AN ARGUMENT AGAINST IMMIGRATION DETENTION OF ASYLUM SEEKERS IN CANADA

by

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Abstract

This thesis will provide an argument against the use of immigration detention for asylum seekers. The thesis will critically analyse the law and policy of immigration detention in Canada. It will argue that the current policy of immigration detention in Canada does not comply with international human rights and obligations. The current policy of immigration detention does not reflect the values enshrined in the Charter of Fundamental Rights and Freedom, and the policy of mandatory detention should be abolished immediately.

Immigration Detention should be a last resort, only enforced after alternatives to detention have been considered. There should be regular reviews of detention, equally applicable to all immigrants, and detention should last for as brief a period as possible.
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**Introduction**

‘It is often said that a society’s moral strength is measured by how humanely it deals with the most vulnerable individuals living within its domain. The asylum detention centre, deliberately hidden from the public gaze, threatens to leave an indelible mark on our legacy, a strain that history will have difficulty erasing.’¹

This thesis will focus on the law and policy of immigration detention affecting asylum seekers in Canada and argue that detention should only be used as a last resort measure only after a consideration of the alternatives to detention. There should be a regular review process to avoid indefinite detention. The thesis will assert that the current policy of mandatory detention in Canada is contrary to International Law and Charter jurisprudence and should be abandoned immediately.

The thesis will provide a background to the law and policy of immigration detention. It will assess the policy objectives of the detention of asylum seekers. It will critically analyse the societal impact that immigration detention has had resulting in the securitization of immigration issues and criminalization of immigrants. Detention will be analysed within the legal framework of human rights at International Law and national Charter jurisprudence.

The thesis will provide a comparative analysis of immigration detention in the United Kingdom, the United States and Australia.

This paper seeks to contribute to the argument against immigration detention in all but the most exceptional circumstances. Such a decision should be based on an individual assessment of the facts in each case. When detention is resorted to there should be regular review of this decision so as the period of detention is as brief as possible. The policy of mandatory detention

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detention for designated foreign nationals should be abandoned as it is contrary to international law and *Charter* jurisprudence.
Chapter One

Background: Law and Policy on Immigration Detention

Introduction

This chapter will provide a background to the law and policy on the immigration detention of asylum seekers. It will explain the definition of immigration detention that will be explored in this thesis. The chapter will assess what the motivations are for national governments’ to pursue a policy of immigration detention. It will also highlight the impact that immigration detention has on detainees. The purpose of this chapter is to provide a background to the law, policy and impact on the immigration detention of asylum seekers in Canada.

What is Immigration Detention?

The UNHCR Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum Seekers and Alternatives to Detention provide the following definition for immigration detention, ‘the deprivation of liberty or confinement in a closed place which an asylum seeker is not permitted to leave at will, including, though not limited to, prisons or purpose-built detention, closed-reception or holding centres or facilities.’

Immigration detention has been described by Nakache as the detention of non-citizens ‘either upon seeking entry to a territory (front-end detention) or pending removal from a territory (back-end detention)…detention so that an administrative procedure can be implemented.’ It is important to distinguish detention for immigration reasons from

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detention for security or criminal reasons. These separate issues are often blurred, particularly in the media.

It is widely recognised that detention is a serious breach of individual liberty. Silverman has argued that the right to liberty ‘is at the core of liberal political, moral, and legal philosophy.’ Silverman explains that detention is an administrative power used by governments to further immigration objectives. Silverman highlights a number of inherent flaws in immigration policy. States recognise the right to emigrate without recognising the correspondent right to immigrate. There is a disparity between international human rights standards and the national reality. The current immigration climate features an increased scrutiny of immigration, borders and national identity. These factors prove to be interesting drivers behind how countries shape their immigration detention policies.

Silverman has argued that protracted immigration detention is unavoidable as long as a policy of immigration detention persists in a liberal country for ‘a stateless person who poses a flight risk, or a suspected terrorist deemed dangerous to the population…’ Silverman argued that although it is not disputed that states have sovereign powers to deport and exclude non-citizens, it does not follow from this that detention is a corollary power requisite to the enforcement of such aims. Silverman acknowledged that in some cases detention is a useful protective immigration tool. However, cases should be dealt with as quickly as possible as the longer detention lasts the more harm is caused and the higher the cost

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4 ibid.
5 ibid.
8 ibid.
9 ibid.
10 ibid.
11 ibid at 2.
12 ibid.
13 ibid.
14 ibid at 9.
incurred. Silverman argues that Canada is in violation of, ‘international human rights law, human rights concerns, and other binding rights principles…’ for permitting immigration detention for indefinite periods. Furthermore, Silverman notes that the Canadian policy of immigration detention ‘cannot be arbitrary or punitive, and it must be justified on an individual basis.’

Cole has suggested that there is little else more serious than depriving an individual of their freedom. Cole noted that such deprivation of freedom was the reasoning behind the inclusion of the protections of due process and habeas corpus in the Constitution of the United States of America. Cole has argued that in the US the same non-punitive standard of due process that applies to civil detainees should be equally applicable to immigration detainees. He argued that individuals detained for immigration purposes should be given the opportunity to provide testimony at a hearing and justifications should be provided for their detention.

Cole has argued that immigration detention should only be enforced as a last resort measure, and only used where there is an established flight risk or a suspected danger to society. He argued that aliens within the borders and at the borders should be treated with the same level of due process. Cole suggested that the fear fuelled by the war on terror has led the government ‘to exploit immigration law to its fullest’. This has led to massive infringements of the individual rights of detainees. It is precisely due to this current

15 iid.
16 iid.
17 iid.
19 iid.
20 iid at 36.
21 iid.
22 iid.
23 iid at 37.
24 iid at 37.
25 iid.
atmosphere that we should strictly follow due process rights particularly in relation to individual liberty.26

The Policy Objectives behind the use of Immigration Detention

This section will explore the policy objectives behind immigration detention. Bauman has suggested a conception of immigration as a ‘global hierarchy of people’ where those at the top enforce restrictions on movement to those at the bottom of the hierarchy.27

Cort has suggested that the approach taken by a country to refugee policy issues depends to a varying degree in each context on three main factors, ‘traditional norms, international initiatives, and domestic politics’.28

In C v Australia before the Human Rights Committee the Australian government justified the policy of mandatory detention by arguing policy grounds such as,

‘maintaining the integrity of the immigration system; ensuring that only those entitled to were permitted to enter; processing claims swiftly by ensuring ready access to migrants; facilitating removal of rejected applicants; past experience of absconding…difficulties in tracing absconders’29

Wilsher argued that the committee in C v Australia suggested a similar approach to a proportionality test.30 Such an approach would assess the length of detention against the danger posed to gauge the reasonableness.31 The Committee rejected the government’s

26 ibid.
27 ibid.
30 ibid at 7.
31 ibid.
arguments but this provides an insight into the motivations behind a policy of immigration detention.\textsuperscript{32}

The need for detention is strongly challenged by the fact that less than 10\% of applicants fail to reappear when they are released to some form of alternative to detention, even for deportation hearings.\textsuperscript{33} The system of immigration detention incurs a huge expense for governments'.\textsuperscript{34} In 2008-2009 the Canadian government spent $45.7 million on immigration detention, and together with removal proceedings this figure reached $92 million.\textsuperscript{35} Furthermore governments’ are required to pay compensation for cases of wrongful detention.\textsuperscript{36}

The policy of immigration detention is used widely by countries and is enforced either on arrival or pending deportation.\textsuperscript{37} Wilsher has argued that immigration detention has recently been used ‘more frequently and for longer periods’.\textsuperscript{38} In an era of globalization immigration detention is likely to continue as a major issue for governments. Wilsher suggests this is partly due to ‘large numbers of migrants fleeing persecution, economic ruin or natural disaster.’\textsuperscript{39}

Wilsher helpfully described the two types of immigration detention, detention on arrival when admission applications are being considered and detention before deportation of individuals that are considered a security threat.\textsuperscript{40} Both instances are noted to be administrative rather than punitive.\textsuperscript{41} The length of detention can become extensive due to the

\textsuperscript{32} ibid.
\textsuperscript{33} ibid at 14.
\textsuperscript{34} supra n.2 at 38
\textsuperscript{35} ibid.
\textsuperscript{36} ibid.
\textsuperscript{37} supra n. 28 at 1.
\textsuperscript{38} ibid.
\textsuperscript{39} ibid.
\textsuperscript{40} ibid.
\textsuperscript{41} ibid.
delay in processing applications and other states refusal to accept the individuals.\textsuperscript{42} In the context of immigration a tension exists between non-citizens human rights and the states sovereign power to control who enters and resides within their borders.\textsuperscript{43} This tension is rooted in the rights debate, the extent to which non-citizens’ should be able to avail of the same rights as citizens.\textsuperscript{44}

