Federal Court  Cour fédérale

Date: 20220322

Docket: IMM-1792-22

Citation: 2022 FC 383

Ottawa, Ontario, March 22, 2022

PRESENT: Mr. Justice Norris

BETWEEN:

ZHENGQI LEE (BY HER LITIGATION GUARDIAN, GERALDINE SADOWAY)

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. OVERVIEW

[1] Zhengqi Lee, the applicant, is a 22 year old citizen of Singapore. She arrived alone at Toronto Pearson International Airport on November 13, 2021. She had a valid Singapore passport and had obtained an electronic travel authorization for Canada less than a week earlier.

[2] On examination by a Canada Border Services Agency ("CBSA") officer, Ms. Lee confirmed that she understood English. She stated that she wished to enter Canada as a visitor. However, she had no money or luggage and was not wearing clothing that was appropriate for the season. She said she was coming to visit family and friends but did not have any contact information for them. She had nowhere to stay and could not say what she planned to do in Canada. The examining officer determined that Ms. Lee had been refused entry to Canada at the Niagara Falls Port of Entry in September 2021, a fact she had not disclosed in her recent electronic travel authorization application. This raised a concern about Ms. Lee possibly being inadmissible to Canada due to misrepresentation: see subsection 40(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*").

[3] The CBSA officer was able to contact Ms. Lee's parents in Singapore. They disclosed that she had a history of mental illness but they did not elaborate. They provided telephone numbers for some potential contacts in Canada. No one that a CBSA officer was able to contact wanted to be involved or to have Ms. Lee in their home.

[4] Ms. Lee was eventually arrested for the purpose of further examination because, in the opinion of the arresting officer, she "was not understanding the situation" or its gravity and detention appeared to be in her best interests. Ms. Lee declined the opportunity to contact counsel or her embassy. She was placed in detention at the Greater Toronto Area Immigration Holding Centre ("IHC").

[5] A CBSA officer contacted Ms. Lee's parents again the next day. Her father disclosed that she had suffered from mental health issues in the past and was very socially awkward around people she does not know. He said he wanted her to return to Singapore and was willing to book a flight for her. Ms. Lee was offered a chance to speak with her parents but she refused.

[6] On November 16, 2021, Ms. Lee was referred for an admissibility hearing before the Immigration Division ("ID") of the Immigration and Refugee Board of Canada ("IRB"). Before doing so, the Minister's Delegate had attempted to conduct an examination of Ms. Lee. Ms. Lee refused to come out of her cell for the examination and remained mute throughout. She was then re-arrested on the basis that she would not appear for her admissibility hearing. She was ultimately ordered deported on December 7, 2021.

[7] As required by section 57 of the *IRPA*, the ID has conducted regular reviews of Ms. Lee's detention since her arrest. Her continued detention has been ordered after every review. The most recent decision was made on February 21, 2022. Ms. Lee remains detained at the IHC.

[8] Apart from her initial interactions with a CBSA officer on arrival, Ms. Lee has been essentially mute the entire time she has been in Canada. She has not engaged in any meaningful way with immigration officials conducting the admissibility inquiry, with the ID during her detention reviews, or with her counsel. Designated representatives have been appointed for her under the *IRPA*. A pre-removal risk assessment ("PRRA") application was initially waived but then later initiated on behalf of Ms. Lee. She has not participated in the PRRA process at all.

[9] For purposes of proceedings in this Court, Geraldine Sadoway, an experienced immigration and refugee lawyer, has been appointed litigation guardian for Ms. Lee.

[10] Through her litigation guardian, Ms. Lee now seeks judicial review of the February 21, 2022, decision of the ID.

[11] Ms. Lee contends that the decision to continue her detention is unreasonable and that the ID unreasonably concluded that her continued detention did not violate her right to be protected against cruel and unusual treatment guaranteed by section 12 of the *Canadian Charter of Rights and Freedoms*. In her written materials, Ms. Lee asked that the ID's decision continuing her detention be set aside and that the matter be remitted to a different decision maker for redetermination. In oral submissions, counsel for Ms. Lee clarified that, since a new hearing will be held in any event, an order remitting the matter to the ID for redetermination is unnecessary and that the remedy of *certiorari* would suffice. The respondent agreed that an order remitting the matter for reconsideration is unnecessary in the event that the Court was satisfied that the application should be allowed.

[12] The parties had jointly requested that the application for leave and judicial review be determined on an expedited schedule. This schedule was approved by Prothonotary Horne in an Order dated March 7, 2022. Leave to proceed with the application for judicial review was granted on March 17, 2022, with the hearing of the application set for March 21, 2022. The Court has been informed that Ms. Lee's next detention review is scheduled for March 22, 2022, at 1:00 p.m..

[13] The hearing of the application for judicial review proceeded before me on March 21, 2022. I reserved my decision briefly.

[14] For the reasons that follow, the application for judicial review must be allowed.

[15] The reasonableness of the ID's decision to continue Ms. Lee's detention turns on the reasonableness of its application of the factors enumerated in section 248 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 ("*IRPR*"). One of these is the viability of the alternative to detention Ms. Lee proposed. As I will explain, I am not persuaded that, on the record before it, the ID's determination that the proposed alternative to detention is inadequate is unreasonable. Thus, this factor reasonably supported Ms. Lee's continued detention. However, the ID unreasonably found that other factors under section 248 also supported detention. Despite the importance of the alternative to detention issue to the ID's decision, I am not persuaded that these other flawed determinations can be excused as being insufficiently central to the decision as a whole. As a result, the decision must be set aside.

