Federal Court Cour fédérale

Date: 20120920

Docket: IMM-8716-12

Citation: 2012 FC 1100

Ottawa, Ontario, September 20, 2012

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Applicant

and

ALFRED BERISHA (aka ALFRED CUKALI)

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Minister asks the Court to set aside the decision of Harold Shepherd of the Immigration Division of the Immigration and Refugee Board (the Member), dated August 27, 2012, ordering the respondent to be released from immigration detention on conditions that include electronic monitoring.

[2] There is a question as to the true identity of the respondent. Notwithstanding the respondent's continued assertion that he is Alfred Berisha from Kosovo, I and most who have

examined the evidence, conclude, on the balance of probabilities, that he is Alfred Cukali from Albania. Unless the context otherwise requires, he is referred to in these reasons as the respondent.

[3] By Order dated September 6, 2012, I issued a stay of the Order for release, granted the Minister leave to judicially review that decision, and at the request of the parties expedited the hearing of the judicial review.[1] The next detention review is scheduled to commence in Toronto on September 24, 2012. The respondent asked the Court to stay that next review; however, I declined. I am not convinced that a judge of the Federal Court has jurisdiction to stay a review that is mandated by Parliament to be held every thirty days. I did undertake to issue my judgment on the judicial review by September 21, 2012. Counsel for the parties appeared and fully argued the merits of the application, in Toronto, on Friday, September 14, 2012.

[4] For the following reasons, the Member's Order releasing the respondent is unreasonable and must be set aside.

Background

The respondent's history in Canada, with its courts, and with immigration authorities

[5] Many members of the Board have noted and commented upon the respondent's lack of credibility, including his lack of credibility as to his identity. They have also noted and commented on his lack of trustworthiness, his lack of cooperation with Canada Border Services Agency (CBSA) and other immigration authorities (except when it suited his own purposes), his

ability to obtain forged documents, and his ability to cross the Canada-US border without detection.

[6] The following statement from Member A. Laut from the detention review he conducted in May 2012 is illustrative of the views expressed by members of the Immigration Division as to the respondent's character and conduct.

> I'm satisfied and agree with the assessment both of Member Kowalyk and Ms. Funston that there are strong reasons to believe that he would be unlikely to appear for removal. … He's resisted efforts to remove him and it's become increasingly clear that he's been untruthful about his identity for many, many years now. He is fundamentally not a trustworthy person and he is a person who has relatively easy access to fraudulent documents and continues, in my view, to have that access, which could aid him in evading the authorities.

[7] Mr. Shepherd agreed with his colleagues' assessment of the respondent. In his oral decision releasing the respondent from detention he stated:

> [T]he concern this division has had all along is that Mr. Berisha Cukali, has simply not been forthcoming with this division, and is also somebody willing to take flight and use alternative names if it's not convenient for him at any given time. In the conclusion of this – of this division, if things didn't go well, Mr. Berisha or Cukali is quite capable of flight – taking flight …

[8] The following is the known history of the respondent since he arrived in Canada. There are periods of time unaccounted for by the respondent. This history supports the finding that he is neither credible nor trustworthy, and amply supports the finding that he is a significant flight risk.

[9] The respondent entered Canada on December 19, 1995, using an improperly obtained Italian passport. The following day he made application for social assistance payments from the City of Toronto. In January 1996 he was found to be inadmissible to Canada as he was not in possession of a valid and subsisting passport, identity, or travel document.

[10] The respondent made a claim for refugee status, claiming to be from Kosovo and a citizen of the former Yugoslavia. A departure order was issue against him on May 27, 1996.

[11] The Convention Refugee Determination Division of the Immigration and Refugee Board of Canada denied his refugee claim because of numerous credibility concerns both with the documents the respondent was relying upon to establish his identity as well as with his oral testimony. An application for leave to review that decision was dismissed by this Court on October 14, 1997.

[12] On February 24, 1999, the respondent submitted an application for permanent residence on humanitarian and compassionate grounds. This application was refused on June 19, 2000.

[13] In June 1999 the respondent was found to be inadmissible to Canada due to serious criminality because on May 29, 1997, he had been convicted in Toronto of uttering and possession of counterfeit money. On June 14, 1999, he was also charged with attempted murder, possession of a weapon for a dangerous purpose, and two counts of assault.

[14] As a consequence, he was detained by immigration authorities. A senior immigration officer forwarded to the Toronto East Detention Centre an offer of release on a $2,000 cash bond; however, the detention centre improperly released the respondent without the posting of the bond. An enforcement officer spoke to the respondent and arranged for him to report to the detention centre on July 27, 1999, and again on August 3, 1999, to remedy the situation of the unsatisfied bond. The respondent failed to report despite promising to do so. On January 7, 2000, a warrant was issued for his arrest.

[15] More than five years were to pass before the Canadian immigration authorities were to have contact again with the respondent. He was in the USA for at least part of that five-year period.

[16] On October 3, 2005, the respondent reported to Toronto Police Services regarding the outstanding criminal charges from June 1999. He was arrested but released by the Ontario Court of Justice on a $25,000 surety and $10,000 cash bail bond.

[17] The respondent then turned himself in to the Greater Toronto Enforcement Centre on October 5, 2005. He was released on a performance bond. His outstanding criminal charges from 1999 were withdrawn.

