Federal Court of Appeal | Cour d'appel fédérale

Date: 20200807

Dockets: A-274-17
A-282-17

Citation: 2020 FCA 130

CORAM: **GAUTHIER J.A.**
STRATAS J.A.
RENNIE J.A.

BETWEEN:

ALVIN BROWN and
END IMMIGRATION DETENTION NETWORK

Appellants

and

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

Respondents

and

CANADIAN ASSOCIATION OF REFUGEE LAWYERS and
CANADIAN CENTRE FOR INTERNATIONAL JUSTICE

Interveners

Heard at Toronto, Ontario, on February 26 and 27, 2019.

Judgment delivered at Ottawa, Ontario, on August 7, 2020.

REASONS FOR JUDGMENT BY: RENNIE J.A.

CONCURRED IN BY: GAUTHIER J.A.
STRATAS J.A.

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REASONS FOR JUDGMENT

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I. Overview

[1] Enforcement of removal orders by the Canada Border Services Agency (CBSA) is an everyday occurrence in this country. In most cases, removal proceeds in an expeditious manner. But sometimes it does not. The person to be removed may not report. The receiving country may delay or refuse to issue the necessary travel documents. Sometimes the political situation in the receiving country is unstable, or removal carries an unacceptable risk of human rights violations. Significant delays can result, placing the person subject to removal in an administrative and legal limbo. The person has no right to remain in Canada but Canada has no ability to effect the removal.

[2] For certain foreign nationals, there may also be reasonable grounds to believe that they pose a danger to the public or are a flight risk and may not report to the CBSA for removal. In such cases, the Immigration Division (ID) of the Immigration and Refugee Board of Canada may order their arrest and detention pending removal (*Immigration and Refugee Protection Act*, S.C. 2001, c. 27, s. 55 (IRPA)).

[3] Over the course of a year, over 5,000 persons, inadmissible to Canada for various reasons, are held in immigration detention, either in immigration holding centres operated by the CBSA or in provincial correctional institutions. The vast majority of detentions are of short or intermittent duration—far less than 100 days. But some detainees are held for much longer. The appellant, Alvin John Brown, is an example of the latter.

[4] The Federal Court has described the facts surrounding Mr. Brown's stay in Canada and eventual removal (2017 FC 710, *per* Fothergill J. at paras. 9-18). He was found to be inadmissible to Canada on the basis of a series of criminal convictions. At the end of his term of imprisonment he was ordered detained pending removal because he was both a danger to the public and a flight risk. Notwithstanding the increasing length of Mr. Brown's detention, at each of his subsequent detention reviews the ID ordered that he continue to be detained.

[5] Mr. Brown was held in provincial correctional institutions in Ontario from September 2011 until his deportation to Jamaica five years later in September 2016. Despite repeated and continuous efforts, the CBSA was unable to obtain a travel document for Mr. Brown from the Jamaican High Commission during this time.

[6] In the Federal Court, Mr. Brown, together with the End Immigration Detention Network, a third party with public interest standing, challenged the constitutionality of the immigration detention regime established under sections 57 and 58 of the IRPA and sections 244 to 248 of the *Immigration and Refugee Protection Regulations*, S.O.R./2002-227 (Regulations). There, they contended that the regime violates sections 7, 9, 12 and 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

[7] Although Mr. Brown had been removed from Canada by the time of the hearing, no one asserted the objection of mootness. Nevertheless, the Federal Court considered mootness and, after reviewing the jurisprudence, exercised its discretion to hear the application in the public

interest. No one raised mootness in this Court and there is no reason on this record to second-guess the Federal Court's exercise of discretion.

[8] The Federal Court dismissed the appellants' Charter challenge. They now appeal to this Court on the basis of the following certified question:

> Does the [Charter] 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?

[9] Once a question is certified, all issues that bear upon the disposition of the appeal are at large (*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193 at para. 12 (*Baker*); *Mahjoub v. Canada (Minister of Citizenship and Immigration)*, 2017 FCA 157, [2018] 2 F.C.R. 344 at para. 50; *Lewis v. Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130, [2018] 2 F.C.R. 229 at para. 37).

[10] In this Court, the appellants renew their constitutional challenge. They are supported by two interveners: the Canadian Association of Refugee Lawyers and the Canadian Centre for International Justice. The interveners advocate for specific procedural protections for immigration detainees including mandatory release dates, early disclosure by the Minister of Public Safety of any evidence relevant to a detainee's case, and the imposition of an onus on the Minister of Public Safety to establish, with strong supporting reasons, that continued detention is warranted.

[11] Casting a shadow on the appellants' constitutional challenge is the Supreme Court of Canada decision, *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350 (*Charkaoui*). There, the Supreme Court prescribed the process and protections required to ensure that lengthy and indeterminate detention is consistent with detainees' rights under sections 7 and 12 of the Charter.

[12] The Supreme Court's conclusions in *Charkaoui* are set forth in paragraph 96:

> 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. 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 […]

[13] Elsewhere, at paragraph 105 of *Charkaoui*, the Supreme Court recognized that immigration detention may have to be or may practically end up being indeterminate: "[i]t is thus clear that while the *IRPA* in principle imposes detention only pending deportation, it may in fact permit lengthy and indeterminate detention or lengthy periods subject to onerous release conditions." It rejected the detainee's argument that after 5 years his detention had become indefinite and, thus, unconstitutional for that reason.

[14] The Supreme Court held that extended periods of detention under the IRPA do not violate the Charter if they are accompanied by regular review of the reasons for detention, the length of

detention, the reasons for the delay in removal, the anticipated future length of detention and the availability of alternatives to detention such as release on conditions (at paras. 110-117).

[15] But the Supreme Court also foresaw that cases could arise where a particular detention was not Charter compliant. In these circumstances, the Court concluded that, although prolonged detention under the regime established by the IRPA was constitutional, "[…] this does not preclude the possibility of a judge concluding at a certain point that a particular detention constitutes cruel and unusual treatment or is inconsistent with the principles of fundamental justice, and therefore infringes the *Charter* in a manner that is remediable under s. 24(1) of the *Charter*" (at para. 123).

[16] *Charkaoui* stands in the way of the appellants' argument that lengthy or indeterminate detention is *per se* unconstitutional. In response, the appellants launch a frontal attack on *Charkaoui*.

[17] The appellants contend that where removal is no longer reasonably foreseeable, release is the only constitutionally compliant outcome, and the failure of the IRPA to expressly require release "in these circumstances" renders the scheme constitutionally deficient. Analogizing to the principles expressed in *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631 (*Jordan*) the appellants contend that their section 7 and 9 Charter rights can only be protected by judicially mandated limits on the length of detention or, alternatively, that the scheme should be declared unconstitutional under section 52. They say that *Charkaoui* must be read in light of the principles expressed in *Jordan*.

[18] The appellants advance a second attack on the detention scheme. The appellants say the fact that the legislation grants a discretionary power that may be exercised in an unconstitutional manner renders the enabling provision unconstitutional. The appellants contend that for the detention provisions of the IRPA to pass constitutional muster, it must be impossible for the ID to order detention when there is no reasonable prospect of removal.

[19] The appellants and interveners also argue that the detention scheme offends section 7 of the Charter because it places an onus on detainees to justify why they should be released. As well, the appellants and interveners challenge the constitutionality of detention orders under section 12 of the Charter because the ID has no control over the location and conditions of detention. They also raise a procedural fairness challenge based on the limited disclosure by the Minister during detention hearings.

[20] The arguments challenging the detention scheme fail and so I would dismiss the appeal. However, as will be seen, ID members conducting detention reviews and judges sitting in judicial review, must consider Charter and administrative law standards. Although the appellants' challenge to the validity of the sections fails, many of their arguments are vindicated by what is said in these reasons concerning what judges conducting detention reviews must consider.

[21] All Charter analysis begins with an informed understanding of the legislation in question. The legislation must first be interpreted according to the accepted principles of statutory interpretation (*Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559 at

para. 26; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, 154 D.L.R. (4th) 193 at para. 21). And in examining the effects of the legislation, as is necessary when applying the Charter, we must understand how it operates against the backdrop of accepted common law and administrative law principles (see, *e.g.*, *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031, 125 D.L.R. (4th) 385 at 1049; *R. v. Khawaja*, 2012 SCC 69, [2012] 3 S.C.R. 555 at paras. 43-45; *R. v. Levkovic*, 2013 SCC 25, [2013] 2 S.C.R. 204 at para. 78; Ruth Sullivan, *Statutory Interpretation*, 3rd ed. (Toronto: Irwin Law, 2016) at 315).

[22] When the detention provisions are read in light of their text, context and purpose, there is no infringement of sections 7, 9 or 12 of the Charter. The detention scheme possesses the same hallmarks of constitutionality that allowed the Supreme Court in *Charkaoui* to find that extended periods of detention under the IRPA's security certificate detention scheme did not contravene sections 7 and 12 of the Charter. These hallmarks include robust and timely review of the continued need for detention, the ability to "consider terms and conditions that would neutralize the danger" and the "fashion[ing of] conditions that would neutralize the risk of danger upon release" together with power to order release if satisfied that the need for detention no longer exists (*Charkaoui* at paras. 117, 119-123).

[23] *Charkaoui* is also clear guidance from the Supreme Court, along with many other leading authorities, that the recourse against an improper exercise of discretion resulting in the over-holding of a detainee is an application to quash that exercise of discretion under administrative law principles and section 24 of the Charter, not to strike down the section under section 52 of the *Constitution Act, 1982*.

[24] Two opening observations are in order.

