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IMM-643-22

2022 FC 286

Minister of Public Safety and Emergency Preparedness (*Applicant*)

v.

Magabi Lashury Suleiman (*Respondent*)

INDEXED AS: CANADA (PUBLIC SAFETY AND EMERGENCY PREPAREDNESS) V. SULEIMAN

Federal Court, Sadrehashemi, J.—By videoconference, February 16; Ottawa, March 1, 2022.

Citizenship and Immigration — Exclusion and Removal — Inadmissible Persons — Detention and Release — Judicial review of Immigration and Refugee Board, Immigration Division (ID) decision ordering respondent's release from immigration detention — ID member determined that after approximately two-and-a-half years in immigration detention, efforts to remove respondent from Canada had stalled to point where removal could no longer be considered possible — Having found that respondent's removal no longer possible, Member ordered respondent to be released from detention centre — Respondent coming to Canada as stateless refugee with family; obtained permanent resident status — Denied Canadian citizenship due to criminal convictions — Found inadmissible for serious criminality under Immigration and Refugee Protection Act, s. 36(1)(a); ordered deported — Also found to be danger to public; lost protected person status — Now considered foreign national with enforceable removal order — Has had over 30 detention reviews — ID Member found that respondent's removal no longer seen as achievable; therefore, relying on Federal Court of Appeal's decision in Brown v. Canada (Citizenship and Immigration), detention no longer hinged to immigration purpose of removal — Respondent released from immigration detention on several conditions; however, respondent's release stayed by Federal Court until determination of application for judicial review — Issues were whether Member erred in finding that respondent's removal was not possible; whether Member erred in finding no nexus to immigration purpose that could justify continued detention; whether terms, conditions of release Member imposing unreasonable — In this case, ID Member's determination on threshold question of whether respondent's detention remained tied to immigration purpose was central issue on this judicial review — Member's pivotal determination was that possibility of deporting respondent had become illusory, speculative — There was no basis to interfere with Member's assessment of this issue — Member's finding was transparent, intelligible, justified based on review of extensive evidence on file, guidance set out by Federal Court of Appeal in Brown on how to assess when removal is no longer possible — Member's evaluation, conclusion on this issue were therefore reasonable — Regarding possibility that detention could be ordered on stand-alone ground of being danger to public even where removal found not to be possible, Brown not enumerating other circumstances in which detention could occur where it was not pending removal — Member's interpretation was that Brown held that in circumstances like those in respondent's case, there was implicit requirement that

deportation be possible in order for detention to be continued under Act, ss. 58(1), (2); there was nothing in Brown that explicitly excluded those being detained on public danger grounds from requirement that their deportation be possible — Applicant failed to establish that Member's view unreasonable — Member's reasoning intelligible, transparent, justified — Conditions of release also reasonable — Overall, Member considered that in this context, where detention could no longer be ordered because of their determination that removal was no longer possible, these were appropriate conditions to order on release — Application dismissed.

This was an application for judicial review of an Immigration and Refugee Board, Immigration Division (ID) decision ordering the respondent's release from immigration detention. The ID member determined that after approximately two-and-a-half years in immigration detention, efforts to remove the respondent from Canada had stalled to a point where removal could no longer be considered possible. Having found that the respondent's removal was no longer possible, the Member ordered the respondent to be released from the Ottawa-Carleton Detention Centre. The applicant first argued that the Member erred in finding that removal could no longer be considered possible. Second, because the respondent was detained on the ground of being a danger to the public, the applicant's view was that there remained a nexus to the immigration purpose of public safety that could justify detention, even if removal was no longer possible. Lastly, the applicant argued that the release conditions imposed by the Member were unreasonable by failing to adequately address the public safety and/or flight risk concerns and in failing to balance the factors under section 248 of the *Immigration and Refugee Protection Regulations*.

The respondent is considered stateless and might have been born in Uganda. He arrived in Canada as a stateless refugee almost thirty years ago through the refugee resettlement program. He came to Canada from a refugee camp in Kenya and was granted permanent residence upon entry into Canada with his family in 1993. In Canada, the respondent was removed from his family home and placed in foster care for several years during his adolescence. He was later returned to his mother's care. Though other members of his family applied for and received Canadian citizenship, no citizenship application was submitted for the respondent while he was a minor. He applied for citizenship in 2007 when he was approximately 25 years old, but this application was ultimately refused in 2015, presumably due to his criminal convictions. Between 2011-2015, the respondent was convicted of a number of serious criminal offences, including violent offenses. As a result of these criminal convictions, the respondent faced a number of immigration proceedings. In 2016, he was found inadmissible for serious criminality under paragraph 36(1)(a) of the *Immigration and Refugee Protection Act* (Act) and a deportation order was issued against him. The respondent lost his permanent resident status. Later, he was also found to be a danger to the public under paragraph 115(2)(a) of the Act, which resulted in his protected person status no longer being an impediment to the applicant removing him from Canada. The respondent is now considered a foreign national in Canada with an enforceable removal order. Following the completion of his criminal prison sentence in August 2019, the respondent was immediately taken into immigration custody. He remained in immigration detention in a provincial jail since then. Since the respondent has been in immigration detention, he has had over 30 statutory detention reviews where the ID consistently declined to release him. At each detention review, the ability to remove the respondent was at issue since his nationality had still not been confirmed. Throughout this time, the respondent was cooperative with the applicant's extensive efforts to ascertain his nationality for the purposes of acquiring travel documents to facilitate his removal. The applicant and respondent had recently been working toward an agreement with a specific organization for the respondent to be admitted into their in-residence program for treatment.

At the last detention review hearing, the ID Member found that given the failure by Canadian authorities to access any useful information from Kenya or Uganda since the respondent's detention, removal was no longer seen as achievable and therefore, relying on the Federal Court of Appeal's decision in *Brown v. Canada (Citizenship and Immigration)*, detention was no longer hinged to the immigration purpose of removal. The respondent was released from immigration detention on several conditions. However, the respondent's release was stayed until the determination of this application for judicial review.

The issues raised by the applicant in challenging the ID Member's release decision were whether the Member erred in finding that the respondent's removal was not possible; whether the Member erred in finding no nexus to an immigration purpose that could justify continued detention; and whether the terms and conditions of release the Member imposed were unreasonable.

Held, the application should be dismissed.

The Member's assessment that the efforts to remove the respondent had stalled and could no longer be said to be possible was a reasonable evaluation of the evidence and application of the principles set out in the Federal Court of Appeal's decision in *Brown*.

