



Citizenship and Immigration

CITIZENSHIP AND IMMIGRATION SECTION / SECTION DE LA CITOYENNETÉ DE LA IMMIGRATION

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Detention in Security Cases

*Ron Poulton**

DETENTION IN SECURITY-RELATED CASES commences with the issuance of a security certificate signed by two Ministers: the Minister of Citizenship and Immigration and the Minister of Public Safety and Emergency Preparedness. The certificate sets out allegations against a foreign national or permanent resident that the person is inadmissible to Canada on grounds of security, violating human or international rights, serious criminality or organized criminality. Once signed, the certificate is then referred to a Federal Court judge for a determination of whether or not the allegations are reasonable.

The government generally prefers to proceed by issuing a security certificate rather than a report under section 44, as the latter is adjudicated by the Immigration Division, while the former is reviewed in the Federal Court. In addition, the issuance of a security certificate allows for immediate detention pending the outcome of proceedings.

Security Detention Pre-*Charkaoui*

Prior to the recent pronouncement by the Supreme Court of Canada in *Charkaoui*,¹ the detention of a foreign national or permanent resident for reasons of national security invoked distinct procedures under the *Immigration and Refugee Protection Act*. Pursuant to section 82 of *IRPA*, a permanent resident against whom a security certificate was issued could only be detained following the issuance of a warrant for arrest and detention by the Minister of Citizenship and Immigration and the Minister of Public Safety and Emergency Preparedness upon reasonable grounds to believe that the permanent resident was a danger to national security or to the safety of any person or was unlikely to appear at a proceeding for removal. By subsection 82(2), unlike a permanent resident, a foreign national against whom a security certificate had been issued was subject to mandatory detention without the need for a warrant.

A further distinction between permanent residents and foreign nationals was found in the detention review provisions. Permanent residents detained under section 82 were to be brought before a Federal Court judge no later than 48 hours after the beginning of detention. If detention was upheld, then the permanent resident was brought back for further reviews at least once in the six-month period following each preceding review until such time as a decision was made on whether the security certificate was reasonable.



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IRPA then directed the judge to order detention continued if satisfied that the permanent resident continued to be a danger to national security or to the safety of any person, or was unlikely to appear at a proceeding or for removal. The onus remained on the Ministers to prove the need for continued detention.

Under section 84 of *IRPA*, a foreign national had to wait until 120 days had elapsed following the Federal Court determination of whether the security certificate was reasonable, before the detainee's first opportunity to seek review of the continuing detention. Unlike the situation for permanent residents, in order to obtain release a foreign national had the onus of demonstrating that removal would not take place within a reasonable time and that release would not pose a danger to national security or to the safety of any person. Foreign nationals could linger for prolonged periods, even years, before a judge first heard their detention review. Once finally permitted access to a detention review, the onus was on the foreign national to prove that he or she should be released. Challenged on grounds of *habeas corpus* in the provincial courts and section 7 and 9 of the *Charter* in the Federal Court, these detention provisions had been upheld as being constitutional.²

In practical terms, the Court had interpreted section 84 as setting a high standard for release. In interpreting the predecessor to subsection 84(2) under the *Immigration Act*, the Federal Court of Appeal held that judicial release "cannot be an automatic or easy thing to achieve", and that it "is not to be routinely obtained".³

The Implications of Charkaoui

The Supreme Court reviewed the above detention provisions in *Charkaoui* and held that extended periods of detention would not violate the *Charter* if accompanied by a process that provided regular opportunities for review of detention, taking into account all relevant factors. Borrowing from the Federal Court Trial Division in *Sabin*,⁴ the Court then provided a non-exhaustive list of factors to be taken into consideration in detention cases, including:

1. THE REASONS FOR DETENTION - Detention pursuant to a security certificate is justified on the basis of a continuing threat to national security. While the criterion for release under section 83 of *IRPA* includes the likelihood that a person will appear at a proceeding or for removal, a threat to national security or to the safety of a person is a more important factor for the purpose of justifying continued detention. The more serious the threat, the greater will be the justification for detention.

The fact that a security certificate had been upheld as being reasonable, does not equate to a finding that the person concerned is a danger to national security or to any person for the purpose of a detention review.

2. LENGTH OF DETENTION - The longer the detention period, the less likely that a detainee will remain a threat to security, as it is presumed that the ability to communicate with co-conspirators, if any, has been disrupted.

3. REASONS FOR DELAY IN DEPORTATION - Recourse to applicable provisions of *IRPA* and the *Charter* that are reasonable should not count against either party. Unexplained delay or lack of diligence should count against the offending party.

4. ANTICIPATED FUTURE LENGTH OF DETENTION - Lengthy periods of detention or an unascertained period of detention weighs in favor of release.

5. ALTERNATIVES TO DETENTION - Release is preferable to detention. Even if a person is found to be a danger to national security, provided that this threat can be neutralized through the imposition of conditions, the Court will opt for release. Conditions have included: house arrest, the wearing of ankle bracelets and GPS monitoring, wire taps on phones and monitoring of computers, the installation of cameras inside and outside residence for constant surveillance and, in addition to the foregoing, the posting of significant cash and performance bonds.

To date the only remaining security detainee is Hassan Almrei, detained since October 2001 at the Kingston Immigration Holding Centre, within the walls of Millhaven Institution, near Kingston.

The Supreme Court, then, found that subsection 84(2) of *IRPA*, which denies a prompt hearing to foreign nationals by imposing a 120 period after confirmation of the security certificate, violated section 7 of the *Charter*, and struck that provision down. It then read the words “foreign nationals” into section 83 and struck the words “until a determination is made under subsection 80(1)” from subsection 83(2). In so doing the Court imposed equality into the detention review process for foreign nationals and permanent residents. Provided that the review process is regular and ongoing and considers the factors listed, the process will comply with the *Charter*.

The Use of Secret Evidence

Detention was not the only issue considered by the Supreme Court. The use of ‘secret evidence’ both at the Court review of the security certificate and in detention hearings, was also considered. In invoking section 78 of *IRPA*, before *Charkaoui*, the Minister could facilitate the hearing of evidence in the absence of the permanent resident, foreign national or their respective counsel. This provision applied to both security certificate hearings and detention reviews.

In applying *Charter* principles to the use of secret evidence in security proceedings, the Supreme Court of Canada first established revolutionary principles for *Charter* litigation involving non-citizens, and then applied these principles to strike down the ‘secret evidence’ provisions of *IRPA*.

Since 1992, when the Supreme Court rendered its decision in *MEI v. Chiarelli*,⁵ a non-citizen in Canada was accorded diminished *Charter* safeguards in all matters within the immigration context. Under this approach, the status of a person in Canada determined the content of *Charter* rights in immigration matters, virtually ignoring the actual impact government action had on fundamental human rights interests of non-citizens. Consequently, long-term permanent residents were deported with minimal due process rights,⁶ Canadian children were separated from their non-citizen parents,⁷ refugee claimants with criminal backgrounds were denied access to the Immigration and Refugee Board,⁸ and secret evidence was used to detain and deport those deemed to be security threats.⁹

Writing for the majority in *Chiarelli*, Mr. Justice Sopinka had set a course for non-citizens which would facilitate and justify prolonged detention and even the risk of removal to torture when he penned these words:

Thus in determining the scope of principles of fundamental justice as they apply to this case, the Court must look to the principles and policies underlying immigration law. The most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in the country. At common law an alien has no right to enter or remain in the country:¹⁰

This pronouncement was made seven years after Madam Justice Wilson held in *Singh*¹¹ that the status of a person had no place in an assessment of the rights they should be accorded under the *Charter*. In effect, the decision in *Chiarelli* had over-ruled *Singh* and set a course upon which fundamental human rights principles embodied in the *Charter* had different applications for the citizen and the non-citizen.

The Supreme Court decision in *Charkaoui* rejects this notion of status as informing *Charter* rights and re-institutes a human rights approach to *Charter* analysis of government action affecting non-citizens. This is new, it is revolutionary and it should have a wide-ranging impact on the practice of immigration law in Canada.

Engagement of Section 7 of the Charter

At paragraph 18 of the decision in *Charkaoui*, after citing the *Chiarelli* formulation regarding non-citizens and how it was applied in *Medovarski*¹² the court said that: “In determining whether section 7 applies, we must look at the interests at stake rather than the legal label attached to the impugned legislation.”

In other words, the application and extent of *Charter* protections should be determined by the impact on a person and on their life, and not by the fact that it is an immigration enactment or the interests of a non-citizen which are at issue.

Once this principle was accepted, the Court determined that section 7 was engaged both because of the obvious impact that detention had on section 7 liberty interests, but also because the issuance of a security certificate under *IRPA* had as a possible consequence, deportation to a risk of persecution, torture or other cruel and inhumane treatment. Such a process therefore also engaged security of the person interests in section 7.

The determination by the Court that all links in a chain which may lead to an eventual infringement of the *Charter* engage security of the person interests is similarly novel in immigration law. Previously, the lower courts had held that the *Charter* only came into play in immigration matters at the very end of the process,¹³ when the person concerned faced removal to a risk of persecution or other forms of cruel and unusual treatment. *Charkaoui* suggests that at each and every stage of the process of removal *Charter* scrutiny and, as such, due process rights, will arguably be engaged.

Once the Court accepted that section 7 was engaged, it then moved on to the second stage of the section 7 analysis, to determine whether the principles of fundamental justice had been breached. The Court found that alternatives which preserved the sensitivity of secret evidence existed, and that they would also allow a permanent resident, foreign national or his counsel to test the reliability of the evidence. The use of special counsel for this purpose who would be privy to the evidence and allowed to cross examine on it, was suggested.

The Court also found that the secrecy of the scheme at present denies the named person the opportunity to know the case put against him or her and hence to challenge the government's case. This was a breach of the fundamental justice guarantee of section 7 of the *Charter*. The order was suspended for one year in order to allow Parliament time to amend the law, meaning that detention hearings held during the year subsequent to the decision would continue using secret evidence. As a consequence, in July 2007 Hassan Almrei's detention was reviewed relying on evidence which neither he nor his counsel were permitted to know or to challenge.

The first security detention case to proceed following the Supreme Court pronouncement in *Charkaoui* was *Jaballah*.¹⁴ In that decision, the Court on review set out the principles now to be applied to security certificate detention reviews. They can be summarized as follows:

1. The Ministers bear the initial burden at each detention review of establishing that the criteria in section 83 are met.
2. The appropriate standard to be applied when reviewing a continuation of detention is that of reasonable grounds to believe. Mere suspicion or speculation is insufficient. This requires the judge to consider whether there is an objective basis, which is based on compelling and credible information.
3. The legislation authorizes the reviewing judge to fashion conditions that would neutralize the risk of danger upon release and to order the release of the detainee upon those terms.
4. Indefinite detention is a factor to be considered, but is not determinative.
5. Given the fact that the Supreme Court held its order in abeyance for one year, the unfairness or the constitutional infirmity of the process would not be factored in when considering the danger posed by the person concerned.
6. The evidentiary standard to be applied to assess competing pieces of evidence is balance of probabilities. Hence, the Ministers must prove the alleged facts on a balance of probabilities.
7. Each detention hearing is *de novo*.

Until a new procedure is enacted by Parliament which allows the foreign national or permanent resident the protections necessary to adequately address evidence which they have not seen, the process will remain unfair and taint any decision rendered by the Court which fails to release a security detainee.

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- ¹ *Charkaoui v. MCI* [2007] SCJ No. 9.
- ² *Re Baroud* (1995) OJ No. 43(Ont.CA); and *Ahani v. MCI* (1976) FCJ No. 937.
- ³ *Ahani v. MCI* 2000 24 Admin. L.R. (3d) 171 (FCA).
- ⁴ *Sabin v. MCI* [1995] 1 FC 214.
- ⁵ [1992] SCJ No. 27.
- ⁶ *Williams v. MCI* (1997) FCJ no. 393 (FCA).
- ⁷ *Langner v. MEI* (1995) FCJ No. 469 (FCA).
- ⁸ *Nguyen v. Canada* (1993) FCJ No. 47 (FCA).
- ⁹ *Ahani v. MCI* (1996) FCJ No. 937 (FCA).
- ¹⁰ *R. v. Governor of Pentonville Prison*, [1973] 2 All E.R. 741.
- ¹¹ *Singh v. MEI* (1985) SCJ No. 11.
- ¹² *Medovarski v. MCI* (2005) SCJ No. 31.
- ¹³ *Nguyen v. Canada* (supra).
- ¹⁴ *Jaballah v. MCI* [2007] FCJ No. 518.



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Message from the Chair

*Sergio R. Karas**



AS I BEGIN MY TENURE as Chair of the OBA Citizenship and Immigration Section, I look forward to an exciting and fulfilling year. The challenges ahead are many, but we will meet them with enthusiasm and determination. We have a group of dedicated and accomplished members of the new Executive who freely contribute their time and expertise to advance the interests of the Citizenship and Immigration Section and of the Bar.

Our Section subcommittees are already hard at work, organizing meetings with government officials to keep our lines of communication and dialogue open and constantly flowing. In the past, our proactive approach resulted in significant achievements for our Section, and we hope to continue on that successful path. Our subcommittees for this year will include Enforcement/CBSA; Port of entry; Service Canada; IAD; Federal Court and Newsletter.

