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Siena Anstis

*Munk School of Global Affairs and Public Policy, University of Toronto*

Molly Joeck

*University of British Columbia*

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## Detaining the Uncooperative Migrant

SIENA ANSTIS & MOLLY JOECK\*

A migrant held in a Canadian prison refuses to hand over a DNA sample to the Canadian Border Services Agency (CBSA). Another refuses to sign a statutory declaration of voluntary return to Somalia where his return is anything but voluntary. Others outright refuse at times to assist in any manner whatsoever with their own deportation. Canadian officials, judges, and adjudicators have treated all of these situations as instances of “non-cooperative” behaviour by an immigration detainee and, in turn, relied on such conduct to impose lengthy and indefinite periods of immigration detention. While the issue of an immigration detainee’s “non-cooperation” seems idiosyncratic and relatively unimportant in the larger scheme of immigration controls in Canada, we argue that this line of case law constitutes an example of the ambiguity surrounding the purpose of immigration detention itself and, when considered in light of writing by Michel Foucault and David Garland, reveals the State’s goal of individualizing, disciplining, and controlling non-citizens in order to achieve certain political aims in response to fears stoked by globalization. More specifically, we contend that where non-cooperation is cited by Canadian courts and tribunals as a justification for detaining a non-citizen, the supposedly nonpunitive nature of immigration detention is called into question. In this article, Foucault’s writing on the disciplinary society is used as a lens to demonstrate that, rather than immigration detention being used as a means to further the machinery of immigration control, it is instead being used as a means of disciplining non-citizens who have dared to “transgress” the Canadian border regime. David Garland’s writings on crime control also show that immigration detention serves an expressive function, allowing the Canadian government to denounce these perceived transgressions of sovereignty committed by undisciplinable migrants for political traction. At the same time, we seek to underline a fact that often goes unacknowledged in discussions around immigration detention: namely, that non-cooperation can constitute a form of resistance—an expression of agency and autonomy—on the part of migrants against the machinery of the state. Finally, we conclude by arguing that the justification of lengthy and indefinite periods of detention of non-citizens on the basis of non-cooperation is instrumentally incoherent (in that detention on the basis of non-cooperation does not seem to achieve the purpose of immigration control) and legally incoherent (in that the statutory basis for non-cooperation as justification for lengthy and indefinite detention is absent). We argue that the introduction of certain principles into the Canadian immigration detention regime could remedy this significant problem.

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\* Siena Anstis is a Senior Legal Advisor at the Citizen Lab at the Munk School of Global Affairs and Public Policy, University of Toronto. Previously, she practised refugee law in Toronto, Ontario and as a litigation associate in New York City with Morrison & Foerster LLP and clerked at the Supreme Court of Canada and the Court of Appeal for Ontario. She holds a Master in Laws from Cambridge University and a Bachelor of Civil Laws/Bachelor of Common Law from McGill University. Molly Joeck is a PhD student at the University of British Columbia under the supervision of Professor Catherine Dauvergne and a lawyer practising in the area of immigration and refugee law with Edelmann & Co, in Vancouver, Canada. She holds a Bachelor of Civil Laws/Bachelor of Common Law from McGill University and a Master of Laws from the University of British Columbia.

THIS ARTICLE EXAMINES THE DETENTION OF NON-CITIZENS who are perceived as failing to cooperate in their own deportations—so-called “uncooperative migrants.” At first blush, non-cooperation appears to be an idiosyncratic and relatively unimportant issue in the overall architecture of immigration control in Canada. However, findings of non-cooperation have serious consequences for the lives of detainees and their prospects for release—in particular, in their closely intertwined relationship with indefinite detention. Moreover, the invocations of non-cooperation in this context belie the supposedly non-punitive nature of immigration detention, instead demonstrating that immigration detention serves a disciplinary function, allowing the state to maintain a veneer of strict border control in an era where globalization has fomented fears around encroachments on state sovereignty.

What precisely constitutes “uncooperative” behaviour by a migrant facing immigration detention in Canada remains undefined and falls along a flexible and shifting spectrum in the jurisprudence (both at the Immigration Division of the Immigration and Refugee Board of Canada [the “Division”] and in the courts) and in practice (*i.e.*, the positions advanced by the Canadian Border Services Agency (CBSA) in relation to detainees). For example, the Division has considered—in deciding whether to continue the detention of a migrant—that a migrant is uncooperative when they refuse to sign a statutory declaration of voluntary return even where their return is by all accounts not voluntary.<sup>1</sup> The CBSA has argued that non-cooperation includes the unwillingness of an individual subject to a removal order to provide personal family information that the CBSA believed was critical in effecting deportation.<sup>2</sup>

In light of the serious implications for non-citizens of tribunal and court reliance on “non-cooperation” in detention matters, we seek to elucidate some of the leading jurisprudence regarding non-cooperation in the immigration detention context and develop an argument as to why it is an instrumentally and legally problematic construct. A review of key Canadian case law on the issue of non-cooperation demonstrates a trend where some courts effectively (although not necessarily explicitly) endorse the use of detention as a coercive measure to induce migrants to collaborate in their own removal and to discipline conduct perceived to be transgressive. A number of courts and adjudicators justify long-term and indefinite detention with little more than a belief that migrants are—so to speak—the authors of their own misfortune and thus deserving of their ongoing detention.<sup>3</sup> Such an analysis suggests that non-cooperation, instead of furthering

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<sup>1</sup> See *e.g.* the Division’s prior decisions in *Warssama v Canada (Minister of Citizenship and Immigration)*, 2015 FC 1311 at paras 5–12 [*Warssama*].

<sup>2</sup> See *e.g. Ali v Canada (Attorney General)*, 2017 ONSC 2660 [*Ali*]. The CBSA claimed that efforts to deport Mr. Ali were “hampered by Mr. Ali’s lack of cooperation, including his constantly changing account of where he lived prior to coming to Canada; his different accounts of where he went to school prior to coming to Canada; his inconsistent stories about his family and their whereabouts; the various aliases Mr. Ali has used during his time in Canada; and the fact that the information about his past, that Mr. Ali has provided, has proven to be unverifiable or false” (at para 7). The Superior Court, however, concluded that Mr. Ali had in fact provided the relevant information, departing from the position of the Attorney General and multiple adjudicators of the Immigration Division, all of whom had taken the position that he continued to withhold relevant information.

<sup>3</sup> See *Ebrahim Toure v Minister of Public Safety*, 2017 ONSC 5878 [*Toure ONSC*], as affirmed in *Toure v Canada (Public Safety & Emergency Preparedness)*, 2018 ONCA 681 [*Toure ONCA*]; *Canada v Dadzie*, 2016 ONSC 6045 [*Dadzie*]; *Canada (Public Safety and Emergency Preparedness) v Lunyamila*, 2016 FC 1199 [*Lunyamila*]; and *Canada (Minister of Citizenship and Immigration) v Kamail*, 2002 FCT 381 [*Kamail*]*—*all of which endorse potentially indefinite detention on grounds of absence of cooperation, and all of which fail to even consider the possibility that the alleged lack of cooperation may be explicable or justifiable. While it could be argued that a detainee has other avenues of relief under Canadian immigration law that obviate the necessity or justification for

the detention regime's purported goal of furthering immigration control, is instead serving as a disciplinary technology.

Further, despite the serious implications, both legal and otherwise, of findings of non-cooperation, we find that the case law suffers from a lack of coherent principles underpinning the use of non-cooperation as a justification for continuing an individual's immigration detention. Because of this absence of a clear legal basis for the findings in question, the concept remains troublingly vague and often appears to be applied in an unprincipled and heterogenous manner. This is problematic in many respects. Most importantly, it is problematic because this concept has been used to provide a basis to justify indefinite detention—which is, at least on its face, contrary to the *Charter* and Canada's international legal obligations.<sup>4</sup> Further, the unprincipled nature of these judgments makes it difficult for detained individuals to challenge them, facilitating the state's ability to use non-cooperation as tool of discipline and punishment. Finally, these judgments appear to accept, without stating so explicitly, that immigration detention is *not* meant solely to serve as a mechanism of furthering immigration control, but rather has a disciplinary dimension.

In Part I, this article considers the critiques that have been made of the purposes served by immigration detention before proceeding to an analysis of non-cooperation and immigration detention grounded in Foucault's writings on power and the disciplinary society and Garland's work on crime control in the modern era. In Part II, this article reviews the legislative framework for immigration detention in Canada and examines the role of non-cooperation within that framework. In Part III, this article reviews the Canadian case law on non-cooperation, highlighting the ways in which non-cooperation continues to be applied by the courts in an incoherent and subjective manner that uncritically rationalizes the indefinite detention of migrants. In Part IV, this article sets out an argument as to the indefensibility of the jurisprudential trend towards non-cooperation as a basis for long-term detention. Finally, in Part V, this article explores potential reforms and ways forward. In particular, we note that some jurisdictions have developed specific legal norms which mitigate the risk of immigration detention serving disciplinary or punitive ends. We argue that if non-cooperation is going to continue to serve as a factor in the reasoning of Canadian tribunals and courts in the immigration detention context, it must do so in a way that coheres with the relevant legislative scheme, the *Charter*, and international law.

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non-cooperation in their own deportation (for example, seeking an additional Pre-Removal Risk Assessments (PRRA) or making a Humanitarian & Compassionate Application), such an argument fails to account for the *de facto* absence of meaningful remedies for most detainees facing sustained removal efforts. While it is beyond the scope of this article, the reality is that the legal mechanisms that exist to prevent return to countries where these individuals may face mistreatment or hardship, are, at best, imperfect, and that migrants face numerous access to justice barriers (such as cost and access to counsel) in even effectively accessing those mechanisms—particularly from detention. In many cases, detainees may have exhausted all of their reasonably available recourses and still have a genuine fear of the conditions that await them on removal or have children or other family members in Canada from whom they do not wish to be separated.

<sup>4</sup> The constitutionality of Canada's immigration detention regime was recently addressed in *Brown v Minister of Citizenship and Immigration*, 2020 FCA 130 [*Brown FCA*]. In addressing the constitutionality of the lack of time limits on immigration detention, the Court briefly addressed the issue of non-cooperation, noting that “[d]etention cannot be ordered on the basis of non-cooperation alone—to do so would be contrary to sections 7 and 9 [of the *Charter*].”

## I. NON-COOPERATION AND THE DISCIPLINARY SOCIETY

### A. THE AMBIGUITY OF IMMIGRATION DETENTION

In her seminal 2014 work, *Inside Immigration Detention*, Mary Bosworth underscored the fundamental lack of “clear, inherent purpose or legitimacy” of immigration detention centres.<sup>5</sup> This indictment of the British immigration detention system was based on Bosworth’s extensive fieldwork inside six immigration removal centres [IRCs] in the UK which revealed that, despite being called “removal centres,” a growing number of immigration detainees held in IRCs in the UK were being detained for prolonged periods of time, and sometimes released back into the community.<sup>6</sup>

Arjen Leerkes and Dennis Broeders have levelled a similar critique, pointing to three phenomena that the purported purpose of immigration detention (*i.e.*, the enactment of border control, principally through deportation) fails to account for in the Netherlands: (1) since the early 1990s there has been a steady increase in the use of immigration detention, while the numbers of deportations have decreased; (2) the average length of immigration detention has increased in recent years; and (3) if the state is unable to deport migrant detainees, they are released back into society.<sup>7</sup>

These critiques are instructive for purposes of an analysis of the Canadian immigration detention system, which, like the UK and the Netherlands, suffers from a similar crisis of legitimacy regarding its purpose and role in the immigration system.<sup>8</sup> A few preliminary observations regarding the Canadian immigration system help to contextualize these concerns for the purposes of this article.

