Federal Court  Cour fédérale

Date: 20110613

Docket: IMM-3081-11

Citation: 2011 FC 682

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, June 13, 2011

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Applicant

and

MOHAMED SALL

Respondent

REASONS FOR ORDER AND ORDER

[1] This is an application for judicial review of an order issued on May 10, 2001, by Yves Dumoulin, a member of the Immigration Division of the Immigration and Refugee Board (the Member or the ID), ordering the release of the respondent, Mr. Sall, upon a review of his detention.

[2] The Minister of Public Safety and Emergency Preparedness (the Minister) is challenging the order and submits that the Member's decision is unreasonable since it does not consider the

danger Mr. Sall constitutes to the public, and, more particularly, his former wife, and that the conditions imposed to counterbalance this risk do not suffice.

[3] Having carefully examined the record that was before panel, the previous decisions and the written and oral submissions of the two parties, I have come to the conclusion that this application for judicial review should be dismissed. The Member made his decision after due deliberation, and he had the benefit of seeing and hearing the respondent and his wife, who is acting as his guarantor. For the following reasons, it is my view that the arguments raised by the Minister are insufficient to find the ID's decision unreasonable.

I. Facts

[4] The respondent is a Mauritanian citizen. He arrived in Canada on January 5, 2003, after obtaining a student visa. A few days after his arrival in Canada, he claimed refugee protection on the grounds of his political opinions. On February 4, 2004, the claim was allowed by the Refugee Protection Division. He later obtained permanent residence on January 12, 2005.

[5] In 2004, the respondent returned to Mauritania and married his second wife, Ms. K.G. (his ex-wife). Ms. K.G. arrived in Canada on July 24, 2005, and a child was born of their union in May 2006. Unfortunately, it appears that the respondent quickly behaved violently towards his ex-wife, and, on June 19, 2009, the Court of Quebec found him guilty of several criminal offences, including assault with a weapon, assault causing bodily harm, sexual assault, sexual assault with a weapon, and threats to cause death or bodily harm. Except for one, all of these offences were committed between March and July 2007. The respondent was also found guilty of failing to comply with a recognizance entered into before a judge. Although he had entered into a recognizance before a judge obliging him not to contact his ex-wife or to go to her home,

and to keep the peace and to be of good conduct, the respondent, armed with a knife, raped his ex-wife at her home. Having been found guilty of these offences, he was sentenced to five years' imprisonment. Given the time that he had already spent in preventive detention and the fact that he was eligible for release after serving two-thirds of his sentence, he completed his sentence on March 16, 2010. In the meantime, his ex-wife was granted a divorce in 2009.

[6] On August 26, 2009, the respondent was the subject of a report finding him inadmissible on grounds of serious criminality, and a new arrest warrant for him was issued. He was consequently turned over to the Canada Border Services Agency (CBSA) when he was released on March 16, 2010, and again found himself detained on immigration grounds.

[7] Following the first review of his detention on March 18, 2010, the ID ordered the release of the respondent subject to certain conditions, in addition to the payment of a $2,000 guarantee. The applicant immediately challenged this decision through an application for judicial review and, on March 25, 2010, obtained a stay of the order until a rendering of a final decision by this Court on the application for judicial review. The same scenario occurred again at the two subsequent detention reviews, on March 25 and April 30, 2011.

[8] On June 10, 2010, the ID found that the flight risk had increased since a removal order had been issued against the respondent and the Quebec Court of Appeal had dismissed the respondent's appeal of his conviction by the Court of Quebec. As of then, the respondent's detention was maintained at each monthly review of his detention until the decision that is the subject of the current judicial review.

[9] On October 27, 2010, Madam Justice Tremblay-Lamer dismissed the applications for judicial review filed by the Minister against the release orders issued following the first three detention reviews. In her opinion, these applications had become moot since the ID had maintained the detention of Mr. Sall since June 10, 2010.

[10] On February 10, 2011, the Minister decided that Mr. Sall was a danger to the Canadian public under paragraph 115(2)(*a*) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA). The application for leave and for judicial review of that decision was dismissed by the Federal Court.

