

Federal Court



Cour fédérale

Date: 20210611

Docket: IMM-3748-21

Citation: 2021 FC 592

Ottawa, Ontario, June 11, 2021

PRESENT: Mr. Justice Sébastien Grammond

BETWEEN:

**THE MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS**

Applicant

and

**SHAMRAAJ
THAVAGNANATHIRUCHELVAM**

Respondent

JUDGMENT AND REASONS

[1] The Minister is applying for judicial review of a decision of the Immigration Division [ID] of the Immigration and Refugee Board releasing Mr. Thavagnanathiruchelvam from detention, under conditions. The Minister argues that the conditions are insufficient to mitigate Mr. Thavagnanathiruchelvam's flight risk and the danger he poses to the public. In particular, the Minister argues that several aspects of these conditions are less stringent than those imposed on Mr. Thavagnanathiruchelvam in July 2020, which he breached in December 2020.

[2] I disagree with the Minister. Viewed globally, the present release conditions are as stringent as those imposed in July 2020. The ID took into consideration the Minister's concerns, but found that release was nevertheless warranted. I am not persuaded that the ID acted unreasonably in reaching this conclusion. Accordingly, the application for judicial review is dismissed.

I. Background

A. *Mr. Thavagnanathiruchelvam's Immigration Status and Criminal Record*

[3] Mr. Thavagnanathiruchelvam was born in Sri Lanka in 1990. He came to Canada in 1998 with his grandfather, while the rest of his family stayed in Sri Lanka. They were granted refugee status in 1999 and obtained permanent residence in 2000.

[4] When Mr. Thavagnanathiruchelvam was 14 years old, his grandfather died. As he had no family in Canada, he came under the supervision of the Children's Aid Society. He believed that the Society had applied for citizenship on his behalf. This, however, was not done. As a result, Mr. Thavagnanathiruchelvam never obtained Canadian citizenship.

[5] In 2011, Mr. Thavagnanathiruchelvam was victim of a car accident. A neuropsychological assessment performed in 2016 suggests that the accident caused him permanent injury and mental health issues.

[6] Mr. Thavagnanathiruchelvam's criminal record begins in 2013. It is not necessary to describe each offence, but three incidents taking place within two weeks of each other in 2016 stand out. First, he was involved in a bar fight, during which he threw two bar stools, injuring the bartender's wrist and causing material damage. Second, he assaulted a young woman and hit her with a tree branch. It appears that the assault had a sexual dimension, although he pled guilty to reduced charges.

[7] The third incident is extremely serious. Apparently believing that some of his possessions had been given to an elderly man, Mr. Thavagnanathiruchelvam, with one of his friends, attended the man's house. An altercation ensued and Mr. Thavagnanathiruchelvam assaulted the man, hitting him with a cane until he fell unconscious. After stealing some items, he fled, leaving the man for dead. The man sustained permanent injuries because of Mr. Thavagnanathiruchelvam's assault. He lost the use of his left arm and is now bound to a wheelchair. His family members, who live abroad, have also been considerably impacted by the crime. Mr. Thavagnanathiruchelvam pled guilty to a charge of aggravated assault and other charges and was sentenced to five years in custody, less credit for pre-trial detention.

[8] An officer of the Canada Border Services Agency [CBSA] then wrote a report pursuant to section 44 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act], alleging that Mr. Thavagnanathiruchelvam was inadmissible on grounds of serious criminality under section 36(1)(a) of the Act. On January 29, 2019, the ID found him inadmissible and made a deportation order. CBSA is currently seeking a danger opinion, allowing for Mr. Thavagnanathiruchelvam's removal despite his refugee status.

B. *Mr. Thavagnanathiruchelvam's Release and Recent Events*

[9] The events that followed involved both the correctional and immigration processes. Mr. Thavagnanathiruchelvam's criminal sentence comes to an end on July 26, 2021. However, he was entitled to statutory release on June 24, 2020. Among other conditions of release, the Parole Board of Canada required Mr. Thavagnanathiruchelvam to reside in a halfway house (or "community residential facility"). Although this was not explicitly provided in his parole conditions, his parole officer required him to wear an electronic bracelet.

[10] Nevertheless, CBSA detained Mr. Thavagnanathiruchelvam pursuant to section 55 of the Act. His detention was reviewed according to the Act and, on July 31, 2020, the ID ordered his release on a number of conditions. The ID found that Mr. Thavagnanathiruchelvam was both a flight risk and a danger to the public, but that danger to the public was the most serious concern, based on his criminal record. The concern regarding danger to the public, however, could be offset if Mr. Thavagnanathiruchelvam resides in a halfway house, which provides a high degree of supervision. Likewise, the flight risk could be offset by the fact that two friends were prepared to act as bondspersons and deposit \$5000. Among the conditions imposed by the ID, Mr. Thavagnanathiruchelvam had to report to CBSA 10 days prior to the expiry of his criminal sentence to determine next steps regarding residence.

