Federal Court  Cour fédérale

Date: 20200325

Docket: IMM-1495-20

Citation: 2020 FC 427

Toronto, Ontario, March 25, 2020

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Applicant

and

ANDREW JOHN TAINO

Respondent

JUDGMENT AND REASONS

[1] The Minister comes to this Court to challenge a decision of the Immigration Division [ID] which ordered Mr. Taino's release from detention. For the Reasons set out below, I will grant the judicial review and return the matter to the ID. To be sure, I am mindful of issuing this decision amidst unprecedented times. Uncertainty abounds with the declaration of medical emergencies. Concerns are being raised about the safety of Ontario's correctional institutions, including for immigration detainees. Given the situation, prior to issuing these Reasons, I

convoked the parties for a teleconference to provide my decision, along with three messages about the next detention review, scheduled to take place later today before the ID.

[2] First, I asked that the two senior Department of Justice counsel representing the Minister immediately set about consulting their client, continue to work on finding a suitable residence and/or treatment program for Mr. Taino, and ensure that when he is released from detention, it is done safely and securely to protect not only the public, but also himself.

[3] Second, for the sake of continuity and efficiency, I will return the matter to the same ID Member, to the extent that she is available, which counsel agreed was the right approach. I note that the Member has handled the matter diligently and compassionately, including having patiently presided over six hearings in January and February 2020 and rendering a very thorough decision including a detailed analysis of the law, albeit one with which I disagree on certain points as outlined below. It is my hope that she can assist the parties to arrive at a suitable alternative to detention quickly, along with counsel.

[4] Third, should Mr. Taino's case require any further judicial intervention from this Court, I will remain seized of the matter, another approach that counsel endorsed. My objective in doing so is that, with ongoing oversight, a speedy resolution will be reached by parties, based on the very able representation of their counsel in this judicial review. Any resolution will obviously have to be in accordance with the law and acceptable to the ID, such that Mr. Taino is released in a manner that will be closely monitored, with appropriate conditions to mitigate any danger to the public, which is the only basis upon which he remains in detention today.

[5] A brief background of the case follows.

I. Background

[6] Mr. Taino is a citizen of the Philippines. In 1997, at the age of 12, he entered Canada and obtained permanent residence [PR] at the time of entry. Mr. Taino, through the years, has been afforded numerous second chances, but has continued to commit crimes, based, it appears, on his drug addiction to methamphetamine ("crystal meth"). As a brief summary of the more grievous convictions and reprieves, Mr. Taino lost his PR status in 2010 after a criminal conviction for assault with a weapon led the ID to find him inadmissible for serious criminality. In 2012, a deportation order was issued against him. Mr. Taino successfully appealed that deportation order to the Immigration Appeal Division [IAD], which stayed the deportation for four years subject to terms and conditions. This stay was cancelled in 2017 after Mr. Taino was convicted of uttering threats and assault causing bodily harm in a violent domestic attack on his partner in front of her child, his two children, and his mother.

[7] In January 2018, Mr. Taino was arrested by the Canada Border Services Agency [CBSA] and placed in immigration detention on the ground that he was unlikely to appear for his removal. Mr. Taino then applied for a Pre-Removal Risk Assessment [PRRA], which concluded in April 2018 that he was at risk in the Philippines. Because he was only eligible for a limited PRRA on account of criminality, the matter was referred to National Headquarters for a balancing of the risk he faces in the Philippines against the danger he poses to the Canadian public.

[8] In August 2018, Mr. Taino was released from immigration detention on stringent terms and conditions, which included three sureties, house arrest, participation in drug rehabilitation and anger management programming, and a prohibition against engaging in activities that could result in a conviction. However, late one night in November 2018, Mr. Taino pointed a firearm at a woman in a Goodlife Fitness parking lot and tried to steal her car. This plot – to sell the car and use the proceeds to purchase drugs – was apparently conceived of with an acquaintance. Mr. Taino was convicted of robbery the following June and sentenced to 244 days in prison and 18 months' probation.

[9] In December 2019, upon completion of his criminal sentence, he was transferred to immigration detention. This time, he was detained on the grounds that he was a danger to the public and that he was unlikely to appear for his removal. At both his first (48-hour) and 7-day detention reviews, the ID continued Mr. Taino's detention. Both ID Members who decided these two December reviews found that Mr. Taino was a danger to the public and unlikely to appear for his removal and that the factors under section 248 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*Regulations*] did not justify release.

[10] On January 7, 2020, however, Mr. Taino received a positive decision on his outstanding PRRA from the Case Management Branch of Immigration, Refugees and Citizenship Canada [IRCC]. As a result of this decision, IRCC advised that "the arrangements to enforce your removal from Canada have been suspended." The removal order stands, but it has been stayed by operation of the law; it is presently unenforceable.

[11] On January 13, at Mr. Taino's 30-day detention review, the Minister informed the ID Member of the positive PRRA decision. The Minister sought continued detention of Mr. Taino pending the formulation of an adequate release plan. The ID Member (who also adjudicated Decision under review) adjourned the hearing and sought submissions on the applicability of sections 7, 9 and 15 of 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 [*Charter*].

[12] When the proceedings resumed on January 16, 2020, the Minister requested more time to draft the requested *Charter* submissions. Due to the statutory timeframes, the ID Member rendered a decision that day to continue Mr. Taino's detention and scheduled an early detention review to address the *Charter* issues. In that January decision, the Member found that Mr. Taino was a danger to the public and that the section 248 factors marginally weighed in favour of continued detention.

[13] The hearings resumed on January 20 and continued for three different sittings thereafter, with concluding submissions from counsel on February 17, 2020. On February 28, the ID Member issued her decision ordering the Respondent's release from immigration detention [Decision], which the Minister now challenges on judicial review.

II. Decision under Review

[14] The Member stated at the outset that, in addition to determining whether Mr. Taino constitutes a danger to the public, she must determine whether continuing his detention, when his removal from Canada cannot be enforced, would violate his rights under sections 7, 9 or 15 of

the *Charter*. The Member concluded that while Mr. Taino constitutes a danger to the public, his ongoing detention infringes sections 7 and 9 of the *Charter*, and these infringements are not saved by section 1. She thus ordered his release under subsection 24(1) of the *Charter*, imposing four terms and conditions. A summary of her analysis is provided below.

A. *Grounds for Detention and Danger to the Public*

[15] The Member found that, although the Minister's evidence was not the "best evidence" possible, the Minister had established that Mr. Taino is a danger to the public under paragraph 58(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*Act*]. In making the determination that Mr. Taino is a danger to the public and that a ground for detention had been established, the Member considered the factors in section 246 of the *Regulations*. She noted that Mr. Taino has received multiple convictions involving violence or weapons and that he has admitted to a substance abuse issue for which he has not received adequate treatment. She also considered the PRRA's assessment that Mr. Taino is a danger to the public but that the risk he would face upon removal should be given more weight.

