Immigration and Refugee Board | Commission de l'immigration et du statut de réfugié

GUIDELINES
ISSUED BY THE CHAIRPERSON
PURSUANT TO SECTION 65(4)
OF
THE *IMMIGRATION ACT*

Guidelines on Detention

Immigration and Refugee Board
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GUIDELINE 4

Guidelines on Detention

Canadian law[1] regards preventive detention as an exceptional measure. This general principle emerges from statute and case law, and is enshrined in the *Canadian Charter of Rights and Freedoms*[2] (hereinafter referred to as the Charter). International law,[3] as reflected in the *International Covenant on Civil and Political Rights* and the *Optional Protocol to the International Covenant on Civil and Political Rights*, respects the same principle.

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1 For examples, refer to ss. 503(1) and 515(10) of the *Criminal Code*, R.S.C. 1985, c. C-46.

2 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, Schedule B of the *Canada Act 1982*, 1982, c. 11 (U.K.).

3 *International Covenant on Civil and Political Rights*, (1976) 999 UNTS 107, in force on March 23, 1976, ss. 9, 10 and 11, and the *Optional Protocol to the International Covenant on Civil and Political Rights*, (1976) 999 UNTS 216, in force on March 23, 1976. These two instruments confer status in law on the civil and political rights set out in the Universal Declaration of Human Rights, U.N. Doc. A/810, p. 71 (1948).

In the immigration field, Parliament has established two main grounds that justify detention:[4]

1. The person is likely to pose a danger to the public.

2. The person is not likely to appear for an examination, an inquiry or removal.

Adjudicators have the power to order the detention or continued detention of a person. They may also order that a person be released from detention, subject to such terms and conditions as they deem appropriate, including the payment of a security deposit or the posting of a performance bond.[5]

These Guidelines deal with the following topics which are intended to help adjudicators achieve greater consistency in exercising their jurisdiction and, thereby, ensure greater fairness:

(a) long-term detention;

(b) the notion of "danger to the public";

(c) alternatives to detention; and

(d) evidence and procedure.

A. LONG-TERM DETENTION

In immigration matters, a person may be detained for an examination, an inquiry or removal.[6] Consequently, custody is preventive rather than punitive in nature. Furthermore, Parliament has required that the reasons for detention be reviewed at regular intervals, although it has not limited the total detention period. **Adjudicators should, however, be guided by certain general principles arising from the case law:**

- **Detention is an exceptional restraining measure in our society;**[7]
- **Although the *Immigration Act* does not limit the total duration of detention, there are implicit restrictions on the power of detention;**[8]

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4 The detention provided for in section 103.1 of the *Immigration Act* is not dealt with in these Guidelines because these specific provisions are infrequently applied.

5 Sections 80.1 and 103 of the *Immigration Act*.

6 Sections 103(3), 103(6) and 103(8) of the *Immigration Act*.

7 *Salilar v. Canada (Minister of Citizenship and Immigration)*, [1995] 3 F.C. 150 (T.D.); *Sahin v. Canada (Minister of Citizenship and Immigration)*, [1995] 1 F.C. 214 (T.D.), appeal dismissed on the grounds that the certified question had become hypothetical: *Sahin, Bektas v. M.C.I.* (F.C.A., no. A-575-94), Stone, MacGuigan, Robertson, June 8, 1995.

8 In *Sahin* (*supra*, note 7) Rothstein J. quoted, at p. 227, Woolf J. in *R. v. Governor of Durham Prison, ex p. Singh*, [1984] 1 All E.R. 983 (Q.B.) at p. 985: "Since 20 July 1983 the applicant has been detained under the power contained in para. 2(3) of Sch. 3 to the *Immigration Act* 1971. Although the power which is given to the Secretary of State in para 2 to detain individuals is not subject to any express limitation of time, I am quite satisfied that it is subject to limitations. First of all, it can only authorize detention if the individual is being detained in one case pending the making of a deportation order and, in the other case, pending his removal. It cannot be used for any other purpose. Second, as the power is given

- **Detention for a reasonable length of time, given all the circumstances of the case, is the standard applicable to continued detention;**[9] **and**
- **The right guaranteed by section 7 of the Charter**[10] **implies that continued detention must be in accordance with the principles of fundamental justice.**[11]

Often a person whose detention is continued is under a removal order or a conditional removal order. In such circumstances, continued detention is justified only if the removal order can be executed **within a reasonable period of time**.

