

CANADA / JUDGMENT

Hemond v. Canada (Citizenship and Immigration)

2024 FC 1980

COURT

Federal Court

DECIDED

6 December 2024

Source: decisions.fct-cf.gc.ca · Research copy typeset by Esheria. Not court-issued or certified.

Hemond v. Canada (Citizenship and Immigration)

Court (s) Database

Federal Court Decisions

Date

2024-12-06

Neutral citation

2024 FC 1980

File numbers

IMM-5926-23, IMM-8969-22

Decision Content

Date: 20241206

Dockets: IMM-8969-22

IMM-5926-23

Citation: 2024 FC 1980

Ottawa, Ontario, December 6, 2024

PRESENT: Mr. Justice Norris

Docket: IMM-8969-22

BETWEEN:

FREDERIC JOSEPH HEMOND

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

and

CANADIAN ASSOCIATION OF REFUGEE LAWYERS

Intervener

Docket: IMM-5926-23

AND BETWEEN:

HOLLAND GEOFFREY WILLIAMSON RHODES

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

and

CANADIAN ASSOCIATION OF REFUGEE LAWYERS

Intervener

JUDGMENT AND REASONS

I. OVERVIEW [1] Does a detainee have the right not to testify in a detention review hearing conducted under section 57 of the Immigration and Refugee Protection Act, SC 2001, c 27 (IRPA)? The Immigration Division (ID) of the Immigration and Refugee Board of Canada (IRB) has not provided a consistent answer. Sometimes, members have held that detainees are compellable witnesses at detention reviews. In the view of some members, paragraph 127(c) of the IRPA obliges a detainee to answer any questions put to them at a detention review hearing, failing which they may be found guilty of an offence under section 128 of the IRPA and be subject to a fine, imprisonment, or both. Some members have also held that, if a detainee refuses to testify, an adverse inference can be drawn from this, effectively using the detainee's silence as a make-weight on the side of the scale favouring continued detention. Other times, members have held that a detainee is not a compellable witness in a detention review; the detainee is entirely free to choose whether to testify. As the members who take this view also often observe, remaining silent risks leaving them with an incomplete picture of the factual circumstances of the case, which can be to the detainee's detriment, but this is a risk the detainee is free to run.

- [2] The applicants are foreign nationals who were arrested and detained under the IRPA. At their respective detention reviews, which were conducted by the same ID member, the member ruled that the applicants would be required to testify. Over the objections of their counsel, the member held that paragraph 127(c) of the IRPA obliged the applicants to answer the member's questions. (This provision states that no person shall knowingly "refuse to be sworn or to affirm or declare, as the case may be, or to answer a question put to the person at an examination or at a proceeding held under this Act.") The applicants acceded to the rulings and answered the member's questions. The member ordered the continued detention of both applicants. In doing so, he relied in part on information that had been elicited from the applicants during the detention review hearings.
- [3] The applicants now apply under subsection 72(1) of the IRPA for judicial review of the decisions continuing their detention. They submit that the decisions should be set aside because the ID's determination that they were required to testify is unreasonable. Since the applications raised common legal issues, they were ordered joined and are being determined together. The Canadian Association of Refugee Lawyers (CARL) was granted leave to intervene in both matters.
- [4] There is no issue that the applications for judicial review are moot; at subsequent detention reviews, both applicants were released from detention. The applicants submit, however, that the Court should exercise its discretion to determine the applications on their merits in order to provide guidance on an important legal issue that is evasive of review. The respondent submits that the applications should be dismissed as moot. In the alternative, the respondent submits that the applications should be dismissed because the decisions under review are reasonable.
- [5] For the reasons that follow, the applications for judicial review will be allowed. I am satisfied that the applications should be decided on their merits despite their mootness. I also agree with the applicants that the ID member's decisions to require them to testify at their respective detention review hearings are unreasonable because they unjustifiably limited the applicants' rights under section 7 of the Canadian Charter of Rights and Freedoms. As a result, the decisions continuing the applicants' detentions must be set aside. In the circumstances, no other order is requested or required.
- [6] The parties have proposed questions for certification under paragraph 74(d) of the IRPA. While I do not agree that the questions proposed by the parties meet the test for certification, I am satisfied that this matter does give rise to a certifiable question. This will be discussed further at the conclusion of these reasons.

II. BACKGROUND A. IMM-8969-22 [7] Mr. Hemond is a citizen of the United States. He came to the attention of the Canada Border Services Agency (CBSA) after he was arrested on September 3, 2022, by the Toronto Police Service following an alleged assault in a city park.

- [8] While Mr. Hemond was in criminal detention, the CBSA wrote a report under subsection 44(1) of the IRPA alleging that he is inadmissible to Canada under paragraph 41(a) of the IRPA (non-compliance with the Act) for having failed to present himself for examination on entry to Canada. The CBSA alleged that Mr. Hemond had entered Canada illegally on a freight train via the Vermont/Quebec border about a month earlier.
- [9] On September 6, 2022, Mr. Hemond was released on bail on the criminal charge. He was then transferred to the custody of the CBSA and placed in immigration detention.
- [10] Mr. Hemond's 48-hour detention review was held on September 8, 2022. During the hearing, over the objection of Mr. Hemond's counsel, the member ruled that Mr. Hemond was a compellable witness and was required to answer the member's questions. Mr. Hemond answered the questions the ID member put to him. The member then asked counsel if they had any questions "arising out of" his. Counsel for Mr. Hemond asked him a single question (whether, if released, he would appear at his admissibility hearing or any other immigration proceeding). Counsel for the Minister then questioned Mr. Hemond about whether he had made arrangements to return to the United States yet and whether he had a criminal record in the United States. In ordering Mr. Hemond's continued detention, the member relied, in part, on information that had been elicited from him during the detention review hearing.
- [11] On September 13, 2022, Mr. Hemond filed the present application for leave and for judicial review challenging the 48-hour detention review decision.
- [12] Mr. Hemond's 7-day detention review was held on September 14, 2022, before a different member of the ID. He was ordered released. That release order was executed and Mr. Hemond is no longer detained. In fact, it appears that he is no longer in Canada, having returned to the United States.

B. IMM-5926-23 [13] Mr. Rhodes is also a citizen of the United States. He has a history of repeated entries to and removals from Canada dating back to 2018. For present purposes, it suffices to note that he came to the attention of the CBSA again on March 29, 2023, after he had been arrested and criminally charged in Toronto. After being granted bail on his criminal charges, on April 6, 2023, Mr. Rhodes was transferred to the custody of the CBSA and placed in immigration detention. A deportation order was issued on the same date.

- [14] Mr. Rhodes's 48-hour detention review took place on April 11, 2023. The ID member ordered his continued detention.
- [15] Mr. Rhodes's 7-day detention review took place on April 17, 2023, before a different ID member. During the hearing, over the objection of his counsel, the member ruled that Mr. Rhodes was a compellable witness. The member then told Mr. Rhodes he was "calling [him] as a witness to give evidence at this detention review." Mr. Rhodes agreed to answer the member's questions. After concluding his questioning of Mr. Rhodes, the member asked counsel for Mr. Rhodes and counsel for the Minister if they had any questions for him. Both did. Mr. Rhodes answered all the questions that were put to him. In ordering Mr. Rhodes's

continued detention, the member relied, in part, on information that had been elicited from him during the detention review hearing.

