Federal Court  Cour fédérale

Date: 20221201

Docket: IMM-11366-22

Citation: 2022 FC 1664

Vancouver, British Columbia, December 1, 2022

PRESENT: Madam Justice Sadrehashemi

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

EKO TJHANG

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Respondent, Eko Tjhang, ("Mr. Tjhang"), is currently detained in a provincial correctional facility. He has been held in immigration detention since November 7, 2022 because of concerns that he is a flight risk. From November 8, 2022 until November 14, 2022, Mr. Tjhang was held in segregation. On November 15, 2022, a Member of the Immigration Division ("Member") ordered Mr. Tjhang's release with conditions ("Release Order"). Mr. Tjhang was

not released at that time because the Minister of Public Safety and Emergency Preparedness ("the Minister") obtained an interim stay of the Release Order from this Court.

[2] I am deciding the judicial review of the Release Order. The Minister challenges the Release Order on two grounds. First, the Minister argues that the Member failed to provide a justification for departing from the Member's earlier decision at the 48-hour detention review. Second, the Minister argues that the Member's decision lacks meaningful analysis of the suitability of the bondsperson.

[3] The Minister has not convinced me that there is a basis to disturb the Member's decision to release Mr. Tjhang. The Minister has not shown any serious shortcomings in the Member's analysis that would justify setting aside the decision. Accordingly, for the reasons below, I dismiss the application for judicial review.

II. Background and Procedural History

[4] Mr. Tjhang is a citizen of Indonesia. He is thirty years old. He came to Canada just over four years ago, in July 2018, on a study permit and a work permit. He received extensions of his permits while he was in Canada. A few months ago, in June 2022, Mr. Tjhang's study and work permits expired. He did not apply for any further extensions or make any other immigration applications. He has been in Canada without status for approximately four months.

[5] Mr. Tjhang came to the attention of Canada Border Services Agency [CBSA] on October 25, 2022. He went to the Royal Canadian Mounted Police [RCMP] detachment in

Burnaby, BC two days prior asking for assistance. The police observed that he looked "distraught," "made mention of his phone being hacked", and "appeared to be under the influence of drugs and stated that he used methamphetamine." Mr. Tjhang was arrested under section 28 of the *Mental Health Act*, RSBC 1996, c 288 and transported to Burnaby General Hospital. He was not cooperative at the hospital and received treatment involuntarily after he was certified under the *Mental Health Act* by the emergency room doctor. Two days later, one of the arresting officers emailed a CBSA officer that Mr. Tjhang had mentioned to the police at the hospital that he had issues enrolling in school and that his visa was expired.

[6] On November 7, 2022, two CBSA officers attended at Mr. Tjhang's last listed address and interviewed him. Mr. Tjhang told the officers that his visa had expired in June 2022 and that he had no status in Canada. He also advised that his passport was with his friend (the same individual who Mr. Tjhang presented as a bondsperson at the second detention review). The CBSA officers arrested Mr. Tjhang and brought him to the Immigration Holding Centre.

[7] Mr. Tjhang was transferred from the Immigration Holding Centre to Fraser Regional Correctional Centre [FRCC], a provincial correctional facility. Mr. Tjhang's transfer was precipitated because, during an intake interview, Mr. Tjhang "attempted to hold open the door to the holding room [in the Immigration Holding Centre] on multiple occasions" though the contracted security guards directed him to let go of the door. At FRCC, Mr. Tjhang was held in segregation upon arrival for 7 days due to the facility's "7-day induction period as per FRCC COVID policy." Following this, Mr. Tjhang was moved to the "immigration wing" at FRCC.

[8] On November 9, 2022, Mr. Tjhang had an admissibility hearing and his first detention review (the 48-hour detention review) before the Immigration Division. He was represented by Duty Counsel and also a designated representative was appointed for him under subsection 167(2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] because the Member found Mr. Tjhang was unable to appreciate the nature of the proceedings.

[9] At the admissibility hearing, Mr. Tjhang conceded that he had overstayed his visa. The Member found Mr. Tjhang failed to leave Canada at the end of the period authorized for his stay in violation of subsection 29(2) of *IRPA* and therefore issued an exclusion order under paragraph 45(d) of *IRPA*.

[10] At the 48-hour detention review hearing, neither the Minister nor Duty Counsel presented an alternative to detention. Mr. Tjhang's designated representative raised concerns about the conditions of Mr. Tjhang's detention. The Member found that Mr. Tjhang was a flight risk under paragraph 244(a) of the *Immigration and Refugee Protection Regulations*, SOR 2002-227 [*IRPR*] because his drug use and mental health issues affect his reliability. The Member expressed concern about Mr. Tjhang's detention conditions, stating he was "shocked" that Mr. Tjhang was being detained at the provincial correctional facility instead of the Immigration Holding Centre. For this reason, the Member ordered that he would remain the Member at the next detention review hearing and scheduled that detention review to take place earlier than the mandated seven-day period.

