Federal Court  Cour fédérale

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Dockets: IMM-1443-22
IMM-2354-22

Citation: 2022 FC 415

Ottawa, Ontario, March 25, 2022

PRESENT: Mr. Justice Sébastien Grammond

BETWEEN:

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Applicant

and

MAJOK THON MAWUT

Respondent

JUDGMENT AND REASONS

[1] Mr. Mawut has been detained for more than a year pursuant to the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act]. The Immigration Division [ID] ordered his release. It found that Mr. Mawut's rights under section 12 of the *Canadian Charter of Rights and Freedoms* [Charter], were breached when he was confined for more than 15 consecutive days. More generally, it found that Mr. Mawut's harsh conditions of detention warranted his release.

[2] The Minister seeks judicial review of the ID's decision. I am allowing this application. While it was reasonable for the ID to find that Mr. Mawut's conditions of detention overwhelmed any factors favouring the continuation of his detention, it was unreasonable to release him without imposing any condition mitigating the danger he poses to the public.

I. Background

A. *Mr. Mawut's Criminal and Immigration History*

[3] Mr. Mawut was born in 1989 and came to Canada in 2000 from a refugee camp in Ethiopia where he spent most, if not all of his childhood. The Canada Border Services Agency [CBSA] believes that Mr. Mawut is now a citizen of South Sudan, a country that came into existence in 2011.

[4] Mr. Mawut has a lengthy criminal record. He committed very serious offences. In 2015, he was found guilty of armed robbery and was sentenced to five years in custody. He was then found to be inadmissible to Canada for serious criminality, pursuant to paragraph 36(1)(*a*) of the Act. He was later found to be a "danger to the public" pursuant to paragraph 115(2)(*a*) of the Act. As a result, there is an enforceable removal order against Mr. Mawut.

[5] When Mr. Mawut's criminal sentence ended in November 2020, he was detained pursuant to the Act. He has been held at the Central East Correctional Centre [CECC], a provincial institution. The ID has reviewed his detention periodically since then and continued the detention until the decision challenged in this application. CBSA encountered certain challenges in removing Mr. Mawut to South Sudan, some of which gave rise to my decision in

Mawut v Canada (Public Safety and Emergency Preparedness), 2021 FC 1155. After that decision was rendered, Mr. Mawut sought a deferral of his removal. On February 11, 2022, an enforcement officer granted that request and deferred removal for a period of 60 days. On March 7, 2022, the Minister agreed to reconsider the danger opinion.

[6] It appears that Mr. Mawut suffers from serious mental health issues. There is evidence that he suffers from an array of mental health conditions and has been hospitalized several times. His behaviour in detention is erratic. His counsel states that it is impossible to obtain meaningful information or instructions from him.

B. *The ID's decision*

[7] At the December 21, 2021, detention review, Mr. Mawut argued that his conditions of detention breached section 12 of the Charter, which protects against "cruel and unusual treatment or punishment." On January 19, 2022, the ID issued a preliminary decision in which it agreed in part with Mr. Mawut's submissions.

[8] Relying on cases such as *R v Smith*, [1987] 1 SCR 1045, *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 SCR 350, and *Brown v Canada (Public Safety and Emergency Preparedness)*, 2020 FCA 130, [2021] 1 FCR 53 [*Brown*], the ID noted that treatment or punishment would only breach section 12 if it outrages society's standards of decency. It also noted the Ontario Court of Appeal's finding in *Canadian Civil Liberties Association v Canada (Attorney General)*, 2019 ONCA 243 [*CCLA*], that keeping an inmate in

their cell for more than 22 hours per day for more than 15 consecutive days constitutes a breach of section 12 of the Charter.

