Federal Court  Cour fédérale

Date: 20190411

Docket: IMM-1989-19

Citation: 2019 FC 451

Ottawa, Ontario, April 11, 2019

PRESENT: The Honourable Mr. Justice Norris

BETWEEN:

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Applicant

and

WARSAME FAISAL MOHAMMED

Respondent

ORDER AND REASONS

I. Introduction

[1] The applicant, the Minister of Public Safety and Emergency Preparedness, seeks an order staying the order for the respondent's release issued on March 25, 2019 [Release Order] by Member M. Tessler of the Immigration Division [ID] of the Immigration and Refugee Board of Canada. The stay is sought pending the determination of the Minister's application for judicial review of the Release Order.

[2] For the following reasons, I am dismissing the motion.

II. Background

[3] The respondent, Warsame Faisal Mohammed, is a thirty-six year old citizen of Somalia. He entered the United States with his family in 1996 and was granted asylum there. He lived in the United States until June 2017, when he entered Canada illegally. While living in the United States, Mr. Mohammed had acquired a lengthy criminal record. As a result of that record, he lost his status in the United States and was ordered deported to Somalia. Rather than allow this to occur, Mr. Mohammed left the United States for Canada. He crossed the border on foot between ports of entry. While the record is not entirely clear, it appears that at the time there was an outstanding warrant for his arrest because he failed to attend court on an impaired driving charge in Minnesota.

[4] On July 30, 2017, Mr. Mohammed was arrested for entering Canada without authorization. He was held in immigration detention. On August 14, 2017, it was determined that he was inadmissible to Canada due to serious criminality. A deportation order was issued against him. On September 1, 2017, Mr. Mohammed was offered a Pre-Removal Risk Assessment [PRRA] under section 112 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. He subsequently submitted a PRRA application. This application was rejected on December 18, 2017. On September 25, 2018, Mr. Mohammed applied for leave and judicial review of the rejection of his PRRA application. The application included a request for an extension of time to file because the time limit for commencing the application had passed. The Minister consented to the request and an order granting the extension of time was made by

Justice Shore on November 26, 2018. On January 17, 2019, Justice LeBlanc granted leave to proceed with the judicial review application. That application is scheduled to be heard next week in Winnipeg, on April 16, 2019.

[5] Meanwhile, on September 12, 2017, Mr. Mohammed was released from immigration detention on conditions. A year later, on September 14, 2018, the Canada Border Services Agency [CBSA] served him with a letter stating that he would be removed from Canada to Somalia in less than two weeks, on September 26, 2018. The record supports the conclusion that Mr. Mohammed was surprised and shocked by this turn of events. He believed (incorrectly, as it turned out) that counsel (not Mr. Hogg) was pursing an application for judicial review of the rejection of his PRRA application and that he would not be removed until this had been dealt with by the Court. Upon being told that he was about to be removed to Somalia, Mr. Mohammed allegedly advised the CBSA officers that he would be killed there and that he would rather spend the rest of his life in jail in Canada than go back to Somalia. Concerned in light of these and other comments that Mr. Mohammed was unlikely to appear for removal, the officers placed him under arrest. Up until this point, there had been no serious concerns about Mr. Mohammed's compliance with the order for his release during the year he was out of detention.

[6] Subsequent to his arrest in September 2018, Mr. Mohammed had a total of eight detention reviews. Seven of the reviews resulted in his continued detention. The eighth resulted in the Release Order dated March 25, 2019, that is the subject of the present motion.