[11] On December 24, 2020, Mr. Thavagnanathiruchelvam failed to return to the halfway house at the agreed upon time. There are conflicting accounts of what took place. Mr. Thavagnanathiruchelvam says that he went shopping, but that weather conditions and long line-

ups to enter stores on Christmas Eve delayed his return. Electronic monitoring data, however, suggests that he was in a residential area. The police was called and arrested him close to the halfway house. While under arrest, Mr. Thavagnanathiruchelvam kicked the door of the police cruiser. As this caused material damage, he was charged with mischief.

[12] Because of this incident, Mr. Thavagnanathiruchelvam's statutory release was suspended and he was reincarcerated. Meanwhile, a new warrant for his detention under the Act was issued.

[13] Under the *Corrections and Conditional Release Act*, SC 1992, c 20, a suspension of release must be reviewed by the Parole Board. On May 4, 2021, the Parole Board cancelled Mr. Thavagnanathiruchelvam's suspension. The Board reviewed the December 24, 2020 event, Mr. Thavagnanathiruchelvam's risk factors and lack of progress on his correctional plan. Nevertheless, the Board found that he did not present "an undue risk to society" and that he did not appear to "have re-entered [his] offence cycle." The Board noted that the December 24, 2020 event did not meet "the threshold for risk of reoffending." Thus, the Board cancelled the suspension with a reprimand.

[14] Immediately thereafter, Mr. Thavagnanathiruchelvam was brought under immigration detention. He was housed in a provincial correctional facility. Upon the 48-hour review, Mr. Thavagnanathiruchelvam's detention was maintained. The ID noted that there were no significant changes in Mr. Thavagnanathiruchelvam's risk factors and that it would be inappropriate to release him on a plan that involved less supervision than what was ordered in July 2020. In particular, the ID relied on the Parole Board's decision that found the December

24, 2020 event “not to represent an heightening of the danger.” However, the absence of potential bondspersons, only a few days after his detention, prevented the ID from ordering his release to the halfway house.

C. *Decision Under Review*

[15] The decision that is the subject of this application for judicial review was made after Mr. Thavagnanathiruchelvam’s second detention review. The hearing took place over eight days and several witnesses were heard, including the three proposed bondspersons.

[16] On June 3, 2021, the ID ordered Mr. Thavagnanathiruchelvam’s release on conditions. It found that, on a balance of probabilities, he was unlikely to appear and was a danger to the public but that a viable alternative to detention was available. The ID member gave extensive reasons for her decision.

[17] With respect to flight risk, the ID found that Mr. Thavagnanathiruchelvam was unlikely to appear, due to his strong desire to remain in Canada, his history of non-compliance with criminal and immigration rules, and his history of substance abuse. It placed his flight risk on the higher end of the spectrum.

[18] In particular, the ID considered the December 24, 2020 event and the explanations given by Mr. Thavagnanathiruchelvam at the hearing, but preferred the Minister’s evidence. It concluded that the December 24th event elevated his flight risk. It nevertheless gave little weight to the mischief charge, since there had been no finding of guilt at the time of the decision.

[19] The ID also considered the other alleged breaches of parole, but found that they were somewhat minor, in particular when compared with his past behaviour. They would only slightly elevate the risk associated with his ability to comply.

[20] With respect to the issue of danger to the public, the ID found that Mr. Thavagnanathiruchelvam was at the higher end, but that the level of risk was the same as in July 2020, when he was released on conditions. In reaching this conclusion, the ID adopted the findings of the Parole Board and the 48-hour detention review, described above. Thus, while the December 24 incident was a breach that increased flight risk, it did not result in a heightened danger to the public. The mischief charge had not led to a court finding, and did not constitute evidence of danger towards others.

[21] The ID also found that the concerns in relation to flight risk and danger to the public were mitigated by the fact Mr. Thavagnanathiruchelvam would reside at the halfway house. It characterised this halfway house as a highly restrictive environment, where experts were available to deal with individuals who had committed serious offences. Moreover, it noted that Mr. Thavagnanathiruchelvam did not commit acts of violence during his stay there.