[11] On November 15, 2022, the Immigration Division held Mr. Tjhang's second detention review. The Member's decision following this hearing is the subject of this judicial review. Mr. Tjhang's counsel presented a bondsperson at this hearing. Both Mr. Tjhang and the bondsperson testified. The Member found Mr. Tjhang to be a flight risk under paragraph 244(a) of *IRPR* but concluded that there was an alternative to detention under paragraph 248(e) of *IRPR* and released Mr. Tjhang on conditions, which include the following: that he report in person on a weekly basis to the CBSA office, that he report as directed by CBSA, that he reside at the address of his bondsperson, that his bondsperson pay a $5,000 deposit, and that he not use or possess any controlled substances as defined in the *Controlled Drug and Substances Act* unless prescribed by a physician.

[12] On November 15, 2022, the Minister filed an application for leave and judicial review challenging the Member's Release Order. The Minister also wrote to this Court requesting an interim stay of the Release Order. On November 15, 2022, Justice Bell granted the interim stay until November 30, 2022. On November 24, 2022 the Minister filed and served a motion record for a stay of the Release Order pending determination of the application for leave and judicial review of the Release Order. On November 25, 2022, the Minister advised the Court that Mr. Tjhang had new counsel and the motion materials were served on his new counsel that day. The parties asked that Mr. Tjhang's new counsel be able to file their materials by November 29, 2022 and that the Court hear the full stay motion no sooner than November 30, 2022 at 2pm. I directed that the stay motion hearing proceed at 2 p.m. on November 30, 2022.

[13] At the outset of the hearing, I advised counsel that I would be willing to decide the merits of the underlying judicial review instead of the stay motion. The parties agreed with this approach. I noted that the record before me includes the transcripts of the two detention review hearings and the evidence filed at both of those hearings. The Minister confirmed that there would be no further evidence filed for the judicial review hearing. In these circumstances, in light of the liberty interests at stake and the desire to conserve the resources of the Court and parties alike, I decided to proceed directly to the determination of the judicial review on the merits.

III. Issues and Standard of Review

[14] Both parties agree I should apply the reasonableness standard in evaluating the Member's decision. The Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] confirmed that reasonableness is the presumptive standard of review when reviewing administrative decisions on their merits. This case raises no issue that would justify a departure from this presumption.

[15] In V*avilov*, the Supreme Court of Canada described the reasonableness standard as a deferential but nonetheless "robust form of review", where the starting point of the analysis begins with the decision maker's reasons (*Vavilov* at paras 13, 84). A decision maker's formal reasons are assessed "in light of the record and with due sensitivity to the administrative regime in which they were given" (*Vavilov* at para 103).

[16] The Court described a reasonable decision as "one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para 85). Administrative decision-makers must ensure that their exercise of public power is "justified, intelligible and transparent, not in the abstract, but to the individuals subject to it" (*Vavilov* at para 95).

IV. Analysis

A. Failure to Explain to Departure from Previous Detention Decision

[17] There is no merit to the Minister's assertion that the Member failed to explain their departure from their previous detention decision. The Member's line of reasoning from the 48-hour detention review to the early 7-day review is easy to follow and is explained.

[18] A central takeaway from the Member's decision at the 48-hour detention review was their concern that Mr. Tjhang was in detention at FRCC instead of the Immigration Holding Centre. Though the Member found that there were grounds for continued detention, and that there was no alternative to detention at that time, the Member stated: "it's at a situation where the circumstances of your detention or the situation you're in right now is tipping the scales close to release. We are not at that point today….".

[19] At the early 7-day detention review, the Member had much more information. First, they heard more from Mr. Tjhang and determined that they found him credible; they learned that the proposed bondsperson returned Mr. Tjhang's passport to the CBSA; they learned that there was

now a $5,000 cash bond from the proposed bondsperson available for deposit; and in lieu of detention, there was now an alternative that Mr. Tjhang could live at the proposed bondsperson's home. Mr. Tjhang had now also been in detention for a longer period of time and had indicated that he would be filing a pre-removal risk assessment, which would mean that the length of his detention could be 6-8 weeks. With this new information, the Member explained that they weighed the factors in section 248 of *IRPR* and determined that though Mr. Tjhang continued to be a flight risk as he was at the 48-hour detention review, there was now a suitable alternative to detention. I can see no basis to find that the Member failed to justify the departure from their previous decision. There is no ambiguity as to how the Member reached this decision at the early 7-day detention review as compared to the Member's finding at the 48-hour detention review hearing.

B. Suitability of the Bondsperson

[20] *Vavilov* instructs that a "reviewing court must also read the decision maker's reasons in light of the history and context of the proceedings in which they were rendered" (*Vavilov* at para 94; *Canada (Minister of Public Safety and Emergency Preparedness v Shen*, 2020 FC 405 at para 46). Members deciding detention reviews at the Immigration Division are balancing various factors in crafting a release plan. As Justice Grammond observed, this is a complex exercise:

> The release conditions are composed of many moving parts and must be assessed as a whole. In this connection, Parliament has conferred upon the ID [Immigration Division], not this Court, the task of balancing the risk factors and the effectiveness of the release conditions to mitigate the risk. There is an inherent element of subjectivity in this exercise, as there is no mathematical formula to determine the outcome *(Canada (Public Safety and Emergency Preparedness) v. Thavagnanathiruchelvam*, 2021 FC 592 at para 32).