In the enforcement of immigration control governments often seek to differentiate the treatment that is acceptable for citizens from non-citizens. As noted by Wilsher the majority of US decisions have interpreted the law so that non-nationals on entry cannot benefit from the protections enshrined in the Constitution.\textsuperscript{45} The adjudication of cases is carried out as if the detainee is not within the US.\textsuperscript{46}

Wilsher suggested that Canada was the most liberal of the countries analysed in the paper however recent changes to immigration law in Canada would arguably make this position less certain.\textsuperscript{47} This thesis will provide an argument as to why Canada should avoid using immigration detention in all but the most necessary cases. Wilsher has proposed that a proportionality test should be used for assessing immigration detention.\textsuperscript{48} He argued that, ‘whilst a State should not be forced to grant formal immigration status to migrants it does not want’ that does not provide a justification for immigration detention.\textsuperscript{49}

Immigration detention has been used by governments as a deterrence measure. De Giorgi suggests borders are not disappearing but becoming permeable for those more ‘deserving’

\begin{itemize}
  \item \textsuperscript{42} ibid.
  \item \textsuperscript{43} ibid at 2.
  \item \textsuperscript{44} ibid.
  \item \textsuperscript{45} ibid at 21.
  \item \textsuperscript{46} ibid.
  \item \textsuperscript{47} ibid at 30.
  \item \textsuperscript{48} ibid at 38.
  \item \textsuperscript{49} ibid.
\end{itemize}
immigrants to pass across.\textsuperscript{50} To use detention as a measure of preventing individuals from coming to the country at all is an explicit breach of the \textit{Refugee Convention}. This motivation is also innately flawed, as demonstrated by Edwards detention is not proven to deter irregular migration or individuals from seeking asylum.\textsuperscript{51}

\textbf{The Impact on Detainees}

This section will explore the impact immigration detention has on detainees by considering the criminalization of asylum seekers, how individuals health is affected by detention, and the impact of detention on children.

The rights infringements which have stemmed from strict immigration control have been justified by government security concerns. This has caused what has been referred to by many as the criminalisation of the immigration system and the criminalisation of asylum seekers. This is in direct contradiction with the \textit{Refugee Convention} which provides that it is not a crime to seek asylum.\textsuperscript{52}

Welch suggested that there is a policy of control which is reflected by the eager use of detention.\textsuperscript{53} In particular this is evidenced by the detention of asylum seekers which is in direct contradiction with the \textit{Refugee Convention}.\textsuperscript{54} Welch argued that a parallel can be drawn between the culture of control and the distrust directed at those seeking asylum.\textsuperscript{55} The detention of asylum seekers creates a criminal perception and suggestion that their claims are ‘bogus’.\textsuperscript{56} Welch seeks to demonstrate that the culture of control is spreading rapidly in a post

\begin{flushleft}
\textsuperscript{50} \textit{ibid.}
\textsuperscript{52} ibid. 1951 Refugee Convention accessed at <http://www.unhcr.org/pages/49da0e466.html>
\textsuperscript{54} \textit{ibid.}
\textsuperscript{55} \textit{ibid} at 3.
\textsuperscript{56} \textit{ibid.}
\end{flushleft}

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September 11 world.\textsuperscript{57} It is argued that the ‘unnecessary and costly detention of undocumented immigrants in general, and asylum seekers in particular, rarely registers public concern…’ the culture of control has made detention a norm in society.\textsuperscript{58} The policy can be justified by the public conception that there is an influx of false claims for asylum.\textsuperscript{59} The policy of immigration detention is justified by the ‘emergent criminology of the other in which lawbreakers- and asylum seekers- are characterized as menacing strangers who threaten not only individual safety but also the entire social order.’\textsuperscript{60} For example in the US asylum seekers are usually handcuffed on entry and led to a detention centre, often without an understanding of why this is happening.\textsuperscript{61} Although they can be eligible for parole in certain circumstances in practise this rarely happens.\textsuperscript{62} MacIntosh has also explored the change in approach to human rights for asylum seekers in Canada post 9/11. In the aftermath of 9/11 the UN Security Council ‘adopted a resolution flagging the fact that…’ those seeking asylum could potentially be terrorists.\textsuperscript{63} This was done to ensure states did not grant refugee status to those who had committed acts of terror.\textsuperscript{64} However, the \textit{Refugee Convention} already notes that protection should not be given to those who have committed crimes against ‘peace or humanity’ so this resolution did nothing but add to the current war on terror climate which has had the impact of criminalising asylum seekers.\textsuperscript{65} Bosworth has argued that to resolve the issue of criminalisation of immigration we must reconceptualise the idea of ‘citizenship and belonging’ to match the new world in an era of

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\textsuperscript{57} \textit{ibid.} \\
\textsuperscript{58} \textit{ibid.} \\
\textsuperscript{59} \textit{ibid} at 4. \\
\textsuperscript{60} \textit{ibid.} \\
\textsuperscript{61} \textit{ibid} at 5. \\
\textsuperscript{62} \textit{ibid.} \\
\textsuperscript{64} \textit{ibid.} \\
\textsuperscript{65} \textit{ibid.} \\
\end{flushleft}
globalization. Bosworth suggested that immigration policy emulates a rhetoric that breeds fear and connotations of criminality. This rhetoric has been mainly directed at those who deserve our sympathy most, individuals fleeing persecution and seeking asylum. It is argued that this criminalisation is achieved by strategies such as significant surveillance and immigration detention.

It is most worrisome that with a spread in the culture of control comes the increased use of detention which has a particularly negative impact for asylum seekers, limiting their chances of refuge. It is recognised that detention will be necessary in some circumstances but thorough checks and balances are required on the procedure of immigration detention to ensure legal protections are incorporated to respect individual rights.

De Zayas argued that ‘if detention is to discourage illegal immigration, other strategies must be found that do not deny the human dignity of would-be immigrants’. He argues for alternatives to detention that are proportionate to the states concerns and ‘enhance rather than destroy human rights’. De Zayas suggests that this could be achieved by states making better use of existing mechanisms such as the United Nations complaints procedure and inter-state complaints. This would draw attention to issues that the public are unaware of and cause incentive for the governments to better respect individual rights.

De Zayas has noted that the actual objectives of detention need to be outlined and assessed.

If it is to prevent terror attacks a rights assessment is required, if it is to deter illegal immigration then the dignity of detainees needs to be strongly respected, he argues there

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66 ibid at 13.
68 ibid.
69 ibid.
70 ibid.
72 ibid.
73 ibid.
74 ibid.
needs to be ‘proportionate solutions’.\textsuperscript{75} He argues that the gap between international law standards and national law and practice needs to be closed, with international law standards prevailing in cases where there is conflict.\textsuperscript{76}

Individual’s physical and mental health is demonstrated to deteriorate from the experience of immigration detention. It is particularly severe for asylum seekers as due to their previous experiences of persecution they are already very vulnerable. Although children are not supposed to be detained in immigration detention the practise is still wide spread, in particular there are problems with age identification.

Immigration detention has a severe impact on detainee’s physical and mental health. Coffey has demonstrated the vast research that suggests, ‘asylum seekers in detention have high rates of depression and Post Traumatic Stress Disorder (PTSD)…and the extent of their mental ill health is correlated with the length of time spent in detention.’\textsuperscript{77} Coffey argued that the ‘serious consequences of long-term detention…should be heeded by governments that rely on immigration detention to manage asylum seekers and other irregular migrants in their country.’\textsuperscript{78} Mandatory detention for those who arrive irregularly specifically targets individuals who have been smuggled into Canada. It is those individuals who are particularly vulnerable as they are likely to have experienced violence and therefore immediate detention has a severely detrimental impact on their physical and mental health as well as infringing their human rights.

Children are particularly vulnerable and should be protected at all costs regardless of citizenship. ‘They are a measure of our possibilities: how we treat them is the measure of our

\textsuperscript{75} ibid.
\textsuperscript{76} ibid.
\textsuperscript{78} ibid.
humanity." It has been found that children flee for a number of reasons including, ‘fear of child torture; the impact of armed conflict in which 300,000 child soldiers are estimated to be involved; sexual exploitation of girls trafficked into Europe; death, imprisonment or disappearance of parents in the home country.’ Contrary to this there is a dangerous government perception that has been portrayed within Europe and in particular the UK that unaccompanied minors are economic migrants rather than asylum seekers in need of protection.