[11] On February 16, 2011, a removal officer met with Mr. Sall to initiate steps to obtain a travel document, but the respondent refused to cooperate in any steps leading to his removal. His unwillingness to cooperate was raised at his subsequent detention reviews.

[12] A few days before his last detention review, Mr. Sall agreed to sign a statement required to obtain a travel document for him. Given that Mr. Sall was able to provide only a photocopy of his birth certificate, the issuance of a travel document could still take four to five months, since verifications have to be made in Mauritania.

[13] At his last detention review on May 6, Mr. Sall presented some new information on his situation. First, he testified that he had decided to cooperate with the removal officer to obtain a travel document. Second, he had married Ms. Kanyenyeri on April 20. 2011. Mr. Sall met his new wife in December 2010, while he was in detention. His new wife is from Burundi and has obtained permanent residence status in Canada; she testified with a great deal of candour and transparency, is fully aware of her husband’s criminal record and is willing to act as his

guarantor. Lastly, Mr. Sall stated that he had filed an application for leave with the Supreme Court of Canada concerning his criminal conviction.

[14] After reserving his decision for four days, the Member ordered the conditional release of Mr. Sall. On the same day, the Minister filed an application for leave and judicial review of that decision, and an application to stay the decision until the Court had ruled on the application for judicial review. The stay application was allowed on May 16 of this year, and an expedited hearing of the judicial review application was set for June 3.

II. Impugned decision

[15] In his decision, the Member first returned to the new information presented at the hearing held on May 6. He emphasized the fact that Mr. Sall cooperated in obtaining a travel document from Mauritanian authorities and that he would continue to cooperate with the Canada Border Services Agency to effect his removal. Mr. Sall had even explicitly accepted that he might have to leave Canada before the Supreme Court has had time to rule on his application for leave.

[16] The Member also noted that Mr. Sall had taken courses to learn how to manage his violence and control his emotions. Regarding the fact that Mr. Sall has still not admitted the facts leading to his criminal convictions, the Member stated that he understood the logic of this refusal given the legal proceedings he has instituted to have these convictions overturned.

[17] Lastly, the Member placed much emphasis on Ms. Kanyenyeri’s testimony. He noted that Ms. Kanyenyeri earned approximately $1,200 a month after taxes, and that she had already lost a guarantee she had posted for her brother after her brother failed to respect the conditions of his conditional release. He ensured that Ms. Kanyenyeri was well aware of her husband’s past, and

he noted that she seemed capable of having a positive influence on him. Ms. Kanyenyeri testified that she had talked at length with Mr. Sall and that she was aware of her duties as a guarantor. She added that she would not hesitate to contact the officer responsible for Mr. Sall should Mr. Sall not respect his conditions.

[18] After explaining that he would make his decision on the basis of his overall assessment of the entire file, the Member started by considering whether Mr. Sall is a danger to the public. He noted that Mr. Sall had always denied any responsibility for the offences of which he was found guilty and that he had previously refused all therapy. He also recognized that he had to consider the danger opinion that had been issued by the Minister, as required by section 246 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (IRPR). In that regard, the Member explained that the opinion itself did not increase the respondent's degree of dangerousness, since the opinion merely recorded a factual situation that was already true at the time of his conviction in 2009. He added that no evidence had been submitted to him to demonstrate that other violent incidents had increased the danger since then.

[19] The Member also considered Mr. Sall's participation in a number of workshops on learning to manage his emotions, live without violence and understand that it was in his own interests to behave himself. He observed that the respondent had been attacked by fellow inmates on two occasions and that he had not retaliated or let himself be provoked, showing the beneficial effects of these workshops.

[20] Member Dumoulin did not find that there was a significant flight risk and did not believe that it was sufficient to prevent his release. While Mr. Sall had previously refused to cooperate in his removal and had expressed fears of returning to his country, he seems to have undergone a

change in attitude and now shows himself willing to cooperate with the CBSA in his removal, the eventuality of which he now seems to accept.

[21] Last, the Member made much of the fact that Ms. Kanyenyeri appears to be a credible and suitable guarantor. Her testimony did not contradict Mr. Sall's statements; she was well aware of his record; and she convincingly transmitted her understanding of her duties as a guarantor. She was willing to post a guarantee of $3,000 and to house her husband at her home; and she seemed to have a positive influence on him. She was also willing to cooperate with members of the Mauritanian community who testified at previous detention reviews that they wished to help Mr. Sall respect his conditions.

