

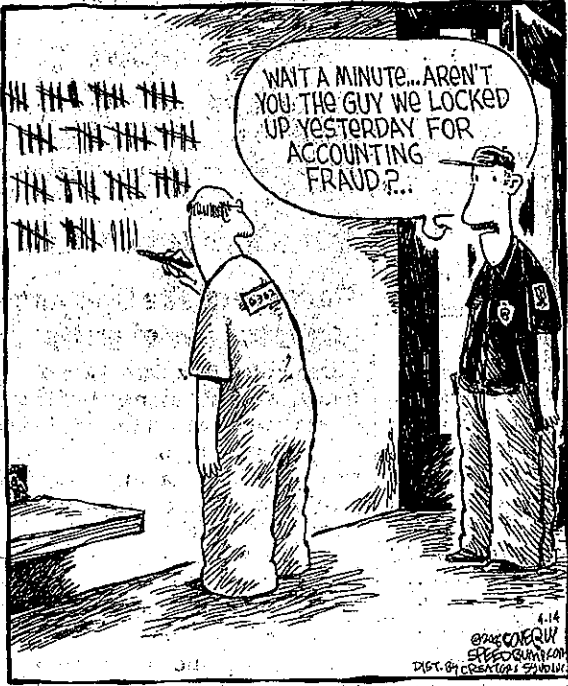
DETAINED AND TERRIFIED

IMMIGRATION DETAINEES AND THEIR RIGHT TO JUSTICE

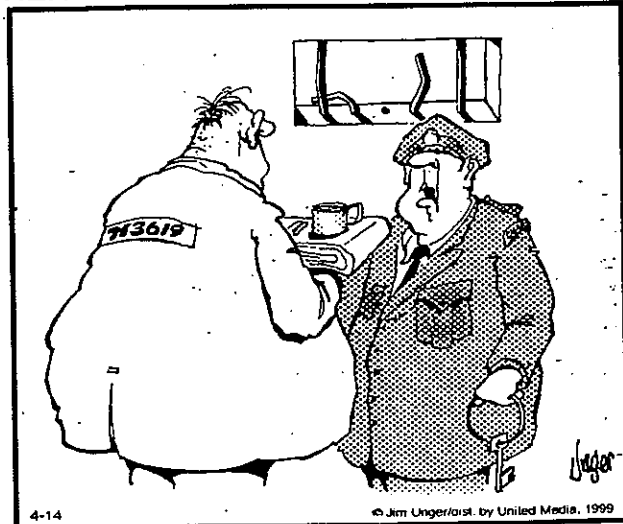
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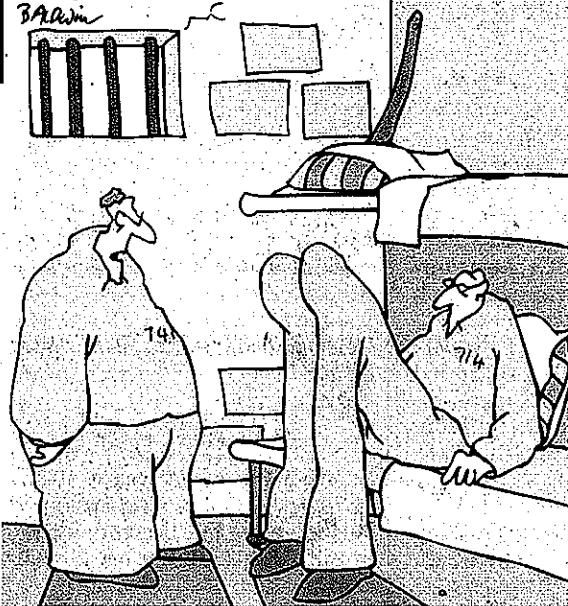
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"You're the only guy we can trust in this cell 'til we get those bars fixed."

