Federal Court  Cour fédérale

Date: 20120529

Docket: IMM-2451-12

Citation: 2012 FC 655

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

B147

Respondent

REASONS FOR JUDGMENT

RENNIE J.

[1] The respondent is a citizen of Sri Lanka. He arrived in Canada on the *MV Sun Sea* on August 13, 2010 and made a refugee claim. He has been held in immigration detention since, initially on the basis of identity and, after the Minister became satisfied of his identity, on the basis that he posed a flight risk.

[2] On August 16, 2011, the Immigration Division of the Immigration and Refugee Board of Canada found the respondent inadmissible to Canada for having engaged in people smuggling. A

deportation order issued and the respondent became ineligible to have his refugee claim determined. The pre-removal risk assessment (PRRA) was initiated in September, 2012, when his removal order came into force. Further materials with respect to the PRRA were received October 2, 2011.

[3] The respondent appeared for his 22nd detention review hearing on March 7, 2012 and on March 9, Immigration Division Member Trent Cook (Member Cook) ordered the respondent released from detention on terms and conditions, including the posting of a bond. The Minister seeks to have that decision set aside.

Decision Under Review

[4] Member Cook found that the Minister had established a *prima facie* case that the respondent posed a flight risk. This was based on the circumstances of his arrival, his motivation to avoid returning to Sri Lanka and his lack of credibility. However, Member Cook found that the reason for the respondent's detention (flight risk for credibility reasons, rather than performance issues) and the length of his detention (19 months in the absence of any evidence that the respondent presented a public danger) weighed in favour of his release.

[5] After reviewing the history of the respondent's detention reviews, Member Cook noted that the Minister's timeframes for the completion of the PRRA process "have gone from a degree of certainty to total uncertainty." On September 21, 2011, Minister's counsel estimated a three-month timeframe for a decision. That estimate then changed to an additional two to three weeks, in January 2012, to "as soon as possible", and at the last hearing, to no stated expectation at all. While

acknowledging that the respondent's detention had to be reviewed every 30 days Member Cook found that the respondent's case now fell into the category of "indefinite detention".

[6] In reaching this conclusion Member Cook acknowledged that he had reached a different conclusion than that reached by Member Shaw-Dyck at the respondent's detention review a month previous. He disagreed with her finding that "a decision will be forthcoming in the reasonable near future". Member Cook rejected the proposition that he should accept that the respondent's detention was not indefinite because the Minister said that it was being processed even though that information was accepted as sufficient at the last detention review. Member Cook instead found the Minister's failure to provide a time estimate was "indicative of uncertainty" and that the "notion of an uncertain timeframe for PRRA is extremely rare".

[7] In light of the uncertain length of the respondent's future detention Member Cook concluded that the respondent's liberty interests were of paramount consideration. He thus reassessed the alternatives to detention and ordered his release subject to terms and conditions, including that a $30,000 bond to be posted by the respondent's aunt. It was acknowledged that $25,000 of the $30,000 was provided by the respondent's brother, a resident of Norway.

[8] Member Cook summarized his reasons as follows at pages 12-13 of the decision:

> To summarize, you have been a person detained as a flight risk for the past 19 months. There's documented uncertainty as to when your detention might conclude. Your detention is rooted in credibility issues, not in performance issues of going underground or breaching conditions. There's a significant monetary bond being posted by two family members and there is a release plan in place that includes constant contact with the aunt, who is going to be living next door to you. You're going to live with your father, who has expressed his knowledge of how important it is to follow immigration conditions and has had an unblemished record in doing so. I believe that there

> are people that have been released from detention on the ground of unlikely to appear with a much less complex release plan [than] you have.

Issues

[9] The core of the Minister's submission is that in considering the factors under section 248 of the *Immigration and Refugee Protection Regulations* (SOR/2002-227) (*Regulations*), Member Cook erred in finding that the detention was indefinite and in his assessment of the adequacy and capacity of the bondspersons. The Minister also points to an overarching error; the failure to provide, as required by the jurisprudence, clear and compelling reasons for deviating from the previous Immigration Division decision maintaining detention.

