Federal Court Cour fédérale

Date: 20160608

Dockets: IMM-5281-15
IMM-174-16
IMM-192-16
IMM-638-16

Citation: 2016 FC 640

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IMM-174-16

BETWEEN:

ALI MWINYI SHARIFF

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

Dockets: IMM-192-16
IMM-638-16

AND BETWEEN:

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Applicant

and

ALI MWINYI SHARIFF

Respondent

REASONS FOR JUDGMENT

BOSWELL J.

[1] These are the reasons for the judgment (2016 FC 310) I rendered on March 10, 2016, in which the applications for judicial review of four decisions of the Immigration Division of the Immigration and Refugee Board were each dismissed. The first and second applications (IMM-5281-15 and IMM-174-16) related to decisions of the Immigration Division [the ID] in which it was ordered, first on November 20, 2015 and again on December 28, 2015, that Mr. Shariff remain and continue in detention. The third and fourth applications (IMM-192-16 and IMM-638-16) related to decisions of the ID in which it was ordered, first on January 13, 2016 and again on February 10, 2016, that Mr. Shariff be released from detention even though in previous reviews of his detention over a period of some four and a half years he had been held in custody as being a danger to the public and a flight risk.

[2] The application for judicial review in Court file IMM-5281-15 was dismissed on March 10, 2016, because it had been rendered moot by the time of the hearing of these four applications. For the reasons stated below, the Court declines to exercise its discretion to determine the merits of that application.

[3] The application for judicial review in Court file IMM-174-16 was also dismissed on March 10, 2016, because it too had been rendered moot by the time of the hearing on that day. However, notwithstanding such mootness and in view of the circumstances surrounding Mr. Shariff's lengthy detention, it is appropriate for the Court to exercise its discretion and determine

the merits of this application. This application concerns an order of M. Tessler, a member of the ID, on December 28, 2015 continuing Mr. Shariff's detention.

[4] The applications for judicial review in Court files IMM-192-16 and IMM-638-16 were also dismissed on March 10, 2016, because the orders for the release of Mr. Shariff issued on January 13, 2016 and on February 10, 2016 by L. King, another member of the ID, were justifiable in the circumstances of this case and, therefore, reasonable. The Court declined to intervene on March 10, 2016, primarily because each order for Mr. Shariff's release was intelligible, transparent, justifiable, and defensible in respect of the facts and the law: *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para 47 [*Dunsmuir*].

I. Background

[5] Mr. Shariff is a 46 year old citizen of Somalia who was granted status in Canada as a Convention refugee on August 15, 1994. Since his arrival here, a considerable history of criminal convictions and immigration detentions has ensued. Between 1998 and 2010, Mr. Shariff was criminally convicted over 40 times, including convictions for breach of court orders, theft, assault, assault with a weapon, possession of stolen property, obstruction of justice, robbery, uttering threats to cause death or bodily harm, and in 2010, assault causing harm.

[6] Mr. Shariff's immigration problems first began in September 2001 when he was reported for inadmissibility due to criminal convictions, but with a recommendation that there be no further inquiry because, as a Convention refugee, he could not be removed without a danger opinion from the Minister. Following his conviction for robbery in 2008, which was preceded by

a conviction for assault with a weapon several years earlier, Mr. Shariff was the subject of an inadmissibility report issued on September 22, 2009 under subsection 44(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*Act*] on grounds of serious criminality; an order for Mr. Shariff's deportation was subsequently issued on October 21, 2009.

[7] The Canada Border Services Agency [CBSA] notified Mr. Shariff in October 2010 that it would be seeking the Minister's opinion as to whether he posed a danger to the public under subsection 115(2) of the *Act*. On January 27, 2011, CBSA issued an immigration warrant for Mr. Shariff's arrest and detention for removal on the basis that he was a danger to the public and unlikely to appear for removal. This warrant was executed on July 31, 2011, after Mr. Shariff completed his prison term for the 2010 assault conviction; thus began his lengthy immigration detention.