The Federal Court of Appeal's decision in *Brown,* in response to a challenge to the fairness and constitutionality of the detention review scheme under sections 7, 9 and 12 of the *Canadian Charter of Rights and Freedoms*, comprehensively addressed numerous parts of the scheme. Ultimately, the Federal Court of Appeal determined that the appellants' challenge to the validity of the detention scheme failed but noted that many of their arguments were vindicated as to what judges conducting detention reviews must consider. The Federal Court of Appeal found that there were implicit requirements informing the interpretation of whether a member could find that there were grounds to detain under subsection 58(1) of the Act. It held that as a threshold issue, the member had to be satisfied that the applicant had established that there remained a nexus between the detention and an immigration purpose; in cases where the person was detained pending removal, this nexus would not be fulfilled if there was no possibility of removal. In this case, the ID Member's determination on this threshold question of whether the respondent's detention remained tied to an immigration purpose was the central issue on this judicial review. The Member's pivotal determination was that the possibility of deporting the respondent had become "illusory" and "so remote as to be speculative." The Member reached this conclusion after a thorough review of the applicant's and the respondent's efforts to date in determining his country of birth and obtaining travel documents to facilitate removal. The Member reviewed the Federal Court of Appeal's guidance in *Brown* on how decision makers should approach the assessment of whether removal remains a possibility and applied this framework to their evaluation of the evidence. There was no basis to interfere with the Member's assessment of this issue. The Member's determination that removal was no longer a possibility was not premature. In reviewing the applicant's efforts in their full context, the Member determined that the prospect of being able to obtain travel documents for the respondent, a stateless person, 30 years after his landing in Canada, had become illusory. The Member's finding was transparent, intelligible and justified based on a review of the extensive evidence on file and the guidance set out by the Federal Court of Appeal in *Brown* on how to assess when removal is no longer possible. The Member's evaluation and conclusion on this issue were therefore reasonable.

The applicant argued that the Member's interpretation of *Brown* was not reasonable because the Federal Court of Appeal left open a possibility that detention could be ordered on the stand-alone ground of being a danger to the public, even where removal was found to not be possible. The Federal Court of Appeal did not enumerate the other circumstances in which detention could occur where it was not pending removal. Neither the applicant nor the respondent could be certain about the meaning of the circumstances, other than removal, that the Federal Court of Appeal might have been referring to in its decision on this point. The applicant argued that this was a "grey area" left by the *Brown* decision. The Member's interpretation of this grey area was that: (i) the Federal Court of Appeal in *Brown* held that in circumstances like those in the respondent's case, there was an implicit requirement that deportation be possible in order for detention to be continued under subsections 58(1) and (2) of the Act; and (ii) there was nothing in *Brown* that explicitly excluded those being detained on public danger grounds from the requirement that their deportation be possible. The applicant failed to establish that the Member's view was unreasonable. There was no basis to interfere with the Member's decision. The reasoning was intelligible, transparent and justified in light of the record and the submissions made to the Member.

The conditions of release were also reasonable. The release decision had to be considered in its context. The Member had before them materials from over 30 detention reviews. Parliament has

conferred upon the Immigration Division, not the 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. Overall, the Member considered that in this context, where detention could no longer be ordered because of their determination that removal was no longer possible, these were the appropriate conditions to order on release. The Member considered the rehabilitation programs the respondent had already attended, his most recent behaviour in immigration detention, his cooperation with the CBSA officials, and his willingness to participate in two specific programs for sex offenders that were available to him. In the exceptional circumstances of this case, the conditions were reasonable.

STATUTES AND REGULATIONS CITED

Canadian Charter of Rights and Freedoms, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44], ss. 7, 9, 12.

Immigration and Refugee Protection Regulations, SOR/2002-227, s. 248.

Immigration and Refugee Protection Act, S.C. 2001, c. 27, s. 36(1)(a), 58, 115(2)(a).

CASES CITED

APPLIED:

Brown v. Canada (Citizenship and Immigration), 2020 FCA 130, [2021] 1 F.C.R. 53; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653; *Canada (Citizenship and Immigration) v. Mason*, 2021 FCA 156, [2022] 1 F.C.R. 3.

CONSIDERED:

Canada (Public Safety and Emergency Preparedness) v. Suleiman, IMM-643-22, Fothergill J., order dated February 1, 2022 (F.C.) (unreported); *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350; *Canada (Public Safety and Emergency Preparedness) v. Taino*, 2020 FC 427, [2020] 4 F.C.R. D-1; *Canada (Public Safety and Emergency Preparedness) v. Samuels*, 2009 FC 1152, [2010] 2 F.C.R. D-13; *Ali v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2017 ONSC 2660, 137 O.R. (3d) 498; *Canada (Public Safety and Emergency Preparedness v. Thavagnanathiruchelvam*, 2021 FC 592.

REFERRED TO:

Isse v. Canada (Citizenship and Immigration), 2011 FC 405, 200 A.C.W.S. (3d) 1114; *Canada (Public Safety and Emergency Preparedness) v. Lunyamila*, 2016 FC 1199, [2017] 3 F.C.R. 428; *Canada (Public Safety and Emergency Preparedness) v. Thomas*, 2021 FC 456, 82 Imm. L.R. (4th) 196; *Canada (Public Safety and Emergency Preparedness) v. Shen*, 2020 FC 405.

APPLICATION for judicial review of an Immigration and Refugee Board, Immigration Division decision (2022 CanLII 131157) ordering the respondent's release from immigration detention. Application dismissed.

APPEARANCES

Kevin Spykerman for applicant.

Jessica Chandrashekar and *Benjamin Liston* for respondent.

SOLICITORS OF RECORD

Deputy Attorney General of Canada for applicant.

Legal Aid Ontario Refugee Law Office, Toronto, for respondent.

The following are the reasons for judgment and judgment rendered in English by

Sadrehashemi J.:

I. Overview

[1] On January 21, 2022, a Member of the Immigration Division (Member) ordered Mr. Suleiman's release from immigration detention [*Suleiman v. Canada (Public Safety and Emergency Preparedness)*, 2022 CanLII 131157 (I.R.B.)]. The Member determined that after approximately two and a half years in immigration detention, efforts to remove Mr. Suleiman from Canada had stalled to a point where removal could no longer be considered possible. Having found that Mr. Suleiman's removal was no longer possible, the Member ordered Mr. Suleiman to be released from the Ottawa-Carleton Detention Centre.

[2] The applicant, the Minister of Public Safety and Emergency Preparedness (the Minister), has challenged Mr. Suleiman's release from immigration detention. The Minister first argues that the Member erred in finding that removal could no longer be considered possible. Second, because Mr. Suleiman was detained on the ground of being a danger to the public, the Minister's view is that there remained a nexus to the immigration purpose of public safety that could justify detention, even if removal was no longer possible. Lastly, the Minister argues that the release conditions imposed by the Member were unreasonable by failing to adequately address the public safety and/or flight risk concerns, and in failing to balance the factors under section 248 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (IRPR).

