CROWN COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF CANADA)

BETWEEN:

NIAHL DENG

Appellant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Factum of the Appellant

80A

Counsel for the Appellant

TABLE OF CONTENTS

OVERVIEW

1. The Canadian immigration system is built on fairness, equality, and promoting health and safety. Yet, the Appellant ("Mr. Deng"), who came seeking refugee protection, now faces indefinite detention without a clear path to release. His situation highlights how Canada remains one of the few countries where individuals seeking safety can be detained indefinitely, with no certainty of removal and no criminal conviction justifying their prolonged detention.

2. Parliament did not intend for foreign nationals to be subjected to indefinite immigration detention in a provincial jail merely because the government makes "any efforts" to effect removal. The likelihood of Mr. Deng's removal is nonexistent, given the receiving state's inaction and the government's minimal efforts to effect removal. Relying on another state's cooperation to establish a foreign national's identity exposes the Canadian immigration system to potential corruption. "Any efforts" cannot justify removal or detention. Instead, detention hinges on demonstrating a clear connection to removal. If detention cannot be justified by the possibility of removal, it cannot be justified solely on the grounds that a foreign national poses a danger to the public.

3. Using danger to the public as a standalone ground for removal, while no removal timeline exists, leads to indefinite detention. Mr. Deng's indefinite detention infringes on his *Charter* rights and undermines the integrity of Canada's immigration system, as there is no longer a rational connection to an immigration purpose. With no removal in sight, alternatives to detention must be explored, offering a less restrictive option that would allow Mr. Deng to live without the physical and psychological stress of detention. Given the availability of alternatives, Mr. Deng's detention is unreasonable and not in accordance with the principles of fundamental justice.

PART I: FACTS

A. Immigration History

4. Mr. Deng arrived in Canada on March 2, 2019, using a non-genuine passport obtained in Kenya after fleeing South Sudan.[1] He made a claim for refugee protection but does not have any other identity documents.[2] On January 23, 2022, the Refugee Protection Division denied Mr. Deng's claim due to his failure to establish his identity and issued a conditional removal order.[3] His appeal to the Refugee Appeal Division was subsequently dismissed on December 2, 2022.[4] On January 1, 2023, his conditional removal order became a deemed deportation order after he failed to voluntarily leave Canada.[5]

B. Criminal/Health History

5. Mr. Deng suffers from post-traumatic stress disorder and depression, which stem from traumatic events he witnessed during his time in a South Sudanese refugee camp.[6] These conditions were exacerbated by the prolonged waiting period for his refugee hearing and subsequent denial of his claim.[7] Consequently, he began to use alcohol as a coping mechanism while in Canada.[8]

6. Mr. Deng was arrested and criminally charged on several occasions between July 13, 2021, and August 10, 2022.[9] Many of the charges brought against him were ultimately withdrawn, and

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[1] *Immigration Division Decision*, IRC Law Moot 2025 at para 2 [*ID Decision*].
[2] *Ibid* at para 2.
[3] *Ibid* at para 3.
[4] *Ibid*.
[5] *Ibid*.
[6] *Ibid* at para 4.
[7] *Ibid*.
[8] *Ibid*.
[9] *Ibid* at para 5.

for the few offenses where he pled guilty (assault causing bodily harm, assault with a weapon, and sexual assault with a weapon) he accepted responsibility and served his sentences.[10] These incidents occurred while Mr. Deng was unhoused and intoxicated.[11]

7. Mr. Deng has acknowledged using alcohol as a way to cope with his untreated mental health struggles.[12] His current detention in a provincial jail has further restricted his ability to access essential rehabilitation programs, which could provide the support necessary for his mental health recovery and long-term stability.[13]

C. Detention History

8. Upon the completion of his last criminal sentence on July 10, 2023, Mr. Deng was immediately arrested by the CBSA on the basis that he was a) unlikely to appear for removal and b) posed a danger to the public.[14] Mr. Deng has cooperated with the CBSA to establish his identity and obtain travel documents from South Sudanese officials.[15] He has now been detained for over one year and had 14 detention reviews while held at the Maplehurst Correctional Complex.[16]

D. The Immigration Division Decision

9. Mr. Deng's immigration detention was reviewed a 14th time on July 11, 2024. The Immigration Division ("ID") found that Mr. Deng's continued detention was unlawful because it no longer served a valid immigration purpose.[17] The ID applied the "reasonably foreseeable" test

[10] *Ibid*.
[11] *Ibid*.
[12] *Ibid* at para 4.
[13] *Ibid* at para 13.
[14] *Ibid* at para 6.
[15] *Ibid* at para 7.
[16] *Ibid* at para 6.
[17] *Ibid* at para 16.

to determine there was no realistic prospect of removal.[18] Despite repeated efforts, including diplomatic pressure and communication with South Sudanese officials, the CBSA failed to secure a travel document for Mr. Deng.[19] CBSA acknowledged it had reached an impasse and admitted that no new investigative steps could advance the removal process.[20]

10. The ID rejected the argument that public safety concerns alone justified Mr. Deng's detention.[21] It emphasized that detention under the *Immigration and Refugee Protection Act* ("*IRPA*") must remain tied to an immigration purpose, such as facilitating removal.[22]

11. Because the CBSA could not demonstrate a realistic possibility of removal, the ID concluded that Mr. Deng's detention no longer served the objectives of the *IRPA*.[23] As a result, the ID ordered Mr. Deng's release without conditions.[24]

E. Federal Court Decision

12. The ID's decision to release Mr. Deng was set aside by the FC.[25] The FC determined that the wrong legal test had been applied by the ID when it required that removal be "reasonably foreseeable".[26] It was clarified by the FC that detention under s.58(1)(a) of *IRPA* is lawful as long as the "any efforts" standard is being met by the state to pursue removal, even if these efforts do not advance the removal process.[27]

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[18] *Ibid* at para 17.
[19] *Ibid* at paras 7, 8.
[20] *Ibid* at para 8.
[21] *Ibid* at para 16.
[22] *Ibid* at para 15.
[23] *Ibid* at para 17.
[24] *Ibid* at para 18.
[25] *Deng v Canada (Citizenship and Immigration)*, 2024 FC 97450 at 13 [*FC Decision*].
[26] *Ibid* at para 2.
[27] *Ibid* at para 12.

