Federal Court  Cour fédérale

Date: 20191119

Docket: IMM-6551-19

Citation: 2019 FC 1454

Ottawa, Ontario, November 19, 2019

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Applicant

and

LS

Respondent

ORDER AND REASONS

[1] The Applicant, the Minister of Public Safety and Emergency Preparedness [the Applicant or the Minister], seeks to stay the order for the release of the Respondent, LS (LS or the Respondent) issued on October 30, 2019 [Release Order] by Member B. Gunn of the Immigration Division [ID] of the Immigration and Refugee Board of Canada. The stay is sought pending the determination of the Minister's Application for Leave and for Judicial Review of the

Release Order. An interim-interim stay of the Release Order pending the determination of this motion was issued on November 1, 2019 on consent of both parties.

[2] If the stay is granted, the Minister also seeks an Order granting the Application for Leave and for Judicial Review of the Release Order and expediting the hearing of the Application for Judicial Review.

[3] LS is a permanent resident of Canada who was found inadmissible to Canada due to serious criminality. LS is schizophrenic with a long criminal record, including violent and sexual offences. He has been in immigration detention for over one year, including 110 days in administrative segregation. At the most recent detention review hearing, the ID found that LS's detention in administrative segregation, which ended in April 2019, infringed his rights under section 12 of the Charter. As a remedy for that breach, the ID released LS from detention with conditions. The Minister seeks to stay LS's release from detention, highlighting that the conditions of release do not address the fact that LS is both a flight risk and a danger to the public. Further context for the Court's determination whether the stay should be granted is set out below.

[4] The motion highlights the challenges posed where liberty interests collide with the need to protect the public from persons who pose danger and who pose a flight risk. The motion also highlights the paucity of resources available to assist mentally ill immigration detainees.

[5] Although the circumstances are troubling and further detention may be harmful for LS, I am granting a stay of the Release Order pending the determination of the Application for Judicial Review, for the reasons provided below.

I. Preliminary Issue

[6] At the outset of the hearing of this motion, the Respondent sought an Order for confidentiality, in particular, to LS's identity given the personal information regarding his mental health and to protect the identity of a minor victim. The Minister does not oppose the request. The Court is satisfied that, in the circumstances, the Order for confidentiality should be granted. Therefore, the Respondent will be referred to by initials and others will be referred to by relationship, initials or other descriptors.

II. Background; Criminal and Immigration History

[7] LS are a citizen of Jamaica. He was admitted to Canada in April 2007 with a temporary foreign worker permit valid until December 15, 2007.

[8] LS overstayed his work permit. He was found inadmissible to Canada in 2008 and issued an exclusion order *in absentia*. LS was eventually located and arrested by the Canada Border Services Agency [CBSA] on July 24, 2009. He was granted Permanent Resident Status on September 1, 2011, due to sponsorship by his wife under the Family Class category.

[9] LS has an extensive criminal history, which has escalated over the years. His criminal history includes the following convictions:

- **April 11, 2014:** convicted of failure to comply with a probation order.
- **August 22, 2014:** convicted of uttering threats and failure to comply with a probation order.
- **November 5, 2014:** convicted of theft under $5000 and failure to comply with a probation order.
- **May 25, 2015:** convicted of theft under $5000, assault, and failure to comply with a probation order.
- **May 28, 2015:** convicted of uttering threats and failure to comply with a probation order.
- **December 22, 2015:** convicted of uttering threats and failure to comply with a probation order.
- **February 12, 2016:** sentenced for failure to comply with a probation order.
- **June 7, 2016:** convicted of assault with a weapon (stabbing with scissors) and sexual interference of a 14-year-old girl.
- **November 16, 2016:** convicted of uttering threats and three counts of failure to comply with a probation order.
- **October 19, 2017:** convicted on four counts of failure to comply with a probation order.
- **October 30, 2018:** convicted of assault of a peace officer with a weapon.
- **October 30, 2018:** convicted of threatening death/bodily harm, assault of a peace officer and failure to comply with a probation order.

[10] On September 21, 2017, the ID found LS to be inadmissible for serious criminality pursuant to paragraph 36(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] as a result of his conviction for assault and sexual interference in June 2016. The ID issued a deportation order.

[11] On November 2, 2018, LS completed his criminal sentence and was transferred to immigration detention, where he has remained.

[12] On November 8, 2018, the CBSA offered LS a restricted Pre Removal Risk Assessment [PRRA] pursuant to subsection 112(3) of the IRPA, however, he did not submit the application at that time.

[13] In mid-December 2018, LS was placed in administrative segregation in the Toronto East Correctional Center [TECC].

[14] On April 3, 2019, LS was transferred from administrative segregation at the TECC to a special needs unit at the Toronto South Detention Centre [TSDC]. The Toronto Bail Program [TBP] and the Salvation Army both indicated that they could not supervise Mr. Smith if released due to his refusal to take injectable medication for his mental illness.

[15] On April 2, 2019, the CBSA agreed to defer LS's removal from Canada to permit him to submit his PRRA.

[16] On May 28, 2019, LS received a positive decision on the first stage of his PRRA. (In other words, the CBSA found that he would face a risk upon return to Jamaica.) On June 7, 2019, the CBSA provided submissions to Immigration Refugees and Citizenship Canada [IRCC] regarding whether LS constitutes a danger to the public. If IRCC finds that LS is a danger to the public, IRCC must weigh the risk to LS upon return to Jamaica with the danger he poses to

public safety in Canada and determine whether his PRRA should be refused and removal enforced. The decision on the PRRA is expected in January 2020.

[17] The Minister's affiant attests that, in the event that LS is to be removed, the CBSA has his expired passport, which can be renewed or extended. In addition, Jamaican authorities have stated that they are willing to issue a travel document for LS and to facilitate his return to Jamaica and have requested that a three-month's supply of medication be provided to LS on removal.

