Immigration Detention Summit Case Law Updates

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Overview

- Detention reviews in the past and legislative updates
- Case law updates
  - Disclosure (*Brown* 2020*, Mawut* 2021)
  - Nexus (*Brown* 2020*, Suleiman* 2022*)*
  - Minister's onus and burden of proof (*Brown* 2020)
  - Danger to the public
    - Danger in the context of nexus (*Brown 2020, Suleiman* 2022)
    - Danger and proportionality (*Mawut* 2022)
  - Unlikely to appear
    - UTA and mental health (*Lee* 2022)
  - S. 248 factors
    - S. 248 factors are not exhaustive; ID can consider conditions of detention (*Brown* 2020)
    - ATDs in the context of vulnerability (*Lee 2022, Tjhang* 2022)
    - Bondspersons and structuring ATDs (*Thavagnanathiruchelvam* 2021)

Detention reviews in the past

- Extremely lengthy detentions
- Location and conditions of detention
  - Very high numbers in provincial prisons
  - Punitive and arbitrary transfers
  - Children in detention – BIOC not a factor under R248
- Detention review procedures
  - Very low representation rates
  - Collegiality between MC and BM
  - 10-15 minute DRs
  - Little to no disclosure, hearsay evidence
  - Overreliance on past decisions to continue detention

Key changes in last decade

- 2013 – hunger strike at Central East Correctional Centre – EIDN campaign, pushed public discourse + key litigant in upcoming challenges
- Habeas wave – Chaudhary (2014/2015); Ogiamien, Dadzie (2016/2017), Ali, Scotland and Toure (2017); Chhina ABCA (2017)
- Brown & EIDN – 2017 FC 710
- R248 amended: BIOC of a directly affected child now a factor (2018)
- Report of the 2017/2018 External Audit (Detention Review)
- First amendment of Chairperson Guideline 2: Detention (2019, 2021)
- Chhina 2019 SCC 29, Brown 2020 FCA 130
- Increased representation rate at DRs - 2020 onwards

Disclosure: Brown 2020 FCA 130

- Challenge brought by Alvin Brown, who was detained for 5 years prior to removal, and End Immigration Detention Network
- Appellants challenged the constitutionality of the detention regime as violating sections 9, 12, and 15 of the Charter
- FCA found regime is constitutional. Extended periods of detention under IRPA don't violate the Charter if they are accompanied by regular review of the reasons for detention and whether detention is warranted (ie. the s. 248 factors)
- FCA made important findings on key issues including procedural fairness & disclosure, the Minister's legal burden, the requirement for a nexus to an immigration purpose, and the ID's jurisdiction to consider conditions of detention

Disclosure: Brown 2020 FCA 130

- [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.

Disclosure: Brown 2020 FCA 130

- [145]: **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.
- 137: Greater duty of fairness in process that impacts detainee's liberty
- 148: Lack of cooperation does not impact Minister's disclosure obligation
- 123: Quantity and quality of evidence to justify detention increase over time

Disclosure: Mawut 2021 FC 1155

- JR of ID's decision refusing counsel's request to order disclosure of documents
- Minister had disclosed summaries of communications with South Sudanese authorities
- Counsel requested production order of the communciations with foreign officials themselves
- FC (Grammond J.) applied findings in *Brown* and disclosure principles from civil and criminal law, ultimately confirming that the disclosure obligation encompasses actual communications with foreign officials

Disclosure: Mawut 2021 FC 1155

- Paras 33-34: Relevance is defined broadly & assessed through the lens of reasonable possibility, that is, by asking whether the info can possibly assist the other party in building its **case…Relevance should be defined broadly when defining the scope of the Minister's duty to disclose evidence in its possession**
- Para. 35: start from premise that **disclosure is the rule and withholding is the exception.** An assessment of relevance, however, cannot be based on the Minister's representative's opinion as to what avenues the detainee's counsel should pursue, or the idea that the evidence already disclosed is overwhelming with respect to a particular issue or sufficient to justify detention.