13. The FC also found that the ID failed to consider that removal is often influenced by factors beyond Canada's control, such as the administrative processes and cooperation of the receiving state.[28] The ongoing efforts by CBSA, including diplomatic pressure on South Sudanese authorities and attempts to gather evidence from Mr. Deng's alleged family members, were acknowledged as valid steps toward removal.[29]

14. The FC also concluded that the ID erred in rejecting danger to the public as a standalone ground for detention.[30] It was held that detention on public safety grounds is permitted under the *IRPA*, independent of the prospect of removal.[31] The ID was found to have improperly limited the scope of detention by failing to consider whether Mr. Deng's detention could be justified solely on the basis of public safety.[32]

15. The FC certified two questions for appeal under s. 74(d) of the *IRPA*:

1) 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?
2) 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?

[28] *Ibid* at para 9.
[29] *Ibid* at para 13.
[30] *Ibid* at paras 4, 14.
[31] *Ibid* at para 17.
[32] *Ibid*.

PART II: POINTS IN ISSUE

16. There is no nexus to removal merely because the state actively makes "any efforts" to pursue removal.

17. A foreign national or permanent resident of Canada cannot be detained on the basis of danger to the public alone where there is no longer a nexus to removal.

18. Detaining Mr. Deng purely for public safety reasons and not to advance removal violates his *Charter* rights.

PART III: ARGUMENT

A) Statutory Framework and Jurisprudence

Immigration and Refugee Protection Act

19. Under section 58(1) of the *IRPA*, the ID shall order the release of a permanent resident or foreign national unless it is satisfied, taking into account prescribed factors, that they pose a danger to the public, are unlikely to appear for immigration proceedings or removal, are under investigation for suspected inadmissibility (e.g., security or criminality), or their identity remains unverified due to lack of cooperation or ongoing efforts by the Minister to confirm it.[33]

Immigration and Refugee Protection Regulations

20. Section 248 of the *Immigration and Refugee Protection Regulations* ("*Regulations*") requires consideration of factors before deciding on detention or release, including the reason for detention, the length of detention, the anticipated duration, any delays or lack of diligence by the government, or the individual, the availability of alternatives to detention, and the best interests of

[33] *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] at ss 58(1)(a), (b).

a directly affected child who is under 18 years of age.[34]

Summary of *Brown*

21. In *Brown*, the Federal Court of Appeal ("FCA") considered the constitutionality of section 58 of the *IRPA* and section 248 of the *Regulations*.[35] The appellant, Brown, was held in immigration detention for five years based on a series of criminal convictions until his deportation to Jamaica in September 2016.[36] The length of his detention was due to the CBSA's struggles to obtain travel documentation for him.[37] The FCA in *Brown* found that there was no prescribed period of time at which detention becomes unconstitutional.[38] However, it discussed the process of immigration detention and release, holding that release is the default and that detention will only continue if the Minister can establish grounds for it; detention must always be tethered to a statutory purpose.[39] *Brown* laid out characteristics of detention review that must comply with the *Charter* including a nexus to an immigration purpose, the burden of proof, the relevance of previous detention reasons and the content of procedural fairness.[40]

B) The Standard of Review is Reasonableness

22. Reasonableness is the presumptive standard of review whenever a court reviews administrative decisions.[41]

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[34] *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*Regulations*] at s 248(a)-(e).
[35] *Brown v Canada (Citizenship and Immigration)*, 2020 FCA 130 at para 6 [*Brown*].
[36] *Ibid* at paras 4-5.
[37] *Ibid* at para 5.
[38] *Ibid* at paras 14, 162, 163.
[39] *Ibid* at paras 10, 32, 42, 44, 163.
[40] *Ibid* at para 89.
[41] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 10 [*Vavilov*].

23. The reasonableness standard requires that a decision be evaluated in light of its underlying rationale to ensure that the decision as a whole is transparent, intelligible and justified.[42] A reasonable decision is one that is based on an internally coherent and rational chain of analysis and is justified in relation to the facts and law that constrain the decision maker.[43] The reasonableness standard requires that a reviewing court defer to such a decision.[44]

24. In Mr. Deng's case, no exceptions arise to displace this presumptive standard, meaning the ID and the FC decisions must be reviewed on the standard of reasonableness.

C) There is no nexus to removal merely because the state actively makes any efforts to pursue removal.