III. The Decision and Order for Release

[18] The Reasons for Decision rendered by ID member B. Gunn, dated October 30, 2019, outline LS's criminal history and immigration history in significant detail. Member Gunn also describes LS's immigration detention, which commenced on October 30, 2018, following his release from detention imposed for criminal convictions.

[19] Member Gunn noted that LS was placed in administrative segregation at CECC on December 18, 2017. He remained in administrative segregation until April 3, 2019 when he was transferred to TSDC, where he has remained in a "Special Needs Unit". Member Gunn described the deterioration of LS's mental health while in segregation, the efforts made by LS's designated representative to raise awareness of his deteriorating state and to explore alternatives to segregation at successive detention review hearings, as well as the efforts of Counsel for LS to do so. Member Gunn noted that in April 2019, Counsel for LS first raised the argument that

detention in administrative segregation violated LS's rights pursuant to section 7 and 12 of the *Charter*. Although LS's detention was continued, he was moved to TSDC.

[20] Member Gunn noted that subsequent 30-day detention reviews, conducted by other ID members, resulted in the continued detention of LS. Member Gunn also noted that this Court granted judicial review of two separate ID decisions, and remitted to the ID the determination of whether to release LS, including consideration of whether past conditions of detention amounted to a breach of section 12 for which a remedy should be granted.

[21] On October 4, 2019, Member Gunn conducted the ninth 30-day detention review of LS.

[22] Member Gunn considered two issues: first, whether LS's section 12 right not to be subjected to cruel and unusual punishment or treatment had been breached due to his detention in administrative segregation and, if so, the appropriate remedy for the breach; and second, whether LS should be released from detention upon consideration of the grounds for detention and the factors set out in section 248 of the *Immigration and Refugee Protection Regulations* (SOR/2002-227) [Regulations].

[23] Member Gunn concluded that LS should be released with conditions as a remedy pursuant to subsection 24(1) of the *Charter* for the breach of his section 12 rights and also as a result of the statutory detention review analysis.

[24] In finding that LS's detention for 110 days in administrative segregation constituted cruel and unusual treatment or punishment, Member Gunn noted that LS's mental health deteriorated significantly and alarmingly in this period, pointing to the record which includes notes of the daily assessments of the mental health nurse and other records from CECC. Member Gunn found that the responsibility for immigration detainees rests with the Minister of Public Safety and Emergency Preparedness who is responsible for the CBSA, although LS was detained in a provincial remand facility.

[25] Member Gunn referred to the Report of Dr. Rachelle Larocque, "Segregation in Ontario; Segregation Literature Review" prepared for the Independent Review of Ontario Corrections in 2017. The Report describes the results of research on the psychological and physiological effects of segregation, including anxiety, depression, cognitive disturbances, perceptual distortions, paranoia and psychosis. Member Gunn found that LS experienced many of the noted effects.

[26] Member Gunn considered the jurisprudence, including *Canadian Civil Liberties Association v Canada (Attorney General)*, 2019 ONCA 243, 144 OR (3d) 641 [*CCLA*], and concluded that it supports finding that prolonged administrative segregation of any inmate is harmful and can result in serious permanent psychiatric and physical damage and is particularly detrimental to those with pre-existing mental health issues.

[27] Member Gunn relied on *CCLA* to conclude that administrative segregation longer than 15 days infringes section 12 of the *Charter* and cannot be saved under section one. The Member acknowledged that the Supreme Court of Canada had issued an interim stay of the declaration of

constitutional invalidity of the relevant provisions of the *Corrections and Conditional Release Act* (which was at issue in *CCLA*) but concluded that the finding that segregation longer than 15 days violated section 12 remains as a precedent.

[28] Member Gunn added that even without the CCLA precedent, she would have found, given the evidence, that LS's section 12 rights were infringed, noting that the 110 days he spent in administrative segregation violated accepted norms of treatment and was grossly disproportionate so as to outrage standards of decency. Member Gunn also found that LS had no meaningful opportunity to challenge his detention and that no real alternatives to segregation were considered or offered, concluding that the process was not procedurally fair.

[29] With respect to the remedy for the section 12 breach, Member Gunn cited *Canada (Minister of Citizenship and Immigration) v Li* 2009 FCA 85 at para 74, [2009] FCJ No 329 [*Li*], that the *Charter* trumps the risk of flight or danger to the public where detention constitutes cruel and unusual treatment.

[30] Member Gunn found that the only meaningful remedy within her power to grant was to release LS subject to conditions.

[31] Member Gunn agreed with the past findings of the ID that LS is unlikely to appear for removal. The Member also noted LS's extensive criminal history, stating that it "calls into question his ability to follow the rules and comply with conditions of release". However, the Member found that there was no evidence that LS has ever violated immigration conditions of

release. Member Gunn concluded that LS is capable of complying with conditions of release, such as reporting for interviews, but also found that there was a likelihood that he would not appear for removal.

[32] Member Gunn further found that LS poses a danger to the public. Member Gunn noted LS's extensive criminal history and the escalating violent offences, including his conviction for sexual interference with a 14 year old, his stabbing of the same 14 year old and his threat to kill her, as well as his convictions for assault with a weapon and assault of a police officer. Member Gunn noted that the correlation between LS's mental health and his serious criminality was not clear, as there was no evidence on the record regarding his mental health at the relevant time.

[33] Member Gunn found, on a balance of probabilities, that LS posed a present and future danger to the public, due to his 2015 assault convictions and his 2016 convictions for assault with a weapon and sexual interference, but concluded that this risk could be mitigated by appropriate conditions.

[34] Member Gunn then referred to the factors in section 248 of the Regulations, which provide that where there are grounds for detention, the listed factors must be considered before a decision is made to release or detain. The Member first noted that the reason for detention is that LS is both a flight risk and a danger to the public. The Member noted that LS had been detained for one year and that another two to three months detention was anticipated until his PRRA was determined.