[18] The respondent then submitted an application for permanent residence in the spouse or common-law partner in Canada class on July 9, 2007. This application was refused on April 16, 2012. On May 4, 2012, he filed an application for leave and judicial review and, on consent of

the Minister, the decision was set aside and sent back to be determined again. It remains outstanding.

[19] Days after the spousal sponsorship application was filed, the respondent submitted a Pre-Removal Risk Assessment application (PRRA). The PRRA decision was rendered on January 29, 2009, and was negative.

[20] In January 2010 the CBSA received information that the respondent, using the name Alfred Cukali, was wanted in the United States for possession of ecstasy with intent to distribute. Canada also received documents from the USA that indicated that in June 2001 the respondent was ordered removed from the United States to Albania or Italy; that this removal decision was appealed; and that a final decision was issued in January 2003. There is nothing that indicates that he was so removed. He may have entered Canada then, or remained in the USA until he returned to Canada, or he may have been elsewhere than Canada and the USA. Only the respondent knows.

[21] On February 2, 2012, a warrant for the respondent's arrest was issued by Canadian immigration officials because he had violated the conditions of release by not living at the address he had indicated. The warrant was executed on February 7, 2012, and the respondent has been detained for removal since that date.

[22] On May 8, 2012, CBSA received a telephone call from the Embassy of Albania advising that they had received confirmation of the respondent's identity as Alfred Cukali and that they were in a position to issue him a travel document.

[23] On May 16, 2012, CBSA received information from the Embassy of Albania via Alba Zoto, the respondent's alleged common law partner, that the respondent suffers from a heart condition called cardiomyopathy, which prevents him from flying safely. An assessment by a cardiologist on June 22, 2012, found him fit to fly.

[24] On July 6, 2012, CBSA scheduled the respondent for escorted removal to Albania on July 18, 2012.

[25] On July 9, 2012, the Ontario Court of Justice ordered that the respondent to be brought before the Court on July 25, 2012, and thereafter as may be required in order to give evidence in a criminal proceeding. This summons was obtained by Nicolas Charitsis, a criminal defence lawyer in Toronto who is counsel for a Mr. Kazazi in the criminal proceeding. The applicant has noted that Mr. Charitsis is apparently also a friend of the respondent because on June 8, 2012, he offered to be a bondsperson. He has offered a $25,000 bond and to pay for part of the electronic monitoring device that forms a significant condition of the decision to release that is under review.

[26] As a result of the summons to appear, CBSA cancelled the respondent's scheduled removal.

[27] On July 25, 2012, again at the request of Mr. Charitsis, the Ontario Court of Justice issued another subpoena ordering the defendant's appearance as a witness for the defence in the trial of the above-noted criminal proceeding which is now scheduled to commence on December 4, 2012.

[28] The following summarizes the various detention reviews.

The respondent's detention reviews

[29] Since being detained on February 7, 2012, the respondent has received regular detention reviews as required by s. 57 of the Act. Prior to the August 27, 2012, release decision under review, the conclusion of each member was that the respondent was not trustworthy, was a significant flight risk, and should remain in detention.

February 14, 2012

[30] As an alternative to detention, the respondent proposed a $10,000 cash bond from his common law partner Ms. Zoto, as well as a performance bond of $10,000 and a cash bond of $2,000 from a friend, Mr. Beci. Member Heyes found this insufficient to offset his concern that the respondent was a flight risk:

> Whether you are Mr. [Berisha] or that other gentleman from Albania are not entirely settled in my view that certainly affects credibility and trustworthiness of you and whether or not you can be trusted to abide with terms and conditions.
>
> I do not see that either bondsperson or I do not see in this proposal (inaudible) something that either bondsperson could ensure your appearance for removal.

> Your wife is sponsoring you to remain in Canada as a spouse. The other bondsperson would be living in a separate city and has some health concerns which I believe might impact his ability to supervise.
>
> And I think given that your nationality and identity are still an issue I do not believe that this proposal sufficiently offsets flight risk concerns.
>
> ...
>
> And given that information I do not believe that simply increasing the bonds is sufficient to offset my concern that you would not be likely to appear for removal.
>
> And so I am going to continue your detention on the grounds of being unlikely to appear for removal.

March 1, 2012

[31] The respondent proposed additional bondspersons and amounts at his second review, namely: Ms. Zoto, a $10,000 security deposit; Mr. Beci, a $3,000 security deposit; Mr. Kraja, a $10,000 security deposit; Mr. Luga, a $20,000 security deposit and $20,000 performance bond; and Mr. Charitsis, a $10,000 security deposit.

[32] Member Kowalyk did not find that the "substantial" funds offered offset the concerns that arose from the respondent's use of an alternative identity and undocumented re-entry into Canada around 2005, nor did these funds offset his lack of credibility and trustworthiness or the doubt as to his availability for removal. Member Kowalyk was satisfied that the respondent would be unlikely to appear for removal if released on the terms offered.

April 11, 2012

[33] The respondent proposed an additional $10,000 security deposit from Ms. Zoto. Member Funston explained that clear and compelling reasons have to be given for departing from prior detention review decisions and that the additional cash from Ms. Zoto was the only new information being provided. Member Funston noted and agreed with Member Kowalyk's concerns as to the respondent's trustworthiness and credibility:

> The concerns regarding your credibility, your trustworthiness and your identity and your questionable cooperation are not offset by the alternatives that are being proposed.
>
> ...
>
> I am satisfied that you are a flight risk and that 58(1)(b) continues to apply against your release.