Nakache notes there is not a reliable statistic on exactly how many children are in detention in Canada. It should be ensured that detention of children is only permitted in the most exceptional cases.

**Conclusion**

This chapter has defined immigration detention of asylum seekers and provided an analysis on what drives the policy of immigration detention for government’s at a national level.

The following chapter will provide analysis of Canada’s international law obligations and demonstrate that the current policy of immigration detention is not reflective of Charter values by assessing relevant Charter jurisprudence.

This chapter has demonstrated the impact detention has on detainee’s physical and mental health. It has promoted the alternatives to detention and argued that Canada should only use detention as a last resort measure.

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80 ibid at 4.
81 ibid at 5.
82 supra n.2 at 10.
Chapter Two

The Canadian Approach to Immigration Detention

Introduction

This chapter will consider the Canadian approach to immigration detention by outlining the relevant legal provisions. It will consider the legislative changes that have been introduced in recent years. The chapter will consider detention under the Immigration and Refugee Protection Act, as well as consider specifically detention under the security certificate regime.

Law and Policy

This section will consider the law and policy within Canada applicable to immigration detention. The power of immigration detention is vested in the Canadian Border Services Agency by division 6 section 55 of the Immigration and Refugee Protection Act. This is similar to the systems of immigration detention in the United Kingdom and United States.

Canada has built ‘safeguards’ into the immigration detention system to prevent individuals being held for a long period of time. There will be a review of the reasons for the individual’s detention by a member of the Immigration and Refugee Board (IRB) after 48 hours. The Charter of Fundamental Rights and Freedoms also offers protections to detainees. The CBSA are required to inform an individual of the reasons for their arrests or detentions, their right to legal representation, and their rights to notify a representative of their governments that they have been arrested or detained.

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83 supra n.6 at 1.
84 ibid.
85 ibid at 3.
86 ibid.
87 ibid.
Silverman provided data from Citizenship Immigration Canada which stated that there are on average 455 immigrants in detention across Canada. However, this number could be vastly on the increase. The government in Canada is beginning to more readily pursue a policy of immigration detention evidenced by legislative amendments progressively introduced in recent years. The changes by various bills portray a developing more restrictive approach to asylum law. This thesis will focus in particular on the changes related to detention of asylum seekers although this has affected a number of other areas including healthcare provision for refugees and asylum seekers.

**Legislative Changes**

Changes have been made to the Immigration and Refugee Protection Act by the introduction of a number of governmental Bills including Bill C-11, Bill C-31 and Bill C-49. Bill C-11 of the *Immigration and Refugee Protection Act* was introduced in 2001. This bill was introduced after widespread consultation and in the aftermath of the arrival of a large number of boat immigrants from China. The Bill provided immigration officers with the right to detain for ‘any reason’ permanent residents or foreign nationals who are subject to an investigation. Division 6 changes included the power to detain for administrative reasons. The House of Commons Committee recommendations included the promotion of alternatives to detention. Bill C-31 largely contained the same provisions as Bill C-4 which was introduced for debate at the same time but added a prohibition for the detention of minors

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88 *ibid* at 2.
90 *ibid*.
91 *ibid* at part E section 1.
92 *ibid* at part F.
93 *ibid* at House of Commons Recommendations.
under 16. Bill C-31 target human trafficking and Bill C-4 targeted human smuggling, the distinction between the two is very unhelpful in reality. The bill created different detention rules for those who arrive irregularly in a group and labelled these individuals ‘designated foreign nationals’. The review procedure for designated foreign national differed to other categories of immigrant arrivals and was set at 14 days. Bill C-49 included a provision to target human trafficking in the Criminal Code.

Lowry presented an interesting perspective that interdiction, which mainly affects women and children, forces individuals to turn to human smugglers and effect an irregular arrival. This is which is exactly what CIC are trying to target. These individuals are then punished for availing of irregular arrival measures by being placed in immigration detention.

The provisions introduced include mandatory detention for those who arrive irregularly, which specifically targets individuals connected to human trafficking. The imposition of mandatory detention for up to 12 months is explicitly against Canada’s international obligations. International law and the obligations Canada has signed up too will be further explored in the following chapter.

MacIntosh has suggested that the mandatory detention provisions arguably stemmed from the 2001 recommendations of the Standing Committee on Citizenship and Immigration. The recommendations suggested that detaining those who are trafficked protects them from

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94 Bill C-31 Immigration and Refugee Protection Act accessed online at <http://www.parl.gc.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?source=library_prb&ls=C31&Parl=41&Ses=1&Language=E&Mode=1>
95 ibid.
96 ibid.
97 ibid.
98 Bill C-49 accessed online at <http://www.parl.gc.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?ls=C49&Parl=38&Ses=1>
100 ibid.
101 ibid.
102 supra n.63, at 7.
the traffickers by cutting off the financial incentive. As a result the government are in fact penalising the victims through mandatory detention, who have likely experienced violence and trauma making them particularly vulnerable to the impact of detention on individuals. Paradoxically the committee recognised although a criminal punishment would not be appropriate the individuals concerned should still be detained.

MacIntosh suggested the motivation behind Bill C-49 is to reassure public opinion that Canada’s borders are secure, particularly for critics in the US. MacIntosh argued that ‘countering “perceptions” is a spurious justification for violating human rights and will not pass the test for proportionality that is required when asylum-seekers or refugees are detained.’ MacIntosh argued that the Canadian government appear to assume by punishing human smugglers this will put an end to human smuggling. To the contrary the impact may be to drive asylum seekers underground and this could result in an increase in the number of undocumented migrants in Canada.

The amendments introduced in relation to the detention of asylum seekers are contrary to that goal. The following provisions of the Immigration Refugee Protection Act are most relevant for exploring immigration detention in Canada. Section 54 provides for the review of decisions to detain. The provisions relevant to foreign nationals and permanent residents will firstly be considered and subsequently the provisions which relate to designated foreign nationals. The government has artificially created categories of immigrants, in particular foreign nationals and permanent residents fall into one category which provides a higher level

103 ibid, at 7.
104 ibid at 8.
105 ibid.
106 ibid at 13.
107 ibid at 14.
108 ibid at 15.
109 ibid.
of protection from arbitrary detention. Those who arrive in a group in a manner which the
government deems to be irregular are classified as designated foreign nationals and
mandatory detention is imposed upon these individuals.

**Foreign nationals and permanent residents**

Section 55 is applicable for the detention of a foreign national or permanent resident, it
allows for officers to issue a warrant to arrest and detain for an individual whom the officer
has ‘reasonable grounds to believe… [is] inadmissible and is a danger to the public or is
unlikely to appear for examination, for an admissibility hearing, for removal from Canada or
at a proceeding that could lead to the making of a removal order by the Minister…’

Section 55 (2) provides for the arrest without a warrant. This refers to detention of foreign
nationals and permanent residents at the border. S. 55 (3) allows detention on entry to
Canada, in order to complete questioning or ‘reasonable grounds to suspect that the
permanent resident or the foreign national is inadmissible on grounds of security, violating
human or international rights, serious criminality, criminality or organized criminality.’

This permits the detention of foreign nationals and permanent residents without a warrant.
There is no limit provided on the period of detention at section 56. Section 57 lays out the
different procedures for review for different categories of immigrant. For foreign national and
permanent residents section 57 proscribes for regular review, this will take place firstly after
24 hours in detention and again within the first week. Following this there will then be further

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111 *ibid*, at section 55.
112 *ibid* at section 55 (2).
113 *ibid* at section 55 (3).
114 *ibid*
115 *ibid* at section 55 (2).
reviews within each 30 day period of detention to assess if the reasons for detention are still valid.\textsuperscript{116} The individual concerned will be present before the board during each review.\textsuperscript{117}

**Designated foreign nationals**

There is mandatory detention for designated foreign nationals upon entry.\textsuperscript{118} Section 55.3.1 provides that there is to be mandatory detention for designated foreign nationals, part (a) states that this is to be applied to ‘a designated foreign national and who is 16 years of age or older on the day of the arrival…’\textsuperscript{119} Following this, without delay notice is then given to the Immigration Board.\textsuperscript{120} There is no limit provided on the period of detention at section 56. Detention must continue until a final decision is made on their claim, or there is a release order granted.\textsuperscript{121} Section 57 provides review of the decision to detain after 48 hours for permanent residents and foreign nationals. However, at section 57.1 this is extended to 14 days for designated foreign nationals. An initial review is to take place within 14 days and then the second review within 6 months of this.\textsuperscript{122} With regard to detention of minors it is noted that this shall be a measure of last resort at section 60 and that the best interests of the child should be prevalent.\textsuperscript{123} Security certificate detentions can also affect asylum seekers the provisions are stated at section 81-84, and the individual will appear before a review board within 48 hours of being detained.\textsuperscript{124}

Increasingly the XXXX case is being used to justify detention of asylum seekers.\textsuperscript{125} In *R v Mann* the Supreme Court of Canada considered the rights of an individual when the police

\textsuperscript{116} *ibid* at section 57.
\textsuperscript{117} *ibid* at section 57 (3).
\textsuperscript{118} *ibid* at section 55 (3).
\textsuperscript{119} *ibid* at section 55 (3.1).
\textsuperscript{120} *ibid*.
\textsuperscript{121} *ibid* at s.56.
\textsuperscript{122} *ibid* at s.57.1 (1) and (2).
\textsuperscript{123} *ibid* at s.56.
\textsuperscript{124} *ibid* at s.82.2 (2).
\textsuperscript{125} *ibid* at 60.
exercise their power to detain for investigative purposes. Although this concerned a
criminal matter the principles can be applied to the context of immigration detention. The
court confirmed that everyone has a right to be made aware of the reasons for their arrest and
detention.

