

**DOMESTIC AND INTERNATIONAL STANDARDS AND THE IMMIGRATION AND
REFUGEE BOARD'S GUIDELINE ON DETENTION**

REPORT RESEARCHED AND WRITTEN FOR UNHCR**

Jared Will, February 2018

*The views expressed in this report are those of the author and do not necessarily reflect those of the United Nations or UNHCR.

About the Author

Jared Will practices law in Toronto as the principal of Jared Will & Associates and is a member of the Law Society of Upper Canada and the *Barreau du Quebec*.

Acknowledgements

The substantial research and drafting assistance provided by Reni Chang, Esther Lexchin and Maia Rotman is gratefully acknowledged, as is the editing by Caitlin Leach and Mayoori Malankov.

Special thanks are due to Rana Khan, Aviva Basman and Jean-Nicholas Beuze for comment on earlier drafts.

Table of Contents

Executive Summary	6
I. Context	7
A. Role of the Immigration Division and Guideline 2.....	7
B. The supervisory role of the UNHCR and its Detention Guidelines	7
C. Methodology	8
II. Statutory Framework for Immigration Detention in Canada.....	9
A. The role of international and domestic human rights norms in detention reviews	9
Recommendation	11
B. Grounds for Detention and Release in IRPA	11
C. Factors for Detention and Release in the IRPR.....	11
III. Comparing the Current IRB Guideline with International Standards and Canadian Law	12
A. Background considerations	12
B. Grounds for Detention.....	13
1. Flight Risk.....	13
a. International standards	13
b. Canadian law.....	14
c. Analysis.....	14
Recommendations.....	15
2. Identity	15
a. International standards	15
b. Canadian law.....	16
c. Analysis.....	17
Recommendations.....	17
3. Minister inquiring into inadmissibility	18
a. International standards	18
b. Canadian law.....	18
c. Analysis.....	19
Recommendations.....	19

4. Danger.....	19
a. International standards	19
b. Canadian Law	21
c. Analysis.....	22
Recommendations.....	23
C. Other factors for consideration: s 248 IRPR.....	23
1. Role of the s 248 factors under international and Canadian law	23
Recommendations.....	25
2. Reasons for detention.....	25
a. International law: the necessity, reasonableness and proportionality principles	25
b. The emergence of the necessity, reasonableness and proportionality in Canadian law	26
i. Reasonableness and Proportionality	26
ii. Necessity.....	27
c. Analysis.....	27
Recommendations.....	28
3. Length of time.....	28
a. International standards	28
b. Canadian Law	30
c. Analysis.....	30
Recommendations.....	31
4. Indeterminate future detention.....	31
a. International standards	32
b. Canadian law.....	34
c. Analysis.....	36
Recommendations.....	37
5. Unexplained Delays/Lack of Diligence	37
a. International standards	37
b. Canadian law.....	38
c. Analysis.....	38
Recommendations.....	39
6. Alternatives to Detention	39
a. International standards	39
b. Canadian law.....	40
c. Analysis.....	41
Recommendations.....	42

7. Minors	43
a. International standards	43
b. Canadian law	44
c. Analysis	44
Recommendations	45
D. Guideline 2 should contain guidance on procedural and evidentiary issues.....	46
Recommendation	46
1. Access to counsel	46
a. International standards	46
b. Analysis	47
Recommendation	47
2. The <i>Thanabalasingham</i> principle and the burden of proof	47
a. International standards	47
b. Canadian case law tempering <i>Thanabalasingham</i>	47
c. Analysis	48
Recommendations	49
3. Disclosure and Summons Applications	49
a. International standards	49
b. Canadian law	50
i. Timely Disclosure of Documents and Information Relied Upon by the Minister.....	50
ii. <i>Inter partes</i> disclosure of relevant evidence and information	50
c. Analysis	51
Recommendations	51
IV. Conclusion	522
ANNEX A: RECOMMENDATIONS	53

Executive Summary

The Immigration and Refugee Board's [IRB] *Guideline 2: Guideline on Detention* ["Guideline 2"] is intended to assist Members of the Immigration Division in carrying out their adjudicative function in reviewing the legality and appropriateness of immigration detentions in Canada.¹ In order to fully serve that purpose, the Guideline should reflect both international legal standards on immigration detention and Canadian jurisprudential developments on this issue.

To that end, this report reviews international standards and leading Canadian jurisprudence on issues relating to immigration detention, followed in each section by an analysis of the content of Guideline 2 as currently drafted in comparison to those norms. Overall, there is an emergent convergence between the recent jurisprudential developments in Canada and the prevailing international standards. Each section concludes with a set of specific recommendations for amendments and supplements to Guideline 2 based on that analysis.

The time is certainly ripe for substantial revisions to Guideline 2, as there have been significant jurisprudential developments since it was last updated, including express findings by the Courts that call upon the Immigration Division to play a more substantive role in ensuring that detention reviews are conducted in conformity with international and domestic legal standards. More robust guidelines that reflect human rights norms and best practices for immigration detention will assist Members in fulfilling that role.

¹ *Guidelines Issued by the Chairperson Pursuant to paragraph 159(1)(h) of the Immigration and Refugee Protection Act, Chairperson's Guideline 2: Detention*, effective 5 June 2013, available at <http://www.irb-cisr.gc.ca/Eng/BoaCom/references/pol/GuiDir/Pages/GuideDir02.aspx>.

I. Context

The following analysis and recommendations are directed towards aligning Guideline 2 with international law and best practices regarding immigration detention in general, and the detention of refugees and asylum seekers in particular. In view of the hardship which it entails, and consistent with international refugee and human rights law and standards, the detention of asylum-seekers should be a measure of last resort.²

A. Role of the Immigration Division and Guideline 2

Once a non-citizen has been detained under the *Immigration and Refugee Protection Act*³ [IRPA] for more than 48 hours, the Immigration Division of the IRB has sole and exclusive jurisdiction under the statute to maintain detention or order the detainee's release.⁴ The Immigration Division carries out this function by conducting detention reviews to determine whether detention remains lawful and justified.⁵ Guideline 2's stated purpose is to "assist Immigration Division members in carrying out their duties as decision-makers under the IRPA and to promote consistency, coherence and fairness in the treatment of cases at the Immigration and Refugee Board of Canada (IRB)".⁶

Like all decision-making under the IRPA, the Immigration Division is required to apply the Act in a manner that "ensures that decisions taken under this Act are consistent with the *Canadian Charter of Rights and Freedoms*" [Charter] and "complies with international human rights instruments to which Canada is signatory".⁷ The Division is also bound to ensure that proceedings before it respect principles of "fairness and natural justice".⁸

In order to robustly fulfill its purpose, Guideline 2 must guide Members on these requirements when making decisions on detention and release.

B. The supervisory role of the UNHCR and its Detention Guidelines

Canada has been bound by the *Convention relating to the Status of Refugees* [CSR] since 1969. Under the CSR and related instruments, the United Nations High Commissioner for Refugees is mandated by United Nations [UN] members, including Canada, to supervise and assist states in

² UNHCR *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012 [Detention Guidelines]

³ *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

⁴ *Ibid*, ss 55-58, 162(1).

⁵ *Ibid*, s 58; *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR], ss 244-250.

⁶ Guideline 2, s 1.1.1.

⁷ IRPA, *supra* note 3, s 3(3)(d)(f). It is also now well-established that the Immigration Division is a Court of competent jurisdiction to grant remedies under s 24(1) of the Charter: *Stables v Canada (Citizenship and Immigration)*, 2011 FC 1319 at para 29, [2013] 3 FCR 240. The relevant international human rights instruments are, inter alia, the *Convention relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137 [*Refugee Convention*]; and *Protocol Relating to the Status of Refugees*, 31 January 1967, 606 UNTS 267; the *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, Can TS 1976 No 47, 6 ILM 368 (entered into force 23 March 1976, accession by Canada 19 May 1976) [ICCPR]; and the *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3 [CRC].

⁸ IRPA, *supra* note 3, s 162(2).

the application of refugee protection treaties.⁹ As a result of its functions, the United Nations High Commissioner for Refugees has developed institutional expertise in matters of international human rights that may be applicable to entrench or supplement the rights guaranteed in the CSR.

With a view to assisting states in complying with their international human rights obligations where they seek to detain non-citizens, the United Nations High Commissioner for Refugees published its *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention [Detention Guidelines]* in 2012. These Guidelines are directed principally towards asylum seekers and those in need of other forms of international protection, but much of their content is based in more broadly applicable principles of international law, and thus apply *mutatis mutandis* to the detention of migrants and non-citizens more generally.¹⁰

The *Detention Guidelines* are premised on the following basic principles of international human rights law:

The fundamental rights to liberty and security of person and freedom of movement are expressed in all the major international and regional human rights instruments, and are essential components of legal systems built on the rule of law... These rights apply in principle to all human beings, regardless of their immigration, refugee, asylum-seeker or other status.¹¹

In accordance with these principles of international law, the detention of asylum seekers “should be a measure of last resort” and the detention of other migrants must be exceptional and scrupulously justified.¹²

C. Methodology

We endeavor herein to assess Guideline 2 in comparison with international human rights law and leading Canadian case law pointing to best detention practices. Taking the *Detention Guidelines* as the starting point for international standards, we make recommendations aimed at ensuring that Guideline 2 promotes respect for international standards and best practice as well as Canadian case law that reflects fundamental human rights, international law or best practices.

⁹ Annex to the Statute of the Office of the United Nations High Commissioner for Refugees, GA Res 428 (V), UNGAOR, 1950 [Statute], at para 8(1); *Refugee Convention*, *supra* note 7, art 35(1).

¹⁰ *Detention Guidelines*, at para 4.

¹¹ *Ibid* at para 12 (citations omitted).

¹² *Ibid* at para 14.

II. Statutory Framework for Immigration Detention in Canada

A. The role of international and domestic human rights norms in detention reviews

As noted above, the Immigration Division is statutorily required to ensure that its decisions are consistent with international and domestic human rights norms. Given that all detention reviews concern the fundamental human right to liberty and security of the person, international and domestic human rights norms, both procedural and substantive, must be at the core of the Division's decision-making and practices. Stated most briefly, those norms require that detention be a measure of last resort based on principles of necessity, reasonableness and proportionality and that detention be regularly reviewed in a fair hearing with robust procedural protections.

For administrative detention to be permissible under international law, it must comply with the following norms, the sources of which are discussed in detail below:

- The detaining authority bears the burden of proving all facts necessary to justify the detention and demonstrates that it is in accordance with the applicable legal limits;
- Detention must be absolutely necessary, used only as a measure of last resort where the state has met its burden to demonstrate that there are no reasonable alternatives;
- The detention itself, including its length and conditions, must be proportionate to its purposes and must be no longer or harsher than is reasonably necessary in all of the circumstances, including the particular needs or vulnerabilities of the detainee;
- The detention is arbitrary and unlawful if its duration is unreasonable or if it is no longer substantially connected to its underlying immigration-specific purpose;
- Detention on grounds of identity or to investigate security concerns and the detention of asylum seekers in general must be of minimal duration;
- If migrants are detained, they must be detained in specialized facilities and never commingled with those being detained or punished for criminality; and
- All of the above principals apply *a fortiori* in the case of the children of detention, who should not be detained at all. It is never in the best interests of children to be detained or separated from their parents for the purpose of immigration enforcement.

In what follows, we return to these principles as they apply in each of the themes covered in Guideline 2, explain their application and suggest amendments to Guideline 2 that are necessary to ensure that immigration detention in Canada complies with international standards.

On the Canadian front, the case law has become more closely aligned with international standards over the past decade, and we highlight that convergence in what follows. Of particular note is the impact of the 2017 Federal Court judgment in *Brown v Canada*, which is the first judgment to assess the constitutionality of the IRPA detention regime as applied to regular detainees and the

Immigration Division's process.¹³ The judgment leaves intact the IRPA regime, but puts the onus on the Immigration Division to implement and apply the following principles in order to ensure the constitutional application of the IPRA's detention provisions.¹⁴

- a) The Minister of PSEP must act with reasonable diligence and expedition to effect removal of a detainee from Canada.
- b) The onus to demonstrate reasons that warrant detention or continued detention is always on the Minister of PSEP.
- c) Before ordering detention, the ID must consider the availability, effectiveness and appropriateness of alternatives to detention.
- d) At each detention review, the ID must decide afresh whether continued detention is warranted.
- e) Detention may continue only for a period that is reasonable in all of the circumstances, including the risk of a detainee absconding, the risk the detainee poses to public safety and the time within which removal is expected to occur.
- f) Once the Minister of PSEP has made out a *prima facie* case for continued detention, the individual must present some evidence or argument, or risk further detention. The Minister of PSEP may establish a *prima facie* case in a variety of ways, including reliance on reasons for prior detentions.
- g) The Minister of PSEP must provide reasonable notice of the evidence or information that will be relied upon at the detention review. Detainees or their representatives may request further disclosure, and ask that the Enforcement Officer be summoned to appear at the hearing.
- h) If insufficient disclosure is provided, a detainee or representative may ask the ID to briefly adjourn the hearing, or to bring forward the date of the next review. If necessary, an application for judicial review may be brought in this Court on an expedited basis.
- i) Detainees held in an IHC may challenge the location or conditions of their detention directly to the CBSA. Detainees held in a provincial correctional facility may challenge the location or conditions of their detention in accordance with the procedures of that facility. Detainees may also bring applications for *habeas corpus* or judicial review in a superior court.

To ensure that the Division is best enabled to assume this function as the guardian of detainees' substantive and procedural rights, the redrafted *Guideline 2* should instruct Members on the application of these parameters, as addressed in the following sections.

¹³ *Brown v Canada (Citizenship and Immigration)*, 2017 FC 710 [*Brown*] (under appeal in Federal Court of Appeal files A-274-17 and A-282-17). Though the Federal Court of Appeal stated in *Li v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 1 at para 41 that the constitutionality of the detention regime had been reviewed by the Supreme Court in *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 SCR 350 [*Charkaoui*], that case dealt with the distinct detention regime applicable to security certificate detainees, and the Court there placed much emphasis on the specific role of the Federal Court in that process.

¹⁴ See, in particular, *Brown*, *supra* note 13 at para 159, where the Court provides a list of nine legal principles that must be respected by the Division in its adjudicative functions.

Recommendation

Guideline 2 should instruct Members on relevant legal principles and their application, in order to ensure that detention reviews are conducted fairly and in conformity with Canadian and international human rights standards. These principles include, but are not limited to, those stated at paragraph 159 of *Brown* and the principles of necessity, reasonableness and proportionality that form the core of the international norms governing immigration detention.

B. Grounds for Detention and Release in IRPA

As set out in Guideline 2, the IRPA requires the Immigration Division, at each detention review, to order a detainee's release unless one of the following grounds are proven by the Minister:

- **“Flight risk”**: the detainee 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;
- **“Identity”**: the Minister is of the opinion that the identity of the foreign national has not been, but may be, 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.
- **“Ministerial inquiry”**: the Minister is taking necessary steps to inquire into a reasonable suspicion that they are inadmissible on grounds of security, violating human or international rights, serious criminality, criminality or organized criminality; or
- **“Danger”**: the detainee is a danger to the public;¹⁵

The IRPA also states that “a minor child shall be detained only as a measure of last resort, taking into account the other applicable grounds and criteria including the best interests of the child”.¹⁶

C. Factors for Detention and Release in the IRPR

The *Immigration and Refugee Protection Regulations*¹⁷ (*IRPR*) provide non-exhaustive lists of factors to be considered by Members in assessing danger, flight risk and detention on identity grounds. Below, we provide analysis and recommendations relating to the application of these grounds to order continued detention.

The *IRPR* also provide a list of “other factors” that must be considered when grounds of detention have been found to exist [‘the s 248 factors’]. These factors and the manner in which they are

¹⁵ *IRPA*, *supra* note 3, s 58. This paper does not address the distinct issues that arise with respect to the detention of ‘designated foreign nationals’ under the IRPA.

¹⁶ *IRPA*, *supra* note 3, s 60.

¹⁷ *IRPR*, *supra* note 5. The Regulations are regrettably silent with respect to the Ministerial inquiry ground of detention.

understood and applied are critical to comply with international law and human rights standards in the detention review process, and we return to them in detail below.