[16] I am also satisfied that the ID's determination that Ms. Lee's continued detention did not violate her rights under section 12 of the *Charter* is unreasonable because the ID failed to meaningfully come to grips with the issue before it. However, given that the decision must be set aside on other grounds, it is neither necessary nor appropriate to decide whether it should be set aside on this additional ground as well.

II. BACKGROUND

[17] Very little is known about Ms. Lee. According to her passport, she was born in China in November 1999. She arrived in Canada on a flight from the United States. She stated in her initial examination that her parents had paid for the flight because she has friends here. She said she had been in the United States for a month before coming to Canada. As noted above, Ms. Lee had attempted to enter Canada once before, on September 8, 2021. She was refused entry at the Niagara Falls Port of Entry and permitted to leave. There is no evidence of where she went or what she was doing until she arrived in Toronto on November 13, 2021.

[18] After Ms. Lee's designated representative had waived her right to a PRRA on December 22, 2021, arrangements were made for her removal to Singapore with an anticipated departure on January 10, 2022. Those arrangements were cancelled after the waiver of the PRRA was withdrawn the next day. The PRRA application was eventually submitted to Immigration, Refugees and Citizenship Canada ("IRCC") on January 6, 2022. As already noted, Ms. Lee did not participate in the PRRA application process. The PRRA application was refused on February 8, 2022. Thus, at the time of the most recent detention review, it was anticipated that the CBSA would be making arrangements for Ms. Lee's removal. The ID was informed that Ms. Lee was seeking judicial review of the negative PRRA decision but at the time of the hearing there was no legal impediment to her removal. However, on March 14, 2022, Justice Ahmed ordered a stay of her removal pending the final determination of that judicial review: see *Lee v Canada (Citizenship and Immigration)*, 2022 FC 344.

[19] It has been apparent to all who have dealt with her in Canada that Ms. Lee is mentally unwell. Her parents have reported a history of unspecified "mental health issues." Later, they informed counsel for Ms. Lee that she "suffers from depressed feelings" and, when she feels depressed, "she feels disconnected and stops speaking to anyone." From February 13, 2021, to March 15, 2021, Ms. Lee was an in-patient at the Institute of Mental Health in Singapore where she was diagnosed with schizophrenia. According to records of that admission, Ms. Lee's condition on discharge was "better than at the time of admission" but there is otherwise no information about her presenting symptoms or condition. Ms. Lee was prescribed anti-psychotic medication on discharge. However, she did not have any medication with her when she arrived in Canada.

[20] Due at least in part to Ms. Lee's uncommunicativeness, it has been difficult to arrive at a definitive diagnosis of her current mental state. Her current treatment needs are also largely if not entirely unknown. Ms. Lee herself has not sought out any medical treatment and she has consistently refused offers of medication.

[21] Ms. Lee met with a psychiatrist, Dr. McMaster, at the IHC on December 4, 2021. Throughout the interview, she sat in the corner of the room staring at the wall. Ms. Lee communicated with Dr. McMaster only by nodding or shaking her head or (with prompting) indicating numbers with her fingers. In this way, Dr. McMaster was able to elicit from her that she has a high school education, does not work, and is supported financially by her parents. On the basis of his observations of her as well as reports of suicidal ideation and an account from a nurse that Ms. Lee had ignored a fire alarm at the IHC, Dr. McMaster completed a Form 1 under

the *Mental Health Act*, RSO 1990, c M-7, committing her to a hospital for a psychiatric assessment.

[22] (A Form 1 is the mechanism by which a physician can authorize the involuntary committal of an individual to a hospital for a psychiatric assessment under subsection 15(1) of the *Mental Health Act*. The grounds on which the committal can be authorized include that the physician has reasonable cause to believe that the person has threatened or is threatening to cause bodily harm to himself or herself or that the person has shown or is showing a lack of competence to care for himself or herself and that the person is apparently suffering from a mental disorder of a nature or quality that will likely result in serious bodily harm to himself or herself or serious physical impairment of himself or herself.)

[23] Ms. Lee was transferred from the IHC to a hospital. She did not speak with staff there. She was diagnosed with selective mutism/depression and returned to the IHC the same day.

[24] Dr. McMaster met with Ms. Lee again at the IHC on January 12, 2022. He noted a marked deterioration in her condition. She was thin, unkempt, and cachectic (i.e. showing loss muscle mass). She appeared to be downcast and did not communicate with him in any way. Dr. McMaster was informed that Ms. Lee was behaving bizarrely at the IHC, that she does not engage with anyone (staff, lawyers, representatives), and that she is not eating or caring for herself. Dr. McMaster also noted that "[t]here does not appear to be a clear motivation for [Ms. Lee's] behaviour and it is less likely that she could be malingering given her behaviour has been pervasive (does not interact with anyone)."

[25] Dr. McMaster completed another Form 1 so that Ms. Lee could be seen at a hospital again “for consideration of treatment” (according to his consultation notes). Like the first one, this Form 1 was based on Dr. McMaster’s assessment that Ms. Lee was apparently suffering from a mental disorder of a nature or quality that likely will result in serious bodily harm or serious physical impairment to herself.

[26] Ms. Lee was transferred to a hospital on the Form 1 but, as before, she was returned to the IHC the same day.

[27] Ms. Lee has not received any psychiatric treatment or medication since she has been detained at the IHC.

III. THE FEBRUARY 18, 2022, DETENTION REVIEW

[28] Ms. Lee’s most recent detention review (her fifth) began on February 18, 2022, and concluded on February 21, 2022, when the ID rendered its decision to continue her detention.