First, though a significant proportion of immigration detention in Canada occurs on arrival for periods of approximately three weeks or less, a not insignificant number of individuals are detained pending deportation and some of them for lengthy periods of time—anywhere from ninety days to upwards of seven years. The CBSA’s own statistics for the fiscal year 2016-2017 reveal that 439 non-citizens were detained that year for ninety days or more. This article focuses on a particular subset of immigration detention cases, where detention is linked to findings of non-cooperation. Of the twenty-one non-cooperation cases analyzed for purposes of this article, all but two involved instances of long-term detention (*i.e.*, more than ninety days) and, in most cases, the purported rationale for detention was deportation procedures. In several instances of detention involving non-cooperation, the detained individual was not removed from Canada and was instead released into Canadian society.<sup>9</sup>

Second, and relatedly, Canadian courts take the position that immigration detention is non-punitive and must be “hinged” to an immigration purpose (often, though not always,

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<sup>5</sup> Mary Bosworth, *Inside Immigration Detention* (Oxford: Oxford University Press, 2014) at 85.

<sup>6</sup> *Ibid* at 5-14.

<sup>7</sup> Arjen Leerkes & Dennis Broeders, “A case of mixed motives: formal and informal functions of administrative detention” (2010) 50 *Brit J Crim* 830 at 831.

<sup>8</sup> Immigration and Refugee Board, “Report of the 2017/2018 External Audit (Detention Review)” (20 July 2018) <[irb-cisr.gc.ca/en/transparency/reviews-audit-evaluations/Pages/ID-external-audit-1718.aspx](http://irb-cisr.gc.ca/en/transparency/reviews-audit-evaluations/Pages/ID-external-audit-1718.aspx)>.

<sup>9</sup> See *e.g.* *Canada (Minister of Citizenship and Immigration) v Panahi-Darghaloo*, 2010 FC 647 [*Panahi* 2010]; *Toure* ONSC, *supra* note 3; *Ali* ONSC, *supra* note 2; *Canada (Public Safety and Emergency Preparedness) v Chipovalov*, 2017 FC 623 [*Chipovalov*]; *Canada (Minister of Public Safety and Emergency Preparedness) v Paul Rooney*, 2016 FC 1097 [*Rooney*].

removal).<sup>10</sup> However, this insistence on the non-punitive nature of immigration detention is hard to square with the experiences of individuals who find themselves behind bars for lengthy periods of time in provincial penitentiaries, comingled with individuals serving criminal sentences or detained pending trial, oftentimes only to be released back into Canadian society.<sup>11</sup>

When it comes to long-term detention resulting from non-cooperation, Bosworth, Leerkes, and Broeders' observations as to the ambiguity around the purpose of detention are thus relevant in the Canadian context. In short, their observations regarding immigration detention should prompt us to ask: can it really be the case that long-term detention of uncooperative non-citizens furthers immigration control, or are there other underlying motives? If so, what are they?

## B. COERCION AND DISCIPLINARY POWER

In order to answer this question, it is necessary to acknowledge that detention for non-cooperation is fundamentally about coercion—an argument that will be further fleshed out in Part IV of this article. Where non-cooperation is cited as a justification for continuing detention, the language adopted in the case law reveals that detention is being wielded to coerce certain behaviour from the detainee and thus achieve a certain outcome—whether that be signing a travel document, divulging the name of a birth parent, etcetera.

What is the justification or rationale for this coercion? Legal theorists have argued that the coercive powers of the state are justified on a social contract-like basis. In brief, state coercion constitutes an incursion into the autonomy of the individual—a principle of primary importance in the liberal democratic state<sup>12</sup>—and can only be justified where the state acts to protect the autonomy of its citizens through the (re)distribution of resources.<sup>13</sup> However, non-

<sup>10</sup> See *e.g.* *Brown* FCA, *supra* note 4 at paras 42-43; *Chaudhary v Canada*, 2015 ONSC 1503 at para 5; *Alvin Brown v Ministry of Public Safety*, 2016 ONSC 7760 at para 102; *Ali* ONSC, *supra* note 2 at para 26.

<sup>11</sup> There are only three Immigration Holding Centres (IHCs) in Canada: one in the Toronto area, one in the Montreal area, and one that opened in March 2020 in the Vancouver area (a fourth facility at the Vancouver airport is only for detentions of forty-eight hours or less). As a result, anyone who is arrested in Ontario, Quebec, or British Columbia is assessed by the CBSA for holding at an IHC via a tool called the “National Risk Assessment for Detention” (NRAD), an opaque process by which the CBSA identifies the risk an individual may pose in detention for the purposes of determining the most appropriate detention placement. CBSA’s enforcement manual on detention (<[www.canada.ca/content/dam/ircc/migration/ircc/english/resources/manuals/enf/enf20-det-en.pdf](http://www.canada.ca/content/dam/ircc/migration/ircc/english/resources/manuals/enf/enf20-det-en.pdf)> [[perma.cc/9BQZ-TG321](https://perma.cc/9BQZ-TG321)]) states that: “(the IHC should always be the default detention facility if risk can be mitigated, in regions where those facilities are available. Individuals detained under the *IRPA* who have scored 0 to 4 points and 5 to 9 points (if risk can be mitigated in an IHC) on the NRAD form [BSF754] should be held in an IHC.” Detainees who are not held in IHCs are generally detained in provincial penitentiaries, where they are comingled with individuals awaiting criminal trial or serving sentences after trial. Various theorists have pointed out the punitive nature of immigration detention, regardless of whether it is formally understood as such. See *e.g.* Cesar Cuauhtemoc Garcia Hernandez, “Immigration detention as punishment” (2014) 61:5 *UCLA L Rev* 1346; Janet Cleveland, “Not so short and sweet: Immigration detention in Canada,” in A Nethery & SJ Silverman, eds, *Immigration Detention: The migration of a policy and its human impact* (Abingdon, UK: Routledge, 2015); Izabella Majcher, “Discipline and punish? Analysis of the purposes of immigration detention in Europe” (2015) 11:2 *AmeriQuests*.

<sup>12</sup> See Michael Blake, “Distributive Justice, State Coercion, and Autonomy” (2001) 30:3 *Philosophy & Public Affairs* 1 at 266-272, building on Immanuel Kant and Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986) at 376–78. Blake also references John Stuart Mill, *On Liberty* (1859) (Indianapolis: Hackett Publishing, 1978) and Martha Nussbaum, “Non-Relative Virtues: An Aristotelian Approach” in Martha Nussbaum & Amartya Sen, eds, *The Quality of Life* (Oxford: Oxford University Press, 1993) at 224–69 for arguments as to the importance of individual autonomy.

<sup>13</sup> *Ibid*, Blake at 280-282.

citizens, by virtue of their lack of formal membership in the nation state, are excluded to varying degrees from this social contract depending on their immigration status, and the coercion-autonomy trade-off is therefore disrupted—which means that coercion has to be understood differently when it is enacted upon non-citizens. An immigration detainee, in particular, is clearly excluded from the autonomy-coercion-(re)distribution model, having been forcibly removed from society through the deprivation of their liberty. The formal explanation for this form of coercion is that it is carried out in order to further the mechanisms of border control—but the long-term nature of the instances of detention analyzed for this article, in addition to the fact that various of the detainees in question were ultimately released from detention and not deported, reveal that border control is not actually always occurring when a non-citizen is detained. How then is the state’s coercion into the most fundamental aspect of the autonomy of an immigration detainee—their freedom—justified, or at least explained?

Foucault’s writings on the disciplinary society are particularly apt in this regard. The disciplinary society produces the transgressor, just as the prison produces the punishable subject. Disciplinary power, Foucault observes, “separates, analyses, differentiates, carries its procedures of decomposition to the point of necessary and sufficient single units .... Discipline ‘makes’ individuals; it is the specific technique of a power that regards individuals both as objects and as instruments of its exercise.”<sup>14</sup> Reliance on non-cooperation in order to justify continuing detention is an exercise in disciplining, individualizing power, forcibly abstracting individuals from the broader global context in which they have committed their alleged transgressions. It is an uncomfortable and oft unspoken truth that immigration detention is, in large part, a product of global inequality—which is itself generally a product of colonial and postcolonial histories and realities. Immigration detention in nation states like Canada repeatedly subjugates citizens of the global south who have dared to transgress international borders fixed by those in power, finding themselves on the wrong side of the geopolitical lines that the powerful have drawn and redrawn since the Treaty of Westphalia in 1648.

Non-cooperative migrants, by refusing to submit to the coercive forces of the state, have thus proved themselves to be undisciplinable subjects. And this in an age when the reification of borders makes “irregular” border crossers the ultimate transgressors. In denuding the state of its ability to maintain the fiction of border control by expelling those who have been legally cast out of the nation state, the non-cooperative migrant reveals the discomfiting ineffectiveness at the heart of the border control regime. Thus, it is perhaps unsurprising in the face of this apparent flouting of sovereignty that the reaction of the state is so harsh—which is apparent from the strong language of Canadian courts in the non-cooperation case law that we review in this article.<sup>15</sup>

David Garland’s writings on crime and social control are also instructive for purposes of this analysis of the animating forces behind non-cooperation jurisprudence, and immigration detention more generally. Building on Foucault’s work on the performative nature of punishment in the pre-industrial era, Garland observes that in the face of general insecurity deriving from the

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<sup>14</sup> Michel Foucault, *Discipline and Punish: The Birth of the Prison* (New York: Vintage Books, 1995) at 170.

<sup>15</sup> For example, in *Canada (Public Safety and Emergency Preparedness) v Fankem*, 2019 FC 186 [*Fankem*] at para 7, Justice Bell of the Federal Court observed of the detainee that he “considers himself to be the director of a play and Canadian authorities are but actors subject to his direction.” In *Canada (Public Safety and Emergency Preparedness) v Lunyamila*, 2016 FC 1199 428 at paras 4 and 58, Chief Justice Crampton of the Federal Court set aside five release decisions by the Immigration Division, observing that the detainee was effectively attempting to “take the law into his own hands.” These are just two examples of the type of language utilized by the Courts in relation to “noncooperative” migrants.



precarity of social and economic relations in late modern society, which is understood to be a product of the failure of the state to deliver physical and economic security, American and British legislatures have instituted measures that are designed to be “expressive, cathartic actions, undertaken to denounce the crime and reassure the public,” in so doing downplaying “the complexities and long-term character of effective crime control in favour of the immediate gratifications of a more expressive alternative.”<sup>16</sup>

Garland’s observations, scaled up, are easily applicable to the immigration detention regime. The same social and economic insecurity identified by Garland is, in the immigration context, linked to societal fears related to globalization and the associated weakening of state sovereignty in the 21<sup>st</sup> century—and as Catherine Dauvergne has pointed out, state efforts to remain relevant in the age of globalization are largely staked out in the texts and politics of migration regulation.<sup>17</sup> As a result, the weakening of state sovereignty, instead of being blamed on economic forces such as the rise of multinational corporations and the increasingly unrestrained cross-border flows of goods and currency, is blamed on the state’s failure to control the flow of “risky” or “dangerous” migrants.<sup>18</sup> It has therefore become a political imperative for nation states like Canada to institute policies and legislative change that, as Garland puts it, denounce the perceived transgressions committed by migrants and reassure the public that border controls are, in fact, effective. What this has meant is more stringent controls on migrants, detention being the most extreme form of such controls, allowing the state to telegraph the message to its citizens that it is “in control over the geographical (and social) borders that citizens want to maintain.”<sup>19</sup>

### C. NON-COOPERATION AS RESISTANCE

A theoretical explanation of the role of the state vis-à-vis an uncooperative migrant would be incomplete without an inquiry into the role of the uncooperative migrant vis-à-vis the state—for despite the disciplining and individualizing power of the state, the migrant retains some degree of agency which must be recognized. While some cases of non-cooperation may partly be tied to cognitive or mental health issues,<sup>20</sup> it is not the case that all instances of non-cooperation are

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<sup>16</sup> David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Chicago: University of Chicago Press, 2001) at 133-134.

