Federal Court of Appeal  Cour d'appel fédérale

Date: 20180119

Docket: A-444-16

Citation: 2018 FCA 22

CORAM: **STRATAS J.A.**
WOODS J.A.
LASKIN J.A.

BETWEEN:

JACOB DAMIANY LUNYAMILA

Appellant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

Heard at Toronto, Ontario, on October 30, 2017.

Judgment delivered at Ottawa, Ontario, on January 19, 2018.

REASONS FOR JUDGMENT BY: LASKIN J.A.

CONCURRED IN BY: STRATAS J.A.
WOODS J.A.

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REASONS FOR JUDGMENT

LASKIN J.A.

I. Overview

[1] This appeal is from the judgment of Crampton C.J. of the Federal Court (2016 FC 1199), granting five consolidated applications by the Minister for judicial review, setting aside the five corresponding orders issued by members of the Immigration Division of the Immigration and Refugee Board releasing the appellant from immigration detention on conditions, and remitting

the question of release or continued detention to Member Cook of the ID, who made the most recent of the five orders.

[2] In both their written and their oral submissions the parties focused on the application judge's decision with respect to the order of Member Cook, which superseded the four earlier orders. It is appropriate to do the same in these reasons.

[3] However, my doing so leads me reluctantly but inescapably to the conclusion that this Court lacks jurisdiction to decide the appeal. The question as certified by the application judge, on which this Court's jurisdiction depends, does not in my respectful view meet the well-established criteria for certification, and reformulation of the question would not render it compliant. I say "reluctantly" because the appeal was well and fully argued on the merits, and because underlying the certified question may well be a serious legal question of general importance that, as the application judge suggested, calls for further judicial consideration. But the question as framed is not dispositive of the appeal as it was argued, so that deciding the appeal would take the Court outside the role that Parliament envisaged for it in immigration matters. I see no alternative therefore but to dismiss the appeal.

[4] In explaining why I reach this conclusion, I will first briefly outline the scheme of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, as it relates to removal orders, detention and release. Next, I will set out the relevant background, addressing the circumstances relating to the appellant's detention, Member Cook's decision, and the decision on judicial review. I will then consider in more detail the requirements that a certified question must meet

and how in my view those requirements are not met in this case. I appreciate that all of this is a rather lengthy prelude to a decision that ultimately does not address the merits of the appeal, but the context may nonetheless prove helpful in grounding the disposition that I propose.

II. Removal, detention and release under the IRPA

[5] The *Immigration and Refugee Protection Act* establishes a framework for immigration to Canada and the grant of refugee protection. The objectives of the IRPA are set out in subsection 3(1). By paragraphs 3(1)(*h*) and 3(1)(*i*), they include the protection of public health and safety and the security of Canadian society and the promotion of international justice and security by fostering respect for human rights and denying access to Canadian territory to persons who are criminals or security risks.

[6] By sections 34 to 37 of the IRPA, a foreign national may be inadmissible and liable to removal on grounds of security, violation of human or international rights, serious criminality, criminality or organized criminality. A removal order is enforceable if it has come into force and is not stayed (subsection 48(1)). If a removal order is enforceable, the foreign national against whom it is made "must leave Canada immediately and the order must be enforced as soon as possible" (subsection 48(2)).

[7] The Act authorizes the arrest and detention of a permanent resident or foreign national who there are reasonable grounds to believe is inadmissible and a danger to the public or unlikely to appear for removal from Canada or at a proceeding that could lead to removal (subsection 55(1)).

[8] Within 48 hours of arrest, the Immigration Division of the Immigration and Refugee Board is required to review the reasons for detention (subsection 57(1)). Following this initial review, the ID must conduct additional reviews within seven days and at least once every 30 days thereafter (subsection 57(2)).

[9] In a detention review, the ID must assess whether there are grounds for detention: whether, among other things, the detainee is a danger to the public, a flight risk, or a foreign national whose identity has not been established. Unless it is satisfied that one or more of the specified grounds is made out, it must order the detainee's release (subsection 58(1)). By paragraph 245(*b*) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, the assessment whether there is a flight risk includes consideration of the detainee's voluntary compliance with any previous departure order and, therefore, compliance with subsection 48(1) of the IRPA, which as set out above requires a foreign national to leave Canada immediately as soon as a removal order becomes enforceable.

