Federal Court  Cour fédérale

Date: 20210901

Docket: IMM-5829-21

Citation: 2021 FC 908

Ottawa, Ontario, September 1, 2021

PRESENT: Mr. Justice Norris

BETWEEN:

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Applicant

and

ANNABEL ERHIRE

Respondent

ORDER AND REASONS

I. OVERVIEW

[1] The Minister of Public Safety and Emergency Preparedness seeks a stay of the order of the Immigration Division ("ID") of the Immigration and Refugee Board of Canada ("IRB") dated August 26, 2021, ordering Annabel Erhire's release from detention on terms and conditions. This stay is sought pending the Minister's application for leave and judicial review of the decision ordering Ms. Erhire's release. On August 27, 2021, Justice Roy granted an

interim stay of the release order pending a hearing of the motion for an interlocutory stay. He set that hearing down for August 31, 2021. I heard the matter then and reserved my decision.

[2] Despite the very able submissions of counsel for Ms. Erhire, I am granting the Minister's motion. As I explain in the reasons that follow, I am satisfied that the Minister has met all three parts of the test for a stay.

II. BACKGROUND

[3] Ms. Erhire was born in Nigeria in 1998. In September 2016, when she was 18 years of age, Ms. Erhire came to Canada with her mother and four siblings. They all sought refugee protection. Their claims for protection were rejected by the Refugee Protection Division of the IRB on September 20, 2017. It appears that an appeal was filed with the Refugee Appeal Division but it was not perfected and was dismissed accordingly. With the rejection of her refugee claim, Ms. Erhire became subject to removal from Canada.

[4] On May 14, 2018, Ms. Erhire submitted an application for permanent residence on humanitarian and compassionate ("H&C") grounds under subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*"). A request for deferral of her removal from Canada was granted on October 19, 2018. It appears that a deferral of removal was also granted to the other members of her family, who had also submitted H&C applications.

[5] On October 23, 2018, Ms. Erhire, her mother and her siblings made an application for a pre-removal risk assessment ("PRRA") under subsection 112(1) of the *IRPA*. However, on

April 1, 2019, Mr. Erhire's mother and her siblings withdrew their PRRA applications because they had decided to return to Nigeria. Ms. Erhire did not wish to return to Nigeria so she maintained her PRRA application. That application was refused on May 25, 2019. Her H&C application was refused on May 29, 2019.

[6] Ms. Erhire was directed by the Canada Border Services Agency ("CBSA") to report for a pre-removal interview on August 22, 2019. She failed to appear for this interview. As a result, a warrant for her arrest was issued. The CBSA attempted to locate her but was unable to.

[7] On April 24, 2020, Ms. Erhire had an encounter with the police. The police notified the CBSA that they had located Ms. Erhire. The CBSA executed the warrant for her arrest. Ms. Erhire was then released on conditions. Since removals from Canada had been halted due to the COVID-19 pandemic, no steps were taken at that time to enforce the removal order against her.

[8] Mr. Erhire was not served with the negative PRRA and H&C decisions until April 12, 2021. It appears that at or around this time, the removal process was recommenced.

[9] A pre-removal interview was conducted with Ms. Erhire by telephone on June 16, 2021. She was directed to attend for another pre-removal interview on June 21, 2021, but she did not attend. She called the CBSA later that day and said she had been feeling unwell.

[10] Ms. Erhire attended for another interview as directed on June 22, 2021. She was served with a Direction to Report for removal on July 22, 2021. She attended a pre-removal interview on July 13, 2021, and provided her consent for CBSA to obtain a Medical Requirements for Removal Report to determine whether she was fit to fly. This report, provided on July 14, 2021, determined that Ms. Erhire was fit to fly. The CBSA conducted a follow-up pre-removal interview with Ms. Erhire by telephone.

[11] As part of the removal process, Ms. Erhire was required to attend for COVID-19 testing on July 20, 2021. She failed to do so. She also failed to attend for another pre-removal interview scheduled for the same day. Later that day, she called the CBSA after-hours line to say she had been unwell again.

