Federal Court  Cour fédérale

Date: 20200604

Docket: IMM-2466-20

Citation: 2020 FC 669

Ottawa, Ontario, June 4, 2020

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Applicant

and

AFSHIN IGHANI MALEKI

Respondent

JUDGMENT AND REASONS

[1] On May 12, 2020, Member Puddicombe of the Immigration Division of the Immigration and Refugee Board ordered the release of the Respondent from detention. This Court granted a stay of that decision on May 15, 2020, and expedited the hearing of this application for judicial review. The Respondent has been in detention since January 28, 2020.

[2] The Respondent, a citizen of Iran, was granted a permanent resident visa in 1991, and entered Canada at age 20 under the Convention Refugee category. Since then, he has frequently interacted with law enforcement and immigration officials.

[3] In 2002, a report issued under subsection 44(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27, for inadmissibility for serious criminality, and a deportation order subsequently issued. On appeal, that order was stayed on conditions, to be reconsidered in five years. In 2007, prior to the expiry of the five-year period, the Minister filed an appeal to cancel the stay, which was granted because the Respondent failed to respect the terms and conditions imposed for the stay of his removal order.

[4] Currently, Canada Border Services Agency is seeking the opinion of the Minister pursuant to paragraph 115(2)(a) of the Act that the Respondent is a danger to the public in Canada and, notwithstanding his protected status, may be removed to a country where he may be at risk of persecution, torture or cruel and unusual treatment or punishment.

[5] The Respondent has 18 criminal convictions, including fraud, possession of narcotics (cannabis marijuana), assault, uttering threats to cause death or bodily harm and possession of property obtained by crime under $5,000.00, possession of a scheduled substance (cocaine and marijuana), possession of a firearm or ammunition, possession of a restricted firearm with ammunition, trafficking, possession for the purpose of trafficking, unauthorized possession of a prohibited or restricted weapon (2 counts), possession of a listed substance (2 counts), and possession of a firearm or weapon contrary to an order.

[6] While in custody for his crimes, the Respondent committed numerous additional offences under the *Corrections and Conditional Release Act*, SC 1992, c. 20, including assault and threats. The danger opinion report correctly notes that the information relating to his incarceration "demonstrated that his behaviour while institutionalized included rule violations, non-compliant and threatening behaviour, as well as peer-related issues." It also notes entries from correctional staff that "there were periods of rule-abiding and respectful behaviour" and that "there were several months prior to his final assessment from August 2016 that indicated he demonstrated good behaviour."

[7] The Respondent's detention was reviewed on January 30, February 6, February 28, March 27, and April 24, prior to the decision under review. In each instance, he was found to be a danger to the public and detention was continued.

[8] The April 24, 2020 review was before Member Puddicomb and the Respondent advanced New Visions Recovery Society [New Visions] as an alternative to detention. The Member stated that the proposed alternative might be available but he had too many questions to make a determination as to whether it might mitigate any risk the Respondent poses. He suggested that testimony from someone at New Visions would be of benefit. In particular, the Member was concerned about the level of supervision and the availability of programming at New Visions.

[9] At the May 12, 2020 hearing, the Executive Director of New Visions, Justin Thomas, testified. He was asked questions specifically about these two areas of previous concern.

[10] Mr. Thomas testified that the houses are staffed 24 hours a day and that there are two exits to each facility, in the back and in the front, both within view of the front desk and living room. He stated that if someone leaves, it is reported to the RCMP, bail office, immigration officer, or whomever else is necessary. There are roll calls throughout the day. The facility is locked at night, but can be opened from inside. When asked if "anyone walked off the facility" he responded "Lots". When asked, "how many people would typically go AWOL in a given month" he responded "About 20". When asked "[D]o you know how many have been found afterwards and how soon" he responded, "Nobody gets picked up within five hours. Some maybe a week".

[11] It should be noted that at the hearing of the stay motion counsel for the Respondent expressed her view that the transcript was inaccurate and that the Executive Director actually said that most get picked up within five hours. In the end, nothing turns on this. The relevant fact is that many residents leave the premises without permission, and most are found.