[8] On November 23, 2011, while Mr. Shariff was in immigration detention, the Minister's delegate issued an opinion that Mr. Shariff was a danger to the public. At his regular 30-day detention review on November 30, 2011, the Minister asked Mr. Shariff to sign a statutory declaration that he was willing to be removed to Somalia, but he refused to do so; in fact, up until the time of his release from detention Mr. Shariff consistently and repeatedly refused to sign any documentation which would facilitate his removal to Somalia. According to the Minister, African Express Airlines is the only current carrier who will transport individuals to Somalia, but this airline requires Mr. Shariff to sign the statutory declaration.

[9] On February 23, 2012, this Court denied Mr. Shariff's application for leave to judicially review the Minister's danger opinion. On January 16, 2014, this Court also denied Mr. Shariff's application for leave to judicially review the detention decision dated August 29, 2013, which was one of the many decisions that had ordered his continued detention.

[10] On October 1, 2014, ID member L. King ordered that Mr. Shariff be released on certain terms and conditions, one of which was that he reside at a rehabilitation centre in Surrey [the 2014 Release Order]. Some three weeks after his release from detention, however, on October 26, 2014, Mr. Shariff voluntarily reported to CBSA and was arrested for breach of his release conditions after being asked to leave the rehabilitation facility because of marijuana use. Thus, Mr. Shariff was again ordered detained on October 28, 2014, on the basis that he is a danger to the public and unlikely to appear for removal. Mr. Shariff's detention then continued for some 15 months until January 13, 2016, when ID member L. King ordered that Mr. Shariff be released from immigration detention [the January Release Order].

[11] Prior to the January Release Order, member King had continued Mr. Shariff's detention on November 20, 2015 [the November Detention Order]. On December 16, 2015, after the release of this Court's decision in *Warssama v Canada (Citizenship and Immigration)*, 2015 FC 1311 [*Warssama*], member Tessler adjourned the detention review hearing and in a decision dated December 28, 2015, continued Mr. Shariff's detention [the December Detention Order]. At Mr. Shariff's next detention review hearing on January 16, 2016, the January Release Order was made by member King. However, on the same day as that release order was made, this Court granted an interim stay of it. On January 26, 2016, the Court granted leave for judicial review of

the January Release Order and a stay of the release order until the application for judicial review was determined on its merits.

[12] On February 10, 2016, member King again ordered that Mr. Shariff be released from detention [the February Release Order], but on the same day as that order was made this Court granted an interim stay of it. On February 23, 2016, the Court granted leave for judicial review of the February Release Order and a stay of that order until the application for judicial review was determined on its merits.

II. Issues

[13] As noted above, these reasons for judgment relate to the separate applications for judicial review in respect of the November Detention Order, the December Detention Order, the January Release Order, and the February Release Order. Although the parties identify multiple issues arising from these four applications, including the admissibility of the Minister's new evidence about effecting removals to Somalia in the wake of Justice Harrington's decision in *Warssama*, there are three overarching issues common to each application which require the Court's attention:

1. What is the applicable standard of review?
2. Have any of the applications been rendered moot because of Mr. Shariff's release from detention?
3. Are any of the decisions unreasonable?

A. *What is the applicable standard of review?*

[14] It is well established that decisions of the ID respecting immigration detention are subject to review by this Court against a standard of reasonableness and, because they are primarily fact-based decisions, warrant deference from the Court (see, e.g., *Ahmed v Canada (Citizenship and Immigration)*, 2015 FC 792 at para 18, 256 ACWS (3d) 898; *Canada (Minister of Citizenship and Immigration) v Thanabalasingham*, 2004 FCA 4 at para 10, [2004] 3 FCR 572 [*Thanabalasingham*]; *Canada (Citizenship and Immigration) v B004*, 2011 FC 331, at para 18, 387 FTR 79; *Tursunbayev v Canada (Public Safety and Emergency Preparedness)*, 2012 FC 504, at para 20, 409 FTR 176; *Canada (Citizenship and Immigration) v B046*, 2011 FC 877, at paras 32 and 33. [2013] 2 FCR 3; *Panahi-Dargahlloo v Canada (Citizenship and Immigration)*, 2009 FC 1114, at paras 21-22, 357 FTR 9 [*Panahi-Dargahlloo*]; *Walker v Canada (Citizenship and Immigration)*, 2010 FC 392 at paras 23-26, 89 Imm LR (3d) 151; *Canada (Citizenship and Immigration) v Li*, 2008 FC 949, at para 16, 331 FTR 68).