- [16] On May 10, 2023, Mr. Rhodes filed the present application for leave and for judicial review challenging the 7-day detention review decision.
- [17] Subsequently, on July 21, 2023, the ID ordered that Mr. Rhodes be released from detention on terms and conditions. After he was released, Mr. Rhodes failed to report as required and a warrant for his arrest was issued. The warrant was executed on or about March 9, 2024, and Mr. Rhodes was placed back in immigration detention. His detention was continued after his 48-hour detention review, which took place on March 12, 2024. No information about his status since then has been provided to the Court.

III. PRELIMINARY ISSUE: SHOULD THE APPLICATIONS BE DISMISSED AS MOOT? [18] The doctrine of mootness “reflects the principle that courts will only hear cases that will have the effect of resolving a live controversy which will or may actually affect the rights of the parties to the litigation except when the courts decide, in the exercise of their discretion, that it is nevertheless in the interest of justice that the appeal be heard” (*Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62 at para 17).

- [19] As is well known, when the issue of mootness is raised, the analysis proceeds in two stages. The first question is whether a live controversy remains that affects or may affect the rights of the parties. If a live controversy remains, the matter is not moot and, other things being equal, it should be decided on its merits. On the other hand, if no live controversy remains, the proceeding is moot. This triggers the second stage of the inquiry. At that stage, the court considers whether it should exercise its discretion to decide the matter on its merits despite its mootness (*Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 at 353-63; *Democracy Watch v Canada (Attorney General)*, 2018 FCA 195 at para 10).
- [20] As already noted, there is no issue that the present applications for judicial review are moot. The decisions under review have been superseded by subsequent orders of the ID, whether release orders, detention orders, or both. When these applications for judicial review were commenced, there was a tangible and concrete dispute between the parties over whether the detention orders under review should be upheld or set aside. With the release of the applicants pursuant to subsequent orders of the ID (and, in the case of Mr. Rhodes, with his subsequent arrest and detention), the substratum of the judicial review applications has disappeared (*Borowski*, at 357). A decision on the reasonableness of the detention orders under review would have no practical effect for the parties because those orders no longer have any legal force.
- [21] Even though the applications for judicial review are moot, the applicants ask me to exercise my discretion to determine them on their merits. As I have already said, I am satisfied that I should do so.

- [22] In *Borowski*, the Supreme Court of Canada formulated guidelines for the exercise of the Court's discretion to hear and determine a matter despite its mootness. Three factors were identified: (1) whether there is still an adversarial context; (2) the concern for judicial economy; and (3) whether deciding the matter on its merits would be consistent with the court's adjudicative role (at 358-63). The Supreme Court emphasized that this list is not exhaustive; "more than a cogent generalization is probably undesirable because an exhaustive list would unduly fetter the court's discretion in future cases" (at 358). Further, the application of these factors is not a "mechanical process" and the factors may not all support the same result or bear the same weight in a given case (at 363). The ultimate question is whether it is in the interests of justice to address a matter that is moot (*Doucet-Boudreau*, at para 17).
- [23] In the present cases, the first *Borowski* factor favours deciding the applications on their merits. There is no question that an adversarial context is still present. The parties continue to be fully engaged and both sides have advanced their positions on the merits of the judicial review applications very ably.
- [24] The second *Borowski* factor also favours deciding the applications on their merits. Indeed, in my view, it strongly favours doing so.
- [25] The jurisprudence recognizes that it can be an effective use of judicial resources to decide a moot case on its merits when it raises an important issue that is evasive of review: see *Mission Institution v Khela*, 2014 SCC 24 at para 14; *R v Oland*, 2017 SCC 17 at paras 17-18; *R v Myers*, 2019 SCC 18 at paras 13-14; and *R v Penunsi*, 2019 SCC 39 at paras 10-11.
- [26] As with judicial interim release under the Criminal Code, issues relating to detention under the IRPA are evasive of judicial review due to the inherently temporary nature of detention orders (*Fomenky v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 1160 at para 28; *Jama v Canada (Attorney General)*, 2022 FC 37 at para 65). Decisions affecting immigration detainees can also be evasive of review while there is still a live controversy because detainees may be removed from Canada before the matter can be heard. For example, in *Brown v Canada (Citizenship and Immigration)*, 2020 FCA 130, which concerned a challenge to the constitutionality of the IRPA detention review regime under sections 7 and 9 of the Charter, the Federal Court of Appeal noted that the application judge had raised the issue of whether the challenge was moot given that Mr. Brown had been removed from Canada to Jamaica by the time of the hearing. The application judge exercised his discretion to decide the constitutional issues raised in the case despite the fact that it had likely become moot due to Mr. Brown's removal to Jamaica. The Federal Court of Appeal stated: "No one raised mootness in this Court and there is no reason on this record to second-guess the Federal Court's exercise of discretion" (at para 7). Likewise, in *Canada (Public Safety and Emergency Preparedness) v Chhina*, 2019 SCC 29, which concerned the availability of habeas corpus for immigration detainees, Mr. Chhina had been removed from Canada by the time the matter reached the Supreme Court of Canada. Justice Karakatsanis observed: "Given the importance of clearly delineating the exceptions to habeas corpus, it is

appropriate for this Court to consider the legal issues raised by Mr. Chhina's appeal notwithstanding its mootness. No party has objected to this Court doing so" (at para 15).

- [27] Transcripts of detention review hearings filed by the applicants demonstrate that different ID members have taken diametrically opposing views concerning whether a detainee is a compellable witness. Indeed, Mr. Rhodes himself was told two different things by two different members. The member presiding over his 48-hour detention review explained that it was up to him whether to testify or not while the member presiding over his 7-day detention review told him he was required to answer the member's questions.
- [28] IRB Chairperson Guideline 2: Detention (last amended April 2021) does not offer any guidance beyond stating that both parties "have the right to present relevant evidence at a detention review" and that members "should ensure that the person concerned understands and has an opportunity to testify, present evidence and counter the Minister's evidence, including by presenting their own sworn testimony, calling witnesses, and/or cross-examining the Minister's witnesses" (at para 7.3.1). The issue of compellability is not addressed, one way or the other. A policy and procedure manual prepared by the Government of Canada, ENF-3 Admissibility Hearings and Detention Reviews (last updated March 3, 2022), states that the compellability of the person concerned "has not been definitively resolved for detention reviews" (at para 7.10).
- [29] As things currently stand, the legal rights of a detainee at a detention review appear to depend entirely on the identity of the presiding ID member and, as a result, can vary from one detention review to the next. From a rule of law perspective, this is a highly unsatisfactory state of affairs. As already noted, by their very nature, the ID's determinations in detention review hearings are evasive of review. The inconsistency in the ID's approaches to whether a detainee is a compellable witness warrants the expenditure of the necessary resources to decide these cases on their merits despite the fact that they are moot.
- [30] The respondent submits that it would be more appropriate to wait for the issue to recur so that another litigant can then bring an expedited application for judicial review and have the matter determined before it becomes moot. I do not agree. While expedited applications for judicial review certainly have their place (especially in the detention review context), I do not see how it would be in the interests of justice to insist that the legal issues raised by the present applications be decided under such exigencies when it is not necessary to do so. Moreover, the present applications were fully briefed by the parties and have now been heard by the Court. If they were to be dismissed as moot at this stage, all of the resources already expended by the parties and by the Court would be thrown away. This would not promote either judicial economy or the interests of justice.
- [31] Finally, the third Borowski factor does not weigh against deciding these applications on their merits. The Supreme Court held that a court "must demonstrate a measure of awareness of its proper law-making function" and "must be sensitive to its role as the adjudicative branch in our political framework" (Borowski, at 362). The Court continued: "Pronouncing

judgments in the absence of a dispute affecting the rights of the parties may be viewed as intruding into the role of the legislative branch” (ibid.). The danger of such an intrusion was clear in *Borowski*, which concerned a moot challenge to the constitutionality of legislation governing abortion. There is no such danger here. The issues and arguments raised by the applicants do not invite the Court to stray into the sphere of the legislature or the executive; rather, they fall squarely within the purview of the Court sitting in judicial review of decisions of the ID.

