Federal Court  Cour fédérale

Date: 20220411

Docket: IMM-7717-19

Citation: 2022 FC 518

Toronto, Ontario, April 11, 2022

PRESENT: Madam Justice Go

BETWEEN:

JOSE ARNULFO RECINOS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Pursuant to s. 115(2)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], a Senior Decision-Maker [Decision-Maker] of Immigration, Refugees and Citizenship Canada [IRCC] issued a Danger Opinion on October 27, 2017 against Mr. Jose Arnulfo Recinos [Applicant], on the basis that he is inadmissible on grounds of serious criminality and constitutes

a danger to the public, thereby removing him from the protection of *non-refoulement* found in s. 115(1) of the *IRPA*.

[2] This judicial review application concerns the Decision-Maker's second refusal to reopen the Danger Opinion and consider the new evidence submitted by the Applicant [Decision].

[3] The Applicant submits that the Decision was both unreasonable and procedurally unfair. The Respondent argues that the Decision-Maker reasonably found that the new evidence was insufficient to meet the high threshold for re-opening a Danger Opinion.

[4] I allow the application as I find the Decision unreasonable. The reasons provided by the Decision-Maker in assessing the new evidence do not meet the qualities of justification, transparency and intelligibility that are required within the decision-making process.

II. Background

A. *Factual Context*

[5] The Applicant is a citizen of El Salvador. He came to Canada at the age of 21 via the sponsored refugee program in 1988, during the civil war in his home country and following his father's murder.

[6] Starting in 1992, the Applicant, who has an addiction to alcohol, accumulated a criminal record including convictions for assault, assault causing bodily harm, assault with a weapon,

criminal harassment and uttering threats. He also received convictions for driving while impaired, dangerous operation of a motor vehicle and driving while disqualified, in addition to convictions for failure to comply with recognizances, probation orders, bail conditions, and to attend court. His last offence occurred in 2013, for which he was sentenced to three years in federal custody.

[7] The Applicant has not committed any crimes since 2013 and has been sober since 2014. While in custody, he completed a 12-step program with Chapel Overcomers Recovery Support, he completed the Integrated Correctional Program – Moderate Intensity program, he regularly participated in Alcoholics Anonymous meetings, and he worked as a caregiver. He was evaluated as being in a group where two out of three offenders would not commit an indictable offence after release. After completing his sentence in May 2017, the Applicant was immediately placed in immigration detention.

[8] The Applicant was ordered released from detention by the Immigration Division [ID] on October 15, 2018. Since his release, the Applicant completed another 3-month residential treatment program ending in February 2019, to further his rehabilitation.

B. *Prior Legal Proceedings*

[9] The Canada Border Services Agency [CBSA] issued the Danger Opinion against the Applicant in October 2017 on the basis that the Applicant was inadmissible for serious criminality pursuant to s. 36(1)(a) of *IRPA* as a result of his 2006 conviction for operating a motor vehicle with a blood concentration of 80 milligrams of alcohol in 100 millilitres of blood.

[10] As explained in the Danger Opinion:

> A determination that Mr. Recinos constitutes a danger to the public permits him to be refouled to El Salvador if to do so is in accordance with section 7 of the *Canadian Charter of Rights and Freedoms* (*Charter*). As outlined in the Supreme Court's decision in *Suresh*, to comply with section 7 of the *Charter* requires a balancing of the risk Mr. Recinos faces should he be refouled to El Salvador and the danger to the public should he remain in Canada. Where the evidence demonstrates a substantial risk of torture or the death penalty, the individual cannot be removed save in exceptional circumstances. Humanitarian and compassionate considerations also factor into the balancing exercise.

[11] The Applicant brought an application for leave and judicial review of the Danger Opinion, which was dismissed by the Federal Court.

[12] On June 8, 2018, the Applicant submitted his first request for reconsideration of the Danger Opinion Decision, based on new evidence of risk and of rehabilitation. On June 12, 2018, Justice Heneghan granted the Applicant's motion for a stay of removal. On July 12, 2018, the Applicant's request for reconsideration of the Danger Opinion Decision was refused [First Reconsideration Decision].

[13] The Applicant sought judicial review of the First Reconsideration Decision, and leave was granted.

[14] The Applicant was released from immigration detention on October 15, 2018 (i.e. after the First Reconsideration Decision). As the first reconsideration request had been unable to provide evidence of his sobriety and rehabilitation outside of detention, he submitted another

reconsideration request on March 14, 2019, and provided updated evidence in May, July, August, and October 2019.

[15] Meanwhile, on April 25, 2019, in *Arnulfo Recinos v Canada (Immigration, Refugees and Citizenship)*, 2019 FC 521 [*Arnulfo Recinos*], Justice Strickland found that the refusal to reopen the first reconsideration request was reasonable and procedurally fair.