[15] The Court should not intervene, therefore, if the ID's decision is intelligible, transparent, justifiable, and defensible in respect of the facts and the law: *Dunsmuir,* at para 47. Those criteria are met if "the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes": *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, at para 16, [2011] 3 S.C.R. 708. Furthermore, it is not up to this Court to reweigh the evidence before the ID, and it is not this Court's function to substitute its

own view of a preferable outcome: *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, at paras 59 and 61, [2009] 1 S.C.R. 339.

B. *Have any of the applications been rendered moot because of Mr. Shariff's release from detention?*

[16] The Minister argues that the judicial review application in respect of the November Detention Order is moot because of the ID's subsequent decisions which are the subject matter of the other three applications for judicial review, and that such mootness is compounded by each new decision of the ID concerning Mr. Shariff's detention or release. For his part, Mr. Shariff argues that the first application for judicial review is not moot because that would mean 30-day detention decisions would be protected from any judicial review as each decision is rendered moot by the next detention review decision. According to Mr. Shariff, the January Release Order does not render this application moot because there is still an adversarial relationship and Mr. Shariff remains detained pending the outcome of the hearing in respect of the four applications. In any event, even if this application is moot, Mr. Shariff contends that the Court should exercise its discretion to determine the merits of the case.

[17] In *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 at para 15, 57 DLR (4th) 231 [*Borowski*], the Supreme Court of Canada stated that the doctrine of mootness "applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case." This involves a two-step analysis: "First, it is necessary to determine whether the required tangible and concrete dispute has disappeared and

the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case" (*Borowski* at para 16).

[18] Accordingly, in a case where there is "no longer a live controversy or concrete dispute" the case can be determined to be moot (*Borowski* at para 26). Even if a case may be moot because there is no longer a live controversy or concrete dispute, it is nonetheless necessary for the Court to determine whether it should exercise its discretion to hear the case on the merits where circumstances warrant. Three overriding principles are to be considered in this second step of a mootness analysis: (1) the presence of an adversarial relationship; (2) the need to promote judicial economy; and (3) the need for the court to show a measure of awareness of its proper role as the adjudicative branch of government (*Borowski* at paras 31, 34, 40; see also *Harvan v Canada (Citizenship and Immigration)*, 2015 FC 1026 at para 7, [2015] FCJ No 1048, and *Khalifa v Canada (Citizenship and Immigration)*, 2016 FC 119 at para 18, 263 ACWS (3d) 30). The Court should consider the extent to which each of these principles may be present in a case, and the application of one or two may be overborne by the absence of the third and vice versa (see: *Borowski* at para 42).

[19] The Supreme Court in *Borowski* identified several instances where the Court's discretion may be exercised to allow it to hear and decide a case which might otherwise be moot. For example, if: (1) there is still the necessary adversarial relationship between the parties; (2) the Court's decision will have practical effect on the rights of the parties (see *Borowski* at para 35); (3) the case is recurring but of brief duration, such that important questions might otherwise

evade judicial review (see *Borowski* at para 36); or (4) issues of public importance are at stake such that resolution is in the public interest, although the mere presence of a matter of national importance is insufficient (*Borowski* at paras 37, 39).

