Federal Court  Cour fédérale

Date: 20181024

Docket: IMM-4969-18

Citation: 2018 FC 1076

Vancouver, British Columbia, October 24, 2018

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Applicant

and

JW aka JH

Respondent

ORDER AND REASONS

[1] The Applicant, the Minister of Public Safety and Emergency Preparedness [the Minister] seeks an Order to stay the Amended Order of Member Ko of the Immigration Division of the Immigration and Refugee Board [ID] , dated October 15, 2018, which released the Respondent from detention [the Release Order], until the earlier of the disposition of the Application for Leave and for Judicial Review of the Release Order or the next statutorily required detention review hearing, currently scheduled for November 8, 2018. If the stay is granted, the Applicant

also seeks an order granting the Application for Leave for Judicial Review of the Release Order and expediting the hearing of the Application for Judicial Review.

[2] At the outset of the hearing of this motion, the Respondent sought an Order for confidentiality - in particular, to protect the identity of the Respondent and his family members. The Applicant agreed that the Order should be made. The Court is satisfied that, in the circumstances, and based on the submissions of Counsel for the Respondent and the information in the Records before the Court with respect to the related proceedings underway regarding the Respondent's immigration status, that the Order for confidentiality should be granted. Therefore, the Respondent will be referred to by initials and his family members shall be referred to by relationship and / or initials. The Motion Record and the Application Record shall be sealed until further Order of this Court. The Respondent has agreed to prepare a public record to the extent this is necessary.

[3] The Applicant and Respondent have filed their Application Records in addition to their Motion Records [the Records], given that the same information is relevant to both proceedings. The Records have provided the Court with extensive information for the purpose of determining the issues relevant to the present motion. In the event that the stay is granted and the Application for Judicial Review proceeds on an expedited basis, the Applicant and Respondent have agreed that some additional information (for example, additional transcripts of detention review hearings) may be submitted to supplement their respective records for the purpose of the Application for Judicial Review and that affidavits to provide the additional information would be used, rather than filing a Certified Tribunal Record.

I. The Background

[4] Some background is necessary to put the issues into context. However, the background is far more extensive than noted here.

[5] JH, also known as JW, is a fugitive from China where he is wanted on charges analogous to fraud involving several million dollars. The Records, which include the Canada Border Services Agency [CBSA] documents describing the immigration history of JH and JW, reveal, among other things that JH arrived in Canada in 2012 as a visitor. The CBSA was later advised that JH had fled China with a large debt. As a result, an inadmissibility report based on misrepresentation was prepared pursuant to subsection 44(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act]. A warrant for JH's arrest was issued but he could not be found.

[6] In September 2013, JH using the name JW received a Temporary Resident Visa based on a Guatemalan passport issued to JW. He also received a multiple entry Visa around the same time. JW entered Canada in October 2013 via a circuitous route. JW married a woman in Canada and a spousal sponsorship application was ultimately approved in October 2016. As a result, JW became a permanent resident of Canada.

[7] In the meantime, CBSA received further information from China with respect to JH's background and the charges he faced in China arising from illegally obtaining credit from financial institutions.

[8] The CBSA also learned that JH was previously twice married and has children in China and in the United States. These children and marriages were not disclosed in his earlier immigration applications.

[9] In October 2017, CBSA learned that the Guatemalan passport relied on by JW was "altered" and that the name JW did not appear on any Guatemalan registry. That passport was later revealed to have been purchased for $160,000.

[10] In February 2018, the CBSA issued a Report pursuant to subsection 44 (1) of the Act alleging that JW was inadmissible for misrepresentation, including failing to disclose his identity and his charges in China. The Report was referred to the ID for an admissibility hearing. The CBSA issued a warrant for JW's arrest because he was unlikely to appear for his admissibility hearing; in other words, he was a flight risk.

[11] The CBSA arrested JW on February 22, 2018 and he has been in immigration detention since that time based on the risk that he would be unlikely to appear for his admissibility hearing if not detained.

[12] JW has had immigration detention review hearings in accordance with the provisions of the Act, initially within 7 days and thereafter, generally every 30 days since his arrest.

