

# Invisible Citizens

Canadian Children in Immigration Detention



UNIVERSITY OF TORONTO  
FACULTY OF LAW

INTERNATIONAL  
HUMAN RIGHTS  
PROGRAM

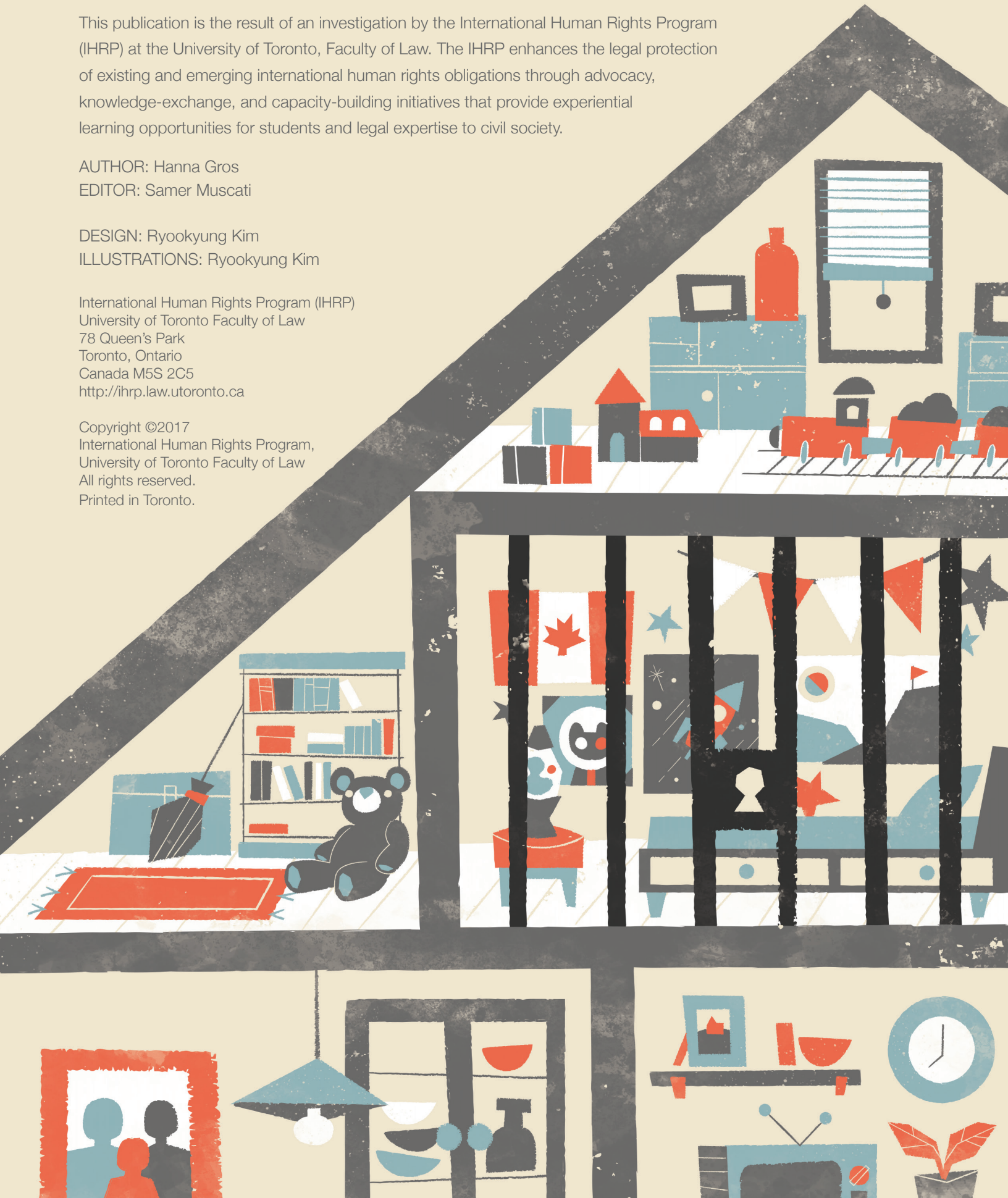
This publication is the result of an investigation by the International Human Rights Program (IHRP) at the University of Toronto, Faculty of Law. The IHRP enhances the legal protection of existing and emerging international human rights obligations through advocacy, knowledge-exchange, and capacity-building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

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# LIST OF ACRONYMS

<b>CBSA</b>	Canada Border Services Agency
<b>CRC</b>	<i>Convention on the Rights of the Child</i>
<b>CRCS</b>	Canadian Red Cross Society
<b>BB &amp; JFCY</b>	<i>BB and Justice for Children and Youth v. Minister of Citizenship and Immigration</i>
<b>IHC</b>	Immigration Holding Centre
<b>IHRP</b>	International Human Rights Program
<b>IRB</b>	Immigration and Refugee Board of Canada
<b>IRPA</b>	<i>Immigration and Refugee Protection Act</i>
<b>IRPR</b>	<i>Immigration and Refugee Protection Regulations</i>
<b>NIDF</b>	National Immigration Detention Framework
<b>UNHCR</b>	United Nations High Commissioner for Refugees

# FOREWORD

# Foreword

Audrey Macklin

When it comes to children, migrant detention isn't just for migrants. Children with Canadian citizenship are also locked up.