[20] In view of *Borowski*, I find that the application for judicial review in respect of the November Detention Order has been rendered moot and, moreover, nothing in the record or in the parties' written and oral submissions compels the Court to exercise its discretion to determine this application on its merits. There is no longer any live controversy or concrete dispute arising from Mr. Shariff's detention. Since the time of the November Detention Order, there have been other review hearings and orders for continued detention and release and no useful purpose would be served by reviewing the merits of the November Detention Order (see: *Kippax v Canada (Citizenship and Immigration)*, 2014 FC 429 at para 7, 240 ACWS (3d) 142; *Moscicki v Canada (Citizenship and Immigration)*, 2014 FC 993, at para 5, 245 ACWS (3d) 908; *X v. Canada (Citizenship and Immigration)*, 2011 FCA 27 at paras 1 and 3, 198 ACWS (3d) 8).

[21] This is not an appropriate case for the Court to exercise its discretion to determine the merits of the application relating to the November Detention Order for various reasons. First, a decision by the Court on the merits of this application will not have any practical effect on the rights of the parties since Mr. Shariff is no longer subject to any present or continuing detention reviews. Second, as to judicial economy, although the Respondent did not make a motion prior to the hearing of this matter to have the application dismissed by reason of mootness, an application for judicial review can certainly be dismissed for mootness at the time of the hearing without the necessity of a motion prior to the hearing (see, e.g., *Gladue v Duncan's First Nation*, 2015 FC

1194, 259 ACWS (3d) 5). To the extent that the Court should be mindful of utilizing scarce judicial resources by hearing matters which are otherwise moot, those resources were, for the most part, already expended upon the hearing of this matter.

[22] Third, the issues raised by this application for judicial review cannot be characterized as being of such a nature that they raise important questions which might otherwise evade review by the Court. In this regard, the Court's determination that this application is moot, and that the merits should not be determined, must not be taken or interpreted as suggesting that situations of immigration detention should escape judicial review simply because a detainee may no longer be detained or is released by the time their application for judicial review is dealt with through the judicial process. There may well be circumstances or situations where, despite a detainee's continued detention or release, the issues raised by an otherwise moot application for judicial review should be reviewed and determined on their merits because they concern matters such as, for example, alleged violations of *Charter* rights while in detention. Lastly, the application related to the November Detention Order does not concern issues of such public importance that resolution of such issues would be in the public interest.

[23] Accordingly, as noted above, the application for judicial review in respect of the November Detention Order is moot and this is not an appropriate case for the Court to exercise its discretion to review or determine the substantive issues raised by Mr. Shariff concerning that order.

[24] The same cannot be said, however, with respect to the December Detention Order. Although the judicial review application related to this order has also been rendered moot because of the January and February Release Orders, the Court should nonetheless exercise its discretion to review and assess the reasons for the December Detention Order given the circumstances of this case.

C. *Are any of the decisions unreasonable?*

[25] Prior to reviewing the reasonableness of the December Detention Order and the January and February Release Orders, it is useful to bear in mind the Court's decision in *Sahin v Canada (Minister of Citizenship and Immigration)* [1995] 1 F.C. 214, 50 ACWS (3d) 1278 (T.D.) [*Sahin*] as well as section 248 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*Regulations*].

[26] In *Sahin*, Justice Rothstein noted that detention decisions must be made with section 7 *Charter* considerations in mind, and in this regard stated:

> [30] … The following list, which, of course, is not exhaustive of all considerations, seems to me to at least address the more obvious ones. Needless to say, the considerations relevant to a specific case, and the weight to be placed upon them, will depend upon the circumstances of the case.
>
> (1) Reasons for the detention, i.e. is the applicant considered a danger to the public or is there a concern that he would not appear for removal. I would think that there is a stronger case for continuing a long detention when an individual is considered a danger to the public.
>
> (2) Length of time in detention and length of time detention will likely continue. If an individual has been held in detention for some time as in the case at

> bar, and a further lengthy detention is anticipated, or if future detention time cannot be ascertained, I would think that these facts would tend to favour release.
>
> (3) Has the applicant or the respondent caused any delay or has either not been as diligent as reasonably possible. Unexplained delay and even unexplained lack of diligence should count against the offending party.
>
> (4) The availability, effectiveness and appropriateness of alternatives to detention such as outright release, bail bond, periodic reporting, confinement to a particular location or geographic area, the requirement to report changes of address or telephone numbers, detention in a form that could be less restrictive to the individual, etc.

