Federal Court  Cour fédérale

Date: 20140107

Docket: IMM-8117-12
IMM-1512-13

Citation: 2014 FC 5

Ottawa, Ontario, January 7, 2014

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

RUSTEM TURSUNBAYEV

Applicant

and

THE MINISTER OF PUBLIC SAFETY
AND
EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] These reasons concern two applications for judicial review under section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], of two decisions which partially varied the terms and conditions of the applicant's release from detention.

[2] The application in Court file IMM-8117-12 concerns a decision made on August 9, 2012. Court file IMM-1512-13 relates to a decision made on February 12, 2013.

BACKGROUND:

[3] Mr. Tursunbayev is a citizen of Kazakhstan and of St. Kitts and Nevis, and a permanent resident of Canada. He and his immediate family landed in Canada on July 17, 2009, and became permanent residents under the federal skilled worker program. On August 26, 2011, Interpol issued a Red Notice calling for Mr. Tursunbayev's arrest on embezzlement and corruption charges in Kazakhstan. Mr. Tursunbayev is alleged to have misappropriated approximately $20 million USD.

[4] On January 4, 2012, Kazakhstan requested Mr. Tursunbayev's extradition. No extradition proceedings had been commenced to the Court's knowledge as of the date of hearing. On January 9, 2012, a Canada Border Services Agency (CBSA) officer, prepared two section 44(1) *IRPA* reports on the basis that Mr. Tursunbayev was inadmissible to Canada under paragraphs 37(1)(a) and (b) of the *IRPA*.

[5] On February 8, 2012, a warrant for Mr. Tursunbayev's arrest pursuant to subsection 55(1) of the *IRPA* was issued. He was arrested and detained on February 10, 2012. His detention was reviewed and continued on three occasions following his arrest on the ground that he was unlikely to appear for his admissibility hearing.

[6] An application for judicial review of the third detention review decision was granted on May 2, 2012, and the matter was remitted for redetermination: *Tursunbayev v Canada (Minister of Public Safety and Emergency Preparedness)*, 2012 FC 504.

[7] Upon redetermination on May 18, 2012, it was held that although Mr. Tursunbayev was a flight risk, it was appropriate to order his conditional release. He was released from detention on June 1, 2012. The terms and conditions of release provided the following:

- Mr. Tursunbayev was required to wear an electronic monitoring device;
- he could not leave his house, including to go into his backyard, except in the case of a medical emergency or with 48 hours' notice and prior approval from the CBSA to meet with his lawyer or a medical practitioner;
- meetings with legal or medical counsel were limited to twice weekly and for a duration not exceeding four hours per absence; and
- Mr. Tursunbayev was required to be in the company of his surety, Mr. Dave Perry, and another investigator anytime he was away from home.

[8] On July 9, 2012, Mr. Tursunbayev brought a motion, pursuant to Rule 38 of the *Immigration Division Rules*, SOR/2002-229, to vary the terms and conditions of his release. Mr. Tursunbayev withdrew his request for an oral hearing and the decision was made on the basis of written submissions as no hearing dates were available prior to the middle of August.

[9] In a decision dated August 9, 2012, the Immigration Division held that the applicant's flight risk was unchanged. However, the application was partially allowed to allow another principal of the security firm hired to supervise the conditional release, Mr. Ron Wretham, to accompany the applicant on outings where Mr. Perry was unavailable. Mr. Wretham was required to post a $50 000 cash bond. The applicant's request to extend the duration of his meetings with his lawyers at their offices to 7 hours was granted, to account for travel time, but limited to twice a week. This did not limit meetings with the lawyers at his home. The applicant was required to provide the CBSA with at least 48 hours' notice of meetings with his lawyers.

[10] The applicant's request to attend a doctor without providing the CBSA with a minimum of 48 hours' notice where the medical visit was not to treat a medical emergency was declined. Requests for family outings and to be able to attend school were also declined. The applicant was permitted to have access to his backyard between sunrise and sunset, under direct supervision, but was not permitted to use the pool or hot tub due to concerns about the effect on transmissions from the electronic bracelet he is required to wear, or to be in the front yard of his residence.

[11] The August 9, 2012 decision is the subject of the application for judicial review in Court file IMM-8117-12.