I witnessed this first-hand in Fall 2015, when I attended the Toronto Immigration Holding Centre on behalf of the International Human Rights Program (IHRP) to interview an African woman named Glory Anawa and her son, Alpha. Glory had been taken into detention directly from the airport after making, and then withdrawing, a refugee claim. She was pregnant at the time. By the time I met Glory, Alpha was two-and-a-half years old. Born on Canadian soil, Alpha was a Canadian citizen. Sadly, however, he had never seen the outside of the detention centre. Put bluntly, he was a child born and raised in captivity. It was as dehumanizing as it sounds. As a mother, I was shocked and depressed to know that this was happening only a few kilometres from where my daughter and I live a comfortable Canadian life. A few months after our interview, Glory and Alpha were deported.

Children are surely the most innocent and defenceless among us. Yet Canada Border Services Agency (CBSA) detains both citizen and non-citizen children, without acknowledging detention of the former or adequately justifying detention of the latter.

Since I met Glory and Alpha, I came to know other Canadian children living in immigration detention. Unlike Alpha, they had a life in Canada prior to detention. Some were infants and toddlers; others were children attending school until they were torn away from the life they had known and shunted into detention. Their parents (usually mothers) were faced with a dilemma that Solomon himself could not resolve: surrender their child to child protection authorities, with all the attendant risks of foster care, or bring their child into detention with them. When parents choose the latter, CBSA regards this as an unencumbered choice of the migrant parent, and labels the child a "guest" of CBSA. Others have called this constructive or *de facto* detention.

Canadian children living in detention have been a largely invisible population, and the central task of this report is to make their existence and their plight visible. The invisibility of their detention has been achieved and sustained by several related features of the system. First, CBSA denies that they are formally detained under the authority of the *Immigration and Refugee Protection Act*. Since there is no legal category of "guest of the CBSA," these Canadian children in detention are invisible in law. Second, because these children do not exist as "detainees," the Immigration Division has consistently refused to acknowledge them for purposes of detention review, or to take their interests into account when making decisions about the detention of their parents. Third, Canada's federal government has resisted gathering and disclosing data on the number of citizen children in detention, on the basis that they do not count as "detained." And finally, initiatives by individual lawyers to publicize the plight of citizen children and their parents have been thwarted by the very genuine and valid fear that speaking out on behalf of their clients would only trigger speedier deportation or forcible separation of children from parents.

The IHRP's unique position as an international human rights clinic housed in an academic institution enables it to approach the issues from a systemic perspective. This is the third report in two years issued by the IHRP on immigration detention and the second on detention of children. IHRP's advocacy on behalf of children in immigration detention is animated by two twin principles, each supported by international human rights law: first, immigration authorities should not detain children; and second, immigration authorities should not separate children from parents who are able and willing to care for them. In concert with mental health professionals and refugee rights advocates, and with the support of the Refugee Law Office and Torys LLP, the IHRP was able to elicit and synthesize data about the numbers of citizen children in detention, and recount the profoundly damaging impact of detention on children. Thanks to this superb report, and years of sustained advocacy by many other groups, citizen children in detention facilities now appear in CBSA statistics, and cannot be ignored by the Immigration Division of the Immigration and Refugee Board. These are important achievements that bring Canadian law closer to conformity with its international legal obligations. More work remains to be done to close the gap, however, so that no infant or child — Canadian or otherwise — is deprived of the love and care of parents, or deprived of contact with the rest of the world that lies beyond bars and thick plexiglass windows.

**Audrey Macklin**

Director, Centre for Criminology and Sociolegal Studies  
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February 2017





# SUMMARY

# Summary

Over the past several years, scores of Canadian children have been housed in immigration detention facilities in Canada as “guests” alongside hundreds of formally detained non-Canadian children. According to figures obtained by the International Human Rights Program (IHRP) through access to information requests, each year between 2011 and 2015, an average of at least 48 Canadian children stayed in the Toronto Immigration Holding Centre for some period of time. These Canadian children were not formally detained, but stayed in the detention facility with their parent(s) as *de facto* detainees. This figure is an underestimate of the total number of Canadian children housed in immigration detention, as the IHRP was only able to obtain partial data from the Toronto Immigration Holding Centre, which is just one of the immigration detention facilities in Canada. The data that the IHRP was able to obtain indicate that, between 2011 and 2015, Canadian children in the Toronto facility generally spent longer periods of time in detention and tended to be younger than non-Canadian children subject to formal detention orders across the country.

