Federal Court Cour fédérale

Date: 20210516

Docket: IMM-3002-21

Citation: 2021 FC 456

Toronto, Ontario, May 16, 2021

PRESENT: Justice Andrew D. Little

BETWEEN:

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Applicant

and

AKIDO SHANDEL THOMAS

Respondent

ORDER AND REASONS

[1] The applicant, the Minister of Public Safety and Emergency Preparedness, seeks a stay of a decision of a Member of the Immigration Division that ordered the release of the respondent, Mr Thomas, from immigration detention, on certain conditions.

[2] For the reasons below, the motion for a stay is granted. The Member's decision to release Mr Thomas is stayed pending the determination of the Minister's application for judicial review of the decision.

I. Facts and Events Leading to this Application

[3] Mr Thomas is a citizen of Grenada. He entered Canada as a permanent resident in January 2004, at age 13. Due to his criminal activity in this country starting in 2008, Mr Thomas is now inadmissible to Canada. He is the subject of an enforceable removal order. His removal is expected during the week of May 24, 2021.

[4] Mr Thomas has been incarcerated or in immigration detention for almost 6 years, since May 2015. In December 2020, he reached the statutory release date for his criminal convictions and was released on probation. That same day, he was taken into custody by immigration officials. He remains in detention today.

[5] The Immigration Division ("ID") continued Mr Thomas's detention in a series of six statutory detention reviews from December 2020 until April 2021. The principal reasons why the Members declined to release Mr Thomas were that he is a danger to the public and he is unlikely to appear for his removal (which was not imminent until recently), and no sufficient release plan was proposed to mitigate those risks if Mr Thomas were to be released.

[6] A further detention review hearing occurred on May 3, 2021, with Mr Thomas's removal anticipated within three weeks. On May 4, 2021, Member Hennebury issued a decision to release Mr Thomas with conditions to address the concerns that he is a danger to the public and may not appear for removal (the "Decision").

[7] On May 5, 2021, the Minister filed an application for leave and judicial review of the Decision. The Minister obtained an interim Order of this Court staying the Member's decision until 5 p.m. on May 12, 2021. The Minister filed motion materials for the present motion on May 10, 2021. On May 11, 2021, Mr Thomas filed a responding motion record. The Court heard oral submissions at a hearing the next morning. After hearing submissions on the merits of the motion and on an extension of the interim stay Order, the Court ordered an extension of the stay of the Decision until May 14, 2021 at 5 p.m., which the Court extended until Monday May 17, 2021 at noon (after hearing from the parties).

[8] On this motion, the Minister applies for a stay of the Member's Decision, pending an expedited hearing of the Minister's application for judicial review of the Decision.

A. ***Mr Thomas's Criminal History and Inadmissibility to Canada***

[9] Mr Thomas has an extensive history of criminal convictions. For the period from 2008 to 2014, that history may be summarized as follows:

- January 2008: convicted in Youth Justice Court (Toronto) of robbery, assault and failure to comply with a recognizance. He was sentenced to 105 days in custody and two years probation;
- November 2008: convicted in Youth Criminal Justice Court (Hamilton) of assaulting a police officer and sentenced to an additional 30 days, for which he received pre-sentence credit;
- 2010: convicted for failing to appear, sentenced to 1 day in custody;
- 2013: convicted of trafficking in a substance;

- May 2014: convicted of possession of property obtained by crime and sentenced to 90 days in custody and a mandatory weapons prohibition order. He was also found guilty of failing to comply with a recognizance and sentenced to a 30-day custodial sentence concurrent.

[10] In June 2014, a report was issued under s. 44 of the *Immigration and Refugee Protection Act,* SC 2001, c 27 (“IRPA”) finding Mr Thomas inadmissible to Canada on grounds of serious criminality: *IRPA*, para 36(1)(a).

[11] On May 21, 2015, Mr Thomas was arrested and charged with several additional offences. He has been incarcerated since that date. On June 8, 2017, he was convicted by a jury of kidnapping with a firearm, unlawful confinement, assault, uttering a death threat, extortion using a firearm (all of which were found to be for the benefit of or in association with a criminal organization), weapons possession and breaching his weapons possession prohibition order. At trial, Mr Thomas admitted to being a member of a gang called IDS (In Da Streets) that operates in the Jamestown area of Toronto.

[12] For those offences, on November 9, 2017, Mr Thomas was sentenced to nine years in prison. Owing to pre-sentence custody, Mr Thomas had 5 years and 8 months remaining to be served.

[13] The sentencing decision dated November 6, 2017 is found at 2017 ONSC 6684. Mr Thomas was one of three accused convicted by the jury. The Court noted that the crimes were

gang-related – specifically, it was a case of gang members kidnapping someone, using a gun, and doing so for the benefit of the gang (at paras 1-5 and 56).

[14] Justice R.F. Goldstein noted that the jury must have accepted that during the kidnapping, Mr Thomas beat the victim. He also had a handgun with a silencer. The Court found that he had possession of a gun. The Court also accepted that Mr Thomas threatened to shoot the victim (at para 3). In addition, the Court found that Mr Thomas was a party to extortion with a firearm in association with or for the benefit of a criminal organization (at para 4). Mr Thomas admitted to being a member of the criminal organization (at paras 1 and 5).

[15] At paragraph 52, the Court concluded that Mr Thomas's significant criminal record was a highly aggravating factor in sentencing, recognizing that much of his record consisted of youth offences. There were few mitigating factors. The Court characterized Mr Thomas as a "professional criminal".

[16] At paragraph 55, the Court stated:

> Finally, I must comment on the demeanor of the three accused men before me and before the jury. All three men were appropriate, polite and respectful in court. If did not know better, I might have taken them for university students or apprentice tradesmen. I understand that even hardened criminals know the rules of the game and are on their best behavior in front of the judge and the jury. Nonetheless, it at least tells me that these young men are at least capable of learning the important lesson that public behavior counts. I hope that they take this lesson to heart.

