

Federal Court



Cour fédérale

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Dockets: IMM-1844-18  
IMM-2061-18

Citation: 2018 FC 552

Montreal, Quebec, May 29, 2018

PRESENT: THE CHIEF JUSTICE

BETWEEN:

THE MINISTER OF PUBLIC SAFETY AND  
EMERGENCY PREPAREDNESS

Applicant

and

ARAM ALI

Respondent

**JUDGMENT AND REASONS**

I. **Introduction**

[1] Mr. Ali is inadmissible to Canada on grounds of serious criminality. On March 16, 2018, a delegate of the Minister of Citizenship and Immigration issued an opinion pursuant to paragraph 115(2)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], stating that he constitutes a danger to the public in Canada [the **Danger Opinion**].

[2] Subsequently, the Immigration Division of the Immigration and Refugee Board [the **IRB**] issued two separate decisions releasing Mr. Ali from immigration detention, subject to several conditions of release. Among other things, the IRB concluded that those conditions would “adequately mitigate” any risk, (i) that Mr. Ali may present to the public in Canada, or (ii) that he may not appear for his removal from Canada, when required to do so.

[3] The sole issue in these Applications for judicial review is whether the IRB’s two decisions were unreasonable, having regard to the Danger Opinion and to recent assessments by Mr. Ali’s Parole Officer and Correctional Service Canada [**CSC**] that Mr. Ali presents a “moderate” public safety risk.

[4] For the reasons set forth below, I consider that the IRB’s decisions to release Mr. Ali subject to various conditions were not unreasonable.

[5] Whereas the Danger Opinion and the risk assessments mentioned above were primarily based on “static” factors that date back to the period of 2008-2010, the IRB’s decisions were based on “dynamic” factors relating to Mr. Ali’s very positive record since that time. That record included an unblemished period of over four years when he was free on “cash bail” awaiting his trial and his sentencing hearing in respect of his 2009 offences. It also included evidence of significant improvement in several of Mr. Ali’s risk factors, and of family and community support. As a result of the dynamic factors that it identified, the IRB concluded that the risk posed by Mr. Ali on a forward-looking basis is significantly less than what it was in 2009.

[6] Given the additional evidence that was before the IRB, that finding was not unreasonable. That said, it was unreasonable for the IRB to have gone further and concluded or suggested that such risk no longer exists. Had the IRB not proceeded to impose a robust package of release conditions, its decision would not have been reasonable.

[7] The conditions of release imposed on persons who are inadmissible on grounds of serious criminality and have been found to constitute a danger to the public in Canada must ensure that the public is not exposed to any meaningful risk of harm. That is to say, they must virtually eliminate any risk to public safety, or any flight risk, presented by the person in question.

[8] Given the very particular facts of this case, it was not unreasonable for the IRB to conclude that the release conditions it imposed on Mr. Ali will collectively achieve this objective.

## II. **Background**

[9] Mr. Ali is a stateless person who was born in Iraq. He became a permanent resident of Canada after arriving here as a refugee with his parents and a sibling in 2000.

[10] In 2009, when he was 23 years old, he was convicted of possession of a scheduled substance for the purpose of trafficking. While he was on bail awaiting his trial for that offence, he was charged with several offences arising out of a shooting incident that occurred in February of that year outside of a strip-club in Surrey, B.C.

[11] In brief, acting on instructions from a high ranking member of the United Nations gang who gave him a gun, Mr. Ali fired eight shots at a vehicle occupied by a rival gang member and three passengers. Three bullets entered the passenger cabin and a fourth lodged in the dashboard. Three of the four additional shots also hit the vehicle. The driver was shot in the shoulder, shattering his clavicle, and his ear was grazed. After the shooting, Mr. Ali disposed of the loaded weapon by throwing it out of the window of his vehicle and onto a public street, where it was found by a passerby.

[12] After being apprehended by the police, Mr. Ali was charged with attempted murder and discharging a firearm with intent to wound. Ultimately, he was convicted of the lesser included offence of aggravated assault, and of discharging a firearm with intent to wound. On December 15, 2015, he was sentenced to 8.5 years in prison in respect of those offences, and given a credit of 5 years for the time he was incarcerated while awaiting bail, between early 2009 and August 2011.

[13] In 2009, Mr. Ali was convicted of his possession charge, mentioned at paragraph 10 above, and was given a suspended sentence, two years of probation and a mandatory prohibition order.

[14] On July 10, 2016, Mr. Ali was the subject of two inadmissibility reports: one, pursuant to s. 37 of the IRPA for organized criminality, and the other, pursuant to s. 36 of the IRPA for serious criminality, following his conviction for aggravated assault. The inadmissibility report

was referred to the IRB for an admissibility hearing, where Mr. Ali was found to be inadmissible to Canada on grounds of serious criminality.

[15] On August 9, 2016, the IRB issued a deportation order against Mr. Ali.

[16] On December 7, 2016, the Parole Board denied Mr. Ali's request for parole. An appeal of that decision was dismissed in April 2017.

[17] As previously noted, a ministerial delegate then issued the Danger Opinion in March of this year.

[18] On April 17, 2018, Mr. Ali reached his statutory release date and was taken into immigration detention by the Canada Border Services Agency [**CBSA**].

[19] On April 20, 2018, Mr. Ali appeared before the IRB for the 48-hour detention hearing that is required pursuant to subs. 57(1) of the IRPA. After Member Ko ordered Mr. Ali to be released subject to certain conditions, the Minister sought an interim stay of release that was granted by Justice Gleeson later that same day. Justice Gleeson then issued a subsequent Order on April 26, 2018, staying Mr. Ali's release until the earlier of the determination of the Minister's Application for Leave and for Judicial Review of Member Ko's decision, or the next statutorily required detention review hearing.