[3] I find the Member's assessment that the efforts to remove Mr. Suleiman had stalled and could no longer be said to be possible was a reasonable evaluation of the evidence and application of the principles set out in the Federal Court of Appeal's decision in *Brown v. Canada (Citizenship and Immigration)*, 2020 FCA 130, [2021] 1 F.C.R. 53 (*Brown*). On the issue of nexus to an immigration purpose, I find it reasonable that the Member, relying on *Brown*, held that there was no longer a nexus given their finding that removal was no longer possible. Overall, given the exceptional circumstances of this case, I find the Member's determination on the conditions for release to be reasonable.

[4] For the reasons set out below, the Minister's application for judicial review is dismissed.

II. Background Facts

[5] Mr. Suleiman is considered stateless as he has no confirmation of citizenship in any country. It is believed that he was born in Uganda but this has not been confirmed.

[6] Mr. Suleiman arrived in Canada as a stateless refugee almost thirty years ago, at 11 years old, through the refugee resettlement program. He came to Canada from a

refugee camp in Kenya, where he and his family lived for several years. Mr. Suleiman was granted permanent residence upon entry into Canada with his family in 1993.

[7] In Canada, Mr. Suleiman was removed from his family home and placed in foster care for several years during his adolescence. He was returned to his mother's care when he was approximately sixteen years old. Though other members of his family applied for and received Canadian citizenship, no citizenship application was submitted for Mr. Suleiman while he was a minor. He applied for citizenship in 2007 when he was approximately 25 years old, but this application was ultimately refused in 2015, presumably due to his criminal convictions.

A. *Criminality and loss of status*

[8] Between 2011-2015, Mr. Suleiman was convicted of a number of serious criminal offences, including: (1) failing to comply; (2) possession of a Schedule 1 substance; (3) causing a disturbance; (4) trafficking in a Schedule 1 substance; (5) possession of a Schedule 2 substance for the purpose of trafficking; (6) mischief under $5,000; (7) sexual assault; (8) criminal harassment; (9) mischief in relation to property; (10) forcible confinement; and (11) theft.

[9] Mr. Suleiman's criminal offences that took place between June 2010 and April 2011 were particularly serious and violent. He was convicted of two counts of sexual assault, where he was found to have preyed upon vulnerable young women, who were intoxicated, by posing as an underground cab driver.

[10] I pause to note for the completeness of the record that during the course of these judicial review proceedings, it was confirmed by both parties that the Member had misstated the extent of Mr. Suleiman's criminal convictions in their decision, where they found that he had been convicted of 14 counts of sexual assault, and erroneously referred to him as the high profile "Byward Market Rapist". Neither of the parties are relying on this error in advancing any argument on judicial review.

[11] On October 30, 2014, Mr. Suleiman was sentenced to 4 years, 9 months and 10 days. He served the majority of his sentence at Millhaven Maximum Security Institution and was detained until his warrant expiry on August 7, 2019.

[12] As a result of these criminal convictions, Mr. Suleiman faced a number of immigration proceedings. In February 2016, Mr. Suleiman was found inadmissible for serious criminality under paragraph 36(1)(a) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) and a deportation order was issued against him. Mr. Suleiman lost his permanent resident status. He also was found, on October 1, 2019, to be a danger to the public under paragraph 115(2)(a) of IRPA (Danger Opinion), which resulted in his protected person status no longer being an impediment to the Minister removing him from Canada. Mr. Suleiman is now considered a foreign national in Canada with an enforceable removal order.

B. *Immigration detention*

[13] Following the completion of his criminal prison sentence on August 7, 2019, Mr. Suleiman was immediately taken into immigration custody. He has remained in immigration detention in a provincial jail since then.

[14] Since Mr. Suleiman has been in immigration detention, he has had over 30 statutory detention reviews where the Immigration Division has consistently declined to release him on the grounds that he is a danger to the public in Canada, he is unlikely to appear for removal and there are no adequate alternatives to detention proposed to mitigate those risks if Mr. Suleiman was released. At each detention review, the ability to remove Mr. Suleiman has been at issue since his nationality has still not been confirmed.

[15] Throughout this time, Mr. Suleiman has been cooperative with the Minister's extensive efforts to ascertain his nationality for the purposes of acquiring travel documents to facilitate his removal.

[16] Recently, the Minister and Mr. Suleiman have been working toward an agreement with the John Howard Society for Mr. Suleiman to be admitted into their in-residence program. The John Howard Society stated that it would consider admitting Mr. Suleiman into its in-residence program provided that he was also accepted into treatment programs at Circles of Support and Accountability Ottawa (CoSA) and the Royal's Sexual Behaviour Clinic (RSBC). Mr. Suleiman had been accepted into the CoSA program some time ago, and was recently admitted into the RSBC program.

C. *January 12, 2022 detention review hearing and decision*

[17] At the most recent detention review hearing on January 12, 2022, Minister's Counsel advised that the John Howard Society would take a few weeks to assess Mr. Suleiman's file now that he had been accepted into the required programs. If and when the John Howard Society accepted Mr. Suleiman into its in-residence program, the parties would work together to make a plan for release as soon as possible.

[18] Minister's Counsel also presented evidence that Public Services and Procurement Canada (PSPC) International had declined to approve the contract to commence a private investigation in Uganda into Mr. Suleiman's identity. Minister's Counsel advised the Member that it was unclear whether the issue was with the private investigative company or Uganda itself, since Canada does not have a bilateral security agreement with Uganda.

[19] Counsel for Mr. Suleiman had only learned about the setback in the Uganda investigation the day prior to the hearing. At the hearing, counsel asked the Member to issue the following orders:

(a) Summon the Canada Border Services Agency (CBSA) official liaising with PSPC International to testify and shed light on the stalled private investigation in Uganda;

(b) Schedule an early detention review to hear the evidence from the CBSA official;

(c) Disclose all communications between the Canadian and Ugandan authorities; and

(d) Release Mr. Suleiman on the ground that there is no nexus between his detention and an immigration purpose, and without conditions as removal was no longer possible

[20] Minister's Counsel did not object to calling the CBSA official to provide testimony and agreed to produce him at the next detention review hearing. The Member determined that an early detention review hearing was unnecessary at this time, but noted that if there was progress obtaining an alternative to detention with the John Howard Society, either party could request an early hearing.

[21] The Member advised that they were not prepared to render a decision on the two remaining orders requested by Mr. Suleiman—namely, the disclosure of communications between the Canadian and Ugandan authorities, and the issue of nexus between detention and an immigration purpose and conditions upon release—and that an interim decision would be issued prior to the next detention review.