[9] The ID then reviewed Mr. Mawut's conditions of detention at CECC. It found that, during a COVID-19 outbreak in January and February 2021, he was kept in his cell for more than 22 hours a day for 24 consecutive days, as part of "droplet precaution measures." In fact, he was not allowed outside of his cell at all during 16 of these days. The ID found that this constituted a breach of section 12 of the Charter. The ID also considered whether Mr. Mawut's other periods of confinement for more than 22 hours per day breached section 12 of the Charter because he suffers from serious mental illness, pursuant to *Francis v Ontario*, 2021 ONCA 197 [*Francis*]. The parties do not dispute the fact that Mr. Mawut suffers from mental health issues and cognitive impairment. However, the ID reviewed the medical evidence and found a lack of clear diagnosis that could bring Mr. Mawut within the holding in *Francis*. Nevertheless, the ID found that "being locked in a cell alone and only let out for an average of one hour and forty-five minutes per day for the better part of 11 months, amounts to extraordinarily difficult conditions of detention."

[10] The ID then gave the parties an opportunity to make submissions regarding section 1 of the Charter and the application of the balancing process described in *Doré v Barreau du Québec*, 2012 SCC 12, [2012] 1 SCR 395 [*Doré*]. The ID also reminded the parties that it would need to make findings regarding the factors listed in section 248 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [Regulations].

[11] After receiving the parties' submissions, the ID issued its final decision on February 14, 2022. In light of new evidence submitted by the Minister, the ID revised its factual findings and found that, in January and February 2021, Mr. Mawut was kept in isolation for 18 (not 24) consecutive days. The ID also rejected the Minister's submissions that the justification for keeping Mr. Mawut in isolation, namely, the COVID-19 pandemic, should be taken into account when deciding whether section 12 of the Charter was breached, instead of when deciding whether such breach is justified under section 1 of the Charter.

[12] The ID then reviewed the section 1 of the Charter test, as "adapt[ed] to administrative settings" by *Doré*. It readily accepted that the protection of public health is a valid objective, and that the droplet precaution measures implemented in January and February 2021 were rationally connected to it. However, the ID found that these measures did not minimally impair Mr. Mawut's rights. It noted that Mr. Mawut tested negative for COVID-19 at the beginning of his 18-day period of isolation, and concluded that according to the guidelines then in place, there was no justification for keeping Mr. Mawut in isolation for such a prolonged period. The ID also noted that Mr. Mawut was not isolated during a much larger outbreak in May 2021.

[13] The ID then turned to remedy. It found that releasing Mr. Mawut would be a just and appropriate remedy for the breach of his Charter rights. However, the ID went on to consider the analytical framework governing detention reviews and found that its application also led to Mr. Mawut's release.

[14] The first step of this framework is to ascertain whether the grounds for detention mentioned in subsection 58(1) of the Act are present. In this regard, the ID reiterated that Mr. Mawut constitutes a danger to the public, given his criminal record that includes serious offences against the person, in particular sexual assault and armed robbery. It also found that Mr. Mawut is unlikely to appear for his removal, given his history of non-compliance with court orders, and is indeed on "the high end of the flight risk spectrum."

[15] The next step of the inquiry is to consider the factors mentioned in section 248 of the Regulations, namely, the reason for detention, the past and likely future length of time in detention, the cause of any delays and the alternatives to detention. The ID gave considerable weight to the reasons for detention, namely, the danger to the public posed by Mr. Mawut and his flight risk. It also considered that the detention had been very lengthy and that removal had been stayed for another two months. With respect to alternatives to detention, the ID noted that the CBSA's efforts had not been fruitful. Pursuant to the Federal Court of Appeal's decision in *Brown*, the ID also found that Mr. Mawut's "exceptionally harsh" conditions of detention favoured release, whether they breached section 12 of the Charter or not. Balancing all these factors, the ID found that continuing M. Mawut's detention "would be a disproportionate use of the power of immigration detention."

[16] For these reasons, the ID ordered Mr. Mawut's release on standard conditions, which included a duty to report biweekly to the nearest CBSA office and to keep CBSA informed of his residential address.

C. *The Minister's Application for Judicial Review*

[17] The Minister immediately applied for leave and judicial review of the ID's decision and requested a stay. My colleague Justice Michael Phelan granted the stay, granted leave and ordered that the application be heard on short notice (Docket IMM-1443-22).

