Federal Court  Cour fédérale

Date: 20211105

Docket: IMM-3778-19

Citation: 2021 FC 1187

Ottawa, Ontario, November 5, 2021

PRESENT: The Honourable Mr. Justice Pamel

BETWEEN:

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Applicant

And

ISAAC BOAMPONG

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Minister of Public Safety and Emergency Preparedness [Minister] seeks judicial review of a decision of the Immigration Division [ID], dated June 17, 2019 [the Decision], ordering the release of the respondent, Isaac Boampong [Mr. Boampong], a person with a noteworthy immigration and criminal history in Canada.

[2] The Minister submits that the Decision should be set aside because the member of the Immigration Division [ID member], first, fettered her discretion by relying on a decision of a previous member of the ID who released Mr. Boampong five years earlier without having on hand a copy of the reasons for his release at the time and, second, breached the principles of procedural fairness by not permitting the Minister's representative to question the proposed guarantor or bondsperson, or make submissions regarding detention alternatives.

[3] I am persuaded by the Minister on both fronts. Accordingly, and for the reasons set out below, I grant the present application for judicial review and set aside the Decision.

II. Facts

[4] Mr. Boampong is a citizen of Ghana and became a permanent resident of Canada in 1985. Between 1993 and 1994, Mr. Boampong was convicted of seven criminal charges: two counts of breaking and entering, one count of robbery, two counts of uttering threats, one count of possession of stolen property and one count of possession of prohibited weapons. He was deported from Canada under escort in 1995 after being found inadmissible on grounds of criminality and was not permitted to return to Canada without first obtaining an Authorization to Return to Canada.

[5] It would seem that Mr. Boampong is a resourceful man and sometime between 2002 and 2003 managed to enter the United States with the assistance of smugglers and fraudulent documents. He re-entered Canada in December 2004, it would seem again with the help of smugglers and fraudulent documents.

[6] Some three and a half years later, in June 2008, the Canada Border Services Agency [CBSA] received word that Mr. Boampong was arrested by the Montreal police for identity fraud, however, the CBSA arrived on the scene too late to avoid Mr. Boampong being released by the police. When the CBSA went looking for him, it became clear that the addresses Mr. Boampong had provided to the police were also false. In any event, the Montreal police eventually caught up with and arrested Mr. Boampong at his girlfriend's apartment on August 22, 2008 and remanded him into the custody of the CBSA on August 26, 2008; Mr. Boampong immediately claimed refugee protection.

[7] At his detention review on September 4, 2008, the ID, considering that Mr. Boampong had just filed a claim for refugee protection, released him on the strength of a $2,000 bond provided by his aunt, acting as guarantor, as well as conditions to report regularly to the CBSA and to keep the peace and maintain good behaviour.

[8] Mr. Boampong's penchant for criminality continued, as did the issuance of deportation orders against him: his conviction for falsely identifying himself to a police officer in June 2008 led to a deportation order being issued against him in February 2009; another deportation order followed in June 2009 relating to Mr. Boampong's return to Canada without authorization after first being removed to Ghana in 1995; another deportation order was issued against him in February 2011. In May 2012, he was charged with assault with a weapon and in April 2013 he was charged with yet another offence in Quebec City.

[9] In June 2013, Mr. Boampong ceased to report to the CBSA and in October 2013 a warrant for his arrest was issued.

[10] Several months later, on June 1, 2014, Mr. Boampong' refugee claim was dismissed – he was found to be ineligible for refugee protection on grounds of serious criminality. Shortly thereafter, the street gang squad of the Montreal police arrested Mr. Boampong for failure to respect his release conditions. It would seem that Mr. Boampong had again attempted to provide the police with a false identity, but this time to no avail. He was surrendered to the CBSA and detained on June 3, 2014. Mr. Boampong was offered a pre-removal risk assessment [PRRA] as he claimed to fear for his life if he was to return to Ghana.

[11] Mr. Boampong's detention was maintained during his 48-hour, seven-day, first month (July) and second month (August) detention reviews. Amongst other things, given that Mr. Boampong had breached his release conditions by ceasing to report to the CBSA in 2013, the ID determined that releasing Mr. Boampong on the strength of his aunt acting as guarantor was no longer an appropriate alternative to detention.

[12] In July 2014, Mr. Boampong was convicted of possession of cannabis and failure to comply with an undertaking. Following the completion of his 38-day prison sentence, on August 22, 2014, Mr. Boampong was released by the Montreal police, remanded back into the custody of the CBSA and again detained. While he was serving his prison sentence, Mr. Boampong was informed that his PRRA application had been rejected; he did not challenge that decision by way of judicial review.

[13] I note that during his seven-day detention review on August 29, 2014, Mr. Boampong actually stated that he was now willing to return to Ghana. However, his aunt was not present at the hearing and no one was available to act as guarantor to secure his release; he continued to be detained.