In addition, our Section will have to address issues arising out of the *Access to Justice Act* and paralegal regulation. Last year, the OBA Task Force on Access to Justice made submissions to the Ontario Legislature, and was instrumental in securing several amendments to Bill 14 to protect the integrity of the legal profession. The Task Force then met with the Law Society of Upper Canada to ensure that the regulations governing paralegals apply consistently to all those purporting to give legal advice in the province of Ontario. The Task Force, with the assistance of the OBA staff and a subcommittee of the Citizenship and Immigration Section, also requested the Law Society to include immigration consultants in their regulatory scheme. At the moment, the position of the Law Society in the matter remains unclear. Our Section will work diligently with OBA staff to prepare submissions and meet with the Law Society, to ensure that immigration consultants operating in the province of Ontario are regulated in accordance with the letter and spirit of the legislation. A recent series of investigative reports by journalists of *The Toronto Star* highlighted the constant and rampant abuses carried out by some unscrupulous immigration consultants and their agents, who operate with impunity despite the so-called regulation by CSIC. Stay tuned for further developments on this subject.

Program Coordinator Nan Berezowski has prepared an interesting and useful line-up of luncheon programs for the membership. I encourage everyone to attend as many as possible. Luncheon meetings are not only the best way to stay current and learn from government officials and experienced counsel, but also a good way to network with colleagues and exchange viewpoints. We strive to bring you the highest possible quality programming to assist you in your practice.

CLE Liaison Shoshana Green is working on an informative program for the upcoming OBA Institute. The OBA Institute is a showcase of all the Sections and their expertise in different areas of the law. It is a wonderful opportunity to reach out to members of other Sections and areas of practice, and to provide them with a glimpse into the activities of Citizenship and Immigration. The program will include many government speakers and I encourage you to attend.

AGR Liaison Marshall Drukarsh is working with OBA staff on a regular basis to ensure that our voice is heard by the relevant departments, and that we enjoy effective communications with both the Ontario and Federal governments.

Technology Liaison Jerry Kreindler has met with OBA staff to evaluate our technology needs and determine how best to share information and improve communications amongst members of the Section.

Newsletter Editor Les Morley has worked diligently over the summer to ensure that this newsletter was published promptly with useful and interesting content for the membership.

Last, but not least, a very special thanks to all the dedicated and capable OBA staff, and in particular to Section Coordinator Janet Green, who is responsible for organizing our activities, and to Louise Harris, Jonathan Clancy

and Catherine Brennan of the AGR Department, who tirelessly advocate on behalf of the legal profession in Ontario and keep us updated on all legislative developments.

We look forward to a successful year and we welcome the participation of every member of the Section. We are all in this together.

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Editor's Message

Leslie H. Morley*



IT IS A PLEASURE to take hold of the reins of the newsletter. I thank my predecessor Nan Berezowski for readying the steed, Section Chair Sergio Karas for pointing the way forward, the contributors for their good work, and all the rest of you for support and encouragement.

In this issue of the Citizenship and Immigration Section's newsletter we focus on the detention of immigrants. It is a subject often neglected both by immigration practitioners and prison lawyers, but one that has a most profound impact upon those who are experiencing it directly. It is past time that we took a closer look.

What are the procedures employed in detaining immigrants in Canada? What rights do such detainees have, and what resources may they access? In assisting them, are there any lessons to be learned from the experiences of those incarcerated in our reformatories and penitentiaries? And what shall be done with the mentally ill, or those suspected of affiliation with terrorists? These and other topics are addressed in this issue.

Detention generally begins with arrest, and so Adrian Huzel outlines for us the *Charter* right to counsel upon immigration arrest and detention. Silvia Valdman introduces us to the basics of detention reviews, with a particular focus on the special rules relating to designated representatives. Further aspects of immigration detention are explored in Douglas Lehrer's on the Toronto Bail Program and Kristin Marshall's on immigration bonds and guarantees. For his part, Marshall Drukarsh answers the question as to whether or not indefinite immigration detention exists in Canada.

In our feature piece, Ron Poulton explains the process currently in place by which one might end up in custody on a security certificate, and reviews the principles now to be applied to security certificate detention reviews. Paul Copeland takes us behind the walls of the Kingston Immigration Holding Centre, to reveal the tribulations of those security certificate detainees who have called it home. How, he asks, can anyone be incarcerated there and not go mad? It is a question also touched upon by Randy Hahn, in his review of a book about the experiences of a Canadian interned in a Saudi jail.

We have accepted Ann Pollak's invitation into the realm of correctional law, and she guides us through the application of *habeas corpus* in immigration cases. David Matas takes us deeper into that territory, as he reviews developments respecting the detention of immigrant day parolees.

We retain our US Watch feature in this issue, and have added to it "Regional Beat", in which are contained dispatches from outlying areas of the province.

If anyone has any questions or comments about this issue of *Citizenship and Immigration*, we would be delighted to hear from you!

* Leslie H. Morley is the Editor of Citizenship and Immigration, the President of the Ontario Prison Lawyers' Association, and an Accredited Family Mediator with the Ontario Association of Family Mediation. He practices in Kingston, and may be reached at les@lesmorley.com.

The Kingston Immigration Holding Centre

Paul Copeland*



SINCE THE ATTACK on the World Trade Center, five men have been held in Canada pursuant to the security certificate provisions of the *Immigration and Refugee Protection Act*. Adil Charkaoui was arrested in Montréal. Hassan Almrei, Mahmoud Jaballah, and Mohamed Mahjoub were arrested in Toronto. Mohamed Harkat was arrested in Ottawa. Mahjoub and Jaballah were arrested before September 11, 2001; Jaballah about a month before, and Mahjoub about a year before.

Adil Charkaoui, the only one who was a permanent resident in Canada, and who is therefore subject to a different bail regime, was released on stringent bail terms on his third bail hearing.

Mr. Harkat was detained at the Ottawa Regional Detention Centre for three-and-a-half years. The other three men were detained at the Toronto West Detention Centre. For most of the time Mr. Harkat was in regular population at the Ottawa Regional Detention Centre and Mr. Jaballah at the Toronto West Detention Centre. The other two at the Toronto West Detention Centre spent most of their time in segregation and frequently engaged in hunger strikes to try to improve their situation in the jail.

The conditions of detention for Almrei, Jaballah and Mahjoub at Toronto West became serious issues in the litigation relating to the continued detention of those three men and the attempts to have them released on bail. For Mr. Almrei, the conditions of detention were considered in the Supreme Court of Canada.

The Federal government finally announced, in open court on October 19, 2005, that arrangements were being made to transfer the four men still in custody to a new facility to house them. That is how the Kingston Immigration Holding Centre came to be built on the grounds of Millhaven Penitentiary in southeastern Ontario.

Notwithstanding all of the problems that occurred in the detention of the three men in Toronto, Canada Immigration authorities did not consult the three men or their lawyers prior to planning and building the KIHC.

On April 24, 2006, Harkat, Mahjoub, Jaballah and Almrei were transported to the KIHC. Immediately upon their arrival at the facility it became apparent to the men that there were many, many problems with the KIHC.

The Federal Correctional Investigator in his 2005-2006 annual report had noted that there were no plans for the Correctional Investigator to have jurisdiction over the institution. He noted that when the men were in the provincial jails the Ombudsman had jurisdiction to deal with these complaints. The Correctional Investigator noted that the failure to provide for a correctional investigator or an ombudsman meant that Canada was in violation of its international treaty obligations under the *Optional Protocol of the Convention against Torture*. A Parliamentary Committee looking into the security certificate issue and the conditions at the KIHC deplored the lack of a correctional investigator and recommended that the Minister of Public Safety correct that problem, but nothing was done.

Arrangements made for the visitors to the institution were problematic. A two-hour visit starting at 9:00 AM was available, as was a two-hour visit in the afternoon. Those time periods were useless for the wives and young families of Jaballah and Mahjoub. To travel to KIHC in the morning to arrive by 9:00 AM would require a departure no later than 6:00 AM. KIHC is in the middle of nowhere and there is nothing to do and no place to go over the lunch hour. Requests to change the visiting hours fell on deaf ears.

The KIHC is on the grounds of Millhaven Penitentiary and the very bright light from the penitentiary shone into the cells of the four men. Requests for curtains also fell on deaf ears.

The KIHC is a very small facility attached to Millhaven Penitentiary. It consists of two buildings in a relatively small area with high wire mesh fences topped by razor wire. One building, a double-sized wooden mobile home, contains six small cells, a common area and an administrative office for the guards. There is a small yard made up of a patchwork of concrete and asphalt. The yard contains one wooden picnic table with bench seats attached. On the other side of the yard there is a concrete building with a small work-out room, a small common room for visiting, a video teleconferencing room, a room for medical examinations and a small storage room.

The list of problems at KIHC was almost endless, and included:

- Strip searches before and after visits;
- return to one's cell four times a day for count (this in an institution that had four inmates);
- problems with the use of the phone to call family and friends, particularly for overseas calls to family;
- prohibition from using the washroom facilities in the common area when exercising;
- disputes and arguments with guards;
- taunts and threats from guards;
- interference with religious practice;
- property issues, including when property could be brought into KIHC;
- the lack of an adequate process to resolve issues at KIHC;
- quantity and quality of the food;
- foreseeable problems with the lack of air conditioning;
- the requirement to wear prison-issued clothing;
- a poorly designed common space desk that, because of its design, could not be used for board games or writing;
- the promise of a ping pong table, subsequently broken;
- the lack of canteen facilities;
- denial of use of a big grassy fenced area immediately beside the KIHC site;
- daily visits by the nurse, which the inmates felt was invasive and unnecessary;
- the poor quality of the food provided; and
- the lack of educational programs.

This is an incomplete list of all of the issues.

A meeting was held with senior CBSA and Corrections Canada on May 4 to discuss the many problems. All requests for action were refused and no changes were made.

Shortly after the transfer to KIHC, my co-counsel Matt Webber and I were successful in obtaining an order for the release of Mr. Harkat on bail, albeit on the tightest bail in Canadian legal history so far as we know.

The three men still in KIHC commenced a hunger strike on May 13, 2006 and stayed on the hunger strike until June 26, 2006. Some of the problems were resolved at that point. Visits were changed to the afternoons, the requirement for one-hour advance notice to make a phone call was eliminated, air-conditioning was promised, and canteen was provided.

A second hunger strike to deal with many of the remaining issues commenced on December 6, 2006.

Barb Jackman and John Norris, the lawyers for all three men, commenced litigation in the Federal Court for damages and injunctive relief concerning the conditions at KIHC. Chief Justice Lutfy of the Federal Court conducted numerous mediation sessions over many months in an attempt to resolve the litigation and improve the conditions in the jail.

Mahjoub and Jaballah were successful in being granted bail and ceased their participation in the hunger strike in March of 2007. Mr. Almrei continued on the hunger strike, drinking only orange juice and water, for a total of 156 days.

I took over as counsel for Mr. Almrei in the spring of 2007. I first met him in person on May 9, 2007 when he was to be cross-examined upon his affidavit in support of the motion for injunctive relief in relation to jail conditions. This was scheduled to be heard for a week in Federal Court in late May 2007.

I spent most of the day with Mr. Almrei. He was born in Syria on January 1, 1974. He was raised in Saudi Arabia. When he was 16 years old, in 1990, with financial assistance from the Saudi government, he flew to Islamabad with the intention of joining the mujahadeen fighting the communist government in Afghanistan. The fight against the Russian invaders and later, after the Russians left, against the Najibullah government, was supported by the Saudis, many other Arab governments and mainly by the CIA. Hassan came down with malaria and after 27 days returned home. He made four more trips to Afghanistan in 1991, 1992, 1994 and 1995. Eventually, he left the Middle East and came to Canada where he made a successful refugee claim.

During the course of our discussions, Hassan told me of an on-going argument he was having with the nurse in the KIHIC. She came to see him every day. He did not want to see her and had told her and jail officials that if he needed medical help he would ask for her. The morning of the day I saw him the argument had been a little more heated.

After meeting with Hassan and representing him at the cross-examination I left to drive to Ottawa for a hearing in the Harkat case. The next day when driving back to Toronto I received a call on my cell phone from a friend of Hassan. I was told that when Hassan had returned to his cell after the cross-examination, he was advised that because of the argument with the nurse he was to be locked in his cell. Hassan responded to that by announcing that he would stop drinking juice and water. Based on the information I had concerning lengthy hunger strikes, I thought that likely left Hassan a few days to live. When I spoke with senior jail officials, it appeared that they thought the same thing. They had given Hassan a non-resuscitation letter and wanted him to get legal advice from me about signing it. I declined to give him legal advice on that issue. Hassan discussed the matter with MP Bill Siksay who was visiting him. I tried over the phone to resolve the issues but had no success.

Late that day when I got back to Toronto, I sent emails to the government lawyers on the case. I proposed some minor changes to the situation in the jail that would stay in place until the court reached a decision on the injunctive relief application. The next day the government agreed to my proposals and Hassan ended his hunger strike. The motion for the injunction was settled on the first day of the week scheduled for the hearing. Settlement was achieved after another mediation session with Chief Justice Lutfy and agreement to terms and conditions set out in a sealed document that was filed with the court.

In July, we commenced the third detention review hearing for Mr. Almrei, this time before Justice Lemieux. Significant reliance was placed on the evidence and findings from the two previous bail hearings. The new hearing was done under the new rules set out by the Supreme Court of Canada in its February 23, 2007 decision in Charkaoui-Almrei-Harkat case. We spent a total of six days in Court hearing evidence and adducing argument. Justice Lemieux has reserved his decision.

I am not allowed to give out the details of the settlement. I can tell you that the situation in the KIHIC is better than it has ever been there or at the Toronto West. Still, it is outrageous that the unconstitutional security certificate process has kept Mr. Almrei in detention in inhumane conditions for 46 months.

The treatment of Mr. Almrei by CBSA and Corrections Canada officials at KIHIC would have had the effect of driving most inmates stark raving mad. I do not suggest that was their intention, but their bureaucratic, unthinking, unresponsive attitude could well have achieved that result.

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Day Parole for Convicted Foreign Nationals

David Matas*



ARSHAD MAHMOOD CHAUDHRY, a citizen of Pakistan, entered Canada in July 1993 as an undocumented visitor and remained without authorization after his visitor status expired in December of that year. In October 1994, he was convicted on two counts of trafficking in a narcotic and was sentenced to 14 years' imprisonment.