[25] First, this appeal involves nothing more than applying settled principles to specific legislation and a specific evidentiary record. There is no real dispute between the parties on the settled principles. Thus, I will not elaborate on either the general content of section 7 (see, *e.g.*, *Tapambwa v. Canada (Citizenship and Immigration)*, 2019 FCA 34, 69 Imm. L.R. (4th) 297 at paras. 76-90; *Kreishan v. Canada (Citizenship and Immigration)*, 2019 FCA 223, 438 D.L.R. (4th) 148 at paras. 78-87) or the two-stage process to be followed when applying section 7 (*Ewert v. Canada*, 2018 SCC 30, [2018] 2 S.C.R. 165 at para. 68 and *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101 at para. 58). It is sufficient to say that Mr. Brown's Charter rights are engaged, and that as a foreign national in Canada he has standing to challenge this legislative scheme using sections 7, 9 and 12 of the Charter (*Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, 17 D.L.R. (4th) 422 at 201-202; see also *R. v. Appulonappa*, 2015 SCC 59, [2015] 3 S.C.R. 754 at para. 23 (*Appulonappa*)). Nor is there any dispute over the scope and content of sections 7, 9 and 12.

[26] The second observation relates to the Supreme Court decision in *Canada (Public Safety and Emergency Preparedness) v. Chhina*, 2019 SCC 29, 433 D.L.R. (4th) 381 (*Chhina*), rendered while this appeal was under reserve and on which the parties made additional written submissions. A comment is required on the relevance of *Chhina* to the issues in this appeal.

[27] The constitutionality of the immigration detention scheme was not in issue before the Supreme Court in *Chhina*. The focus of that case was the availability of *habeas corpus* as an

alternative remedy to judicial review to determine the legality of a detention order. The case did not require a full interpretation of the IRPA detention provisions and none was done. The questions raised here have not been answered. Nor did the Supreme Court in *Chhina* reverse or cast any doubt on *Charkaoui*, which directly applies to the question before this Court.

II. The detention provisions of the IRPA comply with sections 7 and 9 of the Charter

[28] Under sections 34 to 37 of the IRPA, a foreign national may be inadmissible and liable to removal on grounds of security, a violation of human or international rights, serious criminality or organized criminality. Unless the removal order is stayed by the Federal Court, the foreign national against whom it is made "must leave Canada immediately and the order must be enforced as soon as possible" (IRPA, s. 48(2)).

[29] Under subsection 55(1), the ID may issue a warrant for the arrest and detention of a foreign national where there are reasonable grounds to believe they are inadmissible and pose a danger to the public or are a flight risk. No warrant is required for foreign nationals that are not protected persons, as defined under subsection 95(2) of the IRPA, and are a danger to the public or a flight risk, or whose identity cannot be confirmed (IRPA, s. 55(2)).

[30] Within 48 hours of arrest, or otherwise without delay, the ID is required to review the reasons for detention advanced by the Minister responsible for the CBSA, the Minister of Public Safety (IRPA, s. 57(1)). If the ID concludes that a detention order is appropriate, a second review must take place within the following seven days, and then again, if necessary, within every subsequent 30-day period (IRPA, s. 57(2)).

[31] Subsection 58(1) stipulates that grounds for detention may exist in five circumstances:

Release — Immigration Division

58. (1) 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

(a) they are a danger to the public;

(b) they are unlikely to appear for examination, an admissibility hearing, removal from Canada, or at a proceeding that could lead to the making of a removal order by the Minister under subsection 44(2);

(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;

(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;

Mise en liberté par la Section de l'immigration

58. (1) La section prononce la mise en liberté du résident permanent ou de l'étranger, sauf sur preuve, compte tenu des critères réglementaires, de tel des faits suivants :

a) le résident permanent ou l'étranger constitue un danger pour la sécurité publique;

b) le résident permanent ou l'étranger se soustraira vraisemblablement au contrôle, à l'enquête ou au renvoi, ou à la procédure pouvant mener à la prise par le ministre d'une mesure de renvoi en vertu du paragraphe 44(2);

c) le ministre prend les mesures voulues pour enquêter sur les motifs raisonnables de soupçonner que le résident permanent ou l'étranger est interdit de territoire pour raison de sécurité, pour atteinte aux droits humains ou internationaux ou pour grande criminalité, criminalité ou criminalité organisée;

d) dans le cas où le ministre estime que l'identité de l'étranger — autre qu'un étranger désigné qui était âgé de seize ans ou plus à la date de l'arrivée visée par la désignation en cause — n'a pas été prouvée mais peut l'être, soit l'étranger n'a pas raisonnablement coopéré en fournissant au ministre des renseignements utiles à cette fin, soit ce dernier fait des efforts

or	valables pour établir l'identité de l'étranger;
(e) the Minister is of the opinion that the identity of the foreign national who is a designated foreign national and who was 16 years of age or older on the day of the arrival that is the subject of the designation in question has not been established.	e) le ministre estime que l'identité de l'étranger qui est un étranger désigné et qui était âgé de seize ans ou plus à la date de l'arrivée visée par la désignation en cause n'a pas été prouvée.

[32] The language of Parliament in subsection 58(1) is clear and the context and purpose of section 58 does not change the plain meaning of that language. Under subsection 58(1), detention must cease unless the ID is satisfied, on a balance of probabilities, that a ground for detention exists. If a ground for detention is not established, the inquiry is at an end. Release is the default.

[33] But detention does not simply follow on proof of a ground for detention. Section 248 of the Regulations makes this clear. Before a detention order is made, the ID must proceed to the second stage and examine whether detention is warranted based on certain prescribed factors (see also Sasha Baglay & Martin Jones, *Refugee Law*, 2nd ed. (Toronto, ON: Irwin Law, 2017) at 389). The prescribed factors are as follows:

Other factors	**Autres critères**
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 :
(a) the reason for detention;	a) le motif de la détention;
(b) the length of time in detention;	b) la durée de la détention;
(c) whether there are any elements	c) l'existence d'éléments

that can assist in determining the length of time that detention is likely to continue and, if so, that length of time;	permettant l'évaluation de la durée probable de la détention et, dans l'affirmative, cette période de temps;
(d) any unexplained delays or unexplained lack of diligence caused by the Department, the Canada Border Services Agency or the person concerned;	d) les retards inexpliqués ou le manque inexpliqué de diligence de la part du ministère, de l'Agence des services frontaliers du Canada ou de l'intéressé;
(e) the existence of alternatives to detention; and	e) l'existence de solutions de rechange à la détention;
(f) the best interests of a directly affected child who is under 18 years of age.	f) l'intérêt supérieur de tout enfant de moins de dix-huit ans directement touché.

[34] These factors were first articulated by Rothstein J., then of the Federal Court, in *Sahin v. Canada (Minister of Citizenship & Immigration)* (1994), [1995] 1 F.C. 214, 5 Imm. L.R. (3d) 159 (Fed. T.D.) at 231 (*Sahin*). They were subsequently given legislative expression in section 248 of the Regulations, which came into force in 2002 (S.O.R./2002-227).

[35] In considering alternatives to detention, the ID may impose any conditions on the detainee that it considers necessary to mitigate the risks (IRPA, s. 58(3)). Either the Minister or the detainee may subsequently apply to vary these conditions on the basis that they are no longer necessary to ensure compliance.

[36] If the ID orders detention, the detainee is remitted to the custody of the CBSA. The CBSA may decide to place the detainee in an Immigration Holding Centre (IHC), or transfer the detainee to provincial authorities to be housed in a provincial correctional institution. The ID has no control over the privileges a detainee has access to while detained. If a detainee is dissatisfied

with the conditions of their detention, they can bring a judicial review application in the Federal Court, if housed in a federal institution, or, if in a provincial institution, in the provincial superior court using legislation such as the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1.

[37] It is clear from this review that the immigration detention scheme has all of the protections mandated by *Charkaoui* to ensure that extended periods of detention do not violate sections 7, 9 and 12 of the Charter. Detention reviews are timely and frequent: subsection 57(2) of the IRPA requires that detention be reviewed within 48 hours of arrest, within seven days after that, and every 30 days for the detention's duration. The onus is on the Minister to establish both a ground of detention and that detention is warranted based on mandatory, case-specific factors. Detention may only be ordered where there are no appropriate alternatives, and, in considering alternatives to detention, subsection 58(3) authorizes the ID to impose any conditions that it considers necessary to neutralize the risk associated with release. The legality of the detention is subject to judicial scrutiny in the Federal Court.

[38] The Supreme Court has recently suggested in *obiter* in *Chhina* (at para. 60) that the factors under section 248 of the Regulation may be deficient or vague because they do not expressly require release if removal is not foreseeable. This *obiter* statement, made in passing, does not repeal the central holding of the Supreme Court in *Charkaoui*, namely that an ongoing detention does not automatically run afoul of the Charter. In *Charkaoui*, the section 248 factors formed the heart of the issue before the Court. It would be startling if some idle words in *Chhina* displaced the detailed, well-considered and necessary holding in *Charkaoui*, almost as if by a side-wind.

[39] Nevertheless, the appellants say that the legislation does not go far enough. They note that the IRPA is constitutionally flawed in that does not expressly say that there can be no detention in the absence of a reasonably foreseeable prospect of removal and does not impose a maximum period of time during which a person can be detained. For the reasons that follow, these arguments fail.

III. Limitations on the power of detention

[40] A statutory power, such as the power to detain in this case, can only be used for the purposes for which it was intended. This principle of administrative law stems from the requirement that all government action must be authorized by a grant of legal authority. Whether express or implied, the text of a statute, seen in light of its context and purpose, prescribes the limits of the legal authority of a decision-maker exercising discretionary power (Brown and Evans, *Judicial Review of Administrative Action in Canada*, (Toronto: Thomson Reuters, 2019) at § 15:2241; *Entertainment Software Assoc. v. Society Composers*, 2020 FCA 100 at para. 88 (*Entertainment Software Assoc.*) and cases cited therein). The classic statement of this principle is found in *Roncarelli v. Duplessis*, [1959] S.C.R. 121, 16 D.L.R. (2d) 689 (*Roncarelli*) where Rand J. said (at 140):

> In public regulation of this sort there is no such thing as absolute and untrammelled 'discretion', that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute.[...][T]here is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption.

[41] Citing *Roncarelli*, the Supreme Court in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1 observed (at para. 108) (*Vavilov*):

> […] while an administrative body may have considerable discretion in making a particular decision, that decision must ultimately comply "with the rationale and purview of the statutory scheme under which it is adopted": *Catalyst* […]. Likewise, a decision must comport with any more specific constraints imposed by the governing legislative scheme, such as the statutory definitions, principles or formulas that prescribe the exercise of a discretion: see *Montréal (City)*, at paras. 33 and 40-41; *Canada (Attorney General) v. Almon Equipment Ltd.*, 2010 FCA 193, [2011] 4 F.C.R. 203 (F.C.A.), at paras. 38-40.

