Federal Court  Cour fédérale

**Date: 20100927**

**Docket: IMM-4875-10**

**Citation: 2010 FC 964**

**Ottawa, Ontario, September 27, 2010**

**PRESENT: The Honourable Mr. Justice Zinn**

**BETWEEN:**

**THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS**

**Applicant**

**and**

**MEHDI KARIMI-ARSHAD**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] The Minister asks this Court to set aside the August 18, 2010 decision of the Immigration Division of the Immigration and Refugee Board which ordered that Mr. Karimi-Arshad be released from detention on the conditions set out in the Order for Release.

[2] The Order under review was stayed by this Court pending the final determination of this application for judicial review. The Court expedited the hearing of the application and it was heard little more than a month after the Order under review issued. In light of the fact that the respondent

remains in detention pending this decision and that it was ordered that no further detention reviews be conducted pending this decision, it is being issued with some haste.

**Background**

[3] The respondent is 50 years old. He is a citizen of Iran. He came to Canada in 1989 and was granted refugee status. He then embarked on a series of crimes which Board members appear to accept were a consequence of his heroin addiction. Since 1992 he has been convicted of 23 criminal offences, the majority of which related to theft. The respondent's record includes a very serious August 2001 conviction for robbery and the use of an imitation firearm during the commission of an offence, which related to a bank robbery he committed. His record also includes convictions for failure to attend court in February 2000 and failure to comply with a probation order in June 2001. Most recently, in September 2007, he was convicted of theft under $5000. He has been in detention since then.

[4] As a result of the respondent's criminality, on October 15, 2002 he was found inadmissible and ordered deported pursuant to subsection 36(1)(a) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27; an appeal from this order was dismissed. On November 18, 2002 a warrant to arrest the respondent for removal was executed while he was incarcerated at Collins Bay Institution in Kingston, Ontario. On May 31, 2004 the respondent was found by the Minister to be a danger to the public pursuant to section 115(2)(a) of the Act. On December 15, 2004 the respondent was transferred to immigration detention.

[5] The Toronto Bail Program has repeatedly declined to offer supervision to Mr. Karimi-Arshad because of his serious criminal record and his failure to cooperate with Canada Border Service Agency's (CBSA) attempts to obtain the travel document necessary for him to return to Iran. Nonetheless, on July 20, 2006 CBSA recommended the respondent's release from detention on terms and conditions that included his own promise to appear and to observe the conditions of release.

[6] His release did not last for long as the respondent resumed his criminal behaviour. On April 8, 2007 the respondent was arrested by CBSA as he had been charged with theft under $5000, attempting to resist arrest, and dangerous driving. On September 14, 2007 he was convicted of theft under $5000 and sentenced to four months time served. On that same day he was transferred to immigration detention, where he remains. Since then, he has had numerous and regular detention reviews, as is required by the Act, and until the decision under review was made no member had ordered his release from detention.

[7] There have been ongoing and continuing problems arranging for Mr. Karimi-Arshad's removal to Iran. At first the respondent was the principal cause of the delay in getting the required travel document; however, more recently it appears that Iranian authorities are not fully co-operating with attempts to return the respondent to his country of birth.

[8] From November 2004 to October 2005 the respondent refused to complete the Travel Document application. He informed CBSA that he had no Iranian identification documents nor any

family or friends who could assist in obtaining them. In November 2005 the respondent provided CBSA with an unsigned Travel Document application, which was then forwarded to the Iranian Embassy. The necessary documents from Iran were not forthcoming.

[9] At the April 2008 detention review, Mr. Karimi-Arshad said that he had received correspondence from the Iranian embassy advising him that he did not need identification to be issued a travel document, but that he was required to attend an interview and sign a form indicating that he was leaving Canada and returning to Iran voluntarily. An interview with Iranian Embassy officials was arranged for the respondent but he was not taken to the interview because he refused to sign a letter indicating he would voluntarily return to Iran. Such a letter was required by the Iranian Embassy before it would issue travel documents.

[10] In August 2009 Mr. Karimi-Arshad signed a statutory declaration affirming that he was a citizen of Iran and that he was prepared to return to Iran. On February 24, 2010 he attended a private interview with officials from the Iranian Embassy and signed a statutory declaration affirming that he had signed all travel documentation applications and was voluntarily returning to Iran.