The Department of Citizenship and Immigration is responsible for enforcing removal orders as soon as is reasonably practicable.[12] Nonetheless, the enforcement of removal orders can be delayed by reason of a legal impediment,[13] such as a stay of execution.

The existence of a legal impediment to the execution of a removal order does not render removal invalid.[14] However, if a detention appears unduly lengthy, the reasonableness of the delay should be considered, in order to ensure that the detention is not in fact an "indefinite detention."[15] Such detentions constitute deprivations of liberty that come into conflict with the principles of fundamental justice.

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in order to enable the machinery of deportation to be carried out, I regard the power of detention as being impliedly limited to a period which is reasonably necessary for that purpose. The period which is reasonable will depend on the circumstances of the particular case. What is more, if there is a situation where it is apparent to the Secretary of State that he is not going to be able to operate the machinery provided in the Act for removing persons who are intended to be deported within a reasonable period, it seems to me that it would be wrong for the Secretary of State to seek to exercise his power of detention." In that case, the person had been convicted of a criminal offence and was detained for approximately five months following release on parole. See also, *Lam v. Tai A Chau Detention Centre* (1996), 199 N.R. 30 (J.C.P.C.).

9 *Sahin*, *supra*, note 7.

10 *Supra*, note 2, section 7: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

11 *Sahin*, *supra*, note 7, at p. 230: "…an adjudicator must have regard to whether continued detention accords with the principles of fundamental justice under section 7 of the Charter."

12 Sections 48 to 53 of the *Immigration Act*.

13 Sections 49, 50, 52(3), 53(1), 73(1)(c) and 74(2) of the *Immigration Act*.

14 *Re Rojas and the Queen* (1978), 20 O.R. (2d) 590 (Ont. C.A.). In dismissing a *habeas corpus* application, the Ontario Court of Appeal held as follows: "It is obvious that the problem of finding a country to which the appellant can be deported continues to occupy the bona fide attention and efforts of the immigration authorities, and therefore his detention cannot be characterized as having ceased to be lawful. " In *Sahin* (*supra*, note 7), a person had been detained for fourteen months on the ground that he was not likely to appear for his removal, based on his own statements to the effect that he would not report for removal if required to do so. The Minister applied for a judicial review of a decision of the Convention Refugee Determination Division in which it was held that the person was a Convention refugee. Thus, the person was under a conditional removal order. Rothstein J. of the Federal Court (Trial Division) held at pp. 223-224: "Until all appeals have been disposed of, a person might still be found not to be a Convention refugee and it is that eventuality that justifies the continuance of conditional removal orders against such persons. As long as a conditional removal order may become an effective removal order, section 103 recognizes that the Minister must be in a position to enforce the order. It is consistent with that objective that persons be detained when the Minister is of the opinion that they would not appear for removal if a removal order is to be executed."

15 An example of such a situation is where the Immigration Appeal Division stays the execution of a removal order based on s. 74(2) of the *Immigration Act*, which provides that the Division "…shall review the case from time to time as it considers necessary or advisable." Given that

The fact remains however that in most cases of long-term detention, enforcement of the removal order is delayed despite the absence of any legal impediment. This can be attributed chiefly to the problems immigration authorities encounter in ascertaining the identity of the person in custody and in securing the cooperation of the country to which the person is to be removed.

