

Submissions

Procedures

PRELIMINARIES:

- IO is to give notice “without delay” if a PR or FN is taken into detention (A55(4));
- review to happen “within 48 hours” after taken into detention “or without delay afterward” (A57(1));
- subsequent reviews at least once within following seven days and at least once every 30 days thereafter (A57(2));
- can apply for an earlier date if facts justifying earlier date are provided (IDR9);
- IO shall bring the PR or FN before the ID (A57(3)); and
- Minister must provide specified information (IDR8(1));

THE IMMIGRATION DIVISION:

- has sole and exclusive jurisdiction (A162(1));
- may allow the parties “at their own expense” to “be represented by a barrister or solicitor or other counsel” (A167(1));
 - if there will be counsel, the person concerned with counsel's contact info (IDR12)
- must hold a hearing “where practicable” (A173(a));
- may require participation in a “conference to discuss issues, relevant facts and any other matter that would make the proceedings more fair and efficient” and provide info or documents before the conference (IDR20)
- unless otherwise provided, proceedings must be held in public (A166(a));
- “may be” in the “presence of the parties” or “by means of live telecommunication with” the person concerned (A164);
- must give notice of the proceeding to the person concerned and the Minister (A173(b) & IDR22);

- must hold hearing “without delay” (A173(b));
- not bound by legal or technical rules of evidence (A173(c));
- may receive and base its decisions upon evidence adduced that is credible and trustworthy (A173(d));
- shall deal with matters before it as informally and quickly as fairness and natural justice permit (A162(2));
- may do what they consider necessary to provide a full and proper hearing (A165);
- must notify the parties of the decision at the conclusion of the review (IDR11(1));
- must provide a copy of a signed and dated order (IDR11(2));
- must give reasons orally or in writing (A169(b)), and must provide written reasons if requested within 10 days of the notification of the decision (A169(d) & IDR11(4));
- may excuse a person from a requirement of a rule and extend or shorten a time limit before or after the time limit passes (IDR50)

Personal Background

Crime

Flight Risk (R245)

the ID shall release the PR or FN unless it is satisfied, taking into account the prescribed

factors, that:

- previous avoidance of exam, escape or attempts (R246(e));
- involvement in people smuggling (R246(f)); and
- the existence of strong ties to a community in Canada (R246(g));
- “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 under subsection A44(2)”
- priority for Immigration Officers is “*to support removal where removal is imminent and where a flight risk has been identified*” [ENF 20 &5.2]
- *is he a fugitive from justice in a foreign jurisdiction in relation to an offence?* [R245(a) & ENF 20 &5.7]
- *did he voluntarily comply with any previous departure order?* [R245(b) & ENF 20&5.7]
- *did he voluntarily comply with any previously required appearance at an immigration or criminal proceeding?* [R245(c) & ENF 20&5.7]
- *did he previously comply with conditions imposed in respect of entry, release or a stay of removal?* [R245(d) & ENF 20&5.7]
- *did he previously avoid or escape from examination or custody, or attempt to do so?* [R245(e) & ENF 20&5.7]
- *is he involved in people smuggling so as to be vulnerable to influence?* [R245(f) & ENF 20&5.7]
- *does he have strong ties to the community in Canada?* [R245(g) & ENF 20&5.7]
- *does he have a fixed place of residence in Canada?* [ENF 20&5.7]
- *is removal imminent?* [ENF 20&5.7]
- *are there responsible relatives in Canada who are prepared to provide a guarantee or surety?* [ENF 20 &5.7]

- *is his behaviour during the examination credible?* [ENF 20 &5.7]
- *are there alternatives to detention sufficient to mitigate the flight risk?* [ENF 20 &5.7]

Mere presence of some of these factors should not automatically lead to detention [ENF 20 &5.7]

Must consider all the factors [ENF 20 &5.7]

Whether or not there is a flight risk can change over time [ENF 20 &5.7]

Danger to the public (A58(1)(a) & R246)

- priority for Immigration Officers “*where safety or security concerns are identified (including criminality, terrorism or violent behaviour at the time of the examination)*” [ENF 20 &5.2]
- *is the person a danger to the public or to the security of Canada within the meaning of A101(2)(b), A113(d)(i) or A115(2)(a) or (b)?* [R246(a) & ENF 20 &5.6]
- *is he associated with a criminal organization within the meaning of A121(2)?* [R246(b) & ENF 20 &5.6]
- *is he associated with people smuggling or trafficking in persons?* [R246(c) & ENF 20 &5.6]
- *does he have a conviction or pending charges for a sexual offence or offence involving violence or weapons?* [R246(d) & ENF 20 &5.6]
- *does he have a conviction or pending charges for drug trafficking, importing or production?* [R246(e) & ENF 20 &5.6]
- *is there a history of violent or threatening behaviour demonstrated by the person at the time of examination?* [R246(f) & ENF 20 &5.6];
- *is there violent or threatening behaviour at the time of examination?* [R246(g) & ENF

