Federal Court  Cour fédérale

Date: 20170725

Docket: IMM-364-15

Citation: 2017 FC 710

Ottawa, Ontario, July 25, 2017

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

ALVIN JOHN BROWN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION and THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

and

END IMMIGRATION DETENTION NETWORK

Third Party

JUDGMENT AND REASONS

I. Overview

[1] Alvin John Brown seeks judicial review of a decision of the Immigration Division [ID] of the Immigration and Refugee Board [IRB]. The ID found that Mr. Brown was a danger to the public and unlikely to appear for removal to Jamaica, the country of his birth. The ID therefore ordered that he continue to be detained under the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. The ID also found that Mr. Brown's continued detention did not contravene the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (UK), 1982, c 11 [*Charter*].

[2] Mr. Brown was removed to Jamaica on September 7, 2016, the same day that Justice Alfred O'Marra of the Ontario Superior Court of Justice heard his application for *habeas corpus*. In a decision released on September 12, 2016, Justice O'Marra held that Mr. Brown's detention was lawful and did not violate his *Charter* rights (*Brown v Ontario (Public Safety)*, 2016 ONSC 7760 [*Brown* (ONSC)]). Mr. Brown nevertheless asks this Court to declare that the statutory regime under which he was held is unconstitutional.

[3] Before the state can detain people for significant periods of time, it must accord them a fair process. This basic principle has a number of facets. It comprises the right to a hearing. It requires that the hearing be before an independent and impartial decision-maker. It demands a decision based on the facts and the law. It entails the right to know the case put against one, and the right to answer that case. Precisely how these requirements are met will vary with the context, but each of them must be met in substance (*Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 [*Charkaoui*]).

[4] In addition, there may be circumstances where immigration detention violates the *Charter* because it has continued for an excessive period of time, there is no reasonable prospect of removal to the detainee's country of citizenship, or the conditions of detention have become intolerable.

[5] The evidence and arguments presented in this application by Mr. Brown and the End Immigration Detention Network [EIDN], a third party granted public interest standing, suggest that there may be shortcomings in the manner in which detention reviews are conducted by the ID. But none of these shortcomings are the inevitable consequence of ss 57 and 58 of the IRPA and ss 244 to 248 of the *Immigration and Refugee Protection Regulations,* SOR/2002-227 [Regulations]. Properly interpreted and applied, these provisions of the IRPA and the Regulations comply with the *Charter*.

[6] The application for judicial review is therefore dismissed. However, in light of concerns raised by some of the evidence adduced in this proceeding, these reasons include a restatement of the minimum legal requirements for detention reviews before the ID.

II. Appropriate Respondent

[7] The Minister of Citizenship and Immigration asks that the Respondent be identified as the Minister of Public Safety and Emergency Preparedness [PSEP], because the removal of persons from Canada and their detention pending removal is the latter's responsibility. Mr. Brown says that the Minister of Citizenship and Immigration is the proper Respondent, because the relief sought includes declarations that ss 57 and 58 of the IRPA and ss 244 to 248 of

the Regulations contravene ss 7, 9 or 12 of the *Charter* in a manner that cannot be justified under s 1. The Minister of Citizenship and Immigration is responsible for the administration of the IRPA and the Regulations.

[8] I agree with Mr. Brown that the Minister of Citizenship and Immigration is properly named as a Respondent, given the breadth of the constitutional challenge. However, because the Minister of PSEP is responsible under s 4(2) of the IRPA for removal and detention for immigration purposes, I will grant the request of the Minister of Citizenship and Immigration to add the Minister of PSEP as an additional Respondent. The style of cause is amended accordingly.

III. Applicant's Background

[9] Mr. Brown arrived in Canada in March 1983 when he was eight years old. He obtained permanent residence in June 1984. On January 17, 2000, he was found to be inadmissible to Canada due to a criminal conviction for trafficking in a controlled substance.

[10] Mr. Brown appealed his deportation order to the Immigration Appeal Division [IAD] of the IRB. The IAD found that it lacked jurisdiction and dismissed the appeal. Mr. Brown filed an application for leave and judicial review of the IAD's decision in this Court.

[11] In October 2008, an officer with Citizenship and Immigration Canada [CIC] conducted a Pre-Removal Risk Assessment [PRRA] and concluded that Mr. Brown could be safely returned

to Jamaica. Mr. Brown filed an application for leave and judicial review of the PRRA in this Court. Leave was refused in April 2009 (Court File No. IMM-5339-08).

[12] On June 23, 2009, Justice Michael Phelan found that the IAD had jurisdiction over the appeal of Mr. Brown's deportation order, and returned the matter to the IAD (*Brown v Canada (Public Safety and Emergency Preparedness)*, 2009 FC 660).

[13] In May 2010, Mr. Brown was convicted of robbery and uttering death threats. He was again found to be inadmissible to Canada on May 14, 2010.

[14] Mr. Brown was released from custody on January 27, 2011, and was then detained by the Canada Border Services Agency [CBSA]. He was released under the Toronto Bail Program in March 2011, but re-arrested in September 2011 for violating the conditions of his release by being uncooperative, using cocaine and living in a shelter.

[15] The IAD dismissed Mr. Brown's appeal of his deportation order on October 27, 2011.

[16] In February 2012, the CBSA asked the Jamaican consulate to issue a travel document for Mr. Brown. Further information in support of the request was submitted in May 2012. Following an exchange of correspondence, a CBSA Officer met with Jamaican consular officials in November 2012 to resolve outstanding issues. The CBSA made further enquiries of the Jamaican consulate in May, July, August and September of 2013, but received no response.

[17] In October 2013, Jamaican consular officials advised that they were still awaiting confirmation of Mr. Brown's nationality. The matter was discussed by Canadian and Jamaican officials in November 2013. From January to October 2014, there was still no confirmation of Mr. Brown's nationality.

[18] Mr. Brown finally received a Jamaican travel document on September 6, 2016, and was removed from Canada the following day.

IV. Decision under Review

[19] During a review of his detention by the ID on October 13, 2014, Mr. Brown took the position that his continued detention contravened the *Charter*. He argued that pre-removal detention exceeding three years was contrary to s 12 of the *Charter*, and the lack of a presumptive period within which removal must occur was contrary to ss 7, 12 and 15 of the *Charter*. Sections 7 and 12 of the *Charter* guarantee the right to life, liberty and security of the person, and the right not to be subjected to cruel and unusual treatment or punishment. Section 15 of the *Charter* enshrines the right to the equal protection and equal benefit of the law without discrimination.

[20] The ID noted that Mr. Brown had accumulated 17 criminal convictions between 1999 and 2010. These included drug trafficking, weapons offences, robbery, uttering threats and assault with a weapon. He had repeatedly broken probation orders, and provided no evidence of rehabilitation. The ID therefore concluded that Mr. Brown was a danger to the public.

[21] The ID then considered whether Mr. Brown was likely to appear for his removal to Jamaica. The ID noted that Mr. Brown had been in Canada since 1984, and that he had family in this country, including six children. The ID also noted that Mr. Brown had four convictions for failing to comply with conditions, probation orders and recognizances. He had a history of addiction and non-compliance with the law. The ID concluded that Mr. Brown was fearful of returning to Jamaica, had strong ties to Canada and had demonstrated "a complete disregard for the law". The ID therefore concluded that Mr. Brown could not be trusted to voluntarily comply with his conditions of release, which included appearing for removal.

[22] The ID considered the factors prescribed by s 248 of the Regulations, and found that they weighed in favour of Mr. Brown's continued detention. The ID made the following observation: "[a]lthough I am not in the position to predict how long it will take the consulate to issue documents for Mr. Brown, I have no evidence that leads me to believe that his detention will be indefinite, or that his removal is not going to be effected." The ID noted that Mr. Brown had proposed no alternative to his continued detention.

[23] The ID rejected Mr. Brown's *Charter* arguments, citing the Supreme Court of Canada's decision in *Charkaoui*. The ID held that, consistent with the requirements identified in *Charkaoui*, there were regular reviews of Mr. Brown's detention and the legislation was therefore constitutional. The ID observed that when Mr. Brown was released under the Toronto Bail Program in 2011, he failed to comply with the conditions of his release and his detention therefore resulted from actions within his control.

[24] The ID issued its decision on January 8, 2015. The ID held that Mr. Brown was a danger to the public and was unlikely to appear for his removal, and his continued detention was therefore warranted. The ID also held that there was no *Charter* violation.

[25] Mr. Brown filed an application for leave and judicial review of the ID's decision in this Court on January 26, 2015.

V. *Habeas Corpus* Application

[26] At the same time he filed the application for judicial review in this Court, Mr. Brown filed an application for *habeas corpus* in the Ontario Superior Court of Justice seeking his release pending deportation. He also requested a remedy under s 24(1) of the *Charter* on the ground that his rights under ss 7, 9, 10 and 12 of the *Charter* had been violated.

[27] Justice O'Marra dismissed both the application for *habeas corpus* and the request for a remedy under s 24(1) of the *Charter*, concluding as follows:

> [95] I am not satisfied that [Mr. Brown's] detention was unlawful. He was subject to a continuing process of review every thirty days in a quasi-judicial process that has been recognized as being procedurally fair – the subject having a right to be represented by counsel, to call evidence, cross-examine witnesses and to receive disclosure in advance.