The dissenting judgment which called for an ‘articulable’ cause rather than reasonable
suspicion. In the context of immigration detention articulable causes should be made
explicit in contrast to reasonable suspicion. There are civil and not criminal matters and so
should offer higher level of protection. Liberty is a core human right and sure only be
infringed as a last resort measure. The *Charter of Fundamental Rights and Freedoms* also
provides protection for asylum seekers in Canada and this will be explored further in the next
chapter.

**Alternatives to Detention**

Alternatives to detention should be further explored and pressure should be put on the
government to use more ethically sound policies to control immigration rather than detention
that is an ‘offence to the dignity of noncitizens.’ Silverman demonstrates the UK’s
‘regrettable but necessary’ justification to be flawed.

The Toronto Bail Project is available to those who are unable to secure a private bondsperson
in Toronto for their release. It involves an interview, although it has been noted that the
assessment criteria is unclear, when accepted it allows for the detainees release and they

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126 *R v Mann*, 2004 SCC 52, para 2
127 ibid, at para 21.
128 ibid, at para 63.
129 S. Silverman, “‘Regrettable but necessary’ A Historical and Theoretical Study of the Rise of the U.K.
130 ibid.
131 C. Costello and E. Kayatz, “Building Empirical Research into Alternatives to Detention: Perceptions of
usually report once a week.\textsuperscript{132} There are not many asylum seekers on the program as it is mainly for the use of criminals or other immigrants, those who are accepted note that they are treated like criminals and liken it to being on ‘parole’.\textsuperscript{133}

Crawley outlines alternatives to detention noting that reporting is the ‘least intrusive’ and most widely used alternative to detention.\textsuperscript{134} This method of monitoring asylum seekers is much more preferable to detention, although the frequency of having to report should be considered in line with the likely limited resources available.\textsuperscript{135} Another alternative is supervised accommodation which is preferable when there are lenient rules in place in contrast to detention centres.\textsuperscript{136} ‘Case support and contact management’ is another alternative to detention that is suggested.\textsuperscript{137} Crawley explains each case is managed with regard to the level of risk the claimant poses.\textsuperscript{138} This process provides support and legal information and encourages dialogue between the asylum seeker and the decision-maker.\textsuperscript{139}

**Conclusion**

This chapter has explained the Canadian approach to immigration detention. It has highlighted how the policy has evolved in recent years by the introduction of legislative changes through various bills. The current law was explained which differentiates immigrants by categorisation. Two or more individuals who arrive together and are deemed to have arrived irregularly will be classified as designated foreign nationals. The legislation provides a higher level of protection for foreign nationals and permanent residents in comparison to designated foreign nationals. The following chapter will situate the Canadian approach to

\textsuperscript{132} ibid at 33,34.
\textsuperscript{133} ibid at 34.
\textsuperscript{135} ibid.
\textsuperscript{136} ibid at 10.
\textsuperscript{137} ibid at 11.
\textsuperscript{138} ibid at 12.
\textsuperscript{139} ibid.
immigration detention amongst the wider legal framework of human rights and obligations. It will critically analyse International Law and Charter jurisprudence.
Chapter 3

The Legal Framework: International Law and Charter jurisprudence

Introduction

This chapter will critically analyse the legal framework of human rights and obligations applicable to immigration detention in Canada. It will be argued that the policy of immigration detention in Canada is not reflective of the values and rights contained in the Charter of Fundamental Rights and Freedoms. Furthermore, the current policy and practice of immigration detention is inconsistent with international human rights and refugee law. This chapter will explore the relevant rights and obligations that are certainly engaged and arguably infringed by the current policy of immigration detention in Canada. It will consider the detention of individuals under general IRPA provisions as well as security certificate detention.

International Law

The significance of Canada being a signatory to international instruments is that they have agreed to be bound by the terms of such instruments by the international community. The 1951 Refugee Convention, provides at article 31 that refugee claimants who enter a country illegally should not be treated detrimentally when they ‘present themselves without delay and show good cause’ for having done so. Countries should only apply restrictions that are ‘necessary’. Goodwin-Gill explains that article 31 allows for ‘preliminary detention if

\[\text{footnotes} \]


\[\text{141 supra n. 52, Article 31 (1), 1951 Refugee Convention.} \]

\[\text{142 ibid.} \]
necessary for and limited to the purposes of preliminary investigation.’ However, the Canadian mandatory detention provisions arguably go further than this.

The Immigration and Refugee Protection Act introduced by royal assent in November 2001, incorporated article 31 of the 1951 Refugee Convention into national law. However, the subsequent amendments have derogated from the international human rights protections contained in the Refugee Convention. Immigration detention should be used as an ‘exceptional measure’ and in order to reflect this there should be an individual assessment of whether detention is necessary in each particular case. Goodwin-Gill recommends that the ‘balance of interests requires that alternatives to detention should always be fully explored’.

International human rights law provides a number of rights that are inconsistent with immigration detention. Article 9 of the International Covenant on Civil and Political Rights provides that, ‘(e)veryone has the right to liberty and security of the person. No one shall be subject to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with procedures as are established by law.’ The right to liberty and security is also contained in article three of the Universal Declaration of Human Rights 1948. Article 14 UDHR recognises the right to seek asylum as a basic human right.

Article 37 of the Convention on the Rights of the Child 1989 prohibits detention of a child unlawfully or arbitrarily and states that this should only be used as a last resort measure. Canada is also a signatory to the UN Convention on the Rights of the Child. Nakache found

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144 ibid at 48.
145 ibid.
148 ibid.
that the CBSA recording of statistics of minors detained is deceiving as minors who are accompanied with parents will not be recorded.\textsuperscript{150} CBSA suggest that the child is ‘not personally detained and could theoretically leave at any time’, this is nonsensical and as recommended in the report needs to be rectified so as an accurate picture of the number of children in detention can be achieved.\textsuperscript{151} Detention of children should be avoided in all but the most exceptional circumstances as it is incompatible with the best interests of the child.

Article 7 of the Office of the High Commissioner for Human Rights \textit{Recommended Principles and Guidelines on Human Rights and Human Trafficking} provides that individuals should not be punished for being victims of trafficking.\textsuperscript{152} Guideline 2 and guideline 6 emphasise that trafficked persons should not be held in immigration detention centres.\textsuperscript{153}

The \textit{UNHCR Detention Guidelines} provide guidelines as to the approach countries should take to immigration detention. Although they are not binding they provide guidance as to the policy and practice, for contracting countries in particular such as Canada. Further to the international rights of liberty and security of the person, the guidelines provide that detention should be a last resort.\textsuperscript{154}

The policy of mandatory detention for designated foreign nationals would seem to be arbitrary from the \textit{UNHCR Guidelines}. The guidelines provide that in order to avoid arbitrary detention it should be ‘necessary in the individual case, reasonable in all the circumstances proportionate to a legitimate purpose…Further failure to consider less coercive or intrusive means could also render detention arbitrary.’\textsuperscript{155} There should be an individual assessment in