[11] The record reveals that since November 2004 the Minister has made a number of efforts to obtain Iranian identification and a travel document for the respondent so that he could be removed to Iran. As stated, originally the respondent was the major impediment to obtaining these documents. The member whose decision is under review stated in her July 28, 2010 reasons that

"It was only at the point when the Iranian Embassy decided that Mr. Karimi-Arshad would not be issued a passport even if he signed the letter of voluntary return that Mr. Karimi-Arshad finally agreed to sign the required letter." Therefore, while the respondent had been the principal impediment to removal prior to February 24, 2010, the Iranian authorities appear to have been the principal impediment since then.

[12] The respondent had a number of recent detention reviews leading up to the August 18, 2010 review that resulted in the release order which is the subject of this application. At these detention reviews, members of the Board declined to release the respondent because of concerns relating to the inadequacy of the proposed release terms and because of the possibility that the applicant would be able to arrange for the respondent's removal to Iran.

[13] After the detention review hearing of August 18, 2010, Board Member O.M. Kowalyk ordered the respondent released. The Board came to this decision despite finding that Mr. Karimi-Arshad remained a danger to the public and that he was unlikely to appear for removal from Canada. The Board member's specific finding with respect to the respondent being a continuing danger to the public is reflected in the following passage from her reasons:

> I find that that evidence concerning the Danger Opinion and the circumstances of the convictions, escalation of violence and the sentence imposed establish that Mr. Karimi-Arshad is a danger to the public.

[14] With respect to the respondent continuing to be unlikely to appear for removal, the member recites much of the history of the respondent's dealings with CBSA but does not provide the same

sort of analysis as was provided with respect to the danger finding. Nonetheless, the member says at the beginning of her reasons: "I find that I am satisfied that Mr. Karimi-Arshad is a danger to the public and that Mr. Karimi-Arshad is unlikely to appear for removal from Canada."

**Issues**

[15] The applicant Minister raises two issues:

1. Whether the member's order unreasonably releases the respondent, a danger to the public and a flight risk, without supervision or monitoring; and
2. Whether the member failed to provide clear and compelling reasons to depart from several previous decisions ordering the respondent's continued detention.

**Analysis**

[16] The Court must be guided by the following principles:

(i) The standard of review for a decision by a member of the Board to release a foreign national from detention is reasonableness: *Canada (Minister of Citizenship and Immigration) v. Panahi-Dargahloo*, 2010 FC 647, para. 25.

(ii) Deference is owed to the member's findings of fact and assessment of the evidence: *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12, para. 59.

(iii) The role of this Court is not to substitute its opinion for that of the member: *Walker v. Canada (Minister of Citizenship and Immigration*, 2010 FC 392, paras. 25-26.

(iv) If a member departs from prior decisions that maintained the detention, then the member must set out clear and compelling reasons for so doing: *Canada (Minister of Employment and Immigration) v. Thanabalasingham*, 2004 FCA 4.

[17] The reasonableness of the Order for release and the reasons provided require an examination of the specific terms of release in light of the Board's findings that the respondent remains a flight risk and a danger to the public and in light of the previous decisions of the Board. Accordingly, an examination of earlier rejected proposals for release is necessary. In the present circumstances, the more recent detention review hearings are the most relevant.

Previous Recent Detention Reviews

*2009 Reviews*

[18] Comments from members in two of the detention reviews before 2010 reflect previous decisions, and set the tone for subsequent reviews.

[19] Member Shepherd provided lengthy reasons following his review on March 12, 2009. He considered each of the previous reviews.[1] In his reasons he notes that the respondent was "released on terms and conditions on July 24, 2006 that included monthly reporting" and that he failed to report on April 5, 2007 after he lost his cell phone which contained his appointment calendar. The

[1] [1] He found in this decision that the respondent did not pose a danger to the public; however, at the next review which he also conducted on April 7, 2009 he found him to be a danger to the public and writes: "In light of details missing at last DR, the 58(1)(a) allegation is well founded."

member finds this explanation wanting but does find that he is likely to report to CBSA, notwithstanding this one occasion of non-reporting:

> Notwithstanding this explanation, his conduct demonstrates a lack of due diligence in complying with his conditions of release. He knew that he was subject to monthly reporting. He could reasonably be expected to contact CBSA to confirm the next reporting date in the event that he did not remember it. Notwithstanding this point, his reporting history was otherwise good. … Based on all the facts of the case, I am satisfied that he would likely report to CBSA on a monthly basis.