<sup>17</sup> Catherine Dauvergne, *Making People Illegal: What Globalization Means for Migration and the Law* (New York: Cambridge University Press, 2008) at 44, referring to Sundhya Pahuja, “‘Normalizing’ Pathologies of Difference: The Discursive Functions of International Monetary Fund Conditionality,” in Lyndsay M Campbell et al, eds, *International Intersections: Law’s Changing Territories: Papers Presented at Green College, University of British Columbia, April 3-May 2, 1998* (Vancouver, British Columbia, Faculty of Law, Graduate Program, 1998) at 81. Migration is fundamental to the project of nation building, insofar as it is essential to creating and defining the population that constitutes the nation.

<sup>18</sup> Multiple theorists have identified the largely post-9/11 discursive, rhetorical, and political shifts towards the perception of migrants as “risky” and “dangerous.” See e.g. Bridget Anderson, *Us and Them?: The Dangerous Politics of Immigration Control* (Oxford: Oxford University Press, 2013); Anna Pratt, *Securing Borders: Detention and Deportation in Canada* (Vancouver: University of British Columbia, 2005); Audrey Macklin, “Borderline Security” in Ronald J Daniels, Patrick Macklem & Kent Roach, eds, *The Security of Freedom: Essays on Canada’s Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2001).

<sup>19</sup> Leerkes & Broeders, *supra* note 6 at 843.

<sup>20</sup> In six of the cases we analyzed, the mental health or cognitive ability of the detainee was mentioned by the Court in the course of the decision (*Chipovalov*, *supra* note 8; *Fankem*, *supra* note 14; *Lunyamila*, *supra* note 3; *Toure ONCA*, *supra* note 3; *Rooney*, *supra* note 8; *Toure ONSC*, *supra* note 3).



attributable to cognitive impairment or mental health. It is therefore worth treating the so-called “uncooperative” behaviour of migrants as theoretically instructive—for doing so brings us back to the role of coercion in the migrant–state relationship.

Antje Ellerman, in an article on resistance and the liberal state, makes a useful observation about the nature of non-cooperation as resistance.<sup>21</sup> She argues that the nature of the liberal state “exposes a critical space for resistance that is unique to liberal states,” the reason for this being the liberal state’s “self-limited sovereignty,” which includes the “self-imposed curtailment of its coercive powers.”<sup>22</sup> Because the power of the liberal state is premised first and foremost upon voluntary compliance, which depends upon the availability of meaningful incentives that ensure that the benefits of compliance outweigh its costs, and in the alternative, coercion, which is constitutionally constrained, it is “those individuals with the weakest claims against the liberal state—who cannot be offered any incentives for compliance—who are able to constrain its exercise of sovereignty.”<sup>23</sup> Migrants who refuse to provide identifying information to immigration authorities prevent the state from exercising its sovereign power, insofar as deportation is contingent on the possession of identity documents.<sup>24</sup> As a result, Ellerman contends that the state is therefore limited in its exercise of coercion against the individual. Therefore, and counterintuitively, it is “those individuals who have the weakest claims against the liberal state that are most able to constrain its exercise of sovereignty.”<sup>25</sup>

The stalemate identified in the case law between the state and the uncooperative migrant is, therefore, not simply an instance of the state asserting its disciplining power over the migrant, but also an instance of the migrant asserting their power over the state—even if that assertion of power results in a complete deprivation of liberty and years spent behind bars.

## II. THE LEGAL FRAMEWORK FOR NON-COOPERATION AS JUSTIFICATION FOR DETENTION

This article is not intended to provide a comprehensive overview of the legal structure of immigration detention in Canada.<sup>26</sup> However, some context is necessary to situate the “uncooperative” migrant within the scheme of Canadian immigration detention law and practice and to show that non-cooperation is a principle that has little statutory support. This section highlights the general absence of a statutory obligation to cooperate in one’s own deportation. It then provides an overview of the immigration detention legal regime in Canada, identifying the relevant provisions of the *Immigration and Refugee Protection Act (IRPA)* and the *Immigration and Refugee Protection Regulations (IRPR)*<sup>27</sup> that bear directly on questions of non-cooperation.

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<sup>21</sup> Antje Ellermann, “Undocumented Migrants and Resistance in the Liberal State” (2010) 38:3 *Politics & Society* 408.

<sup>22</sup> *Ibid* at 409.

<sup>23</sup> *Ibid*.

<sup>24</sup> *Ibid* at 414-415.

<sup>25</sup> *Ibid* at 409.

<sup>26</sup> For a more detailed review of this issue, see Siena Anstis, Jared Will & Joshua Blum, “Separate but Unequal: Immigration Detention in Canada and the Great Writ of Liberty” (2018) 63:2 *McGill LJ* 1 at 8–18.

<sup>27</sup> *Immigration and Refugee Protection Act*, SC 2001, c 27, [IRPA]; *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR].

## A. THE ABSENCE OF A STATUTORY OBLIGATION TO COOPERATE WITH ONE'S OWN DEPORTATION

Under the *IRPA* and the *IRPR*, the obligation to provide information or otherwise cooperate with immigration authorities begins and ends with a person's claim for refugee protection in Canada, a formal application to enter Canada, or a formal application to remain in Canada (ss 15-18 of *IRPA*).<sup>28</sup> The *IRPR* specify that the "examination" in which the person is obliged to cooperate ends when there is a decision on the application or claim for protection.<sup>29</sup> Thus, individuals who are detained for removal and are not making an application to remain in Canada are generally under no statutory obligation to answer questions or cooperate with immigration authorities. This is the situation for all of the non-cooperation cases reviewed in this article—the absence of cooperation related to removal and not to any application to enter or remain in Canada. Thus, contrary to the untethered assertions in the case law, there is generally no statutory duty to facilitate one's own deportation.<sup>30</sup>

Further, even if there is an arguable obligation to cooperate located in the *IRPA* other than at ss 15-18 of the *IRPA*, this is not clearly spelled out in the relevant case law. The severe deprivation of liberty entailed by immigration detention must mean, at the very least, that the obligation to cooperate in a given instance is specified and located within the legislative scheme, and that this is clearly articulated by tribunals and courts.

A potential caveat to this is found in section 127(a) of the *IRPA*, which provides that no person shall knowingly "directly or indirectly *misrepresent* or *withhold* material facts relating to a relevant matter that *induces or could induce an error in the administration of this Act*" [emphasis added].<sup>31</sup> Thus, if the alleged absence of cooperation could induce *an error* in the administration of the *IRPA* through the withholding or misrepresentation of facts, then such lack of cooperation constitutes a contravention of the *IRPA*. The provision does not cover all conduct that frustrates deportation, as the inability to deport is not an "error" in the administration of the *IRPA*. Further, this provision captures only a subset of the kinds of conduct that are alleged as non-cooperation against detainees.<sup>32</sup> Moreover, if section 127(a) of the *IRPA* is in fact the source of the purported obligation to cooperate, none of the court or tribunal decisions reviewed for purposes of this article cited that provision of the *IRPA* as such.

A further potential caveat is section 58(1)(d) of the *IRPA*, which authorizes detention on identity grounds where the Minister "is of the opinion" that a foreign national's identity has not been, but may be, established.<sup>33</sup> This is discussed in more detail below. However, it is worth

<sup>28</sup> *IRPA*, *ibid* at ss 15-18. See further *IRPR*, *ibid* at s 10, which makes clear that an "application" exists only where a number of formalities are met, and does not come into existence by the mere expression of a desire to enter or remain.

<sup>29</sup> *IRPR*, *ibid* at s 37.

<sup>30</sup> Perhaps most egregiously in *Dadzie*, *supra* note 3 at para 52, where the Superior Court baldly states that the "applicant has a statutory obligation to cooperate with CBSA" yet fails to cite any statutory basis for that obligation.

<sup>31</sup> *IRPA*, *supra* note 25 at s 127(a).

<sup>32</sup> For example, the refusal to sign a declaration of voluntary return, the refusal to sign a travel document application, the refusal to provide DNA sample or fingerprints and the refusal to consent to publications of one's photograph—which have constituted the basis of non-cooperation findings—would arguably not be captured within the scope of this provision as they do not constitute misrepresentation or the withholding of a material fact.

<sup>33</sup> *IRPA*, *supra* note 25 at s 58(1)(d). In *Brown FCA*, *supra* note 4 at para 99, the Federal Court of Appeal (FCA) held that non-cooperation as the sole basis of detention would constitute a violation of the *Charter*. However, it noted that where "the impasse in effecting removal is disputed identity and the detainee has refused to cooperate in confirming their identity, delays in removal cannot count against the Minister. Release in these circumstances would

noting that out of the twenty-one decisions we analyzed, identity was either raised and/or held to be a ground of detention in only four cases.<sup>34</sup> In every other instance, the Minister did not allege that identity had not been established.

Additionally, and importantly, the fact that certain conduct or omissions are criminalized under the *IRPA* does not *per se* create a statutory obligation to act—it merely exposes the person concerned to prosecution and penalty if the elements of the offence are proven beyond a reasonable doubt.<sup>35</sup> The maximum available penalty for such conduct or omission is imprisonment of five years.<sup>36</sup> However, where absence of cooperation is invoked to justify continued detention, detention may be, and in some cases has been, maintained for far longer than the person concerned could have been imprisoned for a breach of section 127(a) of the *IRPA*. For example, in the detentions of Mr. Ali and Mr. Warssama, discussed in greater detail below, allegations of lack of cooperation served to justify detentions (seven years and five years, respectively) far longer than they would have faced had they been convicted under section 127(a) of the *IRPA*.

Moreover, Mr. Warssama’s refusal to sign a declaration of voluntary return falls outside of the ambit of section 127(a) of the *IRPA* as it cannot amount to withholding a material fact and did not induce an error in the administration of the Act.<sup>37</sup> His non-cooperation—a refusal to sign what would have been a false declaration of voluntariness—was nonetheless repeatedly invoked to justify his detention of over five years.<sup>38</sup> Mr. Ali was detained for seven years before a court ruled on the Minister’s allegation of non-cooperation in the form of withholding material facts. In the context of Mr. Ali’s *habeas corpus* application, the court found that this allegation was based on mere speculation and could not be sustained.<sup>39</sup>

## **B. THE *IRPA* AND *IPRR* DETENTION REGIME AND NON-COOPERATION**

It is against this backdrop—the absence of a clearly delineated legal obligation under the *IRPA* to cooperate with one’s own deportation—that the role of non-cooperation under the detention provisions must be examined. In the absence of a statutory obligation to cooperate with one’s

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encourage detainees to be less than forthcoming. Where a detainee is uncooperative, detention cannot be classified as indefinite because it is within the detainee’s control to change their destiny.” What the FCA fails to grapple with is the fact that in the majority of non-cooperation cases, identity is not at issue – and tribunals and courts are therefore relying on non-cooperation as a factor in situations that go beyond disputed identity. Further, as we discuss later in this article, the FCA—like the Federal Court—fails to critically engage with the concept of non-cooperation, omitting to consider, for example, the vagueness of the concept of noncooperation when it is relied upon by courts and the CBSA as a basis upon which to rationalize lengthy or indefinite detentions and the impact on the detainee.