[29] Counsel for the Minister opposed release from detention. Counsel for Ms. Lee sought her release. There does not appear to have been much issue that Ms. Lee’s detention was warranted because of a risk she would fail to appear as required: see paragraph 58(1)(b) of the *IRPA* and section 245 of the *IRPR*, set out below. Rather, the focus of the dispute between the parties was over the factors listed under section 248 of the *IRPR* – especially whether there was an alternative to detention. Counsel for Ms. Lee also submitted that the ID should find that

Ms. Lee's continued detention violated her rights under section 12 of the *Charter* and that this was another important factor favouring release.

[30] For ease of reference, section 58(1)(b) of the *IRPA* provides as follows:

Release — Immigration Division	**Mise en liberté par la Section de l'immigration**
58 (1) The Immigration Division shall order the release of a permanent resident or a foreign national unless it is satisfied, taking into account prescribed factors, that	**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 :
[…]	[…]
(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);

[31] Section 245 of the *IRPR* identifies the factors to be taken into account in determining whether an individual is a flight risk, including the following:

Flight risk	**Risque de fuite**
245 For the purposes of paragraph 244(a), the factors are the following:	**245** Pour l'application de l'alinéa 244a), les critères sont les suivants :
[…]	[…]

(b) voluntary compliance with any previous departure order;	**b)** le fait de s'être conformé librement à une mesure d'interdiction de séjour;
(c) voluntary compliance with any previously required appearance at an immigration or criminal proceeding;	**c)** le fait de s'être conformé librement à l'obligation de comparaître lors d'une instance en immigration ou d'une instance criminelle;
(d) previous compliance with any conditions imposed in respect of entry, release or a stay of removal;	**d)** le fait de s'être conformé aux conditions imposées à l'égard de son entrée, de sa mise en liberté ou du sursis à son renvoi;
(e) any previous avoidance of examination or escape from custody, or any previous attempt to do so;	**e)** le fait de s'être dérobé au contrôle ou de s'être évadé d'un lieu de détention, ou toute tentative à cet égard;
[…]	[…]
(g) the existence of strong ties to a community in Canada.	**g)** l'appartenance réelle à une collectivité au Canada.

[32] Section 248 of the *IRPR* then provides as follows:

Other factors	**Autres critères**
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	**c)** l'existence d'éléments permettant l'évaluation de la

determining the length of time that detention is likely to continue and, if so, that length of time;	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.

[33] Counsel for the Minister relied on previous submissions and findings to support Ms. Lee's continued detention. With regard to the section 248 factors, counsel for the Minister noted the following:

(a) The reason for Ms. Lee's detention is that she is unlikely to appear for removal.

(b) Ms. Lee has been detained since November 14, 2021.

(c) Since Ms. Lee's PRRA application had been refused, the CBSA will continue with removal arrangements. She would be escorted by the CBSA on her return to Singapore. Inquiries had been made with United Airlines for a ticket for Ms. Lee and a response was expected within 48 hours. Ms. Lee's passport was still valid so there was no impediment to travel.

(d) There had been only minimal delays on the part of the Minister very early in the process and this weighed only marginally in favour of Ms. Lee's release.

(e) The Minister "is currently not aware of any alternatives that offset the flight risk concerns." Release on her own recognizance is inappropriate because Ms. Lee requires supervision. Counsel for the Minister noted that Ms. Lee is a vulnerable person and submitted that "release into the community without support would be akin to sending her out into the cold" and expecting her to "fend for herself."

(f) No children are directly affected.

[34] Counsel for the Minister also submitted that the conditions of detention – having particular regard to the absence of any active COVID-19 cases in the IHC and the fact that the facility is well-below capacity, thus allowing for social distancing – do not favour release.

[35] The position of counsel for Ms. Lee may be summarized as follows:

- Ms. Lee cannot be considered a flight risk in the usual sense. In fact, she is "actually quite immobile" and "not likely to run away." The sole basis for her detention has been concerns about her mental health, which in turn have led to the concern that she will not appear as required. Put another way, the "unlikely to appear" allegation is tied exclusively to Ms. Lee's mental health.

- Medical records confirm that Ms. Lee is mentally ill. She had been hospitalized in Singapore for a month with a diagnosis of schizophrenia. More recent medical records reflect diagnoses of selective mutism and depression.

- The length of detention has become excessive considering the impact that detention is having on Ms. Lee. Dr. McMaster observed that her condition had worsened

significantly between December 4, 2021, and January 12, 2022. This is consistent with studies of immigration detainees demonstrating that their mental health tends to decline the longer detention is prolonged and improves once they have been released from detention.

- The IHC is not providing adequate mental health support for Ms. Lee. Her last contact with a psychiatrist was with Dr. McMaster on January 12, 2022. Thus, at the time of the detention review, it had been more than a month since Ms. Lee had been seen by a psychiatrist. There was no evidence that she is receiving any other ongoing mental health supports.

- Two applications for leave and judicial review of the negative PRRA decision were filed on February 18, 2022. As a result, the future length of detention is unknown.

- Counsel for Ms. Lee proposed admission to the Gerstein Crisis Centre in Toronto as an alternative to detention. This is a short-term residential crisis program specifically geared to individuals who are in mental health crisis. According to counsel, it is "a safe and home-like setting with individual bedrooms for all residents" and 24-hour on-site staffing. It provides counselling and programming for residents and referrals to community supports. The longest Ms. Lee could stay at the centre would be 30 days so counsel proposed that the ID could convene a hearing twenty days after release to determine what the release plan should be once Ms. Lee had completed her stay there.

- The CBSA has refused to cooperate in finding an alternative to detention. Ms. Lee is a vulnerable person so there is a heightened onus to justify her detention and, relatedly, a heightened responsibility to find an alternative to detention for her. See IRB *Chairperson*

Guideline 2: Detention at para. 3.1.15 ("the *Guideline*"). The failure of the Minister to assist in finding an alternative to detention favoured Ms. Lee's release.

