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Citation: 2018 FC 211

Ottawa, Ontario, February 23, 2018

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Applicant

and

JACOB DAMIANY LUNYAMILA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] These are applications for judicial review by the Minister of Public Safety and Emergency Preparedness [Minister] of three Orders of three different members of the Immigration and Refugee Board of Canada, Immigration Division [ID], dated October 30, 2017 [October Order], November 27, 2017 [November Order], and December 21, 2017 [December

Order], in which it was ordered that the Respondent be released from immigration detention [collectively, the Release Orders]. These three applications were heard together on February 5, 2018, in Vancouver.

[2] The issue before the Court is whether these decisions are reasonable. The Respondent has been in continuous immigration detention since September 2013. This is the third time this Court is called upon to assess the reasonableness of decisions taken by the ID to release the Respondent from detention during that period of time. On the first two occasions, these decisions, taken over the course of seven detention reviews held by various ID members between the months of January and September 2016, were found to be unreasonable, the paramount considerations being that the Respondent had up until that point refused to cooperate with a validly issued order for his removal from Canada, was unlikely to appear for his removal and was a danger to the public, and that the conditions set forth for his release in each case would not have addressed either the danger or the flight risk he posed (*Canada (Public Safety and Emergency Preparedness) v Lunyamila*, 2016 FC 289 (Justice Harrington) [*Lunyamila I*] and *Canada (Public Safety and Emergency Preparedness) v Lunyamila*, 2016 FC 1199 (the Chief Justice) [*Lunyamila II*]).

[3] In *Lunyamila II*, the Chief Justice certified a question. In a decision released on January 19, 2018, the Federal Court of Appeal declined to answer that question, being of the view that it was not "sufficient to give this Court jurisdiction to decide the appeal" (*Lunyamila v Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22 at para 53 [*Lunyamila FCA*]). Therefore, it dismissed the appeal brought by the Respondent.

[4] The day following the hearing of the present judicial review applications, that is on February 6, 2018, counsel for the Minister advised the Court that subsequent to the detention review held in January 2018, the ID ordered that the Respondent be detained. Accordingly, she sought leave to file written submissions regarding the mootness issue arising from that development. Leave was granted and both parties filed written submissions. Although the parties disagree on whether the present case is moot, they both urge the Court, as contemplated by *Borowski v Canada (Attorney General)*, [1989]1 SCR 342 [*Borowski*], to exercise its discretion to decide the matter on the merits, even if I were to conclude that the matter is now moot, as there is still an adversarial relationship between the parties.

[5] *Borowski* sets out a two-step process for determining whether an issue is moot. The first step consists of determining whether there remains a live controversy between the parties. I agree with the Minister that the latest detention order supersedes the Release Orders that are the subject the present judicial review applications, resulting in these Release Orders no longer having any effect and in the Court's decision on these applications having no direct impact on the Respondent's continued detention (*Canada (Public Safety and Emergency Preparedness) v Ali*, 2016 FC 661 at para 29). Therefore, I am satisfied that no live controversy between the parties subsists regarding the impugned Release Orders and that the issues raised in the underlying applications are, as a result, moot.

[6] The second step of the *Borowski* test requires the Court to decide, if the issue is moot, whether to exercise its discretion to hear the matter in any event. In exercising that discretion, the Court must have regard to the following factors: (i) the existence of an adversarial relationship

between the parties; (ii) concern for judicial economy; and (iii) awareness of the Court's proper law-making function (*Borowski*, at paras 31, 34 and 40).

[7] Here, and although *Lunyamila I* and *Lunyamila II* already provide significant and authoritative guidance to the ID in reviewing the Respondent's detention, I agree with the parties that I should decide the present matter on its merits even though it is moot considering that there is still an adversarial relationship between them, that the issues raised in the present matter are more likely than not, given the case history, to arise again, and that the Respondent has now spent more than 55 months in continued detention, including more than 15 months since *Lunyamila II* was rendered. This case offers the Court an opportunity to reaffirm the core legal principles set out in *Lunyamila I* and *Lunyamila II* and apply them to what is inherently an evolving situation.

II. Background

A. *The Respondent's Immigration History in Canada*

[8] *Lunyamila FCA* provides this useful summary of the Respondent's immigration history in Canada:

> [13] The [Respondent] 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.
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> [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.

[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.

[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 Canadian 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.
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> [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.
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> [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.
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> [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.
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> (Headings omitted)

[9] To the Federal Court of Appeal's summary of the Respondent's history, I would add that the Respondent has obtained a total of 54 criminal convictions, which include, but are not limited to, one conviction for carrying a concealed weapon, 10 for assault, 4 for uttering threats, 22 for theft under $5,000, and one sexual assault conviction for non-consensual touching. He also has 13 convictions for failing to appear in court and failing to comply with orders, terms and recognizances. The Vancouver Police Department described the Respondent as "a chronic offender, a persistent criminal who causes significant societal harm" (*Lunyamila I*, at para 3).

[10] Furthermore, and of relevance to the conditions attached to the Release Orders, the Respondent was homeless for 12 years prior to his detention. During that time, he sometimes stayed at the Union Gospel Mission [UGM], a drop-in shelter which runs a number of community based programs, including substance abuse recovery programs, and claims to be familiar with the facility and its staff. In fact, one of his assault conviction results from an altercation with another, female, UGM resident and a condition of his probation order was that he was no longer permitted to attend the premises.

B. *The January and February 2016 Release Orders: Lunyamila I*

[11] On January 5, 2016, Member Nupponen ordered the Respondent's release because even if he did cooperate with Canadian Border Services Agency [CBSA] and signed the required documents, it was highly speculative that he could be deported because he lacked the requisite identity documents, leading to a conclusion of indefinite detention. Member Nupponen further concluded that the Respondent no longer presented the same risk to the public as he had been sober for two years and had taken anger management classes. On February 2, 2016, Member Nupponen again released the Respondent, as there were no reasons to depart from his previous decision. He downplayed the evidence of the Respondent's violent reaction when informed that his release had been stayed by order of this Court, concluding that it was a reasonable reaction of frustration.

[12] As indicated at the outset of these Reasons and in the case summary provided in *Lunyamila FCA*, these two release orders were held to be unreasonable. With respect to the January 5, 2016 decision, the Court found that the conclusion reached by Member Nupponen

was not supported by the record. The Respondent was convicted of violent assaults, including sexual assault, and nothing in the record indicated that the Respondent's enforced abstinence while in detention would lead to sobriety in the future. There was no evidentiary basis either supporting a conclusion that he would comply with the conditions of his release and report regularly.

[13] In reviewing the February 2, 2016 decision, the Court reached the same conclusion as in the previous decision, but added that the Member's consideration of the Respondent's reaction when informed of the stay of the January 5, 2016 decision was unreasonable as the Respondent's agitation and aggressive reaction suggested that he did not have his anger issues under control and continued to be a danger to the public.

C. *The Release Orders of March, July, August and September 2016: Lunyamila II*

[14] On March 1, March 31, July 14, August 11, and September 16, 2016, the Respondent was released from immigration detention by the ID yet again. On March 1, Member King concluded that the Respondent could not be removed without Rwandan identity documents, something he has not had since arriving in Canada and was extremely unlikely to obtain. As such, maintaining the Respondent's detention would be to maintain detention indefinitely, contrary to several of his *Charter* rights. On March 31, Member McPhalen also concluded that detention had become indefinite, breaching the Respondent's *Charter* rights.

