Immigration, Refugee and Citizenship Law Moot

Concours de plaidoirie en droit de l'immigration, des réfugiés et de la citoyenneté

OFFICIAL PROBLEM

ENGLISH VERSION

Concours de Plaidoirie IRC Law Moot

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Law Moot

2025 IMMIGRATION – REFUGEE LAW MOOT PROBLEM

The following are the Decision and Reasons of Board Member Matilda Machado of the Immigration Division ("ID") of the Immigration and Refugee Board ("IRB"), in which the ID held that Niahl Deng should be released from detention. In coming to this conclusion, the Board held that when assessing nexus to removal, this is to be established against a threshold of reasonable possibility of removal. Further, danger to the public was held to not be a standalone ground of detention, but rather must be linked to a possibility of removal. The decision of ID Board Member M. Machado was subsequently overturned on both grounds by the Honourable Justice Silas Salamat of the Federal Court of Canada; the judgment for which is also set out below.

In this moot, both the ID Board Member and Federal Court have jurisdiction over the issues raised in their respective decisions. The standard of review adopted by the Federal Court is not the subject of appeal to the Crown Court of Canada. Please do not make arguments challenging issues of jurisdiction, the standard of review, or sufficiency of reasons.

The Crown Court is a fictional court established to hear immigration and refugee appeals from the Federal Court. No decision of any Canadian court, including the Supreme Court of Canada, is binding on the Crown Court of Canada; however, Canadian jurisprudence can and should be used in the appeal facta to argue respective positions. In accordance with Rule 9 of the *Official Rules*, Canadian jurisprudence is persuasive in the Crown Court of Canada in accordance with the established hierarchy of those courts.

All the issues raised in the reasons given by ID Board Member and Federal Court should be addressed by counsel for the Appellant or Respondent in their submissions. Arguments not referenced in the reasons may be advanced by counsel in their submissions, but only if they relate to the issues identified in the previous decisions.

In order to appeal to the Crown Court of Canada, Justice Salamat certified the following questions:

> Is there a nexus to removal sufficient to ground the detention of a foreign national or permanent resident of Canada under the *Immigration and Refugee Protection Act* so long as the state is making any active efforts to pursue removal?
>
> Can a foreign national or permanent resident of Canada be detained on the basis of Danger to the Public pursuant to s.58(1)(a) of the *Immigration and Refugee Protection Act* where there is no longer a nexus to removal?

Whether these questions are properly certified **is not** a subject of appeal to the Crown Court.

Pursuant to Rule 10 of the *Official Rules,* mooters may request clarification on points that are unclear in the Official Problem and that reasonably need to be clarified in order to submit a proper

argument. Such requests must be made by email to info@ilm-cpdi.ca by midnight EST on November 29, 2024 and include a max. 250 word explanation as to why a clarification is necessary.

0003-B7-000615-11-July-2024-M-MACHADO-30DR

IMMIGRATION AND REFUGEE BOARD

- IMMIGRATION DIVISION -

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Record of a Detention Review held under the
Immigration and Refugee Protection Act, concerning

NIAHL DENG

HELD AT:	Maplehurst Correctional Complex	
DATE:	July 11, 2024	
BEFORE:	Matilda Machado	- Member
APPEARANCES:		
	Niahl Deng	- Person Concerned
	Refugee Law Office	- Counsel
	Mr. Hirji	- Minister’s Counsel
	N/A	- Interpreter

REASONS AND DECISION

INTRODUCTION

1. This is the decision on the current detention review concerning Mr. Niahl Deng. Today is July 11, 2024. We are located at the Immigration and Refugee Board offices in Toronto. My name is Matilda Machado and I am a Member of the Immigration Division.

2. Mr. Niahl Deng purports to be a citizen of South Sudan. He arrived in Canada on March 2, 2019, and made a claim for refugee protection. At the airport, Mr. Deng arrived on a non-genuine passport that he states he obtained in Kenya after fleeing South Sudan and used it in order to travel to Canada. Mr. Deng has no other identity documents.

3. On January 23, 2022, the Refugee Protection Division denied Mr. Deng's claim for refugee protection on the basis that his identity had not been established. The Refugee Appeal Division denied his appeal for the same reason on December 2, 2022. Mr. Deng did not seek leave of the Federal Court to judicially review that decision. His conditional removal order, issued when he made a refugee claim, came into force and following Mr. Deng's failure to voluntarily leave Canada, became a deemed deportation order on January 1, 2023.