[36] Counsel for Ms. Lee also submitted that "at this point, particularly given the conditions of detention for someone with her mental health diagnoses and presentation," Ms. Lee's detention "has become grossly disproportionate" and, consequently, she is "being held in violation of section 12 of the *Charter*." The ID is required "to look at section 12 of the *Charter* and determine if, at this point in time, detention is grossly disproportionate." According to her counsel, Ms. Lee is being detained because she does not appreciate what is happening; however, the proposed alternative to detention would fully address this concern "by having this wraparound mental health support and full-time staffing at the facility that has been outlined." In this more appropriate and supportive environment, Ms. Lee "can begin to improve. She can communicate her health needs." Her counsel submitted that, "at this point, the effect on Ms. Lee is that her mental health is seriously deteriorating, that her ability to communicate is being eroded because of her mental health concerns, and there is a viable and supportive alternative to detention." To continue to detain her in such circumstances would violate section 12 of the *Charter* because the impact of detention is grossly disproportionate to what is appropriate and thus is so excessive as to outrage our standards of decency.

[37] In summary, "an assessment of section 58 of *IRPA* and Regulation 248 is that her release is required under the Act, and that, at this point, her continued detention is grossly disproportionate and violates section 12 of the *Charter*."

[38] A crisis worker from the Gerstein Crisis Centre testified during the detention review. She was questioned by counsel for Ms. Lee, by counsel for the Minister, and by the ID member.

[39] The crisis worker testified that the centre does not provide any mental health treatment and medical professionals do not come on-site. Rather, the program there is recovery-based and is meant to provide people in crisis with a safe space. It requires the voluntary participation of the person concerned. As the witness put it, "there has to be willingness" on the part of the resident. If someone were to become dangerous or challenging or was interfering unduly with other residents, they would be asked to leave. Since people are there voluntarily, the centre would not normally be reporting to anyone if a resident left and did not return. Although staff are on-site 24-hours a day, it is not their role to "supervise" residents apart from checking in on them periodically. As well, residents "need to be independent" and to be able to look after their daily needs. Staff do not assist with self-care. While a bed had been reserved for Ms. Lee, an initial intake assessment was yet to be completed.

[40] Counsel for the Minister raised the following points in reply:

- Ms. Lee's detention is being prolonged by the decision to challenge the negative PRRA determination. But for this, she could be returned to Singapore.

- Ms. Lee is not being detained because she has mental health issues. She is being detained because "she has refused or is unable to answer questions posed to her to determine her inadmissibility," something she is legally obliged to do.

- Residing at the Gerstein Crisis Centre is not an appropriate alternative to detention. There are no doctors on site. It is staffed only by crisis workers and the supervision provided there is insufficient for Ms. Lee's needs. As well, Ms. Lee is incapable of caring for herself and the centre is unable to provide her with the care she requires. In any event, there is no evidence that Ms. Lee even wants to go to this facility.

[41] Counsel for the Minister did not specifically address the argument that continued detention would violate section 12 of the *Charter*.

IV. DECISION UNDER REVIEW

[42] The ID delivered its decision orally on February 21, 2022.

[43] The ID found that Ms. Lee is unlikely to appear for removal. Addressing Ms. Lee (although she had disconnected from the hearing by that point), the ID held:

> This decision and the detention review is being rendered in your absence, as you are not speaking with your counsel, with the designated representative, or the CBSA officials, or the Member during the process of your detention review hearing. You were ordered deported from Canada on December 7, 2021. You are now detained for removal from Canada. You appear to suffer from mental illness, as well as depression. You have no family or friends in Canada that would be available to support you. And your conduct has repeatedly shown that you are either unable or unwilling to comply with the immigration process or any conditions that might be imposed leading up to your removal from Canada. Your behaviour indicates to me that you cannot be relied on to appear for further immigration proceedings or for removal from Canada on your own volition.
>
> I am persuaded that you are unlikely to appear for removal and that you are a flight risk, and for these reasons I find on a balance of

> probabilities that there are grounds for your detention on the basis that you are unlikely to appear.

[44] Turning to the section 248 factors, the ID found that Ms. Lee's detention "is becoming lengthy." While this factor might normally favour release, it does not do so in this case because much of the time spent in detention has been due to Ms. Lee's "lack of communication and cooperation" with the CBSA, the designated representative and even her own counsel. The ID held as follows:

> It is noted that mental health issues appear to play a role in your behaviour and conduct, which has resulted in delays in the process moving forward. As a result, this factor does not significantly weigh in favour of your release, as it is lengthy due to your own actions and challenges that you are facing, which CBSA and your counsel continue to make efforts to address and support. Accordingly, the evidence under this factor cannot be given significant weight. The evidence under this factor favours detention.

[45] Given that no removal date had been set, the anticipated length of future detention is unknown. The ID treated this as a factor favouring release.

[46] The ID treated the question of the lack of diligence on the part of either party as a neutral factor. On the one hand, there were initial delays on the part of the CBSA in bringing the matter forward to an admissibility hearing but there was nothing to show that this was "intentional or malicious." In any event, the admissibility process has been completed. On the other hand, there have also been delays on Ms. Lee's part "related to [her] mental health issues."

[47] Turning to the question of alternatives to detention, the ID ruled out releasing Ms. Lee on her own recognizance as a viable alternative. The ID held:

> Release on your own recognizance would be inappropriate, given that you have not responded much or cooperated with immigration officials. I have no evidence to determine your state of mind, whether you do or do not understand what is going on, as well as your intentions or desires.