[28] Justice O'Marra also rejected the argument that there was a violation of s 9 of the *Charter*, because Mr. Brown met the criteria for detention in the reviews, and his detention was

for the valid purpose of removal, which continued to exist until he was finally removed in September 2016.

[29] In addition, Justice O'Marra found that Mr. Brown received adequate health care, and his detention did not amount to cruel and unusual treatment or punishment contrary to s 12 of the *Charter*.

VI. Issues

[30] Mr. Brown does not challenge the reasonableness of the ID's decision on administrative law grounds. His sole argument is that the legislative scheme which permitted his detention violates the *Charter*. He seeks declarations that ss 57 and 58 of the IRPA and ss 244 to 248 of the Regulations contravene ss 7, 9 or 12 of the *Charter*, and are not justified by s 1.

[31] Mr. Brown asks this Court to read in to the legislative scheme a requirement that pre-removal detention not exceed six months, after which it will be presumptively unconstitutional. He also says that there should be a "hard cap" on pre-removal detention of 18 months.

[32] This application for judicial review therefore raises the following issues:

A. Is the application for judicial review barred by the doctrine of mootness?

B. Is the application for judicial review barred by the doctrine of issue estoppel?

C. Do ss 57 and 58 of the IRPA and ss 244 to 248 of the Regulations contravene ss 7, 9 or 12 of the *Charter*?

D. If so, are ss 57 and 58 of the IRPA and ss 244 to 248 of the Regulations justified under s 1 of the *Charter*?

E. What are the minimum legal requirements of detention for immigration purposes?

F. Should questions be certified for appeal?

VII. Analysis

A. *Mootness*

[33] Mr. Brown has been removed from Canada to Jamaica, and the question therefore arises whether his application for judicial review is moot.

[34] The doctrine of mootness is an aspect of general policy or practice that allows a court to decline to answer questions that have become hypothetical or abstract, and where the decision of the court would have no practical effect on the parties. The essential question that must be asked is whether some "live controversy" which affects or may affect the rights of the parties continues to exist (*Borowski v Canada*, [1989] 1 SCR 342 at page 353 [*Borowski*]).

[35] The two-part test for mootness requires the Court to decide: (a) whether the concrete dispute between the parties has disappeared such that the issues have become academic; and (b) if the response to the first question is affirmative, whether the Court should nevertheless exercise its discretion to hear the case (*Borowski* at para 16; *Bago v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1299 at para 11).

[36] While the concrete dispute between the parties may have disappeared, in light of the decision of Justice Patrick Gleeson to grant third party public interest standing to the EIDN in this application, the Respondents fairly concede that the answer to the second question posed by the Supreme Court in *Borowski* is likely yes: the Court should exercise its discretion to hear this case in the broader public interest. I agree.

[37] In his decision dated October 7, 2016, Justice Gleeson identified a number of obstacles to bringing matters such as these before the courts. He granted third party public interest standing to the EIDN to ensure a full presentation of the issues, and to allow the Court to consider the legality of the impugned provisions of the IRPA and the Regulations even if the case was rendered moot by Mr. Brown's departure from Canada:

> [21] […] the evidence advanced by EIDN indicates that many detainees have little in the way of financial resources and face challenges in accessing legal representation. The challenge in bringing these issues before the court due to limited financial resources is evident in this case. This application for judicial review was adjourned and referred to case management partly in recognition of the fact that Mr. Brown was awaiting a decision on test case funding from Legal Aid Ontario. This funding was required to allow Mr. Brown to advance this application. There is no guarantee that this funding would be made available to potential individual litigants in the future.

> [22] The frequent nature of detention review hearings also presents another obstacle to bringing these matters before the courts. Decisions to retain an immigration detainee often become moot once a subsequent hearing is held and decision rendered. Furthermore, the constitutionality of the IRPA provisions would only come before the court on a judicial review where the detainee, as was done here, expressly challenges the constitutionality of those provisions before the ID.
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> [23] I am also mindful of the fact that Mr. Brown has been removed from Canada, a situation that may well render the proceeding moot or possibly result in its abandonment should EDIN not be granted standing. Theoretically, there are other potential individual litigants in a position to place these issues before the courts however, as noted above, the practical obstacles these individuals face raise serious questions as to the likelihood of this occurring. I am of the view that granting EIDN standing will ensure a full presentation of the issues and allow the Court to consider the legality of the impugned provisions of the IRPA and their corresponding regulations under the IRPR […].

[38] For similar reasons, I exercise my discretion to decide the constitutional issues raised by this case, notwithstanding that it has likely become moot due to Mr. Brown's removal to Jamaica.

B. *Issue Estoppel*

[39] The Respondents say that Mr. Brown is estopped from advancing his *Charter* arguments in this Court because they have been previously and finally determined by the Ontario Superior Court of Justice in *Brown* (ONSC) (citing *Danyluk v Ainsworth Technologies Inc*, 2001 SCC 44 at para 25 [*Danyluk*]; *Toronto (City) v CUPE, Local 79*, 2003 SCC 63 at para 23 [*Toronto (City)*]).

[40] In *Danyluk*, the Supreme Court of Canada explained the doctrine of issue estoppel as follows:

> [24] Issue estoppel was more particularly defined by Middleton J.A. of the Ontario Court of Appeal in *McIntosh v. Parent*, [1924] 4 D.L.R. 420, at p. 422:
>
> > When a question is litigated, the judgment of the Court is a final determination as between the parties and their privies. Any right, question, or fact distinctly put in issue and directly determined by a Court of competent jurisdiction as a ground of recovery, or as an answer to a claim set up, cannot be re-tried in a subsequent suit between the same parties or their privies, though for a different cause of action. The right, question, or fact, once determined, must, as between them, be taken to be conclusively established so long as the judgment remains. [Emphasis in original.]

[41] Issue estoppel arises when the following preconditions are met (*Danyluk* at para 25; *Toronto (City)* at para 23): (a) the issue must be the same as the one decided in the prior decision; (b) the prior judicial decision must have been final; and (c) the parties to both proceedings must be the same, or their privies.

[42] Mr. Brown concedes that the second and third preconditions are met, although he notes that the decision of the Ontario Superior Court of Justice has been appealed. However, he disputes that the issues decided in *Brown* (ONSC) were the same as those raised in this application for judicial review. According to Mr. Brown, the case before the Ontario Superior Court of Justice proceeded on the assumption that the legislative regime was constitutional, and concerned only whether it was applied to Mr. Brown in a manner that violated his *Charter* rights.

[43] I am not persuaded that Justice O'Marra approached the issues in exactly the manner suggested by Mr. Brown. Indeed, his judgment includes an explicit finding that the legislative regime governing pre-removal immigration detention is constitutional:

> [99] Here, there was a statutory basis for Mr. Brown's detention pursuant to a process that afforded due process, and an appellate review. The immigration detention review regime provides the protection that fundamental justice requires in the circumstances. There is a mechanism for periodic ongoing reviews of his detention. In *Charkaoui v. Canada (MCI)*, 2007 1 S.C.R. 350 at pp. 374 and 408 to 411 and *Sahin v. Canada (MCI)*, [1995] 1 FCR 214 it has been held that the IRPA detention review scheme meets the standards for a constitutionally compliant detention review scheme.

[44] Justice O'Marra's consideration of Mr. Brown's rights under ss 9 and 12 of the *Charter* was more case-specific, and did not directly address the constitutionality of the legislative regime as a whole.

[45] Mr. Brown points out that he did not seek a remedy under s 52 of the *Charter* in his application for *habeas corpus*, but only a remedy under s 24(1). He suggests that the broader remedy contemplated by s 52, namely a declaration that the applicable legislative regime is without force or effect, is not available in an application for *habeas corpus*. He has provided no authority for this proposition. I note that in *PS v Ontario*, 2014 ONCA 900 [*PS*], a case on which Mr. Brown relies, the Ontario Court of Appeal made a declaration under s 52 of the *Charter* in an appeal of a *habeas corpus* application.

[46] In any event, I accept that the relief Mr. Brown sought in the Ontario Superior Court of Justice was limited to damages under s 24(1) of the *Charter*. He requested only a declaration that

his own *Charter* rights had been violated, not that the legislative regime was inherently unconstitutional.

[47] The constitutional challenge in this application for judicial review is therefore broader than the one that was before the Ontario Superior Court of Justice in *Brown* (ONSC). The issues have been comprehensively argued before this Court with the contribution of the EIDN, a third party that was granted public interest standing in light of the importance of the matters raised. Even if issue estoppel may be said to apply to some aspects of the positions advanced by Mr. Brown and the EIDN, the issues in this proceeding are not identical to those decided by Justice O'Marra.

[48] Furthermore, the Court retains discretion not to apply issue estoppel when this would work an injustice (*Danyluk* at paras 29-31). In this case, I am not persuaded that Mr. Brown should be prevented from seeking a declaration under s 52 of the *Charter* regarding ss 57 and 58 of the IRPA and ss 244 to 248 of the Regulations only because similar issues were dealt with by the Ontario Superior Court of Justice in an application for *habeas corpus*.

[49] Justice O'Marra's conclusions may nevertheless be persuasive, and may have added force by virtue of the doctrine of comity.