4. At previous detention review sittings, Mr. Deng disclosed a psychiatric report which states that he suffers from post-traumatic stress disorder and depression. Mr. Deng says that this stems from the events he witnessed living in a refugee camp in South Sudan. Mr. Deng has previously testified that he began to abuse alcohol as a coping mechanism while in Canada, especially during the long delay before his refugee hearing took place and after his claim was denied, times during which he felt hopeless.

5. The Toronto Police Service ("TPS") have arrested Mr. Deng at least seven times in 13 months, leading to various charges. During each incident, the TPS reports state that he appeared unhoused and intoxicated:
    - Arrested on July 13, 2021, and charged with assault, contrary to s.266 of the *Criminal Code* (later withdrawn)
    - Arrested on August 3, 2021, and charged with mischief under, contrary to s.430(1) of the *Criminal Code* (later withdrawn)
    - Arrested on October 30, 2021, and charged with assaulting a peace officer, contrary to s.270(1) of the *Criminal Code* (later withdrawn)
    - Arrested on November 17, 2021, and charged with assault causing bodily harm, contrary to s.267(b) of the *Criminal Code* (pled guilty, convicted, and given a suspended sentence in addition to 2:1 credit for 30 days pre-sentence custody). Released on December 17, 2021.
    - Arrested on March 1, 2022, and charged with assault with a weapon, contrary to s.267(a) of the *Criminal Code* (pled guilty, convicted, and sentenced to 60 days imprisonment in addition to 2:1 credit for 25 days pre-sentence custody). Released on May 5, 2022.
    - Arrested on July 15, 2022, and charged with theft under $5000, contrary to ss. 334(a) of the *Criminal Code* (later withdrawn)
    - Arrested on August 10, 2022, and charged with sexual assault with a weapon, contrary to s.272(1)(a) of the *Criminal Code* (pled guilty, convicted, and sentenced to 1 year imprisonment in addition to 2:1 credit for 90 days pre-sentence custody). Released on July 10, 2023.

6. Following his release from his criminal sentence on July 10, 2023, Mr. Deng was immediately arrested by the Canada Border Services Agency ("CBSA") on the basis that

he was a) unlikely to appear for removal and b) posed a danger to the public. He has remained in immigration detention ever since at the Maplehurst Correctional Complex in Milton, Ontario, with my colleagues finding both grounds for his detention have been made out at each of his prior detention reviews. Mr. Deng has been in immigration detention for one-year and this is his fourteenth detention review.

7. One reason that Mr. Deng has remained in detention for this length of time is because CBSA has been unable to obtain a South Sudanese travel document with which to facilitate his removal. Mr. Deng has been twice interviewed by South Sudanese consular authorities and CBSA has located some of Mr. Deng's more distant family members in a refugee camp in South Sudan. Despite this, South Sudanese consular authorities maintain that they are not satisfied he is a South Sudanese national. CBSA concedes that Mr. Deng has cooperated with efforts to establish his identity and to obtain a travel document.

8. In the present detention review, the Minister advises that they are now at an impasse with South Sudanese consular authorities and currently, there are no new investigative steps to be taken to obtain a travel document. Although the South Sudanese officials are not currently satisfied as to Mr. Deng's status as a South Sudanese national, the Minister advises that CBSA will be continuing efforts made to persuade them of his nationality and to issue him a travel document. The Minister asks that Mr. Deng's detention be continued both as a flight risk and a danger to the public.

9. In regards to the flight risk ground, the Minister argues that the nexus to removal is still made out in this case, despite the concession of a current impasse on the issue of the travel document. Although the South Sudanese officials are not currently satisfied as to Mr. Deng's status as a South Sudanese national, the Minister advises that there will be continuing efforts made to persuade them of his nationality and to issue him a travel document. In particular, the Minister advises that Canada intends to continue diplomatic pressure on the South Sudanese consular officials as well as renewed efforts to obtain evidence from Mr. Deng's alleged family in the South Sudanese refugee camp. The Minister states that, in the past where such pressure has been applied, there has been situations of consular officials changing their minds and issuing a travel document. I note in the record evidence of emails showing that CBSA has been contacting South Sudanese officials on a monthly basis to urge for the issuance of a travel document. I note however that each email (and response) seems similar to the last. The Minister argues that these continuing future efforts to establish identity upon which removal remains a possibility is sufficient to ground a nexus to removal and that any determination that removal is no longer possible is premature.

10. Through his counsel, Mr. Deng disagrees and argues there is no reasonable possibility of removal based on these "shot in the dark" efforts made by the Minister. I agree with Mr. Deng on this issue as well. The Minister is effectively asking that I find that nexus to removal is established by the State making any efforts to pursue removal, even where its efforts are more of the same or, as termed by Mr. Deng, "a shot in the dark". To agree with the Minister would be to allow detention as long as there was evidence of any efforts made by the State – regardless of whether these efforts differed from ineffective efforts in the past and in the absence of evidence that proposed efforts could bear any fruit now or in the future for the immigration purpose of removal. In other words, detention would be grounded in speculation only.