[7] Mr. Mohammed was not removed on September 26, 2018, as had originally been proposed. As will also be obvious, he has still not been removed. A number of removals have been scheduled and cancelled subsequent to the original removal date – namely, October 17, 2018; the week of January 28, 2019; and the week of March 11, 2019. The delay in removal has been due to a variety of factors. The Minister had difficulty securing cooperation from commercial airlines given the concerns expressed about whether Mr. Mohammed would pose a security or safety threat on board. The Minister had difficulty arranging a private charter as an alternative to a regular commercial flight. The Minister had difficulty obtaining confirmation from Somalia that they would admit Mr. Mohammed on arrival. Indeed, as of the last detention review hearing, the Minister had still not received this "authorization" from the Somali Ministry of Foreign Affairs and International Cooperation, despite having a valid travel document issued by the Somali Embassy in Washington in hand. It is also fair to say that Mr. Mohammed has not been cooperative with CBSA efforts to facilitate his removal, expressing intense fear about the fate that will befall him if he is removed to Somalia and often refusing to deal with CBSA officers in any sort of a constructive way.

[8] Eventually, late last month, after the hearing of the last detention review had concluded, the Minister agreed to an administrative deferral of Mr. Mohammed's removal until the application for judicial review of the rejection of the PRRA application has been disposed of by the Court. Counsel for the Minister requested that the detention review be resumed in order to put this updated information before the ID. The request was granted and the hearing continued briefly on March 22, 2019. The Member reserved his decision.

[9] In a written decision dated March 25, 2019, the Member ordered Mr. Mohammed released from detention subject to the following conditions:

- Present yourself at the date, time and place that a CBSA officer requires to comply with any obligation imposed on you under the Act, including removal, if necessary.
- Prior to release report a residential address to a CBSA officer and advise CBSA in person of any change in address prior to the change being made.
- Report in person to a CBSA officer at Room 100, 289 Main Street, Winnipeg, MB, R3C 1B3 on every Tuesday and Friday. A CBSA officer or the Immigration Division, on application may, in writing, reduce the frequency of reporting.
- Keep the peace and be of good behavior and not engage in any activity that would result in a violation under any Act of Parliament.
- Have no contact with persons that you know or have reason to believe are engaged in criminal activity.
- Not to work in Canada without a work permit issued under the Act.
- To act civilly and courteously in your interaction with CBSA employees.

[10] The Minister immediately applied for leave and judicial review of this decision. On the same day as the decision was released, Justice Walker granted the Minister's motion for an interim interlocutory stay of the Release Order. As a result, Mr. Mohammed has remained in detention pending the determination of the present motion for an interlocutory stay of the Release Order. He has now been in immigration detention for over 200 days.

III. The Test for a Stay

A. *General Principles*

[11] An order staying a tribunal's decision is extraordinary equitable relief. The test for whether to grant such an order is well-known. As the party seeking the relief here, the Minister must demonstrate three things: (1) that the application for judicial review raises a "serious question to be tried;" (2) that the Minister will suffer irreparable harm if a stay is refused; and (3) that the balance of convenience (i.e. the assessment of which party would suffer greater harm from the granting or refusal of the stay pending a decision on the merits) favours granting the stay. See *Toth v Canada (Employment and Immigration)* (1988), 86 NR 302, 6 Imm LR (2d) 123 (FCA); *R v Canadian Broadcasting Corp*, 2018 SCC 5 at para 12 [*Canadian Broadcasting Corp*]; *Manitoba (Attorney General) v Metropolitan Stores Ltd*, [1987] 1 SCR 110; and *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311. A party seeking such interlocutory relief must meet all three branches of the test.

[12] With respect to the first part of the test, the threshold for establishing a serious issue to be tried is generally low. Typically, the issues raised in the underlying application must simply be shown to be neither frivolous nor vexatious. However, as I discussed in *Canada (Public Safety and Emergency Preparedness) v Allen*, 2018 FC 1194 at para 15 [*Allen*], there are weighty considerations that warrant applying an elevated standard where, as here, the Minister seeks to stay an order releasing an individual from detention.