C. *Evidence*

(1) General Principles

[50] A proper factual foundation must exist before measuring legislation against the provisions of the *Charter*, particularly where the effects of impugned legislation are the subject of the attack (*Danson v Ontario (Attorney General)*, [1990] 2 SCR 1086 at para 26 [*Danson*]). A distinction must be drawn between two categories of facts in constitutional litigation: "adjudicative facts" and "legislative facts".

[51] Adjudicative facts are those that concern the immediate parties. They are specific and must be proved by admissible evidence. Legislative facts are those that establish the purpose and background of legislation, including its social, economic and cultural context. Such facts are of a more general nature, and are subject to less stringent admissibility requirements (*Danson* at paras 27-28).

(2) Applicant and Third Party

[52] Mr. Brown relies on the facts of his own case. He has also filed affidavits from experts in psychology and foreign law. The EIDN has submitted the affidavits of a number of former detainees and those close to them, together with the affidavits of some of its members and supporters, including a sociologist. The following summary, which is necessarily incomplete, encompasses the most salient facts and expert opinions.

(a) Aloxen Myers

[53] Aloxen Myers came to Canada in May 2003. She is a single mother with two minor children. Ms. Myers was detained at the Vanier Centre for Women for a total of ten months. Despite having no criminal record, she was held in general population and subject to lockdowns

and strip searches. Her children were placed in the care of the Children's Aid Society while she was detained.

[54] Ms. Myers' detention was reviewed by the ID on approximately 12 occasions. She says that each hearing lasted roughly ten minutes. In December 2014, she was released under the supervision of the Toronto Bail Program.

[55] Ms. Myers says that her detention has had a significant impact on her, and also on her children. Both children are undergoing therapy at SickKids Hospital. Ms. Myers has health problems that she attributes to poor diet, anxiety, and the stress of detention.

(b) Jennifer James

[56] Jennifer James came to Canada in April 2009. She failed to report to the CBSA in December 2012, and a warrant was issued for her arrest. She was detained at the Toronto Immigration Holding Centre [TIHC] for approximately eight months on the ground that she was unlikely to appear for removal.

[57] Ms. James' detention was reviewed by the ID on approximately ten occasions. She says each hearing lasted roughly ten minutes. She formed the impression that her continued detention was pre-determined. She had difficulty finding a suitable bondsperson. She was asked about her children at one hearing, but it did not change the outcome.

[58] Ms. James says that she noticed that detainees were sometimes transferred to provincial prisons for what she considered to be minor infractions, and so she became quiet and acquiescent. She was eventually released under the joint supervision of the Toronto Bail Program and her son's teacher. She says that she experiences flashbacks and suffers from depression.

(c) Kyon Ferril

[59] Kyon Ferril came to Canada in 1994 as a small child. In 2011, he was convicted for a series of offences he committed in 2007 and 2008, specifically four counts of robbery, three counts of use of an imitation firearm, and one count of attempt to commit an indictable offence. He received a sentence of nine years and two months.

[60] Following the completion of his criminal sentence, Mr. Ferril was transferred to immigration detention at the Central East Correctional Centre [CECC]. He was detained for approximately three years and two months as a flight risk and a danger to the public.

[61] Mr. Ferril's detention was reviewed by the ID on approximately 40 occasions, often before the same member of the ID. The hearings were conducted by video link. He was represented by counsel approximately eight times. When he was not represented, the hearings concluded within five minutes. His expressions of remorse and evidence of rehabilitation were rejected by the ID. He says that as an immigration detainee, he had little or no access to rehabilitation programs and services.

[62] Mr. Ferril says that he experienced more than 1,000 lockdowns between October 2013 and December 2016. This caused him frustration and further isolation. He alleges that his detention reviews did not always take place within the statutorily-mandated timeframe.

[63] According to Mr. Ferril, he was often the target of homophobic aggression and violence by other prisoners, guards and the CBSA. In March 2015, he was attacked in the day room by a group of prisoners and badly beaten until guards intervened. He was attacked again by the same individuals later that day, and defended himself with a sock filled with dominoes. This resulted in a charge of assault with a dangerous weapon. He was held in segregation and then transferred from immigration detention to criminal remand.

[64] Mr. Ferril says that a second violent attack in September 2016 nearly killed him. He alleges that his recovery was frustrated by a lack of adequate medical care. He was held in segregation at least three times, primarily out of concern for his safety. He was eventually released under the joint supervision of his brother and his common law partner, under the auspices of the Toronto Bail Program.

(d) Oluwayanmife Oluwakotanmi

[65] Oluwayanmife Oluwakotanmi was smuggled into the United States with his parents when he was eight years old. He lived and worked without status until he came to Canada. He was detained at the TIHC, then at the Maplehurst Correctional Centre [MCC], and then at the CECC. Mr. Oluwakotanmi was detained for approximately eleven months on the ground that he was unlikely to appear for removal.

[66] Mr. Oluwakotanmi has a criminal record in the United States. While he was working as a taxi driver, he was involved in a collision that resulted in the death of his passenger. He was convicted of reckless homicide and sentenced to 30 months' probation. He came to Canada without completing his sentence.

[67] Mr. Oluwakotanmi made a refugee claim in Canada using a false name. His claim was rejected. He failed to appear for a pre-removal interview, and remained in Canada for the next five years without status.

[68] In December 2015, Mr. Oluwakotanmi was assaulted in Brampton. He was not charged, but was turned over to the CBSA. After providing his fingerprints, he disclosed his real identity, his immigration history and his U.S. criminal record.

[69] Mr. Oluwakotanmi says that his detention at the CECC interfered with his ability to retain counsel. His partner found it difficult to visit him at the CECC because she did not possess a vehicle. Mr. Oluwakotanmi's detention reviews were occasionally conducted by video link. He says that he sometimes felt he could not speak at his detention reviews, and when he did so, he felt it had no bearing on the ID's decision.

[70] Mr. Oluwakotanmi had difficulty proposing alternatives to detention. His partner was his only close and consistent friend in Canada. According to Mr. Oluwakotanmi, his partner was not allowed to attend his detention reviews, nor was she accepted as a bondsperson.

Mr. Oluwakotanmi was eventually released on November 30, 2016, when his counsel asked the MCC to contact the Toronto Bail Program.

(e) Kimora Adetunji

[71] Kimora Adetunji is the wife of a man detained at the CECC. When she swore her affidavit, her husband had been detained for approximately eight months. She says that she suffers from sleeplessness and stress-induced, debilitating headaches. She is now a single parent, and is unable to keep up with bills and provide basic necessities for her children. The children have also felt the impact of their father's absence. Ms. Adentunji has not been able to visit her husband, as she does not have access to a vehicle or childcare.

[72] Ms. Adetunji tried to attend her husband's first detention reviews when he was detained at the MCC. She says that before one of the hearings, she overheard a conversation between the ID and the Hearings Officer regarding detainees who were unlikely to be released that day. This led her to conclude that the process was unfair, and that the decision was predetermined.

(f) Mina Ramos and Syed Hussan

[73] Mina Ramos and Syed Hussan are volunteers with the EIDN. Their affidavits refer to a report published by EIDN in 2014, "Indefinite, Arbitrary and Unfair: the Truth About Immigration Detention in Canada", which analysed data obtained under the *Access to Information Act*, RSC 1985, c A-1. According to Ms. Ramos and Mr. Hussan, the data show that rates of detention or release vary widely depending on the region or the ID member, and the chances of release diminish as the length of detention increases, becoming negligible after six

months of detention. The report also cites evidence suggesting that the ID unduly relies upon, or simply duplicates, past decisions. An internal memorandum from a former Chair of the IRB states that the ID's reasons lack consistency and detail, and essentially reiterate the decision of the previous member.

(g) Caileigh McKnight

[74] Caileigh McKnight is a member of the EIDN. Her affidavit was submitted in support of the EIDN's motion to be added as a third party in this application for judicial review. Ms. McKnight describes the activities of the EIDN and the services it offers to detainees. She recounts the experiences of detention and the review process as told to her by detainees. She attaches to her affidavit the following exhibits: (a) the EIDN 2014-2015 Annual Report; (b) the article titled "Indefinite, Arbitrary and Unfair: The Truth About Immigration Detention in Canada" published by the EIDN in 2014; (c) a selection of media articles; and (d) a selection of press releases issued by the EIDN.

(h) Ali Esnaashari

[75] Ali Esnaashari is a lawyer practising immigration law in Toronto. He was called to the bar in June 2016. Mr. Esnaashari says that he has represented eleven individuals at detention reviews before the ID. Based on his experience, Mr. Esnaashari says it can be difficult to learn when a detention review is scheduled to take place, and they may be scheduled just one day in advance. He states that "[a]lthough hearing officers are often forthcoming with helping on files, they are scheduled to be in hearings during the day and are not available to discuss matters over the phone". He says that a Hearings Officer may make a general assertion that an individual has

been uncooperative without providing a comprehensive description of the surrounding circumstances. He notes that generally he is not advised if a client is transferred to a different detention facility, nor of the reasons for the transfer. He also maintains that the specific criteria used by the Toronto Bail Program for accepting detainees are unclear, and finding a suitable bondsperson is often difficult or impossible.

