Federal Court  Cour fédérale

Date: 20200323

Docket: IMM-1626-20

Citation: 2020 FC 405

Ottawa, Ontario, March 23, 2020

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Applicant

and

DAWEI SHEN

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Minister of Public Safety and Emergency Preparedness seeks judicial review of a decision made by the Immigration Division of the Immigration and Refugee Board of Canada on February 24, 2020 [Decision]. The Immigration Division ordered the release of the Respondent, Dawei Shen, from immigration detention with two bondspersons as well as 22 terms and conditions.

[2] Between September 3, 2019 and January 27, 2020 the Respondent had seven detention reviews. In each review, the Immigration Division ordered that the detention of the Respondent continue.

[3] On February 24, 2020, the Immigration Division ordered the release of the Respondent as it was satisfied that the new proposed conditions were a reasonable alternative to continued detention.

[4] For the reasons that follow, this application is dismissed.

II. **Background Facts**

[5] The Respondent entered Canada at Vancouver International Airport on August 31, 2019. He was travelling on a Mexican passport in the name of Dawei Shen Guillen, and stated that he wanted to explore investment opportunities in the marijuana industry in Canada. He was travelling with 7 cell phones and over $10,000 in undeclared currency.

[6] The Canadian Border Services Agency [CBSA] determined that the Mexican passport was fraudulent. The Respondent was detained on the basis that his identity could not be established. The Respondent then admitted that he was a citizen of China and provided CBSA with Chinese identity documents. CBSA found that the documents appeared to have been tampered with, or lacked security features.

[7] On September 3, 2019, the Respondent made a refugee claim, alleging that he feared persecution if returned to China.

[8] Between August 31 and October 1, 2019, CBSA conducted several interviews with the Respondent. On September 26, 2019, the Respondent told CBSA that he was being accused in China of obtaining illegal financing for his company. On October 31, 2019, the Respondent stated that if he was released from detention, he would call in a debt owed to him by a friend and use that money to support himself in Canada.

[9] On November 14, 2019, CBSA confirmed that the Respondent was wanted in China for "illegally absorbing public deposits." CBSA consulted with an expert on Chinese law who stated that the equivalent offence in Canada would likely be fraud over $5,000, contrary to s. 380 of the *Criminal Code*.

[10] The Respondent remained in immigration detention between September 1, 2019 and February 24, 2020 with periodic detention reviews. At his January 27, 2020 detention review, the Respondent proposed an alternative to detention that included a bondsperson and electronic monitoring. Member Ko ordered the Respondent's continued detention, since this alternative to detention did not adequately address the fact that he was a flight risk.

[11] At his February 24, 2020 detention review, the Respondent and two proposed bondspersons testified before Member Osborne. At the conclusion of the hearing, the Respondent was released on conditions which included electronic monitoring, house arrest, and $108,000 in bonds from the two bondspersons. Oral reasons were provided by Member Osborne.

[12] On March 6, 2020, on consent of the parties, Mr. Justice Gascon stayed the release order of February 24, 2020 until the earlier of the final determination of this judicial review or the outcome of the Respondent's next detention review hearing scheduled for March 25, 2020.

III. **Issues and Standard of Review**

[13] The issue for determination is whether the Decision is reasonable.

[14] The Applicant submits that the Decision is unreasonable for two reasons: (1) Member Osborne failed to provide an explanation as to how the bondspersons would fulfil their statutory role of ensuring the Respondent's compliance with conditions; and (2) she failed to provide clear and compelling reasons for departing from the previous decisions in which electronic monitoring and the posted bond were found not to be appropriate alternatives to detention.

[15] Since the Supreme Court of Canada decision in Can*ada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], the starting point for establishing the standard of review of a decision by an administrative tribunal is the presumption that the standard is reasonableness. While this presumption is rebuttable, none of the situations identified as warranting a different standard are present in this application: *Vavilov* at paras 16 and 17.

[16] 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.

[17] The burden is on the party challenging the decision to show that it is unreasonable. Flaws or shortcomings in the decision must be more than superficial or peripheral to the merits of the decision. They must be sufficiently central or significant to render the decision unreasonable: *Vavilov* at para 100.

IV. **Legislation**

[18] Relevant to this matter is that in determining whether or not to release a person from immigration detention, subsection 58(1) of the *Immigration and Refugee Protection Act*, SC 2001, c27 [*IRPA*] requires the Immigration Division to release the detainee unless they are unlikely to appear for certain matters including removal from Canada or a proceeding that could lead to such removal.

