



Citizenship and
Immigration Canada

Citoyenneté et
Immigration Canada

ENF 20

Detention

ENF 20 Detention

Updates to chapter	2
1. What this chapter is about.....	3
2. Program objectives.....	3
3. The Act and Regulations	3
3.1. Authority to detain a person	3
3.2. Regulatory factors and conditions.....	4
3.3. Required forms.....	5
4. Instruments and delegations	5
5. Departmental policy.....	6
5.1. Principles.....	6
5.2. General.....	6
5.3. Grounds for detention	7
5.4. To complete the examination.....	7
5.5. Suspected of security risk/human or international rights violations	8
5.6. Danger to the public.....	9
5.7. Flight risk.....	10
5.8. Identity.....	11
5.9. Other regulatory factors	12
5.10. Detention of minor children (under 18 years of age).....	13
5.11. Alternatives to detention	14
5.12. Third party risk management programs	15
5.13. Vulnerable groups	15
5.14. Jurisprudence	16
5.15. Rights of detained persons.....	16
5.16. Right to a detention review	17
5.17. Person named in a certificate described in A77	17
6. Definitions.....	17
7. Importance of notes in the file	18
8. Detention procedures	19
9. Detention review.....	20
10. Release by officer.....	20
11. Place of detention.....	21
12. Transitional measures	22

ENF 20 Detention

Updates to chapter

Listing by date:

Date: 2007-09-26

Section 8 has been amended to include clearer and more detailed procedural guidelines on detention.

Section 11 has been amended to include the addition of the Kingston facility housing security certificate cases.

Date: 2005-11-02

Section 4 has been amended to include a reference to A55, A56 as well as to IL 3 where the complete Designation of Officers and Delegation of Authority documents can be found.

Section 5 now reflects that the Minister of Citizenship and Immigration is responsible for the administration of the Act with the exception of those areas of responsibility which fall within the mandate of the Minister of Public Safety and Emergency Preparedness.

Date: 2004-01-19

The fourth paragraph of Section 5.16, Right to a detention review, has been amended and now reads as follows:

It should be noted that, according to section 9 of the Immigration Division Rules applicable to detention reviews, if a party has new facts to present, the party may make an application requesting a detention review before the expiry of the seven-day or 30-day period, as the case may be.

2003-02-13

Section 8 has been amended to provide clearer guidance for persons who are in the custody of another judicial body and are of interest to immigration.

ENF 20 Detention

1. What this chapter is about

This chapter offers guidance to officers in exercising their powers of detention under IRPA. It also states the principles underlying our detention policy, and describes the administrative and legal framework within which detention operates.

2. Program objectives

IRPA has the following objectives:

- protect the health and safety of Canadians and to maintain the security of Canadian society;
- promote international justice and security by fostering respect for human rights and by denying access to Canadian territory to persons who are criminals or security risks.

The power to detain permanent residents and foreign nationals meets these objectives by:

- protecting Canadian society; and
- supporting enforcement of IRPA.

3. The Act and Regulations

3.1. Authority to detain a person

A55 identifies the grounds on which an officer may detain a permanent resident or foreign national, and the circumstances under which a warrant is required.

For information about	Refer to this section of IRPA
Arrest and detention with warrant An officer may issue a warrant for the arrest and detention of a permanent resident or a foreign national who the officer has reasonable grounds to believe: <ul style="list-style-type: none">• is inadmissible; and• is a danger to the public; or• is unlikely to appear for examination, an admissibility hearing or removal from Canada.	A55(1)
Arrest and detention without warrant An officer may, without a warrant, arrest and detain a foreign national, other than a protected person, who the officer has reasonable grounds to believe: <ul style="list-style-type: none">• is inadmissible; and• is a danger to the public; or• is unlikely to appear for examination, an admissibility hearing, removal from Canada,	A55(2) A95(2) (protected person)

ENF 20 Detention

<p>or at a proceeding that could lead to the making of a removal order by the Minister's delegate under subsection A44(2); or</p> <ul style="list-style-type: none"> if the officer is not satisfied as to the identity of the foreign national in the course of any procedure under this Act. 	
<p>Detention without warrant on entry into Canada A permanent resident or a foreign national may, on entry into Canada, be detained if an officer</p> <ul style="list-style-type: none"> considers it necessary to do so in order for the examination to be completed; or has reasonable grounds to suspect that the permanent resident or foreign national is inadmissible on grounds of security or for violating human or international rights. 	A55(3)(a) and A55(3)(b)
<p>Detention of a person covered by a certificate (without warrant for a foreign national, with warrant for a permanent resident)</p>	A77 and A82

3.2. Regulatory factors and conditions

Regulations on detention and release have been developed under A61.

Part 14 of the Regulations is constructed as follows:

R244	Factors that shall be considered by the officer and the Immigration Division.
R245	Factors: risk of flight.
R246	Factors: danger to the public.
R247	Factors: identity not established.
R248	Other factors.
R249	Special considerations for minor children.
R250	Applications for travel documents.

R244 stipulates that the officer and the Immigration Division shall take into consideration the factors set out in Part 4 in making their assessment, whether a person:

- is 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's delegate under A44(2);
- is a danger to the public; or
- is a foreign national whose identity has not been established.

R245 to R247 list the factors that shall be taken into consideration when they are present in the case being examined. It must be established how the presence of one or more of these factors shows that the person in question is a danger to the public, is unlikely to comply with the immigration procedure provided for in A55, is not cooperating to establish their identity, or has been unable to prove their identity to the officer's satisfaction.

The Regulations provide a non-exhaustive list of factors that officers and members of the Immigration Division shall consider. The mere presence of a factor or factors should not lead to an automatic detention or release decision. Rather, officers and members of the Immigration Division

ENF 20 Detention

must always consider, in addition to the factors mentioned in the Regulations, all other factors and facts pertaining to the circumstances of the case when making a detention decision, as provided by A55 and A58.