[13] Building on my observations in *Allen*, I note that there is an important sense in which staying a release order effectively sets aside the disposition ordered by the ID, the very relief sought in the underlying judicial review application. Indeed, it can also be said that the stay effectively provides the Minister with the disposition of the detention review which he sought unsuccessfully from the ID – namely, the detainee's continued detention. In my view, this is analogous to the situation that obtains when a stay of a removal order is sought pending judicial review of a refusal to defer the removal. In this latter context, it is well-established that an elevated standard applies on the first branch of the test, and that the moving party must demonstrate that the underlying application is likely to be successful: see *Wang v Canada (Minister of Citizenship and Immigration)*, [2001] 3 FC 682, 2001 FCT 148 (CanLII) at para 10; *Baron v Canada (Public Safety and Emergency Preparedness)*, 2009 FCA 81 at paras 66-67 (per Nadon JA, Desjardins JA concurring) and para 74 (per Blais JA). I find that the same rationale for an elevated standard on the first part of the test for a stay also applies in the present context.

[14] I acknowledge that in *Canada (Citizenship and Immigration) v B479*, 2010 FC 1227, my colleague Justice Zinn rejected this analogy and the submission that an elevated threshold should be applied on motions by the Minister to stay release orders (see paras 19-26). For the reasons set out herein, I respectfully take a different view.

[15] It is true, as counsel for the Minister points out, that Mr. Mohammed's continued detention resulting from a stay being granted could be short-lived. Mr. Mohammed would be entitled to regular detention reviews and he could well be released as a result of a subsequent

review. Still, that subsequent order for release would only grant Mr. Mohammed something he has already been granted by the ID. The ID is an expert tribunal that has been given primary responsibility for deciding matters of detention and release under the *IRPA*. A detainee who has been ordered released by the ID should not be required to wait in custody for the next detention review and then have to try to obtain release again unless there are clear reasons to think that the release order is likely to be set aside on judicial review.

[16] I am fortified in this view by the recent decision of the Supreme Court of Canada in *Canadian Broadcasting Corp*. The Court held there that the burden of complying with a mandatory injunction warranted an extensive review of the merits at the interlocutory stage and that the appropriate criterion for assessing the first part of the tripartite test is not merely whether there is a serious issue to be tried but rather whether the moving party has shown a strong *prima facie* case (see paras 15-16). As *Canadian Broadcasting Corp* demonstrates, the tripartite test is a flexible one which must be responsive to the equities engaged by the particular relief sought. While the analogy again is not perfect, in my view, an order whose effect is to continue a denial of liberty ought to meet a similar threshold when it comes to evaluating the merits of the underlying application before the legal effect of an order for release should be suspended.

[17] Even more to the point, liberty ought never to be denied without a compelling reason. While an order staying an order for release does preserve the *status quo* pending the underlying judicial review application, this is not something that should ever be done lightly when liberty is at stake. As Justice Iacobucci wrote in *R v Hall*, 2002 SCC 64, [2002] 3 SCR 309, at para 47 (dissenting, but not on this point)

> At the heart of a free and democratic society is the liberty of its subjects. Liberty lost is never regained and can never be fully compensated for; therefore, where the potential exists for the loss of freedom for even a day, we, as a free and democratic society, must place the highest emphasis on ensuring that our system of justice minimizes the chances of an unwarranted denial of liberty.

While Justice Iacobucci made these observations in the criminal bail context, they apply with equal force here.

B. *The Test Applied*

(1) Serious Issue

[18] Counsel for the Minister initially calibrated his submissions to the usual low standard of simply demonstrating that the grounds relied on are neither frivolous nor vexatious. When I raised the idea that an elevated standard for assessing the merits of the underlying application for judicial review could apply in a case such as this, counsel for the Minister contended that the grounds relied upon meet that standard too. Despite counsel's able submissions, I am not satisfied that the Minister has demonstrated a likelihood of success with respect to any of the grounds upon which the Member's decision is challenged.

[19] The Minister submits that the Member erred by:

a) failing to provide clear and compelling reasons for departing from previous decisions of the ID; and

b) releasing [Mr. Mohammed] on wholly inadequate conditions.