[10] By subsection 247(1) of the Regulations, in assessing whether the identity ground is established, the ID must consider among other things the detainee's cooperation, including whether the detainee provided or assisted the Department of Citizenship and Immigration in obtaining evidence of identity, or provided his or her date and place of birth and parents' names. Subsection 16(3) of the Act authorizes an immigration officer to require or obtain from a detainee any evidence that may be used to establish identity.

[11] If any of the specified grounds of detention are established, the ID is obliged to consider the factors set out in section 248 of the Regulations before a decision is made on detention or release: (a) the reason for detention; (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. These factors, which originated in the decision in *Sahin v. Canada (Minister of Citizenship and Immigration)*, [1995] 1 F.C. 214 at p. 231, 85 F.T.R. 99 at para. 31, were incorporated into the Regulations in 2002.

[12] If the ID orders release, it may impose any conditions that it considers necessary (IRPA, subsection 58(3)). The person concerned may apply to vary these conditions on the basis that they are no longer necessary to ensure compliance with the Act (*Tursunbayev v. Canada (Public Safety and Emergency Preparedness)*, 2014 FC 5, 21 Imm. L.R. (4th) 302 at para. 31).

III. The appellant

[13] The appellant came to Canada in 1994, and was granted refugee status in 1996. He asserts that he is Jacob Damiany Lunyamila, a citizen of Rwanda, born there in September 1976. However, his identity has not been established. Among other things, he has no Rwandan identity documents, and the file associated with his refugee claim was destroyed years ago in accordance with standard Immigration and Refugee Board document retention policies.

IV. Criminality and danger to the public

[14] In the period from January 1999 to June 2013, Mr. Lunyamila was charged with 94 criminal offences and convicted of 54. It appears that a number of the convictions were connected to alcohol addiction and mental health issues. In July 2012, Mr. Lunyamila was found inadmissible for criminality under paragraph 36(2)(*a*) of the IRPA. A deportation order was issued against him in August 2012. After a conviction for sexual assault, he was also found inadmissible for serious criminality under paragraph 36(1)(*a*) of the IRPA. In May 2014, a danger opinion was issued under paragraph 115(2)(*a*) of the IRPA, declaring that he was a danger to the public and that the risk to the Canadian public outweighed any risk he would face on return to Rwanda and any humanitarian and compassionate considerations. Leave to seek judicial review was denied.

V. Detention history

[15] Mr. Lunyamila was arrested and detained under section 55 of the IRPA in June 2013. His detention was initially continued on the grounds that he was both a flight risk and a danger to the public. On the second 30 day review, he was ordered released on conditions. The conditions included a requirement that he live at a specified addiction rehabilitation facility, complete its three month program and abide by its rules and regulations. However, he left the facility after two days and was rearrested. He has remained in detention since September 2013.

[16] Until January 2016, successive 30 day reviews resulted in orders for continued detention, at first on flight risk and danger grounds, and then on identity grounds as well. However,

beginning in January 2016 ID members issued a series of orders for Mr. Lunyamila's release. Each of these orders was stayed, and two of them – those issued in January and February 2016 – were set aside by the Federal Court on judicial review (2016 FC 289). A further five release orders, including the order made by Member Cook, were the subject of the consolidated applications that led to this appeal.

VI. Failure to cooperate in removal

[17] Following the issuance of the danger opinion in May 2014, the CBSA took steps to deport Mr. Lunyamila to Rwanda. Since Mr. Lunyamila did not have a Rwandan passport or other travel document, the Canada Border Services Agency contacted the Rwandan High Commission to ascertain the requirements for him to obtain one. The CBSA was informed that the requirements included providing certified copies of Rwandan identity documents and a statutory declaration affirming a willingness to return to Rwanda.

[18] Mr. Lunyamila had stated that he did not have the required identity documents. Despite ten separate requests by CBSA officers – in June, July, November and December 2014, and February, May, July, August, November and December 2015 – he also refused to sign the required statutory declaration. In response to several of these requests, he stated, in effect, that he would never sign and would never cooperate with his deportation.