1) "Any efforts" is the wrong test to apply because it fails to ensure proportionality, fairness, and meaningful progress towards removal

25. The "any efforts" standard misinterprets Parliament's intent by placing undue emphasis on minimal or ineffective removal efforts of the state. While it is true that violent non-citizens may pose a public safety risk, Parliament's objective in enacting the *IRPA* is not to hold *every non-citizen* in detention indefinitely based solely on the actions (or inaction) of foreign governments. The detention of individuals must balance both the need to protect the public and the fundamental rights of detainees.[45]

26. A "possibility" test applied by the ID strikes a better balance by ensuring that individuals are not held indefinitely without meaningful prospects for removal, and that detention is not used as a form of punishment or administrative convenience. The "possibility" standard breaks this

[42] *Ibid* at para 15.
[43] *Ibid* at para 85.
[44] *Ibid*.
[45] *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 at para 18 [*Charkaoui*]; *Hemond v Canada (Citizenship and Immigration)*, 2024 FC 1980 at para 34.

cycle of circular reasoning by requiring a realistic and objective assessment of removal prospects. If removal is not possible, there is no justification for continued detention.[46] It demands a more rigorous, evidence-based approach, in line with the principles of fairness, proportionality, and human rights.[47]

27. The FC decision is fundamentally inconsistent with *Brown* and has no jurisprudential support.[48] *Brown* stresses the importance of assessing the realistic possibility of removal, as opposed to relying on superficial or minimal efforts.[49] This is a far more nuanced and substantive approach than the "any efforts" test, which risks turning detention into a mere administrative formality without regard to the fundamental rights at stake.

28. There are five crucial principles in *Brown* that justify why a more thorough analysis, beyond "any efforts", is necessary in determining whether removal is justified: (1) objective credible facts, (2) good faith efforts and the detainee's cooperation, (3) the burden increasing overtime, (4) disclosure of evidence, and (5) the duration and conditions of detention.[50]

2) "Any efforts" is not a workable test because it does not require an assessment of whether the efforts are credible or grounded in evidence.

29. Any test for assessing a nexus to removal must necessarily involve an examination of the credibility and probative nature of the evidence.[51] *Brown* holds that the power of detention must be exercised principally pending removal.[52] If there is no possibility of removal, immigration

[46] *Brown*, *supra* note 35 at para 44.
[47] *Ibid* at para 136.
[48] *FC Decision*, *supra* note 25 at para 7.
[49] *Brown*, *supra* note 35 at para 95.
[50] *Ibid* at paras 95-104, 128, 142.
[51] *Ibid* at para 95.
[52] *Ibid* at para 44.

detention does not facilitate the machinery of immigration control.[53] Therefore, the threshold for determining whether there is a nexus to removal must address the likelihood of removal.[54] Accepting an "any efforts" standard is patently absurd. Not only does the "any efforts" standard fail to adequately address whether there is a realistic likelihood of the individual being removed, but it also disregards the need to evaluate the probative value and credibility of CBSA's efforts. The "possibility" test, as outlined in *Brown*, mandates this assessment.[55] The "any efforts" test, by contrast, lacks this requirement, rendering it inadequate.

30. If the receiving state is refusing to issue travel documents, or if there are issues with verifying identity, the likelihood of removal is virtually nonexistent. The "any efforts" standard does not require the ID to assess whether further efforts are likely to succeed, which means that individuals could be detained indefinitely, even if it is clear that removal is not feasible. For instance, in a situation where a country's government institutions have collapsed, in the aftermath of a civil war or political unrest, the "any efforts" standard will continue to justify detention even if authorities in that country are unable or unwilling to cooperate.

31. South Sudan is a relatively new country that has only come into existence in 2011.[56] This presents unique challenges with the removal of detainees. Additionally, the CBSA has encountered difficulties removing individuals to South Sudan in the past.[57] The history of failed removals underscores the flaw in the "any efforts" standard because it does not consider the limitations

[53] *Ibid* at para 44; see also *Charkaoui*, *supra* note 45 at paras 125-127.
[54] *Brown*, *supra* note 35 at para 90.
[55] *Ibid* at para 95.
[56] *Mawut v Canada (Public Safety and Emergency Preparedness)*, 2022 FC 415 at para 3 [*Mawut* 2022].
[57] *Ibid* at para 5.

posed by a country's institutions.[58] This highlights the potential abuse of this test, specifically when external factors render removal entirely unfeasible.

3) "Any efforts" does not require good faith efforts or cooperation

32. "Any efforts" does not mandate an assessment of whether those efforts are made in good faith.[59] Because detention could be continued by making efforts that are half-hearted rather than based on good faith, "any efforts" does not equate to good faith efforts.[60] Decision-makers should assess whether all reasonable steps have been taken to procure necessary travel documents and whether active measures have been pursued between detention reviews to advance removal.[61] Likewise, efforts must go beyond routine actions and should include steps such as engaging in diplomatic dialogue, negotiating bilateral agreements, or applying visa restrictions to encourage cooperation from the receiving state.[62] These actions demonstrate that the government is genuinely working toward achieving deportation. Simply waiting for a change in the receiving state's position is insufficient to meet the good faith requirement. Removal is dependent on the cooperation of the detainee and the receiving state.[63]

33. Responsibility for the impasse in effecting removal does not lie with Mr. Deng.[64] Unlike *Lunyamila* and *Ali*, who were both uncooperative, had several criminal charges, and detained for an extended period, it is undisputed that Mr. Deng has been cooperative with CBSA throughout

[58] *Ibid*.
[59] *Brown*, *supra* note 35 at para 100.
[60] *Ibid* at para 100.
[61] *Ibid* at para 102.
[62] *Ibid* at para 102; see also *Canada (Public Safety and Emergency Preparedness) v Suleiman*, 2022 FC 286 at para 47 [*Suleiman*].
[63] *Brown*, *supra* note 35 at para 53.
[64] *Ibid* at paras 99, 102.

his identity investigation.[65] Therefore, Mr. Deng should not bear the burden of delays that result from the receiving state's inability to cooperate.

34. Effectively, South Sudan would determine whether Mr. Deng remains in detention, making the Canadian immigration system vulnerable to corruption. The concept of "any efforts" would allow a state to use Canadian machinery to punish its own citizens.