May 11, 2012

[34] The respondent added to the bonds being proposed: Ms. Zoto was now also offering an additional $5,000 performance bond; Mr. Beci increased his security deposit to $5,000; Mr. Kraja offered an additional $2,000 security deposit, plus $5,000 as a performance bond; and Mr. Charitsis added $2,000 as a security deposit, and $10,000 as a performance bond. Despite the additional amounts, Member Laut concluded that regardless of the amounts at risk, they did not address the concern that the respondent was a significant flight risk:

> I'm satisfied and agree with the assessment both of Member Kowalyk and Ms. Funston that there are strong reasons to believe that [Mr. Berisha] would be unlikely to appear for removal. He's been in Canada since 1995. He has ties, strong ties here. He's resisted efforts to remove him and it's become increasingly clear that he's been untruthful about his identity for many, many years now. He is fundamentally not a trustworthy person and he is a person who has relatively easy access to fraudulent documents and

> continues, in my view, to have that access, which could aid him in evading the authorities.
>
> He has sought to evade serious criminal charges in Canada in the past by fleeing to another jurisdiction. I think there's a likelihood that he would do that if released now. I expect his removal will be soon.
>
> There have been in the past very large bonds offered by several parties, including his common law [spouse]. There are five parties offering bonds today. All of them have been examined and rejected in the past. They're offering larger sums of money today. That does not persuade me that their bonds would be effective.
>
> I agree that Ms. Kowalyk's reasons at paragraph 35 of her reasons for rejecting these bondspersons continue to apply to the circumstances today. I would add very strongly that I have been told that all of these people believe that the individual known as Alfred Berisha – born in Kosovo. I'm not satisfied that that's the truth. I'm not satisfied that these individuals, therefore, even know who they would be signing a bond for.
>
> I don't believe the bonds would be effective.

June 8, 2012

[35] At this review, Mr. Charitsis' security deposit amount was increased to $25,000. The respondent's counsel also raised the possibility of electronic monitoring, but it is clear from the transcript that no evidence was led and counsel made no submissions on this alternative. Member Funston continued the detention, reasoning:

> Now the alternatives that are being proposed today are pretty much echo alternatives that have been proposed in the past. All of the named bondspersons have been offered at one point or another at prior detention reviews, and more than one time or another, and have all been rejected primarily as the concern has been that <u>you've been viewed to be a person who could not be successfully relied upon to comply with the conditions of your release and to comply with removal</u>.

> You have unfortunately been dishonest in your dealings with Immigration officials. You have been withholding very important information with respect to your identity and you have also – it seems to me from the record, that you've not even been honest with your own counsel with respect to the issues around identity and nationality and you're – the lengths that you seem to be prepared to go to in order to mislead Immigration officials and avoid your removal from Canada and (inaudible) that you've been found to be entirely lacking in credibility and (inaudible) trustworthy.
>
> <u>And, Members have not been persuaded that financial guarantees from various friends and acquaintances will be sufficient to ensure your compliance</u>.
>
> There's been nothing today presented to me by way of new information that would lead me to contradict my decision with respect to the assessment of your bondspersons and their ultimate rejection by Members of this Division.
>
> Now, the added feature today is the potential of electronic monitoring. One of your bondspersons I understand is willing to pay for it, but I have not been presented with enough information with respect to the (inaudible) of electronic monitoring and how it would work and whether it would work in your case.
>
> [emphasis added]

July 5, 2012

[36] No transcript was prepared for this review by Member Delduca, but the hand-written notes of Minister's counsel at the hearing summarize the reasons for the decision as "rely on previous reasons; removal soon – fit to fly; detention not lengthy; no altn."

August, 27, 2012

[37] The August 2012 detention review was heard over four days: August 2, 10, 21, and 27, 2012. On August 27, 2012, Member Shepherd gave his reasons for releasing the respondent.

[38] On August 10, 2012, the respondent called witnesses to explain the electronic monitoring he was proposing. He called Robert Aloisio, Director of Business Development with Safe Tracks GPS Solutions, the owner of the electronic monitoring bracelet technology that was being proposed and Frank Darrin Hansma, Behavioural Compliance Program Director for INTACTAccess Incorporated, which through agreement with Safe Tracks GPS Solutions, provides private sales and rentals of its electronic monitoring equipment. It is this company that would contract with the respondent to install and monitor the electronic leg bracelet.

[39] The Member "agree[d] completely" with his colleagues in previous detention reviews that:

> [A]lthough substantial amounts of [bonds] had been proposed, [the respondent's] ... lack of trust does not make him a candidate for release ... [that] the amount of the bond offer is not the problem, and the concern this division has had all along is that Mr. Berisha, Cukali has simply not been forthcoming with this division, and is also somebody willing to take flight and use alternative names if it's not convenient for him at any given time ... [and that] if things didn't go well, Mr. Berisha or Cukali is quite capable of flight.

[40] However, Member Shepherd went on to consider the issue of electronic monitoring. In so doing, he acknowledged the concerns of CBSA and provided his response based on the testimony of the witnesses for the respondent.

> Concern: The respondent could remove the leg bracelet.
>
> Response: The bracelet is made of titanium which is very difficult to cut. As well the leg bracelet has a fibre wire that surrounds it which, if cut, emits a 95

decibel alarm. Further, if one tries to remove it, the alarm is triggered at the call centre which then communicates that information to those on the contact list.