R248 stipulates that if an officer or the Immigration Division determines that there are grounds for detention, the officer or the Immigration Division shall consider the following factors before making a decision on detention or release:

- the reason for detention;
- the length of time in detention;
- whether there are any elements that can assist in determining the length of time that detention is likely to continue and, if so, that length of time;
- any unexplained delays or unexplained lack of diligence caused by the Canada Border Services Agency (CBSA) or the person concerned; and
- the existence of alternatives to detention.

R249 prescribes special considerations that apply in relation to the detention of minor children. R249 must be read and interpreted in light of A60:

60. For the purposes of this Division, it is affirmed as a principle that a minor child shall be detained only as a measure of last resort, taking into account the other applicable grounds and criteria including the best interests of the child.

This section establishes a framework for any decision concerning the detention and release of a minor.

3.3. Required forms

The forms required are shown in the following table.

Form Title
Order of Citizenship and Immigration to Deliver Inmate [A59]
Order for Detention
Security Deposit
Notice of Rights Conferred by the Vienna Convention and to the Right to be Represented by Counsel at an Admissibility Hearing
Performance Bond - IRPA
Performance Bond - IRPA (Where there are co-signers)
Acknowledgement of Conditions - IRPA
Notice of arrest under Section 55 of the IRPA
Review of Detention by Officer pursuant to Section 56 of the IRPA
Identity Information Form
Authority to Release from Detention
Request for admissibility hearing / detention review pursuant to the Immigration Division rules

4. Instruments and delegations

IRPA provides officers with the discretionary authority or power to arrest and detain under A55. A56 designates to officers the authority, prior to the first detention review, to release a person from detention if, in their opinion, the reasons for detention no longer exist.

ENF 20 Detention

Officers at ports of entry and enforcement officers working from inland offices may exercise this power. The CBSA Designation of Officers and Delegation of Authority document can be found in IL 3.

5. Departmental policy

The Minister of Citizenship and Immigration (CIC) is responsible for the administration of the Act with the exception of the areas for which the Minister of Public Safety has assumed responsibility as described below.

The Minister of Public Safety is responsible for the administration of the Act as it relates to the following:

- examinations at ports of entry;
- the enforcement of the Act, including arrest, detention and removal;
- the establishment of policies respecting the enforcement of the Act and inadmissibility on grounds of security, organized criminality or violating human or international rights; or
- determinations under any of A34(2), A35(2) and A37(2)

For further information on arrest and detention procedures, please see ENF 7 Investigations and Arrests.

5.1. Principles

The CBSA is guided by the following principles governing the treatment of persons detained under the Act:

- persons detained under IRPA are treated with dignity and respect at all times;
- that persons are detained in an environment that is safe and secure;
- detention operations are conducted in a transparent manner, while respecting the privacy of the detained persons;
- people who are detained are informed of their legal rights, are given an opportunity to exercise their rights and are informed of the status of their case;
- feedback is welcomed by the CBSA and all detainees have access to a feedback process;
- for Immigration Holding Centres (IHC), the CBSA maintains standards that incorporate international standards;
- monitoring of the CBSA compliance with these standards will be conducted regularly by an external agency;
- in CBSA IHC's, the CBSA makes reasonable efforts to meet the physical, emotional and spiritual needs of detained persons in a way that is culturally appropriate.

5.2. General

The CBSA recognizes that to deny individuals their liberty is a decision that requires a sensitive and balanced approach. In exercising their discretionary authority to detain, officers need to

ENF 20 Detention

consider all reasonable alternatives before ordering the detention of an individual. This approach requires officers to exercise sound judgment in cases involving the arrest and detention of individuals, pursuant to IRPA.

Sound judgment not only requires individual assessment of the case, but also an assessment of the impact of release on the safety of Canadian society. Additionally, it requires a risk management approach to make decisions within the context of the following priorities:

- first, where safety or security concerns are identified; (including criminality, terrorism or violent behaviour at the time of examination);
- second, where identity issues must be resolved before security or safety concerns are eliminated or confirmed;
- third, to support removal where removal is imminent and where a flight risk has been identified;
- fourth, where there are significant concerns regarding a person's identity including multiple identity documents, false documents, lack of travel documents or non-cooperation in assisting an officer to establish their identity.

5.3. Grounds for detention

An officer may detain a person on entry into Canada under the authority of A55(3) where:

- the officer considers it necessary to do so in order for the examination to be completed; or
- the officer has reasonable grounds to suspect that the permanent resident or foreign national is inadmissible on grounds of security or for violating human or international rights.

Officers may arrest and detain on entry into Canada and within Canadian territory under the authority of A55(1) and A55(2) where:

- the officer has reasonable grounds to believe the person is inadmissible and is a danger to the public; or
- the person is 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's delegate under A44(2); or
- the officer is not satisfied of the identity of the foreign national in the course of any procedure under this Act.

For information on how to complete the examination, see Section 5.4.

For information on people suspected of being a security risk/human or international rights violator, see Section 5.5.

For information on how to determine if a person is a danger to the public, see Section 5.6.

For information on assessing a flight risk, see Section 5.7.

For information on detaining a person for reasons of identity, see Section 5.8.

5.4. To complete the examination

Detention to complete an examination is warranted where the officer is concerned that the person may be a security risk, may have violated human or international rights, may be a danger to the public, or may not appear to continue the examination.

ENF 20 Detention

Detention to complete an examination should never be used for administrative convenience.

An officer may require further relevant documents, information or other evidence to determine admissibility. Some situations will require consultations with national and international enforcement agencies. Validation of information is crucial where significant suspicions remain concerning the admissibility of a foreign national or permanent resident.

If detention is not warranted, the following options are available:

- A23 provides that entry may be authorized for further examination. This authorization is associated with conditions prescribed by R43, and the officer may require that a person provide a guarantee or deposit a sum of money with the Minister of Public Safety to guarantee compliance with any imposed condition [R45];
- R51 stipulates that an officer who examines a foreign national who is seeking to enter Canada from the United States shall direct them to return to the United States temporarily if
 - ◆ no officer is able to complete the examination;
 - ◆ the Minister's delegate is not available to consider, under A44(2), a report prepared with respect to the person; or
 - ◆ an admissibility hearing cannot be held by the Immigration Division [R41].
- R42(1) stipulates the situations in which an officer may allow a foreign national to withdraw their application to enter Canada when they indicate to the officer that they wish to do so.