On March 29, 1995, Mr. Chaudhry was ordered deported. On April 19, 1995, a warrant for his arrest and delivery order were issued under subsection 103(1) of the *Immigration Act*. According to a letter of September 29, 1997, written by C. Marchand of the Winnipeg Canada Immigration Centre, the warrant was issued because there were concerns about whether Mr. Chaudhry would otherwise appear for his removal. The effect of the arrest warrant and the delivery order was to authorize the transfer of Mr. Chaudhry to immigration detention once he was released from criminal detention.

On the day that the warrant was issued, an order was also made under section 105 of the former legislation directing the person in charge of the institution where Mr. Chaudhry was incarcerated to detain him until the expiration of his sentence and to deliver him into the custody of an immigration officer. The purpose of this order was to prevent him from evading removal.

An order under subsection 105(1) rendered the person subject to it ineligible for release on day parole or on an unescorted temporary absence, by providing that "notwithstanding the *Corrections and Conditional Release Act*" a person against whom an order is made under the subsection remains incarcerated until the expiration of his or her sentence. On the view taken by the Minister, Mr. Chaudhry had no right to have the reasons for the continuation of detention reviewed by the Adjudication Division of the Immigration and Refugee Board.

Both Mr. Justice Evans of the Federal Court, on March 8, 1999, and the Federal Court of Appeal, on September 7, 1999, disagreed with the Minister. They both held that the former legislation gave Mr. Chaudhry and others in his position the right to an independent review of their detention by the Adjudication Division. Such a review, it was concluded, could lead to the lifting of the order and create eligibility for day parole.

In the Federal Court, Mr. Justice Evans held that Mr. Chaudhry was entitled to day parole eligibility both as a matter of statutory interpretation and by virtue of the *Canadian Charter of Rights and Freedoms* provision prohibiting arbitrary detention.¹ The Court of Appeal relied on statutory interpretation alone to grant Chaudhry the result he sought.²

The Government, in response, introduced legislation into Parliament to overcome the decision. The *Corrections and Conditional Release Act* now provides that:

An offender against whom a removal order has been made under the *Immigration and Refugee Protection Act* is ineligible for day parole or an unescorted temporary absence until the offender is eligible for full parole.³

The legislation came into force June 28, 2002. The legislative ambiguity which allowed Chaudhry to use arguments of statutory interpretation to challenge his ineligibility for day parole was gone. What remained was a challenge under the *Charter*.

Daniel Bedada raised that challenge. Mr. Bedada is a national of Ethiopia. He received a visa, issued on August 23, 2000 from the Canadian visa office in New Delhi, to come to Canada as an independent immigrant. He arrived on January 1, 2001 and was granted permanent resident status on his arrival at the port of entry.

Mr. Bedada pleaded guilty and was convicted on June 9, 2004 on one count of an attempt to obstruct justice contrary to section 139(2) of the *Criminal Code* and was sentenced to 24 months in jail. He was also convicted of

other offences with lesser terms, all of them to be served consecutively to the 24-month term. His total sentence was four years and four months. He began serving it on June 9 at Stony Mountain penitentiary.

Upon being sentenced, Bedada's day parole eligibility date was February 27, 2005. His full parole eligibility date was November 17, 2005; his statutory release date April 30, 2007; and his warrant expiry date October 8, 2008. Upon reception in the penitentiary, Bedada was told of these dates and, in particular, that his day parole eligibility date was February 27, 2005.

On December 14, 2004, the Immigration Division of the Immigration and Refugee Board ordered Mr. Bedada deported based on his criminal conviction for obstruction of justice. After the removal order, on January 6, 2005, David Martin, a parole officer with the Correctional Service of Canada, met with Mr. Bedada and informed him that, as a result of the deportation order, his day parole eligibility date had been changed to his full parole eligibility date, that is to say, from February 27, 2005 to November 17, 2005.

The Canada Border Services Agency (CBSA) issued a warrant for arrest of Mr. Bedada dated January 11, 2005 under section 55(1) of the *Immigration and Refugee Protection Act*. Further, pursuant to section 59, on January 18, 2005 the CBSA ordered the warden of Stony Mountain Institution to deliver Mr. Bedada at the end of his sentence to an immigration officer.

Mr. Bedada sought leave of the Federal Court to commence an application for judicial review of the decision dated January 25, 2005 changing his day parole eligibility date from February 27, 2005 to November 17, 2005. Leave was granted, but Mr. Bedada's sentence expired and he was removed from Canada before his application was heard in Federal Court.

The respondent Solicitor General did not move to dismiss the application for mootness nor argue in Federal Court that the application was moot. The Federal Court judge, Mr. Justice Phelan, nonetheless on his own initiative dismissed the application for mootness.⁴

The mootness ruling at the Federal Court level was surprising not merely because it was not sought by the Minister. Also, it was contrary to what the Court of Appeal had decided in the case of *Chaudhry*, where the person concerned, Mr. Chaudhry, also had been deported by the time the Court of Appeal had heard his case. There the Court stated that "Although this case was moot, the issue here is one that may arise in the future and we have therefore exercised our discretion to hear and decide the first certified question."⁵

Bedada appealed to the Federal Court of Appeal.⁶ At the date of writing, the appeal is pending.

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¹ *Chaudhry v. Canada (M.C.I)* (T.D.) [1999] 3 F.C. 3 relying on *Charter* section 9.

² *Chaudhry v. Canada (M.C.I)* (C.A.), [2000] 1 F.C. 455.

³ *Corrections and Conditional Release Act*, S.C. 1992, c. 20, subsection 128 (4).

⁴ *Bedada v. Solicitor General* 2007 FC 121.

⁵ *Chaudhry v. Canada (M.C.I)* (C.A.), [2000] 1 F.C. 455, para. 12.

⁶ Court No. A-121-07

Habeas Corpus and Immigration Detention

Ann H. Pollak*



ARE *PEIROO* AND *REZA* the last word on *habeas corpus* for immigration detainees?¹ Can *habeas corpus* still be of use? What I know about immigration issues comes from my encountering immigrants as prisoners in provincial jails. I will leave slaying the dragon of the “comprehensive scheme” of internal review to the experts, but I do wonder if The Great Writ might still be useful in addressing concerns about residual liberties for immigration detainees.

Rights conferred under the *Charter* apply to those in immigration detention.² Persons detained under the *Immigration and Refugee Protection Act (IRPA)* therefore, begin with an entitlement to liberty, except where it is limited in accordance with section 7 of the *Charter*. They also begin with an entitlement to *habeas corpus*, guaranteed in subsection 10(c):

10. Everyone has the right on arrest or detention

* * * * *

(c) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

The question is, to what extent have the operation of case law and statute taken away or limited that entitlement?

In *Pieroo*, the applicant sought to review her restraint or detention pending removal after a finding that she did not have a credible basis for her refugee claim. As an outsider to immigration practice, this strikes me as a peculiar and narrow attack on the removal order, but I gather it was common practice at one time in order to effect a speedy remedy against what could be a swift removal. The court concluded that:

Parliament has established in the [*Immigration*] *Act*... a comprehensive scheme to regulate the determination of such claims and to provide for review and appeal in the Federal Court of Canada of decisions and orders made under the *Act*, the ambit of which review and appeal is as broad as or broader than the traditional scope of review by way of *habeas corpus* with *certiorari* in aid. In the absence of any showing that the available review and appeal process established by Parliament is inappropriate or less advantageous than the *habeas corpus* jurisdiction of the Supreme Court of Ontario, it is my view that this court should, in the exercise of its discretion, decline to grant relief upon the application for *habeas corpus* in the present case, which clearly falls within the purview of that statutory review and appeal process.³

The Supreme Court of Canada refused leave to appeal in *Peiroo*, but later took an opportunity to more clearly endorse the provincial superior courts’ discretion to decline to exercise their *habeas corpus* jurisdiction in immigration cases. In approving the reasons of Abella J.A. (as she then was) in *Reza*, the court noted:

She also found it significant that the Federal Court has an exclusive mandate over immigration matters and found the principles from *Peiroo v. Canada (Minister of Employment and Immigration)* (1989), 69 O.R. (2d) 253 (dealing with *habeas corpus*), were applicable. Abella J.A. noted that the failure to decline to exercise jurisdiction would raise concerns over forum-shopping, inconsistency and multiplicity of proceedings.⁴

It is clear the provincial superior courts have discretion to decline to exercise *habeas corpus* jurisdiction in immigration matters, but section 18 of the *Federal Courts Act* does not transfer exclusive jurisdiction to hear applications for *habeas corpus* to the Federal Courts, except in relation to any member of the Canadian Forces serving outside Canada. Neither does the case law remove the discretion of the provincial superior courts to exercise their jurisdiction; although it does bring to mind a story about a camel and the eye of the needle.

A remedy of *habeas corpus* is classically sought in the criminal context as an absolute remedy to detention, that is, as a remedy of release from custody where there is no legal authority to detain. But in recent times, the remedy has been available to review degrees of detention in prison. It is not available to review conditions of confinement, such as diet, access to programs, use of library facilities, or pay levels for prison work. It has been used, however, to review decisions that might in effect create a new detention, such as the decision to segregate a prisoner or transfer to confinement at a higher level of security.

This increase in restrictions was recognized as a new detention by the Supreme Court of Canada for the first time in *Martineau*,⁵ where segregation was dubbed “a prison within a prison.” Those of us who ply our trade in pursuit of liberty owe a great debt to John Conroy who pushed the camel’s nose into the tent in those dark days of prison law before the *Charter*.

Later, when the principle of residual liberties for prisoners was argued in the case of *Miller*,⁶ Conroy’s camel was comfortably in the tent. LeDain, J. for a unanimous court wrote,

In effect, a prisoner has the right not to be deprived unlawfully of the relative or residual liberty permitted to the general inmate population of an institution. Any significant deprivation of that liberty, such as that effected by confinement in a special handling unit meets the first of the traditional requirements for *habeas corpus*, that it must be directed against a deprivation of liberty.

Moreover, the principle that *habeas corpus* will lie only to secure the complete liberty of the subject is not invariably reflected in its application. There are applications of *habeas corpus* in Canadian case law which illustrate its use to release a person from a particular form of detention although the person will lawfully remain under some other restraint of liberty.⁷

It is equally well settled that *habeas corpus* will lie to determine the validity of a deprivation of residual liberty in the prison context.

I do not say that *habeas corpus* should lie to challenge any and all conditions of confinement in a penitentiary or prison, including the loss of any privilege enjoyed by the general inmate population. But it should lie in my opinion to challenge the validity of a distinct form of confinement or detention in which the actual physical constraint or deprivation of liberty, as distinct from the mere loss of certain privileges, is more restrictive or severe than the normal one in an institution.⁸

In British Columbia, persons detained under the *IRPA* for longer than 72 hours are held in a provincial jail.

Persons detained under *IRPA* may be held in a CBSA IHC, provided they are not detained on grounds of danger or security. The CBSA operates three IHCs, Toronto, Ontario; Laval, Quebec; and Vancouver, British Columbia. The facility in B.C. is only for short stays (72 hours). For danger or security cases and for all other areas not served by an IHC, persons detained under *IRPA* are generally held in provincial correctional or remand facilities. Occasionally for short periods, persons are held in RCMP holding cells.⁹

I am uninformed about what happens to persons in an IHC, but those in British Columbia jails are subject to the rules and regulations of the correctional centre. If a provincial prisoner is moved to segregation for administrative or disciplinary reasons, the decision to restrict residual liberty is reviewable by *habeas corpus*. It seems to me reasonable that an immigration detainee’s residual liberty is at least as valuable as another prisoner’s, and *habeas corpus* should lie in this situation.

The policy manual (see note 9) refers to “danger or security cases,” and this suggests to me that there are varying degrees of confinement for immigration detainees even without the use of administrative or punitive segregation. While the initial classification to higher security is likely not reviewable by means of *habeas corpus*, later decisions to increase security level must surely be.

The 1985 trilogy of *Miller*, *Morin*, and *Cardinal* acknowledges the concurrent jurisdiction of the provincial superior courts and the Federal Court with respect to the residual liberty of federal prisoners. The court approved

of the overlapping jurisdiction and the choice of forum, emphasizing the particular importance of a remedy to review restrictions of liberty.

After giving consideration to the two approaches to this issue, I am of the opinion that the better view is that *habeas corpus* should lie to determine the validity of a particular form of confinement in [page641] a penitentiary *notwithstanding that the same issue may be determined upon certiorari in the Federal Court*. The proper scope of the availability of *habeas corpus* must be considered first on its own merits, apart from possible problems arising from concurrent or overlapping jurisdiction. The general importance of this remedy as the traditional means of challenging deprivations of liberty is such that its proper development and adaptation to the modern realities of confinement in a prison setting *should not be compromised by concerns about conflicting jurisdiction*. As I have said in connection with the question of jurisdiction to issue *certiorari* in aid of *habeas corpus*, these concerns have their origin in the legislative judgment to leave the *habeas corpus* jurisdiction against federal authorities with the provincial superior courts. There cannot be one definition of the reach of *habeas corpus* in relation to federal authorities and a different one for other authorities.¹⁰ (emphasis added)

Because of the importance of the right to liberty and the traditional remedy of *habeas corpus*, the court in *Miller* was not bothered by concerns about forum shopping, as the court was in *Reza*. The Supreme Court of Canada in *Reza* did not cite any of the prison and parole cases. The court generally accepted the reasons of Abella J.A., and did not specifically reject her comments about forum shopping.¹¹

More recently, in the case of *May*, the Supreme Court of Canada embraced the choice of forum as a factor in favour of continued overlapping jurisdiction of the Federal Court and the provincial superior courts in reviewing decisions to deprive federal prisoners of residual liberties.