[14] However, following his detention review on September 26, 2014, the ID released Mr. Boampong [the 2014 release decision]. The Records of Proceedings which transcribe the reasons for the member's decision [the 2014 reasons for release] indicate that Mr. Boampong had discussed arrangements for his return to Ghana with his family and had signed an application for travel documents. The member of the ID considered the length of Mr. Boampong's previous detention and the uncertainty as to when travel documents for his removal would be obtained. The member also noted, in particular as regards the appropriateness of Mr. Boampong's aunt acting as bondsperson, that when Mr. Boampong previously breached his release conditions, he was not living with his aunt. Now, the conditions for release would include that Mr. Boampong actually reside with his aunt, a fact which seemed to play heavily in the decision to release Mr. Boampong notwithstanding that his aunt had failed to curtail her nephew's conduct and earlier breach of his release conditions.

[15] The member of the ID made it clear that in his view, although Mr. Boampong clearly remained a flight risk, the length of time that he would potentially remain in detention made it appropriate that the alternative to detention be accepted; the member released Mr. Boampong on a $3,000 bond from his aunt, with conditions to report once a week to the CBSA and to keep the

peace and maintain good behaviour. The Order for Release [the 2014 Order for Release] setting out the conditions for release was accordingly issued.

[16] In May 2019, nearly five years following its initial request to the Ghanaian authorities, the CBSA finally obtained a temporary travel document for Mr. Boampong. Mr. Boampong was advised and a pre-removal interview was scheduled for June 13, 2019.

[17] During the pre-removal interview, Mr. Boampong was informed of his pending removal to Ghana on June 24, 2019. Mr. Boampong stated to the CBSA officer that he had not made arrangements for his removal and again reiterated that he feared being kidnapped and killed if he was to return to Ghana as he was almost killed following his deportation in 1995. The notes from the interview indicate that the CBSA officer proceeded to arrest Mr. Boampong on the grounds that he posed a greater flight risk now that his removal from Canada was imminent. When Mr. Boampong objected to his detention on the grounds that he had respected his release conditions and had presented himself voluntarily, the CBSA officer advised him that the situation had changed now that it had a travel document for him and his removal was imminent, and that because he continues to express fear of returning to Ghana, he constitutes a flight risk.

III. The 2019 release decision

[18] Mr. Boampong's 48-hour detention review took place on June 17, 2019. During the hearing, the Minister's representative raised two grounds for continuing Mr. Boampong's detention, *to wit*, that Mr. Boampong is a danger to the public and that he is a flight risk.

[19] The Minister's representative summarized Mr. Boampong's criminal and immigration history and argued amongst other things that the situation had changed significantly since the 2014 release decision in that, at the time, the duration of his detention was uncertain as the lack of a travel document prevented his removal from Canada. Since then, the CBSA had obtained a temporary travel document and thus Mr. Boampong's removal was now imminent, scheduled for June 24, 2019, some seven days later. According to the Minister, and given Mr. Boampong's strong family ties in Canada and his expressed fear of returning to Ghana, where he has no family, this change in circumstances rendered Mr. Boampong a serious flight risk.

[20] During the hearing, the ID member confirmed to the parties that she did not have in her file a copy of the 2014 reasons for release outlining why Mr. Boampong was released at the time, although she did seem to have on hand a copy of the 2014 Order for Release setting out the conditions for release. It would seem from the transcript that the ID member assumed that the member who rendered the 2014 release decision had not ordered a transcript – a seemingly common practice at the time where members ordered the release of a detainee. In any event, during the hearing, the ID member confirmed with the Minister's representative the terms for Mr. Boampong's release in 2014 – in particular, that reporting to the CBSA was to be on a weekly basis and that the bond of $3,000 that was provided by Mr. Boampong's aunt was still in place.

[21] After the Minister's representative completed her initial submissions, the ID member advised Mr. Boampong's counsel that no submissions were necessary and that she was ready to

issue her decision. The ID member did not examine Mr. Boampong's aunt, who was present, as to her ability and capacity to act as guarantor.

[22] As the ID member began to render her decision, the Minister's representative interjected and requested to examine Mr. Boampong's aunt. The ID member stated simply: "I am rendering my decision right now . . . ". When the Minister's representative commented that she had not been asked to speak to alternatives to detention, the ID member simply answered: "I listened to your position and now I am rendering my decision." The Minister's representative insisted upon questioning Mr. Boampong's aunt on her suitability and capacity to act as guarantor of Mr. Boampong's compliance with his release conditions but was not permitted to do so by the ID member.

[23] In the end, the ID member found that Mr. Boampong no longer represented a danger to the public as the charges against him and his convictions were "dated" and that he had not been charged or convicted of any crime since 2014.

[24] As for Mr. Boampong representing a flight risk, the ID member acknowledged that Mr. Boampong had a history of not respecting release conditions and that he expressed a fear of dying if he was to return to Ghana but that all these issues were before the member of the ID at the September 26, 2014 hearing and that Mr. Boampong was nonetheless released at the time.

[25] As to any behavioral issues pointing to a renewed sense of flight risk, the ID member noted that Mr. Boampong respected his weekly reporting commitment for five years, since 2014,

and that there was “no new behaviour that would lead [the ID member] to believe that [Mr. Boampong represented] a higher flight risk than [he] did in front of [the ID member’s] colleague”, i.e., the member who ordered the release of Mr. Boampong in September 2014.

