriousness of his sexual assault conviction and his consistent history of offending in Canada. Ultimately, the Member weighed these negative factors against the Imam's willingness to support Mr. Arook upon release and to ensure his compliance with the alternative to detention and proposed conditions, and she decided that the risks were sufficiently mitigated to warrant release.

[17] In arriving at this outcome, the Member turned her mind to the factors under section 248 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [Regulations]. She observed that the 36-day detention was not sufficiently long, in and of itself, to favour release. However, this was counterbalanced by the potential future length of detention, given that submissions on the Danger Opinion were still outstanding and could take some time. It would not serve immigration purposes for Mr. Arook to remain in detention while that decision is pending. She also determined that there had been no delays or lack of diligence by either party. The Member accorded the best interests of the child factor neutral weight in light of the lack of evidence on this issue.

[18] Finally and most importantly, the Member placed significant weight on her finding that the proposed alternative to detention sufficiently mitigated the risk posed by Mr. Arook as a flight risk and as a danger to the public. In support of the outcome, the Member noted the Parole Board's designation of Mr. Arook as non-dangerous, and her satisfaction that the imam noted that the religious community had assisted other similarly situated detainees, and that he would personally provide adequate support to ensure Mr. Arook's compliance with the conditions.

[19] To "further mitigate the risk," the Member imposed the following conditions on Mr. Arook's release, which are in addition to the Parole conditions listed in Annex A:

(i) to present himself at the date, time and place that a CBSA officer or the ID requires him to appear to comply with any obligation imposed under the IRPA, including removal if necessary;

(ii) to provide CBSA prior to release with his residential address and advise CBSA by application to the ID of any change in address prior to the change being made;

(iii) to report to an officer at the CBSA office in Vancouver every Tuesday;

(iv) to confirm his departure with a CBSA officer prior to leaving Canada;

(v) to fully cooperate with CBSA with respect to obtaining travel documents;

(vi) not to engage in any activity subsequent to release with results in a conviction under any Act of Parliament;

(vii) not to work or study without authorization in accordance with the IRPA;

(viii) to adhere to a curfew and be present between 10 p.m. and 6 a.m. at the address provided to the CBSA, except where specifically authorized in writing by a CBSA officer;

(ix) not to use or possess any alcohol or any controlled substance as defined by the Controlled Drugs and Substances Act unless prescribed by a physician; and

(x) to abide by any and all conditions imposed upon him by his supervising parole officer, the Parole Board and Correctional Service Canada.

[20] Shortly after the Member's decision to release, the Minister applied to this Court for, and obtained, an interim injunction staying Mr. Arook's release. A request was accordingly made to expedite the hearing of this judicial review, which this Court accommodated by holding a special sitting, such that the matter was heard, and decided, before the next 30-day detention review (scheduled to take place on September 4, 2019).

IV. Relevant Provisions

[21] Under subsection 58(1) of the IRPA, the ID must order the release of a permanent resident or 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).

[22] Once it has been determined that there are grounds for detention, section 248 of the Regulations requires the ID to consider the following factors before making a decision on detention or release:

a) the reason for detention;

b) the length of time in detention;

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;

d) any unexplained delays or unexplained lack of diligence caused by the Department, the CBSA or the person concerned;

e) the existence of alternatives to detention; and

f) the best interests of a directly affected child who is under 18 years of age.

V. Issues and Standard of Review

[23] The Minister argues that the Member erred

1. in her interpretation and application of section 58 of the IRPA and sections 244, 245 and 248 of the Regulations; and
2. by failing to provide clear and compelling reasons for departing from the prior decisions to detain.

[24] ID detention reviews are primarily fact-based decisions and thus attract the deferential reasonableness standard (*Canada (Public Safety and Emergency Preparedness) v Ahmed*, 2019 FC 1006 at para 19). Although not changing that standard of review, given that an individual's liberty interests are engaged in a detention review process, detention decisions must be made while keeping in mind section 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*] (*Ahmed v Canada (Citizenship and Immigration)*, 2015 FC 792 at para 19). In determining whether the Member's decision is reasonable, the guiding question is whether the decision is one that is justifiable, transparent and intelligible and that falls within a range of reasonable outcomes (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

VI. Analysis

[25] The framework for assessing the reasonableness of an ID detention decision that departs from decisions made in prior detention reviews was set out by the Federal Court of Appeal in *Canada (Minister of Citizenship and Immigration) v Thanabalasingham*, 2004 FCA 4 [*Thanabalasingham*], where, the Court held that while prior decisions are not binding on a member, departing from prior decisions to detain requires "clear and compelling" reasons for doing so (at para 10).