35. In cases where the detainee is actively cooperating, the onus falls on the state to demonstrate genuine efforts to effect removal, beyond passive actions.[66] Mr. Deng's continued detention is not justified by "any efforts" but must be based on substantial good faith efforts that show progress towards removal.

36. Section 248(d) of the *Regulations* imposes an explicit duty on the government to act with diligence in the process of removing non-citizens.[67] This provision highlights the necessity for the government to make genuine, sustained efforts to effect removal, ensuring that the state is not complacent in fulfilling its obligations. The "any efforts" test directly conflicts with this requirement of diligence because it allows detention based on minimal or insufficient actions. Under section 248(d), the government is expected to demonstrate tangible progress towards removal. Without evidence of diligent actions, Mr. Deng's continued detention is unreasonable.

37. Ultimately, allowing detention based on the vague standard of "any efforts" undermines the purpose of the *IRPA* and its *Regulations*, which are designed to ensure the government acts in

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[65] *Ali v Canada (Attorney General)*, 2017 ONSC 2660 at paras 7, 24 [*Ali*]; *Lunyamila v Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22 at paras 14, 27 [*Lunyamila*].
[66] *Lunyamila, supra* note 65 at para 29.
[67] *Regulations, supra* note 34, at s 248.

good faith with diligence.[68] The lack of a clear requirement for genuine, cooperative efforts permits ineffective actions to be deemed sufficient.

4) The Minister's burden does not increase overtime with *de minimis* attempts

38. "Any efforts" is not the appropriate test to adopt because it does not impose an increasing burden on the Minister over time and gives no consideration to the damaging effects of prolonged detention. The longer an individual is detained, the heavier the burden on the Minister to prove that removal remains possible.[69]

39. According to *Brown*, the government must disclose evidence that removal remains a possibility.[70] Especially throughout a long period of detention, the government has had substantial time to gather evidence and thus bears an increasing evidentiary onus.[71] Disclosure exists to enable the detainee to challenge the Minister's position.[72] The threshold of "any efforts" represents an exceedingly minimal and vague standard that is insufficient to allow detainees, like Mr. Deng, to effectively challenge the Minister's position.[73]

40. Mr. Deng is entitled to know what steps CBSA has taken or will be taking and whether those efforts advanced his removal. Waiting for information from CBSA with no established timeline and no confidence in the outcome does not satisfy the Minister's onus and magnifies potential psychological, emotional, and social harm for the detainee.[74]

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[68] *IRPA*, *supra* note 33, s 3(1) f.1; *Ibid*, s 248(d).
[69] *Charkaoui*, *supra* note 45 at para 113.
[70] *Brown*, *supra* note 35 at para 145.
[71] *Charkaoui*, *supra* note 45 at para 113.
[72] *Mawut v Canada (Public Safety and Emergency Preparedness)*, 2021 FC 1155 at para 45.
[73] *Brown*, *supra* note 35 at para 145.
[74] *Charkaoui*, *supra* note 45 at para 98.

5) "Any efforts" prolongs the duration of detention in unsuitable conditions

41. "Any efforts" allows for indefinite detention under potentially abhorrent conditions so long as the state makes any efforts. Immigration detainees held in provincial jails face more restrictive conditions than those in immigration holding centers, and they are also more likely to experience longer periods of detention.[75] Immigration detainees in Canada can be held for months or even years without a clear timeline, as there is no legislative limit on the duration of immigration detention.[76]

42. At Maplehurst Correctional Facility, the mental health care is woefully inadequate for Mr. Deng.[77] As held in *Ali*, "housing […]in a federal institution, where there is greater opportunity for treatment, counselling, education and work skills training would assist in ameliorating the impact of a lengthy period of detention".[78] It is to be expected that there has been no progression in Mr. Deng's mental health, as no opportunities or resources have been made available to foster improvement.

43. Furthermore, Mr. Deng's health is deteriorating while in detention, and the government has taken no meaningful steps to improve his condition. The government's position is self-contradictory: it claims that Mr. Deng cannot be released due to being a safety concern, yet it is precisely the government's actions that are exacerbating these conditions, preventing Mr. Deng

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[75] Amnesty International, "Canada: All 10 provinces to end immigration detention in jails" (21 March 2024), online: <https://www.amnesty.ca/human-rights-news/canada-all-10-provinces-to-end-immigration-detention-in-jails/?gad_source=1&gbraid=0AAAAAD5luGIIqV4zuz3-B2mxEeCvOoCpX&gclid=Cj0KCQiA-5a9BhCBARIsACwMkJ6Wfm2OO_wYWgCFU9ZUZs_cPyJNVWhOkQtDSPlXbXNVEZNXL31TmHgaAmaREALw_w>.
[76] *Brown*, *supra* note 35 at para 3.
[77] *ID Decision*, *supra* note 1 at para 13.
[78] *Ali*, *supra* note 65 at para 37.

from getting better. In this regard, the government is directly responsible for the circumstances leading to Mr. Deng's current state. The efforts to facilitate Mr. Deng's removal have failed miserably.[79] Consequently, the government of Canada bears responsibility for the conditions in which Mr. Deng is held, thereby contributing to any potential risk he may pose to the public.

44. The "any efforts" standard does not ensure that detention is proportionate to the circumstances, especially when the state's efforts to effectuate removal are minimal. In fact, the "any efforts" standard directly conflicts with the *IRPA* and its *Regulations* by failing to align with the requirements of due diligence and genuine, substantiated efforts in immigration procedures.[80] It should not be seen as a conclusive factor in determining the necessity of detention, since the "any efforts" standard may skew the analysis by giving undue weight to minimal or ineffective removal efforts, potentially overshadowing other relevant factors that should be considered in a fair and balanced detention assessment. Instead, a more holistic evaluation — based on credible facts, the increasing burden over time, the quality of cooperative efforts and disclosure to evidence, and the humane treatment of detained individuals — should be adopted to ensure that removal decisions are fair, just, and consistent with the principles of fundamental justice.