[17] At paragraph 61, the Court stated:

> This is a case involving gang violence with a firearm. I accept the evidence of Sgt. Nasser regarding the nature of IDS [InDaStreets]. That evidence was not seriously contested. IDS is a street gang that engages in criminal activity, preys on members of the community, and uses fear and intimidation to defeat law enforcement attempts to curb its activities. IDS has been responsible for violence and victimization. Gangs like IDS prey on members of the community who are vulnerable and do not have the resources to resist. That is the reason for the stern sentences imposed for criminal organization offences. On the other hand, I acknowledge that it is not the most serious kidnapping on the spectrum, even if it did involve gangs and firearms. It did not involve gratuitous violence. It was of relatively short duration (at least as far as Mr. Thomas and [co-accused] Mr. Thomas-Stewart's role was concerned) and was not an offence of stark horror, as some kidnappings are.

[18] In determining his sentences, the Court also accepted that Mr Thomas played a secondary role in the kidnapping, but "is a professional criminal who was enforcing the rules of the gang" (at para 76). He appeared to have fewer prospects for rehabilitation than one of his co-accused, but not no prospects. The Court recognized that Mr Thomas was a young man and would almost certainly be deported (at para 76).

[19] Soon after the Court's decision, according to a report prepared in February 2018 while Mr Thomas was at Millhaven penitentiary, Mr Thomas advised that he had appealed his conviction and sentence. I am not aware of any additional information about that appeal.

[20] While in custody from 2015 onwards, Mr Thomas committed several institutional infractions, which included:

- On June 4, 2015, he was found guilty of committing or threatening to commit an assault against an inmate. He received 10 days loss of privileges and 10 days closed confinement;
- On September 7, 2015, he was again found guilty of committing or threatening to commit an assault against an inmate and received 10 days loss of privileges;
- On December 2, 2015, he was found guilty of creating or inciting a disturbance and received 20 days of closed confinement;
- On February 9, 2016, he was found guilty of bringing or attempting to bring contraband into the institution and received 2 days closed confinement;
- On June 9, 2016, he was found guilty of creating a disturbance and was given five days closed confinement. An institutional crisis intervention team had to be activated to resolve the situation;
- On August 15, 2016, he was found to have wilfully disobeyed an order of an officer and was given 10 days loss of privileges; and
- On May 6, 2017, he was found to have committed or threatened to commit an assault against staff and was given two days closed confinement.

[21] On April 24, 2019, a second s. 44 report was issued against Mr Thomas on grounds of serious criminality under *IRPA* paragraph 36(1)(a).

[22] On April 30, 2019, a third s. 44 report was issued, and Mr Thomas was deemed inadmissible to Canada for being a member of a criminal organization, under *IRPA* paragraph 37(1)(a)).

[23] Deportation orders were subsequently issued against Mr Thomas dated September 16, 2019 for the paragraph 36(1)(a) finding of serious criminality and on August 18, 2020 for the paragraph 37(1)(a) finding of involvement in a criminal organization.

[24] Mr Thomas completed his custodial sentence on December 14, 2020. He was placed on probation until July 5, 2022 on conditions that included:

- Following a treatment plan / program arranged by his parole supervisor in the area of violence;
- Not to be within the area bordered by Highway 427 Renforth Rd. to the west, Steeles Ave. W. Etobicoke limit to the north, Humber River to the east and Eglington Ave. W to the south;
- Respecting a curfew from 9PM to 6AM except with his parole supervisor's written agreement; and
- Not to associate with any person he knows or has reason to believe is involved in criminal activity.

[25] Mr Thomas was taken into custody by immigration officials on the same day, December 14, 2020, as he was considered a danger to the public and unlikely to appear for removal, under ss. 55(1) and (2) of the *IRPA*.

B. *Detention Reviews*

[26] Mr Thomas received statutory reviews of his immigration detention on 7 occasions between December 2020 and May 2021. Each one resulted in his continued detention until the Decision by Member Hennebury which is now the focus of this proceeding.

[27] The detention reviews occurred on: December 16-17, 2020 (48-hour review by Member Barry); December 23, 2020 (7 day review by Member Kohler); January 18, 2021 (30 day review by Member Huys); February 12, 2021 (30 day review by Member Kim); March 11, 2021 (30 day review by Member Kohler); April 7, 2021 (30 day review by Member Kohler); and May 3-4, 2021 (30 day review by Member Hennebury).

[28] During the last detention review on May 3-4, 2021, both the Minister and Mr Thomas were represented by counsel. Mr Thomas proposed a plan for his release. That plan involved living with his mother, with a curfew and other restrictions.

[29] On May 3, the Member heard evidence from Mr Thomas (by videoconference) and from Mr Thomas's mother Ms Merle Thomas and his girlfriend Ms Shakera Evans (both by telephone). The Member and counsel for both the Minister and Mr Thomas questioned each witness. Both parties made submissions.

[30] The Member delivered her Decision the next day, with oral reasons. The Member did not accept the release plan proposed by Mr Thomas. She reviewed Mr Thomas's criminal history

and found, as did all the Members before her, that Mr Thomas is a danger to the public and that he is unlikely to appear for removal from Canada (both of which are reasons for continued detention under *IRPA* subs. 58(1)).

[31] In the Member's view, reducing the risk of danger posed to the public by Mr Thomas was the "focus" of concern at the May 3-4 detention review, but that risk of danger would be virtually eliminated if certain conditions were imposed on his release. The Member concluded that Ms Thomas and Ms Evans could act as bondspersons. The Member required each bondsperson to post a cash bond, and found that they would have sufficient control over Mr Thomas to ensure that he appears for removal and complies with the conditions of his release.