[26] This Court has since clarified that the lack of "clear and compelling" reasons to depart should not be interpreted as a discrete ground for judicial review, but instead as an application of the reasonableness standard (*Canada (Public Safety and Emergency Preparedness) v Mohammed*, 2019 FC 451 at para 23). Further, in the wake of the Supreme Court's decision in *Canada (Public Safety and Emergency Preparedness) v Chhina*, 2019 SCC 29 [*Chhina*], where the Court commented that IRPA's current detention review process – or 'scheme' as the Court referred to it – is susceptible to "self-referential reasoning" (at para 62), this Court has cautioned against faulting the ID for departing from earlier decisions (*Canada (Public Safety and Emergency Preparedness) v Baniashkar*, 2019 FC 729 at para 20).

[27] Specifically, in *Chhina*, the Supreme Court noted four criticisms highlighted in a recent audit of the ID, finding that detainees do not receive the full benefit of the scheme, observing that the ID (i) should place the onus on the Minister to continue detention, but often fails to do so and does not approach each detention review afresh; (ii) is often overly reliant on past detention

review decisions; (iii) often overly relies on the CBSA submissions and (iv) as a result of the failure to consider each detention review afresh, is wanting in ensuring compliance with sections 7 , 9 , and 12 of the *Charter* (*Chhina* at para. 63).

[28] In its own response to the Audit, the ID released new guidelines on April 1, 2019 (*Guidelines Issued by the Chairperson Pursuant to paragraph 159(1)(h)of the Immigration and Refugee Protection Act*). These provide revised instructions to members that directly responded to the criticisms of the audit noted above, and are discussed in more detail in my decision in *Canada (Public Safety and Emergency Preparedness) v Hamdan*, 2019 FC 1129 [*Hamdan*], as is the guidance provided by *Chhina*.

[29] In this case, the Member's decision to release Mr. Arook properly adhered to the principles enunciated in *Thanabalasingham*, which state that reasons should be explicit and provide clear and compelling reasons to depart, though those reasons may sometimes be implied. An example of an unreasonable decision would be one that fails to advert to the prior reasons for detention in any meaningful way (*Thanabalasingham* at paras 12-13).

[30] The Decision provides explicit reasons for ordering Mr. Arook's release, beginning with the statement "I am ordering your release today and I am going to explain why I am doing so." In the explanation that follows, the Member refers to the prior decisions to detain and specifies how the circumstances – most significantly those surrounding the alternative to detention – have changed such that release is now warranted.

[31] In particular, the two previous members had recommended that the parties obtain further information from the imam and the supervising parole officer regarding the details of Mr. Arook's release plan. The Decision adverts to and addresses these concerns by, for example, noting that "[p]revious members have indicated that [the imam] needed to be interviewed and we have done so today."

[32] The Decision also mentions that while it would be preferable to speak with Mr. Arook's supervising parole officer before his release, that individual will not be assigned until he is released, thus creating a perpetual cycle. The Member decided that releasing Mr. Arook, and allowing for a supervising parole officer to be assigned will best serve immigration purposes. I note that both parties indicated at the hearing that they had spoken to the prospective parole officer. Counsel for the Applicant noted that due to protocol, the prospective parole officer was not able to testify at the hearing, but that the Member was advised and assured that he would be overseeing Mr. Arook's compliance.

[33] It is thus apparent from her reasons that the Member is satisfied that the concerns highlighted by previous members regarding the alternative to detention have been adequately addressed. The fact that the Minster disagrees that these changes are sufficient to justify Mr. Arook's release does not mean that it was unreasonable for the Member to act on them. As stated by this Court, "[t]his argument is no more than an invitation to reweigh the evidence and that is not the role of the Court on judicial review" (*Canada (Citizenship and Immigration) v B072*, 2012 FC 563 at para 29).

[34] The Member's reasons were also justified in light of the record before her. Conditions of release must be sufficiently robust to protect the public from any material risk of harm and provide a reasonable degree of certainty that the individual will report for removal (*Canada (Public Safety and Emergency Preparedness) v Ali*, 2018 FC 552 at para 47). Based on the evidence presented to her, it was reasonable for the Member to conclude that the risks posed by Mr. Arook – namely as a flight risk and a danger to the public – were adequately mitigated by the alternative to detention.

[35] First, the imam, who worked closely with Mr. Arook for over a year, testified before the ID for the first time and offered to assist Mr. Arook in finding employment and in complying with his conditions. The imam described Mr. Arook as a "role model" in prison and expressed his belief that Mr. Arook had given up his former lifestyle. This evidence had not been heard previously.

[36] Second, the Member heard evidence that Mr. Arook's transitional parole officer had confirmed the availability of a bed at Belkin House for Mr. Arook. This development addressed previous concerns regarding whether Mr. Arook would be accepted into a residence.

[37] Counsel for the Minister expressed serious concerns that Belkin House was not specified among the conditions for release. While the condition was clearly implicit based on the hearing transcript, I was sufficiently concerned about the issue. Mr. Arook's counsel agreed that this appeared to be an omission by the Member, and by both counsel in failing to raise the issue when the Member read out her decision.