Disclosure: Mawut 2021 FC 1155

- [38] …Where a disclosure obligation pertains to documents, there is no authority for the proposition that the obligation may be satisfied by a summary prepared by the disclosing party. The practice in civil and criminal matters is otherwise. **In *Brown*, quoted above, the Federal Court of Appeal explicitly wrote that communications with foreign states ought to be disclosed. Nothing in this passage suggests that a disclosure obligation would be met by providing a summary of the communications.**
- Paras. 39-41: Relies on *Brown* to find that Minister must follow process to claim privilege under *Canada Evidence Act* for anything they don't want to disclose. Obligation to disclose communication with foreign officials applies to all DRs, not just situations of extreme delay.

Disclosure: Practice Tips

- Section 7.3 of the Detention Guidelines reflects the Brown decision, includes examples of evidence Minister needs to provide
- Can request that the ID issue a production order for the documents and/or information that you want:
  - IRPA s. 165: Members have the powers and authority of a commissioner appointed under Part 1 of the *Inquiries Act* and may do any other thing they consider necessary to provide a full and proper hearing
  - Inquiries Act, Part 1, s.4: Commissioners have the power of summoning before them any witnesses, and requiring them to produce such documents and things as commissioners deem requisite to the full investigation of the matters into which they are appointed to examine.
- Can request production orders in advance of the hearing in writing, or orally at the hearing

Nexus to immigration purpose: Brown v. Canada 2020 FCA 130

[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.

[123] …. 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.

Possibility test: Brown FCA

[95] .... 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.

The “possibility” test in practice

- What is sufficient to establish nexus to removal?
- For MC, possible = not impossible
- Temporal element/remoteness of possibility
- Quantifying/substantiating the Minister’s burden to establish
- Even if no release, nexus argument as important strategic tool to pressure CBSA

Onus: Brown 2020 FCA 130

- [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.**
- [123] …..With the passage of time, the assertion that removal remains possible requires a more probing inquiry.

Onus: Brown FCA

- [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.**

Onus & compellability of detainee as witness

- Can a detainee be compelled to testify in DR proceedings?
- Differing opinions among ID members
- A127 No person shall knowingly

  (c) refuse to be sworn or to affirm or declare, as the case may be, or to answer a question put to the person at an examination or at a proceeding held under this Act.
- Parallels to criminal regime and ss. 11(c) and 13 *Charter* protection against self-incrimination
- Challenges to compellability issue

Upcoming challenge: Hemond v. Canada IMM-8969-22

- JR of 48 hour DR
- Member overruled the objection of the Applicant's counsel and determined that the Applicant was a compellable witness in his own detention review. BM then proceeded to examine the Applicant and cited the compelled testimony as part of his reasons for ordering his continued detention;
- Hemond was released at 7 day - case is moot but ought to still be decided
- Being heard on October 18, 2023.

Onus and compellability of witnesses: Hemond & Brown

- Persons appearing in detention reviews under s.57 of the IRPA benefit from a right to silence under s.7 of the *Canadian Charter of Rights and Freedoms* → Right to silence as Principle of Fundamental Justice
- *Brown*'s discussion of the burden on the Minister in each detention review is simply incompatible with the detainee also being a compellable witness who must testify under penalty of prosecution. *Brown*'s repeated refrain that a detainee is not required by law to do anything in a detention review is only consistent with someone who benefits from a right to silence in such a proceeding

Danger to the Public: Danger & Nexus

- *Taino* 2020 FC 427: FC found that danger was a stand-alone ground for detention, whether or not deportation was going to occur
- *Brown* 2020 FCA 130: FCA found that for continued detention to be legal under IRPA, there MUST be a nexus to immigration purpose.
  - Para. 60: “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.”
- Argument that *Brown* para. 44 leaves open a possibility that detention could be ordered for an immigration purpose other than removal such as protecting public safety

Danger & Nexus

Suleiman 2022 FC 286

- Detained as DTP and UTA for 2.5 years
- ID found that removal was no longer possible, therefore no nexus. Release ordered. Minister JR'd.
- ID interprets *Brown* as setting out an implicit requirement that there must be a "possibility of deportation" in order to detain, and that this requirement applies to all of statutory grounds of detention under s. 58(1) of IRPA – no exception for DTP (see paras. 56-58)
- FC (Sadrehashemi J.) finds the ID's interpretation of *Brown* to be reasonable
- Other ID decisions agree – see e.g. 2022 CanLII 91639

