



David Asper Centre for Constitutional Rights
UNIVERSITY OF TORONTO

**Caselaw Compendium on the Legal Requirements for a
Fair Immigration Detention Review Hearing**

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INTRODUCTION

The Immigration and Refugee Board of Canada recently revised *Chairperson Guideline 2: Detention* (hereafter ‘*Guideline*’)³ containing guidelines for immigration detention review hearings. Many of the ‘guidelines’ reflect legally binding obligations under the *Canadian Charter of Rights and Freedoms*, the *Immigration and Refugee Protection Act* and *Regulations*, or Federal Court or Supreme Court caselaw. Our Caselaw Compendium complements the *Guideline* by accentuating where specific guidelines are legally binding requirements for a fair immigration detention review hearing. The David Asper Centre for Constitutional Rights’ objective is to provide counsel with a helpful resource for drawing the Immigration Division Member’s (hereafter ‘ID Member’) attention to the source of its legal obligations beyond the *Guideline* alone.

GENERAL PRINCIPLES

1. Compliance with the *Charter*: Every deprivation of an affected person’s life, liberty and/or personal security interests, resulting from any aspect of the immigration detention system, will engage section 7 of the *Canadian Charter of Rights and Freedoms* and should be consistent with the principles of fundamental justice: *Charkaoui v Canada (MCI)*, 2007 SCC 9 at paras 18 and 27; *Charkaoui v Canada (MCI)*, 2008 SCC 38 at para 53; *Suresh v Canada (MPSEP)*, 2002 SCC 1 at

³ <https://irb-cisr.gc.ca/en/legal-policy/policies/Pages/GuideDir02.aspx>

paras 113-114; *Brown v Canada (MCI)*, 2017 FC 710 at para 113; *Sahin v Canada (MCI)*, 1995 1 FC 214 at 14; *Guideline* 1.1.9 and 1.1.13.

IRPA’s Application: An ID member should bear *Charter* principles in mind when applying and interpreting the *IRPA*: *IRPA*, s 3(3)(d); *Brown*, 2017 FC 710 at paras 4-5; *Guideline* 1.1.4.

Greater Deprivation, Greater Safeguards Principle: The ID Member must ensure sufficient procedural safeguards to satisfy the principle that the greater the impact of the person’s life, liberty and personal security interests, “the greater the need for procedural protections to meet the common law duty of fairness and the requirements of fundamental justice under s 7 of the *Charter*”: *Suresh*, 2002 SCC 1 at para 118; *Charkaoui*, 2007 SCC 9 at para 25.

ID Must Conduct a Fair Hearing: As a general rule, a breach of procedural fairness will void the hearing and the resulting decision: *Cardinal v Kent Institution*, [1985] 2 SCR 643 at para 23; *Singh Dhaliwal v Canada (MCI)*, 2011 FC 201 at para 25.

2. Meaningful and Robust Review: The affected person must have a meaningful and robust review with consideration of the context and circumstances of the specific case: *Charter*, s 7; *Charkaoui*, 2007 SCC 9 at para 29; *Canada (MCI) v Harkat*, 2014 SCC 37 at para 4; *Canada (MCI) v Li*, 2009 FCA 85 at para 68; *Brown*, 2017 FC 710 at para 113; *Canada (MCI) v Mahjoub*, 2009 FC 248 at para 20; *Guideline* 1.1.8.

Awareness of Rights: The ID Member must ensure that the affected person understands her right to a fair and *Charter*-compliant judicial process, and any associated rights: *Guideline* 7.3.1.

Right to be Reasonably Informed: The ID Member must ensure that the affected person is “reasonably informed of the Minister’s case.” The affected person may have a right to access relevant evidence: *Harkat*, 2014 SCC 37 at para 50; *Charkaoui*, 2007 SCC 9 at para 29; *Charkaoui (Re)*, 2003 FC 1419 at paras 47 and 69; *Brown*, 2017 FC 710 at paras 124-128, 159; *Allen v Canada (PSEP)*, 2018 FC 486 at paras 54-57, 75.

Meaningful Opportunity to Challenge: The ID Member must provide the affected person with a meaningful opportunity to challenge their detention: *Charkaoui*, 2007 SCC 9 at paras 29, 53, and 96; *Mahjoub*, 2009 FC 248 at para 20; *Sharma v Canada (MPSEP)*, 2016 FCA 319 at para 34; *Guideline* 1.1.8.

Right to Present Evidence: The ID Member must allow the affected person to present relevant evidence and question witnesses: *Charkaoui*, 2007 SCC 9 at para 29; *Li*, 2011 FC 196 at para 11; *Guideline 7.3.1*.