<sup>34</sup> *Canada (Minister of Citizenship and Immigration) v Gill*, 2003 FC 1398; *Rooney*, *supra* note 8; *Canada (Public Safety and Emergency Preparedness) v Iyile*, 2009 FC 700; *Igbinosa v Canada (Public Safety and Emergency Preparedness)*, 2008 FC 1372.

<sup>35</sup> *IRPA*, *supra* note 25 at s 124, which makes any contravention of the Act or any failure to comply with a condition or obligation imposed under the Act a criminal offence, where a penalty is not otherwise specifically provided. Similarly, s 126 makes it a criminal offence to counsel, induce, aid, or abet any of the behaviours captured by s 124.

<sup>36</sup> *IRPA*, *supra* note 25 at s 128(2).

<sup>37</sup> *Warssama*, *supra* note 1 at para 1.

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ali*, *supra* note 2, at paras 23, 33, where the Court not only dismissed the allegation of non-cooperation, but also found that, in the criminal sentencing context, his detention in such conditions would have counted as more than a decade of imprisonment.

own deportation, any invocation of the failure to do so as a justification for detention should give us pause. Assuming that a detainee is in fact deliberately refusing to cooperate with the processes CBSA is engaging in order to carry out deportation, it is safe to assume that they are doing so because ultimately, they do not wish to be deported, or to consent to their own deportation. The state's use of detention as a coercive mechanism to force such cooperation must be justified in light of the principles animating the *IRPA*, the *Charter*, and Canada's international legal obligations.

Canadian courts have recognized that those accused of crimes cannot be forced to incriminate themselves and that this right flows from the norms requiring “respect for human *dignity* and free choice” [emphasis added].<sup>40</sup> The Supreme Court has, in fact, sought to delineate the scope of the protection against self-incrimination with reference to the “underlying notions of dignity and fairness” that animate it.<sup>41</sup> In short, individuals have a right not to be enlisted in the state's efforts to deprive them of their liberty. This right flows from a recognition that compelling someone to act in such a manner is an affront their inherent dignity. The uncooperative migrant, on the other hand, faces indefinite detention in Canada if they refuse to assist the state in its efforts to violate their personal autonomy and fundamental life choices by deporting them from the country.

More specifically, we argue that the state of the law on non-cooperation is explained, at least in part, by the fact that courts have not even seen the necessity of articulating or defining a legal duty to cooperate, much less a rights-based justification for detention on that basis. It is implicitly accepted that such detention is necessary and therefore defensible.<sup>42</sup>

## C. COOPERATION WHEN DETAINED ON IDENTITY GROUNDS

Once a non-citizen is arrested pursuant to the *IRPA* and held for more than forty-eight hours, it falls to the Division to hold regular hearings to determine whether continued detention is justified. The Division is required to release an individual unless “satisfied” that: (a) the individual is a danger to the public; (b) the individual is unlikely to appear for removal or an immigration proceeding; (c) the Minister of Public Safety and Emergency Preparedness is taking the necessary steps to inquire into a reasonable suspicion that the individual is inadmissible on the grounds of security, violating human or international rights, serious criminality, criminality or organized criminality; or (d) the Minister “is of the opinion” that a foreign national's identity has not been, but may be, established.<sup>43</sup>

In the latter case, section 58(1)(d) of the *IRPA* provides for the possibility of continued detention in cases where the authorities are not satisfied with respect to the identity of the person

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<sup>40</sup> *R v Hart*, 2014 SCC 52 at paras 171, 175.

<sup>41</sup> *British Columbia Securities Commission v Branch*, 1995 CanLII 142 (SCC) at para 77 (as per L'Heureux-Dubé J). In *R v Stillman*, [1997] 1 SCR 607 at para 209, McLachlin J (as she then was) dissented because she refused to acknowledge that the taking of bodily samples fell within the scope of the protection against self-incrimination, which she found to be limited to a “prohibition of the use of physical or moral compulsion to extort communications,” adopting the view of the United States Supreme Court in *Schmerber v California*, 384 US 757 (1966).

<sup>42</sup> This was recently underlined by the FCA in *Brown FCA*, *supra* note 4 at para 99, where the FCA adopted a similar position to the Federal Court in the decisions reviewed for this article—namely that allowing a detainee to ‘not cooperate’ would vest them with too much power vis-à-vis the state and that indefinite detention of a noncooperative detainee where identity is disputed is therefore compliant with the legislative scheme.

<sup>43</sup> *IRPA*, *supra* note 25 at s 58(1).

concerned and the detainee has “not reasonably cooperated with the Minister by providing relevant information for the purpose of establishing their identity.”<sup>44</sup> Thus, while the provision does not establish an obligation to cooperate in one’s own deportation, it does expressly empower the Division to maintain detention where an individual refuses to cooperate with efforts to establish identity, which are in practice closely tied with efforts to deport.

The *IRPR* provide a non-exhaustive list of factors that the Division must consider when assessing whether or not the detainee has “reasonably cooperated” here—essentially the provision of reasonably available travel and identity documents and consistent biographical information as well as a willingness to sign a travel document application.<sup>45</sup> Importantly, even if the identity ground is made out, the Division is still required to consider release and alternatives to detention.<sup>46</sup> In other words, release is still legally available even if the Division finds that the detainee is not cooperating with efforts to establish identity.

Given its explicit mention under this section of the *IRPA* and definition in the *IRPR*, one could easily think that this would be the situation in which absence of cooperation is most frequently and successfully invoked in order to justify continued immigration detention. However, this is not the case. In fact, the identity ground for detention is relatively infrequently relied upon.<sup>47</sup> It was *not* a ground of detention in most of the long-term detention cases reviewed in this article. Instead, these long-term immigration detainees were held on grounds of either flight risk or danger to the public or a combination of the two.<sup>48</sup> In those cases, section 58(1)(d) of the *IRPA* is inoperative and there is no statutory basis for detention on the basis of non-cooperation.<sup>49</sup>

The absence of a statutory basis for detention in these cases has spawned a certain degree of judicial creativity. In one of the judgments that most forcefully endorsed indefinite detention on grounds of absence of cooperation, Justice Clark of the Ontario Superior Court of Justice found that Mr. Dadzie’s detention was justified in light of the statutory obligation to cooperate when detained on identity grounds *even though Mr. Dadzie was not detained on identity grounds*,<sup>50</sup> as expressly acknowledged just a few paragraphs earlier in the judgment.<sup>51</sup> In *Canada (MPSEP) v Fankem*, Justice Bell expressly held that it was unreasonable for the Division to “disregard the fact that identity is an issue,” even where s 58(1)(d) of the *IRPA* is not invoked as a ground of detention.<sup>52</sup> This holding is particularly hard to understand given that the language of

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<sup>44</sup> Notably, it is only the Minister, and not the adjudicator at the Division, who must be of the opinion that identity is not established. The Division has no jurisdiction to determine whether or not identity has in fact been satisfactorily established.

<sup>45</sup> *IRPR*, *supra* note 25 at s 247(1).

<sup>46</sup> Until recently, the Guideline to Division Members inexplicably provided that Members must be particularly cautious in such cases—a warning not found with respect to the other grounds for detention: see Canada, Immigration and Refugee Board, *Chairperson’s Guidelines, 2: Detention* (5 June 2013). The updated 2019 version of Guideline 2 no longer contains such language: see Canada, Immigration and Refugee Board, *Chairperson’s Guidelines, 2: Detention* (1 April 2019).

<sup>47</sup> *Brown v Canada (Minister of Citizenship and Immigration)*, 2017 FC 710 (Evidence, Affidavit of John Helsdon at paras 8-11, which provides statistics concerning grounds of detention) [*Brown FC*].

<sup>48</sup> See Part III of the Article below.

<sup>49</sup> While it is undeniable that non-cooperation could constitute evidence that the detainee poses a flight risk if released (because they have made clear that they do not wish to comply), the point here is that the *statutory obligation* to cooperate in one’s own removal evaporates where the detention is not sought on identity grounds.

<sup>50</sup> *Dadzie*, *supra* note 3 at paras 63, 65.

<sup>51</sup> *Ibid* at para 59.

<sup>52</sup> *Fankem*, *supra* note 14 at para 9.

the *IRPA* confers virtually unfettered discretion upon the Minister, and not the Immigration Division, to determine whether a detainee's identity is established.<sup>53</sup> While the judgment is brief, its implications are dramatic: it solidifies the proposition that the failure to cooperate in the establishment of identity, even where the Minister is no longer advancing identity as a ground of detention, can justify the continuation of detention even in the express absence of a statutory duty to cooperate in that respect.

## D. COOPERATION IN OTHER CASES

As noted above, it is in cases of detention on grounds *other than* identity that non-cooperation has been most frequently invoked to justify lengthy detentions in Canada. It is in these cases that section 248 of the *IRPR* becomes critical.

The factors listed under section 248 of the *IRPR* were added to the Regulations as a result of the Federal Court's decision in *Sahin v Canada (Minister of Citizenship and Immigration)*.<sup>54</sup> In *Sahin*, the applicant argued that his continued detention was contrary to sections 7 and 12 of the *Charter*.<sup>55</sup> Justice Rothstein (then of the Federal Court Trial Division) concluded that "indefinite detention" could violate section 7 of the *Charter*. He went on to provide a non-exhaustive list of factors to consider in making detention decisions, noting that their relative weight would vary in each case. Among the factors noted by Justice Rothstein were whether "the applicant or respondent caused any delay or has ... not been as diligent as reasonably possible" and whether that "[u]nexplained delay and even unexplained lack of diligence" ought to count against the offending party.<sup>56</sup> In reviewing the *Sahin* factors in *Charkaoui v Canada*, the Supreme Court of Canada endorsed these factors.<sup>57</sup> The current version of section 248 of the *IRPR* reads as follows:

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:

- (a) the reason for detention;
- (b) the length of time in detention;
- (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;
- (d) any unexplained delays or unexplained lack of diligence caused by the Department, the Canada Border Services Agency or the person concerned; and
- (e) the existence of alternatives to detention.<sup>58</sup>

In detention cases, non-cooperation is most frequently applied through section 248(d) of the *IRPR*: the detainee's lack of cooperation is alleged to be the cause of the "unexplained" delay in

<sup>53</sup> *IRPA*, *supra* note 25 at s 58(d).

<sup>54</sup> *Sahin v Canada (Minister of Citizenship and Immigration)*, [1995] 1 FCR 214 [*Sahin*].

<sup>55</sup> *Ibid* at para 13.

<sup>56</sup> *Ibid* at para 30.

<sup>57</sup> *Charkaoui v Canada (Citizenship and Immigration Canada)*, 2007 SCC 9 at para 108 [*Charkaoui*].