[19] In November 2013 and in 2014, the CBSA received information suggesting that Mr. Lunyamila was actually a person with a different name and birth date who was a citizen of

Tanzania. However, the CBSA's investigation of this information led to a different individual, and the possibility that Mr. Lunyamila was Tanzanian was not pursued further at that time.

[20] The CBSA recommenced its investigation in February 2015 when it received further information linking Mr. Lunyamila to Tanzania. It explored retaining a private investigator, made inquiries of the Tanzanian police, and arranged for a linguistic analysis, which was conducted in May 2016. The analysis concluded that it was "very likely" that Mr. Lunyamila's linguistic background was Tanzanian, and "very unlikely" that it was Rwandan. The CBSA also sent fingerprints for analysis by Tanzanian authorities, and arranged an interview of Mr. Lunyamila by Tanzanian consular officials in September 2016.

[21] Mr. Lunyamila has cooperated to some degree with this investigation, including by participating in the linguistic analysis, but he has also provided contradictory and nonsensical information in response to inquiries about his connection to Tanzania.

VII. Member Cook's decision

[22] In September 2016, Member Cook made an order for Mr. Lunyamila's release from detention, subject to conditions. Although the member was satisfied that all three grounds for continued detention asserted by the Minister – danger, flight risk and identity – were made out, he found that the risks could be sufficiently mitigated by the conditions that he imposed.

[23] In concluding that Mr. Lunyamila remained "very much a flight risk", and that it was very unlikely that he would appear voluntarily for removal if released, the member observed that

Mr. Lunyamila had done everything in his power to prevent removal to Rwanda, including refusing to sign the declaration required for a Rwandan-issued travel document. Mr. Lunyamila seemed to have figured out, the member stated, that without his cooperation in signing the declaration the CBSA could not remove him.

[24] With respect to identity, the member stated that "the Minister was making reasonable efforts to establish [Mr. Lunyamila's] identity." He noted that the Minister was "undertaking a legitimate investigation […] that [was] capable of uncovering significant evidence," and stated that it would be improper for him to speculate on what the investigation might uncover. He found the Minister's efforts to confirm whether Mr. Lunyamila was Tanzanian, while "not perfect," were reasonable.

[25] Having concluded that the three grounds for continued detention were established, Member Cook then turned to the factors set out in section 248 of the Regulations. He found that the first factor, the grounds for detention, weighed in favour of continuing detention. Mr. Lunyamila had been detained because he was a danger to the public, he was a flight risk, and his identity could not be established. The member stated that he had given this factor significant weight, since the danger factor alone was justification for a lengthy detention.

[26] The member analyzed the second and third factors – the length of time in detention and whether the length of time that detention is likely to continue can be ascertained – together. He found that detention for three years amounted to lengthy detention, and that the length of Mr.

Lunyamila's further detention could not reasonably be anticipated. He concluded that these factors favoured release.

[27] Member Cook noted that the reason for both the lengthy detention and the inability to ascertain the duration of continued detention was the same: the Minister did not have a valid travel document that would permit Mr. Lunyamila's removal. His case was now "at a stalemate": the Minister required Mr. Lunyamila's cooperation to have any prospect of obtaining a Rwandan travel document, but he had refused to cooperate and had stated that he would never cooperate. Although the member acknowledged that Mr. Lunyamila's cooperation in signing a declaration could lead to a valid travel document, he also noted that cooperation would not guarantee removal because Mr. Lunyamila also lacked the identity documents that Rwanda appeared to require. The Minister was unable to state whether Rwandan authorities would waive this requirement. As for the potential removal to Tanzania, the member found there was no way to reasonably anticipate whether Mr. Lunyamila was actually Tanzanian and how long a removal to Tanzania might take. There was therefore no timeline for the anticipated conclusion of the immigration process: Mr. Lunyamila's "detention moving forward [was] indefinite" (2016 FC 1199 at paragraph 102).

[28] The member determined that responsibility for the lengthy detention and uncertainty as to the length of future detention should be apportioned equally to both parties. He assigned a large portion of responsibility for the delay to Mr. Lunyamila. He stated that Mr. Lunyamila's consistent refusal to cooperate in signing the declaration had stalled his removal at the travel

document acquisition stage since 2014, and suggested that the detention might have already ended had he cooperated.