Concern: The respondent could simply take the leg bracelet off in the subway as the tracking system doesn't work underground.
Response: The alarm can be sounded if he attempts removal while underground and if he resurfaces, then, if he still has the leg bracelet on the GPS can once again track him and alert the contacts as to his whereabouts.

Concern: If a call goes to GTEC, it could be a significant amount of time before CBSA can dispatch someone from Mississauga – CBSA is not in a position to offer an effective emergency response.
Response: CBSA says that it will not ignore the alarm. It will use its normal procedures, issue an arrest warrant and it will be in the CPIC system. However, it was noted that arrest may take some time.

Concern: If he fails to pay for the electronic monitoring it will be terminated.
Response: The company says that it does not cut it off if there's a default in payment, it alerts the contacts and some time is given to address the arrears of payment before turning the system off.

Concern: Who is to be alerted if there is a breach?
Response: The bondspersons and CBSA are to be alerted.

> Concern: How can it be assured that he is in his apartment when the GPS system can only reveal whether he is in the apartment building?
>
> Response: The company can install proximity beacons in his apartment which will be triggered if he leaves it.

Member Shepherd noted that no system was perfect and, as he put it, "we have to look to see whether or not the alternative offsets the risk more likely than not." He found that it did.

Order for Release

[41] The Order for release signed by Member Shepherd on September 27, 2012, states that the respondent "is hereby ordered ... released from detention subject to the following conditions:"

1. The following persons post a guarantee (performance bond) or provide cash in the amounts stipulated:

    (a) Alba Zoto: $10,000 cash

    (b) Ilir Kraja: $10,000 cash

    (c) Elvin Luga: $20,000 cash, $20,000 performance bond

    (d) Nicholas Charitsis: $20,000 cash

    (e) Arber Gina: $40,000 cash, $19,000 performance bond

    Total: $100,000 cash, $39,000 performance bond.

2. "Be equipped before release with electronic monitoring equipment from Intact Access Inc. Keep contract with company in good standing at all times. Remain subject to electronic monitoring at all times."

3. "Pay contractual fees on time. Protocol Contact Information must include all bondspersons and the Canada Border Services Agency."

4. "The person concerned shall remain at all times at the residential address disclosed to the Canada Border Services Agency unless to proceed directly to report to CBSA and to return forthwith to the residence. In the event of a medical emergency, he may be present at a hospital for necessary treatment with the presence of a bondsperson."

5. The person concerned shall:

   (a) "Present themselves at the date, time and place that a Canada Border Services Agency (CBSA) officer or the Immigration Division requires them to appear to comply with any obligation imposed on them under the Act, including removal, if necessary."

   (b) "Provide CBSA, prior to release with their address and advise CBSA in person of any change in address prior to the change being made."

   (c) "Report to an officer at CBSA Office at GTEC, 6900 Airport Road, Entrance 2B, Mississauga, Ontario, L4V 1E8 once per week."

   (d) "Reside at all times with Alba Zoto."

The Law Relating to Detention and Release

[42] The provisions of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act) and the *Immigration and Refugee Protection Regulations* (the Regulations) set out the conditions under which persons may be placed in immigration detention and the considerations for their release. For the purposes of this application, the following are the relevant provisions.

[43] Section 55 of the Act provides that a foreign national, such as the respondent, may be detained when there are reasonable grounds to believe that the person is "unlikely to appear for … removal from Canada."

[44] Section 57 of the Act provides that a person so detained "must" have the detention reviewed by the Immigration Division within 48 hours, at least once during the following seven days, and then at least once during each following 30-day period.

[45] Subsection 58(3) of the Act provides that notwithstanding that it has been found that the foreign national is unlikely to appear for removal, the Immigration Division may order the person to be released and if it so orders "it may impose conditions that it considers necessary, including the payment of a deposit or the posting of a guarantee for compliance with the conditions."

[46] Subsection 47(2) of the Regulations provides that a person who posts a guarantee "must … be able to ensure that the person or group of persons in respect of whom the guarantee is required will comply with the conditions [of release] imposed."

[47] Lastly, section 248 of the Regulations stipulates that where there are grounds for detention, then the Immigration Division "shall" consider the following factors before a decision is made on detention or release:

(a) the reason for detention;

(b) the length of time in detention;

(c) whether there are any elements that can assist in determining the length of time that detention is likely to continue and, if so, that length of time;

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

(e) the existence of alternatives to detention.

Issues

[48] In my view, the issues raised by in this application are the following:

1. Did the Member fail to give clear and compelling reasons for ordering the release of the respondent;

2. Did the Member properly consider the requirements set out in section 248 or paragraph 47(2)(b) of the Regulations; and

3. Was the order of the Member releasing the respondent from detention on the condition of electronic monitoring unreasonable?

Standard of Review

[49] The applicant says that the first issue as one of procedural fairness and frames it as follows: "The Member breached procedural fairness by failing to give clear and compelling reasons for ordering the release of the Respondent." The applicant submits that it and the second issue are reviewable on the correctness standard. The respondent submits that the standard of review of all three issues is reasonableness and that considerable deference is to be given to the Board.

[50] The Minister cites *Canada (Minister of Public Safety and Emergency Preparedness) v Welch*, 2006 FC 924 [*Welch*], for the proposition that a member's failure to give "clear and compelling reasons" for departing from the results of previous detention reviews is a breach of procedural fairness reviewable on the standard of correctness.