[35] With respect to alternatives to detention, Member Gunn noted that LS and his representatives had not proposed any alternatives to detention, rather argued for his release to address the section 12 breach. Member Gunn noted that the TBP had previously refused to offer supervision because LS refused to take injectable medication. Member Gunn noted that LS had more recently agreed to do so. Member Gunn found that the TBP's supervision would mitigate the flight risk and danger posed by LS and would help support him given TBP's access to mental health services. Despite this finding, Member Gunn did not make LS's release conditional on TBP supervision, noting that this was because of the *Charter* violation.

[36] Member Gunn also noted that the Salvation Army had previously refused to supervise LS due to concerns about his mental health, but had more recently indicated that it could assist him, however it had a limited capacity of four beds. Member Gunn did not make release conditional on supervision or residential placement with the Salvation Army.

[37] Finding that the factors set out in section 248 were not exhaustive, Member Gunn focused on her finding that LS's section 12 rights had been infringed, that the Minister had not been diligent in exercising his authority over the conditions of detention, that the CBSA had been aware of LS's mental health issues since 2017, that the CBSA did not appear to be aware of LS's segregation until January 2019, and that it took until April, 2019 for action to be taken to end the segregation. The Member reiterated that in *Li*, the Federal Court of Appeal found that a *Charter* breach trumps flight risk and danger to the public concerns.

[38] Member Gunn concluded that the breach of section 12 and the length of LS's detention and anticipated future detention, plus the best interests of LS's daughter (of which Member Gunn had noted that there was very little evidence) outweighed the LS's flight risk and risk of danger to the public, factoring in the release conditions to mitigate the risk.

[39] Member Gun characterized the conditions of release as strict. The conditions imposed on LS are to:

- Present himself at the date, time and place the CBSA or ID requires him to appear to comply with any obligation imposed on him under the IRPA , including removal, if necessary;
- Provide CBSA prior to release with his residential address and advise CBSA in person of any change in address prior to the change being made;
- Report to an Officer at the CBSA office . . . on or before a date to be determined by the CBSA and at a frequency of once every two weeks thereafter. A CBSA officer may, in writing, reduce the frequency or change the reporting location;
- Confirm his departure with a CBSA officer prior to leaving Canada;
- Fully cooperate with CBSA with respect to obtaining travel documents in the event his PRRA is refused;
- Not engage in any activity subsequent to release which results in a conviction under any Act of Parliament;
- If charged with an offence under any Act of Parliament, to inform CBSA of that charge in writing and within seven days;
- If convicted of an offence under an Act of Parliament, to inform the CBSA of that conviction and within seven days;

- Keep the peace and be of good behavior;
- Not work or study without authorization in accordance with the IRPA;
- Not to contact or communicate in any way, directly or indirectly, with the victim of the sexual interference and assault with a weapon convictions;
- Abide by the conditions of the February 2016 Order to comply with *Sex Offender Information Registration Act*, S.C. 2004, c. 10 [*SOIRA*];
- Abide by all conditions of probation imposed by the Ontario Court of Justice in Probation orders dated October 30, 2018, October 19, 2017 and November 16, 2016, which include conditions of attending and participating in counselling and rehabilitative programs as directed by the probation officer; and,
- Make all reasonable efforts to obtain and follow a treatment plan for mental illness.

IV. The Test for a Stay

[40] The conjunctive tripartite test set out in *RJR-MacDonald Inc. v Canada (Attorney General)*, [1994] 1 SCR 311, [1994] ACS No 17 [*RJR- MacDonald*] applies to determine whether the stay requested by the Applicant should be granted: that there is a serious issue to be tried; that the Applicant would suffer irreparable harm if the stay were not granted; and, that the balance of convenience lies in the Applicant's favor. All three elements of this test must be established.

A. *Serious issue*

[41] The jurisprudence has established that the test to establish a serious issue is generally relatively low, being neither frivolous nor vexatious, but must have some chance of success at the judicial review stage (*Mejia v Canada (Citizenship and Immigration*), 2009 FC 658 at para 18, [2009] FCJ No 824 (QL)). The test for serious issue is lower for the purpose of a stay motion than the standard of an "arguable case" for the purpose of leave for judicial review (*Adetunji v Canada (Minister of Citizenship and Immigration*), 2012 FC 708 at para 40, [2012] FCJ No 698). In the present case, the parties agree that if the stay is granted leave for judicial review should also be granted and the hearing of the Application for Judicial Review should be expedited.

[42] The Respondent submits that an elevated threshold to establish a serious issue should apply in the present case, noting that if the stay is granted, the Minister will get what the Minister sought but did not receive from the ID (i.e., continued detention of LS). The Respondent submits that if a person will be deprived of their liberty, the Minister should be able to establish a strong *prima facie* case, particularly in the present case where an interim-interim stay was granted to permit the Minister to prepare their arguments and record.

[43] The Minister submits that the usual threshold for determining whether a serious issue has been raised should apply; a serious issue is one that is not frivolous or vexatious.

[44] There is some division in the recent jurisprudence regarding whether an elevated threshold for serious issue applies in the context of a motion by the Minister for a stay of a

release order, because the stay if granted, keeps a respondent in detention, which is what the Minister initially seeks before the ID and is the same or similar relief that the Minister will seek on judicial review. Proponents of an elevated standard argue that the analogy to a stay of a refusal to defer the removal of a person from Canada provides guidance. In that context, the jurisprudence has established that the party seeking the stay must advance a strong case and show a likelihood of success in the underlying application because the stay, if granted, effectively grants the relief sought in the underlying judicial review application (*Wang v Canada (Minister of Citizenship and Immigration)*, [2001] 3 FC 682 at para 11, 2001 FCT 148 and *Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81 at para 51, [2010] 2 FCR 311 [*Baron*]).

