

# “No Life for a Child”

A Roadmap to End Immigration Detention  
of Children and Family Separation



UNIVERSITY OF TORONTO  
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INTERNATIONAL  
HUMAN RIGHTS  
PROGRAM

This publication is the result of an investigation by the International Human Rights Program (IHRP) at the University of Toronto, Faculty of Law. The IHRP enhances the legal protection of existing and emerging international human rights obligations through advocacy, knowledge-exchange, and capacity-building initiatives that provide experiential learning opportunities for students and legal expertise to civil society.

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## LIST OF ACRONYMS

<b>CAS</b>	Children's Aid Society
<b>CBSA</b>	Canada Border Services Agency
<b>CRC</b>	<i>Convention on the Rights of the Child</i>
<b>CRC Committee</b>	United Nations Committee on the Rights of the Child
<b>GTA</b>	Greater Toronto Area
<b>IHC</b>	Immigration Holding Centre
<b>IHRP</b>	International Human Rights Program, University of Toronto's Faculty of Law
<b>IRPA</b>	<i>Immigration and Refugee Protection Act</i>
<b>IRPR</b>	<i>Immigration and Refugee Protection Regulations</i>
<b>TBP</b>	Toronto Bail Program
<b>UN</b>	United Nations
<b>UNHCR</b>	United Nations High Commissioner for Refugees



# FOREWORD

# Foreword

François Crépeau

Children represent around a quarter of all migrants worldwide. Children migrate for various reasons: to escape violence and conflict, to offset insecurity about their future, or to be reunited with family in the country of destination. They migrate alone or with family members, and some are separated during the course of migration. Without regular status and the protection that comes with it, children on the move are particularly vulnerable to exploitation, violence and abuse. The unknown social and cultural environment, as well as their age and level of development, often make it impossible for children to be aware of and assert their rights.

Rather than regain control of migration movements by opening regular, safe and cheap channels for migration, States continue to erect walls, use barbed-wired fences and take severe deterrence measures, such as systemically detaining migrants, including children. States resort to a wide range of reasons to justify the detention of migrants: health and security screening, identity checks, preventing absconding and facilitating removal. In transit as well as in destination countries, the experience of migrant children is too often linked to their status as migrants rather than to their age.

The *Universal Declaration of Human Rights* and the *International Covenant on Civil and Political Rights* both proclaim the right to liberty and security of person. This right applies to everyone subject to the jurisdiction of a State and to all forms of detention, including for immigration purposes. In order not to violate the right to liberty and security of a person, as well as to protect against arbitrariness, the detention of migrants must be legally prescribed, necessary, reasonable and proportionate. Freedom should be the default position for migrants, as it is for citizens and legal residents.

Most of the time, detention serves the sole purpose of deterrence, a practice counter to Immanuel Kant's categorical imperative: "Act in such a way that you treat humanity, whether in your own person or in the person of any other, never merely as a means to an end, but always at the same time as an end" (*Groundwork of the Metaphysic of Morals*). This dictum sits at the root of our contemporary human rights doctrine.

In addition to the general human rights framework described above, children are entitled to the protection afforded to them by the *Convention on the Rights of the Child* (CRC), which is the most ratified UN human rights treaty, lacking only one ratification in the whole of UN membership. The CRC proclaims that "no child shall be deprived of his liberty arbitrarily" (Article 37(b)), and "in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration" (Article 3).

Detention for administrative purposes can never be in the best interests of a child, as the UN Committee on the Rights of the Child rightly concluded in 2012. It harms their physical and psychological well-being and has adverse effects on their development. It might aggravate trauma experienced in the home or transit country, and the constant control and surveillance may be very disturbing for a child, increasing already high levels of mental distress. Separation from community and the outside world leads to an increased sense of isolation. The often poor hygienic conditions and unbalanced diet have negative consequences on physical well-being and development. Frequently, children and adults are detained together, leading to physical and sexual violence and abuse, while disrespectful staff may further exacerbate feelings of humiliation.

## FOREWORD

Unaccompanied children should never be detained purely on the basis of their migration or residence status, or lack thereof, nor should they be criminalized solely for reasons of irregular entry or presence in the country, as irregular migration is not a crime. Unaccompanied children should be treated as children first and placed in the alternative care system, either family-type or institutional care. Under no circumstances should they be left on their own, as such neglect leaves them vulnerable to violence. States should systematically appoint an independent and competent guardian as soon as the unaccompanied or separated child is identified, and maintain such guardianship arrangements until the child has either reached the age of majority or has permanently left the jurisdiction of the State. It is important that the guardian not only take care of administrative processes related to immigration status, but that he or she advocate for the child's rights and best interests in all aspects of life, including by preventing detention.

The detention of children with their parents is often justified by States using Article 9 of the CRC, which states that children shall not be separated from their parents against their will. However, Article 2 of the CRC provides that children shall not to be punished for the acts of their parents, legal guardians or family members. Hence, not only may the detention of children violate the "best interests" principle, but it may also violate their right to not be punished for the acts of their parents. I have personally observed families detained in the same detention centre, but separated, absurdly, into three groups (women, girls and infants; male teenagers; adult males), with only one daily hour of common family time.

A decision to detain migrant families with children should therefore only be taken in extremely exceptional circumstances; all families with children should be offered alternatives to detention. Such non-custodial measures may include registration requirements, deposit of documents, reasonable bond/bail or surety/guarantor, reporting requirements, and case-management/supervised release.

When applying alternatives to detention, States need to make sure they respect children's rights, including to education, to the enjoyment of the highest possible standard of health, to an adequate standard of living, to rest, leisure and play, to practise their own religion and to use their own language.

In conclusion, children, whether unaccompanied or travelling with their family, should never be detained for the sole reason of their administrative status or that of their parents, as detention can *never ever* be in their best interests. Irregular migration is not a crime and extremely few of those children present any danger to society. Children should be treated as children first, and non-custodial alternatives to detention should be offered to all such unaccompanied children and to families with children. The question for all decision-makers, up to the Minister, to ask themselves is: "Would I accept that my child be treated thus?"

A well-researched and -considered report such as this one, which permits access to the voices of children and highlights the threats that administrative detention poses to their health and well-being, is essential. Policy- and decision-makers should heed the call.

## François Crépeau

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# SUMMARY

# Summary

Over the past several years, Canada has held hundreds of children in immigration detention. These include children from Syria and other war-torn regions, as well as children with Canadian citizenship who are not formally detained but live in detention facilities with their parent(s) as *de facto* detainees. Some children are held in solitary confinement. Children who live in detention for even brief periods experience significant psychological harm that often persists long after they are released.

Where children are spared detention, they are often separated from their detained parents and, as a result, experience similarly grave mental health consequences.

Canada's current practices relating to immigration detention of children are in violation of its international legal obligations. The foundational principle of the best interests of the child — enshrined in the *Convention on the Rights of the Child* — should become a primary consideration in all detention-related decisions affecting children. Currently, the best interests of the child are inadequately protected.

This report uncovers the deficient legal underpinnings and detrimental practical implications of child immigration detention in Canada, and provides recommendations for ensuring that Canada's immigration detention regime complies with its domestic and international legal obligations. In doing so, this report builds upon years of advocacy by refugee and child rights groups in Canada that have called on the government to ensure that children's best interests are a primary consideration in decisions affecting them, and ultimately, to end child detention and family separation.

\*\*\*

Life in immigration detention is woefully unsuited for children. Immigration Holding Centres (IHCs) are medium-security facilities in which children and families are subject to constant surveillance, frequent searches, and restricted mobility within the facility. These measures severely constrain detainees' liberty and privacy, leading to particularly detrimental effects on children in detention. Family separation within IHC facilities means children have limited opportunity to interact with their fathers or other male family members. Education in IHCs is inadequate due to inconsistent frequency and quality, and recreational activities are scarce. Children living in IHCs also have few opportunities to socialize and develop friendships with other children of the same age. In the stressful conditions of detention, pervasive under-stimulation and boredom create a sense of deprivation and powerlessness among children, often resulting in lasting mental health issues.

Research shows that living in immigration detention causes serious psychological harm to children. Children who have lived in detention experience increased symptoms of depression, anxiety, post-traumatic stress, and suicidal ideation. Many also experience developmental delays and behavioural issues. These mental health consequences often persist long after the children have been released, affecting their adjustment to life post-detention. As such, living in detention is never in the best interests of children, and detention should therefore be avoided. This principle is firmly established in international law. Canada is not living up to these standards.

## SUMMARY

While the best interests of the child necessitate alternatives to detention, family separation is not an acceptable alternative. Child detention cannot be remedied simply by detaining parents without their children, a practice that may expose children to apprehension by child protection services. Research bears out the obvious: family separation causes significant psychological distress, and may contribute to post-traumatic stress and other emotional difficulties for both children and their parents. Family separation for the purposes of immigration detention is never in the best interests of children.

The principle of the best interests of the child thus requires consideration of the harms that result both from detention and from family separation. In other words, the best interests of the child and family unity must be treated as twin principles. Viable alternatives to detention and family separation must involve less restrictive community-based arrangements that allow children to reside with their parents. These arrangements include reporting obligations, financial deposits, guarantors, electronic monitoring, third-party risk management programs and, in extraordinary circumstances, open accommodation centres.

Community-based alternatives to detention avoid the detrimental psychological effects of living in detention and family separation, while continuing to serve immigration control objectives. Such alternatives allow for the dignified, humane, and respectful treatment of children and families, and facilitate the protection of their fundamental rights. They are also more cost-effective than either detention or family separation. Authorities can ensure a high rate of compliance when migrants are treated with dignity, understand their rights and duties, receive adequate material support, as well as case management and legal services early and throughout the process.

Community-based alternatives involve less onerous restrictions than detention and family separation; however, such arrangements still constrain the liberty of children and families. As such, community-based alternatives must be tailored to the circumstances of each case, and only used where unconditional release is determined to be inappropriate.

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Recent initiatives by Canada's federal government and the Canada Border Services Agency (CBSA) indicate a strong willingness to reform the immigration detention regime, with a particular view to protecting children and addressing mental health issues. The government has also expressed an intention to engage extensively with non-governmental organizations and other civil society stakeholders in the process of revising relevant policy and designing new programs. The International Human Rights Program (IHRP) is supportive of these efforts, and welcomes the opportunity to collaborate further in order to ensure that Canada is meeting its international human rights obligations.





# INTRODUCTION

“If we fail in our duty of care to the smallest and most vulnerable among us,  
then we fail the most basic test of justice and compassion.”

— Minister of Public Safety and Emergency Preparedness, Ralph Goodale<sup>1</sup>

## Introduction

Statistical records of children living in immigration detention in Canada are scarce. However, figures obtained by the International Human Rights Program (IHRP) through access to information requests indicate that, between 2010 and 2014, an average of 242 children were detained each year, although these numbers have decreased in the last two years within this period.<sup>2</sup> Nevertheless, these figures are an underestimate because they do not account for all children who are not subject to formal detention orders, but are still living with their parents in detention as *de facto* detainees. In 2014–2015, *de facto* detained children spent, on average, nearly three times as long in detention as children under a formal detention order.<sup>3</sup> Some of these *de facto* detainees are children with Canadian citizenship.<sup>4</sup>

### CHILDREN IN DETENTION BY CITIZENSHIP, 2014

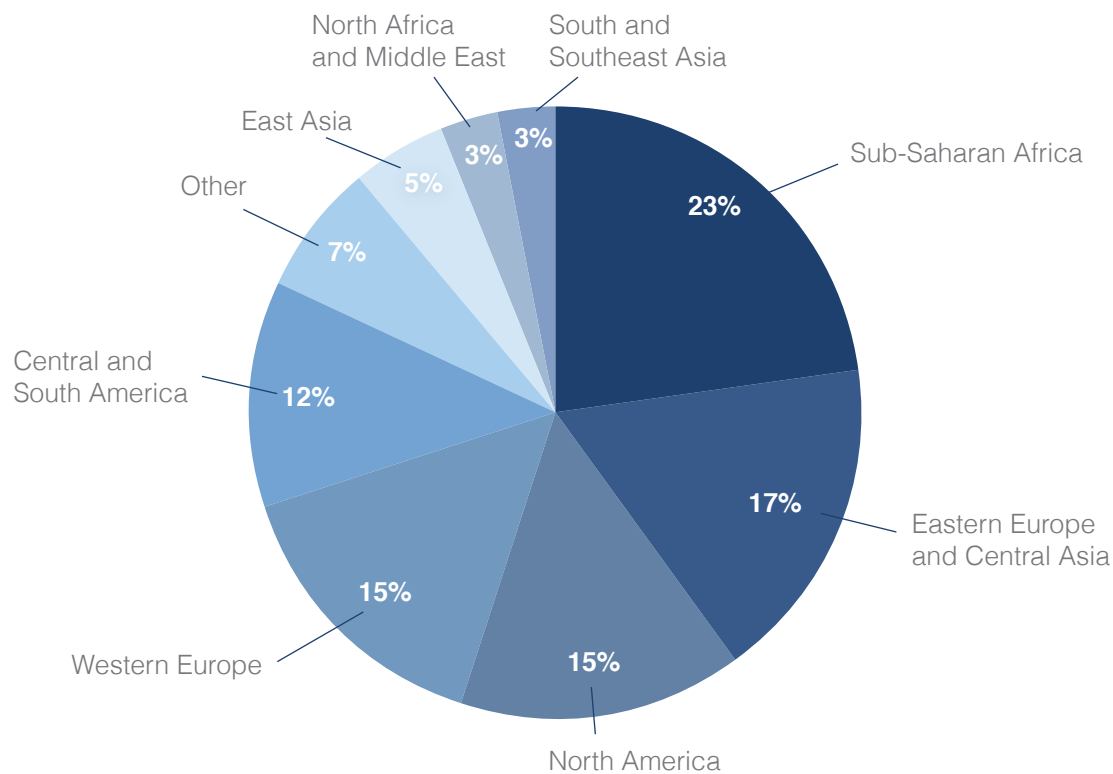
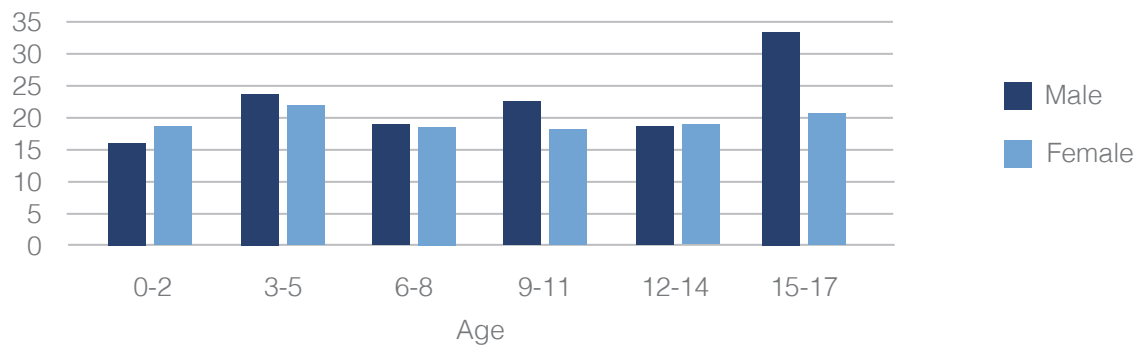


Figure 1: Children in Canadian immigration detention come from all areas of the world.<sup>5</sup>

## INTRODUCTION

### NUMBER OF CHILDREN IN DETENTION BY GENDER AND AGE, YEARLY AVERAGE 2010-2014



**Figure 2: Children of all ages are held in immigration detention in Canada.<sup>6</sup> These figures do not account for all children who are not subject to formal detention orders, but are still living with their parents in detention as *de facto* detainees.**

Although the applicable legislation and policy guidelines provide for special considerations regarding children in the context of immigration detention, the best interests of the child are inadequately accommodated. This is the case whether or not children are subject to formal detention orders. Children who are not themselves subject to formal detention orders, but whose parents are detained, face the awful choice between separating from their parents, or living in detention with their parents as *de facto* detainees. Where detained parents elect to spare their children from detention, they are released to other family members, if possible, or to a child protection agency.<sup>7</sup> However, even where children remain in Immigration Holding Centres (IHCs) with their detained parents, family separation is not entirely preventable: children must live separately from their fathers because the family rooms are restricted to mothers and children.<sup>8</sup> Accordingly, children live with their mothers in detention, and may only visit their fathers for a short period each day.<sup>9</sup> Both detention and family separation have profoundly harmful mental health consequences, and neither option is in a child's best interests.<sup>10</sup>

The United Nations Committee on the Rights of the Child (CRC Committee) has repeatedly criticized Canada, most recently in 2012, for its child detention practices.<sup>11</sup> In particular, the CRC Committee expressed grave concern over the scale of child detention in Canada, and the ongoing failure of Canadian immigration officials to adequately consider the best interests of children.<sup>12</sup> The United Nations High Commissioner for Refugees (UNHCR) has selected Canada as one of 12 countries to participate in its Global Strategy Beyond Detention program, which is aimed at ending immigration detention of asylum seekers and refugees, and children in particular.<sup>13</sup>

In response to criticism of Canada's immigration detention practices, Minister of Public Safety and Emergency Preparedness, Ralph Goodale, has expressed a commitment to "avoid housing children in detention facilities, as much as humanly possible."<sup>14</sup> It is crucial, however, that family separation is not instituted as an alternative to detention. The practice of detaining parents without their children is not an acceptable alternative to housing

## INTRODUCTION

children in detention facilities because family separation also inflicts serious psychological harms on children. The principle of family unity is firmly established in the *Convention on the Rights of the Child* (CRC).<sup>15</sup> As such, prohibiting both child detention and family separation must be viewed as twin principles. In order to meaningfully accommodate the best interests of the child, alternatives to detention should allow children to live in the community with their parents.

# VOICES FROM THE INSIDE: Kimona and Delano\*

By November 2015, Kimona and her 4-year-old son, Delano, had been detained at the Toronto IHC for six months.<sup>16</sup> According to Kimona, Delano was constantly preoccupied with leaving detention. “He would ask me every day, ‘Where is the door to go? How do I get out?’” Kimona was concerned about the effect of detention on Delano’s emotional and behavioural development. She explained that her son had become “angry about everything”; he said that he was “locked in these walls.” He did not sleep well and cried during the night. Delano had not received any psychiatric care or psychosocial support to help him cope with his anger and deteriorating mental health.

Kimona was also concerned about her son’s nutrition; he ate few vegetables, had lost a significant amount of weight since entering the IHC and frequently complained about being hungry. Delano had many food allergies and it took months for the IHC to provide him with suitable and adequate nutrition.

Kimona reported that the IHC provided inadequate educational and recreational opportunities. According to Kimona, a teacher attended the IHC three times a week to teach children of disparate ages — from 4 to 19 years of age. Kimona and Delano were only allowed

to go outside for short periods of time, where Delano was able to play on a few pieces of old playground equipment located in austere concrete surroundings. Given the facility’s tight control on detainees’ mobility, Delano was forced to share the outdoor space with others whose behaviour was compromised by the same stressful conditions of confinement and who, as a result, may have posed a danger to young children. Kimona recounted an incident in which an adolescent detainee pushed Delano to the ground.

“This is no life for a child,” Kimona explained. “He’s suffering and he’s not doing the things he should be doing: just being free on the grass, kicking a ball, whatever. Just not staying here.”