<sup>58</sup> *IRPR*, *supra* note 25 at s 248 [emphasis added].

deportation or to be a “lack of diligence,” pursuant to which the Division and the court then find that non-cooperation favours continued detention.<sup>59</sup>

Section 248(d) of the *IRPR* applies whenever the Division finds that any of the grounds for detention enumerated in section 58(1) of the *IRPA* are made out and is *not* limited to detention on identity grounds. As a result, the more defined and constrained statutory framework of what constitutes non-cooperation that applies only in cases of detention on *identity grounds* has had a very limited role in practice. Instead, most often a broad and unrestricted notion of non-cooperation is applied through the lens of section 248(d) of the *IRPR* to justify continued detention.<sup>60</sup>

Further, as revealed in the review of the jurisprudence below, very little regard is had for the requirement that the “delay” caused by non-cooperation be *unexplained* as required by the express wording of section 248(d) of the *IRPR*. While the clear language indicates that a detainee’s explanation for their refusal to cooperate has to be considered, this has not been the case in practice. In fact, the reasons for which detainees have refused to cooperate—for example, because they were being asked to stipulate that their removal was voluntary when that was not the case,<sup>61</sup> or in cases where the detainee had expressed a fear of torture or persecution upon removal<sup>62</sup>—have been excluded from consideration.

Even more problematic, both conceptually and in practice, is the fact that the functional and historical purpose of section 248(d) is to *protect* the *Charter* rights of detainees, as it is among the factors that the Division has been required to consider in order to ensure that detainees are *not* held indefinitely in breach of their rights under section 7 of the *Charter*. As noted above, section 248 of the *IRPR* was enacted to give effect to the factors enunciated by the Federal Court in *Sahin* in order to ensure that “detention decisions [are] made with section 7 *Charter* considerations in mind.”<sup>63</sup> As seen in the cases reviewed below, however, section 248(d) of the *IRPR*, though drafted as a shield to protect the *Charter* rights of detainees, has become a sword in the Minister’s hand to justify continued detention.<sup>64</sup>

### III. THE ABSENCE OF COOPERATION AND JURISPRUDENTIAL TRENDS

This section reviews the case law addressing lack of cooperation and attempts to identify some trends in this murky area. We have divided the case law into two broad conceptual categories.

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<sup>59</sup> See the cases reviewed in Part III of the Article below.

<sup>60</sup> The FCA’s decision in *Brown FCA*, *supra* note 4 at para 99, suggests that basing detention on non-cooperation outside the context of disputed identity would be problematic.

<sup>61</sup> See *Warssama*, *supra* note 1 and *Panahi* 2010, *supra* note 8. While ultimately successful on judicial review, both Mr. Warssama’s and Mr. Panahi-Dargahloo’s refusals to falsely state that their deportation was voluntary were the basis for their lengthy detentions by the Division.

<sup>62</sup> *Kamail*, *supra* note 3.

<sup>63</sup> *Sahin*, *supra* note 49 at para 29. The *Regulatory Impact Analysis Statement* [RIAS] concerning the final version of the *IRPR* as promulgated in 2002 specifically states that “[t]hese provisions are in keeping with fundamental justice, procedural fairness, Canadian values and the *Charter of Rights and Freedoms*. Codifying factors and conditions in regulation promotes consistency, clarity and transparency in decision making”: *Regulatory Impact Analysis Statement (IRPR)*, (2002) C Gaz 2, 306 (EXTRA Vol 136, No 9). See also *Canada (Citizenship and Immigration) v B046*, 2011 FC 877 at para 54.

<sup>64</sup> A similar phenomenon has been observed in the criminal law context, where courts have shown a tendency to presume the existence of state powers in the negative spaces left unprotected by *Charter* rights. See, for example, *R v Mann*, 2004 SCC 52. See also RJ Delisle, “*Judicial Creation of Police Powers*” (1993) 20 CR (4th) 29.



The first category captures judicial approaches where non-cooperation is either the decisive or the paramount factor in analyzing whether a detention has become unlawful. The second category captures decisions that generally conclude that indefinite detention cannot be justified by lack of cooperation and that release may be required regardless of the detainee's alleged lack of cooperation. As we argue below, the commonalities between the two camps are as instructive as the differences.

## A. THE ABSENCE OF COOPERATION TRUMPS ALL OTHER FACTORS

The first category of cases stands on the proposition that non-cooperation will justify any duration of continued detention *because* that detention is *caused* by the detainee's uncooperative behaviour.<sup>65</sup> In other words, both the length of time already spent in detention and its indefinite future duration are considered to be *the fault of the detainee* and this fault justifies what might otherwise be considered an unlawful lengthy or indefinite detention. Because the detainee is perceived to hold the key to their own release, the detention is characterized as neither indefinite nor unjust. Each of the judgments in this first category starts from the premise that detainees are obliged to cooperate with their own removal process, though they provide virtually no analysis of the source of this obligation.

The judgments that have adopted this approach have also failed to consider the reasons for the lack of cooperative behaviour and do not consider whether there is (or should be) some kind of objective benchmark against which detainee behaviour can be assessed to determine cooperativeness. For example, in quashing a release order for a detainee who could not be removed because he refused to sign a travel document application, the Federal Court held that the “detainee was the sole cause of the indefinite nature of the detention.”<sup>66</sup> An Ontario Superior Court judgment came down even more emphatically on this point, finding that “[w]here, as here, the applicant’s detention is, in effect, self-imposed (because Mr. Dadzie chooses not to cooperate with the CBSA in any productive manner), he cannot rely on his own obstructionist tactics to argue that his detention constitutes a breach of his *Charter* rights.”<sup>67</sup>

Underpinning all of the judgments that exemplify this approach is a concern that to hold otherwise would reward or incentivize uncooperative behaviour and that such behaviour should be disciplined. As stated in what has been the touchstone case for this school of thought, “[t]o hold otherwise would be to encourage deportees to be as uncooperative as possible as a means to

<sup>65</sup> See *Kamail*, *supra* note 3 at paras 33, 35; *Dadzie*, *supra* note 3 at paras 55, 60, 65, 78; *Lunyamila*, *supra* note 3 at paras 2, 58–59.

<sup>66</sup> *Kamail*, *supra* note 3 at para 35.

<sup>67</sup> *Dadzie*, *supra* note 3 at para 60. This point is made several times in the decision (see also para 78). The same finding was made in the case of Mr. Toure, where O’Marra J refused release and found that the detention could become unlawfully indefinite only “where all parties are acting diligently and in good faith” and that “where there is a reasonable prospect removal will take place *with his continued cooperation*, the detention will remain compliant with ss 7 and 9 of the *Charter* even if its future duration is uncertain”: *Toure* ONSC, *supra* note 3 at paras 63 & 65 [emphasis added]. On appeal, in response to the argument that the court below had erroneously justified indefinite detention on grounds of non-cooperation, the ONCA laconically found that there was no error because the court below, “noting that his failure to cooperate in the past with the CBSA is a significant factor, also considered all the other facts of the case. This included a summary of the CBSA efforts to identify Mr. Toure, the failed attempt to remove him to Guinea, and his reason for continued detention, namely, he was found to be a flight risk”: *Toure* ONCA, *supra* note 2 at para 46. Those other factors had nothing whatsoever to do with the indefinite nature of Mr. Toure’s prospective detention and the Court of Appeal therefore simply failed to even engage the issue.

circumvent Canada's refugee and immigration system."<sup>68</sup> In another more recent judgment, Chief Justice Crampton of the Federal Court concluded that continued detention is *required* in circumstances of non-cooperation. This reasoning was framed by broad statements such as: "otherwise, such a detainee could simply produce, or contribute to producing, a 'stalemate,' for the purposes of ultimately obtaining his release from detention," "[t]o hold otherwise would enable him to manipulate our legal system in order to avoid the execution of a validly issued removal order," and "Parliament cannot have intended that the freedom to roam the streets of Canada, and to go into hiding to avoid removal to one's country of origin, could be procured in this manner by persons who pose a danger to the Canadian public or others who do not wish to cooperate with a validly issued removal order."<sup>69</sup> The Chief Justice's ultimate conclusion is that,

the scheme of the *IRPA* and the *Regulations* ... requires resolving a stalemate that has been produced by the detainee's failure to fully cooperate with the Minister's removal efforts, in favour of continued detention ... . Failure to maintain detention in such circumstances would have the perverse effect of rewarding the detainee for his failure to cooperate with his removal.<sup>70</sup>

Another example is *Canada (MPSEP) v Fankem*.<sup>71</sup> At the time the judgment was rendered, the individual in question had been detained for more than five years and was being held in a maximum-security jail. His lack of cooperation was rather unequivocal, as he declined to even speak to counsel, much less assist the CBSA in any manner in effecting his removal. However, he was eventually ordered released by the Immigration Division, which found that in the circumstances, there was no reasonable prospect of removal and that any flight risk posed could be mitigated by strict conditions of release. The Minister successfully sought judicial review of this decision, and the release order was quashed. The Court found that the decision was unreasonable in two respects, both of which were inextricably entwined with the detainee's failure to cooperate. First, the Court found that it was unreasonable to release someone who "would not voluntarily present himself for removal from Canada," regardless of the conditions attached to that release order.<sup>72</sup> Second, the Court found that the person concerned was himself creating an impediment to removal by failing to provide the information necessary to establish his identity—and this lack of willingness to "comply with court or tribunal orders" necessitated continuing detention.<sup>73</sup> The judgment itself is terse and fits squarely within this recurring theme whereby non-cooperation is used to justify continued detention. Moreover, this logic would

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<sup>68</sup> *Kamail*, *supra* note 3 at para 38. More recently, see *Brown FCA*, *supra* note 4 at para 99.

<sup>69</sup> *Lunyamila*, *supra* note 3 at paras 3, 5.

<sup>70</sup> *Lunyamila*, *ibid* at para 95. See also *Philip v Canada (Attorney General)*, 2018 ABQB 167 at para 34. In *Dadzie*, *supra* note 3, the Ontario SCJ offered a further rationale for finding that non-cooperation justifies continued detention, analogizing the situation to that of motions for a stay of proceedings for unreasonable delay under section 11(b) of the *Charter* in the criminal law context, where delays attributable to the accused cannot be invoked in favour of the stay of proceedings. However, this analogy is drawn without regard to some important distinctions: the accused seeking a stay of proceedings is in fact seeking a benefit, namely, to be relieved of criminal liability regardless of the merits of their case on the basis that the state failed to fulfil the right to be tried within a reasonable time. It is under section 11(b) that the courts have quite logically found that the accused cannot obtain the benefit of a stay of proceedings on the basis of their own dilatory conduct. The *IRPA* detainee is seeking liberty, a fundamental right under the common law, international human rights law, the *Charter*, and the *IRPA* itself (at para 37).

<sup>71</sup> *Fankem*, *supra* note 14 at paras 7, 9.

<sup>72</sup> *Ibid* at para 8.

<sup>73</sup> *Ibid* at para 9.

appear to justify indefinite detention, given that the Court seems to view detention as justified until the “stalemate” ends with the detainee capitulating, regardless of how long that may take.

The language adopted in this decision—and over the course of the hearing—speaks volumes. In the decision, Justice Bell characterized the detainee as someone who “considers himself as the director of a play and Canadian authorities are but actors subject to his direction”—an inference that is, at best, difficult to reconcile with him being locked inside a cell for five years.<sup>74</sup> The language from the bench over the course of the hearing was even starker, describing the detainee as “the puppet master” in reference to the fact that he had been given access to counsel in the course of his detention, and stating that he was “lucky” to be in a Canadian jail.<sup>75</sup> The antipathy towards the person concerned due to his non-cooperation with the authorities could not be more patent.

