CANADIAN ASSOCIATION OR REFUGEE LAWYERS

DETENTION TOOLKIT

POST IRB DETENTION AUDIT

MARCH 2019

Contents

Overview

In September 2017, the Immigration and Refugee Board commissioned an external audit of a selection of cases where immigration detention had exceeded 100 days.[1] The audit found multiple concerns and deficiencies in the fairness of the detention review hearings before the Immigration Division.

This toolkit seeks to familiarize counsel with the main findings of the audit and the steps counsel can take to ensure the fairest process possible for our clients.

I) Preparing for the Detention Review: Disclosure and Transcripts

The audit highlighted a number of areas of concern with respect to the provision of disclosure and transcripts from previous hearings:

1) Lack of advance disclosure or transcripts by CBSA hearings officers. Disclosure of written materials and evidence often provided only a few minutes before the hearing begins, leaving little time to review any complex materials;

2) Inadequate disclosure often leads to the adoption of a factual basis unsupported by evidence;

3) CBSA hearings officers will often make allegations without disclosure of evidence or citation to a source upon which the information is based. Too often such statements go unchallenged by the detainee's counsel or the ID at the hearing or in the decision; and

4) Members include statements of fact in their decisions that were not part of the evidence, the submissions of CBSA, or even part of the findings in previous decisions. As a result, an inconsistent or false narrative may develop over time, unchallenged by counsel at successive hearings.

Practical Tips:

- Prior to the hearing, insist upon disclosure of all evidence related to a detainee's immigration file - including that which may be exculpatory - not just the evidence upon which the Minister wishes to rely.[2]

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[1] Immigration and Refugee Board, *Report of the 2017/2018 External Audit (Detention Review)*, (online: https://irb-cisr.gc.ca/en/transparency/reviews-audit-evaluations/Pages/ID-external-audit-1718.aspx) [Audit].

[2] *B135 v Canada (Citizenship and Immigration)*, 2013 FC 871 at para. 26: In the context of the Refugee Protection Division, the Federal Court has held that, "if the Minister chooses to disclose evidence, that disclosure must be complete." It held that failure to do so is a violation of natural justice.

- Request and review all prior transcripts and disclosure in advance to ensure that, during the detention review, the grounds for detention, factual statements and the Minister's submissions remain consistent in successive hearings.

- With respect to disclosure, the Federal Court held that: "The Minister of PSEP must provide reasonable notice of the evidence or information that will be relied upon at the detention review. Detainees or their representatives may request further disclosure, and ask that the enforcement officer be summoned to appear at the hearing."[3]

- Request disclosure be made as soon as possible in advance of the first 48 hour detention review, with full disclosure prior to the 7 day review.

- If insufficient disclosure is provided and/or insufficient time is provided to review the disclosure, you can consider asking for an adjournment. The adjournment may be brief to allow the Minister to produce the missing disclosure. The Federal Court held that "**If insufficient disclosure is provided, the detainee or representative may ask the ID to briefly adjourn the hearing**, or to bring forward the date of the next review."[4] Likewise, the ONSC found that while counsel had made requests for disclosure, they had failed to utilize the "adjournment and/or review procedures available."[5]

- Insist that any factual submissions made by the Minister be supported by documentary disclosure.

II) <u>Grounds of Detention</u>

The audit highlighted the rigid interpretation of statutory and regulatory factors to consider in detention reviews as a concern in decision-making.

- <u>Flight Risk:</u> While s. 245 of *IRPR* lists the mandatory factors to consider in assessing flight risk, the audit found that Members rarely engaged in a true balancing of these factors. The audit specifically took issue with the treatment of following factors:

  > *Community Ties*: Although the language of the IRPA does not give specific direction as to whether existence of strong ties to Canada is a positive or negative factor, the ID routinely relied on community ties as

[3] *Brown v Canada (Minister of Citizenship and Immigration)* 2017 FC 710 at para 159(g) [*Brown*].
[4] *Ibid* at para 159(h).
[5] *Ebrahim Toure v Minister of Public Safety*, 2017 ONSC 5878 at paras. 52-55 [*Toure*].

evidence of detainee's unwillingness to appear for removal, without providing the detainee an opportunity to explain why their ties would not necessarily make them unlikely to appear

Failure to Report/Appear as a Factor: On cases with a mixed record of compliance, the ID often relied on few past missed appointments or appearances, without considering the circumstances underlying the detainee's failure to report. The ID's treatment of this factor for detainees suffering from addictions or mental health issues was of particular concern.