In our view, the following five factors militate in favour of concurrent jurisdiction and provide additional support for the position that a provincial superior court should hear *habeas corpus* applications from federal prisoners: (1) *the choice of remedies and forum*; (2) the expertise of provincial superior courts; (3) the timeliness of the remedy; (4) local access to the remedy; and (5) the nature of the remedy and the burden of proof.¹² (emphasis added)

The initial decision to detain is clearly within the authority of the *IRPA*, and the provincial superior courts will doubtless continue to decline to hear applications for *habeas corpus* to review that decision. They will leave the applicant to seek a remedy within the “comprehensive scheme” of internal review. Subsequent deprivations of residual liberty, however, such as transfers to higher security and segregation, are decisions of the jailer, and *habeas corpus* should not be overlooked as a remedy just because the initial detention was pursuant to the *IRPA*. Surely there is no speedier route to a remedy than through *habeas corpus*.

The Ontario Court of Appeal in *Reza* spoke of “forum shopping” like it was a bad thing. Surely selecting the forum more likely to provide an appropriate remedy is an important and honourable part of counsel’s expertise (not to be confused with judge shopping). Given the court’s warm approach to the concept in *May*, this may be the time for the immigration bar to address the issue again, perhaps importing concepts from the prison cases. In any event, to the extent immigration detainees find their residual liberty restricted *qua* prisoners, surely *habeas corpus* is an important tool in the box.

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¹ *Reza v. Canada (Minister of Employment and Immigration)*, [1994] 2 S.C.R. 394; and *Peiroo v. Canada (Minister of Employment and Immigration)* (1989), 69 O.R. (2d) 253 (C.A.); leave to appeal refused, [1989] S.C.C.A. No. 322.

² *Policy and Program Manual*, Citizenship and Immigration Canada, ENF 20, “Detention,” section 5.15.

³ *Peiroo*, *supra*, note 1.

⁴ *Supra*, note 1, para.16.

⁵ *Martineau v. Matsqui Institution (No. 2)*, [1980] 1 SCR 602.

⁶ *R. v. Miller*, [1985] 2 SCR 613. This case was part of a trilogy again involving Conroy as counsel in *R. v. Cardinal*, [1985] 2 S.C.R. 643. The other case was *Morin v. Canada (National Special Handling Unit Review Committee)*, [1985] 2 S.C.R. 662.

⁷ *Supra*, note 5, para. 32-33.

⁸ *Supra*, para. 36.

⁹ *Policy and Program Manual*, CIC, “Place of Detention,” section 11.

¹⁰ *Supra*, note 5, para. 36.

¹¹ *Supra*, note 1, para. 16 and 18.

¹² *May v. Ferndale Institution*, [2005] 3 S.C.R. 809; [2005] S.C.J. No. 84; 2005 SCC 82; 261 D.L.R. (4th) 541; 204 C.C.C. (3d) 1; 34 C.R. (6th) 228; para. 65.

Hold On: Reflections on Indefinite Immigration Detention

*Marshall Drukarsh**

THERE IS A FALLACIOUS IMPRESSION abroad in the land and, indeed, even within the profession. It is captured in the headlines respecting the Supreme Court of Canada’s unanimous decision in *Charkaoui*,¹ which provides that: “Canada Rules Indefinite Detention Wrong”.² Not much higher authority than the Supreme Court exists. One might reasonably assume that, if terror suspects are protected from indefinite detention, so also our run-of-the-mill clients, who are being held for hearing or for removal, would be protected.

Hold on though. Imagine the person concerned, your potential client, has come into immigration custody. Imagine he was not offered release by the CBSA following its initial investigation, and was not released as a result the 48-hour review, seven-day review, or any of several monthly reviews thereafter. This person, I contend, *is* experiencing indefinite detention; notwithstanding serial *pro forma* procedures.

In 1995, the Federal court said in *Sabin*³ that a person could not be held indefinitely under the *Immigration Act*: there has to be an end of the detention in view. The Court said that:

It is arguable that detention ... is not indefinite because it must be reviewed at least every 30 days and may be maintained only while a conditional removal order is pending, which, itself, implies the taking of recognized and prescribed steps under the *Immigration Act*. On the other hand, when any number of possible steps may be taken by either side and the times to take each step are unknown, I think it is fair to say that a lengthy detention, at least for practical purposes, approaches what might be reasonably termed ‘indefinite’.⁴

The Court set out a non-exhaustive, four-part package of considerations in indefinite detention cases, as follows:

1. What are the reasons for the detention?;
2. How long has detention continued, and how much longer is it likely to continue?;
3. Has the detainee or the state caused any delay?; and
4. What is the availability, effectiveness and appropriateness of alternatives to detention?

Upon an assessment of the answer to these questions, presumably release of the detainee was possible.

In 1997, however, the court moved in the other direction. In *Kidane*,⁵ where an adjudicator found someone to be a danger to the public, and that he was unco-operative in hastening his own removal, prolonged detention was found justifiable, and the regular periodic nature of the detention review procedure was cited as a reason why.

Therefore, despite *Sabin*, immigration detainees in Canada can remain in custody for a very long time. Nationally, as of August 31, 2007, there were 20 persons in detention, that is, still awaiting their next detention review, all of whom had been detained for more than 365 days.⁶ In the circumstances, I conclude that indefinite detention does exist in Canada, but that we just pretend it does not because periodic detention reviews are held.

At this point it is prudent to go back to the basics: an officer designated by the Minister under section 6 of the *Immigration and Refugee Protection Act* may detain a person on entry into Canada under subsection 55(3); may arrest and detain within Canada, with a warrant, under subsection 55(1); and may arrest without a warrant under subsection 55(2).

Of course, the law does not, on the face of it, invite or permit arbitrary detention of anyone seeking to enter into Canada, or remain inside of it, at the sole discretion of whomever the Minister has designated as an officer. There are grounds for detention which ought to be considered. The officer must assess whether or not there are reasonable grounds to suspect that the person to be detained is a security risk, or has violated human or international rights, under the rubric of which is included war crimes, organized criminality, terrorism and espionage.⁷

Oddly enough, as I would have thought it redundant, there is a separate instruction which says that where the officer assesses that there are reasonable grounds to believe that the person is a danger to the public, the person should be detained. Good. A person also should be detained for identity where the officer is not satisfied as to the person's identity, and identity issues need to be resolved for safety security or inadmissibility concerns.

I recall discussions during the CBA national conference in Victoria, and in other fora, that there is a noteworthy disparity across the country in the interpretation and application of the identity document instruction. In some jurisdictions there is a presumption of dangerousness arising from unreliable identity documentation, and a higher than national rate of initial detention; while in more enlightened jurisdictions, the potential connection has to be made logically, and is not presumed.

It is very interesting that the instruction shows a positive orientation only where the premise for detention is that the person poses a potential flight risk. Then, the manual stipulates that, if removal is not imminent, and if no other concerns of the types discussed herein exist, that the officer should consider all alternatives to detention.

Having been detained by an officer of the CBSA, the lucky party may be offered release from detention by the officer who had a duty to consider alternatives to detention in the first place. If release is not offered, then the person's detention is to be reviewed within 48 hours. Realistically, if one comes to the attention of enforcement officers having, for example, been granted bail release on a criminal complaint on a Wednesday or Thursday, the 48 hour detention review will occur the following Monday or Tuesday. Anecdotally I have learned that in some jurisdictions, where counsel can access their clients and CIC maintains facilities in conjunction with the Immigration Division, that the 48 hour review is often substantive in nature.

In the Ontario region, in my experience, when we are fortunate enough to have located the client in whichever detention facility he or she is held, we cannot generally communicate in advance with CBSA or get potential bondspersons or witnesses into hearing in the jails. As a consequence, often we cannot mount an effective detention review presentation until the seven-day review, by which time the unrepresented person, with or without a paralegal, may have gone on record with uninformed, non-reflective credibility-crushing comments that haunt them thereafter.

This issue was specifically addressed by the Court in *Chen*⁸ in which it was held that the Board should have excluded the statement he made while in detention and without access to counsel.

In a typical case, the problem arises where the detainee maintained a posture of righteous indignation at his 48-hour review in the belief, often fed by a paralegal or consultant, that he cannot be made to leave Canada as he has a wife and babies here. By doing so, he has virtually branded himself a flight risk who it would be irresponsible to release as he is unlikely to appear for removal. Subsequently, on the advice of counsel, if there is no reasonable prospect of resolving status from within Canada, the same individual protests that he or she wishes to leave so

that the sponsorship process to return to Canada can be commenced but, typically in my experience, the plea falls on deaf ears despite *Chen*.

One of the milestones on the road to my conclusion that indefinite detention does exist in Canada, is the Federal Court decision in *Ariyaratnam*.⁹ In that case the adjudicator's right to order the location of a detention hearing in or out of detention centre, where no witnesses are permitted, was considered in light of a presumption that a detention review deserves a full and fair hearing. The court granted the Minister's application, finding that the adjudicator had no jurisdiction to order the detention review hearing be held other than at the detention facility.

A milestone in the other direction is the seminal 2004 decision of the Federal Court of Appeal in *Thanabalasingham*.¹⁰ It concerns a suspected Tamil gang leader detained while awaiting deportation, and directly addresses the issue of whether or not each detention review hearing is *de novo* and upon whom the onus of proof lay. The Court of Appeal approved *Sahin* in stating that, as under sections 57 and 58 persons can be detained for indefinite periods without being found guilty or even being charged, detention decisions must be made with section 7 *Charter* considerations in mind. On the issue of onus, the Court stated:

It is the Minister who must establish, on a balance of probabilities, that the respondent is a danger to the public if he wants the detention to continue. The onus is always on the Minister to demonstrate there are reasons which warrant detention or continued detention. However, once the Minister has made out a *prima facie* case for continued detention, the individual must lead some evidence or risk continued detention. The Minister may establish a *prima facie* cases [*sic*] in a variety of ways, including reliance on reasons for prior detentions.¹¹

Addressing the certified question put before it, the Court of Appeal concluded that:

At each detention review made pursuant to sections 57 and 58 of the *Immigration Refugee Protection Act*, S.C. 2001, c. 27, the Immigration Division must come to a fresh conclusion whether the detained person should continue to be detained. Although an evidentiary burden might shift to the detainee once the Minister has established a *prima facie* case, the Minister always bears the ultimate burden of establishing that the detained person is a danger to the Canadian public or is a flight risk at such reviews. However, previous decisions to detain the individual must be considered at subsequent reviews and the Immigration Division must give clear and compelling reasons for departing from previous decisions.¹²

Therefore the rule, if not the practice, is that the onus is always on the Minister to establish a basis for detention, and each new detention hearing is a fresh reconsideration of that basis.

In 2005, the Federal Court in *Romans*¹³ addressed the issue of whether or not there was entitlement to release where the medical condition of the detainee had caused him to be in custody for more than five years. The Court acknowledged that "it is true that there was no new evidence before the member, nor was there any change in Mr. Romans' circumstances" but expressed the view that "despite the passage of more than five years, there was still no end in sight for Mr. Romans, insofar as his legal proceedings were concerned" and found that "the reasons given by the presiding member for departing from decisions rendered in earlier detention reviews are sufficiently clear and compelling as to meet the *Thanabalasingham* standard."¹⁴

Still, the Minister argued that "the Board's finding that Mr. Romans' detention had become indefinite was perverse and capricious, and that the presiding member erred in law in failing to apply the principles contained in the *Immigration and Refugee Protection Act* and *Regulations*, as well as those established in the jurisprudence".¹⁵

Nevertheless, at the end of the day, the Court found that the failure of the adjudicator to impose conditions on the release amounted to a reviewable error, notwithstanding the fact that, as a practical matter, Mr. Romans' situation was best addressed by Ontario's *Mental Health Act*, and was therefore beyond the Board's power. The Minister's application for judicial review of the release order was granted but Mr. Romans' detention was continued with instructions to consider appropriate conditions for release.

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¹ *Charkaoui v. Canada (Citizenship and Immigration)* [2007] S.C.J. No. 9; 2007 SCC 9; [2007] 1 S.C.R. 350; 276 D.L.R. (4th) 594; 358 N.R. 1; J.E. 2007-455; 54 Admin. L.R. (4th) 1; 44 C.R. (6th) 1; 152 C.R.R. (2d) 17; 59 Imm. L.R. (3d) 1; 154 A.C.W.S. (3d) 363; EYB 2007-114995; 2007 CarswellNat 325.

² “Canada Rules Indefinite Detention Wrong”, www.cbsnews.com, February 24, 2007.

³ *Sabin v. Canada (Minister of Citizenship and Immigration)* [1994] F.C.J. No. 1534.

⁴ *Supra*, para. 27.

⁵ *Kidane v. Canada (Minister of Citizenship and Immigration)* [1997] F.C.J. No. 990.

⁶ Conversation with Office of Director Communications, IRB, October, 2007.

⁷ CIC Manual ENF 20, updated to 26-09-2007, paragraph 5.3.

⁸ *Chen v. Canada (Minister of Citizenship and Immigration)* [2006] F.C. No. 910.

⁹ *Ariyaratnam v. Canada (Minister of Citizenship and Immigration)* [2002] F.C.T. No. 48.

¹⁰ *Thanabalasingham v. Canada (Minister of Citizenship and Immigration)* [2004] F.C.A. No. 4.

¹¹ *Supra.*, para. 15-6.

¹² *Supra.*, para. 24.

¹³ *Romans v. Canada (Minister of Citizenship and Immigration)* [2005] F.C.J. No. 435.

¹⁴ *Supra.*, para. 47-8.

¹⁵ *Supra.*, para. 49.