[20] Pursuant to subs. 57(2), that subsequent detention hearing was required to be held within seven days, and took place on May 2-3, 2018. After Member McPhalen once again ordered Mr. Ali to be released subject to certain conditions, the Respondent Minister sought another stay that I issued the following day. Pursuant to my Order, Mr. Ali's release was stayed until the earlier of the determination of the Respondent's Application for Leave and for Judicial Review of Member McPhalen's decision, or the next statutorily required detention review hearing, which I understand has been scheduled for tomorrow, May 30, 2018.

### III. **The Decisions Under Review**

#### A. *Member Ko's Decision (Court File IMM-1844-18)*

[21] Before Member Ko, the Minister's submissions focused almost entirely on "static" factors. The Minister stressed the very serious nature of the offences that Mr. Ali committed in early 2009; the other offences that he committed in 2008; the fact that he committed the former offences while he was on bail awaiting his trial in respect of the latter offences; the Parole Board's December 2016 decision to deny him parole; the April 2017 decision of the Parole Appeal Board upholding the December 2016 decision; and the Danger Opinion. As in the present Applications before this Court, the Minister emphasized the role that Mr. Ali's financial needs played in his crimes, the fact that he no longer has the option of working in Canada to earn income, and the Minister's belief that Mr. Ali's idleness will increase the risk that he will return to a life of crime.

[22] After reviewing the Minister's submissions, Member Ko observed that "if [Mr. Ali] were to act as [he had] done in the past ... the risk to the public in Canada would be very high." However, Member Ko then noted that it is also relevant to assess the forward-looking risk presented by Mr. Ali, based on his behaviour in the over the last several years, including the period while he was on bail between August 2011 and December 2015.

[23] Based on Mr. Ali's good behaviour dating back to 2011, Member Ko concluded that any risk that he might currently present to the public can be "adequately mitigated" by conditions of release that she identified and that are discussed in Part VI.B of these reasons below. With those conditions of release in place, she concluded that Mr. Ali would "not likely reoffend in a violent way or in a way that would cause a risk to the Canadian public" (Certified Tribunal Record [CTR], at 308).

[24] In the course of reaching that decision, Member Ko noted that different evidence and submissions were before her than what was before Parole Board in December 2016 when it denied Mr. Ali's request for parole. She also noted that Mr. Ali had taken additional programming since the date of the Parole Board's decision, which had led to improvements in some of his assessment factors, including his ability and commitment to use the skills required to establish and maintain healthy relationships and support, the manner in which he manages his leisure time, and his overall thinking, attitude and behaviour.

B. *Member McPhalen's Decision (Court File IMM-2061-18)*

[25] Before Member McPhalen, the Minister relied on essentially the same submissions that were made to Member Ko. The Minister also provided an update on the efforts that were being made to obtain a travel document for Mr. Ali.

[26] In his decision, Member McPhalen observed that “there was no doubt that in 2009 [Mr. Ali] posed a danger to the public.” However, after reviewing Mr. Ali’s behaviour since that time, Member McPhalen determined that the Minister had not demonstrated that Mr. Ali currently poses a danger to the public. He also found that Mr. Ali will likely leave Canada voluntarily, if required to do so.

[27] In reaching those determinations, Member McPhalen noted that the author of the Danger Opinion did not have the benefit of the Parole Board’s statutory release decision, dated April 6, 2018.

[28] Notwithstanding the foregoing determinations, Member McPhalen imposed several conditions on Mr. Ali’s release to reduce any danger and flight risk that he might in any event present. Those conditions are discussed in Part VI.C of these reasons below.

IV. **Relevant Legislation**

[29] Pursuant to paragraphs 3(1)(h) and (i), as well as paragraphs 3(2)(g) and (h), of the IRPA, Parliament has placed significant emphasis on public safety and security: *Medovarski v Canada*



(*Minister of Citizenship and Immigration*); *Esteban v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51, at para 10 [*Medovarski*]. Those provisions state as follows:

***Immigration and Refugee Protection Act, SC 2001, c 27***

***Loi sur l'immigration et la protection des réfugiés, LC 2001, ch 27***

**Objectives and Applications**

**Objet de la loi**

*Objectives – Immigration*

*Objet en matière d'immigration*

3 (1) The objectives of this Act with respect to Immigration are:

3 (1) En matière d'immigration, la présente loi a pour objet :

(...)

(...)

(h) to protect public health and safety and to maintain the security of Canadian society;

h) de protéger la santé et la sécurité publiques et de garantir la sécurité de la société canadienne;

(i) to promote international justice and security by fostering respect for human rights and by denying access to Canadian territory to persons who are criminals or security risks;

i) de promouvoir, à l'échelle internationale, la justice et la sécurité par le respect des droits de la personne et l'interdiction de territoire aux personnes qui sont des criminels ou constituent un danger pour la sécurité;

(...)

(...)

*Objectives — refugees*

*Objet relatif aux réfugiés*

3 (2) The objectives of this Act with respect to refugees are:

3 (2) S'agissant des réfugiés, la présente loi a pour objet :

(...)

(...)

(g) to protect public health and safety of Canadians and to maintain the security of Canadian society;

g) de protéger la santé des Canadiens et de garantir leur sécurité;

(h) to promote international justice and security by fostering respect for human rights and by denying access to Canadian

h) de promouvoir, à l'échelle internationale, la sécurité et la justice par l'interdiction du territoire aux personnes et

territory to persons, including  
refugee claimants, who are  
security risks or serious criminals;  
(emphasis added)

demandeurs d'asile qui sont de  
grands criminels ou constituent  
un danger pour la sécurité.  
(je souligne)

[30] Pursuant to subs. 58(1) of the IRPA, the IRB is required to release a detained permanent resident or foreign national unless it is satisfied of certain things relating to such persons, after having taken account of the prescribed factors. Two such things are:

*Immigration and Refugee  
Protection Act, SC 2001, c 27*

*Loi sur l'immigration et la  
protection des réfugiés,  
LC 2001, ch 27*

*Release — Immigration Division*

*Mise en liberté par la Section de  
l'immigration*

(...)

(...)