For more information on the above options, see ENF 4, Port of Entry Examinations.

5.5. Suspected of security risk/human or international rights violations

Where the officer assesses there are reasonable grounds for suspecting the person is either a security risk or has violated human or international rights, the person should be detained.

Intelligence information or lookouts from CIC, the CBSA, the RCMP or CSIS are essential in assessing this type of situation. In addition, these organizations may provide the officer with evidence to support the inadmissibility grounds. A34 and A35 and R14 to R16 describe the facts that result in inadmissibility on grounds of security or for violation of human or international rights. For more information regarding the evidence required to find a person described in these sections, see Inadmissibility, ENF 1, Section 3.

If the officer, in conducting the examination, finds indications that the individual concerned might be a person to whom these sections apply, a detailed examination should follow with more specific questions, relevant to the activities and facts contemplated in A34 and A35. For cases of this type, the officer must contact the appropriate section of the National Security Division, CBSA, NHQ, to receive assistance and to be referred to security experts. It should be noted that this Division is available during regular business hours.

NHQ may be contacted for guidance at:

- NAT-Organized-Crime@cic.gc.ca for persons who have been involved in organized crime;
- NAT-WarCrimes@cic.gc.ca for persons who are or who have been involved in war crime;
- NAT-Security-Review@cic.gc.ca for persons who have been involved in terrorism or espionage.

For the complete list of contacts, please refer to NHQ-CASE MANAGEMENT-USERS found in Microsoft Outlook.

ENF 20 Detention

The officer shall pursue their research to establish whether the person is inadmissible for these reasons during the period of detention. Any actions or steps undertaken shall be noted on the file. At the detention review, proof must be provided to the Immigration Division that the Public Safety Minister is taking the required action to inquire into the reasonable grounds for suspecting that the permanent resident or foreign national is inadmissible on grounds of security or because of human or international rights violations.

5.6. Danger to the public

Where the officer assesses there are reasonable grounds to believe the individual is a danger to the public, the person should be detained. R246 lists the following factors that must be considered in assessing danger to the public:

- (a) the fact that the person constitutes, in the opinion of the Citizenship and Immigration (CIC) Minister, a danger to the public in Canada or a danger to the security of Canada under A101(2)(b), A113(d)(i) or (ii) or 115(2)(a) or (b);
- (b) association with a criminal organization within the meaning of A121(2);
- (c) engagement in people smuggling or trafficking in persons;
- (d) conviction in Canada under an Act of Parliament for
 - (i) a sexual offence, or
 - (ii) an offence involving violence or weapons;
- (e) conviction for an offence in Canada under any of the following provisions of the *Controlled Drugs and Substances Act*, namely,
 - (i) section 5 (trafficking),
 - (ii) section 6 (importing and exporting), and
 - (iii) section 7 (production);
- (f) conviction outside Canada, or the existence of pending charges outside Canada, for an offence that, if committed in Canada, would constitute an offence under an Act of Parliament for
 - (i) a sexual offence, or
 - (ii) an offence involving violence or weapons; and
- (g) conviction outside Canada, or the existence of pending charges outside Canada, for an offence that, if committed in Canada, would constitute an offence under any of the following provisions of the *Controlled Drugs and Substances Act*, namely,
 - (i) section 5 (trafficking),
 - (ii) section 6 (importing and exporting), and
 - (iii) section 7 (production).

The above factors outlined in the Regulations provide a non-exhaustive list for the decision-maker to consider.

IRPA provides to officers and members of the Immigration Division the authority to consider **all other circumstances** pertaining to the case.

The following are additional factors that may be relevant:

- history of violent or threatening behaviour demonstrated by the person at the time of examination;
- violent or threatening behaviour at the time of examination;
- mentally unstable behaviour at the time of examination.

It must be established why the presence of one or more of these factors demonstrates that the person is a danger to the public. For instance, it is not enough to state that an individual

ENF 20 Detention

represents a danger to the public by indicating the individual is the subject of a Citizenship and Immigration Minister's opinion under A101(2)(b). Specific details must support the rationale for the danger opinion. Facts or criminal profile should clearly outline why the individual is a danger to the public.

A criminal record does not necessarily mean that the individual is a threat. Various factors must be weighed, such as the nature of the offences, the circumstances in which they were committed, the punishment imposed, violent behaviour, the possibility of recidivism, and the possible consequences of releasing the person. Assessment reports by correctional services and by police may be a relevant source of information.

For example, a person who was convicted of a criminal offence and has not committed any further offences since that time might not be a menace to public safety. Conversely, there may be reasonable grounds for thinking that an individual with no criminal record is a danger to the public, for example, violent behaviour to an officer during an examination.

Instability of the person associated with mental imbalance at the time of the examination may be a very important indicator in the assessment of the danger, and may point to future violent behaviour. Officers will have to secure the help of the necessary professional resources, in order to make the best possible assessment of the case. CIC's medical services, or even local mental health resources, will be able to provide assistance and to indicate what action should be taken in this type of case.

5.7. Flight risk

Where the person poses a potential flight risk and providing removal is not imminent and no other concerns exist, i.e., identity, danger, security or violations of human or international rights, the officer should consider all alternatives to detention.

Officers may detain an individual to ensure their presence for an examination, an admissibility hearing, or removal at a proceeding that could lead to the making of a removal order by the Minister's delegate under A44(2).

R245 outlines the factors to be taken into account when assessing flight risk:

- (a) being a fugitive from justice in a foreign jurisdiction in relation to an offence that, if committed in Canada, would constitute an offence under an Act of Parliament;
- (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 that would likely lead the person to not appear for a measure referred to in R244(a) or to be vulnerable to being influenced or coerced by an organization involved in such an operation to not appear for such a measure; and
- (g) the existence of strong ties to a community in Canada.

