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IMM-913-16
IMM-1378-16
IMM-3026-16
IMM-3861-16

Citation: 2016 FC 1199

Ottawa, Ontario, October 27, 2016

PRESENT: THE CHIEF JUSTICE

BETWEEN:

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Applicant

and

JACOB DAMIANY LUNYAMILA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] A fundamental issue raised by these applications is how to resolve the tension between, on the one hand, an immigration detainee's refusal to cooperate with a validly issued order for

removal from Canada, and on the other hand, the length of detention and uncertainty regarding the duration of future detention that result, in whole or in part, from that refusal.

[2] In my view, where such a refusal has the result of impeding any steps that may realistically contribute in a meaningful way to effecting the removal of a detainee who has been designated to be a danger to the public, the tension must be resolved in favour of continued detention. The same is true where it has been determined that a detainee is unlikely to appear for removal from Canada.

[3] If it were otherwise, such a detainee could simply produce, or contribute to producing, a "stalemate," for the purposes of ultimately obtaining his release from detention. This is precisely what the Respondent in these applications, Mr. Lunyamila, appears to be attempting to do. If he were successful, the public would be required to bear at least some risk of his violent and dangerous behaviour. The degree of such risk that it would be required to bear would depend on the nature of the terms and conditions of his release. But there would likely be at least some non-trivial risk. And if no meaningful constraint on such behaviour could be legally imposed, as at least one of the decision-makers whose decisions are the subject of review in these applications believes that risk would be substantial. In my view, this would be contrary to the scheme of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. The same is true with respect to the risk posed by the fact that he would be unlikely to appear for his ultimate removal from Canada. To hold otherwise would enable him to manipulate our legal system in order to avoid the execution of a validly issued removal order.

[4] To permit a detainee who is a danger to the public or who poses a "flight risk" to manipulate and frustrate the operation of the law, as Mr. Lunyamila is attempting to do, would be to allow the detainee to essentially "take the law into his own hands." This would undermine the integrity of our immigration laws and public confidence in the rule of law.

[5] Parliament cannot have intended that the freedom to roam the streets of Canada, and to go into hiding to avoid removal to one's country of origin, could be procured in this manner by persons who pose a danger to the Canadian public or others who do not wish to cooperate with a validly issued removal order.

[6] Accordingly, and for the additional reasons set forth below, the five applications by the Minister of Public Safety and Emergency Preparedness [the Minister] will be granted. In brief, the decisions of the Immigration Division [the I.D.] of the Immigration and Refugee Board to release Mr. Lunyamila were all unreasonable. Moreover, the terms and conditions set forth in those decisions were unreasonable, as they would not have sufficiently addressed either the danger or the flight risk posed by Mr. Lunyamila. Those decisions will therefore be set aside.

II. Background

[7] Mr. Lunyamila claims to be a citizen of Rwanda. He was granted refugee status in this country in 1996.

[8] Since his arrival in this country, Mr. Lunyamila has apparently had 389 police encounters. Those encounters have resulted in 95 criminal charges and 54 convictions. Ten of

those convictions were for assaults that included punching his ex-girlfriend in the face and randomly attacking innocent civilians without provocation. He has also been convicted for sexual assault and carrying a concealed weapon, namely, an axe.

[9] In August 2012, a member of the I.D. issued an order for Mr. Lunyamila's removal after determining that he was inadmissible on grounds of criminality, pursuant to paragraph 36(2)(a) of the IRPA. Approximately two years later, following his conviction for sexual assault, a delegate of the Minister issued an opinion pursuant to paragraph 115(2)(a) that Mr. Lunyamila constitutes a danger to the public in Canada.

[10] Mr. Lunyamila was first placed in detention in June 2013. He was briefly released in September 2013, but was rearrested within a few days after he breached one of the conditions of his release. He has been in detention ever since.

[11] Until January of this year, Mr. Lunyamila's detention was maintained in each of his regular 30 day detention reviews, on the basis that he is a danger to the public and a flight risk. In each or most of those decisions, significant weight appears to have been given to the fact that he was not cooperating with the requirement of Rwandan authorities that he sign a declaration related to the acquisition of travel documents.

[12] However, in January and again in February of this year, I.D. Member Nupponen released Mr. Lunyamila from detention on certain conditions, after realizing that he has not had any Rwandan identity documents since his arrival in Canada. Member Nupponen reasoned that

because Rwandan authorities also generally requested, at that time, certified copies of Rwandan government issued identification documents, which Mr. Lunyamila does not have, the prospects for his removal had become speculative and any further detention had become unreasonable. In this regard, Member Nupponen observed in his February decision that "… even though you're not cooperating with the Minister in the Minister's obligation to remove you, the fact that there is no identity documentation at this point makes removal look very, very distant, if possible" (Certified Tribunal Record [CTR], p. 58).

[13] In ordering Mr. Lunyamila's release, Member Nupponen observed that one of the problematic triggers in Mr. Lunyamila's past has been alcohol. Accordingly, two of the conditions that he imposed on Mr. Lunyamila were that he not consume drugs or alcohol, and that he attend Alcoholics Anonymous. However, Member Nupponen declined to impose certain other terms and conditions that had been imposed by Member King when she released him in 2013. In particular, Member Nupponen refused to require Mr. Lunyamila to "keep the peace and be of good behaviour" or to "cooperate with CBSA with respect to obtaining a travel document." In the latter regard, Member Nupponen observed: "You've made it clear that that really isn't a part of what you're able to do now and from your point of view I can understand why you're not willing to do that so it would be inappropriate for me to include that condition because it would be a condition which undoubtedly would be very quickly breached and it's not my desire to have you breach conditions which in the bigger picture aren't required" (CTR, p. 93).

[14] Justice Harrington granted the Minister's applications for judicial review of Member Nupponen's two decisions, after finding that those decisions were unreasonable (*Minister of*

Public Safety and Emergency Preparedness v Lunyamila, 2016 FC 289 [*Lunyamila*]). Among other things, Justice Harrington observed that it was unreasonable for Member Nupponen to have concluded that Mr. Lunyamila's recent outbursts of violent behaviour in detention did not confirm or exemplify the danger he presented to the general public. He also noted that that there was "nothing in the record to support the proposition that enforced abstinence will lead to sobriety in the future, particularly since [Mr. Lunyamila] was to be released into a home where alcohol was available" (*Lunyamila*, above, at para 10). In addition, Justice Harrington stated that there was "nothing in the record to support the proposition that he will report regularly in the future as set out in the terms of his release" (*Lunyamila*, above, at para 11). In this regard, Justice Harrington added: "Releasing Mr. Lunyamila on the term that he report regularly is certainly not justified by his past record. He has been convicted ten times for being a non-show" (*Lunyamila*, above, at para 15).

[15] While recognizing that the Minister's inquiries with Rwandan authorities had not been robust enough, Justice Harrington observed: "[t]he remedy was not to release Mr. Lunyamila, but rather to call upon the CBSA to get a definitive decision one way or another as to whether his lack of identity papers could be overcome should he sign the required applications" (para 14).

[16] Finally, given that Justice Shore had previously issued a stay "until the application for leave and judicial review is determined on the merits," Justice Harrington certified a question with respect to the legality of Member Nupponen's decision to release Mr. Lunyamila. In passing, I note that an approach similar to that of Justice Shore was adopted by Justice Diner in August of this year (*Canada (Public Safety and Emergency Preparedness) v Lunyamila*

(23 August, 2016), IMM-3428-16 (FC)). However, in April and July, Justices Kane and Martineau made it clear that the stays they issued in respect of the decisions to release that were made in those two months, respectively, were not intended to preclude further 30 day detention reviews from taking place pursuant to subsection 57(2) of the IRPA (*Canada (Public Safety and Emergency Preparedness) v Lunyamila* (20 April, 2016), IMM-1378-16 (FC); *Canada (Public Safety and Emergency Preparedness) v Lunyamila* (10 June 2016), IMM-1378-16 (FC); *Canada (Public Safety and Emergency Preparedness) v Lunyamila*, 2016 FC 880). I have followed that approach in the attached Judgment.

III. Relevant Legislation

[17] Pursuant to subsection 58(1) of the IRPA, the I.D. is required to release a detained permanent resident or foreign national unless it is satisfied of certain things relating to such persons, after having taken account of the prescribed factors. Three of the things in question are:

Immigration and Refugee Protection Act, SC 2001, c 27	*Loi sur l'immigration et la protection des réfugiés*, LC 2001, ch 27
Release — Immigration Division	Mise en liberté par la Section de l'immigration
(…)	(…)
(a) they are a danger to the public;	a) le résident permanent ou l'étranger constitue un danger pour la sécurité publique;
(b) they are unlikely to appear for examination or an admissibility hearing, removal from Canada, or at a proceeding that could lead to the making of a removal order	b) le résident permanent ou l'étranger se soustraira vraisemblablement au contrôle, à l'enquête ou au renvoi, ou à la procédure pouvant mener à la prise par le ministre d'une

by the Minister under subsection 44(2);	mesure de renvoi en vertu du paragraphe 44(2);
(…)	(…)
(d) the Minister is of the opinion that the identity of the foreign national — other than a designated foreign national who was 16 years of age or older on the day of the arrival that is the subject of the designation in question — has not been, but may be, established and they have not reasonably cooperated with the Minister by providing relevant information for the purpose of establishing their identity or the Minister is making reasonable efforts to establish their identity; or	(d) le ministre estime que l'identité de l'étranger — autre qu'un étranger désigné qui était âgé de seize ans ou plus à la date de l'arrivée visée par la désignation en cause — n'a pas été prouvée mais peut l'être, soit l'étranger n'a pas raisonnablement coopéré en fournissant au ministre des renseignements utiles à cette fin, soit ce dernier fait des efforts valables pour établir l'identité de l'étranger; ou
(…)	(…)

[18] Pursuant to section 244 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [the Regulations], the factors to be taken into account in considering whether a person is a "flight risk," a "danger to the public" or "a foreign national whose identity has not been established" are set forth in sections 245, 246 and 247, respectively. Given that none of those factors were in dispute in the decisions that are the subject of these applications for judicial review, they will not be further discussed in these reasons. However, for convenience, they have been included at Appendix 1 below.

[19] Where it is determined that there are grounds for detention, the I.D. must take into consideration the factors listed in section 248, which states:

Immigration and Refugee Protection Regulations, SOR/2002-227	*Règlement sur l'immigration et la protection des réfugiés*, DORS/2002-227
Other factors	Autres critères
248. If it is determined that there are grounds for detention, the following factors shall be considered before a decision is made on detention or release:	248. S'il est constaté qu'il existe des motifs de détention, les critères ci-après doivent être pris en compte avant qu'une décision ne soit prise quant à la détention ou la mise en liberté :
(a) the reason for detention;	a) le motif de la détention;
(b) the length of time in detention;	b) la durée de la détention;
(c) whether there are any elements that can assist in determining the length of time that detention is likely to continue and, if so, that length of time;	c) l'existence d'éléments permettant l'évaluation de la durée probable de la détention et, dans l'affirmative, cette période de temps;
(d) any unexplained delays or unexplained lack of diligence caused by the Department or the person concerned; and	d) les retards inexpliqués ou le manque inexpliqué de diligence de la part du ministère ou de l'intéressé;
(e) the existence of alternatives to detention.	e) l'existence de solutions de rechange à la détention.

IV. Standard of review

[20] Decisions made by the I.D. upon reviews of detention conducted pursuant to subsection 57(2) of the IRPA are decisions of mixed fact and law. It is common ground between the parties that such decisions are reviewable by this Court on a standard of reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9, at para 53 [*Dunsmuir*]; *Shariff v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 640, at para 14 [*Shariff*]; *Canada (Public Safety and*

Emergency Preparedness) v Ismail, 2014 FC 390 [*Ismail*]; *Ahmed v Canada (Citizenship and Immigration)*, 2015 FC 792 at para 18 [*Ahmed 1*]).