[18] Moreover, on March 11, 2022, at the conclusion of a subsequent detention review before a different member, the ID again ordered Mr. Mawut's release and endorsed the reasons given on February 14, 2022. The Minister also applied for judicial review of this new decision (Docket IMM-2354-22). I stayed this decision, granted leave and ordered that the matter be heard together with the first application. These reasons pertain to both applications.

II. Framing the Issues

[19] The Minister is challenging the ID's decision on a wide array of grounds, which reflect the breadth of the topics covered in the decision. Thus, with respect to the Charter issues, the Minister argues that the ID should not have followed the *CCLA* line of cases from the Ontario Court of Appeal, insofar as it precludes considering the justification for the treatment at the section 12 of the Charter stage and, in any event, that it failed to give sufficient consideration to the context of the COVID-19 pandemic at the justification stage. With respect to Mr. Mawut's release, the Minister argues that the ID made no less than four reviewable errors: (1) it failed to clearly articulate the extent to which the decision to release was a result of a Charter breach; (2) if it was, the ID acted outside of its statutory mandate; (3) if not, the ID nevertheless unreasonably balanced the section 248 factors; and (4) the ID's decision to release was contrary

to this Court's jurisprudence, which requires that any danger to the public be "virtually eliminated."

[20] In my view, it is not necessary to address all these submissions. It is apparent that the ID carefully considered all the submissions put before it and took pains to provide detailed reasons regarding all aspects of these submissions. On judicial review, however, the focus of the inquiry is the line of reasoning that directly led the ID to order Mr. Mawut's release. While it spent much time analyzing the Charter issue, the ID consistently stated that the breach of section 12 of the Charter was not an independent reason for ordering Mr. Mawut's release. Rather, the ID relied on the framework laid out in the Act with respect to detention review, in particular the section 248 factors.

[21] A few excerpts from the ID's February 14, 2022 decision show that its findings regarding section 12 of the Charter were *obiter* or, at best, alternative reasons. At paragraph 2, the ID states "a balancing of the section 248 factors results in my finding that his detention has become disproportionate […]." At paragraphs 151–152, the ID noted that it had the statutory power to order a person's release and this made recourse to subsection 24(1) of the Charter unnecessary. Likewise, at paragraph 161, the ID stated that the appropriate remedy under subsection 24(1) mattered very little, because release was being ordered as a result of the balancing of the section 248 factors.

[22] In fact, while the ID took into account the breach of section 12 of the Charter it identified, it also relied on the conditions in which Mr. Mawut was detained for over a year. At paragraphs 228–229, it summarized its reasoning as follows:

> […] even if I am wrong with respect to the s. 12 breach or lack of justification, the conditions of Mr. Mawut's detention overall have been disproportionate to the interest the Minister has in detaining him, both in terms of ensuring his appearance for removal and protecting public safety. […]
>
> Release is the result of not just the breach, but the overall exceptionally harsh conditions he has endured for the majority of his time detained under the IRPA, in addition to the other regulatory factors I have identified as favoring his release. Cumulatively, I have found that these factors outweigh the Minister's interest in detaining him, notwithstanding the legitimacy of those interests.

[23] To be sure, other passages of the decision may be read as indicating that the Charter breach played a much more determinative role in the outcome, for example the mention at paragraph 7 that Mr. Mawut's release is "constitutionally-mandated." Occasional apparent inconsistencies like this may be the inevitable consequence of providing alternative grounds for the same outcome. Nevertheless, when the decision is read as a whole, it is clear that the ID did not release Mr. Mawut exclusively because of a breach of section 12 of the Charter. One must not lose sight that the ID found that for the most part, Mr. Mawut's "exceptionally harsh" conditions of detention did not breach section 12.

[24] In these circumstances, it is not necessary for me to deal with the Minister's arguments regarding the Charter. It also flows from the above that I do not agree that the ID failed to articulate the basis for its decision or exceeded its statutory jurisdiction. The central issue is the Minister's third argument, which calls into question the reasonableness of the ID's balancing of

the section 248 factors. I will also briefly address whether the ID failed to apply this Court's jurisprudence.