[48] The ID also concluded that release to the Gerstein Crisis Centre was not a viable alternative to detention. In summary, the ID found that Ms. Lee has remained uncommunicative and uncooperative. It appeared that mental health concerns may be playing a role in this. Ms. Lee is not attending to her self-care. There is a question of whether she understands what is happening right now and whether she is competent to make decisions. Ms. Lee required supervision and mental health support in addition to strict conditions to assist her with compliance. However, the Gerstein Crisis Centre could offer none of this. The ID found that it offered "nothing in the way of controlled supervision or treatment support that Counsel has said is needed for [her] to get better." The program is entirely voluntary, requires the informed agreement of participants, and is for individuals who are independent.

[49] In light of this, the ID found as follows:

> So, there is nothing in place that CBSA or that I could look at that can be relied on to show that where you – to show that your whereabouts are being monitored or supervised, or that would prevent you from simply running off, intentionally or otherwise. There is also no evidence to show that this facility would ensure you receive the mental health treatment that your counsel says is important for you to receive, as medical professionals are not permitted on the premises, as was testified to by the witness for Gerstein. You would be responsible for making sure you go to appointments on your own, and there is no oversight from the centre to monitor your compliance with treatment.

> As I have no evidence to show that you understand what is happening, agree, and are willing and able to comply with the Gerstein Program, or that you are able to independently direct your mental health treatment if released and comply with immigration conditions, I find that the alternative to detention presented is insufficient, and increases the flight risk, as it is deficient in providing the level of supervision and treatment support needed in your instance.

[50] The ID noted that since there is no evidence of dependent children, this is a neutral factor.

[51] With respect to the conditions of detention, the ID was not satisfied that COVID-19 presents a meaningful risk to Ms. Lee in detention. Accordingly, it treated this as a neutral factor.

[52] The ID did not address Ms. Lee's argument under section 12 of the *Charter* apart from the following: "I find that the medical support you receive at the Immigration Holding Centre currently, although it is not tailored to you, is more than that of the proposed alternative to detention offered and does not rise to the threshold of cruel and unusual treatment."

[53] For these reasons, the ID ordered Ms. Lee's continued detention under paragraph 58(1)(b) of the *IRPA*.

V. STANDARD OF REVIEW

[54] The parties agree, as do I, that the ID's decision should be reviewed on a reasonableness standard. See *Canada (Public Safety and Emergency Preparedness) v Taino*, 2020 FC 427 at para 35.

[55] An assessment of the reasonableness of a decision must be sensitive and respectful yet robust: see *Vavilov v Canada (Citizenship and Immigration)*, 2019 SCC 65 at paras 12-13. Reasonableness review focuses on "the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome" (*Vavilov* at para 83). 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). A decision that displays these qualities is entitled to deference from the reviewing court (*ibid*.). On the other hand, "it is not enough for the outcome of a decision to be *justifiable*. Where reasons for a decision are required, the decision must also be *justified*, by way of those reasons, by the decision maker to those to whom the decision applies" (*Vavilov* at para 86, emphasis in original). See also *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 at para 29. The reviewing court must answer the question: Has the decision maker provided a reasoned explanation for the result?

[56] The burden is on Ms. Lee to demonstrate that the ID's decision is unreasonable. To succeed in having the decision set aside on this basis, she must establish that "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Vavilov* at para 100).

[57] Being responsible for determining whether an individual should be released or detained in custody, the ID has been entrusted with an "extraordinary degree of power" over the individuals who come before it on detention reviews (cf. *Vavilov* at para 135). *Vavilov* instructs that, where "the impact of a decision on an individual's rights and interests is severe, the reasons

provided to that individual must reflect the stakes" (at para 133). More particularly, the principle of responsive justification "means that if a decision has particularly harsh consequences for the affected individual, the decision maker must explain why its decision best reflects the legislature's intention. This includes decisions with consequences that threaten an individual's life, liberty, dignity or livelihood" (*ibid.*). Responsive reasons also "shield against arbitrariness as well as the perception of arbitrariness in the exercise of public power" (*Vavilov* at para 79, citing *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v Lafontaine (Village)*, 2004 SCC 48 at paras 12-13; see also *Vavilov* at para 134).

VI. ANALYSIS

[58] The Federal Court of Appeal observed in *Brown v Canada (Citizenship and Immigration)*, 2020 FCA 130, that "a detention order that does not take into account the proportionality of the risk and the conditions of detention, can be tested in the Federal Court, on both Charter and administrative law principles. A decision that fails to consider the proportionality between the risk and the measures to mitigate that risk will be set aside, as will a decision that reached an unreasonable conclusion in that regard" (at para 116). The Court returned to these principles again later in the decision, stressing that judicial review "tests the legality of a detention decision against the Charter and common law principles" (at para 161). But, the Court continued, "it also does much more; it tests the reasoning process, its transparency and its integrity. It examines the treatment of the discretionary factors and whether they were properly taken into account. It holds up the reasons to independent scrutiny to determine whether they pass legal muster, from both a Charter and administrative law perspective" (*ibid.*).

[59] Ms. Lee was ordered detained because she was found to be a flight risk, there was no viable alternative to detention that could address this risk, and the balance of relevant factors were insufficient to warrant release. The question of whether her continued detention is a proportionate response to the risk she poses is the central issue in this case. Ms. Lee contends that the ID's decision to continue her detention is unreasonable. She also contends that the ID unreasonably failed to recognize that her detention had in fact become so disproportionate as to constitute a violation of her rights under section 12 of the *Charter*.

[60] These issues are closely connected but it is helpful to consider them separately.

A. *Is the decision to continue Ms. Lee's detention unreasonable?*

[61] I begin by noting that Ms. Lee does not argue that the ID's threshold determination that there is a risk she will not appear as required is unreasonable. Although there is a genuine issue concerning why that risk exists and how it should be characterized (an issue I will return to below), Ms. Lee does not suggest that there is no such risk. Accordingly, for purposes of this part of her argument, her submissions focused on the reasonableness of the ID's assessment of the section 248 factors.