Finally, with respect to child detainees, the *IRPR* provide that allegations of non-cooperation cannot be invoked against minors held on identity grounds,¹⁸ and set out a number of “special considerations” to reflect the principle that children can be detained only as a matter of last resort.¹⁹ In an order granted on consent in *B.B. and Justice for Children and Youth v. MCI*,²⁰ the Federal Court further affirmed that the Immigration Division must consider the best interests of a child who is housed in a detention centre at the request of the detained parent, even though the child is not under a detention order.

III. Comparing the Current IRB Guideline with International Standards and Canadian Law

A. Background considerations

Two conceptual clarifications are necessary in order to situate Guideline 2 in the framework of international law standards on the detention of non-citizens: (1) the foundation of the proportionality principle under international law as compared to Canadian law and (2) the distinction in grounds for detention as recognized at international law and under the IRPA.

First, as explained in the UNHCR’s Detention Guidelines:

international law provides substantive safeguards against *unlawful* (see Guideline 3) as well as *arbitrary* detention. “Arbitrariness” is to be interpreted broadly to include not only unlawfulness, but also elements of inappropriateness, injustice and lack of predictability. To guard against arbitrariness, any detention needs to be necessary in the individual case, reasonable in all the circumstances and proportionate to a legitimate purpose (see Guidelines 4.1 and 4.2). Further, failure to consider less coercive or intrusive means could also render detention arbitrary (Guideline 4.3).²¹

Under the applicable principles of international law, the notion of proportionality is understood as an essential component of the protection against arbitrariness. Under the conceptual framework of Canadian human rights law, arbitrariness is about legality and the substantive basis of detention, and the proportionality principle has developed as a protection flowing from the principles of fundamental justice under s 7 of the *Charter* whereby a detention cannot be unreasonably lengthy²² and whereby deprivations of liberty are understood on a spectrum and each degree of deprivation requires justification.²³

¹⁸ *IRPR*, *supra* note 5, s 247(2).

¹⁹ *IRPR*, *supra* note 5, s 249.

²⁰ *B.B. and Justice for Children and Youth v. MCI*, IMM-5754-15

²¹ Detention Guidelines, at para 18 (emphasis in original; citations omitted).

²² *Brown*, *supra* note 13 at para 158.

²³ See, for example, *P.S. v Ontario*, 2014 ONCA 900, applying *Charkaoui*, *supra* note 13, where the Court struck down the provisions of the Mental Health Act governing detention in psychiatric facilities because the reviewing body

Second, under international standards governing the detention of asylum-seekers, there are three purposes for which detention may be necessary in an individual case, and which are generally in line with international law, namely **public order**, **public health** or **national security**.²⁴ These “purposes” overlap with the “grounds” for detention set out in the IRPA, but the two sets are not co-extensive. In order to ensure compliance with international standards, the international law norms concerning limits on the purposes of detention must apply in delineating the scope of the grounds for detention under the IRPA.

B. Grounds for Detention

1. Flight Risk

a. International standards

Flight risk is one of the permissible public order purposes for the detention of asylum seekers under international law: “Where there are strong grounds for believing that the specific asylum-seeker is likely to abscond or otherwise to refuse to cooperate with the authorities, detention may be necessary in an individual case.”²⁵ The Detention Guidelines further explain that

the mere existence of a risk of absconding is not *per se* a justification for detention: Factors to balance in an overall assessment of the necessity of such detention could include, for example, a past history of cooperation or non-cooperation, past compliance or non-compliance with conditions of release or bail, family or community links or other support networks in the country of asylum, the willingness or refusal to provide information about the basic elements of their claim, or whether the claim is considered manifestly unfounded or abusive. Appropriate screening and assessment methods need to be in place in order to ensure that persons who are bona fide asylum-seekers are not wrongly detained in this way.”²⁶

Additional considerations are required where the risk of absconding relates to deportation proceedings as opposed to refugee status determination or other types of examinations to determine the person’s right to remain on the territory in question. In such cases, the same necessity, reasonableness and proportionality principles all come but bear, militate against lengthy periods of detention, and require consideration of the likelihood of removal within a reasonable time.

In the European context, the *Returns Directive* permits Member States to detain where there is a “risk of absconding”.²⁷ The *Returns Directive* however specifically directs that a detention on this

was not given jurisdiction to control the conditions of detention in order to ensure that the detention is no more restrictive of liberty than necessary on the facts of each case.

²⁴ Detention Guidelines, at para 21 (citations omitted).

²⁵ Detention Guidelines, at para 22.

²⁶ *Ibid* (citations omitted).

²⁷ EC, *Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals*, [2008] OJ, L 348/98 [*EU Returns Directive*], art 15(1)(a). Risk of absconding is defined as “the existence of reasons in an individual case which are based on objective criteria defined by law to believe that a third-country national who is the subject of return procedures may abscond”. The European Parliament and the Council of the European Union adopted the *EU Returns Directive* in 2008. The Returns Directive sets out a common legal framework and minimum standards for

ground “shall be for as short a period as possible and only maintained as long as removal arrangements are in progress and executed with due diligence”²⁸ As discussed in greater detail below, detainees held on flight risk grounds under the Returns Directive must be released where “it appears that a reasonable prospect of removal no longer exists”, and requires states to set a maximum period for detention on such grounds that cannot exceed six months.²⁹

More generally, under the necessity and proportionality principles for detention under international human rights law, flight risk can only be retained as a ground for detention where it is sufficiently substantial to justify a deprivation of liberty.³⁰ Further, like the *Returns Directive*, the same principles require that the proceeding from which the detainee is alleged to pose a risk of flight (generally, examination, adjudication or removal) be conducted with reasonable celerity.

b. Canadian law

There is little recent Canadian case law on the application of the flight risk ground. The Federal Court has however clarified that the term ‘fugitive’ should *not* apply to an individual who was unaware of the investigations or charges subsequently laid and is unwilling to return to face them.³¹ The Federal Court has also clarified that the strength of the government’s case is a relevant factor when assessing a risk of flight with respect to an upcoming admissibility hearing, but that it “is an error in law if the Board requires the detainee to first demonstrate there is “absolutely no basis” to the Minister’s allegations before the relative strength of the Minister’s case could weigh in favour of the detainee’s release from detention”.³²

The most notable development in Canadian law is the consent order released in *B.B. and Justice for Children and Youth*³³, where the Federal Court affirmed that a detainee’s obligation to care for a child in Canada may be a factor weighing in favour of release pursuant to s 245(g) of the IRPR.

c. Analysis

The flight risk section of Guideline 2 is presently directed principally towards an exposition of the s 245 IRPR factors, and does not therefore fully reflect the international and Canadian standards set out above.

returning third country nationals who do not have legal grounds to stay in the European Union states. It does not apply to the United Kingdom and Ireland but it applies to the Schengen associate states (Norway, Iceland, Switzerland and Liechtenstein).

²⁸ *Ibid*, art 15(1).

²⁹ *Ibid*, art 15(4)(5). The six months can be extended by national law to 18 months where removal is delayed due to a lack of cooperation by the detainees or delays are engendered by the country of return: *Ibid* art 15(6).

³⁰ In *A. v Australia*, *Communication No 560/1993*, UNHRCOR, 59th Sess, UN Doc CCPR/C/59/D/560/1993 (1997)., the UN Human Rights Committee clarified that assertions about a general risk of absconding cannot legitimise detention:

[T]he burden of proof for the justification of detention lies with the State authority in the particular circumstances of each case; the burden of proof is not met on the basis of generalized claims that the individual may abscond if released.

³¹ *Bruzzese*, *supra* note 58.

³² *Tursunbayev v Canada (Public Safety and Emergency Preparedness)*, 2012 FC 504.

³³ *Supra*, note 20

Guideline 2 provides that “the prescribed factors in the IRPR are not exhaustive,”³⁴ but does not clarify that the mere presence of one or more of the factors enumerated at s 245 of the IRPR are not necessarily sufficient *indicia* of a flight risk. To bring the Guideline into conformity with the principles of necessity and proportionality, the Guideline should instruct Members that an individualized, case-specific assessment is always required to assess the flight risk and ensure that it is current.

Further, Guideline 2 does not instruct Members on the need to respect the proportionality principle by ensuring celerity in the underlying proceedings (examination or removal) where the person is held on flight risk grounds. Particularly where a detainee is held only on flight risks grounds, delays in examination or removal dilute the proportionality of the detention and thus heighten the obligation to fashion alternatives to detention.

Finally, Guideline 2 was drafted prior to the consent order in *B.B. and Justice for Children and Youth* and therefore does not state that the obligation to care for a child in Canada is indicative of a diminished flight risk, and, given the interests at stake, this clarification is of utmost importance.

Recommendations

Guideline 2 should include instructions to Members that, where the detainee is held on the flight risk ground, the proportionality principle imposes a heightened obligation to fashion alternatives to detention where there are delays in the underlying proceedings.

In accordance with the necessity principle, Guideline 2 should instruct Members that the flight risk assessment must always be individualized and focused on the *current* flight risk, and is not limited to the mere presence of one or more of the s 245 IRPR factors.

In accordance with the order in *B.B. and Justice for Children and Youth*, Guideline 2 should instruct Members that the presence of a child in Canada for whom the detainee has care obligations is an indicator of a diminished flight risk that should be given significant weight.³⁵

2. Identity

a. International standards

International law permits, in some circumstances, *minimal* periods of detention to carry out identity checks, so long as reasonable efforts are in fact being made to establish identity.³⁶ However, the power to detain on identity grounds is substantially limited.

³⁴ Guideline 2, s. 2.2.3.

³⁵ *B.B. and Justice for Children and Youth v. MCI*, IMM-5754-15 [B.B.].

³⁶ Detention Guidelines, at para 24.

These limitations are summarized in the Detention Guidelines:

[States must] ensure that their immigration provisions do not impose unrealistic demands regarding the quantity and quality of identification documents asylum-seekers can reasonably be expected to produce....Asylum-seekers who arrive without documentation because they are unable to obtain any in their country of origin should not be detained solely for that reason. Rather, what needs to be assessed is whether the asylum-seeker has a plausible explanation for the absence or destruction of documentation or the possession of false documentation, whether he or she had an intention to mislead the authorities, or whether he or she refuses to cooperate with the identity verification process.³⁷

Strict time limits need to be imposed on detention for the purposes of identity verification, as lack of documentation can lead to, and is one of the main causes of, indefinite or prolonged detention.³⁸

In Europe, the detention of asylum seekers is governed by *Directive 2013/33/EU laying down standards for the reception of applicants for international protection (recast)*.³⁹ With regards to the permissible length of detention, the Directive states,

[T]he notion of ‘due diligence’ at least requires that Member States take concrete and meaningful steps to ensure that the time needed to verify the grounds for detention is as short as possible, and that there is a real prospect that such verification can be carried out successfully in the shortest possible time. Detention shall not exceed the time reasonably needed to complete the relevant procedures.⁴⁰

b. Canadian law

The Federal Court has recently affirmed the principle that the burden to justify detention on identity grounds increases with time. As the Court held in *Rooney*:

[32] ... Although this conclusion differed from previous detention decisions, including the Member’s own prior ruling, time can change circumstances surrounding detention. Even without any fresh evidence regarding the detained individual - medical or otherwise - **there is a proportional relationship between ongoing detention and a detainee’s liberty interests: the longer the period of detention, the greater the need to**

³⁷ *Ibid* at para 25.

³⁸ *Ibid* at para 26. The concern arises both when identity is being assessed on entry and when it is being assessed for purposes of removal.

³⁹ EC, *Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)*, [2013] OJ, L 180/96 at para 15. The preamble to the Directive states, “Applicants may be detained only under very clearly defined exceptional circumstances laid down in this Directive and subject to the principle of necessity and proportionality with regard to both to the manner and the purpose of such detention.”

⁴⁰ *Ibid* at para 16.

justify what may become an indefinite detention, particularly when the Applicant is cooperating in the efforts to ascertain identity.⁴¹

c. Analysis

The Canadian statutory regime does not allow the Immigration Division to assess whether or not the detainee has satisfactorily established his or her identity, and the analysis is limited to the Minister's reasonable efforts. As such, the Immigration Division's jurisdiction to ensure compliance with the international standards set out above is truncated.

That said, upon finding that the identity ground is present, the Immigration Division can and must apply the necessity and proportionality principles when applying the s 248 IRPR factors, which specifically direct the Member to consider the reason for detention, the length of detention, and alternatives to detention.

Because detention on identity grounds beyond a minimal period of time is contrary to international standards, Members should be informed of their heightened obligation to consider alternatives to detention starting at the 7-day detention review, particularly where continued detention may prejudice a refugee claimant's ability to fully present his or her claim or where the detainee is otherwise vulnerable and particularly prejudiced by detention.⁴² Guideline 2 currently says precisely the contrary in instructing that "Members must exercise much caution when considering release of persons where there is evidence that the Minister is of the opinion that their identity has not been established."⁴³ There no basis in law for that proposition and it runs contrary the international standards, as noted above.

Recommendations

The current instruction to Members in Guideline 2 to exercise caution when considering release of persons where the Minister is of the opinion that their identity has not been established should be removed; it has no legal foundation and is contrary to international standards, which require that detention on identity grounds be used sparingly and be of minimal duration.

Guideline 2 should instruct Members to apply the s 248 IRPR factors in a manner that ensures that detentions on identity grounds are of minimal duration, as required under international standards, particularly with respect to refugees and asylum seekers.

In accordance with the reasonableness and proportionality principles, Guideline 2 should instruct Members that as of the 7-day review, there is a heightened obligation to fashion alternatives to detention where detention is on identity grounds.

⁴¹ *Canada (Public Safety and Emergency Preparedness) v Rooney*, 2016 FC 1097 at para 32, [2017] 2 FCR 375. Emphasis added.

⁴² See pages 53-59 below for considerations with respect to vulnerable detainees.

⁴³ Guideline 2, s 2.4.4.

3. Minister inquiring into inadmissibility

a. International standards

Regarding the grounds for detention listed at s 58(1)(c) of the IPRA, the Detention Guidelines provide:

Minimal periods in detention may be permissible to carry out **initial** identity and security checks in cases where identity is undetermined or in dispute, or there **are indications of security risks**. At the same time, the detention must last only as long as reasonable efforts are being made to establish identity or to carry out the security checks, and **within strict time limits established in law** (see below).⁴⁴

The proportionality principle and the prohibition of arbitrary detentions more broadly weigh against detention on the sole ground that an inquiry is being conducted, particularly beyond the initial minimal period of detention.

b. Canadian law

There is a dearth of Canadian case law on this provision of the IRPA. The few judgments rendered confirm that the Immigration Division is to assess only whether the Minister is inquiring into a reasonable suspicion of inadmissibility, and restricts the Board's jurisdiction to examine the reasonableness or diligence of the inquiry itself.⁴⁵

However, the findings of the Supreme Court of Canada in *Charkaoui* are applicable with respect to all of the potential grounds of detention. The Court there emphasized the requirement for every lawful detention to have standards rationally related to the power of detention:

[89] Detention is not arbitrary where there are “standards that are rationally related to the purpose of the power of detention”: P. W. Hogg, *Constitutional Law of Canada* (loose-leaf ed.), vol. 2, at p. 46-5. The triggering event for the detention of a foreign national is the signing of a certificate stating that the foreign national is inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality. The security ground is based on the danger posed by the named person, and therefore provides a *rational foundation* for the detention.

In other words, for there to be a rational basis for the exercise of the power of detention, the detention must be somehow necessary in relation to the statutory ground. In the context of the Ministerial inquiry ground, there must be a *substantive necessity* to detain the person concerned during the course of the inquiry. If there is not, release must be ordered or alternatives to detention found.

⁴⁴ Detention Guidelines, at para 24.

⁴⁵ See *Canada (Public Safety and Emergency Preparedness) v Ismail*, 2014 FC 390, [2015] 3 FCR 53; and *Canada (Citizenship and Immigration) v X*, 2010 FC 112.

c. Analysis

Detention of asylum seekers for Ministerial inquiry is consistent with international standards *only* where the inquiry relates to actual security risks *and* the detention is for a minimal duration. As a result, the Immigration Division is under a heightened obligation to consider and fashion alternatives to detention where this ground is invoked in respect of refugees or asylum seekers, and the intensity of this obligation increases as the detention lengthens. Because detention on this ground can be justified only for a minimal duration, Guideline 2 should reflect the need to seek alternatives as of the seven-day review.