[42] The IRPA has many purposes and objectives, including ensuring the safety and security of Canadians and the promotion of international justice by denying safe harbour for criminals or those who pose a security risk (IRPA, paras. 3(1)(*h*), (*i*)). The power to detain, as set out in subsection 58(1), is one of the mechanisms by which those purposes are realized. That detention can only be ordered where it is linked, on the evidence, to one of the enumerated grounds listed in subsection 58(1) is an application of this principle. The power to detain must always remain tethered to the IRPA's purposes and objectives.

[43] The implicit requirement that the power to detain can only be exercised where it facilitates the purposes of the IRPA has guided the IRPA's interpretation for decades. In *Sahin* at 226-229, Rothstein J. drew on *R. v. Governor of Durham Prison, Ex parte Singh*, [1984] 1 All E.R. 983, [1984] 1 W.L.R. 704 (Q.B.). There, in considering the immigration detention power provided by the *Immigration Act, 1971*, Woolf J. (as he then was) concluded that the Act was subject to two implicit limitations: the power to detain was limited to the purposes of removal and the responsible minister must move "with all reasonable expedition" to ensure removal.

[44] Section 58 of the IRPA authorizes detention for several purposes, including pending determination of identity, pending a determination of admissibility or on the grounds of public safety. The power of detention will be exercised principally, but not exclusively, pending removal. Where detention is for the purposes of removal, and there is no longer a possibility of removal, detention on this ground no longer facilitates the machinery of immigration control and the power of detention cannot be exercised. Detention must always be tethered, on the evidence, to an enumerated statutory purpose. To conclude, the IRPA is not constitutionally deficient because it does not state expressly that which the law already requires.

[45] This conclusion is not altered by the Charter.

[46] Interwoven with the modern approach to the interpretation of legislation is the presumption that Parliament intends to enact legislation in conformity with the Charter. If a legislative provision can be read both in a way that is constitutional and in a way that is not, the former reading should be adopted (*Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, 59 D.L.R. (4th) 416 at 1078 (*Slaight*); *R. v. Swain*, [1991] 1 S.C.R. 933, 125 N.R. 1 at 1010; *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, 93 D.L.R. (4th) 36 at 660; *R. v. Lucas*, [1998] 1 S.C.R. 439, 157 D.L.R. (4th) 423 at para. 66).

[47] The presumption of compliance is that "the legislature *intends* to make legislation that complies with the constitution, and to the extent possible legislation is therefore interpreted to achieve that result" [emphasis in original] (Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham: Lexis Nexis, 2014) 523, at § 16.3 (*Sullivan on the Construction of*

Statutes)). This principle is engrained in Supreme Court of Canada jurisprudence dating back over half a century (see *McKay et al. v. The Queen*, [1965] S.C.R. 798, 53 D.L.R. (2d) 532 at 803-804). In *R. v. Sharpe*, 2001 SCC 2, [2001] S.C.R. 45 at para. 33, McLachlin C.J.C. confirmed the presumption's application in situations where Charter rights are implicated. More recently, the Supreme Court has said that the detention provisions of the IRPA, the very legislation in question here, ought to be interpreted "harmoniously with the *Charter* values that shape the contours of its application" (*Chhina* at para. 128, Abella J., dissenting but not on this point).

(a) *Jordan* distinguished

[48] Nevertheless, the appellants and interveners contend that the Supreme Court has changed the law in the relatively recent, post-*Charkaoui* decision of *Jordan*. They say that the Supreme Court has now recognized that in some situations maximum time limits must be imposed to ensure Charter compliance. Mr. Brown argues the appropriate maximum limit in detention is six months, while the End Immigration Detention Network argues that it is three months; after expiry of those limits, they say the detention is arbitrary and violates sections 7 and 9.

[49] *Jordan* does not alter the constitutional holdings in *Charkaoui*. It is not authority for the proposition that sections 7 and 9 of the Charter require fixed limits on detention.

[50] In *Jordan*, the Supreme Court established ceilings beyond which pre-trial delay becomes presumptively unreasonable under section 11*(b)* of the Charter. Beyond the ceiling, the burden shifts to the Crown to rebut the presumption of unreasonable delay based on exceptional

circumstances. The ceiling was set at 18 months for offences tried in provincial court, and 30 months for those tried in the superior court or those tried in provincial court after a preliminary inquiry (*Jordan* at para. 105).

[51] The objective of the guidelines established in *Jordan* was to protect the constitutional right to trial within a reasonable time under section 11*(b)* of the Charter. But the considerations which prompted the Court to establish those guidelines contrast markedly with those surrounding immigration detention. As I will explain, the differences between the criminal justice system and that of immigration detention could not be greater.

[52] Together, the federal and provincial governments have complete control over almost every aspect of the criminal justice system and the variables that affect delay. The federal government has responsibility for substantive criminal law and criminal procedure via the *Criminal Code*, R.S.C. 1985, c. C-46. The construction of courtrooms, appointment of judges, staffing of provincial courts and prosecutors, and the resources available to police to organize disclosure are all within the legislative competence of either the federal or provincial governments.

[53] In contrast, while removal is one of the objectives of detention, Canada does not have complete control over its realization. Removal may be frustrated by political turmoil in the receiving state. Removal may be delayed by a dearth of evidence as to identity (see, *e.g.*, *Canada (Public Safety and Emergency Preparedness) v. Rooney*, 2016 FC 1097, [2017] 2 F.C.R. 375). Travel documents must be obtained from a great number and diversity of countries, some of

which may not be in a hurry to have a particular national returned. Each will have a different view of what constitutes a timely administrative response to requests for travel documents. Removal is dependent on the cooperation of the receiving state, which, for a myriad of reasons, may be reluctant to or incapable of issuing a travel document. Mr. Brown's situation is a good example. In spite of various, often unanswered, entreaties on the part of the CBSA, it took the Jamaican government nearly five years to confirm Mr. Brown's nationality and issue a travel document. With the document finally in hand, the CBSA deported Mr. Brown the next day.

(b) Other jurisdictions and international law

[54] The appellants rely on international law and the law of foreign jurisdictions to argue that a textual reading of the IRPA pertaining to immigration detention is inconsistent with basic international norms.

[55] There is a well-established presumption that, where possible, Canada's domestic legislation should be interpreted to conform to international law (*R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292 at para. 53 (*Hape*)). "Where possible" is a key qualifier (*Entertainment Software Assoc.* at paras. 76-92). Absent contrary indication, legislative provisions are also presumed to observe "the values and principles of customary and conventional international law" (*Hape* at para. 53; *B010 v. Canada (Citizenship and Immigration)*, 2015 SCC 58, [2015] 3 S.C.R. 704 at para. 47; *Sullivan on the Construction of Statutes* at §18.6; see also *de Guzman v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 436, [2006] 3 F.C.R. 655 at paras. 82–87 and *Entertainment Software Assoc.* at paras. 89-90).

[56] Therefore, both Canada's international treaty obligations and the principles underlying international law can play a role in the interpretation of Canadian laws. This is reinforced by paragraph 3(3)*(f)* of the IRPA, which directs that the Act "is to be construed and applied in a manner that […] complies with international human rights instruments to which Canada is signatory."

[57] There is, however, an important counterweight to these principles—the doctrine of Parliamentary supremacy. An unambiguous provision must be given effect even if it is contrary to Canada's international obligations or international law (*Németh v. Canada (Justice)*, 2010 SCC 56, [2010] 3 S.C.R. 281 at para. 35; *Schreiber v. Canada (Attorney General)*, 2002 SCC 62, [2002] 3 S.C.R. 269 at para. 50; *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324, 74 D.L.R. (4th) 449 at 1371; *Gitxaala Nation v. Canada*, 2015 FCA 73 at para. 16; *Hape* at para. 54; and see generally the comprehensive discussion in *Entertainment Software Assoc.* at paras. 76-92).

[58] There is no doubt as to the design, operation or effect of the detention provisions. The appellants have not identified ambiguities or duelling interpretations that would open the door to an interpretation most consistent with international law. Reduced to its essence, the appellants' argument is simply that in some jurisdictions immigration detention is dealt with somewhat differently. Leaving section 1 of the Charter aside, in light of Parliament's clear legislative choice as to the design of the immigration detention scheme, the practices or legislative frameworks of other jurisdictions are irrelevant.

[59] In any event, as the Federal Court concluded, the Canadian immigration detention scheme is consistent with that of the United Kingdom. The UK legislation does not mandate fixed periods of maximum detention but, as in section 248 of the Regulations, articulates a number of discretionary considerations relevant to whether a detention order should issue. Turning to the European Union, while the EU Return Directive does set a maximum period of detention of 18 months, member states are not required to comply with this limit where third country nationals are denied entry at a country's border or where, like Mr. Brown, they are being returned following inadmissibility rulings arising from criminal convictions. The Ontario Court of Appeal, in hearing Mr. Brown's *habeas corpus* application, did not find his arguments grounded in international law to be persuasive (*Brown v. Canada (Public Safety)*, 2018 ONCA 14, 420 D.L.R. (4th) 124 at paras. 37-38).

(c) Conclusion on sections 7 and 9

[60] The immigration detention regime is constitutionally sound and does not infringe sections 7 or 9 of the Charter. No principle of statutory interpretation requires that, to ensure constitutionality, the legislature must state that which the law already requires. To require an express statement that the power of detention can only be exercised where there is a real possibility of removal would be to read in a redundancy. The statute books of our land would read very differently if, to ensure constitutionality, they had to codify all the applicable common law and constitutional law principles that frame the interpretation and understanding of legislation.