[15] On June 16, Member Ko concluded that the Respondent's detention should be maintained based on new information being pursued by CBSA which raised additional questions as to the

Respondent's identity, notably that he may be Tanzanian, not Rwandan. At the next detention review held on July 14, Member King disagreed with Member Ko's assessment of the new information and ordered the Respondent's release. Member King concluded that the information was not new as the Minister received the information in 2013, but only recently decided to incur the costs associated with pursuing it. Furthermore, Member King found that the fact that the Respondent is a danger to the public and a flight risk and has failed to cooperate in efforts to remove him was insufficient to support the Respondent's 'indefinite' detention.

[16] On August 11, Member Rempel released the Respondent, concluding that detention had become indefinite and that conditions could be imposed to reduce the risk to the public to a level that no longer justified continued detention. Member Rempel concluded that CBSA was unlikely to successfully confirm the Respondent's Tanzanian identity and that the Respondent presented less of a danger than when he entered immigration detention. The conditions of release included acceptance at a residential drug and alcohol treatment program, abstaining from consuming alcohol and refraining from activities which would result in a conviction under an Act of Parliament.

[17] On September 16, Member Cook ordered the Respondent released from detention based on similar reasons as the previous release order. Member Cook noted that the Respondent's case was in a stalemate in large part due to his failure to cooperate but that cooperation would not guarantee removal because the Respondent also lacked the identity documents that Rwanda appeared to require. Member Cook imposed conditions similar to those imposed by

Member Rempel, though he added the requirement that the Respondent make efforts to enroll in and complete a community-based violence prevention program.

[18] These decisions were all found to be unreasonable by the Chief Justice in *Lunyamila II*. The Chief Justice framed the fundamental issue raised by the applications before him as "how to resolve the tension between, on the one hand, an immigration detainee's refusal to cooperate with a validly issued order for removal from Canada, and on the other hand, the length of detention and uncertainty regarding the duration of future detention that result, in whole or in part, from that refusal" (*Lunyamila II* at para 1). He held that this tension had to be resolved in favour of continued detention where such refusal to cooperate "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" or who is "unlikely to appear for removal from Canada" (*Lunyamila II* at para 2).

[19] To hold otherwise, warned the Chief Justice, would enable such a detainee "to simply produce, or contribute to producing, a 'stalemate,' for the purposes of ultimately obtaining his release from detention" and, therefore, "manipulate our legal system in order to avoid the execution of a validly issued removal order", something, the Chief Justice stated, that runs contrary to the scheme of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act] and which the Respondent appears to be attempting to do (*Lunyamila II* at para 3).

[20] The Federal Court of Appeal, in *Lunyamila FCA*, summarized as follows the Chief Justice's findings regarding the unreasonableness of Member Cook's section 248 analysis

of September 16, 2016, which equally apply to the other four release orders examined by the Chief Justice:

> [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.
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> [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.
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> [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, 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 that to be reasonable in the circumstances of Mr. Lunyamila's case, the conditions would have to "virtually eliminate" the risks that he presented.

[21] The Chief Justice also determined that it was unreasonable to conclude that the Respondent presented less of a danger than when he entered detention given recent violent outbursts (*Lunyamila II* at para 73).

[22] Subsequent detention review hearings, between October 2016 and October 2017, maintained the Respondent's detention until the Release Orders that are subject to the present judicial review.

III. Impugned Decisions

A. *The October Order (Member McPhalen)*

[23] The October Order released the Respondent subject to certain terms and conditions including residing at the UGM, reporting weekly to CBSA, enrolling in and completing the UGM's Alcohol and Drug Recovery Program [Program], completing a violence prevention program, keeping the peace, and various requirements that would facilitate obtaining travel documents for him.

[24] The hearing, which was first held on October 24, 2017, was adjourned to permit the Respondent's Designated Representative to come up with a more fleshed out alternative to detention such as a facility that would have a bed available to him on release.

[25] When the hearing resumed on October 30, the Minister's counsel raised the issues that were the basis of the Chief Justice's decision in *Lunyamila II*, namely that the proposed facility

needed to have safeguards in place to protect staff and other residents, and that there had to be measures in place to keep the Respondent in the facility or alert CBSA if he left the facility.

[26] Despite being cognizant of the Chief Justice's decision in *Lunyamila II* and concluding that the Respondent was a flight risk, was unlikely to report for removal and continued to pose a threat to the public, Member McPhalen found that it was unlikely that the Respondent would attack someone living or working at the facility to which he was released as his level of violence was at the lower end of the spectrum.

[27] Member McPhalen further concluded that even if the Respondent fully cooperated, it was unlikely that removal would ever occur given the results of CBSA's attempts at locating information on - and identification of - the Respondent through Rwandan consular services and given that the Tanzanian alternative was a "dead end", as CBSA had exhausted their efforts to establish whether removal to that country was possible. As for the United Nations High Commissioner for Refugees [UNHCR] option, Member McPhalen found that the delay in requesting that the Respondent sign the consent form requested by the UNHCR was unacceptable given that he had been in detention for four years. Accordingly, that option shall not be a bar to the Respondent's release. These were, in Member McPhalen's view, clear and compelling reasons for coming to a different conclusion than other ID members had since Member Cook's decision of September 16, 2016.

[28] Member McPhalen conceded that the conditions imposed on the Respondent's release did not reduce the flight risk or the danger to the public, but held they were the best that could be imposed in the circumstances.

B. *The November Order (Member King)*

[29] The November Order adopted the reasons for the October Order and released the Respondent from detention subject to the exact same conditions. Member King found that there was no clear and compelling reason to depart from Member McPhalen's Order as the Minister's argument that a stronger alternative to detention is needed is an argument for something that cannot be accomplished, in part because the ID does not have jurisdiction to impose the types of conditions imposed by provincial courts in criminal cases. Member King further stated that given the Respondent has never had identity documents and that it was now clear that he could not be removed to Rwanda without them, his refusal to sign documents could hardly be characterized in these circumstances as a lack of cooperation. The same could be said, she added, with respect to Tanzania as denying citizenship of a country one is not a citizen of cannot properly be characterized as non-cooperation.

C. *The December Order (Member Cook)*

[30] The December Order released the Respondent subject to conditions quite similar to those attached to the October and November Orders, with variations such as signing a consent allowing the UGM to inform CBSA if the Respondent leaves the facility for any reason or fails to follow directions, applying for the Program and enrolling in a community-based violence

prevention program, both at the Respondent's first opportunity rather than within two weeks of release. Member Cook also expanded the scope of the condition relating to documentation to complete prior to release.

[31] On detention, Member Cook did not consider that there were any reasons to depart from the previous two decisions. Although he found that, on a balance of probabilities, the Respondent did pose a danger to the public and did present a flight risk if released, and that therefore, the Minister had made out a *prima facie* case for detention, Member Cook determined that the factors set out in section 248 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [Regulations] weighed in favour of releasing the Respondent primarily because there was little confidence in the fact that the Respondent's removal would actually occur, be it to Rwanda, Tanzania or any other country, as the only change in that respect from the previous hearing was that the Respondent had signed the UNHCR consent form. Therefore, the first factor of the section 248 analysis – the reason for detention – which Member Cook identified as being removal from Canada, weighed in favour of the Respondent's release.