[62] In this regard, Ms. Lee challenges the ID's decision in four specific respects: (1) with respect to paragraphs 248(a), (b), and (d), in unreasonably assessing the significance of her failure to communicate and cooperate with immigration authorities given the evidence that she is mentally unwell; (2) with respect to paragraph 248(b), in unreasonably assessing the impact of her ongoing detention on her mental health; (3) with respect to paragraph 248(d), in

unreasonably failing to find that the CBSA had not been duly diligent in pursuing alternatives to detention; and (4) with respect to paragraph 248(e), in unreasonably rejecting the alternative to detention proposed by Ms. Lee.

[63] Looking first at the reason for the detention and the length of the detention (*IRPR*, paragraphs 248(a) and (b)), I agree with Ms. Lee that the ID unreasonably found these factors to favour detention. The ID found that they weighed in favour of detention because both stemmed from Ms. Lee's "lack of communication and cooperation." Yet at the same time, the ID also recognized that "mental health issues" were playing a role in Ms. Lee's behaviour. Indeed, this is the only reasonable explanation for Ms. Lee's conduct given, among other things, how she has behaved since she arrived in Canada, her prior history of mental illness, and Dr. McMaster's opinion in both December and January that she appeared to be suffering from a mental disorder. There was no evidence to suggest that her presentation was feigned. On the contrary, there was direct evidence to the contrary from Dr. McMaster, who opined in January that it was "less likely" that Ms. Lee is malingering. The ID did not address this evidence at all before effectively holding Ms. Lee responsible for her own detention and for its growing length. It was unreasonable for the ID to hold that behaviour that likely stems from a mental disorder favours immigration detention.

[64] This analysis also applies to the ID's characterization of Ms. Lee as a flight risk under paragraph 58(1)(b) of the *IRPA* and section 245 of the *IRPR*. The finding that she is a flight risk was based on the finding that she had "refused or is unable to answer questions for information related to determining her admissibility or inadmissibility" and because "[b]y refusing to attend

the Minister's Delegate review, there has been no voluntary compliance on her part to appear." There is no reasonable basis for the ID to suggest (even in the alternative) that this behaviour is deliberate or wilful on Ms. Lee's part. But even if Ms. Lee cannot reasonably be said to be "refusing" to communicate or cooperate, I agree with the respondent that there is still a reasonable basis to find she is a flight risk in the requisite sense because she is unable to communicate or cooperate (a point counsel for Ms. Lee does not contest). Such a finding would, however, weigh very differently in the overall balancing than a flight risk based on deliberate or wilful non-compliance.

[65] Second, I also agree with Ms. Lee that the ID unreasonably failed to address the evidence suggesting that her continued detention was causing her mental health to deteriorate. There was clear evidence that her condition is deteriorating. Counsel for Ms. Lee buttressed the argument that this is being caused by her detention with academic studies demonstrating that mental health tends to decline in immigration detention and to improve after release. At the same time, there was no expert opinion establishing this link in Ms. Lee's particular case. While a stronger case for this link could certainly have been made, this is perhaps easier said than done given Ms. Lee's uncommunicativeness and how little is still known about her. Given the clear evidence that Ms. Lee is mentally unwell and that she is becoming worse the longer she remains in detention, it was unreasonable for the ID to treat the length of her detention as favouring continuing that detention (even if the exact causal connection between the two has not been determined definitely).

[66] Third, Ms. Lee argued before the ID that the failure of the CBSA to exercise due diligence in identifying and supporting an alternative to detention weighs in favour of release under paragraph 248(d). The ID found instead that paragraph (d) was a neutral factor because there had been delays and a lack of diligence by both parties. As discussed above in connection with paragraphs 248(a) and (b), it was also unreasonable for the ID to find that Ms. Lee's conduct weighed against release under paragraph 248(d). With respect to the CBSA, the ID noted only the delay in moving forward with the admissibility hearing, something that had now been completed. The ID did not address the alleged failure of the CBSA to diligently pursue alternatives to detention.

[67] Assuming for the sake of argument that the ID must have found that there was not a lack of diligence in this regard, I am not persuaded that this is unreasonable. At the time of the detention review, Ms. Lee's PRRA application had been refused and arrangements were underway to remove her to Singapore. Even if no departure date had been set yet, it was reasonable to think that her removal was imminent. In these circumstances, I cannot say that it would be unreasonable for the ID not to have faulted the CBSA for its handling of this matter *up to that point.* At best, the CBSA's handling of the matter up to that point was a neutral factor. However, given the error in assessing Ms. Lee's conduct, it was unreasonable for the ID to treat paragraph 248(d) as a whole as a neutral factor.

[68] As counsel for Ms. Lee properly emphasizes, there is a heightened obligation on the part of the ID to consider alternatives to detention for vulnerable persons such as persons with mental illness (a point I will return to below). Related to this is a heightened onus on the Minister to

justify the detention of such persons, as reflected in paragraph 3.1.15 of the *Guideline*. Consequently, as the *Guideline* also notes, a member should "actively question" the steps that the Minister has taken to make an alternative to detention available when the person concerned is a vulnerable person. I am not persuaded that the ID erred in failing to do this in the last detention review. That being said, there has now been a material change in circumstances with the March 14, 2022, Order of Justice Ahmed granting an interlocutory stay of Ms. Lee's removal. Given this, I fully expect the question of whether the CBSA is being diligent in identifying and supporting alternatives to detention to be front and centre at the next detention review.