[27] Justice Rothstein further observed in *Sahin* that:

> [31] … It seems self-evident that both an applicant and the respondent have an interest in expediting the immigration process when a person is held in detention. There is an obvious public interest in detaining a person who would pose a danger to the public. There is also public interest, although perhaps somewhat less than in the case of public danger, in detaining a person when there are grounds for believing he or she would not appear for examination, inquiry or removal. This public interest must be weighed against the liberty interest of the individual. In many cases, the most satisfactory course of action will be to detain the individual but expedite the immigration proceedings.

[28] In addition to the guidance offered in *Sahin*, section 248 of the *Regulations* prescribes several factors which must be considered before a decision is made on detention or release, namely:

248 If it is determined that there are grounds for detention, the following factors shall be considered before a decision is	**248** S’il est constaté qu’il existe des motifs de détention, les critères ci-après doivent être pris en compte avant qu’une décision ne soit prise

made on detention or release:	quant à la détention ou la mise en liberté :
(a) the reason for detention;	**a)** le motif de la détention;
(b) the length of time in detention;	**b)** la durée de la détention;
(c) whether there are any elements that can assist in determining the length of time that detention is likely to continue and, if so, that length of time;	**c)** l'existence d'éléments permettant l'évaluation de la durée probable de la détention et, dans l'affirmative, cette période de temps;
(d) any unexplained delays or unexplained lack of diligence caused by the Department or the person concerned; and	**d)** les retards inexpliqués ou le manque inexpliqué de diligence de la part du ministère ou de l'intéressé;
(e) the existence of alternatives to detention.	**e)** l'existence de solutions de rechange à la détention.

(1) The December Detention Order

[29] In his reasons and decision dated December 28, 2015, ID member Tessler ordered Mr. Shariff's continued detention primarily on the basis of this Court's decision in *Canada (Minister of Citizenship and Immigration) v Kamail*, 2002 FCT 381, 113 ACWS (3d) 317 [*Kamail*], where Justice O'Keefe stated as follows:

> [33] …I cannot accept that the delay caused by the respondent's refusal to sign travel documents can be used to support a finding that his detention time cannot be ascertained or to support a finding that a further lengthy detention is anticipated. The respondent himself is causing the delay. In the circumstances, the respondent's stay in detention of approximately four months was not an unreasonable length of time. Finally, since the respondent is unlikely to report for removal, it is unlikely that other options such as outright release, bail bond, periodic reporting or reporting changes of address would be available so as to favour release….

> [37] The adjudicator recognized following *Sahin*…that the respondent's lack of cooperation must count against him and not the Minister. …
>
> [38] It is my view that the decision of the adjudicator was unreasonable. To hold otherwise would be to encourage deportees to be as uncooperative as possible as a means to circumvent Canada's refugee and immigration system. …

[30] Member Tessler also noted this Court's decision in *Panahi-Dargahlloo*, where Mr. Panahi-Dargahlloo, who had been in detention for some 21 months, refused to sign a letter required by Iranian embassy officials stating his return to Iran was voluntary. In finding the ID member's decision unreasonable, Justice Mandamin stated:

> [49] The Member went on to conclude the Applicant was unlikely to appear for removal given his lack of cooperation in obtaining a travel document. In my view, the Member did not consider the question of the length of detention choosing instead to focus on the cause for the continuing detention.
>
> [50] Section 248 adds the length of detention as a consideration after determining the likelihood the detainee will appear for removal. The length of the Applicant's detention has to be considered against other factors besides his refusal to sign the letter required by Iranian authorities. This would include his status as a Convention refugee, the fact he reported to Immigration Officials during his last release, the passage of time since his last criminal conviction, whether or not the Applicant had an opportunity to receive rehabilitative treatment for his addictions while in the GTEC and the fact he has support in his rehabilitation proposal.