The above factors outlined in the Regulations provide a non-exhaustive list for the decision-maker to consider. The Act provides both officers and members of the Immigration Division with the

ENF 20 Detention

authority to consider **all other circumstances** pertaining to the individual's case. The following are additional factors that may also be present and relevant:

- no fixed place of residence or attachment in Canada;
- removal is imminent;
- presence of responsible relatives or friends in Canada, who are prepared to provide a guarantee or surety;
- the credibility of the behaviour the person has demonstrated during the examination;
- availability of alternatives to detention and whether sufficient to mitigate the flight risk.

The mere presence of any of the above factors should not automatically lead to detention or release. The factors must be considered in the context of all the circumstances in the case. For example, the person may be indigent; however, this does not constitute proof that the person will not appear. Much would depend on the behaviour of the individual as demonstrated during the examination as well as all other circumstances of the case.

An officer must consider all the elements that support release of the client, before finding that detention is the appropriate decision. For example, the individual has complied with imposed conditions in the past including diligently keeping appointments prescribed by an officer or by a member of the Immigration Division.

It is essential that officers are aware that the risk of flight may change as the various immigration processes unfold. For example, an individual claiming refugee protection may not be a flight risk at the time of the initial claim but may become a flight risk on the issuance of a negative determination by the Immigration and Refugee Board. Similarly a person appealing their removal order may not represent a flight risk while that matter is being reviewed, but may become a flight risk following a negative decision.

5.8. Identity

A person should be detained for identity where the officer is not satisfied as to the person's identity and identity issues need to be resolved for safety, security or inadmissibility concerns to be addressed to the satisfaction of the officer.

Officers should consider detention where there are significant concerns regarding a person's identity, including but not limited to: multiple identity documents, false documents, lack of documents, lack of credibility and non-cooperation to establish identity.

A55(2)(b) allows an officer to arrest and detain, without a warrant, a foreign national, other than a protected person (the term protected person is defined in A95(2)), if the officer is not satisfied as to the identity of the foreign national in the course of any procedure under this Act.

This provision must be read in conjunction with A58(1)(d), which stipulates that the Immigration Division shall order the release of the foreign national unless it is satisfied, taking into account prescribed factors, that:

- the Minister's delegate is of the opinion that the identity of the foreign national has not been, but may be, established;
- the foreign national has not reasonably cooperated with an officer or the Immigration Division by providing relevant information for the purpose of establishing their identity; or
- the Minister's delegate is making reasonable efforts to establish the identity of the foreign national.

ENF 20 Detention

IRPA provides for a foreign national to be released if they have reasonably cooperated by providing relevant information and, despite reasonable efforts by the Minister's delegate, it is not possible to establish identity. R247 lists the following factors to be considered:

- the foreign national's cooperation in providing evidence of their identity, or assisting the officers in obtaining evidence of their identity, in providing the date and place of their birth as well as the names of their mother and father or in providing detailed information on the itinerary they followed in travelling to Canada or in completing an application for a travel document;
- in the case of a foreign national who makes a claim for refugee protection, the possibility of obtaining identity documents or information without divulging personal information to government officials of their country of nationality or, if there is no country of nationality, their country of former habitual residence;
- the destruction of identity or travel documents, or use of fraudulent documents in order to mislead officers, and the circumstances under which the foreign national took those actions;
- the provision of contradictory information with respect to identity at the time of an application to the CBSA or CIC; and
- the existence of documents that contradict information provided by the foreign national with respect to their identity.

Consideration of the factors set out in R247(1)(a) shall not have an adverse impact with respect to minor children referred to in R249.

The above factors outlined in the Regulations provide a non-exhaustive list for the decision-maker to consider. IRPA provides officers and members of the Immigration Division with the authority to consider all other circumstances pertaining to the individual's case. The following are additional factors that may also be present and relevant:

- whether the person is credible;
- whether differences in identities, (names) provided resulted from language differences or interpretation difficulties.

R247(2) directs that a minor child's failure to cooperate must not have a negative impact on the assessment of the case, i.e., non-cooperation in itself should not lead to a detention decision. Identification efforts must be actively pursued and expedited.

Given A58(1)(d), the Minister's representative may be required to demonstrate the possibility of establishing the identity of the person concerned within a reasonable period of time. Officers responsible for the identity investigation must follow each of the cases closely and document any efforts made to establish the person's identity. A lack of cooperation on the part of the individual must also be noted on the file. For further guidelines on investigative procedure for identity, see ENF 7, Investigations and Arrests.

5.9. Other regulatory factors

R248 outlines the factors the officer or the Immigration Division shall consider before making a decision on detention or release:

- the reason for detention;
- the length of time in detention;

ENF 20 Detention

- whether there are any elements that can assist in determining the length of time that detention is likely to continue and, if so, that length of time;
- any unexplained delays or unexplained lack of diligence caused by the CBSA or the person concerned; and
- the existence of alternatives to detention.

R248 sets out the factors to be considered in a detention or release decision as directed in two Federal Court decisions, *Sahin v. M.C.I.*, [1995] 1 F.C. 214 and *Kidane v. Canada (Minister of Citizenship and Immigration)*, Federal Court (IMM-2044-96, 11th July, 1997). For details on these two decisions, see Section 5.14, Jurisprudence in these guidelines.

These cases provide guidance to decision-makers as to the factors that warrant consideration in decisions concerning detention or release. Consideration of the above factors allows for limitations on immigration detention, particularly in the case of long-term detention. However, neither of these decisions preclude detention, particularly long-term detention.

Detention is feasible where:

- public safety is at issue;
- alternatives to detention are not available to mitigate the risk to public safety or flight risks;
- the length of detention can be determined or estimated, that is, when will there be a conclusion to the process, for example, arrangements in place for removal or an estimated time to establish the person's identity; and
- any delays are caused by the detained individual and not the CBSA.

