



Submission to the UN Working Group on Arbitrary Detention
for consideration in “Guiding Principles on the right of anyone deprived of his or her liberty to
challenge the legality of the detention in court”

Country submission: Canada

20 January 2014

The Canadian Council for Refugees (CCR) is pleased to have the opportunity to make a submission in relation to the proposed guidelines. We believe that the guidelines once finalized may be very helpful for clarifying issues relating to arbitrary detention in Canada, particularly with respect to immigration detention.

Canada’s immigration legislation provides for detention on certain grounds where review of detention is available before an independent tribunal, but the tribunal cannot review the legal validity of the decision to detain, only other factors. This leads in our view to arbitrary detention.

Detention on the basis of identity

One of these grounds is identity.¹ Many, if not most, of those detained on this ground are refugee claimants. The law provides for the Canada Border Services Agency (CBSA) to detain the person on the basis that the officer is not satisfied of the person’s identity. The detainee is brought before the Immigration Division of the Immigration and Refugee Board according to the regular schedule of detention reviews provided for by the Act², but the IRB cannot examine whether the detainee’s identity is in fact satisfactorily established: the law requires rather that the adjudicator focus on the status of the Minister’s investigations.³

The UN Working Group on Arbitrary Detention addressed this issue in its 2005 Country Mission report on Canada:

Application of the grounds for detention of foreigners pending admissibility hearings or removal

¹ “An officer may, without a warrant, arrest and detain a foreign national, other than a protected person [...] (b) if the officer is not satisfied of the identity of the foreign national in the course of any procedure under this Act.” *Immigration and Refugee Protection Act (IRPA)*, s. 55(2).

² 48 hours, 7 days and then every 30 days. IRPA s. 57.

³ “The Immigration Division shall order the release of a permanent resident or a foreign national unless it is satisfied, taking into account prescribed factors, that [...] (d) the Minister is of the opinion that the identity of the foreign national — other than a designated foreign national who was 16 years of age or older on the day of the arrival that is the subject of the designation in question — has not been, but may be, established and they have not reasonably cooperated with the Minister by providing relevant information for the purpose of establishing their identity or the Minister is making reasonable efforts to establish their identity”. IRPA s. 58(1).

74. One of the grounds on which an immigration officer can detain a foreign national is that she is not satisfied as to the foreigner's identity. When the immigration officer relies on this ground, as they often do, the law does not allow the Immigration Division to review whether the immigration officer was reasonable in concluding that the identity of the detainee was not established. The legislation thus fails to offer judicial oversight of the decision to detain based on identity [...]

91. With regard to administrative detention under immigration laws, the Working Group notes that, considering the overall number of migrants and asylum-seekers coming to Canada, their detention remains the exception. The Working Group is concerned, however, about several aspects of the immigration law, which give the immigration officers wide discretion in detaining aliens and limit the review of decisions ordering detention.

In practice, the consequence of the Immigration Division's restricted oversight is that the first reviews are unlikely to lead to the release of the detainee. The Immigration Division is required to assess whether the Minister is making "reasonable efforts to establish" the detainee's identity. After 48 hours and even after a subsequent 7 days the Immigration Division will generally conclude that insufficient time has passed to allow it to conclude that the Minister's efforts are not reasonable. The Immigration Division tends to accept CBSA's position about what needs to be done in order to establish identity, which usually involves obtaining documents and submitting them for expertise, and/or making inquiries in Canada and abroad. These procedures routinely take at least several days, and more often several weeks.⁴ Thus, even if the detainee is brought before an independent tribunal, the review of the detention is not meaningful when the tribunal is so constrained that it has little choice but to maintain detention.

Furthermore, the CCR is concerned about the potential for abuse of power when the law requires that the Immigration Division rely on the Minister's opinion. In such a case, there is no legal check on the Minister detaining individuals for improper reasons, such as the person's nationality or religion, or for the Minister's political convenience, or even on the basis of the personal antipathy of the Minister's delegate towards the detainee.