[32] The conditions imposed on Mr Thomas included:

- he must reside at all times with his mother and remain in her residence 24 hours a day, with exceptions only to attend regular parole appointments, regular appointments with Canada Border Services Agency ("CBSA") and to deal with medical emergencies involving him or his immediate family;
- Ms Thomas would act as a bondsperson and must post a $2000 cash bond;
- Ms Evans would act as a second bondsperson and must post a $1,300 cash bond;
- Mr Thomas must be in the constant presence of one of his bondspersons (his mother and/or Ms Evans);
- Mr Thomas was not to have contact, directly or indirectly, with anyone known to him to have a criminal record or an association with a criminal organization or gang;
- Mr Thomas was not to use a cell phone or electronic device (i.e., a computer) except while in the direct company of a bondsperson, so they would know with whom he was communicating;

- Geographic restrictions would be placed on Mr Thomas's movements, even when attending parole appointments, such that he could not enter certain areas of Toronto for any reason;
- Mr Thomas was required to report to CBSA weekly;
- Mr Thomas was required to comply with all the conditions upon him imposed by the Parole Board of Canada;
- Mr Thomas must present himself at the date, time and place that a CBSA officer requires him to appear under the *IRPA*, including for removal;
- Mr Thomas must fully cooperate with CBSA with respect to obtaining travel documents; and
- Mr Thomas must not engage in any criminal activity while out on release.

[33] The Member found that the "main driver" of the release plan was Ms Thomas, the Respondent's mother, "being a solid foundation." The Member required that the Respondent reside at his mother's home exclusively. The Member found that Ms Thomas could adequately supervise her son, having had the benefit of an interview of Ms Thomas, under oath. The Member found that Ms Thomas testified "very credibly" and was currently well informed about Mr Thomas's "immigration and criminal situations".

[34] In requiring Ms Thomas to post a $2,000 cash bond, the Member stated that $2,000 "is a significant amount to her based off of her financial situation. She testified that she … had an income last year of approximately $10,000. She's got four other kids; her savings is around $4,000 so she's giving up about half of her savings in the middle of a pandemic where she's not working. So this is a very significant amount of money to your mother."

[35] On the cash bond by Ms Evans, the Member found that $1,300 was “all of her savings” which is also “significant as she's a single mom, she's got two kids, she's responsible for them. So she's putting up all her savings, she doesn't make very much money, she makes less than $10,000 a year as well. Also [she] isn't working at the moment because of COVID.”

[36] The Member concluded that the “totality” of the elements of the release plan, including the bondspersons and conditions, working together, would “offset and virtually eliminate the risk” that Mr Thomas posed to the public and would ensure that Mr Thomas will appear for his removal.

[37] The Member also found that both bondspersons, Ms Thomas and Ms Evans, were aware that Mr Thomas was to be imminently deported and had committed to ensuring that he attended for removal.

II. The Minister’s Motion for a Stay

[38] Both parties made submissions on this motion based on the three-stage framework set out by the Supreme Court of Canada in *RJR-MacDonald Inc. v Canada (Attorney General)*, [1994] 1 SCR 311, to determine whether it is just and equitable to issue the stay. The three stages are: (i) a preliminary assessment of the merits of the applicant’s case (the parties differ on what the requirements are for this stage); (ii) whether the applicant would suffer irreparable harm if the stay is not granted; and (iii) whether the balance of convenience favours granting or denying the stay, based on an assessment of which party would suffer greater harm from the granting or refusal of the stay, pending a decision on the merits.

[39] The three stages in the *RJR-MacDonald* framework are conjunctive: see e.g. *Air Passengers Rights v Canada (Transportation Agency)*, 2020 FCA 92, at para 15.

[40] In addition, a central objective of an interlocutory injunction, or an interim stay, is to prevent irreparable harm that will occur between the motion and the disposition of the matter on its merits: see e.g., *Google Inc. v Equustek Solutions Inc.*, 2017 SCC 34, [2017] 1 SCR 824, at paras 24, 34, and 40-41.

A. ***Stage 1: Preliminary Assessment of the Merits***

(1) The Legal Standard at Stage 1

[41] The parties set out different positions on the appropriate legal test at the first stage of the *RJR-MacDonald* framework. Those positions reflect two different positions in the decisions of this Court on the standard to be applied at stage one when, as here, a liberty interest is at stake: compare *Canada (MPSEP) v Asante*, 2019 FC 905, [2019] 4 FCR 485 (Zinn J.) with *Canada (MPSEP) v Allen*, 2018 FC 1194 (Norris J.) and *Canada (MPSEP) v Mohammed*, 2019 FC 451, [2019] 4 FCR 459 (Norris J.).

[42] The applicant submitted that the proper approach was to assess the merits of its application on the "usual threshold" – which I take to be whether there is a "serious issue" raised by the application that not frivolous and vexatious (*RJR-MacDonald*, at p. 337) – with the proviso that the Court should have "careful regard to the issues argued to be serious". That phrase is taken from *Canada (MPSEP) v LS*, 2019 FC 1454 (Kane J.), at para 51 (also indexed as *Canada (MPSEP) v Smith*).

[43] The respondent argued for a higher standard to assess the strength of the applicant's case at stage one, because the respondent's liberty is at stake. On the elevated standard, the question to be asked at stage one is whether the applicant is likely to succeed in the underlying application for judicial review. See *Mohammed,* at paras 15-17 and 18; *Canada (MPSEP) v Kalombo*, 2020 FC 793 (Norris J.), at paras 31-32; *Canada (MPSEP) v Mukenge*, 2016 FC 331 (LeBlanc J.), at para 8 (referring to the unreported interim stay decision of Gascon J. in that matter); and *Allen,* at para 15.

[44] In *LS*, Justice Kane observed that applying the higher standard of "likelihood of success" on the judicial review could be viewed as pre-determining the outcome of the judicial review (*LS,* at paragraph 51). Justice Kane also noted the connection between the first and second stages of the *RJR-MacDonald* framework on a motion related to the conditions for release of a detained person. She referred to two decisions in which Zinn J. cautioned that the Court should exercise vigilance in assessing the proposed serious issues and should test the grounds advanced by the applicant against the impugned decision and its reasons: see *Asante,* at paras 41-42 and 50; and *Cardoza Quinteros v Canada (Minister of Citizenship and Immigration)*, 2008 FC 643, at para 13.

[45] I also note that the Supreme Court recognized in *RJR-MacDonald* that an interlocutory injunction application (or, as here, a stay) may in effect amount to a final determination of the underlying action (at p. 338). When it does, the court should conduct a "more extensive review of the merits" at the first stage (at p. 339). However, the Court did not articulate what legal standard must be met following that more extensive review.