CORNERED

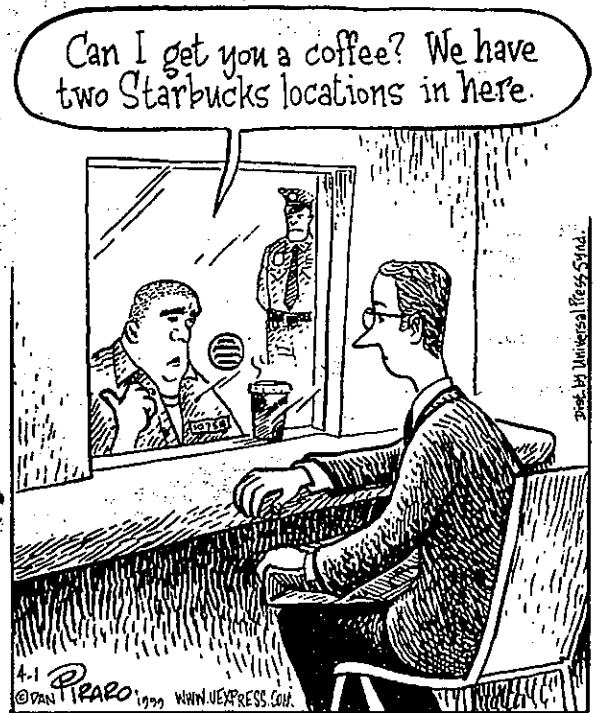
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"Man, how did they ever catch you?"

BIZARRO

By Dan Piraro



DETAINED AND TERRIFIED

1. What is a Detention Review?

Lay people (in which I include clients, their friends, relatives, and supporters), do not understand the term "Detention Review". Nor will they, or can we expect them to. They do, however, understand the term "Bail Hearing". There is, for our purposes, very little difference between the two proceedings. A "Bail Hearing" is the term used in the criminal courts and conducted pursuant to the Criminal Code, while a "Detention Review" is the term given the similar proceeding under the Immigration and Refugee Protection Act (IRPA).

The most significant difference between the two proceedings is as follows: with bail hearings under the Criminal Code, a hearing is convoked by application ahead of time, allowing considerable time for the parties to prepare their case. Under the Criminal Code, a detainee also has the right to waive a bail hearing, which counsel will often advise until the case can be fully and properly prepared. Not so under IRPA, where a Member must review the reasons for the detention by the CBSA following a statutorily mandated time period(s). Under IRPA, the legislation itself insists that a hearing, called a detention review, happen within 48 hours of the first arrest and detention. Ready or not, it will proceed, and the detainee cannot waive it.

The Canada Border Services Agency, which conducts the investigation, issues the warrant, then performs the arrest and detention, is therefore put at considerable advantage in regard to preparing for their case at hearing which will be within 48 hours of the detention. Indeed, they may have had weeks to prepare, whereas counsel and detainee only have hours. With the cards seemingly stacked against us, what do we do about it?

A detention review is the proceeding to determine whether the detainee will have his/her detention continued, ended outright, or whether an "Offer to Release" will be made to the detainee, conditional upon the happening of some conditions, possibly now and/or possibly for the future.

Be prepared for some rough justice. Cases often proceed on limited notice, in very difficult surroundings, and are based upon scant and unreliable evidence. The detainee's liberty and freedom has been severely denied, and a few strangers are being called upon to argue about whether the detention should be continued or ended with conditions.

2. Statutory Framework

The Immigration and Refugee Protection Act, and its Regulations, together contain the legislative scheme that underpins detention reviews. A brief review of the more salient provisions is therefore instructive.

<p>(i) THE ACT</p>

(a) Arrest and Detention With Warrant

A55(1): officer may issue a warrant for the arrest and detention of a permanent resident or a foreign national believed to be inadmissible and believed to be:

- a danger to the public; or
- unlikely to appear for examination, an admissibility hearing, or removal.

(b) Arrest and Detention Without Warrant

A55(2): officer may, without warrant, arrest and detain a foreign national believed to be:

- inadmissible and a danger to the public; or
- unlikely to appear for examination, an admissibility hearing, or removal from Canada; or
- unable to establish their identity.

(c) Detention on Entry

A55(3): a permanent resident or a foreign national may, on entry into Canada, be detained if the officer:

- considers it necessary to do so for the examination to be completed; or
- believes that the person is inadmissible on grounds of security or for violating human or international rights.

(d) Notice

A55(4): as soon as a person is taken into detention, an officer shall without delay give notice of the detention to the Immigration Division.

(e) Immigration Division

A54: The Immigration Division is the competent Division of the Board with respect to the review of reasons for detention.

(f) Release by Officer

A56: Immigration officers have the authority to arrest and to detain. But they also have the jurisdiction to order the release of the detainee from detention before the first detention review is held by the Immigration Division, if it is believed that the reasons for the detention in the first place no longer exist. The officer may impose any conditions, including payment of a deposit or the posting of a bond, that the officer considers necessary.