(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 or an admissibility  
hearing, removal from Canada, or  
at a proceeding that could lead to  
the making of a removal order by  
the Minister under subsection  
44(2);

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

[31] Pursuant to s. 244 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [the **Regulations**], the IRB is required to take into account the factors set forth in ss. 245 and 246 in considering whether a person is a “flight risk” or a “danger to the public,” respectively. For the present purposes, only two of the factors in s. 245 appear to be relevant, namely (c)

“voluntary compliance with any previously required appearance in an immigration or criminal proceeding” and (g) “the existence of strong ties to a community in Canada.”

[32] The factors that are required to be considered by the IRB in assessing whether an individual constitutes a danger to the public, and that are relevant for the present purposes, are as follows:

***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;

(...)

(...)

(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

(i) infraction d'ordre sexuel,

(ii) an offence involving violence or weapons;

(ii) infraction commise avec violence ou des armes;

(e) conviction for an offence in Canada under any of the following provisions of the Controlled Drugs

e) la déclaration de culpabilité au Canada quant à une infraction visée à l'une des dispositions suivantes de la Loi réglementant certaines

and Substances Act, namely,	drogues et autres substances :
(i) section 5 (trafficking),	(i) article 5 (trafic),
(ii) section 6 (importing and exporting), and	(ii) article 6 (importation et exportation),
(iii) section 7 (production);	(iii) article 7 (production);
(...)	(...)

[33] Where the Board considers that there are grounds for detention, it is required to consider the factors set forth in s. 248. That provision states:

***Immigration and Refugee Protection Regulations, SOR/2002-227***

*Other factors*

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:

- (a) the reason for detention;
- (b) the length of time in detention;
- (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;
- (d) any unexplained delays or unexplained lack of diligence caused by the Department, the Canada Border Services Agency or the person concerned; and
- (e) the existence of alternatives to detention.

***Règlement sur l'immigration et la protection des réfugiés, DORS/2002-227***

*Autres critères*

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) le motif de la détention;
- b) la durée de la détention;
- c) l'existence d'éléments permettant l'évaluation de la durée probable de la détention et, dans l'affirmative, cette période de temps;
- d) les retards inexpliqués ou le manque inexpliqué de diligence de la part du ministère, de l'Agence des services frontaliers du Canada ou de l'intéressé;
- e) l'existence de solutions de rechange à la détention.

[34] Pursuant to subs. 58(2) of the IRPA, the IRB has the discretion to order the detention of a permanent resident or a foreign national who constitutes a flight risk or a danger to the public.

That provision states:

***Immigration and Refugee  
Protection Act***, SC 2001, c 27

***Loi sur l'immigration et la  
protection des réfugiés***, LC 2001,  
ch 27

*Detention — Immigration Division*

*Mise en détention par la Section de  
l'immigration*

58(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.

58(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.

[35] Pursuant to subs. 58(3), the IRB may impose any conditions that it considers necessary, when ordering the release of an individual from detention:

***Immigration and Refugee  
Protection Act***, SC 2001, c 27

***Loi sur l'immigration et la  
protection des réfugiés***, LC 2001,  
ch 27

*Conditions*

*Conditions*

58(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.

58(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.

[36] For convenience, the full text of the provisions mentioned above has been included in Appendix 1 to these reasons below.

V. **Issue and Standard of Review**

[37] The sole issue presented in these applications is whether the decisions of Member Ko and Member McPhalen to release Mr. Ali subject to certain conditions were unreasonable.

[38] It is common ground between the parties that such decisions are reviewable by this Court on a standard of reasonableness: *Dunsmuir v New Brunswick*, 2008 SCC 9, at para 53 [*Dunsmuir*]; *Canada (Public Safety and Emergency Preparedness) v Lunyamila*, 2016 FC 1199, at para 20 [*Lunyamila*].

[39] In assessing whether a decision is reasonable, the focus of the Court is generally upon whether the decision is appropriately intelligible, transparent and justified. In this regard, the Court's task will be to assess whether it is able to understand why the decision was made and to ascertain whether the decision falls "within a range of acceptable outcomes which are defensible in respect of the facts and the law": *Dunsmuir*, above, at para 47; *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, at para 16.

[40] Where the IRB releases an individual from detention who has been determined to constitute a danger to the public under paragraph 115(2)(a) of the IRPA, or has been found by the Parole Board or CSC to present anything other than a low risk to public safety, the IRB's

decision will not be sufficiently justified if it fails to meaningfully deal with the important aspects of those other decisions.

[41] To meaningfully deal with those matters, the IRB must explain why it decided to release the individual from detention, despite the danger opinion and/or the adverse risk assessments of the Parole Board or the CSC.

## VI. Analysis

### A. *General Principles*

[42] An important objective of the IRPA is to deny access to Canadian territory to persons, including refugees, who are serious criminals or security risks: IRPA, ss. 3(1)(i) and 3(2)(h).

[43] In furtherance of that objective, the IRB has the discretion to detain a permanent resident or foreign national where it is satisfied that the individual is a danger to the public or is unlikely to appear for removal from Canada: IRPA, subs. 58(2). The existence of that discretion implies that the IRB is not required to detain such individuals. Instead, it may order the release of such individuals subject to any conditions that it considers necessary, including the payment of a deposit or the posting of a guarantee of compliance with the conditions: IRPA, subs. 58(3). So long as the conditions of release will collectively ensure that the individual will not present a meaningful risk to the public, the release of the individual will not be inconsistent with the objectives set forth in subs. 3(1)(h) and 3(2)(g) of the IRPA.

[44] In any event, in its detention decisions, the IRB must always give full effect to the priority that Parliament has given to public safety and security: *Medovarski*, above; *Lunyamila*, above, at paras 60-66. It bears underscoring that this requires the IRB to ensure that any decision that it may make to release an individual from detention does not give rise to a material risk to public safety or security.

