Federal Court  Cour fédérale

Date: 20200618

Docket: IMM-3890-19

Citation: 2020 FC 709

Ottawa, Ontario, June 18, 2020

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Applicant

and

RAUL BULHOSEN RIOS

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application by the Minister of Public Safety and Emergency Preparedness for judicial review of the decision of the Immigration Division [ID] of the Immigration and Refugee Board dated June 20, 2019, in which the ID ordered the Respondent's release from detention [Decision].

[2] For the reasons that follow, this judicial review is dismissed.

II. **Background Facts**

[3] The Respondent, Raul Bulhosen Rios, is a citizen of Mexico who was granted permanent residence in Canada in 2008 under the Temporary Foreign Worker program.

[4] In December 2016, the Respondent pled not guilty to four of ten charges involving cocaine trafficking and money laundering under the *Controlled Drugs and Substances Act*, SC 1996, c 19 and the *Criminal Code*, RSC 1985, c C-46. The remaining charges were withdrawn.

[5] After an agreed statement of allegations was submitted at his trial, the Respondent was convicted of the four offences with which he had been charged. On the basis of a joint submission on sentencing and forfeiture he was sentenced to two concurrent custodial terms which totalled 14 years and 6 months, after he received credit of 42 months for pre-trial custody.

[6] In September 2017, the Applicant issued a Section 44 report for serious criminality and organized criminality under sections 36 and 37 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

[7] The Respondent's admissibility hearing began in December 2018. The Respondent conceded the section 36 serious criminality allegation, but contested the section 37 organized criminality allegation. The admissibility hearing was then adjourned to July 2019 to allow the Respondent to appeal his convictions related to membership in a criminal organization.

[8] On June 13, 2019, the Parole Board of Canada [PBC] granted day parole, with conditions, to the Respondent. The Respondent was arrested by the Canadian Border Services Agency [CBSA] pursuant to an immigration warrant and was put in immigration detention. That event triggered the Decision under review.

[9] On June 18 and 20, 2019, the Respondent had his 48-hour detention review hearing. At the conclusion of the hearing, ID Member Gunn released the Respondent on conditions including those issued by the PBC.

[10] Member Gunn found that the Respondent was a danger to the public, but that there was insufficient evidence to conclude that he was a flight risk. Member Gunn then found that release on specified conditions was a suitable alternative to detention.

[11] The Applicant brought a motion for an interim stay of release, which was granted by Mr. Justice Brown on June 21, 2019. The Applicant brought a subsequent motion for a stay of release, which was granted by Mr. Justice Roy on June 29, 2019.

III. **Preliminary Issue**

[12] At the opening of the hearing of this matter, the Court was advised that a deportation order had been issued for the Respondent. The status of the deportation order was not known. After discussion with counsel concerning whether this application was moot, I decided to proceed to hear it as there was an outstanding appeal to the Supreme Court of Canada which could have affected the validity of the Respondent's criminal conviction.

IV. **Issues**

[13] The Applicant raises two issues in this application.

[14] First, the Applicant argues that Member Gunn improperly ceded the ID's jurisdiction to the PBC when it deferred to the terms and conditions imposed by the PBC. The Applicant argues that Member Gunn showed "excessive deference" to the conditions imposed by the PBC, even though the PBC did not expect that those parole conditions would actually be implemented.

[15] Second, the Applicant argues that Member Gunn failed to consider the *Corrections and Conditional Release Act*, SC 1992, c 20 [*CCRA*] when making the Decision.

V. **Standard of Review**

[16] The standard of review for both issues is reasonableness.

[17] Recently, the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] extensively reviewed the law of judicial review of administrative decisions. The Supreme Court confirmed that judicial review of an administrative decision is presumed to be on the standard of reasonableness subject to certain exceptions, none of which apply on these facts: *Vavilov* at paragraph 23.

[18] A decision is reasonable if the decision-making process is justified, transparent and intelligible resulting in a determination that falls within the range of possible, acceptable

outcomes which are defensible on the facts and law: *Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 47 [*Dunsmuir*].

[19] In *Vavilov*, the requirements of a reasonable decision are restated as possessing "an internally coherent and rational chain of analysis that is justified in relation to the facts and law". To that end, the principled approach to a reasonableness review begins by examining the reasons provided with "respectful attention" while seeking to understand the reasoning process that was followed*: Vavilov* at paragraphs 85 and 83.