Claim for Refugee Status and Pre-Removal Risk Assessment (PRRA): The ID unduly relied on past claims for refugee protection and/or PRRA applications as evidence of the detainee's fear of returning to their home country, and equating it with high flight risk without any meaningful assessment of the detainee's circumstances and/or the detainee being provided with an opportunity to explain how their past or current fear would not make them unlikely to appear.

Record of Past Convictions: The ID often accepted CBSA's argument that a detainee's criminal record demonstrated their disregard for Canadian laws and that they could not be trusted to comply with T&Cs if released. These submissions were often accepted, without consideration of the detainee's full history and past track record of compliance.

- Danger to the Public: The audit highlighted the discrepancy between the seriousness with which criminality was viewed by the criminal courts and the ID, with the ID treating the convictions far more seriously than the criminal courts. The ID was also willing to rely on convictions that were many years old in coming to its finding that a detainee was a danger to the public.

Practical Tips:

- Provide submissions, as well as relevant and convincing evidence, as to why the detainee's community ties in Canada do not make them less likely to appear.

- Emphasize the ID's obligation to consider the detainee's complete record of compliance, not just the incident(s) they failed to appear.

- Be prepared to lead evidence and make submissions on the grounds for detention before presenting an alternative to detention.

- Present evidence that demonstrates the detainee does not have the will or capacity to evade authorities in future (e.g. lack of financial means, history of living in a limited geographic area, medical conditions/treatment).

- If the detainee has expressed fear of returning to their country of citizenship, in the past or at present, provide evidence as to how their fear does not necessarily make them a flight risk. If this fear was expressed in the past, canvass evidence that demonstrates the person's circumstances, intentions and motivations at present are significantly different. If the fear is ongoing, highlight facts that demonstrate the detainee's intentions to comply, notwithstanding this fear (e.g. cooperation at the time of arrest, ongoing cooperation to obtain travel document, surrendering the travel document and/or candid behaviour throughout the proceedings).

- Urge the ID to take a contextual and balanced approach to assessing flight risk. The *ONSC* emphasized the significance of an informed approach: "Without meaning to state and re-state the obvious, arrest and criminal charges without a conviction amount to innocence; a breach of bail conditions that turn out to no longer be in force is a non-breach of bail; pre-trial custody is not a change of address; an inadvertent error is not an intentional, morally culpable act. These cannot logically and legally be held against a detainee on an ongoing basis. At some point, the adjudicator hearing a detention review under the IRPA must step back from the thick foliage of technical enforcement and have look at the trees."[6]

- Evaluate whether the length of time in detention based on being a danger to the public is proportional, particularly in light of the length of the criminal sentence and the length of time since conviction.[7]

- If unable to argue that there are no grounds for detention, lead evidence to contextualize the grounds given that the factual considerations behind the grounds may be relevant, including to alternatives to detention.

- If CBSA asserts the detainee was arrested as a result of "proactive investigation", request that they provide details of their "proactive investigation". If the detainee has information/explanation about the reasons for their arrest, ensure it is provided to the ID. If mental health or addictions were a contributing factor, make sure this evidence is before the ID.

III) Developing and Presenting Alternatives to Detention

The audit identified specific barriers to alternatives to detention, including:

- The ID's inconsistent expectations of what constitutes a viable release plan from one hearing to the next result in unnecessary prolonged detention.

[6] *Scotland v Canada (Attorney General),* 2017 ONSC 4850 at para 76 [*Scotland*].
[7] *Ali v Canada (Attorney General),* 2017 ONSC 2660 at paras 19 and 38 [*Ali*].

- The rotation of members discourages "active adjudication"[8] and the full consideration of alternatives to detention.

- The difficulty in demonstrating rehabilitation as a factor supporting release if there are few rehabilitative programs available to detainees while incarcerated.

- The ID's failure to: 1) hear full evidence on alternatives to detention; 2) consider an alternative to detention at all; and 3) make an independent decision on a proposed alternative to detention.