IV. Discretion and constitutionality

[61] The appellants advance an alternate argument. They contend that the question to be answered is not whether the legislation can be applied in a constitutionally sound manner, but rather whether the ID is empowered by the legislation to violate the detainees' Charter rights. Put otherwise, because the discretion in section 248 is not expressly subordinated to the obligation to release in the face of an unreasonably lengthy detention or a removal that is not reasonably foreseeable, the scheme is constitutionally defective. The appellants focus on the scope of the word "consider" and the fact that the duration of detention is but one factor to be considered in section 248 of the Regulations. They say that a constitutionally compliant statute is one under which unconstitutional over-holding is impossible.

[62] This argument is inconsistent with established methodology of Charter analysis. As I will explain, the appellants' argument invites this Court to do precisely what the Supreme Court has instructed us not to do since the inception of the Charter.

[63] The first question a court must ask in any Charter challenge is whether the infringement arises from the provisions of the legislation or whether it arises from a discretion granted by the legislation.

[64] A statutory provision cannot be interpreted in a manner that grants discretion to infringe the Charter unless such infringement is mandated by Parliament. The comments of Lamer J. (as he then was) in *Slaight* are apposite (at 1078):

> […] As the Constitution is the supreme law of Canada and any law that is inconsistent with its provisions is, to the extent of the inconsistency, of no force or effect, *it is impossible to interpret legislation conferring discretion as conferring a power to infringe the* Charter, *unless, of course, that power is expressly conferred or necessarily implied*. Such an interpretation would require us to declare the legislation to be of no force or effect, unless it could be justified under s. 1. Although this Court must not add anything to legislation or delete anything from it in order to make it consistent with the *Charter*, there is no doubt in my mind that it should also not interpret legislation that is open to more than one interpretation so as to make it inconsistent with the *Charter* and hence of no force or effect. *Legislation conferring an imprecise discretion must therefore be interpreted as not allowing the* Charter *rights to be infringed*.
>
> [Emphasis added]

[65] When a party attacks the validity of a legislative provision, the relevant inquiry is whether *the law* being attacked produces an unconstitutional effect. Where unconstitutional acts are committed under constitutional laws, the Supreme Court has noted that "[t]he acts of government agents acting under such regimes are not the necessary result or 'effect' of the law, but of the government agent's applying a discretion conferred by the law in an unconstitutional manner. Thus, section 52(1) is not applicable. The appropriate remedy lies under s. 24(1)" (*R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96 at paras. 59-60 (*Ferguson*); see also *Schachter v. Canada*, [1992] 2 S.C.R. 679, 93 D.L.R. (4th) 1 at 719-720, Lamer C.J.C.).

[66] *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 S.C.R. 1120 (*Little Sisters*) is also instructive. In that case, the appellants argued that the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.) and *Customs Tariff*, R.S.C. 1985, c. 41 (3rd Supp.) infringed their section 2*(b)* and section 15 Charter rights. The argument focused in part on the unconstitutionality of the prohibition against obscenity, set out in the *Criminal Code*, R.S.C. 1985, c. C-46 when *applied* by customs officers, with Little Sisters arguing that a regulatory

structure open to maladministration was unconstitutionally under-protective of their constitutional rights (at para. 71).

[67] The Supreme Court held that there is no constitutional rule that requires Parliament to address, affirmatively, the customs treatment of constitutionally protected expressive material by legislation rather than by way of regulation, ministerial directive or even departmental practice. Parliament is entitled to proceed on the basis that its enactments "will be applied constitutionally" by the public service (at para. 71).

[68] The Supreme Court found that the source of the problem lay with customs officials who had been acting outside of the constitutionally sound statutory framework by specifically targeting homosexual erotica in violation of section 15(1) of the Charter. Binnie J., writing for the majority of the Court, stated "[...] there is nothing on the face of the Customs legislation, or in its necessary effects, which contemplates or encourages differential treatment based on sexual orientation" (at para. 125).

[69] As in the case before us, the appellants' complaint in *Little Sisters* was about what Parliament did not enact, rather than what it did enact. For this reason, Binnie J. distinguished cases like *R. v. Morgentaler*, [1988] 1 S.C.R. 30, 44 D.L.R. (4th) 385 where the legislative scheme itself was held to be unworkable (*Little Sisters* at paras. 72, 128).

[70] The appellants rely on *Appulonappa* for the proposition that the legislation at issue is defective because it does not preclude the possibility of unconstitutional over-holding.

[71] In *Appulonappa* the Supreme Court found that section 117 of the IRPA, which criminalized the smuggling of aliens into Canada, was unconstitutionally overbroad and contrary to section 7 insofar as it captured humanitarian efforts, mutual aid amongst asylum-seekers or individuals who assisted close family members. The Court found that subsection 117(4), which required that the Attorney General must consent for a prosecution to proceed under section 117, could not save the provision because it was *not impossible* that the Attorney General could consent to prosecution in a case that was overbroad of the legislative purpose (at paras. 74-77).

[72] *Appulonappa* does not stand for the proposition that constitutional compliance depends on the "impossibility" of an unconstitutional exercise of discretion.

[73] In that case, the residual prosecutorial discretion of the Attorney General was advanced as an alternate argument to cure the admittedly overbroad and constitutionally infringing provision of the *Criminal Code*. Put otherwise, it was argued that the overbreadth of section 117 was remedied by the Attorney General's discretion to choose not to prosecute. The Supreme Court rejected that argument. The standard of "impossibility" was premised on a finding that the charging provisions were, in and of themselves, infringing.

[74] Here, in contrast, the scheme is constitutional. Where there are regular detention reviews that give full and fair consideration to the non-exhaustive considerations in section 248, prolonged detention is constitutional. Rather than being a source of unconstitutionality, the existence of discretion ensures that the Charter rights of detainees receive full consideration in light of their particular circumstances.

[75] In *Canadian Civil Liberties Association v. Canada (Attorney General)*, 2019 ONCA 243, 433 D.L.R. (4th) 157 (*Civil Liberties*) the Ontario Court of Appeal considered a constitutional challenge to sections 31-37 of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20. The Court held that the provisions, which confer discretion on the administrative head of a federal penitentiary to order administrative segregation of inmates based on a number of factors, infringed section 12 of the Charter. The Court, in analyzing the scheme, considered whether the scheme itself was unconstitutional or whether it simply permitted unconstitutional maladministration.

[76] Before the Court of Appeal, the Attorney General argued that the Act, properly interpreted, had safeguards that rendered it capable of constitutional compliance (*Civil Liberties* at para. 102). The applications judge had accepted this argument, and concluded that the legislative scheme, even though it permits prolonged segregation, would not "*inevitably result* in the treatment of an inmate which is grossly disproportionate to the safety risk the inmate presents" [emphasis added] (*Corporation of the Canadian Civil Liberties Association v. Her Majesty the Queen*, 2017 ONSC 7491, 140 O.R. (3d) 342 at para. 269).

[77] The Ontario Court of Appeal disagreed. It held, in part because the discretion granted under the Act only required the institutional head to "consider" the inmates' health prior to making segregation decisions, that it was "not impossible" the legislation's application could result in grossly disproportionate treatment (at paras. 105, 110, 113). Based on this and other factors, the Court found the legislation to infringe section 12.

[78] For the reasons I have given, I do not agree that the litmus test for constitutionality is that it must be impossible to exercise discretion in an unconstitutional manner. The word "consider", if one follows the reasoning of the Ontario Court of Appeal, is not to be read in a manner that is consistent with the Charter. However, this is the opposite of what the Supreme Court, from *Slaight*, through to *Ferguson* and *Little Sisters* and beyond, has instructed. A statutory grant of discretionary power should be read to require that it be exercised in a constitutional way, unless the statutory power itself impliedly or expressly authorizes infringement of the Charter, in which case the statutory grant itself may be subject to Charter challenge (*Slaight* at 1078). In this case, the statutory grant of discretionary power uses the word "consider", an open-ended grant of discretion. Far from precluding the decision maker from having regard to Charter standards when assessing the appropriateness of detention, it requires it.

[79] The guidance arising from *Slaight*, *Ferguson* and *Little Sisters* directly applies to and disposes of the appellants' argument that the legislation is defective because it does not expressly prohibit detention when removal is not reasonably foreseeable. There is no proposition of law that legislation, to pass constitutional muster, must exclude all possibility of unconstitutional exercises of discretion. If that were the case, the Supreme Court would have been mistaken in *Charkaoui* when it determined that the remedy for an immigration detention beyond a permissible length lay in section 24(1) (at para. 123).

[80] The Charter does not require that the possibility of maladministration pursuant to a statutory grant of discretion be eradicated from statutes. Rather, the Charter requires that discretion be guided by objective criteria that are capable of identification, articulation and

judicial supervision. This is readily demonstrated by three analogous situations: section 24(2) of the Charter, pre-trial detention or bail provisions, and the provisions of the *Criminal Code* dealing with release pending appeal of a conviction. A comparative review of the broad discretion granted under these provisions demonstrates that the discretion to detain under section 58 of the IRPA and section 248 of the Regulations is constitutionally compliant.

[81] In *Mills v. The Queen*, [1986] 1 S.C.R. 863, 29 D.L.R. (4th) 161 (*Mills*), McIntyre J. commented on section 24(2) of the Charter and the authority of a court to grant any remedy which it considers "appropriate and just in the circumstances", and concluded that it was "difficult to imagine language which could give the court a wider and less fettered discretion" (at 965). Nonetheless, section 24(2) was "an acceptable statutory standard to overcome vagueness" (*R. v. Farinacci* (1993), 109 D.L.R. (4th) 97, 86 C.C.C. (3d) 32 (Ont. C.A.) at 115 (*Farinacci*)).

[82] The circumstance of bail pending appeal also illustrates the point that broad statutory language will not offend constitutional standards where it is capable of judicial definition. In *Farinacci*, the Ontario Court of Appeal considered the constitutionality of subsection 679(3) of the *Criminal Code*, which leaves to appellate courts to determine whether detention pending appeal is "necessary in the public interest." Citing *Mills*, Arbour J.A. concluded that the discretion to balance the public interest and public safety was not vague or unfettered (at paras. 114-115).