[32] As to the second section 248 factor – length of detention - Member Cook also held that it favoured the Respondent's release, even if the detention was attributable to the fact that the Respondent is a danger to the public and a flight risk and that a portion of it was attributable to his lack of cooperation. He noted in that regard that long term detention is acceptable if it is going to ultimately lead to removal, something unlikely to occur in the case of the Respondent.

[33] Member Cook then considered whether there were any factors that could assist in determining how long the detention was likely to continue. He held that the Minister could not provide an estimate for when the Respondent might be removed and that, therefore, the Respondent's removal was illusory and his detention, indefinite. This, he stated, also favoured the Respondent's release. After acknowledging that the Responded had, in the past, withheld cooperation, Member Cook concluded that there were no unexplained delays or lack of diligence on the part of either party that could explain why removal was delayed. Even a lack of cooperation on the part of the Respondent could not affect the removal process at this time, he added, because even with the Respondent's signature, the Minister was not confident he would obtain a travel document.

[34] Finally, Member Cook examined the existence of alternatives to detention, holding that release to the UGM program was the best alternative available although it would not mirror "a lot of what the Chief Justice wants to see", which he found "[not to be] realistic for someone that doesn't have a current link to the criminal justice system" (December Order, Certified Tribunal Record [CTR] at 2243). In discussing the UGM alternative, Member Cook took a more nuanced approach to the Respondent's danger to the public, noting the lack of significant institutional issues such as fights or physical alterations during his five years in detention, and concluding that if steps were taken to deal with the Respondent's anger and addiction he would not pose much risk to public safety.

D. *Stays*

[35] Each of these three Release Orders were stayed by the Court, pending judicial review.

IV. Issues and Standard of Review

[36] These applications raise two issues:

(a) Is the ID's consideration of the factors prescribed by section 248 of the Regulations reasonable?

(b) Are the release conditions imposed in each case reasonable?

[37] The applicable standard of review of the ID's detention review decisions, which are decisions of mixed fact and law, is reasonableness (*Ahmed v Canada (Citizenship and Immigration)*, 2015 FC 792 at para 18; *Lunyamila II* at para 20). This is not disputed by the parties. It is trite law that this standard is met where the impugned decision fits comfortably with the principles of justification, transparency and intelligibility and falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190 [*Dunsmuir*]).

V. Analysis

A. *The Parties' Positions*

[38] The Minister argues that the Release Orders are unreasonable because the section 248 factors were not properly considered as each ID Member treated the length of detention as indeterminate without considering that if efforts made by CBSA pan out, the Respondent will be removed. The Minister further contends that the ID Members failed to consider that there was no reasonable justification for the Respondent's continued failure to cooperate with his removal,

which is not limited to his refusal to sign forms but also includes his refusal to provide straightforward or non-evasive answers to questions pertaining to his family or contacts in Tanzania or Rwanda. Particular to the December Order, the ID also misidentified the reason for detention, stating that it was in order to deport the Respondent.

[39] The Minister also submits that the conditions of release are unreasonable because they failed to mitigate the risks in a reasonable manner. Notably, each of the release plans does not address the Chief Justice's concerns raised in *Lunyamila II*, as it is not clear that the UGM can manage the risks associated with the Respondent, including the one related to the fact the UGM premises are located near an elementary school. Furthermore, based on discussions at the December hearing, the Minister adds that it is unlikely that the Respondent would be accepted into the Program given that he is not currently struggling with alcohol and drugs and has a history of violence targeting women.

[40] Finally, the Minister alleges that the ID did not consider evidence that the UGM is unsuitable because the Respondent has previously been subject to a probation order specifically barring him from the UGM.

[41] The Respondent argues that all three Release Orders are reasonable because the ID in each case clearly considered and weighed each of the section 248 factors. The issue of the Respondent's lack of cooperation was dealt with by making his signing of documents a precondition to release. Furthermore, for the October Order, Member McPhalen had clear and compelling reasons for coming to a different conclusion from that of previous review hearings as

it was obvious to him that the Respondent could not be removed to Rwanda even if he did sign the required applications as he had no identity documents. Finally, the Respondent submits that the Release Orders are reasonable because they are clear and intelligible.

[42] According to the Respondent, the terms and conditions of release are also reasonable because they impose the best alternative to detention available to the ID. Furthermore, the Respondent's criminal convictions are related to alcohol and, given his enforced sobriety while in immigration detention, the Respondent will likely be able to address his substance abuse problems through the Program. The Respondent further submits that the terms and conditions of release will permit CBSA to continue its removal efforts as the Respondent is required to check in on a weekly basis or whenever CBSA considers appropriate.

B. *The Applicable Legal Principles*

[43] Pursuant to sections 34 to 37 of the Act, a foreign national may be inadmissible and liable to removal from Canada on grounds of security, violation of international criminal or humanitarian law, criminality, serious criminality or organised criminality. A removal order may therefore be issued against a foreign national found to be inadmissible to Canada. According to section 48 of the Act, such order becomes enforceable "as soon as possible" once it comes into force, unless it is stayed. When there are reasonable grounds to believe that such individual is a danger to the public or unlikely to appear for removal, section 55 of the Act provides for his/her arrest and detention.

[44] When a foreign national is detained under the Act, section 57 provides that his/her detention must be reviewed within 48 hours of the arrest and then within 7 days, and then every 30 days thereafter. This is what has occurred in the Respondent's case.

[45] The decision to release or continue detaining stems from a premise that individuals ought not to be detained. Therefore, the ID is required to release a foreign national from immigration detention unless the Minister makes a *prima facie* case for detention by demonstrating, as provided for under subsection 58(1) of the Act, that the foreign national is one of the following:

a. he is a danger to the public;

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

c. his identity has not been, but may be, established and he has not reasonably cooperated with the Minister by providing relevant information for the purpose of establishing his identity or reasonable efforts to establish his identity have been made by the Minister;

[46] Once the Minister has made the case for detention, the onus shifts to the foreign national to provide the grounds for release (*Canada (Citizenship and Immigration) v John Doe*, 2011 FC 974 at para 4 [*John Doe*]). When determining whether the individual concerned should be released or remain in detention, the ID must consider the factors listed at section 248 of the Regulations:

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

[47] When the ID determines that the section 248 factors, when considered, favours releasing the detainee, subsection 58(3) of the Act permits the ID to impose on the release "any conditions it considers necessary".

[48] In considering these factors, the same weight need not be given to each of them. They must rather be considered as a whole, and the reasons for detention will affect how each factor should be weighed and assessed (*Shariff v Canada (MPSEP)*, 2016 FC 640 at para 36; *Sahin v Canada (Minister of Citizenship and Immigration)*, [1994] FCJ No 1534 (QL) at para 30

[*Sahin*]). This is key in the present case where the Respondent is in detention because he was found to be a danger to the public and a flight risk. As the Chief Justice emphasized in *Lunyamila II*,

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

[49] These factors do not exist in a vacuum; they must be considered within the context of the broader legislative scheme created by the Act and Regulations. The Act's objective clearly indicates a preoccupation with protecting the safety of Canadians, as contemplated by subsections 3(1)(h) and (i) and 3(2)(g) and (h), and both the Act and Regulations contain numerous provisions which aim at furthering these objectives, including those in play in the present case.