D) A foreign national or permanent resident of Canada cannot be detained on the basis of danger to the public alone where there is no longer a nexus to removal.

1) Detention must be linked to removal

45. When removal is not realistically possible, it becomes a threshold issue that mandates release.[81] At that point, release should not be weighed alongside section 248 of the *Regulations*.[82]

[79] *ID Decision*, *supra* note 1 at para 11.
[80] *Regulations*, *supra* note 34, s 248(d).
[81] *Suleiman*, *supra* note 62 at para 76; *Brown*, *supra* note 35 at para 32.
[82] *Suleiman*, *supra* note 62 at para 76.

The FC erred by overlooking this threshold requirement and improperly prioritizing public safety concerns as an independent basis for detention.[83]

46. The reliance on jurisprudence like *Taino* further underscores the FC's flawed approach. *Suleiman* rightly pointed out that *Taino* predated the FCA's decision in *Brown* and that *Brown* did not suggest that "danger to the public" could serve as an exception to the requirement for a realistic prospect of removal.[84]

47. Allowing danger alone to justify detention exposes a fundamental flaw: the problem of the non-removable person. An individual who has served their criminal sentence and is no longer considered dangerous enough to warrant criminal incarceration could still face indefinite detention under immigration laws, completely untethered from the statutory purpose of removal.

48. Immigration detention was never intended to serve as a substitute for criminal detention or as a tool for managing public safety concerns once removal is no longer feasible. The purpose of immigration detention is to ensure that individuals do not pose a danger to the public *and* remain available for removal while an active immigration process is ongoing.[85] Once removal is no longer possible, continuing detention transforms the system into a preventive detention regime.[86] Even in cases involving national security, like those under security certificates, detention becomes

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[83] *FC Decision*, *supra* note 25 at para 4; *Ibid* at para 76.
[84] *Suleiman*, *supra* note 62 at para 57; see also *Canada (Public Safety and Emergency Preparedness) v Taino*, 2020 FC 427.
[85] *Sahin v Canada (Minister of Citizenship and Immigration) (TD)*, 1994 CanLII 3521 (FC) at 227 j [*Sahin*]; Canada Border Services Agency, Archived - CBSA's New National Immigration Detention Framework (CBSA, 2017) <www.cbsa-asfc.gc.ca/agency-agence/consult/consultations/nidf-cnmdi/menu-eng.html> [*NNIDF*].
[86] *Charkaoui*, *supra* note 45 at para 106.

impermissible if removal is no longer viable.[87]

49. Detention solely on the basis of danger to the public poses serious risk including normalization of indefinite detention and discriminatory application of immigration law.[88] In *Charkaoui*, two primary risks were identified in which the *IRPA* could, in certain circumstances, result in discrimination.[89] First, detention may become indefinite if deportation is delayed or becomes impossible due to a lack of cooperation from the receiving state violating the *IRPA*'s scope.[90] Second, the government could misuse immigration detention for security purposes, holding individuals not for the purpose of removal but to manage perceived public safety risks.[91] Both scenarios create an unequal system where non-citizens face harsher treatment than citizens under criminal law.

50. Detention cannot be based solely on public safety concerns, as this shifts immigration detention from an administrative measure facilitating deportation to punitive incarceration— an approach that is not even consistent with the *Criminal Code*'s sentencing provisions.[92] Section 718 of the *Criminal Code* outlines the legitimate purposes of criminal punishment which includes denunciation, deterrence, rehabilitation, and accountability.[93] It also specifies that separating offenders from society is justified "where necessary," emphasizing that detention is not an automatic measure but rather a proportional response within a structured legal framework.[94]

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[87] *Ibid* at para 126.
[88] *Ibid*.
[89] *Ibid*.
[90] *Ibid*.
[91] *Ibid*.
[92] *Ibid* at para 106; *Criminal Code*, RSC 1985, c C-46, s 718 [*Criminal Code*].
[93] *Criminal Code*, *supra* note 92, s 718.
[94] *Ibid*, s 718 (c).

51. Immigration detention is not meant to function as a parallel criminal justice system with fewer legal safeguards. Under this scheme, the government bears a heavy burden and must meet a strict legal test, satisfying a judge beyond a reasonable doubt of the likelihood of future danger that an offender presents to society based on evidence of both retrospective and prospective danger.[95] This process, which has been upheld as constitutional by the Supreme Court of Canada, includes safeguards such as expert assessments and evidence of both past and future danger.[96]

52. Parliament has already devised a preventative detention scheme to ensure that liberty is deprived only when justified under rigorous standards. Therefore, if the criminal justice system, which is explicitly designed to address public safety concerns, does not justify indefinite detention solely based on risk, immigration detention cannot exceed this standard. By contrast, the immigration regime does not contemplate indefinite detention of an individual when removal is not possible. In Mr. Deng's case, no authority sought to keep him incarcerated after he served his criminal sentence. As a result, there is no reason why Mr. Deng should be held in immigration detention due to his past crimes, which he has completed his sentence for. Mr. Deng's current detention has become akin to criminal incarceration and untethered from an immigration purpose.