[12] Mr. Thomas testified that once a resident is found to be missing, New Visions calls the RCMP, establishes a police file number, and gives a report including what the resident was wearing. They will provide a photo of the resident if an officer comes to its site. Lastly, he testified "then we also have to draft out a letter to the bail supervisor or the immigration officer, as to, you know, what led to him going – walking out or (indiscernible) incident that happened before that so we have to write a report and then we'll fax it within 24 hours but the phone call goes in immediately as soon as he's discovered he has gone AWOL."

[13] Mr. Thomas testified that New Vision's programming includes cognitive behavioural therapy, dialectic behavior therapy, anger management programs, grief and loss, and codependency. He noted that the facility provides group therapy and one-on-one counselling by appointment. He added:

> [T]his is a recovery house, not a treatment centre so all our programs are basic programs only. We don't do any intensive programs.

[14] Mr. Thomas testified that while these programs would be available to the Respondent, he is required to serve a two-week quarantine period due to the current pandemic, and will not be participating in programming during that period.

[15] Mr. Thomas testified that New Visions has often welcomed immigration detainees on conditions, and the facility staff are comfortable contacting CBSA as soon as release conditions are violated.

[16] He also stated that the RCMP are contacted immediately if there are any threats or violence, and the offending resident will be removed from the house immediately.

[17] In the decision under review, Member Puddicomb found that New Visions was an appropriate alternative to detention. With respect to its programming, the Member found:

> There is an ongoing pattern of use and threats of violence on the part of Mr. Ighani. So the programming that he would be provided at New Visions would address that underlying issue. Anger issues, impulse control, that's really what I think needs to be addressed in Mr. Ighani's case and they are prepared to provide him with that. So the programming that would be provided goes a long way to addressing the underlying risk posed by Mr. Ighani.

[18] The Member states that the fact that the doors are not locked and the Respondent could leave "at anytime he chose to do so" was troubling but he "also takes[s] into account that really leaving the facility would not be at all to his benefit." He is also troubled that there are no cameras or guards at the doors, but there are regular roll calls and the exits are viewable by staff. He sums up his findings:

> It's not ideal, but I place a lot of weight on the programming that can be offered. There are a number of people who have walked away but, as I said, it really wouldn't be to Mr. Igani Maleki's benefit to actually do so.
>
> While some people, or while a number of people have walked away, Mr. Thomas indicated that most are found shortly afterwards. … So all that to say while he can walk out, if he does so there's the likelihood is that it's going to be reported very quickly and that the authorities will find Mr. Ighani Maleki shortly afterwards.
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> …
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> So the type of programming that is available to Mr. Ighani Maleki at New Visions, the supervision that they have on site combined with the curfew, their no violence being tolerated policy and other restrictions that are in place, their willingness and comfort, really in contacting the Canada Border Services Agency or even the RCMP as quickly as they can if circumstances warrant that contact as well as Mr. Thomas's testimony to the effect that people who do walk away have been discovered relatively quickly afterwards, all of this I find does eliminate the risk to Canadian society to an acceptable level.
>
> I'm also very well aware of decisions by the Federal Court that state that in situations of danger there's a requirement that the conditions imposed virtually eliminate the risk. I find that required residents at New Visions complying with their programming and house rules supplemented by regular reporting to the Canada Border Services Agency would be virtually eliminating the risk posed to society by Mr. Ighani Maleki.

[19] There is no dispute that the decision under review is to be tested against the reasonableness standard.

[20] The Supreme Court explains at paragraph 87 *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] that "a court conducting a reasonableness review properly considers both the outcome of the decision and the reasoning process that led to that outcome."

[21] In *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, which was issued with *Vavilov*, the majority at paragraph 31, explains that when conducting a reasonableness review, a court should start with the reasons, looking to see if there is a coherent and rational chain of analysis based on the facts and law:

> A reasonable decision is "one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov*, at para. 85). Accordingly, when conducting reasonableness review "[a] reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision maker to arrive at [the] conclusion" (*Vavilov*, at para. 84, quoting Dunsmuir, at para. 48). The reasons should be read holistically and contextually in order to understand "the basis on which a decision was made" (*Vavilov*, at para. 97, citing Newfoundland Nurses).