[31] Member Tessler further noted Justice Harrington's reliance in *Warssama* upon *Panahi-Dargahlloo*, and observed that: "Perhaps the circumstances of Mr. Panahi-Dargahlloo are closer to those of Mr. Shariff in so far as he had refugee status, had a danger opinion against him and had been in detention for a lengthy period." Member Tessler also noted that Mr. Shariff's situation was very similar to that in *Warssama*, where Mr. Warssama, a Somali citizen, had been

in immigration detention for some 57 months and had refused to sign the same airline document that Mr. Shariff had been asked to sign. Unlike Mr. Warssama though, member Tessler observed that Mr. Shariff was considered a danger to the public.

[32] After citing the decision in *Sahin* and the factors in section 248 of the *Regulations*, member Tessler found that Mr. Shariff was still a danger to the public. He further found that although terms and conditions could likely be fashioned to reduce the danger risk, Mr. Shariff also was unlikely to appear for removal. Member Tessler stated as follows:

> [39] Mr. Shariff has been in detention almost continuously for 56 [*sic*] months, a lengthy detention by any standard and far longer than any custodial sentence that he has received in the criminal realm. His lengthy detention is directly attributable to his own refusal to cooperate with his removal. In my opinion his detention is self-imposed and could have ended years ago if he had cooperated with his removal. The reasoning of Mr. Justice O'Keefe in *Kamail* remains very persuasive and applies whether a person's detention is 4 months as in *Kamail*, or 40 months. To release a person where their own behaviour is the sole reason for their continued detention, lengthy or not, would be to encourage deportees to be as uncooperative as possible as a means to circumvent Canada's immigration system and frustrate the Minister's legal obligation to removal persons who are under Deportation orders and in this case against whom a Danger opinion has been issued.
>
> [40] While section 248(d) only asks members to consider "unexplained" delay, Mr. Justice Rothstein in *Sahin* advised members to consider, as well, what would amount to "explained" delay. Members were to consider whether a party has caused delay and suggested that that should count against the offending party, precisely the situation in this case where the delay in his removal from Canada, leading to a lengthy detention, has been caused solely by Mr. Shariff. His lack of cooperation should count against him. Again, this is consistent with *Kamail* where Mr. Justice O'Keefe said "The respondent himself is causing the delay." and ruled against him.

[33] In this case, member Tessler made the same error as that made by the ID member in *Warssama* (at para 29): he placed undue reliance upon *Kamail* and failed to distinguish *Panahi-Dargahlloo*. The only significant similarity between *Kamail* and *Panahi-Dargahlloo* is that in each of those cases the detainee refused to sign a travel document that would facilitate his removal from Canada. Any similarity between these two cases vanishes when one considers "the length of time in detention." In *Kamail*, the Court stated that "the respondent's stay in detention of approximately four months was not an unreasonable length of time" (at para 33). In contrast, in *Panahi-Dargahlloo*, the detainee had been in detention for a total of some 21 months, although he had been released during that time for about two weeks before being detained again.

[34] In this case, Mr. Shariff entered immigration detention on July 31, 2011, and remained detained until the time of the 2014 Release Order, a period of about 38 months. Some three weeks after his release in 2014, he was again ordered detained and he remained detained until the time of the hearing of this matter in March 2016, a period of approximately 16 months. In total, since 2011 Mr. Shariff endured nearly 55 months of immigration detention. Unlike Mr. Warssama whose 57 months of detention was continuous, Mr. Shariff's detention, like that of Mr. Panahi-Dargahlloo, was interrupted by a short period of release from an otherwise lengthy period of detention. The fact that Mr. Shariff's detention may not have been continuous does not diminish or reduce the significance of his "length of time in detention" for purposes of section 248(b) of the *Regulations* or, for that matter, significantly distinguish his situation from that of Mr. Warssama. Assessing a detainee's length of time in detention should be looked at cumulatively, not consecutively, having regard to any release from detention and the duration of such release. Where a detainee's release from detention has been relatively short (in this case

some three weeks) in the broader context of two prolonged periods of detention (in this case 38 months and some 14 months up to the time of the January Release Order), such release loses significance when assessing the "length of time in detention."