[32] For these reasons, I agree with the applicants that the applications for judicial review should be determined on their merits.

IV. STANDARD OF REVIEW [33] The parties submit that the ID’s decisions should be reviewed on a reasonableness standard. Given how the applications for judicial review have been framed, and subject to what follows, I agree.

[34] The applicants accept that the ID has a discretionary power to compel testimony from a detainee. However, they submit that, in exercising this discretion, the ID must balance the protections guaranteed to a detainee by section 7 of the Charter against the objectives of the IRPA. As will be discussed below, the protection at issue here can be characterized in different ways but the fundamental premise of the applicants’ argument is that section 7 guarantees an immigration detainee the right not to be required to testify at a detention review, whether by the ID member or by Minister’s counsel. The applicants submit that the decisions under review are unreasonable because they fail to strike a proportionate balance between this right and the statutory objectives. In presenting their applications for judicial review in this way, the applicants draw on the analytical framework established in *Doré v Barreau du Québec*, 2012 SCC 12 at paras 55-56; see also *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12 at paras 35-42, and *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 at paras 57-59.

[35] Under the *Doré* framework, a preliminary issue is whether a decision under review engages the Charter by limiting its protections: see *Doré*, at para 57; *Loyola*, at para 39; *Trinity Western*, at para 60; and *Commission scolaire francophone des Territoires du Nord-Ouest v Northwest Territories (Education, Culture and Employment)*, 2023 SCC 31 at paras 61-67. If the decision does not limit Charter protections, that is the end of the analysis; there is no need to engage in the balancing exercise described in *Doré* and the cases that follow it.

[36] Here, there is no issue that section 7 of the Charter applies to detention review hearings or that those proceedings must be conducted in accordance with the principles of fundamental justice. The applications turn on the whether the principles of fundamental justice governing detention review hearings under the IRPA entail that a detainee cannot be required to testify. If they do, the protections of section 7 would be limited by requiring a detainee to testify. The reasonableness of the ID’s decisions to require the applicants to testify would then depend on whether the ID proportionately balanced the Charter protection with the statutory objectives. On the other hand, if the principles of fundamental

justice do not protect an immigration detainee from being required to testify, the decisions requiring the applicants to testify would not limit the protections of section 7 and, as a result, there would be no need to engage in any balancing under the Doré framework.

[37] I agree with the applicants that, when the question is whether an administrative decision limits the protections of a Charter right, there cannot be a range of reasonable outcomes: either the decision limits the protections or it does not. There can be only one answer and it is the reviewing court's responsibility to provide it (subject to any appeal, of course). I do not understand the respondent to suggest otherwise. In my view, this approach is consistent not only with the Doré framework but also with the Supreme Court's recent statements concerning how a court should approach constitutional questions on judicial review: see *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 55-56; see also *Société des casinos du Québec inc v Association des cadres de la Société des casinos du Québec*, 2024 SCC 13 at para 45 (per Jamal J) and paras 94-97 (per Côté J); and *York Region District School Board v Elementary Teachers' Federation of Ontario*, 2024 SCC 22 at paras 62-71. Whether a limit on a Charter right is proportionate and justified under the Doré framework is a separate question.

[38] In sum, the standard of review is reasonableness because the ultimate issue is whether the decisions under review are reasonable in the sense just discussed. To establish that the decisions under review are unreasonable, the applicants must first establish that the decisions limited protections guaranteed by section 7 of the Charter. If the Court finds that this is the case, it must then consider whether, as the applicants contend, the decisions are unreasonable because they do not reflect a proportionate balancing of the Charter protections at play with the statutory objectives.

V. ANALYSIS A. The statutory scheme for detention reviews under the IRPA [39] Section 57 of the IRPA provides as follows:

Review of detention

Contrôle de la détention

57 (1) Within 48 hours after a permanent resident or a foreign national is taken into detention, or without delay afterward, the Immigration Division must review the reasons for the continued detention.

57 (1) La section contrôle les motifs justifiant le maintien en détention dans les quarante-huit heures suivant le début de celle-ci, ou dans les meilleurs délais par la suite.

Further review

Comparutions supplémentaires

- (2) At least once during the seven days following the review under subsection (1), and at least once during each 30-day period following each previous review, the Immigration Division must review the reasons for the continued detention.
- (2) Par la suite, il y a un nouveau contrôle de ces motifs au moins une fois dans les sept jours suivant le premier contrôle, puis au moins tous les trente jours suivant le contrôle précédent.

Presence

Présence

- (3) In a review under subsection (1) or (2), an officer shall bring the permanent resident or the foreign national before the Immigration Division or to a place specified by it.
- (3) L'agent amène le résident permanent ou l'étranger devant la section ou au lieu précisé par celle-ci.
- [40] Under subsection 58(1) of the IRPA, a detainee shall be released from detention unless the ID is satisfied that one or more of the grounds for detention identified in paragraphs (1)(a) to (e) have been established. Subsection 58(1) states:

Release — Immigration Division

Mise en liberté par la Section de l'immigration

58 (1) The Immigration Division shall order the release of a permanent resident or a foreign national unless it is satisfied, taking into account prescribed factors, that

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

- (a) they are a danger to the public;
- a) le résident permanent ou l'étranger constitue un danger pour la sécurité publique;
- (b) they are unlikely to appear for examination, an admissibility hearing, removal from Canada, or at a proceeding that could lead to the making of a removal order by the Minister under subsection 44(2);
- b) le résident permanent ou l'étranger se soustraira vraisemblablement au contrôle, à l'enquête ou au renvoi, ou à la procédure pouvant mener à la prise par le ministre d'une mesure de renvoi en vertu du paragraphe 44(2);
- (c) the Minister is taking necessary steps to inquire into a reasonable suspicion that they are inadmissible on grounds of security, violating human or international rights, sanctions, serious criminality, criminality, transborder criminality or organized criminality;