Moreover, under both the necessity and proportionality principles that apply under international law and the domestic prohibition of arbitrary detention, the mere existence of a Ministerial inquiry is an insufficient justification for detention in the absence of a demonstrated necessity to detain for purposes of that inquiry. Given the extraordinary breath of the grounds for inadmissibility captured in s 58(1)(c), there will inevitably be cases where the deprivation of liberty is not rationally related to the conduct of the inquiry. For example, the Minister may well have a reasonable suspicion that the person concerned engaged in subversion by force against the South African apartheid government in the 1970s, but that alone would not provide a rational basis for finding that detention is necessary while this suspicion is investigated. In these cases as well as those of refugees and asylum seekers, the Division's obligation to consider and fashion alternatives to detention is heightened and this should be reflected in Guideline 2.

Recommendations

Guideline 2 should instruct Members that they have a heightened obligation to consider release or fashion alternatives to detention where s 58(1)(c) is invoked in respect of refugees or asylum seekers or where there is no substantive reason to detain during the course of the inquiry as such detentions are contrary to both international standards and the judgment in *Charkaoui*.

Guideline 2 should instruct Members that the Ministerial inquiry ground can only justify detention of minimal duration and that they are under a heightened obligation to consider and fashion alternatives to detention as of the 7-day detention review.

4. Danger

a. International standards

The risk that a person may pose a 'danger to the public' is not as such a recognized ground for detaining asylum seekers under international law.⁴⁶ The Detention Guidelines recognize threats to national security and to public health as potential public order grounds, which may overlap with the concept of danger to the public under Canadian law. Detention on public health grounds is

⁴⁶ Detention Guidelines, at paras 21-33. Notably, danger to the public is not one of the 'public order' grounds of detention.

covered under the *Quarantine Act*⁴⁷ in Canada, and is thus outside the purview of the Immigration Division's functions. The international standards regarding detention on security grounds are, however, applicable: "Even though determining what constitutes a national security threat lies primarily within the domain of the government, the measures taken (such as detention) need to comply with the standards in [the Detention Guidelines], in particular that the detention is necessary, proportionate to the threat, non-discriminatory, and subject to judicial oversight."⁴⁸

With respect to other non-citizens, international law imposes stringent controls on the conditions under which detention on danger grounds may be permissible: All such detentions must be measures of last resort. be proportionate to their purpose and the actual threat posed, and the detainee is not to bear the onus to justify release.⁴⁹ Moreover, detention must be non-discriminatory, which means that detention on danger grounds is permissible only where it is in direct furtherance of an immigration-specific purpose, such as removal.

The UN Human Rights Committee's general comment on Article 9 of the International Covenant on Civil and Political Rights [ICCPR] is instructive:

When a criminal sentence includes a punitive period followed by a non-punitive period **intended to protect the safety of other individuals**, then once the punitive term of imprisonment has been served, to avoid arbitrariness, the **additional detention must be justified by compelling reasons arising from the gravity of the crimes committed and the likelihood of the detainee's committing similar crimes in the future**. States should only use such detention as a last resort and regular periodic reviews by an independent body must be assured to decide whether continued detention is justified. State parties must exercise caution and provide appropriate guarantees in evaluating future dangers. The conditions in such detention must be distinct from the conditions for convicted prisoners serving a punitive sentence and **must be aimed at the detainee's rehabilitation and reintegration into society**. If a prisoner has fully served the sentence imposed at the time of conviction, articles 9 and 15 prohibit a retroactive increase in sentence and a State party may not circumvent that prohibition by imposing a detention that is equivalent to penal imprisonment under the label of civil detention.⁵⁰

In other words, it is contrary to international standards to exact what amounts to double punishment by maintaining detention on danger grounds under the same conditions to which the detainee was subjected as a result of the conviction and without providing mechanisms for rehabilitation.⁵¹

These principles are applicable, *mutatis mutandis*, to the context of immigration detention on danger grounds, especially where the basis of the danger finding is convictions in the host state.

⁴⁷ *Quarantine Act* (S.C. 2005, c. 20).

⁴⁸ Detention Guidelines, at para 30.

⁴⁹ *Rafael Ferrer-Mazorra et al v United States* (2001), Inter-Am Comm HR, No 51/01 at para 221, Annual Report of the Inter-American Commission on Human Rights 2000, OEA/Ser.L/V/II.111/doc.20 rev.

⁵⁰ *CCPR General Comment No. 8: Article 9 (Right to Liberty and Security of Persons)*, UNHRCOR, 16th Sess, UN Doc A/HRC/16/2, (1982). Emphasis added.

⁵¹ *Ibid.*

b. Canadian Law

In a 2017 judgment, the Superior Court of Ontario commented on the interplay between bail decisions and immigration detention as follows: “In the bail context, it is well-established that proper terms and conditions can **reduce the risk** to the public from a person’s release, such that a detention order can no longer be justified. I can see **no compelling reason to treat a release in the immigration context any differently.**”⁵²

Regarding the assessment of danger, the Court commented:

While I appreciate that there are concerns about the prospect of releasing Mr. Ali, given his stated danger to the public, that danger has to be viewed in its proper context. None of Mr. Ali’s prior convictions have been so serious that they have attracted a penalty of more than a few months imprisonment. Indeed, as I noted earlier, the convictions are mostly for minor offences that are consistent with the actions of a drug addict. In addition, there are persons, and an organization, that are prepared to assist Mr. Ali and who will try to make sure that he obeys the conditions of a release.⁵³

In other words, the Immigration Division, in over 80 reviews of Mr. Ali’s detention, had applied too low a standard for finding that the level of danger justified firm detention.

The Court also commented on nexus between the conditions of detention and the possibility of rehabilitation which is relevant in the context of Guideline 2’s current requirement of a change in the detainee’s behavior to consider release:

As it stands now, holding Mr. Ali in a provincial detention facility does not provide for any rehabilitative steps to be taken and, thus, it is not surprising that the eighty some reviews, that Mr. Ali has undergone, have not reached any different conclusion regarding his danger to the public and his flight risk. No one should be surprised at a lack of change, if no opportunity is provided to achieve change.⁵⁴

It is also relevant to recall the findings of the Supreme Court in *Charkaoui*, where the Court held both a) that the burden on the state to prove danger increases with the duration of detention,⁵⁵ and b) that detention on the basis of risks posed by the person concerned is consistent with the *Charter* only if the detention retains a nexus to an immigration-specific purpose. In other words, it is contrary to the *Charter* to detain on danger grounds if the detention has become unhinged from its purpose, i.e. examination or removal, because such detention amounts to unlawful discrimination on the basis of non-citizenship.⁵⁶ This is consistent with international standards which require a demonstrable connection to the immigration-specific purpose of detention.⁵⁷

⁵² *Ali v Canada (Attorney General)*, 2017 ONSC 2660 [*Ali*] at para 34, emphasis added.

⁵³ *Ibid.*

⁵⁴ *Ali*, *supra* note 52 at para 37.

⁵⁵ *Charkaoui*, *supra* note 13 at para 113.

⁵⁶ *Charkaoui*, *supra* note 13 at paras 89, 129-130.

⁵⁷ See pages 12 above and 33 ff, below.

Finally, it is important to note that some Canadian case law is out of step with both international standards and the more recent judgment in *Ali* and should not therefore be the standard used for detention decisions. The finding in *Bruzzese v. Canada*, that “each and every one of the factors listed in section 246 of the *IRPR* is a sufficient ground to find that a person is a danger to the public,” is incompatible with the requirement that a *present danger* be proved by the state to demonstrate that detention is necessary.⁵⁸ The finding in *Canada (Public Safety and Emergency Preparedness) v. Lunyamila* that “any decision to release a person presenting [a danger to the public] should virtually eliminate that risk” is inconsistent with the proportionality principle, which requires a significant risk to justify detention: a risk that has been minimized via an alternative to detention—even if not ‘virtually eliminated—is no longer significant sufficient to justify detention.⁵⁹

c. Analysis

To align with international standards, detention on danger grounds must be truly necessary and proportionate to the threat and purpose, and the state must bear the ongoing burden to prove it is such. Case law suggesting otherwise is inconsistent with international standards and current Canadian jurisprudence as noted above.⁶⁰

Guideline 2 does not instruct Members regarding the ongoing and increasing burden on the Minister, corresponding to the length of detention, to demonstrate danger.⁶¹ Further, by requiring “evidence that the person’s behavior has changed”, Guideline 2 unjustifiably shifts the burden to the detainee to prove rehabilitation.⁶² As explained above, it is impermissible to shift the burden of proof in this manner. Moreover, as noted in *Ali*, immigration detainees in Canada do not have access to activities and programs in detention that would allow them to demonstrate rehabilitation, which further problematizes an instruction requiring detainees to prove rehabilitation.

Finally, Guideline 2 unduly diminishes the importance of the bail decisions of criminal courts.⁶³ As noted in *Ali*, the goal in both settings is to formulate conditions which sufficiently decrease the risk posed and there is no principled reason to treat the two differently. As such, a decision by a court of law to grant bail should, absent compelling reasons to the contrary, be given significant weight by the Immigration Division when assessing whether the alleged danger to the public is sufficiently elevated to justify continued detention.

⁵⁸*Bruzzese v Canada (Public Safety and Emergency Preparedness)*, 2014 FC 230, [2015] 2 FCR 693 [*Bruzzese*].

⁵⁹*(Public Safety and Emergency Preparedness) v Lunyamila*, 2016 FC 1199 [*Lunyamila*] at para 45; appeal under reserve at the time of writing.

⁶⁰ See the discussion of *Bruzzese*, *supra* note 58 and *Lunyamila*, *ibid*, above.

⁶¹ While in other instances, the language is imperative (“must”), the language with respect to the factors to be considered to ensure that the danger is *current* are salutary (“should” and “should not”). Notably, this is less onerous than even the Minister’s own guidelines, which stipulate that “hearings officers must establish that the danger is current”: Operational Manual ENF 3 “Admissibility, Hearings and Detention Review Proceedings”, Citizenship and Immigration Canada at 37, citing *Canada (Minister of Citizenship and Immigration) v Sittampalam*, 2004 FC 1756 at para 25.

⁶² See the analysis at page 48 ff below regarding the *Thanabalasingham* principle and the impermissibility of requiring new evidence or a change in circumstances.

⁶³ Guideline 2, at 6.

Recommendations

To conform to international standards, what is now paragraph 2.1.1 of Guideline 2 should be amended to instruct Members that detention on danger grounds must be necessary in the individual case, reasonable in all the circumstances and proportionate to a legitimate purpose and must be sufficiently significant to justify a deprivation of liberty.

Guideline 2 should instruct Members that the Minister bears the burden to prove a current danger, and that this burden increases with the passage of time in detention, in accordance with international standards and Canadian judgments such as *Charkaoui*, *Brown*, and *Sittampalam*.

Guideline 2 should instruct Members that it is unlawful to shift the burden of proof to the detainee to demonstrate rehabilitation, particularly where the opportunities for rehabilitative activities or programs may not be available.

To comply with the necessity principle, Guideline 2 should instruct Members to maintain focus on an assessment of whether the evidence establishes a current danger to the public and not to conclude that the person is a danger solely because one of the regulatory factors in s 246 of the IRPR is present.

Guideline 2 should instruct Members that a decision granting criminal bail is to be given significant weight in determining whether detention is justified on danger grounds as explained in *Ali*.

Guideline 2 should instruct Members that, according to both international standards and the judgment in *Charkaoui*, detention on danger grounds is arbitrary and discriminatory if it has become unhinged from its immigration-specific purpose.

C. Other factors for consideration: s 248 IRPR

1. Role of the s 248 factors under international and Canadian law

The proper interpretation and application of the s 248 factors is essential to ensuring maximal conformity to international and Canadian constitutional standards, given the broader application of detention under the Ministerial inquiry and identity grounds and the absence of a limit on length of detention under the statute.

The reasonableness, necessity and proportionality principles must come to bear in the Division's decision-making, as the failure to do so results in detentions that are unlawfully arbitrary according

to international standards.⁶⁴ As noted by the Human Rights Committee in *Baban v. Australia*, review of the lawfulness of detention is not limited to “mere compliance of the detention with domestic law”, it must also include the “possibility to order release if the detention is incompatible with the requirements of the Covenant, in particular those of article 9, paragraph 1”.⁶⁵

Moreover, upon review of the constitutionality of the IRPA detention regime, the Federal Court found that the regime itself is constitutional *provided that the Immigration Division respects a number of core principle of law*.⁶⁶ It is therefore incumbent on the Division, which bears primary responsibility for supervising the legality of detentions under the IRPA, to assume its functions as the guardian of sections 7, 9 and 12 *Charter* rights of immigration detainees. Its jurisdiction to do so lies largely in its application of s 248 of the *IRPR*, and the Guidelines should instruct Members as to how those provisions are to be applied in order to promote conformity with the constitutional and international standards. While the Canadian jurisprudence has evolved rapidly since 2015, the following principles bear on the role the s 248 factors must play in ensuring that detention decisions are lawful.

- 1) With respect to s 248(b), a detention that continues for longer than reasonably necessary in the circumstances is contrary to section 7 of the Charter.⁶⁷
- 2) With respect to s 248(a), detention must remain rationally connected to its *purpose*.⁶⁸ Where the purpose is deportation, the detention must remain connected to *that purpose*, and not merely to the statutory *grounds* for detention set out in the IRPA.⁶⁹ This has been interpreted by Canadian courts, adopting the language previously endorsed by UK Supreme Court, to mean that there must be a “reasonable prospect of removal within a reasonable time”.⁷⁰
- 3) With respect to s 248 as a whole, in the absence of statutory limits on the duration of detention, the determination of when a particular detention has become indefinite or arbitrary is to be made on a case-by-case basis either by the Immigration Division in detention reviews or the Superior Courts on *habeas corpus* applications for release.⁷¹

⁶⁴ Detention Guidelines, Guideline 4.2: “Detention can only be resorted to when it is determined to be necessary, reasonable in all the circumstances and proportionate to a legitimate purpose.”

⁶⁵ *Baban v Australia*, *Communication No 1014/2001*, UNHRCOR, 2003, UN Doc CCPR/C/78/D/1014/2001, at 7.2. The HRC found there was no opportunity for adequate or substantive judicial review of the continued lawfulness of the claimants’ detention because, in this case “judicial review of detention would have been restricted to an assessment of whether the author was a non-citizen without valid entry documentation, and, by direct operation of the relevant legislation, the relevant courts would not have been able to consider arguments that the individual detention was unlawful in terms of the Covenant”.

⁶⁶ *Brown*, *supra* note 13 at para 159.

⁶⁷ *Brown*, *supra* note 13 at paras 143 -149 and 159(e).

⁶⁸ *Charkaoui*, *supra* note 13 at para 89; explained in *Brown*, *supra* note 13 at para 113, and *Chaudhary v Canada (Minister of Public Safety and Emergency Preparedness)*, 2015 ONCA 700 [*Chaudhary*] at para 81.

⁶⁹ *Charkaoui*, *supra* note 13 at paras 129-130.

⁷⁰ *Brown*, *supra* note 13 at paras 143-147 (see note 79 below regarding the erroneous distinguishing of some elements of UK law by the Federal Court in *Brown*); *Chaudhary*, *supra* note 68 at para 81.

⁷¹ *Brown*, *supra* note 13 at paras 113(d) and 152; *Chaudhary*, *supra* note 68 at para 81.

- 4) With respect to s 248 as a whole, administrative detention for indeterminate time periods may constitute cruel and unusual treatment and therefore violate section 12 of the Charter, depending on the facts and circumstances of each particular case.⁷²
- 5) With respect to s 248 as a whole, the enumerated factors are not exhaustive of relevant considerations, which include, for example, the best interests of children.⁷³

Recommendations

In accordance with the judgment in *Brown* and ss 3(3)(d) and (f) of the IRPA, Guideline 2 should instruct and clarify for Members that their role is not merely to consider the s 248 factors, but to interpret and apply them in a manner that promotes respect for Canada's international human rights obligations and the *Charter*.