[20] The proposal before Member Shepherd was that Mr. Karimi-Arshad be released on his own recognisance and reside with his former landlord. The member states:

> Release to a person who has not been interviewed for purposes of establishing suitability would not be appropriate in this case. Given his criminal history, past heroine [*sic*] addiction and flight risk, a release Order would need to address such issues as accommodation, medical assessment and treatment, and meaningful supervision by a suitable bondsperson to offset the various issues identified to justify release.

[21] The member who conducted the review on September 23, 2009 wrote that "I can easily describe both the danger to the public that you pose if released as well as your unlikelyness [*sic*] to appear for lawful removal as high to extremely high."

[22] It is against this backdrop of the respondent having breached the terms of his earlier release as well as being found to be a high to extremely high risk of being a danger to the public and failing to attend for removal that subsequent decisions must be read.

*April 13, 2010 Review – Member Heyes*

[23] On April 13, 2010 Member Heyes continued the respondent's detention and rejected the new proposed terms of release which were outlined in letters from Salvation Army Gateway (Gateway) and the Fred Victor Centre. This review is of particular relevance as it appears to have been the first time these two agencies were involved and because the decision under review did release the respondent on the basis of letters from these same agencies, albeit under modified terms.

[24] It was proposed that Mr. Karimi-Arshad would become a resident at Gateway. As it was put in the letter from Gateway dated March 9, 2010, it was responding to his lawyers who were "looking to place Mr. Karimi Arshad [*sic*] at a suitable address where supervision and case management would be present." The letter describes Gateway and its relationship with its residents as follows:

> Salvation Army Gateway is a men's shelter which provides case management, housing support, and a small clinic for our residents. Residents are required to actively participate with a case manager to create a reasonable case plan and are responsible to meet all pre-arranged appointments. Gateway does not provide strict supervision of its residents; rather it is the resident's responsibility to comply with all shelter rules and policies and adhere to their case plan. Failure to do so will result in the loss of their space in the bed program, in which case they will be referred to alternate shelter accommodation. (Emphasis added)

[25] The letter went on to set out the conditions that had to be met before Gateway would accept the respondent at its shelter:

> We are willing to accept Mr. Karimi Arshad [*sic*] at our shelter, provided the following conditions are met:

> 1. Mr. Karimi Arshad [*sic*] is willing to sign a consent to release and disclose personal information forms between Gateway and any agencies/systems he is to be held accountable to such as Immigration, Legal Aid Ontario and probation/parole/bail officers for the purposes of creating a case plan and accountability.
>
> 2. Mr. Karimi Arshad [*sic*] is able to self-care and is ambulatory.
>
> 3. Mr. Karimi Arshad [*sic*] agrees to be compliant with all rules and policies of this facility.

[26] The letter dated March 11, 2010 from the Fred Victor Centre sets out the services that it offers as follows:

> We are a preventative program that provides responsive support in the community to people living with mental illness who are at risk of involvement or re-involvement with the criminal justice system. We offer intensive case management, programming, practical support and advocacy to our clients. We make appropriate referrals to community supports such as safe beds, legal representation, health services, housing workers, and other services identified by the client.

[27] Specifically with respect to Mr. Karimi-Arshad, the Fred Victor Centre writes: "Please let me know where and when I can meet or contact Mr. Arshad [*sic*] to do an intake and begin working on a case plan with him."

[28] It was proposed that the services of these organizations, as described, would be provided to Mr. Karimi-Arshad. At the hearing the respondent's counsel indicated that Gateway would provide the respondent with shelter while awaiting intake into Transition House, which would provide a maximum three-month stay and assistance in dealing with his addiction. Member Heyes rejected

the proposal principally because it failed to provide supervision and because there was a lack of detail concerning the programs that would be in put in place for the respondent. Although lengthy, her statements of her concerns in this regard are instructive when considering the decision under review:

> Your past release on your own promise to abide by conditions when combined with the treatment program dealing with the drug addiction was not effective.
>
> That was over two years ago and I do not see anything specific in this proposal that would allay my concern that this would not occur again.
>
> Past failure to comply when released on a promise to abide by conditions and rehabilitation is not determinative, but it is certainly significant evidence pointing to the requirement that there needs to be more to reduce or mitigate danger and flight risk.
>
> Frankly, I do not see how simply increasing the frequency of reporting to the Greater Toronto Enforcement Centre reduces the flight risk or danger given the absence of any supervising surety.
>
> This is to say that I do not find the alternative that has been proposed is viable. There are things that are lacking in the release plan, supervision for one thing.
>
> It is clear from Exhibit DR-1. The letter from Gateway that Gateway does not provide strict supervision.
>
> The letter indicates it is the resident's responsibility to comply with shelter rules and policies.
>
> Transition House can offer a three-month stay, but does not in my view offer supervision. It indicates that their in-depth counseling [*sic*] is provided by an outside primary counselor [*sic*] and this is a voluntary program.
>
> There is [*sic*] not a lot of specifics in the plan to deal with the heroin addiction in terms of who would provide it, what specifically is being offered, what monitoring there is, what is in place to report any breaches to Canada Border Services Agency.

...

> There is nothing, there is no supervising surety attached to this release plan. Clearly it is not legally required, but for someone who has not complied with previous release on his own promise in my view is simply not enough to simply to rely on rehabilitation programs that are based on a voluntary participation.
>
> I do not see anything specific in the program that would ensure appearance for removal for example.
>
> And I find what is in Exhibit DR-1, DR-2, and DR-3 somewhat lacking in details in terms of what specific treatment is being proposed for you.
>
> For example, in Exhibit DR-3, there is reference to treating you for mental illness, but it does not specify that they are aware what mental illness you are suffering from, how they intend to treat that.
>
> I find that the information is somewhat general and does not specifically address violence in terms of your history and what would be done to reduce this.
>
> I do not after having reviewed the document have any great understanding of what is actually being offered for you and how this can address danger and flight risk.
>
> Given the lack of detail and the fact that I do not believe your detention is at this point indefinite, I'm going to continue your detention on both grounds of both danger and flight risk.

*May 11, 2010 Review – Member Heyes*

[29] There was no new alternative to detention presented for the member to consider and she re-affirmed her view that "some sort of supervision would be required in the circumstances ... given that a release on your own promise to abide by conditions did not succeed in the past." However, the member did note that the detention was becoming lengthy and asked the Minister to "contact the

Department of Foreign Affairs to find out what specific documents the Iranian officials are looking for" and prepare a case history to assist in "sorting out what can still be done."

*June 9, 2010 Review – Member Kowalyk*

[30] This member considered the same letters from Gateway and the Fred Victor Centre as had been considered by Member Heyes at the April 13, 2010 review and concluded that "the alternative proposed does not offset the concerns that arise from the two factors of detention." She specifically stated: "I agree with Member Heyes' assessment that the letter indicates that Gateway offers no monitoring or supervision but rather relies on the individual to comply with the rules and follow their case plan."

[31] Member Kowalyk in her written reasons dated July 28, 2010 considers factors listed under section 248 of the Regulations to the Act that are to be considered before a decision is made on release or continued detention. Her concerns may be listed as the following:

1. The proposed alternatives do not include the posting of any security deposit or guarantee by a Canadian citizen or permanent resident living in Canada;
2. The proposed alternatives do not include monitoring or supervision by a third party or professional organizations such as the Toronto Bail Program;
3. Gateway offers no monitoring or supervision but relies on the individual to comply with the rules and follow their case plan;
4. Gateway does not indicate whether its services are available to an individual regardless of legal status;

5. Gateway takes no responsibility to advise the CBSA that the individual has failed to comply with the rules and is no longer in good standing with Gateway, or that their address has changed because the individual lost his space in the bed program;
6. Gateway has not confirmed the availability of a space in the bed program which it must before an order for release is issued;
7. It is necessary that the case plan confirms that Gateway recognizes that Mr. Karimi-Arshad is no longer a permanent resident and is subject to removal from Canada as soon as a travel document is issued;
8. All of issues 1 to 7 "would have to be addressed in a case plan, agreement or conditions" and the case plan has to be developed before an order for release is issued ("it is not clear why the case plan cannot include monitoring and reporting conditions to meet the concerns of CBSA and a copy of the case plan be provided to the ID for consideration as basis of an order for release");
9. It is not clear why the Fred Victor Center cannot develop the case plan, including the confirmation of a safe bed, and present it at a detention review hearing; and
10. The case plan by either Gateway or the Fred Victor Center has to recognize and deal with Mr. Karimi-Arshad's precarious legal circumstances and "in their present form, the letters from Gateway and the Fred Victor Centre do not deal with those circumstances."