[19] The factors to be taken into account when considering whether a person detained is to be released or continue to be detained are set out in section 248 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*Regulations*]. Six factors are stipulated including the reason for any length of time in detention, the length of time that detention is likely to continue if that can be assessed, unexplained delays or lack of diligence caused by the CBSA or the detainee, the only alternatives to detention and the best interests of the child directly affected was under 18 years of age.

[20] The only factor at issue in this application is in subsection 248(e) “the existence of alternatives to detention”. All the other factors were examined and have not been challenged.

V. **Member Ko's decision**

[21] Member Ko began by noting that the Applicant was seeking continued detention on the grounds of the Respondent being unlikely to appear for removal, rather than the prior grounds of identity. She also found that consideration of other factors warranted his continued detention.

[22] Member Ko set out the background of the Respondent's entry into Canada with a fraudulent Mexican passport, his various contradictory statements in relation to that passport and the fact that he had just over $10,000 that he had not fully declared. She noted that CBSA suspected the funds were proceeds of crime.

[23] After reciting further background facts, Member Ko noted that the Applicant was still concerned about the identity of the Respondent as some of the supporting documents provided were found to have been altered. She reiterated that the reason for detention was that he was unlikely to appear for removal.

[24] Member Ko reviewed the factors outlined in section 248 of the *Regulations.* This application turns on the requirement in subsection 248(e) to consider the existence of alternatives to detention before deciding whether to continue detention or approve release from detention.

[25] Member Ko determined that the proposed alternative to detention was not likely to be effective in ensuring that the Respondent maintain contact with the CBSA, and appear for removal if it became necessary. In doing so, Member Ko focused on whether the Respondent would maintain contact with the CBSA throughout his immigration process.

[26] Member Ko found that given his history of presenting a false passport and maintaining that misrepresentation for a period of time, it was likely that the Respondent would not be committed to completing the immigration process in Canada. She went on to explain why she viewed the Respondent's situation as being different from that of others who had been released. She concluded that the difference was "in the details of the proposed release plan and its likely effectiveness".

[27] Those details are discussed below in the Analysis of the Decision. In effect, they provided a roadmap for the Respondent to follow in order to improve his release plan.

VI. **The hearing before Member Osborne and the Decision**

[28] The Decision was provided orally at the end of the hearing on February 24, 2020.

[29] The transcript of the hearing shows that Member Osborne began by indicating she was required to order the Respondent's release unless satisfied that he was unlikely to appear for removal. She added that even if there were grounds for continued detention, there were various other factors, which she listed, that must be considered under the legislation.

[30] The Applicant indicated that they would be relying on the submissions and previous decisions made it past detention reviews. Member Osborne, who had conducted one of the previous detention reviews, indicated she was familiar with the previous transcript and submissions, so the Applicant should focus on updates and anything to supplement the previous submissions.

[31] The Applicant maintained the position that it was established in the prior proceeding that the Respondent was unlikely to appear for removal. They then went on to discuss the factors set out in section 248 of the *Regulations*.

[32] In response to a question from Member Osborne the Applicant indicated that they did not yet fully accept the Respondent's identity but did accept that he is known to Chinese officials.

[33] Following those brief submissions by the Applicant, the Respondent briefly testified and was cross-examined about his financial resources, his access to funds from friends or family and his anticipated monthly expenses in Canada.

[34] Next the bondsperson Simon Liao testified. He reviewed the nature of his employment income and expenses and confirmed that he did not know the Respondent. Mr. Liao's connection to the Respondent was that a friend of his was the cousin of the Respondent and had asked if he could help him. He confirmed that he was willing to live in a house with the Respondent, who had to stay inside the house because of immigration requirements. He stated that he did not understand the nature or details of those requirements.

[35] Mr. Liao indicated he would be able to leave work and respond to a call from the alarm company if required. He was also aware that no sharp objects or cutting tools would be allowed in the residence because of the electronic monitoring conditions and that CBSA would have access to the residence to search for any such tools.

[36] Member Osborne quizzed Mr. Liao as to what had changed since the previous hearing so that he would now be willing and able to live with the Respondent and answer the phone if the security company or alarm company called. The reply was that at the previous hearing, he had not thought about it and believed that the Respondent would rent a place, live by himself and be monitored by the security company. Once he understood differently, he did not mind living with the Respondent, as they were both single and spoke the same language.

[37] Submissions from the parties followed as no other witnesses were called.

[38] The Respondent stated that although he had no personal relationship with Mr. Liao, he was the best option because there were no personal friends or family members in Canada.

