Federal Court Cour fédérale

Date: 20130117

Docket: IMM-4611-12

Citation: 2013 FC 41

[UNREVISED ENGLISH CERTIFIED TRANSLATION]
Ottawa, Ontario, January 17, 2013

PRESENT: The Honourable Mr. Justice Boivin

BETWEEN:

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Applicant

and

ROBERT DRAGICEVIC

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review, made under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act], of a decision of a member of the Immigration Division, dated May 3, 2012, to release the respondent. The application is moot because the respondent was released immediately by the member. The applicant nevertheless asks this Court to exercise its discretion and hear this application even though it is moot, in light

of the factors set out in *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342, 57 DLR (4th) 231 [*Borowski*].

Factual background

[2] Robert Dragicevic (the respondent) is a citizen of Bosnia–Herzegovina.

[3] On August 12, 2009, the Immigration Division made a deportation order against the respondent, given that he was inadmissible on grounds of serious criminality under subsection 36(1) of the Act. The respondent appealed that decision to the Immigration Appeal Division, but the appeal was dismissed on May 25, 2010. The Immigration Appeal Division noted that the risk of re-offending was high in the respondent's case (Applicant's Record, Affidavit of Hélène Jarry, Exhibit "B", pp 31-38). The application for judicial review of that decision was dismissed by this Court on October 13, 2010 (Applicant's Record, Affidavit of Hélène Jarry, Exhibit "C", p 40).

[4] The respondent was incarcerated from April to September 2009 and from April 2011 to January 2012. The respondent left the penitentiary on January 14, 2012, and was arrested and detained by the Canada Border Services Agency (CBSA). His detention was upheld on January 16, 2012.

[5] On January 23, 2012, Member Musto ordered that the respondent be released on the following conditions (Applicant's Record, Affidavit of Hélène Jarry, Exhibit "D", p 48):

a. that he live with his mother at all times;

b. that a bond of $500 be posted;

c. that he comply with curfew every day from 11 p.m. to 5 a.m.;

d. that he report to CBSA authorities two (2) times a month;

e. that he avoid contact with anyone with a criminal record, except his brother;

f. that he report any offence or arrest to the CBSA within five (5) working days.

After posting the $500 bond, the respondent was released on February 1, 2012.

[6] In a danger opinion issued under paragraph 115(2)(*a*) of the Act and dated April 11, 2012 (the danger opinion), a Minister's delegate concluded that the respondent is a danger to the public in Canada. An application for leave regarding this opinion was dismissed by this Court on July 26, 2012 (docket IMM-4188-12).

[7] On April 24, 2012, when the respondent reported to the CBSA as agreed in his release conditions, the CBSA arrested the respondent because he had allegedly failed to report to the CBSA on April 17, 2012, as an officer had requested. Member Musto continued the respondent's detention in a decision dated April 26, 2012 (Applicant's Record, Affidavit of Hélène Jarry, Exhibit "E", pp 51-56).

[8] On May 3, 2012, at the respondent's detention review, Member Nupponen ordered his conditional release but did not require a bond. This decision by Member Nupponen is the subject of the present application for judicial review.

Impugned decision

[9] Member Nupponen reviewed the decisions of Member Musto, dated January 23, 2012, and April 26, 2012, and found that there was some risk of flight and some danger but that the conditions imposed could offset these risks adequately. Member Nupponen noted that Member Musto had released the respondent on January 23, 2012, and that there had been no changes in the file since then. Member Nupponen stated that there [TRANSLATION] "is a danger opinion, but the opinion itself makes no changes" (Applicant's Record, p 7).

[10] Member Nupponen stated that one had to look at the facts in the past, and that the danger opinion changed nothing, apart from confirming that the respondent had committed crimes in the past. Member Nupponen noted that the respondent had not committed any crimes since his release.