[76] According to Mr. Esnaashari, during a detention review, the ID will usually provide preliminary comments and the Hearings Officer will then read from notes derived from a variety of documents. He says that almost none of the documents are disclosed prior to the hearing to the detainee or counsel, nor are they provided during the hearing. At the TIHC, he may ask for a brief break to discuss matters with his client. However, he says that privacy is non-existent at provincial correctional facilities. Due to security concerns, he is not permitted to step out into the hallway to speak with his client. The ID can only permit him to speak with his client off the record, in front of all participants.

(i) Hanna Gros

[77] Hanna Gros is a recent law school graduate and a Senior Fellow of the International Human Rights Program [IHRP] at the University of Toronto's Faculty of Law. Ms. Gros attaches to her affidavit a report titled "'We Have No Rights': Arbitrary imprisonment and cruel treatment of migrants with mental health issues in Canada" published by the IHRP in 2015. The report is based on a variety of sources, including interviews with seven detainees. The report's conclusions include that: (a) detention has a negative impact on the mental health of individuals; (b) individuals feel disempowered by the experience of detention reviews; (c) the legislative

scheme does not address mental health issues; (d) despite the regular occurrence of detention reviews, there is "no presumption in favour of release after a certain period of time, and detention can continue for years"; and (e) support and treatment in provincial correctional facilities for mental health issues is inadequate.

(j) Janet Cleveland

[78] Janet Cleveland is a clinical psychologist and a researcher affiliated with McGill University. Between 2010 and 2013, she examined the impact of detention in Canadian immigration holding centres on the mental health of asylum-seekers. Dr. Cleveland addresses the psychological impact of long-term detention on: (a) persons with no prior history of mental health issues; (b) persons with pre-existing mental health issues; and (c) persons with profiles comparable to that of Mr. Brown.

[79] According to Dr. Cleveland, detention tends to exacerbate existing mental health issues, or create them where they did not previously exist. Detention for more than six months can lead to feelings of "despair, hopelessness, and anxiety about the outcome of immigration proceedings". She says that six months is the "breaking point", after which an individual is "likely to suffer long-term, and perhaps permanent, mental health impairment". Dr. Cleveland concludes that "Mr. Brown has virtually all the risk factors that are associated with persistent severe mental illness, suicide and victimization among male prison inmates".

(k) Gerald Devins

[80] Gerald Devins is a clinical psychologist. He has practised since 1992, and has performed psychological assessments of more than 5,200 refugee claimants. He conducted a psychological assessment of Mr. Brown based on a single interview. According to Dr. Devins, Mr. Brown "satisfies diagnostic criteria for schizoaffective disorder, depressive type" and has "paranoid delusions and dissociative symptoms". Dr. Devins states that "Mr. Brown's psychopathology renders it impossible for him to appreciate fully the nature of legal proceedings". Dr. Devins makes the following observation:

> Existing evidence indicates that the prognosis for major mental illnesses, such as schizophrenia, is poorer when people are detained in prison as compared to when they can access needed treatments and resources in the community. This is especially true when the clinical picture is complicated by addictions. Mr. Brown requires intensive, comprehensive care that includes expert pharmacotherapy, ongoing supportive therapy, and treatment for his addictions, such as can be accessed in the community. His mental health will benefit significantly if he can obtain such treatment and receive the support required to adhere to it. The likelihood of meaningful and durable improvement is much lower without the benefit of such comprehensive treatment and support.

(l) Lesley Wood

[81] Lesley Wood is Associate Professor of Sociology at York University in Toronto. Her research focuses on the analysis of qualitative and quantitative data.

[82] Dr. Wood performed an analysis of statistical data provided by the IRB in response to requests under the *Access to Information Act*. Dr. Wood examined "the linear regression and

bivariate correlations on the effect of the region, board member and time in detention on an individual's likelihood of release."

[83] Dr. Wood makes the following observations: (a) as the number of days in detention increase, there is a significant negative correlation with release; (b) the likelihood of release is affected by the ID member hearing the case; (c) in 2013, the release rate was 27% in the Western Region, 9% in the Central Region, and 24% in the Eastern Region; and (d) release rates declined between 2008 and 2013. Dr. Wood provides the following disclaimer:

> Although the sample is consistent, the numbers are not large and there is missing data, these figures offer us a strong sense of the variation in detention by Board Member, by region, and through time […]. While I recognize that there may be competing explanations for these variations, I am confident that they provide solid evidence that detention times and release rates depend not only on the merits of a particular case but are tied to the Board Member, the amount of time in custody, and the region the detainee is in custody.

(m) Galina Cornelisse

[84] Galina Cornelisse is Assistant Professor, European and International law, at VU University Amsterdam. Dr. Cornelisse discusses the law of the European Union governing detentions for the purpose of removal, with an emphasis on circumstances where removal is delayed or not possible.

[85] Dr. Cornelisse offers the following conclusion:

> With specific regard to the question whether EU law permits detention under the Return Directive when removal is delayed or

> not possible, we may accordingly conclude the following: There must be a reasonable prospect of removal within the maximum length of detention. In principle this period consists of six months, which can be prolonged *only* when the removal process is expected to take longer because of lack of cooperation of the third-country national or because of delays in getting the necessary documents. Other reasons for extending the six-month period do not exist. Thus, if removal is for example postponed because of a danger of non-refoulement, and it is reasonable to expect that such a risk will still persist in six months time, detention will not be allowed. [Emphasis original.]

(n) Margarita Escamilla

[86] Margarita Escamilla is a Professor of Criminal Law at the Complutense University of Madrid in Spain. Her research focuses on migratory law. She has prepared a report on "The Detention of Migrants According to the Law of the European Union: The Detention for the Purpose of Removal According [to] the Law of the European Union". The report has been translated from Spanish. Ms. Escamilla cites European jurisprudence for the proposition that, where a reasonable prospect of removal ceases to exist, detention is no longer justified.

(o) Jayashri Srikantiah

[87] Jayashri Srikantiah is a professor of law at Stanford Law School in the United States. She has represented detainees and acted as an *amicus* on immigration detention files since 1998, including before the U.S. Supreme Court. Ms. Srikantiah discusses U.S. law governing the detention of non-citizens for the purposes of removal. She addresses time limits on detention, the treatment of those considered to be a danger to the public and procedural safeguards when detention is prolonged.

[88] According to Ms. Srikantiah, in *Zadvydas v Davis*, 533 US 678 (2001) [*Zadvydas*], the U.S. Supreme Court recognized that constitutional questions arise where indefinite detention results from a removal that cannot be implemented. She says the U.S. Supreme Court has recognized an "implicit 'reasonable time' limitation". The "presumptively reasonable" period is six months. After this period, if the individual demonstrates that there is "no significant likelihood of removal", the government must adduce evidence to the contrary. In response to *Zadvydas*, the U.S. government has promulgated regulations to provide for a detention review mechanism. The regulations permit continued detention until it is determined that there is no "significant likelihood of removal in the reasonably foreseeable future". Ms. Srikantiah states that the regulations allow for the detention of individuals beyond six months where the government determines their removal to be "reasonably foreseeable (*e.g.*, from countries who are slow to issue travel documents)". She notes that detainees sometimes make applications for *habeas corpus*, and are sometimes successful.

[89] Ms. Srikantiah notes that in *Demore v Kim*, 538 US 510 (2003), the U.S. Supreme Court "upheld the constitutionality of such detention, but acknowledged its understanding that detention typically lasts only for the 'brief period necessary for [concluding] removal proceedings', a period that it noted 'lasts roughly a month and a half in the vast majority of cases… and about five months in the minority of cases in which the alien chooses to [file an administrative appeal]'".

[90] Ms. Srikantiah says that subsequent jurisprudence has held that the U.S. Constitution "permits prolonged detention without bond hearings while removal proceedings are still

pending". She adds that "mandatory detention without a bond hearing is permitted for only a reasonable period of time, after which a noncitizen must receive a bond hearing".

(3) Objections to the Evidence

[91] The Respondents argue that much of the affidavit evidence submitted by Mr. Brown and the EIDN is inadmissible or should be given little weight, because it includes hearsay, speculation, opinion, advocacy or is otherwise unreliable (citing Rule 81 of the *Federal Courts Rules*, SOR/98-106, *Canada (Board of Internal Economy) v Canada (Attorney General)*, 2017 FCA 43 at paras 15-18). They also complain that the affidavits filed by former detainees and those close to them contain numerous inaccuracies. In addition, the Respondents note that Drs. Cleveland and Devins provided evidence in support of Mr. Brown's application for *habeas corpus*, but Justice O'Marra nevertheless concluded that Mr. Brown's detention did not violate ss 7, 9 or 12 of the *Charter*.

[92] Many of the Respondents' objections to the evidence offered by Mr. Brown and the EIDN are valid. The EIDN acknowledges that the evidence it has submitted contains hearsay. However, much of the evidence is not in dispute. At a minimum, the accounts of detainees and those close to them may be considered "case studies", or scenarios that may reasonably be expected to arise under the legislative regime. I have accepted the evidence for this purpose, mindful of the Respondents' objections to particular aspects of the narratives provided. I have disregarded any evidence that is unreliable, comprises opinion (other than expert opinion) or amounts to advocacy.