[22] On the basis of these new facts, and considering Mr. Sall's changed attitude, the Member concluded that his release could be envisaged; however, he imposed what he considered to be very strict conditions on him, as follows:

- Ms. Kanyenyeri had to post a $3,000 guarantee with the CBSA;
- Upon his release, Mr. Sall had to present himself at the date, time and place determined by the CBSA to comply with any obligation imposed on him under the IRPA, including removal, if necessary;
- Mr. Sall had to reside with Ms. Kanyenyeri at all times, confirm his home address and in person inform the CBSA of any change in address;
- Mr. Sall had to report to the CBSA within 48 hours of his release and, subsequently, twice a week;

- Mr. Sall had to continue to fully cooperate with the CBSA with respect to obtaining a travel document;

- Mr. Sall was not to engage in any activity that would result in a conviction under any Act of Parliament;

- Mr. Sall had to adhere to a curfew and be present always between the hours of 10 p.m. and 6 a.m. at the address provided to the CBSA, except where specifically authorized in writing by the CBSA to engage in employment at the premises of a specific named employer;

- Mr. Sall was to be of good behaviour, keep the peace, inform the CBSA of any new charges and convictions and comply with any order issued by the panel;

- Mr. Sall could not go to Quebec City (where his ex-wife resides) unless there was an official reason and with CBSA permission. He was to stay in Montréal and its surroundings and inform the CBSA if he travelled to other areas.

III. Issues

[23] This application for judicial review essentially raises three issues:

(a) What is the applicable standard of review?

(b) Did the Member err in his analysis of the danger Mr. Sall constitutes to the public?

(c) Could the Member reasonably conclude that the conditions imposed on Mr. Sall were an alternative to detention?

IV. Relevant statutory and regulatory provisions

[24] Section 55 of the IRPA allows an immigration officer to arrest a permanent resident or a foreign national who the officer has reasonable grounds to believe is inadmissible and is a danger to the public or is unlikely to appear for an admissibility hearing or removal from Canada. Conversely, an immigration officer may order the release of a person, subject to certain conditions if there are no longer grounds to detain that person. According to section 57 of the IRPA, persons thus detained may have the grounds of their detention reviewed within 48 hours, seven days and then within each 30-day period after they were taken into detention.

[25] Section 58 of the IRPA provides that the Immigration Division shall order the release of a permanent resident or a foreign national unless it is satisfied of certain facts. If these facts are established, however, it can order the detention of the permanent resident or foreign national in question.

Immigration and Refugee Protection Act, SC 2001, c 27	*Loi sur l'immigration et la protection des réfugiés*, LC 2001, c 27
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 :
(*a*) they are a danger to the public;	*a*) le résident permanent ou l'étranger constitue un danger pour la sécurité

publique;

(*b*) they are unlikely to appear for examination, an admissibility hearing, removal from Canada, or at a proceeding that could lead to the making of a removal order by the Minister under subsection 44(2);

b) le résident permanent ou l'étranger se soustraira vraisemblablement au contrôle, à l'enquête ou au renvoi, ou à la procédure pouvant mener à la prise par le ministre d'une mesure de renvoi en vertu du paragraphe 44(2);

(*c*) the Minister is taking necessary steps to inquire into a reasonable suspicion that they are inadmissible on grounds of security or for violating human or international rights; or

c) le ministre prend les mesures voulues pour enquêter sur les motifs raisonnables de soupçonner que le résident permanent ou l'étranger est interdit de territoire pour raison de sécurité ou pour atteinte aux droits humains ou internationaux;

(*d*) the Minister is of the opinion that the identity of the foreign national has not been, but may be, established and they have not reasonably cooperated with the Minister by providing relevant information for the purpose of establishing their identity or the Minister is making reasonable efforts to establish their identity.

d) dans le cas où le ministre estime que l'identité de l'étranger n'a pas été prouvée mais peut l'être, soit l'étranger n'a pas raisonnablement coopéré en fournissant au ministre des renseignements utiles à cette fin, soit ce dernier fait des efforts valables pour établir l'identité de l'étranger.