[11] Having heard the respondent's testimony concerning his missed meeting with the CBSA on April 17, 2012, Member Nupponen found that this had been a misunderstanding rather than a breach of condition. The respondent explained to the member that he was under the impression that the CBSA officer had not asked him to report. The member agreed that it was not clear in the respondent's mind that he had to report to the CBSA officer on April 17. The member reiterated that, in his view, there was no breach of condition, and that he would not decide the issue of the $500 bond, stating that [TRANSLATION] "if the Minister wants to seize the money, that is a question for the Minister" (Applicant's Record, p 8).

[12] According to Member Nupponen, the respondent had reported to the CBSA two (2) times a month, as requested, confirmed that he would continue to do so, and had not breached any of the conditions of Member Musto's order. Member Nupponen stated that nothing indicated that the respondent intended to flee, and he found that the conditions previously imposed by Member Musto were reasonable. He remarked that the respondent had complied with the conditions imposed in the past with a $500 bond. The member thus determined that it was not necessary to impose a new cash deposit upon release this time. He stated that [TRANSLATION] "it is a change, and the Minister may do whatever the Minister wishes with the $500 that was posted in the past" (Applicant's Record, p 9). The other conditions were the same ones imposed by Member Musto in January 2012.

Issues

[13] This case raises two (2) questions:

a. Did the member err in not considering the danger opinion issued by the delegate of the Minister of Citizenship and Immigration?

b. Did the member err in law by exceeding his jurisdiction in determining that the respondent had not breached a release condition and in not requiring a bond further to this determination?

Statutory provisions

[14] The relevant provisions of the Act and the *Immigration and Refugee Protection Regulations,* SOR/2002-227 [the Regulations], are reproduced in an appendix to this judgment. However, it is useful to recall that section 58 of the Act provides that the Immigration Division shall order the release of a permanent resident or a foreign national unless it is satisfied that certain factors exist, for example, 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. Section 244 of the Regulations states that certain factors shall be taken into consideration when assessing, among other things, whether a person is a danger to the public (paragraph 244(*b*)). The factors to be taken into account to establish whether a person is a danger to the public are set out in section 246 of the Regulations and include a danger opinion issued by the Minister (paragraph 246(*a*)). Subsection 49(4) of the Regulations, meanwhile, provides that a sum of money deposited is forfeited upon failure to comply with a condition imposed.

Standard of review

[15] The parties did not make any arguments regarding the standard of review applicable to the issues in this case. The Court stated in *Canada (Minister of Public Safety and Emergency Preparedness) v Steer*, 2011 FC 423, 388 FTR 37 [*Steer*], that deciding whether or not a member erred by failing to consider the danger opinion as required under the Regulations is a question of law and therefore reviewable on the standard of correctness. In *Canada (Minister of Public Safety and Emergency Preparedness) v Sall*, 2011 FC 682 at para 27, 391 FTR 123 [*Sall*], the Court found, rather, that this was a matter of the member's application of legal standards to the facts in this case, and that the standard of review to be applied is therefore reasonableness.

[16] In the present case, the respondent acknowledges that the member must consider the danger opinion but argues, rather, that he did consider it and rejected it. The Court should therefore examine whether the member adequately considered the danger opinion, which is a question of mixed fact and law that must be reviewed on the reasonableness standard. The Court will therefore intervene only if the member's finding falls outside the "range of possible,

acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190).

[17] As regards the issue of whether the member could act as he did regarding the bond, this is a question of fact that must also be reviewed on the reasonableness standard (*Dunsmuir*, above).

Arguments

Applicant's arguments

[18] As a preliminary remark, the applicant acknowledges that this application for judicial review is moot because the respondent has already been released, given that there was no condition preventing his immediate release. The applicant states that he did not have an opportunity to file a motion in this Court to challenge the respondent's release. The applicant argues that the Court should exercise its discretion to hear this application on the basis of the factors set out by the Supreme Court of Canada in *Borowski*, above, insisting that it is in the public interest for the Court to rule on this issue.