[21] Accordingly, the decisions under review will stand unless they fall outside the range of possible and acceptable outcomes that are defensible in respect of the facts and law. (*Dunsmuir*, above, at para 47). In conducting its review, the Court will assess whether the process and outcome fit comfortably within the principles of justification, transparency and intelligibility (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, at para 59).

V. Analysis

A. *IMM-913-16*

[22] The decision that is the subject of review in Application IMM-913-16 is Member King's decision dated March 1, 2016. At the time that decision was made, the evidence in the record indicated that before issuing the necessary travel documents to persons under an enforceable removal order in Canada, the Rwandan High Commission generally requests, among other things, certified copies of Rwandan government issued identification documents (CTR, at p. 580).

[23] Given that Mr. Lunyamila has not had such documents since arriving in Canada after jumping off a ship, Member King stated that it would be "extremely unlikely that they would be obtainable." Stated differently, she observed that Mr. Lunyamila "has … no way to access Rwandan documents himself." In the absence of evidence to suggest that the Rwandan

government would waive the requirement for identity documents, she found that "there is nothing [Mr. Lunyamila] can do that has any prospect for assisting the government's removal attempts." On the basis of that finding, she concluded that any request to continue to detain him was in essence a request to detain him indefinitely; and that such a request contravened s. 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

[24] Member King added, for the same reason, that such a request also contravened s. 9 of the *Charter*, which protects against arbitrary detention or imprisonment; section 12, which provides a right not to be subjected to any cruel and unusual treatment or punishment; and section 15, which provides that every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[25] Accordingly, Member King concluded:

> Mr. Lunyamila must be released from Immigration detention, not because an alternative to detention or conditions have been found that will mitigate the danger he poses of reoffending. He must be released because to detain him in this situation or even to impose conditions that attempt to deal with criminal behaviour would be a breach of his *Charter* rights (CTR, at p. 33).

[26] The Minister submits that Member King's decision to release Mr. Lunyamila from detention was unreasonable because it was based on an abrupt and speculative conclusion that

his detention was indefinite, without any meaningful consideration of the factors set forth in s. 248 of the Regulations, including Mr. Lunyamila's lack of cooperation.

[27] I agree. Without such analysis, Member King's conclusion that his detention had become indefinite was essentially based on the bald assertions described at paragraph 23 above.

[28] Given the danger posed to the public by Mr. Lunyamila, and the "flight risk" that he poses, Member King should have considered the steps that could reasonably be taken by Mr. Lunyamila to obtain Rwandan government issued identification documents. Member King also should have assessed whether the CBSA could obtain a definitive answer as to whether Mr. Lunyamila's lack of identity papers could be overcome, should he sign the declaration required by the Rwandan High Commission (*Lunyamila*, above, at para 14).

[29] Member King's failure to come to grips with these issues resulted in a decision that was not appropriately justified or defensible in law, particularly given that Mr. Lunyamila has an obligation to cooperate with effecting his removal, as his counsel conceded during the hearing of this application. Until these issues had been fully explored, it could not reasonably be established whether, in fact, Mr. Lunyamila's detention had become indefinite.

[30] To the extent that Member King relied on her finding with respect to indefinite detention to reach her conclusion with respect to the violation of Mr. Lunyamila's *Charter* rights, that conclusion was also unreasonable. Moreover, before reaching any conclusion with respect to the interplay between Mr. Lunyamila's potential length of detention and his rights under s. 7 of the

Charter, Member King was required to consider and weigh additional factors, including the danger that Mr. Lunyamila poses to the public, his flight risk and his steadfast lack of cooperation with the Minister's efforts to remove him (*Sahin v Canada (Minister of Citizenship and Immigration)*, [1994] FCJ No 1534 (QL), at paras 30-33 (TD) [*Sahin*]). She should also have considered the interplay between Mr. Lunyamila's steadfast refusal to cooperate with the Minister's efforts to remove him from Canada, the extent to which such refusal had contributed to the length of his detention and the uncertainty regarding his future detention, and the principles of fundamental justice that are contemplated by s. 7 of the *Charter*. It is not immediately apparent how defiance of an immigration regime that has been repeatedly found to be constitutional can be consistent with the latter principles. However, given that the parties did not address those principles in their written and oral submissions, I will refrain from commenting further on them.

[31] Once the Minister established a *prima facie* case for Mr. Lunyamila's continued detention based on the uncontested danger to the public that he poses and the flight risk that he presents, the onus shifted to Mr. Lunyamila to establish grounds for his release (*Canada (Citizenship and Immigration) v John Doe*, 2011 FC 974, at para 4 [*John Doe*]; *Canada (Minister of Citizenship and Immigration) v Sittampalam*, 2004 FC 1756, at para 27 [*Sittampalam*]). No such grounds were offered, as Member King stated that she did not need to hear any submissions from Mr. Lunyamila.

[32] In any event, it was an error for Member King to decide to release Mr. Lunyamila solely on the basis of a finding that, in the absence of his ability to obtain and provide Rwandan

identification documents, his detention had effectively become indefinite. It is now settled law that the indefinite nature of an individual's detention under the IRPA is only one factor to be considered when conducting a detention review, and cannot be treated as determinative. The other factors set forth in s. 248 of the Regulations also need to be considered (*Ahmed v Canada (Citizenship and Immigration)*, 2015 FC 876, at paras 25-26 [*Ahmed 2*]; *Canada (Public Safety and Emergency Preparedness) v Okwerom*, 2015 FC 433, at para 8 [*Okwerom*]; *Canada (Citizenship and Immigration) v B147*, 2012 FC 655, at paras 53-57 [*B147*]; *Warssama v Canada (Citizenship and Immigration)*, 2015 FC 1311, at para 21 [*Warssama*]; *Canada (Public Safety and Emergency Preparedness) v Hassan*, 2012 FC 1357, at para 47 [*Hassan*]).

[33] Member King further erred when she concluded that the *Charter* prevented her from imposing conditions to reduce the risk that Mr. Lunyamila poses to the public. So long as there is a meaningful process of ongoing review that allows the conditions of his release to be revisited, having regard to the evolving context and circumstances of his particular case, the *Charter* does not prevent the I.D. from imposing such conditions (*Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9, at paras 107-117 [*Charkaoui*]; *John Doe*, above, at para 6).

[34] The foregoing errors distinguish this case from *Ali v Canada (Citizenship and Immigration)*, 2015 FC 1012 [*Ali*], relied upon by Mr. Lunyamila. That case is further distinguishable as it concerned an I.D. Member's reversal of a previous decision to release the detainee, based on new evidence that suggested, among other things, that the airport in Yemen had reopened. Justice Boswell found that reversal to have been unreasonable, in part "because there was no evidence whatsoever to show that the airport in Yemen was now accepting civilian

flights or that the situation of unrest in and around Yemen had undergone significant change" (*Ali*, above, at para 14). With this in mind, the new evidence relied upon to justify the detainee's release could hardly have been considered to have been compelling.

[35] In summary, for the reasons that I have set forth above, Member King's decision dated March 1, 2016 was unreasonable, as it fell outside the range of possible and acceptable outcomes that are defensible in respect of the facts and law.

B. ***IMM-1378-16***

[36] The decision that is the subject of review in IMM-1378-16 is Member McPhelan's decision dated March 31, 2016.

[37] In the course of his decision, Member McPhelan found that Mr. Lunyamila is both a danger to the public and a flight risk. With respect to the former, Member McPhelan noted that Mr. Lunyamila had displayed violent behaviour on two recent occasions at the facility where he is being detained. He also observed that he had engaged in such behaviour without having consumed any alcohol.

[38] However, like Member King, he concluded that Mr. Lunyamila's detention had become indefinite, that this contravened his rights under s. 7 of the *Charter*, and that therefore he should be released.

[39] In my view, Member McPhelan's decision was unreasonable for many of the same reasons as Member King's decision dated March 1, 2016.

[40] In brief, Member McPhelan's finding that Mr. Lunyamila's detention had become indefinite was baldly asserted and not appropriately justified. It was based solely on his view that it was "highly unlikely" that Mr. Lunyamila would be removable to Rwanda without identity documents. That conclusion was somewhat more problematic than the similar one that was reached by Member King, in view of the new evidence indicating that the documentation "requested" by the Rwandan High Commission no longer included "certified copies of Rwandan government issued identification documents." That item on the list had been replaced with "any other pertinent information (passport, expired passport, birth certificate, etc.)" (CTR, at p. 474). However, given that the examples given in parentheses are all in the nature of identity documents, Member McPhelan simply concluded, without any further discussion, that it was very likely that the Rwandan government was going to want to have identity documents. He did so without reconciling that conclusion with the change in the Rwandan High Commission's practice, pursuant to which it no longer explicitly requests certified copies of Rwandan government issued identification documents.

[41] In addition, Member McPhelan erred by ordering Mr. Lunyamila's release solely on the basis of his conclusion that Mr. Lunyamila's detention had become indefinite. In this regard, he observed: "I do find that you are both a danger to the public and a flight risk but I consider that your detention has become indefinite and because of that I am ordering release." This was contrary to the settled case law mentioned at paragraph 32 above, and to the plain wording of

s. 248 of the Regulations, which requires all of the factors listed therein to be considered and weighed.

[42] I recognize that Member McPhelan subsequently identified various ways in which Mr. Lunyamila presents a danger to the public, and that he then proceeded to discuss Mr. Lunyamila's flight risk and his steadfast refusal to cooperate with his removal from Canada. However, he did not in any way engage in the process of balancing those factors, which individually and collectively weigh strongly in favour of keeping Mr. Lunyamila in detention, against the length of his detention to date and the length of time that such detention is likely to continue. Instead of engaging in that balancing exercise, Member McPhelan proceeded directly to explaining the terms and conditions that he imposed on Mr. Lunyamila's release. That failure to engage in the required balancing exercise contemplated by s. 248 rendered Member McPhelan's decision outside the range of possible and acceptable outcomes that are defensible in respect of the facts and law, and therefore unreasonable.

[43] In addition, for essentially the same reasons provided at paragraph 30 above in respect of Member King's decision, Member McPhelan erred in concluding that Mr. Lunyamila's detention had become a violation of his rights under s. 7 of the *Charter*.

[44] Finally, I find that the terms and conditions that Member McPhelan imposed on Mr. Lunyamila's release were not reasonable. Member McPhelan recognized that Mr. Lunyamila is a danger to the public and a flight risk. With respect to the former, he stated:

> When I'm faced with the difficult task of releasing someone who is a danger to the public I think about the types of things that a person

> might do upon release and looking at your criminal record I think it's likely that you might assault someone. You might utter threats at people. You might continue to commit threats. I don't believe the passage of time has improved your behaviour particularly.

[45] Notwithstanding these findings, Member McPhelan did not impose terms and conditions of release that would reduce, to any significant degree, the foregoing risks. The only condition that arguably addressed the danger risk at all was the requirement that Mr. Lunyamila not engage in any activity subsequent to release which results in a conviction under any statute of Canada. In my view, that condition did not reasonably address that risk. While I recognize that it would be very difficult, if at all possible, to completely eliminate the danger posed by Mr. Lunyamila, any decision to release a person presenting such risk should virtually eliminate that risk. The terms described in Member McPhelan's decision fell far short in that regard, thereby rendering that decision unreasonable.

[46] Indeed, to the extent that the condition described in the paragraph immediately above could not be enforced until Mr. Lunyamila had been convicted under a statute of Canada, it contemplates that a crime would have to be committed before it could be addressed, through the criminal justice system. Such an approach was patently unreasonable, and was not cured by the Minister's inexplicable failure to suggest additional conditions.

C. *IMM-3026-16*

[47] The decision that is the subject of review in IMM-3026-16 is Member King's decision dated July 14, 2016. To properly review that decision, it is necessary to briefly summarize Member Ko's, dated June 16, 2016. In that decision, Member Ko concluded that

Mr. Lunyamila's detention should be continued, based on new information that the CBSA was actively pursuing and that raised additional questions as to his identity.