III. Analysis

[25] As I will not address the constitutional issue, I will show deference towards the ID's decision and review it on a standard of reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. Deference is particularly apposite with respect to the ID's assessment of the grounds for detention and balancing of the section 248 factors: *Vavilov*, at paragraph 125; see, for example, *Canada (Public Safety and Emergency Preparedness) v Thavagnanathiruchelvam*, 2021 FC 592. To use the oft-quoted phrase, deference means that the ID's reasons must be considered with "respectful attention:" *Vavilov*, at paragraph 84. Nevertheless, the decision must be based on internally coherent reasoning, and "the reviewing court must be able to trace the decision maker's reasoning without encountering any fatal flaws in its overarching logic": *Vavilov*, at paragraph 102.

[26] In my view, the ID's decision is unreasonable, but for grounds narrower than those put forward by the Minister.

[27] The Minister's basic submission is that the ID's balancing of the section 248 of the Regulations factors was unreasonable. In the Minister's view, the factors favouring detention were overwhelming, whereas the factors favouring release were weaker. The Minister concedes that Mr. Mawut's conditions of detention have been harsh, but argues that they were largely

explained by measures taken to fight the COVID-19 pandemic. In spite of the deference due to the ID, releasing Mr. Mawut in these circumstances would be unreasonable.

[28] I do not agree with the Minister. The weighing of the factors favouring release or detention lies at the core of the ID's jurisdiction. Whether one factor overwhelms the others is for the ID to decide. Indeed, in *Brown*, at paragraph 96, the Federal Court of Appeal suggested that the length or conditions of detention might overwhelm the other factors:

> There may be circumstances where a detention, by virtue of its duration or the conditions of detention affects the liberty interest of the detainee so significantly that the Charter rights of the detainee are offended and release is warranted.

[29] I note that the Minister does not take issue with the ID's assessment of each factor, except to say that the harshness of Mr. Mawut's conditions of detention is mitigated by the need to take measures to prevent the spread of COVID-19. The ID explicitly considered this last issue. I am not persuaded that it made a fundamental mistake in the assessment of the evidence.

[30] This, however, does not end the inquiry. Where the ID releases a person who is a danger to the public or poses a flight risk, it must impose conditions designed to mitigate these risks under subsection 58(3) of the Act. Here, the ID unreasonably failed to do so.

[31] I acknowledge the difficult situation in which the ID found itself. Imposing suitable conditions is largely dependent on CBSA's attempts to find alternatives to detention in a provincial jail. These attempts, in turn, appear to be dependent on the will of provincial or private organizations, such as the Salvation Army, to admit Mr. Mawut in their programs. This

will, or lack thereof, may well be contingent on the resources CBSA devotes to alternatives to detention and proper services for mentally ill immigration detainees. In this regard, this Court previously noted “the paucity of resources available to assist mentally ill immigration detainees”: *Canada (Public Safety and Emergency Preparedness) v LS*, 2019 FC 1454, at paragraph 4.

[32] The ID readily acknowledged that the basic conditions it imposed were insufficient to mitigate the risks posed by Mr. Mawut. It also stated that it would likely be difficult for Mr. Mawut to comply with these basic conditions, because he simply has nowhere to live. It even declared itself ready to impose stricter conditions in the future if a residential program were to accept Mr. Mawut. The ID recognized that its decision “is not a practical outcome,” but that “this is one of those rare cases where the practical must give way to the principle.”

[33] With great respect, I find this to be unreasonable. The ID’s decision ignores this Court’s jurisprudence that requires it to impose conditions of release intended to mitigate the danger to the public posed by Mr. Mawut. This is especially important as the ID determined that with respect to danger to the public, Mr. Mawut falls on the high end of the spectrum, a finding that neither party challenged. Unlike *Canada (Public Safety and Emergency Preparedness) v Suleiman*, 2022 FC 286 [*Suleiman*], this is not a case where the nexus to immigration purpose has ceased to exist and the detainee must be released.