[19] The applicant further submits that Member Nupponen did not consider the danger opinion as prescribed by paragraph 58(1)(*a*) of the Act. The applicant argues that the member stated, on four (4) occasions, that the danger opinion [TRANSLATION] "makes no changes" and [TRANSLATION] "makes no difference in [the] case", that [TRANSLATION] "as regards the danger, there is no change", and that there [TRANSLATION] "is no difference" (Applicant's Record, Reasons for Decision, pp 7-8). According to the applicant, this proves that the member did not consider the danger opinion dated April 11, 2012, as he should have.

[20] The applicant cites *Canada (Minister of Public Safety and Emergency Preparedness) v Steer*, 2011 FC 423, 388 FTR 37 [*Steer*], in which the member had been aware of the danger opinion but had not taken it into account in his analysis. According to the applicant, the Court stated in *Steer*, above, that paragraphs 58(1)(*a*) of the Act and 246(*a*) of the Regulations require that a danger opinion be taken into account and that it is an important new element that must be considered as part of the analysis (*Steer*, above, at paras 18-19). The applicant notes that the danger opinion in the present case refers to an assessment report completed by Quebec corrections authorities in May 2011 which indicates that the respondent [TRANSLATION] "lacks motivation and plays down his criminal dynamics" and [TRANSLATION] "shows little remorse or empathy towards his victims", and that [TRANSLATION] "previous and current punishments have been insufficient to prod the respondent into making real changes to his way of life" (Applicant's Record, Affidavit of Hélène Jarry, Exhibit "A", p 22).

[21] The applicant notes that Member Musto had correctly concluded that the danger opinion was [TRANSLATION] "an important factor, because there is an entire analysis that was done behind [this opinion] . . ." (Applicant's Record, Affidavit of Hélène Jarry, Exhibit "E", p 53). According to the applicant, Member Nupponen's approach is therefore inconsistent with the words of the Act and Parliament's intent.

[22] As regards the bond, the applicant argues that the $500 bond, ordered by Member Musto on January 23, 2012, was maintained for the same amount at the detention review (Applicant's Record, Affidavit of Hélène Jarry, Exhibit "E", p 55). The applicant states that

Member Nupponen wrote that, in his opinion, there had been no breach of condition justifying the forfeiture of this sum and that he did not have to rule on compliance with a release condition (Applicant's Record, p 8). According to the applicant, although this statement is consistent with the Regulations, Member Nupponen went on to err by stating that there would be no bond and that the CBSA could do with the $500 as it saw fit (Applicant's Record, pp 8-9). According to the applicant, in the member's reasoning, there is a causal connection between his belief that there was no breach of condition and his decision not to require a bond, which is an error.

[23] According to the applicant, this reasoning is incorrect, for two (2) reasons. First, subsection 49(4) of the Regulations states that on failure to comply with a condition imposed, the bond is forfeited. The applicant therefore argues that the Immigration Division need not consider the issue of compliance with the conditions, since judicial review of an officer's decision in this regard lies to the Federal Court (citing *Domitlia v Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FC 419, [2011] FCJ no 539 (QL), and *Theodoropoulos v Canada (Minister of Citizenship and Immigration)*, 2005 FC 818, 140 ACWS (3d) 331). The applicant submits that Member Nupponen exceeded his jurisdiction in making a determination on the breach of condition noted by the CBSA and in not requiring a guarantee accordingly. According to the applicant, the member usurped the functions of the CBSA in respect of compliance with conditions and assumed the role of this Court on judicial review.

[24] Second, the applicant submits that the respondent's release without bond is inconsistent with the previous decisions by other members of the Immigration Division. According to the applicant, Member Nupponen did not give clear and compelling reasons for departing from the

previous decisions of his colleagues (*Canada (Minister of Citizenship and IImmigration) v Thanabalasingham* (CA), 2004 FCA 4, [2004] 3 FCR 572 [*Thanabalasingham*]; *Canada (Minister of Public Safety and Emergency Preparedness) v Karimi-Arshad*, 2010 FC 964 at para 16, 373 FTR 292). The applicant argues that the mere fact that the member was satisfied that the respondent had complied with the release conditions would not allow him to depart from the decisions rendered by the other members.