Edging somewhat closer to the middle of the spectrum, there are also judgments within this first category where non-cooperation serves as a factor that weighs heavily against the other section 248 *IRPR* factors that might otherwise justify release, such as the length of detention or the fact that the detainee has not been found to pose a danger to the public.<sup>76</sup> Under this approach, absence of cooperation, though not the only consideration, remains the overriding consideration. In these decisions, the rationale for giving special consideration to non-cooperation also remains the concern that migrants should not be permitted to benefit from uncooperative behaviour or to “circumvent” or “frustrate” the immigration system or the *IRPA*.

In conclusion, absent from all of these judgments is any reflection on the fact that the courts are endorsing or even mandating indefinite detention and violating the fundamental rights of the migrant through the application of non-cooperation as a basis for continued detention. As another court put it in criticizing this approach, “taken literally, that rationale could justify the continued detention of a person forever.”<sup>77</sup>

## B. ABESENCE OF COOPERATION CANNOT JUSTIFY INDEFINITE DETENTION

The second category contains several decisions that generally conclude that *indefinite* detention cannot be justified by a lack of cooperation, but stop short of stating that non-cooperation does not justify lengthy detention.<sup>78</sup> It also includes decisions where, though lack of cooperation is treated as an important factor to consider, the length of time spent in detention remains a paramount concern.<sup>79</sup> As noted above, it is difficult to reconcile these two categories of cases.

<sup>74</sup> *Ibid* at para 7.

<sup>75</sup> *Ibid* hearing transcript (Federal Court file IMM-2918-18). Bell J further commented that the person concerned is “a very competent person who is functioning effectively, as I said before, functioning as a marionette and doing it very, very effectively”—which, as already noted, is difficult to square with the fact that he remains even at the time of writing in a maximum security jail after nearly six years of administrative detention.

<sup>76</sup> *Panahi* 2010, *supra* note 8 at para 62; *Chipovalov*, *supra* note 8.

<sup>77</sup> *Ali*, *supra* note 2 at para 26.

<sup>78</sup> See *e.g.* *Ali*, *ibid* at paras 27–30 (finding that “[t]o authorize the Government to hold a person indefinitely, solely on the basis of non-cooperation, would be fundamentally inconsistent with the well-established principles underlying ss 7 and 9 of the *Charter*. It would also be contrary to Canada’s human rights obligations,” but also relying on the factual finding that the CBSA had failed to prove that Mr. Ali was actually obstructing his own removal) and the series of five Division decisions discussed and quashed by the Federal Court in *Lunyamila*, *supra* note 3.

<sup>79</sup> See *Panahi-Dargahloo v Canada (Minister of Citizenship and Immigration)* 2009 FC 1114 at paras 40–42 [*Panahi* 2009] (finding that the Division member “did not consider the question of the length of detention choosing

The logic of the decisions in the first category justifies indefinite detention on the basis of a detainee's failure to cooperate. In that first set of decisions, the importance of using detention to deter non-cooperation is strongly emphasized.<sup>80</sup> The decisions in the second category reject any reasoning that would serve to justify indefinite detention on the basis of lack of cooperation, recognizing that deterring non-cooperation through detention amounts to unlawfully transforming what should be non-punitive detention into a mechanism of coercion—thereby divorcing detention from its immigration purpose.<sup>81</sup>

However, on closer inspection, the divergence between these cases is perhaps not as great as it might at first appear. In both, it is at least tacitly accepted that detention on the basis of non-cooperation is justified—the divergence lies only in the question of how much or how long detention can be justified on the basis of non-cooperation.

It is perhaps precisely because this premise is shared across the spectrum of judgments that there has been virtually no critical engagement of the issue or attempts to develop a consistent theory of the role of non-cooperation in the detention of non-citizens. While one judgment raises concerns about the legally problematic application of non-cooperation *per se*,<sup>82</sup> the generalized lack of serious engagement with the concept is resounding. There has been no robust analysis of the contours of the obligation to cooperate or of its consequences under the *IRPA* or in light of the *Charter*. The potential transformation of immigration detention from non-punitive administrative detention to a mechanism of coercion wielded against the uncooperative migrant has been noted and either rejected or affirmed, but in both cases with little analysis.<sup>83</sup>

In short, there remains no coherent theory of the role and consequences of non-cooperation under Canadian law.

## IV. DANGERS OF THE STATUS QUO

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instead to focus on the cause for the continuing detention” but not expressly finding that non-cooperation became irrelevant in the face of a lengthy detention); *Panahi* 2010, *supra* note 8 at para 61 (agreeing with Justice Mandamin in *Panahi* 2009 that the length of detention has to be considered against “other factors besides his refusal to sign the letter required by the Iranian authorities,” thus acknowledging its ongoing relevance); *Warssama*, *supra* note 1 at paras 26–34 (noting that Mr. Warssama “may remain incarcerated in Canada for the rest of his life,” noting that the burden of proof was on the Minister at each and every detention review and that the reviews themselves had not been robust for some time, and finding that the Division member “was wrong to conclude that the other section 248 factors outweighed the length of his detention”); *Shariff v Canada (Minister of Public Safety and Emergency Preparedness)*, 2016 FC 640 at paras 38–42 and 45–46 (finding that two Division decisions ordering release were reasonable. In the first decision ordering release, the Division concluded that the detention had become so lengthy “that it outweighed all other factors and, in line with *Warssama*, had become unreasonable.” In the second decision, the Division reaffirmed again that “one of the primary issues was how long Mr. Shariff had been in detention and the length of time it could continue); *Chipovalov*, *supra* note 8 at paras 27, 31 (concluding that the Division did “not err in considering the respondent’s detention to be long-term and that it relied sufficiently on the case law to make that finding,” observing that the member “noted on several occasions that the length of the detention was due, at least in part, to the respondent’s refusal to cooperate with the CBSA, and that [the Division member] addressed this factor in analyzing the subsequent factors in section 248 of the *IRPR*”).

<sup>80</sup> See again *Lunyamila*, *supra* note 3 at paras 3, 95 and *Dadzie*, *supra* note 3 at para 52. See also *Toure* ONSC, *supra* note 4 at para 63, where Court held that the prospect of indefinite detention could only be considered if the detainee is cooperating “in good faith.”

<sup>81</sup> See *Ali*, *supra* note 2 at paras 26–27.

<sup>82</sup> *Ibid* at para 26.

<sup>83</sup> In *Dadzie*, *supra* note 3, at paras 62–64, Clark J appears to take the position that the coercive use of detention is permissible provided there is some other statutory ground for the detention.

In addition to the foundational problem of relying on a concept of lack of cooperation that is divorced from any clear legal obligation, and the subsequent affront to liberty through the perpetuation of lengthy or indefinite periods of immigration detention, there are a number of discrete additional problems and issues that arise with non-cooperation that are cause for concern and that should be addressed going forward. These issues are reviewed briefly below.

## **A. THE ABSENCE OF A DEFINITION AND ITS EFFECT ON IMMIGRATION DETENTION**

In light of the failure of Canadian courts and tribunals to consider the source and extent of detainees' legal obligation to cooperate with their own removal, it is perhaps unsurprising that there is no common understanding of what conduct actually constitutes absence of cooperation. This is problematic because it gives tribunals and courts great latitude to find that a very wide range of behaviour by a detained individual amounts to non-cooperation for the purposes of continuing their detention. It leaves detainees with no benchmark by which to measure what acts of agency and autonomy they may consider will have legal implications and what those implications will be. The following non-exhaustive set of fact patterns in the case law illustrate just how widely divergent the courts have been in determining whether behaviour constitutes non-cooperation.

In *Canada (Minister of Citizenship and Immigration) v Kamail*, the respondent could not be deported to Iran because a travel document from the Iranian government was required, and he refused to sign the application for that document.<sup>84</sup> There is no discussion of the reason for Mr. Kamail's refusal to be deported or of the content of the declaration that he was being asked to sign. Even if one accepts that unjustified obstructionist conduct may warrant continued detention, that leaves open the question of whether some reasons for the refusal to cooperate, such as a stated fear of death upon return (albeit a fear that may have already been assessed by the Refugee Protection Division and/or the immigration minister in the context of an application for a pre-removal risk assessment), or some forms of non-cooperation, such as refusal to sign a statement of voluntary return where return is patently not voluntary, should be assessed differently. In *Warssama v Canada (Minister of Citizenship and Immigration)*,<sup>85</sup> the detainee spent more than five years in jail because of his refusal to sign a declaration of voluntary return to Somalia. Justice Harrington reflects on the perversity of this situation in the opening lines of his judgment, noting that the respondent had been jailed for five years: "Why? Because he will not sign a piece of paper!"<sup>86</sup>

There are other situations where the non-cooperation is not nearly as clearly defined as a specific refusal to sign a document that would allow deportation to occur. The jurisprudence shows that courts are inclined to find a wide range of behaviour non-cooperative, including cases where there was no evidence that a certain course of cooperative action by a detainee would even lead to their deportation. In *Dadzie*, for example, the Ontario Superior Court of Justice concluded that the applicant was uncooperative in that he had not acted in a "productive manner," that he "continually and steadfastly failed to assist the authorities in any meaningful way to establish his identity," that it could "not regard his actions as meaningful cooperation" and that in some cases

<sup>84</sup> *Kamail*, *supra* note 3 at para 12.

<sup>85</sup> 2015 FC 1311.

<sup>86</sup> *Warssama*, *supra* note 1 at para 1.

he “actively frustrated their [the CBSA’s] efforts to identify him.”<sup>87</sup> In support of these statements, the court noted that Mr. Dadzie provided “inconsistent information as to his antecedents” and that when confronted with these inconsistencies he “admitted numerous times that he lied.” Mr. Dadzie also refused to provide the state with his fingerprints.<sup>88</sup> Absent from this decision, however, is any factual finding by the court that certain actions by Mr. Dadzie—such as consenting to fingerprints or clarifying his antecedents—would have had any meaningful effect on the CBSA’s ability to deport him. Without such a finding of fact, it simply cannot be said that Mr. Dadzie’s lack of cooperation was the cause of the CBSA’s inability to deport him—and therefore the cause of his continuing detention. Under this analysis, any failure to comply with any demand from the CBSA amounts to “culpable” non-cooperation, regardless of the presence or absence of a nexus to the prospect of removal.

The slippery slope of findings of non-cooperation is also illustrated by the divergence in findings between the Immigration Division, the Federal Court, and the provincial superior courts. Of the decisions reviewed for this article, there were instances where the Immigration Division had found on multiple occasions that certain behaviour constituted non-cooperation such that it justified continued detention. The Federal Court or Superior Court then found that same behaviour either did not constitute non-cooperation in the first place, or that even if it did, it was not sufficient to justify an order continuing detention.<sup>89</sup> In other instances, the Immigration Division ordered release of an individual multiple times despite demonstrated “noncooperation,” only to have the Federal Court scrutinize the same set of facts and find that the non-cooperation at issue justified further detention.<sup>90</sup> For example, Mr. Ali spent over seven years in maximum-security facilities in Ontario awaiting deportation. The Minister attempted to characterize his behaviour as uncooperative and alleged that he was the “sole impediment to his removal.”<sup>91</sup> The Ontario Superior Court of Justice rejected this argument, finding that the fact that Mr. Ali had “not always been forthright” and that he had on occasion “outright lied about some matters” was not uncooperative behaviour.<sup>92</sup> The court noted that the Attorney General failed to identify any “concrete” information that was being withheld by Mr. Ali:

Vague references to not knowing the names of Mr. Ali’s teachers; or where he went to school; or whether he lived for a short period of time in Italy; or the like, do not go to the central issue regarding his citizenship. For example, while the Attorney General may be justified in her skepticism about Mr. Ali’s lack of memory regarding where he lived in New York State in the early 1980’s, even if Mr. Ali had been able to give the authorities precise addresses where he lived, that would not assist in determining whether he is a citizen of Ghana or Nigeria or both. Indeed, I find it somewhat telling, on that point, that the American authorities have advised that they have no record of Mr. Ali or his mother ever entering the United States, when it clear that they both did [*sic*].<sup>93</sup>

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<sup>87</sup> *Dadzie*, *supra* note 3 at paras 17, 43, 60.