A. *Detention Reviews Since February 2018*

[13] Transcripts of the detention review hearings have been included in the Records and have been reviewed. All detention review hearings were thorough. The respective Members of the ID who determined whether detention should be continued considered the applicable factors related to JW's risk of flight, including his conduct in gaining entry to Canada, his financial ability to purchase a passport, which suggested that the loss of a bond may not have a deterrent effect, his relationship with the proposed bondspersons and their suitability to act as sureties, that JW had children in Canada, but also in the US and China and, therefore, the presence of family in Canada was not a tie to Canada, and the length of time he had spent in detention. At successive detention review hearings, the ID concluded that JW presented a flight risk that could not be mitigated and that continued detention to ensure he appeared at his admissibility hearing was necessary.

[14] At the first detention review hearing in March 2018, the Member found that JW was a high flight risk and alternatives to detention would not mitigate the risk. The Member noted that electronic monitoring was more useful for people who pose a danger, not those who pose a flight risk. The evidence regarding electronic monitoring at that time indicated that the bracelets could be removed. The Member also found that the proposed bond was not a deterrent given JWs resources and that the bondsperson was not credible.

[15] In April, Member Ko conducted the detention review. She noted the factors in section 248 of the *Immigration and Refugee Protection Regulations* [*Regulations*] and concluded that there was no alternative to detention. Member Ko noted that JW's conduct indicated he was not reliable, and the proposed bond and bondsperson would not likely influence his behaviour given

that he had paid for a passport and his evidence was he had enough cash to repay a forfeited bond.

[16] Detention review hearings were held in May, June, July, August and September with the same outcome; that JW's flight risk could not be mitigated with the various release plans proposed. Electronic monitoring was repeatedly proposed and various types of electronic monitoring equipment and responses for tampering, coupled with bonds and bondspersons were considered.

[17] Of note, in June 2018, Member Ko considered the options proposed by JW for electronic monitoring by Tratek and the proposed bond and bondsperson and concluded that JW remained unlikely to appear for his admissibility hearing, which at that time was in process, and that his continued detention was warranted. Member Ko noted, among other things, that she considered JW's past behaviour (which she had set out in more detail in her April 2018 decision) including his misrepresentations and changing stories, his intention to come to Canada to evade Chinese authorities, his use of a false passport, and his willingness to expend large amounts of money to remain in Canada to avoid detection by both Canadian and Chinese authorities. She noted the "predicament" he was in with respect to a potential finding of inadmissibility that could lead to a removal order and the uncertainty of his refugee application. Member Ko again noted that JW's demonstrated willingness to avert the immigration processes led her to question his reliability in attending future processes.

[18] Member Ko concluded that Mr Yan was not a suitable bondsperson and the proposed $30,000 bond was unlikely to ensure JW's compliance with the proposed release plan. Member Ko found that proposed bondsperson, Mr Sikorski, who was willing to post a $20,000 bond, was well intentioned and although he had a relationship with JW's son, he had no relationship with JW. She concluded that Mr Sikorski was not likely to be able to exert influence or moral suasion on JW to ensure that he would follow conditions given: JW's demonstrated ability to disregard such requirements; Mr Sikorski's inability to communicate with JW; and, JWs willingness to use his financial resources to avert immigration processes and avoid detection.

[19] Member Ko also addressed the specific electronic monitoring that was proposed at that time, using the Tratek system. Among other concerns, she found that the technology did not provide an effective way to ensure that the person monitored stayed within geographical boundaries. In addition, the evidence was that the bracelets could be cut off, and if that occurred, there was no ability to track JW. Member Ko noted that technology to meet her concerns may exist in the future. She also noted concerns about the ability of the CBSA to monitor.

[20] Member Ko concluded that electronic monitoring was not a viable option at that time, adding that part of her rationale for not accepting electronic monitoring is that "because of the timeframe until- with respect to the admissibility hearing, I find is very short and does not favour release on this hypothetical alternative at this time". Member Ko considered the length of time JW had been in detention, noting that she did not anticipate it would continue for a lengthy period of time pending the admissibility hearing. Member Ko ordered continued detention based on the ground that JW is unlikely to appear.

[21] Detention review hearings in July and August resulted in similar findings and continued detention.

[22] In September 2018 Member Ko again presided over the detention review hearing. On September 11, 2018, JW presented a new more robust release plan with a different electronic monitoring supplier and security company along with additional monitoring proposals to address the concerns previously noted. The hearing continued on September 19, 20 and 25 to explore the proposals. Member Ko then determined that JW should be released in accordance with a detailed release plan and provided her reasons for her decision orally on October 9, 2018. The Release Order was amended on October 15, 2018.