Where there is no legal impediment to the execution of the removal order, it is all the more important to consider the reasonableness of the delay. With this in mind, the adjudicator should ask the Minister's representative to explain why the removal has not been carried out, since the latter must demonstrate diligent attempts to do so.[16] Depending on the nature of the impediments to removal, it may be appropriate to ask the Minister's representative to estimate the time that will be required to resolve the problems. This will enable the adjudicator to forecast more effectively the expected length of detention.[17]

The following principles should guide adjudicators when reviewing reasons for detention:

- **Where a person is being detained pending removal, it is relevant to consider whether the removal will be executed in the foreseeable future;**[18]
- **Each review of the reasons for detention is a hearing *de novo*. The Minister must, at every hearing, provide adequate reasons for the continued detention.**[19]
- **However, it should be noted that it is incumbent upon the person concerned to show why detention should not continue (especially in the absence of any new facts);**[20] **and**
- **The decisions of adjudicators must be based on their own analysis and assessment of the facts of the case, not solely on a previous decision of a colleague (although this may be considered)**[21] **or the conclusion of another decision-making body.**[22]

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the time of the execution of the removal cannot be foreseen, the detention should be considered "indefinite." In *Sahin* (*supra*, note 7) the Court held as follows at p. 229: "…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'." In *Re Rojas and the Queen* (*supra*, note 14) Zuber J.A. made the following remarks: "The *Immigration Act*, R.S.C. 1970, c. I-2, permits detention pending deportation, but this Act does not thereby authorize permanent imprisonment. In some cases it may be that the objective of deportation will become so unlikely or illusory that detention premised on this occurrence cannot be justified and will become unlawful."

16 *Cushnie v. M.E.I.* (1988), 54 D.L.R. (4th) 420 (Que. C.A.).

17 Where the detention appears unduly lengthy, it may, depending on the circumstances of the case, have become unjustified, and therefore illegal, because removal has become illusory. (See the remarks of Zuber J.A. in *Re Rojas and the Queen*, *supra*, note 14.)

18 *Re Rojas and the Queen*, *supra*, note 14; Cushnie, *supra*, note 16; *Sahin*, *supra*, note 7.

19 *Cushnie*, *supra*, note 16; *Sahin*, *supra*, note 7; *Salilar*, *supra*, note 7.

20 *Canada (Minister of Citizenship and Immigration) v. Salinas-Mendoza*, [1995] 1 F.C. 251 (T.D.).

21 *McIntosh v. Canada (Minister of Citizenship and Immigration)* (1996), 30 Imm. L.R. (2d) 314 (F.C.T.D.); *Arruda v. Canada (Minister of Citizenship and Immigration)* (1995), 27 Imm. L.R. (2d) 154 (F.C.T.D.).

22 *Lin v. Canada (Minister of Citizenship and Immigration)* (1996), 33 Imm. L.R. (2d) 8 (F.C.T.D.); *Salilar*, *supra*, note 7; *Salinas-Mendoza*, *supra*, note 20; *Lam v. Canada (Minister of Employment and Immigration)* (1995), 26 Imm. L.R. (2d) 207 (F.C.T.D.); *Ejim, Chukwudi*

Consequently, when dealing with a continuing detention, adjudicators must consider both grounds for detention as required by the *Immigration Act*. However, their analysis must not end there. In every case where they are called upon to review the reasons for detention, they must consider the reasons for the continued failure to execute the removal, assess—based on the problems identified—whether the person is likely to be removed within a reasonable period of time, and determine—on a balance of probabilities—whether the duration of the detention is reasonable having regard to the circumstances of the particular case.

Adjudicators must also take into account the right to liberty guaranteed by section 7 of the Charter. In *Sahin*,[23] the Federal Court-Trial Division stated as follows: "…it is obvious that section 7 Charter considerations are relevant to the exercise of discretion by an adjudicator under section 103 of the *Immigration Act*." In this case the Court put forth **four factors to be taken into account by adjudicators in determining whether continued detention is in accordance with the principles of fundamental justice as required by section 7 of the Charter**:

1. There is a stronger case for continuing a lengthy detention when an individual is considered a danger to the public;[24]

2. The length of time that a person has already spent in detention and the length of time detention will likely continue, or the fact that the duration of future detention time cannot be ascertained, are factors which should have a bearing on release;

3. Unexplained delay and even unexplained lack of diligence should count against the offending party; and

4. The availability, effectiveness and appropriateness of alternatives to detention must be considered.

The foregoing list of considerations is not exhaustive. The considerations, and the weight to be given to each of them, will depend on the facts of the case.[25] A balance must be struck between the public interest and the person's right to liberty: "The principles of fundamental justice are concerned not only with the interest of the person who claims his liberty has been limited, but with the protection of society. Fundamental justice requires that a fair balance be struck between these interests, both substantively and procedurally."[26] Although detention of asylum-seekers and children is rare, decisions in this regard should be made in a manner that is consistent with not only the Charter but also the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status*[27] and the *Convention on the Rights of the Child*.[28]

Prince Chidi v. M.C.I. (F.C.T.D., no. IMM-4590-94), Rothstein, December 1, 1994. See also comments on *Williams*, *infra*, note 31.