[51] The requirement that on a subsequent detention review a member is to consider and follow previous decisions, absent clear and compelling reasons to do otherwise, arises from the decision of Court of Appeal in *Canada (Minister of Citizenship and Immigration) v Thanabalasingham*, 2004 FCA 4 at paras 10-13:

> 10. Detention review decisions are the kind of essentially fact-based decision to which deference is usually shown. While, as discussed above, prior decisions are not binding on a Member, I agree with the Minister that if a Member chooses to depart from prior decisions to detain, clear and compelling reasons for doing so must be set out. There are good reasons for requiring such clear and compelling reasons.
>
> 11. Credibility of the individual concerned and of witnesses is often an issue. Where a prior decision maker had the opportunity to hear from witnesses, observe their demeanour and assess their credibility, the subsequent decision maker must give a clear explanation of why the prior decision maker's assessment of the evidence does not justify continued detention. For example, the admission of relevant new evidence would be a valid basis for departing from a prior decision to detain. Alternatively, a reassessment of the prior evidence based on new arguments may also be sufficient reason to depart from a prior decision.
>
> 12. The best way for the Member to provide clear and compelling reasons would be to expressly explain what has given rise to the changed opinion, i.e. explaining what the former decision stated and why the current Member disagrees.
>
> 13. However, even if the Member does not explicitly state why he or she has come to a different conclusion than the previous Member, his or her reasons for doing so may be implicit in the subsequent decision. What would be unacceptable would be a cursory decision which does not advert to the prior reasons for detention in any meaningful way.

[52] The requirement that a member give clear and compelling reasons is no more than a requirement that a member give reasons to explain why he or she is departing from previous decisions that have been made and, if the reasons are weak, then there ought not to be any departure. With respect to the view of Justice Gauthier, as she then was, in *Welch*, I do not agree that the requirement to give "clear and compelling" reasons relates to procedural fairness.

[53] In *Baker v Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 para 39, the Supreme Court of Canada considered the purpose of requiring that administrative decision-makers give reasons for their decisions:

> Reasons, it has been argued, foster better decision making by ensuring that issues and reasoning are well articulated and, therefore, more carefully thought out. The process of writing reasons for decision by itself may be a guarantee of a better decision. Reasons also allow parties to see that the applicable issues have been carefully considered, and are invaluable if a decision is to be appealed, questioned, or considered on judicial review: R.A. Macdonald and D. Lametti, "Reasons for Decision in Administrative Law" (1990), 3 C.J.A.L.P. 123, at p. 146; *Williams v. Canada (Minister of Citizenship & Immigration)*, [1997] 2 F.C. 646 (Fed. C.A.) at para. 38. Those affected may be more likely to feel they were treated fairly and appropriately if reasons are given: de Smith, Woolf, & Jowell, Judicial Review of Administrative Action (5th ed. 1995), at pp. 459-60. I agree that these are significant benefits of written reasons. [emphasis added]

[54] The underlined concept above has recently been considered by the Federal Court of Appeal in *Vancouver International Airport Authority v Public Service Alliance of Canada*, 2010 FCA 158. Justice Stratas noted, at paragraph 16:

> There must be enough information about the decision and its bases so that the supervising court can assess, meaningfully, whether the

> decision-maker met minimum standards of legality. This role of supervising courts is an important aspect of the rule of law and must be respected: *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220; *Dunsmuir*, *supra* at paragraphs 27 to 31. In cases where the standard of review is reasonableness, the supervising court must assess "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir*, *supra* at paragraph 47. If the supervising court has been prevented from assessing this because too little information has been provided, the reasons are inadequate: see, *e.g.*, *Canadian Association of Broadcasters, supra* at paragraph 11. [emphasis added]

[55] One must also be mindful of the recent decision of the Supreme Court in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, wherein at para 22 it is explained that it is only when there are no reasons and some are required, that decision is to be examined on the correctness standard:

> It is true that the breach of a duty of procedural fairness is an error in law. Where there are no reasons in circumstances where they are required, there is nothing to review. But where, as here, there *are* reasons, there is no such breach. Any challenge to the reasoning/result of the decision should therefore be made within the reasonableness analysis.

[56] Here there are reasons provided by the Member. Therefore, the Minister has not framed the issues correctly; procedural fairness is not engaged. While the Minister is of the view that the Member's reasons are not "clear and compelling" and don't support him departing from the previous detention decisions, that is an alleged error of mixed fact and law for substantive review – namely the application of section 58 of the Act as interpreted by case law, to the facts of this case – to be conducted on the basis of reasonableness: *Dunsmuir v New Brunswick*, 2008 SCC 9,

at para 53 [*Dunsmuir*]; *B072 v Canada (Citizenship and Immigration)*, 2012 FC 563, at paras 18-19; *Canada (Citizenship and Immigration) v B147*, 2012 FC 655, at para 10.

[57] Similarly, I find that whether the Member considered and properly applied the criteria listed in section 248 and paragraph 47(2)(b) of the Regulations to the facts of this case to be an issue of mixed fact and law to which the reasonableness standard of review applies.

[58] That is not to say that a failure to consider a prescribed factor is easy to overlook on the standard of reasonableness. If, as in *Stemijon Investments Ltd v Canada (Attorney General)*, 2011 FCA 299, the Member expressly demonstrated that he was not applying the law, i.e. the above criteria, that bound him, then his decision is unreasonable. On the other hand, if it is not so obvious from the decision or record that he failed to correctly identify the law to be applied, I will have to more fully grapple with whether there exists "justification, transparency and intelligibility within [his] decision-making process [and] … whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law:" *Dunsmuir*, above, at para 47.

