

CANADA

Canada is a state party to the United Nations Convention Relating to the Status of Refugees and its Protocol, as well as to the International Covenant on Civil and Political Rights and its First Optional Protocol. During 2000, 37,739 asylum applications were filed in Canada and at the end of the year there were 30,177 applications pending decision.¹ In 2001, 44,452 asylum seekers applied for asylum in Canada.² In the first quarter of 2002, 6,784 applications were filed.³ Only a small portion of asylum seekers are detained,⁴ and alternatives to detention are widely used. Statistics from Citizenship and Immigration Canada (CIC) indicate that at any given time there is an average of 455 detainees across Canada under the Immigration Act, however there are not statistics which indicate how many of these detainees are asylum seekers.⁵

Bill C-11, now the *Immigration and Refugee Protection Act (IRPA)*, received royal assent on November 1, 2001. Subsequently, the Regulations were published on June 14, 2002. In terms of detention, the new regulations codify factors to be considered in decision-making on detention many of which were either common practice or in administrative guidelines in the past. Members of the Immigration and Refugee Board (IRB) Immigration Division, who are responsible for reviewing decisions on detention,

¹ E-mail from Bonny Wong-Fortin, Department of Citizenship and Immigration Canada, to Jaya Ramji, Debevoise & Plimpton, at 1 (Feb. 1, 2002) (on file with Debevoise & Plimpton) [hereinafter CIC Correspondence]; U.S. COMMITTEE FOR REFUGEES, WORLD REFUGEE SURVEY 2001 at 277 available at <http://preview.refuges.org/world/worldmain.htm> (Immigration and Refugee Services of America 2001) [hereinafter USCR WORLD REFUGEE SURVEY 2001].

² CIC Correspondence, *supra* note 1, at 1.

³ UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, ASYLUM TRENDS IN 28 INDUSTRIAL COUNTRIES: JANUARY TO MARCH 2001—JANUARY TO MARCH 2002, available at <http://www.unhcr.ch/cgi-bin/texis/vtx/home/+2wwBmelFXx8wwwwwwwwwwhFqAIRERfIRfgItFqA5BwBo5Boq5AFqAIRERfIRfgIcFqF+8afDm15BGowcoSnmagd1DBGon5Dzmxwwwwww/opendoc.pdf> (June 13, 2002) (last accessed Aug. 29, 2002) [hereinafter *Asylum Trends in 28 Industrialized Countries*].

⁴ E-mail from Janet Dench, Canadian Council for Refugees, to Jaya Ramji, Debevoise & Plimpton (Nov. 6, 2001) (on file with Debevoise & Plimpton) [hereinafter Canadian Council for Refugees Correspondence]. While there are no separate statistics for asylum seekers, in fiscal year 2000/2001, Canada detained 9,138 immigrants total for an average of 21 days. CIC Correspondence, *supra* note 1, at 1.

⁵ Catherine Gauvreau and Glynis Williams, "Detention in Canada: Are We on the Slippery Slope?" in *Refuge* vol. 20, No. 3., p. 68, May 2002. at 68. [hereinafter *Gauvreau*]

continue to have wide discretion on issues of detention because decisions are made on a case by case basis, and all circumstances must be considered.⁶ The new legislation broadens the circumstances upon which detention can occur, and the announced benefits of the new regime are to “provide enhanced protection of Canadian society,”⁷ with no mention of the protection of rights of refugee claimants.

As stated in IRPA § 55(2), the three main grounds for detention are flight risk, danger to the public or if the officer is unsatisfied as to the identity of the claimant. While these grounds are the same as in the former legislative regime, the provisions that allow detention are broadened. In the past, persons could only be detained on the basis of identity at the port of entry. Now, persons can be detained at any point in the claim process for identity reasons. This includes those who present themselves to make an inland claim. The expansion of detention on the basis of identity is of particular concern because those seeking asylum are often forced to leave their countries without proper identification because it is their very identity which puts them at risk.⁸ In addition to broader power under the law to detain asylum seekers, the use made of the power also seems to be expanding. In recent years, there has already been an increase in the use of detention for identification grounds, even prior to the change in the law. It remains to be seen how much the government will make routine use of the expanded powers.

Under § 55(3) a claimant may be detained upon entry into Canada where the officer “considers it necessary... in order for the examination to be completed.” This additional ground for detention has been critiqued by Canadian NGOs such as the Canadian Council for Refugees, because it creates a situation in which detention occurs only for reasons of administrative efficiency.