Right to Cross-Examine: The ID Member must allow the affected person to cross-examine the Minister's witnesses, or else must give clear reasons why procedural fairness does not require cross-examination of a particular witness: *Charkaoui*, 2007 SCC 9 at para 29; *Nagalingam v Canada (MCI)*, 2012 FC 176 at paras 162-165 and 171; *Solmaz v Canada (MPSEP)*, 2018 CanLII 112332 (CA IRB) at para 10; *Guideline 7.3.1*

Independent and Impartial Decisionmaker: The ID Member must approach each case with an open mind and, at all times, must be, and must appear to be, independent, impartial, and objective: *Charkaoui*, 2007 SCC 9 at paras 29 and 32; *Scotland v Canada (AG)*, 2017 ONSC 4850 at para 63; *Guideline 1.1.18*.

Non-Deferential Independence: The ID Member must independently make the determinations assigned by Parliament. The ID Member must not uncritically accept the opinions of the Minister, the CBSA, a criminal court, a parole board, or any other relevant person or institution: *Charkaoui*, 2007 SCC 9 at paras 39-42; *Sahin*, 1995 1 FC 214 at 17; *Scotland*, 2017 ONSC 4850 at para 61; *Guideline 2.2.6-2.2.8*.

Right to Hire Counsel: The ID Member must offer to the affected person the opportunity to seek assistance from counsel: *Sharma*, 2016 FCA 319 at para 34.

Capacity to Understand: The ID Member must establish that the affected person has the capacity to understand the immigration detention review proceedings: *Burton v Canada (MPSEP)*, 2018 FC 753 at para 26; *Singh Dhaliwal*, 2011 FC 201 at para 15.

Right to an Interpreter: The ID Member must ensure that the affected person's right to an interpreter is discharged, when the affected person does not sufficiently understand or speak the language in which the proceeding is conducted: *Kamara v Canada (MCI)*, 2011 FC 243 at para 41; *Igbinsosa v Canada (MPSEP)*, 2008 FC 1372 at para 51; Rule 17(1) ID Rules.

Designated Representative: The ID Member must designate a representative where the affected person is under 18 years of age, or the person is unable to appreciate the nature of the proceedings: *IRPA*, s 167(2); *Guideline 6.1.1*.

3. Reasonable, Necessary and Proportionate: Deprivations of Section 7 Interests: Detention and other deprivations of an affected person's life, liberty and/or personal security interests must be

reasonable, necessary and proportionate, in the particular circumstances of the case: *Brown*, 2017 FC 710 at paras 142-152; *Guideline* 1.1.9.

Minimal Deprivation of Liberty: The ID Member must ensure that any conditions of release affect the affected person's liberty as little as possible: *Charkaoui*, 2007 SCC 9 at paras 116-117; *Tursunbayev v Canada (MPSEP)*, 2014 FC 5 at para 25; *Guideline* 1.1.12.

IMMIGRATION DETENTION REVIEW HEARINGS

1. Public Hearing: Detention review hearings must generally be public hearings, but will be held in the absence of the public if they concern a person who has applied to the Minister for protection or who is the subject of proceedings before the Refugee Protection Division or Refugee Appeal Division: *IRPA*, s 166; *Harkat*, 2014 SCC 37 at paras 24 and 77; *Guideline* 7.1.1.; Rule 45 ID Rules.

2. Informal Hearing: Detention review hearings as informal proceedings must nonetheless accord with the principles of fundamental justice: *Brown*, 2017 FC 710 at para 122; *Allen v Canada (MPSEP)*, 2018 FC 486 at para 38; *Guideline* 7.1.2.

3. Timeframe: The ID must honour the statutory obligation to conduct a detention review hearing and deliver a decision within the timeframe set out in section 57 of the *IRPA*, unless the principles of fundamental justice support a minor deviation: *IRPA*, s 173; *Charkaoui*, 2007 SCC 9 at para 29; *Guideline* 9.1.1-9.1.2.

Possible Earlier Review: The ID Member must consider application for an early detention review based on new facts: *Guideline* 9.1.4.; Rule 9 ID Rules.

4. Release as Starting Point: The ID Member must order the release of a permanent resident or a foreign national, unless one of the grounds for detention is met: *IRPA*, s 58(1); *Lunyamila v Canada (MPSEP)*, 2018 FCA 22 at para 9; *Allen*, 2018 FC 486 at para 36; *Canada (MCI) v Thanabalasingham*, 2004 FCA 4 at paras 6-16; *Guideline* 1.1.6, *Guideline* 2.1.1.

Awareness of Duty to Release: The ID Member must ensure that the affected person is aware of the ID's legal obligation to release, unless the Minister has discharged the onus to prove, on a balance of probabilities, that there is a statutory ground for detention: *Guideline* 7.2.1.

5. Onus: The onus is always on the Minister of Public Safety and Emergency Preparedness, or the Canada Border Service Hearings Officer as the Minister's delegate, (hereafter, 'the Minister') to

demonstrate, on a balance of probabilities, in light of all the case's circumstances, that there are sufficient reasons to warrant detention: *Thanabalasingham*, 2004 FCA 4 at para 16; *Brown*, 2017 FC 710 at paras 139 and 159(b); *Chaudhary v Canada (MPSEP)*, 2015 ONCA 700 at para 85; *Guideline* 1.1.6.