[16] The Applicant sought and was denied a deferral of removal by CBSA. On May 21, 2019, Justice Boswell granted the Applicant's request for a stay of removal: *Recinos v Canada (Public Safety and Emergency Preparedness)*, 2019 CanLII 49723 (FC).

C. *Decision under Review*

[17] On December 3, 2019, the Applicant's second request to reopen the Danger Opinion Decision was denied. This is the decision under review. The Decision-Maker found that the new evidence was not "materially relevant" to the danger the Applicant poses to the public, his risk of return to El Salvador, or humanitarian and compassionate considerations.

[18] On February 18, 2020, Justice MacDonald granted the Applicant's request for a stay of removal, until the Court disposes of the present application for judicial review: *Recinos v Canada (Citizenship and Immigration)*, 2020 CanLII 12211 (FC).

III. Issues and Standard of Review

[19] The Applicant submits that the issues are whether the Decision-Maker erred in rejecting his new evidence as not materially relevant, and whether the Decision-Maker fettered their discretion. The Respondent submits that the issue is whether the Applicant has established an error that is sufficiently serious to justify granting this application for judicial review.

[20] The Applicant argues that the decision of whether to reopen a Danger Opinion will normally attract the reasonableness standard of review, per *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. Additionally, the Applicant argues that in ignoring evidence, denying legitimate expectations in applying its own guidelines, and erring in law, the Decision-Maker violated the principles of fundamental justice and procedural fairness, which attracts the standard of correctness according to *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *CUPE v Ontario (Minister of Labour)*, 2003 SCC 29 at para 100.

[21] The Respondent argues that the standard of review is reasonableness. According to the Respondent, while the Applicant has argued that procedural fairness is a ground of review in this matter, examining his submissions reveals that the arguments are not about whether he was heard, but about disagreement with the conclusion.

[22] In the judicial review of the First Reconsideration Decision, Justice Strickland laid out the issues and standard of review as follows:

> [10] While the Applicant identified many issues, in my view, these are all encompassed by the following two questions:
>
> i. Did the Decision-Maker breach procedural fairness?
>
> ii. Was the Decision-Maker's refusal to reopen the Danger Opinion reasonable?
>
> [11] The first of these issues is reviewable on a standard of correctness (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43) and the second is reviewable on the standard of reasonableness (*Clarke v Canada (Citizenship and Immigration)*, 2017 FC 393 at para 12 [*Clarke*]).

[23] Justice Strickland used the umbrella of procedural fairness to address arguments that the Applicant had a reasonable expectation that IRCC's guidelines for reopening Danger Opinions would be followed, as well as arguments that the decision maker had imposed an impossible test, though she ultimately rejected both arguments: *Arnulfo Recinos* at paras 12-18.

[24] I will adopt the same approach as outlined by Justice Strickland, and will review the procedural fairness argument, where applicable, on the correctness standard while applying the reasonableness standard to the rest of the arguments.

[25] To set aside a decision on a reasonableness standard, "the reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency", and the onus is on the Applicant to demonstrate that the decision is unreasonable: *Vavilov*, at para 100. When reviewing issues of procedural fairness, the Court's role is to determine whether the proceedings were fair in all the circumstances: *Canadian Pacific Railway Company v Canada (Attorney*

General), 2018 FCA 69 at paras 54-56; *Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35.

IV. Analysis

A. *IRCC Danger Opinion guidelines*

[26] The parties agree that the following operational instructions from IRCC are the relevant guidelines for a decision on whether to reopen a Danger Opinion (ENF 28, "Ministerial opinions on danger to the public, nature and severity of the acts committed and danger to the security of Canada", November 21, 2017, Chapter 7.16) [ENF 28]:

> A decision maker will review the request and determine whether to reopen the original danger decision based on whether the request (along with any accompanying submission) demonstrates one of the following:
>
> - **New Evidence has been submitted that meets all of the following criteria:**
>
> a) Reliable: Is the evidence reliable, considering its source and the circumstances in which it came into existence?
>
> b) Relevance: Is the evidence relevant to the decision type, in the sense that it is capable of proving or disproving a fact that is relevant to the proceeding?
>
> c) Materiality: Is the evidence material, in the sense that the decision maker may have come to a different conclusion if it had been known?
>
> d) Newness: Is the evidence new in the sense that it is capable of:
>
> i. proving the current state of affairs in the country of removal

ii. proving a fact that was unknown at the time of the original decision

iii. contradicting a finding of fact made by the original decision maker?