Detention — Immigration Division

Mise en détention par la Section de l'immigration

(2) The Immigration Division may order the detention of a permanent resident or a foreign national if it is satisfied that the permanent resident or the foreign national is the subject of an examination or an admissibility hearing or is subject to a removal order and that the permanent resident or the foreign national is a danger to the public or is unlikely to appear for examination, an admissibility hearing or removal from Canada.

(2) La section peut ordonner la mise en détention du résident permanent ou de l'étranger sur preuve qu'il fait l'objet d'un contrôle, d'une enquête ou d'une mesure de renvoi et soit qu'il constitue un danger pour la sécurité publique, soit qu'il se soustraira vraisemblablement au contrôle, à l'enquête ou au renvoi.

Conditions

Conditions

(3) If the Immigration Division orders the release of a permanent resident or a foreign national, it may impose any conditions that it considers necessary, including the payment of a deposit or the posting of a guarantee for compliance with the conditions.	(3) Lorsqu'elle ordonne la mise en liberté d'un résident permanent ou d'un étranger, la section peut imposer les conditions qu'elle estime nécessaires, notamment la remise d'une garantie d'exécution.

[26] Section 246 of the *Immigration and Refugee Protection Regulations* sets out the factors to be considered in determining whether a person is a danger to the public. Moreover, section 248 sets out the factors to be considered when there are grounds for detention, before a decision is made on detention or release:

Immigration and Refugee Protection Regulations, SOR/2002-227	*Règlement sur l'immigration et la protection des réfugiés*, DORS/2002-227
Danger to the public	Danger pour le public
246. For the purposes of paragraph 244(b), the factors are the following:	246. Pour l'application de l'alinéa 244b), les critères sont les suivants :
(*a*) the fact that the person constitutes, in the opinion of the Minister, a danger to the public in Canada or a danger to the security of Canada under paragraph 101(2)(b), subparagraph 113(d)(i) or (ii) or paragraph 115(2)(a) or (b) of the Act;	*a*) le fait que l'intéressé constitue, de l'avis du ministre aux termes de l'alinéa 101(2)b), des sous-alinéas 113d)(i) ou (ii) ou des alinéas 115(2)a) ou b) de la Loi, un danger pour le public au Canada ou pour la sécurité du Canada;
(*b*) association with a criminal organization within the meaning of subsection 121(2) of the Act;	*b*) l'association à une organisation criminelle au sens du paragraphe 121(2) de la Loi;
(*c*) engagement in people smuggling or trafficking in persons;	*c*) le fait de s'être livré au passage de clandestins ou le trafic de personnes;
(*d*) conviction in Canada under an Act of Parliament for	*d*) la déclaration de culpabilité au Canada, en vertu d'une loi fédérale, quant à l'une des infractions suivantes

(i) a sexual offence, or

(ii) an offence involving violence or weapons;

(*e*) conviction for an offence in Canada under any of the following provisions of the Controlled Drugs and Substances Act, namely,

(i) section 5 (trafficking),

(ii) section 6 (importing and exporting), and

(iii) section 7 (production);

(*f*) conviction outside Canada, or the existence of pending charges outside Canada, for an offence that, if committed in Canada, would constitute an offence under an Act of Parliament for

(i) a sexual offence, or

(ii) an offence involving violence or weapons; and

(*g*) conviction outside Canada, or the existence of pending charges outside Canada, for an offence that, if committed in Canada, would constitute an offence under any of the following provisions of the Controlled Drugs and Substances Act, namely,

(i) section 5 (trafficking),

(ii) section 6 (importing and exporting), and

(iii) section 7 (production).