[93] The Respondents also ask the Court to exclude or give no weight to the expert report of Dr. Lesley Wood, on the ground that she is neither independent nor impartial. The Respondents note that Dr. Wood's spouse, Macdonald Scott, is a volunteer with the EIDN. Mr. Scott filed the Notice of Application and Constitutional Issues before the ID, drafted and signed the EIDN's memorandum of fact and law, is an affiant in this case, and attended most of the cross-examinations in this application. Moreover, Dr. Wood, Mr. Scott and counsel for the EIDN all reviewed the article "Indefinite, Arbitrary and Unfair: The Truth About Immigration Detention in Canada". The Respondents also fault Dr. Wood for offering an opinion on detention times and release rates, despite acknowledging that some of the necessary data are missing.

[94] Expert witnesses have a duty to the court to give fair, objective and non-partisan opinion evidence. They must be aware of this duty, and able and willing to carry it out. If they do not meet this threshold requirement, then their evidence should not be admitted (*White Burgess Langille Inman v Abbott and Haliburton Co*, 2015 SCC 23 [*White Burgess*] at para 32).

[95] Once this threshold is met, however, concerns about an expert witness' independence or impartiality should be considered as part of the overall weighing of the costs and benefits of admitting the evidence. The threshold requirement is not particularly onerous, and a proposed expert's evidence will only rarely be excluded for failing to meet it. It is the nature and extent of the interest or connection with the litigation which matters, not the mere fact of the interest or connection; the existence of some interest or a relationship does not automatically render the evidence of the proposed expert inadmissible. However, an expert who assumes the role of an

advocate for a party is clearly unwilling or unable to carry out the primary duty to the court (*White Burgess* at para 46).

[96] Dr. Wood discloses in her affidavit that her spouse is a volunteer with the EIDN, and that she served as a reviewer for the EIDN's 2014 report, "Indefinite, Arbitrary and Unfair: The Truth About Immigration Detention in Canada". She states that she reviewed the *Code of Conduct for Expert Witnesses*, and insists that her association with the EIDN has no bearing on her duty to the Court to provide evidence in good faith.

[97] I am satisfied that Dr. Wood meets the threshold for providing expert evidence to this Court. However, given her admission that the data underlying her opinions may be insufficient, and her acknowledgement of competing explanations for the patterns she identifies, I agree with the Respondents that her evidence should be accorded little weight.

(4) Respondents

(a) John Helsdon

[98] John Helsdon is Manager of the Detentions Unit, Inland Enforcement Program Management Division of the CBSA. He previously served as a Hearings Officer with CIC, as well as a Senior Program Officer responsible for immigration hearings policy and program management.

[99] Mr. Helsdon says that the CBSA resorts to detention in only limited circumstances. These include where a CBSA Officer is unable to confirm the identity of a foreign national, or where a

CBSA Officer has reasonable grounds to believe that a foreign national is inadmissible and is a danger to the public, is unlikely to appear for an examination or an admissibility hearing, or is unlikely to appear for removal.

[100] In 2016, 5,886 individuals were detained for immigration purposes: 1,086 in the Quebec region, 2,751 in the Greater Toronto Area [GTA], 1,487 in the Pacific Region, 30 in the Atlantic Region, 394 in Ontario outside the GTA, and 257 in the Prairie Region. The most common reason given for detention was that the individual would not appear for an examination, an admissibility hearing or for removal. 46 individuals were said to pose a danger to the public. 316 were detained because they were both a danger to the public and unlikely to appear. 2,136 people were released for the purpose of removal, 2,447 were released on bond or with conditions, and 126 were released without conditions.

[101] The CBSA manages three Immigration Holding Centers [IHCs] in Canada. They are located in Toronto, Ontario, Laval, Quebec and Vancouver, British Columbia. The IHC in Vancouver will hold individuals for a maximum of 48 hours. Mr. Helsdon says that the IHCs can accommodate only "low-risk" detainees.

[102] According to Mr. Helsdon, the following individuals are not suited to detention in the TIHC: (a) those with a criminal record in or outside Canada, or who have charges before the courts; (b) fugitives; (c) those who might attempt to escape; (d) those with a history of violence or with violent or uncooperative tendencies; (e) those who pose a danger to themselves or others; (f) those exhibiting "disturbing behaviour" and present a risk that cannot be managed within an

IHC; (g) those who are suicidal; (h) those with serious medical issues; and (i) those being transferred from detention centres who have not passed the centre's medical assessment (*e.g.*, screening for tuberculosis).

[103] Individuals who are not detained in an IHC are usually placed in a provincial correctional facility. Mr. Helsdon says that detainees are never transferred from an IHC to a provincial correctional facility for punitive reasons.

[104] In response to recommendations of the Auditor General of Canada, the CBSA has developed a tool called the National Risk Assessment for Detention [NRAD]. Mr. Helsdon describes the NRAD as a mandatory process to establish, implement and document consistent risk assessment practices for detention decisions under s 55 of the IRPA. The NRAD form is used to assess an individual's level of risk, and affects the location of detention. An NRAD form is completed when an individual is initially detained and every 60 days thereafter. Mr. Helsdon's affidavit includes as exhibits excerpts from the CBSA's detention policy, "ENF 20 Detention" from 2007 and 2015, together with a copy of the NRAD form.

[105] Mr. Helsdon states that once detainees are transferred to a provincial correctional facility, the CBSA no longer exercises control over their conditions of detention. Nor does the CBSA control the choice of provincial detention centre. Detainees are not invited to make submissions, and are rarely given reasons for their transfer.

(b) Parminder Singh

[106] Parminder Singh is a Hearings Officer with the CBSA. He says that the ID usually asks the Hearings Officer to explain the reasons for seeking detention, and to support these with facts and argument. The individual who is the subject of the hearing is given an opportunity to respond. Evidence is presented only where information is challenged. The ID's decision is usually provided orally. A party may request a copy of the transcript.

[107] According to Mr. Singh, the ID considers alternatives to detention such as unconditional release or release with conditions (*e.g.*, a bond or guarantee, reporting requirements, confinement to a specific geographic area). The CBSA usually requests some basic conditions, including that the individual (a) keep the peace and be of good behaviour; (b) report when and where required by CIC, CBSA or ID; and (c) advise the CBSA of any change of address within 48 hours. The ID may impose stricter terms and conditions of release, including curfew, refraining from use of a cellular phone or computer, house arrest, an electronic bracelet to track physical location, restrictions on contacts, and regular inspection of the individual's residence by immigration officials. Release may also be ordered under the supervision of the Toronto Bail Program.

[108] The ID may order the release of an individual under a surety, but the CBSA may prevent release if the surety fails to meet a solvency or "liquidity" test.

[109] A CIC policy document included as an exhibit to Mr. Singh's affidavit, "ENF: Admissibility, Hearings and Detention Review Proceedings" states that "[i]f the hearings officer recommends continued detention, the hearings officer should submit all available evidence to the

ID in support of continued detention". According to Mr. Singh, the requirement to introduce "objective or physical evidence of what actually transpired" arises only when a statement is contradicted by another party. The ID might accept the statement of a Hearings Officer over a challenge by another party without requiring evidence, but he has consistently been asked to "back up" his statements when challenged: "So then I would have to physically look through my file".

[110] Mr. Singh says that "we always do our utmost best to provide all of the disclosure pre-detention review, but sometimes the document is provided at the detention review. So in that circumstance, I could see how counsel may not have had an opportunity to request either that document or provide rebuttal information". Mr. Singh also acknowledges that disclosure is "supposed to be provided in advance. But there are times where it is not provided in advance".

D. *Charter, Sections 7 and 9*

[111] The *Charter* guarantees the following rights in ss 7 and 9:

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.	7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.
9. Everyone has the right not to be arbitrarily detained or imprisoned.	9. Chacun a droit à la protection contre la détention ou l'emprisonnement arbitraires.

[112] In *Charkaoui*, the Supreme Court of Canada considered the constitutionality of security certificates issued under s 77 of the IRPA. This provision allows the Minister of Citizenship and

Immigration and the Minister of PSEP to issue a certificate declaring that a foreign national or permanent resident is inadmissible to Canada on security grounds, among others, leading to the detention of the person named. Mr. Brown acknowledges that the legal framework applied by the Supreme Court in *Charkaoui* is applicable to the constitutional analysis the Court must undertake in this case.

[113] The following principles, derived from *Charkaoui*, inform the Court's consideration of ss 7 and 9 of the *Charter*:

(a) Challenges to the fairness of the process leading to possible deportation and the loss of liberty associated with detention raise important issues of liberty and security, and s 7 of the *Charter* is engaged (at para 18).

(b) Section 7 of the *Charter* requires not a particular type of process, but a fair process having regard to the nature of the proceedings and the interests at stake (at para 20).

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

(d) Detention is not arbitrary where there are standards that are rationally related to the purpose of the power of detention (at para 89). Whether through *habeas corpus* or statutory mechanisms, foreign nationals, like others, have a right to prompt review to ensure that their detention complies with the law (at para 90).

[114] Mr. Brown and the EIDN say that immigration detention fails to comply with the constitutional criteria prescribed by *Charkaoui* in the following four respects: (a) it imposes a "reverse onus" on a detainee to justify release, rather than placing the onus on the Minister to justify continued detention; (b) the detainee is not given a reasonable opportunity to know the case to be met or to respond to that case; (c) the ID has no power to control conditions of detention; and (d) the ID has no obligation to fashion alternatives to detention.