[20] When reviewing a detention review decision made by the ID, the Court is to show deference to the member's findings of fact and assessment of the evidence. The Court is not to substitute its own opinion for that of the member: *Canada (Public Safety and Emergency Preparedness) v Karimi-Arshad*, 2010 FC 964 at paragraph 16; and see *Vavilov* at paragraphs 30, 85 and 125.

VI. **Statutory Scheme**

A. *Immigration and Refugee Protection Act*

[21] Subsection 58(1) of the *IRPA* mandates that the ID order the release of a permanent resident or foreign national unless it is satisfied that one of five conditions are met. These conditions include a finding that the detained person is a danger to the public, or that the person is unlikely to appear for an examination, proceeding, or removal under the *IRPA*.

[22] Sections 244 - 246 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*IRPR*] set out the factors to be considered when determining whether the person is a flight risk or a danger to the public. If the ID finds that there are grounds for detention, section 248 of the *IRPR* requires the ID to consider five factors, including the reason for detention, the length of time in detention, and the existence of alternatives to detention.

B. *Corrections and Conditional Release Act*

[23] The Applicant refers to subsection 128(4) of the *CCRA* which states that "an offender against whom a removal order has been made under the [*IRPA*] is not eligible for day parole or an unescorted temporary absence until they are eligible for full parole."

VII. **Analysis**

[24] The ID hearing took place over two days. On the first day, the Respondent was self-represented because his counsel had not received notice of the hearing. On the second day, his counsel was present and made submissions to the ID, as did Applicant's counsel.

A. *The ID did not improperly cede its jurisdiction to the PBC*

[25] In finding that the Respondent was a danger to the public, Member Gunn noted her role was more expansive than the role of the PBC, and that she was not bound by the decision of the PBC on this issue. Member Gunn noted that she was to consider the factors in section 248 of the *IRPR* and that those factors, specifically danger to the public, are critical objectives of the *IRPA*; they exist for a very different purpose than what the PBC was considering.

[26] Member Gunn noted that the PBC did not find reasonable grounds to believe that, if he was released, the Respondent would commit an offence involving violence. Member Gunn also found that neither the PBC nor the sentencing judge had evidence before them that weapons seized from others had any direct connection to the Respondent or that he had instructed anyone to commit violence or had committed violence himself.

[27] Member Gunn found the documents stated that the weapons and ammunition seized by the authorities did not directly belong to the Respondent. Member Gunn noted that the *IRPR* have a specific section dealing with danger to the public, which is found in subsection 244(b). The factors to be considered for danger, which are found in subsection 246(e), deal with drugs.

[28] The Applicant submits that notwithstanding statements made to the contrary, Member Gunn deferred to the terms and conditions imposed by the PBC. The Applicant points to the additional conditions imposed by Member Gunn that the Respondent "abide by all conditions of Day Parole as issued on June 14, 2019" and "update the CBSA in writing if + when any of the parole conditions are amended or relaxed."

[29] The Applicant submits that the conditions imposed by Member Gunn were essentially that the Respondent "abide by whatever the PBC ordered him to do" but, if the PBC made any changes, he was to advise CBSA. To the Applicant that meant that the ID would not have any role to play in assessing whether a term or condition amended by the PBC was suitable for the purposes of immigration release.

[30] The Applicant says that the requirement to update the CBSA is a problem because in the case of *Canada (Minister of Citizenship and Immigration) v Salinas-Mendoza*, [1995] 1 FC 251 [*Salinas-Mendoza*], Mr. Justice Marc Noël, when a member of this Court, found that an Adjudicator conducting a detention review committed the fundamental error of "excessive deference" to the decision made by the Provincial Court in a criminal matter. As a result, the Adjudicator failed to focus on the specific authority she was to exercise under the *Immigration Act*.

[31] Mr. Justice Noël concluded that the Adjudicator had failed to bring her independent mind to bear on the issue she was to decide. In doing so he found that the Adjudicator had treated the Provincial Court decision as determinative of the issue she was to decide. In addition, she committed a further error in deferring to the Provincial Court decision in the belief that the judge "was more apt, or better positioned jurisdictionally, to assess the potential risk to public."