[22] The Minister submits that the Member's decision is unreasonable. Paragraph 48 of its memorandum provides a summary of its position:

> The residential facility identified by the Member concedes that 20 residents per month leave the facility. Given the Respondent's lengthy history of violence and his repeated intolerance of rules and conditions, taken with his lack of responsibility for his

> criminality, it is unreasonable for the Member to determine that residence at New Visions would mitigate the danger posed by the Respondent to the public and the likelihood to appear for removal.

[23] In response, the Respondent says that the Minister's argument regarding the number of residents who go AWOL seems to be that "the alternative to detention does not sufficiently mitigate the ground of detention that the Respondent would be unlikely to appear." His counsel correctly notes that her client has never been found to be a flight risk; rather, the Minister's position at the detention reviews has been that the Respondent is likely to commit another potentially violent crime and "he would not appear for future immigration proceedings because he would be embroiled in the criminal justice system" or incarcerated. Accordingly, the unlikely to appear ground is rooted in the danger to the public ground.

[24] The central issue then is whether the Member's decision that New Visions is a viable alternative that "virtually eliminates" the danger is a reasonable decision based on the evidence.

[25] In my assessment, the Member explains why the programming offered at New Visions "goes a long way to addressing the underlying risk posed" by the Respondent, thus reducing the risk to other residents, as well as the public in general. He notes that New Visions has a one strike and you're out policy. Any violent conduct within the residence by the Respondent will immediately result in him being returned to detention. Should that occur, there is every likelihood that the Respondent will flee the residence; however, the Member notes that most are quickly apprehended, again resulting in his return to detention.

[26] Frankly, the one aspect of the Member's reasoning that is troublesome is his comment that while the Respondent could simply walk away, "leaving the facility would not be at all to his benefit." Regrettably, the Respondent has a lengthy history of doing things that are not to his benefit. Notwithstanding the Respondent's previous non-compliance with rules, the Member accepted his counsel's submission that understanding the consequences he is more likely to do so.

> I also take into account counsel's, one of the points made by counsel, to the effect that Mr. Maleki or Ighani Maleki engaging counsel in all aspects of the immigration process. It doesn't necessarily show that he is going to be compliant in with all conditions of release but I take it to show, though, that he is engaged with the process and he does fully understand the consequences to him if, in fact, he does not comply with conditions imposed. I agree with counsel that his engagement in the immigration process does show that he is alert and prepared to engage with the processes that are before him.

[27] Without something more to base a finding that he is likely to comply, I would have found this reasoning insufficient. The record shows that the Respondent has had legal counsel in his criminal proceeding and yet that was not sufficient to do what was in his best interests going forward.

[28] However, there is additional evidence in the record that supports the Member's finding, namely, as noted at paragraph 6 above, in the recent past he has been co-operative with correctional officers and compliant with the rules and directions. Although not specifically referenced by the Member, it does support his conclusion that the Respondent is likely to observe all conditions of release.

[29] For these reasons, I find the decision to be reasonable and this application must be dismissed.

[30] The Respondent proposed the following question for certification:

> Where an individual is detained pursuant to s 58(1)(b) of the *IRPA* for posing a danger to the public, does nay proposed alternative to detention need to virtually eliminate the danger posed before release can be ordered, as opposed to on a balance of probabilities standard?

[31] The Minister opposed certifying the question posed. In light of the basis of my finding in this case, the question would not be determinative of an appeal, and therefore the question cannot be certified.

JUDGMENT IN IMM-2466-20

THIS COURT'S JUDGMENT is that the application is dismissed, the stay of release from detention is lifted, and no question is certified.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2466-20
STYLE OF CAUSE:	THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS v AFSHIN IGHANI MALEKI
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