B. *Other Immigration Proceedings*

[23] JW's admissibility hearing began in May 2018 and continued over several days in June, July, August and September and concluded on October 4, 2018. The decision is pending. Member Ko noted, at the time she made the Release Order, that it was not possible to estimate when the admissibility decision would be rendered.

[24] JW's refugee hearing began in August 2018. According to the information provided by Counsel on this Motion, final submissions will soon be made to the Refugee Protection Division.

II. <u>The October 2018 Release Order</u>

[25] Member Ko's decision delivered orally and transcribed spans over 35 pages. Member Ko reviewed the history, the previous decisions which have found JW's detention to be necessary, the relevant provisions of the Act and the jurisprudence which has noted the need for clear and compelling reasons to depart from a previous decision (citing *Canada (Minister of Citizenship and Immigration) v Thanabalasingham*, 2004 FCA 4, 247 FTR 159 [*Thanabalasingham*]), and jurisprudence which has found that electronic monitoring may be an alternative to detention in appropriate circumstances.

[26] The proposed alternative to detention which was approved by Member Ko and set out in the Terms and Conditions of the Release Order and described in Member Ko's reasons differs in several respects from the previous proposals for electronic monitoring plus a bondsperson and bonds. The Terms and Conditions provide for JW to be confined to his home with a "SecureCuff" GPS monitoring system requiring two ankle bracelets to be used, monitoring by SafeTracks GPS Canada of the bracelets and a beacon to be installed in JW's house, a high pitched alarm to sound in the event of any breach or tampering, several responders to respond to tampering with the bracelets, including Hilton Security, CBSA, RCMP (once engaged by CBSA), citizens' arrest powers to be engaged by Hilton Security, removal by CBSA of tools from JW's house, approval by CBSA of all visitors to JW's home and all medical or other necessary appointments, which would also require an escort. In addition, Mr Sikorski was approved as a bondsperson and posted a $20,000 bond. Mr Yan was also approved as a bondsperson and posted a $30,000 bond. Other conditions included prohibiting JW from using cell phones or the internet. The Release Order granted the CBSA authority to search JW's home

to verify compliance with the terms and noted that the terms and conditions could be reviewed and amended upon application.

[27] Member Ko found that there were clear and compelling reasons to depart from previous decisions, including her own, which had found that JW would be unlikely to appear for an admissibility hearing and that continued detention was necessary. She found that there was now a reasonable alternative to detention to adequately mitigate the risk of JW not appearing for his admissibility hearing.

[28] Member Ko again set out JW's history of misrepresentation and other conduct, including using two identities and using his substantial resources to deceive Canadian authorities. Member Ko notes that the concern is that if released, JW would act as he acted in the past and live in hiding. She noted that JW was a fugitive from justice and his ties to Canada were not strong given his other family in the US and China. Member Ko noted the factors set out in section 248 of the *Regulations* and concluded that the ground for detention is well established; JW is a flight risk. She then considered other factors including the length of time in detention noting it was a neutral factor.

[29] Member Ko stated that the determinative issue justifying the finding that continued detention is no longer warranted is the alternative to detention that now exists to mitigate the risk of JW not appearing for his immigration proceedings. She notes that the new evidence and new release plan led her to a different conclusion than in past decisions.

[30] Member Ko noted that eliminating all risk is not possible, nor is perfection the standard (citing *Canada v Berisha*, 2012 FC 1100 at para 85, [2014] 1 FCR 574 [*Berisha*]). Member Ko assessed the electronic monitoring as proposed and noted, among other things, that it can be effective in deterring breach of conditions because JW would be aware he was monitored. Member Ko reviewed the evidence provided from the security company regarding the equipment and the monitoring and that the security company, CBSA and the bondsperson would be alerted to any tampering with the bracelets. Member Ko found that it would be next to impossible for JW to remove the two bracelets without an alert being sent and a timely response, noting that removal of one bracelet with scissors took 30 minutes. She added that removal with bolt cutters could injure JW.

[31] Member KO acknowledged that she had previously rejected the electronic monitoring proposals due to concerns about the technology, but had left the door open to considering a new proposal. She found that the current proposal was significantly different and supported her different conclusion on the likely effectiveness of electronic monitoring.

[32] Member Ko reiterated that electronic monitoring is not just a condition or a release plan in isolation but is one mechanism to "help ensure compliance with conditions that will ensure you are available to CBSA for the continuation of your immigration proceedings".