- **A principle of natural justice was violated by the original decision maker.**

REOPENING AND RECONSIDERING

Where the decision maker decides that a reopening of the original Danger Opinion is required based on either or both of the 2 above assessments, it becomes as though the initial decision was never finalized, and a new decision must therefore be made. The second decision is termed the reconsideration decision. Before the new decision is rendered, the subject of the Danger Opinion and/or their counsel should be informed of the decision to reconsider, and a further opportunity for submissions should be provided.

REFUSAL TO REOPEN AND RECONSIDER

Alternatively, after reviewing the request to reconsider and any submissions made in support of the request, the decision maker may deny the request. The decision maker must explain the reasons for refusing to reopen the original decision with regard to the applicant's submissions and the policy guidelines. This may be done in letter format.

B. *Summary of the Danger Opinion and Reconsideration Request Decisions*

[27] Before analyzing the parties' arguments, I find it useful to summarize the timeline as well as the key findings for the Danger Opinion, the First Reconsideration Decision and the Decision under review in a table set out as follows:

	Danger Opinion dated October 27, 2017	**First Reconsideration Decision dated July 12, 2018**	**Second Reconsideration Decision dated December 3, 2019**

Applicant's location at the time of the decision	The Applicant was incarcerated from May 27, 2015 to May 26, 2017 at Beaver Creek Penitentiary.	The Applicant was in Immigration Detention beginning May 26, 2017.	The Applicant was ordered released from Immigration Detention on October 15, 2018 and was residing in the community with his sister.
Findings on ID decision to release	Not applicable.	Not applicable.	The Applicant was released from immigration detention on conditions. His release did not lessen the danger he poses to the public and would not materially affect the outcome of the original decision.
Findings on rehabilitation	The Applicant's lifetime prohibition on driving and measures taken by his spouse to lock up keys are mitigating factors; however, his recurring pattern of driving while disqualified means he is likely to reoffend. While he has gained insight into his conduct during incarceration, he has not demonstrated an ability to lead a pro-social lifestyle in the community. The Applicant's efforts to control alcohol abuse should be applauded but his intentions remain untested outside of detention. Although alcohol was made available to him in detention and he chose to abstain, this does not	New support letters from family were more evidence in the same vein and do not provide un-biased evidence of rehabilitation. Acknowledged evidence from the Applicant's former spouse that incidents captured in police notes had been misconstrued; however, the Danger Opinion was not based solely on police notes but on assessment of all evidence demonstrating 35+ convictions over 20 years.	Acknowledged notable efforts to participate in treatment and therapy programs since his release from detention. Noting that his efforts to remain sober weighed in his favour in the original decision but were afforded little weight because he was in detention, the evidence post-dating his release was further evidence of the same kind because he must still abstain from substances as part of his release conditions.

	signify rehabilitation. Compliance within detention is to be expected.		
Findings on mental health	Acknowledged submissions that deportation was likely to result in depression. The Applicant saw a physician to discuss anxiety and was prescribed medication. It was unclear if he continued to be followed for anxiety and assertions regarding depression were speculative. There was insufficient evidence he could not seek treatment if symptoms arose.	No findings.	There was a doctor's letter stating he was diagnosed with depressive disorder, had been prescribed anti-depressants, and would deteriorate if removed. This argument was not novel, and the original decision addressed his anxiety issues as well as finding insufficient evidence he could not be treated in El Salvador. The depression diagnosis post-dated the original decision but is not material to the decision. This information did not change the assessment of H&C factors.
Findings on becoming an internally displaced person	The Applicant's profile as a deportee or an alcoholic would not directly result in him being targeted, and there was insufficient evidence to suggest that the Applicant would become a self-employed business owner and face extortion by gangs.	No findings.	No findings.
Findings on work permit	Acknowledged letter from employer stating he will have a job upon release, but did not mention a work permit.	No findings.	Acknowledged that the Applicant had received a work permit and had been working for 2 months. This was not

			new evidence that would materially affect the outcome of the original decision.

[28] With that, I will now turn to the Applicant's specific arguments concerning the new evidence he submitted with his second reconsideration request.

C. *Evidence of release from detention*

[29] The Decision-Maker accepted that the Applicant had been released from detention and that this evidence was new, as it occurred in October 2018. However, the Decision-Maker noted that he was released on conditions, concluding that his release did not mitigate or lessen the seriousness of his criminal record or the danger he poses to the public, and that evidence of his release would not materially affect the outcome of the original decision.

[30] The Applicant submits that it defies logic that his release from immigration detention is considered not material when the determination of the ID, like the Danger Opinion, is whether he "constitutes a present and future danger to the Canadian public." This is especially the case, the Applicant argues, because his continued detention was previously used as a justification that he was not rehabilitated.