23 *Sahin*, *supra*, note 7, at p. 228.

24 *Sahin*, *supra*, note 7, at p. 231. See also *Kidane, Derar v. M.C.I.* (F.C.T.D., no. IMM-2044-96), Jerome, July 11, 1997.

25 *Sahin*, *supra*, note 7; *Halm v. Canada (Minister of Employment and Immigration)*, [1996] 1 F.C. 547 (T.D.).

26 *Cunningham v. Canada*, [1993] 2 S.C.R. 143, at pp. 151-52.

27 *Handbook on Procedures and Criteria for Determining Refugee Status, Office of the United Nations High Commissioner for Refugees*, Geneva, January 1988.

28 *Convention on the Rights of the Child* (CRC), which was adopted by the United Nations General Assembly (Resolution no. 44/25) on November 20, 1989, was signed by Canada on May 28, 1990, was ratified on December 13, 1991 and came into force on January 12, 1992.

The public does, of course, have an interest in detaining individuals who are not likely to appear at the immigration proceedings that they are required to attend, but that interest undoubtedly weighs more heavily in favour of detention where the individuals are likely to pose a danger to the public. It is the latter ground that usually justifies long-term detention. Hence, the need to examine the notion of danger to the public.

B. THE NOTION OF "DANGER TO THE PUBLIC"

Neither the *Immigration Act* nor the case law clearly defines the phrase "danger to the public." Evidently this expression relates to the protection of the health, safety and good order of Canadian society.[29]

In general, the detention of persons who are likely to pose a danger to the public is a detention based on criminal grounds. It is possible for people to be detained because they represent a threat to public order and health; however, since such cases are relatively infrequent, these Guidelines deal solely with detention on criminal grounds.

The following propositions may be made on the basis of existing case law:

- The meaning to be ascribed to "danger to the public" is that there be a present or future danger to the public;[30]
- It is not unreasonable to draw inferences from a person's criminal record in determining whether that person is likely to be a danger to the public;[31]
- Where a person has been convicted of an offence and has served the related sentence, the conviction alone is not sufficient to support a finding that that person is likely to be a danger to the public;[32] and
- The phrase "danger to the public" "must refer to the possibility that a person who has committed a serious crime in the past may seriously be thought to be a potential re-offender."[33]

It follows from these propositions that a person's criminal background is a relevant factor that adjudicators should take into account. Nevertheless, since they must assess the present and future danger posed by the person, it is incumbent on them to assess the seriousness of the crimes and the likelihood of recidivism. The criminal background

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29 Section 3(i) of the *Immigration Act*.

30 *Thompson v. Canada (Minister of Citizenship and Immigration)* (1996), 37 Imm. L.R. (2d) 9 (F.C.T.D.); *Bahadori, Amir Hussein v. M.C.I.* (F.C.T.D., no. IMM-4931-94), Wetston, April 25, 1995.

31 *McIntosh*, *supra*, note 21.

32 *Salilar*, *supra*, note 7.

33 *Williams v. Canada (Minister of Citizenship and Immigration)*, [1997] 2 F.C. 646 (C.A.) at p. 668. In this case, the Court interpreted the phrase "danger to the public" contained in section 70(5) of the *Immigration Act*. It should be noted that the Court was referring to the commission of a crime. Thus, a person who is suspected of having committed a serious offence could be considered to be a person likely to pose a danger to the public. However, in the absence of a conviction, the adjudicator will have to take into account the presumption of innocence guaranteed to the person concerned by the common law and section 11(d) of the Charter. In this case, the person's criminal record is also of relevance and will have to be taken into account by the adjudicator. It should be noted that the Minister's opinion to the effect that the person constitutes a danger to the public is not binding on an adjudicator. The latter's decision must be based on the adjudicator's own analysis and assessment of the facts of the case. Therefore, it is possible that an adjudicator orders a person's release from detention although the Minister has issued a "danger to the public" opinion.

is only one of several factors: an adjudicator cannot conclude that a person is likely to be a danger to the public based on this sole, generally insufficient, consideration. This is especially true where the person has been convicted and has served the related sentence in respect of those offences.