:

(i) infraction d’ordre sexuel,

(ii) infraction commise avec violence ou des armes;

e) la déclaration de culpabilité au Canada quant à une infraction visée à l’une des dispositions suivantes de la Loi réglementant certaines drogues et autres substances:

(i) article 5 (trafic),

(ii) article 6 (importation et exportation),

(iii) article 7 (production);

f) la déclaration de culpabilité ou la mise en accusation à l’étranger, quant à l’une des infractions suivantes qui, si elle était commise au Canada, constituerait une infraction à une loi fédérale :

(i) infraction d’ordre sexuel,

(ii) infraction commise avec violence ou des armes;

g) la déclaration de culpabilité ou la mise en accusation à l’étranger de l’une des infractions suivantes qui, si elle était commise au Canada, constituerait une infraction à l’une des dispositions suivantes de la Loi réglementant certaines drogues et autres substances:

(i) article 5 (trafic),

(ii) article 6 (importation et exportation),

	(iii) article 7 (production).
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 determining the length of time that detention is likely to continue and, if so, that length of time;	*c*) l'existence d'éléments permettant l'évaluation de la durée probable de la détention et, dans l'affirmative, cette période de temps;
(*d*) any unexplained delays or unexplained lack of diligence caused by the Department or the person concerned; and	*d*) les retards inexpliqués ou le manque inexpliqué de diligence de la part du ministère ou de l'intéressé;
(*e*) the existence of alternatives to detention.	*e*) l'existence de solutions de rechange à la détention.

V. Analysis

(a) Standard of review

[27] The issues raised by the applicant are clearly issues of mixed fact and law, in so far as they call into question the Member's application of legal standards to the facts in this case. In fact, it is not so much a matter of assessing whether the Member erred in interpreting the factors set out in the IRPA and the IRPR or whether he failed to consider them, but, rather, of examining whether the conclusions he drew from them, in light of the evidence before him, withstand analysis. It is trite law since *Dunsmuir v Nouveau-Brunswick*, 2008 SCC 9, that the standard of review to be applied to such questions is reasonableness: see also *Canada (Citizenship and*

Immigration) v Li, 2008 FC 949, at paragraphs 13 to 16; *Canada (Citizenship and Immigration) v B157*, 2010 FC 1314, at paragraphs 22 to 25.

[28] It follows that this Court's intervention would be warranted only if it can be demonstrated that the Member's findings do not fall "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir*, above, at paragraph 47. This is not the case here.

(b) Did the Member err in his analysis of the danger Mr. Sall constitutes to the public?

[29] The applicant submitted that the Member's decision was not reasonable since he had not explained clearly why he decided to depart from the previous decisions. Specifically, the applicant argued that the workshops in which Mr. Sall had participated had not been deemed sufficient in the past to conclude that the danger had decreased and that Member Dumoulin had not really explained why he had concluded differently.

[30] It is undisputed that the Member had to assess the reasons for Mr. Sall's detention in light of the earlier decisions of his peers following the previous detention reviews. The Federal Court of Appeal has had to deal with this issue, and it is appropriate to reproduce the comments of Justice Rothstein (as was his title then) in that regard in *Canada (Minister of Citizenship and Immigration) v Thanabalasingham*, 2004 FCA 4:

> [10] Detention review decisions are the kind of essentially fact-based decision to which deference is usually shown. While, as discussed above, prior decisions are not binding on a Member, I agree with the Minister that if a Member chooses to depart from prior decisions to detain, clear and compelling reasons for doing so must be set out. There are good reasons for requiring such clear and compelling reasons.

> [11] Credibility of the individual concerned and of witnesses is often an issue. Where a prior decision maker had the opportunity to hear from witnesses, observe their demeanour and assess their credibility, the subsequent decision maker must give a clear explanation of why the prior decision maker's assessment of the evidence does not justify continued detention. For example, the admission of relevant new evidence would be a valid basis for departing from a prior decision to detain. Alternatively, a reassessment of the prior evidence based on new arguments may also be sufficient reason to depart from a prior decision.
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> [12] The best way for the Member to provide clear and compelling reasons would be to expressly explain what has given rise to the changed opinion, i.e. explaining what the former decision stated and why the current Member disagrees.
>
> [13] However, even if the Member does not explicitly state why he or she has come to a different conclusion than the previous Member, his or her reasons for doing so may be implicit in the subsequent decision. What would be unacceptable would be a cursory decision which does not advert to the prior reasons for detention in any meaningful way.