[115] Mr. Brown and the EIDN also argue that, in circumstances where there is no prospect of removal within a reasonable time, detention is "unhinged" from its immigration purpose and thereby becomes arbitrary, contrary to s 9 of the *Charter*, and discriminatory, contrary to s 15.

(1) Burden of Proof and "Reverse Onus"

[116] Mr. Brown and the EIDN allege that once an individual is detained, the burden to justify the individual's continued detention no longer rests with the Minister of PSEP. Instead, the burden is on the detainee to justify release. They cite the Ontario Court of Appeal's decision in *Chaudhary v Canada (Public Safety and Emergency Preparedness*), 2015 ONCA 700, at paragraphs 88 and 89 [*Chaudhary*]:

> [88] As explained in *Thanabalasingham*, even though prior detention decisions are not binding at subsequent reviews, the reviewing members must set out "clear and compelling reasons" for departing from them (at para. 10). Such reasons can include, for example, relevant new evidence or a reassessment of prior evidence based on new arguments (at paras. 6-10). However, given the requirement for new evidence or new arguments and given that the Minister can rely on previous decisions to establish a *prima facie* case for detention, previous decisions become highly persuasive at the very least.
>
> [89] In theory, a detainee, who bares [*sic*] an evidentiary burden in the detention review after the Minister establishes a *prima facie* case, could potentially succeed in obtaining a release by showing the facts of those prior decisions are wrong or at least that they have changed since that time, warranting a different decision. However, as the length of detention increases, it becomes more and more difficult to argue that an additional 30 days spent in detention since the last review constitutes a "clear and compelling reason" to depart from the earlier disposition.

[117] In *Canada (Citizenship and Immigration) v Thanabalasingham*, 2004 FCA 4 at paragraph 6 [*Thanabalasingham*], the Federal Court of Appeal approved the statement of Justice Douglas Campbell in *Canada (Citizenship and Immigration) v Lai*, 2001 FCT 118 at para 15 that "all existing factors relating to custody must be taken into consideration, including the reasons for previous detention orders being made". Nevertheless, Justice Marshall Rothstein rejected the suggestion that "the findings of previous Members should not be interfered with in the absence of new evidence", and confirmed that the ID's role is always to review the reasons for continued detention: "[A]t each hearing, the Member must decide afresh whether continued detention is warranted" (at para 8).

[118] Justice Rothstein considered the circumstances in which the ID could reasonably depart from previous decisions to detain, and held that the threshold is "clear and compelling reasons" for doing so (at para 10). He provided the following rationale:

> [11] Credibility of the individual concerned and of witnesses is often an issue. Where a prior decision maker had the opportunity to hear from witnesses, observe their demeanour and assess their 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. For example, the admission of relevant new evidence would be a valid basis for departing from a prior decision to detain. Alternatively, a reassessment of the prior evidence based on new arguments may also be sufficient reason to depart from a prior decision.

[119] Justice Rothstein confirmed that the onus is always on the Minister of PSEP to demonstrate there are reasons which warrant detention or continued detention, and provided a detailed explanation of how the burden of proof operates in detention reviews before the ID:

> [14] When determining who bears the burden of proof at a detention review hearing, it is important to remember that sections 57 and 58 allow persons to be detained for potentially lengthy, if not indefinite, periods of time, without having been charged with, let alone having been convicted of any crime. As a result, detention decisions must be made with section 7 *Charter* considerations in mind (*Sahin v. Canada (Minister of Citizenship and Immigration)*, [1995] 1 F.C. 214 at 225-231 (T.D.)).
>
> [15] Subsection 103(7) of the former Act provided that an adjudicator shall order release if "satisfied that the person in detention is not likely to pose a danger to the public and is likely to appear for an examination, inquiry or removal." Under that provision, Campbell J. held that "the initial onus of proving continued detention is warranted rests with the proposer of such an order", *i.e.* the Minister (*Lai* at 334). If anything, this holding applies even more strongly to section 58 which provides that "the Immigration Division shall order the release of the permanent resident or foreign national *unless* it is satisfied" that one of the

> listed conditions is met [emphasis added]. I therefore agree with Gauthier J. that it is the Minister who must establish, on a balance of probabilities, that the respondent is a danger to the public if he wants the detention to continue.
>
> [16] The onus is always on the Minister to demonstrate there are reasons which warrant detention or continued detention. However, once the Minister has made out a *prima facie* case for continued detention, the individual must lead some evidence or risk continued detention. The Minister may establish a *prima facie* cases in a variety of ways, including reliance on reasons for prior detentions. As Gauthier J. put it in her reasons at paragraph 75:
>
> > ... at the beginning of the hearing, the burden was always on the shoulder of the proponent of the detention order, the Minister, but then this burden could quickly shift to the respondent if previous decisions to continue the detention were found compelling or persuasive by the adjudicator presiding [*sic*] the review.

[120] Justice Rothstein's articulation of the law in *Thanabalasingham* is clear, cogent and binding upon the ID and this Court alike. If the ID does not respect these standards in practice, this is a problem of maladministration, not an indication that the statutory scheme is itself unconstitutional (*Little Sisters Book and Art Emporium v Canada (Justice)*, 2000 SCC 69 at para 71).

(2) Opportunity to Know the Case to be Met

[121] Mr. Brown and the EIDN assert that the Minister of PSEP is not required to present evidence at detention reviews. Instead, a Hearings Officer acts for the Minister of PSEP and also makes factual allegations against the detainee. Hearings Officers are neither sworn nor subject to cross-examination, and their evidence is generally hearsay. Mr. Brown complains that Hearings

Officers act as both counsel and witness, and detainees have no meaningful opportunity to challenge their evidence.

[122] Mr. Brown and the EIDN mischaracterize the role of a Hearings Officer. A Hearings Officer is the Minister of PSEP's representative, not a witness. Proceedings before the ID are informal, and the normal rules of evidence do not apply (IRPA, s 173). Hearsay evidence is admissible. According to Mr. Singh, the requirement to introduce evidence arises only when a statement is contradicted by another party. This requirement is generally respected in practice. At a minimum, it is something either a detainee or a representative may insist upon.

[123] The Minister of Citizenship and Immigration's policy guidance "ENF 3: Admissibility, Hearings and Detention Review Proceedings" states: "Parties are not required to prove the facts and arguments, unless information provided is challenged by the other party. If the information is challenged, evidence to support the facts and arguments may be introduced." The document repeatedly states that "[i]f the hearings officer recommends continued detention, the hearings officer should submit all available evidence to the ID in support of continued detention."

[124] The *Immigration Division Rules*, SOR/2002-229 provide in s 26:

Disclosure of documents by a party	Communication de documents par une partie
26 If a party wants to use a document at a hearing, the party must provide a copy to the other party and the Division. The copies must be received	26 Pour utiliser un document à l'audience, la partie en transmet une copie à l'autre partie et à la Section. Les copies doivent être reçues :
(a) as soon as possible, in the case of a forty-eight hour or	a) dans le cas du contrôle des quarante-huit heures ou du

seven-day review or an admissibility hearing held at the same time; and	contrôle des sept jours, ou d'une enquête tenue au moment d'un tel contrôle, le plus tôt possible;
(b) in all other cases, at least five days before the hearing.	b) dans les autres cas, au moins cinq jours avant l'audience.

[125] Detainees or their representatives may request disclosure of additional information, and ask that the Enforcement Officer be summoned to appear at the hearing. Detainees may also provide their own information in response to the Minister of PSEP's position.

[126] Despite the rules and policy governing disclosure, Mr. Singh admitted that disclosure is not always provided in advance, and documents are sometimes produced only at the detention review. He acknowledged that detainees and counsel may not have an adequate opportunity to request documents or provide rebuttal. Mr. Esnaashari described Hearings Officers as forthcoming and helpful, but noted that they are usually in hearings during the day and are not available to discuss matters in advance.

[127] Mr. Brown and the EIDN raise legitimate concerns about the timeliness and quality of pre-hearing disclosure. However, this is again a problem of maladministration, not an indication that the statutory scheme is itself unconstitutional.

[128] Inadequate disclosure may be addressed in a number of ways. A detainee or representative may ask the ID to briefly adjourn the hearing. A request may be made to bring forward the date of the next review. In egregious cases, an application for judicial review may be brought in this Court on an expedited basis.

(3) Conditions of Detention

[129] Mr. Brown complains that the ID has no jurisdiction over the location or conditions of detention, and that s 58(1) of the IRPA permits the ID to decide only if an individual should be detained or released. The ID has expressed a similar view, for example in *Canada (Citizenship and Immigration) v Jama*, [2007] IDD No 6 (IRB):

> The Minister's officers are responsible for determining the place of detention in any given case; the Immigration Division has no authority, as far as I am aware, to order that detention be maintained at a given location such as, in this case, a mental health facility.

[130] Mr. Brown cites the Supreme Court of Canada's decision in *R v Hufsky*, [1988] 1 SCR 621 at para 13 [*Hufsky*] for the proposition that the CBSA cannot exercise an unfettered discretion to detain individuals "wherever and however it sees fit". *Hufsky* concerned a "spot check" procedure intended to curb drunk drivers. The Supreme Court held that detention of individuals by police officers amounted to arbitrary detention because there were no criteria for the selection of the drivers to be stopped and subjected to the spot check procedure. The selection was in the absolute discretion of the police officer. This discretion was held to be arbitrary because there were no criteria, express or implied, to govern its exercise.