- c) le ministre prend les mesures voulues pour enquêter sur les motifs raisonnables de soupçonner que le résident permanent ou l'étranger est interdit de territoire pour raison de sécurité, pour atteinte aux droits humains ou internationaux, pour sanctions ou pour grande criminalité, criminalité, criminalité transfrontalière ou criminalité organisée;
 - (d) the Minister is of the opinion that the identity of the foreign national — other than a designated foreign national who was 16 years of age or older on the day of the arrival that is the subject of the designation in question — has not been, but may be, established and they have not reasonably cooperated with the Minister by providing relevant information for the purpose of establishing their identity or the Minister is making reasonable efforts to establish their identity; or
 - d) dans le cas où le ministre estime que l'identité de l'étranger — autre qu'un étranger désigné qui était âgé de seize ans ou plus à la date de l'arrivée visée par la désignation en cause — n'a pas été prouvée mais peut l'être, soit l'étranger n'a pas raisonnablement coopéré en fournissant au ministre des renseignements utiles à cette fin, soit ce dernier fait des efforts valables pour établir l'identité de l'étranger;
 - (e) the Minister is of the opinion that the identity of the foreign national who is a designated foreign national and who was 16 years of age or older on the day of the arrival that is the subject of the designation in question has not been established.
 - e) le ministre estime que l'identité de l'étranger qui est un étranger désigné et qui était âgé de seize ans ou plus à la date de l'arrivée visée par la désignation en cause n'a pas été prouvée.
- [41] In *Brown*, the Federal Court of Appeal found that the meaning of subsection 58(1) is clear: “detention must cease unless the ID is satisfied, on a balance of probabilities, that a ground for detention exists. If a ground for detention is not established, the inquiry is at an end. Release is the default” (at para 32).
- [42] The prescribed factors referred to in subsection 58(1) are found in sections 244 to 248 of the Immigration and Refugee Protection Regulations, SOR/2002-227 (IRPR). These provisions identify the factors to be taken into consideration when assessing flight risk (section 245), danger to the public (section 246), and whether identity has not been established (section 247). Under the heading “Other Factors”, section 248 provides as follows:

Other factors

Autres critères

248 If it is determined that there are grounds for detention, the following factors shall be considered before a decision is made on detention or release:

248 S'il est constaté qu'il existe des motifs de détention, les critères ci-après doivent être pris en compte avant qu'une décision ne soit prise quant à la détention ou la mise en liberté :

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

[43] Subsection 58(3) provides that, if the ID orders a detainee's release, "it may impose any conditions that it considers necessary, including the payment of a deposit or the posting of a guarantee for compliance with the conditions."

[44] Summarizing the import of these provisions, the Court of Appeal stated in Brown:

The onus is on the Minister to establish both a ground of detention and that detention is warranted based on mandatory, case-specific factors. Detention may only be ordered where there are no appropriate alternatives, and, in considering alternatives to detention, subsection 58(3) authorizes the ID to impose any conditions that it considers necessary to neutralize the risk associated with release.

(Brown, at para 37)

[45] The Court of Appeal added the following about the legal burden on the Minister:

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

(Brown, at para 118)

[46] The Court of Appeal also held that, under the statutory scheme, the legal burden never shifts onto the detainee. At most, the detainee may be faced with “the tactical decision whether to lead evidence to prevent a potentially unfavourable outcome” because introducing evidence in favour of release could be in the detainee’s interest when the evidence establishes a ground for detention and suggests that detention is justified under section 248 of the IRPR (Brown, at para 121). To be clear:

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

(Brown, at para 122)

[47] The fact that the legal burden never shifts from the Minister was one of the key reasons why the Court of Appeal concluded in Brown that the detention review scheme is consistent with section 7 of the Charter.

B. The ID’s power to compel witness testimony [48] The applicants accept that the ID has the power to compel witness testimony. They submit that this power is conferred by section 165 of the IRPA. This provision states that members of the ID (among others) “have the powers and authority of a commissioner appointed under Part I of the Inquiries Act and may do any other thing they consider necessary to provide a full and proper hearing.” Section 4 of the Inquiries Act, RSC 1985, c I-11 provides:

Powers of commissioners concerning evidence

Audition de témoins

4 The commissioners have the power of summoning before them any witnesses, and of requiring them to

4 Les commissaires ont le pouvoir d’assigner devant eux des témoins et de leur enjoindre de :

- (a) give evidence, orally or in writing, and on oath or, if they are persons entitled to affirm in civil matters on solemn affirmation; and
- a) déposer oralement ou par écrit sous la foi du serment, ou d’une affirmation solennelle si ceux-ci en ont le droit en matière civile;
- (b) produce such documents and things as the commissioners deem requisite to the full investigation of the matters into which they are appointed to examine.

- b) produire les documents et autres pièces qu'ils jugent nécessaires en vue de procéder d'une manière approfondie à l'enquête dont ils sont chargés.

[49] I agree with the applicants that these provisions are the source of the ID's power to require a witness to testify, whether at the behest of a party or at the member's own behest. Justice Barnes reached the same conclusion in *B095 v Canada (Citizenship and Immigration)*, 2016 FC 962 at para 21, and in *Bruzzese v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 1119 at para 13; see also *Suresh v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 28 at para 70. I also agree with the applicants that, in their detention review hearings, the ID member erred in relying on the combined operation of paragraph 127(c) and section 128 of the IRPA as the authority to compel them to testify. Setting aside for the moment the question of whether the applicants were compellable at all, these provisions do not confer any authority on the ID to require a witness to testify. Rather, they provide an enforcement mechanism for when a witness who is legally required to answer questions at an examination or at a proceeding under the IRPA refuses to do so. This is a separate matter from the power of the ID to require a witness to testify in the first place. That power is conferred by section 165 of the IRPA. The respondent does not suggest otherwise.

[50] The applicants accept that, if an immigration detainee elects to testify at their detention review hearing, they can be questioned by Minister's counsel and by the ID member. They also accept that, at least in principle, a detainee is a compellable witness at their detention review hearing, whether at the behest of counsel for the Minister or, as occurred in their own cases, at the behest of the ID member. There is no explicit reference in the IRPA to the compellability of witnesses at the ID (*Suresh*, at para 70). In this respect, the ID may be contrasted with the Refugee Protection Division (RPD), which is expressly granted the power to "question the witnesses, including the person who is the subject of the proceedings" (IRPA, paragraph 170(d.1)). Thus, while there is nothing in the governing statutory provisions that expressly authorizes the ID to require a detainee to testify, neither is there anything that prohibits this. The difficult question, and the determinative issue in these applications, is whether section 7 of the Charter constrains the exercise of the ID's power to require a detainee to testify at a detention review hearing. I turn to this now.

C. Does section 7 of the Charter constrain the ID's power to compel testimony from a detainee?

[51] Section 7 of the Charter states: "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."

[52] Since liberty is at stake in a detention review under the IRPA, there is no issue that section 7 of the Charter is engaged (*Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 at paras 12-13 and 18). Consequently, any deprivation of liberty brought about by a detention review must be in accordance with the principles of fundamental justice.

