

How to present your case effectively and be persuasive in securing the release of your client

Below is short summary/digest the important points to bear in mind from my book, "*Detention Reviews in Canada.*" (Published by Brush Education in October 2019)

Preliminaries

- **Well before the detention review (DR) hearing, know what the grounds and evidence are that the Minister is relying upon to seek the detention of your client.**

The three main grounds for the CBSA seeking your client's detention are that he or she is a flight risk, or/and a danger to the public or/and there are issues concerning the identity of your client.

Under the revised 2019 Chairpersons Guidelines, the CBSA is mandated to provide you with full disclosure including all the evidence they intend to rely upon to seek your client's detention.

(I have reproduced below, a useful precedent letter that should be faxed to the Immigration Division when you have been retained to represent the detainee at a DR)

After you are retained to do a detention review, the burning question is whether it is a 48 hour or 7 day or 30-day review. If it is the first 48-hour review after your client has been detained, there will be issues, such as whether you will be able to obtain the CBSA disclosure in time for you to properly consider and respond to the materials before the 48-hour DR hearing. If not, your preparation of the matter may be compromised. In my practice, unless the matter is straightforward, and it is likely the CBSA will consent to the client's release on terms, I advise the client to do

the 48 DR review either on their own or through a friend. As I explain in my book, you will not know the true nature of the allegations made by the Minister against your client that persuaded the member of the Immigration Division (ID) to detain your client until you have read the 48-hour detention review transcript. All DR hearings are tape recorded and transcripts are usually prepared, quite quickly after the DR hearing. Even if the DR transcript has not yet been prepared, you can request the recording and the ID will make sure you receive it.

When you do receive either the transcript or the recording, this is the engine you must analyze and diagnose to properly prepare for the next DR hearing. Common questions that should come to your mind are:

- What was the reason my client was detained?
- Did the detainee present a persuasive plan of release with strong and appropriate bondspersons pledging an appropriate bond or cash?
- Was the credibility of the bondsperson(s) an issue? If so, why? And how can it be resolved?
- Was the level of supervision that these bondspersons provided adequate? if not, why not?
- Was the credibility of the detainee an issue? If so, why? And how can it be resolved?
- Did the member of the ID rely on hearsay evidence that seemed unreliable and was not properly tested in cross-examination? Is there a need to summon the CBSA officer, who prepared an adverse report, to the hearing?
- Are there legal issues that presented itself at the hearing that the member of the ID failed to properly address?
- What is the plan you want to present at the DR?

**ROUTINE LETTER TO THE IMMIGRATION DIVISION IN THE ALFRED BLAKE
CASE** (*From the Precedent Appendix in the Book*)

John Fink
Barrister and Solicitor
10 Denver Street, New Town
Ontario N2V 70D
Tel: 232-765-8976
Fax: 232-766-8790

John Fink, L.L.B. (Hons.)
Barrister and Solicitor
Email: finklaw@gmail.com
LSUC #: 32161V

URGENT

SENT VIA FAX: 416-744-4274

May 3rd, 2018

The Immigration & Refugee Board
The Immigration Division
385 Rexdale Blvd.
Etobicoke, Ontario
M9W 1R9

Attention: Registrar of the Immigration Division

Dear Sir/Madam:

Re: Alfred Blake

Client ID # 00087651

Date of Next Detention Review Hearing: May 9, 2018

Please be advised I have been retained by Alfred Blake who was detained by the CBSA and recently had his 48-hour detention review on May 2, 2018, at the Rexdale Holding

Centre where he is being detained. I enclose the Counsel Contact Information Form to confirm my appointment as Mr. Blake's counsel. I will represent Mr. Blake at his next 7-day detention review at the Holding Centre on May 9, 2018.

In order to properly prepare for that review hearing, I ask that you provide me a copy of the detention review transcript of the hearing on May 2, 2018.

I also require a copy of Mr. Blake's GCMS notes. I will also make a separate request for these notes from the CBSA.

As the hearing is imminent, I would ask that this request be given urgent attention. In the meantime, I thank you for your assistance.