Based on the above statements, **the following factors should be weighed when considering whether a person is likely to be a danger to the public**:

1. The seriousness of the offences:

- their nature[34] (offences against the person vs. offences against property);
- the circumstances in which they were committed; and
- the number of offences, their frequency and the pattern of criminal activity.

2. The likelihood of re-offending:

- the person's criminal record;
- association with or membership in a criminal organization;
- willingness to be rehabilitated35 and possibility of rehabilitation;36 and
- family and community support.37

These factors are not exhaustive. Whether a person is a danger to the public depends on a multiplicity of factors and on the weight given to them, depending on the circumstances of the case.

C. ALTERNATIVES TO DETENTION

Parliament has provided that adjudicators may order the release of a person detained pursuant to the *Immigration Act*, subject to such terms and conditions as they deem appropriate, including the payment of a security deposit or the posting of a performance bond. Given these provisions, together with the basic assumption that

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[34] Because of the changing nature of society's values, it is not always easy to assess the seriousness of offences, based on their nature. For example, it is only in recent years that assaults against a spouse (which constitute offences against the person) have been considered to be serious offences. As far as offences against property are concerned, by way of a guide, under the *Corrections and Conditional Release Act*, S.C. 1992, c. 20, an offender may be released after having served one-sixth of the related sentence in respect of a first offence other than an offence against the person (ss. 119.1 and 126.1, amended by the *Act to Amend the Criminal Code (offenders with a high risk of recidivism)*, the *Corrections and Conditional Release Act*, the *Criminal Records Act*, the *Prisons and Reformatories Act* and the *Ministry of the Solicitor General Act*, ss. 21 and 25, which came into force by order on July 3, 1997, (1997) 131 Can. Gaz. II, 2286).

[35] In order to determine a person's willingness to be rehabilitated, credibility must be assessed. The person's criminal record, conduct following the commission of the offence, behaviour during incarceration and involvement in therapy or rehabilitation programs are some of the factors that may be taken into account.

[36] Depending on the type of problem involved (violence, alcohol or drug abuse, and so on) certain rehabilitation programs may be available. Naturally, despite the desire for rehabilitation shown by the person, the status in Canada of the individual and the imminence of removal may result in the person being unable to take advantage of such programs.

[37] The presence of family members in Canada, the relationship of the person to those family members and ties with the community, as well as the support available from these sources, are all factors that can decrease the likelihood of re-offending.

detention should be an exceptional measure in Canadian society, **adjudicators should, in all cases, consider whether it would not be appropriate to impose certain conditions to reduce the risk of the person concerned failing to appear for an examination, an inquiry or removal from Canada, or to reduce the risk that such a person may pose to the public**.

It should be noted that while Parliament has conferred broad discretionary powers upon adjudicators in this area, it has not given them a free hand; the conditions imposed by adjudicators must be appropriate in the case before them, depending on whether one or both of the grounds of detention exist. The conditions must be designed to secure the presence of the individual at the required proceedings, and/or to ensure the protection of society.

Consideration of this question requires, first, that the risk posed by the person in relation to the above two grounds be assessed. Next, it must be determined whether any conditions would reduce this risk. If, because of the risk involved, a person would have to be subject to conditions that would be very difficult to abide by, a detention order might be appropriate. If, on the other hand, the level of risk is acceptable, or would become acceptable under certain conditions that would make it possible to exercise real control over the person following release, then a conditional release should be contemplated.

The conditions will, of course, vary depending on the grounds for the detention and the circumstances of the case. **However, the conditions of release should be stated in clear and precise terms, leaving no room for ambiguity in their interpretation.** It is also important to ensure that the conditions do not conflict with those imposed by another decision-making body.[38]

The *Immigration Act* provides expressly for the payment of a security deposit or the posting of a performance bond. This is a condition that precedes release and is intended to guarantee that the other conditions imposed will be complied with.

