

## Canada's use of criminal jails for immigration detainees violates Charter, lawsuit alleges

Canada's use of maximum-security provincial jails for immigration detention is under fire again as two former detainees have launched a class-action lawsuit against the federal government alleging the practice violates the Charter of Rights and Freedoms.

"The purpose of jails is to punish individuals who have committed serious crimes," says lawyer Cory Wanless. "No one who is not convicted of a crime or is not accused of a crime should be placed there."

Immigration detainees are not criminally charged and their detention is not supposed to be punitive. They are detained, on an indefinite basis, for one of three reasons: the Canada Border Services Agency (CBSA) believes they are "unlikely to appear" for their deportation or other immigration matter; their identity hasn't been confirmed, or because the CBSA believes they are a "danger to the public," usually due to past criminal charges for which they have already served a sentence.

The vast majority of detainees - more than 80% - are held solely on the grounds they are "unlikely to appear."

The decision of whether or not to hold someone in immigration detention is made by the quasi-judicial Immigration and Refugee Board, which holds hearings in the first 48 hours after someone is arrested by the CBSA, again after seven days and then every 30 days thereafter.

The fairness of those hearings has been called into question since detainees are often unrepresented and the standards are far below those of a court. But the system has ultimately been upheld as constitutional.

Once the tribunal decides whether or not someone should be detained, however, the location of their detention is at the sole discretion of the CBSA, which uses a simple administrative form to determine whether the detainee will be held in one of two places: a less-restrictive Immigration Holding Centre, which is purpose-built for immigration detention; or a maximum-security provincial jail, where detainees are mixed with and treated the same as someone serving a criminal sentence or awaiting trial.

There is no external oversight of the CBSA's decision.

Tyron Richard, a father of four originally from Grenada and one of the lawsuit's plaintiffs, spent more than 18 months in immigration detention, from January 2015 until July 2016. He spent the bulk of his detention at the Central East Correctional Centre, a maximum-security jail in Lindsay, Ont., where many long-term immigration detainees are held.

Richard, who came to Canada as a teenager and is a permanent resident, was the primary caregiver to three of his children at the time of his arrest by the CBSA. He had just dropped off his kids at school and daycare and was at his job at an auto-repair shop in Scarborough when CBSA officers apprehended him.

A 2008 conviction on break-and-enter and weapons charges, for which he served a nine-month conditional sentence (but no jail time, other than 29 days of pretrial custody), meant his permanent residency would be revoked due to "serious criminality." But Richard appealed and in 2010 won a four-year stay of his deportation, dutifully complying with all of CBSA's conditions and reporting dates. During this time he earned his high school diploma, had a steady job and thought he had done everything he needed to do to maintain his immigration status.

He updated the CBSA every time he changed his address, as was required. But he didn't realize he was also supposed to separately update the Immigration and Refugee Board. As a result, he didn't receive notice of a hearing at the end of his four-year stay, so the board considered his appeal to be abandoned. His deportation order was subsequently revived.

Richard says he wasn't aware of any of this when CBSA officers showed up at his workplace, handcuffed him and sent him to jail, where he would remain for the next year and a half.

"I kept asking them, 'What did I do wrong?'" he said in a recent interview. "They didn't explain anything. I felt helpless. I felt like I was actually never going to see my family again."

Richard, who, with the help of lawyer Subodh Bharati, was eventually able to secure his release and regain his permanent residency, said it was never made clear to him why he was placed in a maximum-security jail rather than an Immigration Holding Centre.

Since immigration detention is not supposed to be punitive, according to both international law and the Canadian government's own description, holding immigration detainees in the most restrictive conditions breaches several Charter rights, the lawsuit alleges, including not to be arbitrarily imprisoned and not to be subjected to cruel and unusual punishment.

"As a nation we decided that in certain circumstances we think it's a good idea to detain those who may be deported or facing deportation," said Wanless, who is representing Richard with Bharati. "Having made that decision we have an obligation as a country to treat them humanely."

The Attorney General of Canada has not filed a statement of defence. In response to questions for this story, a CBSA spokesperson said the agency would not comment on "potential or ongoing litigation."

The potential class-action lawsuit, which was filed Monday and has not yet been certified, comes as the Canadian branches of Amnesty International and Human Rights Watch are in the midst of a cross-country campaign arguing that Canada's treatment of immigration detainees violates international human rights law, particularly by discriminating against detainees with mental health conditions, who are automatically deemed "high risk" by the CBSA and sent to provincial jails as a result.

The organizations are lobbying the provinces to cancel their contracts with the CBSA and stop holding immigration detainees in provincial jails.

Earlier this year, British Columbia agreed to review its contract, the first province to do so.

The lawsuit, which seeks a total of \$100 million in damages, argues that the differences between an Immigration Holding Centre and a maximum-security provincial jail are "stark." In the former, detainees wear their own clothes, are not confined to cells, have freer access to phones and outdoor recreation, and can have multiple daily visits, including direct-contact visits. In provincial jails, detainees are often handcuffed and strip-searched; subject to frequent and unpredictable lockdowns, during which they are confined to their cells for hours or entire days; sometimes placed in solitary confinement; forced to wear prison uniforms; have very limited access to phones and visits; and regularly face violence and the threat of violence. All of which "causes significant deterioration in mental health" or exacerbates existing mental health conditions, reads the statement of claim.

A second plaintiff, Alexis Garcia Paez, spent nearly three weeks in immigration detention last October, according to the lawsuit. A refugee claimant from Mexico, Paez had just been released from the Toronto South Detention Centre following a criminal bail hearing when the CBSA detained him at the same jail, solely on the grounds that he was "unlikely to appear."

Both Paez and Richard have suffered from post-traumatic stress, anxiety and depression, among other conditions, as a result of their detentions, the lawsuit states. Richard developed a fear of small spaces and often struggles to sleep, enduring "frequent" nightmares.

The average length of time someone is held in immigration detention is about three weeks, but some detainees, like Richard, spend much longer behind bars. Since 2016, his lawsuit alleges, Canada has held more than 300 immigration detainees for a year or longer.

While a minority of detainees are held in maximum-security jails — the percentage has ranged from 16 per cent to 40 per cent in the last 10 years - most long-term detainees are held in jail, and roughly two-thirds of all days spent in immigration detention are in jail.

Bharati said immigration detention is actually "harsher" than criminal detention because of its indefinite nature. "I also think it's discriminatory. No Canadian would ever be put in a maximum-security prison without substantive procedural safeguards," he said. "But immigration detainees are."

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