[20] My assessment of the strength of these grounds must take into account the deferential standard of review that will be applied by the reviewing court. To succeed on the underlying application for judicial review, the Minister will have to persuade the reviewing court that the Member's decision is unreasonable. Reasonableness review "is concerned with the reasonableness of the substantive outcome of the decision, and with the process of articulating that outcome" (*Canada (Attorney General) v Igloo Vikski Inc*, 2016 SCC 38 at para 18). The reviewing court examines the decision for "the existence of justification, transparency and intelligibility within the decision-making process" and determines "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*]). These criteria are met if "the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes" (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16 [*Newfoundland and Labrador Nurses*]). It is not the role of the reviewing court to reweigh the evidence or to substitute its own view of a preferable outcome (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 59 and 61). In the present context, this deferential standard of review reflects the distinct roles assigned to the ID and the reviewing court by Parliament. It also reflects the relative expertise of the tribunal on matters of detention and release in the immigration context compared to the reviewing court.

[21] Looking first at the alleged failure of the Member to provide clear and compelling reasons for departing from previous decisions of the ID, the requirement for such reasons which the Minister relies upon can be traced back to the decision of the Federal Court of Appeal in

Canada (Minister of Citizenship and Immigration) v Thanabalasingham, 2004 FCA 4 [*Thanabalasingham*]. The articulation of this requirement by Justice Rothstein (as he then was) for the Court is worth setting out in full:

> [10] The question then is what weight must be given, in subsequent reviews, to previous decisions. As became clear in oral argument, the Minister does not say that prior decisions to detain an individual are binding at subsequent detention reviews. Rather, the Minister says that a member must set out clear and compelling reasons in order to depart from previous decisions to detain an individual.
>
> [11] 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.
>
> [12] 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.
>
> [13] 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.
>
> [14] 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.

[22] Thus, in answer to the certified question in *Thanabalasingham*, Justice Rothstein stated the following at para 24:

> At each detention review made pursuant to sections 57 and 58 of the *Immigration [and] Refugee Protection Act*, S.C. 2001, c. 27, the Immigration Division must come to a fresh conclusion whether the detained person should continue to be detained. Although an evidentiary burden might shift to the detainee once the Minister has established a *prima facie* case, the Minister always bears the ultimate burden of establishing that the detained person is a danger to the Canadian public or is a flight risk at such reviews. However, previous decisions to detain the individual must be considered at subsequent reviews and the Immigration Division must give clear and compelling reasons for departing from previous decisions.

[23] *Thanabalasingham* provides valuable guidance to first-instance decision makers about the importance of reasons for explaining the result reached, especially if that result differs from earlier decisions in the same matter. It also encourages the parties to direct their attention and efforts to matters that could make a difference to the result as each successive detention review is litigated. However, when the requirement of clear and compelling reasons for departing from previous decisions is being considered by a court as a ground for judicial review, it should not be treated as a stand-alone ground for setting aside a decision. Rather, it should be considered under the *Dunsmuir* paradigm of judicial review, a paradigm which, it should be noted, emerged after the decision in *Thanabalasingham*. That is to say, the requirement for clear and compelling reasons for departing from a previous decision of the ID should be seen not as a discrete ground for judicial review but, rather, as an application of the reasonableness standard as this has been articulated in *Dunsmuir* and subsequent jurisprudence.

[24] As set out above, under this standard the reviewing court must determine whether "the reasons allow the reviewing court to understand why the tribunal made its decision and permit it

to determine whether the conclusion is within the range of acceptable outcomes" (*Newfoundland and Labrador Nurses* at para 16). As Justice Rothstein himself later observed in *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, "deference under the reasonableness standard is best given effect when administrative decision makers provide intelligible and transparent justification for their decisions, and when courts ground their review of the decision in the reasons provided" (at para 54). Clear and compelling reasons from the ID for departing from earlier decisions can assist the reviewing court in understanding why the ID made its decision and in determining whether the conclusion is within the range of acceptable outcomes that are defensible in light of the facts and the law. Their absence can leave the court unable to make one or both of these determinations, necessitating setting the decision aside and remitting the matter for reconsideration. At the end of the day, the critical question is whether the reviewing court is able to make these determinations having regard to the reasons given and the record as a whole.