[22] The ID also responded to the Minister's concerns regarding the suitability of the proposed bondspersons: Ms. Nitusha Prabharan, Mr. Thavagnanathiruchelvam's girlfriend; Ms. Sharannya Ganeshalingam, a friend of both; and Mrs. Nirmala Sinnadurai, Ms. Prabharan's mother. While they have no experience supervising an offender, the ID found that their role would be complementary to that of the halfway house. Despite certain concerns regarding Mrs.

Sinnadurai's credibility and her willingness to cooperate with authorities, and the fact that she never met Mr. Thavagnanathiruchelvam in person, the ID found that she would add a mother figure to the release plan.

[23] The ID identified further factors that needed to be addressed in a release plan, such as his substance abuse, lack of impulse control and anger management, and the likely associated mental health factors. Although these risks were significant, the ID believed that they could be mitigated through a rigorous release plan. In this regard, the ID noted that access to counselling and other forms of mental health support were impeded by his stay the Central East Correctional Facility, due to COVID-19 restrictions. In contrast, the proposed plan would afford Mr.

Thavagnanathiruchelvam the opportunity to engage in a weekly program at organizations like the John Howard Society or the South Asian Community Centre. The ID also considered that it would be beneficial for Mr. Thavagnanathiruchelvam to obtain a psychological evaluation.

[24] The ID was cognizant that Mr. Thavagnanathiruchelvam's parole conditions would end on July 26, 2021, when he would lose the supervision of his parole officer and the duty to comply with his parole conditions. For this reason, a subsequent hearing was scheduled for July 15 and 16 to revisit his release conditions.

[25] Overall, the ID was convinced that the parole conditions were sufficient to offset the risks posed by Mr. Thavagnanathiruchelvam's release. These conditions included that the three bondspersons post or pay deposits in amounts totalling \$4500; that Mr. Thavagnanathiruchelvam reside at the halfway house; that he appear before the ID on July 15, 2020; and that he obtain a

psychological evaluation and engage in mental health programming prior to the July 15 hearing, or show evidence why an evaluation or programming was not available. The ID compared these conditions with those put in place in the July 2020 release plan and found that they were more stringent, as Mr. Thavagnanathiruchelvam's relationship to the bondspersons was more meaningful and the risks were offset by additional conditions.

[26] The Minister now seeks judicial review of the ID's decision. On June 4, 2021, my colleague Justice Alan Diner granted an interim stay, to last until I render my decision.

II. Statutory Framework

[27] Sections 54–61 of the Act provide for detention, mainly where an inadmissible person is a danger to the public or is unlikely to appear for further proceedings. See, for a general discussion, *Brown v Canada (Public Safety and Emergency Preparedness)*, 2020 FCA 130.

Section 57 provides for periodical review of detention. Section 58, which is directly relevant to this case, sets out the grounds for which detention may be continued:

58 (1) The Immigration Division shall order the release of a permanent resident or a foreign national unless it is satisfied, taking into account prescribed factors, that

(a) they are a danger to the public;

(b) they are unlikely to appear for examination, an admissibility hearing, removal from Canada, or at a

58 (1) La section prononce la mise en liberté du résident permanent ou de l'étranger, sauf sur preuve, compte tenu des critères réglementaires, de tel des faits suivants :

a) le résident permanent ou l'étranger constitue un danger pour la sécurité publique;

b) le résident permanent ou l'étranger se soustraira vraisemblablement au contrôle, à l'enquête ou au

proceeding that could lead to the making of a removal order by the Minister under subsection 44(2);	renvoi, ou à la procédure pouvant mener à la prise par le ministre d'une mesure de renvoi en vertu du paragraphe 44(2);
[...]	[...]

[28] Sections 244–250 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [the Regulations] prescribe the factors to be taken into account to decide whether a person is a danger to the public or a flight risk and, if so, whether they should be detained. Section 245 provides that previous compliance with conditions of release is a relevant factor for assessing flight risk. Section 246 provides that a conviction for an offence involving violence or weapons is a relevant factor for assessing danger to the public. Section 248 lists factors to be taken into account when assessing whether detention should be maintained:

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:	248 S'il est constaté qu'il existe des motifs de détention, les critères ci-après doivent être pris en compte avant qu'une décision ne soit prise quant à la détention ou la mise en liberté :
(a) the reason for detention;	a) le motif de la détention;
(b) the length of time in detention;	b) la durée de la détention;
(c) whether there are any elements that can assist in determining the length of time that detention is likely to continue and, if so, that length of time;	c) l'existence d'éléments permettant l'évaluation de la durée probable de la détention et, dans l'affirmative, cette période de temps;
(d) any unexplained delays or unexplained lack of diligence caused by the Department, the	d) les retards inexplicés ou le manque inexplicé de diligence de la part du

Canada Border Services Agency or the person concerned;	ministère, de l'Agence des services frontaliers du Canada ou de l'intéressé;
(e) the existence of alternatives to detention; and	e) l'existence de solutions de rechange à la détention;
(f) the best interests of a directly affected child who is under 18 years of age.	f) l'intérêt supérieur de tout enfant de moins de dix-huit ans directement touché.