- [53] While accepting, as it must, that detention review hearings engage the protections of section 7, the respondent submits that the applicable principles of fundamental justice must be determined contextually. According to the respondent, the principles and values the applicants draw upon to support their challenge to the ID's decisions are inapplicable to detention review proceedings under the IRPA. The respondent submits that the proposition that an immigration detainee has a Charter right not to be required to testify in a detention review hearing should, therefore, be rejected.
- [54] There is no question that the demands of fundamental justice must be determined contextually. I am not persuaded, however, that a principle of fundamental justice that protects detainees from testimonial compulsion in detention review hearings is incompatible with the IRPA context, as the respondent contends. On the contrary, as I will explain, it is required because of what is at stake in a detention review under the IRPA – the detainee's liberty.
- [55] In advancing their challenge to the ID's decisions, the applicants submit that the principles of fundamental justice include a right to silence when one is under the coercive control of the state. In the criminal law context, this is indisputable. Section 7 provides that a detained person has the right to make a free and meaningful choice as to whether to speak to the authorities or to remain silent (*R v Hebert*, [1990] 2 SCR 151 at 181). However, while I agree with the applicants that the fundamental values articulated in the jurisprudence dealing with the right to silence are germane to the present applications, I am not convinced that the right to silence discussed there is entirely apposite here. This is because that jurisprudence concerns situations where state agents (usually the police) seek to question the detained person to further an investigation. The protections of the Charter in such situations address the detainee's unique vulnerabilities when being questioned by state authorities, vulnerabilities the state can exploit to further its interests, usually contrary to the detainee's interests.
- [56] This is reflected in the analysis in *Hebert*. Justice McLachlin (as she then was) observed: "The state has the power to intrude on the individual's physical freedom by detaining him or her. The individual cannot walk away. This physical intrusion on the individual's mental liberty in turn may enable the state to infringe the individual's mental liberty by techniques made possible by its superior resources and power" (*Hebert*, at 179-80). Similarly, in *R v Singh*, 2007 SCC 48, Justice Charron observed: "After detention, the state authorities are in control and the detainee, who cannot simply walk away, is in a more vulnerable position. There is a greater risk of abuse of power by the police. The fact of detention alone can have a significant impact on the suspect and cause him or her to feel compelled to give a statement" (at para 32).

[57] Section 7 of the Charter therefore imposes limits on the power of the state over the detained person. It “seeks to effect a balance between the interests of the detained person and those of the state” (Hebert, at 180). On the one hand, the state must not use its superior power improperly against the individual; on the other hand, the state’s legitimate interest in law enforcement should not be frustrated without proper justification. Accordingly, Justice McLachlin found as follows in Hebert:

The right to silence conferred by s. 7 reflects these values. The suspect, although placed in the superior power of the state upon detention, retains the right to choose whether or not he will make a statement to the police. To this end, the Charter requires that the suspect be informed of his or her right to counsel and be permitted to consult counsel without delay. If the suspect chooses to make a statement, the suspect may do so. But if the suspect chooses not to, the state is not entitled to use its superior power to override the suspect’s will and negate his or her choice.

(Hebert, at 180)

[58] In my view, the circumstances of a detainee who comes before the ID for a detention review hearing are quite different. While the state has certainly deprived them of their liberty, it has done so for a different purpose than when the police detain a criminal suspect for questioning. As well, for someone detained or arrested in connection with a criminal investigation, their state antagonist (the police) has complete control over whether their loss of liberty will continue, at least until the detainee is eventually brought before a justice for a bail hearing. In contrast, neither the CBSA nor Minister’s counsel, the immigration detainee’s state antagonists in the detention review hearing, decide whether the detention will continue; that is the sole responsibility of the ID member (although Minister’s counsel may agree that the detainee should be released from detention). Furthermore, any questioning of the immigration detainee by Minister’s counsel during the detention review occurs in the presence of the ID member, a quasi-judicial figure, and often in the presence of counsel acting on behalf of the detainee as well. Even when the ID plays a more inquisitorial role during the hearing, this is necessarily tempered by its adjudicative duties and responsibilities. Finally, the right to silence as a principle of fundamental justice in investigative detention contexts is closely entwined with the right against self-incrimination, the presumption of innocence, and the common law confessions rule (Hebert, at 164; *R v JJ*, 2022 SCC 28 at paras 144-45). None of these protections are applicable in detention review hearings under the IRPA. For all these reasons, the requirements of fundamental justice for a detainee in a detention review hearing before the ID will not necessarily be the same as those that apply to other forms of detention where the detainee may be subject to questioning by state agents.

[59] That being said, I agree with the applicants’ core submission: the principles of fundamental justice entail that a person whose liberty is at stake in a legal proceeding must have the choice whether to provide evidence in that proceeding. In my view, given the testimonial context in which the issue arises here, the applicable principle of fundamental justice should be framed as a principle of non-compellability, as opposed to a right to silence. Still,

the two are closely related. To the extent that there is a right to silence in a proceeding before an adjudicative tribunal like the ID, its protections are coextensive with a principle of non-compellability.

- [60] In the criminal process, this right is guaranteed by section 11(c) of the Charter, which provides that any person charged with an offence has the right “not to be compelled to be a witness in proceedings against that person in respect of the offence.” Obviously section 11(c) does not apply to detention reviews under the IRPA; however, it has long been recognized that sections 8 to 14 of the Charter protect rights that illustrate the principles of fundamental justice entrenched by section 7 (*Re BC Motor Vehicle Act*, [1985] 2 SCR 486 at 502).
- [61] Section 11(c) is illustrative of a principle of fundamental justice that applies in a proceeding where a person’s liberty is at stake: the case to meet principle. This principle holds that individuals should not be conscripted by the state to promote a self-defeating purpose (*R v S(RJ)*, [1995] 1 SCR 451 at 504). In a proceeding where the state seeks to deprive a person of their liberty, the burden should be on the state to establish that there is a case to be met. In a fair proceeding, the state is not permitted to conscript the person whose liberty is at stake to help it meet the burden of demonstrating why liberty should be denied. It is only when the state has established a case to meet that the person whose liberty is at stake can be expected to respond. In short, “it is up to the state, with its greater resources, to investigate and prove its own case, and [. . .] the individual should not be conscripted into helping the state fulfil this task” (*R v P (MB)*, [1994] 1 SCR 555 at 579; see also *Dubois v The Queen*, [1985] 2 SCR 350 at 356-59).
- [62] The respondent submits that recognizing any form of testimonial protection for detainees at their detention review hearings would frustrate the objectives of the IRPA, would be inconsistent with settled jurisprudence, and would improperly import criminal law concepts into the immigration context. I do not agree.
- [63] As a principle of fundamental justice, the case to meet principle prohibits the use of compelled testimony in proceedings where section 7 interests are implicated. As a result, “testimonial compulsion has been invariably linked with evidentiary immunity” (*Application under s. 83.28 of the Criminal Code (Re)*, 2004 SCC 42 at para 70). While this idea is most familiar in the criminal law context, as a principle of fundamental justice, it is not restricted to that context. This is demonstrated by *Application under s. 83.28*, where the Court found that the principles of fundamental justice required that use and derivative use immunity with respect to statutorily compelled testimony be extended to other proceedings that engage the guarantees of fundamental justice, namely deportation and extradition proceedings (at para 76). As the Supreme Court held a short time later in *Charkaoui*, “we must look at the interests at stake rather than the legal label attached to the impugned legislation” (at para 18). The Court also quoted the following observation by Professor Hamish Stewart with approval:

Many of the principles of fundamental justice were developed in criminal cases, but their application is not restricted to criminal cases: they apply whenever one of the three protected interests is engaged. Put another way, the principles of fundamental justice apply in criminal proceedings, not because they are criminal, but because the liberty interest is always engaged in criminal proceedings [emphasis in original].