[39] Since no bondsperson would be able to come forward with a personal connection to the Respondent and, given that detention is to be a last resort, it was submitted that to overcome the deficiencies the proposed conditions for release were very strong. The monitoring and security companies were each already working with an immigration release detainee in the area which meant that CBSA already had a relationship with them.

[40] Member Osborne specifically questioned the Respondent about two matters that had been raised at the hearing before Member Ko.

[41] One such matter was that Member Osborne was interested in why Mr. Liao, who did not previously testify, was able to provide more support to the Respondent than previously. The response was that in the period since the prior hearing, arrangements were worked out with

Mr. Liao's employer. In addition, given the previous uncertainty, a secondary bondsperson was arranged as a backup for Mr. Liao.

[42] The other matter raised by Member Osborne was a concern Member Ko mentioned in the previous decision about the level of deception the Respondent used when dealing with CBSA during the identity investigation. Member Osborne asked how the alternative to detention addressed those credibility problems. The answer was that in November the Respondent began cooperating, being very forthcoming and candid about his circumstances in China. For many months he had been cooperative in every way with the CBSA and that should count in his favour to rectify some of his early behaviour.

[43] The Applicant's submissions were that electronic monitoring was found by Member Ko not to be a great alternative in cases of flight risk. They also focussed on the unsuitability of Mr. Liao as a bondsperson both because of his lack of a personal relationship with the Respondent and the fact that the amount of his bond was only $8000 which he indicated would not impact him if he lost it.

[44] The Applicant stated that overall, the parts of the previously proposed plan before Member Ko that were found to be insufficient were not rectified by the proposed conditions put before Member Osborne.

[45] Member Osborne found that in the previous hearing a number of deficiencies had been noted with respect to the alternative to detention proposed at that time. She concluded that:

> There have been a number of changes or amendments proposed today to address those deficiencies, and so I find on a balance of probabilities that those changes are likely to be effective in mitigating the flight risk that you pose, and I am finding – – I will be ordering your release today subject to strict terms and conditions and as proposed substantially by your counsel in Exhibit P-8; and following a review of those conditions, I will also give the Minister an opportunity to contribute or make suggestions with respect to conditions.

VII. **Analysis**

[46] One of the many things confirmed in *Vavilov* is that a reviewing court is to "read the decision maker's reasons in light of the history and context of the proceedings in which they were rendered" as doing so may explain an aspect of the reasoning process that may not be apparent from the reasons themselves: *Vavilov* at para 94.

[47] The Applicant has argued that Member Osborne "failed to provide clear and compelling reasons for departing from the previous decisions in which electronic monitoring and the posted bond were found to be not appropriate alternatives to detention".

[48] This argument fails for two reasons.

[49] First, Member Osborne provided explicit, clear and compelling reasons for departing from Member Ko's conclusion. Member Ko did not simply find that electronic monitoring and the posted bond were not appropriate alternatives to detention. She pointed out that other cases in which individuals had been released differed from the Respondent's in the details of the proposed release plan and in its likely effectiveness. As an example, Member Ko mentioned that other cases had other sureties in place who were also part of the monitoring and who had put up

their own money and agreed to take an active role. At that time, Member Ko observed that Mr. Liao was not expecting to have an active role in providing supervision and his employment would likely mean he would not able to be part of any response plan.

[50] Those obstacles were fully addressed in the release plan presented to Member Osborne. After reviewing the proposed conditions, Member Osborne noted that the proposed second bondsperson was also a secondary contact in the event of an alarm and he had testified that he was willing to attend at the residence if called by the security or alarm company. Member Osborne found that having two bondspeople ready to respond, putting up their own money and agreeing to take an active role in monitoring the Respondent together with the proposed house arrest were sufficient, on a balance of probabilities, to mitigate the possible flight risk by the Respondent. That finding was open to Member Osborne and she clearly addressed the specific concerns articulated by Member Ko.

[51] Second, as a result of another recent case by the Supreme Court of Canada, *Canada (Public Safety and Emergency Preparedness) v Chhina*, 2019 SCC 29 [*Chhina*], the role to be played by previous decisions of the Immigration Division has come under scrutiny, particularly in light of the results of an external audit commissioned by the Immigration and Refugee Board examining how the legislation was being administered with respect to long-term detentions.