[83] The discretion conferred by the *Criminal Code* provisions in respect of initial show-cause hearings and bail review hearings also serves as a useful comparator against which the discretion

granted under section 248 of the Regulations can be tested. These provisions confer a broader and vaguer discretion on the judge or justice of the peace at the initial show cause hearing than the detention provisions of the IRPA. They too have survived constitutional challenge.

[84] As under the IRPA, under subsection 515(1) of the *Criminal Code* release is the default outcome at the initial bail hearing (*R. v. Myers*, 2019 SCC 18, [2019] 2 S.C.R. 105 at para. 1). Mirroring the language and structure of section 58 of the IRPA and section 248 of the Regulations, subsection 515(1) states that the accused shall be released unless the prosecutor can show cause why the accused should be detained or released under conditions. Some of the grounds under which a justice may deny bail mirror the grounds for detention under the IRPA scheme. In order for a justice of the peace or a judge to order pre-trial detention, the Crown must establish that there is a flight risk or that detention is necessary for the protection or safety of the public (*Criminal Code*, s. 515(10)(a) and (b)).

[85] Other grounds bear no resemblance. In contrast to the immigration detention regime, paragraph 515(10)*(c)* of the *Criminal Code* grants a right to detain if the judge is of the view that "detention is necessary to maintain confidence in the administration of justice having regard to all the circumstances" surrounding the offence. The exercise of that discretion is informed by a number of statutory criteria, but no instruction is given as to how these criteria are to be weighed or how they relate to the grounds of detention (see, *e.g.*, *R. v. St. Cloud*, 2015 SCC 27, [2015] 2 S.C.R. 328 (*St. Cloud*)). These are the same criticisms that the appellants make of the immigration detention regime.

[86] In respect of certain offences, there is a reverse onus at the initial show cause hearing on the accused to demonstrate that they should be released. The reversal of onus is constitutional (*R. v. Morales*, [1992] 3 S.C.R. 711, 144 N.R. 176). In contrast, there are no reverse onus provisions under the IRPA and the onus is always on the Minister to justify detention at each and every detention review.

[87] Bail reviews under sections 520 and 521 of the *Criminal Code* are distinguishable from the current case. They are not *de novo* hearings and a detention or release order is only set aside where admissible new evidence shows a material or relevant change in circumstances, where there has been an error of law or where the decision is clearly inappropriate (*St. Cloud* at paras. 6, 94, 110, 120-121, 139). In the last of these situations, "a reviewing judge cannot simply substitute his or her assessment of the evidence for that of the justice who rendered the impugned decision" (*St. Cloud* at para. 6). In sharp contrast to bail review, and as will be discussed, each and every immigration detention review is a fresh, *de novo* determination of whether detention is warranted.

[88] Whether to order the pre-trial release of an accused involves a delicate balancing of all of the relevant circumstances (*St. Cloud* at para. 6). The same is true for whether to order detention pending deportation. As McLachlin C.J.C. noted in *Charkaoui*, the section 248 criteria—rather than being a source of some deficiency—are the guarantors of constitutional compliance (at paras. 110-117). The section 248 factors are "prescribed" factors which "must" be taken into account and ensure that extended periods of detention do not violate the Charter (paras. 109-123). The discretion the factors confer is precisely what ensures sensitivity to the context and

circumstances of the individual case—a requirement under *Charkaoui* for constitutional prolonged detention (at para. 107).

V. A detention review hearing that complies with the Charter and administrative law

[89] What are the defining characteristics of a detention review that complies with the Charter and administrative law? This engages substantive legal questions concerning the need for a nexus to an immigration purpose, compliance with sections 7, 9 and 12 of the Charter, the burden of proof, the relevance of previous detention decisions, and the content of procedural fairness.

(a) The nexus to an immigration purpose

[90] The factors in section 248 of the Regulation, as law, must be followed. But on top of that, in order for continued detention to be legal under IRPA, there must be a nexus between detention and an immigration purpose. If that is missing, detention under IRPA is no longer possible.

[91] Once again, the Supreme Court has already gone some way towards giving us guidance on this. Detention in this context is available only where it is reasonably necessary for immigration purposes: *Charkaoui* at para. 124, citing *R. v. Governor of Durham Prison, ex parte Singh*, [1984] 1 All E.R. 983 (Q.B.) and *Zadvydas v. Davis*, 533 U.S. 678 (2001). Absent a "possibility of deportation", detention in this context is no longer possible: *Charkaoui* at para. 125-127, citing *A. v. Secretary of State for the Home Department*, [2005] 3 All E.R. 169, [2004] UKHL 56.

[92] In assessing the presence of an immigration nexus, *Charkaoui* tells us that detention may be lengthy and it may be indeterminate. *Charkaoui* instructs that length itself is not the only relevant metric, nor is the fact that the date of removal is unknown; indeed, if the date of removal were known, it is doubtful that the parties would be before the court. When examining the constitutionality of indeterminate detention the question is whether removal, and not the precise date on which removal will occur, remains a possibility: *Charkaoui* at para. 125-127, citing *A. v. Secretary of State for the Home Department*.

[93] The appellants contend that the test for a nexus to an immigration purpose is whether removal is reasonably foreseeable. I do not agree that this is the test. There are problems in this, not the least of which is that it is not the test established by the Supreme Court of Canada, which is that removal be a possibility (*Charkaoui* at 125-127). As noted, if *Charkaoui* is read properly, detention is warranted where it is "reasonably necessary" and removal "a possibility." The Court makes no mention of a test of foreseeability.

[94] Reasonable foreseeability, on its own, offers no clear guidance to the factors, considerations or evidentiary thresholds relevant to its application. It raises the questions "foreseeable by whom?" and "reasonable according to whom?" and, perhaps for these reasons, as the *habeas* cases which have adopted the test demonstrate, it leads to inconsistent results. The rule of law mandates, and the jurisprudence on bail demonstrates, that in matters where liberty interests are engaged, discretion should, to the extent possible, be exercised on clear and discernable criteria, as consistently as possible. "Reasonable foreseeability" does not do this. It also invites the unhelpful exercise of assessing what is "reasonable" in the context of countries

with legal, political and structures of public administration vastly different than ours and with which judges have no experience.

[95] The focus of the "possibility" test is, to the contrary, on the existence of objective, credible facts. The decision maker must be satisfied, on the evidence, that removal is a possibility. The possibility must be realistic, not fanciful, and not based on speculation, assumption or conjecture. It must be grounded in the evidence, not supposition, and the evidence must be detailed and case-specific enough to be credible. In my view, as far as a nexus to an immigration purpose is concerned, despite the different wording, there is a general congruence between the detention review and *habeas* tests.

[96] The foregoing concerns only the starting requirement that there be a nexus to an immigration purpose, in other words whether continued detention *can* be ordered. But just because it can be ordered does not mean it *should*. It is at a second stage, namely whether detention should be ordered, that proximity or remoteness of a removal date is engaged. The length of the detention to date and the conditions of the detention are also relevant to that question, *i.e.*, the judge's discretion, informed by the Charter, as to whether continued detention should be ordered. There may be circumstances where a detention, by virtue of its duration or the conditions of detention affects the liberty interest of the detainee so significantly that the Charter rights of the detainee are offended and release is warranted. We leave definitive consideration of this for a future day on the specific facts of a live case.

[97] I offer a few further comments to guide that consideration.

[98] While duration of the detention matters, duration alone is instructive of nothing, and, as several *habeas corpus* cases that follow *Chaudhary v. Canada (Public Safety and Emergency Preparedness)*, 2015 ONCA 700, 127 O.R. (3d) 401 (*Chaudhary*)) demonstrate, a narrow focus on duration leads to a range of subjective and inconsistent decisions (see, *e.g.*, *Ogiamien v. Ontario (Community Safety and Correctional Services)*, 2017 ONCA 839, 55 Imm. L.R. (4th) 220; *Canada (Minister of Citizenship and Immigration) v. Dadzie*, 2016 ONSC 6045, [2016] O.J. No. 5185; *Scotland v. Canada (Attorney General)*, 2017 ONSC 4850, 52 Imm. L.R. (4th) 188; *Ali v. Canada (Attorney General)*, 2017 ONSC 2660, 26 Admin. L.R. (6th) 78).

[99] Detention cannot be ordered on the basis of non-cooperation alone—to do so would be contrary to sections 7 and 9. But where the impasse in effecting removal is disputed identity and the detainee has refused to cooperate in confirming their identity, delays in removal cannot count against the Minister. Release in these circumstances would encourage detainees to be less than forthcoming. Where a detainee is uncooperative, detention cannot be classified as indefinite because it is within the detainee's control to change their destiny. That said, there will be cases where the receiving country alone disputes identity. Care must be taken not to attribute this to the detainee, who should not bear the burden of the country's recalcitrance to confirm identity.

[100] The presence of good faith is necessary. In assessing the Ministers' efforts to effect removal, attention should be paid to all steps taken or that could reasonably be taken to procure the necessary travel documents, and whether the CBSA has actively used the time between periods of detention and release to advance the detainee's removal.

[101] As the facts of this case amply demonstrate, Canada's efforts at removal may be frustrated by the receiving country. Even if a detainee consents to removal, removal depends on the receiving country issuing the necessary travel documents.

[102] The conduct of the receiving country may explain the delay. Canada has the tools necessary to obtain cooperation, whether through escalating levels of diplomatic and political pressure, negotiated bilateral return agreements or placing visa or other entry requirements on nationals from the delinquent country. The question in these circumstances, where there is an impasse, is whether there is a proposed demarche or next step that is likely to advance the process. In other words, does the Minister have a plan to circumvent the impasse and is there a real possibility that it will lead to removal?

(b) Section 12

[103] The variable conditions of detention (in a maximum security facility instead of an IHC) are not pertinent to whether detention is necessary to achieve removal. The conditions of detention are relevant to the legality of detention and the consideration of proportionality, whether under section 12 of the Charter or under judicial review.

[104] The appellants maintain that because the ID lacks jurisdiction to control the conditions of detention when the detainees are in provincial institutions, the ID cannot ensure proportionality between detention and the reasons for detention. Detention is therefore arbitrary and results in cruel and unusual punishment. In the same vein, the appellants contend that the absence of an

explicit power of the ID to consider "harsh or illegal" conditions of detention undermines the regime's constitutionality.