[32] Member Kowalyk then focused her comments on the length of time in detention and the efforts made by the Minister to enforce the deportation order as soon as reasonably practicable. She

notes that the last entry in the chronology of attempts to obtain a travel document is March 11, 2010 and that at previous hearings the Minister had referenced diplomatic contacts with the Iranian Embassy. The member writes: "The CBSA will have to present a detailed update on the obligations that the Iranian Embassy has concerning nationals of Iran and the steps or processes available to ensure or convince Iranian authorities to carry out their obligations."

*July 28, 2010 Review – Member Kowalyk*

[33] On this date the member released the reasons for her decision on the previous review and she continued the detention as there had been no change since then. She set the next review date and stated: "I will again hear from both parties and in particular I would want the parties to address my analysis in the decision that I have issued today."

*August 18, 2010 Review – Member Kowalyk*

[34] At the hearing the respondent presented two revised letters, both dated August 17, 2010. The first was from Gateway and the second was from the Fred Victor Centre.

[35] The Gateway letter contained the same paragraphs set out in paragraphs 24 and 25 of these Reasons and to that extent was no different from that considered previously by Board members and rejected as insufficient; however, the letters contained additions.

[36] The Fred Victor Centre letter indicates that its author and the representative from Gateway had a telephone conference call with the respondent which was an opportunity "to begin to form a case plan with him." This beginning of a case plan contained the following provisions:

1. Mr. Karimi-Arshad if released would go directly to Gateway, be admitted to its shelter and access its addictions counsellor "once he settles in";
2. He will be referred to a doctor in order to continue with his medication for Post Traumatic Stress Disorder; and
3. Gateway and the Fred Victor Centre would continue to work collaboratively with the respondent "to provide the optimum quality of support with his case plan."

[37] The Gateway letter confirms that its author spoke to the respondent during a telephone conference call and confirms the following:

1. Mr. Karimi-Arshad "expressed an interest in a case plan which includes meeting with Gateway's addictions counsellor, exploring possible treatment options for his drug use and finding long-term housing";
2. The respondent and the author of the letter will meet on "a regular basis (every 1-2 weeks, depending on need)"; and
3. The specifics of the case plan would be crafted in collaboration with the Fred Victor Centre and would be "explored in more depth once the respondent is a resident at the shelter."

[38] Gateway confirms that it knows that Mr. Karimi-Arshad is incarcerated, does not have status, and is waiting for his travel documents to be issued. It further confirms that it is able to provide the respondent with a bed on his release.

[39] Gateway reiterates that it does not provide strict supervision to its residents but that it will be the responsibility of Mr. Karimi-Arshad to comply with the shelter's rules and policies and "adhere to his case plan." Importantly, it adds:

> With proper consents, Gateway will be able to respond to CBSA, should they call and ask if Mr. Arshad [*sic*] is residing at Gateway. However, Gateway will not be responsible for reporting Mr. Arshad [*sic*] to CBSA, should he leave Gateway, as that is not our mandate. I am willing to write a letter of support (at Mr. Arshad's [*sic*] request) to take to immigration with the dates of any appointments that Mr. Arshad [*sic*] has with Gateway's case management."

[40] Lastly, echoing the letter from Fred Victor Centre, Gateway says that it is committed to connecting the respondent to its case management staff "in order to start the process of developing a case plan to which he will be held accountable."

[41] The member ordered the release of the respondent on terms and conditions, the most relevant of which, for the purposes of this application, are the following:

> - Be accepted as a client for supervision and case management by the Salvation Army Gateway Counselling Services and the Fred Victor Mental Health and Justice program and remain in good standing with the agencies and the case plan developed.
>
> - Shall report on the next working day to an officer at the CBSA office at GTEC, 6900 Airport Road, Entrance 2B,

Mississauga, Ontario, L4V 1E8 if he is rejected as a client for supervision and case management.