[31] In this case, I find that the Member satisfied this obligation. It is very clear upon reading his decision that he reviewed the whole of the file and the previous decisions: indeed, he refers to them on several occasions, and he himself had refused to release Mr. Sall on two occasions in the past (on July 29, 2010, and November 15, 2010). The Member was also very aware of the seriousness of the offences committed by Mr. Sall and the fact that he has always denied responsibility. Moreover, the Member considered a number of factors that counterbalance the danger Mr. Sall constitutes. He first noted the very positive feedback received by Mr. Sall in the course of the workshops he took. He also mentioned that Mr. Sall had participated in a number of other workshops since the last time he had seen him, which, in his opinion, revealed Mr. Sall's desire to address his problems. He also found that the passage of time seemed to have had a beneficial effect, citing as proof for this the two occasions on which Mr. Sall was attacked

without his retaliating. In the Member's view, this demonstrated Mr. Sall's ability to control himself and not respond when provoked and indicated that the workshops in which he participated have resulted in a change in attitude. Lastly, he noted that Mr. Sall is an intelligent man who knows what is in his best interests and who has understood that violence is not the best solution when there is conflict.

[32] Certainly, some of the factors raised by the Member are not new. The fact remains though that the Member coherently and transparently explains the reasons that led him to believe that the danger Mr. Sall constitutes had to be reassessed on the basis of all of these factors. In addition, the Member had the benefit of seeing and hearing Mr. Sall, and he could assess his credibility. Indeed, the Member specifically stated that he asked himself whether Mr. Sall's cooperation to obtain a travel document was merely a smoke screen, but concluded that, instead, Mr. Sall appeared to have accepted the recommendations made to him at previous detention reviews.

[33] Lastly, Ms. Kanyenyeri's positive influence on the respondent should not be underestimated. The Member noted that her testimony was credible and trustworthy and that their romantic relationship seemed to be genuine. The commitment they made to one another by marrying on April 20, 2011, was another new, extremely relevant factor.

[34] In view of all of this, it is my opinion that Member Dumoulin could depart from the previous decisions. Contrary to the submission of counsel for the Minister, the Member provided ample and convincing reasons to explain his different assessment of the danger. He was clearly well acquainted with Mr. Sall's file and only ruled on the detention review after reserving his decision for four days. Not only is his final assessment reasonable given the evidence that was

before him, but it is also supported by sufficient reasons to meet the requirements set out by the Federal Court of Appeal in *Thanabalasingham*, above.

[35] The applicant also argued that the Member had erred in law in his treatment of the danger opinion issued by the Minister. Noting that such an opinion is one of the factors the ID must consider in its assessment of whether a person is a danger to the public, under paragraph 246(*a*) of the IRPR, counsel for the Minister argued that the Member did not really consider it and instead chose to accord it limited weight, claiming that this opinion merely recorded the situation as it was in 2009.

[36] As mentioned above, we are not dealing here with a situation in which the Member completely ignored the danger opinion, as was the case in *Public Safety and Emergency Preparedness) v Steer*, 2011 FC 423, to which the applicant referred the Court. Moreover, a danger opinion issued by the Minister does not bind the ID; once again, it is merely one factor that it must consider when determining whether an individual constitutes a danger to the public.

[37] In his reasons, the Member dealt with the danger opinion at great length. He first recognized that it was a factor he had to consider in accordance with paragraph 246(*a*) of the IRPR. He then added:

> [TRANSLATION]
>
> I would like to make the following comment regarding the danger opinion: yes, there is a danger opinion, but the danger opinion in itself does not increase the degree—your degree of dangerousness—since the danger opinion reports a factual situation that already existed when you were convicted in 2009. The danger opinion—no evidence was submitted that other violent incidents or other one-time events were considered to—that could have been considered by us, for example, as a demonstration that

> the danger was greater. I have to consider the danger opinion because it is there; it is a ground that is there to demonstrate that there is a danger to the public, but it relates directly to a situation that was true in 2009 and that was (inaudible) with the principal goal of removing you from Canada, given that you are a person in need of protection. If the danger opinion had not been issued, it would not have been possible to remove you from Canada.
>
> So this is why I'm making a distinction, namely that, yes, I am considering the danger opinion because it is a factor that I must consider when determining whether there is a danger but, at the same time, there is no evidence that anything else has been added to the review of this file that adds to the incidents of 2009.
>
> (Panel's record, pages 14 to 15)

[38] It is clear from a reading of this excerpt that the Member was well aware of the danger opinion and that he had to consider it. What the Member is attempting to say, awkwardly maybe, is that the Minister's assessment may have been a new factor in February 2011, but it was nonetheless formed on the basis of the situation that existed in 2009 and past events. Consequently, there are no new facts in this opinion, which, as such, would increase the danger Mr. Sall constitutes to the public.

