

2017

CAPIC Submission on Detention

CAPIC SUBMISSION-IRB CHAIRPERSON'S GUIDELINE 2: DETENTION

245 Fairview Mall Drive, Suite 407, Toronto, ON M2J 4T1
Tel: 416-483-7044; Fax: 416-309-1985; Web: www.capic.ca



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Introduction

The Canadian Association of Professional Immigration Consultants (CAPIC) is the national advocacy group for Regulated Canadian Immigration Consultants (RCICs), founded on the pillars of Education, Information, Lobbying and Recognition. CAPIC's mandate includes providing continuing professional education about Canadian immigration matters and programs to their members, ensuring that they are better able to serve their clients and that consumer confidence is maintained. CAPIC Members are offered the best continuing Professional Development Education in the Industry. As the professional association for RCICs, CAPIC leads, connects, protects and develops the profession.

Preamble

The Immigration and Refugee Board of Canada (IRB) has launched consultation on a number of key files as part of its ongoing efforts to engage with stakeholders in a meaningful way on policies, initiatives and operational changes. The key files that are to be reviewed are the *Immigration Appeal Division (IAD) Rules, and the Chairperson's Guideline on Sexual Orientation and Gender Minority Individuals (SGM), Chairperson's Guideline on Detention, and the Immigration Division Rules (ID)*. The consultations directly reflect the importance that the Immigration and Refugee Board places on stakeholders in contributing and developing the policy process. *The Chairperson's Guidelines on Detention* provide guidance in the treatment of persons who are detained under Division 6 of Part 1 of the Immigration and Refugee Protection Act (IRPA). The Canadian Association of Professional Immigration Consultants will be focusing on the *Chairperson's Guideline 2: Detention* and respectfully recommends changing some provisions of the guidelines to be fairer and more transparent process of dealing with individuals and/or minors in detention.

Opinion/Input on Detention

The Canadian Association of Professional Immigration Consultants having reviewed the Chairperson's Guideline 2: Detention) commends the IRB for the proactive initiatives the Board is taking in ensuring and adapting policies to ensure both reflect the dignity of persons and the integrity of the immigration system.

CAPIC fully supports the consultation and review process and respectfully request that the following modifications be taken into consideration when devising the final Guidelines. It is our view that by considering the points below in the final policy, IRB will produce a policy that is very sound, clear in process and fair to all stakeholders in the process while maintaining program integrity and a highly efficient adjudicative system.



Recommendations for consideration:

Chairperson's Guideline 2: Detention

1.1.3 Section 58(1) of the IRPA establishes five grounds for detention that members of the Immigration Division must consider, when applicable, at a detention review. The purpose for this Guideline is to provide guidance with respect to the treatment of persons who are detained under the IRPA for the following grounds: as a danger to the public, as a flight risk, in cases involving security, and in cases where their identity has not been established.

Recommendation: Please note that only four grounds are listed. Kindly consider expanding the identity grounds to reflect that of IRPA 58(1) (d) (e).

1.1.4 Members must take into account the prescribed factors set out in Part 14 of the IRPR that relate to the grounds for detention and release. If a member determines that there are grounds for detention, there must be a consideration of "other factors" before a decision is made on detention or release, as follows: the reason for detention; the length of time in detention; whether there are any elements that can assist in determining the length of time that detention is likely to continue and, if so, that length of time; any unexplained delays or unexplained lack of diligence caused by the Department or the person concerned; and the existence of alternatives to detention. The factors listed in the IRPR, are not exhaustive.

Recommendation: Please consider revising by adding '*when/in considering the above*' after the last sentence in the paragraph.

3.1.1 The IRPA gives members of the Immigration Division the discretion to order the release of a permanent resident or a foreign national and to impose any conditions that it deems necessary. In cases where release from detention is considered, conditions of release should be tailored to the particular circumstances of the individual and would include, as appropriate, conditions monitoring whereabouts and conduct. Conditions of release need to be proportionate with the level of risk determined.

Recommendation: Kindly insert '*that individuals*' between "monitoring" and "whereabouts" in the paragraph.

3.1.3 The indefinite nature of a person's detention under the IRPA is only one factor to be considered at a detention review and cannot be treated as determinative.

Recommendation: Kindly insert '*a sole*' before the word "determinative."

3.1.6 However, a decision to maintain detention must not be "made solely on the basis of a refusal to cooperate with the minister's removal efforts. The other factors in s. 248 of the [IRPR] must always be considered and weighed before reaching a decision."

Recommendation: Please consider having the Minister provide to the Member proof and/or steps taken to ensure timely removal efforts.



3.1.8 The interests of a child who is held in an Immigration Holding Centre at the request of the detained parent is a factor to be weighed along with the other mandatory factors, or “other factors” listed in s.248 of the IRPR, when considering the release of the parent, however the overall focus remains on the detained parent.

Recommendation: CAPIC respectfully recommend that while focusing on the detained parent with a child, that the Member should consider the best interest of the child as well in relation to the detained parent’s release from detention.

3.1.9 The person concerned has the responsibility to find suitable alternatives to detention. Such alternatives must be presented at the earliest opportunity.

Recommendation: Please consider other factors as to why the person concerned is not able to find suitable alternatives to detention, for example, a lack of connection to the community or individual who can become a bondsperson.

4.1.3 The prescribed factors listed in section 245 of the IRPR are not exhaustive and can include the interests of a child of the person concerned in Canada as a factor in assessing whether the person will be motivated, because of the needs of the child, to comply with terms and conditions of release. The interests of the child would not be a primary factor but would be a factor to be considered on a case by case basis. The overall focus of determining whether the person concerned is a flight risk, however, remains on the detained parent.