[22] The Member determined that Mr. Suleiman continued to be a danger to the Canadian public and a flight risk. In considering the section 248 factors in IRPR, the Member found that the length of time in detention (two and a half years) and the ongoing setbacks in the Ugandan investigation weighed in favour of releasing Mr. Suleiman, although the Member acknowledged that these continued setbacks were out of the hands of the CBSA. Further, the Member noted while the parties have been diligent in following up with Mr. Suleiman's conditions in detention, he has had to endure difficult conditions, especially as a surge in COVID-19 cases at the detention centre had meant that there had been limited movement in detention and access to showers had been an ongoing issue.

[23] The Member found that there were no alternatives to detention, but noted that the parties were very close to obtaining a reasonable alternative through the program at John Howard Society and encouraged the parties to continue to work on securing this alternative. The Member ordered Mr. Suleiman's continued detention.

D. *January 21, 2022 decision to release*

[24] In a written decision, dated January 21, 2022, the Member rendered their decision on the two remaining orders requested by Mr. Suleiman and ultimately ordered his release from immigration detention.

[25] The Member acknowledged that the CBSA had made concerted but unsuccessful efforts to determine Mr. Suleiman's country of birth. However, the latest information from the Minister regarding the Ugandan investigation showed that the procurement process had stalled and the next steps were not sufficiently concrete to satisfy the Member that travel documents would be obtained through the investigation. The Member found that given the failure by Canadian authorities to access any useful information from Kenya or Uganda since Mr. Suleiman's detention, removal is no longer seen as achievable and therefore, relying on the Federal Court of Appeal's decision in *Brown*, detention was no longer hinged to the immigration purpose of removal.

[26] The Member further found, relying on subsection 58(3) of IRPA and the *habeas corpus* jurisprudence, that they had the authority to impose conditions on Mr. Suleiman's release, despite having found that removal could no longer be considered possible. However, since they had already found that detention was not permissible if removal was no longer possible, the Member found that a *de facto* detention created through house arrest, curfews or in-residence programs, would not be reasonable in these circumstances.

[27] The Member ordered the release of Mr. Suleiman from immigration detention on the following conditions:

(a) Keep the peace and be of good behaviour;

(b) Provide the CBSA with a residential address prior to release, and then advise the CBSA of any change of address thereafter before it takes effect;

(c) Present himself at the date, time, and place required by the CBSA;

(d) Fully participate in the CoSA counselling program in accordance with its terms and conditions; and

(e) Fully participate in the RSBC counselling program in accordance with its terms and conditions.

[28] The Member concluded that given there was no possibility of removal, Mr. Suleiman's application for an order to disclose all communications between the Canadian and Ugandan authorities was no longer required. The Member further annulled its orders made at the detention review hearing on January 12, 2022.

E. *Proceedings before this Court*

[29] On January 22, 2022, the Minister filed the notice for this application for leave and judicial review of the order to release Mr. Suleiman. Counsel for the Minister also wrote to the Court asking for an interim stay of the release order until they could bring a motion for a further order staying Mr. Suleiman's release pending the determination of the underlying application for leave and judicial review. The interim stay was granted and the stay motion was scheduled to be heard on January 31, 2022.

[30] Following the stay motion hearing, on February 1, 2022, Justice Fothergill granted the stay of the order to release Mr. Suleiman from detention [*Canada (Public Safety and Emergency Preparedness) v. Suleiman*, IMM-643-22, Fothergill J., order dated February 1, 2022 (F.C.) (unreported)]. Justice Fothergill was satisfied that the Minister had established serious issues to be tried and irreparable harm if the stay was not granted because the conditions of release imposed by the Member were insufficient to address the danger Mr. Suleiman presents to the Canadian public. He found that the Member imposed minimal conditions of release that were not sufficient to "virtually eliminate" the risk because the Member did not believe it had the authority to do anything more. Further, Justice Fothergill found that the balance of convenience lay in favour of the Minister and any inconvenience to Mr. Suleiman would be mitigated by granting leave to commence the underlying application for judicial review and ordering that it be determined on an expedited basis.

[31] On February 3, 2022, by way of joint request of the parties, the hearing of the judicial review was scheduled for February 16, 2022. The parties also advised the Court that Mr. Suleiman's next detention review was scheduled before the Immigration Division on February 18, 2022.

[32] At the close of the oral hearing on the afternoon of February 16, 2022, I advised the parties that the issues raised were complex and that I required some time to

consider their submissions. I advised that I was not certain whether I would be able to issue a decision prior to the detention review on February 18, 2022. I was advised by counsel for the respondent that they would seek instructions from their client and would endeavour to ask the Immigration Division to postpone the detention review, though this decision would ultimately be for the Immigration Division to make. I asked that the parties alert the Court of any subsequent decision.

[33] On February 21, 2022, I learned that the Immigration Division rejected the joint request of counsel for Mr. Suleiman and Minister's Counsel to postpone the hearing scheduled for February 18, 2022. The hearing proceeded on February 18, 2022 but the Immigration Division agreed to the joint proposal of the parties to order Mr. Suleiman's release based on the same decision issued on January 21, 2022, that is under review on this application for judicial review. No new evidence or submissions were filed.

[34] Given that Mr. Suleiman's release was stayed until a decision was issued on this judicial review, on February 23, 2022, as soon as I was in a position to release my decision, I issued an order dismissing the Minister's judicial review, with detailed reasons to follow.

F. *Preliminary issue: evidence before the Member*

[35] There was a preliminary issue about the evidence that had been before the Member. Despite initial objections, the parties eventually agreed that the danger opinion decision had been entered in evidence before the Immigration Division and was therefore properly before this Court on judicial review. With respect to the Correctional Service Canada Security Report, the respondent objected to its inclusion in the record given that they disputed that it had ever been before the Immigration Division. The Minister was not able to present any evidence to demonstrate that it had been entered into evidence before the Immigration Division. Accordingly, I did not consider this report in my decision or rely on the Minister's submissions in their written argument that relied upon it.

III. Issues and Standard of Review

[36] There are a number of issues that the Minister has raised in challenging the Member's release decision: (i) whether the Member erred in finding that Mr. Suleiman's removal was not possible; (ii) whether the Member erred in finding no nexus to an immigration purpose that could justify continued detention; and (iii) whether the terms and conditions of release the Member imposed were unreasonable. No fairness in respect of the process of the detention review were raised by either party.

[37] Both parties agree that the standard I should apply in evaluating the Member's decision on these issues is reasonableness. The Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653 (*Vavilov*) confirmed that reasonableness is the presumptive standard of review when reviewing administrative decisions on their merits. This case raises no issue that would justify a departure from this presumption.