Danger & Proportionality

Mawut 2022 FC 415

- ID found that conditions of detention (extensive periods on lockdown) were extraordinarily difficult and, for one period, breached s. 12.
- ID found that detention had become disproportionate and could no longer be justified; ordered release on standard terms & conditions despite concerns that Mr. Mawut may not comply. Minister JR'd
- FC (Grammond J.) granted JR. While it was reasonable for the ID to find that conditions of detention overwhelmed any factors favouring continuation, it was still unreasonable to release without imposing any condition mitigating the danger.

Danger & Proportionality

Mawut 2022 FC 415

- Silver lining to *Mawut* - new test for conditions of release when DTP
  - *Lunyamila* 2016 FC 1199: conditions of release must "virtually eliminate" any danger to the public posed"
  - *Mawut* para. 35: Taken too literally, the "virtually eliminate" test is virtually impossible to meet and could foreclose release whenever a detainee is a danger to the public. This, however, is not what is contemplated by s. 58 of the Act and s. 248 of the Regulations, nor by the FCA in *Brown*. In the context of bail, which shares a preventive purpose with immigration detention, conditions must "minimize" or "attenuate" risk and be "proportional to the risk": *R. v. Zora,* 2020 SCC 14

Unlikely to Appear (UTA)/Flight Risk

- A58 (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

- **(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);

R245 factors:

(a) being a fugitive from justice in a foreign jurisdiction…

(b) voluntary compliance with any previous departure order

(c) voluntary compliance with any previously required appearance at an immigration or criminal proceeding

(d) previous compliance with any conditions imposed in respect of entry, release or a stay of removal

(e) any previous avoidance of examination or escape from custody, or any previous attempt to do so

(f) involvement with a people smuggling or trafficking in persons operation […]

(g) the existence of strong ties to a community in Canada.

UTA & Mental Health

- What if someone cannot voluntarily comply with conditions due to a MH concern or diagnosis?
- No distinction between unable vs. unwilling; involuntary vs. voluntary non-compliance
- Mental health/addiction = “unreliable,” “deceptive,” “untrustworthy,” “uncontrollable,” or “unable to comply”;
- Section 15 challenges - *R v Zora, 2020 SCC 14*

Criminal context - *R v Zora, 2020 SCC 14*

- A person cannot be held responsible for failing to attend court if they were unable to do so, or if their mental disability caused them not to understand their obligation to the court.
- In determining an individual's criminal responsibility for a breach of a court order, the court had **an obligation to consider whether the breach was done knowingly or recklessly, must consider any mental disability**
- A person with a complex mental health issue may not be culpable for a breach of a court order (or failure to appear in court) if that person's mental health condition prevents them from understanding their bail conditions.
- Responsibility for a failure to appear requires a subjective mens rea component
- Liability for a failure to appear has "profound implications for the liberty interests" of the individual
- Rejection of purely objective test for whether someone should be held liable for failing to attend at court, instead finding that a person must knowingly or recklessly fail to appear before such behaviour will be considered culpable.

UTA & Mental Health: *Lee* 2022 FC 383

- Client was mute throughout most of her arrest and all of her detention proceedings and was observed by a psychiatrist at the IHC to have deteriorating mental health. MC sought detention on UTA. ATD to a MH shelter was proposed and rejected by the ID. Lee (via her litigation guardian) sought JR at the FC.
- This was not a UTA Case – UTA finding not contested at the ID or before the FC. Counsel's arguments focused on the 248 balancing, and the ID's treatment of the ATD and counsel's section 12 Charter arguments – Zora was not argued
- Despite UTA not having been contested the Court (Norris, J.,) made numerous comments about UTA that may complicate arguments based on *Zora* that involuntary noncompliance is not captured by 58(1)(b).