(Charkaoui, at para 18)

- [64] Outside the specific manifestations of the principles of fundamental justice in sections 8 to 14 of the Charter in relation to criminal proceedings, the residual protections under section 7 are always context-dependent (JJ, at para 146). What they require turns on “the nature of the proceedings and the interests at stake” (Charkaoui, at para 20). The protection at play here relates solely to testimonial compulsion in a proceeding where liberty is at stake. Indeed, the fact that liberty is at stake in a detention review hearing is the fundamental rationale for recognizing this protection. It is why a fair balance must be struck between the need to respect individual autonomy and the pursuit of valid public purposes. Whether detention is for a criminal law purpose or for an immigration law purpose, the impact on the liberty of the person concerned is the same. The need to ensure that the state does not improperly use its superior power against an individual does not disappear simply because the proceeding is an immigration proceeding, and not a criminal proceeding.
- [65] The applicants have been careful to say that the protections of section 7 in detention review hearings are not absolute. They accept that, at least in theory, those protections can justifiably be limited in a given case by the objectives of the IRPA. Doing so will be reasonable and lawful as long as the adverse impact on the right’s protections is proportionate to what is achieved with respect to the statutory objectives. Consistent with the applicants’ position, the principle of non-compellability I have found to be guaranteed by section 7 would allow for this too. At the same time, like the applicants, I must acknowledge that, since the protection at issue is one provided by section 7 of the Charter, it will only be in highly exceptional circumstances that public interests can justifiably override this protection: see Charkaoui, at para 66; see also *Re BC Motor Vehicle Act*, at 518.
- [66] Nevertheless, while a principle of non-compellability under section 7 therefore places significant constraints on the ability of the Minister and the ID to elicit information or evidence from the detainee during the detention review hearing if the detainee chooses not to testify, those constraints will not be present in other interactions with the party concerned where their liberty interest is not directly engaged. Contrary to the respondent’s contention, the overall impact on countervailing public interests under the IRPA of recognizing a principle of non-compellability in the detention review context would be negligible if not non-existent. The fact that liberty is directly at stake in detention review hearings distinguishes those hearings from most other proceedings under the IRPA. My conclusion that compelling a detainee to testify at a detention review hearing would limit the protection of section 7 of the Charter is entirely consistent with the fact that, in other circumstances arising under the IRPA where liberty is not directly engaged, individuals can

be required to provide information and evidence to state authorities, even in the context of adjudicative hearings: see B095, at paras 16-22, and Bruzzese, at paras 16-18. In short, I am not persuaded that recognizing a Charter protection against testimonial compulsion in a detention review hearing would be a fateful step onto a slippery slope.

- [67] In helpful submissions, which the applicants also adopt, CARL argues that *Re Jaballah*, 2010 FC 224, established that a principle of non-compellability can apply in proceedings under the IRPA that engage section 7 of the Charter. The respondent argues that *Jaballah* is distinguishable. While the circumstances of that case are certainly very different from those of the present applications, I agree with CARL that the legal analysis in *Jaballah* supports recognizing a principle of non-compellability in detention review hearings.
- [68] Before considering the analysis in *Jaballah*, some additional background may be helpful.
- [69] Mr. *Jaballah* and his family arrived in Canada in May 1996 and claimed refugee protection. A hearing before the RPD ensued. Mr. *Jaballah* testified in support of the refugee claim over several sittings. However, before the claim could be determined, on March 31, 1999, the Minister of Citizenship and Immigration and the Solicitor General of Canada signed a certificate in which they expressed their opinion that Mr. *Jaballah* is inadmissible to Canada on national security grounds. As required by subsection 77(1) of the IRPA, the certificate was referred to the Federal Court for a determination of its reasonableness. In June and August 1999, Mr. *Jaballah* testified in the public part of the hearing concerning the reasonableness of the certificate. (The procedure for determining the reasonableness of a security certificate also permitted a hearing in camera and ex parte in which the Court could consider classified information and evidence that was not disclosed to the person named in the certificate.) On November 2, 1999, Justice Cullen determined that the security certificate was not reasonable and would be quashed.
- [70] A second security certificate was issued against Mr. *Jaballah* on August 13, 2001, on the basis of what the Ministers claimed was new evidence. The second certificate was upheld as reasonable in May 2003 but in July 2004 this decision was overturned on appeal and the matter was remitted for redetermination. While the redetermination was pending, Mr. *Jaballah* applied for release from detention. In support of that application, he testified before the Federal Court over four days in September 2005. His evidence in chief and cross-examination touched on matters relevant to the reasonableness of the certificate. The motion for release from detention was dismissed.
- [71] In the course of the new hearing on the reasonableness of the second certificate, on August 18, 2006, Justice MacKay ordered that Mr. *Jaballah* would have use and derivative use immunity with respect to his testimony relating to the reasonableness of the certificate, which he had given in May and July 2006. This grant of immunity extended to any subsequent proceedings that may result from a challenge to the constitutionality of the security certificate process that was pending at that time at the Supreme Court of Canada. On October 2, 2006, Justice Layden-Stevenson (then a member of the Federal Court) issued

an order on the same terms with respect to Mr. Jaballah's testimony in connection with a third application for release from detention.

- [72] On February 23, 2007, the Supreme Court of Canada determined in *Charkaoui* that the then existing procedure in respect of security certificates unjustifiably infringed section 7 of the Charter. A declaration of invalidity was suspended for 12 months. On February 22, 2008, a third security certificate in respect of Mr. Jaballah was issued under the new regime enacted in response to *Charkaoui*.
- [73] It was in connection with proceedings regarding the third certificate that Justice Dawson (then a member of the Federal Court) made the decision *CARL* relies on in its intervention in the present applications. Invoking section 24(2) of the Charter, Mr. Jaballah sought the exclusion of his prior testimony in relation to the reasonableness of the security certificates as having been obtained in a manner that infringed his rights under section 7 of the Charter. He also sought the exclusion of this evidence pursuant to the protection against self-incrimination entrenched in section 13 of the Charter. Justice Dawson rejected both of these arguments. Instead, she concluded that the Minister should be barred under paragraph 83(1)(g) of the IRPA from using some (although not all) of Mr. Jaballah's prior testimony.
- [74] Paragraph 83(1)(g) of the IRPA provides that, in a proceeding with respect to a security certificate (and certain other proceedings), the judge "may receive into evidence anything that, in the judge's opinion, is reliable and appropriate, even if it is inadmissible in a court of law, and may base a decision on that evidence." Justice Dawson found that this provision allows for both the admission and the exclusion of evidence, depending on whether, in the judge's opinion, the evidence is reliable and it is appropriate to receive it. *Charkaoui* had established that security certificate proceedings engage section 7 of the Charter. Consequently, the procedures followed must conform to the principles of fundamental justice. Justice Dawson therefore concluded: "Absent exceptional circumstances that are difficult, if not impossible, to envision, where the receipt of evidence would violate the principles of fundamental justice it would not be appropriate to receive such evidence" (*Jaballah*, at para 70).
- [75] In a nutshell, Justice Dawson held that the Ministers could not, as part of their case against Mr. Jaballah, rely on his testimony from his previous security proceedings. This was because Mr. Jaballah was not a compellable witness in the current security certificate proceeding. To permit the Ministers to rely on his testimony in previous security certificate proceedings as part of their case in the new proceeding would be to permit them to do indirectly what they could not do directly – namely, compel Mr. Jaballah to testify in the current proceeding. However, should Mr. Jaballah choose to testify, he could be cross-examined on his earlier testimony. On the other hand, the Ministers were not similarly restricted in their use of Mr. Jaballah's testimony at the RPD hearing, which Justice Dawson found to be "qualitatively different" from his testimony in the previous security certificate proceedings because of the circumstances under which it was provided (*Jaballah*, at paras 96-101). The Ministers would be permitted to use Mr. Jaballah's RPD testimony in their case against him. They could also

use that testimony for the purpose of cross-examination if Mr. Jaballah elected to testify. See paragraph 121 of Jaballah for a summary of Justice Dawson's determinations.