[32] I am not persuaded that Member Gunn committed any of the errors that were present in *Salinas-Mendoza*. In this matter, the Applicant equates the PBC to the Provincial Court. The Applicant says that Member Gunn did not independently assess under the *IRPA* whether the PBC conditions, which were made in view of a different statutory scheme, were suitable to determine immigration detention release conditions.

[33] In *Salinas-Mendoza*, the decision-maker (immigration adjudicator) did not perform an independent analysis. She arrived at an incorrect conclusion regarding her jurisdiction and did not focus on the specific authority she was to exercise under the legislation.

[34] In this matter, Member Gunn made no error with respect to jurisdiction nor was she unaware of her specific authority. The Applicant's positon is that while Member Gunn said the right things, she did not follow through with them by conducting an independent analysis.

[35] Member Gunn conducted a full two-day hearing in which she questioned the Respondent at some length about various matters, including the terms of his parole. She reviewed 303 pages of disclosure that included the transcript and reasons from the sentencing hearing, the Niagara police reports, the Criminal Profile Report, the PBC decision and documents related to it.

[36] I have reviewed the underlying record including the transcripts of the detention review hearing, the criminal sentencing transcript, the PBC decision and the various documents associated therewith. I also have considered the Orders of Justices Brown and Roy granting stays of the Release Order made by Member Gunn.

[37] It is clear to me that Member Gunn did not blindly adopt or deferentially accept the PBC conditions. To the contrary, Member Gunn not only stated that she was not deferring to the PBC decision, she explained the importance of the conditions in the context of the *IRPA* danger finding. That danger was identified by Member Gunn as:

> So, the danger in this case to me is the risk that you will once again get involved in importing, trafficking and selling cocaine and thereby contribute to a sub-culture that is inherently violent, and also by selling cocaine, put the health and safety of Canadians at risk. That's the danger I have to respond to here.

[38] In the hearing, Member Gunn explained how she found that the PBC conditions addressed the nature of the danger the Respondent posed. She explained her reasons for

imposing the PBC conditions. For example, the Respondent is prohibited from possessing more than one mobile communication device and he is to provide his parole supervisor with the billing statements for the device. Member Gunn observed that having more than one cellphone tends to be a hallmark of drug traffickers so the condition responds to that concern.

[39] Member Gunn also found that given the Respondent committed crimes largely for financial gain it was absolutely critical that his finances be monitored. She found that the condition that he (1) not operate a business of his own without the written approval of his parole officer, and (2) provide documented financial information to the satisfaction of his parole officer on a schedule to be determined by the parole supervisor responded to that concern.

[40] Another condition that Member Gunn found responsive to the immigration detention concerns include that the Respondent not associate with any person he knew or had reason to believe were involved with criminal activity.

[41] A factor that was considered favourable to release was that the Respondent's parole officer told the PBC that a community residential facility, also known as a halfway house, had a bed available for the Respondent and there was no waiting list. During the hearing, Member Gunn questioned the Respondent at some length about the halfway house. She learned, and noted in the Decision, that he had been provided with the rules for that location and that there was a curfew in place from 7:00 p.m. until 7:00 a.m.. Member Gunn mentioned an important aspect of the rules was that the Respondent indicated that after the first month at the halfway house he

might be able to get a pass for a weekend stay with his family at his home. But, he was aware that if he "screwed up" at the halfway house he would be returned to the penitentiary.

[42] In the Release Order, Member Gunn imposed eight of the standard or usual conditions – which were all that could apply to this Respondent – then added two additional conditions.

[43] The first was that the Respondent "abide by all conditions of Day Parole as issued on June 14, 2019". The Applicant points to that condition as showing that Member Gunn simply deferred to the terms and conditions imposed by the PBC.

[44] I view it quite differently. The legal effect of imposing all of the PBC conditions as immigration conditions under the Release Order made breach of any of those conditions an offence under the *IRPA*. That is not deferring so much as it is ensuring that the ID had the power to punish breaches of the conditions.