[12] On October 30, 2012, Mr. Tursunbayev filed a further application to vary the terms and conditions of his release order pursuant to Rule 38 of the *Immigration Division Rules*. Mr. Tursunbayev sought and was granted an oral hearing, which took place December 19, 2012.

[13] The application was partially allowed in a decision dated February 12, 2013. The applicant's request to have the video feed from his house monitored by the on-site security personnel at the house to reduce costs was granted. His requests to go on outings without either of his surety's present, and to be allowed additional outings, were denied. He was allowed access to his front yard but the bar to use of the pool and hot tub was maintained.

APPLICABLE LEGISLATION:

[14]

Release – Immigration Section	**Mise en liberté par la Section de l'immigration**

58. (1) The Immigration Division shall order the release of a permanent resident or a foreign national unless it is satisfied, taking into account prescribed factors, that

(*a*) they are a danger to the public;

(*b*) they are unlikely to appear for examination, an admissibility hearing, removal from Canada, or at a proceeding that could lead to the making of a removal order by the Minister under subsection 44(2);

(*c*) the Minister is taking necessary steps to inquire into a reasonable suspicion that they are inadmissible on grounds of security, violating human or international rights, serious criminality, criminality or organized criminality;

(*d*) the Minister is of the opinion that the identity of the foreign national — other than a designated foreign national who was 16 years of age or older on the day of the arrival that is the subject of the designation in question — has not been, but may be, established and they have not reasonably

58. (1) La section prononce la mise en liberté du résident permanent ou de l'étranger, sauf sur preuve, compte tenu des critères réglementaires, de tel des faits suivants :

a) le résident permanent ou l'étranger constitue un danger pour la sécurité publique;

b) le résident permanent ou l'étranger se soustraira vraisemblablement au contrôle, à l'enquête ou au renvoi, ou à la procédure pouvant mener à la prise par le ministre d'une mesure de renvoi en vertu du paragraphe 44(2);

c) le ministre prend les mesures voulues pour enquêter sur les motifs raisonnables de soupçonner que le résident permanent ou l'étranger est interdit de territoire pour raison de sécurité, pour atteinte aux droits humains ou internationaux ou pour grande criminalité, criminalité ou criminalité organisée;

d) dans le cas où le ministre estime que l'identité de l'étranger — autre qu'un étranger désigné qui était âgé de seize ans ou plus à la date de l'arrivée visée par la désignation en cause — n'a pas été prouvée mais peut l'être, soit l'étranger n'a pas raisonnablement coopéré en fournissant au ministre des

cooperated with the Minister by providing relevant information for the purpose of establishing their identity or the Minister is making reasonable efforts to establish their identity; or	renseignements utiles à cette fin, soit ce dernier fait des efforts valables pour établir l'identité de l'étranger;
(*e*) the Minister is of the opinion that the identity of the foreign national who is a designated foreign national and who was 16 years of age or older on the day of the arrival that is the subject of the designation in question has not been established.	*e*) le ministre estime que l'identité de l'étranger qui est un étranger désigné et qui était âgé de seize ans ou plus à la date de l'arrivée visée par la désignation en cause n'a pas été prouvée.
[…]	[…]
Detention — Immigration vision	**Mise en détention par la Section de l'immigration**
(2) The Immigration Division may order the detention of a permanent resident or a foreign national if it is satisfied that the permanent resident or the foreign national is the subject of an examination or an admissibility hearing or is subject to a removal order and that the permanent resident or the foreign national is a danger to the public or is unlikely to appear for examination, an admissibility hearing or removal from Canada.	(2) La section peut ordonner la mise en détention du résident permanent ou de l'étranger sur preuve qu'il fait l'objet d'un contrôle, d'une enquête ou d'une mesure de renvoi et soit qu'il constitue un danger pour la sécurité publique, soit qu'il se soustraira vraisemblablement au contrôle, à l'enquête ou au renvoi.
Conditions	**Conditions**
(3) If the Immigration Division orders the release of a permanent resident or a foreign	(3) Lorsqu'elle ordonne la mise en liberté d'un résident permanent ou d'un étranger, la

national, 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.

section peut imposer les conditions qu'elle estime nécessaires, notamment la remise d'une garantie d'exécution.