[31] I disagree with the Applicant's submission that the determination made by the ID was the same as that for the Danger Opinion. I say so for two reasons. First, I note that the Applicant has not provided a copy of the reasons for the ID decision. The only material in the Certified Tribunal Record was a copy of an Annex to Order for Release dated October 15, 2018, which set

out the conditions for the Applicant's release from detention. Without the ID decision, I am unable to confirm the ID's findings, if any, with respect to the danger to the Canadian public posed by the Applicant.

[32] More importantly, the Applicant's position is not supported by law. In *Canada (Minister of Public Safety and Emergency Preparedness) v Ali*, 2018 FC 552 [*Ali*] Chief Justice Crampton described the statutory framework under which the Immigration and Refugee Board [IRB] shall determine whether a person subject to detention – based on a danger to the public or a flight risk – shall be released. The Chief Justice explained that the IRB is required to consider the factors under ss.245 and 227 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*IRPR*], in considering whether a person is a "flight risk" or a "danger to the public," respectively: *Ali*, para 31.

[33] The Chief Justice then set out the specific provision of the *IRPA*, s.58(2), that gives the IRB the discretion to order the detention of a permanent resident or a foreign national who constitutes a flight risk or a danger to the public, before quoting s.58(3) of *IRPA* which allows the IRB to impose any conditions that it considers necessary, when ordering the release of an individual from detention.

[34] As the Chief Justice explained:

> [47] Once the Minister has made out a *prima facie* case that an individual constitutes a danger to the public or a flight risk, the onus shifts to the individual to demonstrate why his or her release from detention is warranted: *John Doe*, above, at para 4. This principle applies equally to the conditions of release. That is to say, the individual in such circumstances bears the onus of demonstrating

> that any conditions of release are sufficiently robust to ensure that the general public will not be exposed to any material risk of harm, and will provide a reasonable degree of certainty that the individual will report for removal from Canada, if and when required to do so.
>
> [48] Where the Minister demonstrates that an individual is the subject of a Danger Opinion issued pursuant to paragraph 115(2)(a) of the IRPA, a *prima facie* case is established that the individual constitutes a danger to the public. In such circumstances, the onus shifts to demonstrate why his or her release is warranted. This is especially so where, as here, the Danger Opinion was recently issued.

[35] My reading of *Ali* suggests that the decision of the ID to continue to detain or release an individual who is subject to a Danger Opinion is not necessarily, as the Applicant contends, a decision based only on the ID's assessment of whether the individual continues to be a danger to the public. Rather, as the Chief Justice clarified, once the Minister has made out a *prima facie* case that an individual constitutes a danger to the public (which can be demonstrated when the individual is the subject of a Danger Opinion), the ID may still release the individual if they demonstrate that their conditions of release "are sufficiently robust to ensure that the general public will not be exposed to any material risk of harm": *Ali*, para 47.

[36] Viewed in this framework, I agree with the Respondent that the Applicant has, before this Court, overstated the impact of the ID's decision to release him from detention. I also find nothing unreasonable about the Decision-Maker's stating that the ID "was satisfied that an alternative to detention existed and ordered [the Applicant's] release on conditions."

[37] The Applicant also notes jurisprudence stating that "where the detainee is a danger to the public, the scheme of the IRPA and the Regulations contemplates that substantial weight should

be given to maintaining the detainee in detention": *Canada (Public Safety and Emergency Preparedness) v Lunyamila*, 2016 FC 1199 at para 85. The Applicant argues that by the same token, if release has been ordered by the ID, and if the Minister has not requested a stay or challenged the release in Federal Court, then substantial weight should be given to the release order.

[38] Once again, the Applicant is conflating the ID decision to release with a negation of the danger to the public finding. As stated in *Ali*, while being a danger to the public constitutes a *prima facie* case for detention, not all individuals who are a danger to the public shall remain in detention.

[39] Finally, the Applicant reiterates that he is not arguing that the ID decision should outweigh all of the Decision-Maker's other concerns, but only that it is new evidence warranting consideration.

[40] There are merits in this particular argument.

[41] I note that in his second request for consideration dated March 14, 2019, counsel for the Applicant made the following submission in connection with the Applicant's release from immigration detention:

> The positive effect of Mr. Recinos' rehabilitation on eliminating any public risk he might pose is also evident from his release from immigration detention. Member Rempel, in prescribing addictions treatment for Mr. Recinos, also recognizes that alcoholism is treatable and that Mr. Recinos is capable of overcoming his past behaviours and rehabilitating himself.

[42] This initial submission sought to present the ID decision to release the Applicant as evidence of the Applicant's capacity to rehabilitate, which in turn helped eliminate the risk he posed to the public.

