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

GUIDELINE 2

Guideline on Detention

Guidelines Issued by the Chairperson, Pursuant to paragraph 159(1)(h) of the *Immigration and Refugee Protection Act*

Effective Date June 5, 2013

IRB·CISR

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1. Introduction

1.1 Introduction

1.1.1 The purpose of this Guideline is to provide guidance in the treatment of persons who are detained under Division 6 of Part 1 of the Immigration and Refugee Protection Act (IRPA).[1] Chairperson's Guidelines are issued 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).

1.1.2 Canadian law regards preventive detention as an exceptional measure.[2] This general principle emerges from statute and case law, and is enshrined in the *Canadian Charter of Rights and Freedoms*[3] (hereinafter referred to as the Charter). International law, 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.[4]

1.1.3 Parliament has established grounds for detention[5] that members of the Immigration Division must consider, when applicable, at a detention review when deciding whether to order the release or continued detention of a permanent resident or a foreign national. Members of the Immigration Division must order the release of a permanent resident or a foreign national unless they are satisfied, taking into account prescribed factors, that:

- they are a **danger to the public**;
- they are **unlikely to appear** for examination, an admissibility hearing, removal from Canada, or at a proceeding that could lead to the making of a removal order by the Minister under subsection 44(2) of the IRPA;
- the Minister is taking necessary steps to inquire into a reasonable suspicion that they are inadmissible on grounds of **security, violating human or**

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[1] S.C. 2001, c. 27, as amended. Section 54 of the IRPA states that the "Immigration Division is the competent Division of the Board with respect to the review of reasons for detention under this Division."

[2] See Part XVI of the Canadian *Criminal Code*, R.S., 1985, c. C-46.

[3] Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c. 11 (U.K.).

[4] International Covenant on Civil and Political Rights, (1976) 999 UNTS 107, in force on March 23, 1976, sections 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).

[5] IRPA, s. 58(1).

international rights, serious criminality, criminality or organized criminality;

- the Minister is of the opinion that the **identity of the foreign national** — other than a designated foreign national who was 16 years of age or older on the day of the arrival that is the subject of the designation in question — 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;

- the Minister is of the opinion that the **identity** of the foreign national who is a designated foreign national[6] and who was **16 years of age or older on the day of the arrival that is the subject of the designation** in question has not been established.

1.1.4 Members of the Immigration Division have the power to order the continued detention of a person based on one or more of the above grounds. They may also order that a person be released from detention and may impose any conditions that they consider necessary, including the payment of a deposit or the posting of a guarantee for compliance with the conditions.[7] In deciding whether to continue detention or order release, the public interest must be balanced with the liberty interest of the individual.[8]

1.1.5 However, in the case of designated foreign nationals who were 16 years of age or older on the day of the arrival that is the subject of the designation in question, members of the Immigration Division must order their continued detention if they are satisfied that any of the applicable grounds exist,[9] and they may not consider any other factors at the 14-day detention review.[10] If the Immigration Division orders the release of the designated foreign national, it may impose any conditions it considers necessary, including the payment of a deposit or the posting of a

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[6] The Minister's authority and jurisdiction with respect to designated foreign nationals is found in s. 20.1 of the IRPA. This provision concerns human smuggling or other irregular arrival in Canada of a group of persons.

[7] IRPA, s. 58(3).

[8] In *M.C.I. v. B147* (F.C., no. IMM-2451-12), Rennie, May 29, 2012; 2012 FC 655, the Federal Court stated:

[54] Section 7 interests, under the *Canadian Charter of Rights and Freedoms* (*Charter*), are rarely absolute. Rather, they imply a balancing of considerations. As stated by McLachlin J. in *Cunningham v. Canada*, [1993] 2 SCR 143, at pp 151-152:

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. ...

[9] The applicable grounds are the grounds described in paragraphs 58(1)(*a*) to (*c*) and (*e*) of the IRPA.

[10] IRPA, s. 58(1.1), which refers to a review under s. 57.1(1). This provision removes the Immigration Division's jurisdiction to consider the factors enumerated in the IRPR, s. 248, at the 14-day detention review.

guarantee for compliance with the conditions,[11] and it must also impose any condition that is prescribed in the Immigration and Refugee Protection Regulations (IRPR).[12]

1.1.6 Members must take into account the prescribed factors set out in Part 14 of the IRPR that relate to the grounds for detention and release. It is not sufficient for a member to just note these factors in their reasons for decision. Members are required to indicate in their reasons how these factors relate to their particular finding.

1.1.7 At each detention review the Immigration Division must come to a fresh conclusion on whether the detained person should continue to be detained. However, previous decisions by the Immigration Division to detain the person concerned must be considered at subsequent reviews and the subsequent decision-maker must give "clear and compelling reasons" for departing from previous decisions.[13] Reasons should be sufficiently detailed to allow the reader to know what factors the decision-maker relied on in support of their decision to detain or release.

1.1.8 The credibility of the person concerned and of witnesses is often an issue at detention reviews. Where a member had the opportunity to observe the demeanour of a witness and assess credibility, the subsequent decision-maker must give a clear explanation of why the prior decision-maker's assessment of the evidence does not justify continued detention. The admission of relevant new evidence could be a valid basis for departing from a prior decision to order detention. In addition, a reassessment of the prior evidence based on new arguments could also be sufficient reason to depart from a prior decision to detain. The member must expressly explain in the reasons what the former decision stated and why they are departing from the previous decision.[14]

1.1.9 At a detention review, the onus is always on the Minister to demonstrate, on a balance of probabilities, that there are reasons which warrant continued detention.[15]

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[11] IRPA, s. 58(3).

[12] IRPA, s. 58(4).

[13] *Canada (Minister of Citizenship and Immigration) v. Thanabalasingham*, [2004] 3 F.C.R. 572 (F.C.A.); 2004 FCA 4; *M.C.I. v. Li, Dong Zhe* (F.C., no. IMM-2682-08), Martineau, August 15, 2008; 2008 FC 949.