- The ID's heavy reliance on unchallenged CBSA reports and evidence weighing against alternatives to detention.

The audit stressed the importance of alternatives to detention and, in general, recommended that:

1) The ID's approach to bonds should be consistent with the direction of the Supreme Court of Canada in *R. v. Antic* that release is to be ordered at the **earliest opportunity possible and on the least onerous grounds**.

2) **Greater use should be made of broader alternatives to detention** which could include: halfway houses, release to a bondsperson, house arrest, curfew, electronic reporting, voice reporting, proposed GPS tracking, release to community agencies, release on other conditions etc.

Practical Tips:

- Argue for alternatives to detention as often as possible, emphasise release should be granted as soon as possible and with the least onerous conditions available, in keeping with the guidance of the Supreme Court of Canada in *R. v. Antic*.

- Ensure detainee can present full evidence on alternatives to detention (both in documentary and oral evidence).

[8] Audit, *supra* note 1: The audit cites "active adjudication" as including:
- Soliciting evidence from both parties on relevant issues;
- Particularly where the detained person is unrepresented (or under-represented), explaining where their evidence is needed to assist in the review, and asking them to address particular issues. (For example: "CBSA says that because you have close family in Canada, and no family in your country of origin, you are likely to go underground, if you are released? I want to hear what you have to tell me in response to that.");
- Questioning CBSA on time estimates or investigation details where unclear;
- Requiring CBSA Enforcement Officers to attend the hearing where clarification is needed;
- Asking the parties to do further work on a release plan that is not yet sufficient.

- Where possible argue for an alternative to detention that does not rely on cash bonds or a bond against real estate to make bail more accessible to indigent detainees without access to sureties.

- Propose to work with CBSA to create or improve any release proposal.

- Refer to transcripts/records from previous hearings to address CBSA objections to a release plan.

- Ensure that release plans include a component that would mitigate the risk of danger, such as counselling, support or treatment.

- If the plan includes a community-based agency that provides support services, ensure you have all details of their programming and oversight provided by the agency. Consider whether a witness from that agency would be helpful.

- If a reasonable alternative to detention has been rejected by the ID, it can be proposed again at the next detention review along with arguments explaining why the prior Member's decision to reject the plan should not be followed. Each Member at each review should take a fresh look at any previously proposed alternatives. If possible, address any alleged shortcomings in the plan identified in a prior decision with further evidence and argument (see section VII, below)

- When release is contingent on conditions, consider how long the conditions are to apply to the detainee after their release and argue for the least onerous option and the shortest period for the conditions to apply.

- In Toronto, if your client does not have a suitable bondsperson, they may be accepted in the Toronto Bail Program (TBP) which is a CBSA-funded program that immigration detainees have access to.

    - The TBP has a high success rate and can provide significant support to detainees post-release including housing, addiction programs, mental health resources, applying for work permits, access to health coverage and social assistance, accompaniment to appointments, assistance with reporting requirements, and more. Be aware that the TBP often has onerous conditions for clients, so all options for alternatives to detention should be canvassed with the client (not just the TBP).

    - In most cases, the ID is inclined to agree to release a detainee who has been accepted by the TBP. Counsel can proactively refer a detainee; if the TBP refuses acceptance, you can also speak with the program administrator personally and request consideration. To do so, contact the TBP Immigration Division at: 416-861-2422. The TBP will review the detainee's file and may

have a caseworker interview your client directly.

- There are some cases, however, which require the CBSA to initiate the referral to TBP. These include: detainees who have served a federal criminal sentence (2+ years); 'fugitives from justice'; those found inadmissible to Canada for reasons of security, human rights violations or organized crime; and those who are allegedly not cooperating with CBSA to secure a travel document/confirm identity. You can request to CBSA that they refer a detainee who falls into one of these latter categories. If CBSA refuses, you can argue at the detention review hearing that CBSA is blocking access to a reasonable alternative to detention.

