Federal Court  Cour fédérale

Date: 20110714

Docket: IMM-5414-10
IMM-5415-10

Citation: 2011 FC 877

Ottawa, Ontario, July 14, 2011

PRESENT: The Honourable Madam Justice Snider

Docket: IMM-5414-10

BETWEEN: **THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

Applicant

and

B046

Respondent

Docket: IMM-5415-10

AND BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

B047

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] In these Reasons for Judgment, I am addressing two applications for judicial review involving two foreign nationals who arrived in Canada on board the "MV Sun Sea" in August 2010. These judicial review applications are two of approximately 61 applications brought by the Minister of Citizenship and Immigration [the Minister], as Applicant, regarding decisions made by members of the Immigration and Refugee Board, Immigration Division [the ID] in which the foreign nationals were ordered to be released from detention.

[2] Court File No. IMM-5414-10 involves a foreign national known as B046, allegedly a Tamil male from Sri Lanka. Court File No. IMM-5415-10 relates to a female Tamil known as B047 who claims to be the spouse of B046. B046 and B047 were held in detention, through two detention reviews, from August 13 to September 15, 2010, on the basis that the Minister was unable to establish their identities.

[3] Following a detention review on September 15, 2010, a member of the ID [the Member] issued a "Release or Imposition of Terms and Conditions Order" for each of B046 and B047 [the Orders]. The terms of release were identical and consisted basically of requirements to provide a security deposit of $1000, to report to CBSA officials once per week, to surrender any passport or overseas identity documents obtained subsequent to release and "to continue to cooperate with CBSA to establish your identity to its satisfaction". One set of reasons for the two Orders was provided orally to the parties at the conclusion of the detention review hearing.

[4] In these judicial reviews, the Minister seeks an order quashing the Member's decision and the Orders. For the reasons that follow, the application for judicial review will be allowed.

II. Issues

[5] The Respondents raise the threshold issue of whether, in view of the fact that B046 and B047 have been released, the questions before this Court are now moot and should not be heard.

[6] The Minister argues that the matter is not moot and submits the following issues for determination:

1. Did the Member err by failing to limit his review under s. 58(1)(d) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] to an assessment of the reasonableness of the Minister's efforts to establish identity?

2. Did the Member fail to provide "clear and compelling reasons" for departing from the ID's previous decisions to continue detention?

3. Did the Member misconstrue s. 248 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [the *Regulations*]?

[7] For the reasons that follow, I have concluded that the matter is not moot and that the decision and the Orders should be quashed.

III. Background

[8] The "MV Sun Sea" arrived in Canadian waters on August 13, 2010 with 492 migrants on board [the Sun Sea migrants]. The offloading and processing of the persons on board was, as described by one member of the ID, "a monumental task".

[9] One cannot ignore the unique context of the Sun Sea migrants. The persons on board were purported to be Tamils from Sri Lanka. There was a serious possibility that some of the migrants had ties to the Liberation Tigers of Tamil Eelam [LTTE], a group designated as a terrorist organization in Canada; such persons would be inadmissible to Canada. While many of the migrants apparently had no documentation to support their claimed identity, officials who searched the "MV Sun Sea" found many unclaimed identity documents that had been partially destroyed. Significantly, there were a number of children on board; it was important that the identity of the children and their alleged parents be established to negate the possibility of child smuggling. These and other factors not normally present in the arrivals of refugee claimants by other means created a situation where the Minister placed a high value on establishing the Sun Sea migrants' identity.

IV. Statutory Scheme

[10] I begin with an overview of the statutory scheme as it relates to detention under the provisions of *IRPA* and the *Regulations*. "Detention and Release" are dealt with in Division 6 of Part 1 of *IRPA* and in Part 14 of the *Regulations*.

[11] The migrants aboard the "MV Sun Sea" were detained upon their arrival in Canada pursuant to s. 55(3) of *IRPA*, which permits detention on entry if an officer: (a) considers it necessary to do so in order for the examination to be completed; or (b) has reasonable grounds to suspect that the permanent resident or the foreign national is inadmissible on grounds of security or for violating human or international rights.