B. *Section 248 Factors*

[16] Having found that there was a ground for detention, the Member introduced her section 248 analysis by commenting that "on a *prima facie* basis, given my findings below that Mr. Taino's detention is arbitrary contrary to s. 9 of the *Charter*, I find that his ongoing detention also violates *Charter* s. 7" (at para 33).

[17] Regarding the reason for detention, the Member acknowledged that generally speaking, this paragraph 248(a) factor should be given substantial weight within the overall assessment when the individual is a danger to the public. However, given her finding that the government's interest in detention is contrary to section 9 and thus arbitrary, she reasoned that the weight accorded to this factor is reduced in the circumstances. Even if this factor should be given substantial weight, she found that it did not outweigh the others.

[18] The Member then found that the length of detention under paragraph 248(b) – at the time, approximately two and a half months – was not insignificant and favoured release. Further, she found that the seven weeks since his stay of removal, which was more than half of his time spent in detention, had been unhinged from its immigration purpose and that the detention was unlawful.

[19] In terms of the anticipated length of detention pursuant to paragraph 248(c), the Member noted the Minister's assertion that detention was sought only until a suitable alternative could be arranged. She also noted the Minister's ongoing efforts to secure a position in the Salvation Army in-house drug rehabilitation program. However, the Member expressed concerns with the Minister's failure to provide a precise timeline or concrete evidence of these efforts. She concluded that the detention's arbitrary nature caused this factor to weigh significantly in favour of release, explaining that this factor has been interpreted in case law as an assessment of the length of time until removal and not until a suitable alternative can be arranged.

[20] On paragraph 248(d), the Member further found no evidence establishing any unexplained delays or lack of diligence, rendering this section 248 factor neutral.

[21] Regarding paragraph 248(e) alternatives to detention, the Member found no evidence of any, other than releasing Mr. Taino on his own recognizance. This factor thus favoured detention.

[22] Finally, regarding the best interests of the children under paragraph 248(f), while noting that it was not a particularly strong factor in this case, the Member found that it weighed in favour of release. She reasoned that although Mr. Taino is not the primary caregiver for his three minor children, there was some evidence that he has an ongoing relationship with them.

[23] She concluded that the section 248 factors weigh in favour of Mr. Taino's release.

C. *Charter Analysis*

[24] The Member went on to explain why she had concluded, as noted at the outset of the Decision, that the detention was unlawful. The Member determined that the first step of the two-step inquiry – whether he was detained – was clearly established. She thus proceeded to analyse whether this detention is "arbitrary" under section 9 of the *Charter*, noting that any unlawful detention, by definition, is arbitrary.

[25] The Member concluded that in this case, Mr. Taino's detention is arbitrary, finding support for this conclusion in the legislative scheme as well as recent case law. First, regarding

the legislative scheme, the Member concluded that the detention-related provisions of the *Act* require that a person be subject to a removal order or a process that could lead to a removal order before permitting the use of detention. She found that there is no "free-standing immigration authority to detain any permanent resident or foreign national in Canada that might be dangerous." She also found that, in practice, the detention review process is structured upon the assumption that the detained person is the subject of removal efforts or a proceeding that could result in a removal order, having examined both subsections 55(1) and 58(2) of the *Act*.

[26] Turning to the case law, the Member considered jurisprudence cited by the Minister for the proposition that detention may be warranted even where a removal order is stayed. The Member found these decisions persuasive but not determinative, distinguishing them on the basis that the applicants in those cases had not yet received a final PRRA determination and that the decisions did not squarely address the *Charter* issue of whether the detention is arbitrary. The Member placed greater weight on more recent case law in which the provincial and federal courts specifically engaged with the section 9 *Charter* implications of immigration detention when that detention has become "unhinged" from the removal process. The Member found that these cases stand for the proposition that a detention becomes unlawful once it lacks an immigration control purpose. The Member concluded that the absence of an enforceable removal order was sufficient to determine that Mr. Taino's detention is arbitrary, breaching section 9 of the *Charter*. The Member accordingly found it unnecessary to assess whether Mr. Taino's section 15 *Charter* rights were also infringed.

[27] Finally, the Member found that, since no submissions were provided to suggest otherwise, the section 9 breach is not justified under section 1 of the *Charter*. The Member found that the appropriate remedy in the circumstances was to order Mr. Taino's release pursuant to subsection 24(1) of the *Charter*.

D. *Terms and Conditions*

[28] The Member imposed four terms and conditions, which essentially require Mr. Taino to report to and update CBSA of any changes in status or address and to comply with obligations under the *Act* (they are listed in full in the last section of these Reasons). The Member noted that no alternatives to detention had been presented that would offset the risks posed by Mr. Taino. At the same time, she rejected the Minister's position that Mr. Taino could not be released until a suitable alternative existed, holding that this would allow the Minister to continue the unlawful detention. She added that Mr. Taino has another year of criminal probation and thus remains subject to its terms and conditions.

III. Issues

[29] The Minister argues that the Member's Decision was fundamentally flawed in numerous respects, rendering it unreasonable. I will only focus on three of the issues raised which render the Decision unreasonable, with the objective of providing the necessary guidance to having the matter resolved soon, with Mr. Taino being released on acceptable conditions, at least given the current circumstances.

[30] First, the Minister argues that the Member misinterpreted the law, including the immigration legislation and *Charter*, along with the relevant jurisprudence, in finding the detention to be unlawful for arbitrariness in violation of section 9 of the *Charter*.

[31] Second, the Minister contends that the Member predetermined the outcome of section 248 of the *Regulations* by unreasonably engaging in an unnecessary *Charter* analysis, rather than simply making a determination under the relevant statutory provisions in the existing administrative scheme.

[32] Third, the Minister argues that by fashioning an inappropriate remedy through inadequate release conditions, the ID erred in releasing Mr. Taino prematurely.

[33] These errors, the Minister argues, independently and collectively render the Decision unreasonable, such that Mr. Taino should remain in detention subject to the outcome of his next detention review, which is currently set to take place later today. I agree, for the reasons that follow, that the Minister has met his burden in this judicial review, namely that these three shortcomings are sufficiently central and significant to render the Decision unreasonable.

IV. Standard of Review

[34] To my knowledge, this is the first judicial review of an immigration detention review decision since the release of *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. *Vavilov* clarified the standard of review framework for administrative decisions. I note that prior to *Vavilov*, reasonableness applied to the review of the merits of ID

detention review decisions (see, for example, *Canada (Public Safety and Emergency Preparedness) v Hamdan*, 2019 FC 1129 at para 31, and *Canada (Public Safety and Emergency Preparedness) v Arook*, 2019 FC 1130 at para 24).