20 &5.6]

criminal record does not necessarily mean that he is a threat [ENF 20 &5.6]

Necessary Steps (A58(1)(c))

- the Minister is taking necessary steps to inquire into a reasonable suspicion that they are inadmissible on grounds of *security of for violating human or international rights* (A58(1)(c))

Identity has not been established (R247)

- IRB(ID) must order the release unless it is satisfied that:
 - his identify has not or may not be established [A58(1)(d) & ENF 20 &5.8] considering:
 - FN's cooperation in providing certain information (R247(1)(a));
 - the possibility of obtaining info confidentially for those claiming ref status (R247(1)(b));
 - destruction or deceptive use of ID or travel documents and circumstances of so doing (R247(1)(c));
 - the provision of contradictory ID info (R247(1)(d)) or existence of documents that contradict info provided by the FN (R247(1)(e));
 - he has not reasonably co-operated in providing info about his identity [A58(1)(d), R247(1)(d) & ENF 20 &5.8]
 - the Minister is making reasonable efforts to establish his identity [A58(1)(d) & ENF 20 &5.8]
- priority for Immigration Officers "*where identity issues must be resolved before security or safety concerns are eliminated or confirmed*" [ENF 20 &5.2]

- has he not reasonably co-operated with the Minister by providing relevant info? [ENF 20 &5.8]
- *did he destroy identity or travel documents or use fraudulent ones?* [ENF 20 &5.8]
- *did he give contradictory identity information previously?* [ENF 20 &5.8]
- *is he credible?* [ENF 20 &5.8]

has the Minister had a reasonable time to establish his identity? [ENF 20 &5.8]

Note: see also A58(2), which provides that the ID may detain a PR or FN for one of the first two reasons above

Must consider (R248)

REASON FOR DETENTION (R248(a))

LENGTH OF TIME IN DETENTION (R248(b))

- *Sahin* (Fed Ct) case provides there must be an end to detention, and there is a four part test:
- a longer detention is justified where the person is a danger to the public;
- if the length of future detention cannot be ascertained, the facts favour release;
- length of delay should count against the offending party; and
- how available, effective and appropriate are proposed alternatives to detention.

PROSPECTS FOR REMOVAL (R248(c))

- whether there are any elements to assist in determining if detention is likely to continue and for how long;
- priority for Immigration Officers is “to

support removal where removal is imminent and where a flight risk has been identified [ENF 20 &5.2]

UNEXPLAINED DELAY OR LACK OF DUE DILIGENCE BY A PARTY (R248(d))

AVAILABLE ALTERNATIVES TO DETENTION (R248(e))

- is he (the detained person) a member of a vulnerable group, eg. ill, handicapped, mentally ill, pregnant or elderly? [ENF 20 &5.13]
- is the guarantor;
 - a Canadian citizen or a PR physically present and residing in Canada? [ENF 8 &3]
 - able to ensure that subject will comply with conditions [R247(2)]
 - does he know the consequences of failure to comply [R49(1)]
 - able to exercise control over him? [ENF 20 &5.13]
 - reliable? [ENF 20 &5.13]
 - has he ever signed guarantee that is in default? [R47(1)(a)]
 - has he provided you with his address and is he prepared to keep it up to date? [ENF8 &5.2]
- does the guarantor have financial resources? [R45(2)9b]
- what are the obligations resulting from the conditions imposed?
- what costs will be incurred to enforce the guarantor?

POTENTIAL CONDITIONS [ENF 20 &5.11]

- report when requested to do so by an officer for the purpose of arranging their departure and removal;

KEY

Wherever there is reference to, say, A55(4) this is to subsection 55(4) of the *Immigration & Refugee Protection Act*, and R44 refers to that section of the *Immigration & Refugee Protection Regulations*. ENF is the Enforcement manual. IDR is the *Immigration Division Rules*. The following abbreviations are used below.

ID = Immigration Division of the Immigration & Refugee Board

IO = Immigration Officer

PR = permanent resident (ie landed immigrant)

FN = foreign national (visitor or person without status)