[45] In *Canada (Public Safety and Emergency Preparedness) v Allen*, 2018 FC 1194 [*Allen*] and *Canada (Public Safety and Emergency Preparedness) v Mohammed* 2019 FC 451 [*Mohammed*], Justice Norris found that an elevated threshold should apply to a stay of release from detention. In *Mohammed*, at para 13, Justice Norris explained:

> 13 Building on my observations in Allen, I note that there is an important sense in which staying a release order effectively sets aside the disposition ordered by the ID, the very relief sought in the underlying judicial review application. Indeed, it can also be said that the stay effectively provides the Minister with the disposition of the detention review which he sought unsuccessfully from the ID – namely, the detainee's continued detention. In my view, this is analogous to the situation that obtains when a stay of a removal order is sought pending judicial review of a refusal to defer the removal. In this latter context, it is well-established that an elevated standard applies on the first branch of the test, and that the moving party must demonstrate that the underlying application is likely to be successful: see Wang v Canada (Minister of Citizenship and Immigration), [2001] 3 FC 682, 2001 FCT 148 (CanLII) at para 10; Baron v Canada (Public Safety and Emergency Preparedness), 2009 FCA 81 at paras 66-67

> (per Nadon JA, Desjardins JA concurring) and para 74 (per Blais JA). I find that the same rationale for an elevated standard on the first part of the test for a stay also applies in the present context.

[46] In *Canada (Minister of Public Safety and Emergency Preparedness) v Berrios Perez*, 2019 FC 452, 307 ACWS (3d) 823, Justice Martineau cited *Allen* in support of applying an elevated threshold for the establishment of a serious issue in the determination of a stay of the release of a detainee on conditions.

[47] The contrary view was expressed in Canada (Public Safety and Emergency Preparedness) v Asante, 2019 FC 905, 308 ACWS (3d) 611, where Justice Zinn found that the "usual" threshold for serious issue had, until recently, been accepted as the applicable threshold in determinations whether to stay release from detention and should continue to be applied. Justice Zinn noted, at para 9, that the test for an injunction, or stay, established in *RJR-MacDonald* had identified two exceptions to the usual threshold;

> These were (1) "when the result of the interlocutory motion will in effect amount to a final determination of the action," and (2) "when the question of constitutionality presents itself as a simple question of law alone." In these exceptional cases the judge must make "an extensive review of the merits at the first stage of the analysis" [emphasis added] to determine whether the applicant has shown a strong prima facie case. This may be described as the elevated threshold for serious issue determination.

[48] Justice Zinn added that the usual threshold also applies in *Charter* cases, explaining at para 31:

> As to the fact that the order being stayed restores a Charter right to liberty, I note that in *RJR-MacDonald*, the Supreme Court held that the usual threshold for serious issue should be applied even in Charter cases. Additionally, as discussed previously, if after a

> hearing on the merits of the application, the release order is found reasonable and the application dismissed, the restriction on the liberty of the individual will be short. I agree with Justice Norris that liberty is a precious right; however, all rights are subject to restrictions and limitations. In this context two considerations apply. First, this restriction must be weighed against the consequences of flight risk or danger to the public. It cannot be assessed in isolation from the context. As the Supreme Court noted in *RJR-MacDonald*: "A careful balancing process must be undertaken." Second, in my view, the restriction on the liberty of the detainee is a matter more properly considered when examining balance of convenience than when considering serious issue.

[49] Justice Zinn explained that staying the release of the detainee would not amount to a final determination of the action at paras 30-41, noting at paras 33-34,

> 33 Granting the stay does not grant the Minister the very relief sought in the underlying application because, if the stay is granted, the Minister will still have to persuade the Court in the expedited judicial review hearing that the release decision was unreasonable and must be set aside. As I stated in *B479*, all the stay order does is maintain the status quo.
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> 34 This situation is not akin to that in *Wang*. In *Wang* situations, if the stay is granted, the individual cannot be removed until after the judicial review hearing—but that hearing is not expedited. Requests for administrative deferrals of removal always ask for a brief period of deferral until some future event. Given the Court's docket in the past, it was not infrequent that the judicial review applications in those contexts were not heard until at least one year or more had passed from the date of the stay order. Even with the current improved state of the Court's docket, judicial review hearings in immigration and refugee matters are unlikely to be determined until some six to nine months after the stay order has been granted. It will often be heard after the deferral date requested in the administrative deferral request.

[50] In the present case, the stay, if granted, will keep LS in detention in the special needs unit of the TDSC until the determination of the Application for Judicial Review (or until other supervisory arrangements can be agreed upon) rather than until his restricted PRRA is

determined. His PRRA is anticipated in January 2020 and will determine whether he is removed from Canada or permitted to remain. If the stay is granted, the hearing of the Application for Judicial Review will be expedited and could likely be determined before the PRRA. The continued restriction on the liberty of LS may be relatively short either way.

[51] On judicial review, the Minister will be required to establish that the Release Order is not reasonable. If the elevated threshold for a serious issue is applied on this stay motion, and one or more serious issues are established, this would signal the Court's finding that these issues have a likelihood of success on judicial review. This could be viewed as pre-determining the outcome of the judicial review, which is not intended. The Application for Judicial Review should be determined on its merits and on the basis of a complete record and full argument on the merits. As a result, the usual threshold for a serious issue should apply, but with careful regard to the issues argued to be serious.