Kimona and Delano have since been deported from Canada.

*\*The individuals’ names have been changed to protect their identities.*

### UNDER REVIEW: National Immigration Detention Framework

Canada Border Services Agency (CBSA) is in the midst of designing a National Immigration Detention Framework, the key components of which are: Partnerships, Alternatives to Detention, Mental Health and Transparency.<sup>17</sup> Specifically, CBSA has outlined plans to reform the immigration detention program to:

- Increase the availability of effective alternatives to detention;
- Reduce the use of provincial jails for immigration detention by making safe, higher quality, federally operated facilities specifically designed for immigration purposes more readily accessible, thus avoiding, to the extent possible, intermingling of immigration/refugee cases with criminal elements;
- Eliminate the detention of minors, except in the most limited and exceptional circumstances in detention facilities;
- Enhance the health, mental health and other human services available to those detained;
- Maintain access to detention facilities for agencies such as the United Nations High Commissioner for Refugees (UNHCR), the Canadian Red Cross, legal and spiritual advisers, and others who provide support and counselling; and
- Achieve greater transparency, including effective independent scrutiny and review of all CBSA operations and proper responses to any specific complaints about officers or facilities.<sup>18</sup>

During the drafting of this report, the IHRP engaged in extensive discussions with CBSA regarding the report's findings and recommendations. CBSA's responses are included throughout the report in *UNDER REVIEW* sections, as well as in Appendix A.



# **CHILD DETENTION PRACTICES IN CANADA**

# Child Detention Practices in Canada

## Detention in Ontario and Québec: Immigration Holding Centres

Children are generally detained in one of two IHCs — located in Toronto and Laval — designed to accommodate long-term stays.<sup>19</sup> These facilities resemble medium-security prisons,<sup>20</sup> with significant restrictions on privacy and liberty, inadequate access to education, insufficient recreational opportunities and poor nutrition. While primary medical care is available at the IHCs, counselling services and mental health support are not provided.<sup>21</sup>

Detainees are under constant surveillance and their daily routines are controlled by strict schedules and rules, the breach of which may result in suspension of privileges or transfer to a more secure facility.<sup>22</sup> Detainees are required to wake up and eat meals at designated times.<sup>23</sup> They are prohibited from closing their cell doors, sometimes even at night.<sup>24</sup> This restriction not only deprives detainees of privacy, but also makes sleeping difficult due to the constant light and noise from the hallways.<sup>25</sup> Some detainees have characterized these sleep disruptions as abusive.<sup>26</sup> Detainees, including children, are subject to body searches each time they leave and re-enter the building,<sup>27</sup> and they may only move between different sections of the IHC if escorted by a guard.<sup>28</sup> Children are detained with their mothers in a separate wing from their fathers, and family visits are generally limited to short periods of time each day.<sup>29</sup>

Children detained at IHCs do not have access to adequate education. The UNHCR Detention Guidelines provide that “[c]hildren, regardless of their length of detention or stay, have a right to access at least primary education,” which should preferably take place off-site at local schools that have superior resources and opportunities for children to socialize.<sup>30</sup> However, CBSA is only “committed in providing education after seven days [of detention] for school age children,” at the IHC (rather than off-site).<sup>31</sup> In addition, there is no clear guideline detailing the level, quality or frequency of education to be provided.<sup>32</sup> Families held at one IHC reported that the few hours of second-language tutoring provided to their children did not constitute “real school.”<sup>33</sup> Furthermore, educational opportunities are only made available to children within particular age groups.<sup>34</sup>

Children are also limited in their recreational activity, particularly because they often lack the opportunity to interact with other children.<sup>35</sup> Interviews with families and children detained at IHCs revealed that “there was little to do in the IHC,” and boredom was “pervasive.”<sup>36</sup> Although outdoor recreational areas are available at both the Toronto and Laval IHCs,<sup>37</sup> detainees at the Toronto IHC reported that the yard only contained some old playground toys on a concrete surface.<sup>38</sup> Indoor recreational opportunities for children are generally limited to sedentary activities, such as watching television.<sup>39</sup> Furthermore, children often do not have the opportunity to socialize with children their own age and, unable to interact with children outside the detention facility, they are limited to exceedingly transient friendships.<sup>40</sup>

IHC conditions may also endanger children's health. In the Laval IHC, the Canadian Red Cross Society reported problems with the heating system, lack of air conditioning, and traces of mold and mildew.<sup>41</sup> In Toronto, detainees reported a lack of ventilation and poor air quality, causing some of the children to suffer regular nosebleeds.<sup>42</sup> Mothers detained at the Toronto IHC also expressed concern about inadequate nutrition provided to their children, especially in the case of infants.<sup>43</sup>



## CHILD DETENTION PRACTICES IN CANADA

Detention in IHCs is woefully unsuited for children, whether they are under a formal detention order or accompanying their detained parents as *de facto* detainees. The constant and invasive surveillance, strict schedules and pervasive under-stimulation transform “daily life into an experience of deprivation and powerlessness.”<sup>44</sup> Furthermore, from the perspective of children, the circumstances of detention invoke a perception of adult figures as “either powerless, anxious, and without a capacity to be protective (in the case of parents), or unpredictably oscillating between warmth and a cold-rejecting stance (in the case of the guards).”<sup>45</sup> Taken together, it is the *fact* of detention — not merely the conditions of detention — that is fundamentally harmful to children’s well-being.

In reforming the immigration detention system, Minister Goodale noted that one of the Ministry’s objectives is to “enhance the health, mental health and other human services available to those detained.”<sup>46</sup> However, the amelioration of detention conditions and services for detainees must not diminish efforts to eliminate detention of children, and reduce the scope of immigration detention in general. Detention is inherently harmful to both children and adults.

## VOICES FROM THE INSIDE: Hasan and Mohammed\*

In 2012, Hasan and Mohammed were 5 and 6 years old when they were detained with their parents, who had been in the process of appealing their rejected asylum claim.<sup>47</sup> The parents had fled to Canada after their eldest son was kidnapped and presumed murdered because of the family’s religious association. Mohammed and Hasan were born in Canada and, as Canadian citizens, they were not subject to the detention order, but accompanied their parents in detention to avoid being separated from them.

The parents were arrested during a routine immigration meeting with CBSA. It was a highly traumatic experience for the boys, particularly because in 2011, they witnessed CBSA officers arresting their father when he went to a hospital after a car accident. He was handcuffed and shackled in front of the children and detained for five days. When CBSA officers arrested the parents a year later, Hasan tried to resist and was physically forced into the van taking the family to the IHC.

According to the boys’ mother, during the brief period of detention, the children were frightened by the guards, appeared anxious, had difficulty sleeping and ate little. However, the most concerning symptoms emerged after, and as a result of, detention. In particular, both boys developed difficulty separating from their parents.

Hasan’s significant anxiety made it difficult for him to attend school for a month following the family’s detention. He worried that he would be “taken away” to detention again, and became frightened of police cars, authorities in uniform, and vans. He became particularly scared of the building where the family attended their weekly reporting obligations. Hasan remained anxious about such reminders of detention for nearly two years. He became irritable, explosive and easily aggressive, which affected his interactions with peers. According to his mother, since the family’s detention, “Hasan is not the same person.”

## **VOICES FROM THE INSIDE: Hasan and Mohammed\***

Mohammed developed distressing symptoms amounting to selective mutism. His school performance suffered because he stopped speaking with adults and refused to participate in classroom activities. Although his symptoms improved somewhat after a year, he remained excessively shy and his parents worried that this would affect his academic performance. Mohammed also had difficulty falling asleep because he was “afraid to close his eyes.” When he did manage to fall asleep, he had nightmares in which he was running to save his mother after someone had grabbed her from behind. He often talked and cried in his sleep. Mohammed also developed a fear of institutional buildings, particularly the health-care centre where the family was seeking psychological support.

The clinicians who interviewed the family two years after their detention noted the multiple stressors that Hasan and Mohammed faced, including “their mother’s high levels of distress, the threat of deportation, school difficulties, and the awareness of their elder brother’s disappearance and possible murder.” However, the boys’ functional decline following detention suggests that this experience was itself traumatic and exacerbated pre-existing sources of stress.

*\*The individuals’ names have been changed to protect their identities.*

## **Detention Outside of Ontario and Québec: Correctional Facilities**

Child detention practices vary considerably among regions across Canada. Outside of Ontario and Québec, families and children are detained in facilities that are even less suitable. In British Columbia, where the IHC is designed to hold detainees only for a maximum of 48 hours,<sup>48</sup> families and children have been detained for longer periods.<sup>49</sup> The Canadian Red Cross Society confirmed that this is inappropriate, especially for children.<sup>50</sup> Where IHCs are unavailable, families and children may be detained in provincial correctional facilities, such as the Calgary Young Offender Centre and the Burnaby Youth Custody Services.<sup>51</sup> Between 2010 and 2014, an average of 11 children were held in non-IHC facilities each year.<sup>52</sup> The majority of these children were held in police stations and correctional facilities, which are not designed to accommodate immigration detainees or children.<sup>53</sup> Conditions of confinement and intermingling with criminal detainees in these facilities lead to even greater deprivations of liberty than at the IHCs in Ontario and Québec, and British Columbia’s short-term IHC facility.<sup>54</sup>

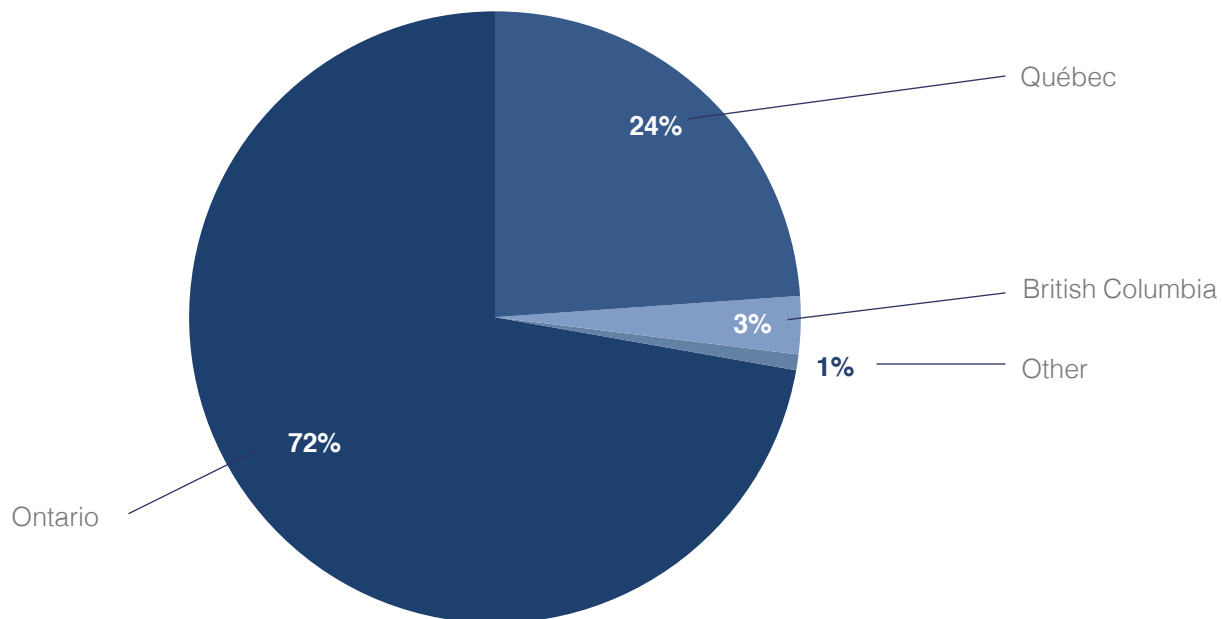
While the IHCs in Ontario and Québec may provide more favourable conditions of confinement than facilities in the rest of Canada, the availability of IHCs seems to increase instances of child detention. Figures obtained by the IHRP through access to information requests indicate that in 2014, 96% of detained children were held in Ontario and Québec.<sup>55</sup> Although the migrant populations into Ontario and Québec are larger than in other provinces,<sup>56</sup> the disparate rates of child detention across the country may be the result of designated detention infrastructure in Ontario and Québec. The fact that long-term IHCs exist may make it more likely that CBSA officers and Immigration Division adjudicators interpret standards differently and apply discretion inconsistently,

## CHILD DETENTION PRACTICES IN CANADA

leading to greater instances of child detention in Ontario and Québec. A 2010 CBSA Evaluation Study on its Detentions and Removals Program stated that:

... in the Pacific Region, minors there are generally released with one parent while the other parent is held in detention, or they are transferred to the care of child and family services. CBSA staff in the Atlantic and Prairie regions indicated they were extremely unlikely to detain minors or persons with mental health issues or other special needs, drawing instead on community agencies and resources where possible to take care of them during immigration processes and hearings.<sup>57</sup>

### CHILDREN IN DETENTION BY REGION, 2014



**Figure 3: In 2014, the vast majority of children in immigration detention were held in Ontario and Quebec.<sup>58</sup>**

Minister Goodale has expressed a commitment “to reduce the use of provincial jails for immigration detention by making safe, higher quality, federally operated facilities — specifically designed for immigration purposes — more readily accessible.”<sup>59</sup> However, the above CBSA report suggests that where IHCs are unavailable, adjudicators rely more heavily on community-based arrangements. Accordingly, added infrastructure may in fact be counter-productive to reducing the detention of children and families. Instead, the government’s priority should be to increase investment in community-based programs that could drastically reduce child detention.

## CHILD DETENTION PRACTICES IN CANADA

### Children in Solitary Confinement

Solitary confinement<sup>60</sup> constitutes physical and social isolation for at least 22 hours per day.<sup>61</sup> Even brief periods of solitary confinement cause serious psychological harm and the “health risks rise with each additional day spent in such conditions.”<sup>62</sup> The consequences are particularly detrimental for children, who experience time in solitary confinement differently from adults: a few days may feel like several weeks.<sup>63</sup> Sensory deprivation and social isolation have a profound impact on children’s brain development.<sup>64</sup>

In early 2016, two 16-year-old boys were held in solitary confinement — in one instance, for three weeks — at the Toronto IHC.<sup>65</sup> Given the inadequate statistical records, it is not clear how often children are placed in solitary confinement. According to CBSA policy, unaccompanied children are “generally released to family members or to a child protection agency.”<sup>66</sup> However, the National Standards and Monitoring Plan for the Regulation and Operation of CBSA Detention Centres provides that where unaccompanied minors are detained, “if under the age of 18, they should not be kept with detained adults.”<sup>67</sup> According to psychologist Janet Cleveland, who has studied the effects of detention at IHCs on children’s mental health,

When unaccompanied minors are detained, they are routinely held in segregation. This is due to the fact that they must be kept separate from adult detainees, in principle for their own protection. ... There is a kind of systemic double bind when detaining unaccompanied minors: either they are mingled with adults who are not family members (a potential risk) or, worse yet, they are placed in solitary confinement.<sup>68</sup>

### UNDER REVIEW: Segregation for Protection

CBSA stated that it “only seek[s] to segregate persons where it is necessary to ensure the safety of the person concerned, where a specific security risk needed to be mitigated, or where it is specifically requested by the person concerned.”<sup>69</sup> However, CBSA is conducting a comprehensive review of its regulations and policies pertaining to the Detention Program, and “the review will look at, among other things, the topic of isolation.”<sup>70</sup>

International law resolutely prohibits solitary confinement of children. The United Nations Special Rapporteur on Torture has stated that subjecting children to solitary confinement for any length of time constitutes a violation of the *International Covenant on Civil and Political Rights* and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.<sup>71</sup> Similarly, the CRC Committee, the body charged with providing authoritative guidance on the binding content of states’ obligations under the CRC, has stated that solitary confinement should be “strictly forbidden” for children.<sup>72</sup> Consistent with these principles, several European countries have adopted a complete prohibition against the detention of unaccompanied children.<sup>73</sup>

## CHILD DETENTION PRACTICES IN CANADA

Given the “systemic double bind” facing unaccompanied children in detention — namely, they are either co-mingled with non-family adults or placed in solitary confinement — unaccompanied children should not be detained. In order to abide by its international law obligations and effectively ensure that children are not subjected to solitary confinement, Canada should enact a statutory prohibition against the detention of unaccompanied children.

# VOICES FROM THE INSIDE: Mohammed\*

In February 2016, 16-year-old Mohammed arrived alone at the Canada–United States border at Fort Erie, Ontario, hoping to seek asylum in one of the only countries in the world welcoming Syrian refugees.<sup>74</sup> After fleeing war-torn Syria to Egypt, Mohammed’s Egyptian residency permit expired.<sup>75</sup> Fearing that he may be deported back to Syria, Mohammed’s parents sent him to Canada, where he has extended family.<sup>76</sup>

However, what Mohammed experienced was far from welcoming. Upon arrival at the Canadian border, CBSA officers took Mohammed into custody and placed him in solitary confinement for three weeks at the Toronto IHC.<sup>77</sup> CBSA ordered that Mohammed be deported back to the United States, a country in which he had no family, and where there was no certainty as to his future.<sup>78</sup> The United States is the only country in the world that has yet to ratify the CRC;<sup>79</sup> within its borders, children are routinely subjected to immigration detention.<sup>80</sup>

During his time in Canadian immigration detention awaiting deportation to the United States, Mohammed was not able to contact his family and was allowed

outside for only 30 minutes a day.<sup>81</sup> “Canada government brings many people from Syria, Jordan and Lebanon, Turkey, but I am coming here, and they don’t accept me,” he said. “Three weeks in detention, I’m feeling sad, and I cry all the time. The room, the iron on the windows, I’m afraid.”<sup>82</sup>

Human rights advocates have called this case “outrageous,”<sup>83</sup> “an inexcusable travesty,”<sup>84</sup> and “out of step with the new government’s pledge to make Canada a more welcoming place for refugees.”<sup>85</sup> After CBSA initially delayed his deportation by a week, Mohammed was temporarily released to a community organization for refugees, where he received shelter and support.<sup>86</sup> Days before Mohammed was due to be deported, Minister of Immigration, Refugees and Citizenship, John McCallum, intervened in the case, and approved Mohammed for permanent residency based on humanitarian and compassionate grounds.<sup>87</sup>

*\*The individual’s name has been changed to protect his identity.*



# **MENTAL HEALTH CONSEQUENCES OF FAMILY SEPARATION AND CHILD DETENTION**

# Mental Health Consequences of Family Separation and Child Detention

The detrimental effects of immigration detention on children's mental health have been extensively documented worldwide.<sup>88</sup> Unfortunately, Canadian researchers have severely limited opportunities to conduct studies on the subject because they have had little access to immigration detainees held in IHCs or correctional facilities.<sup>89</sup> Only a few Canadian studies on the mental health of immigration detainees are available. Nevertheless, those studies have confirmed that detained children experience "high rates of psychiatric symptoms, including self-harm, suicidality, severe depression, regression of milestones, physical health problems, and post-traumatic presentations."<sup>90</sup> Younger children in detention also experience developmental delays and regression, separation anxiety and attachment issues, and behavioural changes, such as increased aggressiveness.<sup>91</sup> One of the few Canadian studies to date confirmed that "immigration detention is an acutely stressful and potentially traumatic experience for children."<sup>92</sup> The same research shows that family separation also has severe detrimental psychological effects on children.<sup>93</sup> As such, neither detention nor family separation account for the best interests of the child.