[131] By contrast, there are criteria that govern the location and conditions of detention of those held under the IRPA. Mr. Helsdon explained the factors that determine whether a detainee is held in an IHC or a provincial correctional facility. The NRAD tool is intended to promote consistent risk assessment practices, including with respect to location of detention. The

Respondents acknowledge that the NRAD process is still under development, but this does not mean that there are no intelligible guidelines governing the location and conditions of detention.

[132] Mr. Brown nevertheless maintains that the ID, rather than the CBSA or corrections officials, is constitutionally required to exercise control over the location and conditions of detention. In *PS*, the Ontario Court of Appeal held that provisions of the Ontario *Mental Health Act*, RSO 1990, c M.7 that dealt with involuntary committal violated s 7 of the *Charter* by allowing for indeterminate detention without adequate procedural safeguards. The Ontario Court of Appeal said the following at paragraph 92:

> [92] In sum, the case law suggests that in the non-punitive detention context, s. 7 requires the body reviewing detention to have the procedures and powers necessary to render a decision that is minimally restrictive on liberty in light of the circumstances necessitating the detention. [Emphasis added.]

[133] One of the authorities relied upon by the Ontario Court of Appeal in *PS* was *Sahin v Canada (Minister of Citizenship & Immigration)*, [1995] 1 FC 214 [*Sahin*], which concerned immigration detention. In *Sahin*, Justice Rothstein confirmed that members of the ID have the jurisdiction to exercise extensive powers to decide important questions of law and fact, including those that implicate a detainee's *Charter* rights:

> [28] […] In my opinion, when making a decision as to whether to release or detain an individual under subsection 103(7) of the *Immigration Act*, an adjudicator must have regard to whether continued detention accords with the principles of fundamental justice under section 7 of the *Charter*. As I have earlier observed, it is not the words of section 103 that vest adjudicators with such jurisdiction, but rather, the application of *Charter* principles to the exercise of discretion under section 103.

[134] Justice Rothstein then offered some observations on what should be taken into account by adjudicators, and provided a non-exhaustive list of the more obvious considerations. These included (*Sahin* at para 30):

> […] The availability, effectiveness and appropriateness of alternatives to detention such as outright release, bail bond, periodic reporting, confinement to a particular location or geographic area, the requirement to report changes of address or telephone numbers, detention in a form that could be less restrictive to the individual, etc.

[135] Justice Rothstein did not suggest that the ID must personally exercise control over the location and conditions of detention; he found only that the ID must consider the availability, effectiveness and appropriateness of alternatives to detention. In this respect, immigration detention may be distinguished from detention under the Ontario *Mental Health Act*. Subsection 4(2) of the IRPA specifically assigns responsibility for the detention of immigration detainees to the Minister of PSEP:

The Minister of Public Safety and Emergency Preparedness is responsible for the administration of this Act as it relates to […] (b) the enforcement of this Act, including arrest, detention and removal;	Le ministre de la Sécurité publique et de la Protection civile est chargé de l'application de la présente loi relativement : […] b) aux mesures d'exécution de la présente loi, notamment en matière d'arrestation, de détention et de renvoi;

[136] Both the federal and Ontario statutes governing the detention of persons in correctional facilities state that any designation of a particular penitentiary in a warrant of committal is of no force or effect (*Corrections and Conditional Release Act*, SC 1992, c 20, s 11; *Ministry of*

Correctional Services Act, RSO 1990, c M.22, s 17). Neither Mr. Brown nor the EIDN cited any authority for the proposition that these provisions are unconstitutional.

[137] In the immigration context, the CBSA makes an initial determination of where an individual should be detained. Thereafter, detainees held in an IHC may challenge the location or conditions of their detention directly to the CBSA. Detainees held in a provincial correctional facility may challenge the location or conditions of their detention in accordance with the procedures of that facility. Detainees may also bring applications for *habeas corpus* or judicial review in a superior court.

[138] The ID's lack of jurisdiction over the location and conditions of detention therefore does not contravene either s 7 or s 9 of the *Charter*. An ID member is constitutionally required to consider the availability, effectiveness and appropriateness of alternatives to detention, as well as less restrictive forms of detention, before deciding whether an individual should be released. Thereafter, responsibility for the location and conditions of detention rests with the CBSA or provincial correctional authorities. Detainees may challenge the location and conditions of their detention in a variety of ways, consistent with the requirements of the *Charter* (*Charkaoui* at para 96).

(4) Alternatives to Detention

[139] Mr. Brown and the EIDN assert that the ID lacks jurisdiction to fashion alternatives to detention, and has no duty to consider them before ordering that an individual be detained. This argument appears to be premised on the faulty assumption that an individual facing the

possibility of detention must satisfy a "reverse onus" before securing release. However, as previously discussed, the onus is always on the Minister of PSEP to demonstrate that there are reasons warranting detention or continued detention. It is only once the Minister of PSEP has established a *prima facie* case for continued detention that the individual must lead some evidence, or risk being detained (*Thanabalasingham* at para 16).

[140] Subsection 248(e) of the Regulations imposes a positive obligation on the ID to consider alternatives to detention:

248. If it is determined that there are grounds for detention, the following factors shall be considered before a decision is made on detention or release:	248 S'il est constaté qu'il existe des motifs de détention, les critères ci-après doivent être pris en compte avant qu'une décision ne soit prise quant à la détention ou la mise en liberté :
[…]	[…]
(e) the existence of alternatives to detention.	e) l'existence de solutions de rechange à la détention.

[141] This is consistent with Justice Rothstein's observation in *Sahin* that before ordering that an individual be detained, the ID must consider the availability, effectiveness and appropriateness of alternatives to detention.

(5) Unreasonable Detention

[142] Mr. Brown says that lengthy, indefinite detention contravenes the principles of fundamental justice contrary to s 7 of the *Charter*, and may result in arbitrary detention contrary to s 9. He argues that detention will violate both ss 7 and 9 of the *Charter* where "there is no

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

[143] Mr. Brown and the EIDN advocate a maximum time limit for detention. Following the example of other countries, Mr. Brown suggests that detention for immigration purposes should be presumed to be unconstitutional after six months, and that detention for the purpose of removal should never exceed 18 months. The EIDN advocates a presumptive period of three months. They cite the European Union Return Directive, the United Nations High Commissioner for Refugees' "Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers and Alternatives to Detention", the decision of the U.S. Supreme Court in *Zadvydas*, and the decision of the United Kingdom Supreme Court in *Lumba v Secretary of State for the Home Department)*, [2011] UKSC 12 [*Lumba*].

[144] In *Ali v Canada (Attorney General)*, 2017 ONSC 2660 at paragraph 17 [*Ali*], Justice Ian Nordheimer of the Ontario Superior Court of Justice held that continued detention is proper only so long as it is necessary to further a legitimate immigration purpose: "A detention cannot be justified if it is no longer reasonably necessary to further the machinery of immigration control" (citing *Chaudhary* at para 81). *Ali* concerned an individual whose nationality could not be ascertained, and who was said to be uncooperative with Canadian authorities in their efforts to establish his country of origin. Justice Nordheimer said the following at paragraph 27:

> [27] The onus remains on the Government to justify a continued detention. In order to do so, the Government must establish that the continued detention remains hinged to the immigration purpose for which the detention was originally ordered. To authorize the Government to hold a person indefinitely, solely on the basis of noncooperation, would be fundamentally inconsistent with the

> well-established principles underlying ss. 7 and 9 of the *Charter*. It would also be contrary to Canada's human rights obligations.

[145] In *Canada (Public Safety and Emergency Preparedness) v Lunyamila*, 2016 FC 1199 at paragraph 32 [*Lunyamila*], Chief Justice Paul Crampton found that the ID had erred in ordering the release of a detainee solely on the basis that, in the absence of his ability to obtain and provide identification documents, his detention had effectively become indefinite. Chief Justice Crampton noted that "[i]t is now settled law that the indefinite nature of an individual's detention under the IRPA is only one factor to be considered when conducting a detention review, and cannot be treated as determinative" (*Lunyamila* at para 32; see also *Ahmed v Canada (Citizenship and Immigration)*, 2015 FC 876 at paras 25-26).

[146] In *Chaudhary*, the Ontario Court of Appeal acknowledged at paragraph 81 that the reasonableness of detention for immigration-related purposes will depend on the circumstances. The decision of the Federal Court of Appeal in *Canada (Citizenship and Immigration) v Li*, 2009 FCA 85 [*Li*] is to similar effect (at para 3):

> In the present instance, the Immigration Division of the Immigration and Refugee Board of Canada (the Division) was called upon to determine whether and when a legitimate long detention becomes an indefinite detention in breach of section 7 of the *Charter*. As put by the appellant's counsel, when is enough enough? Unfortunately, there is no single, simple and satisfactory answer. It all depends on the facts and circumstances of the case.