Standard of Review

[10] The standard of review of a decision of the Immigration Division to release a foreign national from detention is reasonableness: *B072 v Canada (Citizenship and Immigration)*, 2012 FC 563 (per Barnes J); *The Minister of Citizenship and Immigration v B001*, 2012 FC 523 (per Snider J.).

[11] It is also useful to note, by way of preliminary observation, the principles set forth by Justice Russel Zinn in *Canada (Public Safety and Emergency Preparedness) v Karimi-Arshad*, 2010 FC 964 at para 16:

> […]
>
> (ii) Deference is owed to the member's findings of fact and assessment of the evidence: *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12, para. 59.

(iii) The role of this Court is not to substitute its opinion for that of the member: *Walker v. Canada (Minister of Citizenship and Immigration*, 2010 FC 392, paras. 25-26.

(iv) If a member departs from prior decisions that maintained the detention, then the member must set out clear and compelling reasons for so doing: *Canada (Minister of Employment and Immigration) v. Thanabalasingham*, 2004 FCA 4.

Legal Framework

[12] Section 55 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*) provides officers with powers of arrest and detention in respect of permanent residents and foreign nationals. Subsection 57(1) of the *IRPA* requires that 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 reviews must occur within seven days after the 48-hour review and every 30 days thereafter (*IRPA* section 57(2)).

[13] The circumstances in which the Immigration Division is required to order the release of a detained individual are set out in section 58(1) of the *IRPA*:

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 or for violating human or international rights; or	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 ou pour atteinte aux droits humains ou internationaux;
(d) the Minister is of the opinion that the identity of the foreign national 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.	d) dans le cas où le ministre estime que l'identité de l'étranger 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.

[14] Subsection 58(3) allows the Immigration Division to impose conditions on the release of a foreign national or permanent resident:

(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 of a deposit or the posting of a guarantee for compliance with the conditions.	(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 d'une garantie d'exécution.

[15] Where grounds for detention are found to exist, section 248 of the *Regulations* requires that the Immigration Division consider certain factors before deciding to detain or release the individual:

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.

The Finding of Indefinite Detention

[16] The finding of indefinite detention was open to Member Cook on the evidence. The Minister did not provide any timeframe either at the February or March detention reviews. The Minister's attempt to explain this by pointing to the "unique and complex nature" of *MV Sun Sea* cases did not alter the fact that, unlike prior detention reviews, no expectation was provided as to when the respondent's PRRA would be complete.

[17] The respondent rightly points out that Member Cook did not make a finding that the Minister's information regarding the processing of the PRRA was unreliable or not credible. Rather, Member Cook found that, despite the normal practice, the Minister had failed to provide an update on the estimated timeframe. Member Cook thus concluded that the Minister's "silence on this subject is indicative of uncertainty." This did not amount to speculation but was a reasonable inference drawn from the record before the Member.

[18] The Minister contends that "no new evidence was presented to suggest that a new development in the processing of the respondent's PRRA application would cause the respondent to be detained for a substantially longer period of time". While creative, this argument does not respond to, nor address, the absence of evidence. The absence of evidence, in circumstances where it was reasonable to expect evidence, is, in fact, evidence upon which it was reasonable for the Member to predicate an inference and conclusion. There had been a progressive deterioration in the degree of precision or certainty as to the timeframe when the decision might be expected. Given that the PRRA application had been made seven months earlier, it was reasonable to expect greater, rather than less, precision as to the probable date of the decision.

[19] The Minister also points to the fact that Member Cook was advised that the PRRA "was being processed" and that assistance was being sought from Citizenship and Immigration Canada's national headquarters. It was also argued that Member Cook unreasonably discounted the unique and complex nature of assessing *MV Sun Sea* PRRA applications. The Minister argues that Member Cook failed to provide any cogent basis for rejecting this information and that the failure to do so rendered the conclusion of indefinite detention unreasonable.

[20] In my view, the Member was free to reject generalized statements that the PRRA "was being processed" or, as it was characterized in argument "that the PRRA was not stalled". Those statements, when reflected upon, merely say that the application has not been set aside or lost. Members are entitled to presume that, in the ordinary course, PRRA applications are being processed with a reasonable degree of due diligence and dispatch; hence a statement to the Member that the PRRA is being processed is of little probative value.