[105] This argument fails, both on the law and the evidence.

[106] There is a duty on ID members to exercise their discretion in a manner consistent with the Charter (*Canada (Minister of Citizenship and Immigration) v. Thanabalasingham*, 2004 FCA 4, [2004] 3 F.C.R. 572 at para. 14 (*Thanabalasingham*); *Sahin* at 228-229). As Abella J. observed in *Chhina*, "[t]he *Charter* both guides the exercise of discretionary administrative decision making under [the] *IRPA* and informs our interpretation of the scheme itself" (at para. 128).

[107] An express power for the ID to consider the nature or conditions of detention is not required (*R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765 at para. 78). The ability, indeed obligation, to consider sections 7, 9 and 12 is inherent in the exercise of the discretion concerning whether or not detention is warranted. As a tribunal of competent jurisdiction capable of providing Charter remedies, the ID can order release of a detainee on the grounds that the conditions of detention, on their own or in conjunction with other factors, are disproportionate (*Stables v. Canada (Citizenship and Immigration*), 2011 FC 1319, [2013] 3 F.C.R. 240 at para. 29; *Chaudhary* at para. 77).

[108] As the Supreme Court has explained, a section 12 issue of "cruel and unusual" treatment is intertwined with section 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 (*Charkaoui* at para. 96). But, as the Court in *Charkaoui* noted, it is not the detention itself, or its length, that is objectionable; detention is only cruel and unusual in the legal sense if it violates "accepted norms of treatment" (para. 96). As such, denying the means required by the principles of fundamental justice to challenge a detention may render the detention arbitrary and support the argument that it is cruel or unusual, but 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 (*Charkaoui* at para. 96).

[109] Contrary to the appellants' argument, *Charkaoui* does not stand for the proposition that the body reviewing detention must have control over the location and conditions of detention. To be clear, the Supreme Court said that, for an immigration detention scheme to be compliant with sections 7 and 12 of the Charter, it must provide a mechanism for review of detention that permits the reviewing body to set conditions that would neutralize the risk upon release, and that conditions of release must be subject to ongoing, regular review (*Charkaoui* at paras. 107, 117, 121). The Supreme Court's focus in *Charkaoui* is on jurisdiction to impose *conditions of release* and on the detainee's opportunity to challenge those conditions, not on the place and conditions of detention.

[110] In *R. v. Boudreault*, 2018 SCC 58, [2018] 3 S.C.R. 599 (*Boudreault*), the Supreme Court reiterated that demonstrating a breach of section 12 is a high bar: the treatment or punishment must be more than merely disproportionate or excessive—it must be so excessive as to "outrage standards of decency" and be "abhorrent or intolerable" to society (at para. 45; see also *R. v. Lloyd*, 2016 SCC 13, [2016] 1 S.C.R. 130 at para. 24). It is only in very rare and unique

occasions that a treatment or punishment will infringe section 12, as the test is "very properly stringent and demanding" (*Boudreault* at para. 45; see also *R. v. Morrisey*, 2000 SCC 39, [2000] 2 S.C.R. 90 at para. 26; *Steele v. Mountain Institution*, [1990] 2 S.C.R. 1385, 121 N.R. 198 at 1417).

[111] Against this jurisprudential backdrop, including *Charkaoui*, many of the appellants' arguments regarding the conditions of detention were dismissed by the Federal Court. No reviewable error in that finding has been demonstrated. The evidence of conditions of detention falls far short of the threshold of cruel and unusual punishment set by the Supreme Court, and does not support the broad declaration sought by the appellants.

[112] The appellants rely on the Ontario Court of Appeal decision *P.S. v. Ontario*, 2014 ONCA 900, 379 D.L.R. (4th) 191 (*P.S.*). In *P.S.*, the Court found that non-punitive detention under the *Mental Health Act*, R.S.O. 1990, c. M-7 did not comply with section 7 of the Charter because the Consent and Capacity Board's powers were inadequate. The review board lacked the jurisdiction to supervise the security level and treatment of long-term detainees and to craft orders that would ensure an appropriate balance between public protection and the protection of detainees' liberty interests (*P.S.* at para. 115). The objective of reintegrating patients into the community was frustrated by the fact that the Board could not direct that certain types of treatment or therapies be made available to the detainees. The purpose of detention was to facilitate re-integration and, without those tools, detention was not linked to the legislative objective.

[113] Under the IRPA, inadmissible foreign nationals are detained in order to ensure that they do not flee or harm the public before they are deported from the country. The purpose of detention is to facilitate public safety and removal. Unlike the Consent and Capacity Board, the ID has all the tools necessary to effect these objectives and, importantly, the jurisdiction to impose conditions on release, which reflects an appropriate balance between the objectives of the Act and the detainees' liberty interest. The problem in *P.S.* was that the legislative tools granted to the Board were insufficient in relation to its objectives. Here, in contrast, it is argued that the powers of the ID are overbroad in relation to the objective. The case is of no assistance.

[114] More relevant is the Ontario Court of Appeal decision in *Toure v. Canada (Public Safety and Emergency Preparedness)*, 2018 ONCA 681, 40 Admin. L.R. (6th) 261 (*Toure*).

[115] In *Toure*, the Ontario Court of Appeal took no issue with the CBSA criteria that govern the location of detention, and held that the location of detention was a proper issue for immigration detainees to raise with the CBSA (at para. 72). If the location of detention is not consistent with how a detainee fits within the CBSA's own criteria, the decision is the proper subject of judicial review in the Federal Court (at para. 72). I agree with these observations.

[116] The CBSA's decision to stream a detainee into a provincial institution as opposed to an IHC is a reviewable decision or order under section 2 of the *Federal Courts Act*, R.S.C. 1985, c. F-7. Similarly, a detention order that does not take into account the proportionality of the risk and the conditions of detention, can be tested in the Federal Court, on both Charter and administrative law principles. A decision that fails to consider the proportionality between the

risk and the measures to mitigate that risk will be set aside, as will a decision that reached an unreasonable conclusion in that regard.

[117] In any event, as the Federal Court noted, 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*, S.C. 1992, c. 20, s. 11; *Ministry of Correctional Services Act*, R.S.O. 1990, c. M.22, s. 17; see Federal Court reasons at para. 136). Neither the appellants nor the interveners point to authorities which deem those provisions to be unconstitutional.

(c) The legal burden

[118] The detention review scheme established by Parliament imposes a continuing and overarching legal burden on the Minister to establish that detention is lawfully justified according to section 58 of the IRPA, section 248 of the Regulations, and the Charter. The Minister bears the legal burden of establishing, on a balance of probabilities, that there are grounds for detention. If the Minister succeeds in that, the legal burden remains on the Minister to establish, in light of the section 248 criteria, that detention is warranted. This burden rests on the Minister throughout the detention review and re-surfaces every 30 days.

[119] There are only two burdens in Canadian law: the legal or persuasive burden, sometimes called the onus of proof, and the evidentiary burden.

[120] While the terms legal and persuasive burden are interchangeable, "legal burden" is arguably more apt a term than "persuasive burden" because it emphasises the obligation on the asserting party, the plaintiff or the Crown, to establish the requisite substantive factual elements of a cause of action or offence (*R. v. Fontaine*, 2004 SCC 27, [2004] 1 S.C.R. 702 at paras. 10-12). Those facts must be established on a balance of probabilities in a civil matter and beyond a reasonable doubt in a criminal proceeding (*F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41 at paras. 40-41; *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, [2012] 1 S.C.R. 23 at para. 94). Importantly, barring a statutory or common law rule, the legal burdens associated with a party never shift (Sidney N. Lederman, Alan W. Bryant & Michelle K. Fuerst, *Sopinka, Lederman, & Bryant's The Law of Evidence in Canada*, 5th ed. (Toronto, ON: Lexis Nexis, 2018) at § 3.46 (*The Law of Evidence in Canada*)).

[121] If the evidence establishes a ground for detention under the Act and suggests that detention is justified under section 248 of the Regulations, it may be in a detainee's interest to introduce evidence in favour of release. This is not a shifting of the legal burden. It is, rather, descriptive of the tactical decision whether to lead evidence to prevent a potentially unfavourable outcome (*Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625, 175 D.L.R. (4th) 193 at para. 53; *The Law of Evidence in Canada* at 116, § 3.56; *Snell v. Farrell*, [1990] 2 S.C.R. 311, 72 D.L.R. (4th) 289 at 329-330; see also *R v. Darrach*, 2000 SCC 46, [2000] 2 S.C.R. 443 at para. 50). The appellants are right to point to some passages in Federal Court detention reviews that do not respect the difference. The distinction is important, as is the language used. The two ought not be confused.

[122] The legal burden does not shift or change should the Minister establish a *prima facie* case of grounds for detention. The detainee is not required in law to do anything. Establishing grounds for detention does not mean that a detention order should issue. It simply means that there is a basis to consider making a detention order. Even when no evidence is offered by the detainee in response, the legal burden is on the Minister to make the case for detention on a balance of probabilities in respect of each of the section 248 factors. A detainee's decision to introduce evidence in response is entirely tactical.

[123] Nor does the legal burden on the Minister change with successive detention reviews. Whether it is the first or the tenth detention review, the Minister must establish on a balance of probabilities that a ground for detention exists, the existence of a nexus to an immigration purpose and the appropriateness of the detention. What may often change with the passage of time is the quantity and quality of evidence required to justify detention. The longer the period of detention, the more time and opportunity the government has had to make the necessary arrangements with the receiving country and to execute removal. With the passage of time, the assertion that removal remains possible requires a more probing inquiry. Reflecting this reality, in *Charkaoui*, the Supreme Court stated that the burden on the Minister becomes heavier over time (at para. 113); I take the Supreme Court to have been speaking of an evidentiary or tactical burden here, not a persuasive burden.