[26] The ID member ordered the release of Mr. Boampong on the same conditions as the 2014 Order for Release, however, as stated, without the benefit of the 2014 reasons for release, which had seemingly been transcribed and available since October 2014, or the transcripts of the hearing. The ID member wrote the following on the 2019 Order for Release: “Maintain Order of Release of . . . 26/9/14”. The 2019 Order for Release included a requirement that Mr. Boampong present himself whenever required to do so by a CBSA officer, which would include appearing for his scheduled removal on June 24, 2019.

[27] On the next day, June 18, 2019, the Minister filed the present application for judicial review of the Decision and proceeded to serve Mr. Boampong on June 20, 2019 at the address of his aunt, being his last known address and the address where Mr. Boampong had undertaken to reside as a condition of his release, with proof of service filed with the Registry of this Court. The Minister’s counsel indicated during the hearing before me that she sensed that upon his release, Mr. Boampong would not present himself for removal. She consequently sought to serve him with the present proceedings prior to Mr. Boampong possibly “going underground”.

[28] As was feared, Mr. Boampong failed to present himself for his removal on June 24, 2019 and, as of the date of the hearing before me, his whereabouts remained unknown.

[29] On August 2, 2019, in an unrelated matter, another member of the ID similarly decided not to examine a proposed bondsperson and refused the Minister's representative's request to examine the proposed bondsperson before ordering the release of the detainee.

IV. Issues

[30] The Minister raises the following issues:

1. Did the ID member fetter her discretion by relying on the 2014 release decision without having a copy of the 2014 reasons for release?
2. Did the ID's refusal to grant the requests by the Minister's representative to examine the bondsperson and to make submissions on the proposed detention alternative constitute a breach of procedural fairness?
3. Is the Decision unreasonable?

V. Statutory framework

[31] The relevant statutory and regulatory provisions are set out in the Annex to this decision.

[32] The mechanics of immigration detention and review were well explained in the recent Federal Court of Appeal decision in *Brown v Canada (Citizenship and Immigration)*, 2020 FCA 130 at paragraphs 28 to 36 [*Brown*]. In short, under subsection 55(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act], the ID may "issue a warrant for the arrest and detention of a foreign national where there are reasonable grounds to believe they are inadmissible and pose a danger to the public or are a flight risk" (*Brown* at para 29), with

periodic statutory reviews of the detention being required. The five circumstances where grounds for detention exist are set out in subsection 58(1) of the Act.

[33] As stated by Mr. Justice Rennie at paragraph 32 of *Brown*, the "language of Parliament in subsection 58(1) is clear and the context and purpose of section 58 does not change the plain meaning of that language. Under subsection 58(1), detention must cease unless the ID is satisfied, on a balance of probabilities, that a ground for detention exists. If a ground for detention is not established, the inquiry is at an end. Release is the default." (emphasis added).

[34] However, detention is not automatic in the event that grounds for detention exist, and section 248 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [Regulations] provides that before detention is ordered, the ID must proceed to examine "whether detention is warranted based on certain prescribed factors" (*Brown* at para 33) set out in that section, for example, the length of time already spent in detention, the length of time that detention may continue, and the existence of alternatives to detention.

[35] Moreover, "[i]n considering alternatives to detention, the ID may impose any conditions on the detainee that it considers necessary to mitigate the risks (IRPA, s. 58(3))" (*Brown* at para 35). When a bondsperson is proposed as an alternative to detention, pursuant to subsection 47(2) of the Regulations, he/she must be able to ensure that the person concerned will comply with the conditions imposed.

[36] Finally, in accordance with Chairperson Guideline 2 issued by the Chairperson of the Immigration and Refugee Board pursuant to paragraph 159(1)(h) of the Act [Chairperson Guideline], the ID can only dispense with the requirement to hear a proposed bondsperson when the parties make a joint recommendation, or when the Minister does not object (3.3 Bondspersons).

VI. Preliminary issues

Ex parte hearing

[37] Mr. Boampong was not present at the hearing before me and, as stated, his whereabouts remain unknown. However, I am satisfied that proper service of the proceedings was effected upon him on June 20, 2019, at the home of his aunt, where he had undertaken to reside as part of his release conditions. In addition, the Minister advises that efforts were made to contact Mr. Boampong through his aunt and his lawyer but to no avail and that Mr. Boampong has not demonstrated any interest in participating in the present proceedings. I therefore see no issue in proceeding without the presence of Mr. Boampong.

Mootness

[38] As Mr. Boampong has now breached his release conditions and his whereabouts remain unknown – he may have left the country – the Minister quite rightly addressed the issue of the possible mootness of the present application.

[39] As a general rule, courts will not decide issues that have become moot. In situations such as this one, the immediate issues between the parties (in this case the appropriateness of the release) tend to become moot once the detainee breaches release conditions by not reporting to the authorities and either goes underground or leaves the country – the requisite tangible and concrete dispute between the parties has disappeared, thus rendering the issues before the court academic (*Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 at pp 353 to 363 [*Borowski*]). However, important legal issues remain.