More recent figures indicate that the number of Canadian children housed in detention has dropped significantly over the past year. Despite this trend, however, the IHRP is concerned that the frequency of family separation has not seen a similar reduction, and that analyses of the best interests of the child continue to be inadequate in practice. As noted in the IHRP’s September 2016 report, *“No Life for a Child”: A Roadmap to End Immigration Detention of Children and Family Separation*, children who experience even brief periods of detention have extremely negative psychological reactions that often persist long after they are released. Children who are spared detention but are separated from their detained parents experience similarly grave consequences for their mental health.

For this follow-up report, the IHRP interviewed nine detained and formerly detained mothers of Canadian children from the Middle East, West Africa, Central America, and the Caribbean. These mothers indicated that the best interests of their children were inadequately accounted for both at the time of arrest, and throughout their time in detention. They described the arbitrary and rigid rules of the detention facilities in Toronto and Laval, where they were held, and how the conditions eroded their capacity to effectively protect and care for their children. Such was the case for mothers who were detained with their children, as well as for those who were separated. Without exception, the mothers expressed deep anguish about the detrimental consequences of the experience on their children’s health. Their children had difficulty sleeping, lost their appetite for food and interest in play, and developed symptoms of depression and separation anxiety, as well as a variety of physical symptoms. Many of these symptoms persisted after release from detention.

Following arrest, the best interests of Canadian children continue to be inadequately accounted for in detention review proceedings, whether the children are housed in detention with their mothers, or separated from them. The fact that these children have Canadian citizenship has meant, perversely, that they were invisible in the law. Under immigration law, Canadian citizens cannot be formally detained, and therefore, Canadian children are unable to access legal proceedings that review their continued *de facto* detention. As such, *de facto* detained children do not have their own detention review hearings, and until recently, adjudicators explicitly declined to consider the best interests of Canadian children in the detention reviews of their parents. While a recent development in the

courts permits consideration of the best interests of Canadian children in their parents' detention reviews, the overall focus of the detention review analysis remains on the detained parent(s). The best interests of the child are identified as only one of several factors to be taken into consideration in these hearings. The fact that the best interests of the child are not a primary consideration in detention-related decisions means that Canada continues to fall short of the standard prescribed by international law.

There are viable alternatives to both detention and family separation. Where unconditional release is inappropriate, families should be accommodated in community-based non-custodial programs that involve, for example, reporting obligations, financial deposits and guarantors. These alternatives allow for more dignified, humane and respectful treatment of children and families, and facilitate the protection of their fundamental rights. They are also significantly more cost-effective than either detention or family separation. Studies show that authorities can ensure a high rate of compliance with immigration proceedings when individuals are treated with dignity, understand their rights and duties, and receive adequate material support, including case-management and legal services, early and throughout the process.

If Canadian authorities do not move quickly to address the serious human rights violations of some of the most vulnerable members of our society, and entrench the initial progress of the past year into law and practice, Canada's government will further undermine its reputation as a human rights defender. The practices detailed in this report are particularly out of step with Canada's renewed efforts to become a global leader as a multicultural safe haven for refugees and migrants. Ending the needless suffering of children and families simply cannot wait.



# INTRODUCTION

# Introduction

In September 2016, the IHRP released a report, *“No Life for a Child,”*<sup>1</sup> which documented the harmful consequences of Canada’s immigration detention system on the well-being of children. The figures reported in *“No Life for a Child”* — an average of 242 children (almost all non-Canadian-citizens) detained each year between 2010 and 2014 — were a significant underestimate of the total number of children living in immigration detention, according to subsequent data obtained by the IHRP through access to information requests.

Equipped with new CBSA data, this follow-up report builds on *“No Life for a Child”* by focusing on Canadian citizen children who are affected by the Canadian immigration detention regime. In order to contextualize this data, the IHRP interviewed lawyers, social workers, refugee advocates and mental health experts.<sup>2</sup>

This report also includes six case studies of Canadian children who had been housed in detention or separated from their detained parents. The case studies are based on nine interviews that the IHRP conducted with mothers who were detained, or had previously been detained, at the Immigration Holding Centres (IHCs) in Toronto and Laval. Each case reveals the severely detrimental impact of these experiences on both the mothers and their children, and reinforces the vital role of alternatives to detention.

## Recent Developments

After the launch of *“No Life for a Child,”* several developments have advanced policy debates on children in immigration detention.