[45] The first condition also solves one of the main problems identified in *Salinas-Mendoza*. Mr. Justice Noël had noted that because the Immigration Adjudicator did not make an independent order imposing under the *Immigration Act* the terms that had been made by the Provincial Court, the public safety concerns would be "left unattended" if, for any reason, the Provincial Court terms ceased to have effect. In turn, Mr. Justice Noël found that error was symptomatic of excessive deference and the failure to focus on the adjudicator's specific authority (my emphasis).

[46] Therefore, by incorporating the PBC conditions in the Release Order, Member Gunn brought them under the provisions of the *IRPA.* That overcame the problem found in *Salina-Mendoza* of having no independent order imposing the terms under the *Immigration Act*.

[47] The second additional condition was that the Respondent update the CBSA in writing if and when any of the parole conditions are amended or relaxed. The Applicant says this is another example of excessive deference because the ID would have no role in assessing whether a term or condition amended by the PBC would be suitable for the purposes of immigration release.

[48] The parole conditions that appear to have been contemplated as possibly changing were in relation to which halfway house the Respondent might be sent. He was required by Member Gunn to provide CBSA prior to release from immigration hold with his residential address and to provide to CBSA, in person, any change of address. He was also required to report to CBSA every two weeks.

[49] Member Gunn specifically incorporated the June 14, 2019 parole conditions into her Release Order by specifying the date. A subsequent change to those conditions would not necessarily automatically flow into the Release Order. But, the changes would have to be reported to CBSA. As the enforcement branch of the Applicant, it is reasonable to believe that if CBSA viewed any changes to the original parole conditions as problematic they would advise the Applicant to assert that the changes did not alter the provisions of the Release Order. Or, if CBSA found the changes acceptable, either in whole or in part, they could seek appropriate revisions either to the Release Order or to the parole conditions, as the case may be.

[50] The nature of the parole conditions and the terms of the Release Order lead me to find that Member Gunn did not excessively defer to or cede the jurisdiction of the ID to either the PBC or the CBSA with respect to the parole conditions. If anything, Member Gunn asserted her jurisdiction by including the various requirements involving CBSA, many of which, such as reporting to CBSA every two weeks, are in the standard conditions that she included.

[51] I find that Member Gunn did not err regarding her jurisdiction. She noted that the job of the PBC was to evaluate both the risk the Respondent might pose in society as well as reintegration for the Respondent. She identified that reintegration was not a matter before her or one that she was concerned about. Member Gunn found that her role was more expansive than that of the PBC because she was concerned with the security and safety of Canadians.

[52] Concerning a different aspect of her jurisdiction, Member Gunn recognized that when the PBC, within their jurisdiction, granted day parole to the Respondent the immigration arrest warrant was executed immediately. That then brought the Respondent before the ID to exercise their jurisdiction for detention or release under the *IRPA.*

[53] Member Gunn thoroughly reviewed the evidence, noting the differences legislatively and jurisdictionally between the respective powers, tasks and mandates of the PBC and the ID. She reviewed all the conditions set by the PBC for the Respondent and explained the purpose of, and reason for, each condition imposed – whether it originated with the PBC or was imposed by the ID to protect the security and safety of Canadians.

[54] Member Gunn considered the Applicant's argument that the PBC did not intend that the Respondent actually be released on the conditions it imposed.

[55] Member Gunn quoted from the Day Parole Certificate, which stated that "[w]hile awaiting deportation decision(s) or a decision regarding immigration bail, you will be incarcerated at a provincial correctional centre in Ontario." Member Gunn considered this statement and determined that the PBC was "well aware" that the ID would either make an order for release or detention pursuant to the *IRPA*. Member Gunn reviewed the Day Parole Certificate and did not find that the PBC expected the Respondent to *remain* in detention after they granted day parole.

[56] Member Gunn found that there was a suitable alternative to detention that "virtually eliminate[d] the danger" that the Respondent posed. This alternative was release on the conditions imposed by the PBC.

B. *The ID did not fail to consider the CCRA*

[57] The Applicant argues that the Decision is unreasonable because Member Gunn failed to consider subsection 128(4) of the *CCRA*. It states that "an offender against whom a removal order has been made under the [*IRPA*] is not eligible for day parole or an unescorted temporary absence until they are eligible for full parole."

