

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

— against —

SASSINE RAZZOUK,

Defendant.

11-CR-430 (ARR)

**Not for print or electronic
publication**

Opinion & Order

ROSS, United States District Judge:

Defendant Sassine Razzouk (“Razzouk” or “defendant”), through counsel, moves for compassionate release from FCC Otisville (“Otisville”) pursuant to the First Step Act, 18 U.S.C. § 3582(c)(1)(A)(i). *See* Def.’s Mot. to Reduce Sentence, ECF No. 126 (“Def.’s Br.”). The government opposes, asserting that the motion is premature because Mr. Razzouk has not satisfied the administrative exhaustion requirements imposed by § 3582(c) and in light of the Bureau of Prisons’ (“BOP”) existing plan to release defendant to home confinement on or around April 27, 2020. *See* Resp. to Mot. for Comp. Release 3, ECF No. 127. For the following reasons, I grant Razzouk’s motion for compassionate release.

BACKGROUND

Razzouk pleaded guilty to one count of bribery in violation of 18 U.S.C. § 666(a)(1)(B) and three counts of tax evasion in violation of 26 U.S.C. § 7201. *See* Min. Entry dated June 10, 2011, ECF No. 18. I sentenced him to seventy-eight months’ incarceration, to run concurrently with three terms of sixty months’ incarceration, followed by three years of supervised release. April 3, 2018 Judgment, ECF No. 86. Razzouk filed a notice of appeal of my judgment on May

9, 2018. Notice of Appeal of April 3, 2018 Judgment, ECF No 90. His appeal is still pending, having been submitted to the panel upon completion of oral argument on October 1, 2019. Govt Jurisdiction Letter 1, ECF No. 129. He surrendered to BOP custody on June 26, 2018, and has since been incarcerated in Otisville. *See* June 21, 2018 O&O, ECF No. 108. He has served approximately twenty-two months of his sentence. Def.’s Br. 5.

Razzouk is a sixty-two-year-old man who suffers from acute Chronic Obstructive Pulmonary Disease (“COPD”), which renders him more vulnerable to COVID-19. *Id.* 1, 7–15; Pre-sentence Investigation Report 2, ECF No 44.¹ On April 9, 2020, the defendant was placed in isolation, as he began displaying symptoms consistent with COVID-19. Def.’s Br. 2, 16–17. Razzouk’s attorney and family were unable to contact him at Otisville for approximately one week following his transfer to isolation. *Id.* 3. On April 13, 2020, the office of BOP regional counsel informed the government that following Razzouk’s isolation, he would be placed in a fourteen-day quarantine pending home confinement, and was recommended for home confinement to commence “as early as April 27, 2020.” *Id.* 3, 16–17. On April 17, 2020, the government confirmed that Razzouk had tested positive for COVID-19, is currently asymptomatic, and remains in isolation at Otisville.² Govt April 18, 2020 Letter 1, ECF No. 134. The BOP expects to transfer him to home confinement on April 27, 2020. *Id.*

Defendant concedes that he has not fulfilled § 3582(c)’s administrative exhaustion requirement, having filed a petition with Otisville Warden James Petrucci on March 27, 2020, requesting a temporary transfer to home confinement pursuant to the CARES Act, and a subsequent petition on March 31, 2020 to reduce Razzouk’s sentence pursuant to the First Step

¹ *See, e.g.,* CDC, *Preliminary Estimates of the Prevalence of Selected Underlying Health Conditions Among Patients with Coronavirus Disease 2019 — United States, February 12–March 28, 2020* (Apr. 3, 2020).

² The Bureau of Prisons website reports that as of April 19, 2020, fifteen inmates and nine staff members at FCI Otisville have “confirmed cases” of COVID-19. <https://www.bop.gov/coronavirus/> (last visited Apr. 19, 2020).

Act. *Id.* 3, 18–21. Razzouk has received no response to his petitions, and thirty days have not passed since they were submitted. *Id.* Nevertheless, he argues that the administrative exhaustion requirement is waivable, and argues that such a waiver is appropriate in light of defendant’s health condition and the COVID-19 pandemic. *Id.* 4.