***Immigration and Refugee Protection Regulations,* SOR/2002-227.**

***Règlement sur l'immigration et la protection des réfugiés,* DORS/2002-227.**

DETENTION AND RELEASE

DÉTENTION ET MISE EN LIBERTÉ

Factors to be considered

Critères

244. For the purposes of Division 6 of Part 1 of the Act, the factors set out in this Part shall be taken into consideration when assessing whether a person

244. Pour l'application de la section 6 de la partie 1 de la Loi, les critères prévus à la présente partie doivent être pris en compte lors de l'appréciation :

(*a*) is unlikely to appear for examination, an admissibility hearing, removal from Canada, or at a proceeding that could lead to the making of a removal order by the Minister under subsection 44(2) of the Act;

a) du risque que l'intéressé se soustraie vraisemblablement au contrôle, à l'enquête, au renvoi ou à une procédure pouvant mener à la prise, par le ministre, d'une mesure de renvoi en vertu du paragraphe 44(2) de la Loi;

[…]

[…]

Flight risk

Risque de fuite

245. For the purposes of paragraph 244(*a*), the factors are the following:

(*a*) being a fugitive from justice in a foreign jurisdiction in relation to an offence that, if committed

245. Pour l'application de l'alinéa 244*a*), les critères sont les suivants :

a) la qualité de fugitif à l'égard de la justice d'un pays étranger quant à une infraction qui, si elle était

in Canada, would constitute an offence under an Act of Parliament;

commise au Canada, constituerait une infraction à une loi fédérale;

(*b*) voluntary compliance with any previous departure order;

b) le fait de s'être conformé librement à une mesure d'interdiction de séjour;

(*c*) voluntary compliance with any previously required appearance at an immigration or criminal proceeding;

c) le fait de s'être conformé librement à l'obligation de comparaître lors d'une instance en immigration ou d'une instance criminelle;

(*d*) previous compliance with any conditions imposed in respect of entry, release or a stay of removal;

d) le fait de s'être conformé aux conditions imposées à l'égard de son entrée, de sa mise en liberté ou du sursis à son renvoi;

(*e*) any previous avoidance of examination or escape from custody, or any previous attempt to do so;

e) le fait de s'être dérobé au contrôle ou de s'être évadé d'un lieu de détention, ou toute tentative à cet égard;

(*f*) involvement with a people smuggling or trafficking in persons operation that would likely lead the person to not appear for a measure referred to in paragraph 244(*a*) or to be vulnerable to being influenced or coerced by an organization involved in such an operation to not appear for such a measure; and

f) l'implication dans des opérations de passage de clandestins ou de trafic de personnes qui mènerait vraisemblablement l'intéressé à se soustraire aux mesures visées à l'alinéa 244*a*) ou le rendrait susceptible d'être incité ou forcé de s'y soustraire par une organisation se livrant à de telles opérations;

(*g*) the existence of strong ties to a community in Canada.

g) l'appartenance réelle à une collectivité au Canada.

***Immigration Division Rules*, SOR/2002-229.**	***Règles de la Section de l'immigration*, DORS/2002-229.**
Application to the Division	**Demande à la Section**
38. (1) Unless these Rules provide otherwise, an application must follow this rule.	38. (1) Sauf indication contraire des présentes règles, toute demande est faite selon la présente règle.
Time limit and form of application	**Forme de la demande et délai**
(2) The application must be made orally or in writing, and as soon as possible or within the time limit provided in the Act or these Rules.	(2) Toute demande peut être faite oralement ou par écrit. Elle est faite soit le plus tôt possible, soit dans le délai prévu par la Loi ou par les présentes règles.
Procedure in oral application	**Demande faite oralement**
(3) For an application made orally, the Division determines the applicable procedure.	(3) La Section établit la marche à suivre dans le cas de chaque demande faite oralement.
[…]	[…]
No applicable rule	**Cas non prévus**
49. In the absence of a provision in these Rules dealing with a matter raised during the proceedings, the Division may do whatever is necessary to deal with the matter.	49. Dans le cas où les présentes règles ne contiennent pas de dispositions permettant de régler une question qui survient dans le cadre d'une affaire, la Section peut prendre toute mesure nécessaire pour régler la question.