- Even if referred, the TBP may not agree to accept a detainee who has inter alia:
  - been charged with a serious violent crime
  - demonstrated reluctance to being supervised by the TBP
  - not followed the rules of the TBP in the past
  - failed to report as required by the TBP in the past

- The TBP will obtain information about non-cooperation from CBSA. If counsel has information or evidence that rebuts CBSA's allegation of non-cooperation be sure to disclose to the ID and offer to forward when making a request to TBP.

- The TBP will consider other factors including how imminent removal may be and is concerned with providing alternative solutions for otherwise long-term detainees.

- Even if your client is not accepted into the TBP, the ID still must consider all alternatives to detention and release.

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IV) <u>Leading Oral Evidence</u>

With respect to leading evidence and hearing from the detainee and/or a witness, the audit found that:

1) Detainees were being denied procedural fairness because of the ID's practice of not permitting detainees to present oral evidence and have witnesses testify on their behalf. The failure to allow a party to present evidence and to hear and question witnesses, is a fundamental breach of natural justice;

2) CBSA interviewed the potential bondsperson outside the hearing room and then related the information to the ID (rather than having the ID member have the benefit of asking questions and hearing the testimony of the bondsperson directly).

Practical Tips:

- If possible, provide affidavits from bondspersons and possibly even the detainee as disclosure thereby putting sworn evidence into the record that must be accepted as true; especially if the ID refuses to allow a witness to testify. This has a secondary importance of creating a legitimate ground for judicial review or habeas corpus if detention is continued.

- Ensure that all relevant paperwork (e.g. relevant identity documents, proof of status in Canada and financial information), which you have reviewed beforehand, are brought to the hearing.

- Ensure the detainee can bring and examine their own witnesses in support of their release plan (e.g. family member, bondsperson, representative from community agency etc.). If the ID refuses to hear from the detainee or a witness, object to this practice and argue that it is a breach of natural justice.[9]

- Insist on the right of the detainee to present viva voce evidence to the ID directly, citing the case law and findings of the audit. All objections should be made on record. Testimony can be heard in person or by teleconference. If a witness can only testify by teleconference, it is best practice to provide written notice to the ID in advance to ensure the proper equipment is available.

- To eliminate the possibility of objections on procedural grounds, make sure to follow the rules of disclosure and provide advance information about the identity of the witness as per Section 32 of the ID Rules.[10]

- Always adequately prepare the witnesses. For the bondsperson this includes making sure they understand their role; knowledge of the detainee & the reasons they are being detained; how they can influence the detainee to comply with the conditions imposed. For the client, this requires detailed knowledge of the their immigration, criminal, mental health and substance use history in order to anticipate and prepare for cross-examination by CBSA.

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[9] In *Brown, supra* note 3 at para 113(c) [emphasis added], the Federal Court held that "Before the state can detain people for significant periods of time, it must accord them a fair process. This basic principle has a number of facets. It comprises the right to a hearing. It requires that the hearing be before an independent and impartial decision-maker. It demands a decision based on the facts and the law. It entails the right to know the case put against one, and **the right to answer that case."**

[10] See Immigration and Refugee Board, *Practice Notice: Bondsperson Information,* (online: https://irb-cisr.gc.ca/en/legal-policy/procedures/Pages/BondCaution.aspx).

- Have all potential bondspersons and other witnesses integral to the release plan testify in person or by phone. When appropriate, seek adjournments if witnesses are unable to attend.

- Any bondsperson should be able to testify before the ID that: (i) any bond money being posted comes from them and was not provided by the detainee; (ii) that if the detainee breaches the conditions of release that they will immediately notify CBSA and (iii) that the detainee will not repay them if they breach and the bond is forfeited. Also, for detainee subject to enforceable removal orders, it is critical that the bondsperson be able to testify that they understand that the detainee is facing like imminent removal from Canada, they are legally obligated to leave Canada and, if a removal date is set, that the bondsperson will ensure they appear for removal.

- If CBSA leads evidence of a witness (e.g. bondsperson) without the witness present, challenge the CBSA's characterization of the statements and request to have the witness to testify in person or over the phone.

V) Cross examining/testing CBSA's evidence

The audit found that:

1) The ID too often relies uncritically on statements made by CBSA, especially with respect to the issue of non-cooperation.

2) In some instances CBSA misstated facts which were then relied upon in the decision.

3) Over time, inaccurate statements by CBSA can become accepted facts that are repeated in ID decisions.