[40] Where the matter is moot, it is necessary to decide whether the court should nonetheless exercise its discretion to hear the case. The court's exercise of discretion is guided by three policy imperatives: first, whether an adversarial context continues to exist between the parties; second, concern for judicial economy; and third, whether in rendering its decision the court would be encroaching upon the legislative sphere rather than fulfilling its role as the adjudicative branch of government (*Borowski* at pp 358 to 363).

[41] The present situation is similar to the one that presented itself in *Canada (Public Safety and Emergency Preparedness) v Ramirez*, 2013 FC 387, where Mr. Justice Shore stated at paragraph 6 of his decision:

> In the present case, the application has become moot, and the applicant concedes this, given that the respondent voluntarily left Canada before the scheduled date for the enforcement of the removal order. The respondent was later arrested and detained in the United States. However, the applicant is asking the Court to nevertheless exercise its discretion to rule on the merits of the application, considering the urgency and seriousness of the situation. Even though resolving the issues in dispute will have no practical consequences in the present case, the applicant argues that he is challenging what he describes as a [TRANSLATION]

> "constant" practice of the panel, and he asks that the Court assume its role in the development of the law and intervene to sanction the unreasonable decisions made by decision makers in detention reviews while defining the limits of their powers, thereby ensuring, among other things, that similar decisions are not rendered in the future.

[42] Similarly, in this case, the Minister is asking the Court to address an ongoing, problematic issue that continues to arise during detention hearings, being the fettering of an ID member's discretion and the refusal on the part of members of the ID to ensure proper questioning of the bondsperson.

[43] Having heard the Minister and having considered the issues raised in light of the test laid down by the Supreme Court in *Borowski*, I am pusuaded that the Court should exercise its discretion in this case to hear and decide the issues raised by the Minister.

[44] In the matter before me, although Mr. Boampong remains at large, an adversarial relationship continues to exist between him and the Minister; considering that he is still subject to arrest and detention, there continues to exist the potential for collateral consequences resulting from the determination of the validity of the Decision; consequently, the parties continue to have a "stake in the outcome" (*Borowski* at pp 358 to 360). However, even where there no longer exists an adversarial context as between the parties, a court may nonetheless hear the matter where "the circumstances suggest that the dispute will have always disappeared before it is ultimately resolved" (*Borowski* at p 361). That seems to be the case here.

VII. Standard of review

[45] Since the issues raise different standards of review, I will review the standard of review in conjunction with each issue.

VIII. Analysis

The ID fettered its discretion by tethering its assessment of flight risk to the 2014 release decision. Not having a copy of the 2014 reasons for release exacerbated the issue.

[46] The Minister argues that although the ID member did consider the evolutionary history of the matter as well as the fact that there was no change of circumstances since the September 2014 release decision, she ultimately failed to assess the evidence anew. Accordingly, the Minister submits that the ID member fettered her discretion by relying blindly on the 2014 release decision without a copy of the 2014 reasons for release in her file and without reassessing all the evidence which pointed to Mr. Boampong representing a flight risk and his aunt not being an appropriate bondsperson. Accordingly, the Decision cannot fall in the range of what is acceptable and defensible and "must *per se* be unreasonable" with no need to consider the standard of review (*Stemijon Investments Ltd. v Canada (Attorney General)*, 2011 FCA 299 at paras 23-25).

[47] As to the appropriate standard of review, I would agree with the Minister. The fettering of discretion has for some time been an automatic or nominate ground for setting aside administrative decision-making (see for example *Maple Lodge Farms v Government of Canada*, 1982 CanLII 24 (SCC), [1982] 2 SCR 2 at p 6). The Supreme Court in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], seems to confirm this approach

in the area of decision-maker discretion. Although mostly silent on this issue, the Supreme Court outlines a more imperative approach when dealing with decision-maker discretion. In discussing the importance of the governing statutory scheme within a particular administrative decision, the Supreme Court made it clear that "[t]he statutory scheme also informs the acceptable approaches to decision making: for example, where a decision maker is given wide discretion, it would be unreasonable for it to fetter that discretion: see *Delta Air Lines*, at para. 18" (*Vavilov* at para 108).

[48] I agree with Mr. Justice Ahmed in *Canada* (*Public Safety and Emergency Preparedness) v Keto*, 2020 FC 467 [*Keto*], that *Vavilov* does not change the law on this point and, where a tribunal fetters its discretion, the decision cannot stand regardless of the applicable standard of review (*Keto* at para 29). All that is left to determine is whether the ID member indeed fettered her discretion in rendering the Decision.

[49] As was stated by Mr. Justice de Montigny, as he then was, in *Waycobah First Nation v Canada (Attorney General)*, 2010 FC 1188 at para 43, aff'd 2011 FCA 191, "a decision-maker's discretion is fettered where a factor that may properly be taken into account in exercising discretion is elevated to the status of a general rule that results in the pursuit of consistency at the expense of the merits of individual cases. The essence of discretion is that it can be exercised differently in different cases."