[12] Section 54 establishes the ID as the "competent Division of the Board with respect to the review of reasons for detention". Detention reviews are mandated by s. 57 of *IRPA*. The first review is to take place within 48 hours of the detention (s. 57(1)). A second review must take place at least once during the following seven days and at least once every 30 days thereafter (s. 57(2)).

[13] In conducting detention reviews, the ID is bound by s. 58 of *IRPA* which provides as follows:

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	*b*) le résident permanent ou l'étranger se soustraira vraisemblablement au contrôle, à l'enquête ou au renvoi, ou à la procédure

Minister under subsection 44(2);	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] As we can see from the words of s. 58(1) of *IRPA*, in determining whether any of the grounds for continued detention have been met, the ID must take into account the factors prescribed by the *Regulations*. Further direction in this regard is set out in s. 244(c) of the *Regulations*, which states that "the factors set out in this Part [of the Regulations] shall be taken into consideration when

assessing whether a person … is a foreign national whose identity has not been established".

Section 247(1) of the *Regulations* deals specifically with the factors to be considered when detention on the grounds of identity is being considered:

Identity not established	Preuve de l'identité de l'étranger
247. (1) For the purposes of paragraph 244(*c*), the factors are the following:	**247.** (1) Pour l'application de l'alinéa 244*c*), les critères sont les suivants :
(*a*) the foreign national's cooperation in providing evidence of their identity, or assisting the Department in obtaining evidence of their identity, in providing the date and place of their birth as well as the names of their mother and father or providing detailed information on the itinerary they followed in travelling to Canada or in completing an application for a travel document;	*a*) la collaboration de l'intéressé, à savoir s'il a justifié de son identité, s'il a aidé le ministère à obtenir cette justification, s'il a communiqué des renseignements détaillés sur son itinéraire, sur ses date et lieu de naissance et sur le nom de ses parents ou s'il a rempli une demande de titres de voyage;
(*b*) in the case of a foreign national who makes a claim for refugee protection, the possibility of obtaining identity documents or information without divulging personal information to government officials of their country of nationality or, if there is no country of nationality, their country of former habitual residence;	*b*) dans le cas du demandeur d'asile, la possibilité d'obtenir des renseignements sur son identité sans avoir à divulguer de renseignements personnels aux représentants du gouvernement du pays dont il a la nationalité ou, s'il n'a pas de nationalité, du pays de sa résidence habituelle;
(*c*) the destruction of identity or travel documents, or the use of fraudulent documents in	*c*) la destruction, par l'étranger, de ses pièces d'identité ou de ses titres de voyage, ou l'utilisation de documents frauduleux

order to mislead the Department, and the circumstances under which the foreign national acted;

(*d*) the provision of contradictory information with respect to identity at the time of an application to the Department; and

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

afin de tromper le ministère, et les circonstances dans lesquelles il s'est livré à ces agissements;

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

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

[15] If there are grounds for detention, s. 248 of the *Regulations* sets out additional factors to be considered:

Other factors

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

(*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;

Autres critères

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

a) le motif de la détention;

b) la durée de la détention;

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

(*d*) 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

V. Previous detention reviews

[16] As noted, this judicial review concerns B046 and B047 whose final detention reviews were held jointly on September 15, 2010 before the Member. Prior to the September 15, 2010 detention review hearing, each had been the subject of earlier reviews.

- A detention review for B047, together with five other women, was held on August 18, 2010 and, along with one other female detainee, a second review was held on August 25, 2010. In both hearings, an Order of Detention was issued indicating that detention would be continued for reasons of identity.

- A detention review for B046, together with four other migrants, was held on August 18, 2010 and a second review was held on August 24, 2010. In both hearings, the member of the ID issued an Order of Detention indicating that the detention would be continued for reasons of identity.

[17] From the beginning, the Minister expressed concerns regarding the Sri Lankan identity documents. The Canada Border Services Agency [CBSA] officials carried out the difficult task of

examining and verifying identity documents. The first step was to determine whether the documents had been tampered with or altered. This step was carried out by forensic experts in Canada.