[14] *Thanabalasingham*, *supra*, footnote 13; *Li*, *supra*, footnote 13. The Court noted in *M.C.I. v. Sittampalam, Jothiravi* (F.C., nos. IMM-3876-04 and IMM-8256-04), Blais, December 17, 2004; 2004 FC 1756, that "[t]he rationale behind this principle is to safeguard the findings of a previous Member who was in a better position to hear original evidence and assess credibility. New evidence, new arguments or a different assessment on the same evidence which may give rise to a change in the status quo should be clearly laid out by the Member departing from the prior decision."

[15] Thanabalasingham, supra, footnote 13.

2. Grounds for Detention

2.1 Danger to the Public

2.1.1 The Immigration Division may order the continued detention of a permanent resident or a foreign national if they are a danger to the public. Neither IRPA nor the case law explicitly defines the phrase "danger to the public." This phrase relates to the objectives of the IRPA, namely, to protect public health and safety and to maintain the security of Canadian society.[16]

2.1.2 The concept of danger to the public is usually raised with respect to persons who have been involved in criminal activities.

2.1.3 Members of the Immigration Division must consider the following prescribed factors[17] in the IRPR relating to danger to the public:

- the person constitutes, in the opinion of the Minister, a danger to the public in Canada or a danger to the security of Canada;
- association with a criminal organization;
- engagement in people smuggling or trafficking in persons;
- a conviction in Canada for a sexual offence or an offence involving violence or weapons;
- a conviction for an offence in Canada under the *Controlled Drugs and Substances Act* for trafficking, importing and exporting, and production;
- a conviction outside Canada or pending charges outside Canada for a sexual offence or an offence involving violence or weapons;
- a conviction outside Canada or pending charges outside Canada for trafficking, importing and exporting, and production of controlled substances.

2.1.4 The type of offences referred to in the IRPR also include those acts that would render a person inadmissible on grounds of security and violating human or international rights, for example, war crimes, crimes against humanity, acts of espionage, subversion and terrorism.[18]

2.1.5 The following advice and guidance is provided to members in relation to the concept of danger to the public:

[16] IRPA, s. 3(1)(*h*).

[17] IRPR, s. 246.

[18] IRPR, s. 246(*a*). See also IRPA, ss. 34 and 35.

- Members must assess whether the person represents a "present or future danger to the public." In calculating future danger, the probability of danger has to be determined from the circumstances of each case.[19]

- It will often be necessary for members to draw inferences from a person's criminal record in determining whether that person is likely to be a danger to the public.[20] The more serious the criminal offences and the greater number of offences committed the more they weigh in favour of a finding of danger to the public.

- Members must consider "the possibility that a person who has committed a serious crime in the past may seriously be thought to be a potential re-offender."[21] It is acceptable to use past conduct as a reliable indicator of future conduct, although other factors cannot be ignored.[22]

- Various factors should be weighed when considering whether a person is a danger to the public, such as the age of the convictions and the circumstances in which they were committed; the character of the person concerned (for example, drug or alcohol addiction or any other chronic condition), including the willingness to be rehabilitated and the possibility of rehabilitation; the person's behaviour in society since the convictions and family and community support.[23] Recent convictions involving violence or weapons will favour a finding of danger to the public. If 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.[24] However, a conviction in the past for an offence involving violence or weapons is a strong indicator that the person is a danger to the public. Members must assess the current circumstances and determine whether there is evidence that the person's behaviour has changed.

- While members should not automatically conclude that a person is a danger because one of the factors listed in the IRPR exists, the existence of one of the listed factors must be considered. The weight to be given to each factor in a

[19] Thompson, James Lorenzo v. M.C.I. (F.C.T.D., no. IMM-107-96), Gibson, August 16, 1996. Reported: Thompson v. Canada (Minister of Citizenship and Immigration) (1996), 37 Imm L.R. (2d) 9 (F.C.T.D); referred to in Canada (Minister of Citizenship and Immigration) v. Thanabalasingham, [2004] 3 F.C.R. 523 (F.C.); 2003 FC 1225.

[20] *McIntosh, Robert v. M.C.I.* (F.C.T.D., no. 2387-95), Rothstein, September 20, 1995. Reported: *McIntosh v. Canada (Minister of Citizenship and Immigration*) (1996), 30 Imm. L.R. (2d) 314 (F.C.T.D.).

[21] Williams v. Canada (Minister of Citizenship and Immigration), [1997] 2 F.C. 646 (C.A.) at p. 668.

[22] *Willis, Joan Siddon v. M.C.I.* (F.C.T.D., no. IMM-336-01), Gibson, July 24, 2001; 2001 FCT 822.

[23] Thanabalasingham, supra, footnote 13.

[24] Salilar v. Canada (Minister of Citizenship and Immigration), [1995] 3 F.C. 150 (T.D.).

particular case is left to the discretion of the member depending on the individual circumstances.[25]

- In order for a member to find that a person is a danger to the public there need not be evidence of a conviction outside Canada. A pending charge in a foreign jurisdiction for the specific types of offences listed in the IRPR, involving for example, violence or weapons, is a factor that must be considered and weighed with all the relevant circumstances of the case.

- The prescribed factors in the IRPR are not exhaustive. The Immigration Division may determine that a person is a danger to the public even if none of the prescribed factors exist if there is evidence that the person represents a "present or future danger." Members must consider evidence that the person has been involved in gang activity even if that person has no criminal convictions. Evidence of gang-related activity is a factor that weighs in favour of a finding of danger to the public.

- The Immigration Division is not bound to follow the determination of the National Parole Board as to whether the person is a danger to the public. The member must exercise independent discretion and cannot simply adopt the decision of the National Parole Board.[26] A finding by the National Parole Board that a person with a violent past may be paroled with supervision does not mean that the person is not a danger to the public since all the circumstances in the case must be considered.