[33] Member Ko then addressed the proposed bondspersons. She noted that Mr Yan is unlikely to influence JW to comply with the conditions. She found that Mr Sikorski would be likely to help JW comply with the conditions once the electronic monitoring is in place. Member

Ko again noted that there was not much, if any, relationship between Mr Sikorski and JW and there was a language barrier, however Mr Sikorski was well intentioned and would likely respond to any alerts and could accompany JW to any approved appointments.

[34] Member Ko also addressed the other conditions included in the Release Order, including the need for written contracts to be executed with the security companies and CBSA, payment to be made by JW in advance, the installation of an additional beacon, the identification of an inclusion zone for monitoring JW's presence in that zone, an "alerts" protocol, and CBSA's right to test the equipment and observe the installation of the two bracelets on JW.

III. The Test for a Stay of the Release Order

[35] The conjunctive tripartite test set out in *RJR MacDonald Inc v Canada (AG)*, [1994] 1 SCR 311 and as articulated by the Federal Court of Appeal in *Toth v Canada (MEI)*, (1988) 86 NR 302 (FCA) applies to determine whether the stay requested by the Applicant should be granted: that there is a serious issue to be tried; that the Applicant would suffer irreparable harm if the stay were not granted; and, that the balance of convenience lies in the Applicant's favour, and that all three elements of this test must be established.

[36] The jurisprudence has established that the test to establish a serious issue, in this context, is relatively low, being neither frivolous nor vexatious, but must have some chance of success at the judicial review stage *(Mejia v Canada (Citizenship and Immigration)*, 2009 FC 658 at para 18 (CanLII), [2009] FCJ No 824 (QL)). As noted by Justice de Montigny in *Adetunji v Canada (Minister of Citizenship and Immigration)*, 2012 FC 708, [2012] FCJ No 698, the test for serious

issue is lower for the purpose of a stay motion than the standard of an "arguable case" for the purpose of leave for judicial review. As a result, the Court could find that a serious issue has been established on the low threshold for the purpose of the stay, but that an arguable case had not been established for the purpose of leave. The Court could also find that there is an arguable case to grant leave, but this does not suggest or influence the outcome of the Application for Judicial Review as yet a higher threshold applies to establish that the decision is not reasonable. In the present case, the parties agree that if a stay is granted, even on a low threshold of serious issue, leave should also be granted and the Application for Judicial Review should be expedited.

IV. The Applicant's Submissions

[37] The Applicant argues that the decision of Member Ko raises serious issues because Member Ko did not provide clear and compelling reasons for departing from previous ID decisions which continued JW's detention, including her own decisions, which found that JW was a serious flight risk and the electronic monitoring coupled with a bond were not sufficient to mitigate the flight risk.

[38] The Applicant acknowledges that Member Ko's decision reviewed all the past detention hearings and the concerns raised and clearly found that JW continued to be a high flight risk. The Applicant argues that despite this finding, Member Ko found that the new release plan with enhanced electronic monitoring coupled with two bondspersons and other conditions would adequately mitigate this high risk. The Applicant argues that despite Member Ko stating that she provided clear and compelling reasons, she failed to do so. Although Member Ko referred to the salient facts, the jurisprudence and the extensive features of the current release plan, Member Ko

did not address the fact that JW himself has not changed; he remains untrustworthy and unreliable and is motivated to flee, particularly given the potential finding of inadmissibility which is pending. The Applicant submits that the key concern in all the detention review hearings was JWs conduct, in particular his reliability. Member Ko did not squarely address how this had changed by September, 2018. The Applicant notes that JW still has significant resources at his disposal, he has proven to be resourceful and deceptive in the past and he is motivated to avoid the potential consequences of an admissibility hearing. The Applicant submits that JW could find a way to cut off the two ankle bracelets- which can be removed with scissors albeit with difficulty- and flee, perhaps with the assistance of others or that a plan could be put in place before attempting to remove the bracelets, and before any of the sophisticated monitoring in place sends signals to CBSA, Hilton Security or his bondsperson. The Applicant submits that the release plan requires cooperation from JW and this cooperation cannot be assumed or expected and would not be forthcoming.

[39] The Applicant submits that Member Ko failed to give adequate consideration to the effectiveness of electronic monitoring once the bracelets are removed, noting that the monitoring would only indicate where the electronic bracelets were located and not where JW was located. The Applicant submits that despite the many conditions included, such as the removal of tools from JW's home, his family would still have access to tools as would possible visitors.