5.10. Detention of minor children (under 18 years of age)

IRPA does not allow a minor child to be detained for their protection. Child protection responsibility rests with the provincial youth protection agencies. A60 stipulates that it is affirmed as a principle that a minor child shall be detained only as a measure of last resort, taking into account other applicable criteria including the best interests of the child.

A60 is consistent with the *UN Convention on the Rights of the Child* to which Canada is a signatory and which provides that an administrative authority must take the interests of the child into account. Refer to <http://www.unicef.org/crc/crc.htm>. IRPA makes no distinction between accompanied and unaccompanied minors; therefore, officers must be guided by the principles of IRPA in all cases involving minors.

R249 identifies the special considerations that apply in relation to the detention of minor children under 18 years of age. These considerations are described in R249 as follows:

- (a) the availability of alternative arrangements with local child care agencies or child protection services for the care and protection of the minor children;
- (b) the anticipated length of detention;
- (c) the risk of continued control by the human smugglers or traffickers who brought the children to Canada;
- (d) the type of detention facility envisaged and the conditions of detention;

ENF 20 Detention

- (e) the availability of accommodation that allows for the segregation of the minor children from adult detainees who are not the parent of or the adult legally responsible for the detained minor children; and
- (f) the availability of services in the detention facility, including education, counselling and recreation.

In response to those considerations, the CBSA is committed in providing education after seven days for school age children in CBSA IHCs.

Where safety or security is not an issue, the detention of minor children is to be avoided whether unaccompanied or accompanied by a parent or legal guardian. Alternatives to detention are to be considered. Detention of a minor child, however, is not precluded where the minor is considered a security risk or danger to the public.

For unaccompanied minors the preferred option is to release with conditions to the care of child welfare agencies, if those organizations are able to provide an adequate guarantee that the minor child will report to the immigration authorities as requested. If the presence of smugglers or traffickers is a concern, the matter must be discussed with the child protection officers to ensure that adequate protection is provided and that the risk of flight in these situations is mitigated. Effective working arrangements and administrative agreements with child welfare organizations should be developed and fostered at the regional and local levels.

Where detention is an option for non-danger or security cases, whether the minor is accompanied or unaccompanied, it should be for the shortest period of time and should be primarily focused on supporting removal. In cases involving detention of minor children officers must advise their manager.

For appearances before the Immigration and Refugee Board (IRB) in situations where a minor is detained, A167(2) provides that a representative shall be designated for any person who is under 18 years of age or who, in the opinion of the Division, is unable to understand the nature of the proceedings. For more information on detention review, see ENF 3, Admissibility Hearings and Detention Review Proceedings.

5.11. Alternatives to detention

Officers must be aware that alternatives to detention exist. As an alternative to detention, an officer may impose conditions, require a deposit of money or direct that a person participate in a third party risk management program.

An officer, under A56 or the Immigration Division under A58(3) may exercise discretion in choosing to impose conditions upon release.

The following are examples of conditions that may be imposed at the discretion of the officer or at the request of a hearings officer at a detention review:

- report, when requested to do so by an officer, to any place, on any date and at any time for the purposes of arranging for their departure and removal from Canada;
- report to an officer on the date and time stipulated at the CBSA office nearest to their residence and thereafter (indicate frequency, e.g., every Tuesday);
- report to the Immigration Division of the IRB at the date and time stipulated, as required by the Immigration Division for their admissibility hearing and for any continuation thereof;
- report for any appointments ordered by an officer, to the place, on the date and at the time stipulated;
- inform the CBSA in writing without delay of any criminal charges or convictions;

ENF 20 Detention

- if a person decides to leave Canada, they must notify an officer of their departure arrangements, and must have their departure verified by an officer;
- for persons claiming refugee protection, the following conditions are generally applied:
 - ◆ the person must not work or study in Canada without written authorization from an officer;
 - ◆ the person must comply with the instructions issued by CIC or the CBSA;
 - ◆ the person must comply with all instructions contained in the IRB's notice to appear;
 - ◆ the person must undergo a medical examination within the number of days stipulated after receiving the medical instructions (medical report and list of panel doctors).

Before releasing a person, the officer must ensure that the person's fingerprints and photograph are on file and that all travel documents and other important documents have been seized and placed on the file. See ENF 7, Investigations and Arrests, for procedures relating to seizure of documents and fingerprinting.

If the officer is concerned that the detained person will not appear if released, the officer may release the person to a guarantor who is prepared to take responsibility for the person concerned. Officers must be satisfied that the guarantor will be able to exercise enough control over the released person to ensure their appearance at immigration proceedings. Officers must also assess the reliability of the proposed guarantor. For example, if the guarantor has already failed to observe the conditions of a previous performance bond, the officer will be less inclined to release the person concerned without requiring a security deposit.

In the case of a foreign national who makes a claim for refugee protection, the application for a passport or travel document shall not be divulged to government officials of their country of nationality as required by R250. In the case of a person with no country of nationality, their country of previous habitual residence will not be informed of their claim for refugee protection, as long as the removal order to which they are subject is not enforceable.

5.12. Third party risk management programs

The CBSA's contractual agreement with the Toronto Bail Program is an example of a third party risk management program. The Toronto Bail Program is a non-profit agency that provides the CBSA, in the Greater Toronto Area, an additional alternative to detention where other alternatives (i.e., bonds, conditions) are not available or not appropriate.

The Toronto Bail Program determines which detained clients would be suitable for this type of community supervision. The selection criteria developed by the program and the CBSA include a person's willingness to surrender their travel document or to complete an application for travel documents prior to release. In order for this program to be successful, the individual must possess the ability to understand and comply with the requirements established for community supervision. During the selection process the Toronto Bail Program actively seeks to identify suitable bondspersons who could come forward on behalf of the detainee. If a suitable bondsperson is identified, the Toronto Bail Program is not the appropriate alternative to detention.