[50] The context in the present case has changed little since the previous orders releasing the Respondent from immigration detention were reviewed by this Court. In reviewing those release orders, the Chief Justice summarized the legislative context and the circumstances leading to a detainee's release or continued detention when that detainee is a danger to the public or a flight risk and has not cooperated with the Minister's efforts to remove him:

> [59] In my view, the scheme of the IRPA and the Regulations contemplates that persons who are a danger to the public or a flight risk and who are not cooperating with the Minister's efforts to

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

[51] As the Chief Justice explains at paragraph 66 of *Lunyamila II*, taking these public safety and security considerations into account when interpreting and weighing the factors listed in section 248 of the Regulations makes certain guiding principles evident:

> i. Where the reason for continued detention is that a person poses a danger to the public, "there is a stronger case for continuing a long detention" (*Sahin* at para 30). Indeed, where the person is a danger to the public on grounds of serious criminality, as contemplated by paragraph 115(2)(a), the scheme of the [Act] and the Regulations imply that this factor should be given very considerable weight.
>
> ii. Where an individual has been in detention for some time and a further lengthy detention is anticipated, or if the extent of future detention time cannot be ascertained, these facts ordinarily would tend to favour release (*Sahin*, above). However, where, as in Mr. Lunyamila's situation, the detainee has substantially contributed to the length of his detention due to his steadfast refusal to cooperate with his removal, or where that refusal is significantly contributing to the uncertainty with respect to the extent of future detention time, this ordinarily would substantially reduce the weight to be attributed to such facts. In my view, to place substantial weight on the length of past and projected future detention in circumstances of a steadfast refusal to cooperate would permit a detainee to frustrate the scheme of the [Act] and the Regulations, through non-cooperation. Among other things, this would allow the detainee to gain access to Canadian territory (outside detention), contrary to the clear objectives set forth in

> paragraph 3(1)(h) and (i), and paragraph 3(2)(g) and (h) of the Act. It would also allow the detainee, who has been found to be inadmissible to Canada, to manipulate our legal system to facilitate his increased access to this country, and to frustrate, or assist in frustrating, Parliament's will that he be removed from Canada as soon as possible.
>
> iii. Unexplained delay and unexplained lack of diligence should count against the offending party (*Sahin*, above). However, the weight given to this factor should be less when the other party has contributed to the delays or lack of diligence of the offending party - that is to say, where the detainee has contributed to the Minister's delay, or vice versa. This is particularly so where, as in Mr. Lunyamila's case, such contribution has been considerable.
>
> iv. Where a person is a danger to the public, the weight given to this factor should vary directly with the extent to which alternatives to detention can mitigate such danger. Stated conversely, the greater the risk that the public would be required to assume under a particular alternative, the more this factor should weigh in favour of continued detention. Where, the conditions of release are such that the public would be required to bear significant risk of danger at the hands of the detainee, as was the case with the conditions that Ms. King imposed on Mr. Lunyamila in her decisions of March 1, 2016, and July 14, 2016, this should weigh strongly in favour of continued detention. If it were otherwise, Parliament's public safety and security objectives, which have been prioritized in the IRPA and the Regulations, would be significantly undermined.

[52] When considering the third guiding principle, related to the reasons for delay, the ID should be governed by an understanding that an individual cannot be allowed to benefit from their manipulation and frustration of the law, such as by their continued refusal to cooperate with any attempts that would lead to their eventual deportation (*Lunyamila II* at paras 4, 55 and 58).

[53] In sum, a foreign national found to be inadmissible to Canada who is a danger to the public or a flight risk and who is not cooperating with the CBSA's efforts to remove him from the country must, except in exceptional circumstances, be detained until such time as he

cooperates with his removal because “it will ordinarily be very difficult to formulate terms and conditions of release that will eliminate, or virtually eliminate, the danger to the public presented by the individual” (*Lunyamila II* at para 59).

[54] I respectfully see no reason whatsoever to deviate from the Chief Justice’s reading and understanding of the Act and Regulations and not to apply them to the facts of this case. The principle of judicial comity discourages it in any event in order to prevent the creation of conflicting lines of jurisprudence and promote certainty in the law (*Apotex Inc v Allergan Inc*, 2012 FCA 308 at paras 43-48 [*Apotex*]; *Alyafi v Canada (Citizenship and Immigration)*, 2014 FC 952 at paras 42-45). As applied by this Court, this principle dictates that the conclusions of law reached by a judge “will not be departed from by another judge unless he or she is convinced that the departure is necessary and can articulate cogent reasons for doing so” (*Apotex* at para 48). Departure may be deemed necessary when the judge is convinced that the decision of the previous judge is wrong (*Apotex* at para 47). As I have said, I have no such conviction, quite the contrary.

C. *The Release Orders and their Release Conditions are Unreasonable*

[55] Although they attempted, to various degrees, based on his institutional record and the nature of his criminal convictions, to downplay the danger he poses to the public, Members McPhalen, King and Cook did find that the Respondent does pose such a danger and is unlikely to appear for removal if and when required to do so. All three were therefore satisfied that the Minister had, in each case, established a *prima facie* case for detention, as required by subsection 58(1) of the Act. This is not in issue in the present case.

[56] What is in issue is whether the assessment of the section 248 factors performed in each case is reasonable.

(1) The October and November Orders

[57] Given that the November Order adopts the reasons and conditions for the October Order, these decisions will be assessed as one.

(a) *The Reason for detention (Subsection 248(a))*

[58] The Respondent is in detention because he poses a danger to the public and a flight risk; neither favours his release. Furthermore, Member McPhalen conceded that it was likely that the Respondent "would reoffend in the future" and, with the exception of the UGM staff, "will continue to assault people from time to time and utter threats at people from time to time" (October Order, CTR at 32). However, Member McPhalen considered the risk to be acceptable by finding that the level of violence of his crimes was "at the lower end of the scale".

[59] If Member McPhalen thereby intended to minimize the danger the Respondent poses to the public and, therefore, the weight to be accorded to the first factor of the section 248 analysis, I find his analysis to be unreasonable. As the Minister points out, the Respondent has a lengthy history of criminality, including acts of random violence. He is the subject of a Ministerial Opinion stating that he is a danger to the people of Canada. His convictions include uttering threats, sexual assault against a community worker and numerous incidents of physical assaults, including unprovoked attacks on complete strangers. He broke into an ex-girlfriend's home and

punched her in the face; he was also found with an axe concealed on his person. The Vancouver Police labelled him as "a persistent criminal that causes significant societal harm"; Justice Harrington as a "criminal" (*Lunyamila I* at para 3); and, the Chief Justice as someone with a "violent and dangerous behavior" (*Lunyamila II* at para 3). In other words, the Respondent's Canadian experience has been, so far, one of criminality, including violent criminality, and non-compliance with court orders (*Lunyamila II* at para 8; *Lunyamila I* at para 11).