Since October 2016, more than 50 leading Canadian medical, legal and human rights organizations have signed a statement calling for an end both to immigration detention of children and to separation of children from their detained parents.<sup>3</sup> The organizations supporting the statement include the Canadian Paediatric Society, College of Family Physicians of Canada, the Canadian Psychiatric Association, the Canadian Academy of Child and Adolescent Psychiatry, Ordre des travailleurs sociaux et des thérapeutes conjugaux et familiaux du Québec, the Ontario Association of Children’s Aid Societies, Amnesty International, the Canadian Centre for Victims of Torture, Children’s Aid Society of Toronto, the Registered Nurses’ Association of Ontario, Justice for Children and Youth, the Refugee Law Office of Legal Aid Ontario, and the British Columbia Civil Liberties Association.<sup>4</sup> Hundreds of doctors, health-care providers, mental health experts, professors, lawyers and others have also endorsed the statement.<sup>5</sup> In December 2016, the Canadian Council for Refugees also released a Call for Legislative Amendment to end immigration detention of children.<sup>6</sup>

Over the past several months, CBSA has taken some initial steps to address the systemic issues within the immigration detention regime. In CBSA’s response to the preliminary draft of this report, the Agency noted that “[t]he transformation of the detentions program is a present and ongoing Government of Canada priority.”<sup>7</sup> CBSA has embarked on several new programs to improve transparency, alternatives to detention, and infrastructure:

- In November 2016, CBSA published immigration detention statistics pertaining to both adults and children;<sup>8</sup>
- Effective April 2016, CBSA enhanced access to medical services, including offering a psychiatrist and psychological counselling, at the Toronto IHC. According to CBSA, “[s]imilar level of services will be offered at the CBSA’s Laval, Quebec and Surrey, BC IHCs in fiscal years 2017–18 and 2018–19, respectively”;<sup>9</sup>
- In fiscal year 2017–18, as part of the new National Immigration Detention Framework (see below), “CBSA is planning to roll out new technology enabled voice reporting tool across Canada to facilitate the reporting of persons released on conditions”;<sup>10</sup>
- In fiscal year 2017–18, “CBSA will also be expanding across Canada its alternatives to detention program in partnership with non-governmental organizations that will be mandated to offer community case management and release services to minimize the use of detention while improving enforcement outcomes”;<sup>11</sup>
- In fiscal year 2018–19, “CBSA is planning to move into a new Immigration Holding Centre in Surrey BC, which will be adapted to satisfy the needs of its detained population and improve its well-being during detention. The CBSA is also planning to move into a purpose built Immigration Holding Centre in Laval, QC in fiscal year 2020–21.”<sup>12</sup>

In recent months, CBSA also engaged in a review of national detention policies and standards. In late 2016, CBSA consulted with over 50 key stakeholder groups across Canada on a National Immigration Detention Framework (NIDF), to review detention policies and standards and ensure a “better, fairer immigration detention system.”<sup>13</sup> The review focused on four key areas: “detention of minors,<sup>14</sup> mental health and medical health services within its IHCs, long-term detention, and national detention standards.”<sup>15</sup>

The Immigration and Refugee Board (IRB) has also renewed efforts to address issues pertaining to children in immigration detention. In late 2016, the IRB drafted new guidelines regarding immigration detention, and sought input from selected stakeholders.

While the IRB’s and CBSA’s initial steps are encouraging, the inherent urgency in cases involving children demands more. This report affirms the eleven recommendations made in *“No Life for a Child”* (see Appendix A), and asserts that authorities should continue to implement them until this initial progress is entrenched into law and practice.





# HOW DO CANADIAN CHILDREN END UP IN IMMIGRATION DETENTION?

# How Do Canadian Children End Up in Immigration Detention?

The *Immigration and Refugee Protection Act* (IRPA) and the associated *Immigration and Refugee Protection Regulations* (IRPR) provide that only foreign nationals and permanent residents may be subject to immigration detention orders.<sup>16</sup> However, CBSA policy states that, even where there are no grounds for detention, children — regardless of their legal status — “may be permitted to remain with their detained parents in a CBSA immigration holding centre if it is in the child’s best interest and appropriate facilities are available.”<sup>17</sup> As a result, even where children are not under formal detention orders, they may be housed in a detention facility to avoid separating them from their detained parents. In cases where children are not housed in detention with their parents, they may be transferred to the care of family members or child protection agencies.<sup>18</sup> Many of these children are Canadians.

Canadian children housed in detention are subject to the same conditions of detention as children under formal detention orders (for this reason, the IHRP refers to them as *de facto* detainees).<sup>19</sup> Nevertheless, *de facto* detained children do not have access to the legislative safeguards that protect formally detained children. As per section 60 of IRPA, children are to be detained only as a matter of last resort, and section 249 of IRPR provides the special considerations that Immigration Division adjudicators must consider in reviewing detention of children.<sup>20</sup> However, because *de facto* detained children are not legally recognized as being detained, they are not subject to detention review hearings. CBSA considers *de facto* detained children to be mere “guests” of the detention facility. In other words, they are legally invisible in the immigration detention system.