[40] The Applicant also submits that Member Ko failed to provide clear and compelling reasons for departing from previous determinations which noted the length of time in detention. The Applicant submits that Member Ko did not explain why an alternative to release was now

appropriate given that detention had been required for the past eight months and a decision on admissibility was now pending and more imminent.

[41] In oral submissions, the Applicant elaborated that the choice of bondsperson also raises a serious issue. Both Mr Yan and Mr Sikorski had been previously found to not be suitable bondspersons and Member Ko did not explain how that had changed.

[42] With respect to irreparable harm, the Applicant submits that JW's release would bring the integrity of the immigration system into disrepute. JW is a fugitive from justice, who has been found over and again to be a high flight risk. JW has demonstrated himself to be deceptive and has used his significant resources to mislead the immigration authorities in the past. The gaps in the effectiveness of the release plan could permit JW to abscond and if he did so, the proposed tracking system would not assist and it would be unlikely that the Applicant could locate him to pursue enforcement.

[43] The Applicant submits that in the circumstances, the balance of convenience favours the Minister. The public interest requires that JW should remain in detention pending the determination of the Application for Leave and Judicial Review or the next detention review hearing, which in this case is a short period.

V. The Respondent's Submissions

[44] The Respondent submits that Member Ko did provide clear and compelling reasons to depart from previous decisions. Member Ko thoroughly canvassed the background and past

decisions. She acknowledged JW's past conduct and general untrustworthiness, all of which led her to find that he continued to be a flight risk. However, Member Ko reasonably found that the flight risk could be mitigated with the new robust plan to provide new technology for electronic bracelets provided by SafeTracks, monitoring by a security company along with other monitoring and many additional conditions that would work together to ensure his compliance.

[45] The Respondent notes that the jurisprudence establishes that electronic monitoring can provide an effective alternative to detention. The jurisprudence establishes that such options should be considered (*Sittampalan v Canada (The Minister of Public Safety and Emergency Preparedness*) 2006 FC 1118 at para 22, 300 FTR 48) and that a reasonable alternative does not mean a perfect alternative (*Berisha*, at para 85). The Respondent notes the jurisprudence which has found that depending on the specific facts and evidence of effectiveness, electronic monitoring would provide a reasonable alternative to detention.

[46] The Respondent submits that even on the low standard for serious issue, none have been raised. Member Ko provided clear and compelling reasons to depart from her own and other Members' past findings that electronic monitoring would not be effective in accordance with the guidance provided in *Thanabalasingham.* Member Ko acknowledged that JW was unreliable in several passages which outlined his past conduct and deception.

[47] Member Ko focussed on the new evidence regarding the new technology and the new monitoring to be provided 24/7. She addressed the unlikelihood of removal of the bracelets and the response times of the several responders.

[48] With respect to the Applicant's submission that the inability to track JW once the bracelets were removed was not addressed, the Respondent submits that Member Ko found it would be next to impossible for the two bracelets to be removed without alerting the monitors who would respond, thereby eliminating this possibility of losing track of JW.

[49] The Respondent submits that the length of time in detention to date was noted by Member Ko and found not to be so long as to favour release.

[50] With respect to irreparable harm, the Respondent notes that the Minister's own policy manual notes that alternatives to detention should be augmented and that electronic monitoring is being used more routinely in some regions to permit release . There will be no impact on the integrity of the immigration system from implementing the very policy the Minister seeks to expand.

[51] The Respondent adds that JW's detention and deprivation of liberty has been harmful to him as well as to his family.

VI. The Applicant Has Established That The Stay Should Be Granted

[52] The requirement of clear and compelling reasons to depart from a previous decision at a detention review was explained in *Thanabalasingham*, at paras 10-13:

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

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

[53] In the present case, Member Ko acknowledged the requirement for clear and compelling reasons. Member Ko's lengthy decision addresses several of the concerns raised in the past decisions and explains why she is reaching a different conclusion with respect to some of the previous findings.

[54] However, I agree with the Applicant that despite the explanations provided by Member Ko to reach a different conclusion and to permit release based on a new and more robust plan and the evidence provided, and applying the low standard or threshold required to establish a serious issue, Member Ko's reasons for departing with previous findings do not squarely address how JW himself has changed since, for example, June, which would now motivate him to

comply with this more robust plan and cooperate with all the conditions to ensure he attends his immigration proceedings.