[52] In this court, Mr. Justice Grammond, when considering an application to stay the release of an immigration detainee, had occasion to make these comments about the effect of *Chhina* on the judicial review of immigration detention decisions:

> [20] Relying on certain passages in *Canada (Minister of Citizenship and Immigration) v Thanabalasingham*, 2004 FCA 4, [2004] 3 FCR 572, the Minister argues that the ID errs when it fails to clearly explain why it departs from its previous decisions. However, as I mentioned earlier, the Supreme Court criticized this approach in *Chhina* and noted that this could lead to "self-referential reasoning" (paragraph 62). On this point, Justice Abella stated, "It is not enough for the Minister to rely on previous Immigration Division decisions to satisfy the Immigration Division on the s. 58 and s. 248 inquiry" (paragraph 127). Therefore, the ID should not be faulted for departing from its earlier decisions in rendering its decision on May 13.
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> *Canada (Public Safety and Emergency Preparedness) v Baniashkar*, 2019 FC 729 at para 20.

[53] This admonition by Justice Abella led Mr. Justice Diner to sum up the current state of the law this way in *Canada (Public Safety and Emergency Preparedness) v Arook*, 2019 FC 1130:

> [25] The framework for assessing the reasonableness of an ID detention decision that departs from decisions made in prior detention reviews was set out by the Federal Court of Appeal in *Canada (Minister of Citizenship and Immigration) v Thanabalasingham*, 2004 FCA 4 [*Thanabalasingham*], where, the Court held that while prior decisions are not binding on a member, departing from prior decisions to detain requires "clear and compelling" reasons for doing so (at para 10).
>
> [26] This Court has since clarified that the lack of "clear and compelling" reasons to depart should not be interpreted as a discrete ground for judicial review, but instead as an application of the reasonableness standard (*Canada (Public Safety and Emergency Preparedness) v Mohammed*, 2019 FC 451 at para 23). Further, in the wake of the Supreme Court's decision in *Canada (Public Safety and Emergency Preparedness) v Chhina*, 2019 SCC 29 [*Chhina*], where the Court commented that IRPA's current detention review process – or 'scheme' as the Court referred to it – is susceptible to "self-referential reasoning" (at para 62), this Court has cautioned against faulting the ID for departing from earlier decisions (*Canada (Public Safety and Emergency Preparedness) v Baniashkar*, 2019 FC 729 at para 20).

[54] The end result of the Applicant's argument concerning a lack of clear and compelling reasons is that I disagree that Member Osborne did not provide clear and compelling reasons. To the contrary, the reasons were precise and detailed. They directly addressed the evidentiary weaknesses that Member Ko had previously identified. In addition, the current jurisprudence of this Court and the Supreme Court indicates that "clear and compelling reasons" must avoid "self-referential reasoning" by undertaking a fresh review of the detention with a fulsome review of the lawfulness of the detention at every review hearing. I am satisfied from the record that Member Osborne conducted such a review.

[55] Member Osborne acknowledged that it is a serious ground to be unlikely to appear for removal. She referred to it as the most serious ground that could be alleged and found that it did not weigh in the Respondent's favour but, she also found that the alternatives to detention were sufficient to warrant the Respondent's release. That finding was certainly open to Member Osborne on the evidence. I would have to re-weigh the evidence to come to a contrary conclusion and that is not my role as the reviewing court.

[56] Member Osborne noted the concern of Member Ko that in dealing with the CBSA the Respondent had demonstrated a level of untruthfulness and provided false documents. Member Osborne gave the Respondent credit for speaking to CBSA when interviewed and found that his willingness to remain under house arrest would be a good faith effort to cooperate and participate in the proceedings.

[57] To put the Decision in context, it is important to note that there was evidence before Member Osborne that was not before Member Ko when she continued the Respondent's

detention. Each of the two proposed bondspeople testified before Member Osborne. Neither were heard by Member Ko who was only presented with the fact of Mr. Liao as a bondsperson.

[58] There were also extensive new conditions proposed by the Respondent to be added to or replace the conditions previously put forward to Member Ko. Those additional conditions were directly responsive to the concerns articulated by Member Ko in her oral reasons.

[59] The release plan presented to Member Ko contained, in addition to standard refugee terms and conditions, seven proposed conditions with two enhanced conditions.