As a matter of practice, while this provision sounds hopeful that counsel might have the chance to be able to persuade an officer to order release before the first

detention review is conducted, it is extremely unlikely that you will have time to amass enough compelling evidence that could be sent and reviewed by the officer within the 48 hours prior to the statutorily mandated hearing.

(g) First Review of Detention

A57(1): within 48 hours of the subject being taken into detention, or without delay afterward, the Immigration Division must review the reasons for the continued detention.

This means that a Member of the Immigration Division will hear submissions from the Hearings Officer of the CBSA as to what the reasons were for the detention in the first place, and what the reasons are that the officer believes justifies continued detention.

(h) Subsequent Reviews of Detention

A57(2): if your client has not been released as a result of the first detention review (either because his continued detention was ordered or because he could not comply with the offer for release), then there is a mandatory provision under the Act that his/her continued detention must be reviewed:

- at least once in the next 7 days; and
- at least once in each subsequent 30-day period.

Any subsequent hearing is somewhat of a *de novo* hearing, however, the first document entered in such hearing is a transcript of the earlier hearing or hearings. A detention review is not precisely a trial *de novo*, because the Board Member is expected to take into account the evidence and the reasons pertaining to previous detention orders. But the Member must decide afresh at each hearing whether continued detention is warranted. The Member hearing each detention review must come to a new (but not necessarily different) conclusion. As a result, counsel must know the case to meet, which means access to each of the earlier determinations and the evidence upon which they have been heard and decided. To win where all the preceding hearings have been lost requires considerable effort, and must necessarily also include new evidence and circumstances.

Thanabalasingham, (2004) 9 January 2004 F.C.A, Stone, Rothstein, Sharlaw JJ.A..

"If a Member chooses to depart from prior decisions to detain, then clear and compelling reasons for doing so must be set out. The best way for the Member to provide clear and compelling reasons would be to expressly explain what has given rise to the changed opinion".

"Sections 57 and 58 allow persons to be detained for potentially lengthy if not indefinite periods of time, without having been charged let alone having been convicted of any crime. As a result, detention decisions must be made with

section 7 (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) of the Charter in mind."

(i) Presence

A57(3): the subject must be brought before the Immigration Division. This can be either in person at the Board's premises, in the jail (most often), by video conference, or simply by telephone conference.

(j) Release

A58(1): The Immigration Division shall order release unless it is satisfied, taking into account the prescribed factors (see Regulation 244 below) that:

- (a) they are a danger to the public; or
- (b) they are unlikely to appear for examination, an admissibility hearing, or removal from Canada; or
- (c) the Minister is suspicious that they are inadmissible on grounds of security or for violating human or international rights; or
- (d) the Minister believes that the person's identity has not been, but may be, established.

(k) Detention

A58(1): Detention may be ordered if the Division is satisfied that the person is subject to an examination, to an admissibility hearing, or to a removal order, and further that the person is a danger to the public or is unlikely to appear for the examination, the hearing, or his removal.

(l) Release Conditions

A58(3): If the Division orders the release of the subject, it may impose any conditions that it considers necessary, including the payment of a deposit or the posting of a bond (which would ensure compliance with the conditions).

(m) Minor Children: A60

Detention only as a measure of last resort

(ii) The Regulations: Detention and Release
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FACTORS TO BE CONSIDERED

A. Flight Risk: R245

- (a) fugitive from justice in a foreign jurisdiction;
- (b) compliance with any previous departure order;
- (c) compliance with any previous appearance required by immigration or criminal proceeding;
- (d) compliance with any previous conditions;
- (e) avoidance of examination, escape from custody, or attempt to do so;
- (f) association with smugglers or traffickers; and
- (g) whether or not strong community ties.

B. Danger to the Public: R246

- (a) Minister's opinion that a danger to the public;
- (b) Minister's opinion that a danger to the security of Canada;
- (c) people smuggling or trafficking;
- (d) conviction in (or outside) Canada of a sexual offence;
- (e) conviction in (or outside) Canada of an offence involving violence;
- (f) conviction in (or outside) Canada of an offence involving weapons;
- (g) conviction in (or outside) Canada of drug trafficking;
- (h) conviction in (or outside) Canada of importing/exporting drugs;
- (i) conviction in (or outside) Canada of drug production.