Respondent's arguments

[25] In his memorandum, the respondent did not present any arguments regarding the Court's discretion in this case.

[26] As regards the decision of Member Nupponen, the respondent submits that the member considered the danger opinion dated April 11, 2012, but decided to disregard it in his assessment of the danger, choosing to base his decision on the respondent's current situation rather than his criminal past as set out in the opinion. According to the respondent, the member instead relied on the fact that there had been no changes since his release on January 23, 2012. The respondent submits that where the member says, [TRANSLATION] "For me, the opinion itself makes no difference in your case", this shows that he knows that the danger opinion has to be taken into consideration but that it changes nothing in the particular circumstances of this case.

[27] The respondent submits that in *Sall*, above, the Court had found that this excerpt showed that the member understood that the danger opinion itself was a new fact but did not contain any

new facts that would increase the danger to the public (*Sall*, above, para 38). According to the respondent, Member Nupponen did the same in the present case.

[28] The respondent also argues that the objectives of a detention review are different from those of a danger opinion, and that it is possible for the member to disagree with the Minister's findings in the danger opinion. The respondent points to a passage in *Sall* which indicates that political considerations may come into play in a danger opinion prepared for the purposes of a possible removal but would not be relevant in a detention assessment by a member of the Immigration Division (*Sall*, above, at para 39).

[29] As regards the $500 bond, the respondent submits that the bond was not [TRANSLATION] "maintained" by Member Musto at the detention review of April 26, 2012, contrary to the applicant's claims at paragraph 37 of his memorandum. According to the respondent, Member Musto simply remarked that the sum had not been forfeited and was therefore still available to be used in a new alternative to the respondent's detention (Applicant's Record, p 55).

[30] The respondent states that the applicant is confusing the powers of the CBSA with those of the Immigration Division. The respondent submits that subsection 49(4) of the Regulations gives the CBSA an exclusive discretionary power to declare a bond to be forfeit when there has been a breach of condition. The wording of section 46 of the Regulations is such that this power also encompasses conditions imposed by the Immigration Division under subsection 58(3) of the Act. According to the respondent, section 46 and subsection 49(4) of the Regulations grant an exclusive power to seize, not an exclusive power to determine whether a breach of condition has

occurred. The respondent submits that nothing in the Act states that the other players in the Canadian immigration system are bound by the CBSA's conclusions regarding breaches of conditions. The respondent notes that the member's role is to order an individual's release or detention, and that to do so, the member must assess whether the individual represents a flight risk or a danger (criteria in paragraphs 58(1)(*a*) and (*b*) of the Act). Breaches of conditions previously imposed by the Immigration Division are an element that must be considered; according to the respondent, it is from this perspective that a member can judge whether a breach has occurred. For the respondent, as the CBSA's findings are not binding on the Immigration Division, the findings of a member cannot be imposed on the CBSA when it exercises its power to seize a bond.

[31] The respondent therefore submits that in finding there to be no breach of condition, the member is not encroaching on the CBSA's powers to seize the bond but is, rather, reviewing the criteria in section 58 of the Act and assessing whether the respondent will comply with the conditions on his release.

[32] Although the respondent acknowledges that Member Nupponen departs from the decision of Member Musto with regard to the need for a bond, he argues that the member has good reason to do so. The respondent submits that his compliance is new evidence that justifies not imposing a bond.

Analysis

[33] In his memorandum, the respondent did not submit any arguments regarding the Court's exercise of its discretion but did make submissions on this point at the hearing. Having heard the parties at the hearing before this Court and having taken into consideration the factors set out in *Borowski*, above, as well as the specific circumstances of this case, the Court will exercise its discretion.

[34] The Court will therefore begin by addressing the question of the danger opinion of the Minister of Citizenship and Immigration.