[25] Moreover, as the Federal Court of Appeal emphasized in *Thanabalasingham*, when considering whether an ID member's reasons satisfy the requirement of providing clear and compelling reasons for departing from previous decisions, the reviewing court must bear in mind that such reasons can be found in the express words of the decision or implicitly in the result. This is consistent with the later observation by Justice Abella in *Newfoundland and Labrador Nurses* that, in assessing whether a decision is reasonable in light of the outcome and the reasons, "courts should not substitute their own reasons, but they may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome" (*Newfoundland and Labrador Nurses* at para 15).

[26] Applying this framework, I find that the Minister has not demonstrated that this ground for judicial review is likely to succeed.

[27] The crux of the Member's reasons is found in paragraph 24 of the decision. The Member writes:

> With respect to the relevant factors in section 248 of the *Immigration and Refugee Protection Regulations*, Mr. Mohammed has been in detention for six months. At this point removal is on hold pending conclusion of matters in the Federal Court which is a significant change in circumstances from previous detention reviews where the Minister was still moving forward with removal. It is difficult to predict how long it will take for the Federal Court to render a decision, and there are a myriad of other potential outcomes including having the matter sent back for another PRRA. It is not my role to speculate about further processes that could delay removal; at this point I am looking only at the Federal Court judicial review and in my experience a decision would be at approximately three months from the date of hearing. Mr. Mohammed is facing at least that in additional detention.

[28] The Member notes here that the Minister's decision not to pursue Mr. Mohammed's removal at this time is "a significant change in circumstances." This is indisputable. It is a highly material development in at least two respects. First, as the Member knew very well, the previous decisions to continue detention were all premised on Mr. Mohammed's removal being imminent. This is no longer the case. Second, the prospect of imminent removal also explained Mr. Mohammed's behaviour after the fateful meeting with CBSA officers on September 14, 2018. Mr. Mohammed's anxiety stemmed not only from his fears about what will happen to him in Somalia but also from his perception that the CBSA was attempting to remove him despite the legal remedies he believed were being pursued on his behalf. With removal

continuing to be said to be imminent, there was a basis for the ID to find that Mr. Mohammed's obstructive behaviour would continue. Once again, this is no longer the case.

[29] The materiality of this change in circumstances is further demonstrated by the same Member's reasons for continuing Mr. Mohammed's detention at the seven day detention review on September 25, 2018 – i.e. the day prior to the scheduled removal. The Member stated then in ordering continued detention:

> My concern is that removal is scheduled for tomorrow. Mr. Mohammed has expressed extreme reservations at removal and that is an indication to me that he's unlikely to appear for that removal scheduled for tomorrow.
>
> So for sure those circumstances can change. If the deferral is granted; if a stay is granted; if one or the other happens, then that would be a change in circumstances and that could be taken into consideration. Then, again, considering that Mr. Mohammed had been cooperative, at least regarding reporting until how [*sic*] that my concern is with his very strong statements about not wanting to return to Somalia that the likelihood at this point in light of the absolute imminence of removal that he would not voluntarily appear.

[30] While September 26, 2018, came and went without Mr. Mohammed being removed, at all the detention review hearings conducted in the interim between September 25, 2018, and the last one, the ID accepted the Minister's representations that removal was actively being pursued and continued to be imminent. Given this, and given the *Thanabalasingham* principle, it is not surprising that none of the other members who dealt with Mr. Mohammed's case found that there were clear and compelling reasons for departing from Member Tessler's decision on September 25, 2018. A clear and compelling reason for departing from all of these earlier decisions emerged only when the Minister agreed not to pursue removal for the time being. It is

difficult to imagine what else the Member should have said to explain why he was now departing from the previous decisions to continue Mr. Mohammed's detention.