JURISDICTION

Initially, I did not have jurisdiction to decide Razzouk’s compassionate release motion because he had an appeal of his conviction and sentence pending at the Second Circuit Court of Appeals. *See* April 17, 2020 Opinion & Order, ECF No. 133 (explaining that I lacked jurisdiction to modify Razzouk’s sentence and notifying the Second Circuit that I believed his application raised a substantial question). The Second Circuit authorized a limited remand, permitting me to decide Razzouk’s motion. Order Granting Mot. for FRAP 12.1(b) Remand, *United States of America v. Razzouk*, 18-CR-1395, Docket No. 117.

LEGAL STANDARD

The First Step Act governs motions for compassionate release. 18 U.S.C. § 3582(c)(1)(A)(i) states that:

the court, upon motion of the Director of the Bureau of Prisons, or upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant’s behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant’s facility, whichever is earlier, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that . . . extraordinary and compelling reasons warrant such a reduction . . . and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission[.]

18 U.S.C. § 3582(c)(1)(A)(i). There are four prerequisites to a court’s granting compassionate release under the First Step Act. First, the defendant must have exhausted his administrative

rights. § 3582(c)(1)(A). Second, the court must find that “extraordinary and compelling reasons warrant” release. § 3582(c)(1)(A)(i). Third, the court must consider the factors set forth in § 3553(a). Fourth, the court must find that release is consistent with the Sentencing Commission’s policy statements.

DISCUSSION

I. The Administrative Exhaustion Requirement is Waived in this Case.

A prisoner exhausts his administrative rights when the BOP fails to bring a motion for compassionate release on his behalf and he exercises all administrative rights to appeal, or after “the lapse of 30 days from the receipt of such a request by the warden of the defendant’s facility, whichever is earlier[.]” § 3582(c)(1)(A). However, “[e]ven where [administrative] exhaustion is seemingly mandated by statute or decisional law, the requirement is not absolute.” *Washington v. Barr*, 925 F.3d 109, 118 (2d Cir. 2019). A court may waive an administrative exhaustion requirement “where [exhaustion] would be futile, . . . where the administrative process would be incapable of granting adequate relief . . . [or] where pursuing agency review would subject [the person seeking relief] to undue prejudice.” *Id.* at 118–19 (citing *McCarthy v. Madigan*, 503 U.S. 140, 146–48 (1992), *superseded by statute on other grounds as recognized in Booth v. Churner*, 532 U.S. 731, 740 (2001)).

“[U]ndue delay, if it in fact results in catastrophic health consequences,” can justify waiving an administrative exhaustion requirement for any of those three reasons. *Id.* at 120–21. The government highlights decisions from several district courts in this circuit indicating that administrative exhaustion cannot be waived. Govt Br. 2; *see, e.g., United States v. Napout*, 15-CR-252 (PKC), 2020 WL 1872455, at *1 (E.D.N.Y. Apr. 14, 2020); *United States v. Hernandez*, 19 Cr. 834 (PAE), 2020 WL 1445851, at *1 (S.D.N.Y. Mar. 25, 2020); *United States v. Cohen*,

18-cr-602 (WHP), 2020 WL 1428778, at *1 (S.D.N.Y. Mar. 24, 2020). However, numerous other courts have determined that the COVID-19 outbreak, when considered in conjunction with a particular defendant's heightened health risks, can justify waiver. *See, e.g., United States v. Zuckerman*, No. 16 Cr. 194 (AT), 2020 WL 1659880, at *2 (S.D.N.Y. Apr. 3, 2020) (finding that in light of defendant's age and preexisting conditions, "exhaustion of the administrative process can be waived in light of the extraordinary threat posed—in his unique circumstances—by the COVID-19 pandemic."); *United States v. Colvin*, No. 3:19-cr-179 (JBA), 2020 WL 1613943, at *2 (D. Conn. Apr. 2, 2020) (determining that in light of defendant's preexisting conditions, administrative exhaustion could result in "catastrophic health consequences" and subject defendant to "undue prejudice"); *United States v. Perez*, No. 17 Cr. 513-3 (AT), 2020 WL 1546422, at *3, *3 n.3 (S.D.N.Y. Apr. 1, 2020) (explaining that waiving administrative exhaustion is more appropriate when defendant is in a "facility where COVID-19 [is] spreading" and "his medical condition put[s] him at particular risk of experiencing deadly complications from COVID-19."). I agree with the courts that find that a defendant's particular health circumstances can justify waiver of the administrative exhaustion requirement.