[45] This priority to protect the public from foreign nationals, including refugees, who constitute a danger to the public or who otherwise present a material risk to public safety, flows from the basic principle that “[o]ne of the most fundamental responsibilities of a government is to ensure the security of its citizens”: *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9, at para 1 [*Charkaoui*].

[46] So long as there is “a meaningful process of ongoing review that takes into account the context and circumstances of the individual case,” and other relevant factors that include those set forth in s. 248 of the Regulations, the continued detention of an individual or the continued imposition of conditions of release will not contravene the liberty interests protected by s. 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [*Charter*]: *Charkaoui*, at paras 107-117 and 123; *Canada (Citizenship and Immigration) v Doe*, 2011 FC 974, at para 6 [*John Doe*]. While those liberty interests must be given substantial weight, priority must be given to the right to life, liberty and security of the general public for the duration of the period that there is a valid immigration purpose for the individual’s detention or release on conditions.



[47] Once the Minister has made out a *prima facie* case that an individual constitutes a danger to the public or a flight risk, the onus shifts to the individual to demonstrate why his or her release from detention is warranted: *John Doe*, above, at para 4. This principle applies equally to the conditions of release. That is to say, the individual in such circumstances bears the onus of demonstrating that any conditions of release are sufficiently robust to ensure that the general public will not be exposed to any material risk of harm, and will provide a reasonable degree of certainty that the individual will report for removal from Canada, if and when required to do so.

[48] Where the Minister demonstrates that an individual is the subject of a danger opinion issued pursuant to paragraph 115(2)(a) of the IRPA, a *prima facie* case is established that the individual constitutes a danger to the public. In such circumstances, the onus shifts to demonstrate why his or her release is warranted. This is especially so where, as here, the danger opinion was recently issued.

B. *Member Ko's Decision (Court File IMM-1844-18)*

[49] The Minister submits Member Ko's decision to release Mr. Ali was unreasonable for two principal reasons. First, the Minister asserts that Member Ko failed to consider the prescribed factors under the Regulations. Second, the Minister maintains that Member Ko failed to impose terms and conditions of release that reasonably address the danger to the public and the flight risk posed by Mr. Ali.

[50] It is unclear what relevant prescribed factors under the Regulations may not have been considered by Member Ko.

[51] Member Ko explicitly considered the factors set forth in s. 246 of the Regulations that are relevant in this case, namely, the fact that Mr. Ali is the subject of the Danger Opinion; and the fact that the crimes for which he was convicted involved violence, weapons, drug trafficking and organized crime. Based on those static factors, she agreed that Mr. Ali did in fact constitute a danger to the public in 2009.

[52] Member Ko also considered the pertinent flight risk factors set forth in ss. 245 and the other relevant factors set forth in s. 248.

[53] However, based on the forward-looking assessment that she adopted, she found that the risk currently posed by Mr. Ali is significantly less than the risk described in the Danger Opinion and by the Minister. In my view, that finding was not unreasonable. In other words, it was reasonably open to Member Ko to place greater weight than did the Danger Opinion on the substantial progress that Mr. Ali has made in recent years, his exemplary record while on bail for over four years immediately prior to being sentenced in December 2015, his excellent institutional behaviour throughout the 3.5-year period of his most recent incarceration, and the support that has been offered to Mr. Ali by his family and members of the community.

[54] The Danger Opinion was written prior to the decisions of the CSC and the Parole Board, dated March 19, 2018 and April 6, 2018, respectively, which referenced the progress that Mr. Ali has made with institutional programming since his request for parole was rejected in December 2016.

[55] In addition, the Danger Opinion placed emphasis on the “static” fact that Mr. Ali had returned to the “gang scene in Vancouver ... out of financial need” after attempting to leave that life behind. It also placed “a great deal of weight” upon the conclusions reached by the Parole Board in its December 2016 decision to deny Mr. Ali’s request for parole.

[56] However, that decision by the Parole Board, as well as the subsequent decision by the Appeal Division, did not have the benefit of the CSC’s Final Program Performance Report, dated January 16, 2018, which discussed the significant progress that Mr. Ali had made in his institutional programming, during the intervening thirteen-month period.

[57] Ultimately, the Parole Board’s decision to deny Mr. Ali’s request for parole was based on his flight risk, the fact that he is unable to work in Canada, the fact that financial gain was a primary driver in his offences, and the fact that his personal supports were not aware of his criminal history, his associates or his risk factors. In addition, the Parole Board relied upon the (now dated) assessment that Mr. Ali has a high need for improvement in his risk as it relates to his attitude and associates. The Parole Board also emphasized the static factors of his willingness to disregard release conditions many years ago, and the violent nature of his most recent offences.

[58] With respect to Mr. Ali’s flight risk, Member Ko noted that he complied with his bail conditions during the entire 4.5-year period prior to his incarceration, including after he was convicted and was awaiting sentencing. Notwithstanding the uncertainty that he faced during that latter period regarding the length of his prison sentence, Member Ko noted that he still did not

abscond. She added that she did not agree with the Minister that Mr. Ali's incentives to abide with conditions of release would be less now than they were at the time he was on bail awaiting sentencing. In my view, that finding was not unreasonable, particularly given the fact that his mother, who is receiving social assistance and has very limited means, would lose her \$5,000 bond if he were to breach any of those conditions. As Member Ko observed, that is a significant amount of money for her, and neither she nor Mr. Ali would not want to see that money forfeited. In addition, as Member Ko noted, any breach of those conditions would jeopardize whatever time Mr. Ali may have to spend with his family, prior to his removal from Canada.

[59] Regarding Mr. Ali's financial circumstances and community support, Member Ko found that Mr. Ali would have the support of his family and other community members who can offer him shelter and the provision of his basic necessities. That finding was in part based on evidence that was not before the Parole Board in 2016. In this regard, she noted that his brother recently secured full-time employment and that Mr. Luqman is prepared to offer him accommodations and other support. Mr. Luqman is a good friend who previously employed Mr. Ali for a period of time, and who spent time with Mr. Ali in a refugee camp prior to coming to Canada. It was reasonably open to Member Ko to give greater weight to this and to other evidence of family and community support, than was given by the author of the Danger Opinion, who discounted much of that other evidence.