[38] In *Vavilov*, the Supreme Court of Canada described the reasonableness standard as a deferential but nonetheless "robust form of review", where the starting point of the analysis begins with the decision-maker's reasons (at paragraph 13). A

decision-maker's formal reasons are assessed "in light of the record and with due sensitivity to the administrative regime in which they were given" (*Vavilov*, at paragraph 103).

[39] The Court described a reasonable decision as "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 paragraph 85). Administrative decision-makers, in exercising public power, must ensure that their decisions are "justified, intelligible and transparent, not in the abstract, but to the individuals subject to it" (*Vavilov*, at paragraph 95).

IV. Analysis

A. *Federal Court of Appeal decision in* Brown

[40] The Federal Court of Appeal's decision in *Brown,* in response to a challenge to the fairness and constitutionality of the detention review scheme under sections 7, 9 and 12 of the Charter [*Canadian Charter of Rights and Freedoms*], comprehensively addressed numerous parts of the scheme. Ultimately, the Court determined that the appellants' challenge to the validity of the detention scheme failed but noted that "many of their arguments are vindicated by what is said in these reasons concerning what judges conducting detention reviews must consider" (at paragraph 20). The Court highlighted that "[Immigration Division] members conducting detention reviews and judges sitting in judicial review, must consider Charter and administrative law standards" (at paragraph 20).

[41] A key issue in *Brown* was whether the detention scheme set out in IRPA and IRPR was constitutionally deficient in that there was no explicit time limit on the length of detention and no explicit statutory requirement that a member release a detainee where removal was no longer reasonably foreseeable. The Federal Court of Appeal found that there were implicit requirements informing the interpretation of whether a member could find that there were grounds to detain under subsection 58(1) of IRPA.

[42] Relying on the decision of the Supreme Court of Canada in *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350 (*Charkaoui*) and finding there to be a general congruence with the *habeas corpus* jurisprudence on this point (*Brown*, at paragraphs 22–23 and 95), the Court of Appeal held that as a threshold issue, the member had to be satisfied that the Minister had established that there remained a nexus between the detention and an immigration purpose; in cases where the person was detained pending removal, this nexus would not be fulfilled if there was no possibility of removal (*Brown*, at paragraph 44).

[43] The Member's determination on this threshold question of whether Mr. Suleiman's detention remained tied to an immigration purpose, facilitating the machinery of immigration control, is the central issue on this judicial review.

B. *The Minister has failed to establish removal is possible*

[44] The Member's pivotal determination was that the possibility of deporting Mr. Suleiman had become "illusory" and "so remote as to be speculative." The Member reached this conclusion after a thorough review of the Minister's and Mr. Suleiman's

efforts to date in determining his country of birth and obtaining travel documents to facilitate removal. The Member reviewed the Federal Court of Appeal's guidance in *Brown* on how decision-makers should approach the assessment of whether removal remains a possibility and applied this framework to their evaluation of the evidence. I see no basis to interfere with the Member's assessment of this issue.

[45] Relying on the Supreme Court of Canada's decision in *Charkaoui*, the Federal Court of Appeal in *Brown* held that "detention is warranted where it is 'reasonably necessary' and removal 'a possibility'" (at paragraph 93). The Court rejected the reasonable foreseeability of removal test and instead adopted an approach where the decision maker would ask whether deportation still remained possible [at paragraph 92]:

> …. When examining the constitutionality of indeterminate detention the question is whether removal, and not the precise date on which removal will occur, remains a possibility: *Charkaoui*, at paragraphs 125–127, citing *A. v. Secretary of State for the Home Department*.

[46] The Federal Court of Appeal provided guidance to decision makers on the criteria to use in determining whether there still remained a possibility of deportation [at paragraph 95]:

> …. The decision maker must be satisfied, on the evidence, that removal is a possibility. The possibility must be realistic, not fanciful, and not based on speculation, assumption or conjecture. It must be grounded in the evidence, not supposition, and the evidence must be detailed and case-specific enough to be credible.

[47] The Member acknowledged that over the last two and a half years, the CBSA had made concerted but unsuccessful efforts to determine Mr. Suleiman's country of birth and to obtain travel documents so that he could be removed from Canada. Mr. Suleiman has been cooperative with those efforts. The Member detailed the extent of these efforts:

(a) Request for assistance from the Ugandan authorities for an emergency travel document;

(b) Requests to the Ugandan Passport Control Office, the Ugandan National Identification Registration Authority and the Uganda Registration Service Bureau for any documentation on Mr. Suleiman;

(c) Attempts to establish family connections to provide to Ugandan authorities;

(d) Interviews and phone calls with family members in Canada, most notably Mr. Suleiman's sister;

(e) Trips to British Columbia to conduct a door knock on the remaining relatives of Mr. Suleiman;

(f) Communications with the Ugandan High Commission;

(g) Soliciting information from Canada's overseas missions in Africa;

(h) A linguistic assessment in an attempt to verify Mr. Suleiman's nationality;

(i) Correspondences with the overseas Liaison Officer responsible for Kenya to reach out to both Kenyan Immigration and Kenya's National Bureau for any records of Mr. Suleiman, his mother or his sister;

(j) Repeated interviews with Mr. Suleiman;

(k) Meetings with the Immigration Attaché and High Consular Official for the Ugandan High Commission;

(l) Liaising with Passport Intelligence to provide copies of any documentation used by Mr. Suleiman and his family members when they applied for Canadian Passports, Canadian Citizenship and Permanent Residency;

(m) Seeking information and assistance from the Red Cross and the United Nations High Commission for Refugees (UNHCR);

(n) Hiring private investigators to investigate in Kenya in the hope of finding background information and documentation on Mr. Suleiman; and

(o) Attempts to secure a similar contract with private investigators to investigate in Uganda.

[48] The Member noted that the step taken to hire private investigators in Kenya was an extraordinary, costly, and highly unusual effort. The Immigration Division learned that this effort had failed in July 2021, after Mr. Suleiman had been detained for approximately two years. At that point, Minister's Counsel advised that "all possible avenues to establish the nationality and place of birth of Mr. Suleiman were exhausted in Kenya as no official documentation was uncovered there." The Minister's next strategy was to seek to secure a contract with the same private investigators to conduct a similar inquiry in Uganda. Over the last approximately six months, at each 30-day review, Minister's Counsel provided updates to the Immigration Division about their efforts at securing this contract to be able to move forward with this further investigative work in Uganda.