Generally, if an adjudicator contemplates a person's release subject to the payment of a security deposit or the posting of a performance bond, it is because the adjudicator is of the opinion that the person could be released and that such a security deposit would reduce the risk of that person's failing to attend the related examination, inquiry or removal proceedings. This does not mean, however, that the release of a person who is likely to pose a danger to the public cannot be contemplated. Where the public interest and the person's right to liberty are in the balance, it goes without saying that a detention, even of short duration, is more easily justified if the person concerned is likely to pose a danger to the public.[39] Nevertheless, if all the relevant factors are considered and weighed, including those listed above under the heading "The Notion of 'Danger to the Public' ", it should be possible to gauge the level of risk and to determine whether the terms and conditions—namely, the payment of a security deposit or the posting of a performance bond—would reduce the risk to a level where release would be possible.

It is incumbent on adjudicators to determine whether it is appropriate to impose conditions, including the payment of a security deposit or the posting of a performance bond. If the latter conditions are imposed, adjudicators should consider the amount of the security deposit and the form that it should take. The amount should

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[38] For example, conditions imposed by a Justice of the Peace, a court of criminal jurisdiction or—in respect of a stay of execution of a removal order—by the Immigration Appeal Division.

[39] *Sahin*, *supra*, note 7, at p. 232.

always be based on the risk posed by the person and the constraint that the security deposit would achieve in the circumstances of each particular case. **If a security deposit is not available, all other alternatives to detention should be contemplated.**[40]

At first glance, the payment of a security deposit might appear more constraining, but a performance bond provided by a solvent individual may be just as effective. The *Immigration Act* makes no distinction as to the relative value of each. In fact, the relationship between the guarantor and the detainee can sometimes impose a greater constraint on the latter. When examining this question, therefore, adjudicators should consider the availability of a cash security deposit and the suitability of the guarantor, including the guarantor's ability to pay.

On occasion, the parties will have come to an agreement on the conditions of release before the hearing and will submit the agreement to the adjudicator. If the parties' proposal seems reasonable, the adjudicator should endorse it. If, however, the proposed conditions are unusual or seem excessive, the adjudicator should determine whether other conditions are more appropriate, having regard to the nature and degree of risk posed by the person, and the constraining effect such conditions would have on the conduct of the person concerned.

D. EVIDENCE AND PROCEDURE

I. EVIDENCE

In the absence of statutory provisions concerning evidence, two general principles apply when it comes to determining whether a person is to be detained or released:

1. The balance of probabilities constitutes the applicable standard of evidence.[41]

2. Refusal to accept relevant and available evidence when reviewing the reasons for detention constitutes a breach of the principles of natural justice.[42]

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[40] Family members, the community and even NGOs may be able to exert such influence on a person as to secure the person's presence at the required immigration proceedings.

[41] *Salilar*, *supra*, note 7, at pp. 157-58. See also *Smith v. Canada (Minister of Employment and Immigration)*, [1991] 3 F.C. 3 (T.D.). In this case, the Court decided on the reasonable nature of a certificate issued in accordance with section 40.1(1) of the *Immigration Act* and whose effect is to compel the adjudicator to issue a detention order. At p. 29, Cullen J., referring to *R. v. Secretary of State for the Home Department, ex p. Khawaj*, [1984] A.C. 74, stated as follows: "As a liberty interest was at stake in the detention, the immigration officer had to satisfy a civil standard of proof to a high degree of probability that the detained person was an illegal immigrant."

[42] *McIntosh*, *supra*, note 21. See also *Sahin*, *supra*, note 7, at p. 234: "It is the adjudicator himself or herself who must determine whether he or she is satisfied that the applicant would not pose a danger to the public. ... The issue is an open one on each detention review and must be decided by the adjudicator each time. The applicant and the respondent are free to bring forward whatever evidence or information is relevant to assist the adjudicator in reviewing a detention."