[29] However, the member also found that the Minister must share the responsibility. Despite the "stalemate" and knowledge that Mr. Lunyamila was not prepared to sign the declaration, the Minister had not undertaken alternative measures to remove him. The member acknowledged that there might not in fact be any alternatives. He also acknowledged that the Minister was now focused on Tanzania as a possible alternate destination for removal. However, he was critical of the Minister's delay in pursuing the possibility of Tanzanian identity when information to this effect first came to light in 2013. The member accordingly found that the factor of delay and lack of diligence was neutral and favored neither continued detention nor release.

[30] The member then turned to the last factor, alternatives to detention. He stated that any alternatives must "on balance […] have a likelihood of mitigating the grounds for detention that have been established." He expressed his belief that if Mr. Lunyamila agreed to comply with all of the conditions he set out, "the grounds for detention [could] be mitigated to a degree whereby [his] release pending removal can be manageable" (2016 FC 1199 at paragraph 104).

[31] Member Cook set out a total of nine conditions. Condition 1 was that prior to release Mr. Lunyamila sign the declaration requested by Rwanda. Member Cook rejected the suggestion made by another ID member in an earlier review that this condition would amount to "disguised detention" given Mr. Lunyamila's past refusals to sign. Member Cook reasoned that because Mr. Lunyamila was a criminal and a danger to the public, this condition and Mr. Lunyamila's

deportation were consistent with the immigration objectives, set out in paragraphs 3(1)(*h*) and (*i*) of the IRPA, of protecting public health and safety, maintaining the security of Canadian society, and denying criminals access to Canadian society. The condition was also consistent with the obligation imposed by subsection 48(2) of the Act on Mr. Lunyamila to leave Canada immediately, and the obligation on the CBSA to enforce the removal order as soon as possible. The member described Mr. Lunyamila's non-cooperation as "completely contrary to what is required by Canadian law" (2016 FC 1199 at paragraph 109).

[32] The other conditions that Member Cook imposed included cooperation with an interview with Tanzanian officials and with any additional CBSA investigation into his identity, acceptance prior to release in a residential drug and alcohol treatment facility and completion of its program, on completion of that program making efforts to enrol in a community-based violence prevention and anger management program and completing the program once enrolled, mandatory reporting to the CBSA, abstention from alcohol, and compliance with any physician-prescribed treatment program.

VIII. The decision on judicial review

[33] In his decision on judicial review, the application judge accepted the parties' agreement that the appropriate standard of review was reasonableness. He considered the order made by Member Cook after having concluded that he would set aside as unreasonable the other four orders that were the subject of the consolidated applications. He determined that Member Cook's order was also unreasonable.

[34] The application judge framed the fundamental issue raised by the applications as "how to resolve the tension between […] an immigration detainee's refusal to cooperate with a validly issued order for removal from Canada, and […] the length of detention and uncertainty regarding the duration of future detention that result, in whole or in part, from that refusal" (2016 FC 1199 at paragraph 1).

[35] He expressed his resolution of this tension as follows at paragraph 2:

> 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.

[36] The application judge reasoned that if it were otherwise, a detainee who was a danger or a flight risk could by the refusal to cooperate produce or contribute to producing a "stalemate," resulting in release and the infliction on the public of the associated risk. This would allow detainees to "take the law into [their] own hands" (2016 FC 1199 at paragraph 4), in a manner that Parliament could not have intended.

[37] In considering one of the other release orders that was the subject of the consolidated applications, the application judge addressed the suggestion made by the ID member who had granted the order that there was a conflict between two lines of cases in the Federal Court – one holding that indefinite detention cannot be treated as a determinative factor in a detention review and the other, that length of detention should be given substantial weight in the balancing process under section 248. He characterized these cases as consistent to the extent that they all properly

saw it as necessary to consider and reasonably weigh all of the section 248 factors. But, he stated (at paragraph 85), "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."