Burden Increases with Detention's Length: The Minister's burden for justifying the affected person's continued detention increases with the detention's duration: *Charkaoui*, 2007 SCC 9 at para 113; *Ahmed v Canada (MCI)*, 2015 FC 792 at para 32; *Guideline* 3.1.5.

6: Fresh Consideration: The ID Member must consider the evidence and arguments afresh at each detention review and come to his/her own independent determination of whether the affected person should be released or further detained: *Thanabalasingham*, 2004 FCA 4 at paras 8, 24; *Brown*, 2017 FC 710 at para 159(d); *Canada (MPSEP) v Ali*, 2016 FC 661 at para 28; *Guideline* 1.1.7; *Guideline* 7.2.4.

7. Prescribed Factors: The ID Member must consider the prescribed factors set out in sections 245 to 247 of the *IRPR*, where they are relevant: *IRPA*, s 58(1); *Guideline* 1.1.7, *Guideline* 2.1.3.

8. Additional Factors: In addition to the factors prescribed in the *IRPR*, the ID member must consider all relevant factors, including those set out in section 248 of the *IRPR*: *Charkaoui*, 2007 SCC 9 at paras 110-117; *Canada (MPSEP) v Lunyamila*, 2016 FC 1199 at para 19; *Sahin*, 1995 1 FC 214 at 14-15; *Guideline* 1.1.7 and 2.1.3.

EVIDENCE AND DISCLOSURE

1. Right to Present Evidence: The ID Member must allow the affected person to present relevant evidence, including witnesses: *Charkaoui*, 2007 SCC 9 at para 29; *Li*, 2011 FC 196 at para 11; *Guideline* 7.3.1.

2. Right to Disclosure: The ID Member must ensure that the Minister discloses any information or evidence upon which the case relies to the affected person, counsel or the special advocate: *Harkat*, 2014 SCC 37 at para 35; *Charkaoui*, 2008 SCC 38 at para 56; *Allen*, 2018 FC 486 at para 48; *Guideline* 7.3.2. and 7.3.4.

Undisclosed Evidence: The ID Member must not consider any of the Minister's claims based on undisclosed information or evidence, if the affected person has challenged it: *Harkat*, 2014 SCC 37 at paras 59-60; *Guideline* 7.3.2.

Request to Summon Enforcement Officer: The ID Member must consider any request to summon an Enforcement Officer to provide testimony: *Brown*, 2017 FC 710 at para 159(g); *Guideline 7.3.3.*; Rule 33 ID Rules.

Potential Testimony of Enforcement Officer: The ID Member must independently consider whether to summon an Enforcement Officer to provide testimony to fill a gap in the evidentiary record, particularly where the affected person is not represented by counsel: *Brown*, 2017 FC 710 at para 159(g); *Guideline 7.3.3.*

3. Right to Scrutinize and Challenge Evidence: The ID Member must ensure that the affected person has an opportunity to scrutinize and challenge, as well as raise evidence against, any evidence against her: *Brown*, 2017 FC 710 at para 159(g) and (h); *Guideline 7.3.2.*

4. Right to Reasonable Advanced Notice and Disclosure: The ID Member must ensure that the affected person has reasonable advanced notice of the evidence and information upon which the Minister will rely: *Brown*, 2017 FC 710 at para 159(g); Rule 26 ID Rules; *Guideline 7.3.3.*

5. Right to an Adequate Remedy for Nondisclosure: The ID Member must provide an adequate remedy for the Minister’s failure to provide reasonable advanced disclosure: *Brown*, 2017 FC 710 at para 128.

NECESSARY CONSIDERATIONS

1. Present and Future Danger: Where section 58(1)(a) is relevant, the ID Member must independently assess whether the affected person represents a “present and future danger to the public”: *Sahin*, [1995] 1 FC 214 at 17; *Guideline 2.2.3.*

Initial Determination: Where section 58(1)(a) is relevant, the ID Member must independently consider the circumstances leading to the initial determination of danger to the public: *Guideline 2.2.10.*

2. Non-Compliance: Where section 58(1)(b) is relevant, the ID Member must not treat as determinative the affected person’s non-compliance with orders from a legal authority, including the ID, the Minister, and the CBSA: *Guideline 2.3.4.*

Totality of Compliance and Non-Compliance: Where section 58(1)(b) is relevant, the ID Member must consider the totality of the affected person’s compliance and non-compliance in

the context of the particular circumstances, including the reasons, severity, frequency, and consequences of any non-compliance: *Guideline 2.3.5*.