[60] As stated by the Chief Justice, the Act prioritizes protecting the public from foreign nationals who engaged in serious criminality. Therefore, where a person is detained because he/she is a danger to the public, as is the Respondent, this factor must be given considerable weight, not minimized in the absence of evidence of a change in circumstances. This factor was given considerable weight by both Justice Harrington and the Chief Justice. However, there is nothing in the record to support the proposition that the Respondent is now less of a danger to the public than he was 15 months ago. In particular, there is no evidence that the anger and substance abuse issues that contribute to the Respondent's criminality are now under control. To paraphrase Justice Harrington, there is still no evidence that the Respondent's enforced abstinence resulting from his detention will lead to sobriety in the future (*Lunyamila I* at para 10). There is, however, evidence that the Respondent continues to exhibit concerning behavior while detained as, the week prior to the October hearing, he was observed throwing his drink, jumping on a bench and banging on a window.

[61] The "reason for detention" factor must therefore still be given considerable weight and any suggestion that the danger to the public is lesser today, something which appears to have tainted the whole section 248 analysis, is simply not supported by the record.

(b) *Length of time in detention, ability to ascertain the duration of continued detention and unexplained delays and lack of diligence (Subsections 248(b) to (d))*

[62] The Respondent was arrested in June 2013 but released two months later. Shortly thereafter, that is in September 2013, he was re-apprehended after failing to comply with the conditions of his release order. He has been in continued detention since. This lengthy detention results from the inability to deport the Respondent, due in large part to his lack of identity documents.

[63] Member McPhalen concluded that given recent communications from Rwandan officials indicating that the Respondent could not be removed to Rwanda without Rwandan identity documentation, and given the Respondent's lack of such documentation, the Respondent could not be deported even if he were to cooperate. Based on his conclusion that there was no possibility for removal at that time, Member McPhalen determined that the Respondent's detention had become indefinite.

[64] In assessing whether there were unexplained delays or a lack of diligence on the part of either party, Member McPhalen noted that CBSA acted "quite diligently" and has "gone to great lengths" in attempting to track down identity documents for the Respondent. In contrast, the Respondent was not cooperative in signing travel document applications and releases, and

though Member McPhalen concluded that CBSA should have requested his signature on those documents earlier, neither would have made a difference in the feasibility of deporting him (October Order, CTR at 33).

[65] I find that Member McPhalen's assessment of these factors is unreasonable for two reasons. First, it fails to take into account the Respondent's long history of failing to cooperate with CBSA's attempts to ascertain his identity or procure identity documents for him. Since steps were first taken to attempt to deport the Respondent in 2014, he has repeatedly refused to sign documents when requested and, though he cooperated with a linguistic analysis to assess if he might be from Tanzania, he also has a tendency to provide contradictory or nonsensical information when asked about his country of origin. This is particularly egregious given that Member McPhalen concluded that there had been no lack of diligence on CBSA's part.

[66] Second, it is possible that had the Respondent cooperated earlier, one of three situations would have occurred: either the Respondent would have been deported, CBSA would have exhausted certain lines of inquiry and moved on to pursuing other available avenues for securing identification documents for the Respondent, or CBSA would have concluded that it would not be able to deport the Respondent. Until CBSA has exhausted its efforts to ascertain the Respondent's identity and obtain travel documents for him, efforts which are ongoing and require the Respondent's cooperation, it is premature to conclude that there is no possibility of removal.

[67] In *Lunyamila II*, the Chief Justice examined the case of *Canada (Minister Citizenship and Immigration) v Kamail*, 2002 FCT 381[*Kamail*] to find that Member Rempel's conclusion that the Respondent's length of detention had become indeterminate was unreasonable. He had this to say in that case:

> [89] The Court set aside the adjudicator's decision, after concluding that it was unreasonable to have decided to release the detainee on the ground that his detention had become indefinite, given that the detainee was the sole cause of the indefinite nature of the detention. The Court observed: "To hold otherwise would be to encourage deportees to be as uncooperative as possible as a means to circumvent Canada's refugee and immigration system. The decision of the adjudicator cannot be allowed to stand" (*Kamail*, above, at para 38). I note that essentially the same conclusion was reached by the Court in *Sittampalam*, above, at paras 15-16.

[68] For the same reasons as in *Kamail* and *Lunyamila II*, it was unreasonable for Member McPhalen to conclude that length of the Respondent's detention had become indeterminate. As the Chief Justice made it quite clear in *Lunyamila II*, the Respondent cannot benefit from his long history of non-cooperation, as this would undermine the integrity of the immigration laws and public confidence in those laws (*Lunyamila II* at paras 4, 55 and 58). It is settled law that the length of detention under the Act is only one factor to be considered when conducting a detention review. It is not determinative (*Lunyamila II* at paras 30-32, 61).

[69] Here, it is clear that Member McPhalen's finding that removal will not occur and that, as a result, the Respondent's detention has become definitive, transcends the whole section 248 analysis. This was an error.

[70] I agree with the Minister that it was premature for Member McPhalen to conclude that there was no possibility of removal. On this point, there has been no material change of circumstances since the Chief Justice's decision. Contrary to Member McPhalen's assessment, the evidence shows that CBSA, in a context where the Respondent's cooperation remains problematic as illustrated by his refusal to sign the UNHCR consent form, is pursuing its efforts to establish the Respondent's identity, including by seeking records from the UNHCR. This may be a "long shot" but it is certainly not, at least at this point in time, a "dead-end". Also, if the Respondent provides a completed travel document application for Rwanda, CBSA might be in a position to make further inquiries with Rwandan authorities with a view to facilitating his removal. Again, this avenue can hardly be characterized as a "dead-end".

[71] This very important guiding principle in *Lunyamila II* regarding lack of cooperation and its impact on past and future detention seems to have been lost in Member McPhalen's analysis:

> [66] When the [section 248] factors are approached with the above-mentioned scheme of the [Act] and the Regulations in mind, the following becomes evident:
>
> […]
>
> ii. Where an individual has been in detention for some time and a further lengthy detention is anticipated, or if the extent of future detention time cannot be ascertained, these facts ordinarily would tend to favour release (*Sahin*, above). However, where, as in Mr. Lunyamila's situation, the detainee has substantially contributed to the length of his detention due to his steadfast refusal to cooperate with his removal, or where that refusal is significantly contributing to the uncertainty with respect to the extent of future detention time, this ordinarily would substantially reduce the weight to be attributed to such facts. In my view, to place substantial weight on the length of past and projected future detention in circumstances of a

> steadfast refusal to cooperate would permit a detainee to frustrate the scheme of the IRPA and the Regulations, through non-cooperation. Among other things, this would allow the detainee to gain access to Canadian territory (outside detention), contrary to the clear objectives set forth in paragraph 3(1)(h) and (i), and paragraph 3(2)(g) and (h) of the Act. It would also allow the detainee, who has been found to be inadmissible to Canada, to manipulate our legal system to facilitate his increased access to this country, and to frustrate, or assist in frustrating, Parliament's will that he be removed from Canada as soon as possible.

[72] Therefore, these factors (length of time in detention, ability to ascertain the duration of continued detention and unexplained delays and lack of diligence) cannot reasonably favour releasing the Respondent from detention at this point in time as CBSA has been quite diligent while the Respondent's lack of cooperation contributed to the length of his detention and to the uncertainty with respect to the extent of future detention time.