In "Asylum-Seeking Children's Experiences of Detention in Canada," researchers from McGill University reported findings from interviews with 20 families, including children ranging from infants to teenagers, who were held in the Toronto and Laval IHCs.<sup>94</sup> The study found that children who were detained with their parents were severely affected by detention. Children reacted to confinement with "extreme distress, fear, and a deterioration of functioning," exhibiting a range of symptoms both during detention and after release.<sup>95</sup> Parents reported that, while in detention, their children became aggressive and commonly exhibited symptoms of separation anxiety and depression, as well as difficulty sleeping and loss of appetite.<sup>96</sup> Following release from detention, children continued to experience emotional distress for months, including separation anxiety, selective mutism, sleep difficulties and post-traumatic symptoms.<sup>97</sup> Several children developed a fear of symbols of authority (such as uniforms, police vehicles and institutional buildings) and their academic performance deteriorated.<sup>98</sup>

At the time of the interviews, the average length of detention was 56.4 days, but the median length was 13.5 days.<sup>99</sup> The relatively brief period of detention in the majority of cases makes the severity of the resulting psychiatric symptoms particularly alarming.<sup>100</sup>

A study of children in immigration detention in the United Kingdom found similar results.<sup>101</sup> Researchers interviewed 11 children and found that they were "disorientated, confused and frightened by the detention setting," and that they exhibited symptoms of depression and anxiety.<sup>102</sup> Many also experienced sleep problems, eating problems and somatic symptoms, such as headaches and abdominal pains.<sup>103</sup> Parents reported that their detained children showed high levels of emotional and behavioural difficulties, including problems in peer relationships, hyperactive behaviour and conduct problems, despite having been well-behaved prior to detention.<sup>104</sup>

Children are also impacted by the effects of immigration detention on their parents' mental health. Studies in Canada and other Western countries have shown that adult asylum-seekers who are detained for even a brief period experience higher levels of depression, anxiety and post-traumatic stress than those who are not detained.<sup>105</sup> Research shows that detained parents also exhibit high levels of psychological distress<sup>106</sup> and suicidal



## MENTAL HEALTH CONSEQUENCES OF FAMILY SEPARATION AND CHILD DETENTION

ideation, with some detainees reporting that “it would be better if they were dead.”<sup>107</sup> There is extensive literature indicating that children of parents with poor mental health are more likely to experience behavioural problems and psychiatric illnesses, including depression, anxiety and substance dependence.<sup>108</sup> Accordingly, the adverse effect of detention on parents’ mental health is another pathway by which immigration detention harms children.

Family separation also has detrimental effects on children’s mental health. In the McGill study, 14 of the 20 families interviewed experienced separation in the course of detention,<sup>109</sup> causing children significant distress.<sup>110</sup> In cases where parents were detained without their children, although visitation hours were accommodated, some children were so distressed by the conditions of the visits (especially being searched by the guards) that parents decided that it was better for their children not to visit them.<sup>111</sup> Being separated from their parents had a significant and lasting emotional toll on the children involved, particularly in families that had experienced traumatic separation before fleeing to Canada.<sup>112</sup> The researchers concluded that the “separation of families is not in children’s best interests.”<sup>113</sup> In fact, “state-imposed separation of children from their detained parents is usually *even more detrimental* than allowing them to stay with their parents” (emphasis added).<sup>114</sup> These results align with research findings in the United States, which indicated that children who were separated from their detained parents experienced significant changes in behaviour, including increased aggression and withdrawal.<sup>115</sup>

Children’s mental health also suffers when only one of their parents is detained. A study from the United States found that parents whose spouses had been detained experienced symptoms of depression and anxiety, as well as feelings of hopelessness and worthlessness.<sup>116</sup> These symptoms were “exacerbated by stress and worry over their inability to provide for their children, prolonged separation from spouses ... and uncertainty over whether and when they and/or their spouses might be deported.”<sup>117</sup> Family separation is detrimental to parents’ mental health thereby also harming children’s well-being.

The best interests of the child cannot be meaningfully accommodated where immigration detainees face the option of either subjecting their children to *de facto* detention or separating from them. Deciding between these alternatives is effectively a choice between modalities for the production of grave mental health consequences. It is never in the best interests of children to be separated from the care of their parents or to live in immigration detention.

## UNDER REVIEW: Diversity and Mental Health Training

Training is a key aspect of the National Immigration Detention Framework. According to CBSA, “[d]iversity and cultural awareness training is mandatory for security personnel who interact with immigration detainees on a daily basis.”<sup>118</sup> While mental health training — specifically, identification of mental health issues and suicide prevention — is required for contract security personnel and CBSA employees working at IHCs, CBSA noted that it is refining its policy “to ensure consistency of program delivery through a comprehensive training plan.”<sup>119</sup>

## IN FOCUS: Sandplay and Stories

In a recent study on children's experiences in immigration detention, researchers from McGill University explored the perspectives of younger children using a method called "sandplay."<sup>120</sup> Researchers provided children with a miniature sand box (or sand tray) and a variety of figurines, including people, furniture, houses, vehicles, animals and religious symbols. They then asked the children to "create a world in the sand," and prompted them to "tell the story of this world."

The study included 10 children between the ages of 3 and 12 years. Five of the children were in detention at the time of the study and the rest participated in the study after they had been released.

Psychiatrist Rachel Kronick explained that the sandplay method is particularly appropriate in this context because direct questioning about trauma and detention would be too frightening for the children and their parents may view such questioning as inappropriate. In addition, children often express "what is going on in their interior world" through play and imagination.

"Over all, we saw very high levels of psychological distress expressed through the sandplay," Dr. Kronick explained.

In particular, children were showing signs of traumatic re-enactment: trauma being played out in a repetitive way. Children were grappling with imprisonment, confinement, and surveillance. Many children told stories of people being held captive, being watched, being trapped. We also found that children were blurring the lines between past trauma and the experience of detention. Children told stories that would make reference to horrific events of the past, and those events almost

became merged with stories of captivity and confinement. Our interpretation was that detention was often triggering past traumatic memories and causing a reemergence of post-traumatic symptoms.

Dr. Kronick noted that the sand tray worlds and stories also revealed that children were trying to transform some of their traumatic experiences — whether the trauma of the past or detention — into something less frightening through play. "They were trying to digest the frightening things they were experiencing, and transform them so that they would be less anxiety-provoking," she explained. "Children are resilient in the face of trauma, but detention appeared to impede their natural capacity to heal."

## IN FOCUS: Sandplay and Stories



All photographs © Rachel Kronick

This sand tray, dominated by symbols of violence, security and barricades, was created by a 12-year-old boy while he was detained with his mother and older sister. The family's asylum claim was refused and, at the time of the interview in 2011, they had been detained at the IHC for seven months. The boy appeared to have developed multiple psychiatric symptoms during detention.

"There is a war. [In the war there is] a cowboy; guy with a gun. I think that's the devil. A knight with a horse." Pointing to a figure of a baby underneath a crib overturned like a cage, the boy said, "That's a grave."



## IN FOCUS: Sandplay and Stories



The creator of this sand tray was an 8-year-old Canadian-born girl who was detained at an IHC for 48 hours with her parents and two siblings after her parents' refugee claim was refused. While in detention, her father was held in a separate men's section in the facility. After the family was released from detention, the child developed selective mutism, an anxiety disorder, which persisted for several months.

The girl's older brother had been kidnapped and murdered in the family's country of origin. Her sand tray story merges this previous trauma with the trauma of her arrest and detention by CBSA, suggesting that the experience of detention had re-traumatized her and worsened her post-traumatic symptoms.

"There is a person [my brother] who wants to go outside ... and he sees a police officer watching him. He [police] sees him and he takes him, he captures him."

## IN FOCUS: Sandplay and Stories



A 3-year-old boy created this sand tray four months after he was released from detention. The boy was detained in an IHC with his mother and older sibling for 180 days, while his father was separately detained in a correctional facility for 210 days. The family was in the process of seeking asylum in Canada. Prior to their arrival in Canada, the child and his family had witnessed the killing of other family members and had been exposed to regular shelling.

“So [the army man] started by shooting the people. They are shooting the animals, then they are shooting the people.”



## IN FOCUS: Sandplay and Stories



An 11-year-old girl, who had been detained for 30 days at an IHC with her parents and younger sister, created sand trays both during detention and following release. While in detention, her father was held in a separate men's section in the facility. The family experienced religious persecution in their country of origin and was in the process of seeking asylum in Canada.

The girl created the first sand tray after two weeks in detention. The sand tray story depicts the police as benevolent figures and the country as protective.

"This house is very good because the police protect it ... Once family lives here. They are very happy. They are free. They want to do everything. They can have a good life. ... God gave people a safe country. Because before the country not safe."

## IN FOCUS: Sandplay and Stories



The girl created the second sand tray after the family was released from detention. In her story post-detention, the police and fences, once representative of protection, became symbols of fear and captivity. This suggests that her view of Canada as a safe country was transformed by her experience of detention.



## IN FOCUS: Sandplay and Stories



A 9-year-old girl created these sand trays after her family's refugee claim was accepted and they were granted permanent residency. Three years prior to the interview, she had been detained with her mother and two siblings for seven days for identity verification. Unlike the other children's creations, this child's sand tray contained no representations of violence, imprisonment or loss. Instead, she described her world as a kind of utopia.

"The flags meant that there is always peace and no war, because there are different flags ... There is no pollution so the animals are free to live anywhere."



# **LEGAL BASIS FOR FAMILY SEPARATION AND CHILD DETENTION**

# Legal Basis for Family Separation and Child Detention

Immigration detention is implemented under the authority of the *Immigration and Refugee Protection Act*<sup>121</sup> (IRPA) and its *Regulations*<sup>122</sup> (IRPR). The administrative framework sets immigration detention at the intersection of two agencies. In general, CBSA administers the initial decision to detain, and the Immigration Division of the Immigration and Refugee Board adjudicates proceedings concerning the continuation and termination of detention, with the participation of CBSA counsel.<sup>123</sup>

In addition to the legislation, both CBSA and the Immigration Division rely on policy guidelines that help to interpret the relevant provisions.<sup>124</sup> The legislation and policy guidelines provide for some special considerations regarding children in detention.<sup>125</sup> However, there is no general prohibition against the detention of children, nor a limit on the duration they can be detained. Furthermore, the specific grounds for detention, as well as the mechanism of adjudication and enforcement of detention, generally apply to both children and adults.<sup>126</sup> For these reasons, it is helpful to review the overall legislative framework of immigration detention.

## Decision to Detain: CBSA

In general, IRPA provides that foreign nationals (including refugee claimants) and permanent residents may be detained where a CBSA officer determines that they constitute a flight risk or a danger to the public.<sup>127</sup> Foreign nationals may also be detained where their identity is not established.<sup>128</sup> CBSA officers may also detain foreign nationals and permanent residents on entry into Canada if they consider the detention necessary for the completion of an examination of their status.<sup>129</sup> In addition, individuals may be detained on entry if CBSA officers suspect that they pose a security risk, have violated “human or international rights,” or have participated in serious criminal activity or organized crime.<sup>130</sup> If it is determined that there are grounds for detention, IRPR requires officers and adjudicators to consider several factors before making a decision on detention or release.<sup>131</sup>

As it pertains to “minor” children, IRPA provides that they are only to be detained “as a measure of last resort, taking into account the other applicable grounds and criteria including the best interests of the child.”<sup>132</sup> IRPR elaborates on this principle by listing the special considerations that apply in relation to the detention of children.<sup>133</sup>

Children who are foreign nationals or permanent residents may be formally detained in accordance with the above legislative provisions.<sup>134</sup> Recent figures show that the vast majority of children detained under formal detention orders are held because they are believed to constitute a flight risk. On average, 86% of children were detained on this basis each year between 2010 and 2014.<sup>135</sup>

According to CBSA policy, children who are not formally detained may “be permitted to remain with their detained parents in a CBSA Immigration Holding Centre if it is in the child’s best interests and appropriate facilities are available.”<sup>136</sup> This practice essentially creates a class of *de facto* child detainees, including Canadian citizens,

## LEGAL BASIS FOR FAMILY SEPARATION AND CHILD DETENTION

who are not subject to a detention order but reside in detention. In order for detained parents to maintain custody of their children, and prevent them from being transferred to the custody of another relative or a child protection agency, the children must remain in detention as well.

### UNDER REVIEW: Notification Regarding Children in Detention

CBSA has signed a Memorandum of Understanding with the Canadian Red Cross Society with respect to monitoring of detention conditions.<sup>137</sup> Part of the agreement requires CBSA to notify the Red Cross, either verbally or in writing, when a child has been kept in detention following the first detention review.<sup>138</sup> CBSA noted that its notification protocol is currently under review.<sup>139</sup>

In order to ensure that children's best interests are meaningfully accounted for, it is imperative that the appropriate organizations be notified as soon as a child is placed in a detention centre, whether or not under a formal detention order. To this end, CBSA officers should provide such notification to the Refugee Law Office, Office of the Children's Lawyer, Justice for Children and Youth, the Children and Youth Advocate and similar organizations outside of Ontario.

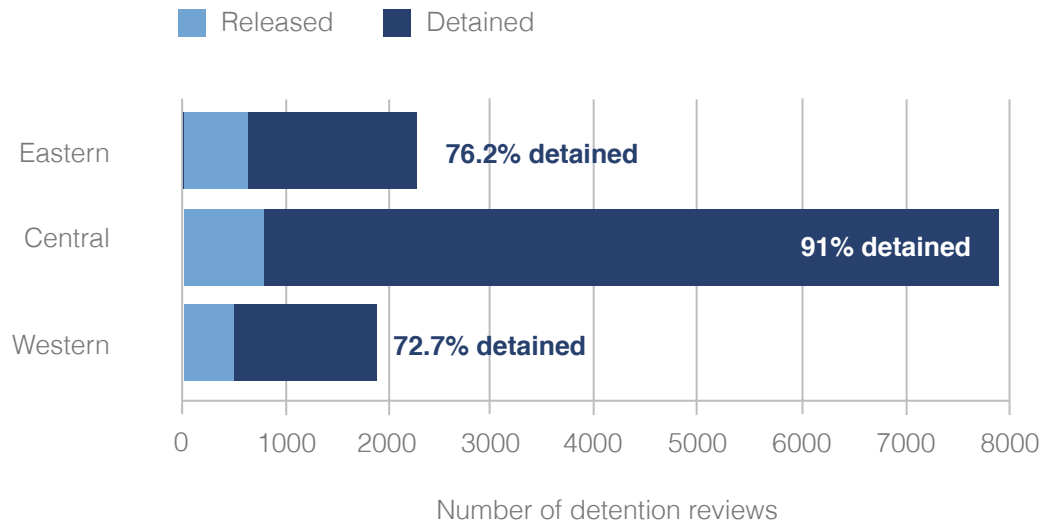
### Decision to Continue Detention: Immigration Division and CBSA

Following the initial decision to detain, CBSA officers may, at their own discretion, decide to release detainees within 48 hours.<sup>140</sup> After this point, detainees are subject to regularly scheduled detention review hearings carried out by the Immigration Division, a quasi-judicial tribunal.<sup>141</sup> If detention is continued following the initial detention review hearing within 48 hours of detention, another hearing is scheduled within a week, and then once a month until the Immigration Division grants release.<sup>142</sup> CBSA hearings officers participate in the detention review hearings by representing the Minister of Public Safety and Emergency Preparedness.<sup>143</sup> Where a child is subject to a detention review hearing, Immigration Division adjudicators are required to designate a person to represent the child.<sup>144</sup>

Several aspects of the detention review hearings place immigration detainees at a significant disadvantage in terms of procedural fairness. The format of detention review hearings is adversarial, but Immigration Division adjudicators are "not bound by any legal or technical rules of evidence," and may rely on evidence that they consider "credible or trustworthy in the circumstances."<sup>145</sup> This is not a rigorous evidentiary standard for the deprivation of liberty, and it makes it exceedingly difficult for detainees to counter evidence that is presented against them, especially if they do not have legal representation at detention review hearings. Furthermore, in order to continue detention, adjudicators must be satisfied on a balance of probabilities<sup>146</sup> that continued detention is warranted.<sup>147</sup> This decision is made on the basis of specific factors, one of which is the "existence of alternatives to detention."<sup>148</sup> However, the best interests of detainees' children is not explicitly mentioned as a pertinent factor in the legislation.<sup>149</sup>

## LEGAL BASIS FOR FAMILY SEPARATION AND CHILD DETENTION

### DETENTION REVIEW OUTCOMES BY REGION, 2013



**Figure 4: In 2013, the percentage of detention review hearings that resulted in a decision to release the detainee varied significantly among regions across Canada.<sup>150</sup> Detainees in the Eastern and Western regions were more than twice as likely to be released than were detainees in the Central region.<sup>151</sup> This inconsistency raises concerns about the procedural fairness of detention review hearings.**

Finally, Immigration Division adjudicators may only order detainees to be released from detention if there are “clear and compelling reasons” to depart from previous decisions to detain.<sup>152</sup> The “clear and compelling reasons” test effectively puts the burden on detainees to show that their detention is not justified; it requires detainees to produce new evidence or make new arguments on the basis of previously submitted evidence in order to demonstrate that the circumstances for the previous decision have changed.<sup>153</sup> This means that, in addition to the hurdles of low evidentiary standards and the state’s low burden of proof (balance of probabilities), the default decision is to continue detention. This is supported by statistical information suggesting that some Immigration Division adjudicators rarely find “clear and compelling reasons” to depart from prior decisions to detain.<sup>154</sup>

In addition to the IRPA and IRPR, Immigration Division adjudicators are also instructed by the *Chairperson’s Guidelines*, which provide instructions for special evidentiary considerations<sup>155</sup> and procedural accommodations<sup>156</sup> for detained child refugee claimants, and require adjudicators to consider the best interests of the child.<sup>157</sup> However, it is not clear whether these considerations and accommodations apply exclusively to refugee claimant children or to all children who are subject to detention orders.<sup>158</sup> Furthermore, children who are *de facto* detained do not benefit from these considerations and accommodations, because their detention is not subject to review before the Immigration Division.

# **INTERNATIONAL STANDARDS AND CANADIAN LAW: BEST INTERESTS OF THE CHILD**

# International Standards and Canadian Law: Best Interests of the Child

As noted above, IRPA provides that children are only to be detained as a measure of last resort, taking into account the best interests of the child.<sup>159</sup> CBSA policy also provides that *de facto* detention is available to children with detained parents “if it is in the child’s best interest.”<sup>160</sup> In order to explore whether Canadian law provides adequate safeguards to children, it is important to examine the best interests of the child principle as defined in international law. When taking into consideration the full scope of the best interests of the child as set out in the CRC, it is evident that Canadian law falls short of the standards enshrined in international law.