3. Minister's Investigation of Suspicion: Where section 58(1)(c) is relevant, the ID Member must independently determine whether the Minister has taken necessary steps to investigate any suspicion relating to security, violating human or international rights, criminality, serious criminality, or organized criminality: *Guideline 2.4.2*.

Minister's Diligence: Where section 58(1)(c) is relevant, the ID Member must independently determine whether the Minister has been diligently and expeditiously conducting a good faith investigation of any suspicion relating to security, violating human or international rights, criminality, serious criminality, or organized criminality: *Brown, 2017 FC 710 at para 159(a); Guideline 2.4.3*.

4. Minister's Efforts to Establish Identity: Where section 58(1)(d) is relevant, the ID Member must independently determine whether the Minister has made reasonable efforts to establish the foreign national's identity: *Guideline 2.5.2*.

Reasonable Potential to Confirm Identity: Where section 58(1)(d) is relevant, the ID Member must independently determine whether the Minister's actual acts have a reasonable potential to confirm the foreign national's identity: *Li, 2009 FCA 85 at para 68; Guideline 2.5.4*.

Reasonableness of Requests for Cooperation: Where section 58(1)(d) is relevant, the ID Member must independently determine whether the Minister's specific requests for the foreign national's cooperation are reasonable in the particular circumstances of the individual case: *Guideline 2.5.3*.

Efforts to Establish Identity: Where section 58(1)(d) is relevant, the ID Member must assess the Minister's and foreign national's efforts to establish her identity: *IRPA, s 288(d); Ali, 2016 FC 1406 at para 19; Lunyamila, 2016 FC 1199 at paras 29-30; Guideline 2.5.3*.

Non-Cooperation is Not Determinative: Where section 58(1)(d) is relevant, the ID Member must not treat the foreign national's non-cooperation as determinative: *Lunyamila, 2016 FC 1199 at para 84; Guideline 3.1.9*.

5. Independent Release or Detain Decision: Where the ID Member has independently determined that at least one of the grounds under section 58(1) has been met, the ID Member must nevertheless still independently assess whether to release or detain the affected person, after

considering all relevant circumstances and factors, including those listed in section 248: *Lunyamila*, 2016 FC 1199 at para 19; *Guideline* 3.1.1.

6. Actual and Anticipated Length of Detention: Under section 248, the ID Member must consider the actual and anticipated length of detention: *Lunyamila*, 2016 FC 1199 at para 32; *Chaudhary*, 2015 ONCA 700 at para 82; *Guideline* 3.1.6.

Indefinite Detention: The indefinite anticipated length of detention may be determinative of the affected person’s release insofar as it indicates that the detention does not serve a legitimate and achievable immigration purpose: *Charkaoui*, 2007 SCC 9 at para 123; *Sahin*, 1995 1 FC 214 at 13; *Guideline* 3.1.6.

No Speculation about Potential Proceedings: ID Members may not base their predictions about an individual’s anticipated future length of detention on speculation about forthcoming Ministerial decisions or proceedings that parties could bring: *Li*, 2009 FCA 85 at para 78; *Liu*, 2008 FC 1297 at para 17.

7. Non-Cooperation is Not Determinative: Under section 248, the ID Member must not treat as determinative the affected person’s non-cooperation with the Minister’s removal efforts: *Toure v Canada (MPSEP)*, 2018 ONCA 681 at para 46; *Ali v Canada (AG)*, 2017 ONSC 2660 at paras 25-27; *Lunyamila* 2016 FC 1199 at paras 84-86; *Guideline* 3.1.9.

LENGTHY DETENTION

1. Arbitrary Detention is Prohibited: Indefinite detention that does not serve a legitimate and achievable immigration purpose will amount to an arbitrary detention contravening section 9 of the *Charter*: *Charkaoui*, 2007 SCC 9 at paras 89 and 127; *Ali*, 2017 ONSC 2660 at para 27; *Li*, 2009 FCA 85 at para 41; *Guideline* 3.1.6.

Apparent Indefinite Detention: A detention appears indefinite “when any number of possible steps may be taken by either side and the times to take each step are unknown”: *Sahin*, [1995] 1 FC 214 at 13.

No Reasonable Prospect of Removal: The ID Member must not order continued detention where there is no reasonable prospect that the process will end with the affected person’s removal from Canada: *Ali*, 2017 ONSC 2660 at para 39; *Chaudhary*, 2015 ONCA 700 at para 81; *Toure*, 2018 ONCA 681 at para 30; *Toure*, 2017 ONSC 5878 at para 20; *R v Ogiamien*,

2016 ONSC 4126 at para 85; *Charkaoui*, 2007 SCC 9 at paras 117, 123; *Brown*, 2017 FC 710 at paras 4 and 151; *Sahin*, [1995] 1 FC 214.