[48] I will note in passing that no detention reviews were held in April or May of this year, because the I.D. interpreted the Order issued by Justice Kane on April 20, 2016 as having imposed a stay on any release of Mr. Lunyamila until the application for judicial review of Member McPhelan's decision was finally disposed of. Justice Kane subsequently clarified that she had not intended to suggest that subsequent 30 day reviews of detention pursuant to subsection 57(2) of the IRPA should not continue to occur.

[49] The new information relating to Mr. Lunyamila's identity that provided the basis of Member Ko's decision to detain him consisted principally of the following:

- Information from an informant who provided some details regarding persons he stated were Mr. Lunyamila's father and an imam who may have known his father, who the informant claimed were both living in Tanzania. Although that information was initially received in February 2015, the evidence suggested that the CBSA had been having difficulty following it up with Canadian officials based in Tanzania. However, new information suggested that the International Organization for Migration might be able to assist in the process. In addition, the CBSA was exploring the option of hiring a third party to assist with the investigation. It is relevant to note that the same informant appears to have attended Mr. Lunyamila's first few detention reviews and had initially informed an enforcement officer in November 2013 that Mr. Lunyamila had told him that

his name was Maximilian Mlele Bundare and that he was born on April 7, 1968 in Tanzania (CTR at pp. 339, 354, 385, 392, 414, 430, 499; CTR Vol. 5 at p.150). The CBSA's investigation of that information led to a different person by that name.

- Confirmation from open source information that a person by the name of the imam existed in Tanzania.
- Evidence reporting that the CBSA's national headquarters had agreed to fund the cost of a field visit by a liaison officer to Tanzania to further the investigation of this information.
- A linguistics analysis that stated that Mr. Lunyamila's linguistic background had been assessed to be Tanzanian with a very high degree of certainty and very unlikely to be Rwandan.
- Evidence from the CBSA that it had decided to request representatives from the Tanzanian High Commission here in Canada to meet with Mr. Lunyamila in Vancouver, in order to attempt to determine his nationality.

[50] Based on that new information, Member Ko found that further information should be available in the near future to assist in determining whether there is a viable possibility for Mr. Lunyamila's removal to Tanzania. Member Ko then relied on that finding to depart from the four immediately previous reviews by concluding that Mr. Lunyamila's continued detention could no longer be said to be indefinite. She therefore decided to keep him in detention, after discussing the length of his detention and the following facts: (i) his refusal to cooperate with the CBSA's efforts to remove him from Canada, (ii) unexplained delays on the part of the Minister

that had contributed to some of the delays in the removal process, (iii) the danger to the public that he presents, and (iv) the flight risk that he presents.

[51] In her decision of July 14, 2016, Member King disagreed with Member Ko's assessment of the new information summarized above. Insofar as Member King explicitly adopted her decision of March 1, 2016 "in its entirety," it was unreasonable for the various reasons discussed at paragraphs 27-35 above.

[52] In addition to the reasons given in her March 1st decision, Member King stated that she disagreed with member Ko's decision on several grounds.

[53] In particular, she rejected Member Ko's conclusion that Mr. Lunyamila's detention could no longer be said to be indefinite because of the new information that I have summarized above. In this regard, she observed that the informant who has been suggesting that Mr. Lunyamila is a Tanzanian citizen initially provided that information to the Minister in 2013, yet the Minister has only recently decided to incur the costs associated with the investigation activities relied upon by Member Ko. She stated that the Minister was not entitled to win detention for longer periods of time because an identity investigation is expensive.

[54] In my view, that analysis was unreasonable. In brief, it failed to recognize that Mr. Lunyamila has insisted all along that he is Rwandan, he has not been cooperating with the Minister's efforts to remove him to Rwanda, and it was only recently that a linguistics analysis concluded that he is "assessed to be Tanzanian with a very high degree of certainty."

The Minister was entitled to take the time required to pursue what initially appeared to be the most likely avenue for removing him from Canada, namely, by removing him to Rwanda, before devoting scarce public funds to the possibility of removing him to Tanzania.

[55] The Minister is not required to devote scarce funds from the public purse to chase down every possibility, no matter how remote, for removing someone from Canada when that person is not cooperating with efforts to remove him from Canada. It was not reasonable to require the Minister to incur the substantial costs that were required to explore the possibility of removing Mr. Lunyamila to Tanzania until the linguistics analysis was conducted and the new information was received from the informant, and partially verified by confirming the existence in Tanzania of an imam going by the name provided by the informant. Until those new developments, the basis for believing that Mr. Lunyamila might be of Tanzanian nationality was very speculative.

[56] Member King also noted in her decision that Mr. Lunyamila's indefinite detention cannot be supported by the facts that he is a danger to the public, a flight risk and has not been cooperating with the Minister's efforts to remove him for three years.

[57] I disagree. In addition to what I have said earlier in these reasons in connection with Member King's decision dated March 1, 2016, I would add the following:

[58] To permit someone in these circumstances to take the position that he should be released on the grounds that his detention had become indefinite would be effectively to allow that person to frustrate the will of Parliament and, in essence, "take the law into his own hands"

(*Sahin*, above, at para 15; *Ahani v Canada*, [1995] 3 FC 669, at para 40, aff'd [1996] FCJ No 937, at para 4, leave to appeal denied [1996] SCCA No 496; see also, *R v Malmo-Levine, R v Caine*, 2003 SCC 74, at para 178). That would undermine the integrity of our immigration laws and public confidence in the rule of law.

[59] In my view, the scheme of the IRPA and the Regulations contemplates that persons who are a danger to the public or a flight risk and who are not cooperating with the Minister's efforts to remove them from this country, must, except in exceptional circumstances, continue to be detained until such time as they cooperate with their removal. Exceptional circumstances would be warranted, because it will ordinarily be very difficult to formulate terms and conditions of release that will eliminate, or virtually eliminate, the danger to the public presented by the individual. Thus, it ordinarily would be difficult to avoid exposing the general public to some risk by releasing the detainee. However, this might be justified in an exceptional circumstance, such as where there have been unexplained and very substantial delays by the Minister that are not attributable to the detained person's lack of cooperation or to an unwillingness on the part of the Minister to incur substantial costs that would be associated with pursuing non-speculative possibilities for removal.

[60] In *Medovarski v Canada (Minister of Citizenship and Immigration); Esteban v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51, the Supreme Court of Canada underscored the priority given to security in the IRPA, in the following terms:

> [10] The objectives as expressed in the *IRPA* indicate an intent to prioritize security. This objective is given effect by preventing the entry of applicants with criminal records, by removing applicants with such records from Canada, and by emphasizing the

> obligation of permanent residents to behave lawfully while in Canada. This marks a change from the focus in the predecessor statute, which emphasized the successful integration of applicants more than security: e.g., see s. 3(1)(*i*) of the *IRPA* versus s. 3(*j*) of the former Act; s. 3(1)(*e*) of the *IRPA* versus s. 3(*d*) of the former Act; s. 3(1)(*h*) of the *IRPA* versus s. 3(*i*) of the former Act. Viewed collectively, the objectives of the *IRPA* and its provisions concerning permanent residents, communicate a strong desire to treat criminals and security threats less leniently than under the former Act.

[61] This priority to protect the public from foreign nationals who have engaged in serious criminality is in keeping with the fact that "[o]ne of the most fundamental responsibilities of a government is to ensure the security of its citizens" (*Charkaoui*, above, at para 1).

[62] This priority is reflected in the objectives of the IRPA, in particular paragraphs 3(1)(h) and (i), and paragraphs 3(2)(g) and (h) which state:

Immigration and Refugee Protection Act, SC 2001, c 27	*Loi sur l'immigration et la protection des réfugiés*, LC 2001, ch 27
Objectives and Applications	Objet de la loi
Objectives – Immigration	Objet en matière d'immigration
3 (1) The objectives of this Act with respect to Immigration are:	3 (1) En matière d'immigration, la présente loi a pour objet :
(…)	(…)
(h) to protect public health and safety and to maintain the security of Canadian society;	h) de protéger la santé et la sécurité publiques et de garantir la sécurité de la société canadienne;
(i) to promote international justice and security by fostering respect for human	i) de promouvoir, à l'échelle internationale, la justice et la sécurité par le respect des

rights and by denying access to Canadian territory to persons who are criminals or security risks;	droits de la personne et l'interdiction de territoire aux personnes qui sont des criminels ou constituent un danger pour la sécurité;
(…)	(…)
Objectives — refugees	Objet relatif aux réfugiés
3 (2) The objectives of this Act with respect to refugees are:	3 (2) S'agissant des réfugiés, la présente loi a pour objet :
(…)	(…)
(g) to protect public health and safety of Canadians and to maintain the security of Canadian society;	g) de protéger la santé des Canadiens et de garantir leur sécurité;
(h) to promote international justice and security by fostering respect for human rights and by denying access to Canadian territory to persons, including refugee claimants, who are security risks or serious criminals; (emphasis added)	h) de promouvoir, à l'échelle internationale, la sécurité et la justice par l'interdiction du territoire aux personnes et demandeurs d'asile qui sont de grands criminels ou constituent un danger pour la sécurité. (je souligne)

[63] In furtherance of these security and public safety objectives, the IRPA contains numerous provisions, including:

i. subsection 36(1), which provides that a permanent resident or a foreign national is inadmissible on grounds of serious criminality for having been convicted of one or more of certain types of offences, or for committing a certain type of act outside Canada;

ii. subsection 36(2), which provides that a foreign national is inadmissible on grounds of criminality for having been convicted of one or more of certain types of offences, or for committing a certain type of act outside Canada;

iii. subsection 48(2), which provides that if a removal order is enforceable, the foreign national against whom it was made must leave Canada immediately and the order must be enforced as soon as possible;

iv. subsection 55(2), which permits an officer to arrest and detain a foreign national, other than a protected person, without a warrant, (a) who the officer has reasonable grounds to believe is inadmissible and is a danger to the public or is unlikely to appear for examination, an admissibility hearing, removal from Canada, or at a proceeding that could lead to the making of a removal order by the Minister under subsection 44(2); or (b) if the officer is not satisfied of the identity of the foreign national in the course of any procedure under this Act;

v. paragraph 58(1), which requires the Immigration Division to release from detention a permanent resident or a foreign national, unless it is satisfied, taking account of prescribed factors, that:

(a) they are a danger to the public;

(b) they are unlikely to appear for examination, an admissibility hearing, removal from Canada or at a proceeding that could lead to the making of a removal order by the Minister under subsection 44(2);

(c) the Minister is taking necessary steps to inquire into a reasonable suspicion that they are inadmissible on grounds of security, violating

human or international rights, serious criminality, criminality or organized criminality;

(d) the Minister is of the opinion that the identity of the foreign national — other than a designated foreign national who was 16 years of age or older on the day of the arrival that is the subject of the designation in question — has not been, but may be, established and they have not reasonably cooperated with the Minister by providing relevant information for the purpose of establishing their identity or the Minister is making reasonable efforts to establish their identity; or

(e) the Minister is of the opinion that the identity of the foreign national who is a designated foreign national and who was 16 years of age or older on the day of the arrival that is the subject of the designation in question has not been established.

(Emphasis added.)

vi. Subsection 64(1), which provides that no appeal may be made to the Immigration Appeal Division by a foreign national or their sponsor or by a permanent resident if the foreign national or permanent resident has been found to be inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality;

vii. Paragraph 101(f), which provides that a claim for refugee protection is ineligible to be referred to the Refugee Protection Division if the claimant has been determined to be inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality, except for persons who are inadmissible solely on the grounds of paragraph 35(1)(c);

viii. paragraph 112(3), which provides that protection may not be conferred on an applicant who is determined to be inadmissible on grounds of serious criminality with respect to certain types of convictions within or outside Canada; and

ix. paragraph 115(2)(a), which provides an exception to the principle of non-refoulement for persons who are inadmissible on grounds of serious criminality and who constitute, in the opinion of the Minister, a danger to the public in Canada.

[64] In addition to the foregoing:

i. paragraph 230(3)(c) of the Regulations prohibits the Minister from issuing a stay of removal in respect of a person who is inadmissible under subsection 36(1) of the IRPA on grounds of serious criminality or under subsection 36(2) of the IRPA on grounds of criminality, even where removal would be to a country that is in a state of armed conflict or environmental disaster; and

ii. section 239 of the Regulations provides, among other things, that if a foreign national does not voluntarily comply with a removal order, the removal order shall be enforced by the Minister.