Lee 2022 FC 383

- [63] Looking first at the reason for the detention and the length of the detention (*IRPR*, paragraphs 248(a) and (b)), I agree with Ms. Lee that the ID unreasonably found these factors to favour detention. The ID found that they weighed in favour of detention because both stemmed from Ms. Lee's "lack of communication and cooperation." Yet at the same time, the ID also recognized that "mental health issues" were playing a role in Ms. Lee's behaviour. […]The ID did not address this evidence at all before effectively holding Ms. Lee responsible for her own detention and for its growing length. **It was unreasonable for the ID to hold that behaviour that likely stems from a mental disorder favours immigration detention.**

Lee 2022 FC 383

- [64] This analysis also applies to the ID's characterization of Ms. Lee as a flight risk under paragraph 58(1)(b) of the *IRPA* and section 245 of the *IRPR*. The finding that she is a flight risk was based on the finding that she had "refused or is unable to answer questions for information related to determining her admissibility or inadmissibility" and because "[b]y refusing to attend the Minister's Delegate review, there has been no voluntary compliance on her part to appear." There is no reasonable basis for the ID to suggest (even in the alternative) that this behaviour is deliberate or wilful on Ms. Lee's part. **But even if Ms. Lee cannot reasonably be said to be "refusing" to communicate or cooperate, I agree with the respondent that there is still a reasonable basis to find she is a flight risk in the requisite sense because she is unable to communicate or cooperate (a point counsel for Ms. Lee does not contest). Such a finding would, however, weigh very differently in the overall balancing than a flight risk based on deliberate or wilful non-compliance.**

Practice tips: UTA & MH in light of *Zora* & *Lee*

- Build strong evidentiary record – expert psych evidence whenever possible, expert evidence from criminal counsel on how involuntary non-compliance is treated in criminal matters in light of *Zora;*
- When making *Zora* based UTA arguments make sure to highlight that Lee was not a UTA case and the issue of involuntary non-compliance was not argued before the Court;
- Distinguish *Lee* on facts – other issues of non-compliance in that case;
- Some wiggle room in *Lee* – some distinction to be made between voluntary vs. involuntary non-compliance in terms of weight
- Continue to push evidence based Section 15 challenges where appropriate – differential treatment based on MH or addiction

Regulation 248 factors

- STEP 1 – Establish grounds for detention under A58. If made out, then
- STEP 2 – Turn to R248 factors
- Balancing exercise
- Even when grounds for detention exist, R248 factors may warrant release
- Determine weight afforded to each R248 factor and if the factor favours continued detention or release;
- Factors are non-exhaustive – eg: conditions of detention are read in, as per *Brown*

R248: ATDs & Vulnerability

Lee 2022 FC 383

- FC (Norris J.) granted JR of ID's decision continuing detention
- Para. 68: "…there is a **heightened obligation on the part of the ID to consider alternatives to detention for vulnerable persons** such as persons with mental illness…Related to this is a **heightened onus on the Minister to justify the detention of such persons**, as reflected in paragraph 3.1.15 of the *Guideline.* Consequently, as the *Guideline* also notes, a member should "actively question" the steps that the Minister has taken to make an alternative to detention available when the person concerned is a vulnerable person."

R248: ATDs & Vulnerability

- Para. 70: I agree with counsel for Ms. Lee that the ID mischaracterized the risk that needs to be managed as that of Ms. Lee "running off, intentionally or otherwise." As well, I note that the *Guideline* directs members to "consider how certain vulnerabilities, such as mental illness, may affect the person's ability to comply with conditions of release and whether a less restrictive alternative to detention would be viable before continuing detention" (ata para. 5.1.1). I also note again that the *Guideline* states that, where vulnerabilities are identified, a member is under a heightened obligation to consider alternatives to detention "and to impose attainable conditions that are connected to the circumstances of the vulnerable person concerned" (at para. 5.1.6). These are important considerations**. They reflect an acknowledgement that release on less than perfect conditions may be necessary because the continued detention of a vulnerable person would be disproportionate to the public interest being served.** This would especially be the case when other relevant factors (including those enumerated in section 248) are found to favour release).

R248: ATDs & Vulnerability

Tjhang 2022 FC 1664

- Mr. Tjhang had substance use and mental health issues. Was detained at provincial jail in BC, mostly in segregation. Evidence that he was experiencing distress in detention.
- ID ordered release to a bondsperson at the 7-day review.
- FC (Sadrehashemi J.) dismissed Minister's JR of ID release
- Paras 21, 25: As in *Lee,* FC in *Tjhang* cites the *Guideline:* where a detainee has vulnerabilities, a member is under heightened obligation to consider ATDs and impose attainable conditions that are connected to the circumstances of the vulnerable person concerned.