[38] The application judge went on in his discussion of the Federal Court case law to address a further tension identified by the member – that between cases in which the Court had set aside ID release decisions as unreasonable where the detainee's non-cooperation was the sole cause of the indefinite nature of the detention, and those in which the Court had found unreasonableness in the failure of the member to consider factors other than the detainee's non-cooperation. He stated (at paragraph 95) that, in his view, "the scheme of the IRPA and the Regulations […] 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."

[39] The application judge found Member Cook's decision unreasonable in several respects. First, there was an inconsistency between Member Cook's conclusion that Mr. Lunyamila's detention had become indefinite and the member's own findings as to the prospects of removing Mr. Lunyamila to Rwanda or Tanzania. The member had also recognized that a large portion of the delay was attributable to Mr. Lunyamila's refusal to cooperate, and that his non-cooperation had, in addition, contributed significantly to the uncertainty of the timing of removal. It was therefore unreasonable for the member to rely on delay and uncertainty to find that the detention had become indefinite, and then to treat these factors as favouring release: this amounted to giving Mr. Lunyamila credit for factors for which he had been largely responsible.

[40] The application judge also found unreasonable the member's decision to give a neutral weighting to the fourth section 248 factor, relating to delay and lack of diligence. He accepted that the Minister could have been more diligent in making efforts to remove Mr. Lunyamila to Rwanda, but observed that Mr. Lunyamila's non-cooperation had substantially undermined those efforts. This factor should therefore, the application judge stated, have weighed strongly in favour of continued detention. The application judge found further unreasonableness in Member Cook's determination that the Minister should have done more sooner to pursue the possibility of removal to Tanzania.

[41] The application judge went on to consider the conditions of release set out by Member Cook. The application judge applauded Member Cook for including the pre-release condition that Mr. Lunyamila sign the declaration required by Rwanda. Permitting Mr. Lunyamila to obtain release while continuing to refuse to cooperate would, the application judge stated (at paragraph 119), 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." However, he agreed with the Minister that the conditions taken together were unreasonable because they did not adequately address Mr. Lunyamila's violent tendencies and his flight risk. He stated (at paragraph 45) that to be reasonable in the circumstances of Mr. Lunyamila's case, the conditions would have to "virtually eliminate" the risks that he presented.

[42] Having concluded that the conditions of release taken as a whole were unreasonable, the application judge set aside Member Cook's order, along with the other four orders that were subjects of the consolidated applications. Based on Member Cook's recent familiarity with Mr.

Lunyamila's situation and his understanding of the statutory scheme and many of the relevant legal principles, the application judge remitted the matter back to Member Cook for reconsideration in accordance with his reasons.

IX. The certified question

[43] Neither party proposed a question for certification under paragraph 74(*d*) of the IRPA. Both were of the view that the case was grounded in its particular facts and therefore presented no question of general importance. However, the application judge saw the differences of view in the Federal Court's case law as giving rise to a question of general importance warranting this Court's consideration. He therefore sought the parties' comments on a question that he proposed. The parties maintained their position that the proposed question was not suitable for certification, because the appropriate balancing of the factors in section 248 will vary depending on the circumstances of each case. The application judge nonetheless certified the following question (at paragraph 137):

> 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*?

X. The requirement of a properly certified question

[44] By paragraph 74(*d*) of the IRPA, this Court has jurisdiction to hear an appeal from the judgment of the Federal Court on an application for judicial review with respect to any matter

under the Act only if, in rendering judgment, the Federal Court "certifies that a serious question of general importance is involved and states the question."

[45] As this Court observed in *Varela v. Canada (Minister of Citizenship and Immigration)*, 2009 FCA 145, [2010] 1 F.C.R. 129 at para. 23, this provision "fits within a larger scheme designed to ensure that a claimant's right to seek the intervention of the courts is not invoked lightly, and that such intervention, when justified, is timely." Other elements of the scheme include the requirement in section 72 of the IRPA to obtain leave before pursuing an application for judicial review in the Federal Court.