## Best Interests of the Child under International Law

The CRC provides a foundational international law framework with respect to children and the principle of the best interests of the child is its central animating theme.<sup>161</sup> The best interests of the child is a threefold concept that encompasses a *substantive right* of a child to have his or her best interest accounted for as a primary consideration; an *interpretive legal principle*; and a *rule of procedure* that requires the decision-making process to evaluate the possible impact of the decision on the child concerned.<sup>162</sup> Article 3(1) of the CRC provides that “in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”<sup>163</sup>

The content of the child’s best interests is complex and must be determined on a case-by-case basis.<sup>164</sup> The CRC Committee has developed a non-exhaustive, non-hierarchical list of elements to be taken into account when assessing a child’s best interest:<sup>165</sup>

- The child’s views;<sup>166</sup>
- The right of the child to preserve his or her identity;<sup>167</sup>
- Preservation of the family environment and maintaining relations;<sup>168</sup>
- The care, protection and safety of the child;<sup>169</sup>
- A situation of vulnerability, such as belonging to a minority group, being a refugee or asylum-seeker;<sup>170</sup>
- The child’s right to health;<sup>171</sup> and
- The child’s right to education.<sup>172</sup>

As noted above, not all of these elements are relevant to every case but vary depending on the circumstances. Since the best interests of the child is also a procedural right, states must put into place formal processes designed to assess and determine the child’s best interests when making decisions affecting the child.<sup>173</sup>

In 2012, the CRC Committee specifically addressed the best interests of the child in the context of immigration detention.<sup>174</sup> Article 37(b) of the CRC provides that detention must “be used only as a measure of last resort and for the shortest appropriate period of time.”<sup>175</sup> The CRC Committee urged that “the detention of a child because of their or *their parent’s* migration status constitutes a child rights violation and always contravenes the principle of the best interests of the child” (emphasis added).<sup>176</sup> The United Nations General Assembly, the United Nations Working

## INTERNATIONAL STANDARDS AND CANADIAN LAW: BEST INTERESTS OF THE CHILD

Group on Arbitrary Detention, and the Inter-American Court of Human Rights have all reaffirmed that the migration status of a child or their parent is insufficient to justify the detention of a child.<sup>177</sup> In fact, the UNHCR has noted that children “should in principle not be detained at all.”<sup>178</sup>

The CRC Committee has called on states to “expeditiously and completely cease the detention of children on the basis of their immigration status,”<sup>179</sup> and recommended that “primary consideration should be given to the best interests of the child in any proceeding resulting in the child’s *or their parents’ detention*” (emphasis added).<sup>180</sup> Instead of detention, states should adopt alternatives that fulfill the best interests of the child, including children’s rights to liberty and family life.<sup>181</sup> In particular, pursuant to Article 9(1) of the CRC, states must ensure that children are not separated from their parents through state action or inaction, unless it is necessary for the child’s best interests.<sup>182</sup> To this end, states should develop alternatives that accommodate families in “non-custodial, community-based contexts” while their immigration status is resolved.<sup>183</sup> Echoing these recommendations, the United Nations Special Rapporteur on the Human Rights of Migrants has called on states to “preserve the family unit by applying alternatives to detention to the entire family,” and only resort to detaining parents accompanied by their children “in very exceptional circumstances.”<sup>184</sup> Similarly, the United Nations Special Rapporteur on Torture and the Inter-American Court of Human Rights have concluded that “the imperative requirement not to deprive the child of liberty extends to the child’s parents, and requires the authorities to choose alternative measures to detention for the entire family.”<sup>185</sup>

Turning its attention to Canada, the CRC Committee found that the best interests of the child is not appropriately integrated or consistently applied in Canada, particularly in the context of immigration detention.<sup>186</sup> The Committee recommended that the Government of Canada “ensure that detention is only used in exceptional circumstances, in keeping with the best interest of the child,” and “ensure that legislation and procedures use the best interests of the child as the primary consideration in all immigration and asylum processes.”<sup>187</sup>

### UNDER REVIEW: Best Interests of the Child as a Primary Consideration

CBSA has acknowledged IHRP’s “significant insight into the question of family unity in the detention system, the psycho-social impacts of ‘co-detention’ and how children could be better factored into the overall assessment of whether to detain or release.”<sup>188</sup> Nevertheless, CBSA noted that, in detention-related decisions that affect children — specifically, where children are *de facto* detainees — the best interests of the child should be “considered as one factor, but is not a primary factor.”<sup>189</sup>

### Domestic Incorporation and Interpretation of the Best Interests of the Child

IRPA provides in section 3(3)(f) that the Act “is to be construed and applied in a manner that ... complies with international human rights instruments to which Canada is signatory.”<sup>190</sup> Although Canada has both signed and ratified the CRC,<sup>191</sup> the principle of the best interests of the child has not been adequately incorporated into IRPA.<sup>192</sup>

The Supreme Court of Canada has interpreted the CRC’s domestic application in several decisions. In the landmark case *Baker v. Canada (Minister of Citizenship and Immigration)*, the Court noted that “the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review.”<sup>193</sup> More recently, in *De Guzman v. Canada (Minister of Citizenship and Immigration)*, the Supreme Court stated that, “a legally binding international human rights instrument to which Canada is signatory is determinative of how IRPA must be interpreted and applied, in the absence of a contrary legislative intention.”<sup>194</sup>

IRPA’s reference to the best interests of the child falls short of the standard set out in the CRC. In particular, IRPA only calls for best interests of the child to be “taken into account” in specific contexts,<sup>195</sup> whereas the CRC requires that best interests of the child be a “primary consideration” in all actions concerning children.<sup>196</sup> The Supreme Court confirmed this lower standard in several decisions. In *Baker*, the Court noted that the principle of the best interests of the child requires decision-makers to “consider children’s best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them.”<sup>197</sup> In a more recent landmark decision, *Kanthasamy v. Canada (Citizenship and Immigration)*, the Supreme Court used particularly strong language in describing the importance of the principle of the best interests of the child, but still fell short of framing it as a primary consideration in all actions concerning children.<sup>198</sup> The Court stated that, where the legislation “specifically directs that the best interests of a child who is ‘directly affected’ be considered, those interests are a singularly significant focus and perspective.”<sup>199</sup>

These shortfalls in the IRPA are particularly pronounced in the realm of immigration detention, for both formally and *de facto* detained children. While children under formal detention orders do not have their best interests accounted for as a primary consideration, until a recent Federal Court order,<sup>200</sup> *de facto* detained children did not even have access to a procedure that accounts for their best interests. Children who were *de facto* detainees were rendered “legally invisible” within the immigration detention regime because they were not subject to detention review hearings, and their parents’ detention reviews similarly failed to take into account the best interests of the child. As Andrew Brouwer, Senior Counsel at the Refugee Law Office of Legal Aid Ontario, explained:

The jurisprudence indicates that the list of factors to consider in deciding on adults’ detention or release [under section 248 of IRPR] is intended to be open-ended, and therefore, could include the best interests of the child. However, in practice Immigration Division adjudicators and CBSA hearings officers took the position that the list is closed and that the best interests of the child is excluded as a factor. Typically, when the principle of the best interests of the child is raised at detention review hearings, Immigration Division members found that, because the child is not under a detention order, there is no jurisdiction to consider the child’s interests.<sup>201</sup>



	Formally detained children	De facto detained children
Number of children	161	71
Average length of detention	10 days	29.8 days
Median length of detention	3 days	10 days

**Table 1: Total number of children detained formally, compared with the total number of children accompanying their parents in detention as *de facto* detainees, as well as their respective lengths of detention, for fiscal year 2014-2015.<sup>202</sup> Children who were *de facto* detained remained in detention, on average, nearly three times longer than those subject to a formal detention order.**

In the case of *B.B. and Justice for Children and Youth v. Minister of Citizenship and Immigration*, the Federal Court confirmed that the list of factors set out under section 248 of IRPR is not exhaustive, and that the interests of *de facto* detained children can be considered in their parents' detention review hearings.<sup>203</sup> While this provides for a procedure to account for the best interests of *de facto* detained children, the court order falls short of requiring the best interests of the child to be a primary consideration in parents' detention review hearings.<sup>204</sup> Accordingly, the legislation continues to provide inadequate protection to children in immigration detention.

The Court in *B.B. and Justice for Children and Youth* is also silent on the Immigration Division's jurisdiction to consider the interests of non-detained children who are separated from their detained parents.<sup>205</sup> However, the finding that the list of relevant factors is open-ended should signal to the Immigration Division that it could also consider the interests of children separated from their detained parents. As stated above, interpretive commentary on the CRC confirms that family separation is an inappropriate alternative to holding children in detention with their parents.<sup>206</sup> The principle of the best interests of the child requires consideration of the harms resulting both from living in detention and from family separation.

## IN FOCUS: Child Protection Agencies Are Not an Appropriate Alternative to Child Detention

“There is no decision made in the life of a child that can be considered more serious than removing them from their families,” according to Irwin Elman, the Provincial Advocate for Children and Youth.<sup>207</sup> “Separating a child from their family has truly life-altering consequences for the child. The act of an apprehension becomes part of a narrative that they carry forever.”<sup>208</sup>

Mr. Elman has been the Provincial Advocate for Children and Youth in Ontario since 2008.<sup>209</sup> The mandate of his office is to “serve youth in state care and the margins of state care through individual, systemic and policy advocacy.”<sup>210</sup> Among other things, the Provincial Advocate conducts investigations into “matters concerning a child or a group of children receiving services from a children’s aid society (CAS) or a residential licensee where a CAS is the placing agency.”<sup>211</sup> According to Mr. Elman, child protection service in Ontario is carried out by 45 agencies mandated under the *Child and Family Services Act*.<sup>212</sup> The primary goal of each agency is to ensure that children are free from neglect and physical, emotional, and sexual abuse. Agencies accomplish this goal by conducting child abuse investigations, and either removing children from the home to protect them or supporting parents while children are in the home.

Mr. Elman noted that “life in a child welfare system is notoriously difficult for many children.”<sup>213</sup> A landmark report written by young people who have been involved in the system spoke of six themes that marked their experiences: “we are vulnerable,” “we are isolated,” “we are left out of our own lives,” “no one is really there for us,” “care is unpredictable,” “care ends and we struggle.”<sup>214</sup> According to Mr. Elman, “the report sadly was accepted as a statement that accurately reflected the experiences of many children in child welfare care.”<sup>215</sup>

As noted above, where children are separated from their detained parents, they are either transferred to the custody of other relatives where possible, or to a child protection agency.<sup>216</sup> Mr. Elman emphasized that

It is absolutely not appropriate to remove a child from their family unless they are being physically, emotionally, sexually abused or neglected. A child who is detained in an immigration detention centre has had their rights under the CRC violated without a doubt, but this violation of their rights does not meet the threshold for apprehension by a child protection agency.<sup>217</sup>

The suitability of child protection services in the context of immigration detention has been put to the test in several cases. Andrew Brouwer, Senior Counsel at the Refugee Law Office of Legal Aid Ontario, reported on a recent case involving a parent and a *de facto* detained child:

After considerable public advocacy to secure release for this family, CBSA called children’s aid and raised a concern that the existence of the child at the IHC might raise a protection concern for children’s aid, presumably with the prospect that the child might be seized and then brought into foster care. A children’s aid worker conducted a lengthy interview, considered the relationship between the parent and the child, and determined that this parent was deeply committed to the child, and the two need to be together. Being in jail together is a terrible situation, but it would be even worse — especially after a lengthy detention — to take the child away, with the prospect that the parent is about to be deported any day.<sup>218</sup>

## INTERNATIONAL STANDARDS AND CANADIAN LAW: BEST INTERESTS OF THE CHILD

In order to remedy the IRPA's shortfalls, section 60 should explicitly require consideration of the best interests of the child as a primary consideration in all actions that directly affect children. Furthermore, in order to ensure best interests of the child considerations both for *de facto* detained children and for non-detained children who are separated from their detained parents, section 248 of the IRPR should explicitly incorporate the best interests of the child as a primary consideration in detained parents' detention reviews. The failure to fully account for and accommodate the best interests of children living in detention or separated from their parents ignores the harmful consequences that flow from both of these situations. Where children are not formally detained — whether they are subject to *de facto* detention or family separation — their parents' detention reviews are the only procedure where the best interests of the child could be considered in a meaningful way, with an opportunity for adjudicators to order necessary accommodations.

Canadian legislation continues to fall short of international law standards in the realm of immigration detention, despite continuous calls for reform over the past decade.<sup>219</sup> In 2007, the Standing Senate Committee on Human Rights released a report emphasizing that “the federal government needs to make all efforts to come into compliance with the CRC, ... and that priority should always be given to the best interests of the child.”<sup>220</sup>

## VOICES FROM THE INSIDE: Nadine and Michel\*

Nadine was two months pregnant when she was detained in February 2013.<sup>221</sup> Shortly thereafter, she was transferred to a correctional institution and remained there for the rest of her pregnancy. After Nadine gave birth to her son, Michel, in August 2013, they were transferred back to the IHC, where they were held until they were deported in late 2015.

Michel, a Canadian citizen, had lived his entire life in detention prior to being deported with his mother. “It’s hard for him ... this is what he thinks is a normal life,” Nadine explained. “He knows the rules, the routines, the time for room search (they search the room everyday), he knows to keep the doors open — he knows the things that are confined in this area.”

Nadine described the living accommodations at the IHC. She and Michel shared a room with two beds, in a wing designated for women detained with their

children. The room was equipped with a bathroom and a window that could not be opened, resulting in poor air quality and “no ventilation.” Although they had their own room, Nadine and Michel had no privacy. “The rooms are always open. If I close the door, sometimes [Michel] will open it because he knows the rules.”

Nadine explained that her daily routine was “so boring and so stressful, because the more you have nothing to do, the more you think.” Michel had to accompany Nadine everywhere she went, including detention review hearings. Nadine and Michel were able to go outside for short periods of time each day, where he played with the few playground toys, but Michel and his mother had to be searched upon return. “[Michel] is used to it,” Nadine noted, “he just goes straight to the wall and puts his hand up ... He thinks that’s just how it goes.” Michel even searched the other children “as a game.”

## VOICES FROM THE INSIDE: Nadine and Michel\*

Nadine noted that the IHC was not adequately equipped to house children. Michel was deprived of many things that children need growing up, including basic nutrition, a healthy environment and educational opportunities. For example, Nadine had to obtain CBSA's consent before the kitchen could provide baby cereal for Michel. Nadine also described the experience of another mother, who had to call 911 before the kitchen manager agreed to provide her hungry infant son with baby formula. "We have to fight and write to immigration and do all kinds of things to get food," Nadine said. She was also concerned about her son's lack of opportunity to socialize with other children his age. Michel found it particularly distressing when other detained children are released: "He thinks he is doing something bad because his friends will come and go after two weeks."

Nadine described her experience in detention review hearings. By October 2015, she had attended about 30 hearings. When Nadine's lawyer would raise Michel's best interests, the Immigration Division adjudicators consistently responded that Michel has Canadian citizenship, that "he is not detained," and that it is

Nadine's "choice to have him in [detention]." In her May 2014 hearing, the Immigration Division adjudicator told Nadine that, since Michel is accompanying her in detention as a "non-detainee," his best interests could not be considered in her detention review.<sup>222</sup> At the same hearing, Nadine informed the adjudicator that there was a bondsperson who was prepared to post a cash and performance bond of \$4,000 in total.<sup>223</sup> This proposed alternative to detention was rejected.<sup>224</sup> In Nadine's September 2014 hearing, the Immigration Division adjudicator repeated that since Michel is a Canadian citizen, "he does not have to remain in detention."<sup>225</sup> The adjudicator also noted that, "I understand it may be a difficult choice for you to turn [Michel] over to Children's Aid Society or someone to look after him, but he is not in detention, he is accompanying you here as a visitor."<sup>226</sup> Michel was one year old at the time.

"Every mom would prefer to stay with her children," said Nadine. Ultimately, "it doesn't matter if [Michel] is a citizen...he lives the same life as a detained child."

*\*The individuals' names have been changed to protect their identities.*

# **ALTERNATIVES TO FAMILY SEPARATION AND CHILD DETENTION**

# Alternatives to Family Separation and Child Detention

CBSA officers and Immigration Division adjudicators are legislatively required to consider all reasonable alternatives to detention before making a detention-related decision.<sup>227</sup> This requirement is reflected in CBSA's operational manual<sup>228</sup> and the *Chairperson Guidelines*.<sup>229</sup>

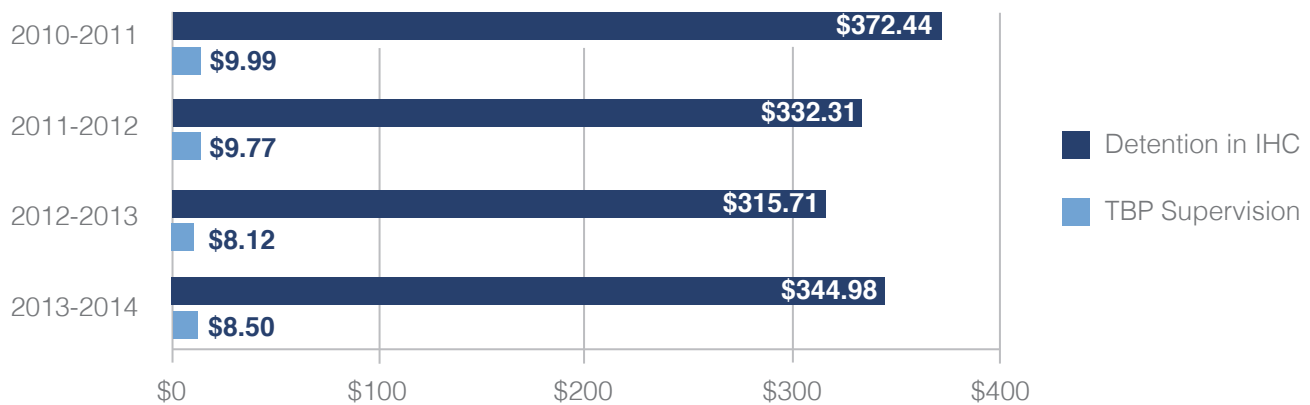
IRPA provides CBSA officers and Immigration Division adjudicators with broad discretion to impose any conditions that they consider necessary on the release of an individual from detention.<sup>230</sup> CBSA's operational manual lists examples of these conditions, which include: reporting to a CBSA officer at regular intervals, reporting to the Immigration Division for admissibility hearings, informing CBSA of any criminal charges or convictions, and notifying CBSA of plans to leave Canada.<sup>231</sup> Additional conditions are generally applied upon release of asylum-seekers, including the requirements that they do not work or study in Canada without authorization.<sup>232</sup> Individuals may also be released from detention on the payment of a deposit to the Minister of Public Safety and Emergency Preparedness, on the posting of a guarantee, or both.<sup>233</sup> In such cases, section 48 of IRPR requires that the person concerned or the guarantor provide the Department of Immigration, Refugees and Citizenship with their address and notify the Department of changes to their address.<sup>234</sup> CBSA officers and Immigration Division adjudicators may also release detainees to a third-party risk management program, such as the Toronto Bail Program (TBP).<sup>235</sup> Before individuals are released from detention, officers are required to fingerprint them and seize their travel documents and "other important documents."<sup>236</sup>

## Community-Based Alternatives to Detention

Community-based alternatives to detention are preferable to immigration detention for several reasons. First, individuals' fundamental rights are better protected in community-based arrangements than in detention.<sup>237</sup> Community-based alternatives to detention facilitate the treatment of individuals with dignity, humanity, and respect. Second, as noted above, immigration detention and family separation can have profoundly detrimental and lasting mental health consequences.<sup>238</sup> Where outright release from detention is not possible, community-based arrangements can mitigate the harms of detention and family separation, and better protect the best interests of children. Finally, community-based alternatives are often significantly more cost-effective than immigration detention. Detention is costly: between 2010 and 2014, CBSA spent an average of nearly \$21.5 million on immigration detention in IHCs each year.<sup>239</sup> In comparison, the average yearly cost of TBP supervision in the same period was approximately \$1.1 million, about one twentieth the cost of detention in IHCs.<sup>240</sup>

## ALTERNATIVES TO FAMILY SEPARATION AND CHILD DETENTION

### COST OF SUPERVISION VS. COST OF DETENTION PER INDIVIDUAL PER DAY



**Figure 5: According to CBSA figures, the daily cost of TBP supervision for one individual is dramatically lower than the cost of detention in an IHC.<sup>241</sup>**

Community-based programs are also effective at fulfilling immigration control objectives. As noted above, the vast majority of detained children are held due to concerns that they pose a flight risk.<sup>242</sup> However, statistics from Canada and abroad indicate that individuals placed in community-based alternatives to detention rarely fail to appear for administrative and judicial procedures.<sup>243</sup> A 2011 UNHCR study, “Back to Basics,” found that the average compliance rate of 13 community-based programs around the world was 94.59%.<sup>244</sup> Indeed, compliance rates under the TBP have also been high, with 96.35% of participants complying with the TBP in 2009–2010<sup>245</sup> and 94.31% in 2013–2014.<sup>246</sup> Local community organizations that provide assistance to refugee claimants released from detention report even higher rates of compliance, at 99–99.95%.<sup>247</sup>

“Back to Basics” found that several factors contribute to higher compliance rates for individuals placed in community-based alternatives to detention.<sup>248</sup> Successful programs provided clear and concisely communicated information about the status determination procedure, the individual’s rights and duties, and the consequences of non-compliance.<sup>249</sup> Referral to legal services occurred early and throughout the process, and included advice regarding all legal avenues to remain in the country.<sup>250</sup> Successful programs also provided individuals with adequate material support and accommodation, as well as case management services.<sup>251</sup> Finally, the study found that individuals who were treated with dignity, humanity, and respect throughout the process were more likely to cooperate.<sup>252</sup>

Although less restrictive than detention, community-based alternatives continue to place limitations on individuals’ liberty and therefore must not be used excessively or arbitrarily. These programs must be alternatives to *detention*, rather than alternatives to *release*: alternatives to detention must only be used where unconditional release is inappropriate. The restrictions imposed by community-based arrangements should be tailored to the circumstances of each case. Decisions about alternatives to detention should also be subject to regular and independent review to ensure that restrictions on liberty are not excessive.