[60] With respect to the awareness of Mr. Ali's family members and Mr. Luqman of his criminal history, Member Ko noted that his mother testified during the detention hearing that she is now aware of the circumstances that lead to him being imprisoned, and that she promised to do

her best to ensure his compliance with his release conditions. She added that Mr. Ali would also be under the supervision of his parole officer, at least until the expiry of the remaining term of his formal sentence, sometime in 2019. The evidence in the CTR reflects that Mr. Luqman is also aware of the nature of Mr. Ali's past crimes and his past involvement with criminal gangs (CTR, 82-83). The same appears to be true with respect to Mr. Ali's brother, Sardar (CTR, 212).

[61] Regarding Mr. Ali's associations with criminals, Member Ko noted that he took active steps to sever those during his incarceration, and had developed skills for managing and developing positive relationships. She also observed that he took purposeful steps to avoid any continued relationships with persons involved in criminal activity, while he was on bail awaiting his trial and sentencing hearing.

[62] With respect to the Minister's concerns in relation to Mr. Ali's idleness (due to his inability to work), Member Ko noted that he had successfully completed programing that has provided him with educational, vocational and social skills; and that he would be spending time on various activities with his family and friends.

[63] In addition to the foregoing, Member Ko relied on several other factors in finding that the risk posed by Mr. Ali on a forward-looking basis was significantly reduced from what it had been in 2009. Collectively, those factors were summarized in the following passage of her decision:

... I consider that in 2012 you did move to Calgary and began residing with your family and, for a period of time, on your own, you secured employment, and you cut ties with the individuals that you had been associated with here in the Lower Mainland as being

involved in crime, that you had no breaches of your bail conditions for that four-year period of time that you were on bail pending your — the conclusion of your criminal proceedings. As well, there have — the information indicates that there were no serious issues while you were serving your sentence. So while there had been some previous issues in terms of your institutional behaviour while initially remanded, more recently, while you were serving your sentence, there was no indication of any serious issues. The only institutional violation that's mentioned in the materials before me was an unauthorized television that was in your cell at one point in time.

But the reports indicate that you've incurred no new offences, that there — you have not engaged in any aggressive or violent behaviour while at the Pacific Institution, you've completed the required programming that you were to undertake, you've earned your high school diploma, and obtained vocational certifications. The corrections reports indicate that you have been engaged in your programming, respectful to corrections staff, punctual in your attendance, that there is no suspected involvement in the prison subculture, gang involvement or impulsiveness, that in your interactions with — with the corrections staff or your case management team that you appear ashamed and remorseful about having been previously drawn into the gang lifestyle and for the crimes that you've committed, that your attitude and behaviour indicates that you've embraced change to a pro-social lifestyle, that you are able to use the program skills that you have acquired, and that you've changed your mindset and thinking regarding your behaviour that you had previously used to justify your criminal behavior.

[64] Given the evidence summarized above, some of which was not before the author of the Danger Opinion, it was reasonably open to Member Ko to conclude that the risk to the public posed by Mr. Ali on a forward-looking basis is significantly less than what was described in the Danger Opinion.

[65] For greater certainty, this does not imply that it was unreasonable for the author of the Danger Opinion to conclude that Mr. Ali still presents a danger to the public. I explicitly refrain

from making any finding in that regard, as that decision is not the subject of review in these Applications. However, even if the Danger Opinion may have been reasonable, it was reasonably open to Member Ko to reach a different conclusion, on the basis of the evidence that was before her.

[66] Notwithstanding the foregoing, in the course of reaching her decision, Member Ko failed to address the finding made in the Parole Board's statutory release decision, dated April 6, 2018, that there had not been any changes in some of Mr. Ali's risk factor ratings since he began serving his sentence. She also failed to address the fact that the CSC rated Mr. Ali's public safety risk to be "medium" in its pre-release report dated March 19, 2018. That rating was given despite the progress that Mr. Ali had made in respect of several of the "dynamic" factors that it addressed, and that Member Ko relied upon in reaching her decision. In my view, these failures would have been fatal, had Member Ko not proceeded to impose conditions on Mr. Ali's release.

[67] The Order for Release issued by Member Ko require Mr. Ali to do the following:

- i. Present himself at the date, time and place that a CBSA officer of the Immigration Division requires to appear to comply with any obligation imposed on him under the IRPA, including removal, if necessary.
- ii. Provide the CBSA prior to release with his residential address and advise the CBSA in person of any change in address prior to the change being made.
- iii. Report to a CBSA official at Room 170, 220 4<sup>th</sup> Avenue SE, Calgary, AB within one week of release and weekly thereafter. A CBSA officer or in the event of a

medical emergency. An officer may, in writing, reduce the frequency or change the location of reporting.

- iv. Adhere to a curfew and be present always between the hours of 2100 (9:00 pm) and 0600 (6:00 am) at the residential address provided to the CBSA, except where specifically authorized in writing by a CBSA officer or in the event of a medical emergency. An officer may, in writing, reduce the hours that the person concerned must be present at his residence or authorized absence for a specific occasion.
- v. Abide by all statutory release conditions imposed by the Parole Board of Canada, namely, to:
  - a. not associate with any person known or believed to be involved in criminal activity;
  - b. not own or possess more than one mobile communication device and provide the parole supervisor access to that device to monitor contact lists and communications in addition to the monthly billing statement for the device; and
  - c. provide documented financial information to the satisfaction of the parole supervisor to help ascertain that Mr. Ali's income and expenditures are from legitimate sources and that his financial stress is not such that he is at risk of re-entering the offence cycle to earn money.
- vi. Not work or study in Canada unless authorized to do so under the IRPA.



- vii. Keep the peace and be of good behaviour.
- viii. Report any new criminal charges or convictions to the CBSA forthwith.
- ix. Fully cooperate with the CBSA with respect to obtaining travel documents.