2. Reasons for detention

a. International law: the necessity, reasonableness and proportionality principles

As outlined above, international standards and the principles of necessity, reasonableness and proportionality inform the interpretation and application of each of the grounds for detention.

As highlighted in the Detention Guidelines, there is a double aspect to these principles, as they relate to both the legal basis for the detention (the grounds for detention) and the purpose of the detention (which extends beyond the grounds to include the other objectives, such as examination or removal, for which detention is justified).⁷⁴ Under international law, the necessity, reasonableness and proportionality of cases of immigration detention *must* be review by a “competent, independent and impartial body”.⁷⁵

With respect to the second aspect, the reasons for detention under international law encompass both the grounds for detention and its purpose (e.g. examination or removal). International law decision-makers have concluded that continued detention for the purposes of removal is disproportionate where there is no real and tangible or reasonably foreseeable prospect of

⁷² *Charkaoui*, *supra* note 13 at paras 107, 123, as applied in *Ebrahim Toure v Minister of Public Safety*, 2017 ONSC 5878 [*Toure*] at paras 70ff.

⁷³ *Charkaoui*, *supra* note 13 at paras 107 and 123; *Toure*, *supra* note 72 at paras 70 ff.

⁷⁴ Detention Guidelines, at para 34: “The need to detain the individual is to be assessed in light of the purpose of the detention (see Guideline 4.1), as well as the overall reasonableness of that detention in all the circumstances, the latter requiring an assessment of any special needs or considerations in the individual’s case (see Guideline 9). [...] The authorities must not take any action exceeding that which is strictly necessary to achieve the pursued purpose in the individual case. The necessity and proportionality tests further require an assessment of whether there were less restrictive or coercive measures (that is, alternatives to detention) that could have been applied to the individual concerned and which would be effective in the individual case (see Guidelines 4.3 and Annex A).” Emphasis added. For an elucidating discussion of these principles, see *Saadi v United Kingdom*, No 13229/03, [2008] ECHR 80, 47 EHRR 17, at paras 67-74 [especially para 70].

⁷⁵ Report of the Working Group on Arbitrary Detention, 15 December 2003, E/CN.4/2004/3.

removal.⁷⁶ Removal may be unlikely for a wide variety of reasons, including statelessness, the risk of torture, a lack of cooperation on the part of the country of origin or the individual,⁷⁷ the absence of a safe route for removal, or the absence of proper documentation.⁷⁸

b. The emergence of the necessity, reasonableness and proportionality in Canadian law

In recent developments, Canadian case law has begun to integrate the international standards outlined in the previous section.

i. Reasonableness and Proportionality

In *Brown*, the Federal Court found that the “Hardial Singh” principles previously articulated by the UK Supreme Court are “broadly consistent with the evolution of the common law in Canada”.⁷⁹ These principles include the requirement that the “deportee may only be detained for a period that is *reasonable in all the circumstances*”, which the Federal Court reformulated as follows:

Detention may continue only for a period that is reasonable in all of the circumstances, including the risk of a detainee absconding, the risk the detainee poses to public safety and the time within which removal is expected to occur.⁸⁰

The requirement to assess the proportionality of the detention against the totality of the circumstances was also endorsed in the Supreme Court’s s 12 analysis in *Charkaoui*.⁸¹ Among the factors that must be considered are the detainee’s personal circumstances and mental health and the conditions of detention.⁸²

In *Scotland v Canada (Attorney General)*, the Ontario Superior Court of Justice endorsed the proportionality principle and went a step further to recognize that “the right under section 7 not to

⁷⁶Report of Working Group on Arbitrary Detention, UNHRCOR, 13th Sess, UN Doc A/HRC/13/30, (2010) [UNWGAD 2010] at para 64.

⁷⁷ UNWGAD, *Opinion 45/2006 (United Kingdom)*, UNHRCOR, 7th Sess, UN Doc A/HRC/7/4/Add.1, (2008) [Opinion 45/2006] at para 10; *Mikolenko v Estonia*, No 10664/05 (8 January 2010) (ECHR) [Mikolenko] at paras 59-68: “the applicant’s expulsion had become virtually impossible as for all practical purposes it required his co-operation, which he was not willing to give. While it is true that States enjoy an “undeniable sovereign right to control aliens’ entry into and residence in their territory” (see, for example, Saadi, cited above, § 64, with further references), the aliens’ detention in this context is nevertheless only permissible under Article 5 § 1 (f) if action is being taken with a view to their deportation” (para 65).

⁷⁸ Alice Edwards, “Back to Basics: The Right to Liberty and Security of Person and ‘Alternatives to Detention’ of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants”, Legal and Protection Policy Research Series, UNHCR, April 2011 at 22; *Mikolenko*, *supra* note 77.

⁷⁹ *Lumba v Secretary of State for the Home Department*, [2011] UKSC 12 at para 22, [2011] 4 All ER 1 (23 March 2011) [Lumba] as endorsed in *Brown*, *supra* note 13 at paras 147-149. Notably, the Court in *Brown* was simply incorrect in finding some inconsistencies between Canadian law and the *Hardial Singh* principles, because, contrary to what the Court Federal found, those principles *do* “involve a consideration of the risk that a detainee might reoffend or abscond”: (*Lumba, ibid*, at paras 53 and 104).

⁸⁰ *Brown*, *supra* note 13 at para 159(e).

⁸¹ *Charkaoui*, *supra* note 13 at paras 107 and 123.

⁸² *Toure*, *supra* note 72 at paras 70 ff.

be detained absent moral culpability” applies to immigration detainees.⁸³ As a result, in cases where the detention is not related to any culpable conduct on the part of the detainee, this factor weighs heavily in favour of release.

ii. Necessity

In its two companion judgments in *Chaudhary v Canada* and *Ogiamien v Ontario*, the Court of Appeal for Ontario established that detention that is “unhinged” from its immigration purpose is unlawful because it is “no longer reasonably necessary to further the machinery of immigration control”.⁸⁴

c. Analysis

The necessity, reasonableness and proportionality principles are the backbone of international law standards on immigration detention and are recognized as applicable under Canadian law. If Guideline 2 is to fulfill its purpose (to “assist Immigration Division members in carrying out their duties”), it must instruct Members on the content and application of these principles in the detention review context.

The three principles must be considered jointly, as it their interrelation that provides the minimum standards under international law. Therefore, proper consideration of the “reason for detention”, understood in the broad sense set out above, is critical, as it is the primary comparator for the detention’s necessity, reasonableness and proportionality.

Moreover, a detention is arbitrary and thus unlawful under both international and Canadian law if it becomes unhinged from its underlying immigration-specific purpose. Consideration of s 248(a) must therefore include the purpose of detention in order to ensure the Member’s analysis guards against the specter of arbitrary detention.

⁸³ *Scotland v Canada (Attorney General)*, 2017 ONSC 4850 [Scotland] at paras 53-54.

⁸⁴ *Chaudhary*, *supra* note 68 at para 81; *Ogiamien v Ontario (Community Safety and Correctional Services)*, 2017 ONCA 839 [Ogiamien] at paras 13 and 37. The same finding has also been endorsed by the Court of Appeal of Alberta in *Chhina v Canada (Public Safety and Emergency Preparedness)*, 2017 ABCA 248 at para 68.

Recommendations

Guideline 2 should instruct Members that continued detention is lawful only if it is necessary, reasonable and proportionate in all of the circumstances, including the grounds of the detention, the purpose of the detention, the length of detention, the detainee's personal circumstances (including physical and mental health and other vulnerabilities) and the conditions of detention.

Guideline 2 should instruct Members that before ordering continued detention, s 248(a) requires that Members first determine whether the detention is actually in furtherance of the immigration-related purpose and that, if it is not, it is arbitrary and release is required.

3. Length of time

Issues relating to the length of detention overlap with concerns regarding indefinite or arbitrary detention, which are addressed in the next section with respect to the indeterminate future duration of detention. Here, only those standards relating directly to the duration of permissible detention are addressed.

a. International standards

The United Nations High Commissioner for Refugees and the UN Working Group on Arbitrary Detention [UNWGAD] have both affirmed that Article 9 of the ICCPR requires state parties to legislate time limits on the duration of immigration detention.⁸⁵

The *Detention Guidelines* reiterate these international law standards:

The length of detention can render an otherwise lawful decision to detain disproportionate and, therefore, arbitrary.⁸⁶

[...]

To guard against arbitrariness, maximum periods of detention should be set in national legislation.⁸⁷

In the European context, the *Returns Directive* requires states to legislate maximum periods of detention for removal of six months, which can be extended to 18 months in certain circumstances.

⁸⁵ ICCPR, *supra* note 7, arts 2, 7, 9, 10 as interpreted in Human Rights Committee, *Concluding Observations on the Sixth Periodic Report of Canada*, UNHRCOR, 2015, UN Doc CCPR/C/CAN/CO/6, at para 12; UNWGAD, *Opinions adopted by the Working Group on Arbitrary Detention at its Sixty-ninth session, No. 15/2014 (Canada)*, UNHRCOR, 69th Sess, UN Doc A/HRC/WGAD/2014/15, at para. 23 [UNWGAD Canada]; UNWGAD, *Opinions adopted by the Working Group on Arbitrary Detention at its sixty-second session, No. 56/2011 (Lebanon)*, UNWGADOR, 62d Sess, at para 13 [UNWGAD Lebanon]; and UNWGAD, *Deliberation No 5, On situation regarding immigrants and asylum seekers*, ESCOR, 56th Sess, UN Doc E/CN.4/2000/4 [UNWGAD Deliberation No 5].

⁸⁶ Detention Guidelines, at para 44.

⁸⁷ Detention Guidelines, at para 46.

Eighteen months is however a hard cap, and detention cannot exceed eighteen months, regardless of the grounds.⁸⁸

The standard in the UK, which is not bound by the *Returns Directive*, requires that a detention be limited to “a period that is reasonable in all the circumstances”, as discussed further below.⁸⁹ The ECtHR has confirmed that this standard, properly applied, is sufficient for purposes of Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms [ECHR],⁹⁰ reiterating that a detention must not exceed the period of time “reasonably required for the purpose pursued”.⁹¹

The United States Supreme Court established a six-month benchmark as the threshold beyond which detention *for removal* is presumptively unjustifiable.⁹² *Zadvydas v. Davis* dealt with individuals detained under 8 USC 1231(a)(6), which authorizes detention after administrative proceedings have concluded and after an initial 90-day period to effect removal has passed (post-removal-period statute). The case dealt specifically with individuals who were ordered removed and were removable under certain provisions of 8 USC 1227 (“Deportable Aliens”). The US Supreme Court read into the statute “an implicit ‘reasonable time’ limitation,”⁹³ and recognized a “presumptively reasonable period of detention” of six months.⁹⁴ The Court held that after six months,

[O]nce the alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing. And for detention to remain reasonable, as the period of prior post removal confinement grows, what counts as the “reasonably foreseeable future” conversely would have to shrink.⁹⁵

The Court further held,

the statute, read in light of the Constitution’s demands, limits an alien’s post-removal period detention to a period reasonably necessary to bring about that alien’s removal from the United States. It does not permit indefinite detention.⁹⁶

⁸⁸ See the ECJ judgment in *Bashir Mohamed Ali Mahdi*, C-146/14 PPU, ECLI:EU:C:2014:1320 (Eur-Lex), (5 June 2014) (ECJ) at paras 61-62.

⁸⁹ See below at page 25. This is one of the four “Hardial Singh Principles”, as first stated in *R v Governor of Durham Prison, Ex parte Singh*, [1984] 1 All ER 983, [1984] 1 WLR 704..⁸⁹

⁹⁰ *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, Eur TS 5 [ECPHR] art 5.

⁹¹ *Guide on Article 5 of the Convention: Right to Liberty and Security*, European Court of Human Rights (2014) at 19, para 102, online: <http://www.echr.coe.int/Documents/Guide_Art_5_ENG.pdf> [Guide on Article 5]. See also *J.N. v United Kingdom*, No 37289/12, (19 May 2016) (ECHR) [JN].

⁹² *Zadvydas v Davis*, 533 US 678 (2001).

⁹³ *Ibid* at 682.

⁹⁴ *Ibid* at 701.

⁹⁵ *Ibid* at 701.

⁹⁶ *Ibid* at 689.

In *Clark v. Martinez*, this reasoning was extended to other non-citizens, namely ‘Inadmissible aliens’ under 8 USC 1182.⁹⁷

b. Canadian Law

There is no legislative limit on the duration of detention in Canada, and the Federal Court has recently found that the *Charter* does not require that one be set.⁹⁸ However, in *Ali*, the Court indicated:

... One thing is clear and that is that Canada cannot purport to hold someone in detention forever. Mr. Ali has not been convicted of a criminal offence, and yet he has been held for over seven years in detention facilities, facilities that, if he had been convicted of a criminal offence, would have entitled him to a credit of more [than] 10 ½ years against any sentence that might be imposed. I would also note, on this point, that, as best as I can tell from Mr. Ali’s criminal record, he has spent almost twice as much time in detention, pending his removal, than he served as punishment for all of his criminal convictions added together. That result is unacceptable.⁹⁹

Simply put, a detention of more than seven years must be seen as being exceptional under any proper definition of that word. I note that the opposite of exceptional is usual or typical. If it is typical for Canada to detain persons for seven or more years for immigration purposes, then this country has a much more serious problem with its immigration process than is currently understood. While it may not always be a question of simply counting the days, at some point the number of days, by themselves, allow for no other conclusion.¹⁰⁰

It is also well established in Canadian law that the length of detention weighs in favour of release,¹⁰¹ that “[d]etention may continue only for a period that is reasonable in all of the circumstances”,¹⁰² and that “there is a proportional relationship between ongoing detention and a detainee’s liberty interests: the longer the period of detention, the greater the need to justify what may become an indefinite detention.”¹⁰³

c. Analysis

⁹⁷ *Clark v Martinez*, 543 US 371 (2005). Post-*Zadvydas*, the government issued regulations implementing the decision. These regulations leave it up to Immigration and Customs Enforcement (ICE) to determine whether there is a “significant likelihood of removal in the reasonably foreseeable future” (8 CFR 241.13). ICE can suspend the removal period in cases of non-cooperation (8 CFR 241.1(g)). The regulations require an immigration judge to hold hearings to assess reasonable cause for detention in these circumstances. If and when the immigration judge has decided reasonable cause exists, the non-citizen is entitled to a hearing on the merits during which DHS bears the burden of proof (8 CFR 241.14(h)). The regulations also create an exception for individuals deemed a “special danger to the public”, allowing for detention even where there is no “significant likelihood of removal in the reasonably foreseeable future.” (8 CFR 241.14(a)(1)).

⁹⁸ *Brown*, *supra* note 13 at para 152.

⁹⁹ *Ali*, *supra* note 52 at para 33.

¹⁰⁰ *Ibid* at para 19.

¹⁰¹ *Charkaoui*, *supra* note 13 at paras 112 and 115.

¹⁰² *Brown*, *supra* note 13 at para 159(e).

¹⁰³ *Canada (Public Safety and Emergency Preparedness) v Rooney*, 2016 FC 1097 at para 32, [2017] 2 FCR 375.

To ensure that the Division's decisions promote conformity with the Charter and Canada's international human rights obligations, Guideline 2 must adequately instruct Member as to the legal significance of lengthy detention.

As currently drafted, the two brief paragraphs in Guideline 2 devoted to this factor instruct Members only with respect to the case *against* release notwithstanding the length of detention. Guideline 2 is silent with respect to the manner in which the length of detention would weigh in favour of release. Particularly in light of the judgement in *Brown*, where the Court assigned the Division the specific role of ensuring that detention does not last longer than is reasonably necessary, specific direction with respect to detentions of unreasonable duration are necessary.¹⁰⁴

Also of concern is the fact that, notwithstanding the legal principles that lengthy detention should weigh in favour of release *and* increase the Minister's burden to prove the grounds of detention and justify ongoing detention, detainees appearing before the Immigration Division become less and less likely to be released as the length of their detention increased.¹⁰⁵

Recommendations

In accordance with international standards and the judgment in *Brown*, Guideline 2 should emphasize that detention may continue only for a period that is reasonable in all of the circumstances, even where the statutory grounds are established, and that an unduly lengthy detention requires release.