[46] In the circumstances of this case and in accordance with that guidance, I have reviewed the record and the parties' submissions, including the transcript of the hearing before the Member. With respect to the applicable legal standard, I agree that it is insufficient in the present circumstances for the applicant merely to show that the application for judicial review raises "serious issues" that are not frivolous and vexatious. On the other hand, I do not believe is necessary to adopt a standard that requires the Court to find that an application for judicial review is likely to succeed. In these particular motions for interim relief, the first and second stages of the *RJR-MacDonald* framework are often very closely related, in a way that may not arise in interlocutory injunction or stay applications in other areas of the law. A serious issue and irreparable harm may follow or flow from one another (see *Asante*, at para 39 and *LS*, at para 52 and 99). In this case, the parties have essentially argued stages one and two of the *RJR-MacDonald* framework together. Apart from the legal submissions, each party's arguments were the substantively the same.

[47] In addition, I observe that the adoption of a higher legal standard at stage one requires the Court to make a judgment (albeit preliminary) about the merits of a judicial review on a very urgent motion involving two profoundly important interests -- the liberty of the individual (a value protected in the *Canadian Charter of Rights and Freedoms*) and the safety of the public (a critical value in society and a key objective of the *IRPA:* see *Medovarski v Canada (Minister of Citizenship and Immigration),* 2005 SCC 51, [2005] 2 SCR 539, at para 10; *Canada (Public Safety and Emergency Preparedness) v Lunyamila*, 2016 FC 1199 (Crampton CJ) (*"Lunyamila II")*, at paras 60-64 [appeal dismissed, 2018 FCA 22]). In detention release matters, a nuanced appreciation of the evidence may also be required to ascertain whether, for example, conditions

imposed on the individual for release will sufficiently protect society from the danger posed by individuals who have committed serious crimes and may be involved in criminal organizations. These interests can be challenging to assess on an interim motion: one only need look at the length and precision of the analyses that may be required in the judicial review of a decision to release an individual involved in serious criminality, such as *Lunyamila II*; *Canada (Public Safety and Emergency Preparedness) v Lunyamila*, 2018 FC 211 (LeBlanc J.) (*"Lunyamila IV")*; and *Canada (Public Safety and Emergency Preparedness) v Ali,* 2018 552 (Crampton CJ).

[48] At stage one, because the underlying application is for judicial review of the Member's Decision, the Court must consider the strength of the Minister's case by applying the reasonableness standard in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65. In conducting a reasonableness review, the reviewing court considers the outcome of the administrative decision in light of its underlying rationale, in order to ensure that the decision as a whole is transparent, intelligible and justified: *Vavilov*, at para 15. The focus of reasonableness review is on the decision made by the decision maker, including both the reasoning process that led to the decision and the outcome: *Vavilov*, at paras 83 and 86.

[49] In the circumstances of this case, and given the considerations already identified and the burden and evidentiary requirements to show irreparable harm (discussed below), I believe it is satisfactory to determine at stage one whether the Minister has shown that there are one or more serious issues on the merits of the pending judicial review, having careful regard to the issues argued to be serious and testing them to ensure they are serious.

[50] With these general principles in mind, I turn to the arguments in the present case.

(2) Has the Minister Met the Burden at Stage 1?

(a) *The Parties' Positions*

[51] The Minister submitted that the Member's Decision was not "based on an internally coherent and rational chain of analysis" and was not justified in relation to the facts and law that constrained the Member (citing *Vavilov*, at paras 85, 90, 99 and 105-107). The Minister submitted that ordering Mr Thomas's release based on the suitability of Ms Thomas and Ms Evans as bondspersons to ensure that Mr Thomas would appear for removal and to mitigate the danger to the public, coupled with the Member's assessment of the length of the detention and ongoing COVID-19 pandemic, was unreasonable.

[52] More particularly, the Minister argued that the alternative for detention ordered by the Member was unreasonable in light of the fact that the Member found Mr Thomas to be both a flight risk and a danger to the public. The applicant submitted that before ordering Mr Thomas's release, as a matter of law the Member was obliged to ensure that the danger to the public was eliminated or virtually eliminated (*Lunyamila II*, at para 45) and that she did not do so. The applicant pointed to evidence before the Member of Mr Thomas's long-standing involvement in violent crimes and gang activity and his consistent disregard of the law. The applicant noted that Mr Thomas continued to incur institutional charges as well as guilty convictions while serving his criminal sentence. The Minister also highlighted that in one of the institutional reports in the record, a case worker observed that Mr Thomas's family and friends have "no influence" over his negative lifestyle choices.

[53] The Minister further submitted that assessments from Mr Thomas's community liaison officer ("CLO") recommended only professional supervision of Mr Thomas if he were ever to be released. The Minister submitted at some length that Ms Thomas and Ms Evans were not suitable bondspersons because they could not effectively supervise and control Mr Thomas. The applicant argued, for example, that Ms Thomas could not control Mr Thomas when he was a teenager, because he had only been living with her at least part-time when he committed many of his earlier offences. The Minister pointed out that Ms Thomas currently has four other children or young people currently living with her, who are between the ages of 13 and 20. The applicant submitted that Ms Thomas did not even know about the extent of her son's crimes or that he had already spent months in jail until she heard about it in criminal court. The Minister drew the Court's attention to the CLO's finding that "Mr Thomas requires a strong supervision plan and someone with the proper knowledge of how to deal with an individual with a history of violence to mitigate danger to the public concerns."

[54] The applicant criticized the Member's view that Ms Thomas and Ms Evans could realistically have perceived a change in Mr Thomas based only on telephone calls. Telephone calls have been the only way that the bondspersons have been able to communicate with Mr Thomas while he has been in detention, as in-person visits are prohibited during the pandemic. The Minister also noted that Ms Evans has only been in a relationship with Mr Thomas for a few months, a relationship that has existed entirely over the phone. (They knew each other earlier in their lives, as teenagers, then fell out of touch and reconnected last year.)