[39] Moreover, the Member was entitled to disagree with the assessment made by the Minister, not only because he relied on other factors to measure the danger (the workshops taken by Mr. Sall, his cooperation with the CBSA, the passage of time and his marriage), but also because this danger opinion was issued in a very specific context (to determine whether he should be removed from Canada), which is distinct from the purposes of a detention review. As pointed out by the Federal Court of Appeal in *Williams v Canada (Minister of Citizenship and Immigration)*, [1997] 2 FC 646, what the Minister or his delegate must focus on in the exercise of his discretion under paragraph 115(2)(*a*) of the IRPA is to determine whether an individual

who has committed one or more serious crimes in the past creates an unacceptable risk to the public. Such an assessment necessarily involves “political considerations not inappropriate for a minister” (*Williams*, at paragraph 29), but which are certainly not relevant for the ID in a detention review.

[40] In light of the foregoing reasons, it is my view, therefore, that the Member did not err in finding that the danger opinion issued by the Minister was distinguishable from and did not really add to the danger that Mr. Sall might constitute. Contrary to what was argued by counsel for the applicant, the Member did not ignore the factor provided at paragraph 246(1)(*a*) of the IRPR, but rather chose to depart from the danger opinion in the reasons for his decision. The Minister has not satisfied me that the Member erred in doing so, especially as this is only one of the factors enumerated at section 246 of the IRPR.

[41] Lastly, the applicant submits that the Member failed to consider the factors enumerated at section 248 of the IRPR, more specifically at paragraph 248(*d*). Even though Member Dumoulin considered the reason for the detention, the length of the detention and the fact that Mr. Sall would likely be detained a further four to five months, he never considered paragraph 248(*d*). If he had done so, counsel for the Minister argued, he would have found that the Minister was not responsible for the time limits imposed by Mauritania because of the fact that Mr. Sall provided only a copy of his birth certificate and that his detention would have been shorter if he had not waited until April 29, 2011, before cooperating with the removal officer. According to the Minister, in these circumstances, it is inconceivable that Mr. Sall be released now while the final stage is imminent, since the flight risk can only increase with the approach of Mr. Sall’s removal.

[42] It is true that the Member did not specifically refer to paragraph 248(*d*) in his reasons, no more so than he did to the other paragraphs of section 248. A close reading of his decision reveals, however, that he did consider it.

[43] It is true that since June 2010, the ID had always decided to maintain Mr. Sall's detention. But the circumstances had changed at the last detention review on May 6. The Member not only found that there was now an alternative to detention (I will come back to this in the next section of my reasons), but he also referred to a recent decision of one of his colleagues, according to which Mr. Sall could eventually be offered a release should he agree to fully cooperate with the CBSA. Member Dumoulin found that Mr. Sall had taken this recommendation to heart and was of the opinion that the change in attitude was not just a smoke screen but that it seemed sincere. Mr. Sall's unwillingness to cooperate could therefore no longer be held against him to justify a detention that had lasted for almost a year. I can therefore not accept the Minister's argument that the Member failed to consider this factor in his decision.

[44] For all of these reasons, the applicant's first ground of argument against Member Dumoulin's decision must therefore be dismissed. His analysis of the danger Mr. Sall constitutes to the public and of his flight risk was thorough and consistent with the applicable statutory and regulatory provisions. The conclusion he drew from that analysis is supported by the evidence that was before him and falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

(c) Could the Member reasonably conclude that the conditions imposed on Mr. Sall were an alternative to detention?

[45] The applicant alleged that the conditions imposed by Member Dumoulin as an alternative to his detention are insufficient. He noted that two members had refused to release Mr. Sall in the past, despite the even stricter conditions that had been proposed by counsel for Mr. Sall. In failing to explain why the strict conditions his colleagues had deemed necessary were no longer required, the Member had therefore made an error that warranted the intervention of the Court.