- Similarly, the Immigration Division is not bound to follow determinations made in a court of law with respect to the granting of bail and with respect to the imposing of a sentence.[27] While such determinations may be considered at a detention review, members must come to their own conclusions, taking into account all the facts in the case and the immigration context.

- The Minister's opinion that the person constitutes a danger to the public is a factor to take into account at a detention review but is not in itself sufficient for finding that the person is a danger to the public.[28]

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[25] Thanabalasingham, supra, footnote 13.

[26] *Lam, Bao Ngoc v. M.E.I.* (F.C.T.D., no. IMM-5528-93), Jerome, October 8, 1993; *M.C.I. v. Alyea, Kevin Richard* (F.C.T.D., no. IMM-1345-99), Campbell, September 23, 1999. Reported: *Alyea v. Canada (Minister of Citizenship and Immigration)* (1999), 3 Imm. L.R. (3d) 118 (F.C.T.D.); *Willis, supra*, footnote 22.

[27] Canada (Minister of Citizenship and Immigration) v. Salinas-Mendoza, [1995] 1 F.C. 251 (T.D.); Camacho, Jairo Hidalgo v. M.C.I. (F.C.T.D., no. IMM-1908-00), Dawson, May 1, 2000.

[28] IRPR, s. 246(*a*). In *M.C.I. v. Singh, Harjit* (F.C.T.D., no. IMM-3937-01), McKeown, August 27, 2001; 2001 FCT 954, the Court recognized that in addition to the Minister's opinion on danger, there was additional evidence that taken together led to a finding that the person posed a danger to Canadian society. See also *Alyea, supra*, footnote 26; *M.P.S.E.P. v. Sall, Mohamed* (F.C., no. IMM-3081-11), de Montigny, June 13, 2011; 2011 FC 682.

- In determining whether a person is a danger to the public, members must consider whether the person has or had an "association" with a criminal organization as opposed to "membership" in the organization.[29] The concept of "criminal organization" in this context means a criminal organization as defined in the *Criminal Code* of Canada.[30]

- In some instances danger to the public may dissipate due to the length of time that a person has been in detention or because evidence supporting a detention order has turned stale.[31] In such circumstances members must still consider whether there is ongoing danger to the public as a result of the commission of past criminal offences or prior association with a criminal organization.

2.1.6 In the case of designated foreign nationals who were 16 years of age or older on the day of the arrival that is the subject of the designation in question, however, at the 14-day detention review the Immigration Division must consider only the prescribed grounds relating to the relevant ground for detention, and may not consider any other factors.[32]

2.1.7 If the Immigration Division orders the release of the designated foreign national who was 16 years of age or older on the day of the arrival that is the subject of the designation in question, it must impose any condition that is prescribed in the IRPR.[33]

2.2 Flight Risk

2.2.1 The Immigration Division may order the continued detention of a permanent resident or a foreign national if the person "is unlikely to appear for examination, an admissibility hearing, removal from Canada, or at a proceeding that could lead to the making of a removal order by the Minister under section 44(2)."[34]

2.2.2 Members must consider the following prescribed factors[35] in the IRPR when determining flight risk:

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[29] *M.C.I. v. Nagalingam, Panchalingam* (F.C., no. IMM-4340-03), O'Keefe, December 17, 2004; 2004 FC 1757.

[30] IRPA, s. 121.1(1) reads: "… "criminal organization" means a criminal organization as defined in subsection 467.1(1) of the *Criminal Code*." The previous definition of "criminal organization" found in s. 121(2) of the IRPA has been repealed.

[31] *Sittampalam, supra*, footnote 14. In *Sittampalam, Jothiravi v. M.P.S.E.P.* (F.C., no. IMM-7293-05), O'Reilly, September 19, 2006; 2006 FC 1118, the Court said the Immigration Division made an error in ordering continued detention because it did not consider that after five years in detention, the gang of which the person concerned had been a leader was essentially defunct.

[32] IRPA, s. 58(1.1), which refers to a review under s. 57.1(1). This provision removes the Immigration Division's jurisdiction to consider the factors enumerated in the IRPR, s. 248, at the 14-day detention review.

[33] IRPA, s. 58(4). At present there are no prescribed conditions in the IRPR.

[34] IRPA, s. 58(1)(*b*).

[35] IRPR, s. 245.

- being a fugitive from justice in a foreign jurisdiction in relation to an offence that, if committed in Canada, would constitute an offence under an Act of Parliament;
- voluntary compliance with any previous departure order;
- voluntary compliance with any previously required appearance at an immigration or criminal proceeding;
- previous compliance with any conditions imposed in respect of entry, release or a stay of removal;
- any previous avoidance of examination or escape from custody, or any previous attempt to do so;
- involvement with a people smuggling or trafficking in persons operation that would likely lead the person to not appear for a measure referred to in paragraph 244(*a*) of the IRPR or to be vulnerable to being influenced or coerced by an organization involved in such an operation to not appear for such a measure;
- the existence of strong ties to a community in Canada.

2.2.3 The prescribed factors in the IRPR are not exhaustive. In determining whether a person is a flight risk and potentially not suitable for release, the member should consider such factors as the person's access to a significant amount of wealth, previous use of false identity documents, prior use of aliases, prior attempts to hide their presence in Canada and a lack of credibility.[36]

2.2.4 As is the case when considering the issue of danger to the public, when determining flight risk members may consider the fact that the person was granted bail by a court of law, but they are not bound by a decision of a court to release and must come to their own conclusions taking into account all the facts in the case.