[35] I do not see anything in the *Vavilov* framework as requiring a change in approach. *Vavilov*'s presumption of reasonableness applies to Mr. Taino's release since the Member was interpreting her home statute (*Vavilov* at para 25). Furthermore, these circumstances do not raise any constitutional questions, general questions of law of central importance to the legal system, or questions related to the jurisdictional boundaries between administrative bodies that would overcome this presumption in favour of a correctness review (*Vavilov* at para 53). In short, the question this Court must now answer is whether the Member's Decision was reasonable. Shortly after the issuance of *Vavilov*, Justice Rowe cogently summarized the principle of reasonableness in *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, where he wrote (at paras 31-33):

> A reasonable decision is "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). Accordingly, when conducting reasonableness review "[a] reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision maker to arrive at [the] conclusion" (*Vavilov*, at para. 84, quoting *Dunsmuir*, at para. 48). The reasons should be read holistically and contextually in order to understand "the basis on which a decision was made" (*Vavilov*, at para. 97, citing *Newfoundland Nurses*).
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> A reviewing court should consider whether the decision as a whole is reasonable: "what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review" (*Vavilov*, at para. 90). The reviewing court must ask "whether the decision bears the hallmarks of reasonableness — justification, transparency and

> intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov*, at para. 99, citing *Dunsmuir*, at paras. 47 and 74, and *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 13).
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> Under reasonableness review, "[t]he burden is on the party challenging the decision to show that it is unreasonable" (*Vavilov*, at para. 100). The challenging party must satisfy the court "that any shortcomings or flaws relied on . . . are sufficiently central or significant to render the decision unreasonable" (*Vavilov*, at para. 100).

V. Analysis

A. *Was the Member's Interpretation of the Law Reasonable?*

[36] The fact at the heart of the Member's Decision is the decision under subsection 112(3) of the *Act* granting Mr. Taino a positive, albeit restricted, PRRA decision. The Minister argues that in concluding that Mr. Taino's detention under an unenforceable removal order was arbitrary contrary to section 9 of the *Charter*, the Member erred in a plain reading of the law, as well as her interpretation of the jurisprudence. Mr. Taino counters that the Member's interpretation was not only reasonable, it was also correct.

[37] In *Vavilov*, the Supreme Court instructs that we use the modern approach to statutory interpretation as articulated by Professor Driedger in *Construction of Statutes* (2nd ed. 1983). That is, we are to read the words of a statute in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme and object of the *Act*, along with the intention of Parliament (at para 117). I cannot reconcile the Member's conclusion that the Minister lacks legal authority to seek continued detention where there is no enforceable removal order with a

plain reading of the law within the context of the scheme and objective of the *Act*. Subsection 58(2) states:

58(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.	**58(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.

[38] The enforceability of a removal order is not a prerequisite to detention, particularly when this provision is contrasted with section 48, which defines the concept of an enforceable removal order:

48(1) A removal order is enforceable if it has come into force and is not stayed.	**48(1)** La mesure de renvoi est exécutoire depuis sa prise d'effet dès lors qu'elle ne fait pas l'objet d'un sursis.
(2) If a removal order is enforceable, the foreign national against whom it was made must leave Canada immediately and the order must be enforced as soon as possible.	**(2)** L'étranger visé par la mesure de renvoi exécutoire doit immédiatement quitter le territoire du Canada, la mesure devant être exécutée dès que possible.

[39] The legislation thus specifically distinguishes between a removal order that is enforceable and one that is not. Other sections of the immigration legislation which specify "enforceable"

removal orders include sections 206, 209, 215, 222, 224, 250, 273, 274 and 276 of the *Regulations*. The legislation does not include a requirement that a removal order be enforceable in order to effect detention. Rather, it simply requires the existence of a valid order. Certainly, detention is permitted, and sometimes occurs, in other contexts where removal orders are not enforceable, such as for pending refugee and PRRA claimants, if there are underlying concerns, including identity, flight risk, or danger.

[40] Going back to an ordinary reading of the statute in Mr. Taino's situation, the Tribunal can keep an individual detained, having taken into account the prescribed factors, if s/he is a danger to the public. We must assume that Parliament deliberately chose not to make such a distinction in section 58. Therefore, the mere existence of a removal order, along with a danger opinion, may suffice to justify continued detention, after consideration of the section 248 factors that incorporate *Charter* section 7 considerations (see discussion of those factors below).

[41] Recognizing that *Vavilov* reminded reviewing courts tasked with deciding whether an interpretation of a statutory provision was reasonable that they are not to conduct a "*de novo* analysis of the question or 'ask itself what the correct decision would have been'" (at para 116), this approach does not permit reading in new language that changes the meaning of the home statute. As I will explain, the reading in of the term "enforceable" removal order that occurred in this case had already been rejected by two prior decisions of this Court.

[42] Turning to the Member's analysis, which was significant, spanning paragraphs 56-65 of her Decision, she wrote at paragraphs 59 and 62:

> Section 58(2) of the IRPA, which provides the Immigration Division authority to detain somebody who is not already in detention, similarly only authorizes detention of a person who is the subject of an examination or an admissibility hearing or the subject of a removal order. As such, the legislative scheme makes it a mandatory prerequisite to the use of immigration detention that the person being detained is the subject of a removal order or a process that could result in a removal order being issued against them, regardless of who is initiating a person's detention.
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> …
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> While it is true that in s. 58(1)(b) of IRPA that there is no explicit reference to removal, as set out above, the legislative scheme does not permit the detention of a person for immigration purposes unless there is a removal order in existence or a process that could lead to a removal order being made. As a result, there is no free-standing immigration authority to detain any permanent resident or foreign national in Canada that might be dangerous. If a foreign national or permanent resident is not inadmissible or subject to a proceeding that could result in them being inadmissible, they cannot be detained by immigration authorities regardless of how dangerous they might be.

[43] The Member makes valid and entirely reasonable findings and I agree with her on these principles of statutory interpretation. Where we depart, however, is her conclusion that immigration detention must remain hinged to an ongoing removal process and that, once it becomes unhinged from that process, such as in this case with a positive (restricted) PRRA, a person's detention will automatically become arbitrary contrary to section 9 of the *Charter*. She writes at paragraph 64:

> It is also worthwhile noting that, practically speaking, the Canadian detention review process is structured upon the assumption that the detained person is the subject of removal efforts or a proceeding that could result in a removal order. This is perhaps most evident in how the section 248 factors are regularly assessed at hearings before the Immigration Division. For example, as noted above, when assessing the anticipated length of detention, as required by section 248(c) of the IRPR, the issues that are canvassed at hearings are how long before a person's removal can

> occur or before the process that they are being detained for (admissibility bearing, examination etc.) which could lead to a removal order will take place. It is in this context that the anticipated length of detention is typically determined.