Yours truly,

John Fink
Barrister and Solicitor
LSUC # 32161V

Enc: Counsel Contact Information Form

Do you have bondspersons who are appropriate and satisfy the check list below?

Checklist

1. **Their status:** A Canadian citizen or a permanent resident. I know of no cases where the ID would accept a person who only has temporary status as an appropriate bondsperson. Exhibit proof of citizenship such as the bio page of their Canadian passport or citizenship card or birth certificate if they are a citizen because of birth in Canada. With permanent residents, exhibit their permanent resident card.

- 2. No criminal convictions or pending criminal charges:** The member of the ID should know the bondsperson is of good character and has no criminal convictions or outstanding criminal charges. If they do, explain why the convictions or charges would not bar them from being considered an appropriate bondsperson.

- 3. Their relationship to the detainee:** it is important to provide full details of that relationship. The more solid the relationship with clear indications that the detainee will respect the house rules and discipline of the bondsperson, the greater the likelihood that the bondsperson will appear more compelling and attractive to the member of the ID. Here, the committed common law relationship between Gill and Alfred and the fact they have known each other since September 2017 and have lived together for the past three months is a strong positive factor. The daily contact between Tony and Alfred is again a positive factor. A sentence such as “Alfred respects me and will obey the rules of my household” is useful and should be included in the affidavit.

- 4. Solvency:** One of the things you need to grapple with is that your bondsperson has appropriate savings and assets they can liquidate in the event the detainee breaches the conditions of release. However, be careful in your analysis. One of the problems I have seen in assessing the solvency of a bondsperson, who is providing a performance bond, is the singular failure of lawyers or consultants to consider ENF 8 of the IRCC (see *Chapter 13* for a detailed analysis of the solvency rules and a link to the ENF 8 manual at *Appendix G*), which contains detailed information on this solvency assessment. There is nothing more frustrating than after the release order, you find that your bondsperson cannot meet the solvency test as directed by EN 8 so the CBSA cannot release the client. If the bondsperson has savings of \$3,000.00 in the bank account, and she relies on the savings for her living expenses as her income is low, it can pose problems. The rule of thumb is

that the amount of the bondsperson's income (less liabilities) and assets (less liabilities) must be at least three times the amount of the performance bond. Similar problems can arise if the bondsperson cannot meet his living expenses through posting the cash deposit. It is therefore important to outline the employment of the bondspersons and exhibit their notice of assessment for the past three years to demonstrate their solvency and ability to post bond and provide the cash deposit. You may want to exhibit their recent paystubs and any letters of employment. Your assessment of the solvency of the bondsperson and whether the CBSA will accept them after a release order by the ID is made ought to be done at the beginning of your preparation for the hearing, certainly before you draft their affidavit, so no complications arise after release. The CBSA have their own solvency questionnaire and procedure. The worst thing that can happen to your client is that the ID makes a release order, but he cannot be physically released because his bondspersons do not meet the solvency tests.

5. **Knowledge of the detainee's immigration history and illegal status:** The ID member will want to know the bondsperson is aware of the exact immigration status of the detainee so that the member is satisfied that these bondspersons know the risks involved in being a bondsperson for the detainee. Here, the fact that Alfred is a flight risk through his abandonment of his employment at FFP and failing to return to Jamaica after his work permit expired are matters that the bondsperson must know.

6. **The amount of the bond/cash deposit and flexibility:** This is one of the most difficult matters to quantify. An assessment must be made of the grounds for detention, how serious these grounds are and how likely the immigrant may breach any conditions of release or his failure to keep the peace. Here, Alfred poses a flight risk. However, the fact he will reside with his bondspersons means there is a greater degree of supervision.