[59] For these reasons, I find that each of the issues identified by the applicant is reviewable on the basis of reasonableness.

Analysis

1. <u>Clear and compelling reasons for departing from previous decisions</u>

[60] Member Shepherd provided oral reasons for his decision to release the respondent from detention. While not as detailed or coherent as one might wish, I cannot agree with the Minister that he failed to give clear and compelling reasons for departing from previous decisions.

[61] Member Shepherd agreed with the previous members that the respondent is a flight risk. He states that their findings of fact are "sound and their objection to the bonds persons is sound." He agrees with his colleagues that "if things didn't go well, Mr. Berisha or Cukali is quite capable of flight." The objection to the bondspersons throughout has been that no amount of money placed at risk will prevent the respondent from fleeing if it suits his purpose. They were never rejected for some reason personal to them although, as noted below, Alba Zoto warranted a closer examination.

[62] Member Shepherd notes at the beginning of his reasons that at the previous hearings the respondent's detention was noted as "recent" whereas now he has been detained for four months; that whereas he had been considered to be subject to a "more quick removal" he is now under a subpoena to testify in December 2012 and cannot be removed earlier; and now the amount and number of bondspersons proposed has been increased. Despite these differences from previous decisions he says "this isn't enough to warrant release, so based on all of those bonds persons, I don't see a significant change, a clear and compelling reasons [to depart] from my colleague's determination, so I think that if it is – if there had been no more than that, the matter would end there with detention."

[63] However, Member Shepherd then says the following:

> However, I have to go on and consider something else. The issue of electronic monitoring. … So the first time that the alternative of electronic monitoring has been squarely before this division what is in the August detention review which continues today.
>
> So the issue is whether or not electronic monitoring will provide a material change in circumstance and clear and compelling reasons why detention should end if Mr. Berisha Cukali should be ordered release, notwithstanding the fact that the bonds persons alone do not offset (inaudible) very significant flight risk posed by Mr. Berisha, Mr. Cukali.

[64] The Member then examines the evidence as to how the electronic monitoring works, considers the Minister's concerns including concerns as to its operability underground, as to those to be alerted if there is an alarm, as to ensuring that he remains in his apartment, as to possible failure to recharge the unit, and as to removal of the leg bracelet. He concludes with this statement: "So the issue is is this enough to have clear and compelling reasons that [departing] from not only my colleague's version, I call it conclusion, I hold myself, and even conclusion that the new bonds person, Alfred Gina does not (inaudible), <u>does the addition of the electronic monitoring offset the risk so that more likely than not, Mr. Berisha or Mr. Cukali would report for removal</u> [emphasis added]."

[65] He concludes that the electronic monitoring permits the bondspersons to respond "right away" if the respondent goes where he is not to be, if he fails to recharge the bracelet, if he attempts to remove the bracelet, or generally if he attempts to flee.

[66] It is beyond question that the Member saw the addition of electronic monitoring as the clear and compelling reason to depart from previous decisions, and absent that new condition, that he would not have departed from the previous decisions. In my view, based on the

foregoing, it was not unreasonable for the Member to find this to be a clear and compelling reason entitling him to depart from the dispositions of previous detention reviews. It remains an issue for examination whether, once entitled to depart from previous dispositions, his decision to release was otherwise reasonable based on the applicable law and the evidence before him.

2. Consideration of section 248 and paragraph 47(2)(b) of the Regulations

Factors to be considered before release – section 248 of the Regulations

[67] Section 248 of the Regulations prescribes five factors that "shall" be considered prior to making a decision to release from detention: (i) the reasons for the detention, (ii) the length of time in detention, (iii) the length of time detention is likely to continue, (iv) any unexplained delays or diligence by the person or Department, and (v) the existence of alternatives to detention.

[68] The applicant submits that the Member erred in failing to consider that the respondent was removal ready and was only in detention due to the subpoena requiring that he testify. I do not agree.

[69] The following passage from the record shows that the Member was aware that the respondent was removal ready and that he could not be removed until he had testified:

> [A]t this point, there's a steady (inaudible) until December when a criminal matter of drunk driving will be heard. He's a witness at that trial. He's got a subpoena, so he's got to (inaudible) stay until that matter has been resolved. So at this point in time, four months and once that matter has been resolved, once he has given evidence, then he's removal ready. There are no obstacles to his removal except for that issue.

[70] It is also evident from the record that the Member was well aware of the other factors required to be considered under s. 248, and he did so. There is no merit to the applicant's submission.

Imposing conditions on release – paragraph 47(2)(b) of the Regulations

[71] Subsection 58(3) of the Act provides that if the Immigration Division orders release "it may impose any conditions that it considers necessary including the payment of a deposit or the posting of a guarantee for compliance with the conditions." In this case the Member ordered both cash and bond to be put in place by five persons.

[72] Subsection 47(2) of the Regulations applies to an order for release made by the Immigration Division. It places mandatory requirements on a bondsperson. Specifically, paragraph 47(2)(b) provides that a bondsperson "must be able to ensure that the person … in respect of whom the guarantee is required will comply with the conditions imposed."

[73] The Minister submits that the Member erred by failing to comply with this requirement, stating that "the Member in this case found that the bondspersons could not ensure the Respondent's compliance and yet still ordered release."

