

# Minimum Legal Standards for a Lawful Detention in the Immigration Context

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# Section 7 and *Charkaoui*

- “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”
- In the immigration context, detention and conditional release necessarily engage the detainee’s section 7 interests.
- Section 7 requires a contextual analysis to determine whether the individual detainee’s particular deprivations are consistent with the principles of fundamental justice.
- The affected person has a right to “a fair judicial process” (*Charkaoui*, 2007 SCC 9 at para 29)

# “Fair Judicial Process”

- five requirements from *Charkaoui*:
  - (i) “the right to a hearing”
  - (ii) the hearing must be conducted “before an independent and impartial magistrate”
  - (iii) the magistrate or decisionmaker must decide based “on the facts and the law”
  - (iv) the affected person has a “right to know the case to meet”
  - (v) “the affected has a right to answer that case”

# “Fair Judicial Process”

- five requirements from *Charkaoui*:
  - (i) “the right to a hearing”
    - **Proceedings**

173 The Immigration Division, in any proceeding before it,  
(a) must, where practicable, hold a hearing
  - (ii) the hearing must be conducted “before an independent and impartial magistrate”
    - the ID Member herself must decide (*Sahin*, 1995 1 FC 214 at 17)
    - the ID Member must maintain a non-deferential role (*Charkaoui*, 2007 SCC 9 at paras 39-42)

# “Fair Judicial Process”

- five requirements from *Charkaoui*:
  - (iii) the magistrate must decide based “on the facts and the law”
  - (iv) the affected person has a “right to know the case put against one”
  - (v) “the affected has a right to answer that case”
  - After *Charkaoui*, the IRPA was amended to provide a special advocate for the affected person where confidential information or evidence is not disclosed due to security concerns.

# The Immigration Context

- three further requirements:
  - (vi) a right to ongoing or periodic review
    - **Review of detention**

57 (1) Within 48 hours after a permanent resident or a foreign national is taken into detention, or without delay afterward, the Immigration Division must review the reasons for the continued detention.

(2) At least once during the seven days following the review under subsection (1), and at least once during each 30-day period following each previous review, the Immigration Division must review the reasons for the continued detention.
  - (vii) a right to timely or prompt review
  - (viii) a right to reasons from the decisionmaker (particularly for rejected release plans)

# The Amended *IRPA*

- The amended *IRPA* is constitutionally compliant ...
  - “Properly interpreted and applied, [ss 57 and 58 of the *IRPA* and ss 244 to 248 of *Regulations*] comply with the *Charter*.” (*Brown*, 2017 FC 710 at paras 4-5)
- But a detention may be unconstitutional, or an individual ID decision may be unfair, unconstitutional, or unreasonable.
  - Maladministration should be raised directly with the ID and/or CBSA.
  - The detainee may seek judicial review of unreasonable or procedurally unfair ID decisions.
  - The detainee may bring a *habeas corpus* motion where the detention as a whole may be illegal.

# The ID Member's Decision

- The *IRPA* requires that the detainee be released, unless further detention is justified (*Allen*, 2018 FC 486 at para 36)
- The onus is always on the CBSA Hearings Officer as the Minister's delegate (*Thanabalasingham*, 2004 FCA 4 at para 16)
- Immigration detention review hearings are informal hearings, and “the normal rules of evidence do not apply (*Brown*, 2017 FC 710 at para 122, and *Allen*, 2018 FC 486 at para 38)
- “the judge may receive into evidence anything that, in the judge's opinion, is reliable and appropriate, even if it is inadmissible in a court of law, and may base a decision on that evidence” (*IRPA*, s 83(1)(h))

# Right to Disclosure

- Section 7 protects the detainee's right to disclosure (*Charkaoui II* 2008 SCC 38 at para 56)
- Where factual claims or arguments are challenged, the party pleading those facts or arguments must disclose the relevant evidence to substantiate them (*ENF 3*, CIC Manual)
- But in practice, advanced disclosure is not always provided, and documents are sometimes produced only at the review hearing.
- The proper remedy may be a brief adjournment, an earlier date for the next review, or even judicial review (*Brown*, 2017 FC 710 at para 128)
- No fishing expeditions because the Minister's duty to disclose is limited to the case to meet (*Allen*, 2018 FC 486 at para 57)

# Length of Detention

- “the lengthier the detention, the heavier the onus is on the government” (*Charkaoui*, 2007 SCC 9 at para 113)
- “Where an individual has been in detention for some time and a further lengthy detention is anticipated, or if the extent of future detention time cannot be ascertained, these facts ... tend to favour release” (*Lunyamila*, 2016 FC 1199 at para 66(ii))
- “the current and future length of detention are but “factors” to be taken into account” (*Chaudhary*, 2015 ONCA 700 at para 82)
- “It is now settled law that the indefinite nature of an individual’s detention under the IRPA is only one factor to be considered when conducting a detention review, and cannot be treated as determinative.” (*Lunyamila* at para 32)