A. The danger opinion of the Minister of Citizenship and Immigration

[35] It is important to bear in mind that considering the opinion is relevant in assessing the danger to public safety that the respondent represents. First, the Court notes that Member Musto had doubts about the events of April 16 and 17, 2012, and decided it would be more prudent to keep the respondent in detention in her decision dated April 26, 2012. She also stated that she did not think that detention until removal was necessary but that there were facts that would have to be clarified by the CBSA. Upon reading the decision of Member Nupponen, it becomes clear that Member Nupponen did not depart from the decision: he was given a statutory declaration by the CBSA officer, and he listened to the respondent's testimony regarding the misunderstanding surrounding the April 17 appointment. Member Nupponen preferred the respondent's testimony, thereby clearing up the doubts identified by Member Musto. In this sense, he does not depart from the previous decisions of Member Musto (*Thanabalasingham*, above).

[36] The Court is of the opinion that the present case parallels the findings made by the member in *Sall*, above. At paragraph 18 of *Sall*, Justice de Montigny states as follows:

> 18. . . . [The Member] also recognized that he had to consider the danger opinion that had been issued by the Minister . . . . 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 . . . .

[37] In the present case, Member Nupponen mentions the danger opinion and is aware of its contents, but he finds that the danger opinion does not alter the danger that the respondent has represented since the decision to release him on January 23, 2012. In *Steer*, above, a danger opinion had been issued in 2006 and in 2010, but the member's reasons showed that he thought that this was essentially the same danger that had been considered and addressed in 2006. In the case at hand, Member Nupponen did not ignore the danger opinion, and the opinion which Member Musto and Member Nupponen refer to is the same one. Furthermore, although the member's reasons in *Sall* regarding the danger opinion were more detailed, the underlying conclusion was the same: [TRANSLATION] "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" (*Sall*, above, at para 37).

[38] Moreover, it appears from the reasons of Member Musto, dated April 26, 2012, that she considers the danger opinion to be important, in that it makes the individual's removal likely: [TRANSLATION] "The effect of this decision is that the Agency may now proceed with a removal or work towards an official removal from Canada. . . . Before, it was possible; now, it becomes more likely. So it is an important factor, in that sense" (Applicant's Record, p 54). She appears to

indicate, however, as Member Nupponen reiterates in his decision, that the danger opinion in itself does not mean that the respondent is more dangerous now than when the conditions were imposed on him on January 23, 2012:

> [TRANSLATION]
> What I have to look at today is whether this decision means that you represent a greater danger today than yesterday or than when I released you on January 23? I do not think that this decision, in itself, suddenly makes you more dangerous. However, this decision, as I explained to you, Mr. Dragicevic, has a significant impact on your future in Canada.
> (Applicant's Record, pp 53-54)
>
> [Emphasis added.]

[39] The opinion is important for the flight risk criterion because it crystallizes the likelihood of a removal, which previously was only hypothetical, but Member Musto and Member Nupponen appear to agree that the opinion alone does not affect the danger the respondent represents, apart from confirming the crimes he committed in the past. In addition, Member Nupponen acknowledges that the flight risk changed, stating that [TRANSLATION] "yes, it is true that your removal is a little closer at hand than before, but I see in the file that you have fully complied with the conditions in the past and will continue to do so in the future" (Applicant's Record, p 8). The Court sees no contradictions in how Member Musto and Member Nupponen treated the danger opinion, and it cannot agree with the applicant's argument to this effect.

[40] The Court notes that the standard of review is the reasonableness standard. Although Member Nupponen could have dealt with the danger opinion at greater length in his reasons for releasing the respondent, the Court must consider the decision as a whole, in light of the record (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*,

2011 SCC 62, [2011] 3 SCR 708). The applicant's argument regarding the member's duty to analyze the danger opinion in his decision must also be rejected in this case. On the one hand, the applicant has not clearly defined the degree of analysis that is supposedly required; on the other hand, a reading of the decision reveals that Member Nupponen had the danger opinion in mind, as he made reference to it, and the Court can see that he took it into consideration.