[35] Thus, I reject the Minister's argument that since Mr. Shariff was released for some three weeks in October 2014, and then detained again until the hearing of this matter, his "length of time in detention" for purposes of section 248(b) of the *Regulations* is only 15 months, not 54 months. It is true, as the Minister points out, that once a person is returned to immigration detention the clock starts ticking again for purposes of the statutory detention reviews mandated by section 57 of the *Act*. However, that statutory requirement has no bearing when assessing the length of time in detention under section 248 of the *Regulations*.

[36] Although member Tessler acknowledged that the factors in section 248 of the *Regulations* cannot be considered in isolation from each other, looking at member Tessler's decision as a whole, he did not reasonably consider the length of Mr. Shariff's time in detention but, rather, focussed and fixated upon the cause for his continued detention. Although this fixation makes member Tessler's decision unreasonable, there is no need to set aside the decision since Mr. Shariff's detention has ended because, as discussed below, the January and February Release Orders were each reasonable.

(2) The January Release Order

[37] No issue of mootness arises with respect to the application for judicial review of the January Release Order because Mr. Shariff remained in detention once that order was stayed;

there was, therefore, still a live controversy or concrete dispute between Mr. Shariff and the Minister.

[38] In making the January Release Order, ID member King stated she disagreed with member Tessler's December Detention Order and identified the decision in *Warssama* as a change in circumstances since she last presided over a detention hearing for Mr. Shariff. Member King found that *Warssama* could not be distinguished from Mr. Shariff's case. Although she acknowledged the Minister had been exploring alternative arrangements for removals to Somalia without the requirement of the statutory declaration, member King found that the Minister could not estimate how long that would take or whether they would be successful. She further found that Mr. Shariff's detention had been so lengthy that it outweighed all other factors and, in line with *Warssama*, had become unreasonable. Consequently, member King ordered Mr. Shariff's release from detention subject to various terms and conditions.

[39] In reviewing the January Release Order, the main issue is whether member King adequately provided clear and compelling reasons to end Mr. Shariff's detention. In this regard, the Federal Court of Appeal in *Thanabalasingham* has stated as follows:

> [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.….
>
> [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.

[40] In this case, member King clearly stated that she disagreed with member Tessler's decision to continue Mr. Shariff's detention. During the course of her oral reasons to order Mr. Sharrif's release she stated, amongst other things, that:

> … I have reviewed the transcript and the decision made by the member at the previous hearing. I have reviewed thoroughly the submissions made at the last hearing. I have to say today that I disagree with Member Tessler's decision and I have reached the conclusion that it is time to order Mr. Shariff's release from detention.
>
> I had ordered his release in 2012 [2014, *sic*] finding that at that time the *Panahi-Dargahlloo* case was analogous and indicated that the length of time involved with respect to his detention was too long, in spite of the fact that he was refusing to sign a document.
>
> Since I last presided in this case, there has been the Federal Court decision issued in *Warssama*. That case is completely similar to Mr. Shariff's situation and circumstances. And I really don't see any way that it can be distinguished from the case that is in front of me today.
>
> I agree completely with the submissions made by counsel at the last detention review hearing. The Minister has submitted that since the *Warssama* decision, they are now exploring -- or the Minister is now exploring alternative methods to arrange -- or attempt to arrange removals to Somalia without the requirement of the signature on the statutory declaration.
>
> However, there is no ability for the Minister to estimate how long those attempts might take, or even if they will be successful. So they do nothing, those current attempts do nothing to address the issue of the length of time that Mr. Shariff has been in detention.
> …

> With respect to the submissions by the Minister and the member's decision at the last detention review, they simply disagree with the court's conclusion in *Warssama*. And I conclude, based on the preponderance of the case law that has been referred to by counsel at the last hearing, and some of which I've referred to today, that is simply not sustainable – or a sustainable decision in law. So I disagree with the conclusion.