Canadian children are also excluded from the monitoring safeguards set up between CBSA and the Canadian Red Cross Society (CRCS).<sup>21</sup> In particular, *de facto* detained children do not benefit from the Standard Operating Procedure that requires CBSA to notify the CRCS when children are brought into CBSA detention facilities.<sup>22</sup>

In the absence of meaningful legislative and monitoring safeguards, Canadian children are at risk of serious human rights violations that result from CBSA decisions, without adequate accountability or oversight.

**Table 1: Safeguards for children in detention**

	Formal detention	<i>De facto</i> detention
<b>Legal jurisdiction</b>	IRPA	CBSA policy
<b>Legislative safeguards</b>	Detention review hearings	None*
<b>Monitoring safeguards</b>	Memorandum of understanding between CRCS and CBSA	None

\* Following *BB & JFCY* (reviewed below), the best interests of the child are accounted for in the parent’s detention review hearings, but *de facto* detained children are not subject to their own hearings.

**HOW MANY CANADIAN  
CHILDREN END UP  
IN IMMIGRATION  
DETENTION?**

# How Many Canadian Children End Up in Immigration Detention?

Each year between 2011 and 2015, on average, at least 48 Canadian children stayed in the Toronto IHC for some time as *de facto* detainees.<sup>23</sup> The Toronto IHC is the largest of Canada’s immigration detention facilities. A total of at least 227 Canadian children stayed in this facility from 2011–2015.<sup>24</sup> However, this total may be an underestimate because 332 (18 percent) of the daily logs<sup>25</sup> for this period were missing from the data set that CBSA provided the IHRP.

For the period between 2011 and 2015, it is unclear how many Canadian children were housed in detention facilities in the rest of the country, as CBSA did not provide the IHRP with figures for other detention facilities. However, the IHRP is aware of at least one other facility where Canadian children have been housed: the Laval IHC.<sup>26</sup> Furthermore, according to CBSA, “formally detained children have been held in the Vancouver Immigration Holding Centre on a short term basis as this facility is a 48-hour facility, and on rare occasions in police stations and only at the time of arrest, for a short period until the CBSA can attend in person, and in youth centres or a juvenile wing within some correctional facilities across the country.”<sup>27</sup> Given that *de facto* detained children are housed in the same conditions as formally detained children, it is possible that Canadian children have also been housed in facilities other than the Toronto and Laval IHCs. Accordingly, the available data from the Toronto IHC is likely to be a significantly underestimated indicator of the total number of Canadian children living in detention facilities across the country.

**Table 2: Number of Canadian children that stayed in the Toronto IHC, 2011–2015.<sup>28</sup>**

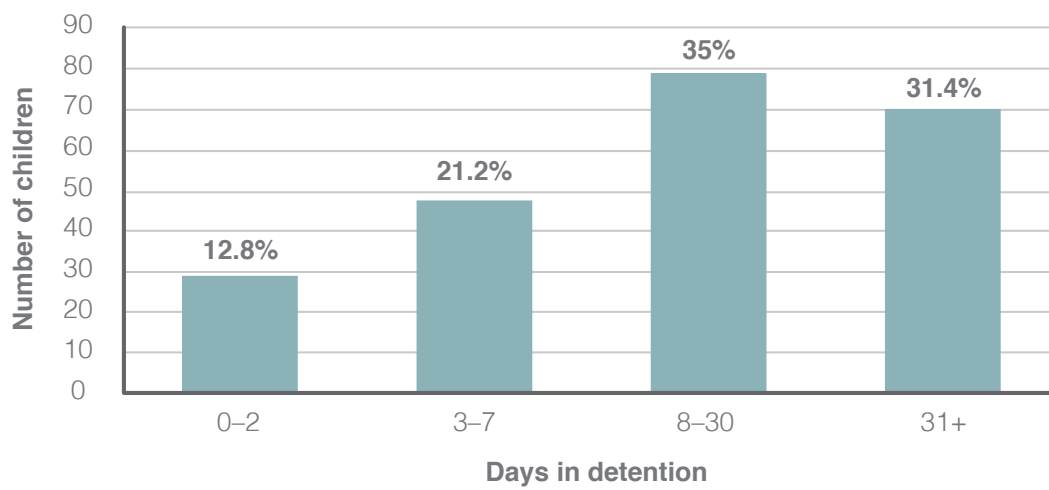
Calendar year	2011	2012	2013	2014	2015	Yearly average
Number	68	67	30	43	33	48.2