[44] When viewed in light of the authority to detain provided in subsection 58(2), the Member's conclusion that "the practical day-to-day realities of the detention review process further supports a finding that the detention of an individual must be tethered to a removal order or a process that could result in a removal order being issued" (at para 65), does not reconcile with either the fact that (i) Mr. Taino still has an underlying removal order that the restricted PRRA did not eliminate, and (ii) a plain reading of subsection 58(1) of the *Act* regarding release:

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	**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) they are a danger to the public;	**a)** le résident permanent ou l'étranger constitue un danger pour la sécurité publique;
(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);	**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) 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,	**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

criminality or organized criminality;	sécurité, pour atteinte aux droits humains ou internationaux ou pour grande criminalité, criminalité ou criminalité organisée;
(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 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	**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 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.

[45] The combined effect of the two key detention provisions of the *Act* reproduced above (subsection 58(2) and paragraph 58(1)(a)) is that a foreign national may (i) be detained if subject to a removal order, and (ii) remain detained if declared a danger to the public. In other words, assuming a valid removal order exists, any of the circumstances in paragraphs (a)-(e) of subsection 58(1) may justify refusing to release the detainee. These are not conjunctive factors. Rather, any one of the five enumerated circumstances may justify ongoing detention.

[46] I note that the same Member wrote a decision six months to the day prior to Mr. Taino's release order, in which she arrived at different conclusions regarding her acknowledgement of a "danger to the public." This decision, *Alemu v Canada (MPSEP)*, ID File No. 0003-B7-00527 [*Alemu*], was rendered on August 28, 2019, and its analysis is worth consideration, by way of contrast to Mr. Taino's.

[47] As is always the case, there are differences in the profiles and history of Messrs. Taino and Alemu. But there are similarities as well, including a long history in Canada, the loss of their permanent resident status due to criminal inadmissibility, drug use, and a finding of danger to the public. One difference, for instance, was a possibility that removal could still be effected for Mr. Alemu. Unlike Mr. Taino, he had not received a positive risk analysis. With respect to his section 248 assessment, the Member found at paragraph 34 of *Alemu* that:

> In this case, while I have found him to be both a danger to the public and a flight risk, it is the danger finding that most significantly weighs in favour of detention at this stage, particularly given its severity in the circumstances of this case. As noted by the Federal Court in Lunyamila: "where the detainee is a danger to the public, the scheme of the IRPA and the Regulations contemplates that substantial weight should be given to maintaining the detainee in detention [at para 85]."

[48] Mr. Alemu, at the time of this detention review before the Member, had been in immigration detention for almost two years. Indeed, the Member noted that his detention had become "indefinite," because officials were unable to provide an anticipated timeline for removal other than to say that it would be lengthy, and might not ever happen, given the difficulty of obtaining a travel document from Ethiopia. However, the Member could not say that

it could not be effected and, on that basis, she did not find a section 9 breach. The Member concluded (at para 68):

> As such, I find that the fact that Mr. Alemu is being detained on the grounds that he is a danger to the public prevents his detention pursuant to s. 58(1)(a) from being arbitrary even if his detention becomes unhinged from its removal purposes.

[49] Six months later, the same Member held in the Decision under review (at para 79):

> … I find that Mr. Taino's detention has become unhinged from the immigration purpose of removal and is therefore unlawful. Mr. Taino's detention therefore contravenes s. 9 of the *Charter* and cannot be maintained.

[50] While I understand that the Member did not feel that Mr. Alemu's detention had yet become unhinged from removal given its possibility, she noted that "even if his detention becomes unhinged from its removal purposes," his detention would not be arbitrary due to the danger he posed.

[51] I feel that the conclusion in *Alemu* represents a reasonable assessment, as opposed to the conclusion reached in *Taino* six months later. To say that the detention has become unhinged from removal is one thing. To say that the detention has become unhinged from any immigration purpose is quite another. Mr. Taino has been found, in no uncertain terms, to pose a danger to the public by IRCC in its restricted PRRA decision. And as also described above, the Member came to the same conclusion in the first part of her analysis. Ensuring the public is not at risk is an immigration purpose quite apart from removal.

[52] In the language used by the jurisprudence, removal – and the existence of a removal order – is one hinge in the machinery of immigration control. But so, in my view, is danger. That is a second hinge that may necessitate detention. In fact, I do not think it is any coincidence that danger to the public is enumerated first by Justice Rothstein (as he then was) in *Sahin v Canada (Minister of Citizenship and Immigration)* (1994), 85 FTR 99, 1994 CanLII 3521 (TD) [*Sahin*], in the list of considerations for detention or release that were later codified in section 248 of the *Regulations*, and which also came first amongst those factors. Indeed, as Justice Rothstein stated about that first factor, "I would think that there is a stronger case for continuing a long detention when an individual is considered a danger to the public."

[53] *Sahin* was decided under the previous immigration legislation. The current *Act* places even more importance on the safety of Canadians than the previous one, prioritizing security as a key aim as is made clear by various of its section 3 objectives (*Medovarski v Canada (Minister of Citizenship and Immigration); Esteban v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51 at para 10).

[54] I further agree with the Minister that the Member's interpretation unreasonably departed from subsequent jurisprudence of this Court, including most notably *Canada (Public Safety and Emergency Preparedness) v Samuels*, 2009 FC 1152 [*Samuels*], where this Court held that it is unnecessary to read into subsection 58(2) a requirement that a removal order be enforceable in order to justify detention. In that decision, Justice Tremblay-Lamer held (at paras 27-31):

> A removal order that is stayed is not void. Although it cannot be executed pending a ruling on a protected person's application for permanent residence or the passing of the deadline to file such an

> application, it still exists and is valid and, in my opinion, the person against whom it was issued is still "subject to it."
>
> The Respondent is, in effect, asking the Court to read the exclusion of stayed removal orders into subsection 58(2), which would then provide (in the part relevant to this case) that "[t]he 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 subject to an ***enforceable*** removal order and that the permanent resident or the foreign national is a danger to the public…"
>
> I am not persuaded by the Respondent's submission that this reading in is necessary to ensure that the provision complies with the *Charter*. Pursuant to subsection 57(2) of the *IRPA*, the Respondent has a right to have his detention reviewed every 30 days. The purpose of these reviews is to take into account any new events in the Respondent's case. The Immigration Division must, pursuant to section 248 of the *Regulations*, consider the anticipated length of his future detention and the existence of alternatives to detention. In my view, these elements confirm that the statutory scheme created by Division 6 of the *IRPA* and the *Regulations* already reflects concerns associated with the *Charter*.
>
> I add that the *Charter*'s guarantee of the right to liberty is not absolute; the *Charter* only prohibits deprivations of liberty inconsistent with principles of fundamental justice. The Respondent makes no submissions on whether detention for a limited (though admittedly potentially significant) period, of a person who is a danger to the public is in fact inconsistent with such principles. In the absence of any debate on this point, I do not think it this Court's role to re-write the statute in the way suggested by the Respondent.
>
> I find that the Tribunal had jurisdiction to order the continued detention of the Respondent, if it was satisfied that he was a danger to the public.
>
> [Underline added; italics in original.]