[73] Again, the Respondent cannot benefit from his long history of non-cooperation. It seems to me that permitting that he be released on the primary ground that his detention has become indefinite would do just that in the current circumstances of this case. This would produce an outcome that was not intended by Parliament, as the Chief Justice persuasively demonstrated in *Lunyamila II*.

(c) *The Existence of Alternatives to Detention (Subsection 248(e))*

[74] The following conditions were imposed on the Respondent by the October and November Orders:

- Reside at the UGM upon release;
- Inform CBSA in person without delay if he leaves the UGM and provide his new address to CBSA;
- Report to the CBSA office located at 700-300 West Georgia Street, Vancouver, BC on November 6, 2017 and weekly thereafter. A CBSA officer may, in writing, reduce the frequency of reporting;
- Present himself at the time and place that an officer or the ID requires him to appear to comply with any obligation imposed on him under the Act;
- Prior to release, sign a form giving the UNHCR permission to release to the CBSA any information that the UNHCR may have about him;
- If, after release, he comes into possession of a passport or travel document, to surrender any such document to the CBSA without delay;
- Prior to release, complete a travel document application for Rwanda;
- Keep the peace and be of good behaviour;
- If charged with an offense under an Act of Parliament, inform CBSA of that charge in person without delay;
- Apply for and be accepted into the Program within two weeks of release and complete the Program;
- Enroll in and complete a community-based violence prevention program or enroll in and complete a similar program at the UGM;
- After release, if required by CBSA, complete any documents related to establishing identity or obtaining a travel document.

[75] I agree with the Minister that these conditions of release fall well short of offsetting the danger the Respondent poses to the public as well as the flight risk he represents, and that they are contrary to the Chief Justice's guidance in *Lunyamila II*.

[76] As the only alternative to detention currently proposed, the UGM does not favour the release of the Respondent because, as Member McPhalen readily admits, it does not satisfy all

the concerns previously expressed by the Court in *Lunyamila II* (December Order, CTR at 31-32). The Chief Justice concluded, based on the strong priority given to public safety and security in the Act, that "any conditions of release would have had to virtually eliminate, on a day-to-day basis, any risk that Mr. Lunyamila would pose to people living or working at any residence where he may be required to reside, and to the public at large. They would also have to have virtually eliminated any risk that he might disappear into the general public, to avoid future removal" (*Lunyamila II* at para 116). A reasonable alternative to detention for the Respondent is a facility that has the ability to prevent the Respondent from harming another patient or someone who works there and that has a way of ensuring that the Respondent remains on the premises (*Lunyamila II* at paras 121-122).

[77] The UGM and enrolment in the Program clearly do not meet the guiding principles of *Lunyamila II*. First, prior to his enrolment in the Program, the Respondent would be residing at the UGM drop-in shelter, an alternative that does not appear to meet these guidelines in any way or form. Second, the Respondent himself indicated the UGM as an alternative to detention because he is familiar with the organisation and its employees, having resided there previously, during the 12-year period prior to his detention during which he was homeless. However, this is also why releasing the Respondent on the conditions that he reside at the UGM is not a reasonable alternative to detention as it consists of releasing the Respondent into the same conditions in which he was living prior to being detained, conditions in which he struggled with substance abuse problems and under which he had frequent interactions with the police and the criminal justice system. This alternative clearly does not mitigate the risk to the public and the fact that he is free to come and go as he pleases does nothing to mitigate the flight risk. This is

particularly unreasonable given that Member McPhalen acknowledges that if the Respondent is free in the community, “it’s likely at some point [he] may assault someone” (October Order, CTR at 30).

[78] Second, though the Program appears as if it could provide an alternative to detention, this alternative is somewhat speculative. The Respondent has not applied for or been accepted into the Program, nor is it certain that he will be. When asked at the hearing, by counsel for the Respondent, what would happen if the Respondent was not accepted into the Program, Member McPhalen answered, “I don’t know. I guess the matter comes back” (October Order, CTR at 33). The Respondent’s enrolment in the Program, proposed as an alternative to detention, is an uncertain alternative at best. Furthermore, this alternative in no way aligns itself with the Chief Justice’s concern, which the Minister’s counsel raised at the hearing, that the Respondent be accepted into a drug and alcohol treatment program prior to his release (October Order, CTR at 24).

[79] Third, despite the ID Member stating that the Respondent’s crimes are related to his alcohol abuse problems, as explicitly noted in relation to the Respondent’s sexual assault conviction in the October Order (CTR at 31-32), the release conditions do not prohibit the Respondent’s consumption of alcohol, simply limiting themselves to requiring his enrolment in the Program, a process which, as previously mentioned, is not immediate. Given that the Respondent’s previous substance abuse issues appear to have been a contributing factor to his criminal convictions, it is unreasonable to not include such a condition in order to mitigate the risk to the public.

[80] The Respondent claims that under section 58(3) of the Act, the ID Members have the discretionary power to impose the conditions they deem necessary on the release of an individual from immigration detention. I do not debate this, nor do I disagree with the argument that the imposition of conditions of release is within the core expertise of the ID (*Ahmed v Canada (Citizenship and Immigration)*, 2015 FC 876 at para 33). However, the exercise of this discretion is still required to fall within the realm of possible, acceptable outcomes defensible in respect to the facts and law (*Dunsmuir*, at para 48). As a whole, the terms and conditions of the October and November Orders fail, in my view, to achieve that.

[81] Members McPhalen and King are both cognizant that their release conditions do not meet the preoccupations of the Chief Justice in *Lunyamila II*, but claim that the UGM and the Program is the best that they can come up with. Not being "criminal court judge[s]", the argument that a stronger alternative needs to be found by the Respondent is something, they claim, that "just simply can't be accomplished" (October Order, CTR at 31-32; see also November Order, CTR at 11).

[82] There are two difficulties with that argument. First, it appears to downplay the actual authority the ID possesses to impose conditions when releasing an individual from immigration detention. This authority is crafted in the most open-ended language in subsection 58(3): the ID "may impose any conditions it considers necessary". This is not limiting empowering language. Second, and more importantly, the ID is bound by the Chief Justice's decision in *Lunyamila II*. For the moment, and barring a material change of circumstances, this decision provides the ID with the road map for determining, in the case of the Respondent, a reasonably acceptable

alternative to detention. If there is no alternative to detention that meets these guidelines, then unfortunately, there is no reasonable alternative to detention. As this Court pointed out in *Canada (Citizenship and Immigration) v B147*, 2012 FC 655 [*B147*], the length of detention does not transfer inadequate release conditions into adequate ones (*B147* at para 57). In other words, it does not relieve the ID from its responsibility of ensuring, given the Respondent's violent tendencies, his flight risk, and the strong priority given to public safety and security in the Act and Regulations, that any conditions of release "virtually eliminate, on a day-to-day basis, any risk that Mr. Lunyamila would pose to people living or working at any residence where he may be required to reside, and the public at large" as well as "any risk that he might disappear into the general public, to avoid future removal" (*Lunyamila II* at para 116).

[83] Given that we are but at the early stages of the search for reasonable alternatives for the Respondent, it is unlikely that there are no alternatives to detention. But the alternative proposed by Members McPhalen and King simply does not meet the minimum threshold of acceptability set out by the Chief Justice.