[31] For these reasons, I find that the Minister has not demonstrated that a reviewing court is likely to find that the Member made "a cursory decision which does not advert to the prior reasons for detention in any meaningful way" (*Thanabalasingham* at para 13). More broadly, the Minister has not demonstrated that a reviewing court is likely to find that the March 25, 2019, decision is unreasonable.

[32] For similar reasons, I also find that the Minister has not demonstrated that the judicial review of the Release Order is likely to succeed on the ground that the Member committed a reviewable error by imposing inadequate conditions of release. As with the previous ground, I must assess the strength of this ground through the lens of the reasonableness standard of review. The record demonstrates that the Member was fully aware of Mr. Mohammed's history, including the tenor and the content of Mr. Mohammed's dealings with CBSA after he was informed he was about to be removed. This was, after all, part of the reason the same Member continued Mr. Mohammed's detention at the seven day detention review. The March 25, 2019, reasons demonstrate that the Member was aware that Mr. Mohammed's problematic conduct had continued since the seven day review.

[33] The reasons also demonstrate that, in the Member's view, the significance of this conduct must be assessed in the context of events as they were unfolding at the time. The Member observed that it is "not uncommon for a person, when first advised of their imminent removal, to

react with hyperbole, not appreciating that the officers delivering the message of removal are powerless to prevent it," but then eventually the person calms down and cooperates with the removal process. The Member also noted another salient feature of Mr. Mohammed's case, stating:

> I am also of the opinion that Mr. Mohammed has made a valid point that he believed he was going to be removed while he believed he still had legal remedies in Canada. This does not excuse his behaviour but it does to some degree explain it. His comments about fearing for his life if returned to Somalia I consider to be hyperbole and not a reliable reflection of flight risk. Mr. Mohammed was at liberty from 11 September 2017 until his arrest on 14 September 2018. During that time he complied with his conditions and reported regularly to CBSA.

[34] The Member determined that in these respects as well, the decision to defer removal for the time being was a material change in circumstances. It changed the context that must be considered when attempting to predict Mr. Mohammed's future behaviour and when assessing the adequacy of proposed terms of release. The Member was aware of the previous decisions finding that the terms Mr. Mohammed had proposed for his release were not adequate to ensure that he would appear for removal. The Member took into account the context in which these decisions were made. He also took into account that this context had changed.

[35] In addition, the Member had the singular advantage of observing Mr. Mohammed over the course of three detention review proceedings (September 25, 2018; March 18, 2019; and March 22, 2019). He was uniquely well-positioned to evaluate Mr. Mohammed's credibility and sincerity. In particular, the Member had the benefit of being able to compare how Mr. Mohammed presents now with how he presented just a few days after he was arrested in September 2018. These are advantages neither I nor the judge who will hear the judicial review

application share. These are also considerations that a reviewing court will have regard to when determining whether the Member's decision is reasonable or not.

[36] With the benefit of what he could observe, and considering the material change in circumstances, the Member concluded that release on the terms he stipulated was now appropriate. Having regard to all of the foregoing, the Minister has not demonstrated that it is likely that a reviewing court will find that it was unreasonable for the Member to do so.

[37] I will conclude with respect to this part of the test with three observations.

[38] First, while I have applied an elevated standard when assessing the merits of the underlying application for judicial review, this is not determinative of this motion. Even if I had framed the serious question test as whether the application is frivolous or vexatious, I would still have denied the motion. This is because, while I would have found that the grounds advanced are not frivolous or vexatious, I also find, for reasons set out below, that the Minister has not established that irreparable harm will result if the stay is not granted.

[39] Second, even though I have found that the merits of the application for judicial review are insufficient to warrant a stay of the Release Order, whether they are sufficient to meet the standard of an "arguable case" for the purpose of obtaining leave for judicial review is a separate question. I address this issue at the conclusion of these reasons.