\textsuperscript{150} \textit{ibid} at 37.
\textsuperscript{151} \textit{ibid}.
\textsuperscript{152} \textit{Recommended Principles and Guidelines on Human Rights and Human Trafficking} accessed online at <http://www.ohchr.org/Documents/Publications/Traffickingen.pdf>
\textsuperscript{153} \textit{ibid}.
\textsuperscript{154} \textit{supra} n. 2 at para 14.
\textsuperscript{155} \textit{ibid}, para 18.
each case so it can be decided on the facts whether detention is necessary.\textsuperscript{156} The guidelines prohibit ‘Mandatory or automatic detention as it is not based on an examination of the necessity of the detention in the individual case.’\textsuperscript{157} This is contrary to the mandatory detention provisions in Canada which apply to designated foreign nationals. Guideline 8 provides that punitive detention is not appropriate and should be avoided.\textsuperscript{158} Guideline 9 provides that there should be consideration given to those of a particularly vulnerable position, for instance it states that ‘victims of trauma or torture…should generally not be detained’.\textsuperscript{159} It is of particular relevance that the recent changes are targeted at human smuggling as the guidelines specifically note that ‘The prevention of trafficking or re-trafficking cannot be used as a blanket ground for detention, unless it can be justified in the individual case.’\textsuperscript{160} 

The prevalent use of prisons to detain asylum seekers is against the \textit{UNHCR Guidelines to Detention}. It is a commonly held standard that individuals should not be criminally sanctioned for civil matters and this is widely recognised in national and international law. Nakache reveals that there are a worryingly high number of asylum seekers and refugees held in penal institutions.\textsuperscript{161} At the time the article was published this was quoted at 27\% of which only 6\% ‘are suspected of criminality, representing a danger to the public or security risk.’\textsuperscript{162} Furthermore, when held in prisons instead of detention centres individuals are usually held longer.\textsuperscript{163} Data has also demonstrated significant variance in reasons for and length of detention depending on where an individual entered Canada suggesting regional

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\textsuperscript{156} \textit{ibid} at para 19. 
\textsuperscript{157} \textit{ibid} at para 20. 
\textsuperscript{158} \textit{ibid} at para 48. 
\textsuperscript{159} \textit{ibid} at para 49. 
\textsuperscript{160} \textit{ibid} at para 62. 
\textsuperscript{161} \textit{supra n. 2 at 6}. 
\textsuperscript{162} \textit{ibid}. 
\textsuperscript{163} \textit{ibid}. 

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policy determines how likely one is to be released.\textsuperscript{164} Although the report acknowledged that detainees are informed of the reasons for detention, they can often lack understanding of the situation due to a language barrier.\textsuperscript{165}

Edwards highlights that international law has recognised the right of states to control their borders but this is inherently limited by their duty to respect international human rights obligations.\textsuperscript{166} Edwards argues that the international law ‘principle of proportionality must also be read as requiring detention to be a measure of last resort’.\textsuperscript{167} From this assertion by Edwards, Canada is clearly violating the international principle of proportionality by implementing a policy of mandatory detention, without consideration of alternatives this cannot be considered the last resort.

Edwards argues that penalising asylum seekers for irregular arrival would amount to a penalty under 31 (1) of the 1951 \textit{Refugee Convention}.\textsuperscript{168} The provisions directed specifically towards irregular arrivals in the recent changes to the Immigration and Refugee Act are arguably in contravention of 31 (1). Although 31 (2) permits detention if ‘necessary’, the mandatory detention suggests there is no assessment of whether the detention is ‘necessary’.\textsuperscript{169}

Edwards highlights that the \textit{UNHCR guidelines} provide that there should be an individual assessment in each case before detention is used as a last resort.\textsuperscript{170} The legislation provides for review of the decision to detain, however, as noted by Edwards, assessment after detention is not compliant with ‘the principles of necessity, reasonableness and proportionality…’ with regard to deprivation of individual liberty as at this point the analysis

\begin{flushleft}
\textsuperscript{164} \textit{ibid}.
\textsuperscript{165} \textit{ibid} at 7.
\textsuperscript{166} \textit{supra} n. 51 at 15
\textsuperscript{167} \textit{ibid}.
\textsuperscript{168} \textit{ibid} at 23.
\textsuperscript{169} \textit{ibid} at 24.
\textsuperscript{170} \textit{ibid} at 33.
\end{flushleft}
is a mere fiction. The emphasis in international law that there is an individual assessment on the facts of each case is in direct contradiction with the mandatory detention for all designated foreign nationals. Canada is ignoring the obligation to decide on the facts of each case whether detention is necessary.

The ‘blanket detention’ of asylum seekers is a violation of international law which prohibits detention in all but exceptional circumstances. International law also stipulates that the decision to detain should be reached through ‘prompt and fair individualized hearings before a judicial or similar authority.’ It is civil and not criminal crimes which are used to create an ‘overarching criminal narrative’ to justify immigration detention.

**Charter Values and Immigration Detention**

The *Charter of Fundamental Rights and Freedoms* is to receive precedence over any inconsistent law in Canada. Yet by contrast international rights are conferred on individuals due to their personhood. Section 7 of the *Charter* states that, ‘Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.’ Immigration detention should only be used where it is necessary for fundamental justice.

Crepeau has noted that section 1 of the Charter provides that the rights are for everyone present within Canada, with exceptions of voting, rights to enter and remain and minority language privileges, the right are for the benefit of non-citizens as well. Crepeau argues that the recent case law concerning security certificates have constituted a ‘partial retreat’

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171 ibid at 38.
172 ibid at 337.
173 ibid.
174 supra n.6 at 9.
from the *Singh* precedent. He opined that *Singh* had a significant impact as it forced the government to create the Immigration and Refugee Board. He argues that the current security climate has a negative impact on immigration and in particular refugee rights.

*Baker v Canada* not only incorporated best interests of the child test into national law but set the precedent that immigration decision makers should be cognisant of international law.

*Ahani* and *Charkaoui* cases noted there needs to be a balancing of migrant rights and security interests. The Supreme Court of Canada held in *Charkaoui* that some of the provisions in relation to security certificates are unconstitutional and that there needs to be fair judicial process in relation to detention decisions.

The following section will consider the rights which have been emphasised in *Charter* jurisprudence in the cases on immigration detention under general IRPA cases and more specifically cases which have concerned security certificate detention.

**Detention under IRPA**

In *Sahin v Canada* a Turkish national who had been detained as the adjudicator thought it unlikely that the applicant would appear for removal proceedings. The judicial review challenged the legality of this detention. The initial detention was made due to the inability of authorities to confirm the individual’s identity as he lacked the requisite travel documents. Throughout the period of detention a revfurtheriew was carried out every thirty

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177 ibid at 4.
178 ibid.
179 ibid at 5.
180 ibid.
181 ibid at 20.
182 ibid.
184 ibid.
185 ibid at 5.
days, during the period of detention the refugee application was heard and Sahin was granted
refugee status.\textsuperscript{186}

The court affirmed that ‘Non-citizens do not have an unqualified right to enter and remain in
Canada.’\textsuperscript{187} The court made clear that Canada has a right to restrict the movement of non-
citizens across the border.\textsuperscript{188} It was upheld, and the respondent agreed, that refugees can avail
of \textit{Charter} protections in such a case, section 7 in particular.\textsuperscript{189} The court suggested that it is
not only in the individual’s interest but also the government’s to minimize the use of
detention due to the high cost.\textsuperscript{190}

The court laid out considerations in relation to detention, such as there being a stronger case
to detain when the concern is related to public security.\textsuperscript{191} Periods of detention should be kept
as brief as possible and the court suggests considering release after lengthy periods.\textsuperscript{192} The
court also emphasised considering alternatives to detention it was provided that the,
‘availability, effectiveness and alternatives to detention such as outright release, bail bond,
periodic reporting, confinement to a particular location or geographic area, requirement to
report changes in address or telephone number…’ should be considered as viable methods of
keeping track of individuals without infringing so much on their liberty.\textsuperscript{193} Government
policy should place more emphasis on developing alternatives to detention not only to protect
individual rights but to save the government money, with this in mind reaching decisions in
detention cases should be placed as a ‘priority’.\textsuperscript{194}

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\textsuperscript{186} \textit{ibid}.  \\
\textsuperscript{187} \textit{ibid} at 9.  \\
\textsuperscript{188} \textit{ibid}.  \\
\textsuperscript{189} \textit{ibid} at 10.  \\
\textsuperscript{190} \textit{ibid} at 12.  \\
\textsuperscript{191} \textit{ibid} at 14.  \\
\textsuperscript{192} \textit{ibid}.  \\
\textsuperscript{193} \textit{ibid} at 15.  \\
\textsuperscript{194} \textit{ibid} at 16.  \\
\end{flushright}
It was held that the following factors should be considered to decide whether detention is appropriate; the reasons for the detention, the anticipated length of detention, any delay should impede the party responsible, and the alternatives to detention should be considered.\textsuperscript{195} The court suggested that decisions involving applicants who are in detention should be given priority so as applicants can be released at the soonest opportunity.\textsuperscript{196} The court recognised cases of detention involve a balance of interests between the individual deprivation of liberty and the public interest in detaining the individual.\textsuperscript{197}