[84] Finally, in keeping with the issue of the alternative to detention and the conditions imposed by Members McPhalen and King, it seems unreasonable to expect that the Respondent will honour the conditions of his release such as reporting to the CBSA office weekly or informing CBSA if he leaves the UGM when the evidence on file demonstrates that he has repeatedly failed to appear when required to do so or disregarded orders, as evidenced by his 13 convictions to that effect and by how, when released in 2013, he managed to comply with the conditions of release for only two days. I am not the first to reach this conclusion as

Justice Harrington, in determining that Member Nupponen's January 2016 decision to release the Respondent was based on a "hope and a prayer" (*Lunyamila I* at para 10), as "there is nothing in the record to support the proposition that [the Respondent] will report regularly as set out in the terms of his release" (*Lunyamila I* at para 11). Again, there is no evidence on record of any material change of circumstances in that regard since Justice Harrington issued his decision.

(2) The December Order

(a) *The reason for detention (Subsection 248(a))*

[85] Member Cook determined that the reason for the Respondent's detention was his removal from Canada. From this, he found that this factor favoured the Respondent's release as the Respondent has been in detention for five years and there is little likelihood of removal actually occurring (December Order, CTR at 2240). I agree with the Minister that this conclusion is entirely unreasonable; the Respondent is in detention because, as multiple ID Members and this Court have determined, he is a danger to the public, a flight risk and uncooperative. The Respondent was originally detained pursuant to section 55 of the Act as an inadmissible foreign national who is a danger to the public and a flight risk, and the Minister has repeatedly made the case for his continued detention on these grounds pursuant to section 58 of the Act. Though the Respondent's removal from Canada is the ultimate objective, it is illogical to conclude that this is the reason for his detention. Plenty of individuals have awaited their impending removal from Canada outside of immigration detention; the Respondent is not among them because he presents a danger to public safety and a flight risk.

[86] Member Cook concluded that this weighed heavily in favour of the Respondent's release because it was unlikely that there was any reasonable prospect of removing the Respondent to either Rwanda or Tanzania. This conclusion is based on the lack of information provided by the Minister on the removal front and the fact that Rwanda requires the Respondent to have Rwandan identity documents in order for him to be removed there. Leaving aside the fact that Member Cook's analysis of the reason for detention demonstrates a clear lack of understanding of that factor, he also fails to take into account that both parties concentrated their submissions on the alternatives to detention. In fact, the Respondent made no submissions on factors other than the alternative to detention, despite the onus resting on the Respondent to make the case for his release (*John Doe* at para 4). Furthermore, the Respondent did inform Member Cook that the Respondent had signed the UNHCR document prior to the hearing, and stated, if briefly, that efforts to ascertain the Respondent's identity and nationality are ongoing, but they had no updates (December Order, CTR at 2225). It is unreasonable to conclude as Member Cook did until the Minister has exhausted its avenues of inquiry.

(b) *Length of time in detention, ability to ascertain the duration of continued detention and unexplained delays and lack of diligence (Subsections 248(b) to (d))*

[87] Member Cook was correct in stating that when one of the grounds for detention is danger to the public, a long-term detention is more justifiable. He noted that the Court has upheld detention orders in cases where individuals had been in detention longer than the Respondent, but that such a lengthy detention is justifiable only if it will ultimately lead to removal. Member Cook concluded that the length of detention thus far favoured the Respondent as he did not have confidence that there was a chance such removal would take place. This conclusion is

unreasonable because Member Cook fails to examine whether the Respondent's danger to the public justifies the length of detention despite clearly stating that the detention of dangerous individuals is more justifiable.

[88] When examining whether there are any unexplained delays or unexplained lack of diligence caused by CBSA or the Respondent, Member Cook concluded that there were no unexplained delays or lack of diligence on the part of either party since the Respondent had now signed the UNHCR consent and the Minister did not make any submissions regarding the Respondent's lack of cooperation. I take issue with this conclusion.

[89] First, this conclusion fails to take into account that the reason for the length of the Respondent's detention up until that point lay squarely in his lack of cooperation with CBSA, a conclusion reached by many of Member Cook's colleagues when reviewing the Respondent's detention. In the October Order, Member McPhalen noted that CBSA has acted diligently in attempting to track down identity documents for the Respondent, while the Respondent has not been cooperative in signing travel document applications; this Court has concluded that the Respondent's lack of cooperation is an important contributor to his continued detention (*Lunyamila II* at paras 11, 30, 42, 50, 101, 102, 107). The Respondent's longstanding lack of cooperation, which has repeatedly been demonstrated, is something that Member Cook should have weighed as he is expected to take into account evidence and reasons pertaining to previous detention orders (*Canada (Minister of Citizenship and Immigration) v Sittampalam*, 2004 FC 1756 at para 26 [*Sittampalam*]).

[90] Second, Member Cook bases his conclusion in part on the Minister's lack of submissions regarding the Respondent's cooperation or lack thereof, when such submissions are normally made (December Order, CTR at 24). However, Member Cook does not address the fact that neither party made any submissions pertinent to this factor, and erred in drawing his conclusion from an absence of submissions from the Minister when the onus is on the Respondent to make the case for his release (*Sittampalam* at para 27; *John Doe* at para 4).

[91] Finally, it is worth repeating that it is unreasonable for the length of the detention and the elements determining that length to favour the Respondent as this would permit him to benefit from his long history of non-cooperation, something that would undermine the integrity of the immigration laws and public confidence in those laws (*Lunyamila II* at paras 4, 55 and 58).

(c) *The existence of alternatives to detention (Subsection 248(e))*

[92] Member Cook released the Respondent subject to conditions similar to those imposed by Members McPhalen and King, though I would note the following changes:

- Requiring the Respondent to sign a consent form that authorizes the UGM to inform CBSA if he fails to follow the directions of the facility, fails to comply with any condition of the Program, moves out of the facility or is removed from the facility by a UGM official;

- Enrollment in the Program and a community-based violence prevention program at the Respondent's first opportunity, rather than within two weeks.

[93] The proposed alternative to detention is the UGM Program, which is unchanged from the October and November Orders, still fails to meet the Chief Justice's guidelines. Like Members McPhalen and King, Member Cook concluded that the UGM Program is "the best [the Respondent] is going to get" (December Order, CTR at 2245). However, when making his decision Member Cook had considerably more information available to him than his two colleagues did as the Minister's and Respondent's submissions before him primarily discussed possible alternatives to detention, including alternatives other than the UGM.

[94] It is also worth reiterating that given the Respondent's danger to the public, the weight given to this factor "should vary directly with the extent to which alternatives to detention can mitigate such danger. Stated conversely, the greater the risk that the public would be required to assume under a particular alternative, the more this factor should weigh in favour of continued detention" (*Lunyamila II* at para 66). Member Cook is well aware that the Respondent is a danger to the public (December Order, CTR at 2239), the Vancouver Police Department has described him as "a chronic offender, a persistent criminal who causes significant societal harm" (*Lunyamila I* at para 3), and the Respondent is repeatedly found to be a danger to the public at his detention review hearings. Therefore, this factor is unlikely to weigh in favour of the Respondent's release unless the alternative proposed falls within the guidelines elaborated by the Chief Justice and will thus "virtually eliminate the danger to the public" (*Lunyamila II* at para 85).