In light of s. 3(3)(f) of the IRPA, Guideline 2 should instruct Members that it is necessary and appropriate to look to international standards in assessing what constitutes a period that is reasonable in all of the circumstances.

In accordance with international standards and the judgments in *Charkaoui* and *Brown*, Guideline 2 should instruct Members that the Minister's burden to prove the grounds of detention and to justify ongoing detention *increases* with the length of detention and, consequently that the obligation to fashion and impose alternatives to detention increases with the length of detention.

4. Indeterminate future detention

Two distinct concepts apply when considering indeterminate future length of detention under s 248(c) IRPR: indefinite detention and arbitrary detention. These concepts overlap to the extent that a detention that has become divorced from its underlying purpose (e.g. removal) may also have become indefinite for the same reason—that is, because there is no reasonably definite timeframe within which that purpose may be achieved. However, whereas Canadian, foreign and international authorities prohibit indefinite immigration detentions only where they have already been “lengthy”, a detention may be arbitrary regardless of its duration where there is no “reasonable

¹⁰⁴ *Brown*, *supra* note 13 at para 159(e).

¹⁰⁵ *Chaudhary*, *supra* note 68 at para 90.

prospect that the detention's immigration-related purposes will be achieved within a reasonable time".¹⁰⁶

a. International standards

Article 9 of the *ICCPR* and Article 5 of the *ECHR* both guarantee that "Everyone has the right to liberty and security of person."¹⁰⁷ This guarantee has been found to apply equally to all deprivations of liberty by a public authority and regardless the detainee's status in the country in question.¹⁰⁸ Canadian courts have found that Article 9 applies in the immigration detention context.¹⁰⁹

International human rights instruments are clear and consistent that indefinite detention for immigration purposes is arbitrary and unlawful. In General Comment 35 on Article 9, the UNHRC stated, "[T]he detention must be justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time... The inability of a State party to carry out the expulsion of an individual because of statelessness or other obstacles does not justify indefinite detention."¹¹⁰

The UNWGAD has declared detentions to be arbitrary when they were excessively long and when the detentions were maintained despite an inability to carry out removal.¹¹¹ In its 2010 report, the Working Group stated unequivocally that "a maximum period of detention must be established by law and that upon expiry of this period the detainee must be automatically released."¹¹²

The UNWGAD has also stated that the obligations *on the Government* to seek alternatives to detention become "pressing", "[w]hen the chances of removal within a reasonable period are remote." Where "the actual likelihood of expulsion is small or even practically non-existent... [the] detention thus assumes an indefinite character and cannot be seen as necessary or proportional to the stated goal."¹¹³

¹⁰⁶ Chaudhary, *supra* note 68 at para 81; Ogiamien, *supra* note 84 at para 41.

¹⁰⁷ *ICCPR*, *supra* note 7; *ECHR*, *supra* note 90.

¹⁰⁸ *CCPR General Comment No. 15: The Position of Aliens Under the Covenant*, UNHRCOR, 27th Sess, UN Doc HRI/GEN/1/Rev.9 (Vol. I), (1986) at para 1; *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of Congo)*, Merits, Judgment, [2010] ICJ Rep 639 at para 77; and see also Inter-American Commission on Human Rights, "Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas", 2008, online: <<http://www.cidh.org/basicos/english/Basic21.a.Principles%20and%20Best%20Practices%20PDL.html>> [accessed 23 November 2017], Principle 3(2).

¹⁰⁹ See *Ali*, *supra* note 52, and *Chaudhary*, *supra* note 68.

¹¹⁰ *General Comment No. 35: Article 9 (Liberty and security of person)*, UNHRCOR, 2014, UN Doc CCPR/C/GC/35 at 15 [General Comment No. 35] at para 18; see also *F.J. et al v Australia*, UNHRCOR, 2 May 2016, UN Doc CCPR/C/116/D/2233/2013 [F.J.], at para 10.3, and *F.K.A.G. et al v Australia*, UNHRCOR, 20 August 2013, UN Doc CCPR/C/108/D/2094/2011, at para 9.3.

¹¹¹ See *Opinion 45/2006*, *supra* note 77 where "the Working Group declared arbitrary, *inter alia* on the grounds of its excessive length, the detention of a Somali citizen liable for removal which could not be carried out because of security concerns regarding his country of origin. The person concerned had been detained for four and a half years under immigration powers after having served a criminal sentence," in UNWGAD, *Report of the Working Group on Arbitrary Detention*, UNHRCOR, 7th Sess, UN Doc A/HRC/7/4, at para 48.

¹¹² UNWGAD 2010, *supra* note 76 at para 61; see also UNWGAD, *Opinion No 4/2011*, UNHRCOR, 2012, UN Doc A/HRC/WGAD/2011/4, para 19.

¹¹³ UNWGAD, *Opinion No 4/2011*, UNHRCOR, 2012, UN Doc A/HRC/WGAD/2011/4, at para 26.

These principles are reflected in the Detention Guidelines, which states that:

Insufficient guarantees in law to protect against arbitrary detention, such as no limits on the maximum period of detention or no access to an effective remedy to contest it, could also call into question the legal validity of any detention.¹¹⁴

The United Kingdom has not prescribed a time limit on detention; rather detention for the purposes of removal is limited by the “Hardial Singh” principles. The principles were distilled and re-stated by Lord Dyson in a 2002 Court of Appeal judgment and then endorsed by the UK Supreme Court in 2012:

- (i) The Secretary of State must intend to deport the person and can only use the power to detain for that purpose;
- (ii) The deportee may only be detained for a period that is reasonable in all the circumstances;
- (iii) If, before the expiry of the reasonable period, it becomes apparent that the Secretary of State will not be able to effect deportation within a reasonable period, he should not seek to exercise the power of detention;
- (iv) The Secretary of State should act with reasonable diligence and expedition to effect removal.¹¹⁵

These principles have been interpreted to mean that, “If there is no realistic prospect that deportation will take place within a reasonable time, then continued detention is unlawful.”¹¹⁶ This is true even if a “reasonable period” has not yet elapsed.

In *R(I)*, Lord Dyson also proposed a non-exhaustive list of circumstances that are or may be relevant to the determining a reasonable period of time:

- the length of the period of detention;
- the nature of the obstacles which stand in the path of the Secretary of State preventing a deportation;
- the diligence, speed and effectiveness of the steps taken by the Secretary of State to surmount such obstacles;
- the conditions in which the detained person is being kept;
- the effect of detention on him and his family;
- the risk that if he is released from detention he will abscond; and
- the danger that, if released, he will commit criminal offences.¹¹⁷

As previously mentioned, in the European Union, detention for the purpose of removal is governed by the *Returns Directive*. Article 15 provides that the maximum period of detention for the

¹¹⁴ Detention Guidelines, at para 17.

¹¹⁵ *R (I) v Secretary of State for the Home Department*, [2002] EWCA Civ 888, [2003] INLR 196, (28 June 2002) [*R(I)*] at para 47, followed in *Lumba*, *supra* note 79 at para 22.

¹¹⁶ *Lumba*, *supra* note 79 at para 103.

¹¹⁷ *R (I)*, *supra* note 115 at para 48, cited in *Lumba*, *supra* note 79 at para 101.

purposes of removals is six months, which may be extended for an additional maximum of 12 months, under two specific circumstances: where the delay is caused either by the detainee's non-cooperation or by a third country. There is no provision for detention for the purposes of removal beyond 18 months, and, in all cases, release is mandatory where there is no reasonable prospect of removal, regardless of whether the 6 or 18 month thresholds have been met.¹¹⁸

Several European countries have incorporated the 6 and 18 maximums into national legislation. However, several other countries have more stringent time limits (including Belgium, Portugal, Spain and France).

Although the *Returns Directive* has prescribed time limits regarding detention for the purposes of removal, the ECtHR has ruled that Article 5 of the ECHR does not *require* time limits.¹¹⁹ According to the Court, “in and of themselves [time limits] are neither necessary nor sufficient to ensure compliance with the requirements of Article 5 s.1(f).”¹²⁰ However, the Court has interpreted the term “lawful” under Article 5(1)(f) to encompass a prohibition on arbitrariness, which requires that the duration of detention is limited.¹²¹ It also affirmed the Grand Chamber's decision in *Chahal* that “any deprivation of liberty under Article 5 § 1(f) will be justified only for as long as deportation proceedings are in progress. If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible.”¹²²

b. Canadian law

In *Sahin v Canada*, Justice Rothstein observed that “what amounts to an indefinite detention for a lengthy period of time may, in an appropriate case, constitute a deprivation of liberty that is not in accordance with the principles of fundamental justice” and therefore violates s 7 of the *Charter*.¹²³ He further found that “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’.”¹²⁴ He thus concluded that consideration of what are now the s 248 factors is necessary to guard against unconstitutionally indefinite detention.¹²⁵

Contrary to what is indicated in the current Guideline 2,¹²⁶ neither *Sahin* nor its progeny stand for the proposition that a detention is lawful if the s 248 factors have been taken into consideration during regular detention reviews. Justice Rothstein was clear that the factors should be considered in order to avoid indefinite detention, but not that they necessarily preclude such an outcome. The Supreme Court also made this clear in *Charkaoui*, where it expressly held that decision-makers

¹¹⁸ *Said Shamilovich Kadzoev (Huchbarov)*, C-357/09 PPU, [2009] ECR I-11189.

¹¹⁹ *J.N.*, *supra* note 91 at para 90.

¹²⁰ *J.N.*, *supra* note 91 at para 106.

¹²¹ *Abdolkhani and Karimnia v Turkey*, No 30471/08, (22 September 2009) (ECHR); *Z.N.S. v Turkey*, No 21896/08 (19 January 2010) (ECHR).

¹²² *J.N.*, *supra* note 91 at para 82.

¹²³ *Sahin v Canada (Minister of Citizenship and Immigration) (TD)*, [1995] 1 FCR 214, 1994 CanLII 3521, 1994 CarswellNat 1425.

¹²⁴ *Ibid.*

¹²⁵ *Ibid* at paras 28-31, as re-affirmed in *Charkaoui*, *supra* note 13.

¹²⁶ Guideline 2, s 3.1.4.

must continuously consider the possibility that the detention has become unconstitutionally indefinite *even where the s 248 factors have been considered*.¹²⁷

In terms of assessing whether a detention has become indefinite, the Federal Court has offered further guidance that is of assistance in applying the standard first articulated in *Sahin* (“when any number of possible steps may be taken by either side and the times to take each step are unknown, ... a lengthy detention, at least for practical purposes, approaches what might be reasonably termed ‘indefinite’”). First, the assessment must be based on facts known at the time of the detention review, “rather than based on anticipated but not yet available future processes”.¹²⁸ Second, where the future steps are in the hands of a Minister or a third party, it is the Minister’s burden to demonstrate a reasonably definite timeframe for their completion, failing which the Member may find that the detention has become indefinite.¹²⁹

The governing standard was articulated in *Charkaoui*, where the Court specified that the *purpose* which justifies an immigration detention must be substantive and immigration-specific.¹³⁰ For example, detention for removal on the basis of the detainee’s alleged danger to the public is not arbitrary where danger to the public is a rational basis for detention, but it is nonetheless impermissible if divorced from its immigration specific purpose of deportation.¹³¹ The Court of Appeal for Ontario, in *Chaudhary*, came to the same conclusion and further clarified the test for arbitrary detention in the immigration context:

[81] A detention cannot be justified if it is no longer reasonably necessary to further the machinery of immigration control. Where there is no **reasonable prospect that the detention’s immigration-related purposes will be achieved within a reasonable time** (with what is reasonable depending on the circumstances), a continued detention will violate the detainee’s ss. 7 and 9 *Charter* rights and no longer be legal.”¹³²

While the case law remains unsettled regarding the reasonable prospect of completion of the immigration-related purpose of the detention within a reasonable time standard,¹³³ the applicable principle is clear: Where the purpose of the detention will not be achieved within a reasonable time, the detention is arbitrary.

¹²⁷ *Charkaoui*, *supra* note 13 at para 123. Moreover, of the s 248 factors, the inability to determine the future length of detention is the only factor that the Court indicated should be given “significant” weight: see para 108.

¹²⁸ *Ali v Canada (Citizenship and Immigration)*, 2015 FC 1012 at para 15, citing *Canada (Citizenship and Immigration) v Li*, 2009 FCA 85, [2010] 2 FCR 433. The judgement in *Toure*, *supra* note 72, incorrectly frames the analysis as a question of whether future steps may allow for a determination of how much longer the detention will continue.

¹²⁹ *B147 v Canada (Citizenship and Immigration)*, 2012 FC 655 at paras 53-56 [*B147*] at para 21-23.

¹³⁰ *Charkaoui*, *supra* note 13 at paras 89 and 129-130.

¹³¹ *Ibid.* As the Court explains, it would be unlawful because it would constitute impermissible discrimination on the basis of non-citizenship.

¹³² As followed in *Ogiamien*, *supra* note 84 at para 13 and 37.

¹³³ See the differing approaches in *Ogiamien*, *supra* note 84; *Ali*, *supra* note 52; *Scotland*, *supra* note 83; and *Toure*, *supra* note 72.

c. Analysis

Guideline 2 should reflect the international standards set out above. In particular, the Guideline should reflect the principles that indefinite detentions are unlawful and that consideration of the s 248 factors does not automatically protect against indefinite detention.

Guideline 2 currently states, “If detention under the IRPA has been lengthy and there are still certain steps that must be taken in the immigration context, if valid reasons still remain to order continued detention, such as flight risk or danger to the public, an order for continued detention does not constitute indefinite detention.” This is incompatible with international standards, which require release where a lengthy detention becomes indefinite. It is also incompatible with Canadian case law noted above¹³⁴ and the judgement of the Supreme Court of Canada in *Charkaoui*, which stipulates that the indeterminate future length of detention is the only factor that is given “significant weight”.¹³⁵

Guideline 2 should instead expressly direct Members that the s 248 factors are to be assessed in order to prevent indefinite detention, rather than inviting Members to order continued detentions *because* the factors have been weighed.¹³⁶ Similarly, to comply with international law, a finding of indefinite detention must itself be a ground for release, not a mere factor for consideration. References to outdated jurisprudence that is inconsistent with both international standards and current Canadian jurisprudence should be removed from Guideline 2.¹³⁷

Moreover, what is now Section 3.4.2 of Guideline 2 mentions only future steps in legal proceedings as potential sources of indefinite detention, and should be amended to explicitly alert Members to situations where detention has become indefinite because there is no reasonable prospect of removal within a reasonable time.

¹³⁴ See *Chaudhary*, *supra* note 68; *Ogiamien*, *supra* note 84; and *Ali*, *supra* note 52.

¹³⁵ *Charkaoui*, *supra* note 13 at para 108.

¹³⁶ The case law cited at footnote 64 of Guideline 2 all pre-dates *Charkaoui*, *supra* note 13, *Chaudhary*, *supra* note 68, and the decisions of the Human Rights Committee and UNWGAD, *supra* notes 77, 85, and 111. Indeed, *Charkaoui* itself recognizes the possibility of a detention contravening s 7 on grounds of indefiniteness even where the s 248 factors have been weighed: para 123. There is conflicting case law on this question. While the Courts in *Ali*, *supra* note 52, and *Chaudhary*, *supra* note 68, have clearly prohibited indefinite detention (which is also contrary to Canada’s international human rights obligations and international best practices, as discussed throughout), other Courts have held that the indefinite nature of a detention is but one factor to be weighed by the Division: *Canada (Public Safety) v Okwerom*, 2015 FC 433 at para 8 [*Okwerom*]; *B147*, *supra* note 129 at paras 53-56; the Fothergill decision in the *Ahmed* trilogy: indefinite detention is not itself a ground for release, *Ahmed v Canada (Citizenship and Immigration)*, 2015 FC 792 [*Ahmed*]; and *Lunyamila*, *supra* note 59 at paras 27-28.

¹³⁷ See especially the Supreme Court’s analysis in *Charkaoui*, *supra* note 13 and the principles stated by the Court of Appeal for Ontario in *Chaudhary*, *supra* note 68 and *Ogiamien*, *supra* note 84.

Recommendations

To ensure compliance with Canadian jurisprudence, Guideline 2 should make clear that the purpose of the s 248 factors is to prevent detentions from becoming indefinite and arbitrary.