**Security certificate Detention**

In *Charkaoui v Canada* the case concerned the detention of individuals subject to ‘security certificates’, which the minister can issue against those thought to be a threat to public security or thought to be unlikely to appear for deportation proceedings.\textsuperscript{198} Following the issuance of a security certificate detention happens with immediacy, for permanent residents it can be reviewed within 48 hours but foreign nationals have to wait 120 days after there has been a reasonableness assessment of the certificate.\textsuperscript{199} The appellant argued there was a breach of article 7 of the Charter.\textsuperscript{200} In order to prove this there is a requirement to demonstrate that there has been a violation of article 7 and that this was not ‘in accordance with the principles of fundamental justice’.\textsuperscript{201} If the appellant succeeds in showing there was a breach it is for the state to prove this was justified under section 1 of the Charter.\textsuperscript{202}

The court laid out that for section 7 to be met there needed to be a hearing ‘before *an independent and impartial magistrate… a decision by the magistrate on the facts and the*
law…right to know the case put against one, and the right to answer that case.\textsuperscript{203} The judge must appear fair as well as be fair in substance.\textsuperscript{204} Information contained in the security certificate can be withheld from the appellant this inhibits their ability to respond to the case.\textsuperscript{205} The court found that either the information should be provided or ‘a substantial substitute’ of information be provided which was not done in this case.\textsuperscript{206} The section 7 assessment rests on the procedural fairness, placing responsibility with the judge.\textsuperscript{207} The court held that the government could do more with IRPA to protect individual’s interests while also keeping important security information private.\textsuperscript{208}

The court rejected that detention was arbitrary as it did not take into consideration individual interests as the security threat made the detention reasonable.\textsuperscript{209} It was held that the detention of 120 days before a review was in violation of section 9 of the charter, the court noted that although there has to be some flexibility accorded due to the security nature of the perceived threat, if a permanent resident could review after 48 hours it was feasible for a non-national to review sooner than 120 days.\textsuperscript{210} The court found there was a violation due to the lack of a ‘timely review’ which could not be justified under section 1.\textsuperscript{211}

The court held that providing opportunities to review the detention taking into consideration all relevant factors would satisfy section 7 and 12 of the Charter.\textsuperscript{212} The court held there were two faults with the legislation that are not compatible with the Charter, the concealment of evidence from the appellant without protections in place for individual concerned and that the manner of review of the detention is in breach of section 7 and cannot be saved under section\textsuperscript{213}

\begin{footnotesize}
\begin{enumerate}
\item ibid at para 29.
\item ibid at para 32.
\item ibid at para 54.
\item ibid at para 61.
\item ibid at para 63.
\item ibid at para 87.
\item ibid at para 89.
\item ibid at para 93.
\item ibid at para 94.
\item ibid at para 107.
\end{enumerate}
\end{footnotesize}
1. The court considered that in a section 7 analysis if the impact on the individual has been ‘fundamentally unfair’ although security concerns will mitigate this interest, they cannot mitigate ‘fundamental justice’. Following this line of argument immigration control of asylum seekers may mitigate a section 7 breach that has been ‘fundamentally unfair’ but this is not necessarily consistent with ‘fundamental justice’. In cases of detention for irregular arrivals it is not so much detention on security grounds but mandatory detention is used as a punishment for the irregular arrival itself which arguably is ‘fundamentally unfair’.

In Thwaites analysis of section 15 of the Charter equality for non-citizens in relation to security certificates it was suggested that this was not detention pending deportation but rather indefinite detention without a criminal conviction. The court classifying the detention as immigration detention allows for ‘lower legal protections…’their’ safety sacrificed for ‘our’ security’. Thwaites notes that the core quality of citizenship is the right not to be removed, the question is asked then as to what is the extent of vulnerability this hence has for non-citizens.

Thwaites proposed two models of judicial decision making on immigration detention, ‘rights limited’ which allows detention where removal is likely in the foreseeable future. The other model is ‘rights precluding’ which permits two justifications for immigration detention, one that the government in good faith believes there will be deportation proceedings initiated soon and they can demonstrate that they are making efforts to do so, and the other is when

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213 *ibid* at para 139.
214 *ibid* at para 22, 23.
215 *ibid*.
216 *ibid*.
218 *ibid*.
219 *ibid* at 9.
220 *ibid* at 10.
detention is permitted to protect public safety and there is no other country willing to accept the individual.\textsuperscript{221}

Although Thwaites acknowledged that some form of ‘preventative detention’ is required, there should be a thorough system of legal protections for in place so as to avoid indefinite detention.\textsuperscript{222} It is suggested that these could come in the form of a time limit, or a higher evidentiary burden which would correlate with the length of detention.\textsuperscript{223} Thwaites has argued this is not a form of immigration detention pending removal but is in fact preventative detention for security purposes and so to avoid a section 15 breach this should also be extended to citizens.\textsuperscript{224}

Thwaites argued that although the Charkaoui cases went some way in improving the legal protections in place, the security certificate system is still massively inadequate.\textsuperscript{225} Change is required in relation to the issuing of security certificates as the current process, ‘discriminating as it does against non-citizens and disconnected from reasoning on legal bounds on preventative detention more generally, needs to be confronted.’\textsuperscript{226} These cases offered an opportunity, as suggested by Thwaites, to put a time limit in place for immigration detention. Security certificate deficiencies similar in other countries will be explored further in next chapter on comparative analysis of immigration detention regimes.

\textbf{Conclusion}

\textsuperscript{221} ibid at 11.
\textsuperscript{223} ibid.
\textsuperscript{224} ibid.
\textsuperscript{225} ibid at 24.
\textsuperscript{226} ibid.
\textsuperscript{226} ibid.
This chapter has demonstrated the legal framework within which detention should be considered in Canada. An analysis of International law and Charter jurisprudence has demonstrated that detention should be a measure of last resort. When it is necessary to resort to detention it should be for as brief a period as possible and regular review mechanisms should be in place to prevent indefinite detention for individuals. The following chapter will conduct a comparative analysis of other countries experiences of detention of asylum seekers and seek to demonstrate the massive infringements of rights that have occurred and that Canada should pursue alternatives to detention.
Chapter 4

Comparative Analysis of Immigration Detention

Introduction

This chapter will conduct a comparative analysis of the law and policy on immigration detention. It will comparatively analyse immigration detention policy and practice in the United Kingdom, Australia and the United States by a consideration of academic commentary. The chapter will conclude by drawing upon what Canada could learn from this analysis.

United Kingdom

Amnesty International completed a report on immigration detention of asylum seekers in the UK. It was concerned with whether the UK policy of detention is compliant with the international ‘obligations with respect to the right to liberty and the right of people to be treated with dignity and humanity under international refugee and human rights law and standards’.\textsuperscript{227} Amnesty international are critical of the country’s detention policy noting that the UK ‘policy and practice is compounded by the influence that the country yields internationally.’\textsuperscript{228} Arguably Canada also holds a strong international influence on policy and practice and is often seen as having a model practice, for example the Toronto Bail system.

Amnesty argued that,

‘Detention is an extreme sanction for people who have not committed a criminal offence. It violates one of the most fundamental human rights protected by international law, the right to liberty. In addition, some people will have been detained without charge or trial in their own country and/or have been subjected

\textsuperscript{227} Amnesty International Report, “Seeking Asylum is not a crime: detention of people who have sought asylum.” (2005) at 4.
\textsuperscript{228} ibid.
to torture, only to be further detained at some stage of the asylum process in the UK.’

The report found that the UK detention policy inflicted ‘a terrible human cost’ and was inconsistent with international human rights standards.\textsuperscript{229} It is suggested that international standards provide asylum seekers should be provided with protection and treated as refugees until the time their claim is held to be unfounded through a fair decision-making system.\textsuperscript{230} A system of mandatory detention is not treating asylum seekers with the requisite standard of protection. Nor is a policy of detention that does not consider each case on the individual facts to ascertain if as a matter of last resort detention is necessary.