[49] However, the latest information from the Minister regarding the Ugandan investigation showed that the procurement process had stalled. The Member reviewed the evidence that had been presented about the process over the most recent detention reviews. At the December 2021 detention review, the Immigration Division was advised that there were still a few remaining issues to work out with PSPC International before the private investigation in Uganda could be finalized, but Minister's Counsel expressed optimism that the contract could be awarded over the next 30 days. At the most recent detention review, on January 12, 2022, the Member learned that PSPC International refused to approve the contract because of their view that Uganda did not meet the security standards required. The Member reviewed the options that were presented by the CBSA official who had been liaising with PSPC and found that the options they presented about the next steps "are not sufficiently concrete to advance the process of obtaining travel documents for Mr. Suleiman." The Member found that the steps outlined are "too oblique, too speculative, and too unrealistic, based on previous futile or unsuccessful attempts to uncover evidence from Uganda and Kenya, to satisfy this Panel that the Canadian authorities will obtain travel documents through investigation."

[50] The Member situated this last setback within the larger picture of the continuous efforts by the Minister and Mr. Suleiman in Canada, Uganda and Kenya, to obtain travel documents to facilitate removal. Ultimately, the Member found that given the failure by Canadian authorities to access any useful information from Kenya or Uganda since Mr. Suleiman's detention, over two and a half years ago, removal could no longer be seen as achievable and therefore detention was no longer hinged to the immigration purpose of removal.

[51] The Minister argues that the Member's determination that removal was no longer a possibility was premature. The Minister's view is that the Member should have waited to hear more information about next steps from the CBSA official who was tasked with securing the private investigation contract, who was supposed to be testifying at the next detention review hearing.

[52] The problem with the approach advanced by the Minister is that it considers the effort to secure a contract for a private investigator in Uganda in isolation without the full context of the totality of the efforts made to date. It may well be that at each stage, the Minister is making good faith and reasonable efforts at moving forward with some activity with a view that it may lead to obtaining further information for a travel document. But this does not answer the question as to whether removal remains a possibility, when reviewing those efforts in their full context. The Member determined that the prospect of being able to obtain travel documents for Mr. Suleiman, a stateless person, 30 years after his landing in Canada, had become illusory:

> …. Considering the failure by Canadian authorities to access any useful information from Uganda in the year since Mr. Suleiman's detention, the incomplete record of Mr. Suleiman's African origins, the failed investigation in Kenya, as well as the ill-fated investigation in Uganda, this Panel concludes that obtaining travel documentation some 30 years after Mr. Suleiman's landing in Canada is illusory. The CBSA can continue looking at options *ad infinitum*. However, Mr. Suleiman cannot be held in detention indefinitely while awaiting results. There must necessarily come a point where the impasse is accepted, and removal is no longer seen as achievable.

[53] The Member's finding was transparent, intelligible and justified based on a review of the extensive evidence on file and the guidance set out by the Federal Court of Appeal in *Brown* on how to assess when removal is no longer possible.

C. *No nexus to immigration purpose where removal is no longer possible*

[54] The Member found that because they determined that Mr. Suleiman's removal was no longer possible, continued detention could no longer be ordered. The Member's assessment of this issue relied on the Federal Court of Appeal's decision in *Brown.* I find that the Member's evaluation and conclusion on this issue to be reasonable.

[55] I note that there were limited submissions made to the Member on this issue at the oral hearing. No party raised any procedural fairness concerns relating to their ability to bring forward their arguments on this issue.

[56] The Member first addressed the Minister's Counsel's argument that the Member must follow the decision in *Canada (Public Safety and Emergency Preparedness) v. Taino*, 2020 FC 427, [2020] 4 F.C.R. D-1 (*Taino*) where this Court found that even if a

person's removal was stayed, detention could be ordered if there remained a basis to detain on the statutory ground of being a danger to the public.

[57] The Member summarized the *Taino* decision and then explained their view that *Taino* need not apply as it predates the Federal Court of Appeal's decision in *Brown*. The Member reasoned that *Brown* affirmed that, in these circumstances, where removal was not possible, there was no longer a nexus to an immigration purpose. The Member also noted that there was no indication by the Federal Court of Appeal that someone being held on the ground of being a danger to the public was an exception to the implicit requirement that there must be a possibility of deportation to be able to order continued detention under subsections 58(1) and (2) of IRPA. The Member found that the determination in *Taino*—that danger was a stand-alone ground, irrespective of whether deportation was going to occur—was not endorsed by the Court of Appeal, though the *Taino* decision itself was cited for different reasons.

[58] I find the Member's approach to the *Taino* decision on the issue of nexus to be a reasonable interpretation of the impact of *Brown*.

[59] Though nothing in this decision turns on this distinction, I acknowledge that the factual context underlying the two cases is distinct. The Member considering Mr. Suleiman's case was facing a similar fact scenario as that contemplated by the Federal Court of Appeal in *Brown*, i.e. "The person has no right to remain in Canada but Canada has no ability to effect the removal" (at paragraph 1) and has been kept in detention on immigration grounds for a lengthy period. Mr. Suleiman has no right to remain in Canada but the Member has also determined that there is no possibility that Canada could deport him. The factual context of *Taino* is different. In *Taino,* this Court was considering a decision in relation to someone who had just received a stay of their removal because of a positive decision on a Pre-Removal Risk Assessment (PRRA); in other words, Mr. Taino had a right to remain in Canada because Canadian officials had granted him a stay of his removal. This Court in *Taino* also noted that the length of immigration detention for Mr. Taino had been considerably shorter (2.5 months) than those cases from the *habeas corpus* context upon which the Immigration Division was relying upon (at paragraph 72).

[60] The Federal Court of Appeal in *Brown* found where a person is detained pending removal, the implicit requirement that deportation be possible must be read into an interpretation of the grounds authorizing continued detention under section 58 of IRPA. The Federal Court of Appeal held that the scheme was not unconstitutional for not having set time limits or the requirement that removal be reasonably foreseeable because "to require an express statement that the power of detention can only be exercised where there is a real possibility of removal would be to read-in a redundancy" (*Brown*, at paragraph 60). This runs counter to the finding in *Taino*. This Court in *Taino* found it unreasonable for the Immigration Division to not apply the binding jurisprudence of this Court in *Isse v. Canada (Citizenship and Immigration)*, 2011 FC 405 and *Canada (Public Safety and Emergency Preparedness) v. Samuels*, 2009 FC 1152, [2010] 2 F.C.R. D-13, in which it had already been determined that "enforceable" could not be read into subsection 58(2) of IRPA as it was contrary to the plain meaning of the section, which only required that a "removal order" be in place (at paragraphs 57–58).