[18] Once it was confirmed that a national identity card [NIC], or other relevant identity document, submitted by a migrant aboard the "MV Sun Sea" had no evidence of alteration and that the document displayed characteristics and printing methods generally associated with an authentic document, CBSA officials moved to the second step. The second step involves establishing the authenticity of the issued documents.

[19] The following description of and reasons for the second part of the document verification was described by the Minister's counsel at the detention review hearing for B047, and one other person, on August 25, 2010 (B047, Certified Tribunal Record [CTR], p.49, April 12, 2011):

> [R]esearch from the Immigration and Refugee Board's Research Directorate, which is included with the document that the Minister disclosed at the outset of the hearing, suggests that there have been [issues] with documents directly being fraudulently obtained. The research indicates that there have been Sri Lankan national identity cards issued as a result of bribery. Reports from 2004, upon which the Research Directorate relied, make reference to there having been a massive national identity card racket that involved employees of the Sri Lankan government's Registration of Persons Department and that involved the issuance of fraudulent national identity cards for exorbitant prices.
>
> There is also reference in this research to documents having been obtained in the names of deceased individuals and there is reference to documents having been obtained upon the submission of fraudulent documents. In other words, fraudulent documents were provided to that department and it was based on those documents that a national ID card was issued or that national identity cards were issued.
>
> There is evidence in these documents that Sri Lankan officials began to take action to address this problem but that these actions did not

> substantially start until 2006. I note that in the [case of B047], their documents were issued in 2000 and 2004 respectively. It is not the Minister's submission that these documents were fraudulently obtained, it is our submission that we are currently not satisfied of the identity of the persons based on these documents alone and that further investigation must take place prior to the Minister being satisfied of the identities of the persons concerned.

[20] It is important to note that the Minister's submissions in this regard were supported by documentary evidence that formed part of the record. In sum, the Minister's submission, in the previous detention reviews as well as the one before the Member, was that, prior to 2006, Sri Lankan identity cards had "some serious security breaches" (B047, CTR, p.57, April 12, 2011) that warranted further investigation. The position of the Minister, throughout all of the detention reviews, was – and continues to be – that the Minister is not satisfied with the identity of the persons and that he is taking reasonable steps to determine the identities.

[21] The member of the ID who presided at the detention review for B047 on August 18, 2010 concluded that detention should continue, notwithstanding that the NIC for B047 had not been altered. The member accepted the Minister's argument, concluding that "it is reasonable at this point that the Minister seek additional documentation, which would hopefully assist in verifying that this is, in fact, a properly issued identity card" (B047, CTR, p.58, April 12, 2011).

[22] The situation for B046 was different. His identity card presented problems at the first stage of verification. The analysis unit who carried out the examination of the NIC commented as follows:

> The ragged edges of an inner layer of laminate can be seen protruding from between the front and rear layers around the

> perimeter of the card. The ragged edges are an indication that the laminate has been cut.

[23] This evidence was presented to the Member of the ID at the detention review hearing of September 15, 2010 – the subject of this judicial review.

VI. Mootness

[24] The Respondents filed their further memoranda of argument on June 2, 2011 – less than one week before the hearing of this matter. For the first time, the Respondents raised the argument that the matters of this judicial review are moot. They argue that the release of B046 and B047, pursuant to the Orders of the ID, has removed any live controversy between the parties. I do not agree.

[25] The Respondents rely on the decision of this Court in *B045 v Canada (Minister of Citizenship and Immigration)* (May 26, 2011) IMM-1015-11 [*B045*], where I stated the following:

> This is because the Court of Appeal, in *XXXX* [*XXXX v. Canada (Minister of Citizenship and Immigration)*, 2011 FCA 27 [referred to as "*Ocean Lady*"], has already ruled that, once a detainee is released from detention, the question becomes moot. In that context, the Court of Appeal commented that: "there are cases pending which raise issues similar to those before us in this appeal and which will likely come to this Court for determination". This is not one of those cases. The only possible resolution of the problems faced by those lawyers and interested organizations will come from a case involving a "live controversy" – that is, a situation where a person remains in detention. In every other case, the matter becomes moot.