[55] The Minister further argued that the Member erred in her understanding of Mr Thomas's (lack of) rehabilitation, pointing to evidence that Mr Thomas was not rehabilitated (or a lack of evidence that he is rehabilitated). The Minister pointed out that Mr Thomas has never accepted responsibility for his crimes, and continued to commit institutional infractions until as recently as 2017 while incarcerated.

[56] In addition, the Minister argued that Mr Thomas's time in detention was not in fact "lengthy" and that on the evidence, the COVID-19 pandemic should not have been a material factor in the Member's analysis, because there were a low number of cases in the institution and sufficient measures in place to mitigate the risks of contracting the virus. The applicant submitted that the Member ignored evidence about the precautions and minimal cases of COVID-19 in the institution where Mr Thomas is being detained.

[57] The applicant suggested that these arguments demonstrated that the Member did not "grapple" with the evidence and that her Decision was not rationally connected to the record before her.

[58] The applicant also submitted that the Member failed to provide clear and compelling reasons, as required by applicable case law, for departing from the previous ID decisions to continue to detain Mr. Thomas. The applicant referred to *Canada (MPSEP) v Thanabalasingham*, 2004 FCA 4, [2004] 3 FCR 572; *Canada (MPSEP) v Iamkhong*, 2009 FC 52 (Shore J.); *Canada (MPSEP) v Berisha*, 2012 FC 1100 (Zinn J.); and *Canada (MPSEP) v Karimi-Arshad*, 2010 FC 964 (Zinn J.).

[59] The respondent submitted comprehensively that the Member's Decision was fully justified on the evidence and raised no serious issue. Mr Thomas submitted that the Member imposed a very strict set of conditions, including 24/7 house arrest. Mr Thomas characterized the Member's Decision as justified, intelligible and reasonable in light of the evidence. He submitted that the reasons provided "clear and compelling" reasons why the Member departed from previous Members' decisions.

[60] Mr Thomas noted that he proposed a new and robust release plan to the Member, which the Member did not accept, and instead imposed even stricter requirements. Mr Thomas also pointed to his testimony before the Member that he was ready to return to Grenada and that he had made some plans for that return with his father. Mr Thomas contended that he was now older, wiser and willing to listen to his mother and did not want to do anything to cause her to lose the savings that she would be posting as a cash bond.

[61] Mr Thomas noted that the Member questioned the bondspersons. She found them both suitable and that both were proposing to post cash amounts that were meaningful to them in their circumstances. The Member found that Ms Thomas testified "very credibly" and was "well meaning". The respondent referred to the evidence that Ms Thomas had many conversations with her son about his criminality. She believed he would listen to her because he was now at an age when he was more responsible, had acknowledged his faults and understood the seriousness of his crimes. Further, on a practical level, because she was not working, she would be at home to closely monitor Mr Thomas.

[62] Mr Thomas observed that Ms Evans testified that she had had many conversations with Mr Thomas about his past behaviour, and that she also believed that he has changed. In addition, Ms Thomas and Ms Evans spoke by telephone almost every day and had discussed their plans for supervising Mr Thomas together. The respondent noted that Ms Evans was previously proposed as the sole bondsperson (in December 2020) and was rejected, but she was now serving as a supplementary bondsperson with the majority of the responsibility for supervising Mr Thomas lying with Ms Thomas (in whose home Mr Thomas had to remain at all times). Ms Evans was also much more aware by May 2021 about the extent of Mr Thomas's criminal past.

[63] Mr Thomas recognized the recommendations of the CLO concerning the need for professional supervision, but submitted that the Member understood that recommendation and gave clear reasons for departing from it. The Member stated in her Decision:

> I know the Minister's counsel [and the CLO] ha[ve] suggested that you [Mr Thomas] need professional supervision, but realistically speaking we have lay people before us all the time who offset danger to the public. And in this particular plan, I have the inclusion of all these conditions that will work with it if we have effective bondspeople. And … that's what I [am] finding we have…

[64] In essence, the Member found that the bondspersons would exercise sufficient control over Mr Thomas and that the conditions imposed, particularly house arrest, constant presence of the bondspersons with him, and non-communication with persons with a criminal record or in a gang, in their "totality" were sufficient to eliminate the danger to the public and the flight risk. Mr Thomas submitted that the Member was well aware of the legal requirement to have the conditions she imposed "virtually eliminate" the risk to the public, having used that phrase several times during her reasons.

[65] On the conditions imposed by the Member, Mr Thomas submitted that the Member thoroughly canvassed the relevant factors under s. 248 of the *Immigration and Refugee Protection Regulations,* SOR/2002-227 (*"IRPR"*) (discussed below). The factors considered by the Member under s. 248 included Mr Thomas's criminal record, past violations of conditions of release on criminal releases, institutional misconducts and ties to Canada. The Member expressly noted the 9-year sentence and Mr Thomas's participation in a street gang, and stated that there is a "lot of risk there in terms of danger to the public on the face of the record". The respondent submitted that the Member was aware of the seriousness of his criminal history, including the institutional infractions while he was incarcerated up to 2017. The Member stated that she took into account the "institutional misconducts".

[66] Although the applicant also referred to institutional charges from 2019 that were withdrawn in February 2021, Mr Thomas submitted that the applicant did not adduce any factual evidence about those charges. The Member therefore could not consider them: *Sittampalam v Canada (MCI),* 2006 FCA 326, at para 50. From submissions at the hearing, I understand the charges were not withdrawn because of a request by CBSA to permit Mr Thomas's removal.

[67] Mr Thomas also noted that the Member was aware of his efforts to pursue rehabilitation. He obtained his high school diploma while in custody and was willing to participate in additional programs, but was unable to do so due to waitlists and the impact of COVID on programming.

(b) *Analysis*

[68] In a judicial review of a detention review decision permitting the release of the individual, the Court may consider whether an ID Member's decision considered the factors prescribed by s. 248 of the *IRPR*, and whether the release conditions imposed by the Member were reasonable: *Canada (Public Safety and Emergency Preparedness) v Lunyamila*, 2016 FC 289 (Harrington J.) (*"Lunyamila I")*, at paras 10-15; *Lunyamila II*, at paras 19-21*; Lunyamila IV*, at para 36 and following and at para 104; and *Ali,* at paras 66-73.