[61] It was in this context that this Court in *Taino* did not find it reasonable for the Immigration Division—instead of applying binding jurisprudence of this Court—to look to

the *habeas corpus* cases, which the Court found to involve a different test and generally lengthier immigration detention, and the Supreme Court of Canada's decision in *Charkaoui*, which related to the security certificate detention scheme (at paragraphs 70–74 and 80). In contrast, the Federal Court of Appeal in *Brown*, when considering the issue of nexus to an immigration purpose in the context of a comprehensive constitutional challenge to the detention scheme provided for in IRPA and IRPR, relied heavily on the *Charkaoui* decision and held that there was a "general congruence between the detention review and *habeas* tests" (at paragraph 95).

[62] The Member's determination that the Federal Court of Appeal in *Brown* held that detention could not continue where it was found that deportation was not possible has support throughout the decision (at paragraphs 43, 44, 60, 90 and 91). The section of the decision, paragraphs 90 to 102, that specifically considers the requirement that there be a nexus with an immigration purpose addressed only the implicit requirement that deportation be possible. The Federal Court of Appeal relied on *Charkaoui* on this point [at paragraphs 91–92]:

> Once again, the Supreme Court has already gone some way towards giving us guidance on this. Detention in this context is available only where it is reasonably necessary for immigration purposes: *Charkaoui*, at paragraph 124, citing *R. v. Governor of Durham Prison, Ex p. Hardial Singh*, [1984] 1 All E.R. 983 (Q.B.) [cited above] and *Zadvydas v. Davis*, 533 U.S. 678 (2001). Absent a "possibility of deportation", detention in this context is no longer possible: *Charkaoui*, at paragraphs 125–127, citing *A. v. Secretary of State for the Home Department*, [2004] UKHL 56, [2005] 3 All E.R. 169.
>
> In assessing the presence of an immigration nexus, *Charkaoui* tells us that detention may be lengthy and it may be indeterminate. *Charkaoui* instructs that length itself is not the only relevant metric, nor is the fact that the date of removal is unknown; indeed, if the date of removal were known, it is doubtful that the parties would be before the court. When examining the constitutionality of indeterminate detention the question is whether removal, and not the precise date on which removal will occur, remains a possibility: *Charkaoui*, at paragraphs 125–127, citing *A. v. Secretary of State for the Home Department* [cited above].

[63] The Member's view was the repeated reference to this implicit requirement that there must be a "possibility of deportation" in order to detain applied to all of the statutory grounds of detention set out in subsection 58(1) of IRPA, and that there was nowhere in *Brown* where the Federal Court of Appeal stated that this requirement did not apply where a person was detained on the ground of being a danger to the public.

[64] The Minister argued before me that the Member's interpretation of *Brown* was not reasonable because the Federal Court of Appeal left open a possibility that detention could be ordered on the stand-alone ground of being a danger to the public, even where removal was found to not be possible. The Minister referred to the section of the decision where the Federal Court of Appeal was setting out the limits to the detention power generally, and noted, at paragraph 44, that the implicit requirement that removal be possible applied where detention was ordered "for the purposes of removal" and that detention occurred "principally, but not exclusively, pending removal."

[65] The Federal Court of Appeal did not enumerate the other circumstances in which detention could occur where it was not pending removal. The parties each had their own view on the appropriate way to fill in this gap.

[66] The Minister relied on this gap to argue that detention could still be ordered, even if removal was no longer possible, if it was for the purpose of protecting public safety, where someone had been detained on the ground of being a danger to the public. The Minister's position was that in these circumstances, detention would not be for the purpose of removal, but rather for the purpose of protecting the public.

[67] I note that the Minister relied on the Federal Court of Appeal's statement that all of the grounds of detention set out in section 58 are tethered to the immigration purposes of "ensuring the safety and security of Canadians and the promotion of international justice by denying safe harbour for criminals or those who pose a security risk (IRPA, paragraphs 3(1)(h), (i))" (at paragraph 42). The Minister did not, however, engage with or provide any explanation of the basis on which, according to their view, some of the grounds justifying detention would be subject to the implicit requirement that removal be possible, while others would not be, if the public safety purpose was later argued as providing the basis for the detention.

[68] The respondent understood this gap to be referring to where a person is awaiting other immigration processes that "facilitat[e] the machinery of immigration control", processes related to the entry and exit of migrants that may not yet be at the removal stage, such as awaiting identity and security examination and investigations, and admissibility hearings. If one took the respondent's view of the circumstances in which detention could be ordered other than for the purposes of removal, the Federal Court of Appeal's comment at paragraph 44 would not be relevant for the Member's interpretation of *Brown* as applied to Mr. Suleiman, given that there were no further immigration processes available for him, other than removal.

[69] There is no dispute between the parties that Mr. Suleiman's detention has taken place over the last two and a half years pending the Minister's efforts to remove him from Canada. Like Mr. Brown, Mr. Suleiman has been detained throughout this process, on the grounds of being a danger to the public and being unlikely to appear for removal. There is also no dispute that, other than removal, there are no further immigration processes remaining for Mr. Suleiman. He has already been found inadmissible, lost his permanent residence status and been found to be a danger to the public pursuant to paragraph 115(2)(a) of IRPA, allowing for his removal from Canada in spite of his protected person status. The only immigration-related process Mr. Suleiman has been awaiting, while he has been detained, is his removal from Canada.

[70] Ultimately, I am left with the impression that neither party can be certain about the meaning of the circumstances, other than removal, that the Federal Court of Appeal could be referring to in paragraph 44 of its decision. The Minister, argued, in oral submissions before me, that this was a "grey area" left by the Brown decision. This may well be the case. However, I am left with the Member's interpretation of this "grey area." The Member's interpretation was: (i) the Federal Court of Appeal in *Brown* held that in circumstances like those in Mr. Suleiman's case, there was an implicit requirement that deportation be possible in order for detention to be continued under subsections 58(1) and (2) of IRPA; and (ii) there was nothing in *Brown* that explicitly excluded those being detained on public danger grounds from the requirement that their deportation be possible.

[71] I do not find the Minister has established that the Member's view is unreasonable. I am satisfied that the reasoning of the Member "adds up" (*Vavilov*, at

paragraph 104; *Canada (Citizenship and Immigration) v. Mason*, 2021 FCA 156, [2022] 1 F.C.R. 3 (*Mason*), at paragraph 40). I do not see a basis to interfere with the Member's decision. The reasoning is intelligible, transparent and justified in light of the record and the submissions made to the Member.

D. *Conditions of release are reasonable*

[72] Now that I have determined that the Member's decision regarding the possibility of removal and nexus between detention and an immigration purpose is reasonable, this brings me to the third issue, namely, the reasonableness of the conditions of release. I find these conditions to be reasonable.