2. Legitimate and Achievable Immigration Purpose: Detention must serve a legitimate and achievable immigration purpose to comply with the *Charter*: *Toure*, 2018 ONCA 681 at paras 13-15; *Charkaoui*, 2007 SCC 9 at para 81; *Ali* 2017 ONSC 2660 at para 27; *Brown*, 2017 FC 710 at para 144; *Scotland* at para 59; *Guideline* 3.1.5.

3. Actual Prospect of Removal: The ID Member must carefully review all the Minister's efforts to remove the affected person from Canada, including an assessment of the likelihood of removal given the *actual* circumstances: *Li*, 2009 FCA 85 at para 68; *Guideline* 7.3.8.

Reasonable Legal Challenges are Excluded: The ID Member must not count against the affected person any delays resulting from the diligent exercise of reasonable legal challenges: *Charkaoui*, 2007 SCC 9 at para 114; *Li*, 2009 FCA 85 at para 38.

4. Minister's Duty of Due Diligence: The ID Member must ensure that the Minister has honoured the duty under subsection 48(2) of the *IRPA* to diligently and expeditiously effect the affected person's removal: *Allen*, 2018 FC 486 at para 31; *Brown*, 2017 FC 710 at para 159(a); *Guideline* 7.3.8.

RELEASE AND ALTERNATIVES TO DETENTION

1. Member Must Consider ATD: When a Member is satisfied that a ground for detention exists, they must assess whether to release or maintain detention, having regard to the circumstances of the subject person including the existence of alternatives to detention. This obligation is stipulated in section 248 of the *Immigration and Refugee Protection Regulations* and required as a matter of fundamental justice: *Sahin*, [1995] 1 FC 214 at para 30; *Charkaoui*, 2007 SCC 9 at paras 109-110, 116; *Guideline* 3.1.1.

ATD for Mentally Ill Individuals: Where an individual's mental illness makes him or her a danger to the public, provincial mental health legislation may provide an alternative to continued immigration detention: *Canada (MCI) v Romans*, 2005 FC 435.

2. Reverse Onus on Release: Once the Minister has established a case for detention, the burden shifts to the individual to demonstrate why release is warranted, and that conditions of release are appropriate in place of detention: *Canada (MPSEP) v Ali*, 2018 FC 552 at para 46.

3. Contextual Conditions: Release conditions must be tailored to the specific circumstances of the case. The conditions must be related to the specific threat sought to be neutralized: *Mahjoub (Re)*, 2011 FC 506 at para 42; *Guideline 3.1.2*.

4. Proportionate Conditions: The conditions imposed must be proportionate to the specific risk posed by release of the subject person. Conditions on release are a form of deprivation of liberty, and a disproportionate deprivation of liberty violates section 7 of the *Charter* as it is arbitrary: *Charkaoui*, 2007 SCC 9 at para 116; *Guideline 3.1.2*.

5. Ongoing Review of ATD: Ongoing and regular review of release conditions is a constitutional requirement. The reviewing authority must reassess the necessity of the release conditions which continue to deprive the subject person of their liberty. This reassessment must be made with regard to all the same factors as detention hearings, including the existence of less onerous release conditions: *Charkaoui*, 2007 SCC 9 at para 117; *Canada (MPSEP) v Sittampalam*, 2009 FC 863 at para 27 (*Sittampalam* pulls *Charkaoui*'s call for ongoing review specifically into the context of release under section 58(3) of the *IRPA*); *Guideline 3.1.3*.

6. Obligation of the Reviewing Authority: The immigration division is constitutionally required to review the conditions of release, even if the individual subject to the conditions does not ask them to do so. As a matter of procedural fairness the Member must provide both parties the opportunity to make submissions on alterations to conditions: *Sittampalam*, 2009 FC 863 at paras 27, 29.

Note: In order to reconcile this constitutional obligation with the shifting onus of justifying release (see *Ali*, 2018 FC 552 at para 46), the reviewing Member should apply their mind to any shortcomings in the subject person's proposed release plan, provide opportunity for their resolution, and provide diligent reasons addressing the decision to impose less onerous conditions of release and the need for proportionality.

7. Heightened Obligation Where Detention is Indefinite: The IRB and the Minister have a heightened obligation to consider alternatives to detention where detention has become indefinite: *Ahmed*, 2015 FC 876; *Guideline 3.1.5*.

Note: This heightened obligation does not reduce the requirement that alternatives to detention be considered earlier on in the process and employed where appropriate. Rather, it reinforces the *Charter*'s aversion to lengthy deprivations of liberty even where there is a valid statutory purpose.

8. Relief Against Indefiniteness: To constitute a fair and constitutional process, reviews of detention and/or release conditions must provide genuine opportunity for relief against indefinite detention. Detention not reasonably connected to removal cannot be indefinite: *Charkaoui*, 2007 SCC 9 at paras 117, 123; *Guideline* 3.1.6.