Recommendation: Please consider the situation when the detainee is not a parent and clearly outline the process by which a decision will be rendered.

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

Recommendation: Though the Member must take bail into consideration when determining the conclusion, please consider clearly stating why bail is not a factor in a Member’s decision.

4.2.5 Members must consider the possibility that a person who has committed a serious crime in the past may seriously be thought to be a potential re-offender and therefore a danger to the public. However, while it is acceptable to use past conduct as a reliable indicator of future conduct, other factors should be considered, such as how much time has passed since prior criminal conduct and the circumstances in which they were committed.

Recommendation: Please consider having the Minister clearly establish how the person concerned would likely re-offend given their previous criminal history. It would prove greatly beneficial for the Member to consider whether there were any attempts to apply Rehabilitate or an application for Rehabilitation or Pardon in their home countries as a part of their assessment. Please clearly provide all reasoning as to whether the Minister believes the individual will re-offend when making a conclusion.

4.2.7 If there is evidence that prior criminal conduct was related to drug or alcohol addiction or mental health issues, members must consider whether the condition is sufficiently controlled to determine whether the person’s behaviour has changed.



Recommendation: Please consider the individuals motivation and plan to control their addiction and/or mental health issues. Additionally, kindly consider inserting *'in order'* after the word "controlled" in the paragraph.

4.2.8 Members must consider evidence that the person has associated with a criminal organization, such as gangs or organized crime, even if that person has no criminal convictions. Evidence of such associations is a factor that weighs in favour of a finding of danger to the public.

Recommendation: Please consider that though the ID does not deal with Political Opinion (IRPA 96) nor person in need of protection (IRPA 97), the nature of the relationship with the gangs or organized crime and whether the individual concerned has denounced such an association as an act of *political opinion* to be weighed when considering whether the individual is a danger to the public.

4.2.10 Members are not bound to follow determinations made in a court of law with respect to the granting or not of bail. Members must come to their own conclusions, taking into account all the facts in the case and the immigration context.

Recommendation: Kindly insert *'within'* between "and" and "the immigration context."

4.2.17 The conditions of release for someone found to be a danger to the public may include, wherever applicable:

iv. not having contact with certain people (e.g., the victim of domestic abuse)

Recommendation: Kindly add *'or gang members'* after "certain people" as another option.

xii. residing with a bondsperson or other person considered capable of exercising control over the individual.

Recommendation: Kindly insert *'and influence'* after "exercising control."

4.2.20 If a member is considering releasing a sex offender, the member must ensure that the conditions of release offset or neutralize the continued risk of re-offending, which may include registering for treatment in a sex-offender program, confinement to a particular location, curfew, and restricting or prohibiting contact with certain persons.

Recommendation: Kindly insert *'will'* after "release."

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

Recommendation: Please consider having the Minister satisfy the Member that the mere post of warrants, for instance a "Red Notice" are not conclusive evidence to determine the individuals criminality. Rather the Minister should bear in mind that certain warrants from nations are politically motivated to suppress dissent.

4.3.3 The question that must be answered by the member is not whether the evidence relied upon by the Minister is true or compelling, but whether that evidence is reasonably capable of supporting the Minister's suspicion of potential inadmissibility. It is for the Minister to decide what further



investigatory steps are needed. The member's supervisory jurisdiction on this issue is limited to examining whether the proposed steps have the potential to uncover relevant evidence bearing on the Minister's suspicion and to ensure that the Minister is conducting an ongoing investigation in good faith.

Recommendation: Kindly insert *'and timely manner'* after "good faith."

4.4.3 Members need to be cautious when considering release of a foreign national whose identity has not been established, however a lack of* identity does not mean that a member may not consider alternatives to detention. If a member is considering release in these circumstances, the imposition of appropriate terms and conditions of release must be instituted.

Recommendation: Kindly insert *'proven'* between "lack of" and "identity."

6.1.2 When a bondsperson is present and available to testify, before determining that this person is suitable to be a bondsperson, members should hear direct evidence from that *person.

Recommendation: Revising the sentence in the following manner: *'When a bondsperson is present and available to testify, before determining that this person is suitable or not to be a bondsperson, members should hear direct evidence from that proposed bondsperson.'*

6.1.3 Members must ensure that various issues relating to the proposed bondsperson are explored at the detention review to be able to assess the suitability of the person put forward. Members must consider how long the proposed bondsperson has known the person concerned and the nature of those ties. Members must consider whether the proposed bondsperson is aware of the history of the person concerned, including the immigration history.

Recommendation: Kindly revise and substitute "history" with *'and past criminality.'*

6.5.1 At the beginning of their reasons for decision members should briefly set out the relevant detention history of the person concerned.

Recommendation: Kindly revise and insert *'facts of'* instead of "relevant."



Conclusion

CAPIC-ACCPI commends the IRB's proactive approach of seeking stakeholder input via consultation sessions and the ability to provide submissions. We have recommended slight modifications which we hope the IRB will give due consideration to incorporating in the final policy *Chairperson's Guideline 2: Detention*.

The Canadian Association of Professional Immigration Consultants (CAPIC-ACCPI) as a stakeholder appreciates IRB's ongoing collaboration and dialogue/consultation with the stakeholders in an effort to collectively address issues and policies for continued effectiveness of the tribunals' adjudicative process and program integrity.

We thank IRB for the opportunity to provide this input in the drafting of important policy.

Respectfully Submitted,

A handwritten signature in blue ink, appearing to be 'Donald Igbokwe'.

Donald Igbokwe
President
CAPIC – ACCPI