[55] As already explained above, I agree with Justice Tremblay-Lamer that when the words of subsection 58(1) are read in their grammatical and ordinary sense, as well as harmoniously with the scheme and object of the *Act*, one cannot read in the word "enforceable" before removal

order (*Vavilov* at para 117; see also *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at para 21). Parliament could have – but did not – write "enforceable" in the detention provision of the statute, whereas it did in other provisions.

[56] The Member's decision to read in that language is, in my view, equivalent to a declaration of constitutional invalidity. Rather than attacking the scheme and fashioning a subsection 24(1) *Charter* remedy, as the Member did in this case, a constitutional challenge under *Charter* subsection 52(1) invalidating a key section of the statute would require a proper foundation and procedure. I note that no notice of constitutional question was filed in this case. Without a proper constitutional challenge, I see no reason to depart from the *Samuels* interpretation, and the Member did not provide a reasonable basis to do so.

[57] In this regard, I note that the Member was not only obligated to explain her departure from *Samuels*, but also from *Isse v Canada (Citizenship and Immigration)*, 2011 FC 405 at paragraphs 27-28 [*Isse*], where Justice Mosley of this Court adopted and applied *Samuels*, as follows:

> I agree with the respondent that the Immigration Division retains jurisdiction to determine whether a foreign national should be detained or released on conditions so long as there is a valid removal order in existence, even if removal is stayed and can't be effected because of the Minister's decision not to issue a danger opinion. Respect for the principle of *non refoulement* and the Immigration Division's jurisdiction to detain an individual who faces a valid removal order and is found to be a danger to the public are not mutually exclusive concepts.
>
> To construe the Act as the applicant submits would, as Justice Tremblay-Lamer noted in *Samuels*, above, require that the word *enforceable* be read into subsection 58 (2) of the Act. Accordingly, I find that the Member was correct to assert that "the removal order

> is still valid and it is still in force so you are properly detained for removal".
>
> [Italics in original.]

[58] In both *Isse* and *Samuels*, there was a strong element of risk to the public. Both gentlemen suffered from serious mental illness and long-term substance abuse problems, along with lengthy criminal records. As a result, at some point both had become inadmissible, lost their prior permanent residence status, and received removal orders. Ultimately, both decisions held that detention may occur even in the presence of an unenforceable removal order.

[59] In my view, Mr. Taino, throughout his most recent immigration detention and ID hearings, remained subject to a valid removal order, which was stayed due to operation of the law when he received his positive, restricted PRRA. That is because paragraph 114(1)(b) of the *Act* stipulates that a decision to allow a subsection 112(3) PRRA has the effect of staying the removal order.

[60] Translating this to plain English, this means that Mr. Taino's removal order currently remains. It still exists. It is simply inactive, or in abeyance. That, too, could be said to varying degrees for Messrs. Samuels' and Isse's removal orders. The Member correctly pointed out that the facts of both *Isse* and *Samuels* were different and that neither of those cases involved a final determination barring the applicant's removal.

[61] However, that their factual matrices differed will invariably be a valid observation in the field of immigration law. People come to Canada from a multitude of countries, hail from

diverse backgrounds, immigrate through various categories and, in some cases, later become inadmissible and subject to removal for a host of different reasons. That diversity certainly describes the paths of Messrs. Samuels, Isse, and Taino. Despite those differences, certain fundamental commonalities exist in all three cases, namely (i) the existence of valid removal orders, (ii) an element of danger based on their past conduct, and (iii) the attendant need for the ID to adequately protect the public. In Mr. Isse's case, this included significant constraints on his liberty through the ID's conditions on release, which Justice Mosley approved.

[62] To briefly review some of those factual distinctions specifically on the issue of the status of their removal orders, Mr. Samuels was given a positive PRRA and, at the time of the 2009 hearing, the Minister was seeking a danger opinion, which could have led to Mr. Samuels' removal from Canada. The ID held that while a danger opinion was being sought, it was likely to take a considerable amount of time and could be negative, so that it "wouldn't be fair" to keep Mr. Samuels in detention. The Tribunal noted that the respondent had "a pretty impressive criminal file," but concluded that "if there's no removal in sight, [the Tribunal is] not responsible to protect Canadian society anymore" (*Samuels* at para 14). The Federal Court reversed this finding.

[63] In Mr. Isse's case, the Minister decided not to pursue a danger opinion. That did not negate the fact that he had committed violent crimes to result in his loss of status, and thus an inadmissibility finding leading to a removal order.

[64] I do not see these factual distinctions in the status of the *Samuels* and *Isse* removal orders as impacting the fundamental ratio in those cases vis-à-vis the interpretation of the law on a plain reading of the legislation. Neither case involved detention for imminent removal. Both had a long history of non-compliance with immigration and criminal law. And like Mr. Taino, Mr. Samuels benefitted from a statutory stay of removal at the time of his judicial review due to his positive PRRA. Despite these similarities, the Member found (at paras 68 and 70-71):

> While these decisions are persuasive, I do not find that either of them is determinative of the *Charter* section 9 issue before me. Not only is Mr. Taino in a slightly different position factually from the Applicants in *Isse* and *Samuels*, but the Court's decisions in those cases did not squarely address the Charter issue currently before me. Furthermore, there is more recent caselaw which has explicitly grappled with the applicability of s. 9 of the *Charter* in the immigration detention context which has reached a contrary view and found that immigration detention is unlawful once it becomes unhinged from its immigration related purpose of removal.
>
> …
>
> Similarly, although Justice Tremblay-Lamar [*sic*] did canvass the Charter ramifications of her decision in a little more detail in *Samuels*, she explicitly noted that the *Charter* implications of an unenforceable removal order were not argued before her and she therefore did not engage with that specific issue in her determination:
>
> > [30] I add that the *Charter*'s guarantee of the right to liberty is not absolute; the *Charter* only prohibits deprivations of liberty inconsistent with principles of fundamental justice. <u>The Respondent makes no submissions on whether detention for a limited (though admittedly potentially significant) period, of a person who is a danger to the public is in fact inconsistent with such principles. In the absence of any debate on this point, I do not think it this Court's role to re-write the statute in the way suggested by the Respondent.</u>
> >
> > [Emphasis added by Member.]

> As such, the decisions in *Isse* and *Samuels* do not squarely address the issue that I must decide: namely, whether the unenforceability of Mr. Taino's removal order renders his detention arbitrary contrary to s. 9 of the *Charter*. As such, I find that they are not determinative of the issue before me.

[65] It is true that much has developed in the decade since *Samuels* and *Isse* were issued, including numerous trial and appellate decisions in different provinces on *habeas corpus* applications based on section 9 of the *Charter*. In addition, Justice Fothergill issued his decision in *Brown v Canada (Citizenship and Immigration)*, 2017 FC 710 [*Brown*], upholding the constitutionality of the detention scheme, while certifying a question regarding length of detention that is currently on reserve at the Federal Court of Appeal. I will turn to some of this case law next, none of which I feel justifies the analysis or conclusion in this case, or has the effect of reversing the decisions in *Samuels* and *Isse*.