- [76] It is Justice Dawson's reasons for concluding that Mr. Jaballah was not a compellable witness in the security certificate proceeding (a point the Ministers had conceded) that are instructive for the present applications. After noting the common law presumption of compellability and that section 11(c) of the Charter only protects a person from testimonial compulsion when they are charged with an offence, Justice Dawson wrote:

However, I do not believe paragraph 11(c) of the Charter to exhaust Charter protection against compellability. Just as section 7 of the Charter may provide a residual protection against self-incrimination, section 7 may provide a residual protection against compellability. Security certificates entail the detention of a non-citizen incidental to the ministers' attempt to remove the person from the country. The seriousness of the liberty and security interests implicated in this process require commensurate procedural protections that meet the common law duty of fairness and the requirements of fundamental justice.

The ministers would only attempt to compel a person named in the security certificate to testify for the purpose of furnishing evidence that the ministers could rely upon. In my view, to coerce such a person to furnish evidence against his or her interest, in circumstances where their liberty and security interests are so engaged, would not afford the person a fair judicial process and would be contrary to the principles of fundamental justice. This is so because the factors that favour the importance of the search for truth do not outweigh the factors that favour protecting the individual against undue compulsion by the state.

(Jaballah, at paras 77-78)

- [77] Justice Dawson therefore concluded that, by the operation of section 7 of the Charter, Mr. Jaballah was not a compellable witness (Jaballah, at para 79). The underlying rationale for this conclusion is the case to meet principle that applies in proceedings where liberty is at stake. While agreeing with the Ministers that "there should be no wholesale importation of criminal justice principles into what is otherwise an immigration matter" (at para 83), Justice Dawson found that the case to meet principle did apply in the proceeding before her because of the interests at stake. Since the non-compellability principle serves to protect and promote the case to meet principle, Justice Dawson found that the principle of non-compellability also applied in the proceeding before her.
- [78] To summarize, while the case to meet principle and the related principle of non-compellability are commonly associated with criminal proceedings, Jaballah demonstrates they are not limited to such proceedings. They can also apply in proceedings under the IRPA where liberty is directly at stake. I agree with CARL (and the applicants) that Justice Dawson's analysis of the residual protections of section 7 applies with equal force to detention review hearings, another type of proceeding under the IRPA where liberty is at stake.

- [79] Taking a step back, in my view, extending the case to meet principle and the principle of non-compellability to detention review hearings under the IRPA is entirely consistent with the statutory scheme Parliament adopted. The respondent contends that extending these principles to detention review hearings would defeat the purpose of those proceedings but I cannot agree. On the contrary, as the discussion in *Brown* of the legal burden in detention review hearings demonstrates, the values underlying these principles are foundational to the scheme Parliament has adopted. Extending the case to meet principle and the principle of non-compellability to detention review hearings sits comfortably with the fact that, as Parliament has designed these proceedings, the legal burden always remains on the Minister to justify detention. As *Brown* held: “The detainee is not required in law to do anything” (at para 122).
- [80] Properly applied, the statutory scheme helps to ensure that the detainee’s Charter rights are respected. Conversely, allowing the Minister to compel information or evidence from a detainee would be contrary to Parliament’s intent that the legal burden to justify detention always rests squarely on the Minister, a key feature of the statutory scheme that helped ensure its constitutionality in *Brown*. Likewise, if the ID were to seek to compel testimony from the detainee at its own behest, this too would be contrary to Parliament’s intent because it would effectively ease the legal burden on the Minister to justify detention and would shift the burden onto the detainee to justify release.
- [81] Finally, in rejecting the applicants’ submissions objecting to the ID member requiring them to testify, the member appears to imply that any restrictions on the receipt of evidence that may follow from the principles of fundamental justice under section 7 of the Charter would not apply in proceedings before the ID in any event because, pursuant to paragraph 173(c) of the IRPA, the ID “is not bound by any legal or technical rules of evidence.” At the risk of stating the obvious, the principles of fundamental justice are not “legal or technical rules of evidence” within the meaning of this provision. The ID’s view to the contrary is clearly erroneous. The respondent does not suggest otherwise.
- [82] For all of these reasons, I conclude that an immigration detainee at a detention review hearing under section 57 of the IRPA is protected by a principle of non-compellability as a principle of fundamental justice under section 7 of the Charter.
- D. Did the decision to require the applicants to testify limit the protections of section 7 of the Charter? [83] If, as I have found, the applicants were protected by a principle of non-compellability under section 7 of the Charter, there can be no question that the decisions requiring them to testify limited this protection significantly. Indeed, the decisions arguably overrode this protection altogether.
- [84] Before considering whether this limit is proportionate under the *Doré* framework, to avoid any uncertainty in future cases, I would add the following two points.

- [85] First, while it was the ID itself that compelled the applicants to testify in their detention review hearings, the same analysis would apply if it had been Minister's counsel who sought to question the applicants over their objection. It is immaterial whether it is the ID member or Minister's counsel who seeks to compel a detainee to testify. In both cases, the Charter protection against testimonial compulsion would be limited in a way that engages the Doré framework.
- [86] Second, drawing an adverse inference from the refusal of a detainee to testify in a detention review hearing would also limit the protections of section 7 of the Charter. If an adverse inference could be drawn from the exercise of Charter rights, the protections of the Charter would be but a "snare and a delusion" (cf. *R v Chambers*, [1990] 2 SCR 1293 at 1316, and *R v Noble*, [1997] 1 SCR 874 at paras 71-75). What this means is that if a detainee's silence were to be used to assist in establishing a ground for detention, the decision to do so must proportionately balance the impact on the protected right with the statutory objectives. It is difficult to see how a proportionate balance could ever favour drawing such an inference, however, since the statutory scheme itself prohibits drawing an adverse inference from a detainee's silence. As the Federal Court of Appeal stated in *Brown*: "Even when no evidence is offered by the detainee in response, the legal burden is on the Minister to make the case for detention on a balance of probabilities in respect of each of the section 248 factors" (at para 122). As discussed above, at most there is a tactical burden on the detainee to present evidence favouring release, and never a legal burden.

E. Do the decisions to require the applicants to testify reflect a proportionate balancing? [87] Having maintained that section 7 of the Charter does not protect an immigration detainee against testimonial compulsion at a detention review hearing, the respondent contends that the ID's decisions to compel the applicants to testify do not require any Doré balancing. For the reasons set out above, I disagree.

- [88] Under the Doré framework, when an administrative decision will limit Charter protections, the decision maker should first consider the statutory objectives. The decision maker should then ask how the Charter right or underlying value "will best be protected in view of the statutory objectives" (Doré, at para 56). The severity of the interference with the Charter protection must be balanced with the statutory objectives; the former must be proportionate to the latter. On judicial review, "the question becomes whether, in assessing the impact of the relevant Charter protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the Charter protections at play" (Doré, at para 57).
- [89] A proportionate balancing "is one that gives effect, as fully as possible to the Charter protections at stake given the particular statutory mandate" (Loyola, at para 39). Put another way, the Charter protections must be affected "as little as reasonably possible" in light of the state's particular objectives (Loyola, at para 40). Given that the protection at issue here stems from section 7 of the Charter, in assessing whether a proportionate balance was struck by the administrative decision maker, the reviewing court must bear in mind that violations of

section 7 are not easily saved by section 1. The rights protected by section 7 – life, liberty, and security of the person – “are basic to our conception of a free and democratic society, and hence are not easily overridden by competing social interests” (Charkaoui, at para 66; see also *BC Motor Vehicles*, at 518). Since a Doré proportionality analysis “finds analytical harmony with the final stages of the Oakes framework used to assess the reasonableness of a limit on a Charter right under s. 1” (Loyola, at para 40, referring to *R v Oakes*, [1986] 1 SCR 103), and since it works the same “justificatory muscles” as the Oakes test (Doré, at para 5), it must be the case that the Doré framework will be equally demanding when it comes to whether a limitation on a section 7 protection is proportionate and justified.