53. If the government considered Mr. Deng to be a significant threat warranting incarceration, it had the option to invoke the Dangerous Offender provisions or other legal mechanisms which require a higher evidentiary standard.[97] The Dangerous Offender provisions in the *Criminal Code* impose a strict legal test and apply to individuals convicted of violent crimes who have a history

[95] *R v Boutilier*, 2017 SCC 64 at para 23, 36 [*Boutilier*]; *R v Sipos*, 2014 SCC 47 at para 20.
[96] *R v Lyons*, 1987 CanLII 25 (SCC) at paras 119-121; *Boutilier, supra* note 96 at paras 23, 36.
[97] *Criminal Code, supra* note 92, s 753; see also *Mental Health Act*, RSO 1990, c M.7, ss. 20(1)(c), 20(1.1)(a)-(f), 20(4)(a)-(b) [*Mental Health Act*].

of violent offenses and a high likelihood of reoffending.[98] In those situations, the Crown may apply to the sentencing court to have them designated a Dangerous Offender. The primary goal of this regime is public protection and the prevention of future violence. Generally, such applications cannot be made after an offender has been sentenced or completed their sentence.[99]

54. In immigration law, however, a designation of "danger to the public" lacks the same rigorous justification. Without the requirement of expert assessment and fixed timelines, danger to the public alone cannot justify indefinite detention.

55. The provincial *Mental Health Act* also provides mechanisms for involuntary treatment where mental health issues pose a danger to the individual or others.[100] The government's failure to act during Mr. Deng's incarceration demonstrates that the risk assessment at that time did not support such measures. This failure calls into question the legitimacy of the current justification for his detention, as it suggests a lack of procedural diligence and undermines the argument that he now poses a sufficiently serious threat to warrant continued detention. Canada's existing systems reflect a commitment to balancing public safety with procedural fairness and individual rights.[101] The failure to apply those systems earlier highlights the arbitrary nature of Mr. Deng's current detention, which underscores how the government fails to use the least restrictive means necessary.

56. It is fundamentally flawed that an individual who has served their criminal sentence and is

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[98] *Criminal Code*, *supra* note 92, s 763(1).
[99] British Columbia Prosecution Service, Dangerous Offenders and Long-Term Offenders (April 2019), online (infographic): <www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/prosecution-service/information-sheets/infosheet_dangerous_offenders_long_term_offenders.pdf>.
[100] *Mental Health Act*, *supra* note 97, ss 20(1)(c), 20(1.1)(a)-(f), 20(4)(a)-(b).
[101] *IRPA*, *supra* note 33, s 3(1)(f.1) & (i).

no longer deemed dangerous enough for criminal incarceration could still face indefinite detention under immigration laws. Such an approach erodes public trust in the immigration system, fosters inequality, and promotes discriminatory practices against vulnerable individuals.

2) Alternatives to detention must be prioritized

57. Mr. Deng's detention should not be ordered solely on the basis of danger to the public, as the ID has both the statutory mandate and the ability to impose release conditions that adequately address any potential risks.[102] Section 248 of the *Regulations* requires the ID to consider alternatives to detention, such as bonds or guarantees, reporting requirements, geographic restrictions, or less restrictive forms of detention — before a detention order is made.[103] These alternatives reflect a fundamental principle of immigration detention law: detention should only be used as a last resort when no appropriate alternatives exist.[104] Moreover, alternatives to detention effectively balance public safety concerns with detainees' *Charter* rights, and the ID has the discretion to modify conditions to address any ongoing risks.[105] These alternatives avoid the harms associated with indefinite detention akin to criminal incarceration.

58. Mr. Deng's criminal conduct must be understood within the broader context of his untreated mental health struggles, trauma, substance dependency, and homelessness — issues stemming from his experiences as a refugee from South Sudan.[106] His offenses occurred during a period of intense mental health struggles exacerbated by a lengthy wait for his refugee hearing and

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[102] *Brown*, *supra* note 35 at para 37.
[103] *Ibid* at para 33; *Sahin*, *supra* note 85 at 231; *Regulations*, *supra* note 34, s 248.
[104] *Brown*, *supra* note 35 at para 37; *NNIDF*, *supra* note 85.
[105] *Mawut* 2022, *supra* note 56 at para 34; *Charkaoui*, *supra* note 45 at paras 110-117; *Canada (Public Safety and Emergency Preparedness) v Chhina*, 2019 SCC 29 at para 140.
[106] *R v Gladue*, 1999 CanLII 679 (SCC) at paras 66-68.

the subsequent denial of his claim.

59. After his refugee claim was denied in January 2022, Mr. Deng testified to experiencing feelings of hopelessness, which contributed to his alcohol use.[107] Notably, for the two years following his arrival in Canada in March 2019, Mr. Deng had no criminal conduct. His first serious offense, assault causing bodily harm, occurred in November 2021,[108] during the stressful wait for the outcome of his refugee claim. His behaviour is not rooted in inherent danger but in personal struggles that require treatment and community-based support, not indefinite detention without access to rehabilitation.

60. The CBSA's New National Immigration Detention Framework acknowledges that detention should be avoided or used only as a last resort for vulnerable individuals, such as those with mental health conditions, unless safety or security concerns exist.[109] If detention is necessary, it must be limited to the shortest duration possible and focused on facilitating removal.[110]

60. Even detainees with serious criminal histories have been safely released with the imposition of appropriate conditions, suggesting alternatives to detention can adequately mitigate risks while respecting *Charter* rights.[111] Mr. Deng's situation is no different. His circumstances clearly demonstrate that alternatives to detention — combined with appropriate support — would address public safety concerns more effectively than indefinite detention. A structured release plan focused on rehabilitation and reintegration would mitigate risk and promote long-term stability.