[66] The language of remaining "hinged" to an immigration control purpose emerged through Justice Nordheimer's *habeas corpus* decision in *Ali v Canada (Attorney General)*, 2017 ONSC 2660. It has been cited by, among other judges, Justice Morgan in *Scotland v Canada (Attorney General)*, 2017 ONSC 4850 [*Scotland*], another *habeas corpus* case. It was also a key part of Justice Fothergill's observations in *Brown* at para 144:

> In *Ali v Canada (Attorney General)*, 2017 ONSC 2660 at paragraph 17 [*Ali*], Justice Ian Nordheimer of the Ontario Superior Court of Justice held that continued detention is proper only so long as it is necessary to further a legitimate immigration purpose: "A detention cannot be justified if it is no longer reasonably necessary to further the machinery of immigration control" (citing *Chaudhary* at para 81). *Ali* concerned an individual whose nationality could not be ascertained, and who was said to be uncooperative with Canadian authorities in their efforts to establish his country of origin. Justice Nordheimer said the following at paragraph 27:

> [27] The onus remains on the Government to justify a continued detention. In order to do so, the Government must establish that the continued detention remains hinged to the immigration purpose for which the detention was originally ordered. To authorize the Government to hold a person indefinitely, solely on the basis of noncooperation, would be fundamentally inconsistent with the well-established principles underlying ss. 7 and 9 of the *Charter*. It would also be contrary to Canada's human rights obligations.

[67] Ultimately, the Member's key finding in the Decision is that Mr. Taino's detention has become unhinged from an immigration control purpose, and thus arbitrary, because he will not currently be removed. She conceded, as do the parties, that his unenforceable removal order could conceivably change in the future, such that it may once again become enforceable. Indeed, in the January 7 PRRA approval letter to Mr. Taino, IRCC advised: "It is important for you to understand that if there is a change in circumstances, your file may be re-examined. If it is later determined that you are no longer at risk, the stay of your removal order may be cancelled and the arrangements to enforce your removal from Canada resumed."

[68] In effect, the Member held that the mere fact that the Applicant would not be removed due to the stay, and the resulting unenforceable removal order, meant that his detention had been unlawful from the moment his positive PRRA was issued. This determination became interwoven with and determinative of her analysis of all aspects under consideration, including section 248 of the *Regulations*. For instance, the Member wrote at paragraph 38 of her Decision:

> Mr. Taino's detention to date has been approximately 2.5 months. While not unduly lengthy, this is not an insignificant amount of time and I find that it favours release. I also note that it has now been almost 7 weeks since Mr. Taino was granted a stay of removal and his detention became unhinged from its immigration

> purpose. Therefore, for more than half of the time he has been detained, his detention has been unlawful.

[69] The Member herself framed the issue as being confined to the particular circumstances before her, namely whether the unenforceability of Mr. Taino's removal order rendered his particular detention arbitrary. She referred to certain of the "*habeas* cases" that have come to that conclusion. I do not agree that the recent *habeas* cases that have released individuals for arbitrary detention have done so simply because removal is not contemplated or imminent. Rather, there has been something more in each of those cases, such as "indefinite" detention. While the cases, as pointed out above, are highly contextual and turn on their facts, the *habeas* releases resulting in findings of arbitrary detention have differed from Mr. Taino's in two principal ways.

[70] First, the test for *habeas corpus* decisions differs from the statutory test under the *Act* and the *Regulations* for which Mr. Taino has brought this judicial review, and which I have outlined above (and further discussed below in the context of the section 248 balancing). Rather, to obtain an order of *habeas corpus*, the applicant must first establish a deprivation of liberty, and once proven, a legitimate ground to question its legality. The onus then shifts to the respondent to show that the deprivation of liberty was lawful (*Mission Institution v Khela*, 2014 SCC 24 at para 30).

[71] Simply put, the *habeas corpus* test and the remedy are not equivalent to those provided under Canada's immigration scheme. The jurisdictional distinctions surrounding *habeas corpus* applications in the immigration context have themselves been the subject of recent commentary in *Canada (Public Safety and Emergency Preparedness) v Chhina*, 2019 SCC 29 [*Chhina*] (and

other leading appellate cases such as *Chaudhary v Canada (Public Safety and Emergency Preparedness)*, 2015 ONCA 700 [*Chaudhary*]).

[72] Second, in the *habeas* cases where detention was found to be unlawful under section 9 of the *Charter*, much longer periods of detention had elapsed than has been the case for Mr. Taino. To take three examples, in *R v Ogiamien*, 2016 ONSC 4126, aff'd in part by *Ogiamien v Ontario (Community Safety and Correctional Services)*, 2017 ONCA 839, a detention of 25 months was held to violate section 9. There, the detainee was not alleged to have posed a danger to public. In *Ali v Canada (Attorney General)*, 2017 ONSC 2660, the immigration detention of over seven years was held to violate section 7. While the ID found Mr. Ali to be a danger to the public, the Court described the danger in muted terms, stating that he had "engaged in petty crimes that are entirely consistent with the criminal activities of a drug addict" (at para 24). Finally, in *Scotland*, the *habeas* application was granted after Mr. Scotland had been in detention about 17 months total while he was not considered a danger to the public.

[73] Mr. Taino also points to other authorities which he argues support the Member's Decision. For example, in *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 [*Charkaoui*], the Supreme Court acknowledged that in principle, the *Act* imposes detention "only pending deportation" (at para 105).

[74] I note, however, that *Charkaoui* focused on the security certificate regime, and its analysis focused on provisions and situations related to that part of the *Act*. It also predated *Samuels* and *Isse*, which both incorporated *Charkaoui* in their reasons. Finally, *Charkaoui* also

noted the importance of protecting the public. Chief Justice McLachlin, writing for the Court, opened the decision with these words: “One of the most fundamental responsibilities of a government is to ensure the security of its citizens” (at para 1).

[75] Mr. Taino also cites *Chaudhary*, where the Court of Appeal for Ontario stated as follows in the context of a *habeas corpus* application (at para 81):

> A detention cannot be justified if it is no longer reasonably necessary to further the machinery of immigration control. Where there is no reasonable prospect that the detention’s immigration-related purposes will be achieved within a reasonable time (with what is reasonable depending on the circumstances), a continued detention will violate the detainee’s ss. 7 and 9 *Charter* rights and no longer be legal. In responding to the application, the Minister must satisfy a court that, despite its length and uncertain duration, the continued detention is still justified.

[76] Here, we have neither a *habeas corpus* application, nor a situation of indefinite detention. Rather, we have a long detention, at least as classified by the Immigration and Refugee Board of Canada’s *Chairperson Guideline 2: Detention* (after this judicial review, now lasting over 100 days). And while Mr. Taino’s detention may no longer be as strongly hinged to immigration control purposes because one hinge has been taken off the door to his release, namely by the positive restricted PRRA and resulting stay of removal, a second hinge nonetheless continues to attach the door preventing his freedom: his present and future danger to the Canadian public, as found both in his danger assessment, and also in the Member’s Decision.