[12] The CBSA ultimately determined that Ms. Erhire should be escorted during her flight to Nigeria. As a result, the July 22, 2021, removal date was cancelled and removal was rescheduled to August 10, 2021. This date was then changed to August 24, 2021, because Ms. Erhire was hospitalized in early August.

[13] Ms. Erhire requested a deferral of her removal but this request was refused by the CBSA on August 20, 2021. (An earlier deferral request had been refused on or about July 21, 2021.) This deferral request was based on Ms. Erhire’s threats to commit suicide if she had to leave Canada and her need to remain here for mental health treatment.

[14] Ms. Erhire attended for another pre-removal interview on August 22, 2021. A COVID-19 test was conducted at the same time. She was scheduled to attend for a second COVID-19 test on August 23, 2021, but she failed to appear. Ms. Erhire texted the CBSA officer she had been dealing with to say she was running late but in the end she never arrived.

[15] Meanwhile, Ms. Erhire had filed an application for leave and judicial review of the August 20, 2021, decision refusing to defer her removal. She also moved for a stay of her removal pending the final determination of this application. The stay motion was dismissed by Justice McVeigh on August 23, 2021. In doing so, Justice McVeigh noted that she had agreed to hear the stay despite the fact that, as of August 23, 2021 (the date of the hearing of the motion), Ms. Erhire had failed to attend for a pre-removal interview and her second COVID-19 test.

[16] On August 24, 2021, the CBSA found Ms. Erhire at the home of her estranged husband. She was placed under arrest and detained at the Immigration Holding Centre.

III. THE RELEASE DECISION

[17] Ms. Erhire's 48 hour detention review took place on August 26, 2021. Ms. Erhire testified, as did her proposed bondsperson, Prisca Ese Bazarin. Counsel for the Minister opposed release on the basis that Ms. Erhire was a flight risk and no effective alternative to detention was available. Counsel for Ms. Erhire submitted that she should be released on conditions under the supervision of her aunt, Ms. Bazarin.

[18] While the hearing was underway, the CBSA confirmed a new removal date for Ms. Erhire for September 7, 2021. The ID was informed of this development after submissions were completed but before it rendered its decision.

[19] For reasons delivered orally on August 26, 2021, the ID found that Ms. Erhire was unlikely to appear for her removal. Indeed, Ms. Erhire posed a "moderate to high" risk of flight. However, the ID also found that this concern could be managed with an appropriate alternative to detention. The ID concluded that release under the supervision of Ms. Bazarin as a bondsperson was an appropriate alternative to detention. Ms. Bazarin was required to provide a cash deposit of $2500 and a performance bond of $10,000. Among other conditions, Ms. Erhire was required to reside with Ms. Bazarin, to cooperate with the CBSA, to report for removal as directed, and in the meantime to report to the CBSA weekly.

[20] As noted, the Minister has applied for leave and judicial review of this decision. He seeks a stay of the order for Ms. Erhire's release from detention pending the final determination of this application.

IV. ANALYSIS

A. *The Test for a Stay*

[21] The test for obtaining an interlocutory stay is well-known. The moving party must demonstrate three things: (1) that the underlying application for judicial review raises a serious question to be tried; (2) that the moving party will suffer irreparable harm if the 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 injunction pending a decision on the merits of the judicial review application) favours granting the stay: see *R v Canadian Broadcasting Corp*, 2018 SCC 5 at para 12; *Manitoba (Attorney General) v Metropolitan Stores Ltd*, [1987] 1 SCR 110; and *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 at 334.

[22] An interlocutory order of this kind is an extraordinary and equitable form of relief. Its purpose is to ensure that the subject matter of the litigation will be preserved so that effective relief will be available should the moving party be successful on the underlying application for judicial review: see *Google Inc v Equustek Solutions Inc*, 2017 SCC 34 at para 24. A decision to grant or refuse such relief is a discretionary one that must be made having regard to all the relevant circumstances: see *Canadian Broadcasting Corp* at para 27. As *Google Inc* states, "The fundamental question is whether the granting of an injunction is just and equitable in all of the circumstances of the case. This will necessarily be context-specific" (at para 25).