[50] A decision-maker must examine each case individually and exercise independent judgment and discretion depending on the circumstances and will fetter her/his discretion if

she/he inappropriately ties the fate of the decision to the opinion of another. (David P. Jones and Anne S. de Villars, *Principles of Administrative Law*, 6th ed (Toronto: Carswell, 2014) at pp 206–207; *Su v Canada (Minister of Citizenship and Immigration)*, 1997 CanLII 5622 (FC), 136 FTR 52). In addition, decision-makers may be fettering their discretion when they base their decision exclusively on an issue, to the exclusion of other relevant considerations (*Gurbek v Canada (Citizenship and Immigration)*, 1999 CanLII 7835 (FC), 168 FTR 313 at para 8).

[51] The Minister submits that the ID cannot discharge its duty to review a person's detention solely by relying on a previous assessment and that in this case, by relying on the 2014 release decision in rendering the Decision, the ID member did not come to her own determination and did not exercise her discretion independently as she was required to do under the Act.

[52] In this case, I am persuaded that the ID member fettered her discretion in rendering her decision by tethering her decision to the 2014 release decision; the problem was only exacerbated by the fact that the ID member did not have the 2014 reasons for release for review.

[53] The ID member acknowledged at the commencement of the hearing of June 17, 2019, that she did not have the full file with her and specifically did not have a copy of the 2014 reasons for release. It is unclear, however, if the Minister's representative would have had access to the 2014 reasons for release as, according to the Minister, they were transcribed and available as of October 2014. The Minister argues that the ID member, if she felt it important, could have proceeded with locating the 2014 reasons for release, but did not do so. That may be so, but in fairness, neither did the Minister's representative, who stated at the hearing before the ID

member: “It is unfortunate that we don’t have the transcript of the decision because I would have loved to understand what he ---”.

[54] Why neither the ID member nor the Minister’s representative had a copy of the 2014 reasons for release during the hearing on June 17, 2019 remains a mystery. In any event, during the hearing, the Minister’s representative summarized the immigration and criminal history of Mr. Boampong, including his failure to respect his release conditions back in 2013, his failed refugee claim, as well as the events that followed, including Mr. Boampong’s recapture and detention, his release in 2014 and his continued respect of his release conditions for five years. The Minister’s representative also highlighted how the risk for Mr. Boampong had increased recently by the fact that a travel document for him had now finally been acquired, making his removal imminent – which was not the case in 2014. It had also increased by his expressed fear of returning to Ghana – during his September 26, 2014 detention review hearing he indicated that he was prepared to return to Ghana, a consideration, amongst others, which may have led to his release at the time.

[55] The ID member set out in detail, for herself, the elements of Mr. Boampong’s immigration and criminal history, often adding to the summary outlined by the Minister’s representative; she specifically mentioned elements of facts that were not present in 2014 and that would tend to favour Mr. Boampong’s release, for example, that Mr. Boampong has not been charged or convicted of any crime since 2014 and that he has respected his reporting condition since 2014.

[56] It is also clear that the ID member considered Mr. Boampong's immigration and criminal history and his fear of returning to Ghana; she specifically mentioned the following: "It is normal that you are saying that you fear to go back to Ghana . . . You were being honest. You fear to go back to Ghana but you didn't say that you are not going to go back to Ghana." The ID member did refer to the 2014 release decision, in particular by first acknowledging that her colleague had released Mr. Boampong in 2014.

[57] Had that been the extent of the ID member's reasons for her decision to release Mr. Boampong, I would not have been inclined to accept the Minister's position. Nor does the ID member's lack of need to hear Mr. Boampong's counsel point to a finding of fettering of discretion on the part of the ID member.

[58] However, after highlighting the elements of Mr. Boampong's history prior to 2014, the ID member stated:

> But all these are past behaviours and this behaviour was in front of my colleague when he released you in September, 2014. There is no new behaviour that would lead me to believe that you represent a higher flight risk than you did in front of my colleague.

[59] By highlighting that the incidents prior to 2014 had already been assessed and that there had been no new behavioral issues since the 2014 release decision to allow her to believe that Mr. Boampong represented a greater flight risk than he did at the time, the ID member tethered her assessment of the risk factors that existed prior to 2014 to the 2014 release decision, with the only thing remaining being to determine whether any new elements of risk or behavioral issues since that time would cause her to alter that assessment. Not only does such a decision-making

process forcibly crystalize the determination of flight risk as regards the elements of Mr. Boampong's history that predated the 2014 release decision, but it also does not properly allow for the exercise of discretion as part of the independent re-evaluation of those same elements of risk with the benefit of the more recent elements of the detainee's risk matrix.

[60] Every detention review must bring with it a fresh assessment of all the evidence, considered together. As stated by Mr. Justice Rennie at paragraph 154 of *Brown*, "[n]either the ID, nor the Federal Court assesses the legitimacy of detention blinded to the overall history of detention. Each 30-day detention review requires consideration of the detention as a whole."

[61] In *Canada (Minister of Citizenship and Immigration) v Lai*, 2001 FCT 118 (CanLII), [2001] 3 FC 326 (TD) at paragraph 15, Mr. Justice Campbell held that in a detention review, "all existing factors relating to custody must be taken into consideration, including the reasons for previous detention orders being made". The principle was repeated in *Canada (Minister of Citizenship and Immigration) v Thanabalasingham*, 2004 FCA 4, [2004] 3 FCR 572 at paragraph 8, where Mr. Justice Rothstein, as he then was, stated that "at each hearing, the member must decide afresh whether continued detention is warranted".