This concern appears to have been justified in the case of the treatment of the passengers of the Sun Sea. In 2010, as the Sun Sea was heading to the West Coast of Canada with some 500 Sri Lankan passengers on board, CBSA had already determined that all the passengers would be detained. According to a CBSA memo "Marine Migrants: Program Strategy for the Next Arrival", they would be detained initially on identity grounds. The memo suggests that maintaining them in detention on this ground might not be sustainable "as experience shows that most Sri Lankans are able to establish their identity in a timely manner".⁵

⁴ Examples of individual cases involving children are presented in the CCR's 2009 report, *Detention and Best interests of the child*, <http://ccrweb.ca/files/detentionchildren.pdf>

⁵ The memo (undated) was obtained by the Canadian Council for Refugees through Access to Information and is available at <http://ccrweb.ca/en/sun-sea-cbsa-strategy>

Nevertheless, CBSA continued to declare that the Minister was unsatisfied of the identity of the passengers of the Sun Sea after documents had been obtained and verified. A member of the Immigration Division wrote in one decision:

I have about 14 years of experience as an immigration adjudicator and I would say that in this case – in these cases – the Minister has raised the bar on what will satisfy him with respect to the identity of persons on the MV *Sun Sea* ... The method of arrival, that is by ship, seems to have struck a nerve and led to the Minister requiring or setting this higher standard.⁶

The Federal Court ruled that the Member was wrong to comment in this way on the Minister's evaluation of identity. With regard to consideration of identity, the Court found that "it is not the opinion of the ID [Immigration Division] that is determinative; rather the focus is on the Minister's opinion. To continue detention under this provision, the ID need only be "satisfied" that the Minister's "opinion" meets the requirements of s. 58(1)(d) of *IRPA*." Further on, the Court reiterates, "It is not for the ID to establish identity; rather, the role of the ID is to assess whether the Minister is doing his job in establishing identity." As such, the Federal Court confirms that section 58(1)(d) significantly limits the Immigration Division's review of the legal basis for detention.

The following are some examples of people who continued to be detained on identity grounds despite documentation that might have led the Immigration Division to conclude that identity was established, if they had that authority.

- A woman and her young daughter were maintained in detention on the basis of identity, despite documents confirming that her identity was known to the Dutch authorities, where she had previously made a refugee claim. CBSA found the detainee to be cooperative. The Immigration Division ordered the mother and daughter to be brought for another review in two weeks, rather than the usual 30 days, due to the presence of a child.
- A husband and wife were detained on identity grounds, despite having multiple documents: marriage certificate, birth certificate for each, national ID card for each, driver's licence and high school diploma for the man. They were not represented by a lawyer. They asked for special consideration due to the fact that the woman was pregnant (in the third trimester) and was experiencing difficulties in detention due to the pregnancy. Nevertheless detention was maintained.
- A 20 year old woman remained in detention on identity grounds after 40 days. Two UNHCR documents were deemed inconclusive by CBSA due to their lack of security features. The woman's lawyer produced a letter from the local UNHCR office affirming the authenticity of both UNHCR documents. The Immigration Division maintained detention for another 12 days to allow CBSA to confirm the new information brought forward by lawyer and detainee. The ID found CBSA lacking in diligence especially considering the young age of the detainee, but nevertheless maintained detention.

⁶ Canada (Citizenship and Immigration) v. B046, 2011 FC 877 (CanLII), <http://canlii.ca/t/fmf67>

Detention on the basis of suspicion of inadmissibility

In addition to identity, certain types of inadmissibility are grounds for detention where the Immigration Division is barred from evaluating the basis for the detention. A CBSA officer may detain a person where he or she has “reasonable grounds to suspect” that the person is inadmissible on grounds of security, violating human or international rights, serious criminality, criminality or organized criminality”.⁷ The Immigration Division is required by the Act to consider not how reasonable the suspicion is, but whether the Minister is “taking necessary steps” to inquire into the suspicion.⁸