[26] The problem with the submission of the Respondents on this point is that they have not recognized that the nature of the dispute between the parties in *Ocean Lady*, above, and *B045*, above, is fundamentally different from the dispute before me in these two cases. As stated by Justice

Nadon, speaking for the majority of the Court of Appeal in *Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81, [2010] 2 FCR 311, at paragraph 29, "the determination of the mootness issue depends on the proper characterization of the controversy that exists between [the parties]".

[27] The decision in *Baron*, above, is very helpful. In that case, the decision in dispute was a decision of an enforcement officer not to defer removal beyond a given date. By the time the application for judicial review was heard, the date for removal had passed. While the trial judge (*Baron v Canada (Minister of Citizenship and Immigration)*, 2008 FC 341, 324 FTR 133) had concluded that the matter was moot, the majority of the Court of Appeal did not agree. The key consideration was the nature of the dispute. The trial judge concluded that the proper characterization of the dispute was whether an applicant should be removed, and is obliged to leave, on the scheduled removal date. Justice Nadon did not agree. At paragraph 28, he described the situation:

> To begin with, it is important to make clear what the appellants were seeking when they requested deferral of their removal from Canada on February 15, 2007. As the enforcement officer says in her decision, the appellants' request was put forward on the grounds that they had an outstanding H&C application [which the appellants say they had attempted to file in March 2003] and that it was in the best interest of their Canadian-born children that removal be deferred until the H&C application had been dealt with. In other words, the appellants were not simply asking that they not be removed on February 15, 2007, but that their removal not take place until the determination of their H&C application.
>
> [Emphasis added.]

[28] Justice Nadon agreed with the parties that the proper characterization of the dispute was whether the appellants should be removed prior to the determination of their H&C application. Since there had been no determination of that issue, the Court found that there was still a live controversy between the parties and that the trial judge had erred by concluding that the matter was moot.

[29] The situation before me is analogous to that before the Courts in *Baron*, above. What was the Minister seeking when he requested the continued detention of the Respondents? The Minister was seeking the continuation of the detentions until the identity of B046 and B047 had been established. That is the proper characterization of the dispute between the parties. In the course of the hearing, the Minister advised the Court that identity had still not been established for B046 and B047. On the same reasoning as applied by Justice Nadon in *Baron*, above, the matter is not moot, in spite of the release of the Applicants.

[30] Moreover, the context of *B045*, above, and *Ocean Lady*, above, was very different from the facts before me. In each of those cases, the decision under review was a decision by the ID to detain the affected person. The applicants in those cases were the individuals who were disputing their continued detention. The dispute between the detained person and the Minister was simply whether the individual should be released or the detention continued. The individuals were not asking the ID to release them until some subsequent event. Once the individuals were released in subsequent detention reviews (and no judicial review commenced by the Minister), the only issue before the ID – whether detention should be continued – had completely disappeared. There was no live controversy.

[31] Thus, for the cases at bar, I conclude that the matter is not moot and should be considered by this Court.

VII. Standard of Review

[32] In general, detention review decisions are fact-based decisions which attract deference; the standard of review is reasonableness. For questions of law, the standard of review is correctness (See, for example, *Panahi-Dargahlloo v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1114, 357 FTR 9, at paras 21-22; *Walker v Canada (Minister of Citizenship and Immigration)*, 2010 FC 392, [2010] FCJ No 474 (QL), at paras 23-26).

[33] On the standard of reasonableness, the Member's decision should stand unless the reasoning process was flawed and the resulting decision falls outside the range of possible, acceptable outcomes which are defensible in respect of the facts and the law (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, at para 47).

[34] When applying the standard of correctness, a reviewing court shows no deference to the decision-maker's reasoning process. After undertaking its own analysis of the question, the Court will either agree or disagree with the conclusion of the ID. Where it disagrees, the Court will substitute its own view and provide the correct answer (*Dunsmuir*, at para 50).

VIII. Analysis of Issues

A. *Issue #1: Did the Member err by failing to limit his review under s. 58(1)(d) to an assessment of the reasonableness of the Minister's efforts to establish identity?*

[35] The Minister submits that, instead of limiting himself to ensuring that the Minister was conducting an ongoing investigation in good faith, as required by s. 58(1)(d) of *IRPA*, the Member erred by: (a) shifting the onus of establishing identity onto the Minister; (b) dictating how the Minister should conduct his investigation; and, (c) making the determination that identity was in fact established.