[65] In my view, the above-mentioned provisions of the IRPA and the Regulations must be taken into account in interpreting and giving weight to the five factors listed in section 248 of the Regulations. For convenience, I will reproduce that section below:

Immigration and Refugee Protection Regulations, SOR/2002-227	*Règlement sur l'immigration et la protection des réfugiés*, DORS/2002-227
Other factors	Autres critères
248. If it is determined that there are grounds for detention, the following factors shall be considered before a decision is made on detention or release:	248. S'il est constaté qu'il existe des motifs de détention, les critères ci-après doivent être pris en compte avant qu'une décision ne soit prise quant à la détention ou la mise en liberté :
(a) the reason for detention;	a) le motif de la détention;
(b) the length of time in detention;	b) la durée de la détention;
(c) whether there are any elements that can assist in determining the length of time that detention is likely to continue and, if so, that length of time;	c) l'existence d'éléments permettant l'évaluation de la durée probable de la détention et, dans l'affirmative, cette période de temps;
(d) any unexplained delays or unexplained lack of diligence caused by the Department or the person concerned; and	d) les retards inexpliqués ou le manque inexpliqué de diligence de la part du ministère ou de l'intéressé;
(e) the existence of alternatives to detention.	e) l'existence de solutions de rechange à la détention.

[66] When the foregoing factors are approached with the above-mentioned scheme of the IRPA and the Regulations in mind, the following becomes evident:

i. Where the reason for continued detention is that a person poses a danger to the public, “there is a stronger case for continuing a long detention” (*Sahin*, above, at para 30). Indeed, where the person is a danger to the public on grounds of serious criminality, as contemplated by paragraph 115(2)(a), the scheme of the IRPA and the Regulations imply that this factor should be given very considerable weight.

ii. Where an individual has been in detention for some time and a further lengthy detention is anticipated, or if the extent of future detention time cannot be ascertained, these facts ordinarily would tend to favour release (*Sahin*, above). However, where, as in Mr. Lunyamila's situation, the detainee has substantially contributed to the length of his detention due to his steadfast refusal to cooperate with his removal, or where that refusal is significantly contributing to the uncertainty with respect to the extent of future detention time, this ordinarily would substantially reduce the weight to be attributed to such facts. In my view, to place substantial weight on the length of past and projected future detention in circumstances of a steadfast refusal to cooperate would permit a detainee to frustrate the scheme of the IRPA and the Regulations, through non-cooperation. Among other things, this would allow the detainee to gain access to Canadian territory (outside detention), contrary to the clear objectives set forth in paragraph 3(1)(h) and (i), and paragraph 3(2)(g) and (h) of the Act. It would also allow the detainee, who has been found to be inadmissible to Canada, to manipulate our legal system to facilitate his increased access to this country, and to frustrate, or assist in frustrating, Parliament's will that he be removed from Canada as soon as possible.

iii. Unexplained delay and unexplained lack of diligence should count against the offending party (*Sahin*, above). However, the weight given to this factor should be less when the other party has contributed to the delays or lack of diligence of the offending party - that is to say, where the detainee has contributed to the Minister's delay, or vice versa. This is particularly so where, as in Mr. Lunyamila's case, such contribution has been considerable.

iv. Where a person is a danger to the public, the weight given to this factor should vary directly with the extent to which alternatives to detention can mitigate such danger. Stated conversely, the greater the risk that the public would be required to assume under a particular alternative, the more this factor should weigh in favour of continued detention. Where, the conditions of release are such that the public would be required to bear significant risk of danger at the hands of the detainee, as was the case with the conditions that Ms. King imposed on Mr. Lunyamila in her decisions of March 1, 2016 and July 14, 2016, this should weigh strongly in favour of continued detention. If it were otherwise, Parliament's public safety and security objectives, which have been prioritized in the IRPA and the Regulations, would be significantly undermined.

[67] In summary, Member King’s conclusion that Mr. Lunyamila’s continued detention could not be supported by the fact that he is a danger to the public, a flight risk and has not been cooperating with the Minister’s efforts to remove him, was contrary to the scheme of the IRPA and the Regulations, and therefore unreasonable. To rely on the criminal justice system to protect

the Canadian public from Mr. Lunyamila's random acts of criminal violence, as she was prepared to do, was to contemplate that he would commit and be convicted for at least one further criminal act subsequent to his release. In my view, that was also contrary to the scheme of the IRPA and the Regulations, and unreasonable.

[68] Member King's decision was also unreasonable in that it did not provide compelling reasons for departing from Member Ko's decision to keep Mr. Lunyamila in detention, given the new information upon which member Ko relied in reaching her decision (*Canada (Minister of Citizenship and Immigration) v Thanabalasingham*, 2004 FCA 4, at para 10). In brief, Member Ko reasoned that in view of the risk to the public and flight risk posed by Mr. Lunyamila, as well as his steadfast refusal to cooperate with the Minister's efforts to remove him from Canada in accordance with the IRPA and the Regulations, he should be kept in detention while the Minister pursued what Member Ko characterized as being reasonable efforts to ascertain his identity. Member Ko also concluded that "further information should be available in the near future in order to determine if there is a viable possibility for your removal from Canada" and that "the Minister should be given a chance to conduct some further investigation before concluding that detention is indefinite." In view of the risks presented by Mr. Lunyamila, his continued refusal to cooperate with the Minister's efforts to remove him, and the new prospects for his potential removal from Canada, the reasons given by Member King for rejecting Member Ko's assessment were neither compelling nor reasonable.

[69] Finally, the conditions of release imposed by Member King simply would have required Mr. Lunyamila to:

i. present himself at the date, time and place that a CBSA officer required him to appear to comply with any obligation imposed on him under the IRPA, including removal if necessary;

ii. provide the CBSA, prior to release, with his residential address and to advise the CBSA in-person of any change in address before making the change;

iii. report to an officer at the CBSA office in Vancouver within 48 hours of his release; and

iv. report once a week to the CBSA.

To the extent that these conditions would have required the Canadian public to bear a substantial risk of criminal violence at Mr. Lunyamila's hands, they were patently unreasonable.

D. *IMM-3428-16*

[70] The decision that is the subject of review in IMM-3428-16 is Member Rempel's decision dated August 11, 2016.

[71] In brief, Member Rempel decided to release Mr. Lunyamila from detention after concluding that his detention had become indefinite and that he could be released subject to conditions that reduced the risks he poses to the public to a level such that continued detention is no longer justified, particularly given the length of his detention to date.

[72] The Minister has alleged that Member Rempel made numerous errors in reaching his decision. It is not necessary to address each of them, as I agree that Member Rempel's decision was unreasonable for the following reasons.

[73] In the course of reaching his decision, member Rempel found that while Mr. Lunyamila would pose a danger to the public if released from detention, "it's less of a danger than [he] posed before [he] came into immigration custody." I agree with the Minister that this conclusion was unreasonable, because it was based on an unreasonable assessment of recent violent outbursts by Mr. Lunyamila that have occurred in the facility where he is being detained.
I further agree with the Minister that Member Rempel misapprehended and minimized the nature of those outbursts, in the course of concluding that Mr. Lunyamila has not had any significant institutional violations or violent behaviour in detention, and that he had not lost control in those instances. I concur with Justice Harrington that Mr. Lunyamila's outbursts were "completely consistent with his previous random attacks on strangers on the street" (*Lunyamila*, above, at para 18). Among other things, the evidence was that, Mr. Lunyamila's "eyes were bulging," "foam was frothing at [his] mouth," he adopted a fighting stance, and it took a number of Correctional Officers to subdue him, as we was "screaming hysterically and physically resisting restraints."

[74] Member Rempel also erred by concluding that it was "highly unlikely that [the CBSA was] going to have much success," with its efforts to confirm the information that it had received regarding Mr. Lunyamila's alleged Tanzanian identity. In this regard, Member Rempel also stated that he was "very sceptical that this identity investigation is going to lead to anything, at

least not in the foreseeable future." This conclusion was unreasonable because it was baldly asserted and not appropriately justified. In addition, Member Rempel completely dismissed the significance of the linguistics analysis discussed earlier in these reasons, the various steps that the CBSA was taking to pursue the possibility of removing Mr. Lunyamila to Tanzania, and the information that the International Organization for Migration had, at that point in time, "accepted to look into this case." This error in turn led to Member Rempel's unreasonable conclusion that Mr. Lunyamila's "detention would be indefinite and strongly favours release."

[75] In addition, I agree with the Minister that the conditions imposed by Member Rempel on Mr. Lunyamila's release were unreasonable because they failed to sufficiently mitigate the danger to the public posed by him.

[76] The conditions that Member Rempel imposed on Mr. Lunyamila's release required him to:

i. Report at the date, time and place that a CBSA Officer requires him to appear;

ii. Comply with any obligation imposed on him under the IRPA, including removal, if necessary;

iii. Provide the CBSA with his address prior to his release, and advise the CBSA in person of any change in his address prior to the change being made;

iv. Confirm his acceptance at a residential treatment drug and alcohol treatment facility;

v. Follow “any” physician-directed treatment program that may be prescribed in respect of his depression or his other physical or mental-health needs;

vi. Refrain from engaging in any activity subsequent to his release which results in a conviction under any Act of Parliament;

vii. Abstain from consuming alcohol;

viii. Report weekly to the CBSA upon completion of his residential treatment program;

ix. Inform the CBSA where he will be residing upon the completion of his residential treatment program.

[77] At best, the only conditions in the list above that could be said to reduce the day-to-day danger that would have been posed by Mr. Lunyamila’s release from detention were the conditions requiring him to abstain from consuming alcohol, to refrain from engaging in any activity subsequent to his release which results in a conviction under any Act of Parliament, and to reside at a drug/alcohol treatment facility. The other conditions did not address Mr. Lunyamila’s conduct at the daily level.

[78] However, the three conditions mentioned immediately above would have imposed only weak constraints on Mr. Lunyamila's violent tendencies. In short, the record demonstrated that Mr. Lunyamila's violent conduct has continued even in the absence of alcohol, while in detention. In addition, as mentioned earlier in these reasons, the requirement to refrain from engaging in any activity subsequent to his release which results in a conviction under any Act of Parliament would not constrain any violence that he engaged in, until he had committed and been convicted for at least one further offence. Moreover, the requirement that he reside at a drug/alcohol treatment facility would have exposed the people at that facility to his violent tendencies, and would have exposed the general public to those same tendencies in the event that he left that facility.

[79] Member Rempel did not address how the treatment facility would prevent Mr. Lunyamila from leaving the premises or would substantially reduce to an acceptable level the risks posed by Mr. Lunyamila's mental health issues and his violent tendencies for those residing or working within the facility. There was also no requirement that he return to detention if he was asked to leave the facility, as occurred after his brief release from detention and stay at a treatment facility in 2013. There was not even a requirement that the facility contact authorities if he left the premises. In brief, as noted by the Minister, Member Rempel imposed a condition in the absence of any evidence or basis for reasonably believing that the unnamed facility to which Mr. Lunyamila would be released would be able to address the public safety concerns raised by his violent tendencies.

[80] Given all of the foregoing, the conditions of release imposed by Member Rempel were unreasonable, as they fell far short of being sufficiently stringent to reduce the danger to the public posed by Mr. Lunyamila, or his flight risk, to an acceptable level (*Canada (Minister Citizenship and Immigration) v Romans*, 2005 FC 435, at para 73 [*Romans*]; *Hassan*, above, at paras 42-46). For that reason they fell outside the range of possible and acceptable outcomes that are defensible in respect of the facts and law.

[81] Before concluding this review of Member Rempel's decision, I consider it appropriate to address his observation that this Court's jurisprudence does not provide clear guidance to the I.D. as to how it should treat the issue of length of detention.