[40] Third, my assessment of the strength of the grounds of judicial review is solely for the purpose of determining whether the Minister has met the first part of the tripartite test for a stay of the Release Order. It is necessarily a preliminary one reached on the basis of the material before me on this motion and the submissions I heard. It is obviously not binding on the judge who hears the application for judicial review. That judge will make his or her own determination on the basis of what may be a more complete record and more comprehensive submissions.

(2) Irreparable Harm

[41] Since the Minister must satisfy all three parts to secure a stay, this motion must fail. Thus, strictly speaking, it is not necessary to address either of the remaining two parts of the test. Nevertheless, since the alleged risk that Mr. Mohammed will not appear for removal is a central concern in this matter, and since I had the benefit of full submissions on this issue, I believe it is appropriate to say something about irreparable harm as well.

[42] On this second part of the test, the Minister bears the burden of demonstrating on a balance of probabilities that irreparable harm will result if the relief is not granted and Mr. Mohammed is released. The Minister submits that there will be irreparable harm to the public interest if a stay of the Release Order is not granted because Mr. Mohammed will attempt to frustrate his removal from Canada by failing to appear for removal if and when that is finally required of him. No other form of harm to the public interest – e.g. that Mr. Mohammed will be a danger to the public if released – is suggested.

[43] To meet this branch of the test, the Minister must adduce clear and non-speculative evidence. It will not suffice merely to demonstrate that irreparable harm is "likely" to be suffered. See *Canada (Attorney General) v Canada (Information Commissioner)*, 2001 FCA 25 at para 12; *International Longshore and Warehouse Union, Canada v Canada (Attorney General)*, 2008 FCA 3 at para 25; *United States Steel Corporation v Canada (Attorney General)*, 2010 FCA 200 at para 7. The Minister must point to "evidence at a convincing level of particularity that demonstrates a real probability that unavoidable irreparable harm will result unless a stay is granted. Assumptions, speculations, hypotheticals and arguable assertions, unsupported by evidence, carry no weight" (*Glooscap Heritage Society v Canada (National Revenue)*, 2012 FCA 255 at para 31 (per Stratas JA)).

[44] There is no dispute that releasing someone who then fails to appear for removal would bring the integrity of the immigration system into disrepute (*Canada (Minister of Public Safety and Emergency Preparedness) v JW*, 2018 FC 1076 at para 61 [*JW*]). The issue before me is whether the Minister has demonstrated a real probability that, if released on the terms ordered by the Member, Mr. Mohammed will not appear for removal.

[45] In support of his position, the Minister points to Mr. Mohammed's extensive criminal history in the United States, his illegal entry into Canada, and his lack of cooperation with previous attempts to remove him from Canada. The criminal history and the circumstances under which Mr. Mohammed entered Canada are said to demonstrate a lack of respect for the law and the fact that Mr. Mohammed cannot be trusted, not even while on release. His lack of

cooperation with the CBSA is said to demonstrate his strong motivation not to return to Somalia and his willingness to do whatever is necessary to prevent this from happening.

[46] I agree with the Minister that these are all salient considerations. However, I am not persuaded that they demonstrate that Mr. Mohammed is unlikely to appear for removal if and when this is required.

[47] Mr. Mohammed's criminal record is concerning but it did not stand in the way of his original release in September 2017. After he was released, Mr. Mohammed complied with the terms of his release for a year, including bi-weekly reporting to the CBSA. His interactions with the CBSA after he was told he was about to be removed to Somalia are also concerning but they must be viewed in context. As discussed above, this context has now changed in material ways. The Minister is not seeking Mr. Mohammed's imminent removal and legal proceedings are fully on track. Mr. Mohammed now has every reason to comply with the terms of release, just as he did when he was first released. The Member saw fit to impose conditions on Mr. Mohammed's release which are geared to ensuring that his removal can be effected if and when it is to proceed. I acknowledge that the Minister contends that the conditions are inadequate. However, for present purposes, I cannot pretend that they do not exist. A failure by Mr. Mohammed to abide by any of them will have real and significant consequences for him.