Immigration Detention and the Charter Right to Counsel

Adrian Huzel*



SUBSECTION 10(b) of the *Canadian Charter of Rights and Freedoms* states that: “Everyone has the right on arrest or detention ... (b) to retain and instruct counsel without delay and to be informed of that right.”

The Supreme Court of Canada defined “detention” in *R. v. Therens* as “a restraint of liberty other than arrest in which a person may reasonably require the assistance of counsel but might be prevented or impeded from retaining and instructing counsel without delay but for the constitutional guarantee”.¹

In the immigration context, subsection 10(b) *Charter* issues often arise where a foreign national has been detained for questioning by immigration officers with the Canada Border Service Agency. The notes of such interviews are routinely included in proceedings before the Immigration and Refugee Board, such as claims for refugee protection and detention reviews.

Foreign nationals appearing at ports of entry who are subject to either primary or secondary inspection by immigration officials do not generally enjoy *Charter* protection, because they are not considered detained within the meaning of subsection 10(b). Such was the finding in the *Dehghani* decision.²

However, where foreign nationals are arrested or detained, the case law is fairly consistent in finding that there is a near absolute right to counsel. In most cases, the determination of whether the foreign national was detained will dictate outcome. In turn, the amount of time that a foreign national is held by the CBSA is a key factor in this determination. Where the CBSA questions a foreign national at a Port of Entry for a day or less, it is unlikely he or she will be considered detained.³ Where the CBSA holds a person overnight at a Port of Entry, chances are much greater that a reviewing court will find that the individual was detained within the meaning of subsection 10(b) of the *Charter*.

In *Chen*, the applicant was held at a Port of Entry and interviewed by an immigration official on the first day of the hold and two days later. Justice O'Reilly found that the applicant was detained after his first interview, and that statements made during the second interview should have been excluded from evidence before the Refugee Protection Division.⁴

In *Huang*, the applicant arrived in Canada on board a ship that was intercepted by the RCMP and taken to a detention facility where she was interviewed several times over a two-day period. Justice McKay found that the applicant was detained within the meaning of subsection 10(b) of the *Charter*.⁵

In *Dragosin*, the applicant came to Canada as a stowaway on a cargo vessel. A member of a local church, who arranged for him to be interviewed by an immigration officer the same day, took him to the police. The immigration officer conducted a lengthy interview with the applicant. After the interview, the applicant was sent to a regional correctional centre. Two days later, immigration officers again interviewed the applicant. Though he had asked to speak to legal counsel, he was not provided an opportunity to do so. After this second interview, an exclusion order was issued against the applicant. Justice MacKay held that the applicant's right to counsel arose the moment he was ordered detained at the regional correctional centre, and set aside the exclusion order on the basis of a denial of the right to counsel.⁶

Once it is determined that a foreign national was detained at the time in question, the issue becomes whether the individual's subsection 10(b) rights were violated, which in turn requires an analysis of what exactly those rights include.

In the criminal context the Supreme Court of Canada has found that subsection 10(b) requires police to inform detainees of their right to counsel and the availability of duty counsel or other regional legal aid programs. It also requires the police to facilitate contact with counsel.⁷ As Lamer J. held in *Manninen*.⁸

The purpose of the right to counsel is to allow the detainee not only to be informed of his rights and obligations under the law but, equally if not more important, to obtain advice as to how to exercise those rights.... For the right to counsel to be effective, the detainee must have access to this advice before he is questioned or otherwise required to provide evidence.

In *Dragosin*, Justice McKay cited with approval the S.C.C.'s rulings on this point, and determined that immigration officers have a responsibility to provide advice about and to facilitate access to counsel.⁹

I acted as counsel for the Applicant in the recent *Rodriguez Chevez* decision.¹⁰ Mr. Chevez overstayed his temporary resident status and was detained by the RCMP when he reported a disturbance at his residence on July 8 2006. He was interviewed by a CBSA Enforcement Officer on that day, after which he was transferred to a CBSA detention facility. On July 10, 2006, he was interviewed by a Minister's Delegate in cells at the CBSA's office in downtown Vancouver. He asked to speak to a lawyer. The Minister's Delegate checked with commissionaires in the cells and was advised that duty counsel was busy in hearings all day. The Minister's Delegate then asked Mr. Chevez if he knew of any lawyers to call, but then proceeded with the interview when Mr. Chevez stated he did not. The Minister's Delegate verbally issued an Exclusion Order against Mr. Chevez at the conclusion of the interview. At that point Mr. Chevez stated that his life was at risk in his country. On July 11, 2007, the Minister's Delegate met with Mr. Chevez again and issued him the Exclusion Order in writing. Later the same day, the Applicant was able to meet with duty counsel, who advised him he could no longer claim refugee status because of the Exclusion Order.

Justice Tremblay-Lamer granted the application and set aside the Exclusion Order on the grounds that Mr. Chevez' subsection 10(b) rights were violated. The Court found that while Mr. Chevez had been informed of his *Charter* rights on July 8 2007 when he was arrested by the CBSA Enforcement Officer, he was denied access to counsel. Justice Tremblay-Lamer found the decision in *Dragosin*, made under the *Immigration Act*, applied equally under *IRPA*, and that immigration officials are required to facilitate a detainee's access to legal counsel.¹¹ In cross-examination the Minister's Delegate admitted that duty counsel is normally available in the cells area several times a day, that if a detainee insists on accessing legal counsel, he would be willing to wait several hours,¹² and that he could have provided Mr. Chevez with a phone number to contact Legal Aid.¹³

It is hoped that this decision will result in the CBSA taking greater care to recognize and facilitate an immigration detainee's *Charter* right to counsel. I encourage immigration practitioners to bring such violations to the attention of the Department of Justice and the Federal Court, as required.

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¹ *R. v. Therens* [1985] 1 S.C.R. 613, at p. 641.

² *Dehghani v. Canada (Minister of Employment and Immigration)*, [1993] 1 S.C.R. 1053; 1993 CanLII 128.

³ *Supra*.

⁴ *Chen v. Canada (Minister of Citizenship and Immigration)* 2006 FC 910, para. 11 (CanLII).

⁵ *Huang v. Canada (Minister of Citizenship and Immigration)* 2002 FCT 149, para. 20 (CanLII).

⁶ *Dragosin v. Canada (Minister of Citizenship and Immigration)* 2003 FCT 81, para. 16 (CanLII).

⁷ *R. v. Brydges*, [1990] 1 S.C.R. 190; and *R. v. Pozniak*, [1994] 3 S.C.R. 310.

⁸ *R. v. Manninen*, [1987] 1987 CanLII 67; 1 S.C.R. 1233 at 1242-1243.

⁹ *Supra*.

¹⁰ *Rodriguez Chevez v. Canada (Citizenship and Immigration)*, 2007 FC 709 (CanLII).

¹¹ *Supra*, para. 20-22.

¹² *Supra*, para. 25.

¹³ *Supra*, para. 26.

Immigration Bond Forfeiture

*Kristin Marshall**

BEFORE THE ENACTMENT of the *Immigration and Refugee Protection Act* there was clear discretion concerning the question of whether a bond posted to ensure compliance with terms and conditions of release would be forfeited, where a breach had been established.¹

Things are less clear now. The permissive “may” in section 104 of the *Immigration Act* is absent in the current legislation. Subsection 49(4) of the *Immigration and Refugee Protection Regulations* states that, where the person fails to comply with a condition of their release, “a sum of money deposited *is forfeited*, or a guarantee posted *becomes enforceable*” (emphasis added).

Despite the language of this section, the relevant CIC policy and procedure manual, *Deposits and Guarantees*,² provides that officers should consider all of the circumstances and conduct a case-by-case review before making a decision. CBSA's practice is to write the bonds person giving ten days to respond in writing to ask why the bond should not be forfeited. Clearly, this sets up an expectation that there is some discretion.

The good news is that there have been several decisions of the Federal Court under *IRPA* confirming that discretion exists, and the failure to exercise it properly is reviewable.³ *Kang* highlights the importance of setting out contradictory facts by affidavit. The manager relied on FOSS notes that were contradicted by the Applicant's affidavit. The application was allowed.

There are obvious parallels between criminal bail hearings and immigration detention reviews. Flight risk and danger to the public will be assessed in both, and if release is offered, in both cases cash or a signature is often required to ensure compliance and to secure the detainee's release.

A particularly interesting question is: to what extent criminal law principles concerning bail and forfeiture may be applied to requests to CBSA for discretion? A corollary questions is: will the Federal Court accept guidance from those principles?

Due Diligence

In the criminal case of *Kennedy*,⁴ the court relieved the surety from forfeiture because he was never properly informed of his duties. The *Immigration and Refugee Protection Regulations* acknowledge this principle at subparagraph 49(1)(a)(b) which requires someone posting a guarantee to acknowledge in writing that they are aware of the conditions, and that non-compliance *will* result in forfeiture.

Due diligence on the bond person's part is highly relevant in the criminal context. In *Kennedy* Hugessen J. states:

By what principles are justices to be guided? They ought, the applicant thinks, to consider to what extent the surety was at fault. If he or she connived at the disappearance of the accused man, or aided it or abetted it, it would be proper to forfeit the whole of the sum. If he or she was wanting in due diligence to secure his appearance, it might be proper to forfeit the whole or a substantial part of it, depending on the degree of fault. If he or she was guilty of no want of diligence and used every effort to secure the appearance of the accused man, it might be proper to remit it entirely.⁵

In *Uanseru*,⁶ the Applicant acted with the utmost diligence, ensuring that her friend reported for removal. Justice MacTavish declined to consider the law on due diligence; instead, she allowed the application on the basis that there was no rationale provided for how the officer used her discretion.

It is interesting that the *Manual* was changed after the *Gayle* decision. Paragraph 6 of the *Manual* issued under the *Immigration Act* referred to discretion not to forfeit a bond where the breach was through no *fault* of the bond person, or where extenuating humanitarian considerations exist.

Discretion to Forfeit a Portion of the Bond

It is quite common in the criminal context for only a portion of the bond to be forfeited.

In the *Khalife*⁷ decision, Justice Mosley certified a question concerning whether an officer is required to consider forfeiting an amount proportionate to the nature and extent of the breach. That Appeal was discontinued. In his decision, Justice Mosley shows reluctance to apply criminal law principles in the immigration context. He comments that a judge under subsection 771(2) of the *Criminal Code* has a greater breadth of discretion than does an Immigration Officer. However, he does state that the circumstances outlined by Lord Denning in *Southampton*, namely, that it may be just and fair for the surety to pay a smaller sum, could also arise in the immigration context where the bond is posted by a relative or friend.

In *Na*,⁸ the Court allowed the judicial review because the officer did not believe he had discretion to collect a lesser amount. The manual in effect at the time stated clearly that the manager could settle for an amount less than the original guarantee.

Although these decisions leave open the possibility that criminal principles can be considered, unfortunately, the *Manual* was amended in February 2007 to the contrary. Paragraph 7.8 now states that CIC and CBSA managers have discretionary power to decide whether a breach of conditions is severe enough to warrant the forfeiture of the deposit or the guarantee. It specifies that managers do *not* have the discretion to reduce or otherwise alter the amount of the deposit or guarantee.⁹

Would I still refer to criminal law principles in a request for discretion from forfeiture? Absolutely. I would argue that the changes to the *Manual* fetter officers' discretion.

Finally, consider a challenge to CBSA's practice not to refund a deposit where the person's refugee claim or PRRA has succeeded but before the person is landed. Subsection 49(3) of the *Regulations* states that the deposit will be returned "after compliance with the conditions". There is no authority that states being landed is one of those conditions. Contrast this with paragraph 68(2)(b) of *IRPA*, where all conditions imposed by the Immigration Division (including bonds) are cancelled when a person gets a stay of their removal order at the IAD.

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¹ *Immigration Act*, R.S.C., c. I-2, as amended, s. 4; and *Gayle v. Canada (Minister of Citizenship and Immigration)*, [2002] F.C.J. No. 446.

² *Policy and Program Manual* ENF8: Deposits and Guarantees (February 1, 2007).

³ *Uanseru v. Solicitor General* 2005 FC 428; *Na v. MPSEP* 2006 FC 474; *Kang v. MPSEP* 2006 FC 652; *Khalife v. MCI* 2006 FC 221.

⁴ *R. v. Kennedy*, 7 C.C.C. (2d) 522.

⁵ *Supra*.

⁶ *Supra*.

⁷ *Supra*.

⁸ *Supra*.

⁹ *Supra*, para. 7.8.

The Toronto Bail Program

*Douglas Lehrer**



YOU JUST GOT THE DREADED CALL. Your client is at the “Heritage Inn.” No, he is not researching his family tree: he is a guest of Her Majesty. His wife is crying on the phone. Can she sign or post a bond, you ask? No money. Who you gonna’ call?? BAIL PROGRAM!

Operating since 1996, the Toronto Bail Program – Immigration Division, fulfils the crucial role of a bondsperson when no one else is available or appropriate.

David Scott, who has a criminology and corrections background, is the Executive Director of the Toronto Bail Program, which comprises two divisions: Immigration and Criminal. He has been the driving force behind the Immigration Program from day one, originally starting with a feasibility study funded by Ontario’s Trillium Foundation. The rest is history. Together with key immigration officials such as Reinhard Mantzel, Grant Simmie and current CBSA Greater Toronto Enforcement Centre Director Reg Williams, Mr. Scott has crafted a program that is unique in North America. The Program is held in high esteem by the various components of the immigration system and by counsel representing immigration detainees. The guiding principles in the development of the Program have been its credibility and autonomy.

In partnership with the Canada Border Services Agency, the Program is a true collaboration between government and the non-profit sector. Stable funding and genuine endorsement by CBSA and Immigration and Refugee Board higher-ups have allowed the Program to develop into a credible alternative to detention, and to continually expand over the years, growing from 50 clients in 1996 to well over 200 clients today.