If a detainee is deemed suitable for this program, the Toronto Bail Program makes an offer of supervision on behalf of a detainee during a detention review to the Immigration Division for their consideration.

For more information on security deposits or guarantees, see ENF 8, Bonds.

5.13. Vulnerable groups

Where safety or security is not an issue, detention is to be avoided or considered as a last resort for the following:

ENF 20 Detention

- elderly persons;
- pregnant women;
- persons who are ill;
- persons who are handicapped;
- persons with behavioural or mental health problems.

For persons falling into these categories, alternatives to detention should always be considered.

Where detention is resorted to for non-danger or security cases, it should be for the shortest period of time and should be primarily focused on supporting removal.

Where a person is detained, officers must ensure that any information pertaining to the person's health or welfare is noted for the health care professionals responsible for the institution where the person is detained.

5.14. Jurisprudence

In *Sahin (supra)*, the Federal Court ruled that persons cannot be held indefinitely under the provisions of the *Immigration Act*. There has to be an end in view to the process. In this case, the reason for detention was that, in the opinion of the adjudicator, the subject would not report for removal if required to do so. The Court's decision in this case set out a four part test regarding detention. The first is that there is a stronger case for justifying a longer detention for someone considered a danger to the public. The second concerns the length of future detention: if it cannot be ascertained, the facts would favour release. The third is a question of who is responsible for any delay: unexplained delay or even unexplained lack of diligence should count against the offending party. The fourth is the availability, effectiveness and appropriateness of alternatives to detention such as outright release, bail bond, periodic reporting, etc.

However, the Federal Court also determined in *Kidane (supra)* that when an adjudicator found that a person was a danger to the public and that the person refused to cooperate in speeding up their removal, prolonged detention could be more easily justified. In the *Kidane* case, the individual concerned argued that prolonged detention violated his rights as guaranteed by the *Canadian Charter of Rights and Freedoms* [<http://laws.justice.gc.ca/en/charter/index.html>]. The adjudicator had found that the individual was a danger to the public, that he was to a large extent responsible for the procedural delays that had prolonged his detention, and that in the final analysis, there were no real alternatives to detention. In that case, the Court was of the opinion that the adjudicator had properly applied the four part test set out in *Sahin*, and that the prolonged detention of the individual did not violate his rights under the Charter. Consequently, even though the length of the detention could not be confirmed in that case, the Court upheld the adjudicator's decision to prolong the individual's detention.

5.15. Rights of detained persons

Rights are conferred under the Charter and The Vienna Convention on Consular Relations and Optional Protocols [the Vienna Convention]. See

<http://www.sos.state.tx.us/border/intlprotocol/vienna.shtml>

For detailed information regarding the rights of person detained, including the right to retain and instruct counsel and the right to have the nearest representative of the government of their country of nationality informed of the arrest and detention, see Investigations and Arrests, ENF 7, Section 16.2 and ENF 7, Section 16.3.

ENF 20 Detention

5.16. Right to a detention review

Another officer must review the officer's initial detention decision. This officer is responsible for reviewing the case considering any new information and for authorizing release under A56, if justified.

If, upon internal review, the detention decision is upheld, then the Immigration Division of the IRB will review the reasons for continuing with the detention within 48 hours following the start of the detention or as soon as possible thereafter.

If detention is maintained by the member, the detainee must be brought before the Immigration Division at least once in the seven-day period following the first review, then at least every 30 days following the preceding review.

It should be noted that, according to section 9 of the Immigration Division Rules Applicable to Detention Reviews, if a party has new facts to present, the party may make an application requesting a detention review before the expiry of the seven-day or 30-day period, as the case may be.

IRPA contains specific provisions governing the detention of a person who is named in a certificate. These detention reviews all occur before the Federal Court and the Public Safety Minister is represented by the CBSA lawyers.

Although it is not a right, refugee claimants should be provided with the telephone number and an opportunity to call the local UNHCR representative or a local organization that provides assistance to refugees. Assisting refugee claimants in this way is beneficial to officers as it may help to reduce the individuals' stress level. In addition, these organizations can identify possible alternatives to detention.

5.17. Person named in a certificate described in A77

For persons described in a security certificate under A77(1), the release and detention criteria, and detention review provisions differ from those described in Division 6 of IRPA. The Federal Court Trial Division will conduct detention reviews when needed.

A82(1) provides that when a permanent resident is named in a certificate, the Public Safety Minister may issue a warrant for the arrest and detention of that person if they have reasonable grounds to believe that the permanent resident is a danger to national security or to the safety of any person or is unlikely to appear at a proceeding or for removal. The first detention review must occur within 48 hours after the beginning of the detention. Until a decision is reached regarding the certificate, the permanent resident shall appear for a detention review at least once in the six months following each previous review, or on the authorization of the judge.

A82(2) provides the authority for a foreign national who is named in a certificate is to be detained without a warrant. There is no requirement for a detention review until a decision on the certificate is rendered under A80(1). According to A84(2), if the foreign national has not been removed from Canada within 120 days of the certificate being found reasonable, then the foreign national may apply to the Federal Court for release from detention. The Federal Court will consider the application and render a decision.

6. Definitions

Reasonable grounds to believe	Reasonable grounds are a set of facts and circumstances that would convince a normally prudent and informed person. They are not mere suspicions. The opinion must have an objective basis.
Reasonable grounds to suspect	Reasonable grounds to suspect, a lower standard than to believe, is a set of facts or circumstances that would lead the ordinarily cautious and prudent person to have a hunch or

ENF 20 Detention

	suspicion.
Protected person under A95(2)	A protected person is a foreign national on whom refugee protection is conferred under A95(1), and whose claim or application has not subsequently been deemed to be rejected under A108(3), A109(3) or A114(4).
Any procedure under IRPA	“Any procedure” refers to any process with regard to a person’s application or status, whether initiated by the person or by CIC or the CBSA that has arisen in the normal course of the immigration system. “Any procedure” does not include investigation.
Criminal organization within the meaning of A121(2)	For the purposes of A121(1)(b), “criminal organization” means an organization that is believed on reasonable grounds to be or to have been engaged in activity that is part of a pattern of criminal activity planned and organized by a number of persons acting in concert in furtherance of the commission of an offence punishable under an Act of Parliament by way of indictment or in furtherance of the commission of an offence outside Canada that, if committed in Canada, would constitute such an offence.
Unaccompanied minor	An unaccompanied minor is a child under 18 years of age who is separated from both parents or from their legal guardian.