[48] The Minister has not led any evidence to show that Mr. Mohammed has either the means or the ability to evade removal by attempting to disappear. The Minister points to the finding by the ID on October 26, 2018, that, given that Mr. Mohammed had fled the United States, he

"would easily do that again." The member continued: "I don't think you would have any problem going back to the United States or hiding somewhere in Canada if it meant preventing Immigration officials from enforcing their removal order against you." Apart from the undisputed fact that Mr. Mohammed fled the United States, the member does not identify any additional evidence supporting this conclusion.

[49] Obviously this finding is not binding on me. I respectfully take a different view of the evidence. As did Member Tessler, I find on the evidence before me that Mr. Mohammed "has no place to flee to; return to the United States is not an option and there is no suggestion that he would try to live underground without status in Canada."

[50] I also note that it is always open to the CBSA to re-arrest Mr. Mohammed should they judge there to be a material change in the risk that Mr. Mohammed would not appear for removal or for any other valid reason within the scope of their authority. I am confident that the CBSA would not take this step in the absence of a sound basis for doing so. At the same time, Mr. Mohammed is aware that CBSA has this power. He knows all too well the consequences that can result from his own behaviour. He will have a strong incentive not to do anything that could give CBSA a reason to exercise this power against him again.

[51] For these reasons, I have concluded that the Minister has not demonstrated that irreparable harm will follow if a stay of the release order is not granted. In particular, the Minister has not demonstrated that, if Mr. Mohammed is released under the Release Order, he will not appear for removal.

IV. Other Relief Requested

[52] The Minister has also requested that leave to proceed with the application for judicial review of the Release Order be granted. While it is somewhat unusual to deal with the issue of leave in this manner, it is far from unheard of (see, for example, *JW* at para 36). Counsel for Mr. Mohammed opposed the granting of leave but it is fair to say he did not do so strenuously, nor did he press the need to file additional materials. In all the circumstances, I am of the view that it is in the interests of justice for me to deal with this question now. Nothing would be gained by delaying this determination. Even though I have found that the Minister has not demonstrated that the underlying judicial review is likely to succeed, I am satisfied that the grounds identified raise an arguable case that is sufficient for leave to be granted (cf. *Adetunji v Canada (Citizenship and Immigration)*, 2012 FC 708 at para 40). I will so order.

[53] The Minister also requests that the application for judicial review be expedited and, in fact, that it be added to the docket in Winnipeg on April 16, 2019, so that it may be heard in conjunction with the judicial review of the rejection of the PRRA application. Had I ordered a stay of the Release Order, this would have been an appropriate step. However, given that the stay is being refused, I do not consider it necessary for the judicial review of the Release Order to be dealt on such an urgent basis. A separate order will be issued setting out the date and time of the hearing of the application for judicial review and the applicable timeline for further documents.

V. Conclusion

[54] For all of the foregoing reasons, the Minister's motion to stay the Release Order is dismissed. The application for leave to proceed with judicial review of the Release Order is granted.

[55] Finally, I thank counsel for the parties for the high quality of their written materials and oral submissions, all of which were prepared under significant time pressures.

ORDER IN IMM-1989-19

THIS COURT ORDERS that

1. The Minister's motion for an interlocutory stay of the Release Order dated March 25, 2019, is dismissed.

2. Leave for judicial review is granted. A separate order will be issued setting out the date and time of the hearing of the application for judicial review and the applicable timeline for further documents.

"John Norris"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1989-18
STYLE OF CAUSE:	MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS V WARSAME FAISAL MOHAMMED
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	APRIL 9, 2019
ORDER AND REASONS:	NORRIS J.
DATED:	APRIL 11, 2019

APPEARANCES:

Brendan Friesen	FOR THE APPLICANT
Alan Hogg	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Attorney General of Canada Winnipeg, Manitoba	FOR THE APPLICANT
Scott Newman & Co. Winnipeg, Manitoba	FOR THE RESPONDENT