[82] In this regard, Member Rempel noted that one line of jurisprudence states that indefinite detention cannot be treated as a determinative factor (see cases cited at paragraph 32 above), whereas another line of cases have given substantial weight to length of detention in the overall balancing process that is required under s. 248 of the Regulations (*Panahi-Darghaloo v Canada (Citizenship and Immigration)*, 2009 FC 1114, [*Panahi-Darghaloo*]; *Walker v Canada (Citizenship and Immigration)*, 2010 FC 392 [*Walker*]; *Shariff*, above; *Warssama*, above).

[83] In my view, the apparent divergence between these two lines of cases narrows considerably when one considers that, in *Panahi-Darghaloo*, *Walker* and *Shariff*, the Court's stated basis for finding the decisions that were under review to have been unreasonable is that they failed to consider the length of detention in question, and appear to have focused exclusively on the detainee's lack of cooperation in deciding to maintain his detention (*Panahi-*

Darghaloo, above, at paras 49-50; *Walker*, above, at paras 28 and 31; *Shariff*, above, at para 36). This was also a principal concern of the Court in *Warssama*, above, at paras 29 and 34, which can in any event be distinguished on the basis that the detainee was not a danger to the public (para 2), and there was no evidence that authorities in the detainee's country of origin (Somalia) were requiring him to sign anything – rather, it was a private airline (para 31). The length of detention in *Warssama* was also longer than in any of the other decisions (5 years), a consideration that I will address further below.

[84] In brief, the two lines of jurisprudence in question are consistent insofar as they maintain that it is an error to focus solely on one factor, whether it be length of detention or the failure to cooperate with the Minister's efforts to remove the detainee from the country. I entirely agree. It is also necessary to consider and reasonably weigh the other factors set forth in, and contemplated by, s. 248 of the Regulations, having regard to the particular circumstances of the case.

[85] That said, it bears emphasizing 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. This is even more so when it appears that conditions of release that would virtually eliminate the danger to the public posed by the detainee on a day-to-day basis have not been identified. In such circumstances, and where the detainee is also largely responsible for the length of his detention, by virtue of his failure to fully cooperate with the Minister's efforts to remove him from Canada, there would be three factors under s. 248 that strongly weigh in favour of continued detention.

[86] I will simply add in passing that the refusal to fully cooperate factor would also be a very important factor to consider in assessing whether the deprivation of the detainee's rights to liberty has been effected "in accordance with the principles of fundamental justice," as set forth in s. 7 of the *Charter*. As in the case at bar, it was not necessary to address that issue in *Panahi-Darghaloo*, *Walker*, *Shariff* or *Warssama*, as the Court in each of those cases was able to deal with the application for judicial review by assessing whether the I.D. decisions in question were reasonable.

[87] Before concluding this assessment of Member Rempel's decision, I should also address the tension that he identified between, on the one hand, this Court's decision in *Canada (Minister Citizenship and Immigration) v Kamail*, 2002 FCT 381 [*Kamail*], and on the other hand the decisions in *Panahi-Darghaloo*, *Walker*, *Warssama*, *Shariff and Ahmed 2*, above.

[88] In *Kamail*, the detainee was a citizen of Iran who was considered to be a flight risk and who refused to sign an application for travel documents that was required by the Iranian government. Nevertheless, an adjudicator from the Immigration and Refugee Board's Adjudication Division released the detainee, on the ground that his detention, which had reached four months, had become indefinite, due to the stalemate that the detainee had produced through his refusal to cooperate in signing the application in question.

[89] The Court set aside the adjudicator's decision, after concluding that it was unreasonable to have decided to release the detainee on the ground that his detention had become indefinite, given that the detainee was the sole cause of the indefinite nature of the detention. The Court

observed: “To hold otherwise would be to encourage deportees to be as uncooperative as possible as a means to circumvent Canada’s refugee and immigration system. The decision of the adjudicator cannot be allowed to stand” (*Kamail*, above, at para 38). I note that essentially the same conclusion was reached by the Court in *Sittampalam*, above, at paras 15-16.

[90] In *Panahi-Darghaloo*, the Court did not specifically comment on the principle quoted above from *Kamail*, although it noted that it was relied upon by the I.D. Member who made the decision that was under review. The Court simply stated that the Member’s failure to consider other factors beyond the detainee’s failure to cooperate, in particular his length of detention, was unreasonable (*Panahi-Darghaloo*, above, at paras 48-51). Essentially the same conclusion was reached in *Walker*, above, at paras 27-31.

[91] In my view, there is no conflict between, on the one hand, the approach adopted in the latter two cases, and on the other hand the approach adopted in *Kamail* and *Sittampalam*, so long as a decision to maintain detention is not made solely on the basis of a refusal to cooperate with the Minister’s removal efforts. The other factors in s. 248 of the Regulations must always be considered and weighed before reaching a decision.

[92] Accordingly, it would not present any conflict with *Panahi-Darghaloo* and *Walker*, above, for an I.D. Member to decide to maintain a detention that has become very lengthy, so long as consideration is given to all of the factors set forth in s. 248.

[93] However, I recognize that the Court's decisions in *Warssama*, and *Shariff* are more difficult to reconcile with *Kamail* and *Sittampalam,* at least once detention reaches the point that was at issue in those cases (approximately five years in *Warssama,* and 55 months in *Shariff*). In view of the length of detention that was at issue in *Warssama,* the Court stated that the I.D. Member "was wrong to conclude that the other section 248 factors outweighed the length of detention" (*Warssama,* above, at para 33). In the course of reaching that decision, the Court observed that the I.D. Member had "placed undue reliance upon *Kamail*, above, and failed to distinguish *Panahi-Darghaloo*, above, which is far more relevant" (*Warssama,* above, at para 29). This statement was adopted by the Court in *Shariff*, above, at para 33.

[94] The apparent conflict between, on the one hand, *Warssama* and *Shariff,* and on the other hand, with *Kamail* and *Sittampalam,* may well be entirely or largely attributable to the fact that the detentions at issue in *Warsamma* and *Shariff* were extremely lengthy.

[95] Nevertheless, in those infrequent situations in which those two lines of jurisprudence come into conflict, the scheme of the IRPA and the Regulations that I have described requires resolving a stalemate that has been produced by the detainee's failure to fully cooperate with the Minister's removal efforts, in favour of continued detention. Of course, this assumes that there have been no material changes in any of the other factors required to be considered under s. 248. Failure to maintain detention in such circumstances would have the perverse effect of rewarding the detainee for his failure to cooperate with his removal.

[96] Where, notwithstanding the foregoing, a decision to release is made, it would be equally perverse, and contrary to the scheme of the IRPA and the Regulations, to refrain from requiring the detainee to fully cooperate with his removal, as he is obliged to do. To do otherwise would be to permit the detainee to "take the law into his own hands" (*Sahin*, above, at para 15).

E. *IMM-3861-16*

[97] The last of the decisions that is the subject of review in this consolidated proceeding is Member Cook's decision dated September 16, 2016. Although counsel noted that they were not able to receive the full CTR prior to the Court's hearing in this matter, they agreed to proceed with this Court's review of that decision.

[98] As with his colleagues whose decisions have been reviewed above in these reasons for judgment, Member Cook decided to release Mr. Lunyamila from detention. He based that decision on the length of time that Mr. Lunyamila had already spent in detention, the indefinite length of time that he might spend in detention moving forward, and the availability of conditions of release that he considered would sufficiently mitigate the risks that Mr. Lunyamila might pose upon his release from detention.

[99] The Minister submitted that Member Cook's consideration of the factors listed in s. 248 of the Regulations, as well as the conditions of release that he specified in his decision, were unreasonable. I agree that Member Cook's decision was unreasonable for both of these reasons.

[100] With respect to the s. 248 factors, Member Cook initially addressed the reasons for detention and found that the Minister had made out three separate grounds for detention, namely, the danger to the public posed by Mr. Lunyamila, his flight risk, and the fact that the Minister was undertaking "a legitimate investigation into [Mr. Lunyamila's] identity that is capable of uncovering significant evidence" (p. 4).

[101] Member Cook then turned to Mr. Lunyamila's length of detention to date and the anticipated length of future detention. With respect to the first of these factors, he noted that Mr. Lunyamila had already been detained three years, and that "[a] large portion of the delay in this case processing falls at [his] feet" (p. 6). This was because Mr. Lunyamila had "repeatedly refused to cooperate in signing the declaration required by the Rwandan government" (p. 6).

[102] Regarding the anticipated length of future detention, he noted that Mr. Lunyamila's case is at a stalemate because he had "refused to cooperate and had stated on the record a number of times that [he would] never cooperate" (p. 5). Nevertheless, he added that it is uncertain as to whether his cooperation in signing a declaration would ultimately result in the Rwandan authorities issuing a travel document. Accordingly, he found that "[t]here does not appear to be a resolution to your case in sight" (p. 6) and that therefore Mr. Lunyamila's detention moving forward is indefinite. Citing *Sahin*, above, he concluded that this fact, together with the three year length of Mr. Lunyamila's detention to date, tended to favour Mr. Lunyamila's release.

[103] With respect to delays and lack of diligence, Member Cook concluded that this factor should receive a neutral weighting. He explained this conclusion by noting that the Minister first

received information regarding the possibility that Mr. Lunyamila is Tanzanian back in 2013, and yet "continued to place the bulk of their resources into the Rwandan angle." Member Cook stated that the Minister should have more vigorously pursued the possibility of removing Mr. Lunyamila to Tanzania.

[104] Finally, Member Cook turned to the last factor in s. 248, the existence of alternatives to detention. He stated that if Mr. Lunyamila agreed to comply with all of the conditions that he subsequently articulated, "the grounds for detention can be mitigated to a degree whereby your release pending removal can be manageable." He then listed various conditions of release that will be discussed further below in these reasons further below.

[105] In my view, the analysis that was undertaken by Member Cook was unreasonable.

[106] To begin, the conclusion that Mr. Lunyamila's detention had become indefinite was inconsistent with Member Cook's own findings regarding the prospects for removing Mr. Lunyamila to Rwanda or Tanzania. With respect to Rwanda, Member Cook stated: "A legitimate diplomatic process with the Rwandan government is in place where your removal may occur. Once you sign the declaration the ball is back in the CBSA's court. They then must engage the Rwandans and formally request that they waive the requirement for supporting identity documents." (p. 10). With respect to the possibility of removing Mr. Lunyamila to Tanzania, Member Cook recognized earlier in his reasons that "the Minister is undertaking a legitimate investigation into your identity that is capable of uncovering significant evidence" (p. 4).

[107] Member Cook also recognized that a large portion of the delay in progressing Mr. Lunyamila's case fell at his own feet, due to his steadfast refusal to cooperate. It is clear from a reading of Member Cook's reasons as a whole that he also recognized that Mr. Lunyamila's repeated refusal to cooperate with the Minister's removal efforts had contributed significantly to the uncertainty that existed with respect to the timing of his future removal.

[108] In these circumstances, it was unreasonable for Member Cook to rely on the foregoing to find that Mr. Lunyamila's detention had become indefinite, and then to rely on this finding to conclude that this, together with the three year length of detention, tended to favour Mr. Lunyamila's release. In essence, Member Cook was giving Mr. Lunyamila credit for his lengthy detention and the uncertainty regarding the timing of his future removal, notwithstanding the fact that Mr. Lunyamila was largely responsible for those things.

[109] This approach was particularly unreasonable given that Member Cook explicitly recognized precisely what Mr. Lunyamila was doing. In this regard, Member Cook observed: "You seem to have figured out that without your cooperation in signing a declaration required by the Rwandan government to issue a travel document that [*sic*] the CBSA cannot remove you" (p. 4). Member Cook also recognized that the wording of subsection 48(2) of the IRPA requires Mr. Lunyamila to leave Canada immediately, and does not give him the choice to refuse to cooperate with his removal. He further recognized that therefore "refusing to provide your signature and remove the process along is completely contrary to what is required by Canadian law."