[68] In addition, as part of his 2015 sentence, Mr. Ali is subject to a lifetime firearm ban and a DNA order.

[69] Moreover, as I have mentioned, Member Ko required Mr. Ali's mother to post a bond in the amount of \$5,000 with the Receiver General for Canada.

[70] Member Ko concluded that the foregoing conditions "adequately mitigated" any risk to the public, and any "flight risk," posed by Mr. Ali.

[71] On the evidence that was before Member Ko, and that is summarized above, that finding was not unreasonable. However, it bears underscoring that to be "adequate" in this context, conditions of release must eliminate any material risk of harm to the public, and must reduce the flight risk posed by the individual, to the extent reasonably possible.

[72] In summary, it was not unreasonable for Member Ko to conclude that the forward-looking risk posed by Mr. Ali is significantly less than risk identified in the Danger Opinion. However, it was unreasonable for Member Ko to have failed to specifically address the CSC's March 19, 2018, determination that Mr. Ali continues to present a "moderate" risk to public

safety. It was also unreasonable for Member Ko to have failed to specifically address the Parole Board's finding that there had not been changes in some of Mr. Ali's risk factor ratings since he began serving his sentence. These were important aspects of the evidentiary record that were inconsistent with the conclusion reached by Member Ko and that therefore ought to have been explicitly addressed. Had Member Ko not imposed conditions of release to ensure that those risks described by the CSC and the Parole Board would no longer be material, her decision would have been unreasonable. This is because it would not have been appropriately justified. However, on the very particular facts of this case, I consider that it was reasonably open to her to conclude that the conditions of release set out in her Order For Release will collectively ensure that Mr. Ali would "not likely reoffend in a violent way or in a way that would cause a risk to the Canadian public."

[73] Based on the reasons she gave, and the terms of the Order for Release that she issued, Member Ko's decision had a rational basis and fell "within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law": *Dunsmuir*, above, at para 47; *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10 (CanLII), at paras 46-47 [*Halifax*].

C. *Member McPhalen's Decision (Court file IMM-2061-18)*

[74] The Minister submits that Member McPhalen's decision that Mr. Ali no longer poses a danger to the public was unreasonable.

[75] In addition, the Minister asserts that Member McPhalen erred by failing to provide clear and compelling reasons for departing from Member Ko's (alleged) finding that Mr. Ali constitutes a danger to the public.

[76] Finally, the Minister maintains that Member McPhalen erred by failing to impose terms and conditions of release on Mr. Ali that reasonably address the danger and the flight risk posed by him.

[77] I agree that Member McPhalen's decision that Mr. Ali no longer poses a danger to the public was unreasonable. However, this is primarily because, like Member Ko, he failed to specifically address (i) the finding made in the Parole Board's statutory release decision, dated April 6, 2018, that there had not been any changes in some of Mr. Ali's risk factor ratings since he began serving his sentence, and (ii) the fact that the CSC assessed Mr. Ali's public safety risk to be "medium," in its pre-release report dated March 19, 2018. That assessment was given despite the progress that Mr. Ali had made in respect of several of the "dynamic" factors that it addressed, and that Member McPhalen relied upon in reaching his decision. As with the corresponding failures in Member Ko's decision, these failures would have been fatal, had Member McPhalen not proceeded to impose a package of terms and conditions on Mr. Ali's release. In brief, the Parole Board's finding and the CSC's assessment constituted important evidence in the CTR that was inconsistent with Member McPhalen's conclusion that Mr. Ali does not pose a danger to the public. By failing to specifically and meaningfully engage with that evidence, Member McPhalen's decision was not appropriately justified. However, as with Member Ko's decision, that shortcoming was cured by the robust package of release conditions

that he imposed, which include conditions previously imposed by the Parole Board. Those conditions will be further discussed below.

[78] Turning to the Minister's second argument, I do not agree with the contention that Member Ko ever concluded that Mr. Ali presents a danger to the public. She did not make any such finding anywhere in her decision. Although she also did not explicitly find that Mr. Ali does not pose a danger to the public, it is readily apparent from her decision that she considered that "any" risk he currently poses is significantly less than what it was in 2009, when he committed his most recent offences. She then proceeded to find that the terms and conditions of release she imposed would collectively ensure that Mr. Ali would "not likely reoffend in a violent way or in a way that would cause a risk to the Canadian public."

[79] This leaves the Minister's third argument that Member McPhalen erred by failing to impose terms and conditions of release on Mr. Ali that reasonably address the danger and the flight risk posed by him.

[80] After reaching his conclusion that Mr. Ali no longer presents a danger to the public or a flight risk, Member McPhalen proceeded to impose terms and conditions of release, over and above those imposed by the Parole Board, "to reduce the flight risk and the danger, hopefully to a level that even CBSA would be comfortable with ..."

[81] Those terms and conditions of release were identical to the ones imposed by Member Ko, with two exceptions. First, they added a requirement that Mr. Luqman post an additional bond in

the amount of \$5,000 with the Receiver General for Canada. Second, they imposed stricter reporting requirements on Mr. Ali, by requiring him to report three times per week, rather than simply once per week

[82] For the same reasons discussed in Part VI.B. of these reasons above, I am satisfied that it was not unreasonable for Member McPhalen to implicitly conclude that those conditions of release will collectively ensure that the public will not likely be exposed to a meaningful risk of harm at the hands of Mr. Ali, and that Mr. Ali will likely report for his removal from Canada, if and when required to do so.

[83] With respect to the alleged danger posed by Mr. Ali, Member McPhalen's relied upon many of the same forward-looking factors that were relied upon by Member Ko. These included the following:

- i. Mr. Ali has not engaged in any criminal behaviour for approximately nine years. Although he has been incarcerated for the last 3.5 years, he was free on bail for well over four years between August 2011 and December 2015 and did not commit any breaches of his bail during that period.
- ii. There is no evidence that he had any contact with any members of his former gang while he was on bail or during his most recent incarceration.
- iii. There is no evidence that he was involved in any drug- or gang-related offences during that period of incarceration.