C. Identity not Established: R247(1)

- (a) the subject's co-operation in providing evidence/information of their identity, their parent's identity, their itinerary, their previous application for a travel document
- (b) the destruction of identity or travel documents, or the use of fraudulent documents; or

- (c) the provision of contradictory information or documents.

D. Other Factors to be Considered in all Cases: R248

If the Division determines that there are sufficient grounds to justify continued detention, the following factors shall (ie. must) be considered before a decision is made to order either detention or release:

- (a) the reasons for detention;
- (b) the length of time already spent in detention;
- (c) the length of time that detention is likely to continue;
- (d) unexplained delays or lack of diligence caused by either the Department or by the subject; and
- (e) the existence of alternatives to detention.

3. Chairperson's Guidelines on Detention

The Chairperson of the Immigration and Refugee Board has issued a Guideline in regard to detentions, which became effective on 12 March 1998. It has not been updated to comply with the IRPA, however, the principles are equally applicable today. It is available on the website of the IRB:

www.irb-cisr.gc.ca/en/about/guidelines/detention_e.htm

The Guideline covers long-term detention, the notion of "danger to the public", alternatives to detention, evidence, and procedure. It is required reading for counsel in this field of practice. It is 13 pages in length, and contains plenty of helpful notations, including caselaw.

In my office, I keep an active precedent file for Detention Reviews, in which is located a copy of the Guideline, copies of the salient and leading cases, and research memos I have done for some of the leading cases I have acted on. Whenever I am retained on a matter that does or could involve a detention review, this is the first file I reach for. Things happen on short notice, so it is prudent to be efficient with your time.

4. Retainer

Make sure that you have a retainer signed in writing, either by the detainee or by his/her supporters. Preferably by both. Normally, I get the retainer signed in my office by the

detainee's supporter who contacted me first, and then later that same day or the next, by the detainee him/herself when I first meet them at the jail.

5. Access to your client

When you are first retained, you must immediately make your best efforts to do the following:

- (i) Obtain the detainee's version of the events. This can be done first by interviewing the detainee's relatives, friends, colleagues, neighbours, employer, etc... Make phone calls, have meetings, get documents. Quickly!
- (ii) Call the Canadian Border Services Agency (CBSA), and track down the name of the officer responsible for the matter. Speak to the officer responsible, and obtain from the officer the officer's position in regard to detention/release. Due to privacy legislation, officers of the CBSA are not supposed to talk to you about any case in particular without first having a Release or Consent signed by the client. So, if you get stonewalled because you do not yet have the Release/Consent signed, you had better get yourself to the jail to get same signed, and fax it asap to the CBSA officer.
- (iii) Once you have the position of the CBSA, you will know how hard you need to work and what evidence you need to acquire, confirm, or rebut in order to prepare for the case. Normally, if there is going to be a Detention Review, it is because the CBSA is seeking continued detention, on either the primary ground of alleged danger to the public, or on the secondary ground of flight risk, or both. The detainee's identity may also be an issue. In any event, you have your work cut out for you, with little time to do it.
- (iv) Accessing your client is problematic. Communicating with them if an interpreter is required complicates the matter significantly. You will need to have a police check performed for any interpreter you plan to take into the jail. The jail can arrange this, but requires 48 hours to do so.

6. The Hearing

- (i) **Venue of Hearing**
It is usually held at the jail or detention facility where the detainee is being held. This creates its own limitations for the following reasons:
 - a. High security**
Immigration detainees are often kept in the maximum security portion of the jail. This makes access to your client very difficult, and time

consuming. Get to the hearing early, and count on delays. It will likely be impossible to get any other viva voce evidence into the hearing other than the testimony of the detainees, simply because as a jail, members of the public are not allowed into the high security areas where the hearings are normally held. Accordingly, to get the evidence before the Member of others who may have relevant statements, affidavit and unsworn statements are the only means to do so.

b. Hearing room

This is often very small, crowded, and lacking in privacy. It could be hot, noisy, and smelly. Privacy and confidentiality may be compromised. If you need to speak in confidence to your client prior to the commencement of the hearing, request to do so. If language is a barrier, this will only complicate matters, since you will need to use the interpreter of the IRB. Do not be shy to make these requests. Members know the difficulty of access, and will readily grant the request. Ask for 15 minutes, and use the time wisely to iron out with your client any matters that are not clear.