[52] In *Asante*, Justice Zinn found, at para 40-41, that where a serious issue is raised with respect to the conditions for release for a detainee found to pose a flight risk and risk of danger to the public, a finding of irreparable harm will follow. However, Justice Zinn cautioned that this approach demands that the Court exercise vigilance and be satisfied that the issues raised are truly serious. Justice Zinn cited his previous decision in *Cardoza Quinteros v Canada (Minister of Citizenship and Immigration)*, 2008 FC 643 at paragraph 13, [2008] ACF No 812:

> The threshold cannot automatically be met simply by formulating a ground of judicial review which, on its face, appears to be arguable. It is incumbent on the Court to test the grounds advanced against the impugned decision and its reasons, otherwise the test would be met in virtually every case argued by competent counsel.

B. *Irreparable harm*

[53] The Minister must establish with clear and convincing evidence on a balance of probabilities that irreparable harm will result between now and the determination of the Application for Judicial Review if LS is released on the conditions imposed. While there is a great deal of jurisprudence on what constitutes irreparable harm, particularly in the context of a stay of removal, the examples provided in that jurisprudence are not generally applicable to the current context.

[54] The Federal Court of Appeal in *Glooscap Heritage Society v Canada (National Revenue)* 2012 FCA 255, at para 31, [2012] FCJ No 1661 (QL) [*Glooscap*] established a principle of wide application,

> [31] To establish irreparable harm, there must be evidence at a convincing level of particularity that demonstrates a real probability that unavoidable irreparable harm will result unless a stay is granted. Assumptions, speculations, hypotheticals and arguable assertions, unsupported by evidence, carry no weight. See *Dywidag Systems International, Canada, Ltd. v. Garford Pty Ltd.*, 2010 FCA 232 at paragraph 14; *Stoney First Nation v. Shotclose*, 2011 FCA 232 at paragraph 48; *Canada (Attorney General) v. Canada (Information Commissioner)*, 2001 FCA 25, 268 N.R. 328 at paragraph 12; *Laperrière v. D. & A. MacLeod Company Ltd.*, 2010 FCA 84 at paragraph 17.

[55] As noted above, there is also support in the jurisprudence for finding that irreparable harm is established where a serious issue is found with respect to the release conditions for a person found to pose a risk to public safety (*Asante* at paras 40-41).

C. *Balance of convenience*

[56] The Minister also bears the onus to demonstrate that the balance of convenience lies in the Minister's favor. This requires an assessment of whether the Minister or LS would suffer greater harm from the granting or refusing the stay of LS's release pending the determination of the Application for Judicial Review (*R v Canadian Broadcasting Corp*, 2018 SCC 5 at para 12, [2018] 1 SCR 196 [*CBC*]).

V. The Applicant's Submissions

[57] The Minister submits that the three part test for the stay to be granted has been established.

[58] The Minister submits that the ID's decision to release LS on minimal conditions is misguided, based on erroneous facts and the application of an incorrect test, and more generally, is irresponsible and unreasonable.

[59] The Minister acknowledges that the ID ordered LS's release on two bases; as a remedy for a *Charter* violation and by applying the factors in section 248 of the Regulations. The Minister submits that serious issues arise on both bases. The Minister submits that as a *Charter* remedy, there was no analysis of the options for release and the remedy is not appropriate and just. The Minister also submits that the ID's analysis of section 248 and balancing of the factors is flawed: LS is a danger to public; the legal test for conditions of release in such circumstances is not simply mitigation of risk, rather to "virtually eliminate" the danger to the public; the

conditions imposed are redundant and ineffective to virtually eliminate or even to mitigate the risk posed by LS; and, LS cannot follow conditions, as demonstrated by his past history and as exacerbated by his mental illness.

[60] The Minister agrees that the ID has the jurisdiction to consider and make findings on *Charter* violations, and to consider a detainee's conditions of detention.

[61] The Minister submits that whether the ID's analysis of section 12 of the *Charter* is correct raises a serious issue. The Minister does not concede that the ID's analysis regarding the *Charter* is correct, but explains that due to the urgency of bringing this motion, arguments on the section 12 issue will be developed and advanced on the Application for Judicial Review in the event the stay is granted. The Minister submits that even if the section 12 finding were reasonable, which is not conceded, the ID fettered its discretion by finding that the only remedy was release of LS. The Minister adds that LS has other remedies, including a civil action, for any violation of his rights.

[62] The Minister submits that the ID failed to adequately analyze the appropriate section 24 remedies. The release of LS on minimal or standard conditions without any supervision is not appropriate and just. The Minister notes that LS was moved from segregation over seven months ago and that his circumstances have changed, therefore, granting release now to remedy a situation that no longer exists, given the other relevant factors, is not appropriate.

[63] The Minister notes that the CBSA explored alternatives to detention during the period that LS was detained. The TBP was approached on several occasions but declined to supervise LS unless he would agree to take injectable medication to treat his schizophrenia. The Salvation Army similarly refused to accept LS into its program due to his mental illness.

[64] The Minister also notes that the ID found that LS is a flight risk and a danger to the public, yet the ID did not consider any plan for his release or any supervision in order to virtually eliminate these risks.

[65] The Minister argues that the ID also erred in its analysis of the statutory grounds for detention and of the factors set out in section 248 of the Regulations that inform that analysis. The Minister notes that although the ID found that LS was unlikely to appear due to his past convictions for failure to comply with probation orders, the ID erroneously found that LS had never violated his immigration conditions. The Minister points out that LS was at liberty in 2016-2017, although he had been found inadmissible to Canada, and during this period his criminal behavior continued and escalated. The ID's erroneous finding that LS had not violated immigration conditions and, therefore, that he would comply in the future is not reasonable.

[66] The Minister argues that although the ID found that LS posed a danger to the public, the ID erred by imposing conditions to "mitigate" rather than to "virtually eliminate" the danger to the public, which is the standard established in *Canada (Minister of Public Safety and Emergency Preparedness) v Lunyamila* 2016 FC 1199 at para 45, [2016] FCJ No 1489 [*Lunyamila*].