Guideline 2 should remove guidance to Members that lengthy and indeterminate detentions are lawful merely because the s 248 factors have been considered. This is contrary to international standards and the judgments of the Supreme Court in *Charkaoui*, the Court of Appeal for Ontario in *Chaudhary* and *Ogiamien*, and the Federal Court in *Sahin*.

Guideline 2 should instruct Members that the indeterminate future length of detention is a factor that warrants *significant weight* in deciding whether detention can be lawfully maintained, as the Supreme Court held in *Charkaoui*.

To promote compliance with both international and Canadian standards, Guideline 2 should instruct Members that a lengthy detention with no reasonable prospect that its immigration-related purpose will be achieved within a reasonable time is unlawful, and that Members must therefore fashion alternatives to detention in such cases.

Guideline 2 should expressly reference the absence of a prospect of removal, separate and apart from ongoing legal proceedings, as a potential cause of indefinite detention.

5. Unexplained Delays/Lack of Diligence

a. International standards

International standards on this issue are clear.

On the one hand, the state is under an obligation to act with diligence in carrying out the immigration-related purpose of the detention, and bears the burden of proof in this respect.¹³⁸

On the other hand, immigration detention is non-punitive, and cannot be used as a deterrent or mode of coercion. As such, while non-cooperation may justify continued detention to a certain point, it cannot justify indefinite detention.¹³⁹ As the ECHR put it in *J.N. v. United Kingdom*, non-cooperation cannot be a “trump card” that will justify any period of detention, no matter how long. The Court cited with approval the lower Administrative Court’s finding in that case, that even given factors like a criminal record, and

the genuine and reasonable concern that he might abscond... there had to come a time when ‘such a sterile tactic as merely sitting and waiting while repeatedly urging the applicant to

¹³⁸ *Returns Directive*, *supra* note 27, art 15(1); *Lumba*, *supra* note 79 at para 22.

¹³⁹ *Detention Guidelines*, at para 32; *Lumba*, *supra* note 79 at para 128; *J.N.*, *supra* note 91.

change his mind, in full expectation that he would not' ceased to be detention genuinely for the purpose of deportation.¹⁴⁰

In the same vein, the *Returns Directive* imposed a hard cap of eighteen months of detention, even where the delay in removal is caused by the detainee's non-cooperation.¹⁴¹

b. Canadian law

The most significant Canadian judgment on this issue is the 2017 judgment of the Ontario Superior Court of Justice in *Ali v Canada (Attorney General)*, where the Court held that non-cooperation does not justify indefinite detention. The Court also held that, because immigration detention must remain non-punitive, detention cannot be maintained on the basis that release may be seen as a "reward" to uncooperative detainees.¹⁴² Citing Article 9 of the *ICCPR*, the Court in *Ali* emphatically concluded as follows:

To authorize the Government to hold a person indefinitely, solely on the basis of noncooperation, would be fundamentally inconsistent with the well-established principles underlying ss. 7 and 9 of the *Charter*. It would also be contrary to Canada's human rights obligations.¹⁴³

c. Analysis

Guideline 2 as currently drafted already reflects the principle that the Minister must act with diligence and the Minister's lack of diligence weighs in favour of release. However, the current version of Guideline 2 does not specify that it is the Minister who bears the burden to prove that examination or removal is being pursued with diligence.

Guideline 2 does not, moreover, make sufficiently clear to Members that while a lack of cooperation may weigh in favour of detention up to a certain point, it can never be used to justify indefinite detention, as that would impermissibly transform preventive detention into a mode of punishment or coercion.

Guideline 2 also does not presently contain any direction to Members concerning the definition of non-cooperation, and does not provide any guidance on the standard and burden of proof, procedural fairness considerations, or the circumstances in which a detainee's alleged non-cooperation may weigh in favour of detention.

These shortcomings are significant in particular because non-cooperation often becomes the sole substantive basis for continued detention in long-term detention cases in Canada.

¹⁴⁰ *J.N.*, *supra* note 91 at para 106.

¹⁴¹ EU Returns Directive, *supra* note 27, art 15(5)(6).

¹⁴² *Ali*, *supra* note 52 at paras 25-27.

¹⁴³ *Ali*, *supra* note 52 at para 27. Justice Nordheimer also, at para 38, endorsed the finding of the European Court of Human Rights in *J.N.*, *supra* note 91, and significantly qualifies the judgments in *Canada (Minister of Citizenship and Immigration) v Dadzie*, 2016 ONSC 6045, [2016] OJ 5185 [*Dadzie*]; and *Lunyamila*, *supra* note 59.

Recommendations

In accordance with international standards, Guideline 2 should specify that the Minister bears the burden to prove that the state is acting with diligence in pursuit of the detention's underlying purpose, be it examination or removal and, where the detainee's non-cooperation is alleged, to prove that the non-cooperation is in fact impeding removal.

Guideline 2 should emphasize to Members the importance of ensuring respect for procedural fairness and the Minister's burden of proof where non-cooperation is alleged in favour of continued detention. Detainees should receive timely disclosure and be afforded a meaningful opportunity to challenge the CBSA's allegations of non-cooperation.

Guideline 2 should instruct the Member that a detainee's lack of cooperation cannot justify indefinite detention.

Guideline 2 should instruct Members that detention cannot be used, directly or indirectly, as a mechanism of punishment or coercion in respect of an alleged lack of cooperation, as held in *Ali* and in accordance with the well-established international principle that immigration detention must be non-punitive.

6. Alternatives to Detention

a. International standards

Detention must be a measure of last resort. In light of the necessity, reasonableness and proportionality principles, international standards require that decision-makers prioritize alternatives to detention and consider that the "availability, effectiveness and appropriateness of alternatives to detention in each individual case needs to be undertaken" on an ongoing basis.¹⁴⁴ As stated in the Detention Guidelines, "consideration of alternatives to detention ... is part of an overall assessment of the necessity, reasonableness and proportionality of detention".¹⁴⁵

The Detention Guidelines set out possible alternatives to detention, and provide best-practice guidelines for their implementation.¹⁴⁶ Consistent with the "principle of minimum intervention", "alternatives to detention should not be used as alternative forms of detention; nor should alternatives to detention become alternatives to release".¹⁴⁷ Further, the principle of legal certainty that is required in order to avoid arbitrary restrictions on liberty demands that alternatives to detention be governed by legal instruments that "specify and explain the various alternatives

¹⁴⁴ Detention Guidelines, at para 35. See further *F.J.*, *supra* note 110; General Comment No. 35, *supra* note 110 at 15; UNWGAD 2010, *supra* note 76 at 65; and UNWGAD, *Report of the Visit to the United Kingdom on the issue of immigrants and asylum seekers*, Commission on Human Rights, 55th Sess, UN Doc E/CN.4/1999/63/Add.3, (1998) [UNGWAD UK] at 26 and 33.

¹⁴⁵ Detention Guidelines, at para 35.

¹⁴⁶ *Ibid* at paras 40-41 and Annex A.

¹⁴⁷ *Ibid* at paras 38-39.

available, the criteria governing their use, as well as the authority(ies) responsible for their implementation and enforcement.”¹⁴⁸

While alternatives to detention must always be considered, the obligation to find alternatives is heightened where the detainee is a member of a vulnerable group (such as children, pregnant women, the elderly, persons with physical or mental disabilities or survivors of trauma or torture, including sexual or gender-based violence) and detention is therefore more likely to cause long-term prejudice to the detainee.¹⁴⁹ International detention standards recognize that detention may have a detrimental effect on the physical and/or psychological health of detainees and advise that periodic assessments be conducted and treatment or counselling be provided where needed.¹⁵⁰ International detention standards also recognize that detention may expose LGBTQ detainees to a risk of violence, abuse or harassment and state that release from, or alternatives to, detention should be considered where security cannot be ensured. Moreover, solitary confinement is an inappropriate way of ensuring the security of such detainees.¹⁵¹

The same principles find expression in European law. In the UK, judges hearing bail applications by immigration detainees are instructed to grant bail if there is an adequate alternative to detention, sufficient to protect the public interest, and considering the applicant’s personal circumstances.¹⁵² The Council of Europe, in its *Guidelines on Forced Return*, asserts that a person may only be deprived of their liberty for the purposes of removal “if, after a careful examination of the necessity of deprivation of liberty in each individual case, the authorities of the host state have concluded that compliance with the removal order cannot be ensured as effectively by resorting to non-custodial measures.”¹⁵³ The *Returns Directive* authorizes detention by Member States in order to prepare for the return of the non-citizens or carry out the removal process only if there is no other sufficient, efficient, and less coercive measure available.¹⁵⁴ The *Returns Directive* emphasizes proportionality and includes a ‘least restrictive means test’¹⁵⁵ that must be respected at each phase of return and removal procedures.¹⁵⁶

b. Canadian law

In *Brown*, the Federal Court held that the Immigration Division must *always* consider the availability of alternatives to detention, thus confirming that this obligation exists even where the

¹⁴⁸ *Ibid* at para 36. See further UNWGAD 2010, *supra* note 76 at 59; UNWGAD UK, *supra* note 144 at 32, 34. See for example, *Shafiq v Australia*, *Communication No 1324/2004*, UNHRCOR, 88th Sess, UN Doc CCPR/C/88/D/1324/2004 at 7.2: “remand in custody could be considered arbitrary if it is not necessary in all the circumstances of the case and proportionate to the ends sought”.

¹⁴⁹ Detention Guidelines, at paras 39, 49-50, 63; *M.S.S. v Belgium and Greece*, ECtHR (Grand Chamber), Application No. 30696/09, 21 January 2011 at paras 232-233

¹⁵⁰ Detention Guidelines at para 48(vi).

¹⁵¹ Detention Guidelines at para 65; *O.M. v Hungary*, ECtHR, Application No. 9912/15, 5 July 2016, at para 53

¹⁵² UK, Tribunals Judiciary, Immigration and Asylum Chamber, *Bail Guidance for Judges Presiding Over Immigration and Asylum Hearings*, (Presidential Guidance Note No 1 of 2012) (11 June 2012) at para 27.

¹⁵³ Council of Europe, Committee of Ministers, *Twenty Guidelines on Forced Return*, 4 May 2005 [*Twenty Guidelines*], Guideline 6.1.

¹⁵⁴ EU Returns Directive, *supra* note 27, art 15(1).

¹⁵⁵ *Ibid*, Preamble.

¹⁵⁶ *Hassen El Dridi*, C-61/11 PPU, [2011] ECR I-03025, at paras 34-41.

detainee is not himself or herself in a position to propose an alternative. In its statement of applicable legal principles, the Court held that

[159] (c) Before ordering detention, the ID must consider the availability, effectiveness and appropriateness of alternatives to detention.¹⁵⁷

Indeed, in *Charkaoui*, the Supreme Court held that a security certificate judge's power to *fashion* alternatives to detention is an essential ingredient in the constitutionality of the regime, which may otherwise unjustifiably permit indefinite detention.¹⁵⁸ As the Federal Court later held in *Brown*, the Immigration Division must also therefore always consider alternatives to detention. The Federal Court has also held that, in cases where the detention has become indefinite, "*both the Board and the Minister* are under a heightened obligation to consider alternatives to detention".¹⁵⁹ It is therefore clear, under Canadian jurisprudence, that all parties to the detention review process share the obligation to formulate and consider alternatives to detention.

c. Analysis

Alternatives to detention must always be considered, regardless of the detainee's capacity to present alternatives him or herself. Contrary to what is indicated in the current Guidelines,¹⁶⁰ it is *not* the detainee's sole responsibility to formulate and demonstrate the adequacy of alternatives to detention. The Minister bears the burden of demonstrating that there are no adequate alternatives to detention. In assessing whether the Minister's burden is met, the Member must consider, fashion and articulate viable alternatives to detention. Even in cases where the alternative envisaged requires participation from the detainee or a bondsperson on his or her behalf, Members should be encouraged to articulate to detainees the alternatives that would be considered sufficient in order that they can then organize themselves accordingly.

The obligation to consider and fashion alternatives to detention increases as the length of detention increases and is elevated *ab initio* in the case of asylum seekers, vulnerable detainees and, most acutely, for children and their families.¹⁶¹

International standards require legal certainty with respect to the availability and application of conditions of detention. As the IRPA and IRPR are presently deficient in this respect, Guideline 2 should fill the void and provide detailed instructions to Members with respect to the availability and role of alternatives to detention.

The instruction currently contained at paragraph 3.6.2 of Guideline 2 ("The member is entitled to reject the joint submission by the parties and either order continued detention or order release on other conditions that are deemed to be more appropriate.") is inconsistent with the baseline requirement that the Minister bears the burden of proof to justify continued detention. If the Minister is seeking release, that burden cannot, by definition, have been met.

¹⁵⁷ *Brown*, *supra* note 13 at para 159.

¹⁵⁸ *Charkaoui*, *supra* note 13 at para 121. For discussion, see *P.S.*, *supra* note 23 at paras 78-92.

¹⁵⁹ *Ahmed v Canada (Citizenship and Immigration)*, 2015 FC 876 at para 34, emphasis added.

¹⁶⁰ Guideline 2, at para 3.6.4.

¹⁶¹ Detention Guidelines, at paras 58, 63-65.

Finally, given the imperative of making use of any availability alternative to detention, Guideline 2 should make clear to Members that they have the jurisdiction to impose conditions of release that permit or require the Minister to take an active role.

Recommendations

In accordance with the necessity principle and the judgment in *Brown*, Guideline 2 should instruct Members that they must also consider and fashion alternatives to detention, even in situations where the detainee is not in a position to do so. Member must therefore demonstrate in their reasons that alternatives have been considered and must explain why they have been found insufficient. In particular, the reasons must demonstrate why the immigration purpose of detention cannot be achieved without resort to detention.

In accordance with the proportionality principle as reflected in both international and Canadian law, Guideline 2 should instruct Members that the obligation to consider and fashion alternatives is elevated in the case of:

- Lengthy detention;
- Detention of children and their families;
- Detention of persons with mental illness;
- Detention of asylum seekers;
- Detention of vulnerable detainees, including LGBTQ detainees, the elderly, those with medical conditions or disabilities and survivors of torture or sexual or gender-based violence and wherever there is a reasonable basis to conclude that continued detention may result in physical or psychological harm to the detainees or unduly prejudice their legal rights.

As emphasized in the Detention Guidelines, Guideline 2 should instruct Members that the necessity, reasonable and proportionality principles apply equally to alternatives to detention, which should not therefore be used as alternative forms of detention; nor should alternatives to detention become alternatives to release.

Guideline 2 should specify and explain the various alternatives available, the criteria governing their use, as well as the authority(ies) responsible for their implementation and enforcement according to the best practices set out in the Detention Guidelines¹⁶² and should in particular specify that it is the role of the Division and not the Minister to determine the suitability of a bondsperson.

7. Minors

a. International standards

It is inconsistent with international norms to detain children on immigration grounds. The principles stated in the Detention Guidelines “apply *a fortiori* to children, who should in principle not be detained at all”.¹⁶³

The Detention Guidelines summarize the applicable principles of international human rights law, derived principally from the *Convention on the Rights of the Child* [CRC],¹⁶⁴ in order to explain and emphasize the imperative that “[a]ll efforts, including prioritisation of asylum processing, should be made to allow for the immediate release of children from detention and their placement in other forms of appropriate accommodation.”¹⁶⁵ In all cases where detention would result in family separation, the same conclusions follow from the principle of family unity, which is deeply entrenched under international law,¹⁶⁶ which protects against state interference with the family unit.¹⁶⁷

As stated articulated in a recent joint statement by the UN Committee on the Rights of the Child and the UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families:

5. Every child, at all times, has a fundamental right to liberty and freedom from immigration detention. The Committee on the Rights of the Child has asserted that the detention of any child because of their or their parents’ migration status constitutes a child rights violation and contravenes the principle of the best interests of the child. In this light, both Committees have repeatedly affirmed that children should never be detained for reasons related to their or their parents’ migration status and States should expeditiously and completely cease or eradicate the immigration detention of children. Any kind of child

¹⁶² Detention Guidelines, at paras 36, 40-41.

¹⁶³ Detention Guidelines, at para 51.

¹⁶⁴ *CRC*, *supra* note 7.