Finally, the powers of Immigration officers to detain without a warrant have been broadened.

Under the new IRPA, there is mandatory detention under § 82(2), which states that “[a] foreign national who is named in a certificate described in subsection 77(1) shall be detained without the issue of a warrant.” § 77(1) provides that the Minister of Immigration and the Solicitor General of Canada “sign a certificate stating that a permanent resident or foreign national is inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality.” A Federal Court Trial judge has the power to decide if the certificate is reasonable, and based on this decision either upholds or quashes the certificate.

⁶ 2002/06/14 *Canada Gazette, Part II, Vol. 136, Extra*, p. 305-6.

⁷ *Id.* at 306.

⁸ *Gauvreau, supra* note 5, at 69.

There are three detention centers in Canada: in Toronto, Vancouver and Montreal. In addition to detaining asylum seekers in designated detention centers, there are cases where they are held in jails.

Is there independent review of the detention decision? Yes.

During the first 48 hours of detention, an immigration officer may choose to release detainees “if the officer is of the opinion that the reasons for the detention no longer exist.”⁹

Review of all detention decisions is undertaken by the Immigration Division of the IRB¹⁰, an independent administrative tribunal established by the Parliament of Canada. The IRB mission is to make well-reasoned decisions on immigration and refugee matters, efficiently, fairly, and in accordance with the law.

When a person is detained, a detention review is held to determine whether there are sufficient reasons to continue the detention of the person under the Act. Detention review hearings generally follow the tribunal processes, including the right to counsel, the right to be fully heard, and that Immigration Division members must provide reasons for their decisions.

Release from detention can occur once an officer of the Immigration Division is satisfied that the grounds for detention no longer exist. For example, if it is found that the detainee is not a danger to the public, that they are likely to appear for their examinations, etc, or if identify has been satisfactorily established.¹¹ There are conditions for release, where the Immigration Division considers it necessary, “including the payment of a deposit or the posting of a guarantee for compliance with the conditions.”¹²

A detained person may request a review of detention at any time. The detained person or CIC may apply to the Federal Court of Canada for leave for judicial review of any decision on detention. Legal aid services may be available for these measures, depending on the provincial legal aid coverage.

Are there limits on the period of detention? No.

While there are no formal limits to detention periods, the IRB guidelines state that decisions to detain and extensions to detention periods must be “reasonable in accordance

⁹ Immigration and Refugee Protection Act, C. 27, 2001, § 56 [hereinafter IRPA].

¹⁰ IMMIGRATION AND REFUGEE BOARD OF CANADA, BACKGROUND INFORMATION, *available at* http://www.irb.gc.ca/en/about/processes/drp_e.htm (last accessed Aug. 29, 2002).

¹¹ IRPA, *supra* note 9, at § 58(1).

¹² *Id.* at § 58(3).

with principles of fundamental justice.”¹³ In *Sahin v. Canada (Minister of Citizenship and Immigration)*, [1995] 1 F.C. 214, the Federal Court, which has jurisdiction over immigration issues, upheld the principle that indefinite detention for a lengthy period of time can constitute a deprivation of liberty that is not in accordance with the principles of fundamental justice. This is upheld in *The Minister of Citizenship and Immigration (Applicant) vs. Cheong Sing Lai and Ming Na Tsang (Respondents)*, [2001] 3 F.C. 326.

Is there periodic review of detention? Yes.

There is a formal detention review process conducted by the Immigration Division of the IRB. The initial review must occur within 48 hours or “with out delay afterward.” Subsequent reviews must take place after 7 days and then after 30 days.¹⁴ This review scheme is less often than in the former legislation, where reviews occurred every 7 days for identity cases.

Each review is done *de novo*, and adequate reasons for continued detention must be given. Consequently, not only the grounds for detentions as per IRPA must be considered, but also other issues such as failure to execute removal, and if the length of detention is reasonable under the circumstances.¹⁵

Is there access to government-funded legal aid? Limited.

There is no right to free legal representation for detained asylum seekers under Canadian law.¹⁶ Each asylum seeker is apprised of the right to legal counsel and afforded an opportunity to obtain legal counsel. However, access to legal aid is limited, and the provision of free legal services is uneven since legal aid is administered provincially not federally.¹⁷ For example in Quebec, the legal assistance available is reported to be so minimal that there is no effective access.

While detention facilities are open to government funded lawyers and NGOs, access can be difficult.¹⁸ As mentioned above, some detainees, such as those who are not in city

¹³ *Id* at 2.

¹⁴ IRPA, *supra* note 9, at § 57.