7. Importance of notes in the file

The factors that justify detention are constantly evolving. They can change if new evidence is uncovered. It is the officer’s responsibility to clearly identify the initial factors that led to the decision to detain a person. An officer must be satisfied that given all the available information, the facts warrant the detention of an individual. Legislative grounds and the facts justifying the officer’s decision must be supported in notes included in the file, to enable others to understand the rationale for the decision.

A detailed decision will help those involved, specifically the hearings officer, understand the reasoning that led to the decision to detain a person as well as the factors that contributed to maintaining the decision for the duration of the immigration procedures. To this end, the officer’s conclusions must appear on the frontispiece page of the file, accompanied by a brief case history to provide context for the reasoning. A rigorous approach to the notes will support the action taken and help others understand the evolution of the file throughout the process (from the initial control to the detention review before the Immigration Division).

In this connection, the prescribed factors relating to detention and release in the Regulations can be used as a basis when an officer anticipates the need to detain an individual because they represent a flight risk or a danger to the public or because there is doubt regarding the individual’s identity. Although these prescribed factors must be considered during the officer’s initial assessment of the situation, they are not restrictive; it is an analysis of the file in its entirety that will determine whether detention is necessary. Thus, each file contains unique details that must be considered in conjunction with the Regulations and that may, when taken alone, lead the officer to conclude that detention is the only alternative.

When preparing the supporting notes, the officer must show that his or her decision is supported by a rigorous assessment of the facts, including factors prescribed by the Regulations. This does not preclude the possibility that a fact or piece of evidence taken alone may be sufficient to warrant detaining an individual.

Although each case must be assessed individually, the prescribed factors are a tool that ensures a high degree of transparency. Indeed, the purpose is not only to determine that a person represents a flight risk or a danger to the public or that there is doubt regarding his or her identity. The officer must also show that the facts underlying his or her decision are defined in one of the

ENF 20 Detention

prescribed factors or that they are sufficiently important to warrant detention or the consideration of an alternate measure. For procedures on taking notes, see ENF 7, Section 13.

8. Detention procedures

Arrest

When an officer concludes that it is necessary to arrest an individual under A55(1) or A55(2), the officer must complete the Notice of Arrest (IMM 1285B) Under Section 55 of IRPA and include it in the file of the detained person.

For complete information on the procedures for arrest under IRPA, see ENF 7 Investigations and Arrests, section 15.

Detention

If an officer determines that detention is the best solution to ensure that immigration procedures are carried out, the following procedures apply:

- In accordance with Section 10 of the *Charter of Rights and Freedoms* and in accordance with the rules of natural justice, the detained person must be informed of the reason for their detention, the right to an interpreter and the right to retain and instruct counsel without delay;
- In accordance with Article 36 of the *Vienna Convention on Consular Relations* (“*Vienna Convention*”), a person detained in a foreign country must be advised of their right to contact consular officials of their own country without delay;
- The officer must complete an Order for Detention (IMM 0421B). The original of this form will be given to the authority responsible for detaining the person and a copy must be placed in the detained persons file. The purpose of the detention order is to detain the person in accordance with the provisions of IRPA.

Data Entry

Detention tracking information is very time sensitive and must be entered into the Field Operations Support System (FOSS) and the National Case Management System (NCMS) databases immediately. This is particularly true for detention initiations and releases from detention. The NCMS must be used for tracking all ‘Immigration holds’ originating at a port of entry (POE), as well as those that originate at inland offices. If an immigration hold detention originates at a POE that does not have access to NCMS, then all information pertaining to the detention must be forwarded to the appropriate CBSA office for the earliest possible data entry to NCMS (regional policy will determine which office is responsible for entering a POE detention into NCMS). For procedures on entering detention data into NCMS, please see the NCMS Standard Operating Procedures (SOP’s).

Persons Serving a Sentence

In cases where a permanent resident or a foreign national is serving a sentence in a federal or provincial institution and a warrant under A55(1) has been issued, but not executed under the

ENF 20 Detention

IRPA, an Order to Deliver an Inmate form (IMM 0419B) in accordance with A59, will be sent to the appropriate institution to ensure that persons serving a sentence are released to CBSA.

For complete information on the procedures for persons serving a sentence, see chapter ENF 22.

9. Detention review

The officer's initial detention decision must be reviewed by another officer independent of the initial assessment of the case. The second officer reviewing the case may consider any new information and may authorize the person's release under A56, if justified.

If the initial detention decision is upheld, the Immigration Division of the IRB will review the reasons for continuing detention, within 48 hours following the start of the detention or as soon as possible thereafter. The officer must, forthwith, notify the registry of the Immigration Division by sending a Request for Admissibility Hearing and Detention Review pursuant to the Immigration Division Rules (IMM 5245B) by facsimile. The officer will retain in the file evidence that the Immigration Division has been informed. A copy of the facsimile receipt is evidence that the transmission has been completed. For more information on detention review pursuant to the Immigration Division Rules, see Chapter ENF 3, Admissibility Hearings and Detention Review Proceedings.

It is essential that the request for detention review (DR) and the detention summary (DS) screens in FOSS be completed as soon as possible by either the officer or the officer reviewing detention under A56, depending on local procedures. Officers must also ensure that the information concerning the detention of an individual is entered in the appropriate screens of the National Case Management System (NCMS).

10. Release by officer

The review of the initial grounds for detaining a person may lead the officer to conclude that the situation no longer requires the person being detained to be deprived of his or her freedom. In the event that the grounds for detention cease to exist before the Immigration Division has conducted a detention review, the officer may release the person being detained.