[58] At the June 18, 2019 sitting of the detention review hearing, the Applicant informed Member Gunn that they had unsuccessfully sought an early deportation order on February 14,

2019 after the Respondent conceded he was inadmissible to Canada due to serious criminality pursuant to subsection 36(1) of the *IRPA*. The Applicant indicated that, given the *CCRA*, had the Member at that time issued a deportation order, the Respondent would not have been eligible for any type of parole.

[59] While that is true, I find that it is not relevant to this application. I note from the June 18, 2019 transcript that the February 14, 2019 admissibility hearing was conducted by a different member of the ID. At the time of the detention review hearing that Member was still seized of the matter which had been adjourned initially for hearing on June 3rd to 5th. When the presiding Member was no longer available for those dates the Respondent was asked to provide their availability for July and August. At that time, the Applicant renewed the request for a deportation Order but no such Order was granted. The Member indicated she would render her decision on all matters at the same time. Although I was not so advised, I presume the deportation order referred to in the Preliminary Issue was issued by the Member who was seized with the admissibility matters.

[60] The Applicant now argues that Member Gunn did not address the *CCRA* issue in the Decision when ordering the Respondent's release. This argument fails for two reasons.

[61] First, at the time of the detention review hearings there was no removal order in place against the Respondent to trigger the provisions of subsection 128(4) of the *CCRA*.

[62] Nonetheless, contrary to the Applicant's submissions, Member Gunn did consider the impact of the *CCRA*. Member Gunn considered the Applicant's submissions on subsection 128(4) and specifically agreed that the Applicant presented a correct reading of the legislation and the case law. However, she reasonably found that subsection 128(4) did not apply because there was no removal order against the Respondent.

[63] Member Gunn's view was that the Minister chose to pursue both s. 36 and s. 37 of the *IRPA* as grounds for inadmissibility, and so must wait for the ID's decision. Member Gunn pointed out that subsection 45(d) of the *IRPA* empowers the ID to issue a removal order "at the conclusion of an admissibility hearing." At that time the admissibility hearing was still in adjournment with another Member. As a result, there was no removal order that would have barred the Respondent's release.

[64] Second, subsection 128(5) of the *CCRA* specifically contemplates the possibility that a removal order will be issued after an individual is released on day parole. According to subsection 128(5), where a removal order is made before an offender's full parole eligibility date, against an offender who has received day parole, the day parole becomes inoperative on the day the removal order is made, and the offender is re-incarcerated.

[65] As the legislation provides for this possibility, it is logically and reasonably open to the ID to grant day parole to eligible offenders who are not yet subject to a removal order. Once a removal order is issued, the offender is automatically subject to re-incarceration.

[66] I find that Member Gunn considered subsection 128(4) of the *CCRA* and reasonably found that it did not apply to the Respondent.

VIII. **Conclusion**

[67] The Applicant, as the party trying to set aside the Decision, bears the onus to show that it is unreasonable. For the reasons set out above, I find that while the Applicant has tried to overcome the findings of Member Gunn, they have not shown that the Decision was unreasonable in light of the relevant factual and legal constraints bearing on the decision: *Vavilov* paragraph 105.

[68] I am mindful of the admonition in *Vavilov* at paragraph 125 that deference includes not reweighing or reassessing the evidence:

> It is trite law that the decision maker may assess and evaluate the evidence before it and that, absent exceptional circumstances, a reviewing court will not interfere with its factual findings. The reviewing court must refrain from "reweighing and reassessing the evidence considered by the decision maker" . . .

[69] If there are any flaws or shortcomings in the Decision they are not such that the Decision fails to meet the well-established requirements of justification, intelligibility and transparency. The reasoning in support of the Decision is both rational and logical. It contains lines of analysis that reasonably lead from the evidence to the conclusions at which Member Gunn arrived. It therefore meets the *Dunsmuir* and *Vavilov* criteria for a reasonable decision.

[70] The application is therefore dismissed.

[71] Neither party proposed a serious question of general importance for certification on these facts nor does one exist.

[72] No costs are awarded.

JUDGMENT IN IMM-3890-19

THIS COURT'S JUDGMENT is that:

1. The application is dismissed.

2. There is no serious question of general importance on these facts.

3. No costs.

"E. Susan Elliott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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