[36] As reflected in s. 58(1) of *IRPA*, Parliament has made it clear that there is a presumption that a detainee is to be released, except in defined situations. One of those specific exceptions is a lack of identity. From the words of s. 58(1)(d), it is obvious that Parliament has identified a lack of confirmed identity as a separate ground for detention. More than this, the ID is directed on how it is to consider the question of identity. It is not the opinion of the ID that is determinative; rather the focus is on the Minister's opinion. To continue detention under this provision, the ID need only be "satisfied" that the Minister's "opinion" meets the requirements of s. 58(1)(d) of *IRPA*.

[37] Section 58(1)(d) begins with the requirement that the Minister be of the opinion that identity of the foreign national has not been, but may be, established. From the words that follow, however, it is evident that a simple opinion based on lack of proven identity is insufficient to support

continued detention. There are two different situations where the Minister's opinion will warrant continued detention:

1. if the foreign national has not reasonably cooperated by providing relevant information to establish identity; OR

2. the Minister is making reasonable efforts to establish identity.

[38] What then is the task of the ID when considering whether detention should be continued where the Minister raises the issue of identity? It appears to me that the first step of the analysis is simple; all that is required is a statement from the Minister that identity has not been established but that it may (or could) be. The second job of the ID will depend on the facts of each case, as put forward by the Minister. The Minister may present evidence that the foreign national has not "reasonably cooperated", in which case the ID will assess whether the evidence demonstrates that the foreign national has not "reasonably cooperated" by putting forward relevant information for the purpose of establishing their identity. In the alternative scenario, the Minister may present evidence to show that he is making reasonable efforts to establish identity. In this case, the ID will examine the evidence to see whether the efforts to establish identity are "reasonable". It is not for the ID to establish identity; rather, the role of the ID is to assess whether the Minister is doing his job in establishing identity. If the ID is satisfied that the efforts are reasonable or that the foreign national has not "reasonably cooperated", the grounds for detention, pursuant to s. 58(1)(d), are established.

[39] In the cases of B046 and B047, at the detention review in question, the Minister asserted that detention should continue because: (a) identity had not been, but may be, established; and (b) that he was making reasonable efforts to establish their identity. In this context, the mandate of the Member was to assess the reasonableness of the Minister's efforts to establish identity.

[40] The Member, at several points in his decision, appears to have agreed that the Minister was taking reasonable steps to establish their identity. However, when read in its entirety, it is obvious that the Member does not accept the reasonableness of the Minister's efforts. The Member questions the need for many of the actions of the Minister. For example, the Member states the following:

> I have about 14 years of experience as an immigration adjudicator and I would say that in this case – in these cases – the Minister has raised the bar on what will satisfy him with respect to the identity of persons on the MV *Sun Sea* … The method of arrival, that is by ship, seems to have struck a nerve and led to the Minister requiring or setting this higher standard.

[41] The Member then goes on to describe how, in the past, the Minister has treated individual Tamil refugee claimants arriving by air and how, in those case, the Minister has recommended release without the need for a secondary review of identity documents. The Member also comments directly on the possible explanations for the lamination problems. In other words, the Member would have been satisfied with the identity documents of B046 and B047. The Member is saying, in effect, that he does not believe that the extra steps are reasonable because the Minister has never done it that way before. By contrasting the investigative steps in earlier cases, the Member is substituting his own view of what ought to have satisfied the Minister for the cases at bar. The problem is that this goes beyond the mandate of the Member, as set out in s. 58(1)(d) of *IRPA*. The

Member is not assessing whether the steps were reasonable or unreasonable; rather, he is deciding whether the steps were correct.

[42] It is difficult to assess what role this analysis played in the Member's decision that B046 and B047 should be released. Had the Member been less critical of the Minister's actions on the question of identity, would he have given the lack of identity more weight in his application of s. 58(1) of the *IRPA*? I am unable to answer that question. In the circumstances, I conclude that the Member's analysis was so problematic as to constitute a reviewable error.