[21] Secondly, if there were particular complexities, such as those arising from the gathering of evidence abroad or where necessary information was dependent upon the cooperation of third parties, the Minister could have said so. The mere statement that the matter was complex was, in and of itself, an insufficient evidentiary foundation on which it can be argued that the decision was unreasonable. The consequences of the complexity and its implication for the timing of the decision could have been articulated. In sum, the finding of indefinite detention cannot be impugned on the basis that it was speculation. In the absence of any timeframe provided it was not speculation. It was an inference drawn from the only evidence before the Member.

[22] I turn to the Minister's final argument and that is that, given that the PRRA process was finite and that there was no evidence that it was stalled, the finding of indefinite detention was not open to the Member.

[23] This argument has been previously rejected by this Court: *Sahin v Canada (Minister of Citizenship and Immigration)*, [1995] 1 FC 214 at paras 25-27. In the absence of any reasonable certainty as to when the PRRA process might conclude, the existence of 30-day detention reviews does not save the detention from being characterized as indefinite.

[24] I note as well, that the constitutionality of the provisions of detention, depend in part, on the 30-day periodic review. The important role served by the 30-day detention review would be defeated if the Court accepted the Minister's claim that PRRA is a finite process, one which must

ultimately come to an end, even though the Minister failed to provide any timeframe for its completion.

[25] Member Cook's decision on the question whether the detention had become indefinite was a question of mixed fact and law to be assessed against a standard of reasonableness. On the evidence before him there was no assurance, even in its most general terms, as to the likely timeframe for decision, and as such, it was open to him to conclude that the detention had become indefinite.

Reasons for Detention

[26] In light of the finding that the detention had become indefinite the Member assessed the factors under section 248 of the *Regulations* with the respondent's liberty interests as the paramount consideration. One of those factors is the reason for detention.

[27] In considering the reason for detention Member Cook found the respondent to have "played a relatively minor role" in the people smuggling operation of the *MV Sun Sea*.

[28] In reaching this conclusion the Member relied on the findings of the inadmissibility determination of the Immigration Division. A closer and fuller reading of the Immigration Division decision suggests (para 20) that the respondent's involvement was otherwise:

> With respect to (c), […] had nothing directly to do with the operation of the *Sun Sea* or its entry into Canada. But his activities were part of the staging of the operation in Thailand. By repeatedly distributing food over a period of several months to dozens if not hundreds of would-be migrants pending the finalization of arrangements for their transportation to Canada, he played a significant role in the preparation of the smuggling operation. The marshalling of *Sun Sea* migrants in limited specific locations, and arrangements for their

> feeding in those locations, were important elements of the logistics of ensuring their availability for departure whenever that might be arranged, and of lessening the chances of the operation's being discovered by authorities….

[29] If a member chooses to rely on the Immigration Division inadmissibility determination in order to characterize the reasons for detention, he or she cannot be selective. Here, the reliance on the finding of the Immigration Division that the respondent played a minor role was wholly de-contextualized, such that it resulted in the Member approaching the section 248 considerations on an entirely different understanding of the nature and extent of the respondent's involvement in the smuggling operation. There is nothing in the reasons that explains the diametrically opposed finding as to the nature of the respondent's participation.

[30] It was argued that this error was not material to the decision to release. It is difficult to sustain this argument. As a logical matter, the reason for detention bears directly on the assessment of all related factors under section 248 and it is impossible to segregate or isolate the implications of this finding of fact from the decision as a whole. The reasons for detention, for example, co-relate to the assessment of the adequacy of the proposed bondsperson and the degree to which the respondent remained a flight risk.

[31] As it is not clear what the outcome of the exercise of discretion at this detention review would have been had the Member not proceeded on the basis of this erroneous finding, the application for judicial review must be granted.

Requirement to Give Reasons

[32] Before leaving this matter, there was considerable argument about the requirement stemming from the Court of Appeal's decision in *Canada (Minister of Citizenship and Immigration) v Thanabalasingham*, 2004 FCA 4 that reasons for departing from prior detention review decisions must be given in clear and compelling terms.