Between 2011 and 2015, Canadian children spent an average of 36 days and a median of 15 days at the Toronto IHC.<sup>29</sup> One Canadian boy spent 803 days — over two years — in immigration detention between 2013–2015.<sup>31</sup> The figures also show that approximately two-thirds of Canadian children who were housed at the Toronto IHC were there for longer than a week, and approximately 31 percent were there for longer than a month.<sup>32</sup> During this period, the vast majority of cases — 87.2 percent — involved detention of three days or more.<sup>33</sup>

Table 3: Length of time Canadian children spent in the Toronto IHC, 2011–2015.<sup>30</sup>

Year	Average (days)	Median (days)
2011	24	15
2012	42	18
2013	34	23
2014	49	18
2015	59	14
<b>Average</b>	<b>36</b>	<b>15</b>

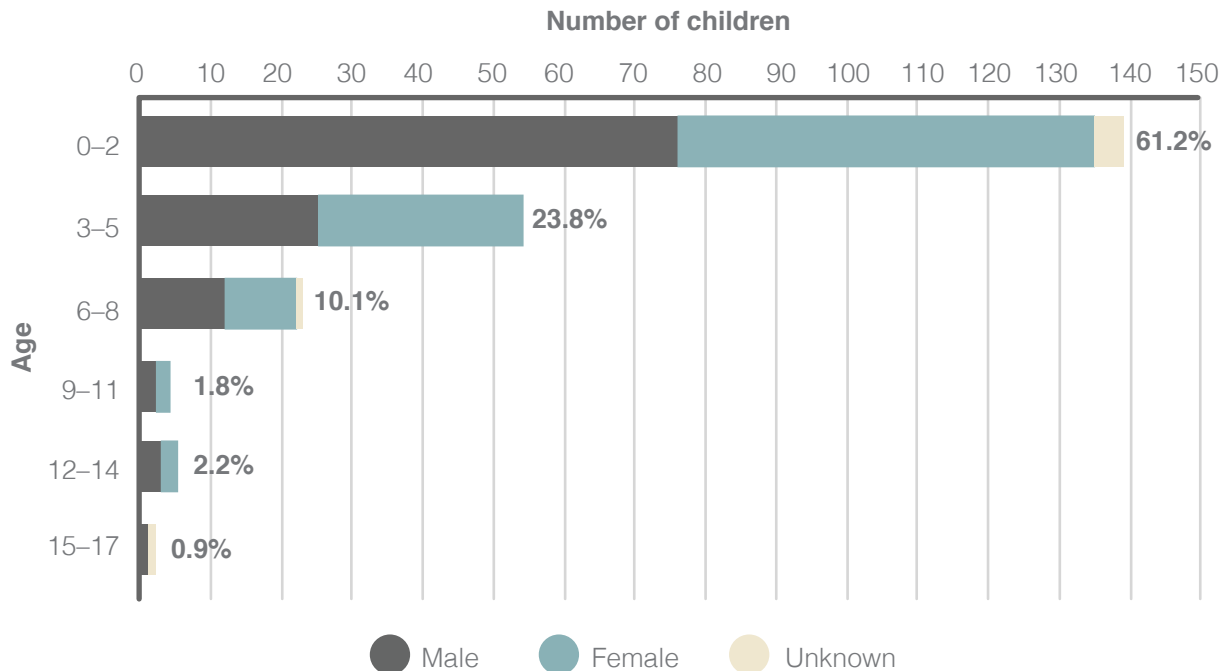
FIGURE 1: CANADIAN CHILDREN HOUSED IN THE TORONTO IHC BY LENGTH OF DETENTION, 2011–2015



## HOW MANY CANADIAN CHILDREN END UP IN IMMIGRATION DETENTION?

According to the data, 85 percent of the Canadian children housed in the Toronto IHC during this period were younger than six years old, and nearly two-thirds were two years old or younger.<sup>34</sup> Fewer than 3 percent were teenagers.<sup>35</sup>

**FIGURE 2: CANADIAN CHILDREN HOUSED IN THE TORONTO IHC  
BY AGE AND GENDER, 2011–2015**



The above data suggest that Canadian children living in the Toronto IHC during this period tended to be significantly younger than formally detained noncitizen children held across the country. Data summarized in *“No Life for a Child”* reveal a relatively even distribution of age-groups among formally detained children, with the exception of 15- to 17-year-old boys, who were detained at higher rates.<sup>36</sup>

## New Trends and Implications

According to CBSA data released to the IHRP in February 2017, the total number of children in detention across the country (both formally and *de facto* detained) has decreased significantly over the first nine months of fiscal year 2016–17 (see Table 4 below).<sup>37</sup> The figures also indicate that the average length of detention has decreased dramatically: For example, during this nine-month period, 12 Canadian children were housed in the Toronto IHC for an average of 4.5 days.<sup>38</sup> CBSA also noted that, “the overall number of detentions has dropped by 27% over the last five years” (see Table 5 below).<sup>39</sup>