¹⁶⁵ Detention Guidelines, at para 57.

¹⁶⁶ *ICCPR*, *supra* note 7 at art 23; *International Covenant on Economic, Social and Cultural Rights* 993 U.N.T.S. 3 at art 10(1); *CRC*, *supra* note 7, at arts 9-10; and Section III, *International Convention on the Protection of the Rights of All Migrant Workers and their Families* 18 December 1990, A/RES/45/158;

¹⁶⁷ *ICCPR*, *supra* note 7 at arts 23 and 17(a) Article 23 and Article 17(1) (“No one shall be subjected to arbitrary or unlawful interference with his...family”). An overly rigid and punitive system can “taint even a system authorized by law as ‘arbitrary’” under the *ICCPR*: *Husseini v. Denmark*, UNHRC Comm. No: 2243/2013, 24 October 2014; *Ilyasov v. Kazakhstan*, UNHRC Comm. No. 2009/2010, 23 July 2014.

immigration detention should be forbidden by law and such prohibition should be fully implemented in practice.¹⁶⁸

If children are detained at all, states and decision-makers must ensure that is a measure of last resort and should be for the shortest possible period of time.¹⁶⁹ According to the UNWGAD, even as a measure of last resort, “it is difficult to conceive of a situation in which the detention of an unaccompanied minor would comply with the requirements stipulated in article 37(b), clause 2, of the Convention on the Rights of the Child”.¹⁷⁰

b. Canadian law

The CRC is among the “international human rights instruments” referenced at s 3(3)(f) of the IRPA, and detention review decisions must therefore conform to the principles set out in the previous section.

The consent order in *B.B. and Justice for Children and Youth v. MCI*,¹⁷¹ also affirmed that the best interests of the child is an important consideration in favour of release not only where the child in question is under a detention order, but also where the child in question is in detention as a result of a detention order against their parent or guardian (i.e. where the child is a ‘guest’ in the detention centre).

c. Analysis

Guideline 2 as currently drafted merely refers Members to the applicable provisions of the IRPA and IRPR without providing further guidance. More robust guidelines would assist in ensuring that the applicable domestic and international norms are given due effect such that children are *never* maintained in detention.

To avoid detention and to ensure that the detention of children is truly a measure of last resort and that children who are detained are released without delay, the obligation to fashion and impose an

¹⁶⁸ See the Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, 16 November 2017, CMW/C/GC/4-CRC/C/GC/23, citing the Convention on the Rights of the Child, art. 37; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, arts. 16 and 17; Universal Declaration of Human Rights, arts. 3 and 9; International Covenant on Civil and Political Rights, art. 9; and the Committee on the Rights of the Child, report of the 2012 day of general discussion, para. 78. See also the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court (A/HRC/30/37, annex), in particular principle 21, para. 46, and guideline 21.

¹⁶⁹ CRC, *supra* note 7, Guideline 9.2, art 37(b).

¹⁷⁰ UNWGAD 2010, *supra* note 76 at 60.

¹⁷¹ *Supra*, note 20

alternative to detention applies from the very outset. Members should not hesitate to impose alternatives that require proactive efforts by the Minister to actualize the alternative imposed.

Guideline 2 is silent with respect to children who are detained as a result of detention orders against their parents or guardians, and should be amended to reflect the content of the consent order in *B.B. and Justice for Children and Youth v. MCI*, discussed above.

Recommendations

Guideline 2 should direct Members to ensure that children and their families are ordered released as soon as possible in order to promote compliance with international law and the IPRA.

Guideline 2 should emphasize to Members that their obligation to fashion and impose alternative to detention for children and their families exists from the outset of the first detention review.

Guideline 2 should instruct Members that the alternatives imposed may require proactive participation by the Minister, and that this is consistent with the Minister's concurrent obligation under the IRPA and under international law to ensure that the detention of children and their families is truly a measure of last resort because it is never in the best interests of a child to maintain their detention.

To ensure compliance with the *Convention on the Rights of the Child* as reflected in the consent order in *B.B.*, Guideline 2 should instruct Members that the best interests of the child is a primary consideration in favour of release, not only where the child in question is under a detention order, but also where the child in question is housed in detention as a result of a detention order against their parent or guardian. It also applies when the child is not detained but their best interests are prejudiced by the detention of the person concerned.

D. Guideline 2 should contain guidance on procedural and evidentiary issues

Guideline 2 is silent concerning evidentiary and procedural issues for purposes of detention reviews.

As noted above, this silence is unjustified. Canadian courts have made clear that the constitutionality of immigration detention depends in large part on robust procedural protections and the application of appropriate burdens and standards of proof in practice. In light of recent judicial pronouncements on deficiencies in the application of constitutional and common law legal standards by the Division,¹⁷² it is all the more urgent to expand the Guideline. Guideline 2 should include direction on what is required to ensure that detention reviews are sufficiently robust and in compliance with international standards and the Canadian *Charter*.

Recommendation

In order to ensure that detention reviews are robust and in compliance with human rights standards and in light of the judgment in *Brown*, Guideline 2 should instruct Members on evidentiary and procedural issues as they relate to issues regarding the right to an effective remedy and procedural fairness.

1. Access to counsel

a. International standards

Under international law, the right to counsel must be effective in practice: lawyers must be able to access their clients and “be able to meet with their client in a secure, private setting”, and communicate effectively both while in custody and during any hearing process.¹⁷³ Moreover, in jurisdiction such as Canada, where non-immigration detainees have access to free legal counsel based on the *Charter*, indigent immigration detainees must have the same access as soon as possible after they are arrested or detained.¹⁷⁴

¹⁷² See *Scotland*, *supra* note 83 and *Brown*, *supra* note 13.

¹⁷³ Detention Guidelines, at para 47(ii); UNWGAD, Report to the 55th Session of the Commission on Human Rights, E/CN.4/1999/63, [UNWGAD 55th Session] at para 69, Guarantee 6.

¹⁷⁴ General Comment No. 35, *supra* note 110 at 15; UNWGAD 55th Session, *supra* note 173 at para 69, Guarantee 7; UNWGAD UK, *supra* note 144 at 31; UNWGAD 2010, *supra* note 76 at 61. In Europe, Article 16(2) of the *Return Directive* stipulates detainees must be allowed to be in contact with legal representatives. The Council of Europe advises that information about availability of counsel should be relayed to the detainee promptly in a language they can understand and they should be provided with the opportunity to contact the lawyer of their choice immediately: *Twenty Guidelines*, *supra* note 153, chapter III – “Detention pending removal”, Guideline 6.2. In France, the Code of Entry and Residence of Foreigners and of the Right of Asylum, which governs immigration law, stipulates that foreigners detained for the purposes of removal are entitled to legal counsel and must be informed of this right in a language the detainee can understand: Global Legal Research Directorate, Law Library of Congress, *Right to Counsel for Detained Migrants in Selected Jurisdictions*, May 2017, at 4, online: <<http://www.loc.gov/law/help/reports/pdf/2017-015027.pdf>>.

b. Analysis

Conducting detention reviews in circumstances where the detainee's right to counsel has not been given practical effect is contrary to international norms. Members must ensure that detainees have had full access to counsel prior to conducting a detention review, and must ensure that detainees are able to confer with counsel in the course of the detention review. Members should be particularly vigilant in this respect where detainees are being held in jails where geographic remoteness, lockdowns, poor telephone access and the like are more likely to have impeded access to counsel. Moreover, where a review is being conducted by videoconference, the Member must ensure that accommodations are provided to allow detainees and counsel to confer during the detention review proceedings.

Recommendation

As the right to counsel for detainees is primordial under both international and Canadian law, Guideline 2 should instruct Members to actively ensure that detainees are given the opportunity to seek counsel, and have a meaningful opportunity to consult with counsel in a confidential setting.

2. The *Thanabalasingham* principle and the burden of proof

The judgment of the Federal Court of Appeal in *Thanabalasingham* is repeatedly referenced in Guideline 2 as authority for the principle that detention reviews are not true *de novo* proceedings and that prior decisions are owed deference such that Members can depart from them only upon articulating clear and compelling reasons for so doing.¹⁷⁵

a. International standards

International law requires that the “burden of proof to establish the lawfulness of the detention rests on the authorities in question”. This is a substantive burden which requires not only proof of a basis for detention, but also justification pursuant to the principles of necessity, reasonableness and proportionality. It is the detaining authority who bears the burden to demonstrate that “less intrusive means of achieving the same objectives” are not available.¹⁷⁶ International standards also require that the burden to justify detention increases with the length of the detention.¹⁷⁷

*b. Canadian case law tempering *Thanabalasingham**

A number of Canadian judicial pronouncements have addressed the proper application of the principle stated in *Thanabalasingham*.

¹⁷⁵ Guideline 2, s. 1.1.7.

¹⁷⁶ Detention Guidelines, at para 47(v).

¹⁷⁷ ICCPR, *supra* note 7.

In *Charkaoui*, the Supreme Court of Canada found that it would be inconsistent with section 7 of the Charter to require new evidence or evidence of a change in circumstances in order to justify release in the face of a prior detention order.¹⁷⁸ Thus, as underscored by the Federal court in *Ahmed v. Canada*, the exercise cannot become one of simply deferring to a prior order absent new information.

However, as reminded by Justice Donald Rennie (as he was then), in *Canada (Minister of Citizenship and Immigration) v B147*, [2012 FC 655 \(CanLII\)](#), 412 FTR 203 [B147] at para 33, “an independent and fresh exercise of discretion is integral to the purpose and object of the detention review”. Otherwise, as warned Justice Rennie, “the requirement that the detention be reviewed fairly, openly and with a fresh perspective to evolving facts would be easily and frequently, if not invariably, defeated”.¹⁷⁹

The Court went on to find that, because s 248 of the *IRPR* requires consideration of the length of time in detention, the Minister’s burden to justify *continued* detention necessarily increases with the passage of time.¹⁸⁰ A similar finding was made by the Federal Court in *Warssama v. Canada (Citizenship and Immigration)*:

[25] The burden is upon the Minister to justify the continued detention. Although this burden is often discharged by building upon earlier detention decisions, with evidence that nothing else has transpired except the passage of 30 days, there comes a point in time in which time itself becomes overwhelming, requiring the parties, and the Immigration Division, to think outside the box.¹⁸¹

This line of case law was further solidified in *Brown*, where the Court underlined the importance of ensuring that the burden of proof always rests on the Minister to justify *continued* detention.¹⁸²

In *Chaudhary*, the Court of Appeal for Ontario noted that *Thanabalasingham* has had the effect of shifting Members’ analysis from the current legality of the detention to an assessment of what has changed since the prior review and, more problematically, effectively diluting the Minister’s burden of proof as the length of detention increased.¹⁸³

c. Analysis

In light of both international and Canadian legal norms, the *Thanabalasingham* principle must be applied with extreme caution to ensure respect for the requirements that the state meet its burden of proof to justify continued detention and that the length of past detention itself weigh in favour of release, as stipulated in international law, s 7 of the *Charter* and s 248 of the Regulations.

¹⁷⁸ *Charkaoui*, *supra* note 13 at para 122.

¹⁷⁹ *Ahmed*, *supra* note 136 at para 17

¹⁸⁰ *Ahmed*, *supra* note 136 at paras 32-33.

¹⁸¹ *Warssama v Canada (Citizenship and Immigration)*, 2015 FC 1311.

¹⁸² *Brown*, *supra* note 13 at para 159(b)(d)(f).

¹⁸³ *Chaudhary*, *supra* note 68 at paras 86-90.

A particular caution is in order with respect to long term detentions and the risk that prior decisions to which each Member is showing deference are already quite stale—for example where Members successively rely on prior findings that the person is a danger, all of which are based on an initial assessment made some months or years prior and thus without regard for the totality of the time that has passed since that assessment was made.

Recommendations

Guideline 2 must expressly instruct Members on the following limitations on the application of the *Thanabalasingham* principle:

- The Minister bears the burden of proof with respect to the justification for *continued* detention; and that burden increases with the passage of time;
- The passage of time weighs in favour of release; and
- The detainee cannot be required to demonstrate new facts or a change in circumstances to secure release.

3. Disclosure and Summons Applications

a. International standards

International law recognizes the right to disclosure of the records relating to a detainee and the grounds of his or her detention.¹⁸⁴ Under international law, one element of the right to equality is the right to sufficient disclosure to ensure “equality of arms” in adjudicative proceedings. As such detainees should have access to “all materials related to the detention” *in addition* to all materials presented to the court by the detaining authorities. This right is subject only to legal distinctions that can be justified on reasonable grounds and will not prejudice the detainee.¹⁸⁵

The European Court of Human Rights, in *A and others v. United Kingdom*, reached a similar conclusion under the terms of the ECHR, and confirmed that “the detainee must be given an opportunity effectively to challenge the basis of the allegations against him”, which “may also require that the detainee or his representative be given access to documents in the case-file which form the basis of the prosecution case against him”.¹⁸⁶ While the Court has held that the procedural protections of Article 5 § 4 are case-specific,¹⁸⁷ “equality of arms” requires sufficient disclosure to allow the detainee to challenge the allegations against her or him.¹⁸⁸

¹⁸⁴ Detention Guidelines, at para 47(ii). See also UNWGAD, *United Nations Basic Principles and Guidelines on remedies and procedures on the right of anyone deprived of their liberty to bring proceedings before a court*, UNGAOR, 30th Sess, UN Doc A/HRC/30/37 (2015), guideline 5 at paras 56ff.

¹⁸⁵ UNWGAD, *UN Basic Principles and Guidelines on the right of anyone deprived of their liberty to bring proceedings before a court*, UNGAOR, 2015, UN Doc WGAD/CRP.1/2015, principle 12: Equality before the courts at 38.

¹⁸⁶ *A. and Others v United Kingdom*, No 3455/05, [2009] II ECHR 137 at para 204.

¹⁸⁷ Guide on Article 5, *supra* note 91 at para 203;

¹⁸⁸ Guide on Article 5, *supra* note 91 at para 205; *Ovsjannikov v Estonia*, No 1346/12 (20 February 2014) (ECHR) at para 72; *Fodale v Italy*, No 70148/01, [2006] VII ECHR 73 at para 41; *Korneykova v Ukraine*, No 56660/12 (24 March 2016) (ECHR) at para 68.

b. Canadian law

i. Timely Disclosure of Documents and Information Relied Upon by the Minister

In *Brown*, the Federal Court found that the evidence demonstrated “legitimate concerns about the timeliness and quality of pre-hearing **disclosure**” in detention review proceedings before the Immigration Division. The Court found that these concerns demonstrated a problem in the “maladministration” of the Act,¹⁸⁹ and emphasized the following principle:

[159] (g) The Minister of PSEP must provide reasonable notice of the evidence or information that will be relied upon at the detention review. Detainees or their representatives may request further disclosure, and ask that the Enforcement Officer be summoned to appear at the hearing.

This both re-affirms and goes beyond what is currently required by Rule 26 of the Immigration Division rules, which requires advanced disclosure of *documents* on which the parties intend to rely at the detention review.¹⁹⁰ The Court in *Brown* both entrenched the importance of *advance* disclosure and made clear that a fair process requires advance disclosure of the *information* on which the parties will rely at the hearing. This means, for example, that the information that the Hearing Officer intends to relay to the Member in the course of a detention review must be disclosed to the detainee in advance.

ii. *Inter partes* disclosure of relevant evidence and information

Canadian courts have affirmed that detention review proceedings engage section 7 of the *Charter*, and the process must therefore comply with the principles of fundamental justice, including the multifaceted right to a fair process.¹⁹¹

The s. 7 right to a fair process includes both the right to know the case to meet and the right to have a decision based on the facts and the law, which in turn requires the decision-maker to be “exposed to the whole factual picture”.¹⁹² As the Supreme Court put it, the detainee’s

knowledge of the case and participation in the process must be sufficient to result in the designated judge being “exposed to the whole factual picture” of the case and having the ability to apply the relevant law to those facts.¹⁹³

¹⁸⁹ *Brown*, *supra* note 13 at para 127.

¹⁹⁰ *Immigration Division Rules*, r 26.

¹⁹¹ *Brown*, *supra* note 13; *Charkaoui*, *supra* note 13 at paras 16-18.