- iv. By all accounts, he used his time at the Pacific Institution to successfully complete all institutional programs recommended in his correctional plan except for one course, for which he was waitlisted.
- v. The CSC's Final Program Performance Report noted that he had improved from moderate to good in respect of several different risk factors, including in relation to his attitude and the risk of getting involved again with criminals.
- vi. He made further progress in the seventeen months since the Parole Board denied his application for parole in December 2016.
- vii. In setting his terms of statutory release, the Parole Board did not feel that it was necessary to impose a requirement that he live in a halfway house.
- viii. He will live with his mother, who will be able to provide for his basic needs.
- ix. Mr. Luqman has also offered to provide financial assistance.
- x. Despite not being able to work, idleness will not be a concern, as he will assist his mother with errands, he will assist his younger siblings, he can work out, paint and play soccer.
- xi. The author of the Danger Opinion placed heavy emphasis on the Parole Board's 2016 decision and did not have the benefit of more recent evidence, including that which is contained in the CSC's Statutory Release Decision. Member McPhalen observed that this more recent evidence might have changed the conclusion reached in the Danger Opinion.

- xii. Mr. Ali's mother and Mr. Luqman both have an understanding of the nature of his criminal record and will be able to exercise a positive influence on him.
- xiii. He has a close relationship with his mother and Mr. Luqman, and will not want to jeopardize their respective \$5,000 bonds by breaching his terms and conditions of release. This is particularly so because his mother's finances are such that this would affect her and his siblings quite negatively.

[84] Having regard to the foregoing, I consider that it was not unreasonable for Member McPhalen to implicitly conclude that the terms and conditions of release that he imposed on Mr. Ali would collectively ensure that he would not pose a meaningful risk to the public.

[85] With respect to the flight risk posed by Mr. Ali, Member McPhalen relied upon the following findings:

- i. Mr. Ali did not miss any court appearances since 2009, and did not commit any breaches of his bail conditions between August 2011 and December 2015.
- ii. Mr. Ali has demonstrated that he can honour conditions even when he does not want to. In this regard, Member McPhalen observed: "You were on bail between when you were convicted and when you were sentenced for the index offences, but you walked into a courtroom for the sentencing hearing knowing that the Crown was asking for 12 years."
- iii. Mr. Ali did not abscond after he learned in 2014 that an inadmissibility report had been issued against him.

- iv. Mr. Ali and his mother have been cooperating with the CBSA in its efforts to obtain travel documents.

[86] Once again, based on the foregoing, I consider that it was not unreasonable for Member McPhalen to conclude that the terms and conditions of release imposed on Mr. Ali would ensure that he would likely report for removal from Canada, if and when required to do so.

[87] In summary, I am satisfied that the terms and conditions of release imposed by Member McPhalen cured his failure to address the findings of the Parole Board and the CSC discussed at paragraph 77 above. As a result of those terms and conditions of release, I am satisfied that his decision was not unreasonable.

[88] As with Member Ko's decision, based on the reasons that he gave, and the terms of the Order for Release that he issued, Member McPhalen's decision had a rational basis and fell "within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law": *Dunsmuir*, above, at para 47; *Halifax*, above.

## VII. Conclusion

[89] For the reasons set forth in parts VI.B and VI.C of these reasons above, these Applications are dismissed.

[90] At the hearing of this matter, counsel to the parties indicated that no serious question of general importance arises from the facts and issues in these Applications. I agree.



**JUDGMENT in IMM-1844-18 and IMM-2061-18**

**THIS COURT’S JUDGMENT** is that:

1. These applications are dismissed.
2. There is no question for certification.

“Paul S. Crampton”  
\_\_\_\_\_  
Chief Justice

## APPENDIX 1 — Relevant Legislation

### ***Immigration and Refugee Protection Act, SC 2001, c 27***

#### **Objectives and Applications**

##### *Objectives – Immigration*

3 (1) The objectives of this Act with respect to Immigration are:

(...)

(h) to protect public health and safety and to maintain the security of Canadian society;

(i) to promote international justice and security by fostering respect for human rights and by denying access to Canadian territory to persons who are criminals or security risks;

(...)

##### *Objectives — refugees*

3 (2) The objectives of this Act with respect to refugees are:

(...)

(g) to protect public health and safety of Canadians and to maintain the security of Canadian society;

(h) to promote international justice and security by fostering respect for human rights and by denying access to Canadian territory to persons, including refugee claimants, who are security risks or serious criminals;

(...)

#### **Inadmissibility**

##### *Serious criminality*

36 (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for

(a) having been convicted in Canada of an

### ***Loi sur l'immigration et la protection des réfugiés, LC 2001, ch 27***

#### **Objet de la loi**

##### *Objet en matière d'immigration*

3 (1) En matière d'immigration, la présente loi a pour objet :

(...)

h) de protéger la santé et la sécurité publiques et de garantir la sécurité de la société canadienne;

i) de promouvoir, à l'échelle internationale, la justice et la sécurité par le respect des droits de la personne et l'interdiction de territoire aux personnes qui sont des criminels ou constituent un danger pour la sécurité;

(...)

##### *Objet relatif aux réfugiés*

3 (2) S'agissant des réfugiés, la présente loi a pour objet :

(...)

g) de protéger la santé des Canadiens et de garantir leur sécurité;

h) de promouvoir, à l'échelle internationale, la sécurité et la justice par l'interdiction du territoire aux personnes et demandeurs d'asile qui sont de grands criminels ou constituent un danger pour la sécurité.

(...)

#### **Interdictions de territoire**

##### *Grande criminalité*

36 (1) Emportent interdiction de territoire pour grande criminalité les faits suivants :

a) être déclaré coupable au Canada d'une

offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;

(b) having been convicted of an offence outside Canada that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years; or

(c) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years.

(...)