[43] The Decision did not address this aspect of the Applicant's submission. Instead, the Decision-Maker noted that the ID decision "does not mitigate or lessen the seriousness of his criminal record nor the danger he poses to the Canadian public." I acknowledge that the ID decision is not meant to modify the Danger Opinion for reasons I have set out above. However, this statement of the Decision-Maker did not explain why the ID decision does not meet the requirements for new evidence under Chapter 7.16 of ENF 28 for the purpose of considering whether to re-open the Danger Opinion, nor was it responsive to the submission made by the Applicant with respect to the ID decision.

[44] While decision makers are not expected to respond to every argument or line of possible analysis, their failure to "meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision maker was actually alert and sensitive to the matter before it": *Vavilov*, para 128.

[45] In this case, the Decision-Maker failed to grapple with the Applicant's submission that his release from immigration detention was further evidence of his rehabilitation, an issue separate and distinct from the Applicant's initial criminality that led to the issuance of the Danger Opinion. The reasons provided by the Decision-Maker also lacked transparency and intelligibility as they failed to explain why the ID decision "does not constitute new evidence

that would materially affect the outcome of the original decision", especially given that the continued detention was previously used as a justification that the Applicant was not rehabilitated, an issue I will review further below.

[46] The lack of transparent and intelligible reasons for rejecting the ID decision as new evidence renders this aspect of the Decision unreasonable.

D. *Evidence of rehabilitation*

[47] The Decision-Maker acknowledged the Applicant's efforts at rehabilitation, but found that because he must abstain from drugs and alcohol as part of his release conditions, evidence of rehabilitation since release from detention was "further evidence of the same kind that was already before me at the time of the original decision" and did not outweigh the danger he posed to the public.

[48] The Applicant argues that this is fallacious reasoning, which implies that he can never benefit from continued abstinence from alcohol because he has abstained before. In the Applicant's view, this reasoning means that any evidence of further sobriety is considered irrelevant because sobriety has already weighed in his favour – notwithstanding that his sobriety was given little weight in the original Danger Opinion Decision.

[49] The Applicant highlights that the reason for giving little weight to his sobriety in the original Danger Opinion Decision was that he was detained at the time. As such, the Applicant argues that he provided the exact evidence found to be missing in the original decision, in order

for his rehabilitation to be given greater weight, and thus it was incumbent upon the Decision-Maker to consider further evidence to determine if his rehabilitation can be given greater weight.

[50] In the Respondent's view, the Applicant's argument that rehabilitation was given a "zero value" in the original decision is based on a misstatement or misapprehension of what the Decision-Maker actually found, as rehabilitation was given some weight, not zero weight.

[51] I disagree with the Respondent. Instead, I agree with the Applicant that his previous efforts to achieve sobriety were given little or no weight, because it took place while he was incarcerated or under immigration detention. Specifically, the Decision-Maker had this to say in the Danger Opinion Decision about the Applicant's rehabilitation:

> Mr. Recinos has been serving his sentence since 2015 and was subsequently detained by CBSA officials earlier this year. He has been in a monitored and restrictive environment and to his credit, has gained insight and has taken advantage of the programming which has been made available to him. I applaud his efforts to gain control of his alcohol abuse, participate in programming to ultimately curb his offence cycle. However, his good intentions remain untested outside of the confines of a detention centre. For this reason, I afford little weight to his abstinence since he was last arrested. While on bail, he was subject to a number of conditions. In detention, the consumption of alcohol was prohibited. And though counsel indicates that alcohol was made available to him in detention and he chose to abstain, in my view does not signify rehabilitation. On the contrary, he was subject to a number of restrictions while incarcerated, alcohol being only one of many, and compliance within that environment is to be expected. It is not indicative of reformation. [emphasis added]

[52] It is clear from the above quoted passage in the Danger Opinion Decision that the Decision-Maker gave no credence to any evidence of sobriety as it "does not signify rehabilitation" and is "not indicative of reformation" because his compliance "is to be expected" and "his good intentions remain untested" while he was detained.

[53] For the same Decision-Maker to then conclude, in the Second Reconsideration Decision, that the Applicant's efforts to remain sober ***after*** his release "constitutes further evidence of the same kind which was already before me at the time of the original decision" was illogical, when the original decision rejected such efforts as rehabilitation because of the Applicant's confinement.

[54] The Respondent also argues that in the judicial review of the First Reconsideration Decision, Justice Strickland found reasonable that evidence of sobriety in detention was "in the same vein" as evidence submitted previously: *Arnulfo Recinos* at para 32. Similarly, according to the Respondent, evidence of sobriety outside of detention but while under conditions of release is "in the same vein" as past evidence.

[55] I reject this argument for two reasons. At the time *Arnulfo Recinos* was decided, the Applicant was still in detention. It was thus reasonable for Justice Strickland to conclude as she did. Second, given that the Decision-Maker previously took such great length to discount the Applicant's "good intentions" because they were "untested" while in confinement, I find it unreasonable to then not accept new evidence about his progress when the Applicant was no longer under detention.