9. Judicial Order of Release: Where the length of detention is found to infringe a detainee's *Charter* rights because it constitutes cruel and unusual treatment (section 12), is arbitrary (section 9) or is inconsistent with the principles of fundamental justice (section 7), a detainee may seek a judicial order for release or conditional release under section 24(1) of the *Charter*: *Charkaoui*, 2007 SCC 9 at para 123; *Li*, 2009 FCA 85 at paras 74-75, *Canada (MPSEP) v. Chhina*, 2019 SCC 29.

10. Stays of Order of Release: Where the Minister seeks a stay of an order of release, the court will review the grounds advanced as serious issues against the release decision and make a preliminary assessment of whether the issues raised are, in fact, serious. The Court will not engage in an extensive review of the merits of the Minister's application to determine whether the Minister has a strong *prima facie* case. If the Court is convinced that there is a serious issue with the release decision or that the individual whose release has been ordered is a flight risk or a danger to the public, the Court will almost always be satisfied that irreparable harm will result if a stay of the order is not granted. Where the preliminary assessment does not reveal any serious issue with the decision, the stay will likely not be granted: *Asante*, 2019 FC 905 at paras 39, 50-51.

11. Security Concerns Do Not Justify Unfairness: The Supreme Court has made clear that security concerns cannot be used to excuse procedures that do not conform to fundamental justice in the analysis of whether there is a breach of section 7 of the *Charter*. Administrative constraints associated with national security inform the question of fairness, but there is no absolute hierarchy placing security over liberty at the section 7 stage. Fundamentally unfair processes must be justified against section 1 of the *Charter*: *Charkaoui*, 2007 SCC 9 at paras 19-27.

Note: The Federal Court stated as a general principle in *Ali* that “[w]hile those [s 7] liberty interests [of the detainee] must be given substantial weight, priority must be given to the right to life, liberty and security of the general public for the duration of the period that there is a valid immigration purpose for the individual's detention or release on conditions” (2018 FC 552 at para 46). While the Court also acknowledged the need for contextual analysis, the above general principle does not conform with the Supreme Court's treatment of security considerations in *Charkaoui*.

12. General Standard for Conditions of Release: Release conditions, as alternatives to detention, must be effective and appropriate in addressing the grounds for detention. In cases where the subject person is found to pose a danger to the public, the Federal Court has stated that conditions should “virtually eliminate” the risk to the public and any flight risk, while also acknowledging that it may be impossible to “completely eliminate” the risk: *Li*, 2009 FCA 85 at para 69; *Brown*, 2017 FC 710 at para 159; *Ali*, 2018 FC 552 at para 7; *Canada (MPSEP) v Lunyamila*, 2016 FC 1199 at para 45, *aff’d* 2018 FCA 22.

13. Best Interests of the Child: The best interests of children of detained persons may be a factor supporting the conditional release of a parent and must be appropriately considered by a Member of the IRB. Best interests of the child are to be considered even where the children themselves are not formally detained: *Calin v Canada (MPSEP)*, 2018 FC 731 at paras 29-33; *Guideline 3.1.7*.

BONDSPERSONS

1. Release without Bond: Bonds are not a necessary condition for conditional release under section 58(3) of the *IRPA*. Members may impose reasonable alternatives to detention in the absence of a cash bond. Release without imposing a bond may be reasonable due to the subject person’s limited resources, lack of ties to Canada, and the ability of the Minister to re-arrest if there is a finding of inadmissibility: *Canada (MCI) v B188*, 2011 FC 94 at paras 49-51.

2. Rationale for Bonds: The theory behind the use of bondspersons is that

the person posting the bond or deposit will be sufficiently at risk to take an interest in seeing that the release complies with the conditions of release including appearing for removal. From the point of view of the person who is to be released, the element of personal obligation to the surety is thought to act as an incentive to compliance: Canada (MCI) v Zhang, [2001] 4 FC 173, 2001 FCT 521 (Fed TD) at para 19.

3. General Standard for Bondspersons: A Member must be satisfied that a proposed bondsperson is able to ensure that the detainee will comply with the conditions of the release order. While the onus of justifying detention is on the Minister, as a practical matter the onus of satisfying the adjudicator that the proposed bondsperson is acceptable rests on the detainee. A Member may consider a number of factors going to the bond and bondsperson’s ability to control the subject persons’ actions: *Canada (MPSEP) v Berisha*, 2012 FC 1100 at para 74; *Zhang*, [2001] 4 FC 173 at para 23.

4. Bondspersons' Influence Must be Proactive: The bondsperson must assist in preventing a breach of the subject person's conditions of release. Reacting to a breach is not enough. For example, monitoring of the subject person by the bondsperson will not be of assistance if the bondsperson is alerted only after a breach has occurred: *Berisha*, 2012 FC 1100 at para 76.

5. Character of the Bondsperson: The character of the bondsperson will be considered with respect to whether they will make it more or less likely that the detained person will respect their conditions of release. This in turn means that the bondsperson cannot be yet unidentified at the moment the release order is to be issued: *Zhang*, [2001] 4 FC 173 at para 22.