\textit{Saadi} was a case referred from the United Kingdom to the Grand Chamber concerning the detention of an asylum seeker from Iraq.\textsuperscript{231} The court assessed if there had been a breach under article 5.1 and 5.2 of the European Convention on Human Rights.\textsuperscript{232} Collins J in the High Court found that ‘it was not permissible under the Convention to detain, solely for purposes of administrative efficiency, an asylum-seeker who had followed the proper procedures and presented no risk of absconding.’\textsuperscript{233} It was held that even if the detention had been compliant with article 5.1 it was ‘disproportionate to detain asylum-seekers for the purpose of quickly processing their claims’ particularly as alternatives to detention had not been considered.\textsuperscript{234}

This decision was unanimously overturned by the Court of Appeal.\textsuperscript{235} It was held that the detention was lawful as it was necessary for the efficient processing of the vast number of

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\textsuperscript{229} \textit{ibid} at 8.  \\
\textsuperscript{230} \textit{ibid} at 35.  \\
\textsuperscript{231} \textit{Saadi v United Kingdom}, 13229/03, Council of Europe: European Court of Human Rights, 29 January 2008.  \\
\textsuperscript{232} \textit{ibid}.  \\
\textsuperscript{233} \textit{ibid} at 6.  \\
\textsuperscript{234} \textit{ibid}.  \\
\textsuperscript{235} \textit{ibid}. 
\end{flushleft}
asylum applications.\textsuperscript{236} The court found that the purpose of article 5.1.1 was to respect the sovereign power of states to regulate unauthorised entry at their borders.\textsuperscript{237}

On appeal to the Chamber a four to three majority decision was reached upholding there was not a breach of article 5.1, they found that the power to detain was inherently part of a states sovereign right to control their borders.\textsuperscript{238} It was stated that ‘Until a potential immigrant had been granted leave to remain in the country, he had not effected a lawful entry, and detention could reasonably be considered to be aimed at preventing unlawful entry.’\textsuperscript{239} The plight of asylum seekers fleeing persecution and seeking protection in accordance with their international right to do so is incompatible with the courts view of an unlawful entry. The Chamber distinguished infringement of an individual’s right to liberty in an immigration situation in contrast to other infringement of liberty cases.\textsuperscript{240}

The UNHCR submitted to the Grand Chamber a number of concerns regarding the Chamber judgment. The judgment conflated asylum seekers with other types of immigrant.\textsuperscript{241} The judgment asserted that asylum seekers on arrival had ‘no lawful or authorised status.’\textsuperscript{242} Furthermore the court had declined to recognise the importance of a consideration if the detention was of an arbitrary nature.\textsuperscript{243}

The Grand Chamber provided that article 5.1.f provides an exception to the right to liberty contained in article 5.1 where infringement may be necessary for immigration control.\textsuperscript{244} The court opined that to consider detention necessary only in cases of evasion or attempted

\textsuperscript{236} \textit{ibid} at 7.
\textsuperscript{237} \textit{ibid}.
\textsuperscript{238} \textit{ibid} at 18.
\textsuperscript{239} \textit{ibid}.
\textsuperscript{240} \textit{ibid}., para 44.
\textsuperscript{241} \textit{ibid}., para 45.
\textsuperscript{242} \textit{ibid}., para 54.
\textsuperscript{243} \textit{ibid}.
\textsuperscript{244} \textit{ibid}.
evasion of immigration control was ‘too narrow a construction’. The Grand Chamber held that

‘given the administrative problems with which the UK was confronted during the period in question, with increasingly high numbers of asylum seekers, it was not incompatible with Article 5.1 (f) of the Convention to detain an applicant for seven days in suitable conditions to enable his claim to asylum to be processed speedily. Moreover, regard must be had to the fact that the provision of a more efficient system of determining large numbers of asylum claims rendered unnecessary recourse to a broader and more extensive use of detention powers.’

The court held that there was a breach of article 5.2 as the reasons for detention were not provided ‘promptly’.

The dissenting opinion agreed with the majority that there was a breach of article 5.2 but took issue with the analysis of the article 5.1 breach. The dissenting judgment was critical that the majority fail to recognise the importance of differentiating between immigrants and asylum seekers. The dissenting judgment holds that international law has provided that the entry of asylum seekers should be considered lawful. In addition, on the facts in this case the individual was given lawful permission to enter for three days prior to detention.

The justification of detention on administrative grounds is critiqued in the dissenting opinion. It was argued that ‘to maintain that detention is in the interests of the person concerned appears to us an exceedingly dangerous stance to adopt…In no circumstances can the end justify the means; no person, no human being may be used as a means towards an end.’

The dissenting opinion is critical that if a seven day period of detention is deemed reasonable it is left unclear what period of detention will become unreasonable. They argued that the
majority erred in not promoting the consideration of alternatives to detention.\textsuperscript{252} The dissenting judgment provides that the \textit{European Convention on Human Rights} cannot ‘operate in a vacuum’.\textsuperscript{253} Similarly the Charter in Canada does not operate in a vacuum but has been consistently informed with international law principles.

It is highlighted from the case law of the Human Rights Committee that not only does detention have to be lawful but also not imposed to due administrative convenience which directly contradicts the majority’s conclusion.\textsuperscript{254} The dissenting opinion is in disagreement with the majority that article 5 should in effect offer a lesser standard of protection for immigrants and asylum seekers.\textsuperscript{255} They note that issues of immigration will only grow in prominence and argue that it is not a crime to be a non-citizen.\textsuperscript{256}

O’Nions suggested that the European Court of Human Rights decision in \textit{Saadi} by condoning, ‘detention for asylum seekers on the grounds of practicality and administrative convenience appears to legitimise the indiscriminate and increasingly restrictive asylum policies of Western Europe.’\textsuperscript{257} She argued that detention without necessity is not tolerated within the criminal justice sphere and by the court allowing this within asylum law suggests that refugee’s human rights are limited due to the act of seeking asylum.\textsuperscript{258} It is argued that the growing use of detention for administrative reasons is difficult to reconcile with the requisites on state to detain in a non-arbitrary and proportionate manner.\textsuperscript{259}

O’Nion’s warns that if detention is left unchecked its use for administrative convenience will grow, taking states into dangerous territory by growing the number of individuals in detention.

\begin{thebibliography}{99}
\item \textit{ibid} at 36.
\item \textit{ibid} at 37.
\item \textit{ibid}.
\item \textit{ibid}.
\item \textit{ibid} at 38.
\item \textit{ibid}.
\item \textit{ibid}.
\item \textit{ibid} at 5.
\end{thebibliography}
and the periods which they are held in detention for.\textsuperscript{260} It is argued that the widespread use of detention and the impact that this has on detainees is ‘reprehensible on both an individual and societal level’.\textsuperscript{261} O’Nions highlighted that detention traumatises the detainee as well as encouraging public xenophobia and perceptions of immigrants as outsiders.\textsuperscript{262} O’Nions argues persuasively against the use of detention on legal, social, moral and financial grounds.\textsuperscript{263}

Wilsher argued that the ECHR decisions have been unclear and have provided states with a wide freedom on detention decisions.\textsuperscript{264} Wilsher suggested that the most important decision was \textit{Chahal v United Kingdom} where the court held that proportionality was irrelevant when assessing immigration detention.\textsuperscript{265} The decision in \textit{Saadi} goes further by holding that there need not be any reason at all but that the detention is required and continuing.\textsuperscript{266} As human rights instruments provide rights and then provide for derogation from such rights in cases of emergency, the question posed by Wilsher is can the influx of migrants be classified as an emergency?\textsuperscript{267} He suggests that this would have to involve immigration on a massive scale that incurred huge social and financial costs, and that the common situation where a state incurs a financial burden is insufficient to justify an emergency situation.\textsuperscript{268} Wilsher argues that the \textit{Chahal} judgment infers mandatory immigration detention is acceptable even in times not deemed to be an emergency.\textsuperscript{269}

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\item \textsuperscript{260} \textit{Ibid} at 36.
\item \textsuperscript{261} \textit{Ibid}.
\item \textsuperscript{262} \textit{Ibid}.
\item \textsuperscript{263} \textit{Ibid} at 37.
\item \textsuperscript{264} \textit{Supra} n. 29 at 8.
\item \textsuperscript{265} \textit{Ibid} at 9.
\item \textsuperscript{266} \textit{Ibid} at 10.
\item \textsuperscript{267} \textit{Ibid} at 12.
\item \textsuperscript{268} \textit{Ibid}.
\item \textsuperscript{269} \textit{Ibid} at 13.
\end{itemize}
\end{footnotesize}
Bacon notes that although the number of asylum applications received in the UK has decreased, the immigration detention estate has increased in size.\textsuperscript{270} There is a developing private business interest in the continued growth of immigration detention in the UK.\textsuperscript{271} Bacon suggests that the privatisation of immigration centres is a contributing factor to the lack of bail proceedings in the UK.\textsuperscript{272}