ISSUES:

[15] A number of issues were raised in the written materials in each application concerning the variation requests. Certain of the requests denied in the August 9, 2012 decision were granted in the February 12, 2013 decision. Others were refused in the first decision and not pursued in the second. I agree with the respondent that the issues arising from the granted requests and those that were not pursued are now moot. The Court should not exercise its discretion to hear the matter unless satisfied that there is a sufficient reason to do so: *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, [1989] S.C.J. No. 14. I am not satisfied that there is sufficient reason to consider the matters now moot.

[16] A third category of requests were refused in both decisions, such as permission for additional outings to attend school or to spend time with family accompanied by persons other than the applicant's bondspersons, and use of the hot tub and pool at his home. The applicant submits that there continue to be live issues with respect to the test to be applied, the evidence to be considered and the explanations required in determining whether to vary terms and conditions of release. The respondent agrees that there continues to be a concrete and tangible dispute between the parties with respect to the requests denied in the February 12, 2013 decision.

[17] I don't intend to deal with the specific merits of each of the requests. However, I agree with the applicant that there continue to be live issues between the parties arising from the denial of the requests in the two decisions. Those issues can be dealt with together through the following questions:

1. What is the test to be applied in determining whether to vary terms and conditions of release?

2. Did the Member err by providing inadequate reasons?

3. Did the Member err by making findings without regard to the evidence?

STANDARD OF REVIEW:

[18] The applicant submits that correctness is the standard of review applicable to the issue of whether the appropriate legal test was applied in determining whether to vary the terms and conditions of release. He acknowledges that the standard applicable to the other issues is reasonableness.

[19] I agree with the respondent that variation decisions are inherently fact-based and should therefore, in general, attract deference: *Canada (Minister of Citizenship and Immigration) v Lai*, 2007 FC 1252 at para 17, [2007] FCJ no 1603; *Isse v Canada (Minister of Citizenship and Immigration)*, 2011 FC 405 at para 15, [2011] FCJ no 563.

[20] The Immigration Division officers who make variation decisions have considerable expertise. As was stated in *Canada (Minister of Citizenship and Immigration) v Thanabalasingham*, 2003 FC 1225 at para 42, [2003] FCJ no 1548 [*Thanabalasingham*]; aff'd 2004 FCA 4:

> **42** Like the other two branches of the I.R.B., the Immigration Division is a tribunal of some expertise. However, unlike the other two branches of the I.R.B., members of the Immigration Division are not Governor in Council appointees. As career civil servants, they are in a position to acquire significant expertise over the years. In fact, with respect to detention reviews, previous adjudicators which have now become members of the

> Immigration Division have potentially acquired numerous years of dealing with similar problems under ss. 103(6) and (6) of the old Act. This relative "institutional expertise" (Dr. Q., supra, at para. 29) suggests some deference. This is especially so when one considers that, with respect to some criteria set out in the Regulations (such as the likely length of time the person will be detained), members of the Immigration Division have definitely better knowledge and expertise than this Court. This expertise favors a more differential approach, particularly on questions of facts.

[21] There is some support in the jurisprudence for the proposition that questions of law arising in this context should be reviewed on the correctness standard: *Canada (Minister of Citizenship and Immigration) v B046*, 2011 FC 877 at para 32. However, the question of the test to be applied is not a matter of central importance to the legal system or one outside the specialized area of expertise of the administrative decision maker: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at paragraph 55 [*Dunsmuir*].

[22] Given that detention review decisions are essentially fact-based: *Thanabalasingham*, above, at para 10, I conclude that the Member is entitled to deference on a reasonableness standard of review. That standard is concerned with the "range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir*, above, at paragraph 47.

> *What is the test to be applied in determining whether to vary terms and conditions of release?*

[23] Detention under the *IRPA* engages liberty rights under the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 (the *Charter*) and so must be imposed in accordance with the principles of fundamental justice. Its purpose in the immigration context is not to punish, but rather to ensure compliance with

the *IRPA*: *Canada v B072*, 2012 FC 563 at para 33. While the legislation does not set out a specific procedure for assessing motions to vary terms and conditions of release, Rule 49 of the *Immigration Division Rules* allows for the Immigration Division to "do whatever is necessary to deal with the matter" where there is no applicable rule.