B. *Issue #2: Did the ID fail to provide "clear and compelling reasons" for departing from the ID's previous decision to continue detention?*

[43] The decision under review was the outcome of the third detention review hearing for each of B046 and B047. Detention had been continued for B046 on August 18 and August 24 and for B047 on August 18 and August 25.

[44] If a member of the ID chooses to depart from prior decisions to detain an individual, the member must set out "clear and compelling reasons" for doing so and must deal with those earlier decisions in a meaningful way (*Canada (Minister of Citizenship and Immigration) v Thanabalasingham*, 2004 FCA 4, [2004] 3 FCR 572 [*Thanabalasingham*]; *Canada (Minister of Citizenship and Immigration) v Iyile*, 2009 FC 700, 348 FTR 12, at paras 34-37; *Sittanpalam v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1352, [2005] FCJ No 1734 (QL)).

[45] As pointed out in the jurisprudence, the record in detention reviews is built up on a continuous basis from one review to the next. The Court of Appeal provided guidance on what is required if a member departs from the earlier review, in *Thanabalasingham*, above, at paragraphs 11 to 13:

> [F]or example, the admission of relevant new evidence would be a valid basis for departing from a prior decision to detain. Alternatively, a reassessment of the prior evidence based on new arguments may also be sufficient reason to depart from a prior decision.
>
> The best way for the Member to provide clear and compelling reasons would be to expressly explain what has given rise to the changed opinion, i.e. explaining what the former decision stated and why the current Member disagrees.
>
> However, even if the Member does not explicitly state why he or she has come to a different conclusion than the previous Member, his or her reasons for doing so may be implicit in the subsequent decision. What would be unacceptable would be a cursory decision which does not advert to the prior reasons for detention in any meaningful way.

[46] Within this framework, I turn to the decision in issue. What had changed since the previous decision? What was the same? What reasons did the Member provide for departing from the earlier decision?

[47] The changes were as follows:

- another month had passed; B046 and B047 had now been in detention for 33 days;

- the Minister had received the report that the NIC of B046 showed evidence that the document had been relaminated; and

- B046 claimed to have a brother in Canada prepared to post a $1000 bond.

[48] The facts or circumstances that had not changed were the following:

- the evidence with respect to authenticity of documents from Sri Lanka had not changed;

- the Minister had confirmation that the NIC of B047 had not been altered – on its face, it was a valid NIC;

- the Minister had not completed the second phase of the document verification that was intended to address the question of whether the NICs were fraudulently issued; and

- the Minister continued to take steps to establish identity.

[49] In the earlier decisions, the ID had concluded that continued detention was appropriate. In essence, nothing of substance had changed from the earlier detention reviews. The need for a secondary analysis of the identity documents was before the members in those reviews and was before this Member. The process for such verification was outlined to the Member, and had not changed since the earlier reviews. The Minister, while unable to provide definitive timelines at this hearing, clearly outlined the steps that were being taken. As acknowledged by the Member, the Minister "committed to providing timelines at the next detention review". If anything, the

discovery of tampering with B046's NIC presented a stronger argument for continued detention. An offer of a bond from a "brother" may not be a changed circumstance when identity has not been established.

[50] Nowhere in his decision does the Member acknowledge or discuss these earlier detention review decisions. By failing to provide "clear and compelling reasons" (or any reasons) to depart from the ID's prior decisions, the Member committed a reviewable error (see *Canada (Minister of Citizenship and Immigration) v Li*, 2008 FC 949, 331 FTR 68 at para 99).

C. *Issue #3: Did the Member misconstrue s. 248 of the Regulations?*

[51] The third issue raised by this judicial review is whether the ID misconstrued s. 248 of the *Regulations*. While his decision is not as clear as it could be and incorporates some language that suggests otherwise, I do not conclude that the Member erred in his approach to s. 248.

[52] Section 244(c) of the *Regulations* requires that the factors set out in Part 14 of the *Regulations* be taken into consideration when assessing "whether a person … is a foreign national whose identity has not been established". The specific factors in respect of identity are listed in s. 247(1) of the *Regulations*.