Here, defendant concedes that he has not exhausted his administrative remedies, but argues that the administrative exhaustion requirement should be waived in light of his acute COPD and positive COVID-19 test. Although the Bureau of Prisons currently intends to release Razzouk to home incarceration on April 27, 2020, the additional time in prison risks denying Razzouk timely and adequate access to medical care that he may require, in light of his diagnosis. It also risks exposing him a second time to the virus, which, in light of his preexisting condition, could be fatal. In this circumstance, Razzouk's preexisting conditions could result in "catastrophic health consequences" that could make administrative exhaustion futile and could subject him to undue

prejudice. *United States v. Perez*, 2020 WL 1546422, at *3 (citing *Washington v. Barr*, 925 F.3d at 120–21).

II. Razzouk’s Health Condition is an Extraordinary and Compelling Reason Warranting A Sentence Reduction.

In order for a court to grant compassionate release, it must find that “extraordinary and compelling reasons warrant” such release. 18 U.S.C. § 3582(c)(1)(A)(i). The Sentencing Commission has issued a Policy Statement that defines “extraordinary and compelling reasons.” U.S. Sentencing Guidelines Manual § 1B1.13 (U.S. Sentencing Comm’n 2018) (“USSG”); *see United States v. Ebbers*, No. (S4) 02-CR-1144-3 (VEC), 2020 WL 91399, at *4 (S.D.N.Y. Jan. 8, 2020); *United States v. Bellamy*, No. 15-165(8) (JRT/LIB), 2019 WL 3340699, at *2 (D. Minn. July 25, 2019). Under this Policy Statement, in relevant part, “extraordinary and compelling reasons exist” based on the defendant’s “medical condition” when “[t]he defendant is . . . suffering from a serious physical or medical condition, . . . suffering from a serious functional or cognitive impairment, or . . . experiencing deteriorating physical or mental health because of the aging process[.]” USSG § 1B1.13 cmt. n.1(A)(ii). That medical condition must “substantially diminish[] the ability of the defendant to provide self-care within the environment of a correctional facility,” and it must be one “from which [the defendant] is not expected to recover.” *Id.*

This Policy Statement is “anachronistic” because it pre-dates the First Step Act itself. *Ebbers*, 2020 WL 91399, at *4. Some district courts have concluded that the court may make an “independent assessment” of whether “extraordinary and compelling reasons” for release are present, looking to the Policy Statement only for “guidance.” *United States v. Beck*, No. 1:13-CR-186-6, 2019 WL 2716505, at *6 (M.D.N.C. June 28, 2019); *see also United States v. Young*, No. 2:00-cr-00002-1, 2020 WL 1047815, at *6 (M.D. Tenn. Mar. 4, 2020) (“[T]he district courts

themselves have the power to determine what constitute extraordinary and compelling reasons for compassionate release.”). *But see Ebbers*, 2020 WL 91399, at *4 (deeming Policy Statement “helpful in defining a vague standard” and concluding that its “descriptions of ‘extraordinary and compelling reasons’ remain current.”).

Razzouk’s positive COVID-19 diagnosis, considered in conjunction with the ongoing COVID-19 pandemic and his acute COPD, constitutes an extraordinary and compelling reason justifying his immediate release from incarceration pursuant to 18 U.S.C. § 3582(c)(1)(A)(i). *See* U.S.S.G. § 1B1.13 comment n.1(A)(ii). *See also United States v. McCarthy*, No. 3:17-CR-0230 (JCH), 2020 WL 1698732, at *1–2, *5 (D. Conn. Apr. 8, 2020) (granting compassionate release to a sixty-five-year-old defendant convicted of armed bank robbery, explaining that his preexisting conditions, including COPD and asthma, made him “especially vulnerable to the virus.”); *United States v. Gonzalez*, 2:18-CR-0232-TOR-15, 2020 WL 1536155, at *1, *3 (E.D. Wash. March 31, 2020) (granting compassionate release to a sixty-four-year-old defendant convicted of mail fraud and mail fraud conspiracy, explaining that “[s]he is in the most susceptible age category (over 60 years of age) and her COPD and emphysema make her particularly vulnerable.”).