2.2.5 In the case of designated foreign nationals who were 16 years of age or older on the day of the arrival that is the subject of the designation in question, at the 14-day detention review the Immigration Division must consider only the prescribed grounds relating to the relevant ground for detention, and may not consider any other factors.[37]

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[36] *Li, supra*, footnote 13. In *S.G.C. v. Oraki, Ali Reza* (F.C., no. IMM-2187-05), Blanchard, April 25, 2005; 2005 FC 555, the person was considered a severe flight risk due to his record of past convictions, his use of false passports, and his total lack of credibility. The Court noted that there was a very good chance he would fail to comply with conditions of release and fail to report as required.

[37] IRPA, s. 58(1.1), which refers to a review under s. 57.1(1). This provision removes the Immigration Division's jurisdiction to consider the factors enumerated in the IRPR, s. 248, at the 14-day detention review.

2.2.6 If the Immigration Division orders the release of the designated foreign national who was 16 years of age or older on the day of the arrival that is the subject of the designation in question, it must impose any condition that is prescribed in the IRPR.[38]

2.3 Minister Inquiring into Security, Violations of Human or International Rights, Criminality, Serious Criminality or Organized Criminality

2.3.1 Members of the Immigration Division may order the continued detention of a permanent resident or a foreign national if they are satisfied that 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, criminality, serious criminality or organized criminality.[39]

2.3.2 It is up to the Minister to satisfy the member that the Minister is taking necessary steps to investigate their suspicion relating to security, violating human or international rights, criminality, serious criminality or organized criminality.

2.3.3 The question that must be answered by the member is not whether the evidence relied upon by the Minister is true or compelling, but whether that evidence is reasonably capable of supporting the Minister's suspicion of potential inadmissibility. It is for the Minister to decide what further investigatory steps are needed. The member's supervisory jurisdiction on this issue is limited to examining whether the proposed steps have the potential to uncover relevant evidence bearing on the Minister's suspicion and to ensure that the Minister is conducting an ongoing investigation in good faith.[40]

2.3.4 There are no prescribed factors for this ground of detention in the IRPR. In the case of designated foreign nationals who were 16 years of age or older on the day of the arrival that is the subject of the designation in question, at the 14-day detention review the Immigration Division may not consider any other factors.[41]

2.3.5 If the Immigration Division orders the release of the designated foreign national who was 16 years of age or older on the day of the arrival that is the subject of the

[38] IRPA, s. 58(4). At present there are no prescribed conditions in the IRPR.

[39] IRPA, s. 58(1)(*c*). A permanent resident or foreign national may be detained pursuant to this ground only on entry into Canada. See IRPA, s. 55(3)(*b*). Given the wording in s. 58(2) of the IRPA, the Immigration Division cannot order detention on this ground where the person is not already in immigration detention.

[40] *Canada (Citizenship and Immigration) v. X*, [2011] 1 F.C.R. 493; 2010 FC 112. The Court also stated: "It is not the role of the IRB to dictate how the Minister's ongoing investigation should be conducted. The Minister is entitled to a reasonable time to complete the admissibility investigation."

[41] IRPA, s. 58(1.1), which refers to a review under s. 57.1(1). This provision removes the Immigration Division's jurisdiction to consider the factors enumerated in the IRPR, s. 248, at the 14-day detention review.

designation in question, it must impose any condition that is prescribed in the IRPR.[42]

2.4 Identity of Foreign National Not Established (other than a Designated Foreign National 16 years of age or older on the day of the arrival that is the subject of the designation)

2.4.1 The Immigration Division may order the continued detention of a foreign national if there is evidence that the Minister is of the opinion that the identity of the foreign national has not been, but may be, established and the person has 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.[43] Only a foreign national other than a designated foreign national who was 16 years of age or older on the day of the arrival that is the subject of the designation in question may be detained under this ground.

2.4.2 It is not for the Immigration Division to determine whether the identity of the foreign national has been established as this is solely for the Minister to determine.[44] Once the Minister has indicated an opinion that the identity of the foreign national has not been established, the key issues left for the member to determine are whether the foreign national has reasonably cooperated with the Minister by providing relevant information for the purpose of establishing their identity, or whether the Minister is making reasonable efforts to establish the identity of the foreign national. Even if either of these latter two conditions has been met, the member must still consider the additional factors in section 248 of the IRPR.[45]

2.4.3 The obligation to establish one's identity rests first and always with the foreign national, and not the Minister. The Minister's obligation is to make reasonable efforts. Neither has the complete onus of proof, neither can sit back and do nothing. The determination of "reasonable efforts" is conditioned to some extent by the efforts of the foreign national. This is over and above the obligation to not obstruct and to cooperate. The member must make a qualitative evaluation of the

[42] IRPA, s. 58(4). At present there are no prescribed conditions in the IRPR.

[43] IRPA, s. 58(1)(*d*). Given the wording in s. 58(2) of the IRPA, the Immigration Division cannot order detention on this ground where the person is not already in immigration detention.

[44] In *M.C.I. v. Singh, Ravinder* (F.C., no. IMM-1468-04), Blais, November 23, 2004; 2004 FC 1634, the Court found that the Immigration Division crossed the line as the discretion regarding the validity of documents belongs to the Minister, not the member. See also *M.C.I. v. Gill, Randheer Singh* (F.C., no. IMM-4191-02), Lemieux, November 28, 2003; 2003 FC 1398; *M.C.I, v. Mwamba, Junior* (F.C., no. IMM-4190-02), Blais, September 8, 2003; 2003 FC 1042; *M.C.I. v. Bains, Avtar Singh* (F.C.T.D., no. IMM-5215-97), Pinard, January 5, 1999.

[45] IRPR, s. 248. In *Gill, supra*, footnote 44, in considering whether identity of the foreign national had been established under s. 58(1)(*d*) of the IRPA, the Court noted that once it is determined there are grounds for detention, the Immigration Division must examine the factors provided for in s. 248 of the IRPR, namely alternatives to detention.

efforts on the part of both parties. Members should focus on the reasonableness of what had been done and was intended to be done in the future, and not on what they thought should have been done.[46]

2.4.4 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. While a lack of identity is an important consideration, it does not mean that a member may not consider alternatives to detention.[47] If a member is considering release in these circumstances, the imposition of appropriate terms and conditions of release should be instituted.