[53] If – and only if – it is determined that there are grounds for detention, s. 248 of the *Regulations* becomes relevant. The ID is instructed to consider five different factors before it concludes whether the person should be detained or released.

[54] The purpose of s. 248 is to address the *Canadian Charter of Rights and Freedoms*, RSC 1985, App II, No 44, Sched B [the *Charter*] issues that can arise from an indeterminate detention. The factors in s. 248 were first articulated in *Sahin v. Canada (Minister of Citizenship and Immigration)*, [1995] 1 FC 214, 85 FTR 99, [*Sahin*] at para 30, aff'd 184 NR 354, 97 FTR 80 (note)(FCA). In that decision, Justice Rothstein (as he was then) commented that detention decisions must be made with section 7 of the *Charter* in mind. Justice Rothstein outlined a list of factors that were to be taken into account. Justice Rothstein emphasized that the amount of time that is anticipated until a final decision on whether the affected person would remain in Canada was a consideration that "deserves significant weight" (*Sahin*, above, at para 31). When the current *Regulations* came into force on June 28, 2002, Justice Rothstein's "list" of considerations formed – almost verbatim – the content of s. 248.

[55] Provided that the ID addresses all of the factors and has regard to the evidence before it in assessing the factors in s. 248, this Court should be reluctant to intervene in the ID's decision to release or detain.

[56] In this case, the Minister argues that the Member treated the alternatives to detention, pursuant to s. 248(e) of the *Regulations*, as determinative. I do not agree. The Member clearly directed his mind to all of the factors of s. 248. Specifically, the Member acknowledges that the reason for detention was identity, and that "identity is fundamental to immigration processing in Canada". While observing that the length of detention has been "relatively short", he notes that:

> [T]he migration integrity officer investigation is currently without timelines and, by logic, would likely be a very long process because of the sheer volume of documents that will need to be assessed. Potentially [B046 and B047] could face a long period in detention.

> It's unpredictable at this time, although I acknowledge that the Minister is committed to providing timelines at the next detention review.

[57] Finally, the Member reviewed the alternatives to detention, concluding that:

> In the circumstances of these cases, with two young children, solid Canadian reception, continued detention, despite the opinion of the Minister with respect to identity and the reasonableness of its efforts, seems unnecessary and there exists an alternative to detention that I consider will be effective and appropriate in these circumstances.

[58] The Member gave considerable weight to the length of the detention and to the lack of any reasonable estimate as to how long it would take the Minister to complete the document verification. He did not err in doing so; *Sahin*, above, teaches that this is an important consideration. The Minister's only response to the question of "how long" was that he would provide timelines at the next detention review. The fact that the Minister was taking concrete, reasonable steps to establish the identities of B046 and B047 does not negate the fact that the Minister was unable to provide the Member with any timelines. I might not have given as much weight to this factor; but, that, on its own, does not make the Member's decision unreasonable.

[59] The Minister posits that it is inconsistent with the scheme of *IRPA* to assess alternatives to detention if identity has yet to be determined. The Minister argues that, once detention is maintained on the ground of identity, the scheme of *IRPA* is clear that the ID cannot look at the question of alternatives to detention.

[60] I do not agree. All of the factors of s. 248 are to be weighed. The Minister's interpretation of s. 248 would have identity issues trump all other factors in s. 248. The regulation is not drafted in that manner and the scheme of *IRPA* does not require such an interpretation.

[61] I acknowledge that identity should be a very important consideration. However, while a lack of identity is obviously an important consideration for a s. 248 analysis, it does not mean that the ID may not consider alternatives to detention. Indeed, s. 58(1) of *IRPA* requires the ID to take into account the prescribed factors. "Alternatives to detention" is listed as a factor under s. 248 of the *Regulations*. There is no exception for an identity question under s. 58(1)(d).

[62] The Minister also argues that, in determining appropriate conditions of release, the Member placed undue emphasis on the bond given by B046's alleged brother. The Minister submits that, in the absence of B046 having established his identity, it was unreasonable for the Member to rely on a bond from a person whose link to B046 has not been established. I agree that the words used by the Member in this regard seem to make an assumption of identity for B046 that has not yet been established. If B046's identity is not established, how can the Member be certain that the proposed bondsperson is a brother of B046? However, I do not see this as a material concern. While the exact relationship between B046 and the bondsperson may be unproven, the fact is that someone with a connection with B046 and B047 was prepared to post what the Member described as a "relatively nominal bond in the form of a guarantee". As I read the Member's decision in this regard, I do not believe that much, if any, weight was placed on the relationship of B046 to the bondsman.