[23] While each part of the test is important, and all three must be met, they are not discrete, watertight compartments. Each part emphasizes factors that inform the Court's overall exercise of discretion in a particular case: *Wasylynuk v Canada (Royal Mounted Police)*, 2020 FC 962 at para 135. The test should be applied in a holistic fashion where strengths with respect to one factor may overcome weaknesses with respect to another: see *RJR-MacDonald* at 339; *Wasylynuk* at para 135; *Spencer v Canada (Attorney General)*, 2021 FC 361 at para 51; *British Columbia (Attorney General) v Alberta (Attorney General)*, 2019 FC 1195 at para 97 (rev'd on other grounds 2021 FCA 84); *Gill v Canada (Public Safety and Emergency Preparedness)*, 2020

FC 1075 at para 20. See also Robert J Sharpe, “Interim Remedies and Constitutional Rights” (2019) 69 UTLJ (Supp 1) at 14.

[24] Taken together, the three parts of the test help the Court to assess and assign what has been termed the risk of remedial injustice (see Sharpe, above). They guide the Court in answering the following question: Is it more just and equitable for the moving party or the responding party to bear the risk that the outcome of the underlying litigation will not accord with the outcome on the interlocutory motion?

B. *The Test Applied*

(1) Serious Question

[25] The Minister submits that the threshold for establishing a serious question to be tried is a low one and that he only needs to show that his application for judicial review is not frivolous or vexatious: see *Canada (Public Safety and Emergency Preparedness) v Smith*, 2019 FC 1454 at paras 41-52; *RJR-MacDonald* at 335 and 337; *Gateway City Church v Canada (National Revenue)*, 2013 FCA 126 at para 11; and *Glooscap Heritage Society v Canada (National Revenue)*, 2012 FCA 255 at para 25. However, the Minister also acknowledges that decisions from this Court (including three of my own) have held that a higher threshold must be met in cases where the Minister seeks to stay an order for release from detention. According to this line of cases, to satisfy the first part of the test, the Minister must demonstrate on a *prima facie* basis that the underlying application for judicial review is likely to succeed: see *Canada (Public Safety and Emergency Preparedness) v Allen*, 2018 FC 1194 at para 15; *Canada (Public Safety and*

Emergency Preparedness) v Mohammed, 2019 FC 451 at paras 15-17; and *Canada (Public Safety and Emergency Preparedness) v Kalombo*, 2020 FC 793 at para 31. In view of this, the Minister submits in the alternative that the grounds for review he advances also meet this higher threshold.

[26] As I noted at the hearing of this motion, one additional factor supporting the application of a higher threshold in this case is that this motion will be the only effective review of the ID's decision. This is because, given the pending seven day review and the imminent removal date, in a short time the Minister's application will become moot.

[27] I am satisfied that one of the grounds for review advanced by the Minister meets the higher threshold. More specifically, I am satisfied that the Minister has demonstrated that he is likely to succeed in persuading a reviewing court that the ID's assessment of Ms. Bazarin's effectiveness as a bondsperson is unreasonable.

[28] There is no issue that the ID's decision is to be reviewed on a reasonableness standard. Reasonableness review focuses on "the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome" (*Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 83). A reasonable decision "is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para 85). The decision maker's reasons should be read in light of the record and with due sensitivity to the administrative setting in which they were given (*Vavilov* at paras 91-95). When considering whether a decision is

reasonable, “the reviewing court asks whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision” (*Vavilov* at para 99).

[29] In the present case, the Minister has not persuaded me that a reviewing court is likely to interfere with the ID’s determination that Ms. Bazarin was credible, was willing to post a significant amount of money, would take her obligations as a bondsperson seriously, and would make her best efforts to ensure that Ms. Erhire complied with her legal obligations. These are all matters with respect to which a reviewing court is likely to show considerable deference to the ID. However, the Minister has persuaded me that a reviewing court is likely to find that the ID’s determination that Ms. Bazarin’s can supervise Ms. Erhire effectively lacks the hallmarks of reasonableness.