- Shall comply with conditions of the case plan, treatment program for mental health and substance abuse developed by the case management by the Salvation Army Gateway Counselling Services and the Fred Victor Mental Health and Justice program.

- Shall sign a consent form to release and disclose to the CBSA personal information forms given to agencies or physicians dealing with the case plan, programs or treatment he is enrolled in; updates of the case plan, treatment and program set up in his case; updates on his compliance with the case plan, programs, treatment and medication plan.

- Shall sign a consent form to allow the CBSA to request information, updates and documentation on the case plan, treatment and his compliance with the conditions, rules and policies of the case plan and to confirm that he remains in good standing with the agencies and the case plan.

- Present himself at the date, time and place that a Canada Border Services Agency (CBSA) officer or the Immigration Division requires him to appear to comply with any obligation imposed on him under the Act, including removal, if necessary.

- Provide CBSA, prior to release with his address and advise the CBSA in person of any change in address prior to the change being made.

- Report to an officer at the CBSA office at GTEC, 6900 Airport Road, Entrance 2B, Mississauga, Ontario, L4V 1E8 on or before date scheduled by the CBSA and once a week thereafter. A CBSA officer may, in writing, reduce the frequency or change the reporting location.

- Reside at all times at the address referred to by the Salvation Army Gateway, Counselling services or the Fred Victor Mental Health and Justice program and comply with all rules and policies of that facility.

[42] The letters from Gateway and Fred Victor Centre satisfy some of the conditions set out by Member Kowalyk in her reasons of July 28, 2010. Specifically they address items 4, 6, and 7 as summarized in paragraph 31 of these Reasons in that they indicate that services are available to someone regardless of legal status, that a bed will be available for the respondent on release, and that the agencies acknowledge that they know that the respondent is subject to removal.

[43] Gateway does not directly address the remaining previous concerns. Specifically, the proposed alternative does not include the posting of any security deposit or guarantee by a Canadian citizen or permanent resident living in Canada; does not include the monitoring or supervision by a third party or professional organization such as the Toronto Bail Program; does not include the reporting to CBSA by the agencies of non-compliance or change of address, and does not set out a developed case plan prior to release, although one has begun to be created.

[44] The Minister submits that the reasons of the member do not set out how the consents that the respondent is ordered to provide to CBSA will ensure compliance by the respondent with the terms and conditions of release. The Minister further submits that the member fails to provide clear and compelling reasons for departing from earlier decisions that maintained the detention of the respondent. These are inter-related issues and I will deal with them together.

[45] Unlike earlier decisions, this member finds that she is “unable to determine that removal will be effected as soon as reasonably practicable.” She reaches this conclusion after having reviewed the previous history of contacts with the Iranian authorities. The record before the

member indicated that the Iranian authorities were not consistent in indicating what exactly was required to provide the necessary travel document; however, it appears that what is now required is original documentation that shows that the respondent is a citizen of Iran. He has none and it appears that none can be obtained from Iran unless one is actually present in the country – thus a Catch-22 faces the parties.

[46] The Minister has been in contact with the respondent's family members in Canada (who appear to have had little contact with the respondent) in an attempt to obtain original documentation; however, they do not appear to have any such documents. There is some suggestion that the respondent's mother in Iran may have original records of his Iranian military service and that she may be coming to Canada and she may be able to bring these with her; however, this is all very speculative. Lastly, the Minister advised the member that he was looking into whether someone in Iran with a power of attorney from the respondent might be able to access original documents; again this was very speculative and success was uncertain. Nonetheless, the member noted that while the respondent had previously refused to provide such a power of attorney at the hearing in August he agreed to sign a power of attorney "to allow the Canadian Mission in Tehran to act on his behalf to secure a birth certificate or other original identity document."

[47] Although the Minister submitted that there were ongoing diplomatic discussions between the two countries, the member noted that no specifics had been provided. She specifically found that there was no update provided as to "the actions DFAIT will implement to resolve the issues and when the parties expect the issuance of a travel document."