[56] At the hearing, the Respondent went even further to suggest that the Applicant is "not in the community" because he is required to live with his sister. I reject this argument outright. Being subject to the condition that he must reside with his sister, does not mean the Applicant is not released into the community. While he has to respect curfew and return to his sister's every

night, the Applicant is free to go outside, walk on the street, or even go into a bar (although he cannot drink alcohol). There would be plenty of opportunities in the community where his sobriety will be tested – unlike the situation when he was in detention.

[57] As the Applicant submits, it is not reasonable to compare the situation in detention (where he was subject to many restrictions in a strictly enforced environment) to living outside detention for 15 months (where compliance cannot be expected and where he often faces temptation in the community).

[58] It may well be that all the evidence of rehabilitation on the part of the Applicant would not be sufficient to overcome the Danger Opinion, but to reject such evidence as new evidence under ENF 28 as it was "further evidence of the same kind" was unreasonable, particularly in light of the reasoning to the contrary in the Danger Opinion Decision, and in light of the Applicant's continuing sobriety efforts since his release from detention.

[59] Finally, the Applicant argues that the Decision-Maker ought to have considered how addiction should influence the weight to be given to his previous criminality. The Applicant quotes the analysis by Justice Norris in the context of an H&C decision in *Magsanoc v Canada (Citizenship and Immigration)*, 2018 FC 821 [*Magsanoc*] at paras 46-48, arguing that it shows a decision will be unreasonable if it does not properly explore the crucial context between substance abuse, criminality, and rehabilitation.

[60] While I agree with Justice Norris' comment that addiction might, in some cases, mitigate the blameworthiness of an individual's conduct and can be a relevant fact in assessing inadmissibility in the context of a humanitarian and compassionate application (*Magsanoc*, at para 48), that ship has sailed in the case of the Applicant. Without any new evidence that specifically links the issue of alcohol addiction to the Applicant's current situation and/or the risks he may continue to pose to Canadian society, I agree with the Respondent that the Applicant's reference to *Magsanoc* is an attempt to re-litigate the original Danger Opinion Decision.

E. *Evidence of depressive disorder diagnosis*

[61] The Decision-Maker also rejected medical evidence from the Applicant's family physician and social worker/therapist stating that he had been diagnosed with depressive disorder, prescribed antidepressants, and referred for counselling.

[62] Of note, the letter from Dr. Kuisma dated July 29, 2019 stated, in part, that based on the Applicant's current symptoms, Dr. Kuisma has diagnosed him with "a depressive disorder." The letter from the Applicant's social worker/therapist, Ms. Sheida Bamda, dated October 25, 2019, confirmed the Applicant's referral for therapy and counselling services due to his experience with "stress, anxiety and depressive moods."

[63] The Decision-Maker found that this evidence was not novel, as evidence of anxiety was considered in the original decision, and not material, because it would not change the assessment of H&C considerations.

[64] I find the Decision-Maker's rejection of the medical evidence as new evidence unreasonable.

[65] I agree with the Applicant that anxiety issues are substantively distinct from a medical diagnosis of depressive disorder. In the Danger Opinion Decision, while the Decision-Maker referenced a medical note dated November 5, 2015 confirming that the Applicant was seen by a physician to discuss his "anxiety issues", the Decision-Maker specifically rejected counsel's assertion regarding depression to be "speculative." Thus, apart from the fact that anxiety and depression are two different medical conditions, they were also given different treatment by the Decision-Maker in the Danger Opinion Decision. Having made that distinction, the Decision-Maker failed to explain why the new evidence about a new diagnosis of depression, based on the Applicant's "current symptoms" "is not material to the decision."

[66] The Respondent submits that that this diagnosis and medication for depression were not only on record for the original Danger Opinion Decision, but were also in evidence as early as 2015 when he was reported for inadmissibility. However, that was not the basis for the Decision-Maker to reject the evidence, especially since any previous assertion about the Applicant's depression was dismissed as "speculative."

[67] The Respondent further submits that country condition evidence relating to health care is the same or analogous to that before the Decision-Maker originally. The Respondent points out that although the Applicant submitted allegedly "new" evidence on this topic, much of it pre-dates the Danger Opinion Decision. Once again, this submission was not reflected in the

Decision, which made no mention to any country conditions when finding that the diagnosis of depressive disorder was “not material” to the Decision.

[68] With the new evidence submitted for the Second Reconsideration Decision, the Applicant argues that his depression is no longer speculative, and that he has provided the evidence which the Decision-Maker previously found lacking. The Applicant cites *Jama v Canada (Citizenship and Immigration)*, 2019 FC 1644 [*Jama*] at para 26, in which Justice Simpson found a decision not to reopen a Danger Opinion to be unreasonable on the ground that the applicant had a new diagnosis of post-traumatic stress disorder.