Furthermore, the level of income of the bondsperson can also be a factor. A bond of \$3,000.00 and a cash deposit of \$2,000.00 seems enough, but in the affidavits, I want to ensure the ID member knows that imposing a higher amount of bond or cash deposit by the member is possible. (so long that under EN 8, the bondsperson will meet that higher amount of bond when CBSA assesses the bondsperson after the release order---see Chapter 13) You should include a sentence in the affidavit, such as “In the event that the member believes a higher amount of bond or/and cash deposit is required, I am prepared to comply with this.” Sometimes, allowing the member not to be placed in a strait jacket in fixing the amount of the performance bond or cash deposit gives the member the ability to be flexible in being able to increase these amounts based on the member’s analysis of the case. But be cautious and follow the solvency tests in ENF 8. Remember to consider any debts the bondsperson has in assessing the net income or assets that the bondsperson has. Remind your bondsperson to provide full disclosure on these issues, so you can do an accurate assessment of their solvency and whether they can meet the ceiling for any increase of the bond or cash deposit the member may decide to impose.

7. **Any compassionate or compelling circumstances that justifies release of the detainee:** There are cases, and this is one of them where it would be appropriate for the bondsperson to outline some of these compassionate circumstances in her affidavit. Alfred told Gill about the abuse and intolerable conditions at FFP and there is also their committed relationship, which led to this isolated breach of IRPA. It would, therefore, be important for Gill to outline these matters in her affidavit.
8. **The refusal of Gill and Tony to act as bondspersons:** In this case, you need to explain to them the whole detention review process and what the consequences are to them if Alfred breaches any conditions of release. Gill must know she will lose the amount of the bond she posted to the CBSA, and

Tony will lose the cash deposit he provided if there is a breach. Gill's student loan will not be affected by posting a bond. However, the student loan may affect the calculation of net income when doing the solvency assessment) However, you must make sure that both Gill and Tony are fully aware of their supervisory duties over Alfred and the consequences to them of a breach of the conditions of release by Alfred. Their affidavits must make that clear.

ORAL SUBMISSIONS

After the 7-day detention review hearing and all the evidence is in including the affidavits of the bondspersons, Gill St John, and Tony St. John, you will be ready to do your oral submissions to the ID panel member. I have reproduced below a sample oral submission from my book:

CHAPTER 8

SAMPLE ORAL SUBMISSIONS AT THE DETENTION REVIEW HEARING OF ALFRED BLAKE

Note: The words in brackets and in italics are there to illustrate the implementation of the road map for the readers and will not be mentioned when counsel delivers his oral submissions.

"I intend to set out the positive factors that are present in Mr. Blake's immigration history, factors that indicates compliance, the reasons for his breach of IRPA and outline the proposed tight conditions of release, as well as some observations about Mr. Blake's evidence at the hearing. Finally, I will briefly comment on the law on detentions under IRPA. I hope my submissions will persuade you to release my client with appropriate conditions. (*roadmap*)

Mr. Blake has in the past demonstrated the capacity to obey our immigration laws. On two previous occasions, in 2015 and 2016, he was issued a work permit to work at the farm worker's program in Canada, and he went back to Jamaica prior to the expiry of the work permits on both occasions. *(history)*

Mr. Blake also demonstrated a degree of responsibility and compliance when he informed the CBSA by letter of his change of address to that of his girlfriend's address in Orangeville when he moved in with her at the beginning of February 2018. This was a month before the CBSA issued a removal order and a Canada wide arrest warrant against him. Unfortunately, the change of address did not register within the GCMS--- the global case management system, and these documents were sent to his old address at FFP, so that Mr. Blake was not aware of the serious immigration jeopardy he was in. *(compliance)*

Finally, I ask you to consider the reasons he fled from FFP. The abuse at work, which the employer failed to address and the blossoming romantic relationship that developed with Gill incited him to disregard his obligations under IRPA. I agree with Minister's counsel that these reasons in themselves cannot excuse his breach of our immigration rules, but it does provide a context and reason for his disobedience on this one isolated occasion. *(Reasons for breach of IRPA)*

I ask that you consider the strong factors of Mr. Blake's past compliance with our immigration laws and the responsibility he showed in informing the CBSA of his change of address as well as the motivation that led to this isolated one-off breach by looking at alternatives to detention and the release plan that is offered.

At the previous detention review hearing, Mr. Blake was unrepresented and traumatized through his incarceration. He did not know the essential qualities that the bondspersons he proposed must have to make them suitable to supervise him. Both the member of the ID and Minister's counsel were bound to have concerns about that release plan taken the complete unsuitability of the bondspersons he proposed, and it was inevitable that his detention would continue.