[46] This Court recently reiterated in *Lewis v. Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 at para. 36, the criteria for certification. The question must be a serious question that is dispositive of the appeal, transcends the interests of the parties and raises an issue of broad significance or general importance. This means that the question must have been dealt with by the Federal Court and must arise from the case itself rather than merely from the way in which the Federal Court disposed of the application. An issue that need not be decided cannot ground a properly certified question (*Lai v. Canada (Public Safety and Emergency Preparedness)*, 2015 FCA 21, 29 Imm. L.R. (4th) 211 at para. 10). Nor will a question that is in the nature of a reference or whose answer turns on the unique facts of the case be properly certified (*Mudrak v. Canada (Citizenship and Immigration)*, 2016 FCA 178, 485 N.R. 186 at paras. 15, 35).

[47] Despite these requirements, this Court has considered that it is not constrained by the precise language of the certified question, and may reformulate the question to capture the real legal issue presented (*Tretsetsang v. Canada (Citizenship and Immigration)*, 2016 FCA 175, 398 D.L.R. (4th) 685 at para. 5 per Rennie J.A. (dissenting, but not on this point); *Ezokola v. Canada (Citizenship and Immigration)*, 2011 FCA 224, [2011] 3 F.C.R. 417 at paras. 40-44, reversed without comment on the point, *Ezokola v. Canada (Citizenship and Immigration)*, 2013 SCC 40, [2013] 2 S.C.R. 678). Any reformulated question must, of course, also meet the criteria for a properly certified question.

XI. Appropriateness of the certified question

[48] At the hearing of the appeal, the Court raised with counsel for both parties concerns about the certified question as framed (reproduced at paragraph 43 above). These included concerns that the question might be in the nature of a "straw person," in that it would admit of only one reasonable answer. However, the Court also recognized that circumstances like those in this case might give rise to a serious legal issue of general importance, and proposed possible alternative formulations for comment. Counsel were content that the Court try to reformulate the question. The Court decided that it would proceed with the hearing on the merits, leaving the possible reformulation of the certified question to be considered further during the Court's deliberations.

[49] With the benefit of further consideration, I find myself unable to conclude that the question as certified meets the criteria for certification, or that the question can be reformulated so as to address its deficiencies. The fundamental problem as I see it is that the question does not arise from the facts of this case as it developed. The question asks, in essence, whether an

immigration detainee can avoid continued detention by failing to cooperate with removal. But Member Cook's order did not permit Mr. Lunyamila to do so. Rather, Member Cook's order expressly imposed as a pre-release condition the requirement that Mr. Lunyamila do what he has so far refused to do – sign the declaration requested by Rwanda.

[50] Counsel's arguments before us were directed to the reasonableness of this order, including all of its conditions. Counsel for Mr. Lunyamila argued that the order as a whole struck a careful and factually supported balance, that the application judge showed insufficient deference in finding it unreasonable, and that it should not have been set aside. Counsel for the Minister submitted that the application judge was right to find the order unreasonable, but for reasons unrelated to the pre-release condition – a condition which, as noted above, the application judge said he applauded. In sum, therefore, neither party took issue with the pre-release condition of cooperation.

[51] In light of my appreciation of the issue raised by the application judge's formulation and counsel's comments, I considered proposing that the certified question be reformulated along the following lines:

> In a review under section 57 of the *Immigration and Refugee Protection Act* of the detention of a person against whom a removal order has been made, is the Immigration Division of the Immigration and Refugee Board entitled to rely on the factors set out in paragraphs 248(b) and (c) of the *Immigration and Refugee Protection Regulations* ("the length of time in detention" and "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") as factors favouring release where the length of time in detention and the length of time that detention is likely to continue are attributable in whole or in part to the failure of the detainee to cooperate in his or her removal from Canada?

[52] However, given the terms of Member Cook's order and the positions of the parties, it would not be necessary to decide this question either in order to decide the appeal. The reformulation could also be regarded as deficient on the basis that it is a question whose answer would turn on the unique facts of each case – for example, on the nature and extent of the non-cooperation – or that it would transform this appeal into a reference. I therefore came to the view that reformulation would not be appropriate.

[53] For these reasons, I conclude that the certified question is not sufficient to give this Court jurisdiction to decide the appeal, which must therefore be dismissed. I do not see "special reasons" within the meaning of rule 22 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, that would warrant an award of costs.

XII. Proposed disposition

[54] I would dismiss the appeal without costs.

"J.B. Laskin"

J.A.

"I agree.
David Stratas J.A."

"I agree.
J. Woods J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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