[74] Read together, subsection 58(3) of the Act and subsection 47(2) of the Regulations require that a member be satisfied that the proposed bondspersons are able to ensure that the detained person will comply with the conditions of release.

[75] In the case before the Court it is clear that the Member was not satisfied, absent electronic monitoring, that the proposed guarantors were able to ensure that the respondent would comply with the conditions of release. However, he was apparently satisfied that they could ensure compliance if the respondent was monitored electronically. Fatally, as I discuss below, the Member provides no explanation how he reached that view. Either the Member never turned his mind to the question or he did but he failed to provide any reasons for his analysis. Either alternative is fatal to the decision being maintained: both demonstrate a troubling lack of justification and intelligibility.

[76] The focus of the Member is with the fact that the bondspersons will be alerted when the monitoring company receives an alarm. In the Member's view, this provides "the ability of the bonds persons and a group of people that have committed a serious amount of money to be able to respond right away to the situation to deal with it, the ability to CBSA to issue a warrant for Mr. Berisha's arrest in a timely fashion …." However, if the alarm has sounded and the bondspersons alerted, then this means, as counsel for the respondent acknowledged, that the respondent has breached a condition of his release. The bondspersons have done nothing to ensure compliance with those conditions. Their role in that circumstance is akin to the farmhand who closes the stable door after the horses have bolted. They don't prevent a breach; they react to a breach.

[77] Admittedly, one of the conditions of release is that the respondent report for removal when he is no longer under a subpoena and the Member is of the view that these bondspersons will take efforts to ensure, once the alarm has sounded, that the respondent is detained or

prevented from fleeing because they have funds at risk. However, those funds are already at risk because of the breach that triggered the alarm. The issue is not whether the funds will be forfeit but whether the authorities can be convinced that the breach is not serious enough to warrant forfeiture: See *Hussain v Canada (Minister of Citizenship and Immigration)*, 2008 FC 234.

[78] Thus, the role the Member has the bondspersons play is not to ensure compliance with all of the conditions of release but, at most, to ensure compliance with only one of them – to ensure that the respondent reports for removal – by presuming that either they or the CBSA will react and find the respondent after the breach of conditions has occurred.

[79] Crucially, the Member provides no explanation or analysis as to how the bondspersons are to react. There is no discussion as to their physical location in relation to the respondent, the time required to travel to his residence, whether they are available 24/7 to leave work or home to search out the respondent, or what steps they could reasonably be expected to take if the respondent has breached the conditions of release. He fails to address how or whether they will find the respondent if he removes the leg bracelet.

[80] Aside from Alba Zoto, the alleged common law spouse of the respondent, none of the bondspersons are required to be with the respondent at any time. They are required to provide no surveillance or oversight. They are only entitled to receive notification of a breach and the Member expects that they will then react to prevent flight.

[81] The Member also fails to give any consideration to the questions raised by the applicant as to whether Alba Zoto has a sincere desire to see that the respondent complies with the conditions of release and reports for removal. Her role is of particular importance as the Member orders the respondent to reside with her. In my view, the record raises two large questions regarding her suitability as a guarantor. First, when the respondent was to be removed from Canada in May and there were no restrictions on his removal at that time, it was she who alerted the Albanian embassy that the respondent had a medical condition that made him unfit to fly. The record is not clear; however, there is every reason to believe that her report was a falsehood. If she made the false report on her own initiative, then she is hardly a trustworthy bondsperson. On the other hand, if she reported what the respondent told her to, then that too brings her suitability into question.

[82] Secondly, the applicant provided evidence at the August detention review that brings into question the relationship between the respondent and Ms. Zoto. The visitor log from the detention centre showed that Ms. Zoto had not visited the respondent since April 11, 2012 – a period of more than four months before the order for release. Interestingly and unexplained or explored by the Member is that a Ms. Thompson, whose relationship to the respondent is not known, visited him seven times since May 2012. The record indicates that Ms. Zoto was unavailable for examination on August 21, 2012. The Minister submitted that given these new concerns, she was not a suitable bondsperson. The Member provides no reason why he found that she was suitable, nor does he address these concerns.

[83] For these reasons, I am of the view that the Member's decision vis-à-vis the bondspersons was unreasonable, or in other words, that his application of subsection 58(3) of the Act and subsection 47(2) of the Regulations to the evidence before him lacked justification and intelligibility, and did not fall "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law:" *Dunsmuir*, above, at paragraph 47.

3. Electronic monitoring condition unreasonable

[84] Even if I am wrong that the Member erred as determined above, I would still hold that the release condition relating to electronic monitoring was unreasonable as drafted.

[85] The Court concurs with the Member: one cannot examine the alternative to detention expecting perfection. However, a reasonable alternative must be examined with the specific circumstances at front of mind and, on the balance of probability, be an alternative that is likely to result in the person appearing for removal. That determination requires, in the context of this decision, not just an examination of the technology of electronic monitoring, but also a serious examination of the likelihood that a detained person who has been determined to be a serious flight risk will be motivated by virtue of the electronic monitoring to comply and not bypass that technology and flee.

[86] I doubt that the Immigration Division has seen many who have proven to be as untrustworthy as the respondent. He has fled both Canada and the USA when facing charges. He has ignored court processes. He has obtained fraudulent documents on more than one occasion to assist him in his efforts to come to and remain in Canada. He has created a false identity that, despite overwhelming credible evidence to the contrary, he maintains. He has

found bondspersons who are prepared to risk their money for a person they do not truly know. He has lied to everyone: police, immigration authorities, and friends.