[33] I accept that there are limitations on the scope and application of this proposition. If the decision of the first detention review was largely binding on the Member hearing the 22nd detention review, the requirement that detention be reviewed fairly, openly and with a fresh perspective to evolving facts and circumstances would be easily and frequently, if not invariably, defeated. While the Court requires a clear and compelling rationale for departing from prior decisions where the issue in question is material, the Court of Appeal's reasons also balance against that the recognition that an independent and fresh exercise of discretion is integral to the purpose and object of a detention review. In this case, the factual determination as to the reason for detention was central to the decision whether to release. For this reason, clear and compelling reasons had to be given if the nature of the respondent's involvement was to be significantly re-characterized from substantial to the peripheral.

Capacity and Ability of the Proposed Bondspersons

[34] It is not, in light of the finding on the first issue, necessary to address the second ground of review advanced by the applicant. I will do so however, given the emphasis placed on this ground by the parties and its centrality to the decision under review. The Minister submits that Member Cook failed to meaningfully assess whether the respondent's aunt and brother were capable of controlling the respondent's actions in view of serious credibility concerns presented by the

respondent, the reasons for his detention, the finding that he remained a flight risk and the Deportation Order issued against him. I agree, and do so for three reasons.

[35] Before addressing these reasons, three preliminary observations are in order.

[36] First, it was open to Member Cook to conclude that the evidence regarding the respondent's allegiance to his family was believable. A pre-disposition to lie in one respect does not necessarily mean that the respondent's evidence is not to be trusted in another. In *Sittampalam v Canada (Minister of Public Safety and Emergency Preparedness)*, 2006 FC 1118, Justice James O'Reilly noted at paragraph 17 that "just because Mr. Sittampalam's testimony about his past gang activity was found not to be credible should not necessarily mean that his evidence on the detention review must be disbelieved." Thus, B147's prior untruths in respect of his degree of involvement in the human smuggling operation could be separated from his statements about his willingness to comply with the terms of his release and his commitment to his family.

[37] Second, as noted earlier, the Member correctly approached the section 248 criteria with the respondent's liberty interests in the forefront. The Member was exercising a fresh and independent discretion and as such was free to depart or disagree with prior decisions.

[38] Third, the sole stricture on this discretion was that were the Member to depart from prior detention review decisions, clear and compelling reasons need be given for so doing. It is in this later regard that the decision in respect of the bondspersons fails.

[39] The Member affirmed the findings reached in prior detention reviews that the respondent remained a flight risk and was unlikely to appear for removal:

> So it's very clear to me that your different stories were coming about during detention matters as much as they were admissibility matters. Accordingly, I concur with the previous Member's findings that credibility played a major role in the finding that you pose a flight risk. I believe that a person who is willing to go back and forth so many times on their stories is willing to say just about anything if he feels that it will benefit him.
>
> In addition to you[r] credibility issues, I agree with other Members' decisions to detain you as a flight risk because of other factors. It's very evident that you have motivation to be in Canada. This is based simply on the time, effort, risk and cost of getting here in the manner that you did. Your engagement of the refugee process and application for PRRA shows me that you undoubtedly have motivation to avoid a return to Sri Lanka, so I think that the circumstances of your arrival and your motivation, coupled with your credibility, certainly from a *prima facie* case that you pose a flight risk. It's very reasonable for me and other Members to conclude, on balance, that you would be unlikely to voluntarily report for your removal.

[40] In considering the aunt as a bondsperson, the Member wrote:

> When your aunt's offer of $5,000 was turned down by Members, nobody made any disparaging comments about your aunt. This bond was turned down because of the credibility concerns that Members had about you. Your aunt has never been found to be an inappropriate bondsperson. She is currently the bondsperson for both your father and your sister and by all accounts they are performing exceptionally well under her supervision. I have not heard any information about either of them breaching their conditions of release, so there most certainly is a blueprint for success in your aunt's ability to influence your father and sister to comply with their conditions.