[69] Section 248 of the *IRPR* provides:

> 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;
>
> (e) the existence of alternatives to detention; and
>
> (f) the best interests of a directly affected child who is under 18 years of age.

[70] Two key factors relevant to the present case are *IRPR* paragraphs 248(a) ("the reasons for detention") and 248(e) ("the existence of alternatives to detention"). As is clear from *IRPA* subs.

55(1) and paragraph 58(1)(a) and (b), the reasons for detention may include if an individual is a danger to the public or is unlikely to appear for removal.

[71] On a detention review, any decision to release a person who is a danger to the public must "virtually eliminate" that risk. If the terms imposed by the Member's decision fall short of doing so, or are not sufficiently robust to ensure that the public will not be exposed to any material risk of harm, the decision may be unreasonable: *Lunyamila II*, at paras 45, 80 and 116; *Lunyamila IV*, at para 75; *Ali*, at para 47; *Canada (Public Safety and Emergency Preparedness) v. Taino*, 2020 FC 427 (Diner J.), at paras 92-93. The Chief Justice stated in *Lunyamila II:*

> [116] Turning to the conditions of release that Member Cook articulated in his decision, I agree with the Minister that they were unreasonable because they did not adequately address Mr. Lunyamila's violent tendencies and his flight risk. In my view, given those reasons for detention, and the strong priority given to public safety and security in the *IRPA*, any conditions of release would have had to virtually eliminate, on a day-to-day basis, any risk that Mr. Lunyamila would pose to people living or working at any residence where he may be required to reside, and to the public at large. They would also have to have virtually eliminated any risk that he might disappear into the general public, to avoid future removal. The conditions of release articulated by Member Cook fell short of meeting this standard, even though they were notably more robust than what the other Members whose decisions are reviewed in these reasons for judgment would have imposed.
>
> [Emphasis added.]

See also *Lunyamila IV*, at para 82.

[72] If an individual is found to be a danger to the public on grounds of serious criminality, the scheme of the *IRPA* and the *Regulations* imply that this factor should be given very considerable weight: *Lunyamila II*, at para 66i. At paragraph 66iv, the Chief Justice addressed

the weight to be given to the danger to the public, holding that the weight increases as the danger to the public increases, with a commensurate burden to impose conditions to assuage that danger:

> Where a person is a danger to the public, the weight given to this factor should vary directly with the extent to which alternatives to detention can mitigate such danger. Stated conversely, the greater the risk that the public would be required to assume under a particular alternative, the more this factor should weigh in favour of continued detention. Where the conditions of release are such that the public would be required to bear significant risk of danger at the hands of the detainee […] this should weigh strongly in favour of continued detention. If it were otherwise, Parliament's public safety and security objectives, which have been prioritized in the *IRPA* and the *Regulations*, would be significantly undermined.

See also *Lunyamila IV*, at para 94.

[73] In a judicial review application, *Vavilov* prescribes that the Member's Decision is constrained by the facts and by the applicable law, including the *IRPA*, *IRPR* and binding case law, that constrained the decision maker: *Vavilov*, at paras 105 and following.

[74] In the present case, at a high level, the applicant's arguments principally concern whether the Member properly applied the factors under *IRPR* s. 248, particularly paragraphs (a) and (e), and whether the Member complied with the constraints imposed by the binding case law (see *Vavilov*, at paras 111-112). The case law requires the Member to impose conditions on Mr Thomas that virtually eliminate the danger to the public (*Lunyamila II*, at para 45) and requires the Member to provide justification by way of clear and compelling reasons for departing from previous decisions of Members about the same individual's detention (*Thanabalasingham*).

[75] In my view, the applicant has shown that there are serious issues that have sufficient merit on the unreasonableness standard described in *Vavilov* for the purposes of the first stage of the *RJR-MacDonald* framework. In other words, I find that the applicant Minister has met the burden to show at least one serious issue, having had careful regard to and tested the issues raised by the Minister in light of the Decision itself and the applicable factual and legal constraints on it.

[76] The proposed serious issues focus on whether it was unreasonable to release Mr Thomas from detention and whether there was any reasonable alternative to detention on the evidence before the Member.

[77] In my view, there are serious issues as to whether the conditions imposed by the Member's Decision were unreasonable because they failed to "virtually eliminate" the danger to the public and were not sufficiently robust given the nature and gravity of the danger to the public. The danger arises from the long-term, violent nature of Mr Thomas's criminal behaviour and association with a criminal organization or gang, which includes drug trafficking, kidnapping and weapons offences and has resulted in findings of inadmissibility under both *IRPA* ss. 36 and 37 and three inadmissibility reports under s. 44 of the *IRPA*. There is merit in the Minister's argument that the Member failed to account for the evidence that two bondspersons could not address the significant danger posed by Mr Thomas to the public, because (a) there was no evidence that they were able to control or influence his behaviour in the past – in Ms Thomas's case, from her son's first conviction in 2008 until he was arrested in May 2015, after which she had no opportunity to serve as an influence, and in Ms Evans's case,

because she has only been his girlfriend for less than 6 months while Mr Thomas has been in prison or in detention and they had not seen each other for many years before that; and (b) there is no evidence that either bondsperson has the training, skills or other ability to deal with a person with a history of violent criminal behaviour. In this context, there was evidence in the record that Mr Thomas requires professional supervision in order to eliminate the risks to the public. In addition, the applicant's position on the inadequacy of the conditions is supported by the absence (or insufficiency) of objective evidence of any change in Mr Thomas's conduct since he committed the offences that could ground a reduction in the forward-looking danger to the public. In other words, while he has not been convicted of any new offences or infractions since 2017, there was no (or very little) evidence of rehabilitation and there is evidence of multiple infractions of prison rules while serving his criminal sentence.

[78] Having found sufficiently serious issues at stage one, I do not need to assess the strength of the Minister's arguments related to the absence of "clear and compelling" reasons or that the Member misconstrued or ignored evidence on a variety of issues in reaching her conclusions.

[79] I turn now to the second stage of the *RJR-MacDonald* framework.