[67] The Minister submits that the ID failed to explain how the conditions of release, which are little more than the standard release conditions, would even mitigate the danger posed or the flight risk. Although the ID acknowledged the benefits of supervision by TBP or the Salvation Army, the ID did not include any condition of supervision.

[68] The Minister adds that the ID failed to consider that while LS may be more stable and more amenable to taking his medication since his move to TSDC, this is due to his detention in the special needs unit, where he has support, supervision and access to his medication. The ID failed to consider that upon release, without any supervision, LS will not have the needed support and his mental health will likely deteriorate. The Minister notes that the more recent information provided by the Minister's affiant, indicates that LS is refusing to take his medication.

[69] With respect to irreparable harm, the Minister submits that where there is a serious issue with a release order in circumstances where there is no dispute that the detainee is a flight risk and a danger to the public, irreparable harm necessarily flows from the finding that a serious issue has been raised (relying on *Asante* at paras 40-41).

[70] The Minister adds that irreparable harm will result from the release of LS who is a danger to the public. The conditions of release do not virtually eliminate or even mitigate the risk.

[71] With respect to the balance of convenience, the Minister submits that the protection of the public safety is a paramount consideration. The Minister adds that the evidence establishes

that the Minister will not be successful in enforcing the conditions of release if breached, which will both put public safety at risk and bring the integrity of the IRPA into disrepute. While acknowledging that LS's liberty interest is at stake, the Minister submits that the inconvenience to LS due to his continued detention with support and supervision can be mitigated by expediting the Application for Judicial Review of the ID's decision.

VI. The Respondent's Submissions

[72] The Respondent submits that the ID's decision, which found that LS's rights under section 12 of the *Charter* had been violated and that the appropriate remedy for this serious violation was nothing short of release on conditions, is entirely reasonable and supported by intelligible and transparent reasons. No serious issue has been raised. The Respondent submits that LS – and not the Minister – will clearly suffer irreparable harm if the stay is granted and that the balance of convenience favors LS.

[73] The Respondent submits that the harm caused to LS due to his 110 days in administrative segregation is clear and supported by the evidence, including the research on the harmful effects of segregation and the notes and assessments of the nurses who monitored LS, which reflect that he suffered the very harm noted in the research.

[74] The Respondent notes that although the PRRA process is in its second stage, a determination by January 2020 is an optimistic estimate. Further, in the event of a negative PRRA, there may be obstacles to obtaining documents from Jamaican authorities to permit LS's removal, which could result in further detention.

[75] The Respondent disputes the Minister's argument that the ID failed to conduct an analysis of the possible remedies available pursuant to section 24 and simply jumped to the remedy of releasing LS. The Respondent notes that several remedies were proposed to the ID but few were responsive to the magnitude of the *Charter* breach. Release with conditions is an appropriate response to the gravity of the *Charter* breach, which still permits the CBSA to monitor LS.

[76] The Respondent argues that the reasons why the ID ordered release are clear; the ID found a serious breach of the *Charter* and found that the responsible Minister had let the situation continue. The Respondent notes that no action was taken to address LS's alarming deterioration until arguments were made that his segregation violated the *Charter*. The Respondent points to the ID's findings regarding the serious harm caused to LS as his mental health deteriorated while in segregation and the ID's conclusion that this treatment violated accepted norms.

[77] The Respondent further submits that the ID's analysis of the statutory release conditions is reasonable; the ID addressed all the relevant factors and the evidence with respect to each. The Respondent adds that the list of factors in section 248 is not exhaustive. Therefore, the ID's greater reliance and weight placed on the extent of the section 12 breach and the need to craft a remedy is reasonable.

[78] The Respondent further submits that public safety is not a "trump card" to justify detention, rather the *Charter* interests at stake trump the public safety concern *(Li)*.

[79] The Respondent disputes the Minister's argument that the conditions of release should virtually eliminate the risk of danger to the public and flight risk. The Respondent submits that in *Lunyamila* at para 59, the Court recognized that the standard for conditions of release to virtually eliminate the risk posed by the person is subject to exceptions where the Minister's conduct has caused delays in the person's removal. The Respondent argues that exceptions should apply where there is other Ministerial misconduct.

[80] The Respondent also disputes the Minister's characterization of the release conditions as no more than standard and submits that all conditions are tailored to the particular person.

[81] The Respondent argues that irreparable harm is a distinct part of the test for a stay of an order and cannot simply flow from a finding of serious issue.

[82] The Respondent submits that the balance of convenience clearly favors LS who has been in detention for a year. The Respondent notes that the public interest includes that everyone's liberty be protected and that everyone be protected from cruel and unusual treatment; it is not limited to concerns about public safety. The Respondent further submits that the Minister's conduct in ignoring the conditions of LS's detention for a long period disentitles the Minister to the equitable relief of a stay of release.

VII. One or More Serious Issues Have Been Established

[83] As noted above, the Court adopts the usual threshold for the establishment of a serious issue and finds that one or more serious issues – being neither frivolous or vexatious and having

some chance of success on judicial review – have been established by the Minister with respect to both bases for the ID's decision to release LS on conditions.

[84] The ID found that LS posed a present and future danger to the public, due to his 2015 assault convictions and his 2016 convictions for assault with a weapon and sexual interference, yet concluded that this risk could be mitigated by appropriate conditions. Whether the ID's decision to release LS on conditions is an appropriate and just remedy in the circumstances, in accordance with subsection 24(1) of the *Charter,* for the breach identified by the ID raises a serious issue.