[60] The release plan put in place by Member Osborne contained those put forward by the Respondent as well as additional conditions added at the hearing, some of which were refined by discussion with the Applicant. In the result, the following conditions in addition to the ones proposed to Member Ko, were imposed on the Respondent:

i. an additional bondsperson was required who was to post a $100,000 bond;
ii. a beacon installed in the residence that operates on radio frequency;
iii. the inclusion zone changed to house arrest, including the outside area, to be defined with the input of the CBSA, rather than a curfew between 9:00 p.m. and 7:00 a.m. and inclusion zone of various local municipalities;
iv. an alerts protocol establishing who will be notified of any alerts or breaches of the electronic monitoring system or zone; the protocol to be established with input of the CBSA and must include notification to the two bondspeople;
v. CBSA to have the opportunity to review the monitoring contract and test the monitoring equipment in the residence; any concerns by CBSA are to be raised with the Respondent's counsel and the contracting party. If concerns cannot be resolved there is a right to return to the Immigration Division for determination;
vi. the two electronic monitoring bracelets are to be affixed to the Respondent and the monitoring equipment within the residence activated in the presence of the CBSA;

vii. prior to release, the Respondent is to enter into a written contract with the security company to immediately respond to any alarm/breach and to accompany the Respondent on occasions when he will need to travel outside of his residence as provided for in the conditions;

viii. upon release the Respondent is to remain at all times within his residence, the address of which is to be provided to CBSA in advance and approved by them in advance of release and the Respondent is to notify the CBSA of any address changes or changes to the inclusion zone which CBSA must preapprove;

ix. the Respondent is authorized to leave the inclusion zone for various personal appointments such as medical, lawyers and matters with the CBSA or the IRB but 48 hours notice must be given to the CBSA and the monitoring company; any change to the inclusion zones must be approved by the CBSA and in place before the outing occurs;

x. the Respondent must be accompanied on approved outings either by one of the bondspersons or an employee of the security company; if there is a medical need the monitoring company is to be notified and it shall seek accompaniment from CBSA, the security company or a bondsperson to accompany the Respondent; in the event of a medical emergency, arrange for one of the parties to meet him at the medical facility;

xi. the Respondent is to provide consent to CBSA searching the residence at any time prior to or following release to verify compliance with the ban on possessing any tools or objects that may be used to sever or remove the electronic monitoring bracelets;

xii. Simon Liao and the Respondent must consent to a CBSA search of areas to which the Respondent has access within the residence and about the area of the residence;

xiii. any visitors to the residence must be approved in advance by the CBSA; request for visitors must be provided to the CBSA at least 48 hours in advance of the intended visit;

xiv. a landline telephone is to be installed in the residence prior to the release of the Respondent, if one is not already present, and the Respondent is to provide call records to CBSA upon request;

xv. answer the landline phone between the hours of 8:00 a.m. and 4:00 p.m. rather than submit to weekly biometric voice reporting to CBSA;

xvi. not acquire or possess any identity or travel documents unless requested to do so by the CBSA; when requested by CBSA fully cooperate in obtaining identity and travel documents; counsel is exempted from this condition.

[61] The other issue raised by the Applicant in this application is that Member Osborne did not explain how the bondspersons would fulfil their statutory role of ensuring the Respondent's

compliance with the conditions. The Applicant pointed out that Member Ko had noted that the Respondent had no family in Canada to compel him to complete the immigration process.

[62] Member Osborne had the advantage of being presented with a second bondsperson. She also accepted that there was no family in Canada but found that the two sureties were sufficient to mitigate or overcome the lack of the Respondent having any family present. Each surety was putting up their own money and had agreed to take an active role in monitoring the Respondent.

[63] Member Osborne also found that the Respondent's flight risk was mitigated by the change to house arrest, which had not been proposed to Member Ko. When that was coupled with the other new precautions and conditions, she was satisfied on a balance of probabilities that the flight risk was managed.

[64] Given the extensive and detailed new conditions, the clear findings by Member Osborne responsive to the concerns expressed by Member Ko and the outcome that the release of the Respondent is contingent upon his ability to meet, and continue to meet, all the conditions imposed, I find that the decision as a whole as set out in the reasons is transparent, intelligible and justified to the parties affected: *Vavilov* at paras 15 and 95.

[65] For all the foregoing reasons, the Decision is reasonable and the application is dismissed.

[66] Neither party proposed a question for certification nor does one arise on these facts.

JUDGMENT in IMM-1626-20

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed, without costs. No serious question of general importance is certified.

"E. Susan Elliott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1626-20
STYLE OF CAUSE:	THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS v DAWEI SHEN

JUDICIAL REVIEW HELD VIA TELECONFERENCE ON MARCH 19, 2020 FROM OTTAWA, ONTARIO AND VANCOUVER, BRITISH COLUMBIA

JUDGMENT AND REASONS:	ELLIOTT J.
DATED:	MARCH 23, 2020

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