6. Bondsperson's Knowledge of the Detainee: A proposed bondsperson may be inappropriate if they have insufficient knowledge of the subject person or the subject person's history with the immigration system. A credible guarantor may still be held inappropriate if the relationship between them and the subject person is too tenuous to establish an ability to influence behaviour: *Canada (MCI) v BI57*, 2010 FC 1314 at para 50; *Canada (MPSEP) v Al Achkar*, 2010 FC 744 at paras 52-53.

7. Quantum of the Bond: Forfeiture of the posted bond must be sufficiently impactful on the bondsperson that they will be motivated to influence the subject person: *BI47*, 2012 FC 655 at para 51.

REASONS

1. Basis of Detention: The ID Member's reason must adequately explain the basis for the decision, including any ATD's proposed, and why a particular ATD was accepted or rejected: *Burton*, 2018 FC 753 at para 17; *Guideline* 8.1.3.

Grounds and Factors Supporting Decision: The ID Member's reasons should be sufficiently detailed to indicate the grounds and factors supporting the decision, as well as the reasons for departing from previous decisions: *Canada (MPSEP) v Ramirez*, 2013 FC 387 at para 36; *Guideline* 8.1.4.

Written Reasons: The Member must notify the parties of his or her decision after a detention hearing. Written reasons can be requested and must be delivered within 10 days of the request; Rule 11(4) ID Rules.

Decision to Continue Detention: The ID Member should be satisfied that the Minister has discharged his/her burden of showing that continued detention is warranted on the grounds enumerated in s 58(1) of the *IRPA*; *Thanabalasingham*, 2004 FC 4 at para 24.

Children do not Necessarily Decrease Flight Risk: Being a flight risk is one of the grounds for continued detention pursuant to s 58(1)(b) of the *IRPA*. It appears that federal courts have not been willing to recognize that a detainee's children are a factor that decreases his or her flight risk. In *Canada (MPSEP) v Welch*, 2006 FC 924, the Court held that the fact that a detainee had children in Canada did not obviate the need for clear and compelling reasons to depart from previous detention decisions and that the ID member had failed to provide compelling reasons as to why that particular detainee's children would make it unlikely that the individual would appear for examination or removal.

Justification of Departure from Previous Decision(s) to Detain: A subsequent decision-maker must provide "clear and compelling reasons" for exercising his or her discretion to depart from past detention orders. The ID member must clearly and cogently explain why the prior decision-maker's assessment of the evidence does not justify continued detention, either in light of new evidence or based on a reassessment of prior evidence in light of new arguments: *Thanabalasingham*, 2004 FCA 4 at paras 10, 24; *Kippax v Canada (MCI)* 2013 FC 655 at para 34.

Note: In *Muhammad v Canada (MPSEP)*, 2013 FC 203, the Federal Court required the ID member to provide clear and compelling reasons for *maintaining* the prior detention decision. This case appears to be the only instance of a court asking for clear and compelling reasons for a decision to maintain the status quo; however, given the requirement that subsequent immigration detention reviews be decided afresh, the burden on the Minister to satisfy the Court that continued detention is warranted, and the fact that individuals' freedom is at stake in detention reviews, it may be advisable to provide clear and compelling reasons for all decisions, whether or not they depart from prior decisions.

Decisions to Vary ATD/Conditions of Release: the burden is on ID members to provide "clear and compelling reasons" to vary conditions of release. The ID member must also discuss the alternatives that were considered. Where modification or removal of release conditions is requested, the evidentiary burden is on the applicant to show that conditions of release are no longer necessary because of compliance: *Thanabalasingham*, 2004 FCA 4, *Tursunbayev*, 2014 FC 5 at para 31; *Canada (MPSEP) v Dragicevic*, 2013 FC 41; *Canada (MPSEP) v Dehart* 2013 FC 936; *Berisha*, 2012 FC 1100.

2. Necessary Information: At the beginning of the reasons, the ID Member must briefly set out the affected person's name, the initial date of detention, the detention's purpose, and the Minister's alleged ground for continuing detention: *Guideline* 8.1.1.

3. Type of Hearing: In the reasons, the ID Member should note whether it was a public or private hearing, and whether a designated representative was present: *Guideline* 8.1.1.

4. Evidence: In the reasons, the ID Member must describe the most important evidence adduced at the detention review hearing, and how that evidence relates to the findings: *Guideline* 8.1.2.

5. ATD Options: If continued detention is ordered, the ID Member's reasons must indicate which ATD options were considered and why they were rejected: *Guideline* 3.1.13 and 7.2.3.

Deficiencies in Proposed Release Plan: The ID Member should highlight any specific deficiencies in the proposed release plan relative to the determined risk of release: *Guideline* 3.1.13; *Guideline* 7.2.3; *Guideline* 8.1.4.