## ALTERNATIVES TO FAMILY SEPARATION AND CHILD DETENTION

Minister Goodale has stated that the Ministry intends “to increase the availability of effective alternatives to detention and thus reduce the overall number of cases in which detention is the only technique that can be used to deal with difficult problems of identification, flight risk or danger to the public.”<sup>253</sup> Potential alternatives to detention and monitoring mechanisms are detailed below.

### ***i) Reporting obligations***

Reporting obligations generally provide a minimally invasive alternative to detention. However, reporting requirements that are inflexible and disproportionately onerous may still amount to a significant restriction on liberty and may lead to inadvertent non-compliance if individuals are unable to fulfill the conditions.<sup>254</sup> Regular travel to and from reporting centres may be costly and time-consuming, and may interfere with employment or childcare responsibilities.<sup>255</sup> In Canada, advocates have also expressed concerns about the indefinite application of reporting requirements; for example, one individual was required to report twice a week for over five years, “which seriously impaired his ability to find or hold down a job.”<sup>256</sup> Research also indicates that individuals subject to reporting requirements experienced significant stress due to the possibility of being detained or re-detained when appearing before officers.<sup>257</sup>

In order to reduce the coerciveness of reporting arrangements, the frequency and duration of reporting should be tailored to the circumstances of each case, and should be regularly reviewed. Furthermore, individuals should not be required to report when they have had other contact with authorities, such as a case manager or CBSA officer.<sup>258</sup> In order to accommodate the distances that individuals must travel to fulfill their reporting obligations, compensation for travel expenses should be available. For example, the United Kingdom provides assistance with travel expenses for asylum-seekers who live more than three miles away from their reporting centre<sup>259</sup> or for individuals with “exceptional need,” including individuals with disabilities or childcare responsibilities.<sup>260</sup> Telephone reporting, which is currently only available in the Toronto region,<sup>261</sup> should also be made available across Canada. Finally, sanctions for failing to report must be applied flexibly, particularly when individuals are unable to meet their reporting obligations for valid reasons.

### ***ii) Financial deposits and guarantees***

Financial deposits and guarantees are low-cost alternatives to detention that allow families and children to live in the community. CBSA’s operational manual provides that the amount of the deposit should be set according to the circumstances and financial resources of the detainee, and that a smaller amount may be appropriate in cases of prolonged detention or cases that are unlikely to be resolved in the short term.<sup>262</sup> However, financial deposits often range from \$2,000 to \$5,000.<sup>263</sup> For this reason, this alternative to detention is often inaccessible to detainees who are unable to secure a financial deposit and do not have sufficient ties within Canada to find a guarantor.

In addition, before detainees can be released on the payment of a deposit or the posting of a guarantee, they are required to provide their address.<sup>264</sup> This requirement poses a significant barrier for individuals who have been detained immediately upon arrival in Canada.<sup>265</sup> Local shelters and community organizations, such as FCJ Refugee Centre,<sup>266</sup> Matthew House<sup>267</sup> and Sojourn House,<sup>268</sup> may provide addresses for detainees, and thereby assist them



## ALTERNATIVES TO FAMILY SEPARATION AND CHILD DETENTION

in securing release.<sup>269</sup> However, in other cases, even if detainees obtain the funds necessary for a deposit or guarantee, they may be unable to secure release because of the difficulty of finding an address in the community while living in detention.

Importantly, release on the payment of a financial deposit or on the posting of a guarantee is only available *after* an individual has already been detained. More focus should be placed on developing community-based alternatives to detention that allow individuals to avoid detention altogether, *before* the initial decision to detain is made.

### ***iii) Third-party risk management programs***

The Toronto Bail Program (TBP) provides an alternative to detention that may secure release for detainees who have fewer ties to Canada, and who are unable to pay a financial deposit or to secure a guarantor.<sup>270</sup> The TBP is funded by CBSA<sup>271</sup> and operates as a bondsperson to individuals seeking asylum or awaiting removal.<sup>272</sup> Prior to a detainee's release, the TBP develops an individualized supervision plan that may address the individual's specific needs, such as treatment for mental health issues or addiction.<sup>273</sup> Individuals released to the TBP are required to report to the TBP, to cooperate with immigration procedures, and to notify the TBP of any change to their address.<sup>274</sup>

Despite the various benefits of the TBP, it also raises several concerns. First, the TBP is only available in the Greater Toronto Area (GTA), and detainees in the rest of the country do not have access to a similar program.<sup>275</sup> Even in the GTA, however, the TBP is not able to supervise all detainees who may be suitable for supervised release. The number of detainees that the TBP is able to supervise is limited by its contract with CBSA.<sup>276</sup>

Furthermore, given CBSA's exclusive contract with TBP, Immigration Division adjudicators in the GTA routinely reject other bond providers (including family members and community organizations) and other methods of supervision (such as electronic monitoring).<sup>277</sup> As a result, "if the TBP does not agree to supervise a detainee, the chance of release to an alternative bondsperson or organization is slim to none."<sup>278</sup> This is particularly problematic because TBP's selection criteria are not clear, which infuses considerable uncertainty and lack of transparency into the immigration detention regime.<sup>279</sup> While the TBP is an important alternative to detention, it should not be regarded as the only option and other alternatives should also be considered.

Finally, the TBP is informed by models from the criminal justice context, a legacy reflected in "some aspects of the program, such as overly demanding reporting requirements."<sup>280</sup> A 2010 CBSA report compared TBP supervision to federal parole supervision.<sup>281</sup> Criminal justice models of release and supervision are inappropriate in the context of immigration detention and enforcement, and may "contribute to real or perceived criminalization of migrants."<sup>282</sup>

### ***iv) Open accommodation centres***

While open accommodation centres are less costly<sup>283</sup> and more respectful of fundamental rights than detention,<sup>284</sup> they are among the most restrictive alternatives to detention.<sup>285</sup> As noted above, it is important that alternatives to detention are tailored to the circumstances of each case and avoid imposing excessive restrictions.

## ALTERNATIVES TO FAMILY SEPARATION AND CHILD DETENTION

Advocates have expressed concern that this alternative to detention tends to expand rather than reduce the scope of detention. In the United Kingdom, an organization that operated one of these centres noted that the program was not always used as a last resort for a significant number of families.<sup>286</sup> In Belgium, critics have argued that such accommodation centres have little utility because case management and monitoring can occur while families reside in the community.<sup>287</sup> A 2007–2008 pilot project seeking to establish a similar specialized centre for families with children in the United Kingdom was criticized for being “unhelpful”.<sup>288</sup>

The housing of families who had been refused asylum in [a designated centre] did not create a calm environment. ... Allowing families to remain in the community with their normal routines intact seems a much more helpful way of building a trusting relationship, and enabling families to think through the options available to them in a calm way.<sup>289</sup>

### **v) Electronic monitoring**

Electronic monitoring may be useful for increasing authorities’ contact with individuals under supervision in the community, and for providing early warnings to authorities about attempts to abscond.<sup>290</sup> However, it is among the most costly alternatives to detention.<sup>291</sup> A 2010 CBSA report determined that the approximate cost of monitoring one person was \$204,400 per year, although the cost for monitoring each additional person decreases once the infrastructure and employees required for monitoring are in place.<sup>292</sup>

Electronic monitoring is also one of the most restrictive alternatives to detention.<sup>293</sup> Excessive monitoring and restriction of an individual’s movements may interfere with their right to privacy, and may even constitute arbitrary detention.<sup>294</sup> Wrist and ankle bracelets may also have a stigmatizing effect due to the association of these devices with criminality.<sup>295</sup> In Canada, electronic monitoring has generally been reserved for cases that involve security certificates.<sup>296</sup>

In cases involving children and families, electronic monitoring should only be applied exceptionally. This measure is never appropriate for children, due to the stigmatizing effect and the physical pain and discomfort caused by wearing a monitoring bracelet.<sup>297</sup> Research also indicates that electronic monitoring of parents negatively affects their children:

These parents were not able to attend school sports games or birthday parties with their children, and could not take their children outside the vicinity of their home because of the requirement for them to be in the house at certain hours every day. In one case, a mother and father ... could not take their children to school in the morning because they were not allowed to leave the house.<sup>298</sup>

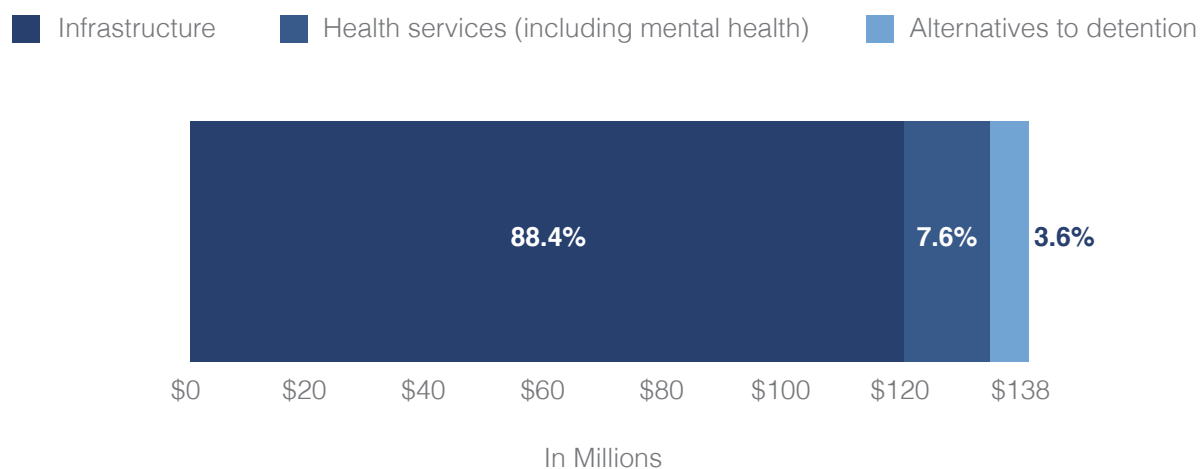
Electronic monitoring of parents may also restrict children’s freedom of movement. One parent under such supervision reported: “I’d love to take my children a bit further afield to show them places, but I can’t because obviously I’ve got this tag and I don’t want to be in a situation where I can’t return at the right time. So, I feel like we’re imprisoned, in a way. We can’t go out together. It’s horrible.”<sup>299</sup>

## UNDER REVIEW: Alternatives to Detention Program

CBSA is expanding its Alternatives to Detention Program, with an aim to “provide nationally-available release management tools to all eligible participants, including parents with children and unaccompanied minors.”<sup>300</sup> To this end, CBSA stated that it “will continue to engage non-governmental organizations and other civil society stakeholders to discuss potential Alternatives to Detention program design elements, including the establishment of individualized case management provisions to minimize the need to detain.”<sup>301</sup>

In a press conference on August 15, 2016, Minister Goodale committed \$138 million to improving the immigration detention system, \$5 million of which will be dedicated to alternatives to detention.<sup>302</sup> Specifically, the Minister noted that the program would focus on developing community supervision, electronic monitoring and voice-recognition technology for reporting.<sup>304</sup> The program will also continue to apply performance bonds and cash deposits.<sup>305</sup> The rest of the funding will be allocated toward enhancing medical and mental health services for detainees, as well as new infrastructure projects that will replace the IHCs in Quebec and British Columbia.<sup>306</sup>

### ALLOCATION OF \$138 MILLION INVESTMENT



**Figure 6:** At a press conference on August 15, 2016, Minister Goodale announced that, of the total \$138 million dedicated toward improving the immigration detention system, \$122 million will be allocated toward IHC infrastructure upgrades, \$10.5 million toward health services, and \$5 million will be spent on developing alternative to detention programs.<sup>306</sup> The allocation of the remaining \$500,000 was not specified.

## ALTERNATIVES TO FAMILY SEPARATION AND CHILD DETENTION

### International Models

In line with the CRC Committee's call to end immigration detention of children,<sup>307</sup> several states have instituted community-based alternatives. The following elaborates on several examples.

#### ***Sweden: supervision***

In Sweden, "supervision" requires individuals to surrender their identity documents and to report regularly to the police authorities or the Swedish Migration Board.<sup>308</sup> There is no standardized procedure for the application of supervision orders.<sup>309</sup> The frequency of reporting is determined on a case-by-case basis, but is usually required weekly or bi-weekly.<sup>310</sup> Authorities may impose daily reporting in cases with a high risk of absconding.<sup>311</sup> Failure to comply with reporting obligations results in a new investigation, after which authorities may order detention.<sup>312</sup> Families with children may only be detained if supervision is deemed insufficient or has failed, and only in appropriate facilities.<sup>313</sup> Administrative authorities review supervision orders within six months,<sup>314</sup> but individuals may appeal the orders at any time.<sup>315</sup> If the grounds for supervision no longer apply, supervision must cease immediately.<sup>316</sup>

In addition to supervision, Sweden has instituted an effective case management system for asylum seekers, which is carried out by two types of caseworkers.<sup>317</sup> Asylum case officers interview asylum-seekers and investigate their claim,<sup>318</sup> while a second caseworker provides support relating to everyday issues, such as housing and schooling, as well as referrals to medical and counselling services.<sup>319</sup> The second caseworker also prepares asylum-seekers for all possible outcomes of the process, and, in the event of a negative asylum decision, assists them to return to their country of origin.<sup>320</sup> This system has resulted in a high rate of voluntary departure in Sweden;<sup>321</sup> in 2014, nearly 73% of returns were voluntary.<sup>322</sup>

#### ***Hong Kong: support program***

The International Social Service Hong Kong Branch (ISSHK) is a non-governmental organization that runs a government-funded program supporting refugee claimants while their claims are processed.<sup>323</sup> It is one of the most expansive alternative to detention programs in the world; a 2011 UNHCR study reported that ISSHK was supporting over 5,000 clients.<sup>324</sup>

ISSHK provides various services to clients, including counselling, distributing food and other material goods, providing reimbursement for transport costs, assisting clients in their search for housing<sup>325</sup> and distributing rental subsidies.<sup>326</sup> Clients reside in the community and receive individualized case management.<sup>327</sup> Clients are required to sign a monthly contract with ISSHK that details their rights and responsibilities under the program.<sup>328</sup> Failure to comply with reporting obligations results in an investigation and may lead to arrest.<sup>329</sup>

In 2011, the daily cost of this program was estimated at HK\$108 (CAN\$18) per person.<sup>330</sup> Although the cost of immigration detention in Hong Kong is not available, it is estimated to be much greater than the cost of the ISSHK program.<sup>331</sup> "Back to Basics" found that the ISSHK support program achieved a compliance rate of 97%.<sup>332</sup>

## ALTERNATIVES TO FAMILY SEPARATION AND CHILD DETENTION

### ***Belgium: open family units***

In Belgium, families with children are housed in open family units and receive individualized on-site case management.<sup>333</sup> Families have considerable freedom of movement, with certain restrictions, such as a nighttime curfew.<sup>334</sup> The Belgian government provides families with a weekly allowance<sup>335</sup> and covers educational, medical, logistical, administrative, and nutritional costs.<sup>336</sup> Families receive coupons to buy groceries, and certain non-food items (such as sanitary and baby products) are available on-site.<sup>337</sup> Families may also access pro bono legal services.<sup>338</sup>

Case managers, or “coaches,” are employed by the Immigration Office to support families in resolving their asylum or immigration cases.<sup>339</sup> Such support includes facilitating access to legal advice, helping families explore all available legal options to remain in Belgium, and where necessary, preparing them to return to their country of origin.<sup>340</sup> These measures have contributed to a high rate of voluntary return and reduced the cost of removal procedures.<sup>341</sup> Coaches also support families in day-to-day challenges, such as arranging appointments with medical professionals, schools and lawyers.<sup>342</sup>

Families that fail to comply with the rules and restrictions of the open family unit system may be sanctioned by, for example, receiving food coupons on a daily rather than weekly basis.<sup>343</sup> Belgian law provides that failure to comply may lead to detention; however, in practice, families with children are not detained because there are no detention facilities that are adequately adapted to their needs.<sup>344</sup>

Although the family unit system provides a far more suitable approach to immigration control than detention, it has also given rise to certain concerns. Critics have advocated for more formal collaboration between case managers and external service providers, such as non-governmental organizations and schools.<sup>345</sup> Critics have also pointed out that case management and access to legal advice should occur earlier in the immigration or asylum procedure.<sup>346</sup> During their stay in the open units, about 30% of the families awaiting removal from Belgium found other legal avenues to remain in the country.<sup>347</sup> If access to legal services were made available earlier in the process, these families could have avoided their stay in the open units. Critics also noted that dedicated facilities may not be necessary at all because case management could be provided in open reception centres or within the community.<sup>348</sup> There is no evidence that housing families in dedicated facilities better prepares them for return to their country of origin.<sup>349</sup> In response to the inadequacies of the family unit system, Belgian authorities have begun to provide coaching services to families living in the community, under certain conditions.<sup>350</sup>



# RECOMMENDATIONS

# Recommendations

The following recommendations are directed to the Ministry of Public Safety and Emergency Preparedness, the Ministry of Immigration, Refugees and Citizenship, as well as Canada Border Services Agency officers and Immigration Division adjudicators. These recommendations represent initial steps toward improved protection of children's rights in the immigration context. These recommendations complement, and build upon, the recommendations in the IHRP's 2015 report, *"We Have No Rights,"* (in particular, the recommendation to create a rebuttable presumption in favour of release after 90 days of detention, for all adult detainees).<sup>351</sup> Given the existing discretionary power under IRPA and IRPR, authorities may implement these recommendations in practice even before legislative and regulatory amendments are completed.