# Future Length of Detention

- Calculating the future length of detention is complex and fraught with difficulties.
- “it is principally a forward-looking test and not one where reasonable decisions are later made to appear as having been unreasonable with the benefit of hindsight” (*Brown*, 2017 FC 710 at para 32)
- “Section 57 of the IRPA provides what the Supreme Court of Canada termed a robust detention review based on actual information reviewable every 30 days” (*Li*, 2009 FCA 85 at para 68)
- it is an error in law for the ID Member to speculate about “potential but as yet non-existing proceedings” (*Li* at para 68)

# Detainee's Non-Cooperation

- An enforceable removal order “must be enforced as soon as possible”, and the affected person “must leave Canada immediately” (*IRPA*, s 48(2))
- For a fair detention process, the CBSA must act diligently to effect a timely resolution to the matter
- The detainee is obligated to cooperate with the Canadian government to effect her removal (*Lunyamila*, 2016 FC 1199 at para 29)
- But the detainee's non-cooperation is not a determinative factor guaranteeing continued detention (*Lunyamila* at para 84)

# Location and Conditions

- The detention's location and conditions likely engage the detainee's section 7 interests, too (*Ali* 2017 ONSC 2660 at para 37)
- The Minister of Public Safety and Emergency Preparedness is responsible for the *IRPA*'s enforcement, "including arrest, detention and removal" (*IRPA*, s 4(2)(b))
- The detention location is "a proper issue for immigration detainees to raise with the CBSA. Particularly, if the location of their detention is not consistent with how they fit within the CBSA's own criteria" (*Toure*, 2018 ONCA 681 at para 72)

# Alternatives to Detention

- Section 58(3) of the *IRPA*:
  - The ID “may impose any conditions that it considers necessary, including the payment of a deposit or the posting of a guarantee for compliance with the conditions.”
- Section 248 of the *IRPR*:
  - “the following factors shall be considered before a decision is made on detention or release:
    - ...
    - (e) the existence of alternatives to detention.”

# ATD: Constitutional Principles

- Existence of ATD is a factor going to fundamental justice under section 7 of the *Charter*
  - *Sahin*, [1994] FCJ No 1534 (TD); affirmed in *Brown*, 2017 FC 710
  - Codified in s 248(e) of the *IRPR*
- Ongoing review of extended release conditions is necessary just as with extended detention (*Charkaoui*, 2007 SCC 9; *Sittampalam*, 2009 FC 863)
- Release conditions cannot be disproportionate response to the nature of the threat posed by the detainee (*Charkaoui*)
  - Constitutional obligation on the ID Member exists independent of what conditions the detainee seeks (*Sittampalam*)

# ATD: General Framework

- ID cannot impose conditions disproportionate to the risk posed (*Charkaoui, 2007 SCC 9; Sittampalam, 2009 FC 863*)
- To be reasonable, conditions should “virtually eliminate” the danger the detainee presents to the public or flight risk (*Ali, 2018 FC 552; Lunyamila, 2016 FC 1199*)
- And a reverse onus: the subject person must demonstrate that any conditions of release are sufficiently robust (*Ali, 2018 FC 552*)
  - Grounds for detention are already made out when s 248 requires that the ID consider ATD

# ATD: Bondspersons

- ID Member must be satisfied that the proposed bondsperson is able to ensure that the detainee will comply with the conditions of release (*Berisha*, 2012 FC 1100), including:
  - Ability to monitor the detainee (*Berisha*)
  - Bondsperson's knowledge of the subject person and their history with the immigration system (*Achkar*, 2010 FC 744)
  - Character of the bondsperson (*Zhang*, [2001] 4 FC 174 (TD))
  - The impact of potential forfeiture of the bond on the bondsperson (*B147*, 2012 FC 655)
- The onus of satisfying the Member that the bond and bondsperson are appropriate rests with the detainee (*Zhang*)

# ATD: Contextual Analysis

- Rehabilitation and reintegration of the detained person are not prescribed factors and thus irrelevant to the question of whether ATD exists (*John Doe*, 2011 FC 974)
  - But if a rehabilitation centre can be acceptable ATD, it must be relevant
- A finding that detention is indefinite creates a heightened obligation to consider alternatives to detention (*Ahmed*, 2018 FC 876)
  - But also: “the fact that the detention was indefinite does not transform an unsuitable bondsperson into a suitable one. Nor does it mitigate the assessment of the respondent's flight risk from extremely high to that of assured compliance” (*B147*, 2012 FC 655)

# ATD: Contextual Analysis

- Best interests of the child may support conditional release of a parent (*Calin*, 2018 FC 731)
  - But BIOC do not create suitable ATD unless it was already possible
- “While those [s 7] liberty interests 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” (*Ali*, 2018 FC 552)
  - But s 7 is not concerned with justification. Security concerns cannot be used to excuse procedures that do not conform to fundamental justice at the s 7 stage (*Charkaoui*, 2007 SCC 9)



Thank you  
for your attention!