¹⁵ IMMIGRATION AND REFUGEE BOARD, OTTAWA, CANADA, GUIDELINES ON DETENTION (Mar. 12, 1998) at 3, *available at* http://www.irb.gc.ca/en/about/legal/guidline/detrev/detrev/Index_e.htm (last accessed Aug. 29, 2002) [hereinafter IRB Detention Guidelines].

¹⁶ CIC Correspondence, *supra* note 1, at 3.

¹⁷ *Id* at 5.

¹⁸ Janet Dench, speech on detention, 2000, (on file with Debevoise & Plimpton).

centers where detention facilities exist, are placed in jails. In addition to it being problematic that they are placed alongside the criminal population, there are generally no NGOs working in these locations with refugees. Consequently, lengthy detention periods result when there are no advocates or legal counselors available.¹⁹

Alternatives to detention: Release on bond, supervision by Toronto Bail Program.

The Canadian system emphasizes that detention of asylum seekers is a last resort. Under the IRPA § 58(3), when ordering the release of a detainee, the Immigration Division may impose “any conditions that it considers necessary, including the payment of a deposit or the posting of a guarantee for compliance with the conditions.” These arrangements are negotiated between the asylum seeker and the authorities of the Immigration Division, with any agreement subject to the approval of the Immigration Division member.²⁰

Expanding on the above provision, IRB Guidelines on Detention state that:

Parliament has provided that adjudicators may order the release of a person detained pursuant to the *Immigration Act*, subject to such terms and conditions as they deem appropriate, including the payment of a security deposit or the posting of a performance bond. Given these provisions, together with the basic assumption that detention should be an exceptional measure in Canadian society, adjudicators should, in all cases, consider whether it would not be appropriate to impose certain conditions to reduce the risk of the person concerned failing to appear for an examination, an inquiry or removal from Canada, or to reduce the risk that such a person may pose to the public.²¹

The Toronto Bail Program has been established as a neutral third party organization that oversees released detainees to ensure that they meet the terms and conditions of their release. This initiative targets detainees in the Toronto area who cannot afford bail in cases where it is deemed that they do not need to remain in custody under certain terms and conditions, and where they can be followed by the community. In this program, Toronto Bail Program staff interview potential clients and conduct a detailed analysis of the detainee’s situation, including examination of factors such as ties to the community, employment and education status and medical problems. Based on this information, the program decides whether or not it will accept the client.²² Once accepted in the program,

¹⁹ *Id* at p. 69.

²⁰ IRB website, *available at* <http://www.irb.gc.ca>.

²¹ IRB Detention Guidelines, *supra* note 15 at § C. Alternatives to Detention.

²² “The Toronto Bail Program” on the Canada website, *available at* http://www.crime-prevention.org/english/publications/youth/mobilize/rro_e.html (last accessed Aug. 29, 2002).

the person is placed under the supervision of the Toronto Bail Program. Failure to comply with any of the terms and conditions imposed by the IRB Immigration Division results in a Failure to Comply order being laid by the Toronto Bail Program supervisor.²³ It is important to acknowledge that Canadian NGOs have critiqued this program, due to the fact that it creates an environment in which the Immigration Division can more easily select supervised, not unconditional, release.²⁴

Vulnerable groups:

There are approximately 11 minors detained in Canada at any given time.²⁵ The IRPA states that children should only be detained as a last resort and when determined to be in the best interest of the child. Regulations further outline special considerations for the detention of minors,²⁶ including:

(a) the availability of alternative arrangements...; (b) the anticipated length of detention; (c) the risk of continued control by the human smugglers or traffickers who brought the children into Canada; (d) the type of detention facility envisaged and the conditions of detention; (e) the availability of accommodation that allows for the segregation of the minor children from adult detainees who are not the parent...; (f) the availability of services in the detention facility, including education, counseling and recreation.²⁷

These considerations have been criticized by Canadian NGOs who argue in spite of the overriding principle, detention of minors is still a possibility.

Other vulnerable groups including the elderly, persons with apparent or possible mental health problems or torture survivors, are not explicitly mentioned in the new Regulations.

²³ *Id.*

²⁴ Ophelia Field, European Commission on Refugees and Exiles, Research Paper on Alternatives to Detention 7-8 (Sept. 1997), *available at* <http://www.ecre.org/research/alterns.doc> (last accessed Aug. 29, 2002).

²⁵ *Id* at 68.

²⁶ *Canada Gazette Part II, Vol 136, s. 249.*

²⁷ *Id.*