Practical Tips:

- Bear in mind that CBSA "must provide reasonable notice of the evidence or information that will be relied upon at the detention review. Detainees or their representatives may request further disclosure, and ask that the Enforcement Officer be summoned to appear at the hearing."[11]

- "If insufficient disclosure is provided, a detainee or representative may ask the ID to briefly adjourn the hearing, or to bring forward the date of the next review."[12]

[11] *Brown*, *supra* note 3 at para. 125(g).
[12] *Ibid* at para 125(h).

- Be attentive as to whether CBSA has respected disclosure deadlines, espcially rule 26 of the *Immigration Division Rules.*[13]

- If the sources of CBSA's evidence are not clear, request that the sources be disclosed where possible. If the evidence is disputed and the source of the evidence is a CBSA Enforcement Officer or Investigator, request that the officer or investigator attend the hearing to be cross-examined on their statutory declarations and/or provide sworn testimony. If CBSA refuses, you can request that the ID issue a summons pursuant to Rule 33 of the ID Rules.

- Make arguments as to the admissibility of CBSA's evidence, and not just the probative value of that evidence; that is, argue that CBSA's evidence should not be admitted when they have not adhered to disclosure rules or are not willing to account for the sources of their evidence. If this is not possible, consider asking for an adjournment to allow the CBSA Enforcement Officer or Investigator to appear at the hearing.

- Ask probing questions regarding delays on CBSA's part to any witnesses and ensure that the Hearings Officer back their statements with evidence.

VI) Working with detainees with mental health, addictions and other vulnerabilities

The audit noted that:

1) Over one-third of the detainees in the sample identified as people with mental health problems.

2) There is a lack of treatment and counselling services in provincial institutions making it difficult for detainees to demonstrate rehabilitation.

3) A detainee's mental health can be used to justify detention on the ground of flight risk and/or danger.

4) The nature of the detainee's illness and impact of the illness on his/her capacity to act is not taken into consideration in the decision making process.

[13] *Immigration Division Rules,* SOR/2002-229, rule 26 [ID Rules]: Rule 26 provides that if a party wants to use a document at a hearing, the party must provide a copy to the other party and the Division. The copies must be received (a) **as soon as possible**, in the case of a forty-eight hour or seven-day review or an admissibility hearing held at the same time; and (b) in all other cases, **at least five days before the hearing** [emphasis added].

Practical Tips:

A) Applying for a designated representative to be appointed

- ID can designate a representative (DR) for a detainee because they are unable to appreciate the nature of the proceedings.[14]

- Notify without delay the ID and the other party in writing if the detainee is unable to appreciate the nature of the proceedings, and if aware of a person in Canada who meets the requirements to be DR, provide the person's contact information in the notice.

- DRs should take an active role in communicating with the detainee, counsel, family and community supports to facilitate the development of a release plan.

- DRs can raise arguments regarding the impact of the place of detention on the detainee's mental health.

- DRs can also raise arguments regarding your client's mental health, their capacity and whether they are a flight risk and/or danger.

B) Making a vulnerable person application

- *Chairperson Guideline 8: Procedures With Respect to Vulnerable Persons Appearing Before the IRB* states that vulnerable persons are individuals whose ability to present their cases before the IRB is severely impaired.

- Various accommodations can be made to facilitate the participation of a vulnerable person, some of which are enumerated in *Chairperson Guideline 8.*

- Any accommodations which may assist the detainee should be canvassed with your client where possible, and presented to the ID.

C) Obtaining a medical report from a psychiatrist, psychologist or other medical professional

- A medical report may be very helpful in providing context to the ID for purposes of assessing the detainee's flight risk, level of perceived (non)cooperation, and/or danger to the public.

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[14] ID Rules, *ibid,* rule 18; Immigration and Refugee Board, *Commentaries to the Immigration Division Rules*, (online: https://irb-cisr.gc.ca/en/legal-policy/act-rules-regulations/Pages/CommentIdSi.aspx): "Unable to appreciate the nature of the proceedings' means that the person cannot understand the reason for the hearing or why it is important or cannot give meaningful instructions to counsel about his or her case. An opinion regarding competency may be based on the person's own admission, the person's observable behaviour at the proceeding, or on expert opinion on the person's mental health or intellectual or physical faculties."