- [90] Once the reviewing court has determined that a discretionary decision limits Charter protections, it “must then examine the decision maker’s reasoning process to assess whether, given the relevant factual and legal constraints, the decision reflects a proportionate balancing of Charter rights or the values underlying them” (*Commission scolaire francophone des Territoires du Nord-Ouest*, at para 73). A decision will be found to be reasonable if the reviewing court concludes that, in exercising its statutory discretion, the administrative decision maker has “properly balanced” the relevant Charter protection with the statutory objectives (Doré, at para 58). If the decision maker has failed to do so, the decision will be unreasonable.
- [91] In both decisions under review, the ID member did not conduct any balancing at all of the relevant Charter protection and the statutory objectives. On the contrary, he took the view that no Charter protection was engaged by a decision to require the applicants to testify. I agree with the applicants that, by failing to conduct any balancing whatsoever of the Charter protection at play with the objectives of the IRPA, the member’s decisions to compel the applicants to testify are unreasonable. As the Supreme Court of Canada held in *Commission scolaire francophone des Territoires du Nord-Ouest*, “Failure to take the relevant values into account necessarily leads to a disproportionate balancing” (at para 93). This must also be true when Charter rights, and not only their underlying values, are at stake, as is the case here.
- [92] Since they were based on the unreasonable determination that the applicants would be required to testify in their respective detention review hearings, the decisions continuing the applicants’ detention must also be found to be unreasonable. Consequently, both of the decisions under review must be set aside.

VI. SHOULD A QUESTION BE CERTIFIED UNDER PARAGRAPH 74(d) OF THE IRPA? [93] The test for certifying a question under paragraph 74(d) is well established. A question can be certified only if it is serious, would be dispositive of the appeal, and transcends the interests of the parties. As well, the question must have been raised and dealt with in the decision from which it arises, and it must arise from the case itself rather than from the judge’s reasons. Finally, the question cannot be a matter of settled law. See *Canada (Public Safety and Emergency Preparedness) v XY*, 2022 FCA 113 at para 7, and *Obazughanmwun v Canada (Public Safety and Emergency Preparedness)*, 2023 FCA 151 at para 28.

[94] The applicants proposed the following question for certification:

Do persons appearing in detention reviews before the Immigration Division of the Immigration and Refugee Board, pursuant to s. 57 of the IRPA, benefit from a right to silence under s. 7 of the Canadian Charter of Rights and Freedoms?

[95] In connection with the Hemond application, the respondent submitted that, in light of the mootness of the application for judicial review, the proposed question is purely academic and, as such, does not meet the test for certification. The respondent also submitted that the compellability of witnesses before the ID is a matter of settled law and, for this reason as well, the proposed question did not merit certification.

[96] The respondent reiterated these submissions in connection with the Rhodes application. However, the respondent also submitted in the alternative that, if the Court is “inclined” to certify a question, the following question would meet the test for certification:

Is the ID’s determination that detainees are compellable at their own detention reviews reasonable, given section 165 of the IRPA and sections 32-35 of the Immigration Division Rules, SOR/2002-229?

[97] Looking first at the issue of mootness, I am not persuaded that this alone is a reason not to certify a question that otherwise meets the test for certification. It is true that a purely theoretical or academic question would not meet the test for certification because it is more in the nature of a reference, which is prohibited (*Mudrak v Canada (Citizenship and Immigration)*, 2016 FCA 178 at para 35). In my view, however, this bar does not apply when the Court has determined that an application for judicial review should be decided on its merits despite its mootness because, among other things, it raises an important issue that is evasive of review. In this regard, it is noteworthy that there was no suggestion in *Brown* that it was improper to certify a question in that case because the matter was moot.

[98] Further, I am unable to agree with the respondent that the issue of the compellability of a party before the ID in a detention review hearing is a matter of settled law. Even if this is the case in other types of proceedings before the ID, as the divergent positions of the parties and the divergent decisions of the ID demonstrate, it is not the case with respect to detainees in detention review hearings. The present decision is the first decision of this Court to address this issue directly.

[99] Turning to the questions proposed by the parties, I am not persuaded that, as drafted, either one meets the test for certification. The respondent’s proposed question does not capture the determinative issue in these applications, a point respondent’s counsel more or less conceded at the hearing. While the applicants’ proposed question comes closer to capturing the determinative issue, the reference to a right to silence is not entirely apt given the analysis set out above. Nevertheless, in my view, the applicants’ proposed question can be reframed to capture the determinative issue – namely, whether an immigration detainee is protected by a principle of non-compellability under section 7 of the Charter. I am satisfied

that a question framed in these terms would meet the test for certification. The question is set out below.

VII. CONCLUSION [100] For these reasons, the applications for judicial review are allowed. The decisions of the Immigration Division continuing the applicants' detention are set aside. In the circumstances, no other order is requested or required. Pursuant to paragraph 74(d) of the IRPA, the Court states the question set out below.

JUDGMENT IN IMM-8969-22 AND IMM-5926-23

THIS COURT'S JUDGMENT is that

The applications for judicial review are allowed.

The decision dated September 8, 2022, continuing the detention of Mr. Hemond is set aside.

The decision dated April 17, 2023, continuing the detention of Mr. Rhodes is set aside.

The following question is stated:

In a detention review hearing under section 57 of the Immigration and Refugee Protection Act, is the detainee protected by a principle of non-compellability under section 7 of the Canadian Charter of Rights and Freedoms?

"John Norris"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:

IMM-8969-22

STYLE OF CAUSE:

Frederic Joseph HEMOND v THE MINISTER OF CITIZENSHIP AND IMMIGRATION ET AL

AND DOCKET:

IMM-5926-23

STYLE OF CAUSE:

HOLLAND GEOFFREY WILLIAMSON RHODES v MINISTER OF CITIZENSHIP AND IMMIGRATION ET AL

PLACE OF HEARING:

HELD BY VIDEOCONFERENCE

DATE OF HEARING:

March 19, 2024

JUDGMENT AND REASONS:

NORRIS J.

DATED:

December 6, 2024

APPEARANCES:

Anthony Navaneelan, J.D. Laura Best

For The ApplicantS

James Todd

For The Respondent

Adriel Weaver Amy Chen

For The INTERVENER

SOLICITORS OF RECORD:

Refugee Law Office Toronto, Ontario

For The ApplicantS

Attorney General of Canada Toronto, Ontario

For The Respondent

Goldblatt Partners Toronto, Ontario

For The INTERVENER

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://decisions.fct-cf.gc.ca/fc-cf/decisions/en/item/527044/index.do>

CASE PAGE <https://chat.esheria.ai/case-law/canada/hemond-v-canada-citizenship-and-immigration-2024>

Prepared on 28 October 2026 · Esheria