2.4.5 Members of the Immigration Division must consider the following prescribed factors[48] when determining whether the foreign national has reasonably cooperated with the Minister or if the Minister is making reasonable efforts to establish identity. These prescribed factors, however, are not exhaustive:

- the foreign national's cooperation in providing evidence of their identity, or assisting the Department of Citizenship and Immigration in obtaining evidence of their identity, in providing the date and place of their birth as well as the names of their mother and father or providing detailed information on the itinerary they followed in travelling to Canada or in completing an application for a travel document;

- in the case of a foreign national who makes a claim for refugee protection, the possibility of obtaining identity documents or information without divulging personal information to government officials of their country of nationality or, if there is no country of nationality, their country of former habitual residence;

- the destruction of identity or travel documents, or the use of fraudulent documents in order to mislead the Department, and the circumstances under which the foreign national acted;

- the provision of contradictory information with respect to identity at the time of an application to the Department;

- the existence of documents that contradict information from the foreign national with respect to their identity.

[46] *M.C.I. v. X* (F.C., no. IMM-5427-10), Phelan, November 5, 2010; 2010 FC 1095. In assessing the reasonableness of the Minister's efforts to establish identity, the Immigration Division should consider whether those steps are rationally connected to the purpose of the provision, i.e., whether they have the potential to uncover relevant evidence, and whether the Minister is acting in good faith.

[47] *M.C.I. v. B046* (F.C., no. IMM-5414-10), Snider, July 14, 2011; 2011 FC 877.

[48] IRPR, s. 247(1).

2.5 Identity of Designated Foreign National Not Established Where the Designated Foreign National Is 16 Years of Age or Older On the Day of the Arrival That is the Subject of the Designation

2.5.1 The Immigration Division must order the continued detention of a designated foreign national who was 16 years of age or older on the day of the arrival that is the subject of the designation in question if the Minister is of the opinion that their identity has not been established.[49] At the 14-day detention review the Immigration Division may not consider any other factors,[50] except for the prescribed factors relating to the relevant ground for detention.[51]

2.5.2 It is not for the Immigration Division to determine whether the identity of the designated foreign national who was 16 years of age or older on the day of the arrival that is the subject of the designation in question has been established as this is solely for the Minister to determine. The Immigration Division must only consider the Minister's opinion as to whether identity has been established.[52] The Immigration Division does not determine whether the designated foreign national reasonably cooperated with the Minister by providing relevant information for the purpose of establishing their identity, or whether the Minister is making reasonable efforts to establish the identity of the designated foreign national.

2.5.3 If the Immigration Division orders the release of the designated foreign national who was 16 years of age or older on the day of the arrival that is the subject of the designation in question, it must impose any condition that is prescribed in the IRPR.[53]

3. Other Factors

3.1 General

3.1.1 Parliament has required that the reasons for detention be reviewed at regular intervals[54] but it has not limited the total length of the detention period. In

[49] IRPA, s. 58(1)(*e*).

[50] IRPA, s. 58(1.1), which refers to a review under s. 57.1(1). This provision removes the Immigration Division's jurisdiction to consider the factors enumerated in the IRPR, s. 248, at the 14-day review.

[51] It appears that the prescribed factors for "identity not established" in IRPR, s. 247, apply only to cases under IRPA, s. 58(1)(*d*), as they relate to such things as foreign national's cooperation in providing evidence of their identity. For cases described IRPA, s. 58(1)(*e*), the only issue is whether the Minister is of the opinion that the identity of the foreign national has not been established.

[52] IRPA, s. 58(1)(*e*).

[53] IRPA, s. 58(4). At present there are no prescribed conditions in the IRPR.

[54] IRPA, s. 57. However, as described earlier, in the case of a designated foreign national, IRPA, ss. 57.1 and 58(1)(*e*) and (1.1), provide different time limits for holding detention reviews and different considerations for ordering release from detention.

deciding whether to order continued detention or release, members of the Immigration Division will be guided by the legislation and certain general principles arising from the case law.

3.1.2 If a member determines that there are grounds for detention, the following prescribed factors[55] – also known as the *Sahin*[56] factors – must be considered before a decision is made to continue detention or order release:

- the reason for detention;
- the length of time in detention;
- whether there are any elements that can assist in determining the length of time that detention is likely to continue and, if so, that length of time;
- any unexplained delays or unexplained lack of diligence caused by the Department or the person concerned;
- the existence of alternatives to detention.

3.1.3 The weight to be placed on each of these factors will depend on the circumstances of the case.[57] These factors are not exhaustive of all the considerations that the member must consider.

3.1.4 The detention of a person under the IRPA is not for the purpose of punishment, but rather a concern that the person is a danger to the public, will not appear for examination, an admissibility hearing or removal, or concerns over security, criminality and identity.[58] However, detention, even for valid reasons, cannot be indefinite. Detention generally under the IRPA is not indefinite because it must be reviewed on a regular basis.[59]

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[55] IRPR, s. 248.

[56] *Sahin v. Canada (Minister of Citizenship and Immigration),* [1995] 1 F.C. 214 (T.D.), appeal dismissed in *Sahin, Bektas v. M.C.I.* (F.C.A., no. A-575-94), Stone, MacGuigan, Robertson, June 8, 1995. The Court provided a list of factors which it said was not exhaustive of all the considerations that a decision-maker must consider when deciding to order continued detention or release in the immigration context. These factors have been codified in s. 248 of the IRPR. As noted in *B046, supra,* footnote 47, the purpose of s. 248 is to address the Charter issues that can arise from an indefinite detention.