[30] The ID recognized that the determinative question is whether Ms. Erhire’s past behaviour is so concerning that the proposed bondsperson is insufficient to offset the concern that she will not appear for removal. In answering this question, the ID took “significant comfort” from the fact that Ms. Erhire “would be residing with a trusted family member who is empathetic with her difficulties, which difficulties include a fear of returning to Nigeria.” In my view, a reviewing court is likely to find that this conclusion is unreasonable in at least three respects. First, the ID did not engage in any meaningful way with the evidence of Ms. Erhire’s significant recent history of suicidal ideation and acute mental health crises, especially when removal is imminent. To the extent that the ID acknowledged this history, it diminished its significance in a way that is untenable in light of the record as a whole. (I will review this history in greater detail below in

connection with irreparable harm.) Second, the ID did not engage in any meaningful way with whether Ms. Bazarin was equipped to deal with these matters in a way that would provide the necessary assurance that Ms. Erhire would report for removal as required. While the reviewing court is likely to accept that a bondsperson does not need to be perfect (see *Canada (Public Safety and Emergency Preparedness) v Thavagnanathiruchelvam*, 2021 FC 592 at para 37), to be reasonable, a decision to approve a bondsperson as an effective alternative to detention must demonstrate at least some insight into any imperfections, especially when they go to the core issue of the bondsperson's ability to ensure compliance. Third, given the record as a whole, the ID unreasonably determined that Ms. Bazarin's good intentions were sufficient to ensure her effectiveness as a bondsperson despite the finding that Ms. Erhire posed a moderate to high risk of flight. All of this leaves one of the ID's key determinations supporting Ms. Erhire's release lacking transparency, intelligibility and justification. In my view, a reviewing court is also likely to find that this error on a central issue warrants setting the release order aside.

[31] On this basis, even applying an elevated threshold, I am satisfied that the Minister has met the first part of the test for a stay.

(2) Irreparable Harm

[32] Under this part of the test, "the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicant[']s own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application" (*RJR-MacDonald* at 341). This is what is meant by describing the harm that must be established as "irreparable". It concerns the nature of the harm rather than its magnitude

(*ibid.*). Of course, where the Minister is the moving party, the issue is not harm to his own private interests but, rather, harm to the public interest in the proper administration of the *IRPA*.

[33] The Minister submits that "the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant" (*Applicant's Written Representations on the Stay of Release Motion*, para 62). I do not agree.

[34] In support of this submission, the Minister cites the following passage from *RJR-Macdonald*:

> In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.
>
> (*RJR-Macdonald* at 346)

[35] In my view, the Minister's reliance on this passage is misplaced for at least two reasons. First, while the issue of irreparable harm is referred to there, it is in the context of a discussion of the balance of convenience, the third part of the test for a stay. This is made clear by the sentence immediately preceding the quotation set out above (which the Minister omits): "In our view, the concept of inconvenience should be widely construed in *Charter* cases." Second, at issue in *RJR-Macdonald* was whether the moving party (a tobacco company) should be relieved of its obligations under duly enacted legislation pending an appeal to the Supreme Court of

Canada concerning the constitutionality of that legislation. This is the context in which the Court was prepared to assume that in most cases irreparable harm to the public interest would arise from restraint of such action at the behest of a private party. This is entirely different from what is at issue in the present case.

[36] Contrary to the Minister's submission, in my view, the same test for establishing irreparable harm applies to him as would apply to a private litigant. The Minister must show that there is "real, definite, unavoidable harm – not hypothetical and speculative harm" (*Janssen Inc v Abbvie Corporation*, 2014 FCA 112 at para 24). He must adduce clear and non-speculative evidence that irreparable harm will follow if the stay is refused. Unsubstantiated assertions of harm will not suffice. Instead, "there must be evidence at a convincing level of particularity that demonstrates a real probability that unavoidable irreparable harm will result" unless the stay is granted: *Glooscap Heritage Society* at para 31; see also *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; and *United States Steel Corporation v Canada (Attorney General)*, 2010 FCA 200 at para 7.