¹⁹² *Charkaoui*, *supra* note 13 at para 36, 50-51. See also *Brown*, *supra* note 13 at para 113(c), referencing *Charkaoui*, *supra* note 13: [113]... (c) Before the state can detain people for significant periods of time, it must accord them a fair process (at para 28). This basic principle has a number of facets. It comprises the right to a hearing. It requires that the hearing be before an independent and impartial decision-maker. It demands a decision on the facts and the law. It entails the right to know the case put against one, and the right to answer that case. Precisely how these requirements are met will vary with the context, but for s 7 to be satisfied, each of them must be met in substance (at para 29). Emphasis added.

¹⁹³ *Canada (Citizenship and Immigration) v Harkat*, 2014 SCC 37 at para 41, [2014] 2 S.C.R. 33.

c. Analysis

Contrary to current practices, the Minister's disclosure obligations are *not* satisfied by merely providing the detainee with a copy of the documents on which the Minister intends to rely at a detention review.¹⁹⁴ There is no guarantee that the Member is exposed to the whole factual picture if the Division considers only the evidence that the Minister has determined to be favourable to its position. For the adversarial system to function, both sides must be placed in a position where they can determine which evidence is necessary to put before the decision-maker'.¹⁹⁵ A detainee's *Charter* right to know the case to meet and, even more particularly, to have the Member exposed to the whole factual picture is respected only if the Minister is required to provide advance disclosure to the detainee.¹⁹⁶

Moreover, in *Brown*, the Federal Court held that one of the components of the detention review process that renders the regime *Charter* compliant is the option for detainees to summons Removal Officers and other relevant actors for cross-examination during a detention review.¹⁹⁷ As a result, late or non-provision of disclosure effectively denies detainees their right to respond by calling and cross-examining those involved in their detention and removal proceedings. This may render the proceedings incompatible with the requirements of the *Charter*.

Recommendations

In accordance with the judgment in *Brown*, Guideline 2 should instruct Members that, under Rule 33(2)(a), detainees have the right to cross-examine those involved in their detention and removal proceedings.

In accordance with the judgment in *Brown*, Guideline 2 should instruct Members to require the Minister to provide timely disclosure, in advance of the detention review, to detainees and their counsel of all evidence and information on which the Minister will rely at an upcoming detention review.

¹⁹⁴ *Charkaoui*, *supra* note 13 at para 36, makes clear that the concern goes beyond just seeing what the judge sees: it is about seeing everything in order to be able to put what *you think* matters before the Immigration Division.

¹⁹⁵ *Charkaoui*, *supra* note 13 at paras 50-51.

¹⁹⁶ By way of example, a fair process requires that the CBSA disclose to the detainee investigative and other updates provided from removal officers to hearings officers; correspondence between the CBSA and the authorities of the detainee's country of nationality or return; CBSA correspondence with other entities or agencies that relates in any way to the statutory grounds invoked by the Minister.

¹⁹⁷ *Brown*, *supra* note 13 at paras 123-125.

In accordance with the international law right to equality of arms and the judgments in *Charkaoui* and *Harkat*, Guideline 2 should instruct Members that the Minister is also required to provide *inter partes* disclosure to detainees or counsel where they have requested such disclosure of documents or information relating to their detention, examination or removal and there is a reasonable possibility that such documents may either assist the detainee in knowing the case to meet or in ensuring that the Division is exposed to the whole factual picture.

IV. Conclusion

The Immigration Division is required under both international and Canadian law to act as the guardian of the *Charter* rights and international human rights of immigration detainees. The revision of Guideline provides an important opportunity for the Immigration and Refugee Board to provide additional guidance to Immigration Division Members to assist them in fulfilling this difficult and critically important role.

ANNEX A: RECOMMENDATIONS

What follows is a list of the recommendations set out and explained in the body of the report. The recommendations follow from the review of international and domestic legal standards and the analysis thereof in each substantive section above. The footnotes to the heading in the present Annex direct the reader to the sections of the report that substantiate the recommendations.

The role of international and domestic norms in detention reviews¹⁹⁸

1. Guideline 2 should instruct Members on relevant legal principles and their application, in order to ensure that detention reviews are conducted fairly and in conformity with Canadian and international human rights standards. These principles include, but are not limited to, those stated at paragraph 159 of *Brown* and the principles of necessity, reasonableness and proportionality that form the core of the international norms governing immigration detention.

Flight risk¹⁹⁹

2. Guideline 2 should include instructions to Members that, where the detainee is held on the flight risk ground, the proportionality principle imposes a heightened obligation to fashion alternatives to detention where there are delays in the underlying proceedings.
3. In accordance with the necessity principle, Guideline 2 should instruct Members that the flight risk assessment must always be individualized and focused on the current flight risk, and is not limited to the mere presence of one or more of the s 245 IRPR factors.
4. In accordance with the order in *B.B. and Justice for Children and Youth*, Guideline 2 should instruct Members that the presence of a child in Canada for whom the detainee has care obligations is an indicator of a diminished flight risk that should be given significant weight.

Identity²⁰⁰

5. The current instruction to Members in Guideline 2 to exercise caution when considering release of persons where the Minister is of the opinion that their identity has not been established should be removed; it has no legal foundation and is contrary to international standards, which require that detention on identity grounds be used sparingly and be of minimal duration.
6. Guideline 2 should instruct Members to apply the s 248 IRPR factors in a manner that ensures that detentions on identity grounds are of minimal duration, as required under international standards, particularly with respect to refugees and asylum seekers.

¹⁹⁸ See Section II.A at page 9ff, above.

¹⁹⁹ See Section III.B.1 at page 13ff, above.

²⁰⁰ See Section III.B.2 at page 15ff, above.

7. In accordance with the reasonableness and proportionality principles, Guideline 2 should instruct Members that, as of the 7-day review, there is a heightened obligation to fashion alternatives to detention where detention is on identity grounds.

Ministerial inquiry²⁰¹

8. Guideline 2 should instruct Members that they have a heightened obligation to consider release or fashion alternatives to detention where s 58(1)(c) is invoked in respect of refugees or asylum seekers or where there is no substantive reason to detain during the course of the inquiry as such detentions are contrary to both international standards and the judgment in *Charkaoui*.
9. Guideline 2 should instruct Members that the Ministerial inquiry ground can only justify detention of minimal duration and that they are under a heightened obligation to consider and fashion alternatives to detention as of the 7-day detention review.

Danger to the public²⁰²

10. To conform to international standards, what is now paragraph 2.1.1 of Guideline 2 should be amended to instruct Members that detention on danger grounds must be necessary in the individual case, reasonable in all the circumstances and proportionate to a legitimate purpose and must be sufficiently significant to justify a deprivation of liberty.
11. Guideline 2 should instruct Members that the Minister bears the burden to prove a current danger, and that this burden increases with the passage of time in detention, in accordance with international standards and Canadian judgments such as *Charkaoui*, *Brown*, and *Sittampalam*.
12. Guideline 2 should instruct Members that it is unlawful to shift the burden of proof to the detainee to demonstrate rehabilitation, particularly where the opportunities for rehabilitative activities or programs may not be available.
13. To comply with the necessity principle, Guideline 2 should instruct Members to maintain focus on an assessment of whether the evidence establishes a current danger to the public and not to conclude that the person is a danger solely because one of the regulatory factors in s 246 of the IRPR is present.
14. Guideline 2 should instruct Members that a decision granting criminal bail is to be given significant weight in determining whether detention is justified on danger grounds as explained in *Ali*.
15. Guideline 2 should instruct Members that, according to both international standards and the judgment in *Charkaoui*, detention on danger grounds is arbitrary and discriminatory if it has become unhinged from its immigration-specific purpose.

²⁰¹ See Section III.B.3 at page 18 ff, above.

²⁰² See Section III.B.4 at page 19 ff, above.

Role of the s 248 IRPR factors²⁰³

16. In accordance with the judgment in *Brown* and ss 3(3)(d) and (f) of the IRPA, Guideline 2 should instruct and clarify for Members that their role is not merely to consider the s 248 factors, but to interpret and apply them in a manner that promotes respect for Canada's international human rights obligations and the Charter.

Reasons for detention²⁰⁴

17. Guideline 2 should instruct Members that continued detention is lawful only if it is necessary, reasonable and proportionate in all of the circumstances, including the grounds of the detention, the purpose of the detention, the length of detention, the detainee's personal circumstances (including physical and mental health and other vulnerabilities) and the conditions of detention.

18. Guideline 2 should instruct Members that before ordering continued detention, s 248(a) requires that Members first determine whether the detention is actually in furtherance of the immigration-related purpose and that, if it is not, it is arbitrary and release is required.

Length of time in detention²⁰⁵

19. In accordance with international standards and the judgment in *Brown*, Guideline 2 should emphasize that detention may continue only for a period that is reasonable in all of the circumstances, even where the statutory grounds are established, and that an unduly lengthy detention requires release.

20. In light of s. 3(3)(f) of the IRPA, Guideline 2 should instruct Members that it is necessary and appropriate to look to international standards in assessing what constitutes a period that is reasonable in all of the circumstances.

21. In accordance with international standards and the judgments in *Charkaoui* and *Brown*, Guideline 2 should instruct Members that the Minister's burden to prove the grounds of detention and to justify ongoing detention increases with the length of detention and, consequently that the obligation to fashion and impose alternatives to detention increases with the length of detention.

Indeterminate future detention²⁰⁶

22. To ensure compliance with Canadian jurisprudence, Guideline 2 should make clear that the purpose of the s 248 factors is to prevent detentions from becoming indefinite and arbitrary.

23. Guideline 2 should remove guidance to Members that lengthy and indeterminate detentions are lawful merely because the s 248 factors have been considered. This is contrary to

²⁰³ See Section III.C.1 at page 23 ff, above.

²⁰⁴ See Section III.C.2 at page 25 ff, above.

²⁰⁵ See Section III.C.3 at page 28 ff, above.

²⁰⁶ See Section III.C.4 at page 31 ff, above.

international standards and the judgments of the Supreme Court in *Charkaoui*, the Court of Appeal for Ontario in *Chaudhary* and *Ogiamien*, and the Federal Court in *Sahin*.

24. Guideline 2 should instruct Members that the indeterminate future length of detention is a factor that warrants significant weight in deciding whether detention can be lawfully maintained, as the Supreme Court held in *Charkaoui*.
25. To promote compliance with both international and Canadian standards, Guideline 2 should instruct Members that a lengthy detention with no reasonable prospect that its immigration-related purpose will be achieved within a reasonable time is unlawful, and that Members must therefore fashion alternatives to detention in such cases.
26. Guideline 2 should expressly reference the absence of a prospect of removal, separate and apart from ongoing legal proceedings, as a potential cause of indefinite detention.

Unexplained delays/lack of diligence²⁰⁷

27. In accordance with international standards, Guideline 2 should specify that the Minister bears the burden to prove that the state is acting with diligence in pursuit of the detention's underlying purpose, be it examination or removal and, where the detainee's non-cooperation is alleged, to prove that the non-cooperation is in fact impeding removal.
28. Guideline 2 should emphasize to Members the importance of ensuring respect for procedural fairness and the Minister's burden of proof where non-cooperation is alleged in favour of continued detention. Detainees should receive timely disclosure and be afforded a meaningful opportunity to challenge the CBSA's allegations of non-cooperation.
29. Guideline 2 should instruct the Member that a detainee's lack of cooperation cannot justify indefinite detention, as decided in *Ali*.
30. Guideline 2 should instruct Members that detention cannot be used, directly or indirectly, as a mechanism of punishment or coercion in respect of an alleged lack of cooperation, as held in *Ali* and in accordance with the well-established international principle that immigration detention must be non-punitive.

Alternatives to detention²⁰⁸

31. In accordance with the necessity principle and the judgment in *Brown*, Guideline 2 should instruct Members that they must also consider and fashion alternatives to detention, even in situations where the detainee is not in a position to do so. Member must therefore demonstrate in their reasons that alternatives have been considered and must explain why

²⁰⁷ See Section III.C.5 at page 37 ff, above.

²⁰⁸ See Section III.C.6 at page 39 ff, above.

they have been found insufficient. In particular, the reasons must demonstrate why the immigration purpose of detention cannot be achieved without resort to detention

32. In accordance with the proportionality principle as reflected in both international and Canadian law, Guideline 2 should instruct Members that the obligation to consider and fashion alternatives is elevated in the case of:
- Lengthy detention;
 - Detention of children and their families;
 - Detention of persons with mental illness;
 - Detention of asylum seekers;
 - Detention of vulnerable detainees, including LGBTQ detainees, the elderly, those with medical conditions or disabilities and survivors of torture or sexual or gender-based violence and wherever there is a reasonable basis to conclude that continued detention may result in physical or psychological harm to the detainees or unduly prejudice their legal rights.
33. As emphasized in the Detention Guidelines, Guideline 2 should instruct Members that the necessity, reasonable and proportionality principles apply equally to alternatives to detention, which should not therefore be used as alternative forms of detention; nor should alternatives to detention become alternatives to release.
34. Guideline 2 should specify and explain the various alternatives available, the criteria governing their use, as well as the authority(ies) responsible for their implementation and enforcement according to the best practices set out in the Detention Guidelines and should in particular specify that it is the role of the Division and not the Minister to determine the suitability of a bondsperson.

Minors²⁰⁹

35. Guideline 2 should direct Members to ensure that children and their families are ordered released as soon as possible in order to promote compliance with international law and the IRPA.
36. Guideline 2 should emphasize to Members that their obligation to fashion and impose alternatives to detention for children and their families exists from the outset of the first detention review.
37. Guideline 2 should instruct Members that the alternatives imposed may require proactive participation by the Minister, and that this is consistent with the Minister's concurrent obligation under the IRPA and under international law to ensure that the detention of

²⁰⁹ Section III.C.7 at page 43 ff, above.

children and their families is truly a measure of last resort because it is never in the best interests of a child to maintain their detention.

38. To ensure compliance with the *Convention on the Rights of the Child* as reflected in the consent order in *B.B.*, Guideline 2 should instruct Members that the best interests of the child is a primary consideration in favour of release, not only where the child in question is under a detention order, but also where the child in question is housed in detention as a result of a detention order against their parent or guardian. It also applies when the child is not detained but their best interests are prejudiced by the detention of the person concerned.

Guidance on evidentiary and procedural issues²¹⁰

39. In order to ensure that detention reviews are robust and in compliance with human rights standards and in light of the judgment in *Brown*, Guideline 2 should instruct Members on evidentiary and procedural issues as they relate to issues regarding the right to an effective remedy and procedural fairness.

Access to counsel²¹¹

40. As the right to counsel for detainees is primordial under both international and Canadian law, Guideline 2 should instruct Members to actively ensure that detainees are given the opportunity to seek counsel, and have a meaningful opportunity to consult with counsel in a confidential setting.

The *Thanabalasingham* principle and the burden of proof²¹²

41. Guideline 2 must expressly instruct Members on the following limitations on the application of the *Thanabalasingham* principle, which flow from both international standards and Canadian case law:
- The Minister bears the burden of proof with respect to the justification for continued detention; and that burden increases with the passage of time;
 - The passage of time weighs in favour of release; and
 - The detainee cannot be required to demonstrate new facts or a change in circumstances to secure release.

Disclosure and summons applications²¹³

42. In accordance with the judgment in *Brown*, Guideline 2 should instruct Members that, under Rule 33(2)(a), detainees have the right to cross-examine those involved in their detention and removal proceedings

²¹⁰ See Section III.D at page 46, above

²¹¹ See Section III.D.1, at page 46 ff, above.

²¹² See Section III.D.2 at page 47 ff, above.

²¹³ See Section III.D.3 at page 49 ff, above.

43. In accordance with the judgment in *Brown*, Guideline 2 should instruct Members to require the Minister to provide disclosure, in advance of the detention review, to detainees and their counsel of all evidence and information on which the Minister will rely at an upcoming detention review.
44. In accordance with the international law right to equality of arms and the judgments in *Charkaoui* and *Harkat*, Guideline 2 should instruct Members that the Minister is also required to provide *inter partes* disclosure to detainees or counsel where they have requested such disclosure of documents or information relating to their detention, examination or removal and there is a reasonable possibility that such documents may either assist the detainee in knowing the case to meet or in ensuring that the Division is exposed to the whole factual picture.