11. In *Brown,*[1] the Federal Court of Appeal held that the possibility of removal must be realistic and not based on speculation; in other words, there can be no detention in the absence of a reasonably foreseeable prospect of removal. Based on the information before me, the failure of the Canadian authorities to obtain identity information persuasive to the South Sudanese authorities such that they issue a travel document has meant that removal is no longer reasonably foreseeable or achievable. With respect, Mr. Deng's liberty and CBSA's authority to continue his detention cannot turn on a copy-and-paste email to South Sudanese consular officials every thirty days with no expectation that they will receive a different response.

12. The Minister also argues that, under s.58(1)(a) of the *Immigration and Refugee Protection Act* ("*IRPA*"), danger to the public is an independent ground of detention for a non-citizen if the Immigration Division finds that removal is no longer a possibility. The Minister notes that, prior to his arrest by CBSA, Mr. Deng's offences involved violence against strangers he encountered while intoxicated on the street; that the seriousness of the offences were worsening over time; and Mr. Deng has not benefitted from any programming to address his alcohol addiction while in detention. According to the Minister, Canadians should not be forced to bear the risk of Mr. Deng's criminality when he has no right to be in the country.

13. In response, Mr. Deng, through his counsel, argues that, to be lawful, immigration detention for any reason must always be tied to a possibility of deportation. Mr. Deng argues that as the Minister has effectively conceded removal is no longer a possibility, Mr. Deng's detention is now unlawful and must end. Mr. Deng also argues that as his detention is in a provincial jail, rehabilitation programming is not available to him, such that it should not be held against him.

[1] *Brown v. Canada (Citizenship and Immigration),* 2020 FCA 130

14. I agree with Mr. Deng. While s.58(1)(a) of the *IRPA* identifies danger to the public as a standalone ground for detention, this must be read in conjunction with the Federal Court of Appeal's judgment in *Brown*[2]. In that judgment, the Court stated that: "To require an express statement that the power of detention can only be exercised where there is a real possibility of removal would be to read-in a redundancy".[3] The Court of Appeal went on to hold that: "The decision maker must be satisfied, on the evidence, that removal is a possibility. The possibility must be realistic, not fanciful, and not based on speculation, assumption or conjecture".[4] I am bound by the Court of Appeal's judgment.

15. I note that the Minister also relies on *Brown* for their position that danger to the public does not need to be linked to a possibility of removal. The Minister points to paragraph 44 of Brown, which states that:

> "Section 58 of the *IRPA* authorizes detention for several purposes, including pending determination of identity, pending a determination of admissibility or on the grounds of public safety. The power of detention will be exercised principally, but not exclusively, pending removal. Where detention is for the purposes of removal, and there is no longer a possibility of removal, detention on this ground no longer facilitates the machinery of immigration control and the power of detention cannot be exercised. Detention must always be tethered, on the evidence, to an enumerated statutory purpose."[5]

16. The Minister contends that the above paragraph in *Brown* identifies public safety as its own immigration purpose and contemplates detaining a non-citizen when removal is not a possibility. I disagree. The phrase "[t]he power of detention will be exercised principally, but not exclusively, pending removal" contemplates that a person may be detained as a danger in circumstances where a removal order has not yet been issued but may be so at the conclusion of the process (e.g., on entry for further examination or for an admissibility hearing). That is the only way to reconcile this portion of the *Brown* judgment with the Court's overall holding that detention "can only be exercised where there is a real possibility of removal". In Mr. Deng's case, he is subject to a removal order and so he is clearly being detained for removal. As the Minister has conceded that removal is no longer possible at this time, Mr. Deng's detention "no longer facilitates the machinery of immigration control and the power of detention cannot be exercised". If I were to order his detention, it would be solely to protect the public – and not to advance removal – which is a role for the criminal law and not immigration law. In my opinion, it would raise serious

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[2] Ibid., at para. 44.
[3] Ibid., at para. 60.
[4] Ibid., at para. 95
[5] Ibid., at para. 44

issues under the *Charter*[6] if non-citizens could be held solely for public safety reasons under the *IRPA* – a statute which permits arrest and detention on far lower standards than the *Criminal Code*.

17. Based on the above, I am obliged to order Mr. Deng's release as his removal is no longer a possibility and detention is no longer lawful in these circumstances. As the Minister has not established a ground of detention under s.58 of the *IRPA*, I will not be considering the factors under s.248 of the *Immigration and Refugee Protection Regulations*.