[55] I also note that in Member Ko's June 2018 decision, which found that electronic monitoring was not a viable option, part of her rationale for not accepting electronic monitoring was that "because of the timeframe until- with respect to the admissibility hearing, I find is very short and does not favour release on this hypothetical alternative at this time". In the Release Order Member Ko notes that the decision on admissibility is pending and that the length of time in detention to date does not favour release. However, Member Ko does not address her change in approach from her past finding that appears to suggest that the short time remaining until the admissibility hearing is what favours ongoing detention.

[56] In addition, Member Ko does not explain why Mr Yan and Mr Sikorski are now suitable bondspersons given that they were previously found not to be. While Member Ko again notes that Mr Sikorski is well intentioned, he remains unable to communicate with JW and no relationship appears to have been established since the last decision (and previous decisions) which found that he was not an appropriate bondsperson. In past decisions, Member Ko found that Mr Yan and Mr Sikorski would not influence or provide "moral suasion" for JW to comply with the conditions. The role of the bondspersons was described by Member Ko as part of a larger plan, but she does not appear to clearly explain why they are now suitable bondspersons.

[57] Based on the low threshold for establishing a serious issue, I am satisfied that the Applicant has raised one or more serious issues in the decision of Member Ko.

[58] With respect to irreparable harm, the issue is whether the Applicant, in this case, the Minister, would suffer such irreparable harm in the period of time until the Application for Judicial Review is disposed of, which in the present case may only be a matter of a few weeks. I note that JW remains in detention and will not be released until several conditions of the Release Plan have been met, and this may take a week or more. However, the Release Order if implemented as proposed will permit JW's release likely before the Application for Judicial Review is disposed of. Generally, speculation regarding irreparable harm does not suffice. However, given JW's past conduct, it is not mere speculation for the Applicant to submit that JW may be motivated to evade the electronic monitoring given the pending admissibility decision. Moreover, even if this worst case scenario did not occur, the Applicant has established that there would be harm to the integrity of the immigration system with respect to release of JW at this time given his past conduct and despite that alternatives to detention should be encouraged and relied on where appropriate.

[59] As the Respondent notes, in *Tursunbayev v Canada (Minister of Public Safety and Emergency Preparedness)*, 2012 FC 504 at para 92, 409 FTR 176, the Court noted that the Regulations require that where grounds for the detention have been established, section 248(e) of the Regulations requires the Board to consider whether alternatives to detention are available. However, the Applicant does not dispute that alternatives should be considered, only that the alternative proposed would not be effective in the overall circumstances.

[60] In conclusion, I have found that the Applicant has raised one or more serious issues with respect to the Release Order applying the low standard to make such a determination.

[61] In the circumstances of this case, the Applicant has also established that it would suffer irreparable harm between now and the time that the application for judicial review is finally determined in that the integrity of the immigration system would fall into disrepute if the Applicant's concerns, which are based on more than simply speculation, materialize and JW, who is clearly found to be a flight risk, does not comply with the terms and conditions of his release. In such a scenario, the Applicant's ability to enforce the terms of the Release Order and to ensure JW's attendance at his immigration proceedings would be jeopardized.

[62] I note that JW will be eligible for a statutory review of his detention again on November 8, 2018. In addition, the Application for Judicial Review will be expedited and, by way of a separate order, will be scheduled for November 5, 2018. The stay of the Release Order is for a brief period pending the earlier of these two dates and decisions rendered. The Applicant's concerns regarding the Release Order could be addressed at future review hearings based on the information available at that time.

[63] I also find that in these circumstances, the balance of convenience lies with the Applicant to ensure that the obligations of the *Immigration and Refugee Protection Act* are carried out.

ORDER in IMM-4969-18

THIS COURT ORDERS that:

1. The style of cause is changed to refer to the Respondent as JW aka JH;

2. The Motion Record and Application Record shall be sealed and shall remain confidential until further Order of this Court;

3. The Minister's motion for a stay of the Release Order is granted;

4. The Release Order of the ID as amended on October 15, 2018 is stayed until the earlier of the final determination of the Application for Judicial Review of the Release Order or the outcome of the next statutorily required detention review hearing for JW;

5. Leave for Judicial Review is granted and a separate Order will be issued setting out the date and time of the hearing of the Application for Judicial Review and the applicable timetable for further documents.

6. There shall be no order as to costs of this motion.

"Catherine M. Kane"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4969-18
STYLE OF CAUSE:	THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS v JW AKA JH
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DATED:	OCTOBER 24, 2018

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