[69] Turning, finally, to the alternative to detention that was proposed to the ID, while it is a close call, I am not persuaded that the ID's determination is unreasonable.

[70] I agree with counsel for Ms. Lee that the ID mischaracterized the risk that needs to be managed as that of Ms. Lee "running off, intentionally or otherwise." As well, I note that the *Guideline* directs members to "consider how certain vulnerabilities, such as mental illness, may affect the person's ability to comply with conditions of release and whether a less restrictive alternative to detention would be viable before continuing detention" (at para 5.1.1). I also note again that the *Guideline* states that, where vulnerabilities are identified, a member is under a heightened obligation to consider alternatives to detention "and to impose attainable conditions that are connected to the circumstances of the vulnerable person concerned" (at para 5.1.6). These are important considerations. They reflect an acknowledgement that release on less than perfect conditions may be necessary because the continued detention of a vulnerable person would be disproportionate to the public interest being served. This would especially be the case

when other relevant factors (including those enumerated in section 248) are found to favour release. Ms. Lee makes a strong argument that the ID did not weigh these considerations reasonably in rejecting the viability of the proposed alternative to detention.

[71] Nevertheless, in my view, the ID's assessment of the proposed alternative to detention is reasonable. While I may have decided the matter differently, that is not the test on judicial review under the reasonableness standard: see *Vavilov* at para 15. Nor is it my role to interfere with the ID's factual findings absent exceptional circumstances: see *Vavilov* at para 125. The ID raised reasonable concerns about the suitability of the Gerstein Crisis Centre for Ms. Lee. It also reasonably determined that Ms. Lee herself could not be relied upon to report for immigration proceedings or for removal and there was nothing in the plan to compensate for this. Even if it is unlikely Ms. Lee would run away or attempt to hide, the ID reasonably determined that she likely would fail to report because she likely would not follow anyone's directions to do so. She would simply stay where she was, completely disengaged from everything and everyone around her. The proposed alternative to detention did not include any meaningful mitigation of the risk of non-compliance given that, in her current state, Ms. Lee could not be counted on to comply of her own volition. The ID reasonably determined that this deficiency called into question the viability of the proposed alternative to detention, particularly considering that removal was then considered imminent. (It goes without saying that how this risk of non-compliance should be assessed now that removal is no longer imminent will be for the ID to determine at the next detention review – subject, of course, to judicial review.)

[72] Given that the ID reasonably determined that Ms. Lee is a flight risk in the sense that she cannot be counted upon to comply with her obligations of her own volition, and given that it also reasonably found that the proposed alternative to detention did not mitigate this risk in any way, I am satisfied that the ID reasonably determined that paragraph 248(e) did not favour release.

[73] On the other hand, as I have explained, some of the ID's findings that other factors favour detention are unreasonable. Despite the importance of the alternative to detention factor in this case, I would not characterize the ID's errors with respect to other factors as insufficiently central or significant to affect the reasonableness of the decision as a whole. They are not "merely superficial or peripheral to the merits of the decision" (cf. *Vavilov* at para 100).

[74] This is a difficult and troubling case. Ms. Lee finds herself in a Catch-22 that, to date, no one has been able to resolve. On the one hand, the ID reasonably determined that, without the necessary supervision, and in the absence of any meaningful engagement by Ms. Lee with the detention review process, the proposal for her release was not a viable alternative to detention. On the other hand, Ms. Lee is not receiving the medical treatment that appears to be necessary if she is to be able to engage meaningfully with the detention review process. Meanwhile, she has been detained in custody and her mental and physical health continue to deteriorate the longer she remains untreated. Even if it cannot be said definitively on the available evidence that her detention alone is causing this deterioration, it is reasonable to think that, at the very least, her continued detention is not helping her mental health or her motivation to obtain treatment. Perhaps more to the point, these are questions of fact that it is incumbent on the ID to address in determining whether continued detention is warranted.

[75] The ID is obliged in every case to determine whether continued detention is proportionate to the risk that otherwise calls for detention. The importance of this obligation is especially acute in a case that involves a vulnerable individual like Ms. Lee. I do not agree with Ms. Lee's counsel that the ID detained Ms. Lee *because* she is mentally ill; rather, the ID detained Ms. Lee because she was a flight risk under paragraph 58(1)(b) of the *IRPA* and overall the factors enumerated in section 248 of the *IRPR* did not weigh in favour of release. Nevertheless, there is a clear nexus between her being a flight risk and her mental state. I am persuaded that the ID did not assess this nexus reasonably when assessing the weight to be attributed to the public interest expressed in paragraph 58(1)(b), when assessing the factors under section 248, or when conducting an overall balancing to determine whether continued detention is proportionate to the risk that Ms. Lee poses.

[76] Subsection 58(1) of the *IRPA* identifies the fundamental objectives served by the power to detain under that Act. The ID is required to determine the proportionality of detention to the underlying objective(s) that are engaged in a given case and it must do so reasonably. One indication that detention is disproportionate is the availability of a viable alternative to detention. Other factors favouring release under section 248 of the *IRPR* can also entail that continued detention is disproportionate. So too can factors not specifically enumerated under section 248 but which are relevant to the impact of continued detention on the person concerned (e.g. the conditions of detention).

[77] The specific factors under section 248 with respect to which I have found that the ID's determinations are flawed relate directly to the ultimate question before the ID: should Ms. Lee's

detention be continued? These flawed determinations cast into doubt the reasonableness of its ultimate conclusion that continued detention is a proportionate and therefore justified response to the flight risk Ms. Lee poses. Consequently, the decision must be set aside.