As Judge Keenan reasoned in *United States v. Smith*, Razzouk’s age and medical condition make him especially vulnerable to COVID-19 because he risks developing severe complications from the disease. No. 12 Cr. 133 (JFK), 2020 WL 1849748, at *1, *4 (S.D.N.Y. Apr. 13, 2020) (granting compassionate release to a sixty-two-year-old defendant with preexisting conditions including asthma, high cholesterol, blood clots, a thyroid condition, and suspected bone marrow cancer). Unlike in *Smith*, however, Razzouk has already tested positive for COVID-19—so his situation is even more urgent. *Id.*

Although the BOP has implemented quarantine and isolation protocols in an attempt to protect inmates from exposure to COVID-19, *see United States v. Korn*, 15-CR-81S, 2020 WL 1808213, at *6 (W.D.N.Y. Apr. 9, 2020), they did not protect Razzouk from exposure to the disease in the first instance, despite his vulnerable status. Additionally, Razzouk’s attorney and family have confronted consistent communication problems with the BOP, and thus were unable to contact Razzouk for approximately one week after he was isolated with COVID-19 symptoms. Because Razzouk’s residence will permit him to isolate himself on a separate floor from the other members of his family and give him ready access to medical care, if required, it would not be reasonable to incarcerate Razzouk at Otisville until April 27th—the timetable established by the BOP.

III. The § 3553(a) Factors and the Sentencing Commission Policy Statements Weigh In Favor of Razzouk’s Immediate Release to Home Incarceration.

The First Step Act requires that the court consider the factors set forth in 18 U.S.C. § 3553(a) in deciding whether to grant compassionate release. *See* § 3582(c)(1)(A). Thus, the court must consider what is “sufficient, but not greater than necessary, to comply with the purposes of [sentencing].” § 3553(a). In particular, the court must consider:

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed—
 - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
 - (B) to afford adequate deterrence to criminal conduct;
 - (C) to protect the public from further crimes of the defendant; and
 - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
- (3) the kinds of sentences available;
- (4) [the kinds of sentences and sentencing range provided in the USSG;]
- (5) any pertinent [Sentencing Commission policy statement;]
- (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
- (7) the need to provide restitution to any victims of the offense.

Id. In considering these factors, the court “should assess whether [they] outweigh the ‘extraordinary and compelling reasons’ warranting compassionate release[.]” *Ebbbers*, 2020 WL 91399, at *7.

Additionally, the court must consider whether release is consistent with the Sentencing Commission’s policy statements. *See* § 3582(c)(1)(A)(i). In particular, it must determine that “[t]he defendant is not a danger to the safety of any other person or to the community, as provided in 18 U.S.C. § 3142(g)[.]” USSG § 1B1.13(2). The § 3142(g) factors are largely duplicative of those in § 3553(a). *See* § 3142(g). In addition, they require the court to consider “whether the offense is a crime of violence,” “the weight of the evidence against the [inmate],” and “the nature and seriousness of the danger to any person or the community that would be posed by the [inmate’s] release.” *Id.* § 3142(g)(1)–(4). In Razzouk’s circumstance, I find that his health condition presents an extraordinary and compelling reason for his release and that this fact is not outweighed by my consideration of the § 3553(a) factors or the Sentencing Commission’s policy statements.

Razzouk, a first-time offender, pleaded guilty to four non-violent offenses—three counts of tax evasion and one count of bribery. *See* Min. Entry dated June 10, 2011; Sentencing Trans. 66:21–23, ECF No. 104. Although Razzouk cooperated with the government, contributing to the successful prosecution of other defendants, Razzouk violated the cooperation agreement prior to his sentencing. *Id.* 4:2–16. Consequently, he lost the benefits of his cooperation at sentencing. *Id.* 3:13–5:3.

At his sentencing, I explained that Razzouk’s crimes were “undoubtedly of an extremely serious nature warranting a severe punishment,” referencing the extensive bribery scheme in which he was engaged. *Id.* 64:24–65:2. Considering the seriousness of his crimes, the sentencing goal of just punishment, and the need for general deterrence, I determined that a sentence of

“considerable severity” was merited in Razzouk’s case. *Id.* 66:6–9. I also noted several mitigating factors, including Razzouk’s physical and mental health conditions, difficult upbringing during the civil war in Lebanon, and the premature death of his first wife. *Id.* 66:19–67:17. Ultimately, I determined that seventy-eight months’ incarceration was an appropriate sentence, consistent with my consideration of the § 3553(a) factors. *Id.* 68:16–21.³

While the nature of Razzouk’s offense remains as serious today as when I imposed his sentence approximately two years ago, several aspects of my analysis have changed in consideration of the extraordinary circumstances posed by the COVID-19 pandemic, and its heightened risk for Razzouk. Razzouk is a sixty-two-year-old man with a preexisting condition, acute COPD, who has tested positive for COVID-19 and remains incarcerated in a high-risk prison. His continued presence there presents an immediate risk to his life and health, which I did not intend when I imposed my original sentence. Consequently, I do not believe that requiring Razzouk to remain at Otisville through April 27th under these circumstances furthers the purposes of sentencing. *See* § 3553(a).