1. Revise section 60 of IRPA to clarify that the best interests of the child should be a primary consideration in all decisions concerning children. Children and families with children should not be detained, or housed in detention, except as a last resort; specifically, where the parents are held on the basis of danger to the public. In all other cases, children and families with children should be released outright or accommodated in community-based alternatives to detention.
2. Revise IRPA and/or introduce new regulations to prohibit under any circumstance the solitary confinement or isolation of children in immigration detention. In order to avoid co-mingling of unaccompanied minors with non-family adults, unaccompanied children should not be detained.
3. Create policy guidelines to increase access to quality education, recreational opportunities, medical services, and appropriate nutrition within immigration detention facilities. However, the amelioration of detention conditions and services for detainees must not diminish efforts to reduce the scope of immigration detention and to eliminate child detention.
4. Revise section 248 of IRPR to incorporate the best interests of the child as a primary consideration for any detention-related decision that affects children; including situations where children are formally detained, where children accompany their parents in detention as "guests," and where children are separated from their parent as a result of the parent's detention.
5. Revise IRPR and/or introduce new regulations to require conditions of release imposed on children and families with children to be the least restrictive conditions suitable in the circumstances, and only imposed where unconditional release is inappropriate. Conditions of release should be reviewed regularly to determine whether they continue to be necessary in the circumstances.
6. Introduce regulations and/or policy guidelines detailing when and under what circumstances alternatives to detention and family separation are to be used, and how they are to be implemented.
7. Engage community organizations to create non-custodial, community-based alternatives to detention and family separation, and make these available in law and in practice for children and



## RECOMMENDATIONS

families with children. Community-based alternatives should allow children to reside with their family members in the community.

- a. Expand and increase the transparency of existing third-party risk management programs and develop other community-based programs in coordination with non-governmental organizations and civil society partners.
- b. Provide individualized case management to children and families with children who are benefiting from community-based programs.

8. Collect and publish information about children in immigration detention, whether they are under detention order or accompanying their detained parents as “guests”, including:
  - a. the number of children housed in detention;
  - b. the reason for children’s detention;
  - c. the length of time children spend in detention;
  - d. the ages of children who are housed in detention;
  - e. the immigration status of children who are housed in detention;
  - f. the number of hours of schooling that children receive in detention; and
  - g. the number of parents who are detained without their children.

Data should also be collected and published to reflect the number of children who are separated from their detained parents, and held in child protection agencies, as well as the number of children and families with children who are benefiting from community-based alternatives.

9. Introduce regulations and/or policy guidelines requiring Canada Border Services Agency officers to inform the Refugee Law Office, Office of the Children’s Lawyer, Justice for Children and Youth, the Children and Youth Advocate, and similar organizations outside of Ontario, as soon as a child is placed in a detention centre, whether or not under a formal detention order.
10. Introduce regulations and/or policy guidelines requiring Immigration Division adjudicators, and Canada Border Services Agency officers and subcontractors to receive quality training on human rights, diversity, viable alternatives to detention, and the effects of detention on children’s mental health. Training should also be regularly updated.
11. Increase access to immigration detention facilities for agencies such as the UNHCR, the Canadian Red Cross, as well as legal professionals, mental health specialists and researchers.



# ACKNOWLEDGEMENTS

# Acknowledgements

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The report was reviewed and edited by Samer Muscati, Director of the IHRP; Andrew Brouwer, Senior Counsel – Refugee Law, Legal Aid Ontario; Audrey Macklin, University of Toronto Faculty of Law, Professor and Chair in Human Rights Law; Michael Bochenek, Senior Counsel, Children’s Rights Division of Human Rights Watch; Janet Cleveland, Psychologist and Researcher, SHERPA Research Centre, Institute regarding Cultural Communities, McGill University; Cheryl Milne, Chair of the Canadian Coalition for the Rights of Children, and Chair of Justice for Children and Youth; Aria Laskin, Alexandra Shelley, Jeremy Opolsky, Sarah Whitmore, and Sheila Block, Torys LLP. The report was copy edited by Vajdon Sohaili and Harry Perlman, and fact checked by Stefan Jovic. Kara Norrington provided administrative support.

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# APPENDIX A:

GOVERNMENT'S RESPONSE TO IHRP REPORT

Letter from CBSA, dated August 12, 2016



Canada Border Services Agency    Agence des services frontaliers du Canada

Mr. Samer Muscati  
 Director, International Human Rights Program  
 University of Toronto, Faculty of Law  
 39 Queen's Park, Room 106  
 Toronto, Ontario M5S 2C3  
 Canada

Dear Mr. Muscati,

I am writing to acknowledge the receipt of your report, "This is No Life for a Child: Roadmap to End Immigration Detention of Children and Family Separation", and to express my gratitude for examining this very important issue. I have duly noted the policy and operational gaps relating to the detention of children and families in the report findings, and assure you that tangible steps are forthcoming to improve the current situation in the immigration detention process.

Furthermore, the Minister of Public Safety is acutely aware of the shortfalls within Canada's immigration detention program and he wants to see the CBSA end its practice of detaining children. However, he fully recognizes that the issue is complex and requires a thorough review and substantive investments to enable alternatives to the current system. To this end, we have been working diligently to reset the immigration detention program to:

- Increase the availability of effective alternatives;
- Reduce the use of provincial jails for immigration detention by making safe, higher quality, federally-operated facilities, specifically designed for immigration purposes, more readily accessible, thus avoiding to the extent possible intermingling of immigration/refugee cases with criminal elements;
- Eliminate the detention of minors, except in the most limited and exceptional circumstances in detention facilities;
- Enhance the health, mental health and other human services available to those detained;
- Maintain access to detention facilities for agencies such as the United Nations High Commissioner for Refugees, the Canadian Red Cross, legal and spiritual advisers and others who provide support and counselling; and
- Achieve greater transparency, including effective independent scrutiny and review of all CBSA operations and proper responses to any specific complaints about officers or facilities.

The issuance of the report is timely as the Agency is about to initiate external consultations with stakeholders on the overall National Immigration Detention Framework to inform and seek support on its key components: Partnerships, Alternatives to Detention, Mental Health, and Transparency. Other cornerstones of the Framework include infrastructure replacement for the current CBSA Immigration Holding Centres,

risk-based national policies and new national standards on detention. Please take this as a place holder with a formal invite to follow in fall 2016.

With respect to the recommendations contained in the report, please find the Agency's response enclosed herein, and I shall avail myself for further discussions.

I look forward to our continued dialogue in the delivery of our immigration detention program.

Yours sincerely,



/s/ Peter Hill  
Associate Vice-President  
Canada Border Services Agency

## ENDNOTES

- <sup>1</sup> Minister of Public Safety and Emergency Preparedness, Press Conference at Laval Immigration Holding Centre, “Detention program and infrastructure announcement” (15 August 2016).
- <sup>2</sup> Canada Border Services Agency, “Minors in detention – by client status” (4 November 2015) (obtained through access to information request by IHRP, A-2015-15845/MZM).
- <sup>3</sup> Figures relating to length of detention of formally and *de facto* detained children were provided to the Library of Parliament from the Canada Border Services Agency. These figures were provided to the IHRP in an email from Canada Border Services Agency (5 August 2016) [Email from CBSA, 5 Aug 2016].
- <sup>4</sup> In December 2015, the IHRP submitted a request (pursuant to legislation) for information within the possession or control of CBSA relating to Canadian citizen children housed in detention. At the time of writing, the IHRP has not received a complete response to this request.
- <sup>5</sup> Canada Border Services Agency, “Minors in detention – by citizenship,” (4 November 2015) (obtained through access to information request by IHRP, A-2015-15845/MZM).
- <sup>6</sup> Canada Border Services Agency, “Minors in detention – by gender & age” (4 November 2015) (obtained through access to information request by IHRP, A-2015-15845/MZM). The IHRP found minor discrepancies in the figures provided by the CBSA.
- <sup>7</sup> Canada Border Services Agency, *Information for people detained under the Immigration and Refugee Protection Act* (2015) at 1, online: <<http://www.cbsa-asfc.gc.ca/publications/pub/bsf5012-eng.pdf>> [CBSA, *Information for detainees*].
- <sup>8</sup> Canadian Red Cross Society, *Annual Report on Detention Monitoring Activities in Canada, Confidential* (2012–2013) (obtained through access to information request by IHRP, A-2014-12993) at 20 [Red Cross Report 2012–2013].
- <sup>9</sup> Rachel Kronick, Cécile Rousseau and Janet Cleveland, “Asylum-Seeking Children’s Experiences of Detention in Canada: A Qualitative Study” (2015) 85:3 *American Journal of Orthopsychiatry* 287 at 290 [Kronick, Rousseau and Cleveland, “Asylum-Seeking Children”]; Janet Cleveland, “Not so short and sweet: Immigration detention in Canada,” in Amy Nethery and Stephanie J Silverman, eds., *Immigration Detention: The Migration of a Policy and its Human Impact* (New York: Routledge, 2015) at 96 [Cleveland, “Not so short and sweet”].
- <sup>10</sup> Kronick, Rousseau and Cleveland, “Asylum-Seeking Children,” *supra* note 9.
- <sup>11</sup> United Nations Committee on the Rights of the Child, *Concluding observations on the combined third and fourth periodic report of Canada*, 61st Sess, UN Doc CRC/C/CAN/CO/3-4 (5 October 2012) at para 73 [CRC Committee, *Concluding observations: Canada*].
- <sup>12</sup> *Ibid* at paras 34, 73–74.
- <sup>13</sup> United Nations High Commissioner for Refugees, “UNHCR report notes fall in refugee child detention in focus countries” (18 August 2016), online: <<http://www.unhcr.org/en-us/news/press/2016/8/57b55e0e4/unhcr-report-notes-fall-refugee-child-detention-focus-countries.html>>.
- <sup>14</sup> Public Safety Canada, News Release, “Statement by the Honourable Ralph Goodale, Minister of Public Safety and Emergency Preparedness, on Immigration Detention” (19 July 2016), online: <<http://news.gc.ca/web/article-en.do?nid=1101379>> [Statement by Minister Goodale].
- <sup>15</sup> *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), article 9.1 [*Convention on the Rights of the Child*].
- <sup>16</sup> IHRP interview with Kimona (name changed), a detainee at an IHC (November 2015) [Interview with Kimona]. Kimona was in detention at the time of the interview.
- <sup>17</sup> Email from Canada Border Services Agency (12 August 2016) [CBSA Draft Response].
- <sup>18</sup> *Ibid*.
- <sup>19</sup> Canada Border Services Agency, “Arrests, detentions and removals” (18 March 2016) online: <<http://www.cbsa-asfc.gc.ca/security-securite/detent-eng.html>> [CBSA, “Arrests, detentions and removals”]. A third Immigration Holding Centre is located in the Vancouver airport, and accommodates short stays of 48 hours.
- <sup>20</sup> Cleveland, “Not so short and sweet,” *supra* note 9 at 83.
- <sup>21</sup> Red Cross Report 2012–2013, *supra* note 8 at 31–32; Canada Border Services Agency, “National Standards & Monitoring Plan for the Regulation and Operation of CBSA Detention Centres” (23 September 2014) (obtained through access to information request by IHRP, A-2015-25857/TW) [CBSA, “National Standards & Monitoring Plan”].
- <sup>22</sup> Cleveland, “Not so short and sweet,” *supra* note 9 at 83; CBSA, *Information for detainees*, *supra* note 7 at 4.
- <sup>23</sup> Kronick, Rousseau and Cleveland, “Asylum-Seeking Children,” *supra* note 9 at 289.
- <sup>24</sup> Interview with Kimona, *supra* note 16; IHRP interview with Nadine (name changed), a detainee at an IHC (October 2015) [Interview with Nadine].
- <sup>25</sup> Kronick, Rousseau and Cleveland, “Asylum-Seeking Children,” *supra* note 9 at 289–290; Interview with Kimona, *supra* note 16; Interview with Nadine, *supra* note 24.
- <sup>26</sup> Kronick, Rousseau and Cleveland, “Asylum-Seeking Children,” *supra* note 9 at 289–290; Interview with Kimona, *supra* note 16.
- <sup>27</sup> CBSA, “National Standards & Monitoring Plan,” *supra* note 21; Interview with Kimona, *supra* note 16; Interview with Nadine, *supra* note 24.
- <sup>28</sup> Cleveland, “Not so short and sweet,” *supra* note 9 at 83.
- <sup>29</sup> *Ibid*; Kronick, Rousseau and Cleveland, “Asylum-Seeking Children,” *supra* note 9 at 290.
- <sup>30</sup> United Nations High Commissioner for Refugees, *Detention Guidelines: Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* (2012) at para 48(xiii) [UNHCR Detention Guidelines].
- <sup>31</sup> Immigration, Refugees, and Citizenship Canada, “ENF 20 Detention” (22 December 2015) at s 5.10, online: <<http://www.cic.gc.ca/english/resources/manuals/enf/enf20-eng.pdf>> [ENF 20].
- <sup>32</sup> *Ibid*; CBSA “National Standards & Monitoring Plan,” *supra* note 21.
- <sup>33</sup> Kronick, Rousseau and Cleveland, “Asylum-Seeking Children,” *supra* note 9 at 289.
- <sup>34</sup> Interview with Nadine, *supra* note 24.
- <sup>35</sup> *Ibid*; Kronick, Rousseau and Cleveland, “Asylum-Seeking Children,” *supra* note 9 at 289.
- <sup>36</sup> Kronick, Rousseau and Cleveland, “Asylum-Seeking Children,” *supra* note 9 at 289.
- <sup>37</sup> Canada Border Services Agency, “The Greater Toronto Area and the Quebec Region,” (undated) (obtained through access to information request by IHRP, A-2015-18226).
- <sup>38</sup> Interview with Kimona, *supra* note 16; Interview with Nadine, *supra* note 24.



## ENDNOTES

- <sup>39</sup> Kronick, Rousseau and Cleveland, "Asylum-Seeking Children," *supra* note 9 at 289; Cleveland, "Not so short and sweet," *supra* note 9 at 83.
- <sup>40</sup> Kronick, Rousseau and Cleveland, "Asylum-Seeking Children," *supra* note 9 at 289; Interview with Nadine, *supra* note 24.
- <sup>41</sup> Red Cross Report 2012–2013, *supra* note at 8 at 32.
- <sup>42</sup> Interview with Nadine, *supra* note 24; Rachel Browne, "Canada says it wants to stop detaining migrant kids, but it's still locking up 2-year-olds," *Vice News* (11 July 2016), online: <<https://news.vice.com/article/canada-locked-up-dozens-of-migrant-children-in-the-last-few-months-new-documents-show>>.
- <sup>43</sup> Interview with Kimona, *supra* note 16; Interview with Nadine, *supra* note 24.
- <sup>44</sup> Kronick, Rousseau and Cleveland, "Asylum-Seeking Children," *supra* note 9 at 292.
- <sup>45</sup> *Ibid.*
- <sup>46</sup> Statement by Minister Goodale, *supra* note 14.
- <sup>47</sup> This case study is based on an interview that psychiatrist Rachel Kronick conducted with the family two years following their detention in Rachel Kronick, *The detention of migrant children and families in Canada: advocacy, policy and lived experience* (MSc Thesis, McGill University, Department of Psychiatry, 2015) [unpublished] at 104–107, online: <[http://digitool.library.mcgill.ca/R/-?func=dbin-jump-full&current\\_base=GEN01&object\\_id=130260](http://digitool.library.mcgill.ca/R/-?func=dbin-jump-full&current_base=GEN01&object_id=130260)>.
- <sup>48</sup> CBSA, "Arrests, detentions and removals," *supra* note 19.
- <sup>49</sup> Red Cross Report 2012–2013, *supra* note 8 at 20.
- <sup>50</sup> *Ibid.*
- <sup>51</sup> *Ibid* at 21; see also, Canada Border Services Agency, "Minors in detention – by detention facility" (4 November 2015) (obtained through access to information request by IHRP, A-2015-15845/MZM) [CBSA, "Minors in detention – by facility"].
- <sup>52</sup> CBSA, "Minors in detention – by facility," *supra* note 51.
- <sup>53</sup> *Ibid.*
- <sup>54</sup> Red Cross Report 2012–2013, *supra* note 8 at 26; UNHCR Detention Guidelines, *supra* note 30 at para 48(iii).
- <sup>55</sup> Canada Border Services Agency, "Minors in detention – by region" (4 November 2015) (obtained through access to information request by IHRP, A-2015-15845/MZM) [CBSA, "Minors in detention – by region"].
- <sup>56</sup> In 2011, Ontario and Québec were home to 62.3% of all newcomers in Canada. See Statistics Canada, "Immigration and Ethnocultural Diversity in Canada" (22 December 2015), online: <<https://www12.statcan.gc.ca/nhs-enm/2011/as-sa/99-010-x/99-010-x2011001-eng.cfm>>.
- <sup>57</sup> Canada Border Services Agency, "ARCHIVED – CBSA Detentions and Removals Programs – Evaluation Study" (November 2010) online: <<http://www.cbsa-asfc.gc.ca/agency-agence/reports-rapports/ae-ve/2010/dr-rd-eng.html>> [CBSA, "Evaluation Study"].
- <sup>58</sup> CBSA, "Minors in detention – by region," *supra* note 55.
- <sup>59</sup> Statement by Minister Goodale, *supra* note 14.
- <sup>60</sup> Solitary confinement is known by different terms, including "segregation," "isolation," "separation," and "cellular," but all these terms can involve different factors. See United Nations General Assembly, *Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment*, Juan Mendez, 66th Sess, UN Doc A/66/268 (5 August 2011) at para 26 [UNGA, *Interim report of the Special Rapporteur on torture*].
- <sup>61</sup> *Ibid* at para 25.
- <sup>62</sup> *Ibid* at para 62.
- <sup>63</sup> Office of the Provincial Advocate for Children and Youth of Ontario, *It's a Matter of Time: Systemic review of secure isolation in Ontario youth justice facilities* (2015) at 16, online: <[https://provincialadvocate.on.ca/documents/en/SIU\\_Report\\_2015\\_En.pdf](https://provincialadvocate.on.ca/documents/en/SIU_Report_2015_En.pdf)>.
- <sup>64</sup> UNGA, *Interim report of the Special Rapporteur on torture*, *supra* note 60 at para 55.
- <sup>65</sup> Maureen Brosnahan, "Syrian boy seeking refugee status ordered deported to United States," (16 February 2016) *CBC News*, online: <<http://www.cbc.ca/news/canada/toronto/syrian-teen-detained-toronto-1.3449595>> [Brosnahan, "Syrian boy ordered deported"]; IHRP interview with Andrew Brouwer, Senior Counsel – Refugee Law, Legal Aid Ontario (5 August 2016) [Interview with Andrew Brouwer].
- <sup>66</sup> CBSA, "Arrests, detentions and removals," *supra* note 19.
- <sup>67</sup> CBSA, "National Standards & Monitoring Plan," *supra* note 21.
- <sup>68</sup> IHRP interview with Dr. Janet Cleveland, Psychologist and Researcher, Transcultural Research and Intervention Team, Division of Social and Cultural Psychiatry, McGill University (10 August 2016).
- <sup>69</sup> CBSA Draft Response, *supra* note 17.
- <sup>70</sup> *Ibid.*
- <sup>71</sup> UNGA, *Interim report of the Special Rapporteur on torture*, *supra* note 60 at para 77.
- <sup>72</sup> United Nations Committee on the Rights of the Child, *General Comment No. 10: Children's rights in juvenile justice*, 44th Sess, UN Doc CRC/C/GC/10 (25 April 2007) at para 89.
- <sup>73</sup> Detention is prohibited for all unaccompanied minors under the age of 18 years in Belgium, Bulgaria, France, Ireland, Slovenia, Slovak Republic, Spain, and certain German *Länder*. In Czech Republic, detention is prohibited for unaccompanied minors under the age of 18 years who are seeking asylum. Detention is prohibited for all unaccompanied minors under the age of 14 years in Austria and Latvia, 15 years in Czech Republic and Poland, and 16 in certain German *Länder*. See European Migration Network, *The use of detention and alternatives to detention in the context of immigration policies: Synthesis Report for the EMN Focussed Study 2014* (November 2014) at 20 [EMN, *Synthesis Report*].
- <sup>74</sup> This section relies on publicly available information. The IHRP was also involved in this case. Brosnahan, "Syrian boy ordered deported," *supra* note 65.
- <sup>75</sup> *Ibid.*
- <sup>76</sup> *Ibid.*
- <sup>77</sup> Carmen Cheung and Samer Muscati, "An inexcusable travesty: Canada sent a Syrian minor to solitary confinement," *Globe and Mail* (17 February 2016), online: <<http://www.theglobeandmail.com/opinion/an-inexcusable-travesty-canada-sent-a-syrian-minor-to-solitary-confinement/article28781118/>> [Cheung and Muscati, "An inexcusable travesty"].