- Many detainees are detained in provincial correctional institutions, where there may be a lack of psychiatric, counselling or other medical services. Because it may be difficult to find a medical professional able to travel to the correctional institution where a detainee is being held to conduct an assessment, a request can be made to CBSA to transport the detainee to a medical appointment.

- If CBSA is refusing to provide the necessary transportation for your client to attend at a medical appointment, consider making an application to the ID to mandate CBSA's cooperation.

- Requests for medical assessment and transfers to a secure mental health facility can also be made directly to the jail.

D) Flight risk and danger

- The detainee's mental health should be substantively, and not just procedurally, considered by the ID.

- While medical evidence may be key for detainees with mental health issues, for detainees coping with addictions, evidence on cycles of addiction may be helpful.

- Consider challenging CBSA and/or the ID's position that the detainee's mental health makes him/her a flight risk or a danger to the public.

- Where applicable, refer to the fact that the detainee cannot access counselling and/or treatment programs in the detention centre and having access to these programs would be beneficial to them and could reduce any danger they may pose to the public.[15]

E) Capacity

- Be aware of the challenges that vulnerable detainees may have adhering to release conditions (e.g. detainees with mental health issues may struggle with reporting conditions).

- Refer to the evidence of the detainee's mental health to argue that non-cooperation is not voluntary but rather related their mental health and/or to capacity issues.

- Detainees struggling with addictions may find it a challenge to stop using, particular in light of the widespread availability of illegal narcotics in many

[15] See, for example, *Ali, supra* note 7 at para 37: "As it stands now, holding Mr. Ali in a provincial detention facility does not provide for any rehabilitative steps to be taken and, thus, it is not surprising that the eighty some reviews, that Mr. Ali has undergone, have not reached any different conclusion regarding his danger to the public and his flight risk. No one should be surprised at a lack of change, if no opportunity is provided to achieve change."

correctional institutions. With this in mind, **counsel may want to argue for more reasonable release conditions**, whatever those look like in the circumstances, in order to minimize the likelihood of a breach.

VII) Concerns with Decision-Making on Subsequent Detention Reviews

The audit highlighted a number of areas of concern with respect to overall decision-making.

1) The ID fails to "decide afresh" and does not re-assess evidence, even with the passage of time.

2) The ID overly relies on past decisions. In so doing, the ID cites *Thanabalasingham*[16] as restricting their discretion to change course without "clear and compelling reasons".

Practical Tips:

- Carefully examine the record to determine if the facts presented are valid and if they need to be re-assessed, for example, in light of the passage of time.

- Consider challenging formulaic decisions that: 1) rely on rigid statutory interpretation; 2) fail to decide afresh; 3) over rely on past decision; or 4) fail to fully and independently consider alternatives to detention.

- Push back on a restrictive reading of *Thanabalasingham.* In *Thanabalasingham*, the Federal Court of Appeal held that "the subsequent decision maker must give a clear explanation of why the prior decision maker's assessment of the evidence does not justify continued detention". This can be based on new evidence or simply "reassessment of prior evidence based on new arguments". The ID can come to a different conclusion than previous decisions, even without new evidence.

- Consider whether you should insist on the final word (a sur-Reply) in oral submissions, as the burden has arguably shifted to the detainee in light of *Thanabalasingham.*

- Insist on the opportunity to respond if the Minister bring up new arguments or information in their "reply".

[16] *Canada (Minister of Citizenship and Immigration) v Thanabalasingham*, 2004 FCA 4.

VIII) Post-Hearing Follow-up

Practical Tips:

- When appropriate, request the member be seized on the matter so they can assess the changes to the release plan.

- Follow up to ensure that transcripts from the last hearing are provided in a timely manner.

- Request clarification from the ID to understand how the shortfalls of a release plan can be addressed. Confirm the reasons for rejecting the proposal are on the record.

- Confirm progress with respect to any ongoing investigation or timelines for removal with Hearings Officer and Removals Officer and keep notes regarding the same.

- If you request an early subsequent detention review, the order of submissions is usually reversed. This gives the benefit of allowing the detainee the final word in submissions to the Member.