[57] *Sahin*, *supra*, footnote 56. The Court noted that "Parliament has dealt with the right of society to be protected from those who pose a danger to society and the right of Canada to control who enters and remains in this country. Against these interests must be weighted the liberty interest of the individual."

[58] IRPA, s. 58.

[59] IRPA, s. 57. In the decision of *Charkaoui v. Canada (Citizenship and Immigration),* [2007] 1 S.C.R. 350; 2007 SCC 9, the Supreme Court of Canada considered the scheme of review for a person detained pursuant to a security certificate. Detention under a certificate is justified on the basis of a continuing threat to national security or to the safety of any person. The Court concluded that "extended periods of detention under the certificate provisions of the *IRPA* do not violate sections 7 and 12 of the Charter if accompanied by a process that provides regular opportunities for review of detention, taking into account all relevant factors." The five

3.2 Reason for Detention

3.2.1 There is a stronger case for continuing a long detention when an individual is considered a danger to the public as opposed to the concern that the person would not appear for removal.[60] However, a person may be detained when the issue is one of flight risk only.[61]

3.3 Length of Time in Detention

3.3.1 Lengthy detention does not mean indefinite detention.[62] The case law does not specify a time period as to what constitutes "indefinite detention." When determining whether to order continued detention, even in cases where detention has been lengthy, members must consider all applicable factors and all the circumstances of the case, including the length of the person's detention.[63]

3.3.2 Lengthy detention, even for a period greater than two years, is one factor to consider, and will not by itself support a finding of release if there are other reasons to support continued detention.[64] For example, if the person has been involved in criminal activity that involves violence and weapons or other offences referred to in the IRPR, and the member determines that the imposition of strict conditions of release will not sufficiently negate the danger to the public, this will likely support an order for continued detention, even in circumstances where the person has already been in detention for a lengthy period.

3.4 Elements to Assist in Determining Length of Detention

3.4.1 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.[65]

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factors identified are almost identical in wording to the *Sahin* factors and also correspond to the prescribed factors in s. 248 of the IRPR. However, in, *B147*, *supra*, footnote 8, the Court held that in the absence of any reasonable certainty as to when the Pre-Removal Risk Assessment (PRRA) process might conclude, the existence of 30-day detention reviews did not save the detention from being characterized as indefinite in that case.

[60] *Sahin*, *supra*, footnote 56.

[61] *Li*, *supra*, footnote 13.

[62] *M.C.I. v. Liu, Xiaoquan* (F.C., no. IMM-3745-08), Lutfy, November 20, 2008; 2008 FC 1297.

[63] *Sahin*, *supra*, footnote 56. See also *Panahi-Dargahlloo, Hamid v. M.C.I.* (F.C., no. IMM-4335-08), Mandamin, October 30, 2009; 2009 FC 1114.

[64] *Kidane, Derar v. M.C.I.* (F.C.T.D., no. IMM-2044-96), Jerome, July 11, 1997. In that case the person concerned was a convicted drug trafficker and had been convicted of at least 15 offences. In *Singh* (2001 FCT 954), *supra*, footnote 28, the Court, in granting a stay of release, said that despite the one-year period of time that the person had spent in detention, it cannot overcome the finding that he is a danger to the public.

[65] *Sahin*, *supra*, footnote 56. The Court noted that the right of liberty is enshrined in section 7 of the Charter and a person may not be deprived of their rights to liberty except in accordance with the principles of

3.4.2 The length of time required for a matter to be dealt with by the Federal Court or for other recourses is generally a "neutral" factor.[66] While a person has a right to exhaust every legal avenue that is available, "he may not claim that on the basis of his own actions, that he will not be removed from Canada within a reasonable time."[67] Even where the anticipated length of time in detention may be lengthy until all proceedings are concluded, this alone is not considered to be indefinite detention and is not an infringement of section 7 of the Charter; rather, it is one factor to consider.[68] If it is anticipated that further litigation in the Federal Court or further remedies available under the IRPA are expected before removal can take place, the person's detention may be continued and expedited time frames for subsequent steps can be achieved by the parties.[69]

3.4.3 The timeframe for determining the anticipated length of detention are the current proceedings that are already in existence, and not an estimate of what future proceedings may be brought by the person. The member must make a decision based on the proceedings that are underway, or pending, at the time of the detention review, and not on an estimate of the person's anticipated pursuit of all available processes under the IRPA and at the Federal Court.[70] Members are not obliged to come to a precise finding in terms of the exact time for proceedings that are underway or pending.[71]

3.5 Unexplained Delays or Unexplained Lack of Diligence

3.5.1 Members must determine whether the parties have caused any delay or have not been as diligent as reasonably possible. If a party has delayed in filing submissions regarding a danger opinion or did not file an appeal of the deportation order in a timely manner, if a reasonable explanation for the delay or

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fundamental justice. The Court also said that detention decisions under the former *Immigration Act* must be made with section 7 Charter considerations in mind.

[66] *Canada (Minister of Citizenship and Immigration) v. Li*, [2010] 2 F.C.R. 433; 2009 FCA 85. The Court said at para. 38: "to the extent that detainees or the Government are diligently exercising recourses under the IRPA that are reasonable in the circumstances or resorting to reasonable Charter challenges, the ensuing delays should not count against either party."

[67] *Ahani, Mansour v. M.C.I.* (F.C.A., no. A-160-99), Linden, Rothstein, Malone, July 11, 2000. Reported: *Ahani v. Canada (Minister of Citizenship and Immigration)* (2000), 3 Imm. L.R. (3d) 159 (F.C.A.).

[68] *San Vicente, Roberto v. M.C.I.* (F.C.T.D., no. IMM-2615-97), MacKay, January 27, 1998. Reported: *San Vicente v. Canada (Minister of Citizenship and Immigration* (1998), 42 Imm.L.R. (2d) 138 (F.C.T.D.).