[124] The Supreme Court observed in *Mission Institute v. Khela*, 2014 SCC 24, [2014] 1 S.C.R. 502 at paragraph 40 (*Khela*) that the shift in onus from the prisoner to the detaining authority is

unique to the writ of *habeas corpus.* But there is no reason why a statutory detention regime cannot achieve the same effect as *habeas corpus*. Parliament has crafted such a regime here.

[125] Indeed, the scheme in the IRPA offers procedural and substantive advantages over a *habeas corpus* application. Properly interpreted, the IRPA requires the Minister to establish afresh the justification for detention every thirty days. The detention review occurs without any action on the part of the detainee, and for the entirety of the inquiry the burden is on the Minister to justify detention. The detainee is not required to do anything, procedurally or substantively. This can be contrasted to an application for *habeas corpus* where the applicant must initiate the application, establish that they have been deprived of liberty and that there is a legitimate ground to question their detention before the onus shifts to the responding authorities to show that the deprivation was lawful (*Khela* at para. 30).

[126] There remain the observations of the Supreme Court in *Chhina* that the burden on the Minister decreases with time and that the requirement not to depart from prior decisions without clear and compelling reasons leads to self-referential reasoning and, in effect, shifts the onus to the detainee.

[127] *Chhina* must be understood in light of the principles articulated by the Supreme Court in *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609 (*Henry*). *Henry* instructs that reasons move along a spectrum—from the ratio, which is binding, to guidance that, although not strictly binding, is expected to be followed, to commentary (at para. 57). The Court's comments in *Chhina* on *Thanabalasingham* fall within the last-mentioned category.

[128] *Thanabalasingham* does not stand for the proposition that the burden shifts to the detainee. To the contrary, in *Thanabalasingham*, this Court held precisely the opposite: that "[t]he onus is always on the Minister to demonstrate there are reasons which warrant detention or continued detention" (at para. 16). Similarly, contrary to what the Court said in *Chhina*, in *Charkaoui* the Supreme Court held that the burden and evidentiary challenges on the Minister increase with the passage of time.

[129] The Court in *Chhina* did not conduct a statutory interpretation exercise of the detention provisions in the IRPA, examine *Thanabalasingham* in depth or reconsider *Charkaoui*. For these reasons, the observations in *Chhina*, above, should not be regarded as binding upon us.

(d) The relevance of previous detention decisions

[130] The appellants argue that the scheme is unconstitutional because the collective weight of past decisions to detain creates a strong incentive to defer to those decisions and maintain detention. Once detained, always detained. The appellants say that this flows from the jurisprudence, which requires an ID member to provide "clear and compelling reasons" if they wish to depart from a prior detention decision (*Thanabalasingham* at para. 10) and the recent observations of the majority of the Supreme Court in *Chhina* that the ID's periodic reviews are susceptible to "self-referential" reasoning (see also *Chaudhary* at paras. 85-88).

[131] If this were a consequence of either the statutory scheme or the effect of *Thanabalasingham*, these arguments would have substance. But they have no foundation, either in the statutory scheme or in the jurisprudence. I have already explained how nothing in the

IRPA or the Regulations places an obligation on a detainee to lead fresh evidence between detention reviews in order for the ID to reach a different result. Nothing in the IRPA requires the detainee to demonstrate a change in circumstances, and neither does the jurisprudence.

[132] In *Thanabalasingham*, Rothstein J. expressly and unequivocally rejected the argument that the findings of previous members "should not be interfered with in the absence of new evidence" and held that "at each hearing, the Member must decide afresh whether continued detention is warranted" (at paras. 7-8). Guidelines issued on April 1, 2019, by the Chair of the Immigration and Refugee Board pursuant to paragraph 159(1)(*h*) of the IRPA reinforce this point and align with the instructions of the Federal Court to the ID in *Canada (Public Safety and Emergency Preparedness) v. Hamdan*, 2019 FC 1129 (*Hamdan*) (see Immigration and Refugee Board of Canada, *Chairperson Guideline 2: Detention* (Ottawa: Immigration and Refugee Board of Canada, April 1, 2019)).

[133] Members of the ID are obligated, under their oath and by law, to consider the circumstances of the particular individual whose detention or liberty is in issue in a fair and open-minded way. Each member is required to undertake their own independent assessment of the case for and the case against detention. Abella J. returns to this point in *Chhina*, noting that "[t]he integrity of the *IRPA* process is dependent on a fulsome review of the lawfulness of detention, including its *Charter* compliance, at every review hearing" (at para. 127). Abella J.'s dissenting reasons, which were not contradicted by the majority on the point mentioned here, were foreshadowed in Federal Court jurisprudence (see, *e.g.*, *Sahin* at 228-230; *Thanabalasingham* at para. 14).

[134] *Thanabalasingham* creates no special rule for ID reviews. The requirement to give reasons when departing from a prior decision is directed to the well-understood requirement, essential to the integrity of administrative and judicial decision making, that if there is a material change in circumstances or a re-evaluation of credibility, the ID is required to explain what has changed and why the previous decision is no longer pertinent. This reinforces the values of transparency, accountability and consistency. As was explained by the Supreme Court of Canada in *Vavilov*, the primary purpose of reasons is to demonstrate justification, transparency and intelligibility (at para. 81). To promote "general consistency", any administrative body that departs from its own past decisions typically "bears the justificatory burden of explaining that departure in its reasons" (at paras. 129-131). Moreover, reasons are the primary mechanism by which affected parties and reviewing courts are able to understand the basis for a decision (at para. 81; see also *Canada (Public Safety and Emergency Preparedness) v. Berisha*, 2012 FC 1100, [2014] 1 F.C.R. 574 at para. 52).

[135] I note, parenthetically, that the role of reasons when making a decision to depart from a previous decision is no different if *habeas corpus* is sought. The requirement for clear and compelling reasons does not change with the forum. As Professor Paul Daly observed in his commentary on *Chhina*, where a *habeas corpus* application is unsuccessful, a detainee may re-apply, and apply again after that. The provincial superior court hearing the *habeas corpus* application will be faced with the same challenges as the ID in justifying its decision; the same danger of self-referential reasoning remains, one way or another. In part for this reason, the Supreme Court's solution to the problem in *Chhina* has been criticized (see, *e.g.*, Paul Daly, "To Have the Point: *Canada (Public Safety and Emergency Preparedness) v. Chhina*, 2019 SCC 29"

(5 June 2019) online (blog): *Administrative Law Matters* <www.administrativelawmatters.com/blog/2019/06/05/to-have-the-point-canada-public-safety-and-emergency-preparedness-v-chhina-2019-scc-29/>). As Professor Daly notes, the solution to the self-referential reasoning lies not in offering detainees a different procedure for the assessment of the legality of detention, but rather, as Abella J. stressed in her dissent in *Chhina*, ensuring that at each detention review detainees' Charter rights remain front and centre.

(e) Procedural fairness

[136] Where a decision affects the rights, privileges or interests of an individual, the common law duty of fairness is triggered (see, *e.g.*, *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643, 24 D.L.R. (4th) 44 at 653; *Baker* at para. 20). The greater the effect a decision has on the life of an individual, the more robust will be the procedural protections required to fulfill the duty of fairness and the requirements of fundamental justice under section 7 of the Charter (*Charkaoui* at para. 25, quoting *Suresh v. Canada (Minister of Citizenship & Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3 at para. 118). At a minimum, the duty of fairness requires that the affected person know the case they have to meet and have an adequate opportunity to respond. The procedural rights afforded under section 7 of the Charter provide the same protection for detainees (*Charkaoui* at paras. 28-29, 53).

[137] Although the content of the duty of fairness varies with the context within which it is applied, proceedings with stakes analogous to those in criminal proceedings "will merit greater vigilance by the courts" (*Charkaoui* at para. 25, quoting *Dehghani v. Canada (Minister of*

Employment & Immigration), [1993] 1 S.C.R. 1053, 101 D.L.R. (4th) 654 at 1077). Because the liberty of the subject is involved, such is the case here.

[138] Administrative bodies enjoy the autonomy to control their own procedures, but they must nonetheless observe procedural fairness. Only statutory language or necessary implication can displace the duty of procedural fairness (*Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52, [2001] 2 S.C.R. 781 at para. 22; *Kane v. Bd. of Governors of U.B.C.*, [1980] 1 S.C.R. 1105, 110 D.L.R. (3d) 311 at 1113). There is no statutory language in the immigration detention scheme of the IRPA that ousts procedural fairness. The rules respecting disclosure in detention reviews are thus supplemented by the requirement for procedural fairness imposed by the common law.

[139] The *Immigration Division Rules*, S.O.R./2002-229 provide in section 26 that documents the parties intend to rely on must be provided in advance:

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 seven-day review or an admissibility hearing held at the same time; and	a) dans le cas du contrôle des quarante-huit heures ou du 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.

[140] The interveners assert that detainees do not receive sufficient and timely disclosure to allow them to know the case they have to meet and to respond. They argue that the *Immigration Division Rules* fall short of what fairness requires because they, and the relevant policy guidelines, require disclosure of only the documents on which the Minister intends to rely. They also point to evidence that says that the disclosure that is made is often late and leaves counsel with no ability to adequately represent the detainee's interests.

[141] The existence of a legislated disclosure requirement does not dispose of the question whether procedural fairness has been met. The Court must still examine whether the duty of fairness has been fulfilled. The Federal Court observed that Mr. Brown raised "legitimate concerns about the timeliness and quality of pre-hearing disclosure" (Federal Court reasons at para. 127). I agree that those concerns are substantiated by the evidence. Mr. Singh, a hearings officer with the CBSA, admits that, although disclosure is to be provided in advance, "there are times where it is not provided in advance" (Federal Court reasons at para. 110).

[142] The need for detainees to know the case against them creates a disclosure obligation. To be meaningful, the disclosure obligation cannot be limited to information on which the Minister intends to rely. All relevant information must be disclosed, including information that is only to the advantage of the detainee. This includes information pertaining to the grounds for the detention, information pertaining to the section 248 criteria, the existence of an immigration nexus, and the factors that bear upon the judge's assessment whether continued detention is warranted and consistent with Charter and administrative law principles. While the disclosure obligation necessarily encompasses information that is helpful to the detainee, it is not unlimited.