Despite his positive COVID-19 diagnosis, Razzouk’s release poses a minimal danger to the safety of any other person or to the community more generally. In accordance with the conditions I impose in this Order, Razzouk will be transferred from Otisville to his residence, where he will quarantine for fourteen days on a separate floor from his family, in the basement of his residence. Because he has the facilities necessary to quarantine effectively, it is very unlikely that Razzouk would infect his family or the public with COVID-19.

Following his mandatory quarantine, he will be incarcerated in his home and subjected to

³ I also sentenced Razzouk to three terms of sixty months’ incarceration to run concurrently with his sentence of seventy-eight months’ incarceration, three years of supervised release, and ordered him to pay a substantial restitution amount. Sentencing Trans. 69:1–9.

location monitoring. Razzouk's crimes, while extremely serious in nature, were non-violent. They were committed in the context of his employment at Con Edison, a job from which he retired in 2011. *See id.* 67:8–11. Consequently, he presents little risk to the public from involvement in a related scheme upon release from prison.

CONCLUSION

Thus, I grant Razzouk's motion for compassionate release pursuant to 18 U.S.C. § 3582(c)(1)(A)(i), subject to the conditions set forth below. It is hereby ordered that:

1. Pursuant to 18 U.S.C. § 3582(c)(1)(A)(i), I hereby reduce defendant Sassine Razzouk's term of incarceration such that he is released from the custody of the Bureau of Prisons effective as soon as the terms of this order can be implemented;
2. The warden of FCC Otisville shall forthwith release from custody the person of defendant Sassine Razzouk;
3. Defendant Sassine Razzouk shall be on supervised release status, with home incarceration, for a period of 36 months;
4. For that 36-month period, and for 12 months thereafter, defendant Sassine Razzouk shall abide by all the terms and conditions of supervised release that were previously imposed on him and are memorialized in the Judgment dated April 3, 2018, ECF No. 86;
5. Defendant Sassine Razzouk shall be released from FCC Otisville into the custody of Grace Razzouk. Defendant Sassine Razzouk and Grace Razzouk shall proceed immediately to their residence (the "Residence"), where the defendant shall reside for the duration of his period of home incarceration and supervised release;
6. Grace Razzouk must notify the Probation Department for the Eastern District of New York both upon the release of defendant Sassine Razzouk into their custody and upon their

arrival at the Residence. Defendant Sassine Razzouk and Grace Razzouk are directed to follow the instructions of the assigned Probation Officer. Defendant Sassine Razzouk is further directed to follow the conditions of supervised release imposed at the time of his sentence;

7. For 36 months from the date of his release from prison, defendant Sassine Razzouk shall be under 24-hour home incarceration to be enforced by location monitoring, using specific technology to be determined by the Probation Department. The defendant may only leave the Residence for necessary medical services with advanced notification, and approval if time permits, from the Probation Department. All other leave from the Residence must be submitted through defense counsel for the court's approval;
8. Upon entry of this Order, defense counsel shall immediately contact Probation Officer Joanmarie Langone and coordinate with her to facilitate enforcement of the defendant's electronic monitoring and other release conditions;
9. Defendant Sassine Razzouk shall not spend fourteen (14) days in quarantine at FCC Otisville prior to his release, but shall be released as soon as the terms of this Order can be implemented;
10. While traveling from FCC Otisville to the Residence, defendant Sassine Razzouk will isolate himself to the best of his ability, and, beginning as soon as he arrives at the Residence, defendant Sassine Razzouk will quarantine himself for fourteen (14) days in the basement of the Residence, on a separate floor from all other members of the household; and
11. Although the court assumes that defense counsel will notify the BOP of the issuance of this order, the court directs that the United States Attorney's Office for the Eastern District of

New York formally notify the BOP so that this order can be put into effect as quickly as possible.

SO ORDERED.

Dated: April 19, 2020
Brooklyn, New York

_____/s/_____
Allyne R. Ross
United States District Judge