B. *Is the ID's determination that Ms. Lee's continued detention does not violate her right to be protected against cruel and unusual treatment under section 12 of the* Charter *unreasonable?*

[78] Counsel for Ms. Lee submitted to the ID that her detention had reached the point that it violated her right to be protected against cruel and unusual treatment guaranteed by section 12 of the *Charter*. Ms. Lee should therefore be released because to continue to detain her would be to perpetuate this violation of her rights.

[79] As I have already set out above, in its decision, the ID said only the following about section 12 of the *Charter*: "I find that the medical support you receive at the Immigration Holding Centre currently, although it is not tailored to you, is more than that of the proposed alternative to detention and does not rise to the threshold of cruel and unusual treatment."

[80] I agree with Ms. Lee that the ID member seems to have missed the central point of her section 12 *Charter* argument – namely, that her *detention* is having adverse effects on her that are grossly disproportionate to what is appropriate in the circumstances of her case and that outrage our standards of decency. Contrary to what the ID appears to have thought, Ms. Lee had not argued that her medical care (or lack thereof) at the IHC infringed her section 12 rights; rather, this was simply one feature of the overall conditions of her detention which, given her

particular circumstances, were having an impact on her that meets the legal test for breaching section 12 of the *Charter*. This was a central part of her argument in favour of release.

[81] It is incontrovertible that, in conducting detention reviews, the ID must have regard to whether continued detention would violate a right protected by the *Charter*, including of course the right to be protected against cruel and unusual treatment under section 12: see *Sahin v Canada (Citizenship and Immigration)*, [1995] 1 FC 214 at 229-31; *Charkaoui v Canada (Citizenship and Immigration)*, 2007 1 SCR 350 at paras 107-117; *Canada (Public Safety and Emergency Preparedness) v Chhina*, 2019 SCC 29 at paras 122-24 (per Abella J dissenting, but not on this point); and *Brown* at paras 103-107; see also paras 1.1.8 and 1.1.9 of the *Guideline*. As the Federal Court of Appeal stated in *Brown*, "[t]he ability, indeed obligation, to consider sections 7, 9 and 12 [of the *Charter*] is inherent in the exercise of the discretion concerning whether or not detention is warranted" (at para 107).

[82] The test for establishing a breach of section 12 is a "high bar" and "very properly stringent and demanding" (*R v Boudreault*, 2018 SCC 58 at para 45). It requires establishing that the punishment or treatment is not merely disproportionate or excessive but is so excessive as to "outrage standards of decency" and be "abhorrent or intolerable to society" (*Boudreault* at para 45). If the ID is satisfied that this threshold has been met, this would be a compelling – and very likely determinative – consideration in favour of release. (A decision to detain an individual despite finding that to do so would breach section 12 of the *Charter* would likely be set aside on review – provided, of course, that the section 12 determination is reasonable.) But even if it appears evident to the ID that this high bar is not met in a given case, if section 12 of

the *Charter* has been properly raised and relied upon by the detained person, the allegation of a section 12 breach (like any *Charter* claim) must still be addressed with responsive reasons.

[83] In my view, the ID's brief, indirect comment about section 12 of the *Charter*, which was based on a misapprehension of Ms. Lee's submission, is unreasonable. The ID failed to "meaningfully grapple with" a key issue and central argument raised by Ms. Lee. This calls into question whether the ID "was actually alert and sensitive to the matter before it." See *Vavilov* at para 128.

[84] This is obviously concerning. As just discussed, the ID must consider whether continued detention will comply with the *Charter* and it must do so reasonably. Nevertheless, since the decision must be set aside on other grounds, and since Ms. Lee is entitled to a new hearing in any event, it is neither necessary nor appropriate to determine whether the ID's flawed section 12 analysis would warrant setting the decision as a whole aside. While I understand that this result may be unsatisfactory and that it might be desirable to provide more guidance on how the ID should assess claims under section 12 of the *Charter*, it is not the role of this Court on an application for judicial review to answer abstract questions of law. As interesting and important as these questions are, the answers must await another case where the ID actually engages with the section 12 claim or where it is a live issue whether a new hearing should be ordered.

VII. CONCLUSION

[85] For the foregoing reasons, the application for judicial review is allowed. The decision of the Immigration Division dated February 21, 2022, continuing Ms. Lee's detention is set aside.

Since Ms. Lee is entitled to a new detention review before the Immigration Division as a matter of law, there is no need to order that the matter be redetermined.

[86] As noted at the outset, this new hearing is scheduled to commence at 1:00 p.m. today (March 22, 2022). This Judgment and Reasons is being released shortly before then. Strictly speaking, with the ID's decision now having been set aside, there is nothing authorizing Ms. Lee's continued detention at the moment. Nevertheless, it was clearly the common view of the parties that the ID retained jurisdiction over Ms. Lee whatever the outcome of this application and that it should have the opportunity to consider her case anew. If either party is of the view that anything further needs to be said or done in order to preserve the ID's jurisdiction over Ms. Lee, they should contact the Registry immediately. If necessary, a case management conference will be convened on an urgent basis.

[87] Neither party proposed any questions to be certified under paragraph 74(d) of the *IRPA*. I agree that none arise.

[88] Finally, I commend all counsel for the high degree of professionalism that was demonstrated in bringing this application forward so expeditiously. I also thank counsel for their very helpful written and oral submissions.

JUDGMENT IN IMM-1792-22

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed.
2. The decision of the Immigration Division dated February 21, 2022, continuing the detention of Zhengqi Lee is set aside.
3. No question of general importance is stated.

"John Norris"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1792-22
STYLE OF CAUSE:	ZHENGQI LEE (BY HER LITIGATION GUARDIAN, GERALDINE SADOWAY) v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	MARCH 21, 2022
JUDGMENT AND REASONS:	NORRIS J.
DATED:	MARCH 22, 2022

APPEARANCES:

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