[21] In this case, the Member was balancing various factors in creating a release plan, including their concerns about Mr. Tjhang's well-being in detention at a provincial correctional facility and the risk of non-compliance. The Immigration and Refugee Board's Chairperson Guideline 2: Detention [Detention Guideline] states that where a detainee has vulnerabilities, "a member is under a heightened obligation to consider ATDs [alternatives to detention] and to impose attainable conditions that are connected to the circumstances of the vulnerable person concerned." The Member's reasons must be read in light of this context.

[22] Following the bondsperson's testimony, the Member found the bondsperson not credible because of discrepancies in his testimony. Specifically, the Member noted with concern that the bondsperson tried to minimize his involvement in Mr. Tjhang's drug use. Mr. Tjhang had previously stated at the hearing that he had used methamphetamine for approximately two years and that sometimes he used with the bondsperson, and that sometimes the bondsperson paid for the methamphetamine. The bondsperson denied buying non-prescription drugs for Mr. Tjhang or using drugs with him. As opposed to the bondsperson's testimony, the Member found Mr. Tjhang to be truthful and credible.

[23] Unlike a number of decisions of this Court where the Court found the review of the suitability of the bondsperson unreasonable (See for example: *Canada (Public Safety and Emergency Preparedness) v Erhire*, 2021 FC 908 at paras 29-31; *Canada (Minister of Public Safety and Emergency Preparedness) v Rodriguez Martinez*, 2021 FC 1477 at paras 32-35), the Member in this case did not gloss over the inconsistencies in the evidence to find the bondsperson could play a supervisory role for the detainee in spite of clear credibility problems.

The Member was transparent that he did not find the bondsperson credible. The Member's decision is not based on a failure to grapple with the shortcomings of the bondsperson. The Member was transparent about these shortcomings and because of this crafted an alternative to detention that did not rely on the bondsperson to act in a supervisory role. The Member found, given that they had found Mr. Tjhang credible, that the cash bond deposit of the bondsperson would "incentivize" him to be reliable and follow the conditions of his release.

[24] This might be an unconventional approach to take with a bondsperson but, given the circumstances facing the Member, I do not find it an unreasonable one. The Member was concerned about the conditions of detention at the provincial correctional facility. There was evidence before the Member that Mr. Tjhang had experienced distress in detention, including various bouts of crying, banging his bunk, and urinating during a hearing. He had already been in detention for 8 days, with 7 of those days being in segregation at a provincial correctional facility. The Member was not presented with any other alternative to detention.

[25] The Minister relies on Mr. Tjhang's vulnerability to argue that the Member had to be more careful about the release plan. The problem with this submission is that it is very clear that Mr. Tjhang was distressed about being in detention and the Member did not have before them any other real prospect of being able to release Mr. Tjhang in the near future. As noted above, the Detention Guideline puts a heightened obligation on members to consider alternatives to detention where vulnerabilities have been identified. There was no alternative proposal or even a plan for a future proposal for release put forward. The Member acknowledged these practical

constraints in coming to their determination, noting that even though they had reservations about the bondsperson, “I just do not know if he [Mr. Tjhang] is going to get anybody better.”

[26] The Minister also argues that the Member failed to assess the suitability of the bond amount. The bondsperson testified as to his yearly earnings and his monthly take-home pay. There was a back and forth on the amount of the bond and the first proposal of a $1,500 bond was then increased to a $5,000 bond. The Minister’s position is that having found the bondsperson not credible, the Member did not have a basis to determine this was a suitable amount. I can understand the Minister’s point to some extent but again given the context of what is at issue, and that the Member’s decision is a result of balancing the various factors in section 248 of *IRPR*, I do not find this to be a sufficiently serious shortcoming to require that the decision to release be set aside.

V. Disposition

[27] In conclusion, in these circumstances, given the various factors being weighed by the Member, I do not see a basis to find the Release Order unreasonable. The Member was aware of, considered and weighed the relevant factors. Accordingly, the application for judicial review is dismissed. Neither party raised a question for certification and I agree that none arises.

JUDGMENT in IMM-11366-22

THIS COURT'S JUDGMENT is that:

1. The Application for leave is granted.
2. The interim stay of Mr. Tjhang's Release Order is lifted.
3. The application for judicial review is dismissed.
4. No serious question of general importance is certified.

"Lobat Sadrehashemi"
Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET:	IMM-11366-22
STYLE OF CAUSE:	THE MINISTER OF CITIZENSHIP AND IMMIGRATION v EKO TJHANG
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