[46] According to the applicant, the Member had also erred by failing to examine whether Ms. Kanyanyeri was able to ensure that Mr. Sall would respect the conditions. The Member not only failed to explain the possible impact of Ms. Kanyanyeri's having lost the $2,000 guarantee she had posted for her brother in the past, but also afforded undue weight to Ms. Kanyanyeri's opinion and belief that she was able to influence Mr. Sall, regardless of the fact that she had not known Mr. Sall outside a controlled environment and that she worked five evenings a week and every second weekend.

[47] Even though these concerns are certainly valid, I find that the applicant's submissions do not point to any errors in the Member's reasoning but rather reveal a disagreement with his assessment of the conditions capable of providing a detention alternative. In that regard, I must bear in mind that the Member can claim greater experience in this matter than this Court and that he had the benefit of hearing Ms. Kanyanyeri's testimony.

[48] I first note that the amount of the guarantee that Ms. Kanyanyeri has to post is substantial, given her means and her sources of income. An amount of $3,000 for a person whose net income is $1,200 a month is a lot of money and clearly likely to incite Ms. Kanyanyeri to take her role seriously. This requirement seems entirely consistent with the underlying logic of posting a guarantee and which is properly synthesized in the following excerpt:

> It appears that the theory behind the requirement for a security deposit or a performance bond is that the person posting the bond or deposit will be sufficiently at risk to take an interest in seeing that the release complies with the conditions of release including appearing for removal.
>
> *Canada (Minister of Citizenship and Immigration) v Zhang*, 2001 FCT 522, at paragraph 19.

[49] Moreover, the emotional bond that ties Mr. Sall to Ms. Kanyanyeri is not the same as that which tied Ms. Kanyanyeri to her brother. In his reasons, the Member dealt at length with the genuineness of the feelings Mr. Sall and his wife have for each other. His decision largely relies on the positive influence Ms. Kanyanyeri has on Mr. Sall and on his willingness to turn the page on his past. These considerations were entirely relevant, and it was reasonable for the Member to give them weight.

[50] On the other hand, it is true that Ms. Kanyanyeri works from 4 p.m. to 9 p.m. during the week and every second weekend. However, this period of time is not long enough to allow Mr. Sall to go to Quebec City and to come back unbeknownst to Ms. Kanyanyeri, especially as Ms. Kanyanyeri indicated that she could call home while she was at work. But this is not the most important factor. Other than the physical control Ms. Kanyanyeri will have over Mr. Sall, the Member considered the commitment Mr. Sall has made to Ms. Kanyanyeri. The relationship that binds Mr. Sall and his wife may very well turn out to be a better guarantee that Mr. Sall will respect the conditions imposed on him than a 24-hour physical presence by Ms. Kanyaneri; that, at least, was the Member's assessment after he had heard the respondent and his wife and compared their testimony, and the Court is not prepared to intervene to discard that assessment.

[51] Regardless of what counsel for the Minister has to say, the conditions with which Mr. Sall must comply are strict and severe, especially if one considers that he also has to satisfy his probation requirements following his criminal conviction. I am satisfied, in the circumstances, that the Member did not err by ignoring Ms. Kanyenyeri's capacity to have Mr. Sall respect the release conditions imposed on him. To the contrary, the Member demonstrated insight by considering Mr. Sall's character and the offences of which he was found guilty. Far from minimizing their seriousness, he assured himself at the hearing that Mr. Sall's wife knew her husband well and also that she had the willpower to ensure that Mr. Sall would stay on the straight and narrow, and would not hesitate in contacting the CBSA if he failed to do so. In short, the Member's decision was entirely reasonable in the circumstances.

VI. Conclusion

[52] For all of these reasons, the Minister's application for judicial review of Member Dumoulin's decision dated May 10, 2011, must be dismissed. No question is certified.

ORDER

THE COURT ORDERS that the application for judicial review is dismissed. No question is certified.

"Yves de Montigny"

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Judge

Certified true translation
Johanna Kratz

FEDERAL COURT

SOLICITORS OF RECORD

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