[85] The ID relied on *Li* to conclude that a breach of a *Charter* right trumps flight risk and the risk of danger to the public. In *Li*, the detainees were a flight risk but posed no danger to the public. Although the issue of danger to the public did not arise in *Li*, the Court of Appeal commented at paras 74 and 75,

> 74. The case law dictates that the Charter trumps the risk of flight or danger to the public when the length of the detention reaches the stage where it "constitutes cruel and unusual treatment or is inconsistent with the principles of fundamental justice, and therefore infringes the Charter in a manner that is remediable under subsection 24(1) of the Charter": see *Charkaoui*, *supra*, at paragraph 123. In *Canada (Minister of Citizenship and Immigration) v. Romans*, 2005 FC 435, the Federal Court endorsed the release of the respondent because his immigration detention on the basis that he was a danger to the public had become indefinite and contravened the Charter.
>
> [75] There will be instances where nothing short of release from detention, with or without conditions, will remedy a Charter breach. That being said, the prevention of a Charter breach, however, does not necessarily require the same remedy as an actual breach. In other words, preventive measures may be and,

> depending on the circumstances, shall be different from corrective measures.

[86] The ID's interpretation and reliance on *Li* may raise a serious issue given that the Court of Appeal noted that "there will be instances", which begs the question of whether the ID's determination that release from detention was such an instance.

[87] Whether the release conditions reflect an analysis and balancing of the factors set out in Section 248, which must be considered and balanced in determinations whether to release a detainee, with regard to the evidence on the record and the jurisprudence which has interpreted the factors also raises a serious issue.

[88] Whether the ID imposed the correct legal standard of virtually eliminating the risk or whether the circumstances justify a lesser standard raises a serious issue. The ID did not acknowledge the standard established in the jurisprudence and did not consider whether any exception would apply to justify a departure from that standard.

[89] Moreover, whether the conditions imposed even mitigate the risk raises a serious issue.

[90] The ID made a doubly inconsistent finding, first noting that LS's criminal history "calls into question his ability to follow the rules and comply with conditions of release", yet finding that he was capable of abiding by conditions of release, then finding that he would likely not appear for removal if required. The ID also found that LS had never breached the conditions imposed with respect to his immigration. However, this finding overlooks, among other facts,

that LS disregarded the conditions of his work permit in 2007 and that his extensive criminal history is also a violation of his immigration conditions. As noted by the Supreme Court of Canada in *Medovarski v Canada (Minister of Citizenship and Immigration); Esteban v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51, [2005] 2 SCR 539, permanent residents are obliged to abide by the law, at para 10:

> [10] The objectives as expressed in the *IRPA* indicate an intent to prioritize security. This objective is given effect by preventing the entry of applicants with criminal records, by removing applicants with such records from Canada, and by emphasizing the obligation of permanent residents to behave lawfully while in Canada.

[91] Section 248 of the Regulations, states:

248. 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:	248. S'il est constaté qu'il existe des motifs de détention, les critères ci-après doivent être pris en compte avant qu'une décision ne soit prise quant à la détention ou la mise en liberté :
(a) the reason for detention;	a) le motif de la détention;
(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;
(d) any unexplained delays or unexplained lack of diligence caused by the Department or the person concerned; and	d) les retards inexpliqués ou le manque inexpliqué de diligence de la part du ministère ou de l'intéressé;
(e) the existence of alternatives	e) l'existence de solutions de

to detention.

rechange à la détention.

[92] In *Lunyamila*, the Chief Justice considered the reasonableness of several decisions of the ID which had ordered the release of the detainee, who had been found to be both a flight risk and a danger to the public and who had been uncooperative in efforts to permit his removal to his country of origin. The Chief Justice emphasized, at para 41, that section 248 of the Regulations, requires that *all* of the factors listed be considered and weighed. He found that failure to engage in the balancing exercise would render a release decision unreasonable (at para 42).

[93] The Chief Justice noted at para 61 that the principle stated in *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 at para 1, [2007] 1 SCR 350, that "[o]ne of the most fundamental responsibilities of a government is to ensure the security of its citizens" is reflected in the objectives of IRPA, in particular, paragraphs 3(1)(h) and 3(2)(g); "to protect public health and safety and to maintain the security of Canadian society".

[94] The Chief Justice noted several provisions of the IRPA and its Regulations which reflect the security and public safety objectives (at para 63) and concluded at para 65 that these provisions must be taken into account "in interpreting and giving weight to the five factors listed in section 248 of the Regulations".

[95] The Respondent points to para 59 of *Lunyamila* in support of his argument that the requirement that conditions of release "virtually eliminate" the risk posed by a detainee is subject to exceptions where the Minister is at fault. At para 59, the Chief Justice stated:

> [59] In my view, the scheme of the IRPA and the Regulations contemplates that persons who are a danger to the public or a flight risk and who are not cooperating with the Minister's efforts to remove them from this country, must, except in exceptional circumstances, continue to be detained until such time as they cooperate with their removal. Exceptional circumstances would be warranted, because it will ordinarily be very difficult to formulate terms and conditions of release that will eliminate, or virtually eliminate, the danger to the public presented by the individual. Thus, it ordinarily would be difficult to avoid exposing the general public to some risk by releasing the detainee. However, this might be justified in an exceptional circumstance, such as where there have been unexplained and very substantial delays by the Minister that are not attributable to the detained person's lack of cooperation or to an unwillingness on the part of the Minister to incur substantial costs that would be associated with pursuing non-speculative possibilities for removal.

[96] In *Lunyamila*, the Chief Justice focused on the "tension" between the detainee's refusal to cooperate with an enforceable removal order and the length of detention and uncertain future length of detention. In that context, the Chief Justice addressed the need for conditions of release to be responsive to the danger to the public and the flight risk posed by the detainee. Although the Respondent submits that *Lunyamila* does not establish that conditions of release must meet the standard of "virtually eliminating" the danger posed by a detainee, and that the Chief Justice noted exceptions to that standard, in my view, the exception noted arose from the circumstances in *Lunyamila.* Moreover, the Chief Justice did not apply any exception. The Chief Justice's acknowledgement that there may be exceptional circumstances where the public could be exposed to some risk by a detainee must be put in context and read together with the many other references in *Lunyamila* to the need for conditions of release to "virtually eliminate" the danger posed by a detainee, including at paragraphs 45, 85 and 116. The Chief Justice also noted, at para 66, that the factors set out in section 248 of the Regulations should be considered in the context

of the IRPA as a whole, including its objectives, which support the view that a significant danger to the public "weighs strongly" in favour of detention.