[37] The assessment of the threshold the Minister must meet to discharge his onus under this part of the test must take into account that the injunctive relief is directed to a harm which has not happened yet but is only apprehended and expected to occur at some future time if Ms. Erhire is released from detention. As Justice Gascon observed in *Letnes v Canada (Attorney General)*, 2020 FC 636, "The fact that the harm sought to be avoided is in the future does not necessarily make it speculative. It all depends on the facts and the evidence" (at para 57). See

also *Delgado v Canada (Citizenship and Immigration)*, 2018 FC 1227 at paras 14-19; and *Wasylynuk* at para 136. Moreover, as I have stated elsewhere, the idea of a "real probability of harm," particularly as applied to apprehended future harms, is fundamentally a qualitative as opposed to a quantitative assessment: see *Singh v Canada (Citizenship and Immigration)*, 2021 FC 846 at para 29. The harm that is relied on certainly cannot be merely hypothetical or speculative but at the same time it is unrealistic to demand evidence establishing a precise level of risk when the harm to which the relief is directed will only occur in the future, if at all.

[38] In the present case, the Minister alleges that the public interest will suffer irreparable harm if Ms. Erhire fails to report for removal. This is indisputable. According to paragraph 3(1)(f.1) of the *IRPA*, one of the objectives of that Act with respect to immigration is "to maintain, through the establishment of fair and efficient procedures, the integrity of the Canadian immigration system." The integrity of this system depends in part on effective powers of enforcement. If someone who is required to leave Canada fails to report for removal as required, this will inevitably bring the immigration system into disrepute: see *Canada (Public Safety and Emergency Preparedness) v JW*, 2018 FC 1076 at para 61; and *Smith* at para 101.

[39] When considering irreparable harm to the public interest under the second part of the test, it is important not to conflate the harm that is alleged with the risk that it will materialize. These are two separate questions. In my view, the determinative question in the present case is not whether Ms. Erhire's failure to report for removal would constitute irreparable harm – as I have just explained, clearly it would – but whether the Minister has established a real probability that

Ms. Erhire would not appear for removal if released on the conditions ordered by the ID. I am satisfied that he has.

[40] I base this conclusion on the following:

- A few weeks after learning that her PRRA and H&C applications had been refused, Ms. Erhire videotaped herself naked, going onto the balcony of a high rise building, and threatening to kill herself. She posted this video on social media. Friends who saw the video contacted the authorities. Ms. Erhire was apprehended and committed to hospital involuntarily under the *Mental Health Act* from May 5 to May 26, 2021.

- Ms. Erhire was discharged with a diagnosis of either bipolar disorder or cannabis-induced psychosis (her psychiatrist was unable to determine which is the correct diagnosis). She was prescribed medication.

- On June 18, 2021 – two days after a pre-removal interview with the CBSA – Ms. Erhire was assessed by Dr. Gerald M. Devins, a Consulting and Clinical Psychologist. Dr. Devins reported that, on being asked what she would do if she were refused permission to remain in Canada, Ms. Erhire responded that she might try to harm herself again. When asked directly if she intended to take her own life, she said she did not know but at another point in the interview she said she may do so if she could not stay in Canada. In his report (dated June 18, 2021), Dr. Devins opined that Ms. Erhire's attempted suicide in early May was directly related to her being informed by the CBSA that they were undertaking removal action against her.

- In a follow-up report dated July 15, 2021, Dr. Devins wrote the following:

> I spoke to Ms. Erhire, again, this evening to assess her current state of mind. She stated clearly and unequivocally that she intends to take her life should steps be undertaken to remove her from Canada. When I asked about her plans should she be required to leave Canada, Ms. Erhire responded directly and without hesitation, "Kill myself . . . I've researched how to open the plane doors and everything and, well, there's knives." When I asked her whether she truly intends to take her life should she be refused, she replied without hesitation, "That's exactly what I'll do."