Housed at 27 Queen Street East, Suite 203, for the last decade, the TBP-Immigration Division currently supervises some 225 clients at any given time, including 10 to 15 new clients every month. The staff complement currently stands at ten, including Steven Sharpe, the Program’s Mental Health Coordinator, and Marcela Ortega, the Addictions Coordinator.

The Program is easily accessed by calling its office at 416-861-2422. Necessary intake information includes client name, place of detention and immigration client ID number. Referrals are made by counsel, community agencies and immigration officers. No written consent is required for counsel to communicate with the TBP about a client.

The criteria for acceptance into the TBP require that the applicant:

- Co-operate with CBSA in obtaining a travel document and facilitating removal;
- be subject to a removal order (the admissibility hearing or Minister's delegate review must be completed);
- have a real prospect of eventual removal, that is, not be facing "indefinite" detention;
- not be subject to extradition;
- not be a fugitive;
- not be a member of a criminal organization;
- lack the resources to meet traditional forms of release (for example, have non-existent or insufficient family or community support, either financially or in terms of an ability to exert control over him or her);
- must live in the Greater Toronto Area;
- must be incarcerated in one of the correctional facilities in which the TBP conducts interviews, that is, at the Immigration Holding Centre in Rexdale, the Toronto West and Toronto East Detention Centres, the Toronto (Don) Jail, Maplehurst and Vanier (in Milton), the Central East Correctional Centre (in Lindsay) or the Central North Correctional Centre (in Penetanguishene);
- must be able to physically report to the TBP office in downtown Toronto;
- must have a history of compliance with terms and conditions imposed within the criminal justice system (for instance bail and probation conditions), as well as any past terms and conditions imposed by the CBSA or the TBP;
- must be willing and able to comply with a release plan;
- must, in the assessment of the TBP, be credible;
- must not be subject to imminent removal; and
- if he or she is a foreign national with an outstanding criminal charge, establish that the Crown has been approached about staying the charge in order to facilitate removal, and that the Crown has refused to do so.

Cases are looked at individually and the criteria are applied in a flexible manner, with exceptions being made where appropriate. The over-arching goal is to assist as many people as possible who would otherwise face lengthy or indefinite detention. For example, if a person does have a history of non-compliance, but this is explained by a mental health or addiction issue, then a treatment plan can be set up and supervision can still be offered. Further, supervision can be offered in some cases where there is a bondsperson who cannot post the required amount and/or is deemed insufficiently able to exert enough control over the person concerned. In these cases, a "mixed release", combining a private bondsperson and the TBP, can be fashioned.

Unless a client obviously does not meet the criteria from the outset, the TBP interviews the client and assesses eligibility for supervision. Due to high demands on the Program, it can take several weeks to interview and set up an appropriate release plan, and it may not be possible for this to be done in time for the client's next detention review hearing. If a favourable decision is made, the client agrees to enter into an "Agreement of Supervision" which sets out standard and special conditions with which the client must abide. These include reporting to TBP, living at an approved address, seeking and maintaining employment or educational upgrading, submitting to any treatment that might be necessary, co-operating in the process of obtaining a travel document and being amenable to the supervision of TBP.

If, prior to the 48-hour review, the CBSA or a member of the Immigration and Refugee Board, Immigration Division, accepts a release proposal with the TBP offering supervision, the TBP, in effect, becomes the bondsperson. This means that a breach that is reported by the TBP automatically vitiates the release and a Canada-wide arrest warrant is issued. Non-compliance with the TBP becomes part of a person's immigration history, as do detailed records of a person's contacts and routines, which can obviously assist authorities a great deal in carrying out enforcement action. In practice, the TBP monitors compliance much more closely than most private bondspersons.

Where appropriate, TBP will agree to offer supervision on a "second chance" basis to persons who have breached, assuming the necessary safeguards and conditions are put into place to ensure future compliance.

In the words of Toronto immigration lawyer, Susan Woolner, the “TBP will go to the nth degree to plug your client into available community resources.” This writer has known TBP staff literally to drive a client from the jail to the treatment facility in order to ensure that they actually get there.

Clients report to TBP in person twice a week. Over time and where trust is established, the frequency of reporting may be reduced in order to accommodate employment or school attendance.

Many of the TBP’s clients are permanent residents appealing a deportation order to the Immigration Appeal Division on equitable grounds. The Program will prepare an objective letter setting out the person’s performance while under the Agency’s supervision. Such a letter can have an important impact in IAD proceedings, where one of the main issues is the person’s ability to comply with terms and conditions if a stay of deportation is granted. In some cases, the TBP officials will testify in person.

One of the reasons the Program has so much credibility among immigration decision-makers is its very low “lost client ratio,” which is in the low single digits, and its “cost avoidance savings,” amounting to millions of dollars a year.

Perhaps the only weakness of the Program is not a weakness at all, but a direct reflection of its success: why has a program that has obviously helped thousands of individuals and saved untold millions not expanded to other Canadian cities? One can only hope that the CBSA and the TBP move in this direction in future years to put immigration detainees all over Canada on an even playing field.

** Douglas Lehrer was called to the Ontario Bar in 1987, and formed the firm of Vander Vennen Lehrer in 1997. He was certified as a Specialist in Immigration and Refugee Law by the Law Society of Upper Canada in 1999. Fluent in Spanish, his practice serves the Hispanic community, as well as a diverse range of clients from many cultures and every continent of the world.*

Detention and the Designated Representative

Silvia Valdman*



THIS PAPER PROVIDES AN OVERVIEW of the provisions of the *Immigration and Refugee Protection Act*, associated policies and related procedures respecting designated representatives who appear at detention reviews. The focus is on detention of those with a mental or psychiatric disorder, and on the particular challenges that designated representatives often encounter in assisting such detainees.

Designated Representatives

IRPA contains specific procedural guarantees for persons who may not be able to understand the legal process in which they are engaged. Subsection 167(2) provides for the appointment of a representative for persons under 18 years of age and for persons unable to appreciate the nature of the proceedings. It reads: “If a person who is the subject of proceedings is under 18 years of age or unable, in the opinion of the applicable Division, to appreciate the nature of the proceedings, the Division shall designate a person to represent the person”.

Thus, a designated representative may be appointed, where the need arises, by all divisions of the Immigration and Refugee Board, and whether the detainee is a permanent resident or a foreign national.

It is the Member’s responsibility to ensure that the proposed designated representative understands his or her responsibilities. When the candidate is a professional, generally a lawyer or a social worker, explanations are

usually unnecessary, as the subtleties of advocacy for those not competent to advocate for themselves is familiar. For this reason it is preferable for the IRB to appoint a professional, and also because by doing so it avoids any conflicts of interest or potential allegations that it did not make an appropriate or effective appointment.

A designated representative must act in the best interests of the person he or she is representing by helping the person make decisions concerning the proceeding, and especially by assisting to retain and instruct counsel. The extent to which a designated representative may intervene in an admissibility hearing or detention review can vary depending on the extent of the impairment.

It may be possible to act as the designated representative and legal counsel at the same time; although as a matter of practice this does not happen except in the smaller centres. Certainly many designated representatives are lawyers. However, the two roles must not be confused even though, in some respects, the responsibilities of one may encroach on the responsibilities of the other. The designated representative acts as a sort of litigation guardian. Counsel, on the other hand, provides legal advice, prepares the case, presents the evidence and makes oral submissions.

In some circumstances, the designated representative may be asked to testify, if the testimony is relevant to the decision that the member is to make. Therefore, when considering whether or not the two roles should be assumed by one person, it is important to know if the designated representative will have to testify, as he or she cannot then also act as counsel. For this reason, it is generally preferable for the designated representative not to act as counsel.

The designation of a representative for a person who is unable to appreciate the nature of the proceedings does not mean that that person concerned cannot take part in the hearing. The role of a designated representative varies depending on the represented person's level of understanding and interest in participating. To the extent that it is practical, the designated representative should explain, in appropriate terms, the purpose and possible consequences of the hearing and invite the represented person, if he or she is able to contribute, to take part in decision-making.

The Minister's counsel must inform the IRB if a person who is to be the subject of an admissibility hearing or a detention review is believed to be unable to appreciate the nature of the proceedings. This duty is also imposed on legal counsel, who must also provide contact information for any person in Canada who is known to meet the requirement to be designated as a representative.

Sometimes, the advance notice that a designated representative may be necessary is based on medical reports concerning the mental state or intellectual ability of the person concerned; or difficulties noted in meetings or discussions with the person concerned before the hearing. Sometimes it is evident from the age of the person concerned, or from the fact that they are detained in a psychiatric facility.

When the IRB receives such information, it makes arrangements to ensure that the prospective designated representative is present on the day fixed for the hearing. If necessary, the counsel of record is consulted. If the parties do not know anyone who meets the requirements to be designated, the tribunal itself will make arrangements to ensure that such a person is present. The IRB has arrangements to that effect with various organizations who are willing to be on a list to be contacted to act as designated representatives, depending on the region, such as lawyers' associations, provincial social services, and NGOs.

Consequently, a potential representative is usually already present on the day fixed for the hearing. However, if not, and if during the proceeding the member sees that the person concerned is unable to appreciate the nature of the proceedings, the hearing must be adjourned. In such cases, someone must be designated as a representative, even if legal counsel is present.

It is up to the Member to determine whether the person concerned is able to appreciate the nature of the proceedings. To do so, several factors must be considered:

- admissions by the person who is the subject of the proceedings concerning his or her inability to understand what is going on;
- the testimony or report of an expert on the mental health or cognitive abilities of the person who is the subject of the proceedings;
- the behaviour observed at the hearing, including the responses of the person who is the subject of the proceedings to the questions that are put to him or her; and
- the observations of the participants.

Unless the nature of the illness prevents it, the Member endeavours to converse with the person who is the subject of the proceedings before designating a representative. Often, the possible consequences of the hearing are explained in very simple terms, and then the person concerned may be asked to explain them in his or her own words. If the person is unable to do so, this may be considered to be a demonstration of inability to appreciate the nature of the proceedings and may justify the designation of a representative.

The fact that there are medical reports does not mean that a representative should automatically be designated, as a person may have a mental illness or limited intellectual skills but still be able to appreciate the nature of the proceedings. Medical reports are one factor that the member considers. Sometimes, they are sufficiently precise and detailed to indicate that it will probably be necessary to designate a representative, but the Member must consider other factors, in particular, the behaviour of the person concerned, before designating a representative.

Detention

Pursuant to section 54 of *IRPA*, the Immigration Division is the competent unit of the Board with respect to the review of reasons for detention.

Pursuant to section 55 of *IRPA*, an Immigration Officer may issue a warrant for the arrest and detention of a permanent resident or a foreign national who the Officer has reasonable grounds to believe is inadmissible and is a danger to the public or is unlikely to appear for examination, an admissibility hearing or removal from Canada. Furthermore, an officer may, without a warrant, arrest and detain a foreign national, other than a protected person, who the officer has reasonable grounds to believe is inadmissible and is a danger to the public or is unlikely to appear for examination, an admissibility hearing, removal from Canada, or at a proceeding that could lead to the making of a removal order by the Minister; or if the officer is not satisfied of the identity of the foreign national in the course of any procedure under the Act.

Pursuant to section 57 of *IRPA*, 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. 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. In a review under subsection (1) or (2), an officer shall bring the permanent resident or the foreign national before the Immigration Division or to a place specified by it.

Pursuant to section 58 of *IRPA*, the Immigration Division shall order the release of a permanent resident or a foreign national unless it is satisfied, taking into account prescribed factors that:

- they are a danger to the public;
- they are unlikely to appear for examination, an admissibility hearing, removal from Canada, or at a proceeding that could lead to the making of a removal order by the Minister under subsection 44(2);
- the Minister is taking necessary steps to inquire into a reasonable suspicion that they are inadmissible on grounds of security or for violating human or international rights; or
- the Minister is of the opinion that the identity of the foreign national has not been established and they have not reasonably cooperated with the Minister by providing relevant information for the purpose of establishing their identity or the Minister is making reasonable efforts to establish their identity.

The Immigration Division may order the detention of a permanent resident or a foreign national if it is satisfied that the person concerned is the subject of an examination or an admissibility hearing or is subject to a removal order, and is a danger to the public or unlikely to appear for examination, an admissibility hearing or removal from Canada.

Detention Review

Foreign nationals or permanent residents who have been detained by the Canada Border Services Agency for immigration reasons appear before the Immigration Division (ID) of the Immigration and Refugee Board of Canada for detention reviews. The CBSA may detain, or hold, a foreign national or permanent resident, if it has reasonable grounds to believe that the person

1. is unlikely to appear for an examination, hearing or removal;
2. is a danger to the public;
3. is inadmissible, that is, not allowed to enter or remain in Canada, for security reasons or for violating human or international rights; or
4. if a foreign national, the person's identity has not been established to the CBSA's satisfaction.

In the case of a detained person who does not appreciate the nature of the proceedings, the reason for detention is usually 1 or 2. The detainee may be held in a minimum-security immigration holding centre or in a provincial correctional facility.

When the CBSA detains a person, a detention review must be held to decide whether there is reason under *IRPA* or the *Regulations* to continue detention. Within 48 hours of detention, or as soon as possible afterwards, the ID will review the reasons for detention. As a practical matter, the person concerned may ask for an early review at any time after the first review, but must present new facts or a scheduling reason to justify the request.

The proceedings are adversarial. The parties are the person who is detained and Minister's counsel for the CBSA. The detention review process is public, so media or members of the public may attend and report on the proceedings.