[87] He is to be fitted with a device that can be bypassed. The leg bracelet can be severed, albeit not easily and not, perhaps, without an alarm sounding. It has been found that there is no incentive for the respondent to comply with terms of release without the monitoring system. He has been found to be prepared to have his bondspersons forfeit their money. How then, one must ask, does the imposition of electronic monitoring change that scenario? The record shows only that it makes flight more difficult, but the Member does not explain why it makes flight less likely for a person with the talents that this respondent has demonstrated. Without providing an answer to that question, the decision to release is unreasonable.

[88] The applicant concedes that electronic monitoring may be appropriate in some cases as a condition of release. The decision of the Immigration Division in the release of Rustem Tursunbayev, dated May 18, 2012, is one such example. The precision in the terms of that release order illustrate another reason why Member Shepherd's order is unreasonable.

[89] The two witnesses involved in electronic monitoring in their responses to questions put to them referenced throughout the "recommended protocol" or some other similar turn of phrase. What their evidence reveals is that it is essential that many terms and conditions be built into the electronic monitoring protocol. On August 27, 2012, after informing the parties of his decision, the following exchange occurs between Member Shepherd and the Minister's representative:

> MR. SHEPHERD: Before I finalize this, can I get some feedback from the parties as to other terms and conditions? Other things you want to state (inaudible) of disclosure or provisions.
>
> MS. TAYLOR: Well, notwithstanding the fact that the minister continues to object to this alternative, there is the concern that the – that the company has indicated that without a direct response --
>
> MR. SHEPHERD: This is not opportunity for submissions, this is --
>
> MS. TAYLOR: No, no.
>
> MR.SHEPERD: This is additional terms of conditions, I'm --
>
> MS. TAYLOR: Yeah, I'm just trying to determine how this order would actually be put into play given the testimony of the --
>
> MR. SHEPHERD: Thank you very much. Counsel [referencing counsel for the respondent], do you have any submissions? [emphasis added]

[90] It is disturbing that the Member cut counsel off when, as she stated, she was just trying to understand how the order would work. The respondent also indicated that more was required to be able to put a proper protocol in place. He responds to the Member's inquiry as follows:

> MR. MAMANN: Mr. Shepherd, the only thing that I would suggest is I'm certain there's going to be lots of small issues that need to be worked out with CBSA and ourselves. The only thing that I would suggest is that we have a date to come back, let's say maybe around September the 4th, that in the event of a disagreement about the terms that we can come back to that you remain ceased of this matter and any outstanding issues that can be put to you for direction, and I think that would solve all the problems and that would give the parties sufficient incentive to work out terms that are appropriate. [emphasis added]

However, Mr. Shepherd indicated that he needed to make a final order – and he did.

[91] The problem with the final order he issued is that it fails to deal with many aspects of the recommended protocol; it is not nearly as specific as is required, in my view. For example, it fails to direct a precise location where the respondent is to live. It states that he is to reside with Ms. Zoto and inform CBSA of that address prior to his release. It does not direct that the monitoring is to include the installation of proximity beacons in his house or apartment so that it can be known whether he leaves those rooms. It does not provide detail as to the precise terms of the monitoring – what are the parameters that will trigger an alarm? There is no detail as to how quickly the bondspersons or CBSA are to be notified of an alarm. There is nothing to indicate whether CBSA is to be contacted first or last. There is no indication whether the Member envisages that Ms. Zoto will be with the respondent at all times or whether he is permitted to be alone at her residence. It does not specify the telephone numbers the monitoring company is to call if there is a breach. It does not even specify the zone outside of which an alarm will be sounded. In short, it lacks the specificity demanded in the circumstances of this case. On the basis of the brief terms of the release order alone, one cannot implement the proposed electronic monitoring with any degree of assurance that it will prevent the respondent from fleeing.

[92] The order as issued is unreasonable. Even if the electronic monitoring was found to be a reasonable alternative to detention, the order of the Division must outline with sufficient specificity the terms and conditions of that monitoring. It cannot, as was suggested by the respondent, merely be left to the parties to work out. If the Member was so inclined, he could have issued reasons indicating that release with bondspersons and monitoring would be ordered, then adjourn the hearing for a few days with instructions to the parties to return either with an

agreement as to the necessary terms of such an order for his consideration or be prepared to make submissions if they were unable to agree.

[93] As it stands, however, the release order is unreasonable and is set aside.

[94] The parties were provided with an opportunity to propose a question for certification; however, neither did.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is allowed, the decision of Harold Shepherd of the Immigration Division of the Immigration and Refugee Board, dated August 27, 2012, ordering the respondent to be released from immigration detention is set aside, and no question is certified.

"Russel W. Zinn"

Judge

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[1] Certified copies of the written reasons and Order for release of the Member dated September 27, 2012, were received by the Court only after the hearing of this application because it had been significantly expedited so that a decision could be rendered prior to the next detention review. As a result, the application was heard on its merits based upon the records filed by the parties in the stay motion brought by the Minister. There appears to be no differences between the two except for spelling and grammatical changes. The passages quoted in these Reasons are from the stay motion records used by counsel and the Court at the hearing. Although the passages, as transcribed, contain obvious spelling and grammatical error, they have not been corrected.

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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