As with identity cases, the Federal Court has chastised the Immigration Division for exceeding its jurisdiction when it considered whether the Minister had “reasonable grounds to suspect” – the basis for the detention:

The IRB erred in law in exercising its statutory authority such that the respondent’s release from detention was not justified for the reasons it gave. A plain reading of section 58 indicates that the IRB is required to extend deference to the Minister in the exercise of its mandate under paragraph 58(1)(c). In referring respectively to the Minister’s “suspicion” and “opinion”, both paragraphs 58(1)(c) and (d) involve situations of ongoing investigation by the Minister into unresolved concerns about security, admissibility or identity. The reference to the Minister under paragraph 58(1)(c) would serve no purpose if Parliament intended for the IRB to carry out a *de novo* assessment of the available evidence and to decide for itself whether a reasonable suspicion exists. If that was the intent, paragraph 58(1)(c) would have been written in a manner consistent with paragraphs 58(1)(a) and (b), which provide for an independent assessment of the evidence by the IRB. The question that must be answered by the IRB is whether the evidence relied upon by the Minister is reasonably capable of supporting the Minister’s suspicion of potential inadmissibility. In assessing the credibility of both the respondent and the Minister’s expert witness and in substituting its views for those of the Minister, the IRB usurped the Minister’s role to weigh the available evidence in formulating a suspicion. It is not the role of the IRB to dictate how the Minister’s ongoing investigation should be conducted. The Minister is entitled to a reasonable time to complete the admissibility investigation. In this case, the investigation was incomplete and it was wrong for the IRB to decide that enough had been done, or that more should have been done. The IRB’s supervisory jurisdiction on this issue is limited to examining whether the proposed steps may uncover relevant evidence bearing on

⁷ IRPA s. 55(3)(b).

⁸ “The Immigration Division shall order the release of a permanent resident or a foreign national unless it is satisfied, taking into account prescribed factors, that [...] (c) the Minister is taking necessary steps to inquire into a reasonable suspicion that they are inadmissible on grounds of security, violating human or international rights, serious criminality, criminality or organized criminality” IRPA s. 58(1).

the Minister's suspicion, and to ensuring that the ongoing investigation is conducted in good faith.⁹

Detention of Designated Foreign Nationals

Recent changes to the *Immigration and Refugee Protection Act* raise new concerns about arbitrary detention with respect to Designated Foreign Nationals. The Minister of Public Safety now has broad discretionary power to designate a group of individuals.¹⁰ One of the effects of designation is mandatory detention for all individuals in the group who are over 16 years of age.¹¹ Detained Designated Foreign Nationals are subject to a much more restricted schedule of review (14 days and then every 6 months).¹² In addition, the grounds for release are more restricted and the wording of the Act reverses the presumption of release: “the Immigration Division shall order the continued detention” (for Designated Foreign Nationals) as opposed to “The Immigration Division shall order the release” (for other detainees).¹³ The actual basis for the detention – the designation by the Minister of the group – is not subject to review.

⁹ Canada (Citizenship and Immigration) v. X, 2010 FC 112, [2011] 1 F.C.R. 493, <http://reports.fja.gc.ca/eng/2011/2010fc112.html>

¹⁰ The Minister may, by order, having regard to the public interest, designate as an irregular arrival the arrival in Canada of a group of persons if he or she

- (a) is of the opinion that examinations of the persons in the group, particularly for the purpose of establishing identity or determining inadmissibility — and any investigations concerning persons in the group — cannot be conducted in a timely manner; or
- (b) has reasonable grounds to suspect that, in relation to the arrival in Canada of the group, there has been, or will be, a contravention of subsection 117(1) for profit, or for the benefit of, at the direction of or in association with a criminal organization or terrorist group. IRPA s. 20.1 (1)

¹¹ IRPA s. 55(3.1)

¹² IRPA s. 57.1

¹³ IRPA s. 58.