[69] *Liu, supra*, footnote 62. The Court said: "with the cooperation of counsel, any resulting Federal Court proceedings can and should be heard in at least as timely a fashion as this one. In many cases, the most satisfactory course of action will be to detain the individual but expedite the immigration proceedings, even where the person who is a flight risk may not pose a public danger."

[70] *Li, supra*, footnote 66. In this case the Court said that it was an error for the Immigration Division to speculate on potential proceedings that the parties could bring rather than making its estimation on actual pending proceedings.

[71] *Muhammad, Arshad v. M.P.S.E.P.* (F.C., no. IMM-844-13), Martineau, February 27, 2013; 2013 FC 203.

lack of diligence is not provided, this should count against the offending party.[72] However, this is merely one factor to consider in determining whether the person's detention should be continued. Even if the delay caused by one of the parties will result in a lengthier detention, if the person is a danger to the public based on prior criminality and the imposition of strict conditions of release will not neutralize the danger, this will weigh in favour of continued detention.

3.5.2 A person's lack of cooperation is also a factor that favours continued detention, for example, a refusal to sign a travel document so that removal can be carried out.[73]

3.6 Alternatives to Detention

3.6.1 The IRPA gives members of the Immigration Division the discretion to order the release of a permanent resident or a foreign national and to impose any conditions that it deems necessary,[74] subject to the provisions of the IRPA governing designated foreign nationals who are 16 years of age or older on the day of the arrival that is the subject of the designation in question.[75] Before ordering release, members must consider whether the imposition of certain conditions will sufficiently neutralize the danger to the public or ensure that the person will appear for examination, an admissibility hearing or removal from Canada.

3.6.2 On occasion, the parties will have come to an agreement on the conditions of release before the detention review and will submit the agreement to the member at the hearing. The member may endorse it if the member is of the opinion that based on the nature and degree of risk posed the conditions are sufficient to neutralize the risk. 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.

3.6.3 When deciding whether to release, members must consider the availability, effectiveness and appropriateness of alternatives to detention,[76] such as release on an undertaking to comply with conditions imposed, or on the payment of a deposit

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[72] *Sahin*, *supra*, footnote 56. See also *Kidane*, *supra*, note 64.

[73] *M.C.I. v. Kamail, Nariman Zangeneh* (F.C.T.D., no. IMM-6474-00), O'Keefe, April 8, 2002; 2002 FCT 381. In this case the Court found that the person concerned had been the sole cause of the delay because he refused to sign the travel document that would have led to his removal. Despite the indefinite nature of the detention, the Court did not uphold the decision to release because "to hold otherwise would be to encourage deportees to be as uncooperative as possible as a means to circumvent Canada's refugee and immigration system."

[74] IRPA, s. 58(3). While a party may apply to the Immigration Division to vary the terms and conditions of release, the Division must give the other party the opportunity to make submissions as to the appropriateness of new terms of release. See *M.P.S.E.P. v. Sittampalam, Jothiravi* (F.C., no. IMM-5058-08), Tannenbaum, August 31, 2009; 2009 FC 863.

[75] IRPA, ss. 58(1.1) and (4).

[76] *Sahin*, *supra*, footnote 56.

or the posting of a guarantee for compliance with the conditions. Conditions could include periodic reporting, confinement to a particular location or geographic area, the requirement to report changes of address or telephone number, and detention in a form that could be less restrictive to the individual.

3.6.4 Members are required to consider the circumstances of a proposed bondsperson and the bondsperson's relationship to the person. It is up to the detained person to satisfy the member that the proposed bondsperson is acceptable in the circumstances.[77] In deciding on the appropriateness of a potential bondsperson, members must consider whether the proposed bondsperson is willing to supervise and able to influence the person concerned,[78] and whether they are in a position to monitor the activities of the person concerned.[79] Members must also consider the length of time that the bondsperson has known the person concerned in detention and the knowledge that the bondsperson has of the background history of the person concerned.[80] In determining the amount of the bond, members should assess what impact the loss of the amount will have on a particular bondsperson in ensuring compliance with the terms and conditions of release.[81]

3.6.5 The failure to allow for the cross-examination of a bondsperson upon request by the Minister could constitute a breach of natural justice and therefore it is advisable to allow such examination upon request.[82]

3.6.6 If detention has been or could be for a long period of time members may consider whether the risk may be neutralized by the imposition of strict terms and conditions. Some of these strict conditions may include a curfew, refraining from using a cell phone or a computer, house arrest, wearing of an electronic bracelet to track movements, allowing entry into the person's residence at all times by immigration officials and the restriction of contact with certain individuals.[83]

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[77] *M.C.I. v. Zhang, Zu Fa* (F.C.T.D., no. IMM-2499-01), Pelletier, May 23, 2001; 2001 FCT 521. Reported: *Canada (Minister of Citizenship and Immigration) v. Zhang*, [2001] 4 F.C. 173 (T.D.).

[78] *M.P.S.E.P. v. Castillo, Saul* (F.C., no. IMM-4914-09), Lemieux, October 8, 2009; 2009 FC 1022. In *B147, supra,* footnote 8, the Court noted, at para. 57, that an increased length of detention "does not transform an unsuitable bondsperson into a suitable one. Nor does it mitigate the assessment of the [detainees's] flight risk ...".

[79] *M.P.S.E.P. v. Berisha, Alfred* (F.C., no. IMM-8716-12), Zinn, September 20, 2012; 2012 FC 1100. In this case the Court held that the release order must set out with sufficient specificity the terms and conditions of electronic monitoring, including the oversight expected of the bondsperson.

[80] *M.S.P.P.C. v. Al Achkar, Talal* (F.C., no. IMM-4049-10), Shore, July 14, 2010; 2010 FC 744; *B147, supra,* footnote 8.

[81] *M.C.I. v. B001* (F.C., no. IMM-2367-12), Snider, May 3, 2012; 2012 FC 523.