[69] I note, first of all, when *Jama* was decided, the provisions under Chapter 7.16 of ENF 28 were identical to the ones that applied to this application. Justice Simpson was therefore applying the same provisions as I am now, in assessing the new medical evidence.

[70] I also note that in concluding that the decision not to reopen the Danger Opinion was unreasonable, Justice Simpson remarked at para 23: “Although the Applicant had suffered many of the symptoms associated with PTSD for a long time he had no diagnosis until Dr. Barker prepared her report in 2018.” I find that situation is analogous to the case at hand.

[71] I do not find persuasive the Respondent’s submission that *Jama* can be distinguished because in that case the applicant’s original submissions had stated he was “healthy”, given Justice Simpson’s comment that the diagnosis was new “in that it was unknown at the time of the Danger Opinion”, allowed for a much broader scope of changing diagnosis.

[72] Nor do I accept the Respondent's submission that unlike *Jama*, the letter from the Applicant's family physician does not give details on how the diagnosis could have affected his past behaviour or future risk of recidivism, but rather merely suggests he would be unable to receive treatment on return to El Salvador and states a belief in general terms that a deterioration in condition would result.

[73] Justice Simpson's finding that the medical letter was new evidence under ENF 28 was not constrained by what the applicant's doctor may have stated in their letter. Instead, after finding that the diagnosis is "new", she explained at para 26:

> The diagnosis was also reliable because the symptoms were corroborated by the Sunnybrook Letter and by the Applicant's partner's affidavit. The diagnosis was material in the sense that the Delegate might have come to a different conclusion had he appreciated that the Applicant had a treatable mental illness. As well, the diagnosis of PTSD explained the Applicant's earlier failures to address his health issues. Lastly, it is now manifestly clear that the Applicant is not an able bodied man.

[74] The above passage did not refer to any past or future risk of recidivism, or the specific opinions of the applicant's doctor, contrary to the Respondent's assertion.

[75] Additionally, the Applicant contends that the Decision-Maker limited the analysis to H&C factors without considering whether this diagnosis would exacerbate his risk in El Salvador. While the original Danger Opinion Decision noted that he could seek care in El Salvador if he began to display symptoms of depression, no analysis was ever done of the adverse impact of suspending *ongoing* care. The new evidence that the Applicant sought to have considered included opinions from his doctor and his counsellor that his mental health would

deteriorate if he were removed to El Salvador. He also provided new country condition evidence on the lack of access to treatment in El Salvador, which he argues directly responded to the Danger Opinion Decision's finding that he could seek treatment in El Salvador.

[76] The Respondent reiterates that a request for reconsideration is not an opportunity to shore up issues found wanting in the original decision, and argues that the new medical evidence would not materially affect the outcome. According to the Respondent, the prognosis found in the new medical evidence (i.e. that his condition will deteriorate upon removal to El Salvador) remains speculative as no basis for the family doctor's opinion in that regard is provided, nor any reason why a comparable assertion could not have been submitted prior to the original decision.

[77] The Applicant replies that the Respondent is attempting to augment the Decision, which offers little explanation of the Decision-Maker's reasoning. I agree. In finding the new medical diagnosis not material, the Decision-Maker explained as follows: "this information does not change my original assessment of his humanitarian and compassionate considerations in such a way that would materially affect the outcome of the decision." There was no mention of the risk that the diagnosis may pose to the Applicant, nor any mention that the diagnosis was rejected in the original decision because it remained speculative at that time.

[78] In conclusion, I find the short, one-paragraph, conclusion provided by the Decision-Maker to reject the medical evidence of a condition that has not been previously diagnosed as "not material" was unreasonable. These reasons, or the lack thereof, failed to meet the hallmark of justification, transparency and intelligibility: *Vavilov*, para 86.

F. *Other Arguments*

[79] The Applicant makes two more arguments which I will address summarily.

[80] First, the Applicant argues that the Decision-Maker's refusal to consider new evidence of the risk he would face as an internally displaced person in El Salvador was a breach of procedural fairness, and was unreasonable.

[81] In my view, the Applicant has not made out a procedural fairness breach. The case law cited by the Applicant does not support his position that the Decision-Maker's failure to refer to certain evidence constitutes a violation of his right to be heard. In addition, I agree with the Respondent that the new evidence, namely the final version of the United Nations Report of the Special Rapporteur [UN Report] was substantially similar to the preliminary version of the UN Report that was previously submitted to the Decision-Maker and was cited in the Danger Opinion Decision. It was thus reasonable for the Decision-Maker not to address the Applicant's further argument regarding internally displaced persons.