[29] The burden of proof that detention is warranted is on the Minister, and proof must be made at each periodical review: *Brown*, at paragraph 118.

III. Analysis

[30] The matter before me was initially a motion for stay of release. However, when reviewing the parties' extensive motion records, it became apparent that this motion would merely be a dress rehearsal for the hearing of the application for judicial review. Thus, at the outset of the hearing, I suggested that I could decide the application for judicial review instead of the stay motion. Both parties agreed, recognizing that they would have nothing to add to their motion records. Proceeding directly to the application for judicial review, indeed, will result in more efficient use of the Court's and the parties' limited resources.

[31] The ID's decision must be reviewed on a standard of reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. A reasonable decision must be based on internally coherent reasoning. It must also be justified in light of the legal and factual constraints bearing on the decision-maker. The Court must consider the impugned decision globally. To use the oft-quoted phrase, it must not engage in a "line-by-line treasure

hunt for error:” *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34 at paragraph 54, [2013] 2 SCR 458; *Vavilov*, at paragraph 102. Moreover, it is not the Court’s role to reassess the evidence before the decision-maker: *Vavilov*, at paragraph 125.

[32] The Minister challenges the reasonableness of the release conditions imposed by the ID. It impugns four specific aspects of these conditions as being insufficient. Before analysing the Minister’s arguments, I must point out that the release conditions are composed of many moving parts and must be assessed as a whole. In this connection, Parliament has conferred upon the ID, not this Court, the task of balancing the risk factors and the effectiveness of the release conditions to mitigate the risk. There is an inherent element of subjectivity in this exercise, as there is no mathematical formula to determine the outcome. This justifies deference towards the ID, which spent eight days hearing the evidence and issued an oral decision, the transcription of which spans more than 60 pages.

[33] The general thrust of the ID’s decision, which is summarized above, is that the December 24, 2020 event has not substantially increased Mr. Thavagnanathiruchelvam’s flight risk or danger to the public. As a result, release conditions are sufficient to mitigate those risks if they are at least as stringent as those imposed in July 2020. I can see no error in principle in this approach. It is grounded in the evidence and consistent with the Parole Board’s May 4, 2021 decision, which found that Mr. Thavagnanathiruchelvam had not re-entered his offence cycle, and the ID’s decision regarding the 48-hour detention review.

A. *Prematurity / Impending End of Sentence*

[34] The Minister's most serious objection appears to be that the release conditions make no provision for what happens when Mr. Thavagnanathiruchelvam's criminal sentence ends on July 26, 2021. We do not know where he will reside after this date and have no guarantee that there will be an alternative release plan.

[35] Yet, the ID considered this possibility and convened a hearing on July 15 to review the situation. If there is no adequate release plan beyond July 26, the ID has the power to order that Mr. Thavagnanathiruchelvam be detained again: see subsection 58(2) of the Act.

[36] I do not see anything unreasonable in this process. It reflects the principle underlying section 58, namely, that release is the rule and detention, the exception. Mr. Thavagnanathiruchelvam's release is not premature and will facilitate the steps to be taken in order to craft an adequate release plan for the period after his sentence ends. Being detained in a provincial facility will severely restrict his ability to meet health professionals, engage in therapeutic programs or take steps to secure an adequate residential environment when he leaves the halfway house. In this regard, I was informed that CBSA has resources at its disposal to ensure that detainees whose criminal sentences come to an end are gradually reinserted in society. CBSA's policy is to deploy these resources after the conclusion of the 7-day review. In this case, however, the 7-day review was only concluded a month after Mr. Thavagnanathiruchelvam was detained. I would simply express the hope that CBSA will show a greater sense of urgency in finding a proper residential setting for him after July 26.

B. *Appropriateness of Bondspersons*

[37] The Minister challenges the appropriateness of two of the three bondspersons. I see nothing unreasonable in the ID's decision in this regard. In my view, the analysis must begin with the recognition that a perfect bondsperson will rarely be available. This is especially true with respect to Mr. Thavagnanathiruchelvam, who has no family in Canada.