[62] In exercising his/her discretion, a member of the ID must consider the detainee's entire detention history as a whole, however, it is clear from a simple reading of the Decision that the manner in which the ID member assessed Mr. Boampong as a flight risk created a situation whereby that assessment in relation to the elements of Mr. Boampong's history that took place prior to the 2014 release decision was predetermined.

[63] This was not a situation where the ID member relied "entirely on reasons given by previous officials to order continued detention" (*Canada (Public Safety and Emergency Preparedness) v Chhina*, 2019 SCC 29, [2019] 2 SCR 467 at para 62). Here, the 2014 reasons for release were not available. Rather, the ID member deferred her assessment of Mr. Boampong's risk of flight to the member who issued the 2014 release decision. In her mind, the assessment of risk based on those elements was already determined, somehow set in stone, and a decision as to whether or not to release in 2019 would only depend upon behavioral issues that arose since the 2014 release decision. Consequently, the ID member fettered her discretion by not allowing herself to reassess pre-2014 elements within the context of the more recent elements which purportedly made Mr. Boampong a greater flight risk in 2019. As stated, the problem was only exacerbated by the fact that the ID member did not even have before her the 2014 reasons for release, which may have shed greater light on the issue of Mr. Boampong's release at the time.

[64] I am persuaded that the Decision reflects the fact that the ID member, to a great extent, tied the fate of her Decision to the 2014 release decision, and therefore the Decision cannot stand. I would thus allow the application under this ground of review.

Refusing the request of the Minister's representative to examine the bondsperson and to comment on the alternative was a breach of procedural fairness

[65] Citing *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at paragraph 43, the Minister argues that the failure to observe procedural fairness by an administrative tribunal must be reviewed on a correctness standard. I disagree.

[66] For issues of procedural fairness, this Court does not need to engage in a standard of review analysis. As was stated recently by Mr. Justice Gascon in *Angara v Canada (Citizenship and Immigration)*, 2021 FC 376 at paragraphs 23 and 24 [*Angara*]:

> [23] However, the Federal Court of Appeal has affirmed that questions of procedural fairness are not truly decided according to any particular standard of review. Rather, it is a legal question for the reviewing courts, and the courts must be satisfied that procedural fairness has been met. When the duty of an administrative decision maker to act fairly is questioned or a breach of fundamental justice is invoked, it requires the reviewing courts to verify whether the procedure was fair having regard to all of the circumstances (*Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35; *Lipskaia v Canada (Attorney General)*, 2019 FCA 267 at para 14; *Canadian Airport Workers Union v International Association of Machinists and Aerospace Workers*, 2019 FCA 263 at paras 24-25; *Perez v Hull*, 2019 FCA 238 at para 18; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 [*CPR*] at para 54). This assessment includes the five, non-exhaustive contextual factors set out by the SCC in *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817 [*Baker*] (*Vavilov* at para 77). Those factors are: (1) the nature of the decision being made and the decision-making process followed by the public body in making it; (2) the nature of the statutory scheme and the terms of the statute pursuant to which the public body operates; (3) the importance of the decision to the individual or individuals affected; (4) the legitimate expectations of the person challenging the decision; and (5) the choices of procedure made by the public body itself, and the nature of the deference accorded to it (*Congrégation des*

> *témoins de Jéhovah de St-Jérôme-Lafontaine v Lafontaine (Village)*, 2004 SCC 48 at para 5; *Baker* at paras 23-28).
>
> [24] It is up to the reviewing courts to make that determination and, in conducting this exercise, the courts are called upon to ask, "with a sharp focus on the nature of the substantive rights involved and the consequences for an individual, whether a fair and just process was followed" (*CPR* at para 54). Therefore, the ultimate question raised when procedural fairness and alleged breaches of fundamental justice are the object of an application for judicial review is not so much whether the decision was "correct." It is rather whether, taking into account the particular context and circumstances at issue, the process followed by the decision maker was fair and offered the affected parties a right to be heard and a full and fair opportunity to know the case they have to meet and to respond to it (*CPR* at para 56; *Huang v Canada (Citizenship and Immigration)*, 2018 FC 940 at paras 51-54). No deference is owed to administrative decision makers on matters raising procedural fairness concerns.
>
> [Emphasis added.]

[67] The Supreme Court of Canada's decision in *Vavilov* did not modify this approach (*Angara* at para 22). In the end, the Court must simply determine "whether the procedure was fair having regard to all of the circumstances" and ask "whether a fair and just process was followed" (*Canada Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54; *Gill v Canada (Citizenship and Immigration)*, 2020 FC 934 at para 32).