### **Detention and Release**

#### *Review of detention*

57 (1) Within 48 hours after a permanent resident or a foreign national is taken into detention, or without delay afterward, the Immigration Division must review the reasons for the continued detention.

#### *Further review*

(2) At least once during the seven days following the review under subsection (1), and at least once during each 30-day period following each previous review, the Immigration Division must review the reasons for the continued detention.

(...)

#### *Release — Immigration Division*

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

infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans ou d'une infraction à une loi fédérale pour laquelle un emprisonnement de plus de six mois est infligé;

b) être déclaré coupable, à l'extérieur du Canada, d'une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans;

c) commettre, à l'extérieur du Canada, une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans.

(...)

### **Détention et mise en liberté**

#### *Contrôle de la détention*

57 (1) La section contrôle les motifs justifiant le maintien en détention dans les quarante-huit heures suivant le début de celle-ci, ou dans les meilleurs délais par la suite.

#### *Comparutions supplémentaires*

(2) Par la suite, il y a un nouveau contrôle de ces motifs au moins une fois dans les sept jours suivant le premier contrôle, puis au moins tous les trente jours suivant le contrôle précédent.

(...)

#### *Mise en liberté par la Section de l'immigration*

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

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 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.

(...)

*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

(2) La section peut ordonner la mise en détention du résident permanent ou de

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.

#### *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.

(...)

### **Principle of Non-refoulement**

#### *Protection*

115 (1) A protected person or a person who is recognized as a Convention refugee by another country to which the person may be returned shall not be removed from Canada to a country where they would be at risk of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion or at risk of torture or cruel and unusual treatment or punishment.

#### *Exceptions*

(2) Subsection (1) does not apply in the case of a person

(a) who is inadmissible on grounds of serious criminality and who constitutes, in the opinion of the Minister, a danger to the public in Canada; or

(b) who is inadmissible on grounds of security, violating human or international rights or organized criminality if, in the opinion of the Minister, the person should

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) 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.

(...)

### **Principe du non-refoulement**

#### *Principe*

115 (1) Ne peut être renvoyée dans un pays où elle risque la persécution du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques, la torture ou des traitements ou peines cruels et inusités, la personne protégée ou la personne dont il est statué que la qualité de réfugié lui a été reconnue par un autre pays vers lequel elle peut être renvoyée.

#### *Exclusion*

(2) Le paragraphe (1) ne s'applique pas à l'interdit de territoire :

a) pour grande criminalité qui, selon le ministre, constitue un danger pour le public au Canada;

b) pour raison de sécurité ou pour atteinte aux droits humains ou internationaux ou criminalité organisée si, selon le ministre, il ne devrait pas être présent au Canada en

not be allowed to remain in Canada on the basis of the nature and severity of acts committed or of danger to the security of Canada.

raison soit de la nature et de la gravité de ses actes passés, soit du danger qu'il constitue pour la sécurité du Canada.

***Immigration and Refugee Protection Regulations, SOR/2002-227***

***Règlement sur l'immigration et la protection des réfugiés, DORS/2002-227***

**Detention and Release**

**Détention et mise en liberté**

*Factors to be considered*

*Critères*

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

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) 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;

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) is a danger to the public; or

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

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

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

*Flight risk*

*Risque de fuite*

245 For the purposes of paragraph 244(a), the factors are the following:

245 Pour l'application de l'alinéa 244a), les critères sont les suivants :

(a) being a fugitive from justice in a foreign jurisdiction in relation to an offence that, if committed in Canada, would constitute an offence under an Act of Parliament;

a) la qualité de fugitif à l'égard de la justice d'un pays étranger quant à une infraction qui, si elle était commise au Canada, constituerait une infraction à une loi fédérale;

(b) voluntary compliance with any previous departure order;

b) le fait de s'être conformé librement à une mesure d'interdiction de séjour;

(c) voluntary compliance with any previously required appearance at an

c) le fait de s'être conformé librement à l'obligation de comparaître lors d'une

immigration or criminal proceeding;

instance en immigration ou d'une instance criminelle;

(d) previous compliance with any conditions imposed in respect of entry, release or a stay of removal;

d) le fait de s'être conformé aux conditions imposées à l'égard de son entrée, de sa mise en liberté ou du sursis à son renvoi;

(e) any previous avoidance of examination or escape from custody, or any previous attempt to do so;

e) le fait de s'être dérobé au contrôle ou de s'être évadé d'un lieu de détention, ou toute tentative à cet égard;

(f) involvement with a people smuggling or trafficking in persons operation that would likely lead the person to not appear for a measure referred to in paragraph 244(a) or to be vulnerable to being influenced or coerced by an organization involved in such an operation to not appear for such a measure; and

f) l'implication dans des opérations de passage de clandestins ou de trafic de personnes qui mènerait vraisemblablement l'intéressé à se soustraire aux mesures visées à l'alinéa 244a) ou le rendrait susceptible d'être incité ou forcé de s'y soustraire par une organisation se livrant à de telles opérations;

(g) the existence of strong ties to a community in Canada.

g) l'appartenance réelle à une collectivité au Canada.

*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

(i) infraction d'ordre sexuel,

(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).

(...)

#### *Other factors*

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:

(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 l'existence d'accusations criminelles en instance à l'étranger, quant à l'une des infractions ci-après 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 l'existence d'accusations criminelles en instance à l'étranger, quant à l'une des infractions ci-après qui, si elle était commise au Canada, constituerait une infraction à l'une des dispositions ci-après de la Loi réglementant certaines drogues et autres substances :

(i) article 5 (trafic),

(ii) article 6 (importation et exportation),

(iii) article 7 (production).

(...)

#### *Autres critères*

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, the Canada Border Services Agency or the person concerned; and d) les retards inexplicés ou le manque inexplicé de diligence de la part du ministère, de l'Agence des services frontaliers du Canada ou de l'intéressé;
  - (e) the existence of alternatives to detention. e) l'existence de solutions de rechange à la détention.

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

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