After the Member's introductory remarks, he or she hears a statement of facts and arguments from Minister's counsel about why the person should remain detained. The person or counsel responds, advising of additional relevant facts, makes legal submissions and proposes alternatives to detention. The Member then may order that the person remain in detention or be released, or offer a release on specified terms and conditions. If release is offered, the amount of the cash or performance bond and the specifics of the offer, such as place of residence and reporting obligations, are set out in writing. The offer, which is actually an order with conditions precedent, remains available, if it is not immediately accepted, until the next review, when it may be cancelled by the Member then sitting.

If the detention is continued, either the detained person or Minister's counsel may ask the Federal Court of Canada for leave and for judicial review of any Immigration Division decision on detention. There are practical considerations when judicially reviewing a detention review decision. The process is lengthy and the decision being reviewed will become moot when the next review is held 30 days later. It is possible to ask the Minister to suspend further detention reviews pending the judicial review hearing, but many detainees are not willing to give up the chance of release.

The Challenges of Being a Designated Representative

Detention under *IRPA* is a last resort and a member will consider reasonable options to detention where there is a plan of release accompanied with proper supporting information and documentation. However, in order for a person who does not appreciate the nature of the proceedings to have a good chance of release, a designated representative must overcome many challenges.

Detention reviews involving those with limited or no capacity to represent themselves are labour-intensive. There is inadequate funding for them – either from the IRB or Legal Aid Ontario - to allow for either the designated representative or counsel to access the necessary community and medical support systems and gather the letters of support and professional reports needed to demonstrate a credible plan for release.

The IRB honorarium for designated representatives is limited: \$250 for a detention review or \$400 for a detention review with admissibility hearing.

Legal Aid Ontario issues legal aid certificates for detention reviews, but the coverage is limited. Typically, if an opinion is first sought, a maximum of six hours, exclusive of hearing time, is authorized. After meeting with the designated representative; interviewing the person concerned, if possible; gathering evidence of community support from the treatment facility, community housing, family and friends; reviewing, organizing and serving sufficient documentary evidence; and preparing researched submissions for the hearing, the tariff time allotment is almost always exceeded.

For those who are unable to appreciate the nature of a detention review proceeding, access to health care, social service and other community support services may prove difficult. This is especially so for foreign nationals, as the agencies who might normally be able to assist with a plan of release into the community cannot assist the individual when there is no OHIP, IFH or private health care coverage.

Where the detained is without status in Canada *and* cannot appreciate the nature of the proceedings because they suffer from a mental disorder or psychiatric condition, the challenges are compounded because it is much more likely that no reasonable alternative to detention may be presented by counsel or the designated representative. Ongoing detention, sometimes for months or even years, may be the result.

In addition, where a lawyer is acting as designated representative, the lawyer may be faced with “instructions” to take a position at the hearing which, though possible to pursue as counsel, may be undesirable to pursue as designated representative, where the question is whether or not the action or direction proposed is contrary to the best interests of the person concerned. Indeed, it is in this type of situation where the need for a designated representative is particularly acute.

Due to the nature of many mental and psychiatric disorders, the detained individual is not likely to have strong community ties or family and friends willing to offer support for a plan of release. Furthermore, a person in such a situation will not likely have access to the financial resources necessary to make a serious proposal for a bond.

Given all of the above, when the CBSA cannot quickly remove a detainee, for instance because there is no travel document or because there are on-going legal challenges, the person concerned is at risk of prolonged detention.

Conclusion

The role of designated representative for detainees is a difficult one, especially for lawyers. It requires patience, understanding and knowledge of community support systems to serve the best interests of the vulnerable individual concerned. Given that vulnerability, and the complex issues involved, there is much room for improvement in the funding formula for detention reviews both by the IRB and Legal Aid Ontario.

** Silvia Valdman graduated from the University of Ottawa Faculty of Law in 1996, and was called to the Bar in 1998. She has been practicing immigration and refugee law in Ottawa since 2000, appearing regularly before the IRB and Federal Court, including as a Designated Representative.*

Regional Beat: Hamilton/Niagara Peninsula

*Peter Shen**

Official Opening of the Peace Bridge Plaza

I visited this border crossing facility on the Canadian side of the Peace Bridge this summer to have a look at the new buildings built recently.

There are no stores, no McDonald's, and no Tim Horton's in this plaza. Built by the Government of Canada and the Buffalo and Fort Erie Public Bridge Authority at a cost of 50 million dollars, it was officially opened in July. There are four buildings in the plaza: (1) the Peace Bridge Administration Building; (2) the Peace Bridge Travellers Building; (3) the Peace Bridge Refugee Processing Unit; and (4) the Peace Bridge Newcomers Centre.



I. Peace Bridge Travellers Building

Shaped like an upside-down canoe, the design of this building is meant to capture the spirit of the First Nations people who have lived in this area for at least 10,000 years, and emphasizes wood, stone and water.

There is a spacious reception area here, with the Customs counter on one side and the Immigration counter on the other. Travellers are processed quickly. Behind the counters, at the back, are clerical offices, interview rooms, and holding cells. Upstairs are offices and a conference room. The whole structure is the picture of efficiency.

II. Peace Bridge Refugee Processing Unit

Wow! This is a first-class facility. I noticed a bookcase there containing criminal codes from a hundred jurisdictions; a security room with an up-to-date fingerprint scanning machine; and evident connections to police and security agencies in Canada and beyond. There are numerous interview rooms, and the holding cells are at the back. There is a secured overhead walkway connecting the RPU and the Travellers Building.

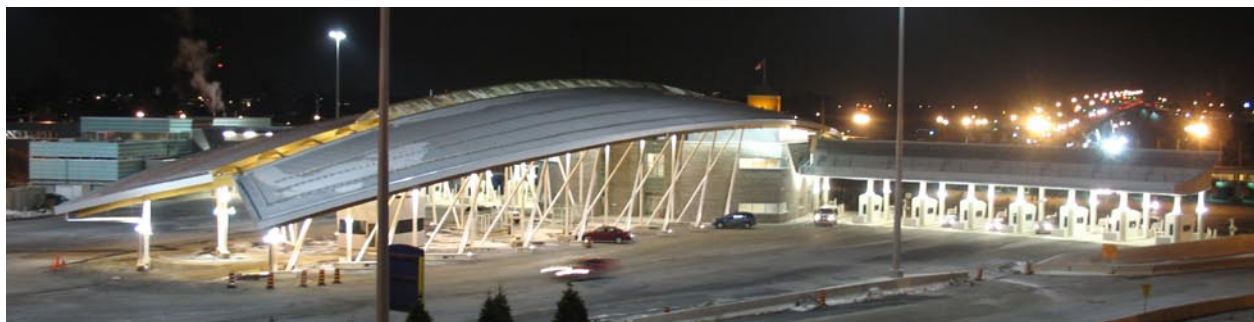
III. Peace Bridge Newcomers Centre

This centre is not operated by either the Canadian government or the Bridge authority, but by the Fort Erie Multicultural Centre: a small organization taking on a big task.

There is a large reception area, with many large stuffed chairs and coffee tables on one side for adults and small chairs and small tables with some toys on the other side for children. Niagara Children's Services sometimes sends staff here to supervise the children. At one end of the room is a large fridge in which is contained donated food and drinks for the newcomers – especially the children.

Refugee claimants wait here for their turn to be interviewed by CBSA officers. Through a secured door, this centre is connected to the Refugee Processing Unit Building. One office in this centre is staffed by an FEMC counsellor. The claimants tell him the name of the municipalities to which they wish to travel, and the counsellor finds for them free shelter there, regardless of the province or territory.

One room has a wooden partition in the middle into which has been inserted a pane of glass. The Executive Director of the Fort Erie Multicultural Centre explained to me that this will be the x-ray room. The \$300,000 x-ray machine will be placed behind this partition, and the x-ray camera will take pictures through the glass. She is waiting for funding from the Interim Federal Health program, a division of CIC, to buy the x-ray machine. In the meantime, the x-ray room is used to store claimants' luggage.



For more information about this project, see the news release from the Peace Bridge Authority [here](#), and for more information about the Peace Bridge itself see <http://www.peacebridge.com/>.

** Peter Shen practices immigration law in Hamilton, and has done so since 1991. He is Regional Coordinator of the Citizenship and Immigration Section of the Ontario Bar Association, (905) 527-5911, info@shenlawyer.ca.*

Regional Beat: London and Western Ontario

Immigration Law in the Hinterlands

Greg Willoughby*



WHEN I WAS ASKED TO WRITE an article about the practice of Immigration law in Southwestern Ontario my first reaction was that it is no different here than anywhere else. We deal with the same HRSD Officers, the same POE Officers, the same Visa Officers and the *Immigration and Refugee Protection Act* and the *Regulations* are just as strangely applied here as anywhere else.

I thought that this was going to be a short and boring article (and it still may be). But before I undersold the idea too much I thought I would talk to Glenn, Ed, Michael, Bill, Jennifer, Sandra or Drew (I know I'm missing one or two) to hear what they think about practicing immigration law in the hinterland. I thought I might also talk to the folks at CIC London, CIC Kitchener, CIC Windsor or my pals at the Bluewater Bridge, since I know all their names and have all their numbers. I quickly realized how incredibly small our community of immigration professionals is. This intimacy may be - relative to most of you in the centre of the universe where there are almost as many immigration lawyers as there are immigrants - what distinguishes the practice of immigration law in the hinterlands of Ontario.

I have also come to realize that there is a very little turnover of Immigration and CBSA Officers in our neighborhood. I have been dealing with exactly the same officers on the same matters since I started and will probably be dealing with the same officers for quite awhile. I feel like that cartoon with the sheep dog and coyote who walk to work together, punch the clock together, do battle all day, and then walk home together (I would like to think that I am the sheep dog protecting the vulnerable sheep, except that on the cartoon the sheep dog always wins). This affects how one practices, since I know that what I say today to one officer will be heard by all officers and will be remembered tomorrow. There is no anonymity and there are very few bridges to burn. Last year, when I was facilitating the admission of refugees via the little ferry crossing between Marine City, Michigan and Sombra, Ontario (the Safe Third Country Agreement doesn't apply at Ferry Crossings and they didn't check ID – they do now!), this news quickly made its way through the ranks of CIC and CBSA Officers in the region and is still raised on occasion in conversation.

Immigration law in the hinterlands is intimate and personal. There are only a few ethnic communities, a handful of lawyers, a small number of big employers, and an even smaller number of consultants. When CIC London rejects a worthy application, I know I can pick up the phone and talk directly to the officer. I also know that this same officer will be deciding my next client tomorrow, and so cannot afford to forget that honey is always more effective than vinegar, even though it is rarely as satisfying.

If you are migrating through our neck of the woods, I invite our colleagues from the bigger or more distant ponds to give us a call, since we can usually provide the direct telephone number or email for most Officers, as well as a psychological profile!

** Greg Willoughby's practice has been restricted to Immigration and Refugee Law since he was called to the Bar in 2000.*

US Watch: Detention South of the Border

Nan Berezowski*



OVER THE LAST FEW MONTHS most US immigration practitioners have been focused on the ups and downs of the *Comprehensive Immigration Reform Act* bill, introduced on May 17, 2007. The bill held the possibility of a new temporary worker program that, among other things, might address the stream of illegal immigrants to the US. In the midst of this, the newsletter editor requested, for this issue of *Citizenship & Immigration*, that I write on the subject of detention.

What does a US business immigration lawyer know about detention issues? Not a whole lot.

This is certainly true from a practice perspective, but like many of us I follow the news reports of places such as Guantanamo Bay with unease. Enter the work New Zealand legal scholar John Ip entitled “Comparative Perspective on the Detention of Terrorist Suspects (Detention, War Powers and Anti-Proliferation)” published earlier this year in the *Journal of Transnational Law & Contemporary Problems*.

In this article, author Ip points out that while the US is detaining several hundred alleged terrorist suspects it is not alone: a number of other western countries including the United Kingdom, New Zealand and Canada are as well. Ip compares the mechanisms pursuant to which the respective nations have situated their authority to detain. Ip concludes that while the American detention model differs from other jurisdictions in that it is executive dominated, certain commonalities arise. For starters, each jurisdiction detains non-citizen terrorist suspects and each has done away with safeguards that detainees are normally entitled to.

Ip chronicles the arrival of the first captives in January, 2002 at Guantanamo Bay and the subsequent building of a series of holding facilities. Central to his thesis is an understanding that the decision to detain terrorist suspects in Guantanamo was deliberate. As an outcome of the Spanish American War of 1898 the US government has an indeterminate lease on this geographically isolated space in Cuba. Ip points out that not only is Guantanamo far away from the glare of the media and the public, but it is in a legal ‘twilight zone’ as neither Cuban nor US domestic law apply. As for international law, Ip recounts the Bush Administration’s arguments of non-applicability and concludes that having denied the application of any body of law to detainees the intended legal vacuum was complete.

Interestingly in this country, such measures were not, apparently considered necessary. Of course, in the 2007 case of *Charkaoui v. Canada (Citizenship and Immigration)*, Chief Justice McLachlin held that certain aspects of the scheme contained within *IRPA* for the detention of permanent residents and foreign nationals on the grounds of national security violated section 7 of the *Charter of Rights and Freedoms* by “allowing the issuance of a certificate of inadmissibility based on secret material without providing for an independent agent at the stage of judicial review to better protect the named person’s interests.” The court also concluded that some of the time limits in the provisions for continuing detention of a foreign national violated section 9 and subsection 10(c) of the *Charter* because they are arbitrary. We have yet to see what modifications Parliament will make and what the revised Canadian approach to the detention of terrorist suspects will be.

Drawing upon the UK experience with detainees from Northern Ireland, Ip concludes his analysis with a discussion of the long-term political costs associated with indiscriminate detention. In his analysis of detention regimes Ip ultimately seeks to situate one of the challenges of our time within a comparative and, to some extent, historical context and thus I found his article to be a refreshing and worthwhile read.