## ENDNOTES

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<sup>78</sup> Brosnahan, “Syrian boy ordered deported,” *supra* note 65.

<sup>79</sup> UN Human Rights Office of the High Commissioner, “Status of Ratification” (2016), online: <<http://indicators.ohchr.org/>> [OHCHR, “Status of Ratification”].

<sup>80</sup> Human Rights Watch, “US: Surge in Detention of Child Migrants” (25 June 2014), online: <<https://www.hrw.org/news/2014/06/25/us-surge-detention-child-migrants>>.

<sup>81</sup> Cheung and Muscati, “An inexcusable travesty,” *supra* note 77.

<sup>82</sup> Brosnahan, “Syrian boy ordered deported,” *supra* note 65.

<sup>83</sup> *Ibid.*

<sup>84</sup> Cheung and Muscati, “An inexcusable travesty,” *supra* note 77.

<sup>85</sup> Rachel Browne, “Canada Reverses Its Decision to Deport Syrian Teen It Held in Solitary Confinement,” *Vice* (18 February 2016) online: <<https://news.vice.com/article/canada-reverses-its-decision-to-deport-syrian-teen-it-held-in-solitary-confinement>> [Browne, “Canada Reverses Decision”].

<sup>86</sup> Brosnahan, “Syrian boy ordered deported,” *supra* note 65.

<sup>87</sup> Browne, “Canada Reverses Decision,” *supra* note 85.

<sup>88</sup> See Kronick, Rousseau and Cleveland, “Asylum-Seeking Children,” *supra* note 9. See also Ann Lorek et al, “The mental and physical health difficulties of children held within a British immigration detention center: A pilot study” (2009) 33:9 *Child Abuse & Neglect* 573 [Lorek et al]; Zachary Steel et al, “Psychiatric status of asylum seeker families held for a protracted period in a remote detention centre in Australia” (2004) 28:6 *Australian and New Zealand Journal of Public Health* 527 [Steel et al].

<sup>89</sup> Kronick, Rousseau and Cleveland, “Asylum-Seeking Children,” *supra* note 9 at 288. It is important to increase access to detention facilities for research purposes in order to establish a firm evidentiary foundation to guide policy developments with respect to immigration detention.

<sup>90</sup> *Ibid.* See also Lorek et al, *supra* note 88; Steel et al, *supra* note 88.

<sup>91</sup> Kronick, Rousseau and Cleveland, “Asylum-Seeking Children,” *supra* note 9 at 291; Lorek et al, *supra* note 88 at 580.

<sup>92</sup> Kronick, Rousseau and Cleveland, “Asylum-Seeking Children,” *supra* note 9 at 292.

<sup>93</sup> *Ibid.* at 290–291.

<sup>94</sup> *Ibid.* at 288.

<sup>95</sup> *Ibid.* at 291–292.

<sup>96</sup> *Ibid.* at 291.

<sup>97</sup> *Ibid.* at 291–292.

<sup>98</sup> *Ibid.* at 291.

<sup>99</sup> *Ibid.* at 288.

<sup>100</sup> *Ibid.* at 292.

<sup>101</sup> Lorek et al, *supra* note 88.

<sup>102</sup> *Ibid.* at 578.

<sup>103</sup> *Ibid.*

<sup>104</sup> *Ibid.*

<sup>105</sup> Katy Robjant, Rita Hassan and Cornelius Katona, “Mental health implications of detaining asylum seekers: a systematic review” (2009) 194:4 *British Journal of Psychiatry* 306; Janet Cleveland and Cécile Rousseau, “Psychiatric Symptoms Associated With Brief Detention of Adult Asylum Seekers in Canada” (2013) 58:7 *Canadian Journal of Psychiatry* 409 [Cleveland and Rousseau, “Psychiatric Symptoms”]; Kronick, Rousseau and Cleveland, “Asylum-Seeking Children,” *supra* note 9 at 292; Lorek et al, *supra* note 88 at 581.

<sup>106</sup> Kronick, Rousseau and Cleveland, “Asylum-Seeking Children,” *supra* note 9 at 290–291.

<sup>107</sup> Lorek et al, *supra* note 88 at 579.

<sup>108</sup> Nicholas M Kowalenko et al, “Family matters: infants, toddlers and preschoolers of parents affected by mental illness” (August 2013) 199:Supplement 3 *Medical Journal of Australia* S14; Myrna M Weissman et al, “Offspring of Depressed Parents: 20 Years Later” (2006) 163:6 *American Journal of Psychiatry* 1001.

<sup>109</sup> Kronick, Rousseau and Cleveland, “Asylum-Seeking Children,” *supra* note 9 at 292.

<sup>110</sup> *Ibid.* at 290–292.

<sup>111</sup> *Ibid.* at 290–291.

<sup>112</sup> *Ibid.* at 291.

<sup>113</sup> *Ibid.* at 292.

<sup>114</sup> *Ibid.*, citing Marcia Yablon-Zug, “Separation, deportation, termination” (2012) 32:1 *Boston College Journal of Law & Social Justice* 63.

<sup>115</sup> Ajay Chaudry et al, *Facing our future: Children in the aftermath of immigration enforcement* (The Urban Institute, February 2010) at 53.

<sup>116</sup> Randy Capps et al, “US Children with Parents in Deportation Proceedings,” in David L Leal and Nestor P Rodriguez, eds, *Migration in an Era of Restriction and Recession*, 1st ed (Cham, Switzerland: Springer International Publishing, 2016) at 93.

<sup>117</sup> *Ibid.*

<sup>118</sup> CBSA Draft Response, *supra* note 17.

<sup>119</sup> *Ibid.* In its draft response, CBSA noted that training for Immigration Detention adjudicators is within the jurisdiction of the Immigration and Refugee Board.

<sup>120</sup> IHRP interview with Dr. Rachel Kronick, Psychiatrist at Jewish General Hospital and Assistant Professor at McGill University Department of Psychiatry (19 August 2016). This research is currently being prepared for publication: Rachel Kronick, Cécile Rousseau and Janet Cleveland, “Police attacks” or a “safe city”? *refugee children’s sandplay narratives in immigration detention in Canada* (2016) (manuscript in preparation).

<sup>121</sup> *Immigration and Refugee Protection Act*, SC 2001, c 27, ss 54–61 [IRPA].

<sup>122</sup> *Immigration and Refugee Protection Regulations*, SOR/2002-227, ss 244–251 [IRPR].

<sup>123</sup> Canada Border Services Agency, “Acts, regulations and other regulatory information: Delegation of Authority and Designations of Officers by the Minister of Public Safety and Emergency Preparedness under the *Immigration and Refugee Protection Act* and the *Immigration and Refugee*

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*Protection Regulations*" (26 July 2016), online: <http://www.cbsa-asfc.gc.ca/agency-agence/actreg-loireg/delegation/irpa-lipr-2016-07-eng.html>; Citizenship and Immigration Canada, "ENF 3 Admissibility, Hearings and Detention Review Proceedings" (29 April 2015) at s 7, online: <http://www.cic.gc.ca/english/resources/manuals/enf/enf03-eng.pdf> [ENF 3].

<sup>124</sup> Canada Border Services Agency, "Operational bulletins and manuals" (27 June 2016), online: <http://www.cic.gc.ca/English/resources/manuals/index.asp>; Immigration and Refugee Board of Canada, "Policy on the use of Chairperson's Guidelines" (27 October 2003), online: <http://www.irb-cisr.gc.ca/Eng/BoaCom/references/pol/pol/Pages/PolGuideDir.aspx>.

<sup>125</sup> See IRPA, *supra* note 121, s 60; IRPR, *supra* note 122, s 249; ENF 20, *supra* note 31 at s 5.10; Immigration and Refugee Board, "Chairperson Guideline 3: Child Refugee Claimants – Procedural and Evidentiary Issues" (September 1996) online: <http://www.irb-cisr.gc.ca/Eng/BoaCom/references/pol/GuideDir/Pages/GuideDir03.aspx> [Chairperson Guideline 3].

<sup>126</sup> IRPA, *supra* note 121, s 55.

<sup>127</sup> *Ibid.*

<sup>128</sup> *Ibid.*, s 55(2)(b).

<sup>129</sup> *Ibid.*, s 55(3)(a).

<sup>130</sup> *Ibid.*, s 55(3)(b).

<sup>131</sup> IRPR, *supra* note 122, s 248. These factors are: (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 or the person concerned; and (e) the existence of alternatives to detention.

<sup>132</sup> IRPA, *supra* note 121, s 60. The definition of "minor child" varies among the provinces. See Immigration, Refugees and Citizenship Canada, "Provincial definitions of a minor," (25 February 2013) online: <http://www.cic.gc.ca/english/resources/tools/refugees/canada/processing/minors-prov.asp>.

<sup>133</sup> IRPR, *supra* note 122, s 249. These special considerations are: (a) the availability of alternative arrangements with local child-care agencies or child protection services for the care and protection of the minor children; (b) the anticipated length of detention; (c) the risk of continued control by the human smugglers or traffickers who brought the children to Canada; (d) the type of detention facility envisaged and the conditions of detention; (e) the availability of accommodation that allows for the segregation of the minor children from adult detainees who are not the parent of or the adult legally responsible for the detained minor children; and (f) the availability of services in the detention facility, including education, counseling and recreation.

<sup>134</sup> IRPA, *supra* note 121, s 55.

<sup>135</sup> Canada Border Services Agency, "Minors in detention – by legislative grounds" (4 November 2015) (obtained through access to information request by IHRP, A-2015-15845/MZM) [CBSA, "Minors in detention – by ground"].

<sup>136</sup> CBSA, "Arrests, detentions and removals," *supra* note 19.

<sup>137</sup> Red Cross Report 2012–2013, *supra* note 8 at 7.

<sup>138</sup> *Ibid.* at 21–22.

<sup>139</sup> CBSA Draft Response, *supra* note 17.

<sup>140</sup> IRPA, *supra* note 121, s 56(1).

<sup>141</sup> *Ibid.*, s 57.

<sup>142</sup> *Ibid.*, s 57(2).

<sup>143</sup> ENF 3, *supra* note 123 at s 7.

<sup>144</sup> IRPA, *supra* note 121, s 167(2).

<sup>145</sup> *Ibid.*, s 173(c) and (d).

<sup>146</sup> Immigration and Refugee Board, "Chairperson Guideline 2: Detention" (5 June 2013) at para 1.1.9, online: <http://www.irb-cisr.gc.ca/Eng/BoaCom/references/pol/GuideDir/Pages/GuideDir02.aspx#s36> [Chairperson Guideline 2]. By contrast, in the criminal justice system, the case against the defendant must be proven beyond a reasonable doubt before the state may justifiably deprive the accused of their liberty.

<sup>147</sup> IRPA, *supra* note 121, s 58.

<sup>148</sup> IRPR, *supra* note 122, s 248(e).

<sup>149</sup> *Ibid.*, s 248.

<sup>150</sup> Immigration and Refugee Board of Canada, Immigration Division, "Detention Reviews Finalized by Member, 2013" (obtained through access to information request by MacDonald Scott, A-2013-02027/JSJ) [ID, "Detention Reviews by Member"].

<sup>151</sup> *Ibid.*

<sup>152</sup> *Canada (Minister of Citizenship and Immigration) v Thanabalasingam*, 2004 FCA 4, 3 FCR 572 at para 10.

<sup>153</sup> International Human Rights Program, "We Have No Rights": *Arbitrary imprisonment and cruel treatment of migrants with mental health issues in Canada* (2015) at 55 [IHRP, "We Have No Rights"].

<sup>154</sup> ID, "Detention Reviews by Member," *supra* note 150.

<sup>155</sup> "In all cases involving minors appearing before the ID ... [adjudicators] will consider and apply the IRB guideline entitled *Child Refugee Claimants – Procedural and Evidentiary Issues* [Chairperson Guideline 3], making necessary modifications in respect of any provisions in this guideline that are not relevant to the ID," in Immigration and Refugee Board, "Chairperson Guideline 8: Procedures With Respect to Vulnerable Persons Appearing Before the IRB" (15 December 2012) online: <http://www.irb-cisr.gc.ca/Eng/BoaCom/references/pol/guidir/Pages/GuideDir08.aspx>. Chairperson Guideline 3, *supra* note 125, provides special considerations that apply to eliciting and assessing evidence in proceedings involving child refugee claimants.

<sup>156</sup> See note 155. Chairperson Guideline 3, *supra* note 125, outlines special procedures that apply to the processing of unaccompanied children's refugee claims.

<sup>157</sup> See note 155. Chairperson Guideline 3, *supra* note 125, provides that "[t]he question to be asked when determining the appropriate procedure for the claim of a child is what procedure is in the best interests of this child?"

<sup>158</sup> See note 155. Chairperson Guideline 3, *supra* note 125, refers exclusively to child refugee claimants: "for the purpose of these *Guidelines*, child refers to any person under the age of 18 who is the subject of proceedings before the Convention Refugee Determination Division."

<sup>159</sup> IRPA, *supra* note 121, s 60.

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<sup>160</sup> CBSA, “Arrests, detentions and removals,” *supra* note 19.

<sup>161</sup> *Convention on the Rights of the Child*, *supra* note 15.

<sup>162</sup> United Nations Committee on the Rights of the Child, General comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), 62nd Sess, UN Doc CRC/C/GC/14 (29 May 2013) at para 6 [CRC Committee, *General Comment 14*].

<sup>163</sup> *Convention on the Rights of the Child*, *supra* note 15, article 3(1).

<sup>164</sup> CRC Committee, *General Comment 14*, *supra* note 162 at para 32.

<sup>165</sup> *Ibid* at para 50.

<sup>166</sup> *Ibid* at paras 53–54.

<sup>167</sup> *Ibid* at paras 55–57.

<sup>168</sup> *Ibid* at paras 58–70.

<sup>169</sup> *Ibid* at paras 71–74.

<sup>170</sup> *Ibid* at paras 75–76.

<sup>171</sup> *Ibid* at paras 77–78.

<sup>172</sup> *Ibid* at para 79.

<sup>173</sup> *Ibid* at para 87.

<sup>174</sup> UN Committee on the Rights of the Child, *Report of the 2012 Day of General Discussion on The Rights of the Child in the Context of International Migration* (28 September 2012) [CRC Committee, *Report of 2012 DGD*].

<sup>175</sup> *Convention on the Rights of the Child*, *supra* note 15, article 37(b).

<sup>176</sup> CRC Committee, *Report of 2012 DGD*, *supra* note 174 at para 78.

<sup>177</sup> United Nations General Assembly, Third Committee, *Migrant children and adolescents*, 69th Sess, UN Doc A/C.3/69/L.52/Rev.1 (19 November, 2014) at para 3; United Nations Working Group on Arbitrary Detention, *Report of the Working Group on Arbitrary Detention: UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court*, 30th Sess, UN Doc. A/HRC/30/37 (6 July 2015) at para 113; *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection* (19 August 2014), Advisory Opinion OC-21/14, Inter-American Court of Human Rights at para 154 [Inter-Am Ct HR, *Rights and Guarantees of Children in the Context of Migration*].

<sup>178</sup> UNHCR Detention Guidelines, *supra* note 30 at para 51.

<sup>179</sup> CRC Committee, *Report of 2012 DGD*, *supra* note 174 at para 78.

<sup>180</sup> *Ibid* at para 72; *Convention on the Rights of the Child*, *supra* note 15, 9(1).

<sup>181</sup> CRC Committee, *Report of 2012 DGD*, *supra* note 174 at para 79.

<sup>182</sup> *Ibid* at para 83.

<sup>183</sup> *Ibid* at para 79.

<sup>184</sup> United Nations General Assembly, *Report of the Special Rapporteur on the human rights of migrants*, François Crépeau, 20th Sess, UN Doc A/HRC/20/24 (2 April 2012) at paras 40 and 72(h); United Nations General Assembly, *Report of the Special Rapporteur on the human rights of migrants*, Jorge Bustamante, 11th Sess, UN Doc A/HRC/11/7 (14 May 2009) at para 62 (“Migration-related detention of children should not be justified on the basis of maintaining the family unit...”).

<sup>185</sup> United Nations General Assembly, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, Juan E. Méndez, 28th Sess, UN Doc A/HRC/28/68 (5 March 2015) at para 80; Inter-Am Ct HR, *Rights and Guarantees of Children in the Context of Migration*, *supra* note 177 at para 158.

<sup>186</sup> CRC Committee, *Concluding observations: Canada*, *supra* note 11 at para 34.

<sup>187</sup> *Ibid* at para 74.

<sup>188</sup> CBSA Draft Response, *supra* note 17.

<sup>189</sup> *Ibid*.

<sup>190</sup> IRPA, *supra* note 121, s 3(3)(f).

<sup>191</sup> OHCHR, “Status of Ratification,” *supra* note 79.