<sup>88</sup> *Ibid* at para 17.

<sup>89</sup> *Ali*, *supra* note 2 at paras 30-31; *Walker v Canada (Citizenship and Immigration)*, 2010 FC 392 at paras 30-31; *Panahi* 2009, *supra* note 72.

<sup>90</sup> *Canada (Public Safety and Emergency Preparedness) v Lunyamila*, 2016 FC 1199 at paras 29-30, 54-59, 67-68; *Canada (Minister of Citizenship and Immigration) v Kamail*, 2002 FCT 381.

<sup>91</sup> *Ali*, *supra* note 2 at para 30.

<sup>92</sup> *Ibid*.

<sup>93</sup> *Ibid*.

In front of another court, such as that in *Dadzie*, Mr. Ali’s “behaviour” may have been found to constitute non-cooperation sufficient to justify continued detention.

In conclusion, the absence of a clear definition of non-cooperation means that an unspecified range of behaviour can lead to lengthy or indefinite periods of detention—regardless of whether lack of cooperation is a considered a relevant factor for purposes of an analysis of the legality of immigration detention. Without a benchmark against which non-cooperative behaviour can be measured, immigration detainees are subject to an arbitrary, ill-defined notion of non-cooperation and some have been forced to spend years in jail for this reason.

## **B. USING IMMIGRATION DETENTION AS A TOOL OF DISCIPLINE AND CONTROL**

As Justice Nordheimer pointed out in *Ali*, detention under the *IRPA* is administrative and should remain non-punitive.<sup>94</sup> It is unlawful to instrumentalize administrative detention as a mechanism of coercion.<sup>95</sup> However, where lack of cooperation is invoked to justify ongoing detention, and in particular where it is used to justify indefinite detention, it is difficult to conceive of continued detention as anything but punishment for non-cooperation, and as a tool of discipline, coercion, and control of the detainee. Thus, once non-cooperation is accepted as a justification for detention, there is a demonstrated risk of transforming a power of administrative detention into a mechanism of discipline. Whatever one may conclude about the utility of such a power, it is impossible to reconcile it with the most basic of common law and constitutional principles governing deprivations of liberty by the state in the penal context where discipline, punishment, and coercion are recognized as legitimate objectives, subject to strict controls such as the right to silence, the requirement of proof beyond a reasonable doubt, proportionality, and the prohibition of indefinite sentences.<sup>96</sup>

The non-cooperation case law reflects untested assumptions about the conduct of non-citizens in Canada and how it should be addressed.<sup>97</sup> In multiple decisions, the language of the court clearly shows a concern—and at times a stated belief—that migrants are solely motivated by a desire to derive as much personal benefit as they can from their “stay” in Canada and that such ambitions are what drive them to “fail” to cooperate. This language rings clear in the decisions reviewed above, which are now cited for the proposition that non-cooperation justifies lengthy or indefinite detention. As noted earlier, none of these decisions consider the broader contextual factors that might motivate a migrant’s behaviour in interacting with the CBSA, such as ties to family or community after having built a life in Canada, a fear of mistreatment in the country of origin upon return (that may or may not have been assessed and found insufficient by the Refugee Protection Division or the Minister of Immigration), the justifiable frustration that builds after years of being mistreated while detained in a provincial penitentiary, and failing to

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<sup>94</sup> *Ibid* at para 26.

<sup>95</sup> We recognize and accept that this is an undefended premise of our argument—that administrative detention cannot become a mechanism of coercion or punishment. In that vein, we also note the absence of any generalizable theory of justification for detention under Canadian law, and in particular the circumstances under which detention is consistent with the “principles of fundamental justice” for the purposes of section 7 of the *Charter*.

<sup>96</sup> See *Scotland v Canada (Attorney General)*, 2017 ONSC 4850 at paras 54–58.

<sup>97</sup> See Part III of the Article above.



see any real progress on the part of the CBSA in effecting deportation with the information they do have at their disposal.<sup>98</sup>

It is an impossible task to precisely surmise from the courts' decisions what exactly forms the foundation for such conclusions regarding the behaviour of migrants and the assumptions about their motives and the degree of threat, if any, to the integrity of immigration controls. However, this phenomenon in the case law can be explained without access to the inner thoughts of the judiciary insofar as it follows from the general ambiguity around the purpose of immigration detention, which leads to the conclusion that other state goals are at play here, as outlined in Part I. If a noncitizen is detained for more than seven years for purposes of deportation, only to be released back into Canadian society without ever being deported, what has been achieved? The power of the state to discipline a migrant who has transgressed the hallowed principle of state sovereignty has been demonstrated, and even if the state was not ultimately successful in achieving its aim of deportation, the migrant in question has lost years of their life to this "stalemate." The migrant may have succeeded in resisting the state, but at what cost?

The case law leads us back to Foucault's theory of the disciplinary society as a lens through which to view immigration detention, particularly when we focus on cases involving non-cooperation. In *Lunyamila*, Chief Justice Crampton could not have provided a more implicit endorsement of discipline and control: despite numerous Division decisions stating that Mr. Lunyamila should be released as his detention was in contravention of the *Charter*, the Chief Justice found that the "tension [between liberty and the imperative of immigration control] must be resolved in favour of continued detention."<sup>99</sup> The Chief Justice reverts to the same language as in *Kamail*, namely that allowing non-cooperation to lead to indefinite detention would "be effectively to allow that person to frustrate the will of Parliament and, in essence, 'take the law into his own hands.'"<sup>100</sup> It is on this basis that he finds that the law requires that persons not

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<sup>98</sup> *Ibid.* In *Kamail*, *supra* note 3 at para 38, instead of considering the factors that might motivate Mr. Kamail to not want to return to Iran, and thus to refuse to sign a travel document required for his deportation, the court focuses entirely on the behaviour and actions engaged in by Mr. Kamail and concludes that this amounts to an attempt to cheat the Canadian immigration system. Similarly, in *Dadzie*, *supra* note 3 at para 65, the Ontario Superior Court of Justice finds that allowing Mr. Dadzie to remain at liberty in Canada during the deportation process despite his uncooperative behaviour would be "a direct and powerful incentive to other persons endeavouring to avoid deportation" to engage in similar actions. The court does not stop to consider the history of interactions between Mr. Dadzie and the CBSA or the fact that years have gone by without any real progress in Mr. Dadzie's case. The court simply assumes that Mr. Dadzie's ultimate goal is to avoid the Canadian immigration system. The court is even of the view that when Mr. Dadzie met with CBSA when he was not detained, he was simply *pretending* to cooperate—although this appears to be an entirely speculative conclusion. The court arrives at this finding on the basis that Mr. Dadzie has been "provided health care coverage and was essentially left alone to work and live in accordance with his work permit and release conditions" (see *Dadzie*, *supra* note 3 at para 43). The court continues, "[a]gainst this backdrop ... it was in the applicant's interest to appear to cooperate in order to remain at large ... [i]n my view, he was simply feigning cooperation in order to maintain the then prevailing *status quo*, which was, presumably, something resembling the sort of existence he had come to Canada to find" (see *Dadzie*, *supra* note 3 at para 43). The same findings, devoid of contextual or evidentiary reality, emerge in *Lunyamila*, *supra* note 3 at paras 3, 5, 54. In the same judgment, Crampton CJ reiterates the same fallacy from *Dadzie*, that there is a legislative obligation to cooperate even where section 58(1)(d) of the *IRPA* is inoperative, writing: "Where, notwithstanding the foregoing, a decision to release is made, it would be equally perverse, and contrary to the scheme of the *IRPA* and the *Regulations*, to refrain from requiring the detainee to fully cooperate in his removal, as he is obliged to do. To do otherwise would be to permit the detainee to 'take the law into his own hands'" (see *Lunyamila*, *supra* note 3 at para 96).

<sup>99</sup> *Lunyamila*, *supra* note 3 at para 2.

<sup>100</sup> *Ibid* at para 58.

cooperating with the government's removal efforts "must, except in exceptional circumstances, continue to be detained until such time as they cooperate with their removal."<sup>101</sup> This conclusion is reached without any consideration of the content of *Charter* rights, Canada's international human rights law obligations, or the requirement to interpret and apply the *IRPA* in conformity with those same rights and obligations.<sup>102</sup>

## V. TOWARDS A MORE PRINCIPLED APPROACH TO NON-COOPERATION AND IMMIGRATION DETENTION

We have argued that the detention of migrants on grounds of non-cooperation flows in part from the desire of the state to discipline the undisciplinable migrant who has dared to transgress the machinery of border control, thereby subverting state sovereignty and calling into question the ability of the state to control its own borders. Having posited this as a partial explanation for the phenomenon as observed, we do not intend to suggest that the problem itself is intractable—even in the current political and social environment where there appears to be near-universal acceptance that non-cooperation is at least a factor to consider in the context of assessing the legality of immigration detention. In fact, assuming for the sake of argument that non-cooperation will continue to factor into the analysis, there remain a number of measures that can and must be taken to at least temper the injustice and lack of coherence described above.

### A. DEFINE NON-COOPERATION

One of the most obvious problems in the Canadian jurisprudence is the lack of definition of non-cooperation: what one judge or Division adjudicator considers sufficient cooperation may be non-cooperation to another. This situation creates a huge measure of uncertainty for detainees and provides undue latitude to the Minister to argue that a wide array of conduct amounts to culpable non-cooperation. In adjudicating the legality of ongoing detention, judges and administrative adjudicators are left with significant discretion to find that the detainee is not sufficiently cooperating such that continued detention is justified.

Even if one accepts that absence of cooperation is relevant for an assessment of the legality of detention, it must be precisely and clearly defined in light of its implications for the detainee's liberty. While it may be the case that migrants cannot be given a free hand to thwart the machinery of border control, there remain limits on the intrusions on liberty that can be justified on that basis.

At most, relevant uncooperative conduct must be limited to actions that *demonstrably impede removal* and for which there is *no sufficient explanation*. The burden must rest clearly on the Minister to establish that the detainee's conduct is an actual impediment to removal—and not just an impediment to whatever step the CBSA wishes to take at a given time—and all compelling reasons for non-cooperation must be considered.<sup>103</sup> Detainees' rights to privacy and personal integrity cannot be discarded on a whim, and the refusal to provide DNA samples or

<sup>101</sup> *Ibid* at para 59. As described in Part II of this Article this is simply not correct.

<sup>102</sup> *IRPA* at ss 3(3)(d), 3(3)(f); *de Guzman v Canada (Minister of Citizenship and Immigration)* 2005 FCA 436 at paras 82–86.