[110] Member Cook's error with respect to the length of past and future detention factors was exacerbated by his decision to give a neutral weighting to the fourth of the factors set forth in s. 248, regarding delay and lack of due diligence. I recognize and accept that the Minister could have been more diligent with efforts to remove Mr. Lunyamila to Rwanda. But those efforts were substantially undermined by Mr. Lunyamila's repeated refusal to cooperate, as Member Cook recognized. Indeed, at one point in his assessment, Member Cook observed: "Your detention may very well have ended by now if you had cooperated as your removal stood a good chance of occurring. It at least stood the chance of the Minister being able to engage Rwanda about whether they would be prepared to offer a travel document in the absence of identity documents" (pp. 6-7).

[111] In my view, in these circumstances, it was unreasonable for Member Cook to have given a neutral weighting to this fourth factor in s. 248. That factor should have weighed strongly in favour of Mr. Lunyamila's continued detention. To weigh this factor otherwise in these circumstances would be to give Mr. Lunyamila the benefit of failing to cooperate, and thereby rendering the Minister's removal efforts much more difficult and lengthy.

[112] Member Cook's decision to give this fourth factor a neutral weighting had a material impact on his overall assessment of the s. 248 factors, as it assisted him to conclude that Mr. Lunyamila's three year length of detention to date, together with the uncertainty surrounding the timing of his future detention, and the availability of "appropriate alternatives" to detention, outweighed the remaining factors that favoured continued detention.

[113] It was also unreasonable for Member Cook to have found that the Minister should have allocated greater resources towards exploring the possibility of removing Mr. Lunyamila to Tanzania, after receiving the initial tip in late 2013 that he might be of Tanzanian nationality. The record demonstrated that the initial tip was followed up, and eventually led to a different person. In addition, Mr. Lunyamila's fingerprints were sent to Tanzanian authorities, who were unable to produce a match. As I have previously stated, the Minister cannot be faulted for failing to dedicate substantial additional resources to the possibility of removing Mr. Lunyamila to Tanzania, until the linguistics assessment was conducted and additional information was received suggesting that Mr. Lunyamila might be of Tanzanian nationality. Prior to those new developments, there was very little remaining basis to warrant spending scarce public funds on the possibility of removing Mr. Lunyamila to Tanzania. This is particularly so given that Mr. Lunyamila had repeatedly stated that he was not Tanzanian, although I recognize that he has given inconsistent evidence regarding whether he had ever been to Tanzania, and at one point he stated that he was "a citizen of the earth" (CTR at pp. 503, 550 and 563).

[114] Relying on *Ahmed 2*, above, at para 34, Mr. Lunyamila submits that Member Cook was under a heightened obligation to consider alternatives to detention, given that his detention had become indefinite. For the reasons I have given, it was unreasonable to conclude that Mr. Lunyamila's detention had become indefinite. In any event, his situation is very different from the situation with which the Court was presented in *Ahmed 2*, as the difficulties that were being encountered in removing Mr. Ahmed appear to have been attributable to ongoing conflict in the region to which he was to be removed. By contrast, Mr. Lunyamila has been a substantial cause of the difficulties in removing him, by virtue of his steadfast refusal to cooperate with the

Minister's removal efforts. That refusal has already created a substantial burden on this country's detention system, this Court (no less than 13 different members of this Court have had to address his situation this year alone) and the taxpayer. In such circumstances, the solution is not to reward those efforts by releasing Mr. Lunyamila subject to conditions to address the risks he poses. Rather, the solution is to "think outside the box" for solutions that would result in Mr. Lunyamila's full cooperation with the Minister's efforts to remove him from Canada. At the same time, the particular facts of this case are such that the Minister should actively explore ways to remove Mr. Lunyamila from Canada on an expeditious basis.

[115] I would simply add in passing that if a set of conditions would not be sufficient to warrant release in the absence of a lengthy detention, they should not be sufficient for that purpose in the presence of a lengthy detention that is largely attributable to non-cooperation by the detainee.

[116] Turning to the conditions of release that Member Cook articulated in his decision, I agree with the Minister that they were unreasonable because they did not adequately address Mr. Lunyamila's violent tendencies and his flight risk. In my view, given those reasons for detention, and the strong priority given to public safety and security in the IRPA, any conditions of release would have had to virtually eliminate, on a day-to-day basis, any risk that Mr. Lunyamila would pose to people living or working at any residence where he may be required to reside, and to the public at large. They would also have to have virtually eliminated any risk that he might disappear into the general public, to avoid future removal. The conditions of release articulated by Member Cook fell short of meeting this standard, even though they were

notably more robust than what the other Members whose decisions are reviewed in these reasons for judgment would have imposed.

[117] The conditions of release that Member Cook would have imposed would have required Mr. Lunyamila to:

i. Sign the statutory declaration required by the Rwandan authorities;

ii. Be accepted into a drug and alcohol treatment facility prior to his release, and then to complete that treatment facility's program;

iii. Abstain from consuming alcohol;

iv. Provide the CBSA with his address prior to his release, and then to advise them in person of any changes to that address before moving;

v. Report to the CBSA on a weekly basis, as well as for any lawful purpose under the IRPA, including removal;

vi. Make efforts to enrol in, and then to complete, a community-based violence prevention program;

vii. Participate with the Minister's efforts to investigate the possibility of him being of Tanzanian nationality;

viii. Keep the peace and be of good behaviour; and

ix. Follow any treatment program that a physician may prescribe.

[118] In my view, each of these conditions was entirely appropriate, for the reasons given by Member Cook. However, collectively they were not sufficient to address the risks posed by Mr. Lunyamila.

[119] Before commenting on the shortcomings of the conditions as a whole, I will pause to address the requirement that Mr. Lunyamila sign the statutory declaration required by the Rwandan authorities. Other Members of the I.D. have been reluctant to impose that condition, on the ground that it is a form of "disguised detention," because Mr. Lunyamila has consistently refused to sign anything that might advance the process of his removal. In my view, permitting Mr. Lunyamila to prevail with this demand would be tantamount to letting him take the law into his own hands, and dictate which laws of Canada he will follow and which ones he will not follow. I applaud Member Cook for recognizing this, and for noting that releasing Mr. Lunyamila into the public "without [such] a signature puts the public at risk."

[120] Turning to the shortcomings of the conditions of release, the reasons why they are not sufficiently robust to address the risks presented by Mr. Lunyamila can be briefly summarized as follows:

[121] First, they did not specifically ensure that the treatment facility to which Mr. Lunyamila is released would have the means and capacity to prevent him from harming another patient or someone who works at the facility on an ongoing, day-to-day, basis (*John Doe*, above, at paras 34-40). Mr. Lunyamila takes the position that this is not a "critical deficiency," as it should be up to the treatment facility to determine for itself, prior to accepting Mr. Lunyamila for treatment, whether it has adequate security and staff trained in de-escalation or experience dealing with past offenders. I disagree. It would be unreasonable to transfer to a treatment facility the responsibility for deciding whether such considerations need to be addressed, and whether it has the capacity to address them.

[122] Second, the conditions of release imposed by Member Cook did not require Mr. Lunyamila to remain on the premises of the treatment facility, to prevent him from going into the community and harming someone, or obtaining alcohol. There was no ongoing term or condition to ensure, on an ongoing and day-to-day basis, that Mr. Lunyamila remained on the premises. Mr. Lunyamila submits that it should be up to the treatment facility to determine its own rules, which may well include such restrictions. I could not disagree more.

[123] Third, there was no obligation on the facility to contact the CBSA to advise if Mr. Lunyamila either was not cooperating fully with his treatment or had left the facility.

Mr. Lunyamila submits that this is a matter that should be left to the facility's own protocol. Once again, I disagree. Something as important as whether Mr. Lunyamila has not cooperated or has left the facility is a matter that needed to be addressed in his conditions of release, to ensure that the risks he poses are effectively addressed.

[124] Fourth, there was no requirement for Mr. Lunyamila to actually enrol in a community-based violence prevention / anger management program. Rather, the condition that Member Cook would have imposed would simply have required him to "make efforts" to enrol in such a program, notwithstanding that Member Cook recognized Mr. Lunyamila's violent tendencies and that they had persisted even in the absence of alcohol consumption during his detention.

[125] Fifth, the requirement that he report on a weekly basis to the CBSA was not sufficient to address the demonstrated flight risk that Mr. Lunyamila presented.

[126] Finally, there were no other conditions to virtually eliminate the risk that Mr. Lunyamila would harm another patient or a worker at the treatment facility, or someone in the public at large. Even if some form of electronic monitoring had been imposed, it is not clear how that would have effectively addressed the risks presented by Mr. Lunyamila.

[127] Accordingly, as a whole, the conditions of release articulated by Member Cook were unreasonable, and Member Cook's decision should be set aside on that basis alone. For the reasons that I have given, those conditions fell outside the range of possible and acceptable outcomes that are defensible in respect of the facts and law.

VI. Conclusion

[128] For the reasons that I have set out in Part V above, the five applications that have been consolidated in this proceeding will be granted. The I.D.'s decisions in those matters will be set aside, and Mr. Lunyamila's detention will be maintained until 48 hours following the issuance of the I.D.'s decision in connection with his next 30-day detention review, which I understand is imminent.

[129] I have included the 48 hour term to permit the Minister to bring an application for an interim stay, should the I.D. decide that Mr. Lunyamila should be released from detention.

[130] Given Member Cook's recent familiarity with the facts of Mr. Lunyamila's complicated situation, and his understanding of the scheme of the IRPA and many of the relevant legal principles, I consider it to be appropriate to remit this matter back to him for reconsideration in accordance with these reasons.

VII. Certification Question

[131] At the end of the hearing of these consolidated applications, counsel to Mr. Lunyamila and counsel to the Minister each declined to propose a question for certification, on the basis that no question of general importance arises on the particular facts of this case.

[132] However, given the tensions in this Court's jurisprudence that Member Rempel has identified, and given that those tensions may well persist notwithstanding my effort to reconcile

them, I consider that there is a question of general importance that arises on the facts of this case, and that it is appropriate that the Federal Court of Appeal be given an opportunity to address that question.

[133] In brief, that question is whether a detainee who is a danger to the public or a flight risk can produce a "stalemate" by not fully cooperating with efforts to enforce a validly issued order for his removal from Canada, and then gain his release from detention as a result of that stalemate.

[134] I therefore requested counsel to provide any comments or suggestions that they might have on the following question, which necessarily has to be more complicated than what I have set forth immediately above, to specifically focus on the narrow issue in question:

> Can a person who has been detained for removal from Canada pursuant to a valid removal order and who has either been designated a danger to the public in Canada pursuant to paragraph 115(2)(a) of the *Immigration and Refugee Protection Act* or found to be unlikely to appear for his removal from Canada, as contemplated by paragraph 58(1)(b), avoid continued detention by refusing to take steps that may realistically contribute in a meaningful way to effecting such removal, and then take the position that the length of his detention has become such as to weigh so heavily in the assessment contemplated by section 248 of the *Immigration and Refugee Protection Regulations* that his release from detention is warranted, assuming there has been no significant change in other factors to be considered in that assessment?

[135] Counsel to Mr. Lunyamila and counsel to the Minister have each taken the position that the subject matter of the question set forth immediately above is not a suitable one for certification, because the balancing of each factor under section 248 of the Regulations will vary depending on the circumstances of each case.

[136] However, in recognition of that fact, I inserted the assumption stated at the end of the question to considerably assist in confining the scope of the question to the narrow issue in respect of which the Federal Court of Appeal's input would be helpful. That issue is whether, holding all other considerations constant, length of detention and future uncertainty regarding the approximate date of removal can overcome a steadfast refusal to cooperate that is largely responsible for such length of detention and future uncertainty. In other words, can detained persons in such situations effectively take the law into their own hands, and gain increased access to the territory of Canada, by refusing to cooperate with a validly enforced order for their removal?

[137] Accordingly, I will certify the following question:

> Can a person who has been detained for removal from Canada pursuant to a valid removal order and who has been found either to be a danger to the public or unlikely to appear for his removal from Canada, avoid continued detention by (i) refusing to take steps that may realistically contribute in a meaningful way to effecting such removal, and then (ii) relying on the length of his detention to argue that his release from detention is warranted, assuming there has been no significant change in other factors to be considered in the assessment contemplated by s. 248 of the *Immigration and Refugee Protection Regulations*?