(ii) Proceedings

(a) Evidence

There are no statutory provisions at all regarding the matter of evidence in detention review proceedings.

Normally, the CBSA officer calls no witnesses, and merely reads into the record the notes of the investigating and arresting officers, who are not ordinarily present at the hearing. This means hearsay evidence not subject to cross-examination. In addition, the CBSA officer will likely file some documents, which, if you are lucky, you have seen the day at most before. Often, however, due to how quickly and without notice these detention reviews proceed, you may only see the documents relied upon by the CBSA at the hearing itself. There are no advance disclosure rules. Surprise can and does sometimes sink your case, however, it can also work to your advantage, since you as counsel are also not faced with any advance disclosure rules.

It is of considerable note that hearsay evidence, even unreliable, inconsistent, and implausible hearsay evidence, is frequently relied on by CBSA officers at these hearings. It is admitted, as long as it is relevant. Your job as counsel is to be better prepared than the CBSA officer, and to challenge not the admissibility of the evidence, but rather its reliability and ultimately its weight. Do so by the use of rebuttal evidence and submissions.

Credibility is often the central issue in these hearings. Your client will likely say that he cooperated with the investigation and the arrest, and further that he will comply with any conditions of release. He desperately wants his freedom, usually at any price or promise. CBSA often sees it differently. What is the Board Member to believe when documents are scant, witnesses non-existent, and cross-examination not pursued?

Despite the limitations to the proceedings, including the thin evidence and the alarming allegations of the CBSA, considering also the rather high burden of proof placed on the Minister of Citizenship and Immigration who is seeking continued detention, there is in my view a considerable deference shown by Members to the evidence and the position of the CBSA. No Board Member wants to have their name appear in the daily papers as the one who ordered the release of your client, only to have your client commit a horrible crime. Accordingly, you should expect that full unconditional release is rare indeed. Be prepared instead for some onerous conditions, such as cash bonds, performance bonds, and reporting in person. Make a reasonable submission regarding an alternative to detention.

Counsel will often have a great advantage over your CBSA counterpart if you receive the evidence of the CBSA in advance, and if you have the good fortune to obtain other evidence that is contradictory and more reliable to the evidence of the CBSA, or which more completely defends your client.

(b) Burden of Proof

Thanabalasingham, (2004) 9 January 2004 F.C.A, Stone, Rothstein, Sharlaw JJ.A..

"It is the Minister who must establish, on a balance of probabilities, that the detainee is a danger to the public, or is a flight risk, if he wants the detention to continue. The onus is always on the Minister to demonstrate that there are reasons which warrant detention or continued detention. Once the Minister has made out a prima facie case for the continued detention, the individual must lead some evidence or risk continued detention. The Minister may establish a prima facie case in a variety of ways, including reliance on reasons for prior detention".

(c) Submissions

After all the testimony is completed, documents are entered and reviewed, it is time to make submissions. The CBSA officer, who has the burden of proof, must proceed first. Counsel has the last say. This is your

opportunity to explain any weaknesses and propose reasonable alternatives to detention.

(d) The Decision

Members are required to give their decisions orally at the hearing. Natural justice and procedural fairness require that the reasons be sufficient and adequate. Take good notes while the reasons are being stated by the Member. Relatives and friends outside the jail will want to be briefed on how the proceedings unfolded, and win or lose, good notes will help you recreate the proceedings, the issues, and the results.

Request a copy of the decision and the reasons as soon as possible. The decision will come by either fax or mail from the offices of the IRB usually days, sometimes weeks later, because it merely amounts to a transcript of what the Adjudicator stated at the hearing. I often notice errors in the transcript, so be mindful of these and take corrective action if the errors are material.

The reasons of the Member must be distributed to the parties before the next hearing is held, in cases involving continued detention. Chase after them. The sooner you receive them, the better you are able to prepare for the next detention review.

(d) Other Noteworthy Cases

Sahin (1994), 19 October 1994, F.C.T.D. Rothstein J.
 Salilar (1995), 30 June 1995, F.C.T.D. MacKay J.
 Bhatti (1996), 8 May 1996, F.C.T.D. Noel J.
 Kidane (1997), 11 July 1997, Jerome A.C.J.
 San Vincente (1998), 27 January 1998, F.C.T.D. MacKay J.
 Sittampalam (2004), 17 December 2004, F.C., Blais J.