[68] The Minister submits that at the hearing, the ID began to render its decision even though the bondsperson had not been heard. When the request was made by the Minister's representative to examine the bondsperson, the ID denied her requests, despite the bondsperson's presence in the courtroom:

> BY THE MEMBER

> [1] This is the decision in the detention review hearing of Isaac Boampong. . . .
>
> . . .
>
> BY THE MINISTER'S REPRESENTATIVE
>
> [3] Excuse me. I don't want to be rude but if you are planning to do an Offer of Release [*sic*], I would like to hear the bonds person.
>
> BY THE MEMBER
>
> [4] I am rendering my decision right now, [name of Minister's representative].
>
> [5] M2 are the ---
>
> BY THE MINISTER'S REPRESENTATIVE
>
> [6] You have not asked me for my comments on a possible alternative.
>
> BY THE MEMBER
>
> [7] I listened to your position and now I am rendering my decision.
>
> BY THE MINISTER'S REPRESENTATIVE
>
> [8] So, I have no rights to question the person?
>
> BY THE MEMBER
>
> [9] I am rendering my decision, [name of Minister's representative]. Thank you.
>
> . . .
>
> [12] So, you have a long history here in Canada. The Minister's Counsel went over many of the facts. I didn't need to hear from your lawyer or to hear any bonds person. My colleague had released you on the 29th of September, 2014 and had imposed some conditions on you.

[69] The Minister argues that by proceeding in this way, the ID member breached procedural fairness by failing to examine the statutory requirements concerning bondspersons and denying

the Minister's representative the right to test the evidence presented by the bondsperson and examine whether these requirements were met.

[70] The Minister argues that the ID member did not have the benefit of the 2014 reasons for release to understand why the aunt had been found acceptable to act as a bondsperson at that time, after being refused and found to be unacceptable as guarantor on several occasions prior to the September 26, 2014 hearing. The Minister argues that the situation had changed since the 2014 release decision with the travel documents now in hand and Mr. Boampong's removal now imminent and that examining the aunt would have allowed the Minister's representative to verify whether she was able to secure the compliance of her nephew, whether she knew that removal was imminent, how she could ensure that Mr. Boampong would comply with his terms and conditions, and where her situation fit within the Chairperson Guideline for bondspersons.

[71] Consequently, adds the Minister, the ID rendered its decision without any information about the aunt's capacity to act as a bondsperson; the ID neither heard any evidence on this issue nor benefited from either the transcript of the decision or hearing held in September 2014 or the 2014 reasons for decision, which could have shed some light on why Mr. Boampong's aunt was accepted as a guarantor when previously she had not been, given Mr. Boampong's breach of reporting conditions in 2013.

[72] Failure to allow the Minister' representative to question a potential bondsperson may constitute breach of procedural fairness (*Canada (Citizenship and lmmigration) v Ke*, [2000] FCJ

No 522 (QL), 188 FTR 91 at paras 6-7 [*Ke*]; *Canada (Public Safety and Emergency Preparedness) v Gyekye*, 2011 FC 185 at paras 28-29).

[73] I find this case to be on all fours with the decision in *Ke*. I accept that although the ID may not be required in all cases to proceed with questioning a bondsperson, it seems to me that where several years have passed since the bondsperson was questioned on her ability to secure the compliance of the detainee and where, as is the case here, key indicia of a heightened risk have appeared, it was incumbent upon the ID member to allow the Minister' representative the opportunity to test the continued ability of Mr. Boampong's aunt to discharge the obligations of guarantor incumbent upon a bondsperson.

[74] In the present case, Mr. Boampong's aunt was present and able to be questioned. She had failed to secure Mr. Boampong's compliance with his release conditions in the past, and it was unclear with the change in circumstances and the passage of time whether she was still able to undertake the responsibility as guarantor of Mr. Boampong's compliance with his release conditions pending his removal from Canada, particularly on account of the suggestion in this case that Mr. Boampong was no longer living with his aunt – a clear breach of the 2014 Order for Release.

[75] Given the history of the matter, I cannot see how it was possible for the ID member to be satisfied that Mr. Boampong's aunt would continue to be able to comply with the obligations incumbent upon her pursuant to paragraph 47(2) of the Regulations without at least allowing the Minister's representative to ask her questions. Adding to the uncertainty was that the reasons

why she was permitted to re-engage as a bondsperson notwithstanding repeatedly being disqualified to so act by previous members of the ID – part of the 2014 reasons for release – was not before the ID member.

[76] Compounding the breach of procedural fairness was the fact that the Minister's representative was also not permitted to make submissions regarding detention alternatives. In fact, it would seem that the alternative to detention – the aunt acting as bondsperson - was initiated by the ID member as Mr. Boampong's counsel was advised she need not make representations on that issue. The Minister's representative was not provided with an opportunity to comment or to rebut the proposal of an alternative in this case.

[77] All in all, it seems to me that it would be difficult to find a clearer case of a breach of procedural fairness than the failure to have allowed the Minister's representative to examine the bondsperson in this context and to provide submissions on the proposed alternative to the detention of Mr. Boampong. I would thus allow the application under this ground of review as well.

IX. Conclusions

[78] Given my findings on the first two issues, I need not consider whether the Decision was otherwise unreasonable. I would allow the application for judicial review. That said, I will simply quash the Decision without sending it back for reconsideration. Reconsideration of the matter at this point would serve no purpose.