B. ***Stage 2: Irreparable Harm***

[80] At stage 2, the applicant must demonstrate, on a balance of probabilities, that irreparable harm is likely to occur if the motion is not granted. It is the nature or quality of the harm – not its magnitude – that must be "irreparable" in the second stage of the analysis. "Irreparable" harm is

harm that cannot be compensated or remediated by monetary damages or otherwise cured: *RJR-MacDonald*, at p. 341.

[81] On motions related to decisions to release arising from a detention review, this Court has consistently applied the requirements established by the Federal Court of Appeal concerning the burden on the Minister. The burden is to adduce clear and non-speculative evidence that irreparable harm will result unless the stay is granted: see *Glooscap Heritage Society v Canada (National Revenue)*, 2012 FCA 255 at para 31; see also *LS*, at paras 54 and 99-101; *Mohammed*, at para 43; *Kalombo*, at para 45; and *Allen*, at para 17.

[82] The Minister's position on this motion concerns harm to the public interest. The Minister submitted that the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant, referring to statements in *RJR-MacDonald* at pp. 341, 346 and 349. However, the applicant did not provide any decisions of this Court adopting a lower requirement and I see nothing in the recent decisions in this area, cited immediately above, to support this position. I will therefore not adopt it in this case.

[83] The previous decisions of this Court on stays of release are instructive, but not determinative, of whether irreparable harm will arise, because each case turns on its particular facts. The common arguments from the Minister when applying for a stay of release are that harm will be caused to the public interest because the individual will not comply with the terms of release, for example by not appearing for removal, or will present a danger to the public that is not virtually eliminated by the conditions imposed for release.

[84] The Court has held that the integrity of the immigration system will be brought into disrepute if the individual does not comply with the terms and conditions of release, for example by failing to appear for removal and thereby remaining unlawfully, and possibly indefinitely, in Canada: see *LS*, at para 101; *Mohammed*, at para 44; and *Kalombo*, at para 46, and the cases cited by Norris J. in the latter two cases.

[85] The same must be true for release with conditions that do not virtually eliminate the danger to the public, although there is an obvious wider public interest that extends beyond the *IRPA* in preventing or avoiding the danger associated with criminal activity, particularly by persons involved with criminal organizations. In other words, the danger posed by an individual through release, on conditions that do not virtually eliminate the danger, may cause harm to the public interest in both the integrity of the immigration system and in preventing the commission of criminal offences, particularly serious offences and gang-related offences. In other cases, there may be sufficient evidence of a danger that will result in irreparable harm to a specific person or property (an example might be if there were evidence of a recent threat and vendetta against an individual that met the evidentiary requirements for irreparable harm).

[86] In *LS*, at paragraph 55, Kane J. noted that there is “support in the jurisprudence for finding that irreparable harm is established where a serious issue is found with respect to the release conditions for a person found to pose a risk to public safety”, referring to *Asante*, at paragraphs 40-41.

[87] In the present case, the Minister argues that Mr Thomas is a continuing serious danger to the public and that he will not appear for removal because his terms of release do not address his flight risk or ensure that he will not endanger the public. The respondent submits that the Minister has not established irreparable harm as the terms of release are sufficient to protect the public and to ensure that Mr Thomas will appear for removal.

[88] I agree with the Minister's position. First, with respect to danger, there is ample evidence of the danger that Mr Thomas would pose to the public if he breached his terms of release. He conceded being a danger to the public at the detention hearing and the Member expressly found that he was a danger, as had all the Members before her. The conclusion is supported by the record, including the nature of the numerous offences committed by the respondent most recently in 2015 (which included kidnapping, violence (beating the victim) and unlawfully possessing a handgun, all for gang-related purposes), his infractions while incarcerated between 2015 and 2017, R.F. Goldstein J.'s sentencing decision in November 2017 and the reports under *IRPA* s. 44 finding him inadmissible under both ss. 36 and 37 of that statute.

[89] Second, there is little or no objective evidence that that the danger Mr Thomas poses to the public has diminished. The Member seems to have reasoned that the danger is now lessened because Mr Thomas has committed no additional offences (criminal or institutional) since 2017, and because Mr Thomas testified that he has changed (i.e., would not reoffend if released. However, Mr Thomas has been incarcerated or in detention since 2015, which may partially explain why he has no additional criminal offences on record. Further, as already discussed, Mr Thomas incurred numerous institutional infractions while he was in federal custody, several of

which took place after he participated in an anger management course. The fact that the Member imposed a 24/7 house arrest and numerous other conditions on Mr Thomas, including the continued presence of his bondspersons, attests to the present danger that he continues to pose to the public.

[90] Third, I am aware that Ms Thomas and Ms Evans both believe, and testified, that they see a change in Mr Thomas. Their opinions are based on their knowledge and conversations with him, Ms Thomas as his mother and Ms Evans as his girlfriend over the past 5-6 months. I agree with the Minister that while they have a genuine belief in Mr Thomas's willingness to abide by the terms of his release, the objective evidence that he has changed and will do so is next to none. The objective evidence on this point from the respondent is essentially captured by the mere passage of time, i.e. the fact that Mr Thomas has had no additional convictions or infractions in the past few years.

[91] Fourth, with respect to the terms of release, the respondent pointed to evidence that Ms Thomas believes she will be able to control her son in her home. I accept that the cash bond that she must post to support Mr Thomas's release is material to her in her situation. (The same is true of the bond to be posted by Ms Evans, in her situation.) I also accept that Ms Evans would support Ms Thomas in ensuring that Mr Thomas abides by his release conditions.

[92] However, the objective evidence is that Ms Thomas was apparently unable to influence her son's conduct prior to his arrest in 2015. Until she came to criminal court to support him in the proceedings, she was unaware of his criminal offences, or even that he had spent as much as

105 days in jail. As well-meaning as Ms Thomas is, and as much moral suasion as she may believe she has over her son today, the evidence does not support her ability to prevent her son – an admitted member of a criminal organization – from simply leaving her home and disappearing before he is removed from Canada. In itself, leaving his mother's home would violate the conditions imposed by the Member. In addition, there is no evidence that either Ms Thomas or Ms Evans has any training or other special ability to manage individuals who are violent or who present a danger to the public. I add that I have difficulty accepting that their constant presence with Mr Thomas would prevent him from communicating with criminal or gang associates by mobile phone (Ms Thomas testified that she had a phone and SIM card for him). Doing so would also violate the conditions imposed by the Member. The Minister pointed out that neither Ms Thomas nor Ms Evans are aware of the names of Mr Thomas's criminal affiliates. This presents a clear practical problem in terms of their ability to enforce the Member's prohibition on communicating with criminal or gang associates.