[41] The first error lies in the reasoning that underlies the conclusion that the respondent's aunt could positively influence B147's behaviour. The Member concluded that as the respondent's father and sister had complied with the conditions of their release on bonds posted by the aunt, so would the respondent. There is good reason to question the reasonableness of this conclusion, including the failure to address certain relevant facts.

[42] Unlike his father and sister, the respondent has a history of being untruthful with Canada Border Services Agency (CBSA) officials and had been found inadmissible to Canada. Secondly, the respondent had not seen his aunt for 12 years. Moreover, at the November 17, 2011 detention review, Member Cook reached the exact opposite conclusion as to the ability of the aunt to influence the respondent:

> The fact that your aunt has been able to exert a positive influence over your sister and father, does not hold a lot of weight with me, when I consider the type of influence she might have against you.
>
> Not only are your father and sister not facing the same issues that you're facing, regarding their eligibility to make a refugee claim denied, but they don't even come close to having the same credibility issues as you do.
>
> I simply, at that time, didn't think that you were a person who could be influenced.
>
> I make that same finding today. […]
>
> […]
>
> Once again, sir, I find that you would not be a person influenced by the suasion of others, simply because I think that you will say one thing to people and then simply turn around and say something else to others. The words that come out of your mouth cannot be trusted.
>
> […]

> So while the monetary value of the bond offer is quite high, the appropriateness of your bother as an influential bondsperson is not anywhere near the degree that I would need, to be satisfied that the high degree of flight risk that you pose would be mitigated.
>
> […]
>
> So while I might believe that you would report regularly to a Canada Border Services Agency official like your father and sister are doing, I think you would only report your pre-removal risk assessment was outstanding. If that decision was not in your favour, I think that your history shows that it is extremely likely that you would employ deception and live underground in Canada because it is very obvious to me that you have absolutely no desire nor incentive to return to Sri Lanka.

[43] The Member is quite free to change his mind, but where that is the case, on material matters such as the extent to which the individual is a flight risk, credibility, and the reasons for detention, clear and compelling reasons must be offered in support of the change.

[44] The reasons do not explain why the considerations and findings which were central to the two prior decisions by the same Member to reject the aunt evaporated. It is also difficult to rationalize or understand the conclusions reached with the prior history of the case. The aunt had been rejected as a suitable bondsperson on three occasions, most recently in September 2011. On November, 17, 2011, the same Member had rejected a bond of $20,000 offered by the aunt and brother.

[45] The second error lies in the reasons with respect to the analysis of the role of the brother in posting the bond. While the Release Order only names the respondent's aunt and provides that the entire $30,000 is to be deposited by her, it was understood and acknowledged by counsel that $25,000 of the bond was paid by the respondent's brother, in Norway, and the balance by his aunt.

[46] As noted, the adequacy of the brother as a bondsperson had been considered and rejected in November, 2011 by Member Cook and again in February, 2012 by Member Shaw- Dyck. In November, 2011 Member Cook concluded:

> In addition, the testimony of your brother revealed a number of factors that weigh in my decision to find him to be an inappropriate bondsperson for you. Though the sum of $15,000 is a good deal of money, and I believe your brother can probably afford it, I don't see how he would be able to exude any influence over you, with him living in Norway and you proposing to live in Montreal.

[47] In the November, 2011 decision the Member also observes that the brother had no knowledge of the status of B147's case, that he had a clear interest in B147 staying out of Sri Lanka, that he did not appear to understand the responsibilities of a bondsperson or that his money would be forfeited if the conditions were breached.

[48] Although not mentioned in the decision, B147 had not seen his brother in over seven years.

[49] The reasons do not consider the fact that, with the exception of the $5,000 posted by the aunt, neither his aunt, his father or sister would suffer repercussions or consequences of default. Nor do they comply with *Thanabalasingham* and the requirement to explain why the brother, although not named as a bondsperson, would nevertheless be effective in exerting control and influence when the opposite had been found in November, 2011, a few four months earlier.

[50] Section 47(2)(a) of the *Regulations* would preclude the brother, as neither a citizen of Canada nor a permanent resident physically residing in Canada, from posting the bond. In this case,

on the evidence, the brother is, *de facto*, posting the bond. This, in and of itself, warranted close analysis of the role of the brother in ensuring the respondent's compliance.