[73] The Member's decision in this regard must be read in light of the parties' submissions. At the close of the January 12, 2022 oral hearing, counsel for Mr. Suleiman argued that if the Member found no nexus to an immigration purpose, then Mr. Suleiman could be released without conditions. Minister's Counsel argued that even if there was no nexus to removal, an alternative to detention that virtually eliminated the risk was required.

[74] The Minister argues that the Member erred when they failed to impose conditions addressing Mr. Suleiman's danger to the public that "virtually eliminated the risk." This standard has been articulated by this Court in numerous cases, including by the Chief Justice in *Canada (Public Safety and Emergency Preparedness) v. Lunyamila*, 2016 FC 1199, [2017] 3 F.C.R. 428, at paragraphs 45 and 116, and recently by Justice Little in *Canada (Public Safety and Emergency Preparedness) v. Thomas*, 2021 FC 456, 82 Imm. L.R. (4th) 196, at paragraphs 71 and 74. I find that the Member reasonably distinguished these cases.

[75] These cases do not address the circumstances of Mr. Suleiman, where the grounds for detention have not been made out because there is no longer a nexus to the immigration purpose on account of the finding that deportation is not possible. Unlike the assessment being performed in those cases, where the "virtually eliminate" standard arose in the context of assessing the section 248 of IRPR factors, the Federal Court of Appeal in *Brown* found the issue of nexus to be a threshold question that happens before an assessment of the factors under section 248.

[76] The Federal Court of Appeal characterized the nexus assessment as "the starting requirement […] in other words whether continued detention *can* be ordered" (*Brown*, at paragraph 96). The Member's determination that removal is not a possibility for Mr. Suleiman is not a factor, like length of continued detention, to be balanced against the other factors in section 248—it is a determinative finding that compels the Immigration Division to order release. Accordingly, it was reasonable that the Member did not apply the "virtually eliminate" standard or reassess the section 248 factors in their decision on January 21, 2022, after having found as a threshold issue, that removal was no longer a possibility.

[77] Further, the Member did not accept the argument by Counsel for Mr. Suleiman that no conditions could be imposed where there was no longer a nexus to removal. The Member found that even if they no longer had the authority to detain Mr. Suleiman, they could issue conditions on release. The Member reasonably grounded this authority in the broad power under subsection 58(3) of IRPA that allows Members to issue any

conditions necessary upon release. I note that there is no precondition in the IRPA that this authority can only be exercised where the grounds of detention have been established.

[78] The Member also referred by way of an analogy to a case from the *habeas corpus* context, *Ali v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2017 ONSC 2660, 137 O.R. (3d) 498, in which the Ontario Superior Court ordered Mr. Ali, an immigration detainee, to be released on fairly stringent conditions, even after finding that his detention could not continue because it was unlawful.

[79] The Member next considered the types of conditions they could possibly impose in this context. The Member found that given their finding that detention was no longer lawful in Mr. Suleiman's case, it would not be reasonable for them to craft "conditions mirroring a true detention." The Member then noted that "a *de facto* detention created through house arrest, curfews or in-residence programs for example, would not be reasonable." In the next paragraph of the decision, the Member indicated that it would, however, be reasonable to impose less restrictive measures and then referenced the in-residence program at John Howard Society.

[80] When these statements are read in conjunction, I take this to mean that the Member was not referring to the examples in the preceding paragraph, i.e. in-person residence programs, the imposition of a curfew, or house arrest, as examples that would necessarily amount to *de facto* detention in each case, in and of themselves; instead, the Member was noting in a general way that if these sorts of conditions were employed in a way that truly mirrors detention, then it would not be appropriate in this context, where detention was found to be unlawful.

[81] While it would have been preferable for this section of the decision to be worded more clearly, reasons "must not be assessed against a standard of perfection" (*Vavilov*, at paragraph 91, *Mason*, at paragraph 40). I am satisfied that the Member did not constrain themselves from considering particular conditions because they amounted to *de facto* detention without any support for the proposition. This particular section of the decision needs to be read in light of the respondent's submissions to the Member that no conditions were permitted to be imposed where detention was found to be unlawful. It was in these circumstances that the Member explained generally that creating "a *de facto* detention" through the use of conditions would not be appropriate.

[82] *Vavilov* instructs that a "reviewing court must also read the decision maker's reasons in light of the history and context of the proceedings in which they were rendered" (at paragraph 94; *Canada (Public Safety and Emergency Preparedness) v. Shen*, 2020 FC 405, at paragraph 46). As noted by the respondent, the John Howard Society in-residence program was not an option that was available to be ordered by the Member at that time. The last information provided to the Member at the January 12, 2022 detention hearing was that it could take weeks for the assessment to be complete and presumably even then there was no guarantee that Mr. Suleiman would be approved for the residence or that there would be space in short order. The parties were to request an early review if the John Howard Society in-residence program became an available option.

[83] The Member also considered the reasons for detention in this case and ordered that Mr. Suleiman fully participate in two separate counselling and support programs

specific to sex offenders, Circles of Support and Accountability Ottawa and the Royal's Sexual Behaviours Clinic. In order to gain entry into these programs, Mr. Suleiman had to participate in intensive intake procedures. The Member noted Mr. Suleiman's cooperation with that process and willingness to continue to work to rehabilitate himself. The Member also noted that he had previously undertaken rehabilitation programs while incarcerated. The Member ordered that he provide his address and that he attend any meeting with CBSA officials when requested. These conditions acknowledge that Mr. Suleiman remains on a valid removal order and address concerns about his flight risk and his danger to the public.

[84] The decision has to be considered in its context. The Member had before them materials from over 30 detention reviews, which included over 120 exhibits and hundreds of pages and documents and previous decisions made by their colleagues. As noted by Justice Grammond [*Canada (Public Safety and Emergency Preparedness v. Thavagnanathiruchelvam*, 2021 FC 592, at paragraph 32]:

> … Parliament has conferred upon the [Immigration Division], 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.

[85] Overall, the Member considered that in this context, where detention could no longer be ordered because of their determination that removal was no longer possible, these were the appropriate conditions to order on release. The Member considered the rehabilitation programs Mr. Suleiman had already attended, his most recent behaviour in immigration detention, his cooperation with the CBSA officials, and his willingness to participate in two specific programs for sex offenders that were available to him. In the exceptional circumstances of this case, the conditions are reasonable.

V. Conclusion

[86] Based on my above reasons, the application for judicial review is dismissed. At the close of the hearing, both parties agreed that there was no basis to certify a question of general importance.

[87] I want to thank counsel for both parties for their able submissions and materials that I know had to be prepared under challenging time constraints.

JUDGMENT in IMM-643-22

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed;

2. No question of general importance is certified.