[82] *M.C.I. v. Ke, Yi Le* (F.C.T.D., no. IMM-1425-00), Reed, April 12, 2000. Reported: *Canada (Minister of Citizenship and Immigration) v. Ke*, (2000) 5 Imm.L.R. (3d) 159 (F.C.T.D.). In *Zhang, supra,* footnote 77, the Court held that the adjudicator was correct in rejecting the Minister's request for cross-examination made after the decision regarding release was announced,

[83] *Mahjoub, Mohamed Zeki v. M.C.I.* (F.C., no. DES-1-00), Mosley, February 15, 2007; 2007 FC 171; *Harkat v. Canada (Minister of Citizenship and Immigration),* [2007] 1 F.C.R. 321 (F.C.); 2006 FC 628.

3.6.7 If, however, the imposition of very strict conditions will not contain or diminish the danger to the public, these circumstances do not weigh in favour of release.[84]

3.7 Minors

3.7.1 A minor should be detained only as a measure of last resort. Members should consider a number of factors when determining whether to continue detention or release of a minor, including the best interests of the child.[85]

3.7.2 Members must consider the following prescribed factors[86] in the IRPR when determining the detention of a minor:

- the availability of alternative arrangements with local child-care agencies or child protection services for the care and protection of the minor children;
- the anticipated length of detention;
- the risk of continued control by the human smugglers or traffickers who brought the children to Canada;
- the type of detention facility envisaged and the conditions of detention;
- the availability of accommodation that allows for the segregation of the minor children from adult detainees who are not the parent of or the adult legally responsible for the detained minor children; and
- the availability of services in the detention facility, including education, counseling and recreation.

3.7.3 In addition, when considering whether to release or continue detention of a foreign national who is a minor – other than a designated foreign national who was 16 years of age or older on the day of the arrival that is the subject of the designation in question – under paragraph 58(1)(*d*) of the IRPA because identity may not have been established, factors that may apply with respect to an adult will not have an adverse impact with respect to minors.[87]

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[84] *Almrei, Hassan v. M.C.I. and M.P.S.E.P.* (F.C., no. DES-5-01), Lemieux, October 5, 2007; 2007 FC 1025.

[85] IRPA, s. 60.

[86] IRPR, s. 249.

[87] IRPR, s. 247(2). The factors listed in the s. 247(1)(*a*) relating to the establishment of identity that must not have an adverse impact in relation to minors are "the foreign national's cooperation in providing evidence of their identity, or assisting the Department in obtaining evidence of their identity, in providing the date and place of their birth as well as the names of their mother and father or providing detailed information on the itinerary they followed in travelling to Canada or in completing an application for a travel document."

4. Statutory Timeframes

4.1 Statutory Timeframes

4.1.1 The statutory scheme for the holding of detention reviews is set out in the IRPA.[88] The timing of detention reviews must reflect the statutory scheme as set out in the IRPA as closely as possible. While the Immigration Division has some discretion[89] to postpone or adjourn a detention review or reserve a decision with respect to the issue of detention, that discretion should be exercised very cautiously. There is an obligation on the Immigration Division to conduct a detention review and deliver a decision within the timeframes stated in the IRPA.

4.1.2 The member may conduct a detention review outside the timeframes set out in the IRPA only in limited circumstances to ensure a fair hearing. An example where a member may exercise discretion to vary the timeframes is where an interpreter is not available until the day after the scheduled detention review. Other examples where variance of the timeframes may be acceptable is where counsel asks for an additional day to prepare in cases involving voluminous and complicated evidence or where a bondsperson is not available until the next day. Any variation in the timeframes, however, should be strictly limited to the time needed to conduct a fair hearing.

4.1.3 In very limited circumstances it may be difficult for a member to give a decision following the receipt of voluminous evidence and extensive submissions by the parties or where the member is departing from previous decisions on detention. The member may reserve the decision for a brief period of time, as necessary, to consider the evidence and submissions.

4.1.4 If the Federal Court has ordered a stay of a previous release order and has not made any order as to whether or not the Immigration Division should continue to conduct detention reviews pending the outcome of the leave application and judicial review, the Immigration Division should conduct detention reviews

[88] Section 57 of the IRPA provides that "within 48 hours after a permanent resident or a foreign national is taken into detention, or without delay afterward, the Immigration Division must review the reasons for the continued detention." The same section in the IRPA also provides that the Immigration Division must review the reasons for the continued detention at least once during the seven days following the preceding review and at least once during each 30-day period following each previous review.

However, in the case of designated foreign nationals who were 16 years of age or older on the day of arrival that is the subject of the designation in question. s. 57.1 of the IRPA provides that "the Immigration Division must review the reasons for their continued detention within 14 days after the day on which that person is taken into detention, or without delay afterward." Subsequently, "[t]he Immigration Division must review again the reasons for their continued detention on the expiry of six months following the conclusion of the previous review and may not do so before the expiry of that period."

[89] *Pierre* v. *Minister of Manpower and Immigration*, [1978] 2 F.C. 849 (F.C.A.). In this case the Court noted that if there is no specific rule governing the manner in which the tribunal should exercise its discretion to grant an adjournment, the decision to grant an adjournment is a discretionary matter for the tribunal. The tribunal must make its decision, however, taking into account the principles of natural justice.

according to the timeframes in the IRPA, while taking into account the Order of the Federal Court.[90]

5. Enquiries

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Chairperson	Date

[90] *M.P.S.E.P. v. Hassan, Abdurahman Ibrahim* (F.C., no. IMM-11131-12), Russell, November 23, 2012; 2012 FC 1357. In this case the Court had ordered the release order stayed until the final determination of the application for leave and judicial review or until the next scheduled detention review. See also *M.C.I. v. B386* (F.C., no. IMM-472-11), Blanchard, February 17, 2011; 2011 FC 175.