* Nan Berezowski, *Berezowski Business Immigration Law*, is a licensed US Attorney who practices business immigration law in Toronto. She is a past executive member of the AILA (Canada) Chapter, and has also served on the ALIA National cross-border committee. She has been an OBA Citizenship & Immigration Section Executive member for most of the past decade and is currently serving the Section as Program Coordinator. She can be reached at (416) 850-5112 or nan@borderlaw.ca.

Confessions of an Innocent Man: Torture and Survival in a Saudi Prison by William Sampson

*Reviewed by Randolph Hahn**

THIS IS AN UNSETTLING BOOK. It is the author's first-hand account of his time in a Saudi prison. It makes for uncomfortable reading.

William Sampson is a Canadian who was living in Saudi Arabia in the year 2000 when his troubles began. He had been working in Saudi Arabia for more than two years. He had been working as a consultant on water treatment projects understood - or so it seemed - how he lived in Saudi Arabia.

But things changed in 2000. There had been a number of car bombings in Saudi Arabia. Obviously, the Saudis were not only unhappy about the bombings; they were also unwilling to acknowledge publicly that this kind of terrorism might have domestic sources or agents. That was apparently unpalatable for Saudi political sensibilities.

So the Saudis were evidently willing to blame the bombings on Westerners. They came up with a theory that the bombings were a result of Western bootleggers fighting for control of the illegal alcohol trade, and people were arrested. Sampson had friends and acquaintances who were involved in the clubs where alcohol was served illegally, and he was caught up in the Saudi effort to find Westerners who would be convenient scapegoats. He was arrested by security officers.

Sampson spent the next two years in the Saudi prison. He was tortured by his captors. He was raped by them. He was made to confess to crimes that he never committed. Much of the book - indeed most of it - is a very detailed account of his harrowing experiences. It is somewhat remarkable that Sampson was evidently able to recount in such detail what transpired day to day and moment to moment over such a lengthy period of time. But that is another subject.

When reading this book, even if one is expecting to be horrified by a detailed account of torture in captivity, there are still episodes that leave the reader shaking his head. For example, despite the serious harm the Saudi authorities were willing to do to Sampson both physically and psychologically, they evidently did not wish him to die in captivity. So when Sampson began suffering from serious heart problems which required surgery he was eventually taken to a good hospital. Before surgery, Sampson was reassured by the operating surgeon that he had been trained in the West and would do everything he could to help. On a subsequent visit, Sampson noticed that the surgeon's attitude was markedly different. The surgeon was hateful. Sampson came to realize that when the surgeon had discovered that Sampson was circumcised, the surgeon had concluded that since Sampson was not a Muslim he must be Jewish. That mistaken line of reasoning was shared with Sampson's jailers who displayed new depths of brutality.

Unhappily, false accusations, torture and abuse of those in custody are not so uncommon in many places in the world. But at this time, most of us in our part of the world assume that this is not what we will experience if we run afoul of the law; at least if we do so where state authorities have effective legal checks on the exercise of their authority. And to the extent many of us have thought about such matters - and most of us probably have not in any meaningful way - we expect that even if we are unlucky or stupid enough to find ourselves accused of a horrible crime in a part of the world that does not share our concern for a fair judicial system and the rule of law then, at the very least, Canadian officialdom abroad would come to the rescue, or at least try to.



engineer who was living in Riyadh, his troubles began. Sampson had been working as a Saudi development fund. He and other Westerners such as himself worked and

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In our minds, we hope that an unhappy story such as that of Maher Arar is a sad exception. On a certain level, we hope that the ignorance and prejudices that gave rise to the horrific miscalculations and bureaucratic idiocy resulting in such a tragedy will not apply to all of us, and if we are fortunate enough to be on one side of the socio-economic divide, then we should be okay.

But the story of William Sampson reminds us that this is not necessarily so.

The Canadian authorities did not look after Sampson's interests - indeed all of our interests - in the way they should have. They did visit Sampson in prison. No doubt, they would assert that they tried to do what they could for him given the legal and practical constraints involved. And, no doubt, they would point out that Sampson himself took a hostile attitude toward his government's efforts to do what they could for him.

But one glaring mistake on the part of the Canadians - perhaps the crucial one - is that they did not take steps to ensure that they could communicate freely with Sampson without having to be concerned about whether the substance of any discussions with him would get back to Sampson's Saudi captors. Indeed, those captors witnessed all of Sampson's meetings with Canadian officials. If private consultations were not possible, then at the very least, the Canadians could have recognized that Sampson may have been under duress and not able to tell them about the horrific things he was enduring. Sampson is seething in his resentment as to how little the Canadian authorities did, and given what Sampson endured that is not at all surprising. Sampson was eventually released but in his mind this was not due to the efforts of the Canadian government.

Although most of us may practice in areas where we and our clients do not have to contend with the problems that William Sampson did, most of us are reminded more frequently than we would care to be that administrators can make wrong-headed decisions, and there is not always a quick and easy fix to those mistakes. And even if we remain confident that the unfortunate confluence of circumstances that gave rise to William Sampson's sad story will not affect us, the concern we ought to feel for another human being who happens to be Canadian ought to serve as yet another not so gentle reminder of how brutish the world can be.

Believe it or not, there is a connection here to the Citizenship and Immigration Section of the Ontario Bar Association.

One would think that geopolitical realities are such that at the very least citizens of Saudi Arabia would require a visa to enter Canada. But until recently this was not so. When the Immigration and Refugee Protection Regulations listing the countries that were visa exempt were listed, Saudi Arabia remained on that list. This was notwithstanding the fact that the Saudi government did not accord visa-free entry to Canadians (indeed the disclosure of religion was required).

Our own Sergio Karas embarked on a campaign to change that.. He wrote to Paul Celluci who at the time was the American ambassador to Canada. Celluci replied that Sergio's letter "addresses a very real concern" and that the matter was under discussion with Canadian authorities. The result was that in September of 2002 it was announced that citizens of Saudi Arabia would be required to obtain temporary resident visas to enter Canada.

William Sampson may or may not care about this. But as lawyers, if we continue to do our best to ensure that bureaucrats do the right thing, perhaps some good may come of it.

** Randolph Hahn practices immigration law in Toronto. He is Vice-Chair of the Ontario Bar Association, Citizenship and Immigration Section, (416) 363-1234 x218, randy@ggbilaw.com.*

Federal Court Report

OBA Citizenship and Immigration Federal Court Subcommittee

Thanks to the good work of our Federal Court Subcommittee, there have been some new developments in the scheduling of immigration proceedings before the Federal Court in Toronto. On October 9, 2007, Justice Snider wrote to Mario Bellissimo, Chair of the Subcommittee as follows:

I am pleased to report that the Federal Court has made changes to accommodate the spirit of your request that a second motions day be scheduled in Toronto in response to the growing number of stay applications.

As of October 15, 2007, on a pilot project basis, a judge will be available in Toronto to hear stay applications in person or by telephone. The allocation of stay applications to the Court's duty judges in either Ottawa or Toronto will be coordinated as usual by the office of the Judicial Administrator. In view of the timing and number of stay applications to be heard on any given day, the Court cannot ensure that every application emanating from Toronto will be heard by the duty judge working in that city. Please be assured, however, that these matters will be scheduled to take into account the convenience of all concerned.

The plan is to have a judge available in Toronto each week, from Monday through Thursday, absent exceptional scheduling circumstances. It is expected that counsel will continue to present stay applications for adjudication on Monday's general sittings.

Your suggestion that counsel be permitted to remain in their respective offices during teleconference stay cases is within the discretion of the individual hearing judge. My colleagues are sensitive to the open court principle and the arrangements that can be made of the kind suggested in your correspondence. Counsel should request if the presiding judge authorizes counsel to remain in their offices.

Thanks to Mario and his committee for their good work in pressing this matter forward!

Upcoming Programs

[Current Citizenship Issues](#)

December 5, 2007

[The Ethics of Immigration Law](#)

January 16, 2008

[Maintaining Permanent Residence Status and Citizenship Applications](#)

February 4, 2008

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April 2008

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Newsletters Now Electronic: Message from the Chair of Sections

OBA Section Newsletters will now all be produced in electronic format and sent to you by e-mail. This is a transition that provides many enhancements in service and delivery:

- instant hyperlinks to cases, legislation, papers, and other sources cited;
- inclusion in Thomson Carswell's legal e-index for enhanced legal research;
- recognition of authors through the Index to Canadian Legal Literature;
- members will receive time-sensitive material expeditiously;
- extensive universal access to timely materials regardless of geographic location.

It is to those Sections which have newsletters that have remained in print format, that this message is primarily addressed. We appreciate the challenges inherent in this change.

Remember, one click on the print button when it arrives in your (or your assistant's) inbox, will give you the newsletter in the familiar printed form faster than snail mail. You can still read it on transit or while languishing in the hallowed halls of justice. We believe you will appreciate the electronic format and the convenience of instant hyperlinks to the source materials when you start using it.

Inundation by e-mails is a major increasing challenge. This challenge will not go away. The need to organize and instantly differentiate types of e-mails is critical to maintaining sanity! What better time to take a few moments to organize your e-mail filing system than now! We offer the following basic observations for starters:

- Most e-mail programs have a 'Rules' feature. Rules can help you manage your inbox by automatically re-routing e-mails to a particular folder.
- You can have a folder for each Section to which you belong.
- To a limited extent, you can colour code incoming mail: so OBA materials could appear in a different colour. This differentiates them from client work. It could trigger you to make a print version or re-route to a file for later viewing or printing.

- You could have e-newsletters e-mailed to your assistant, to print for you, if you prefer them in that format – but watch – we believe you will prefer the benefits of the electronic version, once you start using them in that format! Once you have read the printed version you can return to OBA.org to access the footnoted materials, for more in-depth consideration.
- Indeed you will be able to access the e-newsletters from anywhere, any time you have Internet access.

Useful Sources for systems to organize e-mails:

- Top Ten Technology Tips (And How to Use them) – Dan Pinnington and David J. Bilinsky <http://www.practicepro.ca/TopTenTechTools.pdf>
- Organizing e-mails - Indiana University - University Information Technology Services <http://uits.iu.edu/scripts/ose.cgi?amar.ose.help>
- 10 Tips for Organizing your E-mails - Web Worker Daily - <http://webworkerdaily.com/2007/02/15/10-tips-for-organizing-your-e-mail/>

In Sections, we are committed to providing the best quality support for your practice, and the most affordable (our cost) basis. We believe that there is no better investment for your professional development dollar than OBA Sections, and we are constantly, and with your input, striving to do better. We like to hear your comments – good or bad. Please let us know how we can help you better.

If you do not have an e-mail address or if you practise in an area that does not have broad band Internet access, please call us at 1-800-668-8900 and ask to speak to a Sections staff member.

Yours sincerely,



Erica L. James
Chair of Sections

National Pro Bono Mentorship Program

The National Pro Bono Committee of the CBA is looking for mentors for its new Pro Bono Mentorship Program. Mentors will provide their mentees with insights and ideas to support their pro bono work. This may mean describing how to set up files for a pro bono client, how to find sources to pay disbursements on a case, how to manage clients with multiple needs, or giving guidance on a particular area of law in which the mentee is providing pro bono legal services.

Mentors are practicing or retired members of a provincial or territorial law society, or the Chambre des notaires and members of the CBA. You do not need to have experience doing pro bono to be a mentor. Mentors help by sharing their knowledge and experience so that mentees can take on pro bono legal work.

The Mentorship Program will be officially launched once a roster of potential mentors is established. To become a mentor, or if you have any questions, please contact Kerri Froc at kerrif@cba.org or 1-800-267-8860.

Citizenship and Immigration is published by the Citizenship and Immigration Section of the Ontario Bar Association. Members are encouraged to submit articles or suggest story ideas.

The articles that appear in this publication represent the opinions of the authors. They do not represent or embody any official position of, or statement by the OBA except where this may be specifically indicated; nor do they attempt to set forth definitive practice standards or to provide legal advice. Precedents and other material contained herein are intended to be used thoughtfully, as nothing in the work relieves readers of their responsibility to consider it in the light of their own professional skill and judgment.

Le programme national de mentorat *pro bono*

Le Comité sur les services juridiques bénévoles de l'ABC est à la recherche de mentors pour son nouveau programme de mentorat *pro bono*. Les mentors partageront leurs points de vue et leurs idées avec leurs mentorés dans le but d'appuyer le travail bénévole de ces derniers. Ainsi, les mentors pourraient être appelés à décrire comment gérer un dossier *pro bono* pour un client, comment trouver les ressources pour payer les débours d'une affaire, comment gérer les clients aux besoins multiples ou à donner des conseils relatifs à un domaine de droit spécifique dans le cadre duquel le mentoré fournit des services juridiques bénévoles.

Les mentors sont membres, pratiquants ou à la retraite, d'un barreau provincial ou territorial ou de la Chambre des notaires et sont également membres de l'ABC. Il n'est pas nécessaire d'avoir l'expérience du travail *pro bono* pour devenir mentor. En effet, les mentors aident en partageant leurs connaissances et leur expérience pour que les mentorés soient en mesure d'accomplir leur travail juridique bénévole.

Le programme de mentorat sera officiellement lancé, une fois la liste des mentors potentiels établie. Si vous désirez devenir mentor ou si vous avez des questions, veuillez communiquer avec Kerri Froc à kerrif@cba.org ou au 1-800-267-8860.

Call for Submissions

The OBA *Citizenship and Immigration* Editor invites readers to make contributions to the next edition of the newsletter, relevant to the practice of immigration law in Ontario. For the upcoming issues, we are particularly interested in contributions on the subjects of citizenship and of family issues in immigration law. Submissions can take the form of case law review, commentary or updates. Please contact Les Morley at les@lesmorley.com or call him at (613) 542-2192 to discuss your ideas.

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