[24] The applicant submits that, in the absence of a specific procedure, the Court should look to the principles developed in the context of security certificate detention reviews as set out in decisions such as: *Charkaoui v Canada (Minister of Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 SCR 350; *Harkat (Re)*, 2009 FC 241, [2009] FCJ no 316; *Re Almrei*, 2009 FC 3, [2009] FCJ no 1; and *Re Jaballah*, 2007 FC 379, [2007] FCJ no 518.

[25] In considering a motion to vary terms and conditions of release where flight risk has been determined to be the most significant factor in imposing conditions, the applicant submits that the Immigration Officer must first determine whether the individual continues to be a flight risk, and, if so, determine the impact of the proposed variances in the terms and conditions on the risk of flight. As in the certificate proceedings, the applicant argues, the onus to justify the need for specific terms and conditions remains with the Minister, citing *Harkat*, above, at para 35. An analogy may be drawn with the criminal law context, he submits. As in a criminal detention review proceeding, the Member must ensure that the terms and conditions imposed affect the liberty rights of the individual as little as possible, while ensuring that their purpose is met: *Canada (Minister of Public Safety and Emergency Preparedness) v Sittampalam*, [2008] IDD no 30; *R v Mukpo*, 2012 NSSC 107, [2012] NSJ no 132; and *R v MacLean*, [2010] OJ no 2639 (ONSC). The terms and conditions of a release order must not be disproportionate to the threat posed by the individual and must be tailored to the

individual's circumstances, given that they are restrictions on liberty: *Re Almrei*, 2009 FC 3 at para 282, [2009] FCJ no 1.

[26] The respondent submits that while the *IRPA* is silent on the test to vary terms and conditions of release, the Immigration Division may be guided by the requirement of a material change in circumstances in the security certificate context. In that context, the respondent contends, the Court has indicated that reviews are not meant to drastically overhaul the original conditions, but rather to deal with unanticipated problems: *Harkat v Canada (Minister of Citizenship and Immigration)*, 2007 FC 416 at para 46, [2007] FCJ no 540. The onus rests on the party seeking relief.

[27] The Federal Court of Appeal discussed the detention review process in *Canada (Minister of Citizenship and Immigration) v Thanabalasingham*, 2004 FCA 4, at paras 9-13, 16, 24 [*Thanabalasingham FCA*]:

> **9** The question then is what weight must be given, in subsequent reviews, to previous decisions. As became clear in oral argument, the Minister does not say that prior decisions to detain an individual are binding at subsequent detention reviews. Rather, the Minister says that a Member must set out clear and compelling reasons in order to depart from previous decisions to detain an individual.
>
> **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.
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> **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.
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> **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.
>
> […]
> **16** The onus is always on the Minister to demonstrate there are reasons which warrant detention or continued detention. However, once the Minister has made out a prima facie case for continued detention, the individual must lead some evidence or risk continued detention. The Minister may establish a prima facie case in a variety of ways, including reliance on reasons for prior detentions. As Gauthier J. put it in her reasons at paragraph 75:
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> > ... at the beginning of the hearing, the burden was always on the shoulder of the proponent of the detention order, the Minister, but then this burden could quickly shift to the respondent if previous decisions to continue the detention were found compelling or persuasive by the adjudicator presiding [sic] the review.
>
> […]
> **24** The reasons of Gauthier J. are logical and clear. I am fully satisfied that she correctly applied the proper standards of review to Mr. Iozzo's findings and that she correctly interpreted the relevant law. I would dismiss the appeal. I would answer the certified question as follows:
>
> > At each detention review made pursuant to sections 57 and 58 of the Immigration Refugee Protection Act, S.C. 2001, c. 27, the Immigration Division must come to a fresh conclusion whether the detained person should continue to be detained. Although an evidentiary burden might shift to the detainee once the Minister has established a prima facie case, the Minister always bears the ultimate burden of establishing that the detained person is a danger to the Canadian public or is a flight risk at such reviews. However, previous decisions to detain the individual must be considered at subsequent reviews and the Immigration Division must give clear and compelling reasons for departing from previous decisions.

[28] In order to justify continued detention of a permanent resident or foreign national under s 58 of the IRPA, the Immigration Division must be satisfied that the grounds set out in paragraphs (1) (a) to (e) have been established by the Minister. In this context, the relevant ground for continued detention of the applicant was that he was unlikely to appear for examination, an admissibility

hearing, removal from Canada or a proceeding that could lead to the making of a removal order. In short, a flight risk. The onus to establish that risk rested with the Minister.