[95] Member Cook's conclusion that the alternative to detention "is extremely reasonable and it will mitigate the danger component of [his] case" (December Order, CTR at 2244), is

unreasonable based on the evidence before him. As explained by the Respondent's Designated Representative at the December hearing, the Program has a set number of spaces and the Respondent would only be able to enter the Program if he meets certain criteria and after a face to face interview (December Order, CTR at 2226). Participants in the Program cannot leave the building in the first 60 days except with an escort, but this operates on an honour system; after the first 60 days, participants in the Program can come and go as they please (December Order, CTR at 2227-8).

[96] As an alternative to detention, the Program can best be described as hypothetical. At the time of the hearing, the Respondent was not on the wait list for the Program as he had not yet had the necessary in-person interview (December Order, CTR at 2228). The Respondent also may not be suitable for the Program as he has likely been sober for the duration of his detention period (December Order, CTR at 2229). Finally, the UGM recommended that the Minister look at other options if the Respondent has a history of violence against women or children, as they are located a block away from an elementary school and many families with young children and vulnerable women use the meal services at which the Respondent would be present (CTR at p 2256). The Respondent may therefore not be suitable for the program given that his sexual assault conviction and one of his assault convictions resulted from his attack on a former partner while her children were present.

[97] The evidence before Member Cook in no way supports a conclusion that the conditions under which the Respondent would be released constitute a reasonable alternative to detention as they fail to mitigate the Respondent's danger to the public or flight risk. The release conditions

in the December Order foresee a release where the Respondent is free to come and go as he pleases during the day as the UGM shelter is only available at night. This is tantamount to releasing the Respondent to wander around Vancouver during the day with nothing to prevent the random and unprovoked acts of violence which characterized many of his assault convictions. Even if the Respondent is accepted to the Program, there are no measures in place preventing his contact with the public as the Program operates on an honour system and the UGM would only be bound to inform CBSA if the Respondent moved out of the facility or ceased to comply with the Program's conditions. It is concerning that there are no measures in place to restrict the Respondent's contact with the public until his substance abuse and violence issues have been addressed.

[98] Furthermore, it was unreasonable for Member Cook to conclude that the Respondent would have to be release to be able to apply for the Program (December Order, CTR at 2245). It does not appear that the Respondent's Designated Representative agrees as during the hearing, he discussed arrangements that would need to be made for an in-person interview including the location of such interview and indicated that CBSA's cooperation would be needed. As of yet, it does not appear that a dialogue has been established with CBSA in order to arrange an interview, but CBSA should have every reason to cooperate with the Designated Representative in this respect.

[99] The condition requiring the Respondent to consent that the UGM inform CBSA if the Respondent moves out of the facility would contribute to mitigating the Respondent's flight risk, but fails to address the danger to the public as the Respondent would still be permitted to come

and go in the community at will. If the Respondent can be released directly to a facility that he would not be able to leave until he has adequately addressed his violent tendencies and substance abuse issues, a facility in which there are measures in place that could ensure the safety and security of staff and other residents, protecting them from the risk posed by the Respondent, and if there are measures in place to ensure that the Respondent will appear if, when and where required to do so, then the conditions which create the parameters of such a release would be in line with the Chief Justice's guidelines.

[100] Immigration detention review hearings are an ongoing process in the hope, in the Respondent's case, of eventually deporting him or releasing him from detention. Though the parties are having difficulties finding a facility that can force the Respondent to remain there, the condition introduced by Member Cook, requiring the Respondent to sign a consent authorizing the facility to inform CBSA if he should leave or fail to comply with his treatment program, is a step in the right direction towards mitigating his flight risk. This would also allow CBSA to promptly address the Respondent's failure to comply with conditions and minimize his interactions with the general public.

[101] The submissions made by the Respondent's Designated Representative and the Minister encourage the possibility that a reasonable alternative to detention can be found. The Respondent's Designated Representative has been quite diligent in searching for alternatives to detention such as the Program, as well as similar programs such as Luke 15 House, Harbour Light Program; preliminary information about the Burnaby Center for Mental Health and Addiction, which requires a mental health diagnosis but has an elevated security protocol and

has, in a previous case, agreed to inform CBSA if the person concerned left without authorization, (December Order, CTR at 2223-5) is also encouraging. It is clear that at this point, both parties are actively seeking alternatives that would adequately mitigate the Respondent's danger to the public and flight risk.

[102] But again, for now, the alternative proposed by Member Cook, as is the case of the one proposed by Members McPhalen and King, does not meet the minimum requirement of acceptability set out by the Chief Justice.

VI. Conclusions

[103] I am mindful of the fact that the Court's function on judicial review is not to review the evidence and substitute its own findings for those of the decision maker. In other words, the issue on judicial review is not whether the assessment of the evidence that was before the ID could have led to a different outcome. This is immaterial (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 67; *Amri v Canada (Citizenship and Immigration)*, 2009 FC 925 at para 4).

[104] The issue before the Court was rather whether the October, November and December Orders when considered as a whole, fell within a range of possible, acceptable outcomes, especially in light of the teachings of *Lunyamila I* and *Lunyamila II*. I have concluded that they do not as Members McPhalen, King and Cook unreasonably weighed the section 248 factors and the release conditions imposed do not reasonably mitigate the Respondent's danger to the public or flight risk.

[105] These three decisions will therefore be set aside. Normally, I would have referred the most recent of these decisions, that in IMM-5539-17, back to the ID for reconsideration. However, given that there has been a further detention review hearing since that decision that has resulted in an order maintaining the Respondent's detention, I see no point in remitting the matter back to the ID.

[106] At the end of the hearing of these three judicial review applications, I raised with counsel the issue of certification. Neither had a position on this issue. I note that in *Lunyamila II*, both parties were of the view that the case was grounded in its particular facts and therefore presented no question of general importance (*Lunyamila FCA* at para 43). I also note the efforts made by the Federal Court of Appeal to reformulate the Chief Justice's certified question so that it meets the requirements for certification (*Lunyamila FCA* at paras 48 to 53).

[107] In this peculiar context and in light of the Federal Court of Appeal's refusal to answer the Chief Justice's certified question, I indicated to counsel that I would give them some extra time to reflect on this issue. Therefore, the Respondent shall have until March 1, 2018 to propose a serious question of general importance which could support an appeal to the Federal Court of Appeal. If such a question is proposed, the Minister shall then have until March 7, 2018 to reply.

JUDGMENT IN IMM-5071-17, IMM-4585-17 AND IMM-5539-17

THIS COURT'S JUDGMENT is that:

1. The judicial review applications in IMM-5071-17, IMM-4585-17 and IMM-5539-17 are granted;
2. The decisions that are the subject of review in these proceedings are set aside;
3. The Respondent shall have until March 1, 2018 to serve and file written submissions with respect to the certification of a serious question of general importance and if such a question is proposed, the Minister shall have until March 7, 2018 to serve and file a reply;
4. The submissions on certification shall not exceed five (5) pages;
5. A copy of this Judgment and Reasons shall be placed on each file.

"René LeBlanc"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	IMM-5071-17, IMM-4585-17, IMM-5539-17
STYLE OF CAUSE:	MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS v JACOB DAMIANY LUNYAMILA
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
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