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[107] *ID Decision*, *supra* note 1 at para 4.
[108] *Ibid* at para 5.
[109] *NNIDF*, *supra* note 85.
[110] *Ibid*.
[111] *Suleiman*, *supra* note 62 at paras 8, 27; *Canada (Minister of Citizenship and Immigration) v Romans*, 2005 FC 435 at paras 7, 74-76.

3) Mr. Deng's cooperation demonstrates a willingness to comply

62. The cooperation of a detainee is a relevant consideration for the ID when determining alternatives to detention.[112] In *Kidane*, the FC upheld prolonged detention as the detainee was largely responsible for procedural delays.[113] By contrast, CBSA has acknowledged that Mr. Deng has fully cooperated in establishing his identity and obtaining a travel document. He has also complied with all legal obligations, including attending court, pleading guilty, and serving his sentences without incident.

63. If public safety concerns persist, detention is not the sole or necessary solution. Mr. Deng's compliance with the legal process indicates that he is likely to adhere to any release conditions and appear for removal once scheduled. As a result, continued detention cannot be justified on public safety grounds alone when removal is uncertain.

E) Mr. Deng's detention without the possibility of removal violates section 7 of the *Charter*

64. Detaining a non-citizen solely for public safety reasons — without advancing removal — raises serious *Charter* concerns.[114] While the immigration detention scheme under the *IRPA* has been upheld as constitutionally compliant, Mr. Deng's indefinite detention violates the principles of fundamental justice and his s. 7 *Charter* rights.[115]

65. The FC, in *Sahin*, confirmed that in certain circumstances, "lengthy, indefinite detention is contrary to the principles of fundamental justice" and a violation of an individual's s. 7 *Charter*

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[112] *Brown, supra* note 35 at para 148.
[113] *Kidane v Canada (Minister of Citizenship and Immigration)*, 1997 CanLII 5356 (FC) at paras 8-9.
[114] *ID Decision, supra* note 1 at para 16.
[115] *Charkaoui, supra* note 45 at para 123.

rights.[116] Mr. Deng's right to liberty and security of the person have been deprived through indefinite detention with no clear end in sight, violating the principles of fundamental justice. His detention is arbitrary, overbroad, and grossly disproportionate, rendering it unconstitutional.

66. *Doré* established that when an administrative decision implicates *Charter* rights, the reviewing court should apply an administrative law framework rather than a traditional s. 1 analysis.[117] The Court determined that the *Oakes* test was poorly suited for reviewing discretionary decisions because, unlike legislation, such decisions cannot be assessed based on their objective, rational connection, minimal impairment, and proportional effects.[118]

67. Although distinct from the *Oakes* test, the *Doré* approach is conceptually similar, as both require balancing *Charter* rights against broader statutory objectives.[119] Under the *Doré/Loyola* framework, the reviewing court must answer two key questions: (1) does the administrative decision engage an individual's *Charter* rights; and (2) does the decision reflect a proportionate balancing of *Charter* protections with the statutory objective.[120]

1) Mr. Deng's detention engages his liberty and security of the person

68. All individuals physically present in Canada are entitled to the protection of section 7, which safeguards liberty against physical restraint, including not only actual imprisonment or arrest, but also the use of state power to compel attendance at a specific location.[121] Mr. Deng has been subjected to indefinite detention by the ID, without any indication of a release or removal

[116] *Sahin*, *supra* note 85 at 231.
[117] *Doré v Barreau du Québec*, 2012 SCC 12 at paras 3-6 [*Doré*].
[118] *Ibid* at paras 37-38.
[119] *Ibid* at para 5.
[120] *Ibid* at para 6; *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12 at para 35.
[121] *Singh v Minister of Employment and Immigration*, 1985 CanLII 65 (SCC) at 202; *Charkaoui*, *supra* note 45 at paras 17-18; *R v Ndhlovu*, 2022 SCC 38 at para 51.

date, thereby constituting a deprivation of his rights under s. 7 of the *Charter*.

69. In *Brown*, the FCA acknowledged that prolonged detention can affect the detainee's liberty interests to such an extent that it may violate *Charter* rights.[122] In such cases, release may be warranted even if deportation remains a possibility.[123] Given that Mr. Deng has been detained for over a year with no realistic prospect of removal, his detention imposes significant harm on his liberty and well-being. The conditions of his detention are disproportionate and unjust, particularly given his mental health struggles and the lack of progress toward removal.

70. Additionally, indefinite detention engages security of the person because the psychological stress, uncertainty, and potential for inhumane treatment within detention facilities can cause significant mental and physical harm.[124] The lack of a clear timeline for release creates prolonged distress and undermines human dignity.[125]

71. Given the absence of a clear timeline, the prolonged nature of Mr. Deng's detention inflicts significant harm with respect to his personal security and autonomy. The authorization of Mr. Deng's indefinite detention engages and deprives him of his liberty and security rights, satisfying the first component of the test.

2) The deprivation is not in accordance with the principles of fundamental justice because all three factors of arbitrariness, overbreadth, and gross disproportionality are violated

72. To determine whether the deprivation of liberty and security of the person is justifiable

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[122] *Brown*, *supra* note 35 at para 15.
[123] *Ibid* at para 92; citing *Charkaoui*, *supra* note 45 at paras 125-127.
[124] Human Rights Watch, Amnesty International, "I Didn't Feel Like a Human in There, Immigration Detention in Canada and its Impact on Mental Health" (June 2021), online : < https://amnesty.ca/sites/amnesty/files/canada0621_web.pdf > at 19.
[125] *Ibid* at 88-89.

under section 7, Mr. Deng's ongoing detention must not violate the principles of arbitrariness, overbreadth, or gross disproportionality.[126]

73. Under the *IRPA*, the purpose of detention is to ensure individuals do not pose a danger to society, and to protect the health and safety of Canadians.[127] This process ensures that the detainee is available for removal while immigration proceedings are in progress.[128] However, any measure that restricts liberty must be rationally connected to this purpose and must not exceed what is necessary to achieve it.