The UK must comply with the European Convention of Human Rights and article 5 provides the right to liberty and security of the person, however detention is permitted in order to facilitate removal of non-nationals.\textsuperscript{273} There has been a recognisable increase in the use of detention, for example in the UK there were no permanent detention centres until the 1990s.\textsuperscript{274} The policy is used to facilitate easy removal, hence the name removal centres rather than detention centres.\textsuperscript{275} The increase of detention at border entry suggests the goals of the policy are ‘deterrence and the facilitation of removal.’\textsuperscript{276} The tabloid press is powerfully anti-immigrant in Britain which enforces social stereotypes of bogus asylum seekers, which helps support the policy of detention.\textsuperscript{277} The policy of detention is motivated by ‘perceptions of difference and putative threat.’\textsuperscript{278} It is argued that although across the US and Europe the culture of control appears different there are similar outcomes from the various policies.\textsuperscript{279} Most notable is the increase in numbers of detainees and the periods of detention.\textsuperscript{280}

\textsuperscript{271} ibid.
\textsuperscript{272} ibid at 29.
\textsuperscript{273} supra n. 59 at 338.
\textsuperscript{274} ibid.
\textsuperscript{275} ibid at 339.
\textsuperscript{276} ibid.
\textsuperscript{277} ibid at 346.
\textsuperscript{278} ibid.
\textsuperscript{279} ibid at 17.
\textsuperscript{280} ibid.
policy of detention is being used increasingly and there is inadequate support for detainees particularly in private institutions.\textsuperscript{281}

Silverman argued that the state uses immigration detention as a method of deterring immigration and to speed up deportation proceedings.\textsuperscript{282} She argues that the use of immigration detention is increasingly used by governments around the world.\textsuperscript{283} Silverman suggests that although immigration detention may be useful for the type of stance that government’s such as the UK wish to pursue on immigration, the ethical basis for doing so should be challenged.\textsuperscript{284} Silverman defines, ‘immigration detention as the deprivation of a non-citizens liberty for the purposes of an immigration-related goal’.\textsuperscript{285} Silverman highlights Edwards’ work which provides that there is no evidence to support that immigration detention deters people coming to our borders.\textsuperscript{286} Not only are there ethical reasons for immigration detention to not be used so readily, but it also incurs a massive cost for the state, ‘one bed per day in the immigration detention estate is £120, with a typical immigration removal centre (IRC) costing almost £8.5 million per year to operate.’\textsuperscript{287} Detention is proven to have an impact on an individual’s physical and mental health, and the longer the period of detention the more serious the impact.\textsuperscript{288}

Silverman has argued that immigration detention legislation is most intrusive due to the absence of a constitution and the result is that the courts intervene after the Home Office introduces legislation, similarly in the US the courts act after detention policies have been introduced.\textsuperscript{289} Silverman argues that the ‘post facto checks and balances creates a rocky
foundation for the judiciary to build a relationship with the state on how best to implement immigration detention.\textsuperscript{290}

Silverman argued that NGO action and government lobbying are key to changing current immigration detention policy, as can be seen by the change in stance on child detention, which was brought about by lobbying and creating public awareness of the issues.\textsuperscript{291}

\textbf{Australia}

Australia is now retracting from the policy of mandatory detention. Saul argued that the Australian policy allows for detention without the…

‘substantiation of any prima facie security case against the refugees, it could be inferred that Australia’s detention of them pursued other, illegitimate, objectives: a group-based classification that all ‘boat people’ from Sri Lanka may be potential ‘terrorists’; a generalised fear of absconding which is not personal to each refugee; a broader policy or political aim of punishing unlawful arrivals (contrary to article 31 of the Refugee Convention) or deterring future unlawful arrivals; or the bureaucratic convenience of having persons readily available for processing.’\textsuperscript{292}

These reasons are inconsistent with international law that detention should only be used when necessary and proportionate to the aim to be achieved, in addition to being a last resort measure. Saul also holds that the reasons above are contrary to article 9 (1) of ICCPR.\textsuperscript{293}

\textbf{United States}

It has been argued by Fialho that the rights contained in the US constitution should be applicable to all those within the US regardless of immigration status.\textsuperscript{294} The due process clause in US law is similar to section 7 of the Charter.

\textsuperscript{290} ibid.
\textsuperscript{291} ibid at 15.
\textsuperscript{293} ibid at 18.
Acer has argued that the…fundamental human understanding has somehow been lost in the broader discussions on asylum policy in the United States. Instead, both the humanitarian impulse to help and the legal obligation to do so have been undercut – not so much because of the imperatives of security, but primarily because of the misuse and opportunist abuse of the language of ‘security’.295

Silverman has demonstrated that the policy of immigration detention in the US has developed extensively, without any curtailment in the expanding detainee population and growing lengths of detention.296

The UNHCR Canada/US Bi-National Roundtable made a number of findings in relation to immigration detention. The report outlines that ‘detention of asylum-seekers should in principle be avoided’ and only used as a ‘last resort’.297 Detainees should be separated from those accused or convicted of crimes.298 There should be an individual assessment for each asylum seeker as to whether detention is necessary and preferably what least intrusive alternative to detention is appropriate.299

Lessons for Canada

The current policy and practice of immigration detention in Canada is not wholly compliant with international law and not reflective of Charter values as demonstrated in Chapter 3. There is a recognisable struggle throughout case law and literature of the balance between protecting individual rights of asylum seekers and respecting a countries right to control immigration. International human rights and refugee law needs to be enforced to ensure

297 ibid at 3.
298 ibid.
299 ibid.
protection for asylum seekers and to ensure that in exercising their right to seek asylum they are not treated as criminals.

An assessment of alternatives to detention suggests that a case management system would be the most effective alternative to detention. It would save the government detention expense and respects individual human rights, as well as being compliant with international law and reflective of Charter values.

This chapter has conducted a comparative analysis which outlined the expanding immigration estate in the United Kingdom and the United States and the damage done by mandatory detention in Australia. Canada should be wary of pursuing immigration detention and learn from the mistakes of other jurisdictions.

**Conclusion**

This chapter has comparatively analysed experiences of policy and practice of immigration detention in the United Kingdom, Australia and the United States. The developing use of immigration detention is evident in all jurisdictions and it is necessary to enforce international law and national law protections in order to avoid rights infringements of refugees. It has drawn lessons for Canada by way of conclusion which reinforce the argument against the widespread use of immigration detention.
Conclusion

This thesis has critically analysed Immigration Detention in Canada. It has argued that the current policy does not comply with the rights and obligations at international law and does not reflect the values of the Canadian Charter.

Chapter One provided a background to the law and policy of immigration detention. The chapter provided a definition of immigration detention. The policy motivations for governments’ pursuing a policy of immigration detention were assessed. The impact that detention has at a societal and individual level was highlighted. On a societal level the detention of asylum seekers is criminalizing their plight. Detention also has a detrimental impact on individual’s mental and physical health, particularly vulnerable individuals and children.

Chapter Two considered the Law and Policy of Immigration Detention in Canada. The chapter assessed the Immigration and Refugee Protection Act and the legislative changes which have taken place in recent years. The chapter highlighted the danger of indefinite detention particularly for security certificate detainees. The chapter highlighted the alternatives to detention and argued for the promotion of these mechanisms by the Canadian government.

Chapter Three provided an analysis of international law and Charter jurisprudence. The chapter argued that Canada is infringing rights and obligations in International Law. It was also demonstrated that the policy of immigration detention is inconsistent with the values enshrined in the Charter of Fundamental Rights and Freedoms.

Chapter Four comparatively analysed the experiences of the United Kingdom, Australia and the United States. Lessons were drawn from the other countries experiences of the impact of
policies such as mandatory detention. Such policies have caused massive infringements of individual human rights as well as incurring a huge cost for the state.

This thesis has sought to contribute to the argument against the use of immigration detention for asylum seekers in Canada. It has been argued that immigration detention should only be used in the most exceptional circumstances as a last resort measure. There should be an individual assessment for each decision to detain, which should only be reached after a consideration that no alternative to detention will be appropriate. The government should ensure there are review mechanisms in place which combat indefinite detention or detention that is longer than absolutely necessary. The policy of mandatory detention should be abandoned and there should be strict guidelines in place that regulate a policy of Immigration Detention in Canada which better reflects the values enshrined in the Canadian Charter of Fundamental Rights and Freedoms and the rights and obligations in International Law.
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