## HOW MANY CANADIAN CHILDREN END UP IN IMMIGRATION DETENTION?

Table 4: Canadian children in detention facilities, 1 April 2016 – 31 December 2016.<sup>40</sup>

Region	Total number of children	Number of Canadian children	Average age of Canadian children (years)	Average length of time for Canadian children	Median length of time for Canadian children
National	121	15	3.5	15.2	2
Toronto	42	12	3.5	4.5	1
Vancouver	36	0	N/A	N/A	N/A
Laval	43	3	3.3	58	86

Table 5: Total immigration detention in Canada, 2011–2016.<sup>41</sup>

Fiscal Year	Total number of persons detained	Average length of detention (days)	Regional breakdown of total detentions				
			Ontario	Quebec	BC and Yukon	Prairie Provinces	Atlantic Provinces
2015–2016	6596	23.1	3660	1245	1481	330	29
2014–2015	6768	24.5	3962	1156	1279	467	28
2013–2014	7722	23	4675	1288	1406	460	29
2012–2013	8739	20	5519	1271	1667	440	35
2011–2012	9043	19	5529	1364	1893	395	50

## HOW MANY CANADIAN CHILDREN END UP IN IMMIGRATION DETENTION?

The general decrease in the total number of children in detention over the past several years is an encouraging development. Despite this trend, however, the IHRP is concerned that the frequency of family separation has not seen a similar reduction, and that analyses of the best interests of the child continue to be inadequate in practice.<sup>42</sup>

### Standard Operating Procedures regarding detention of minors at the Toronto IHC

According to Standard Operating Procedures of the Toronto IHC regarding detention of minors, Canadian children should only be allowed to accompany their detained parents at the IHC under the following exceptional circumstances:

- “There [are] ABSOLUTELY no family members or friends available to assume care and responsibility for the minor;
- “Breastfeeding mother;
- “Very young child who requires care and concern of parent;
- “Child has health issues (e.g. Down’s syndrome) with which the temporary guardian cannot manage.”<sup>43</sup>

While this policy limits *de facto* detention of Canadian children, it has the direct effect of separating children from their parents.

Two of the mothers that the IHRP interviewed in detention suggested that, at the time of arrest, CBSA officers did not engage in an adequate analysis of the best interests of the child. CBSA’s own guidelines require:

In any situation where housing or detention may directly or indirectly affect a child, the CBSA officer must take into consideration the parent[’s] opinion. In addition, the child’s opinion must also be considered, in accordance with their age and maturity. ... To obtain free and fully informed consent from the child’s parent, the CBSA officer must explain to them that they have a choice to accept or refuse the housing of their child, and that their decision will not affect their immigration case.<sup>44</sup>

In fact, both of the detained mothers that the IHRP interviewed noted that CBSA separated them from their children upon arrest without offering them the choice of bringing their children into detention with them.



## HOW MANY CANADIAN CHILDREN END UP IN IMMIGRATION DETENTION?

The IHRP also interviewed three formerly detained mothers, who had been allowed to bring their children into detention with them. Two of the mothers told the IHRP that they felt CBSA constantly pressured them to remove their infant children from the IHC, even though they were both still breastfeeding.<sup>45</sup> Another formerly detained mother told the IHRP that, on the basis of a faulty psychiatric assessment, CBSA invited Children's Aid Society to intervene and potentially remove her daughter from her custody.<sup>46</sup> Children's Aid Society made no finding of parental abuse or neglect, and did not remove the child from her mother's custody.<sup>47</sup> Child protection services are mandated to intervene only to ensure that children are free from parental abuse and neglect.<sup>48</sup> However, according to CBSA, "officers must contact CPS [child protection services] if detention is envisioned ... beyond the 48-hour period," following the best interests of the child assessment and if it is determined that there are no alternatives to detention.<sup>49</sup>

Regardless of whether children are ultimately permitted to accompany their parents in detention, it is crucial that this decision be based on a comprehensive analysis of the best interests of the child on a case-specific basis, which includes both parent and child perspectives and a meaningful review of alternatives to detention.

# Voices from the Inside

The IHRP interviewed nine detained and formerly detained mothers of Canadian children, from the Middle East, West Africa, Central America, and the Caribbean.<sup>50</sup> These mothers described the arbitrary and rigid rules of the detention facilities in Toronto and Laval where they were held, and how the conditions eroded their capacity to effectively protect and care for their children. Such was the case whether the children were housed in detention or separated from their detained parents. Without exception, the mothers expressed profound anguish about the detrimental physical and mental health impact on their children. Their stories provide a glimpse into the lived experiences of Canadian children affected by the Canadian immigration detention regime.<sup>51</sup>

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## Daevon<sup>52</sup>

Abigail was on her way to church with her infant son, Daevon, when CBSA officers arrested her in October 2014, a few days before Thanksgiving. Daevon was four months old at the time. Abigail and Daevon remained in detention for nearly six months.