[29] Where the Division orders the release of the detained individual, it may, under ss 58 (3) impose any conditions that it considers necessary, as it did here. On a request to vary those conditions, the principles set out in *Thanabalasingham FCA*, above, are applicable. When the individual has been ordered released subject to conditions, his or her liberty interests are still engaged. The onus remains with the Minister to satisfy the Member that the individual continues to be a flight risk. In satisfying that onus, the Minister may rely on previous decisions and the Member must give clear and compelling reasons for departing from those prior decisions. It is not necessary, in my view, for the Member to re-evaluate the applicant's flight risk on each request for variation before considering whether the proposed change in the conditions would increase that risk.

[30] It is not clear to me that it is necessary for the applicant to demonstrate a material change in circumstances in applying for a variation of the terms and conditions of the release order, although such a change may be highly relevant to the application. It may be that with the passage of time and evidence of the applicant's compliance, the Member may be more willing to accept that the purpose of the conditions can be maintained with less rigorous restrictions: *Harkat*, above, at para 35. A material change in circumstances standard would appear to impose an unnecessary and unreasonable threshold before variations may be considered.

[31] However, if the applicant fails to lead sufficient evidence in support of the proposed variations to satisfy the Member that they will not increase the risk, the Member is unable to make

the requested change. The effect is to impose both an evidentiary and a persuasive burden on the applicant to demonstrate to the satisfaction of the Member that the conditions in question are no longer necessary to ensure compliance with the Act.

Did the Member err by providing inadequate reasons?

[32] With respect to the August 9, 2012 decision, the applicant submits that the Member failed to provide an explanation for why some of the requested changes to the terms and conditions were granted, while others were refused. He submits that the "only possible" explanation is limited to a few sentences, where the Member explained that the applicant's flight risk is limited when his mobility is limited. This reasoning fails to consider the fact that when the applicant is mobile, he is accompanied by a bondsperson and an investigator, and is also under continuous electronic surveillance. Further, the decision fails to explain why, if the applicant is already permitted biweekly outings, additional pre-approved outings cannot be permitted.

[33] Concerning the February 12, 2013 decision, the applicant argues that the Member failed to be consistent in assessing the proposed changes. No explanation was provided as to why some outings were permissible while others were not. The Member further erred, the applicant submits, by failing to explicitly state his findings as to whether or not each proposed change increased the applicant's flight risk and by failing to provide an explaination for his rejection of the sureties' evidence as to the applicant's record of compliance. It was not explained, for example, why additional outings would increase the risk of flight contrary to the sureties' evidence. The evidence that the security guards would have a clear view of the applicant when he was in the hot tub and pool was not explicitly addressed.

[34] The respondent submits that the Member deemed the applicant to be a flight risk and assessed each proposed variation in light of that risk. He allowed some variations after concluding that they would not "jeopardize the conditions of release", which were designed to mitigate the risk of flight. It necessarily follows that proposed variances rejected by the Member would heighten the risk of flight. The respondent argues that given the credible evidence that the applicant – with his resources and desire not to leave Canada – might go 'underground' rather than appear for admissibility or removal proceedings, it was open to the Member to maintain release conditions that mitigated the risk of flight while allowing the applicant a measure of liberty and freedom. Those considerations require that the applicant be permitted to meet medical care providers and legal counsel. However, it does not follow that permitting these outings meant that the additional outings should also have been permitted, particularly where the purpose of the additional outings was to socialize with family members. A history of compliance, the respondent submits, does not mean that the risk of flight – the Minister's primary concern – has been attenuated.

[35] As discussed by the Federal Court of Appeal in *Vancouver International Airport Authority v. Public Service Alliance of Canada*, 2010 FCA 158 at paras 11-17, reasons provided by an administrative decision maker must satisfy a number of purposes, including to assure a reviewing Court that the decision meets the standard of "justification, transparency and intelligibility" identified by the Supreme Court in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at para 47. The decision-maker is not required to deal with every matter or issue raised before it: *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 [*Newfoundland Nurses*] at para 16.