It is always tempered by the requirement that the information be relevant to the circumstances of the particular detainee.

[143] Section 26 of the *Immigration Division Rules*, even if followed, does not fulfill the minimum requirements of the common law duty of fairness. This is because the requirement to introduce evidence arises only where information provided is contradicted by another party (Canada, Citizenship and Immigration Canada, *ENF 3: Admissibility, Hearings and Detention Review Proceedings*, (Ottawa: April 29, 2015) at 34 (ENF 3)).

[144] ENF 3 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" (at 38). This falls short of what procedural fairness requires. Procedural fairness requires that the detainee have advance disclosure of all evidence relevant to the section 248 criteria, regardless of whether the Minister relies on it to support continued detention.

[145] The legality of a detention order pending removal is underpinned by a finding, on the evidence, that removal remains a possibility. For this reason, disclosure of evidence concerning the likelihood of removal is also central to the legality of a detention order. This in turn requires the ID to assess the Minister's efforts respecting removal and the reasons for delay at each and every hearing. Detainees are entitled to know what evidence the Minister relies upon for an argument that removal remains a possibility. Subject to recognized public interest privileges arising under section 38.01 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5, relevant evidence of communications with a receiving country ought to be disclosed in advance of the hearing.

Given the obligation imposed by section 248 of the Regulations, it would be a rare case where a member could properly exercise their discretion to continue detention in the absence of this evidence.

[146] The common law obligation on the Minister to disclose—subject to public interest privileges—all pertinent documents is also consistent with Canada's international law obligations. The United Nations High Commissioner for Refugees' Detention Guide emphasizes that a "minimum procedural protection" for detainees is that an immigration detainee's lawyer "have access […] to records held on their client" (United Nations High Commissioner for Refugees, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum Seekers and Alternatives to Detention*, 2012 at para. 47(ii)). The United Nations *Basic Principles and Guidelines on the right of anyone deprived of their liberty to bring proceedings before a court*, 4 May 2015, WGAD/CRP.1/2015 (*UN Basic Principles and Guidelines*) requires that disclosure include information that could assist the detainee, and that it be provided to the detainee "without delay so as to provide adequate time to prepare the challenge" (*UN Basic Principles and Guidelines*, Guideline 5 at 14, and Guideline 13 at 17-18). The common law requires the same protections.

[147] The interveners point to the Federal Court's recent decision, *Allen v. Canada (Public Safety and Emergency Preparedness)*, 2018 FC 486 (*Allen*), as demonstrative of how the regime lacks procedural protections. In *Allen*, the Federal Court found that the duty of fairness did not require disclosure of the CBSA's communications with Jamaica, even though they had been

specifically requested by the detainee. The Federal Court's decision turned in part on the fact that the detainee had been uncooperative (*Allen* at para. 62).

[148] The cooperation of a detainee is a relevant consideration for the ID in determining alternatives to detention, the cause of delay in removal and the assessment of the reasonableness of the Minister's efforts to effect removal. Lack of cooperation, however, is irrelevant when it comes to deciding which procedural protections are afforded to a detainee by the duty of fairness. To the extent that *Allen* stands for the proposition that lack of cooperation vitiates the Minister's disclosure obligations, it should not be followed.

[149] The lawful exercise of the power to order detention requires an adequate evidentiary foundation. This includes all relevant evidence relating to the factors under section 248. In cases of inadequate disclosure, judicial review can be sought, on an expedited basis, and interim orders can be made compelling disclosure (see section 18.2 of the *Federal Courts Act*). Importantly, a detention decision may be vitiated if it is established that there has not been timely disclosure of material documents which results in a breach of procedural fairness.

VI. Judicial oversight

[150] As I have noted, the conclusion of the majority of the Supreme Court in *Chhina* that recourse to *habeas corpus* should be allowed does not flow from any conclusion regarding the constitutionality of the IRPA. The issue before the Supreme Court was whether *habeas corpus* was available as an alternative remedy to detention reviews and judicial review. The focus of this case, in contrast, is the constitutionality of the scheme that governs detention and review before

the ID. Nonetheless, given the importance of judicial oversight to ensuring the lawful integrity of ID decisions, and considering the submissions received from the parties subsequent to the release of *Chhina* while this case was under reserve, certain observations are in order.

[151] The first observation is that whether viewed from a procedural or substantive perspective, judicial review provides a remedy that is fully responsive to the seriousness of the issues under consideration. I will deal with the substantive considerations first.

[152] A majority of Supreme Court in *Chhina* finds that the ID "does not conduct a fresh review of each periodic detention" and "as such, the scope of review before the Federal Courts is correspondingly narrower than review on *habeas corpus*" (at para. 64).

[153] To the contrary, the ID must look at the detainee's entire detention history. The Regulations themselves require no less. Three of the five criteria in section 248 require the ID to have regard to the length of time in detention, which mandates a consideration of the entire history. The detainee's entire detention history necessarily forms part of the evidence before the ID, as it will before the Federal Court.

[154] Neither the ID, nor the Federal Court assesses the legitimacy of detention blinded to the overall history of detention. Each 30-day detention review requires consideration of the detention as a whole. Indeed, a cursory review of ID and Federal Court decisions demonstrates this to be the case (see, *e.g.*, *Canada (Citizenship and Immigration) v. Li*, 2009 FCA 85, [2010] 2 F.C.R. 433 at paras. 66-67; *Hamdan* at paras. 29-30; *Canada (Public Safety and Emergency*

Preparedness) v. Arook, 2019 FC 1130; *Canada (Public Safety and Emergency Preparedness) v. Taino*, 2020 FC 427; and the *Federal Courts Rules*, S.O.R./98-106, r. 306-309, r. 317).

[155] Where the legislation prescribes a set of considerations, and mandates the default outcome of release, departure or deviance from either results in an unlawful decision (*Canada (Attorney General) v. Almon Equipment Limited*, 2010 FCA 193, [2011] 4 F.C.R. 203). In a detention review, the range of lawful decisions available to the ID member is constrained by section 58 of the IRPA and section 248 of the Regulations. If a detention order has not been made according to law, it will be set aside. For example, an ID member's failure to consider the likelihood of removal, relevant factors in section 248 or beyond, or alternatives to detention, would result in the decision being set aside. Release would follow unless the Federal Court order is stayed.

[156] My second observation is that the assertion made to this Court, and to the Supreme Court in *Chhina*, that judicial reviews were invariably moot has no foundation in the evidence.

[157] The evidence paints a different picture. As Abella J. noted in *Chhina*, the Federal Court heard and disposed of Mr. Chhina's judicial review application in one week less time than the *habeas corpus* application was heard and decided (at para. 119). Again, a cursory review of Federal Court jurisprudence with respect to detention review demonstrates that applications for judicial review are often heard and disposed of in the Federal Court on an urgent basis (see, *e.g.*, *Canada (Public Safety and Emergency Preparedness) v. Shen*, 2020 FC 405; *Hamdan*; *Arook*; and *Taino*).

[158] I agree with my colleague, Justice Stratas, who has recently observed that the "factual spin and speculation about the procedural flexibility, innovative capability and remedial effectiveness of the Federal Courts" in *Chhina* and *R. v. Bird*, 2019 SCC 7, [2019] 1 S.C.R. 409 at paras. 57-61 is "false and unsupported" (*Teksavvy Solutions Inc. v. Bell Media Inc.*, 2020 FCA 108 at para. 22).

[159] The Federal Court is accessible 24 hours a day, 365 days a year, from coast to coast for urgent applications, in both official languages. Interim stay orders are frequently issued (*Federal Courts Act*, section 18.2). Time frames are routinely abridged (see, *e.g.*, *MPSEP v. Mustafa Abdi Faarah* ((IMM-1347-19); *MPSEP v. Martin Sevic* (IMM-1375-20); *Canada (Public Safety and Emergency Preparedness) v. Ahmed*, 2019 FC 1006; *MPSEP v. Baniashkar*, 2019 FC 729; *Hamdan* and *Arook*). Hearing dates are routinely expedited. Hearings may be by teleconference, or in person, in Federal Court facilities across Canada. Cases are heard and disposed of as quickly as the parties request or circumstances require (see, *e.g.*, *MPSEP v. Malkei*, IMM-2466-20; *MPSEP v. Shen*, IMM-1626-20). Federal Court judges assigned to hear judicial review applications of detention decisions understand that liberty interests are at stake. The remedies can be innovative and creative (see, *e.g.*, *Fond du Lac First Nation v. Mercredi*, 2020 FCA 59 at para. 5; *Canada (Public Safety and Emergency Preparedness) v. LeBon*, 2013 FCA 55, 444 N.R. 93; *D'Errico v. Canada (Attorney General)*, 2014 FCA 95, 459 N.R. 167). Further, and unlike many superior courts, there is a standing liaison committee between the Federal Court and representatives of the specialized immigration bar. This committee, including the sub-committee on immigration detention, serves as a vehicle for addressing any matter of concern relating to the efficient and expeditious disposition of immigration proceedings.

[160] In any event, the possibility that an ID decision may be moot is not pertinent. Technically moot decisions may be reviewed where the failure to do so would render the decision evasive of judicial review (*Democracy Watch v. Canada (Attorney General)*, 2018 FCA 195 at para. 14).

[161] To conclude, judicial review, like *habeas corpus*, tests the legality of a detention decision against the Charter and common law principles. But it also does much more; it tests the reasoning process, its transparency and its integrity. It examines the treatment of the discretionary factors and whether they were properly taken into account. It holds up the reasons to independent scrutiny to determine whether they pass legal muster, from both a Charter and administrative law perspective. As the Supreme Court concluded in *Charkaoui*, the remedy of judicial review is "robust" (at para. 123).

VII. Conclusion

[162] The Federal Court certified the following question:

> Does the [Charter] 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?

[163] I would answer the question in the negative and would dismiss the appeal. Consistent with the request of the parties, I would make no order as to costs.

"Donald J. Rennie"
J.A.

"I agree.

Johanne Gauthier, J.A.”

“I agree.
David Stratas, J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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