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The applications in IMM-913-16, IMM-1378-16, IMM-3026-16, IMM 3428-16 and IMM-3861-16 are granted. The decisions that are the subject of review in those proceedings are set aside.

2. Given that Mr. Lunyamila is entitled to another detention review in the near future, only the decision in IMM-3861-16 will be referred back to the I.D. for reconsideration.

3. The decision in IMM-3861-16 shall be remitted back to Member Cook for reconsideration in accordance with these reasons. Member Cook shall review Mr. Lunyamila's detention having regard to the reasons for continued detention that exist at the time of his review.

4. Mr. Lunyamila shall remain in detention until 48 hours following the issuance of Member Cook's decision, provided, however, that if another Member of the I.D. conducts a review of Mr. Lunyamila's detention prior to that time, then the 48 hours stipulated above shall run from the issuance of that Member's decision.

"Paul S. Crampton"
Chief Justice

APPENDIX 1 – Relevant Legislation

Immigration and Refugee Protection Act, SC 2001, c 27	*Loi sur l'immigration et la protection des réfugiés*, LC 2001, ch 27
Serious criminality	Grande criminalité
36. (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for	36. (1) Emportent interdiction de territoire pour grande criminalité les faits suivants :
(a) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;	a) être déclaré coupable au Canada d'une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans ou d'une infraction à une loi fédérale pour laquelle un emprisonnement de plus de six mois est infligé;
(b) having been convicted of an offence outside Canada that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years; or	b) être déclaré coupable, à l'extérieur du Canada, d'une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans;
(c) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years.	c) commettre, à l'extérieur du Canada, une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans.
Criminality	Criminalité
(2) A foreign national is inadmissible on grounds of criminality for	(2) Emportent, sauf pour le résident permanent, interdiction de territoire pour criminalité les faits suivants :
(a) having been convicted in Canada of an offence under an Act of Parliament punishable by way of indictment, or of two offences under any Act of Parliament not	a) être déclaré coupable au Canada d'une infraction à une loi fédérale punissable par mise en accusation ou de deux infractions à toute loi fédérale qui ne découlent pas des

arising out of a single occurrence;

mêmes faits;

(b) having been convicted outside Canada of an offence that, if committed in Canada, would constitute an indictable offence under an Act of Parliament, or of two offences not arising out of a single occurrence that, if committed in Canada, would constitute offences under an Act of Parliament;

b) être déclaré coupable, à l'extérieur du Canada, d'une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable par mise en accusation ou de deux infractions qui ne découlent pas des mêmes faits et qui, commises au Canada, constitueraient des infractions à des lois fédérales;

(c) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an indictable offence under an Act of Parliament; or

c) commettre, à l'extérieur du Canada, une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable par mise en accusation;

(d) committing, on entering Canada, an offence under an Act of Parliament prescribed by regulations.

d) commettre, à son entrée au Canada, une infraction qui constitue une infraction à une loi fédérale précisée par règlement.

Effect

Conséquence

48. (2) If a removal order is enforceable, the foreign national against whom it was made must leave Canada immediately and the order must be enforced as soon as possible.

48. (2) L'étranger visé par la mesure de renvoi exécutoire doit immédiatement quitter le territoire du Canada, la mesure devant être exécutée dès que possible.

Arrest and detention without warrant

Arrestation sans mandat et détention

55. (2) An officer may, without a warrant, arrest and detain a foreign national, other than a protected person,

55. (2) L'agent peut, sans mandat, arrêter et détenir l'étranger qui n'est pas une personne protégée dans les cas suivants :

(a) who the officer has reasonable grounds to believe is inadmissible and is a danger to the public or is unlikely to appear for examination, an admissibility hearing, removal from Canada, or at a proceeding that could lead to the making of a removal order by the Minister under subsection 44(2); or

a) il a des motifs raisonnables de croire que celui-ci est interdit de territoire et constitue un danger pour la sécurité publique ou se soustraira vraisemblablement au contrôle, à l'enquête ou au renvoi, ou à la procédure pouvant mener à la prise par le ministre d'une mesure de renvoi en vertu du paragraphe 44(2);

(b) if the officer is not satisfied of the identity of the foreign national in the course of any procedure under this Act.

b) l'identité de celui-ci ne lui a pas été prouvée dans le cadre d'une procédure prévue par la présente loi.

Review of detention

57. (1) Within 48 hours after a permanent resident or a foreign national is taken into detention, or without delay afterward, the Immigration Division must review the reasons for the continued detention.

Further review

(2) At least once during the seven days following the review under subsection (1), and at least once during each 30-day period following each previous review, the Immigration Division must review the reasons for the continued detention.

Presence

(3) In a review under subsection (1) or (2), an officer shall bring the permanent resident or the foreign national before the Immigration Division or to a place specified by it.

Release — Immigration Division

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

(a) they are a danger to the public;

(b) they are unlikely to appear for examination, an admissibility hearing, removal from Canada, or at a proceeding that could lead to the making of a removal order by the Minister under subsection 44(2);

(c) the Minister is taking necessary steps to inquire into a reasonable suspicion that they are inadmissible on grounds of security, violating human or international rights,

Contrôle de la détention

57. (1) La section contrôle les motifs justifiant le maintien en détention dans les quarante-huit heures suivant le début de celle-ci, ou dans les meilleurs délais par la suite.

Comparutions supplémentaires

(2) Par la suite, il y a un nouveau contrôle de ces motifs au moins une fois dans les sept jours suivant le premier contrôle, puis au moins tous les trente jours suivant le contrôle précédent.

Présence

(3) L’agent amène le résident permanent ou l’étranger devant la section ou au lieu précisé par celle-ci.

Mise en liberté par la Section de l’immigration

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

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

b) le résident permanent ou l’étranger se soustraira vraisemblablement au contrôle, à l’enquête ou au renvoi, ou à la procédure pouvant mener à la prise par le ministre d’une mesure de renvoi en vertu du paragraphe 44(2);

c) le ministre prend les mesures voulues pour enquêter sur les motifs raisonnables de soupçonner que le résident permanent ou l’étranger est interdit de territoire pour raison

serious criminality, criminality or organized criminality;

de sécurité, pour atteinte aux droits humains ou internationaux ou pour grande criminalité, criminalité ou criminalité organisée;

(d) the Minister is of the opinion that the identity of the foreign national — other than a designated foreign national who was 16 years of age or older on the day of the arrival that is the subject of the designation in question — has not been, but may be, established and they have not reasonably cooperated with the Minister by providing relevant information for the purpose of establishing their identity or the Minister is making reasonable efforts to establish their identity; or

d) dans le cas où le ministre estime que l'identité de l'étranger — autre qu'un étranger désigné qui était âgé de seize ans ou plus à la date de l'arrivée visée par la désignation en cause — n'a pas été prouvée mais peut l'être, soit l'étranger n'a pas raisonnablement coopéré en fournissant au ministre des renseignements utiles à cette fin, soit ce dernier fait des efforts valables pour établir l'identité de l'étranger;

(e) the Minister is of the opinion that the identity of the foreign national who is a designated foreign national and who was 16 years of age or older on the day of the arrival that is the subject of the designation in question has not been established.

e) le ministre estime que l'identité de l'étranger qui est un étranger désigné et qui était âgé de seize ans ou plus à la date de l'arrivée visée par la désignation en cause n'a pas été prouvée.

(…)

(…)

Detention — Immigration Division

Mise en détention par la Section de l'immigration

(2) The Immigration Division may order the detention of a permanent resident or a foreign national if it is satisfied that the permanent resident or the foreign national is the subject of an examination or an admissibility hearing or is subject to a removal order and that the permanent resident or the foreign national is a danger to the public or is unlikely to appear for examination, an admissibility hearing or removal from Canada.

(2) La section peut ordonner la mise en détention du résident permanent ou de l'étranger sur preuve qu'il fait l'objet d'un contrôle, d'une enquête ou d'une mesure de renvoi et soit qu'il constitue un danger pour la sécurité publique, soit qu'il se soustraira vraisemblablement au contrôle, à l'enquête ou au renvoi.

Conditions

Conditions

(3) If the Immigration Division orders the release of a permanent resident or a foreign national, it may impose any conditions that it considers necessary, including the payment

(3) Lorsqu'elle ordonne la mise en liberté d'un résident permanent ou d'un étranger, la section peut imposer les conditions qu'elle estime nécessaires, notamment la remise

of a deposit or the posting of a guarantee for compliance with the conditions.

d’une garantie d’exécution.

No appeal for inadmissibility

64. (1) No appeal may be made to the Immigration Appeal Division by a foreign national or their sponsor or by a permanent resident if the foreign national or permanent resident has been found to be inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality.

Restriction du droit d’appel

64. (1) L’appel ne peut être interjeté par le résident permanent ou l’étranger qui est interdit de territoire pour raison de sécurité ou pour atteinte aux droits humains ou internationaux, grande criminalité ou criminalité organisée, ni par dans le cas de l’étranger, son répondant.

Ineligibility

101. (1) A claim is ineligible to be referred to the Refugee Protection Division if

(f) the claimant has been determined to be inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality, except for persons who are inadmissible solely on the grounds of paragraph 35(1)(c).

Irrecevabilité

101. (1) La demande est irrecevable dans les cas suivants :

f) prononcé d’interdiction de territoire pour raison de sécurité ou pour atteinte aux droits humains ou internationaux — exception faite des personnes interdites de territoire au seul titre de l’alinéa 35(1)c) —, grande criminalité ou criminalité organisée.

Restriction

112. (3) Refugee protection may not be conferred on an applicant who

(a) is determined to be inadmissible on grounds of security, violating human or international rights or organized criminality;

(b) is determined to be inadmissible on grounds of serious criminality with respect to a conviction in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years or with respect to a conviction outside Canada for an offence that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years;

(c) made a claim to refugee protection that

Restriction

112. (3) L’asile ne peut être conféré au demandeur dans les cas suivants :

a) il est interdit de territoire pour raison de sécurité ou pour atteinte aux droits humains ou internationaux ou criminalité organisée;

b) il est interdit de territoire pour grande criminalité pour déclaration de culpabilité au Canada pour une infraction à une loi fédérale punissable d’un emprisonnement maximal d’au moins dix ans ou pour toute déclaration de culpabilité à l’extérieur du Canada pour une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d’un emprisonnement maximal d’au moins dix ans;

c) il a été débouté de sa demande d’asile au

was rejected on the basis of section F of Article 1 of the Refugee Convention; or

(d) is named in a certificate referred to in subsection 77(1).

Protection

115. (1) A protected person or a person who is recognized as a Convention refugee by another country to which the person may be returned shall not be removed from Canada to a country where they would be at risk of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion or at risk of torture or cruel and unusual treatment or punishment.

Exceptions

(2) Subsection (1) does not apply in the case of a person

(a) who is inadmissible on grounds of serious criminality and who constitutes, in the opinion of the Minister, a danger to the public in Canada; or

(b) who is inadmissible on grounds of security, violating human or international rights or organized criminality if, in the opinion of the Minister, the person should not be allowed to remain in Canada on the basis of the nature and severity of acts committed or of danger to the security of Canada.

Immigration and Refugee Protection Regulations, SOR/2002-227

Considerations

230. (1) The Minister may impose a stay on removal orders with respect to a country or a place if the circumstances in that country or place pose a generalized risk to the entire

titre de la section F de l'article premier de la Convention sur les réfugiés;

d) il est nommé au certificat visé au paragraphe 77(1).

Principe

115. (1) Ne peut être renvoyée dans un pays où elle risque la persécution du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques, la torture ou des traitements ou peines cruels et inusités, la personne protégée ou la personne dont il est statué que la qualité de réfugié lui a été reconnue par un autre pays vers lequel elle peut être renvoyée.

Exclusion

(2) Le paragraphe (1) ne s'applique pas à l'interdit de territoire :

a) pour grande criminalité qui, selon le ministre, constitue un danger pour le public au Canada;

b) pour raison de sécurité ou pour atteinte aux droits humains ou internationaux ou criminalité organisée si, selon le ministre, il ne devrait pas être présent au Canada en raison soit de la nature et de la gravité de ses actes passés, soit du danger qu'il constitue pour la sécurité du Canada.