<sup>192</sup> Canadian Coalition for the Rights of Children, *Right in principle, right in practice: Implementation of the Convention on the Rights of the Child in Canada* (November 2011) at 72 [CCRC, *Right in principle*].

<sup>193</sup> *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817 at para 70 [Baker].

<sup>194</sup> *De Guzman v Canada (Minister of Citizenship and Immigration)* 2005 FCA 436 at para 87.

<sup>195</sup> IRPA, *supra* note 121, provides that the best interests of the child are to be taken into consideration in four specific contexts: applications for humanitarian and compassionate relief under s. 25(1); the application of permanent residency obligations under s. 28; immigration detention of children under s. 60; and appeals to the Immigration Appeal Division under ss. 67 to 69.

<sup>196</sup> *Convention on the Rights of the Child*, *supra* note 15, article 3(1).

<sup>197</sup> *Baker*, *supra* note 193 at para 75.

<sup>198</sup> *Kanthasamy v Canada (Citizenship and Immigration)* 2015 SCC 61 at para 40.

<sup>199</sup> *Ibid*.

<sup>200</sup> *B.B. and Justice for Children and Youth v Minister of Citizenship and Immigration* (24 August 2016), Toronto IMM-5754-15 (Federal Court) [B.B.].

<sup>201</sup> Interview with Andrew Brouwer, *supra* note 65.

<sup>202</sup> Email from CBSA, 5 Aug 2016, *supra* note 3.

<sup>203</sup> *B.B.*, *supra* note 200.

<sup>204</sup> *Ibid*.

<sup>205</sup> *Ibid*.

<sup>206</sup> CRC Committee, *Report of 2012 DGD*, *supra* note 174 at para 79.

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<sup>207</sup> IHRP interview with Irwin Elman, Provincial Advocate for Children and Youth (4 August 2016) [Interview with Irwin Elman].

<sup>208</sup> *Ibid.*

<sup>209</sup> Office of the Provincial Advocate for Children and Youth, “Meet the Provincial Advocate” (undated), online: <[https://provincialadvocate.on.ca/main/en/about/meet\\_provincial\\_advocate.cfm](https://provincialadvocate.on.ca/main/en/about/meet_provincial_advocate.cfm)>

<sup>210</sup> Office of the Provincial Advocate for Children and Youth, “Mandate and Scope” (undated), online: <[https://provincialadvocate.on.ca/main/en/about/mandate\\_and\\_scope.cfm](https://provincialadvocate.on.ca/main/en/about/mandate_and_scope.cfm)>.

<sup>211</sup> Office of the Provincial Advocate for Children and Youth, “Bill 8” (undated), online: <<https://provincialadvocate.on.ca/main/en/about/Investigations.html>>.

<sup>212</sup> *Child and Family Services Act*, RSO 1990, c C-11.

<sup>213</sup> Interview with Irwin Elman, *supra* note 207.

<sup>214</sup> Youth Leaving Care Hearings, *My REAL Life Book* (May 2012), online: <[https://www.provincialadvocate.on.ca/documents/en/ylc/YLC\\_REPORT\\_ENG.pdf](https://www.provincialadvocate.on.ca/documents/en/ylc/YLC_REPORT_ENG.pdf)>.

<sup>215</sup> Interview with Irwin Elman, *supra* note 207.

<sup>216</sup> CBSA, *Information for detainees*, *supra* note 7 at 1.

<sup>217</sup> Interview with Irwin Elman, *supra* note 207.

<sup>218</sup> Interview with Andrew Brouwer, *supra* note 65.

<sup>219</sup> See for example Standing Senate Committee on Human Rights, *Children – The Silenced Citizens: effective implementation of Canada’s international obligations with respect to the rights of children* (April 2007) [Standing Senate Committee on Human Rights, *Children: The Silenced Citizens*]; CCRC, *Right in principle*, *supra* note 192; Canadian Council for Refugees, *Canada’s Treatment of Non-citizen Children* (January 2012), online: <<http://ccrweb.ca/sites/ccrweb.ca/files/noncitizenchildrenbackgroundunderen.pdf>>.

<sup>220</sup> Standing Senate Committee on Human Rights, *Children: The Silenced Citizens*, *supra* note 219 at 133.

<sup>221</sup> Interview with Nadine, *supra* note 24. Nadine was in detention at the time of the interview.

<sup>222</sup> Transcript of Nadine’s detention review in May 2014 (on file with the IHRP).

<sup>223</sup> *Ibid.*

<sup>224</sup> *Ibid.*

<sup>225</sup> Transcript of Nadine’s detention review in September 2014 (on file with the IHRP).

<sup>226</sup> *Ibid.*

<sup>227</sup> IRPR, *supra* note 122, s 248(e).

<sup>228</sup> ENF 20, *supra* note 31 at s 5.2.

<sup>229</sup> Chairperson Guideline 2, *supra* note 146 at para 3.6.3.

<sup>230</sup> IRPA, *supra* note 121, ss. 56(1) and 58(3).

<sup>231</sup> ENF 20, *supra* note 31 at s 5.11.

<sup>232</sup> *Ibid.*

<sup>233</sup> Citizenship and Immigration Canada, “ENF 8 Deposits and Guarantees” (1 February 2007) at s 5.1, online: <<http://www.cic.gc.ca/English/resources/manuals/enf/enf08-eng.pdf>> [ENF 8].

<sup>234</sup> IRPR, *supra* note 122, ss 48(1)(a), 48(2)(a).

<sup>235</sup> ENF 20, *supra* note 31 at s 5.11, 5.12.

<sup>236</sup> *Ibid.*

<sup>237</sup> EMN, *Synthesis Report*, *supra* note 73 at 39.

<sup>238</sup> See Kronick, Rousseau and Cleveland, “Asylum-Seeking Children,” *supra* note 9; Lorek et al, *supra* note 88. See also Cleveland and Rousseau, “Psychiatric Symptoms,” *supra* note 105.

<sup>239</sup> Canada Border Services Agency, “Detention Program Financial Report: High level Unit Cost by Facility Types” (undated) (obtained through access to information request by IHRP, A-2014-13107).

<sup>240</sup> *Ibid.*

<sup>241</sup> *Ibid.*

<sup>242</sup> CBSA, “Minors in detention – by ground,” *supra* note 135.

<sup>243</sup> Alice Edwards, “Back to Basics: The Right to Liberty and Security of Person and ‘Alternatives to Detention’ of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants” (April 2011) Legal and Protection Policy Research Series PPLA/2011/01.Rev.1 (United Nations High Commissioner for Refugees) at 82-83 [Edwards, “Back to Basics”].

<sup>244</sup> *Ibid.*

<sup>245</sup> *Ibid.* at 57.

<sup>246</sup> International Detention Coalition, *There are alternatives: A handbook for preventing unnecessary immigration detention (revised edition)* (2015) at 34.

<sup>247</sup> Edwards, “Back to Basics,” *supra* note 243 at 82–83.

<sup>248</sup> *Ibid.* at 83–84.

<sup>249</sup> *Ibid.*

<sup>250</sup> *Ibid.*

<sup>251</sup> *Ibid.* at 84. “Case management is a strategy for supporting and managing individuals and their asylum claims whilst their status is being resolved, with a focus on informed decision-making, timely and fair status resolution and improved coping mechanisms and well-being on the part of individuals,” in UNHCR Detention Guidelines, *supra* note 30 at 44.

<sup>252</sup> *Ibid.*

<sup>253</sup> Statement by Minister Goodale *supra* note 14.

<sup>254</sup> UNHCR Detention Guidelines, *supra* note 30 at Annex A (ii).



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- <sup>255</sup> Ophelia Field and Alice Edwards, “Alternatives to Detention of Asylum Seekers and Refugees” (April 2006) Legal and Protection Policy Research Series, POLAS/2006/03 (United Nations High Commissioner for Refugees) at 84 [Field and Edwards, “Alternatives to Detention”].
- <sup>256</sup> *Ibid.*
- <sup>257</sup> Chris, “My Local Border Post,” (20 January 2014), online: <<https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2014/01/my-local-border>>; Sarah Campbell, Maria Baqueriza and James Ingram, *Last resort or first resort? Immigration detention of children in the UK* (2011) Bail for Immigration Detainees and The Children’s Society at 88, online: <[http://www.biduk.org/sites/default/files/LastResortFirstResort\\_FULL%20REPORT%20WEB%20VERSION\\_0.pdf](http://www.biduk.org/sites/default/files/LastResortFirstResort_FULL%20REPORT%20WEB%20VERSION_0.pdf)> [BID, *Last resort?*].
- <sup>258</sup> Alice Bloomfield, Evangelia Tsourdi and Joanna Pétin, *Alternatives to Immigration and Asylum Detention in the EU: Time for implementation*, edited by Philippe de Bruycker (2015) at 91 [Bloomfield et al, *ATDs in the EU*].
- <sup>259</sup> Home Office, “Enforcement Instructions and Guidance: Chapter 22a – Contact Management” (3 June 2015) at s 22a.3.3, online: <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/269986/chapter22acontactmanagement.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/269986/chapter22acontactmanagement.pdf)>.
- <sup>260</sup> *Ibid.* at s 22a.3.3, 22a.5.1.
- <sup>261</sup> Jim Bronskill, “Electronic tracking of immigrants, refugees more cost-effective: Study” Toronto Star (22 September 2014), online: <[https://www.thestar.com/news/canada/2014/09/22/electronic\\_tracking\\_of\\_immigrants\\_refugees\\_may\\_be\\_more\\_costeffective.html](https://www.thestar.com/news/canada/2014/09/22/electronic_tracking_of_immigrants_refugees_may_be_more_costeffective.html)>.
- <sup>262</sup> ENF 8, *supra* note 233 at s 5.2.
- <sup>263</sup> Red Cross Report 2012–2013, *supra* note 8 at 37.
- <sup>264</sup> IRPR, *supra* note 122, ss 48(1)(a), 48(2)(a).
- <sup>265</sup> Field and Edwards, “Alternatives to Detention,” *supra* note 255 at 84.
- <sup>266</sup> FCJ Refugee Centre, “Our Organization” (undated), online: <<http://www.fcjrefugeecentre.org/about-us/our-organization-2/>>.
- <sup>267</sup> Matthew House, “Our Services” (undated), online: <<http://www.matthewhouse.ca/matthewhouse/page.php?p=services&s=services>>.
- <sup>268</sup> Sojourn House, “What We Do” (undated), online: <<http://www.sojournhouse.org>>.
- <sup>269</sup> Field and Edwards, “Alternatives to Detention,” *supra* note 255 at 90.
- <sup>270</sup> Edwards, “Back to Basics,” *supra* note 243 at 57.
- <sup>271</sup> *Ibid.* at 57; Canadian Council for Refugees, “Alternatives to detention: CCR comments regarding the Toronto Bail Program,” (January 2015) online: <http://ccrweb.ca/en/alternatives-detention-comments-toronto-bail-program> [CCR, “TBP comments”].
- <sup>272</sup> Edwards, “Back to Basics,” *supra* note 243 at 57.
- <sup>273</sup> CBSA, “Evaluation Study,” *supra* note 57.
- <sup>274</sup> Edwards, “Back to Basics,” *supra* note 243 at 58.
- <sup>275</sup> ENF 20, *supra* note 31 at s 5.12, does not provide examples of any other third-party risk management program available in Canada.
- <sup>276</sup> IHRP, “We Have No Rights,” *supra* note 153 at 28; Canada Border Services Agency, “Annex A, Statement of Work, Contract between CBSA and TBP” (No. 47636-106168/001/TOR).
- <sup>277</sup> IHRP, “We Have No Rights,” *supra* note 153 at 90; CCR, “TBP comments,” *supra* note 271.
- <sup>278</sup> IHRP, “We Have No Rights,” *supra* note 153 at 28.
- <sup>279</sup> CCR, “TBP comments,” *supra* note 271.
- <sup>280</sup> *Ibid.*
- <sup>281</sup> CBSA, “Evaluation Study,” *supra* note 57.
- <sup>282</sup> CCR, “TBP comments,” *supra* note 271.
- <sup>283</sup> European Migration Network Belgium National Contact Point, *The use of detention and alternatives to detention in the context of immigration policies in Belgium: Focused Study of the Belgian National Contact Point of the European Migration Network* (June 2014) at 44 [EMN Focused Study, Belgium].
- <sup>284</sup> *Ibid.* at 45–47.
- <sup>285</sup> Individuals that are required to reside in specific open accommodation centres have no choice of residence and are often subject to restrictions on movement, such as curfews or security escorts. See Edwards, Back to Basics, *supra* note 243 at 70 (nighttime curfews in Belgian open units); Bwalya Kankulu, *The use of detention and alternatives to detention in the context of immigration policies: National Contribution from the United Kingdom* (October 2014) at 17 (families at semi-open facility can only leave for “short periods of time to participate in an approved activity, subject to a risk assessment and suitable supervision”).
- <sup>286</sup> Barnardo’s, *Cedars: two years on*, (April 2014) at 13–14.
- <sup>287</sup> Edwards, “Back to Basics,” *supra* note 243 at 72–73.
- <sup>288</sup> *Bail for Immigration Detainees and The Children’s Society, An evaluative report on the Millbank Alternative to Detention Pilot* (2009) at 6, online: <[http://www.dianaprincessofwalesmemorialfund.org/sites/default/files/documents/publications/An evaluative report on the Millbank Alternative to Detention Pilot.pdf](http://www.dianaprincessofwalesmemorialfund.org/sites/default/files/documents/publications/An%20evaluative%20report%20on%20the%20Millbank%20Alternative%20to%20Detention%20Pilot.pdf)>.
- <sup>289</sup> *Ibid.*
- <sup>290</sup> EMN, *Synthesis Report*, *supra* note 73 at 36.
- <sup>291</sup> Bloomfield et al, *ATDs in the EU*, *supra* note 258 at 103.
- <sup>292</sup> CBSA, “Evaluation Study,” *supra* note 57.
- <sup>293</sup> Bloomfield et al, *ATDs in the EU*, *supra* note 258 at 102.
- <sup>294</sup> *Ibid.* at 103.
- <sup>295</sup> *Ibid.* at 102.
- <sup>296</sup> CBSA, “Evaluation Study,” *supra* note 57.
- <sup>297</sup> Bloomfield et al, *ATDs in the EU*, *supra* note 258 at 102–103.
- <sup>298</sup> BID, *Last resort?*, *supra* note 257 at 89.
- <sup>299</sup> *Ibid.*
- <sup>300</sup> CBSA Draft Response, *supra* note 17.

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<sup>301</sup> *Ibid.*

<sup>302</sup> Tonda MacCharles, “Ottawa unveils \$138 million plan to replace detention centres in Montreal, Vancouver,” *Toronto Star* (15 August 2016), online: <<https://www.thestar.com/news/canada/2016/08/15/ottawa-to-rebuild-immigration-detention-facilities-in-vancouver-laval.html>>.

<sup>303</sup> *Ibid.*

<sup>304</sup> *Ibid.*

<sup>305</sup> *Ibid.*

<sup>306</sup> *Ibid.*

<sup>307</sup> CRC Committee, *Report of 2012 DGD*, *supra* note 174 at para 78.

<sup>308</sup> European Migration Network Swedish National Contact Point, *The use of detention and alternatives to detention in the context of immigration policies in Sweden* (2014) at 7.

<sup>309</sup> Bloomfield et al, *ATDs in the EU*, *supra* note 258 at 145.

<sup>310</sup> *Ibid.*

<sup>311</sup> *Ibid.*

<sup>312</sup> *Ibid.*

<sup>313</sup> *Ibid* at 144.

<sup>314</sup> Global Detention Project, *Sweden Immigration Detention Profile* (March 2016) at 4, online: <<https://www.globaldetentionproject.org/immigration-detention-in-sweden>> [Global Detention Project, Sweden].

<sup>315</sup> United Nations High Commissioner for Refugees, *Options paper 2: Options for governments on open reception and alternatives to detention* (2015) at 7 [UNHCR, *Options paper 2*].

<sup>316</sup> Global Detention Project, *Sweden*, *supra* note 314 at 4.

<sup>317</sup> UNHCR, *Options paper 2*, *supra* note 315 at 5.

<sup>318</sup> Swedish Migration Agency, “The asylum process” (27 May 2015), online: <<http://www.migrationsverket.se/English/Private-individuals/Protection-and-asylum-in-Sweden/For-lgbtq-persons/The-asylum-process-.html>>.

<sup>319</sup> UNHCR, *Options paper 2*, *supra* note 315 at 5.

<sup>320</sup> *Ibid.*

<sup>321</sup> *Ibid.*

<sup>322</sup> European Migration Network, *Country Factsheet: Sweden 2014* (undated) at 7 online: <[http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european\\_migration\\_network/reports/docs/country-factsheets/27.sweden\\_emn\\_country\\_factsheet\\_\\_2014.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/country-factsheets/27.sweden_emn_country_factsheet__2014.pdf)>.

<sup>323</sup> UNHCR, *Options paper 2*, *supra* note 315 at 7.

<sup>324</sup> Edwards, “Back to Basics,” *supra* note 243 at 66.

<sup>325</sup> *Ibid.*

<sup>326</sup> International Social Service Hong Kong Branch, “Provision of Assistance for Non-Refoulement Claimants,” online: <<http://www.isshk.org/en-us/services/index/NRC>>.

<sup>327</sup> Edwards, “Back to Basics,” *supra* note 243 at 66.

<sup>328</sup> *Ibid.*

<sup>329</sup> UNHCR, *Options paper 2*, *supra* note 315 at 7.

<sup>330</sup> Edwards, “Back to Basics,” *supra* note 243 at 66.

<sup>331</sup> *Ibid.*

<sup>332</sup> *Ibid* at 82.

<sup>333</sup> Liesbeth Schockaert, “Alternatives to detention: open family units in Belgium” (September 2013) 44 *Forced Migration Review* 52 at 53 [Schockaert, “Open family units”]; UNHCR, *Options paper 2*, *supra* note 315 at 5.

<sup>334</sup> Edwards, “Back to Basics,” *supra* note 243 at 70.

<sup>335</sup> *Ibid* at 72.

<sup>336</sup> Schockaert, “Open family units,” *supra* note 333 at 53.

<sup>337</sup> *Ibid*; Edwards, “Back to Basics,” *supra* note 243 at 72.

<sup>338</sup> Schockaert, “Open family units,” *supra* note 333 at 53.

<sup>339</sup> *Ibid.*

<sup>340</sup> UNHCR, *Options paper 2*, *supra* note 315 at 5–6.

<sup>341</sup> Edwards, “Back to Basics,” *supra* note 243 at 85.

<sup>342</sup> UNHCR, *Options paper 2*, *supra* note 315 at 5–6.

<sup>343</sup> Bloomfield et al, *ATDs in the EU*, *supra* note 258 at 132–133.

<sup>344</sup> *Ibid.*

<sup>345</sup> EMN Focused Study, Belgium, *supra* note 283 at 36.

<sup>346</sup> Edwards, “Back to Basics,” *supra* note 243 at 72.

<sup>347</sup> *Ibid.*

<sup>348</sup> *Ibid* at 72–73.

<sup>349</sup> *Ibid* at 72.

<sup>350</sup> EMN Focused Study, Belgium, *supra* note 283 at 30, 50.

<sup>351</sup> IHRP, “We Have No Rights,” *supra* note 153 at 8–11.







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