[97] At para 116, the Chief Justice stated:

> 116 Turning to the conditions of release that Member Cook articulated in his decision, I agree with the Minister that they were unreasonable because they did not adequately address Mr. Lunyamila's violent tendencies and his flight risk. In my view, given those reasons for detention, and the strong priority given to public safety and security in the IRPA, any conditions of release would have had to virtually eliminate, on a day-to-day basis, any risk that Mr. Lunyamila would pose to people living or working at any residence where he may be required to reside, and to the public at large. They would also have to have virtually eliminated any risk that he might disappear into the general public, to avoid future removal. The conditions of release articulated by Member Cook fell short of meeting this standard, even though they were notably more robust than what the other Members whose decisions are reviewed in these reasons for judgment would have imposed.
>
> [Emphasis added]

[98] Whether the release conditions are appropriate – regardless of whether the standard is that they virtually eliminate the risk posed or only mitigate that risk – raises a serious issue. Although the ID set out a long list of release conditions, many are repetitive or overlapping, some are redundant, and some are likely impossible to follow. The conditions boil down to keeping the peace and being of good behavior, because if LS does so, he will avoid breach of probation and further charges and convictions for criminal or other offences. Other conditions, such as giving notice of convictions for criminal offences, are not useful because an arrest of LS would draw the attention of the ID and could result in detention well before he is tried and convicted for an offence. Ordering that LS abide by conditions of probation, when he is already clearly required to do so, the breach of which could result in further charges, serves little purpose

as a condition of release to address the risk he poses. Similarly, ordering that LS not contact his victim or that he comply with the SOIRA are redundant conditions as these already apply and will continue whether or not he is released. The condition to make reasonable efforts to obtain and follow a treatment plan for mental illness is more tailor made for LS, but based on the evidence, it is likely not possible for him to obtain such a plan or to follow it without supervision or assistance. The current release conditions will result in LS going from a restricted environment, yet one that provides support and assistance, including from the Centre for Addictions and Mental Health, to being on his own without any supervision and no professional assistance, support or encouragement to take his medication. It is unrealistic to expect that LS can, on his own, comply with the conditions let alone make any efforts to comply with a treatment plan where no plan has been developed. Some middle ground of release with supervision should have been explored by the ID, even if this results in some delay in LS's release.

VIII. Irreparable Harm is Established

[99] With respect to irreparable harm, the issue is whether the Minister would suffer irreparable harm in the period of time until the Application for Judicial Review is disposed of, which in the present case may only be a matter of up to two months. The Release Order if implemented would permit LS's release before the Application for Judicial Review is determined. Speculation about irreparable harm does not meet the test. While the jurisprudence (*Asante* at paras 40-41*)* has found that irreparable harm flows from a finding of a serious issue with respect to a release condition where a risk of danger to the public has been found, in the present case the evidence of irreparable harm meets the standard established in *Glooscap.*

[100] If the stay is refused, LS will be released on the conditions that raise serious issues with respect to their effectiveness to virtually eliminate or even to mitigate the risk he poses to public safety. The evidence of danger to the public is clear and non-speculative and is supported by the findings made by the ID and the evidence on the record regarding LS's criminal history, including his violent and sexual offending, and his failure to abide by conditions of probation. The ID's finding that the breach of a *Charter* right trumps public safety ignores that *Charter* rights are subject to reasonable limits.

[101] In addition, the integrity of the immigration system would fall into disrepute if the Minister's concerns, which are not speculative, materialize and LS, who has been clearly found to be a flight risk, does not comply with the terms and conditions of his release. In such a scenario, the Minister's ability to enforce the terms of the Release Order and to ensure LS's attendance at his immigration proceedings, including his potential removal from Canada, would be jeopardized.

[102] While LS's continued detention deprives him of his liberty, which is by nature harmful, his release on the conditions imposed, which offer him no support or supervision and no mental health treatment plan, would also likely be harmful to him.

IX. The Balance of Convenience Favors the Minister

[103] With respect to the balance of convenience, it appears that both LS, who has been in detention for a year, and the Minister will suffer harm. I do not agree with the Respondent that the Minister's conduct, which resulted in LS languishing in administrative segregation where his

mental state further deteriorated, disentitles the Minister to this equitable relief. The right of the public to be protected cannot be sacrificed without more careful consideration to alternative release conditions to address the risk. Although I agree with the Respondent that the public also has an interest in ensuring that the rights of all persons are upheld, including the protection of liberty, the public interest includes the right to be safe from persons found to be a danger. The evidence also establishes that the Minister will likely not be able to enforce the conditions of release if breached, which will both put public safety at risk and bring the integrity of the IRPA into disrepute.

[104] In the circumstances, the balance of convenience favors the Minister.

[105] I note that LS will be eligible for a statutory review of his detention again in late November 2019. The Application for Judicial Review of the Release Order dated October 29, 2019 will be expedited and, by way of a separate order, will be scheduled for December 5, 2018.

ORDER in file IMM-6551-19

THIS COURT ORDERS that:

1. The Motion is granted.
2. The Release Order is stayed until the determination of the Application for Judicial Review.
3. The style of cause is amended, with immediate effect. The Respondent will be referred to by the initials LS.

"Catherine M. Kane"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6551-19
STYLE OF CAUSE:	THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS v LEIGHTON SMITH
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	NOVEMBER 8, 2019
REASONS FOR ORDER AND ORDER:	KANE J.
DATED:	NOVEMBER 19, 2019

APPEARANCES:

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