[51] In assessing the adequacy of the bondsperson several factors need to be considered and assessed against the objective of ensuring compliance with immigration processes. The provenance of the funds need to be assessed in determining the effectiveness of the bondsperson in ensuring his future compliance, the impact or effect of forfeiture on the person who posts, the degree of influence the person who posts the bond and their understanding of the detainees circumstances. Put otherwise, as it is the brother who stands to loose should the respondent not abide the terms and conditions of his release, it is the relationship between the brothers that ought to have been central to the assessment of adequacy. The failure to address these considerations effectively circumvents the purpose and object of section 47(2)(a).

[52] I turn next to the third and final ground on which I find that the decision must be set aside.

[53] The error, in this case, is in respect of the law. The Member approached the section 248 criteria from the perspective that the respondent's liberty interests were paramount. For example:

> I think that it is important to note that when Members rejected the bondspeople, it was in the understanding that a PRRA decision would be decided in a reasonable amount of time. It's apparent to me now that this is no longer the case. I believe your detention has reached an indefinite stage and it is appropriate to consider your liberty interests above all else.

[54] Section 7 interests, under the *Canadian Charter of Rights and Freedoms* (*Charter*), are rarely absolute. Rather, they imply a balancing of considerations. As stated by McLachlin J. in *Cunningham v Canada*, [1993] 2 SCR 143, at pp 151-152:

> The principles of fundamental justice are concerned not only with the interest of the person who claims his liberty has been limited, but with the protection of society. Fundamental justice requires that a fair balance be struck between these interests, both substantively and procedurally. . . .

[55] The purpose of the detention provisions of the *IRPA* are not only to protect Canadians from those who may pose a danger, but, importantly, to ensure that those who come to and remain in Canada do so in accordance with legal principles.

[56] The respondent's liberty interests are a grave and weighty concern; but they are not paramount. They are to be balanced against the objects served by the provisions authorizing detention. In sum, in viewing the issue through the lens of paramouncy of the liberty interests, the Member erred. Indeed, the language of section 248 implies a balancing of considerations.

Conclusion

[57] The fact that the detention was indefinite does not transform an unsuitable bondsperson into a suitable one. Nor does it mitigate the assessment of the respondent's flight risk from extremely high to that of assured compliance. It is in circumstances such as these where a significant reassessment is made on critical factual determination, that the clear and compelling reasons which underlie the change must be articulated: *Thanabalasingham*, paras 12-13.

[58] The obligation of a judge sitting in judicial review is not to substitute his or her opinion for that of the member. Members have a discretion to exercise. It is their discretion, not that of the Court, and it is to be reviewed against the deferential standard of reasonableness. In this case, there was an insufficient evidentiary foundation to support the exercise of discretion, nor were clear and compelling reasons provided for departing from prior detention decisions.

[59] This does not mean that there are no circumstances under which the respondent could be released. A member of the Immigration Division could reach the same result as reached by the Member, but in a manner that meets the requisite legal standards and addresses the shortcomings identified in the decision in issue. Such a decision would proceed on a correct factual foundation as to the nature of B147's involvement in the smuggling operation, would explore and rationalize with prior decisions the ability of the brother to influence the respondent would account for the fact that there are substantive differences in the relationship between the aunt and the father and that of the aunt and the brother. They are not similarly situated, nor is there symmetry in the facts. The risks are not the same. Finally, the decision would consider the extent to which the respondent, as a person against whom a deportation order has issued, would have an incentive to comply.

[60] The application for judicial review is granted. As a further detention review is imminent, no purpose would be served by remitting the decision back to the Member for re-consideration. No question for certification has been proposed.

"Donald J. Rennie"
Judge

Ottawa, Ontario
May 29, 2012

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Mr. R. Keith Reimer	FOR THE APPLICANT
Mr. Gurpreet Badh	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Myles J. Kirvan, Deputy Attorney General of Canada Vancouver, B.C.	FOR THE APPLICANT
Smeets Law Corporation Vancouver, B.C.	FOR THE RESPONDENT