[48] The member, in my view, clearly weighed all of the evidence that had previously been submitted, the history of efforts to obtain the necessary travel document, the lack of any information showing the current state of these efforts, and, most importantly, the lack of any indication of when the necessary document might be provided. With that background, the member's assessment that she was unable to determine that removal would be effected as soon as reasonably practicable was reasonable, transparent and justified. I agree with the applicant that the member did not find that the respondent will be detained indefinitely or in a manner contrary to the *Charter*, however her finding regarding the likelihood of removal was significantly different from that of previous members. She was entitled to consider this factor and determine what weight to give it.

[49] The fact that removal from Canada was not likely to happen within the foreseeable future was a significant change in circumstance and it warranted the member seriously examining the new proposal for release, which she did.

[50] The major obstacle to release had always been supervision and monitoring of the respondent while on release from detention both to ensure that he was not a danger to the public and to ensure his compliance with the terms of release. The member notes and is aware that the current proposal for release does not include the posting of a security deposit or guarantee by a Canadian citizen or resident and does not include any third party agency alerting CBSA when the respondent has

breached any of the terms of release, breached his treatment plan, or left Gateway. However, the member concludes:

> I am satisfied that with the signing of the consent by Mr. Karimi-Arshad that the CBSA will have access to current and reliable information as to Mr. Karimi-Arshad's compliance with terms and conditions of the order for release. The requirement that Mr. Karimi-Arshad reports once a week to the Bond Reporting Centre will allow the CBSA to monitor weekly his compliance with his case plan for rehabilitation and control his mental health and drug addiction. His compliance with the case plan for rehabilitation is necessary to ensure that his criminal activity is checked and prevent such incidents as lead to the serious convictions in 2001.

[51] If a surety, guarantor, or third party providing direct supervision and reporting to CBSA had been available to the respondent, it is reasonable to assume that he would have advanced it at some point during his three-year detention. I agree with the submission of the respondent that the member engaged in a weighing of the factors and a balancing exercise. The respondent did not have a surety or guarantor and there was no third party prepared to provide supervision and monitoring that included alerting CBSA when he was in default of the terms and conditions of release or his treatment plan. The member clearly recognized that CBSA had to have some mechanism in place to allow it to become aware of any such breach. Gateway's agreement that it would provide information to CBSA, given the consent of the respondent, on his compliance with his case plan and with the terms and conditions of the two agencies was found by the member, when coupled with weekly reporting to CBSA, to provide the supervision and monitoring that was required and reasonably available in the circumstances.

[52] I have no doubt that CBSA would prefer that a third party call it when a foreign national on release breaches the conditions of release; however, the record before this member indicated that no such system is available to this respondent. If such a system were a pre-condition to release and it was not available to a detainee, then that detainee could never be released from detention. This cannot be the case. While inconvenient to CBSA, there is nothing that prevents it from contacting Gateway as often as it deems necessary to check on the respondent's status and, if it learns that he is non-compliant, to detain him again.

[53] The applicant submits that it was unreasonable for the member not to require as a term of release that the respondent execute the consents necessary to permit CBSA to contact Gateway and obtain information. The Minister submits that "the agencies, given their mandates, are certainly not going to require these consents and the member has imposed no deadline as to when such consents must be provided for the order to be complied with." I find this submission to be without merit. The timing of the execution of the consents is fully within the control of the applicant. I accept the submission of the respondent that "since it is a condition of release that the consents be signed, these consents can easily be prepared for the applicant's signature by CBSA to be signed upon release."

[54] For these reasons, I find that the decision releasing the respondent on the terms set out in the Order for Release is not unreasonable and further find that the member provided clear and compelling reasons to depart from previous detention orders.

[55] No question was proposed by either party for certification and there is no serious question of general importance involved in this application.

**JUDGMENT**

**THIS COURT ORDERS that**:

1. This application is dismissed; and

2. No question is certified.

"Russel W. Zinn"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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|---|---|
| **DOCKET:** | **IMM-4875-10** |
| **STYLE OF CAUSE:** | **MPSEP v. MEHDI KARIMI-ARSHAD** |
| **PLACE OF HEARING:** | **TORONTO** |
| **DATE OF HEARING:** | **SEPTEMBER 22, 2010** |
| **REASONS FOR JUDGMENT AND JUDGMENT BY:** | **ZINN J.** |
| **DATED:** | **SEPTEMBER 27, 2010** |

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