- On August 5, 2021, (approximately three weeks after her first request for a deferral of removal was refused) Ms. Erhire was re-admitted to hospital with symptoms of psychosis in the context of cannabis use. It is unclear how long she remained in hospital. According to a note from her psychiatrist dated August 10, 2021, Ms. Erhire remained hospitalized at that time and her date of discharge was still unknown. This hospitalization resulted in the cancellation of her scheduled removal. Evidently she was discharged from hospital sometime later in August.

- Ms. Erhire's failure to attend for COVID-19 testing and a pre-removal interview on August 23, 2021, resulted in the cancellation of the removal scheduled for the next day.

- Ms. Bazarin, the proposed bondsperson, demonstrated little understanding of Mr. Erhire's recent medical history or the challenges her current mental condition would pose in ensuring compliance with the release order. She understood that Ms. Erhire had been diagnosed with "psychosis". When asked if she knew about anything else, she said Ms. Erhire had an injured shoulder. She also stated that Ms. Erhire suffered from panic attacks. She appeared to know little, if anything, about the suicide threats or how adamant Ms. Erhire is about not leaving Canada. When asked if Ms. Erhire's mental health affects her reliability, Ms. Bazarin replied that she would "work on it" with

Ms. Erhire. If she was in her care, Ms. Erhire "will be fine." When asked why she believed Ms. Erhire would comply with her directions as her bondsperson, Ms. Bazarin said it was because she thought Ms. Erhire was smart.

- Ms. Erhire has a history of non-compliance with her obligations under Canadian immigration law. This history dates back to August 2019, when she first failed to report for removal. Once apprehended in April 2020, Ms. Erhire complied sporadically with her obligations but that compliance typically became much more tenuous as the dates for her removal approached. Her counsel submits that this non-compliance is due to her mental health challenges but the evidence linking the two is not strong. Even if the two are connected, none of the medical interventions to date prevented the failure to report on August 23, 2021, that led to her arrest the next day and to her detention. It is also significant that this failure to report occurred despite the fact that a number of individuals – including her then-counsel as well as Ms. Bazarin – were doing their best to assist Ms. Erhire.

[41] Having regard to all of this evidence, in my view, the release order is manifestly inadequate for ensuring that Ms. Erhire complies with her legal obligations, including that she report for removal. Notably, the release order does not include any condition requiring Ms. Erhire to continue under the treatment of a physician. I accept that Ms. Bazarin means well and would do her best to ensure that Ms. Erhire complied with the conditions of her release. However, I am not satisfied that she would be an effective supervisor. This is because I am not satisfied that she truly understands what this would require or that she is equipped to manage Ms. Erhire. I have given careful consideration to the fact that this release order is the first time

Mr. Erhire would be accountable to a bondsperson. I have also given careful consideration to the fact that Ms. Erhire should now understand the consequences of failing to comply with her obligations under Canadian immigration law. However, the evidence is unequivocal that she does not want to return to Nigeria and that she would do anything to prevent this from happening. This evidence comes from Ms. Erhire herself. I am persuaded that she would prefer the consequences of breaching the order for her release, whatever they might be, over returning to Nigeria.

[42] Having regard to all of these considerations, I am satisfied that the Minister has established that there is a real probability that, if Ms. Erhire were released on the conditions ordered by the ID, she would not report for removal. Accordingly, I am satisfied that the Minister has met the irreparable harm part of the test.

(3) Balance of Convenience

[43] As stated above, the third part of the test requires an assessment of which party would suffer greater harm from the granting or refusal of a stay of the release order pending a decision on the merits of the application for judicial review. The harm found under the second part of the test is considered again in the third part, only now it is assessed in comparison with other interests that will be affected by the Court's decision. The Minister is entitled to a stay only if the harm that would be caused by refusing the stay outweighs the harm that would be caused by granting it.