[34] The ID suggested that failing to release Mr. Mawut would enable the Minister to perpetuate unacceptable conditions of detention, or even a Charter breach. In this regard, I do not wish to foreclose the possibility of releasing a detainee who poses a danger to the public where

the lack of suitable conditions results from the Minister's failure to take adequate steps and devote sufficient resources to ensure the availability of alternatives to immigration detention. However, the ID makes no mention of any evidence suggesting that this would be the case. In particular, there is no indication that the Salvation Army refused Mr. Mawut because of resource issues.

[35] I wish to add that in reaching this conclusion, I have not found it necessary to rely on the idea that the conditions of release must "virtually eliminate" any danger to the public posed by Mr. Mawut. The phrase "virtually eliminate" finds its origin in *Canada (Public Safety and Emergency Preparedness) v Lunyamila*, 2016 FC 1199, [2017] 3 FCR 428 [*Lunyamila*], and was mentioned in subsequent cases. It is not always easy to reduce a complex decision-making process to a few words. Taken too literally, the "virtually eliminate" test is virtually impossible to meet and could foreclose release whenever a detainee is a danger to the public. This, however, is not what is contemplated by section 58 of the Act and section 248 of the Regulations, nor by the decision of the Federal Court of Appeal in *Brown*. In the context of bail, which shares a preventive purpose with immigration detention, conditions must "minimize' or "attenuate" risk and be "proportional to the risk": *R v Zora*, 2020 SCC 14, at paragraphs 84, 85 and 89. I also note that in *Canada (Public Safety and Emergency Preparedness) v Ali*, 2018 FC 552, at paragraph 47, a decision rendered after *Lunyamila*, the test in the context of immigration detention was described as "any conditions of release [must be] sufficiently robust to ensure that the general public will not be exposed to any material risk of harm". Whatever the best manner to formulate the test, it was clearly not met in this case. The basic conditions imposed by the ID do not attenuate in any way, and are not proportional to the risk posed by Mr. Mawut.

IV. Concluding Comments

[36] Mr. Mawut's detention will continue to be reviewed monthly. I offer the following comments in this regard.

[37] It seems that the unspoken premise of the whole process is that Mr. Mawut will be removed to South Sudan and that his mental health issues will be addressed thereafter his removal. In this perspective, immigration detention would be temporary, and it may seem less urgent to find supports allowing for Mr. Mawut's orderly release.

[38] It is true that the ID found that Mr. Mawut's removal remains a possibility. However, as in *Suleiman*, we may well reach a point where this is no longer the case. I need not dwell upon the reasons why this might happen.

[39] Given this underlying uncertainty, it would be prudent for CBSA to plan, not only for a scenario where Mr. Mawut is removed promptly, but also for a scenario where the attempts to remove him ultimately fail and he needs to be reintegrated in Canadian society. The prospect of removing a person detained pursuant to the Act does not absolve CBSA from the responsibility of providing proper mental health supports to immigration detainees: see, for example, *Lee v Canada (Citizenship and Immigration)*, 2022 FC 344; *Lee v Canada (Public Safety and Emergency Preparedness)*, 2022 FC 383. This is especially so as prolonged detention, especially in harsh conditions, may well worsen mental health.

[40] One basic component of such a plan would be to obtain a proper psychiatric diagnosis. It is surprising that such an assessment has not yet been done and that the ID needed to piece together information scattered in the record. A proper diagnosis would allow for a more accurate assessment of the danger posed by Mr. Mawut and would provide a much clearer picture of what living conditions would be appropriate.

V. Disposition

[41] For these reasons, both applications for judicial review will be allowed and the ID's decisions are quashed. As another detention review will take place shortly, it is not necessary to remit the matter to the ID for redetermination.

[42] The Minister asks me to certify a question regarding the proper framework for analyzing allegations of breaches of section 12 of the Charter. As this question is not determinative, it should not be certified.

JUDGMENT in IMM-1443-22

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed.
2. The decision made by the Immigration Division on February 14, 2022, releasing the respondent is quashed.
3. No question is certified.

JUDGMENT in IMM-2354-22

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed.
2. The decision made by the Immigration Division on March 11, 2022, releasing the respondent is quashed.
3. No question is certified.

"Sébastien Grammond"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	IMM-1443-22 IMM-2354-22
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