[41] In my view, even if it might be suggested that member King's reasons for departing from the prior detention decision were somewhat cursory, it cannot be said that she did not clearly state the reasons why she departed from the prior detention determinations. The primary reason was the similar situation for Mr. Shariff as that for Mr. Warssama. Member King's decision was a meaningful response to member Tessler's decision because she concluded he was wrong in law.

[42] Having regard to the deference to be afforded to decisions of ID members when making detention or release orders, member King's January Release Order was transparent, justifiable, and defensible in respect of the facts and the law. Her reasons for making that order are not so deficient that the decision is unreasonable. Moreover, subsection 58(3) of the *Act* grants members of the ID broad discretionary powers to impose any conditions they deem necessary when ordering the release of a detainee. I reject the Minister's arguments that the terms and conditions imposed by member King in the January Release Order were not reasonable. The January Release Order was a reasonable decision in the circumstances of this case, and especially in view of *Warssama* it falls well within the range of acceptable outcomes.

(3) The February Release Order

[43] Because the Minister obtained a stay of the January Release Order on the same day it was made, Mr. Shariff remained in detention and, hence, his continued detention was again reviewed on February 10, 2016, and again by member King. Once again, member King ordered Mr. Shariff's release, but the Minister obtained a stay of the February Release Order on the same day it was made.

[44] No issue of mootness arises with respect to the application for judicial review of the February Release Order because Mr. Shariff remained in detention once that order was stayed; there was, therefore, still a live controversy or concrete dispute between Mr. Shariff and the Minister.

[45] In ordering Mr. Shariff's release yet again, member King found that the Minister's updated information on Somali removal operations was not a significant change. She further found that one of the primary issues was how long Mr. Shariff had been in detention and the length of time it could continue. Member King reaffirmed her decision and the terms and conditions imposed in the January Release Order; she added, however, at the request of Mr. Shariff's bondsperson, an additional condition of release that Mr. Shariff could not enter the municipality of Surrey, British Columbia.

[46] I find the February Release Order and the reasoning which underlies it to be reasonable. Having regard to the deference to be afforded to decisions of ID members when making

detention or release orders, member King's February Release Order, like the January Release Order, was transparent, justifiable, and defensible in respect of the facts and the law. ID members have broad discretionary powers under subsection 58(3) of the *Act* to impose any conditions they deem necessary when ordering the release of a detainee. It was not unreasonable for member King to add in the February Release Order an additional condition for Mr. Shariff's release beyond those imposed in the January Release Order. Indeed, in view of there being no significant change in the circumstances of Mr. Shariff's detention since the time of the January Release Order, other than the fact that he endured yet another month of detention, it would have been an unreasonable and an unacceptable outcome had member King not ordered his release again in the February Release Order.

III. Conclusion

[47] In conclusion, the Court reiterates the judgment rendered on March 10, 2016.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The style of cause in Court files IMM-5281-15 and IMM-174-16 is amended to replace the Minister of Citizenship and Immigration with the Minister of Public Safety and Emergency Preparedness.
2. The applications for judicial review in Court files IMM-5281-15, IMM-174-16, IMM-192-16, and IMM-638-16, are each dismissed.

3. A copy of these reasons for judgment shall be placed in each of Court files IMM-5281-15, IMM-174-16, IMM-192-16, and IMM-638-16.

4. There shall be no order as to costs; and no question of general importance is certified.

"Keith M. Boswell"
Judge

Ottawa, Ontario
June 8, 2016

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	IMM-5281-15 AND IMM-174-16
STYLE OF CAUSE:	ALI MWINYI SHARIFF v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
AND DOCKETS:	IMM-192-16 AND IMM-638-16
STYLE OF CAUSE:	THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS v ALI MWINYI SHARIFF
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	MARCH 10, 2016
REASONS FOR JUDGMENT:	BOSWELL J.
DATED:	JUNE 8, 2016

APPEARANCES:

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