18. Based on the above, I am ordering Mr. Deng's release without conditions.

"Matilda Machado"

DATED at Toronto this 11th of July 2024

[6] *Canadian Charter of Rights and Freedoms*

Federal Court Cour fédérale

Date: 20241017

Docket: IMM-11983-24

Citation: 2024 FC 97450

Ottawa, Ontario, October 28 2024

PRESENT: The Honourable Justice Silas Salamat

BETWEEN

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

NIAHL DENG

Respondent

JUDGMENT AND REASONS

I. Overview

1. This is an application for judicial review of a decision made on July 11 2024 by the Immigration Division [ID] of the Immigration and Refugee Board [IRB], in which Mr. Niahl Deng, the Respondent, was ordered released from immigration detention.

2. For the reasons that follow, I have come to the conclusion that this judicial review must succeed. The ID has erred in finding that danger to the public is not a standalone ground for detention. This is contrary to both the s.58 of the *Immigration and Refugee Protection*

Act (“*IRPA*”) and the Federal Court of Appeal’s holding in *Brown v. Canada (MCI),* 2020 FCA 130 [*Brown*]. The Immigration Division also erred in adopting a test for nexus to an immigration purpose, i.e. removal in this case, as requiring removal to be “reasonably foreseeable”.

II. Background Facts, Issues and Standard of Review

3. The Court adopts the facts as found in the underlying decision of the ID.

4. The Applicant argues that the ID erred in its Decision to release the Respondent on two main grounds. First, the ID erred in finding that if a nexus to removal was required, the standard was that of reasonably foreseeable possibility of removal. The Applicant instead argues that the ID should have adopted the test for nexus as being any efforts made by the State to pursue removal; the Applicant points to the diplomatic pressure to be exerted by Canadian officials upon the South Sudanese consular authorities and renewed efforts to obtain information from the Respondent’s alleged family in the South Sudanese refugee camps as establishing sufficient efforts. Second, the ID erred in finding that Danger to the Public was not a standalone ground and instead requiring the establishing of a nexus to immigration purpose, namely removal.

5. All parties agree that the applicable standard of review is that of reasonableness. This case raises no issue that would justify a departure from reasonableness as the presumptive standard of review when reviewing administrative decisions on their merits: *Canada (Minister of Citizenship and Immigration) v. Vavilov,* 2019 SCC 65, [2019] 4 S.C.R. 653.

III. Analysis

(A) The Board erred in applying a test of “reasonable foreseeability” for removal

6. The ID erred in adopting a test for nexus to an immigration purpose that required that removal is reasonably foreseeable.

7. This was the standard rejected by the Federal Court of Appeal in *Brown,* at 94, and for good reason. Reasonable foreseeability is a nebulous and speculative standard that leads to inconsistent results. It fails to take account that where liberty interests are engaged, discretion should be exercised on clear and discernable criteria as much as is possible. Employing a test of “reasonable foreseeability of removal” does not do this because it requires a decision-maker to assess what is reasonable in the context of the receiving state, a consideration that may vary significantly from country to country.

8. Further, the Supreme Court in *Charkaoui* made no reference to a test of foreseeability (*Charkaoui v. Canada (Citizenship and Immigration),* 2007 SCC 9, [2007] 1 S.C.R. 350 [*Charkaoui*]).

9. As noted in *Brown,* while removal is an objective of detention, the State does not have complete control over its realization. Removal may be frustrated by events in the receiving state such as political turmoil or natural disasters. Again yet, as in this case, removal may be frustrated by a lack of evidence as to identity. Removal is reliant on the co-operation of the receiving state and bound in timing by the efficiency of that state's administrative processes. One might note that receiving states may not wish to facilitate the removal of a detained person such as the Respondent, with varied criminal charges, convictions, and issues of addiction. Canada has neither the ability to control the co-operation of the receiving state nor the speed by which the receiving state may effect their own administrative processes to corroborate identity and travel documents for a returning national.

10. Adopting as the test for nexus to removal as that of *any* efforts and steps of the state to effect removal is to take into account this reality. To require that Canada must establish a reasonable possibility of removal leaves Canada unable to administer its own detention regime as well enforce one of its own objective of detention, that of removal, and effectively leaves this determination in the hands of the receiving state.

11. *Charkaoui* establishes that detention may be lengthy and it may be indeterminate. Length of potential future detention is not the only relevant factor to be considered in whether detention remains lawful. When examining the constitutionality of indeterminate detention, the question is not whether there is a precise date on which removal will occur, but whether there is a possibility: *Brown,* at 93, citing to *Charkaoui* at 125-127).