However, today, the release plan being offered is tight. Both the bondsperson posting the performance bond and the person providing the cash bond, Gill and Tony, are suitable. They have an ongoing relationship with Mr. Blake, that relationship is strong as prior to his detention he had lived with them for over three months. It is important to note that they both observed in their affidavits that he complied with the rules and discipline of their household and respected them when he lived with them. They are both solvent with good jobs and can easily provide both the performance bond of \$3,000.00 and the cash bond of \$2,000.00. Furthermore, they have indicated that should you decide to increase the amount of the bonds, they will comply. They are not providing these guarantees blindly. They are aware of Mr. Blake's immigration history, and the fact that he is currently illegal in Canada. They know there is a risk that they will lose their bonds if Mr. Blake breaches the conditions of release. However, they are confident he will not and will ensure he reports to the CBSA regularly, driving him there if need be. They will be monitoring his mail and will ensure that he attends any immigration proceedings and removal from Canada. The degree of supervision that they will provide is high. It will involve Mr. Blake residing with them and the supervision that naturally results from his residence with them. Gill works day shifts but Tony works at home during the day. When Tony goes to his shop in town, he will bring Alfred with him. There is, therefore, 24-hour 7-day supervision. *(Conditions of release and 24-hour supervision)*

Mr. Blake's evidence at this detention review is credible. He is deeply grateful for the assistance that Gill, and Tony will provide through their bonds and their supervision. He unhesitatingly declared that he would obey them. It will be no different to when he lived with them and obeyed their rules of the household. It is, therefore, unlikely that he will violate any of the conditions of release I propose. I believe the last nine days of detention has been an eye opener for Mr. Blake, and you can be confident that Mr. Blake understands the jeopardy he is in and will not breach any conditions of release that you impose. As he said at the hearing, 'I now understand what I did was wrong, and I have no intention of breaking either the rules of Gill and Tony or the immigration laws.'
(Observation on Blake's evidence at the hearing)

Section 245 of the IRPR lists several factors that are positive in Mr. Blake's case, namely his previous compliance with IRPA and the fact that he has strong community ties with Gill and Tony. It is accepted that an analysis of the length of detention under regulation 248 shows that Alfred does not face lengthy detention, as he has his current Jamaican passport. CBSA can remove him without any impediment. However, section 248 IRPA mandates the ID to consider alternatives to detention. The case law is clear that detention is a matter of last resort, especially when there are suitable and compelling alternatives to detention. The landmark case of *Sahin v. Canada* decided in 1994 in the Federal Court at volume 1 of the Federal Court Reports, at page 214 must be considered. The principles of law in that case were codified in the IRPR and sets out the law that you must follow in deciding whether to release Mr. Blake. I will not go through this with you, sir, as I know you are very familiar with the law on detentions. In my submission, the alternative to detention is compelling and powerful and would justify Mr. Blake's release on the strict conditions I have proposed. (*Brief comments on the law*)

I ask that he is released subject to the strict conditions I have outlined and any other conditions you deem appropriate. Thank you for patiently listening to my submissions.” (*Closing sentence*)

Commentary

Depending on the speed of your speech, these submissions will take less than 15 minutes to deliver! The road map at the start of the submissions provided a logical path for the submissions that followed. The submissions complied with the road map and delivered all the important points in a concise and focused manner. The observations about Blake's evidence at the hearing highlighted the fact that Blake will comply with the rules that Gill, and Tony will impose on him. The brief comment on the law is appropriate. It reminds the member that he must comply with the law and that he knows you *know* the law. However, it also recognizes that the member is familiar with the law, so the advocate avoids wasting time by tediously going over the law in detail.

I am not suggesting that this is a model oral submission. It is not, but it illustrates the methodology involved and the important points that must be made. Each advocate will

have their own style and 'turn' of language. I encourage you to engage your own personality when making oral submissions at both the ID and in all aspects of your advocacy at the IRB.