<sup>103</sup> For example, immigration detainees with legitimate and demonstrable fear of serious mistreatment upon removal should not be forced to cooperate and detainees should not be forced to make false statements of intent or voluntariness to facilitate their own removal.

consent to the public circulation of their photograph cannot be regarded as breaching any duty of reasonable cooperation.

## B. INDEFINITE DETENTION IS UNLAWFUL

The second step would be to clearly stipulate in legislation or in jurisprudence that indefinite detention is unlawful, regardless of whether or not the detainee is cooperating. The past or prospective time in detention that may be attributable to non-cooperative behaviour cannot override the fact that a detention has become indefinite and thus unlawful. This approach requires recognition of the fact that, regardless of the principle of sovereignty, borders are porous, and the fact that a migrant has succeeded in entering the nation state without first seeking permission to do so does not absolve Canadian courts and tribunals from the obligation to justify coercion in the form of imprisonment. One legal principle that is clear in the case law is that immigration detention must remain hinged to an immigration purpose in order to be lawful—regardless of a migrant’s failure to cooperate with border authorities—and where it is no longer clear that a detainee is deportable, detention becomes indefinite, and should therefore be considered unlawful.

## C. SET LIMITS ON THE LENGTH OF DETENTION

The obvious limitation of the foregoing principle—recognizing that *at some point* detention becomes unlawful because it is indefinite even if the detainee is uncooperative—is that it leaves the harder questions unanswered: how long is too long, and at what point does detention become unlawful?

At least some Canadian courts have found that indefinite detention is *per se* unlawful, and recognized that there comes a time that, non-cooperation notwithstanding, detention can no longer be justified.<sup>104</sup> However, they have (at times expressly) declined to articulate when that line is crossed, or even how the assessment is to be conducted. A similar situation prevails in the United Kingdom (UK). It has long been the law in the UK that those detained for removal cannot be held for unreasonable periods of time, and detention cannot be maintained if there is no reasonable prospect of removal.<sup>105</sup> The UK Supreme Court has also recognized that “the fact that the detained person has refused voluntary return should not be regarded as a ‘trump card’ which enables the Secretary of State to continue to detain until deportation can be effected, whenever that may be.”<sup>106</sup>

However, like the Canadian case law, that statement fails to articulate a means for determining how long is too long.<sup>107</sup> As illustrated by the judgment of the European Court of Human Rights (ECtHR) in *JN v United Kingdom*, the question of where that line is drawn

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<sup>104</sup> *Ali*, *supra* note 2 at paras 27, 29; *Chipovalov*, *supra* note 8; and see again the Division decisions under review in *Lunyamila*, *supra* note 3 and *Fankem*, *supra* note 14. However, in *Brown FCA*, *supra* note 4, the FCA found that it was not necessary to put a time limit on detention in order to ensure the constitutionality of the immigration detention scheme.

<sup>105</sup> *Lumba v Secretary of State for the Home Department*, [2011] UKSC 12 at para 22 [*Lumba*]. These are the second and third of what have become known as the “*Hardial Singh* principles.”

<sup>106</sup> *Ibid* at para 128.

<sup>107</sup> See *Sino, R (on the application of) v Secretary of State for the Home Department (Rev 2)* [2015] EWHC 1831 (Admin) at paras 64–65, 77 [*Sino*] for a clear exposition of the difficulties in establishing the acceptable length of detention.

remains elusive. In *JN*, the ECtHR held that Article 5 of the European Convention on Human Rights (ECHR)—which protects the right to liberty—requires that the duration of detention be limited in nature and not indefinite.<sup>108</sup> The ECtHR also found that it was arbitrary to detain the applicant for fifteen additional months after it had already become clear that he was not going to cooperate with his own removal (which would have occurred no more than six months into his detention).<sup>109</sup> In so finding, the ECtHR, however, also held that UK law was *not* inconsistent with the ECHR by reason of the fact that it does not establish a legislative maximum duration of detention for removal.<sup>110</sup> In other words, the ECtHR left open the question of exactly how long is too long, meaning that UK courts must continue to grapple with that rather intractable question.

Fixed upper limits on the length of detention are necessary to resolve the otherwise intractable question of how long is too long. International human rights bodies have repeatedly found that migrants cannot be detained indefinitely, and that this protection applies regardless of the detainee's cooperation or lack thereof.<sup>111</sup> These same bodies have also repeatedly found that states *must* legislate upper limits on the duration of immigration detention in order to adequately protect against indefinite detention.<sup>112</sup> This is precisely the legislative choice made in the

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<sup>108</sup> *JN v United Kingdom*, No 37289/12, [2003] ECtHR at paras 82, 106 [*JN*]. See also *Mikolenko v Estonia*, No 10664/05, [2010] ECtHR at paras 59–68.

<sup>109</sup> *JN*, *ibid* at paras 102–108.

<sup>110</sup> *Ibid* at paras 90–91.

<sup>111</sup> *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 at art 9 (entered into force 23 March 1976, accession by Canada 19 May 1976) [*ICCPR*]; Human Rights Committee, *Concluding Observations on the Sixth Periodic Report of Canada*, UNHRCOR, 2015, CCPR/C/CAN/CO/6 at para 12; Working Group on Arbitrary Detention, *Opinions adopted by the Working Group on Arbitrary Detention at its eightieth session, 20-24 November 2017: Opinion No 71/2017 concerning Said Imasi (Australia)*, UNHRCOR, 80th Sess, UN Doc A/HRC/WGAD/2017/71 (2017) at paras 42, 49; Working Group on Arbitrary Detention, *Opinions adopted by the Working Group on Arbitrary Detention at its sixty-ninth session, (22 April-1 May 2014): No 15/2014 (Canada)*, UNHRCOR, 69th Sess, UN Doc A/HRC/WGAD/2014/15 (2014) at para 23; Working Group on Arbitrary Detention, *Opinions adopted by the Working Group on Arbitrary Detention at its sixty-second session, 16-25 November 2011: No 56/2011 (Lebanon)*, UNHRCOR, 62nd Sess, UN Doc A/HRC/WGAD/2011/56 (2011) at para 13; Human Rights Council, *Opinions adopted by the Working Group on Arbitrary Detention: Opinion No 45/2006 (United Kingdom of Great Britain and Northern Ireland)*, UNHRCOR, 7th Sess, UN Doc A/HRC/7/4/Add.1 (2008) 40 at paras 10, 29; *Revised Deliberation No 5 on deprivation of liberty of migrants*, UNHRCOR, 39th Sess, UN Doc A/HRC/39/45 (2018) 31 at paras 25–26; Human Rights Committee, *General Comment No 35: Article 9 (Liberty and security of person)*, UNHRCOR, 112th Sess, UN Doc CCPR/C/GC/35 (2014) 1 at para 18; Human Rights Committee, *Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning communication No 2233/2013*, UNHRCOR, 116th Sess, UN Doc CCPR/C/116/D/2233/2013 (2016) 1 at para 10.3; *Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights (108th session)*, UNHRCOR, 108th Sess, annex I, UN Doc CCPR/C/108/D/2094/2011 (2013) 2 at para 9.3. See also *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum- Seekers and Alternatives to Detention*, UNHRCOR (2012) at para 32; Working Group on Arbitrary Detention, *Opinions adopted by the Working Group on Arbitrary Detention*, UNHRCOR, 10th Sess, UN Doc A/HRC/10/21/Add.1 (2009) 72 and *Deliberation No 5: Situation regarding immigrants and asylum seekers*, UNHRCOR, 56th Sess, annex II, UN Doc E/CN.4/2000/4 (2000) 29.

<sup>112</sup> *International Migration Law Information Note on International Standards on Immigration Detention and Non-Custodial Measures*, International Organization for Migration, October 2016, at II.3: “A maximum period of detention must be established by law and this may in no case be unlimited or of excessive length. Upon expiry of this period, the detainee should be automatically released”; *Report of the Working Group on Arbitrary Detention*, UNHRCOR, 7th Sess, UN Doc A/HRC/7/4 at para 52; Working Group on Arbitrary Detention, *Opinions adopted by the Working Group on Arbitrary Detention at its sixty-ninth session (22 April–1 May 2014): No. 15/2014 (Canada)*, UNHRCOR, 69th Sess, UN Doc A/HRC/WGAD/2014/15; *Report of the Working Group on Arbitrary Detention*, UNHRCOR, 10th Sess, UN Doc A/HRC/10/21 (2009).

European Union where detention for the purpose of removal, with some exceptions, is governed by the *Returns Directive*.<sup>113</sup> Article 15 provides that the maximum period of detention for the purpose of removal is six months, which may be extended for an additional maximum of twelve months under two specific circumstances: where the delay is caused either by the detainee's non-cooperation or by a third country.<sup>114</sup> There is no provision for detention for the purposes of removal beyond eighteen months, and, in all cases, release is mandatory where there is no reasonable prospect of removal, regardless of whether the six-month or eighteen-month thresholds have been met.<sup>115</sup>

While Canadian courts have, to date, been resistant to arguments promoting the necessity of a legislated or court-imposed maximum duration of detention,<sup>116</sup> we argue that such limits are necessary to protect against indefinite detention and to protect against transforming administrative detention under the *IRPA* into a measure of punishment and coercion. Leaving the assessment to adjudicators to be decided on a case-by-case basis is unsatisfactory. There is no principled way to assess the point at which detention has become too long. As the Supreme Court has determined in the context of acceptable time-limits for pre-trial delay, numerical thresholds promote clarity and consistency.<sup>117</sup>

## VI. CONCLUSION

A finding of non-cooperation in the immigration detention context has lasting and serious consequences for the detainee. Migrants are detained for lengthy and indefinite periods of time on the basis of allegations of non-cooperation. Despite the severity of the consequence, the concept is undefined in the case law and there have been no serious attempts to even connect culpable non-cooperation to the breach of a legal duty. The failure on the part of courts to articulate a clear legal principle underlying detention for non-cooperation must be taken as indicative of deeper tensions underlying the case law—and the purpose of immigration detention more generally. Non-cooperation reveals one of the fundamental contradictions at the heart of immigration detention: the ambiguity over the purpose it serves. Detention continues to be formally understood as preventative, not punitive, and aimed solely at furthering the machinery of border control—and yet the ways in which it is being wielded, particularly in the context of non-cooperation, reveal that these purposes do not explain the practice. What emerges from our analysis is that immigration detention is being used as a disciplinary tool to coerce capitulation by vulnerable non-citizens to the will of the state. It would also appear that detention for non-cooperation serves as a means for the Canadian state to display its effectiveness in the realm of immigration control in the face of societal fears relating to the apparent porousness of borders. Simultaneously, the case law reveals the agency migrants retain to push back against the power of the state by refusing to capitulate to state control—and the great cost at which the exercise of such agency comes in the face of the disciplinary society. Despite these tensions, some elementary safeguards could at least temper the injustices wrought by the present state of the law, and their adoption in other jurisdictions suggests their practicability in the Canadian context.

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<sup>113</sup> EC, *Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008*, [2008] OJ, L 348/98 at art 2(2)(b).

<sup>114</sup> *Ibid* at arts 15(5), 15(6).

<sup>115</sup> *Said Shamilovich Kadzoev (Huchbarov)*, C-357/09 PPU, [2009] ECR I-11189 at paras 60–61, 63, 67, 69.

<sup>116</sup> See *Toure ONCA*, *supra* note 3; *Brown FC*, *supra* note 42.

<sup>117</sup> *R v Jordan*, 2016 SCC 27 at para 108.