[41] It should also be noted that Member Musto had already dealt with the danger opinion and that this item of evidence was therefore not before Member Nupponen for the first time. The Court finds that, in the circumstances, it was reasonable for Member Nupponen to find, as Member Musto had, that the opinion did not increase the level of danger to society now represented by the respondent, and that the conditions previously imposed were still adequate to counter that danger. The applicant's argument on this point, too, must therefore be rejected.

[42] The Court will now turn to the issue of the $500 bond.

B. The $500 bond

[43] The applicant submits that the member erred in his reasons in finding that there was a causal connection between his finding that there had been no breach of condition and the decision not to impose a $500 bond. The respondent, however, states that Member Nupponen considered the issue of the breach of condition as a factor in assessing the flight risk, as required under paragraph 245(*d*) of the Regulations.

[44] The Court notes that Member Nupponen stated that he could not tell the Minister what to do with the $500 bond, which apparently had not been forfeited. Member Nupponen stated that [TRANSLATION] "the Minister may do whatever the Minister wishes with the $500 that was posted in the past" (Applicant's Record, p 9). He then stated that he was satisfied that the conditions had been respected in the past and that the respondent and his mother were going to make every effort to comply with the conditions. Member Nupponen decided that there was no need to post a new bond because, in light of the testimony, he found that the respondent's failure to report was not a breach of condition, but was rather the result of a misunderstanding.

[45] The respondent acknowledges that this is a change in the conditions that had been imposed previously by Member Musto but argues that this change is justified. The Court is of the opinion that Member Nupponen did not err in not requiring a new $500 bond. The Court finds that the member stated that if the CBSA thought that there had been a breach of conditions, it could seize the $500 sum, as subsection 49(4) of the Regulations permits. The Court notes that the member is not suggesting that the CBSA should not act on a breach of condition and not seize the sum offered as a deposit. On the contrary, he states that the bond is still available to the Minister if the Minister decided that there was cause to seize it, but he does not think that a new sum would be necessary, given that, in his view, the respondent had complied with the conditions in the past. Indeed, Member Nupponen is not saying that the $500 sum is still serving as a bond because no breach of condition occurred; rather, he is saying that, regardless of whether or not the CBSA decides to seize the bond, he will not impose a new one.

[46] Furthermore, the Court notes that there is no suggestion here of Member Nupponen carrying over the $500 bond imposed by Member Musto and issuing a direction to that effect to the CBSA. Such a scenario could clearly have raised some issues. Here, Member Nupponen stated that he would not impose a new bond. That being the case, it is nevertheless important to note that, out of respect for the respective roles of the CBSA and the member, Member Nupponen would have done better to limit his remarks regarding the forfeiture of the bond. Although Member Nupponen's comments in this case are ill-considered, it is nevertheless difficult for this Court to conclude in the circumstances, as the applicant would have it, that Member Nupponen, in making his comments, is usurping the CBSA's jurisdiction.

[47] Since this is a departure from the previous decision of Member Musto, Member Nupponen did, however, have to give clear and compelling reasons for this change, namely, the lack of the need for a bond (*Thanabalasingham*, above).

[48] Indeed, if there is no change in the level of danger that the respondent represents, the same conditions should apply: it is up to the member to justify why the $500 bond is no longer needed. It appears from the reasons of Member Nupponen that he thinks that a new bond is not needed because the respondent has complied with the conditions in the past—the failure to report on April 17 having been deemed a misunderstanding—and that he is satisfied that the respondent and his mother are committed to complying with the conditions in the future. The Court also notes that the respondent was represented by counsel before Member Nupponen, which was not the case before Member Musto. Upon reading the record and hearing the parties, it becomes clear that the applicant's representations suggest a disagreement with the member's assessment.