ALTERNATIVES TO DETENTION REVIEW UNDER THE IRPA

1. Writs of *Habeas Corpus*: Following the Supreme Court's recent ruling in *Chhina*, provincial superior courts will be able to hear applications for *habeas corpus* from immigration detainees. The court found that detention review under the *IRPA* scheme is not as broad and advantageous as proceedings initiated by application for *habeas corpus* where a detainee seeks to challenge the length, conditions, or uncertain duration of their detention: *Chhina*, 2019 SCC 29.

APPENDIX OF CASELAW

- Ahmed v Canada (Citizenship and Immigration)*, 2015 FC 792.
- Ahmed v Canada (Citizenship and Immigration)*, 2015 FC 876.
- Allen v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 486.
- Ali v Canada (Attorney General)*, 2017 ONSC 2660.
- Bisla v Canada (Citizenship and Immigration)*, 2016 FC 1059.
- Burton v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 753.
- Brown v Canada (Citizenship and Immigration)*, 2017 FC 710.
- Calin v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 731.
- Canada (Citizenship and Immigration) v B147*, 2012 FC 655.
- Canada (Citizenship and Immigration) v B157*, 2010 FC 1314.
- Canada (Citizenship and Immigration) v B188*, 2011 FC 94.
- Canada (Citizenship and Immigration) v Harkat*, 2014 SCC 37.
- Canada (Citizenship and Immigration) v Li*, 2009 FCA 85.
- Canada (Citizenship and Immigration) v Liu*, 2008 FC 1297.
- Canada (Citizenship and Immigration) v Mahjoub*, 2009 FC 248.
- Canada (Citizenship and Immigration) v Romans*, 2005 FC 435.
- Canada (Citizenship and Immigration) v Zhang*, [2001] 4 FC 173, 2001 FCT 521 (Fed TD).
- Canada (Citizenship and Immigration) v Thanabalasingham*, 2004 FCA 4.
- Canada (Public Safety and Emergency Preparedness) v Al Achkar*, 2010 FC 744.
- Canada (Public Safety and Emergency Preparedness) v Ali*, 2016 FC 661.
- Canada (Public Safety and Emergency Preparedness) v Ali*, 2018 FC 552.
- Canada (Public Safety and Emergency Preparedness) v Asante*, 2019 FC 905.

Canada (Public Safety and Emergency Preparedness) v Berisha, 2012 FC 1100.

Canada (Public Safety and Emergency Preparedness) v Chhina, 2019 SCC 29.

Canada (Public Safety and Emergency Preparedness) v Dehart, 2013 FC 936.

Canada (Public Safety and Emergency Preparedness) v Dragicevic, 2013 FC 41.

Canada (Public Safety and Emergency Preparedness) v Lunyamila, 2016 FC 1199.

Canada (Public Safety and Emergency Preparedness) v Ramirez, 2013 FC 38.

Canada (Public Safety and Emergency Preparedness) v Sittampalam, 2009 FC 863.

Canada (Public Safety and Emergency Preparedness) v Welch, 2006 FC 924.

Cardinal v Kent Institution, [1985] 2 SCR 643.

Charkaoui (Re), [2004] 3 FC 32, 2003 FC 1419.

Charkaoui v Canada (Citizenship and Immigration), 2007 SCC 9.

Charkaoui v Canada (Citizenship and Immigration), 2008 SCC 38.

Chaudhary v Canada (Public Safety and Emergency Preparedness), 2015 ONCA 700.

Igbinoso v Canada (Public Safety and Emergency Preparedness), 2008 FC 1372.

Kamara v Canada (Citizenship and Immigration), 2011 FC 243.

Kippax v Canada (Citizenship and Immigration), 2013 FC 655.

Lunyamila v Canada (Public Safety and Emergency Preparedness), 2018 FCA 22.

Mahjoub (Re), 2011 FC 506.

Muhammad v Canada (Public Safety and Emergency Preparedness), 2013 FC 203.

Nagalingam v Canada (Citizenship and Immigration), 2012 FC 176.

Ogiamien, R. v, 2016 ONSC 4126.

Sahin v Canada (Citizenship and Immigration), [1995] 1 FC 214.

Scotland v Canada (Attorney General), 2017 ONSC 4850.

Singh Dhaliwal v Canada (Citizenship and Immigration), 2011 FC 201.

Sharma v Canada (Public Safety and Emergency Preparedness), 2016 FCA 319.

Solmaz v Canada (Public Safety and Emergency Preparedness), 2018 CanLII 112332 (CA IRB).

Suresh v Canada (Citizenship and Immigration), 2002 SCC 1.

Toure v Canada (Public Safety and Emergency Preparedness), 2018 ONCA 681.

Tursunbayev v Canada (Public Safety and Emergency Preparedness), 2014 FC 5.