[63] In view of the record before the Member, I am not persuaded that he misconstrued s. 248 of the *Regulations*. At times, in the decision, the Member could have been more careful with his choice of language and could have provided a more complete analysis. However, when the decision is read as a whole, the Member addressed and weighed each of the factors outlined in s. 248 of the *Regulations*, as required.

[64] However, while the Member approached s. 248 properly, the underlying foundation of his analysis is flawed. Specifically, he did not accept the reasonableness of the Minister's efforts to assess identity and he failed to provide "clear and compelling" reasons for departing from the previous detention review decisions. Moreover, he appears to have substituted his own views of what was necessary to establish identity for that of the Minister's opinion. Accordingly, the decision ought not to stand. Had the Member understood his role in assessing the reasonableness of the Minister's opinion on identity and had he turned his mind to the earlier detention review decisions, the outcome may have been different.

IX. Certified Question

[65] The Minister submits the following question for certification:

> Can the Immigration Division find that there exists an alternative to detention and order the release of a foreign national from detention under paragraph 248(e) of the [*Regulations*], notwithstanding that the Immigration Division is satisfied that the Minister is of the opinion

> that the identity of a foreign national has not been established and that the Minister is making reasonable efforts to establish identity under s. 58(1)(d) of the [*IRPA*] and other factors under paragraph 248 of the [*Regulations*] weigh against release?

[66] The Respondents propose the following, somewhat broader question:

> To what extent, if any, is the Immigration Division authorized to release a foreign national whose continued detention is sought pursuant to s. 58(1)(d) of the *IRPA* where the Minister is of the opinion that the identity of the foreign national has not been but may be established?

[67] The problem with the certification of either question is that the answer is not dispositive of this judicial review. As I have concluded, the Member's decision is flawed in two different ways. First, the ID failed to have regard to the earlier detention decisions for B046 and B047. Secondly, the ID improperly substituted its view of what was necessary to establish identity for that of the Minister's opinion. Thus, any question with respect to the correct meaning and application of s. 248 of the *Regulations* would not be determinative.

X. Conclusion

[68] For these reasons, the judicial review applications will be allowed, the decisions and the Orders of the Member with respect to B046 and B047 will be set aside and the matters sent back to the ID for re-determination. No question of general importance will be certified.

[69] On a final note, I wish to direct some comments to the ID. When leave is granted in an application for judicial review, an order of the Court is issued pursuant to Rule 14 of the *Federal Courts Immigration and Refugee Protection Rules*, SOR/93-22 [the *Rules*]. A copy of the order is sent to the Tribunal – in this case, the ID – who is required to send a copy of the certified tribunal record [CTR] to the Court and the parties (Rule 14(4)). The CTR should include all material that was before the decision-maker. Without the entire record, the parties and this Court are at serious disadvantage in ensuring that justice is done. In the case of a detention review decision, the CTR should include any previous decisions on detention reviews and the material that relates to those decisions. In the cases of B046 and B047, the CTR initially provided was deficient; this created significant problems in the judicial review. It would be helpful, I believe, if counsel for the ID could consult with counsel for the parties to these proceedings to ensure that, going forward, CTRs are compiled in a manner that is more helpful and complete.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. the decisions and the Release or Imposition of Terms and Conditions Orders of the Member of the ID dated September 15, 2010 in respect of B046 and B047 are quashed and the matters are referred back to the ID for re-determination; and

2. no question of general importance is certified.

"Judith A. Snider"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5414-10; IMM-5415-10
STYLE OF CAUSE:	THE MINISTER OF CITIZENSHIP AND IMMIGRATION v B046, B047
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	JUNE 8, 2010
REASONS FOR JUDGMENT AND JUDGMENT:	SNIDER J.
DATED:	JULY 14, 2011

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