When the officer is conducting a detention review under A56 of IRPA, they must complete the Review of Detention by Officer - (Pursuant to Section 56 of the *Immigration and Refugee Protection Act*) form [IMM 1439E], summarizing the facts that warrant continuing detention or alternatives to detention as the appropriate action. An officer may release a permanent resident or foreign national before the first review by the Immigration Division if they think that the grounds no longer exist or do not warrant detention. The Authority to Release from Detention [IMM 5023B] must be served on the authorities of the detention centre holding the individual.

If the officer is of the opinion that release is the best alternative, they may subject that decision to the imposition of conditions deemed necessary and appropriate, such as a security deposit, to ensure that the client will be present for further proceedings. Those conditions must be included on the Acknowledgement of Conditions - the *Immigration and Refugee Protection Act* form [IMM 1262E] where the officer releases an individual and a signed copy should be given to the person concerned.

If the conditions for release involve payment of a cash bond, the Security Deposit – the *Immigration and Refugee Protection Act* form [IMM 0514B] must be completed by the officer. Where a guarantor is necessary to ensure compliance, the Performance Bond - the *Immigration and Refugee Protection Act* form [IMM 1230E] or the [IMM 1259E] (where there are co-signers) must be used. For further information on bond and performance bond, see ENF 8, Bonds.

ENF 20 Detention

Under A58(1)(d), the Minister's representative must demonstrate that efforts are being made to establish the identity of the foreign national. Therefore, a detention case under A55(2)(b) must be closely monitored and well documented. Efforts made to establish the identity of the person and reasons for their detention must be documented on the file. Monitoring of identity cases and efforts to establish identity are made according to local procedures. In some circumstances the Identity Information Form [IMM 5007B] is useful in capturing the efforts made by officers to establish identity.

The following are some steps that may be taken to establish a person's identity:

- photograph and fingerprint the person concerned and send the prints and photos to the RCMP;
- search the CPIC system and the National Crime Information Centre (NCIC) in the United States;
- conduct a paper investigation of the file to locate names and addresses of associates, employers or relatives;
- ask for the opinion of an interpreter concerning the dialect employed by the person concerned, and for any observations the interpreter might make;
- interview the person concerned on a regular basis;
- interview the friends, relatives and co-workers of the person concerned;
- have the person concerned interviewed by the embassy of the country of which an officer thinks the person is a citizen (does not apply to person asking for protection).

Pursuant to A16(3), an officer may require or obtain from a permanent resident or a foreign national who is arrested, detained or subject to a removal order, any evidence, photograph or fingerprints that may be used to establish their identity or compliance with this Act. For more information on this topic, see ENF 7, Investigations and Arrests.

An officer must inform the detainee and their counsel that they can assist with the identification process by providing a completed personal information form and by personally attempting to obtain documentary evidence from their country of origin.

It is not necessary to obtain the consent of the person concerned to disclose information in the course of verifying their status. Paragraph 8(2)(a) of the *Privacy Act* allows the disclosure of information where the disclosure is made for the purpose for which the information has been gathered, in this case, to establish the identity of a person.

11. Place of detention

Persons detained under IRPA may be held in a CBSA Immigration Holding Centre (IHC). The CBSA operates four IHCs: Toronto (Ontario); Laval (Quebec); Vancouver (British Columbia); and Kingston (Ontario).

The facility in B.C. is only for short stays (72 hours). The facility in Kingston houses security certificate cases only. For danger or security cases and for all other areas not served by an IHC, persons detained under IRPA are generally held in provincial correctional or remand facilities. Occasionally for short periods, persons are held in RCMP holding cells.

A person may be detained for a short period of time in a detention room at the CBSA offices or the CBSA holding cell where available. A detention room is an area that the CBSA has designated as secure and that is used to detain persons. If warranted, a family may be detained in a rented hotel

ENF 20 Detention

room with contracted security guards for a very short time to support their removal. Detention facilities serving the region of each CBSA are enumerated in the CBSA/CIC information technology systems, i.e., FOSS, NCMS.

12. Transitional measures

The following sections of the transitional measures relate to detention:

Every decision made under the former Act continues to be in force after the coming into force of this Act.	R317
Terms and conditions imposed under the former Act become conditions imposed under the Immigration and Refugee Protection Regulations.	R318
(1) The first review of reasons, after the coming into force of this section, for the continued detention of a person detained under the former Act shall be made in accordance with the provisions of the former Act. (2) If the review referred to in subsection (1) was the first review in respect of a person's detention, the period of detention at the end of which that review was made shall be considered the period referred to in subsection 57(1) of the Immigration and Refugee Protection Act. (3) If the review of reasons for continued detention follows the review referred to in subsection (1), that review shall be made under the IRPA.	R322
An order issued by a Deputy Minister under subsection 105(1) of the former Act remains in effect under the IRPA and review of reasons for continued detention is made under the IRPA.	R323
A person released from detention under the former Act becomes a person ordered released from detention under the IRPA and any terms and conditions imposed under the former Act become conditions imposed under the IRPA.	R324
(1) A warrant for arrest and detention made under the former Act becomes a warrant for arrest and detention made under the IRPA. (2) An order for the detention of a person made under the former Act becomes an order to detain made under the IRPA.	R325

For example, if a person is detained under the *Immigration Act* and they have never received a detention review prior to the coming into force of IRPA, then they will receive a 48-hour review under 103(6) or 7-day under 103.1(4) of the former Act, R322(1).

If the 48-hour or 7-day review is the very first detention review in respect of the person's detention, the review is considered to be the 48-hour review, as set out in R322(2). That is, it will be considered as the review after a 48-hour period under A57(1), regardless of how long the detention period really was.

If someone is detained under the old Act and their scheduled 7-day or 30-day review comes up after IRPA has come into force, that detention review shall be conducted under the provisions of the former Act. The next review of their detention shall be conducted under IRPA, R322(3).