[147] In *Lumba*, Lord Dyson of the U.K. Supreme Court invoked the "*Hardial Singh*" principles, derived from *R v Governor of Durham Prison, Ex parte Singh*, [1984] 1 All ER 983, [1984] 1 WLR 704 (QB) (at para 22):

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

[148] The European Court of Human Rights, in *J.N. v United Kingdom*, Application 37289/12, Judgment 19.5.2016, considered the approach adopted by the U.K. courts, and confirmed at paragraphs 90-91 that Article 5 of the *European Human Rights Convention* does not prescribe maximum time limits for detention pending deportation.

[149] The *Hardial Singh* principles are broadly consistent with the evolution of the common law in Canada. However, as Lord Dyson noted in *Lumba* at paragraph 53, they do not involve a consideration of the risk that a detainee might reoffend or abscond. These factors are often found by Canadian courts and tribunals to have a significant bearing on the assessment of whether continued detention is justified in the circumstances (see, for example, *Lunyamila* at paragraphs 59 and 66).

[150] Mr. Brown notes that in *Charkaoui*, the Supreme Court cautioned at paragraphs 130 and 131 that a problem could arise under s 15 of the *Charter* if the IRPA were used not for the

purpose of deportation, but to detain solely on security grounds. This argument is similar in structure to the one premised on s 9 of the *Charter*. The question is whether detention has become "unhinged" from the state's purpose of deportation. The answer to this concern lies in an effective review process that permits a consideration of all matters relevant to the deportation. In Mr. Brown's case, Justice O'Marra was satisfied that his detention continued to be for the valid purpose of deportation until he was finally removed in September 2016.

[151] What emerges from the Canadian jurisprudence, even when considered in light of foreign authorities, is that the reasonableness of an individual's detention will vary with the circumstances. In *Ali*, a detention of more than seven years was held to be unreasonable due to its indeterminate length, and the absence of any reasonable prospect that the situation would change. In *Lunyamila*, the threat to the public posed by the detainee and his lack of cooperation were held to be factors militating against his release, despite the fact that his detention had continued for more than three years. In Mr. Brown's case, which his counsel acknowledged is the most severe of the examples presented to the Court in this application for judicial review, a detention of more than five years in a maximum security facility was found not to contravene the *Charter* (*Brown* (ONSC)).

[152] I therefore conclude that the absence of a time period in the IRPA and the Regulations beyond which detention is presumed to be unconstitutional, or the absence of a maximum limit on detention, do not violate s 7 or s 9 of the *Charter*. As the Federal Court of Appeal observed in *Li*, the question of when detention for immigration purposes is no longer reasonable does not have a single, simple answer. It depends on the facts and circumstances of the case. The matter

falls to be determined by the ID, or by a superior court on an application for *habeas corpus* or on judicial review by this Court. The availability and effectiveness of these review mechanisms are sufficient to render the statutory scheme constitutional (*Charkaoui* at paras 28, 90, 96; *Sahin* at para 30).

E. *Charter, Section 12*

[153] Mr. Brown says that the IRPA and the Regulations violate s 12 of the *Charter* because they authorize detention that amounts to cruel and unusual treatment due to its length, indeterminacy and conditions. He argues that cruel and unusual punishment arises where a person is not accorded meaningful opportunities to challenge continued detention or conditions of release. He also alleges that s 12 of the *Charter* is infringed because: (a) detention may occur under conditions that are "harsh and *de facto* punitive", particularly where detainees are held in provincial jails (*e.g.*, lockdowns, solitary confinement, maximum-security constraints); (b) indeterminate detention and the uncertainty of release may have negative psychological effects; and (c) health care may be inadequate.

[154] The EIDN says that lengthy immigration detentions take a "serious toll" on detainees, including nightmares, hallucinations, concentration and memory problems, and feelings of helplessness. These are aggravated by the conditions in which detainees find themselves, including the stress of lockdowns, poor air quality and sanitation.

[155] Whether detention for immigration purposes constitutes cruel and unusual punishment or treatment was examined by the Supreme Court of Canada in *Charkaoui*. There is nothing in the

evidence or arguments presented in this case to justify a departure from the Supreme Court's analysis, which includes the following observations:

(a) The threshold for breach of s 12 is high. Treatment or punishment is cruel and unusual if it is so excessive as to outrage standards of decency (at para 95).

(b) The s 12 issue of cruel and unusual treatment is intertwined with s 7 considerations, since the indefiniteness of detention, as well as the psychological stress it may cause, is related to the mechanisms available to the detainee to regain liberty. It is not the detention itself, or even its length, that is objectionable. Detention itself is never pleasant, but it is only cruel and unusual in the legal sense if it violates accepted norms of treatment (at para 96).

(c) Denying the means required by the principles of fundamental justice to challenge a detention may render the detention arbitrarily indefinite and support the argument that it is cruel or unusual. The same may be true of onerous conditions of release that seriously restrict a person's liberty without affording an opportunity to challenge the restrictions. Conversely, a system that permits the detainee to challenge the detention and obtain a release if one is justified may lead to the conclusion that the detention is not cruel and unusual (at para 96).

(d) Indefinite detention in circumstances where the detainee has no hope of release or recourse to a legal process to procure his or her release may cause psychological stress and therefore constitute cruel and unusual treatment (at para 98).

[156] The Supreme Court of Canada's analysis in *Charkaoui* supports the conclusion that the IRPA and the Regulations do not impose cruel and unusual treatment within the meaning of s 12 of the *Charter*. Although detentions may be lengthy, the IRPA, properly interpreted and applied, provides a process for reviewing detention and obtaining release, and for reviewing and amending conditions of release, where appropriate.

[157] In addition, I agree with the Respondents that the limited evidence adduced before the Court in this case is not sufficient to support broad declarations that detention for immigration purposes constitutes cruel and unusual punishment or treatment (*Trang v Alberta (Edmonton Remand Centre)*, 2007 ABCA 263 at para 18). Mr. Brown's detention, which his counsel acknowledged was the most arduous of any described in the evidence on this application for judicial review, was found by the Ontario Superior Court of Justice not to violate s 12 of the *Charter* (*Brown* (ONSC) at para 112).

F. *Charter, Section 1*

[158] In light of the conclusion that ss 57 and 58 of the IRPA and ss 244 to 248 of the Regulations do not infringe ss 7, 9 or 12 of the *Charter*, it is unnecessary to consider whether any infringement could be justified under s 1 of the *Charter*.

VIII. Minimum Legal Requirements

[159] The following are the minimum requirements of lawful detention for immigration purposes under the IRPA and the Regulations.

(a) The Minister of PSEP must act with reasonable diligence and expedition to effect removal of a detainee from Canada.

(b) The onus to demonstrate reasons that warrant detention or continued detention is always on the Minister of PSEP.

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

(d) At each detention review, the ID must decide afresh whether continued detention is warranted.

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

(f) Once the Minister of PSEP has made out a *prima facie* case for continued detention, the individual must present some evidence or argument, or risk further detention. The

Minister of PSEP may establish a *prima facie* case in a variety of ways, including reliance on reasons for prior detentions.

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

(h) If insufficient disclosure is provided, a detainee or representative may ask the ID to briefly adjourn the hearing, or to bring forward the date of the next review. If necessary, an application for judicial review may be brought in this Court on an expedited basis.

(i) Detainees held in an IHC may challenge the location or conditions of their detention directly to the CBSA. Detainees held in a provincial correctional facility may challenge the location or conditions of their detention in accordance with the procedures of that facility. Detainees may also bring applications for *habeas corpus* or judicial review in a superior court.

IX. Certified Question

[160] Mr. Brown and the EIDN ask this Court to certify questions regarding the compliance of ss 57 and 58 of the IRPA and ss 244 to 248 of the Regulations with the *Charter*. The Respondents oppose the certification of broad questions for appeal, on the ground that the legal

issues raised by this case have previously been addressed by appellate courts, including the Supreme Court of Canada.

[161] I agree with the Respondents that many of the legal principles that inform the constitutional analysis in this case are well-established, particularly following the Supreme Court of Canada's decision in *Charkaoui*, and the Federal Court of Appeal's decisions in *Sahin*, *Thanabalasingham* and *Li*. However, the Federal Court of Appeal has yet to consider whether the *Charter* imposes a requirement that detention for immigration purposes not exceed a prescribed period of time (*e.g.*, six or three months), after which it is presumptively unconstitutional, or a maximum period (*e.g.*, 18 months), after which release is mandatory.

[162] I am satisfied that the answer to this question (a) would be dispositive of the appeal; (b) transcends the interests of the immediate parties to the litigation; (c) contemplates issues of broad significance or general importance; and (d) arises from the case itself (*Kanthasamy v Canada (Citizenship and Immigration)*, 2014 FCA 113, rev'd on other grounds 2015 SCC 61). I therefore certify the following question for appeal:

> Does the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (UK), 1982, c 11 impose a requirement that detention for immigration purposes not exceed a prescribed period of time, after which it is presumptively unconstitutional, or a maximum period, after which release is mandatory?

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The Minister of Public Safety and Emergency Preparedness is added as a Respondent.

2. The application for judicial review is dismissed.

3. The following question is certified for appeal:

> Does the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (UK), 1982, c 11 impose a requirement that detention for immigration purposes not exceed a prescribed period of time, after which it is presumptively unconstitutional, or a maximum period, after which release is mandatory?

"Simon Fothergill"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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