JUDGMENT in IMM-3778-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed;

2. There is no question for certification.

"Peter G. Pamel"
Judge

Annex

Immigration and Refugee Protection Act, SC 2001, c 27

Release — Immigration Division	**Mise en liberté par la Section de l'immigration**
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	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) 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, 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);	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) 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;	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 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	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

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	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.

Immigration and Refugee Protection Regulations, SOR/2002-227

Requirements if guarantee posted	**Exigences : cautionnement**
47(2) A person who posts a guarantee must	47(2) La personne qui fournit une garantie d'exécution, autre qu'une somme d'argent, doit :
(a) be a Canadian citizen or a permanent resident, physically present and residing in Canada;	a) être citoyen canadien ou résident permanent effectivement présent et résidant au Canada;
(b) be able to ensure that the person or group of persons in respect of whom the guarantee is required will comply with the conditions imposed; and	b) être capable de faire en sorte que la personne ou le groupe de personnes visé par la garantie respecte les conditions imposées;
(c) present to an officer evidence of their ability to	c) fournir à un agent la preuve qu'elle peut s'acquitter de ses

fulfil the obligation arising from the guarantee.	obligations quant à la garantie fournie.
. . .	[…]
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, the Canada Border Services Agency or the person concerned;	d) les retards inexpliqués ou le manque inexpliqué de diligence de la part du ministère, de l'Agence des services frontaliers du Canada ou de l'intéressé;
(e) the existence of alternatives to detention; and	e) l'existence de solutions de rechange à la détention;
(f) the best interests of a directly affected child who is under 18 years of age.	f) l'intérêt supérieur de tout enfant de moins de dix-huit ans directement touché.

Chairperson Guideline 2 issued by the Chairperson of the Immigration and Refugee Board pursuant to paragraph 159(1)(h) of the *Immigration and Refugee Protection Act*, SC 2001, c 27

3.3 Bondspersons	**3.3 Cautions**

3.3.1 If a member determines that a bondsperson is necessary to motivate compliance by the person, the bond should be proportionate to the identified risk.

3.3.1 Si un commissaire décide qu'une caution est nécessaire pour motiver la personne à respecter ses conditions, le cautionnement devrait être proportionnel au risque identifié.

3.3.2 When a bondsperson is present and available to testify, members must hear direct evidence from the bondsperson before determining that the person is not suitable to be a bondsperson. Members cannot rely on bondsperson interviews conducted outside of the hearing room and not in the presence of members in this context. However, upon a joint release recommendation or where the Minister does not object, a member can determine that the bondsperson is acceptable without hearing direct testimony.

3.3.2 Si une caution est présente et disponible pour témoigner, le commissaire doit entendre directement le témoignage de cette personne avant de décider qu'elle ne peut pas servir de caution. Dans ce contexte, les commissaires ne peuvent pas se fonder sur les entrevues menées avec les cautions à l'extérieur de la salle d'audience et en leur absence. Cependant, en cas de recommandation conjointe de mise en liberté, ou si le ministre ne s'y oppose pas, le commissaire peut décider qu'une caution est acceptable sans avoir entendu directement son témoignage.

3.3.3 If the proposed bondsperson is unavailable to provide testimony, a member should determine whether an adjournment is required or a decision should be rendered with an early detention review scheduled, depending on the duration of the lack of availability.

3.3.3 Si la caution proposée n'est pas disponible pour témoigner, le commissaire devrait décider si un ajournement est nécessaire ou s'il y a lieu de rendre une décision et de mettre au rôle un contrôle anticipé des motifs de détention, selon la période pendant laquelle la caution n'est pas disponible.

3.3.4 Members must ensure that relevant considerations relating to the proposed bondsperson are explored at

3.3.4 Lors du contrôle des motifs de détention, les commissaires devraient veiller à examiner les considérations

the detention review in order to assess the suitability of the person put forward.	applicables aux personnes proposées à titre de cautions afin d'évaluer si ces personnes sont des cautions acceptables.
. . .	[…]
3.3.8 Members must assess whether the proposed bondsperson is reliable and whether there has been a previous failure of that bondsperson to ensure compliance with conditions of release by the person concerned, if they were acting as a bondsperson or under a similar obligation in the prior circumstances. Members must assess whether the proposed bondsperson is able to exert influence, provide supervision, and motivate the person concerned to comply with the conditions of release.	3.3.8 Les commissaires devraient évaluer si la caution proposée est fiable et si elle a déjà manqué à son rôle de caution, soit de s'assurer que l'intéressé respecte ses conditions de mise en liberté, dans le cas où elle a déjà agi à titre de caution ou a eu une obligation semblable dans une situation antérieure. Les commissaires devraient évaluer si la caution proposée est capable d'exercer une influence sur l'intéressé, de le surveiller et de le motiver à respecter ses conditions de mise en liberté.
. . .	[…]
[Emphasis added.]	[Je souligne.]

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3778-19
STYLE OF CAUSE:	THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS v ISAAC BOAMPONG
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	JANUARY 13, 2021
JUDGMENT AND REASONS:	PAMEL J.
DATED:	NOVEMBER 5, 2021

APPEARANCES:

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No one appearing	FOR THE RESPONDENT

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