[44] As I have discussed elsewhere, this is not an easy determination to make when the Minister seeks an order staying an order for a detainee's release from detention: see *Kalombo* at paras 57-62. Much of that discussion applies equally here. For present purposes, I place particular emphasis on the fact that while Ms. Erhire's private interests will certainly be affected if her detention is to be continued, there is also a strong public interest in ensuring that any deprivation of liberty is justified. I also reiterate the point that the public interest is not monolithic; it can pull in different directions. For example, it is in the public interest that Ms. Erhire receive the medical care and supervision she requires. The record on this motion suggests that at the moment this can best be achieved at the Immigration Holding Centre. As well, there is a public interest in the enforcement of the release order, an order made by the tribunal that Parliament has empowered to deal with detention and release under the *IRPA*. On the other hand, there is also a public interest in the enforcement of the removal order. It is not in the public interest to pursue one wholly at the expense of the other. In short, the assessment of the balance of convenience is not simply a matter of weighing Ms. Erhire's private interests against the public interest advanced by the Minister.

[45] The Minister notes that Ms. Erhire's seven day detention review is scheduled for Thursday September 2, 2021. In light of this, the Minister submits that in effect he is asking me to maintain the *status quo* only until then and, as a result, an order granting a stay will have only a very modest impact on Ms. Erhire's liberty interest. I cannot speculate about what may or may not happen at the next detention review. But whatever may happen then, it appears certain that, unless there is a change of plans on the part of the CBSA, Ms. Erhire is to be removed from Canada on September 7, 2021. Thus, if the stay is granted, she will be held in detention for no

more than seven additional days. Nevertheless, even if the immediate impact on her liberty of a decision to stay the order for release is time-limited, a loss of liberty for any amount of time is still a weighty consideration: see *R v Hall*, 2002 SCC 64 at para 47; and *R v Penunsi*, 2019 SCC 39 at para 68.

[46] I have given careful consideration to the harmful consequences to Ms. Erhire of staying the order for her release. I accept that they are significant. However, I am satisfied that they are outweighed by the harm that would likely result if she were released under the terms of the release order. As discussed above, Ms. Erhire's failing to report for removal would be detrimental to the public interest. I need not decide whether this alone is sufficient to tip the balance of convenience in the Minister's favour in this case because I find that the public interest is implicated in another important respect that favours detention. This is the compelling evidence suggesting that Ms. Erhire would harm herself if she were released. Counsel for Ms. Erhire argues forcefully that no one should be detained under the *IRPA* simply because they face mental health challenges. I agree. The public interest requires Ms. Erhire's continued detention not simply because she faces mental health challenges but because the release order does not provide any effective mechanisms for addressing those challenges in the community. The need for effective supports for Ms. Erhire is particularly pressing given the imminence of her removal.

[47] On the record before me, there is simply too great a risk that Ms. Erhire will not appear for removal despite the best efforts of Ms. Bazarin. Added to this is the fact that, as I have explained above, a key determination by the ID bearing directly on this central issue is

unreasonable. This flaw in the decision likely would warrant setting the release order aside. Consequently, balancing all of the relevant considerations, and recognizing how difficult continued detention will be for Ms. Erhire, I am satisfied that that is the just and equitable outcome. Accordingly, a stay of the order for her release will issue.

[48] It goes without saying that this determination is made on the basis of the record before me on this motion. While I have highlighted aspects of the ID's decision and the evidence that are salient to the application of the test for a stay, nothing I have said should prevent a full and fresh assessment of whether Ms. Erhire's detention continues to be justified at the next detention review.

V. CONCLUSION

[49] For these reasons, the Minister's application for a stay of the release order dated August 26, 2021, is granted.

[50] I am grateful to counsel for their very helpful submissions, which were prepared under demanding time constraints.

ORDER IN IMM-5829-21

THIS COURT ORDERS that

1. The motion to stay the order for the respondent's release from detention dated August 26, 2021, pending the final determination of the application for leave and judicial review of the decision ordering her release is granted.

"John Norris"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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