12. In application of the correct test, removal remains a possibility so long as Canada continues <u>any</u> efforts to pursue removal. To hold otherwise and apply a standard of reasonable foreseeability would mean Parliament intended the *IRPA* to have no tools with which to protect the public against violent non-citizens – who, it must be recalled, have no right to be in Canada – merely because their country of nationality refuses to issue them a passport. Under the ID's interpretation, the intransigence of a foreign government in issuing a passport becomes a get-out-of-jail-free card for violent non-citizens to be at large in Canada. This cannot have been Parliament's intent in enacting the *IRPA*'s detention scheme.

13. Before the ID, the Applicant indicated that there would be renewed efforts to obtain evidence from the family of the Respondent in South Sudan. Although it seems that this

has not yet been effective in persuading the South Sudanese officials of his nationality, the combination of these renewed efforts with continued diplomatic pressure may yet lead to the issuance of a travel document in the future. The ID is required to consider whether these efforts establish the nexus to removal – on the correct test of "any efforts", rather than on a reasonable foreseeable standard. Detention of the Respondent may be lengthy and may be indeterminate, but in application of the correct test, it may very well not be unlawful based on Canada's efforts to pursue removal.

(B) The Board erred in finding that Danger to the Public requires a nexus to removal

14. Turning to the second alternative ground advanced by the Applicant, the ID held that as removal is no longer a possibility, detention can no longer continue and ordered the Respondent's release. In doing so, the ID erred in finding that Danger to the Public, pursuant to s.58(1)(a) of the *IRPA* is not a standalone ground of detention.

15. I find support for this position in *Canada (Public Safety and Emergency Preparedness) v. Taino,* 2020 FC 427 [*Taino*] where this Court found that even where a person's removal was stayed and removal no longer a possibility, detention could be ordered if there remained a basis to detain on the statutory ground of being a danger to the public.

16. The Federal Court of Appeal subsequently confirmed that the power of detention is not exclusively exercised pending removal: *Brown*, at 44. This leaves open the possibility that detention can be ordered on the stand-alone ground of being a danger to the public, even where removal is no longer possible. Where detention has not been ordered primarily for the purposes of removal, there is no implicit requirement that detention is only lawful where removal is possible.

17. Detention must always be connected, on the evidence, to an enumerated statutory purpose. As raised by the Applicant before the ID, where removal is not the primary purpose, this gap is filled by the purpose of protecting public safety and security of Canadians. This statutory purpose is found at s.3(1)(h) of the *IRPA.* Indeed, the Federal Court of Appeal in *Brown* explicitly tied the grounds of detention at s.58 to this immigration purpose. The ID failed to consider whether it applies to the case at hand where the Respondent has been detained on the ground of being a danger to the public, rather than primarily for the purpose of removal. On this basis alone, the decision must be overturned and returned to the ID for a new decision.

IV. Test for Certification and Certification of Question

18. The Respondent proposes the following questions for certification:

> Is there a nexus to removal sufficient to ground the detention of a foreign national or permanent resident of Canada under the *Immigration and Refugee Protection Act* so long as the state is making any active efforts to pursue removal?
>
> Can a foreign national or permanent resident of Canada be detained on the basis of Danger to the Public pursuant to s.58(1)(a) of the *Immigration and Refugee Protection Act* where there is no longer a nexus to removal?

19. Pursuant to s. 74(d) of the *IRPA,* I am prepared to certify these questions as each is a legal issue that arises from the facts of the case (*Sran v. Canada (Minister of Citizenship and Immigration),* 2018 FCA 16 at para. 16), is dispositive of the appeal (*Varela v. Canada (MCI),* 2009 FCA 145 [*Varela*] at para. 28 and 32) and transcends the case at hand such that it lends itself to an answer of general application (*Kunkel v. Canada (MCI),* 2009 FCA 347 at paragraph 9).

THIS COURT'S JUDGMENT is:

1. The application for judicial review is granted.
2. The decision of the Immigration Division is set aside and the matter being remitted for redetermination by a differently constituted panel.
3. The following questions are certified under subsection 74(d) of the *IRPA*:

> Is there a nexus to removal sufficient to ground the detention of a foreign national or permanent resident of Canada under the Immigration and Refugee Protection Act so long as the state is making any active efforts to pursue removal?
>
> Can a foreign national or permanent resident of Canada be detained on the basis of Danger to the Public pursuant to s.58(1)(a) of the *Immigration and Refugee Protection Act* where there is no longer a nexus to removal?

4. There is no order as to costs.

"S. Salamat"