The Court is of the opinion that it was up to Member Nupponen to assess the situation after hearing the parties and that he made no error, having regard to the facts of this case, in maintaining the conditions imposed by Member Musto without the $500 bond. The finding that Member Nupponen made falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[49] In light of the facts of this case and the evidence in the record, the applicant has not satisfied this Court that its intervention is warranted.

JUDGMENT

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

"Richard Boivin"

Judge

Certified true translation
Michael Palles

Appendix

The following provisions of the *Immigration and Refugee Protection Act* are relevant to this application for judicial review:

DIVISION 6	SECTION 6
DETENTION AND RELEASE	DETENTION ET MISE EN LIBERTE
…	[…]
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, violating human or international rights, serious criminality, criminality or organized criminality;	*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, pour atteinte aux droits humains ou internationaux ou pour grande criminalité, criminalité ou criminalité organisée;
(*d*) the Minister is of the opinion that the identity of the foreign national — other than a designated foreign national who was 16 years of age or older on the day of the arrival that is the subject of the designation in question — has not been, but may be, established and they have not reasonably cooperated with the Minister by providing relevant information for the purpose of	*d*) dans le cas où le ministre estime que l'identité de l'étranger — autre qu'un étranger désigné qui était âgé de seize ans ou plus à la date de l'arrivée visée par la désignation en cause — n'a pas été prouvée mais peut l'être, soit l'étranger n'a pas

establishing their identity or the Minister is making reasonable efforts to establish their identity; or

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;

(*e*) the Minister is of the opinion that the identity of the foreign national who is a designated foreign national and who was 16 years of age or older on the day of the arrival that is the subject of the designation in question has not been established.

e) le ministre estime que l'identité de l'étranger qui est un étranger désigné et qui était âgé de seize ans ou plus à la date de l'arrivée visée par la désignation en cause n'a pas été prouvée.

Continued detention — designated foreign national

(1.1) Despite subsection (1), on the conclusion of a review under subsection 57.1(1), the Immigration Division shall order the continued detention of the designated foreign national if it is satisfied that any of the grounds described in paragraphs (1)(*a*) to (*c*) and (*e*) exist, and it may not consider any other factors.

Maintien en détention — étranger désigné

(1.1) Malgré le paragraphe (1), lorsque la section contrôle, au titre du paragraphe 57.1(1), les motifs justifiant le maintien en détention d'un étranger désigné, elle est tenue d'ordonner son maintien en détention sur preuve des faits prévus à l'un ou l'autre des alinéas (1)*a*) à *c*) et *e*); elle ne peut alors tenir compte d'aucun autre critère.

Detention – Immigration Division

(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.

Mise en détention par la Section de l'immigration

(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

(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

conditions.

Conditions – designated foreign national

(4) If the Immigration Division orders the release of a designated foreign national who was 16 years of age or older on the day of the arrival that is the subject of the designation in question, it shall also impose any condition that is prescribed.

qu'elle estime nécessaires, notamment la remise d'une garantie d'exécution.

Conditions – étranger désigné

(4) Lorsqu'elle ordonne la mise en liberté d'un étranger désigné qui était âgé de seize ans ou plus à la date de l'arrivée visée par la désignation en cause, la section impose également les conditions prévues par règlement.

The following provisions of the *Immigration and Refugee Protection Regulations* are relevant to this application for judicial review:

PART 4	PARTIE 4
PROCEDURES	FORMALITÉS
…	[…]
DIVISION 3	SECTION 3
CONDUCT OF EXAMINATION	EXECUTION DU CONTROLE
…	[…]
Deposits or Guarantees	*Garanties*
…	[…]
Application	Application
46. Sections 47 to 49 apply to deposits and guarantees required under subsection 44(3), section 56 and subsection 58(3) of the Act and section 45 of these Regulations.	**46.** Les articles 47 à 49 s'appliquent aux garanties d'exécution exigées en vertu du paragraphe 44(3), de l'article 56 et du paragraphe 58(3) de la Loi ou de l'article 45 du présent règlement.
…	[…]
Acknowledgment of consequences of failure to comply with conditions	Confirmation des conditions
49. (1) A person who pays a deposit or posts a guarantee must acknowledge in writing	**49.** (1) La personne qui fournit une garantie d'exécution confirme par écrit :
(*a*) that they have been informed of the conditions imposed; and	*a*) qu'elle a été informée des conditions imposées;
(*b*) that they have been informed that non-compliance with any conditions imposed will result in the forfeiture of the deposit or enforcement of the guarantee.	*b*) qu'elle a été informée que le non-respect de l'une des conditions imposées entraînera la confiscation de la somme donnée en garantie ou la réalisation de la garantie.
Receipt	Reçu
(2) An officer shall issue a receipt for the deposit or a copy of the guarantee, and a copy of the conditions imposed.	(2) L'agent délivre un reçu pour la somme d'argent donnée en garantie ou une copie de la garantie ainsi qu'une copie des conditions

imposées.

Return of deposit

(3) The Department shall return the deposit paid on being informed by an officer that the person or group of persons in respect of whom the deposit was required has complied with the conditions imposed.

Restitution de la garantie

(3) Si l'agent informe le ministère que la personne ou le groupe de personnes visé par la garantie s'est conformé aux conditions imposées, le ministère restitue la somme d'argent donnée en garantie.

Breach of condition

(4) A sum of money deposited is forfeited, or a guarantee posted becomes enforceable, on the failure of the person or any member of the group of persons in respect of whom the deposit or guarantee was required to comply with a condition imposed.

Non-respect des conditions

(4) En cas de non-respect, par la personne ou tout membre du groupe de personnes visé par la garantie, d'une condition imposée à son égard, la somme d'argent donnée en garantie est confisquée ou la garantie d'exécution devient exécutoire.

…

[…]

PART 14

DETENTION AND RELEASE

PARTIE 14

DÉTENTION ET MISE EN LIBERTÉ

Factors to be considered

244. For the purposes of Division 6 of Part 1 of the Act, the factors set out in this Part shall be taken into consideration when assessing whether a person

(*a*) is 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) of the Act;

(*b*) is a danger to the public; or

(*c*) is a foreign national whose identity has not been established.

Critères

244. Pour l'application de la section 6 de la partie 1 de la Loi, les critères prévus à la présente partie doivent être pris en compte lors de l'appréciation :

a) du risque que l'intéressé se soustraie vraisemblablement au contrôle, à l'enquête, au renvoi ou à une procédure pouvant mener à la prise, par le ministre, d'une mesure de renvoi en vertu du paragraphe 44(2) de la Loi;

b) du danger que constitue l'intéressé pour la sécurité publique;

c) de la question de savoir si l'intéressé est un étranger dont l'identité n'a pas été prouvée.

…

[…]

Danger to the public

246. For the purposes of paragraph 244(*b*), the factors are the following:

(*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;

(*b*) association with a criminal organization within the meaning of subsection 121(2) of the Act;

(*c*) engagement in people smuggling or trafficking in persons;

(*d*) conviction in Canada under an Act of Parliament for

(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

Danger pour le public

246. Pour l'application de l'alinéa 244*b*), les critères sont les suivants :

a) le fait que l'intéressé constitue, de l'avis du ministre aux termes de l'alinéa 101(2)*b*), des sous-alinéas 113*d*)(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) l'association à une organisation criminelle au sens du paragraphe 121(2) de la Loi;

c) le fait de s'être livré au passage de clandestins ou le trafic de personnes;

d) la déclaration de culpabilité au Canada, en vertu d'une loi fédérale, quant à l'une des infractions suivantes :

(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

(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).

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).

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Daniel Latulippe Jean-Philippe Verreault	FOR THE APPLICANT
Vincent Desbiens	FOR THE RESPONDENT

SOLICITORS OF RECORD:

William F. Pentney Deputy Attorney General of Canada	FOR THE APPLICANT
Monterosso Giroux, LLP Montréal, Quebec	FOR THE RESPONDENT