[82] The Applicant further submits it was unreasonable for the Decision-Maker to use evidence of his employment in Canada to establish his potential to reintegrate into El Salvador but deny the same evidence in determining his ability to reintegrate to Canada.

[83] I disagree. While I note the Applicant's successful re-integration into the community is an important factor to be considered, in this case, the Applicant's skills and employability were

never questioned by the Decision-Maker in the original decision or thereafter. As such, I do not find it unreasonable for the Decision-Maker to find that the Applicant's two-month employment does not constitute new evidence that would materially affect the outcome of the original decision, which already acknowledged the Applicant's ability to secure gainful employment.

V. Costs

[84] The Applicant requested costs "given the nature of the errors" but did not expand on this argument. I agree with the Respondent that the high threshold of "special reasons" for costs has not been established.

VI. Remedy

[85] The Applicant asks the Court to quash the Decision and refer the matter for redetermination by a different Decision-Maker with any other direction as it considers appropriate. Here, I find it necessary to make a final comment about the Decision to support my decision to refer the matter back to a different decision maker.

[86] In the last paragraph of the Decision, the Decision-Maker remarked:

> Both the original Danger Opinion decision and the decision to refuse to consider the Danger Opinion were challenged in Federal Court. Leave was denied on both matters. The Federal Court was therefore satisfied of the reasonableness of both decisions. Seeking a further request to reconsider the decision in the absence of new evidence that meets the criteria set out in ENF 28 is an abuse of process. For the above mentioned reasons, I find the new information presented does not meet the criteria set out in ENF 28, Chapter 7.16, "Reconsideration of a Danger Opinion". As such, I decline to reopen the Danger Opinion decision of October 27, 2017 which will continue to remain in effect. [emphasis added]

[87] It is one thing to find the evidence the Applicant seeks to submit fails to meet the criteria under ENF 28, it is quite another to find that merely seeking to submit new evidence which does not meet these criteria is "an abuse of process." The Decision-Maker should be reminded that the term "abuse of process"- which is reserved for certain egregious conducts on the part of a litigant and/or a decision maker - should not be thrown around lightly. The evidence that the Applicant sought to submit was in fact found to be "new" by the Decision-Maker, even though it was ultimately rejected on the basis of materiality. There was simply no basis for the Decision-Maker to impugn the Applicant's conduct for submitting new evidence, just because the Decision-Maker chose not to accept such evidence.

[88] Being issued a Danger Opinion has a profoundly negative, life-changing, impact on the Applicant. This designation means the Applicant can be refouled to a country where he may face risks. Even if none of the evidence submitted by the Applicant met the criteria under ENF 28, that alone would still not be sufficient to render the Applicant's reconsideration request "an abuse of process", particularly in light of the severe consequences he faces if the Danger Opinion is allowed to stand.

[89] Moreover, while the Court has twice rebuffed the Applicant's challenge to the Danger Opinion, the Court has also seen fit to stay the Applicant's removal from Canada thrice, signalling its view that there are serious issues to be tried with respect to the Danger Opinion and the accompanying Reconsideration Decisions. Two of the Court's orders to stay were issued before the Decision was released, yet were conveniently left out by the Decision-Maker, who

used this Court's findings, in a not so subtle way, to shore up their allegation of abuse of process against the Applicant.

[90] At the hearing, the Applicant criticized the Decision-Maker as having "the audacity" of calling his reconsideration request an abuse of process, which shows a "closed mind" approach. While I may not have chosen the same word to describe the Decision-Maker's bald assertion, I certainly share the Applicant's concern about the Decision-Maker's ability to keep an open mind. It may even put into question whether this unsubstantiated allegation of "abuse of process" has in any way affected the Decision-Maker's assessment of the evidence submitted. I need not consider this question since the Applicant never raised this argument directly. In any event, my findings above with respect to the evidence are determinative of the issues before me.

[91] For these reasons, I find the appropriate remedy is to refer the matter back to a different decision maker for redetermination. I do so with the expectation that the next decision maker will consider the new evidence already submitted by the Applicant, and any additional new evidence he may submit, in an internally coherent and rational manner before reaching a conclusion that is justified in relation to the facts and the law.

VII. Conclusion

[92] The application for judicial review is allowed and the matter is referred back for redetermination by a different decision maker.

[93] There is no question for certification.

[94] There is no order as to costs.

JUDGMENT in IMM-7717-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed.

2. The matter is referred back for redetermination by a different decision maker.

3. There is no question for certification.

4. There is no order as to costs.

"Avvy Yao-Yao Go"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	JOSE ARNULFO RECINOS v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD VIA VIDEOCONFERENCE
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JUDGMENT AND REASONS:	GO J.
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APPEARANCES:

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