[38] The Minister objects to Mr. Thavagnanathiruchelvam's girlfriend on the basis that she has no experience in supervising persons who present a serious danger to the public. This, however, amounts to considering the issue in isolation and ignoring the fact that Mr. Thavagnanathiruchelvam will be the subject of considerable supervision at the halfway house. The Minister also expresses concerns because she was present for part of the December 24, 2020 event. However, the evidence shows that she only came to give Mr. Thavagnanathiruchelvam a ride back to the halfway house at the end of the day. The ID did not misapprehend the evidence in this regard. Rather, the Minister is simply asking the Court to substitute its own assessment, which is not the role of the Court on judicial review.

[39] Likewise, the ID considered the Minister's objections to the girlfriend's mother, but found that despite these shortcomings, she would nevertheless add value to the release plan. In this regard, one must keep in mind that the mother is the third bondsperson. The ID was of the view that other aspects of the release conditions counterbalanced the shortcomings.

[40] In my view, the Minister's objections constitute precisely the kind of "line-by-line treasure hunt for error" proscribed by *Vavilov* and earlier cases. In most cases of this kind, the ID must weigh the shortcomings of the proposed bondspersons against the other elements of the release plan. Highlighting the shortcomings does not render the outcome of the balancing exercise unreasonable.

C. *Lesser Bond Amount*

[41] In July 2020, Mr. Thavagnanathiruchelvam's conditions of release included bonds in a total amount of \$5000. In the decision under review, the ID accepted bonds in a total amount of \$4500. The Minister argues that the \$500 shortfall renders the decision unreasonable.

[42] I disagree. The amount of the bonds was the subject of considerable discussion with the proposed bondspersons at the hearing before the ID. They increased the amount that they initially offered to post. The ID was entitled to measure the amount against the bondspersons' means, which in this case are limited. A 10% difference in the amount compared to the previous arrangements, which involved different bondspersons, is not in itself indicative of unreasonableness.

D. *Psychiatric Assessment*

[43] The Minister asserts that it was impossible for the ID to assess the risk posed by Mr. Thavagnanathiruchelvam, and the sufficiency of his release conditions, without a full psychiatric or psychological evaluation. In the absence of a recent evaluation, it would be impossible "to

properly assess whether the alternative to detention reasonably addresses his mental health concerns.”

[44] In this regard, the ID observed that Mr. Thavagnanathiruchelvam would be able to access services aimed at overcoming his substance abuse issues and improving his mental health if he were to reside at the halfway house. In contrast, such services would not be available, or significantly more difficult to access, in a provincial correctional facility. Likewise, it would be easier for Mr. Thavagnanathiruchelvam to obtain a mental health assessment if he were released than if he remains in jail. Thus, the ID characterized the Minister’s position as a “catch-22.” In order to move forward, the ID ordered an assessment to take place before the hearing scheduled for July 15.

[45] The ID’s approach is reasonable. No psychological assessment was required when Mr. Thavagnanathiruchelvam was released in July 2020, and it is unclear why it would be indispensable now. It does not assist the Minister to speculate about what such an assessment might reveal. As I noted above, the Minister bears the burden of proof and can hardly complain about the lack of evidence. The ID could reasonably reach a decision based on the extensive record, without the addition of a psychological report.

IV. Conclusion

[46] To summarize, the ID had a complex case before it. It heard days of evidence. It made a carefully considered decision. The main grounds on which the decision rests are sound. The ID considered other recent decisions finding that the risk posed by Mr. Thavagnanathiruchelvam did

not significantly increase. It reached the same conclusion. It imposed release conditions which were comparable to those imposed in July 2020. In this context, the Minister's challenge to isolated aspects of the ID's reasoning fails. Viewed globally, the ID's decision was reasonable.

[47] Accordingly, the application for judicial review will be dismissed.

JUDGMENT in IMM-3748-21

THIS COURT'S JUDGMENT is that

1. Leave to apply for judicial review is granted.
2. The application for judicial review is dismissed.

"Sébastien Grammond"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-3748-21

STYLE OF CAUSE: THE MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS v SHAMRAAJ
THAVAGNANATHIRUCHELVAM

PLACE OF HEARING: BY VIDEOCONFERENCE

DATE OF HEARING: JUNE 11, 2021

JUDGMENT AND REASONS: GRAMMOND J.

DATED: JUNE 11, 2021

APPEARANCES:

Meva Motwani FOR THE APPLICANT

Arthur Ayers FOR THE RESPONDENT

SOLICITORS OF RECORD:

Attorney General of Canada FOR THE APPLICANT
Ottawa, Ontario

Arthur Ayers FOR THE RESPONDENT
Barrister and Solicitor
Ottawa, Ontario