74. Mr. Deng's detention is arbitrary if it has no rational connection between its purpose and its effects.[129] While the *IRPA* aims to protect public safety and facilitate removal by securing his identity, Mr. Deng's continued detention is arbitrary because removal is not realistically possible due to the inability to confirm his identity. Since his detention no longer serves the statutory objective of removal, the only remaining effect is punishment.

75. Mr. Deng's detention is overbroad if it "interferes with some conduct that bears no connection to [achieve] its objective".[130] By failing to tailor detention to those for whom it is necessary, the decision extends detention beyond its intended purpose. As a result, it unjustifiably detains individuals where it is unwarranted, imposing a disproportionate restriction on liberty. Furthermore, the failure to consider less restrictive alternatives underscores the excessive and unnecessary impact of detention, as viable and effective alternatives exist that could achieve the

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[126] *Canada (Attorney General) v Bedford*, 2013 SCC 72 at para 57-58, 125 [*Bedford*]; *Carter v Canada (Attorney General)*, 2015 SCC 5 at para 80.
[127] *IRPA*, *supra* note 33, ss 3(2)(g), 3(1)(h); *Sahin*, *supra* note 85 at 227-228.
[128] *Sahin*, *supra* note 85 at 227 j; *NNIDF*, *supra* note 85.
[129] *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44 at paras 129-130.
[130] *Bedford*, *supra* note 126 at paras 101, 112-13.

same objectives without resorting to prolonged confinement.

76. Mr. Deng's detention is grossly disproportionate if its effects are so severe that they are entirely out of sync with the law's objectives.[131] Indefinite detention places immigration detainees in conditions similar to those of criminal incarceration, often for years, even when they have committed no crime. In Mr. Deng's case, the psychological harm, lack of access to proper medical care, and lack of certainty about release make this deprivation grossly disproportionate to the government's objective of ensuring immigration compliance, especially given his cooperation with removal efforts.

77. Mr. Deng's prolonged detention, in the absence of realistic prospects for removal, serves no rational connection to the statutory objectives of the *IRPA*. Instead, it serves as a punishment rather than a valid immigration purpose. His detention is overbroad, extending detention beyond what is necessary and failing to consider less restrictive alternatives that could achieve the same objectives. Most critically, the prolonged deprivation of Mr. Deng's liberty is grossly disproportionate to the government's stated goals, causing significant psychological harm and uncertainty. Mr. Deng's continued detention is unjustifiable and should be reconsidered in light of the disproportionate harm it causes.

3) Mr. Deng's detention does not reflect a proportionate balancing of *Charter* protections with the statutory objective

78. The interference with Mr. Deng's *Charter* rights as a result of his detention is not proportionately balanced with the government's statutory objectives.[132] The *IRPA*'s objectives

[131] *Ibid* at paras 101, 112-13, 120-121.
[132] *Doré*, *supra* note 118 at para 6.

emphasize respect for human rights, including the rights to liberty and security.[133] Detaining an individual should not unnecessarily interfere with these rights, especially if less restrictive measures could achieve the same goals.

79. The government has other statutory tools available under criminal law, such as the Dangerous Offender provisions, which provide more appropriate and legally rigorous mechanisms for addressing public safety concerns.[134] However, the government pursued indefinite immigration detention under a lower standard of proof. Mr. Deng is being detained despite his cooperation, and indefinite detention is causing harm to his mental health. This interference with his *Charter* rights exceeds what is necessary for achieving the statutory objectives.

80. There is no longer a rational connection between Mr. Deng's detention and its immigration purpose. The lack of time limits, failure to consider alternatives, and disproportionate impact make the decision unreasonable and unconstitutional. Holding Mr. Deng in detention is unjust and the Minister has a burden to show that alternatives are impractical or insufficient.[135] Given the Minister's failure to demonstrate the insufficiency of alternatives to detention, Mr. Deng's indefinite detention is not minimally impairing of his *Charter* rights.

81. The prolonged and disproportionate nature of Mr. Deng's detention, coupled with the failure to consider less restrictive alternatives to detention, renders his detention unconstitutional. The government's justification of public danger is unsubstantiated by the available legal mechanisms, and its failure to utilize appropriate mental health programs progressively weakens the grounds for continued detention. Therefore, Mr. Deng's detention is unreasonable, and a

[133] *IRPA, supra* note 33, s 3(1)(h)&(i).
[134] *Criminal Code, supra* note 92, ss 752, 752.01, 735.
[135] *Charkaoui, supra* note 45 at para 113.

violation of his fundamental rights under the *Charter* in a way that is disproportionate to the statutory objectives.

PART IV: ORDERS SOUGHT

82. The appeal should be granted, and the certified questions answered in the negative. All of which are respectfully submitted on the 7th day of February 2025.

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Team 80 A
Counsel for the Appellant

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Canada (Minister of Citizenship and Immigration) v Romans, 2005 FC 435.	61
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Canada (Public Safety and Emergency Preparedness) v Chhina, 2019 SCC 29.	57
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Carter v Canada (Attorney General), 2015 SCC 5.	72
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Doré v Barreau du Québec, 2012 SCC 12.	66, 67, 78
Hemond v Canada (Citizenship and Immigration), 2024	25

FC 1980.	
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Deng v Canada (Citizenship and Immigration), 2024 FC 97450.	12, 13, 14, 27, 45