[36] Courts have been instructed to avoid an unduly formalistic approach to judicial review, and that perfection is not the standard. We are to ask whether "when read in light of the evidence before it and the nature of its statutory task, the Tribunal's reasons adequately explain the bases of its decision": per Evans J.A. in *Canada Post Corp. v. Public Service Alliance of Canada*, 2010 FCA 56, [2011] 2 F.C.R. 221, at para 164, aff'd 2011 SCC 57 and cited with approval in *Newfoundland Nurses*, above, at para 18. 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, the *Dunsmuir* criteria are met: *Newfoundland Nurses*, above, at para 16.

[37] In this instance, it was clear from the entire context of the record before the Member, including the prior decisions, that each request for a variation would be assessed in terms of what possible impact it might have, if granted, on the flight risk posed by the applicant. I am satisfied that the Member reviewed the evidence before him before concluding that the risk of flight had not abated, and thereafter considered the requested variations in the terms and conditions of release in light of the risk of flight. The primary consideration in denying the requests for increased outings was the fact that the investigators who would accompany the applicant on those occasions did not have the same vested interest in ensuring compliance as did the sureties and consequently, granting the requests would heighten the risk of flight.

[38] While it was not explicitly stated that the concern about the hot tub and pool usage was linked to the correspondence from the electronic bracelet company, it is clear from the record that this was the reason for denying those requests. While the Court may have reached a different

conclusion, given the evidence that the pool and hot tub would be at all times directly within the sight of the security guards, it is not its role to reweigh the evidence.

[39] The Member could have better explained his reasons for allowing some requests and denying others. However, it cannot be said that there is such a complete absence of reasons that the Member's decisions lack the justification, transparency and intelligibility required of a reasonable decision.

Did the Member err by making findings without regard to the evidence?

[40] The applicant argues that the length of time over which the conditions have been and will be imposed, due to the legal proceedings currently underway challenging his permanent residence status, militates heavily in the favour of the applicant being granted the requested variations of his release order. He contends that there was no basis for the Member to conclude that the proposed terms and conditions would increase the applicant's flight risk. His record of compliance, as well as the evidence of the sureties, previously found to be credible and reliable, were ignored, he submits. Pursuant to Rule 245(d) of the *Immigration and Refugee Protection Regulations*, compliance was a factor to be considered in assessing flight risk under the detention review provisions of the Act.

[41] The applicant argues that he has not been found to be a danger to the public, nor a threat to national security. He is detained on the sole basis that it was determined that he is a flight risk. Moreover, the applicant submits that there have been several Court determinations that cast doubt on the government's evidence, and on whether the admissibility hearing will be convened. The

applicant contends that these factors weigh heavily in favour of relaxing the conditions on which he has been released.

[42] I do not accept the applicant's assertion that the Member made findings without regard to the evidence. The Member acknowledged the surety's testimony that the applicant was compliant with the terms and conditions of the release order. However, it was open to the Member to conclude that flight risk was not abated as a result of the record of compliance in spite of this evidence. I agree with the respondent's submission that the record of compliance thus far only established the effectiveness of the conditions regime, not that the applicant should be rewarded for his compliance by loosening the release conditions. See *Mahjoub (Re)*, 2011 FC 506 at para 60.

[43] With respect to the decision to deny the request to allow the applicant to travel without his bondspersons, the Member did not ignore the evidence proffered in the surety's testimony but rather was not persuaded. Similarly, the Member did not ignore the surety's testimony with regards to the request that the applicant be permitted to use the pool and hot tub. The reasons establish that the Member was concerned by the evidence that the signal strength of the electronic monitoring equipment is diminished under water and that alerts are triggered. Finally, I disagree that the Member should have considered the duration of the detention as a result of the ongoing litigation in making his findings. The case law is clear that this is a "neutral" factor: *Muhammad v Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 FC 203 at para 14, [2013] FCJ no 207.

[44] In the result, I see no reason to interfere with the decisions rendered. No serious questions of general importance were proposed and none will be certified.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. the applications in Court files IMM-8117-12 and IMM-1512-13 are dismissed;
2. no questions are certified; and
3. these Reasons for Judgment and Judgment shall be placed on both files.

"Richard G. Mosley"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-8117-12 IMM-1512-13
STYLE OF CAUSE:	RUSTEM TURSUNBAYEV and THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	OCTOBER 9, 2013
REASONS FOR JUDGMENT AND JUDGMENT:	MOSLEY J.
DATED:	JANUARY 7, 2014

APPEARANCES:

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