[77] Finally, Mr. Taino emphasizes *Brown*, pointing out that Justice Fothergill of this Court held that “there may be circumstances where immigration detention violates the *Charter* because it has continued for an excessive period of time, there is no reasonable prospect of removal to the

detainee's country of citizenship, or the conditions of detention have become intolerable" (at para 4, emphasis added).

[78] I note that the length of detention is only one element to be considered. In Justice Fothergill's laundry list of minimal requirements for lawful detention for immigration purposes under the *Act* and the *Regulations*, contained in paragraph 159 of *Brown*, he noted that "[d]etention may continue only for a period that is reasonable in all of the circumstances, including the risk of a detainee absconding, the risk the detainee poses to public safety and the time within which removal is expected to occur" (at para 159(e), emphasis added).

[79] Indeed, the danger was a large part of the restricted PRRA decision, comprising approximately half of the officer's 20-page decision, which outlined in detail Mr. Taino's history of convictions, reprieves, and repeated non-compliance with prior orders and probation terms. And as already noted, the Member conceded that the situation could change, writing "Mr. Taino does not have permanent status in Canada and there are circumstances that could arise in the future that would result in the Minister seeking to revisit the issuance of Mr. Taino's stay" (at para 109).

[80] In sum, I find that it was unreasonable for the Member to depart from the most relevant precedents, namely those decisions rendered for immigration purposes under the *Act* and the *Regulations*, rather than those that decided detention issues based on a different legal test (*i.e.* *habeas corpus*) and in different contexts (*i.e.* longer detentions that had, in the main, become unhinged). To render a reasonable decision as to why *Isse* and *Samuels* no longer apply, the

Member "would have to be able to explain why a different interpretation is preferable by, for example, explaining why the court's interpretation does not work in the administrative context: M. Biddulph, "Rethinking the Ramification of Reasonableness Review: *Stare Decisis* and Reasonableness Review on Questions of Law" (2018), 56 *Alta. L.R.* 119, at p. 146. There may be circumstances in which it is quite simply unreasonable for an administrative decision maker to fail to apply or interpret a statutory provision in accordance with a binding precedent" (*Vavilov* at para 112). I find that situation to be present here.

B. *Did the Member Unreasonably Conduct Her Assessment of Section 248 of the Regulations?*

[81] I agree with the Minister that there were problems in the Member's section 248 assessment. First, by engaging in a section 9 *Charter* analysis to deem the detention unlawful for arbitrariness, the Member unreasonably predetermined the outcome of the assessment for detention or release mandated by section 248 of the *Regulations*. She introduced her analysis of whether to release or not (the section 248 assessment) with the following words at paragraphs 33-34 of her Decision:

> The jurisprudence on section 7 of the *Charter* has evolved considerably since Justice Rothstein's decision in *Sahin*. In the last 25 years, the Supreme Court has provided significant guidance on the application of *Charter* section 7. For example, it is now accepted that arbitrariness is a principle of fundamental justice and that a deprivation of a person's liberty interest will violate s. 7 of the *Charter* if it is found to arbitrary. Therefore on a prima facie basis, given my findings below that Mr. Taino's detention is arbitrary contrary to s. 9 of the *Charter*, I find that his ongoing detention also violates *Charter* s. 7.
>
> The fact that I have found Mr. Taino's detention to be arbitrary is therefore sufficient to find a s. 7 *Charter* breach and it warrants the release of Mr. Taino pursuant to s. 24(1) [of the *Charter*]. However, because of the statutory requirement that I specifically

> assess the factors set out in section 248 of the IRPR, I am still mandated by law to canvas the s. 248 factors and therefore have done so below.

[82] The outcome of the section 248 analysis was thus a foregone conclusion. Indeed, in finding the detention to be unlawful and arbitrary under section 9, and thus under section 7 as well, she foreclosed a proper section 248 balancing. For instance, the Member placed reduced weight on the reason for the detention (as set out in paragraph 248(a) of the *Regulations*), namely the danger posed to the public, due to the *Charter* breach. Section 248 reads as follows:

248 If it is determined that there are grounds for detention, the following factors shall be considered before a decision is made on detention or release:	**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 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, the Canada Border Services Agency or the person concerned;	**d)** les retards inexpliqués ou le manque inexpliqué de diligence de la part du ministère, de l'Agence des services frontaliers du Canada ou de l'intéressé;
(e) the existence of alternatives to detention; and	**e)** l'existence de solutions de rechange à la détention;
(f) the best interests of a directly affected child who is under 18 years of age.	**f)** l'intérêt supérieur de tout enfant de moins de dix-huit ans directement touché.

[83] I also agree with the Minister's observation that that the Member erred in determining the end point of the anticipated length of detention under paragraph 248(c). The Member stated that the length of detention must be measured to the point when a detainee can be removed from Canada, as opposed to the length of time until release. In coming to this conclusion, she cited Justice Rothstein's comment in *Sahin* that "[a] consideration that I think deserves significant weight is the amount of time that is anticipated until a final decision, determining, one way or the other, whether the applicant may remain in Canada or must leave" (Decision at para 44).

[84] The Member went on to explain that it is "in this context, not in the context of how long it might take the Minister to find a suitable alternative, that the length of detention is to be assessed" (Decision at para 45). The Member also relied on *Chhina* at paragraphs 135-37 (minority judgment) in this regard. In oral argument, counsel for Mr. Taino also argued that *Canada (Citizenship and Immigration) v Li*, 2009 FCA 85 [*Li*] supported the Member's interpretation of paragraph 248(c).

[85] I agree with the Minister that the Member unreasonably interpreted the period to be assessed. I do not read *Sahin*, *Chhina*, or *Li* as stating that one must only consider the anticipated time until removal. In many cases where an individual is being detained, the removal date will indeed be the relevant date that the ID has to consider. But in unusual cases such as Mr. Taino's, where removal has been stayed through the issuance of a positive (restricted) PRRA, the relevant measure of time must be premised on a future release date, because the removal has been stayed. In Mr. Taino's situation, that would mean when adequate conditions for release have been secured to protect the public from the danger he poses. Indeed, the Member considered the

Minister's efforts towards implementing a release plan, but expressed concerns regarding the lack of concrete plans or timelines adduced by the Minister.

[86] In short, the Member could and should have simply ruled on whether to continue the detention or to release on the basis of the toolkit provided to her by the statute, namely section 248 of the *Regulations*, rather than predetermining it with a *Charter* analysis. Certainly, *Charter* considerations could have been used to consider aspects such as the length of time in detention but, as *Sahin* and other cases have held since, the section 248 factors comply with the demands of section 7. The scheme of the *Act* and *Regulations* has been held to comply with the *Charter* in many cases since, including *Brown*.