[93] The respondent submitted that on this motion, the Court should defer to the findings of the Member and her particular expertise in evaluating alternatives to detention, including because she heard *viva voce* evidence from Mr Thomas, Ms Thomas and Ms Evans and seems to have accepted their testimony. In my view, the Court must come to its own decision on the evidence about whether the Minister has demonstrated irreparable harm in the form of a danger to the public. In my respectful view, the Member failed to identify and address material omissions and deficiencies in the evidence related to any abatement of the continuing danger posed by Mr Thomas and relating to whether his mother and girlfriend could prevent the danger to the public from occurring. Any finding that Mr Thomas has "changed" – which was not

discussed at any length in the Member's Decision – could only have been based on the beliefs and subjective opinions of his proposed bondspersons and his own testimony – not on any concrete evidence by way of his actions or conduct.

[94] In my view, the evidence of the danger posed by Mr Thomas, the absence of any real, concrete demonstration of reformed behaviour (apart from the passage of time without further infractions), and the absence of evidence that the bondspersons are able prevent Mr Thomas from leaving the home and present a danger to the public, far outweigh the evidence that he has "changed". The terms of release will not prevent Mr Thomas from posing a danger to the public. The evidence of continuing danger to the public is non-speculative and clear, as is the harm to the integrity of the immigration system under the *IRPA*. The evidence meets the requirements of *Glooscap*. I find that there is a real probability that the harm will materialize.

[95] The second harm to the public interest in the integrity of the immigration system concerns whether Mr Thomas will fail to appear for removal. The evidence on this issue is modestly more in Mr Thomas's favour but still contains significant concerns. Mr Thomas's convictions show obvious disregard for the law, and include violations of conditions imposed upon him (failing to appear in 2010; failing to comply with a recognizance in 2014; breaching a weapons possession prohibition order in 2015). His infractions while incarcerated include willfully disobeying an order of an officer in 2016. Although the Member did not expressly refer to these offences, she found that he would not appear for removal without conditions on his release.

[96] Against this, Mr Thomas has the evidence of several years having passed without him incurring any additional infractions while incarcerated. He also testified that he would return willingly to Grenada and was ready to do so. There was some evidence that he has started to make plans with his father, who lives there, about starting his new life in Grenada. Those plans are not well advanced.

[97] In her evidence, Ms Evans confirmed that if Mr Thomas did not want to go to the airport, she would “definitely call whoever” she needed to – including the police – to remedy the issue. Ms Thomas confirmed that she would also call authorities to prevent Mr Thomas from breaching his conditions or if he was not complying. However, these are actions to be taken after a term of release has already been breached. They may prevent Mr Thomas from not appearing for removal in some circumstances, but not in others.

[98] In view of all the evidence, a significant, clear and non-speculative concern exists that Mr Thomas will not appear for removal.

[99] For these reasons, I conclude that on the evidence, the Minister has established irreparable harm.

C. *Stage 3: Balance of (In)convenience*

[100] In my view, the balance of convenience favours the Minister.

[101] The harm to the public interest has been described above. The harm to the respondent is the continued deprivation of his liberty in Canada, at least until his removal or until the Court determines the Minister's application for judicial review (which will be heard on an expedited basis). The deprivation of liberty constitutes harm to Mr Thomas, for which there is both a personal interest and, as Mr Thomas submitted, a public interest in ensuring that any deprivation of liberty is justified: *Kalombo*, at para 58.

[102] It appears likely, but not certain, that Mr Thomas will be removed from Canada during the week of May 24, 2021. Emergency travel documents have been arranged (or nearly) with Grenadian officials to enable him to travel there. Travel arrangements have not been finalized.

[103] In addition to the liberty interest at stake, Mr Thomas and Ms Thomas (in her affidavit filed for this motion) both testified that the Thomas family, including his four younger siblings, will miss an opportunity to have family time together before he returns to Grenada. I do not discount the importance of Mr Thomas's family having time together before he is deported. However, the loss of that opportunity for them all is an unfortunate and regrettably necessary effect of Mr Thomas's criminal conduct and inadmissibility to Canada. In my view, it does not outweigh the harm to the public interest established by the Minister.

[104] In my view, the harm to be suffered by Mr Thomas does not outweigh the harm to the public interest described in these reasons. Weighing the harms, the balance leans clearly to greater harm to the public interest as advanced by the Minister.

III. <u>Conclusion</u>

[105] For these reasons, I conclude that the Minister has met the three elements of the *RJR-MacDonald* framework and that it is just to grant the motion for a stay of the Member's Decision to release Mr Thomas.

[106] In view of my analysis above, I would also grant leave to apply under s. 72 of the *IRPA*. The application for judicial review will be expedited. The parties should be in communication with each other and the Registry about the arrangements and an Order setting a hearing date and dates for the delivery of materials.

<u>ORDER in IMM-3002-21</u>

THIS COURT ORDERS that:

1. The decision of the Immigration Division made on May 4, 2021 releasing the respondent from detention is stayed pending the final disposition of the Minister's application for judicial review filed on May 5, 2021 in this proceeding.
2. The applicant is granted leave to apply for judicial review under s. 72 of the *Immigration and Refugee Act.* The application will be expedited. Arrangements as to the date of hearing and filing of materials are to be set by separate Order of this Court.

"Andrew D. Little"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3002-21
STYLE OF CAUSE:	THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS v AKIDO SHANDEL THOMAS
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MAY 12, 2021
REASONS FOR JUDGMENT AND JUDGMENT:	A.D. LITTLE J.
DATED:	MAY 16, 2021

APPEARANCES:

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