[38] Having found it an implicit factor in the reasons to depart from the previous decision, I convened a follow-up teleconference with the parties. A solution was arrived at such that counsel for the Minister would seek a variation to the Order by filing an application with the Immigration Division. Mr. Arook's counsel agreed to this approach.

[39] I would note that while difficult in the context of oral reasons, when important details such as conditions for release are being discussed, they should be clearly listed and noted for the benefit of all parties. Preferably, they would be circulated in written, draft format to avoid having disputes about the implicit meaning of conditions and/or the need to make subsequent applications to vary. In most instances, by the time that the judicial review takes place at the Court, there is simply not the benefit of time to have these issues resolved before a decision is rendered. In this case, as there was agreement between the parties, and as it will be a condition of my decision, the solution was feasible.

[40] Turning back to the Decision, previous ID members and the Minister acknowledged that Mr. Arook's history of substance abuse contributed to the level of risk he posed. The imam testified that Mr. Arook has not tested positive for any drugs since his incarceration, indicating his willingness to change. I note that the conditions of release appropriately include a prohibition against possessing or consuming alcohol and drugs, and a requirement to complete a treatment program arranged by his supervising parole officer. It was these drugs and addiction issues that led Mr. Arook down the road to his criminal past.

[41] Overall, it was reasonable for the Member to conclude that all of the mechanisms in place – namely, the numerous release conditions imposed, the availability of a bed at Belkin House, the imam's offer of assistance in ensuring compliance, and Mr. Arook's demonstrated willingness to change – created an adequate number of checks and balances to mitigate the risks outlined.

[42] The Decision was not a perfect one, as noted above with respect to the missing residence condition. However, reasonableness review is not a line-by-line examination for errors (*Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34 at para 54). Nor is perfection the standard (Justice Evans' dissent at para 163 of *Public Service Alliance of Canada v Canada Post Corporation*, 2010 FCA 56, as relied on by the Supreme Court in allowing the appeal (2011 SCC 57 at para 1)). On the whole, I find the Decision meets the cornerstones of reasonableness for all the reasons noted above.

[43] I have already referred to the decision in *Hamdan* above, and noted its more expansive comments on the recently released ID Guidelines and *Chinna*, and the revitalization that has emerged in at least these two decisions. And similar to *Hamdan*, the Federal Court managed to work within the current practice of expediting standard judicial review schedules, so that these cases could be heard on an urgent basis. This is more consistent with the tight, 30 day timelines of the detention review regime, and avoids the complication of mootness that has arisen from time to time, as observed in *Canada (Citizenship and Immigration) v B386*, 2011 FC 175 at para 13, and noted by the *Chhina* majority at para 66.

[44] An expedited timeline facilitates the rejuvenation of the detention review regime, a robust, if previously tired, one. This allows, as Justice Abella suggests in her dissent, new life to be breathed into the regime, assisted by the new Guidelines, and then manifested in decisions such as the one under review.

VII. Conclusion

[45] The application for judicial review is dismissed. No questions for certification were argued, and I agree none arise. There is no order as to costs.

JUDGMENT in IMM-4822-19

THIS COURT'S JUDGMENT is that:

1. This judicial review is dismissed.

2. There is no award as to costs.

3. No questions are certified.

"Alan S. Diner"
Judge

Annex A

STATUTORY RELEASE - PRE REL.

Condition	Status
• NOT TO CONSUME ALCOHOL Not to consume, purchase or possess alcohol.	IMPOSED
• NOT TO CONSUME DRUGS Not to consume, purchase or possess drugs other than prescribed medication taken as prescribed and over the counter drugs taken as recommended by the manufacturer.	IMPOSED
• AVOID CERTAIN PERSONS Not to associate with any person you know, or have reason to believe, is involved in criminal activity.	IMPOSED
• FOLLOW TREATMENT PLAN Follow a treatment plan/program to be arranged by your parole supervisor in the areas of substance abuse, thinking errors and mental health.	IMPOSED
• NOT TO BE NEAR CHILDREN AREAS Not to be in, near, or around places where children under the age of 18 are likely to congregate such as elementary and secondary schools, parks, swimming pools and recreational centres unless accompanied by an adult previously approved in writing by your parole supervisor.	IMPOSED
• REPORT RELATIONSHIPS Immediately report all intimate sexual and non sexual relationships and friendships with females to your parole supervisor.	IMPOSED
• AVOID PERSONS - VICTIM(S) No direct or indirect contact with the victim or any member of the victim's family.	IMPOSED
• AVOID PERSONS - CHILDREN Not to be in the presence of any female children under the age of 18 unless you are accompanied by a responsible adult who knows your criminal history and has been previously approved in writing by your parole supervisor.	IMPOSED

FEDERAL COURT

SOLICITORS OF RECORD

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