[87] Ultimately, there was no need for the Member to resort to a *Charter* analysis when she could have decided the matter simply by applying principles of administrative law and statutory interpretation (*Chieu v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3 at para 19). Those principles of administrative law and statutory interpretation were well established, and could have been used to arrive at the conclusion she did, which was one open to her – namely that Mr. Taino should be released under conditions that addressed his risks. This brings me to the final issue that I will address in these Reasons.

C. *Were the Conditions Imposed on Mr. Taino Reasonable in the Circumstances?*

[88] The Member's release order contained four reporting requirements, namely that Mr. Taino:

1. present himself at the date, time and place that a CBSA officer or ID requires him to appear to comply with any obligations imposed on him under the *Act*, including removal, if necessary;
2. provide CBSA, within 48 hours of his release, with his address and advise CBSA in writing of any change in address within 48 hours of the change being made;
3. inform a CBSA officer, within a reasonable period of time, of any charges or criminal convictions subsequent to release; and
4. report to an officer at the CBSA office in Mississauga every three months, which frequency may be reduced.

[89] Given the nature of Mr. Taino's past conduct, danger to the public, and acknowledged inability to overcome a long-standing drug addiction (in his testimony before the ID), I find that the conditions placed upon his release by the Member were unreasonable, in that they provided insufficient oversight both in addressing his underlying addiction and protecting the public from the danger he posed.

[90] In arriving at these release conditions, the Member noted that there "was a lack of alternatives" before her. However, the Minister had clearly stated that the officer involved was seeking a place at one of two substance abuse programs in Toronto. In any event, subsection 58(3) of the *Act* provides the ID with the authority to "impose any conditions that it considers necessary, including the payment of a deposit or the posting of a guarantee for compliance with the conditions."

[91] Particularly in light of Mr. Taino's history, which included robbery of a stranger's car, despite prior stringent conditions imposed on him by the ID, and other disturbing offenses noted by the Member in her Decision, I find that these lax reporting conditions were unreasonable. Alternatives to detention could have included consideration of a bondsperson, a residence, supervision, drug counselling, and more meaningful reporting – namely just some of the conditions that were imposed in his previous release (in August 2018, as summarized above). While there is no guarantee that these options would have been available, they should at minimum have been explored. Instead, the Member simply relied on the criminal justice system, finding (at para 107):

> As is the case with any Canadian citizen or other person who cannot lawfully be detained for immigration purposes, the danger that Mr. Taino poses is in the hands of the Canadian criminal justice system. In this regard, I note that Mr. Taino has more than a year of criminal probation remaining and is therefore subject to the significant terms and conditions imposed upon him in that regard for as long as the criminal justice system deems appropriate.

[92] I have already noted my disagreement with the finding that he was unlawfully detained. Furthermore, in light of his violent past and danger to the public, the Probation Order only provided standard assurances that he would keep the peace and good behaviour. It lacked any specificity as to a substance abuse program or residential supervision, and otherwise simply left too much to chance in protecting the public, and was not nearly sufficiently robust in light of the finding of danger (*Canada (Public Safety and Emergency Preparedness) v Ali*, 2018 FC 552 at para 47) to meet the requirement to "virtually eliminate" the risk of the danger posed (*Canada (Public Safety and Emergency Preparedness) v Lunyamila*, 2016 FC 1199 at paras 45, 59, 85 and 116).

[93] It is my hope, as expressed to the parties in our teleconference yesterday, that any conditions placed on Mr. Taino going forward will be far more responsive to the risks that have materialized in the past and will be sufficiently robust to address the various concerns raised in his particular situation.

VI. Proposed Question for Certification

[94] At the judicial review hearing, Mr. Taino proposed the following question for certification:

> *Does section 9 of the Charter preclude detention under the Act of a foreign national or permanent resident when no removal proceedings are contemplated against that person?*

[95] In responding to the Minister's post-hearing submissions on this question, Mr. Taino's counsel stated that he is not wed to the proposed question, writing: "it has been decided that he will not now be removed or, put plainly, that he has a functional right to stay. In these circumstances, does s. 9 preclude the Minister from using deportation legislation to seek his detention?"

[96] However, I find that the errors in this case arise from the specific manner in which the Member approached her Decision. The determinative issues, in my view, do not raise an issue of broad significance or general importance that transcend the interests of the parties (*Lunyamila v Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22 at paras 44-47).

[97] That is not to say a similar question might not be worthy of certification in the future, but at least these dispositive problems were based very much on the specific circumstances of the underlying decision:

a. Unnecessarily resorting to a *Charter* analysis, finding a breach, and employing a subsection 24(1) *Charter* remedy, when the statutory tests and remedies under the Member's home statute (the *Act*) and *Regulations* would have achieved the same outcome, *i.e.* that the Applicant should be released, subject to a suitable release plan;
b. Using that *Charter* determination to predetermine the test set out in section 248 of the *Regulations*;
c. Misstating the time period by which the detention should be measured under paragraph 248(c) of the *Regulations*; and
d. Setting forth unreasonable conditions for release, which did not adequately protect against the danger that the Member had noted.

VII. Conclusion

[98] Having explained why I feel the Decision was unreasonable, the fact is that the Applicant now has no immediate prospect of removal and comes before this Court at an unprecedented moment in the midst of a declaration of emergency, during which he finds himself housed in an institution, which itself poses significant risks. Mr. Taino has testified before the ID that he has hit "rock bottom," and is committed to changing his ways for his family and loved ones. He has now been given a unique chance through his positive (restricted) PRRA to remain in Canada, should he comply with the law and avoid the issues that have led to his problems in the past.

[99] At this moment when the COVID-19 pandemic is making the future very precarious for many, including Mr. Taino, it behooves all those involved in the oversight of his matters to ensure a just and expeditious outcome, such that he is released as soon as the one basis for his detention – the danger to the public – has been adequately mitigated by a suitable alternative to detention. This will protect not only the public, but also himself, from the risks otherwise posed by his release.

JUDGMENT in IMM-1495-20

THIS COURT'S JUDGMENT is that:

1. The judicial review is granted.

2. The matter is to be sent back to the same Member that made the Decision under review.

3. There are no questions of general importance for certification.

4. There are no costs.

5. Should any further issues in relation to the release of Mr. Taino arise, I remain seized of the matter.

"Alan S. Diner"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1495-20
STYLE OF CAUSE:	THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS v ANDREW JOHN TAINO
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MARCH 13, 2020
JUDGMENT AND REASONS:	DINER J.
DATED:	MARCH 25, 2020

APPEARANCES:

Daniel Engel David Knapp	FOR THE APPLICANT
Simon Wallace	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Attorney General of Canada Toronto, Ontario	FOR THE APPLICANT
Refugee Law Office Barristers and Solicitors Toronto, Ontario	FOR THE RESPONDENT