Règlement sur l'immigration et la protection des réfugiés, DORS/2002-227

Sursis : pays ou lieu en cause

230. (1) Le ministre peut imposer un sursis aux mesures de renvoi vers un pays ou un lieu donné si la situation dans ce pays ou ce lieu expose l'ensemble de la population

civilian population as a result of

(a) an armed conflict within the country or place;

(b) an environmental disaster resulting in a substantial temporary disruption of living conditions; or

(b) an environmental disaster resulting in a substantial temporary disruption of living conditions; or

(c) any situation that is temporary and generalized.

Cancellation

(2) The Minister may cancel the stay if the circumstances referred to in subsection (1) no longer pose a generalized risk to the entire civilian population.

Exceptions

(3) The stay does not apply to a person who

(a) is inadmissible under subsection 34(1) of the Act on security grounds;

(b) is inadmissible under subsection 35(1) of the Act on grounds of violating human or international rights;

(c) is inadmissible under subsection 36(1) of the Act on grounds of serious criminality or under subsection 36(2) of the Act on grounds of criminality;

(d) is inadmissible under subsection 37(1) of the Act on grounds of organized criminality;

e) is a person referred to in section F of Article 1 of the Refugee Convention; or

civile à un risque généralisé qui découle :

a) soit de l'existence d'un conflit armé dans le pays ou le lieu;

b) soit d'un désastre environnemental qui entraîne la perturbation importante et temporaire des conditions de vie;

b) soit d'un désastre environnemental qui entraîne la perturbation importante et temporaire des conditions de vie;

c) soit d'une circonstance temporaire et généralisée.

Révocation

(2) Le ministre peut révoquer le sursis si la situation n'expose plus l'ensemble de la population civile à un risque généralisé.

Exception

(3) Le paragraphe (1) ne s'applique pas dans les cas suivants :

a) l'intéressé est interdit de territoire pour raison de sécurité au titre du paragraphe 34(1) de la Loi;

b) il est interdit de territoire pour atteinte aux droits humains ou internationaux au titre du paragraphe 35(1) de la Loi;

c) il est interdit de territoire pour grande criminalité ou criminalité au titre des paragraphes 36(1) ou (2) de la Loi;

d) il est interdit de territoire pour criminalité organisée au titre du paragraphe 37(1) de la Loi;

e) il est visé à la section F de l'article premier de la Convention sur les réfugiés;

(f) informs the Minister in writing that they consent to their removal to a country or place to which a stay of removal applies.

f) il avise par écrit le ministre qu'il accepte d'être renvoyé vers un pays ou un lieu à l'égard duquel le ministre a imposé un sursis.

Removal by Minister

239. If a foreign national does not voluntarily comply with a removal order, a negative determination is made under subsection 238(1) or the foreign national's choice of destination is not approved under subsection 238(2), the removal order shall be enforced by the Minister.

Exécution forcée

239. Si l'étranger ne se conforme pas volontairement à la mesure de renvoi, si une décision défavorable est rendue aux termes du paragraphe 238(1) ou si son pays de destination n'est pas approuvé aux termes du paragraphe 238(2), le ministre exécute la mesure de renvoi.

Factors to be considered:

244. For the purposes of Division 6 of Part 1 of the Act, the factors set out in this Part shall be taken into consideration when assessing whether a person

(a) is unlikely to appear for examination, an admissibility hearing, removal from Canada, or at a proceeding that could lead to the making of a removal order by the Minister under subsection 44(2) of the Act;

(b) is a danger to the public; or

(c) is a foreign national whose identity has not been established.

Critères

244. Pour l'application de la section 6 de la partie 1 de la Loi, les critères prévus à la présente partie doivent être pris en compte lors de l'appréciation :

a) du risque que l'intéressé se soustraie vraisemblablement au contrôle, à l'enquête, au renvoi ou à une procédure pouvant mener à la prise, par le ministre, d'une mesure de renvoi en vertu du paragraphe 44(2) de la Loi;

b) du danger que constitue l'intéressé pour la sécurité publique;

c) de la question de savoir si l'intéressé est un étranger dont l'identité n'a pas été prouvée.

Flight risk

245. For the purposes of paragraph 244(a), the factors are the following:

(a) being a fugitive from justice in a foreign jurisdiction in relation to an offence that, if committed in Canada, would constitute an offence under an Act of Parliament;

(b) voluntary compliance with any previous

Risque de fuite

245. Pour l'application de l'alinéa 244a), les critères sont les suivants :

a) la qualité de fugitif à l'égard de la justice d'un pays étranger quant à une infraction qui, si elle était commise au Canada, constituerait une infraction à une loi fédérale;

b) le fait de s'être conformé librement à une

departure order;

(c) voluntary compliance with any previously required appearance at an immigration or criminal proceeding;

(d) previous compliance with any conditions imposed in respect of entry, release or a stay of removal;

(e) any previous avoidance of examination or escape from custody, or any previous attempt to do so;

(f) involvement with a people smuggling or trafficking in persons operation that would likely lead the person to not appear for a measure referred to in paragraph 244(a) or to be vulnerable to being influenced or coerced by an organization involved in such an operation to not appear for such a measure; and

(g) the existence of strong ties to a community in Canada.

Danger to the public

246. For the purposes of paragraph 244(b), the factors are the following:

(a) the fact that the person constitutes, in the opinion of the Minister, a danger to the public in Canada or a danger to the security of Canada under paragraph 101(2)(b), subparagraph 113(d)(i) or (ii) or paragraph 115(2)(a) or (b) of the Act;

(b) association with a criminal organization within the meaning of subsection 121(2) of the Act;

(c) engagement in people smuggling or trafficking in persons;

(d) conviction in Canada under an Act of

mesure d'interdiction de séjour;

c) le fait de s'être conformé librement à l'obligation de comparaître lors d'une instance en immigration ou d'une instance criminelle;

d) le fait de s'être conformé aux conditions imposées à l'égard de son entrée, de sa mise en liberté ou du sursis à son renvoi;

e) le fait de s'être dérobé au contrôle ou de s'être évadé d'un lieu de détention, ou toute tentative à cet égard;

f) l'implication dans des opérations de passage de clandestins ou de trafic de personnes qui mènerait vraisemblablement l'intéressé à se soustraire aux mesures visées à l'alinéa 244a) ou le rendrait susceptible d'être incité ou forcé de s'y soustraire par une organisation se livrant à de telles opérations;

g) l'appartenance réelle à une collectivité au Canada.

Danger pour le public

246. Pour l'application de l'alinéa 244b), les critères sont les suivants :

a) le fait que l'intéressé constitue, de l'avis du ministre aux termes de l'alinéa 101(2)b), des sous-alinéas 113d)(i) ou (ii) ou des alinéas 115(2)a) ou b) de la Loi, un danger pour le public au Canada ou pour la sécurité du Canada;

b) l'association à une organisation criminelle au sens du paragraphe 121(2) de la Loi;

c) le fait de s'être livré au passage de clandestins ou le trafic de personnes;

d) la déclaration de culpabilité au Canada, en vertu d'une loi fédérale, quant à l'une des

Parliament for

(i) a sexual offence, or

(ii) an offence involving violence or weapons;

(e) conviction for an offence in Canada under any of the following provisions of the *Controlled Drugs and Substances Act*, namely,

(i) section 5 (trafficking),

(ii) section 6 (importing and exporting), and

(iii) section 7 (production);

(f) conviction outside Canada, or the existence of pending charges outside Canada, for an offence that, if committed in Canada, would constitute an offence under an Act of Parliament for

(i) a sexual offence, or

(ii) an offence involving violence or weapons; and

(g) conviction outside Canada, or the existence of pending charges outside Canada, for an offence that, if committed in Canada, would constitute an offence under any of the following provisions of the Controlled Drugs and Substances Act, namely,

(i) section 5 (trafficking),

(ii) section 6 (importing and exporting), and

(iii) section 7 (production).

Identity not established

247. (1) For the purposes of paragraph 244(c), the factors are the following:

infractions suivantes :

(i) infraction d'ordre sexuel,

(ii) infraction commise avec violence ou des armes;

e) la déclaration de culpabilité au Canada quant à une infraction visée à l'une des dispositions suivantes de la *Loi réglementant certaines drogues et autres substances*:

(i) article 5 (trafic),

(ii) article 6 (importation et exportation),

(iii) article 7 (production);

f) la déclaration de culpabilité ou l'existence d'accusations criminelles en instance à l'étranger, quant à l'une des infractions ci-après qui, si elle était commise au Canada, constituerait une infraction à une loi fédérale:

(i) infraction d'ordre sexuel,

(ii) infraction commise avec violence ou des armes;

g) la déclaration de culpabilité ou l'existence d'accusations criminelles en instance à l'étranger, quant à l'une des infractions ci-après qui, si elle était commise au Canada, constituerait une infraction à l'une des dispositions ci-après de la Loi réglementant certaines drogues et autres substances :

(i) article 5 (trafic),

(ii) article 6 (importation et exportation),

(iii) article 7 (production).

Preuve de l'identité de l'étranger

247. (1) Pour l'application de l'alinéa 244c), les critères sont les suivants :

(a) the foreign national's cooperation in providing evidence of their identity, or assisting the Department in obtaining evidence of their identity, in providing the date and place of their birth as well as the names of their mother and father or providing detailed information on the itinerary they followed in travelling to Canada or in completing an application for a travel document;

a) la collaboration de l'intéressé, à savoir s'il a justifié de son identité, s'il a aidé le ministère à obtenir cette justification, s'il a communiqué des renseignements détaillés sur son itinéraire, sur ses date et lieu de naissance et sur le nom de ses parents ou s'il a rempli une demande de titres de voyage;

(b) in the case of a foreign national who makes a claim for refugee protection, the possibility of obtaining identity documents or information without divulging personal information to government officials of their country of nationality or, if there is no country of nationality, their country of former habitual residence;

b) dans le cas du demandeur d'asile, la possibilité d'obtenir des renseignements sur son identité sans avoir à divulguer de renseignements personnels aux représentants du gouvernement du pays dont il a la nationalité ou, s'il n'a pas de nationalité, du pays de sa résidence habituelle;

(c) the destruction of identity or travel documents, or the use of fraudulent documents in order to mislead the Department, and the circumstances under which the foreign national acted;

c) la destruction, par l'étranger, de ses pièces d'identité ou de ses titres de voyage, ou l'utilisation de documents frauduleux afin de tromper le ministère, et les circonstances dans lesquelles il s'est livré à ces agissements;

(d) the provision of contradictory information by a foreign national with respect to identity during the processing of an application by the Department; and

d) la communication, par l'étranger, de renseignements contradictoires quant à son identité pendant le traitement d'une demande le concernant par le ministère;

(e) the existence of documents that contradict information provided by the foreign national with respect to their identity.

e) l'existence de documents contredisant les renseignements fournis par l'étranger quant à son identité.

Other factors

248. If it is determined that there are grounds for detention, the following factors shall be considered before a decision is made on detention or release:

Autres critères

248. S'il est constaté qu'il existe des motifs de détention, les critères ci-après doivent être pris en compte avant qu'une décision ne soit prise quant à la détention ou la mise en liberté :

(a) the reason for detention;

a) le motif de la détention;

(b) the length of time in detention;

(c) whether there are any elements that can assist in determining the length of time that detention is likely to continue and, if so, that length of time;

(d) any unexplained delays or unexplained lack of diligence caused by the Department or the person concerned; and

(e) the existence of alternatives to detention.

b) la durée de la détention;

c) l'existence d'éléments permettant l'évaluation de la durée probable de la détention et, dans l'affirmative, cette période de temps;

d) les retards inexpliqués ou le manque inexpliqué de diligence de la part du ministère ou de l'intéressé;

e) l'existence de solutions de rechange à la détention.

FEDERAL COURT

SOLICITORS OF RECORD

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