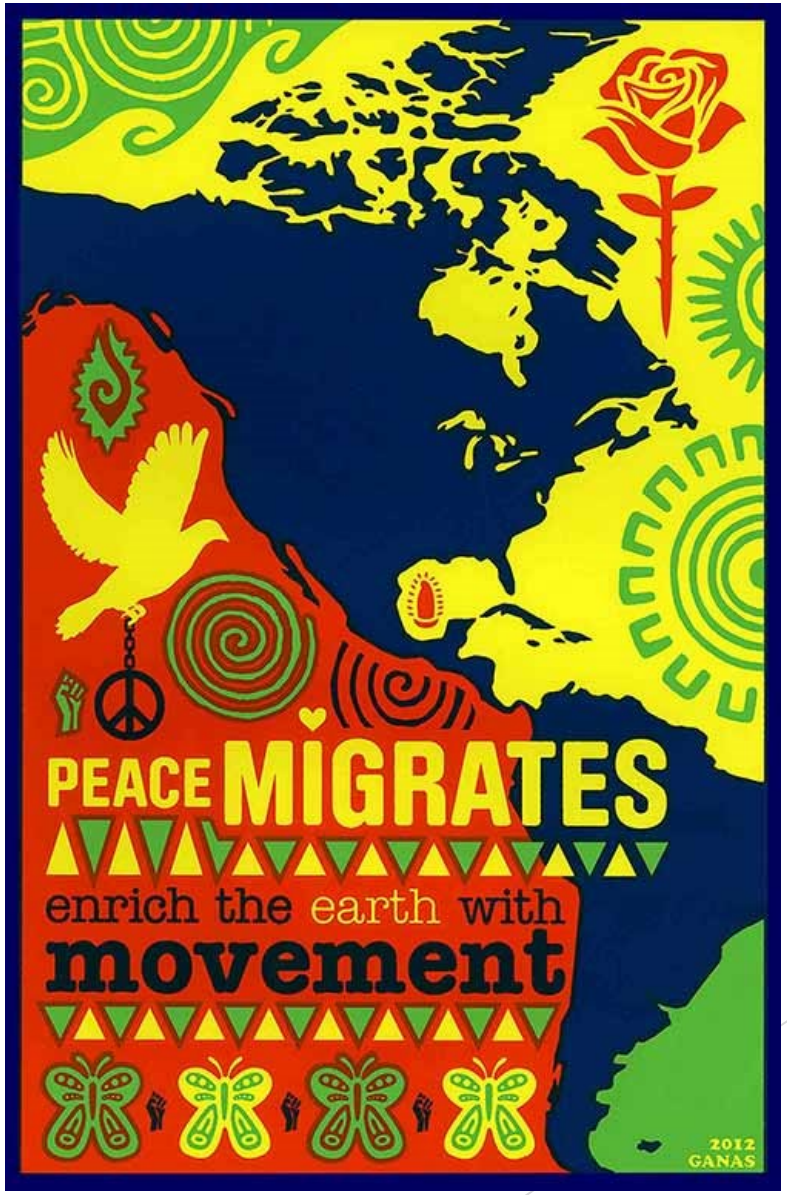
R248: Structuring ATDs

Thavagnanathiruchelvam 2021 FC 592

- ID released Mr. T. to reside at a halfway house for remainder of parole with additional supervision from bondspersons.
- FC (Grammond J.) dismissed Minister's JR of ID release order
- Para 32: "The analysis must begin with the recognition that a perfect bondsperson will rarely be available."
- FC also upheld the ID's decision convening a hearing two weeks prior to parole expiry the following year to review detention at that time (paras. 35-36)

Guideline 2, section 3 sets out further guidance for members on release and ATDs, including imposing conditions of release and bondspersons

QUESTIONS/REFLECTIONS?



Freedom of Movement and Family Unity are Human Rights, Kim Dinh (L)

Peace Migrates , Ernesto Yerena (R)