II. PROCEDURE

As regards procedure, the *Immigration Act* merely states the principle that the hearing to review the reasons for a person's detention shall be conducted in public, subject to any rules of the place where a person is detained.[43]

Despite the absence of statutory provisions creating a framework for a review of the reasons for detention, the Adjudication Division has implemented a procedure that conforms to the principles of natural justice.[44]

The legal controversy over whether the principles of natural justice and fairness oblige a quasi-judicial tribunal to give reasons for its decision has not yet been settled.[45] **Nevertheless, given the serious impact of the Adjudication Division's decisions on the rights of individuals, particularly in the area of detention, detention review hearings must be recorded and the reasons for decision must be given.**[46]

The reasons must be sufficient and adequate. They should allow the person concerned to understand the grounds on which the adjudicator is ordering detention or its continuation, to decide whether the available recourses against the adjudicator's decision should be exercised and, if applicable, to make the most of the case.[47]

Consequently, the reasons must show the following:

1. the nature of the hearing held;[48]

2. the applicable criterion or criteria;[49]

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43 Section 103(9) of the *Immigration Act*.

44 The review of the reasons for detention is undertaken at a hearing, in the presence of the person concerned, who is entitled to the services of an interpreter. The person is informed of the purpose and consequences of the hearing, and of the right to be represented by a lawyer. The person concerned can submit evidence and present arguments in favour of release. See also rules 18, 28, 29 and 30 of the *Adjudication Division Rules*.

45 Where a statutory duty to give reasons exists, the courts ensure that it is strictly enforced. See *Northwestern Utilities Limited v. The City of Edmonton*, [1979] 1 S.C.R. 684 and *S.E.P.Q.A. v. Canada (Canadian Human Rights Commission)*, [1989] 2 S.C.R. 879. Where such a duty does not exist, however, the case law diverges: see *Proulx v. Public Service Staff Relations Board et al.*, [1978] 2 F.C. 133 (C.A.); *Canadian Arsenals Limited v. C.L.R.B.*, [1979] 2 F.C. 393 (C.A.); *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779; *Taabea v. Refugee Status Advisory Committee*, [1980] 2 F.C. 316 (T.D.); *Torres v. Canada (Minister of Employment and Immigration)*, [1983] 2 F.C. 81 (C.A.).

46 *Mensinger v. Canada (Minister of Employment and Immigration)*, [1987] 1 F.C. 59 (T.D.), at p. 72: "It is the facts, the circumstances and the nature of the decision being made which will determine whether a decision-maker is required to give reasons in order to comply with the principles of fairness."; *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643, at p. 659: "…because of the serious effect of the Director's decision on the appellants, procedural fairness required that he inform them of the reasons for his intended decision…".

47 *Mehterian, Pierre Antoine v. M.E.I.* (F.C.A., no. A-717-90), Hugessen, MacGuigan, Desjardins, June 17, 1992; *Syed, Saqlain Mohyuddin v. M.E.I.* (F.C.T.D., no. IMM-2080-93), Jerome, September 13, 1994.

48 Detention ordered by an adjudicator in accordance with ss. 103(3), 103(6), 103(8) or 103.1(5) of the *Immigration Act*. In the case of a review of the decision for detention pursuant to s. 103(6) of the Act, it is important to specify the period of time involved—48 hours, 7 days or 30 days.

49 (1) The person is likely to pose a danger to the public. (2) The person is not likely to appear for the examination, inquiry or removal. In the case of detention pursuant to s. 103.1(2) or (3) of the *Immigration Act*, the applicable criterion is that set out in s. 103.1(5), namely the

3. a summary of the facts;[50]

4. an analysis and assessment of the facts;[51] **and**

5. the decision.

In order to respect the principles of natural justice and procedural fairness, the reasons of the adjudicator ordering the detention should be transcribed and distributed to the parties before the next hearing is held, whether an initial or continued detention is involved.

question whether reasonable efforts are being made by the Minister to investigate the matter.

[50] Unless an initial review of the reasons for detention is involved, the summary of the facts can be very brief, but new facts must necessarily be mentioned.

[51] Since each review of the reasons for detention is a de novo hearing, the analysis and assessment of the facts must be those of the adjudicator who held the hearing.