“[CBSA officers] were adamant,” Abigail said, “they just want you to [be deported], they don’t care about you or the baby or why you’re running.” In 1998, Abigail first fled from Jamaica to a nearby country after reportedly enduring physical and sexual abuse from her former partner, Dwayne, who had become involved with a violent gang. Dwayne tracked her down a decade later, forcing her to flee again, this time to Canada, where she claimed refugee status. Abigail met with her counsel only twice before her refugee hearing, and in 2012, the Immigration and Refugee Board refused her claim.

Although Abigail feared for her life, she said she would have voluntarily returned to Jamaica had it not been for her Canadian child. Daevon was born with severe health problems, and required surgery and extensive medical care that would not be available in Jamaica. Without this treatment, Daevon risked permanent disability.

Once in detention, CBSA initially refused to allow Abigail to accompany Daevon to his appointments.<sup>53</sup> When she refused to part from her son, CBSA officers told Abigail that she could only accompany Daevon in handcuffs.<sup>54</sup> “I told them, ‘I don’t care [about the handcuffs], ... I will never send [Daevon] out alone.’” Ultimately, Abigail was not placed in handcuffs because she had to carry Daevon. But she reported that other detainees were handcuffed during their own hospital visits: “with chains and shackles, like you’re a prisoner. ... It makes you feel like you’ve committed the worst crime.”

Beyond Daevon’s medical appointments, Abigail constantly felt pressured to part with her infant son. Abigail said CBSA repeatedly asked her to give Daevon to her former partner (Daevon’s father), her brother, or her friends from Church who had visited her at the IHC. “CBSA pressured me because they wanted me to leave [Daevon] with someone so I could [be deported],” she said. But Abigail refused to part with Daevon: “I said, ‘No, I can’t, it’s my baby.’” The pressure kept her from sleeping: “I never really slept [well] because I was so scared. I always thought they’re going to take him away.”

Abigail and Daevon were held in a room in the mother-and-child wing of the IHC. Abigail noted that one of the main difficulties was the lack of privacy and the constant room searches. She recalled an instance where she was in the middle of bathing Daevon when a guard conducted a room search.<sup>55</sup> “I couldn’t even get my baby dressed before they came in to flip the bed, the crib and everything. It’s like you’re in prison, you know? I had to just wrap him up and bring him to the eating area so they could keep doing the search.”

Detention had a significant impact on Daevon. Abigail said the limited nutrition that Daevon received in detention has had a lasting effect on him. “Even now [after release], [Daevon] doesn’t eat anything — just baby formula and yogurt. ... Before I got arrested, [Daevon] used to eat avocado or pureed foods, but he doesn’t eat that now because he is not used to it.”

Daevon also had regular nosebleeds due to the dry air and the lack of ventilation in the facility. When Abigail notified the CBSA, “they put us into isolation with a humidifier. ... They said, if [Daevon] wanted the humidifier, we had to stay in isolation because if I got one, everyone else would want one, too.”<sup>56</sup> For three days, Abigail and Daevon stayed in the room alone. “You can’t walk around, you can’t talk to anyone; you are isolated. It’s like in prison,” she said. “But I just wanted my baby to feel better.”

Since the windows to the facility are shut, detainees have to go to the yard to get fresh air. “They let us go outside in the morning and the afternoon,” Abigail said. When detainees re-entered the facility, they would be searched. “You feel violated,” Abigail reported. “[Children] start to put up their hands automatically because they know they would be pat down.”

Three months into detention, Abigail was diagnosed with Major Depressive Episode and Complex Post-Traumatic Stress Disorder. The psychological assessment noted that Abigail “feels like her life is not worth living and her concern for her son’s well-being is the only reason that she pushes herself to keep going.” According to Abigail,

these mental health issues often manifested themselves through severe panic attacks. “At night, I would wake up and feel like I can’t breathe. But I used to hide it ... I was scared that I was going to lose it, but then I had to be strong for my baby. I didn’t want [CBSA] to think I’m going crazy and try to take [Daevon] away to Children’s Aid. That part was really hard for me. I was suffering, and I had to hide it.”

Abigail’s concerns were hardly addressed at detention review hearings. CBSA hearing officers repeatedly insisted that “[Daevon] is not detained.” According to Abigail the CBSA hearing officers “didn’t have empathy or think about my baby’s welfare. ... Their job is to convince the [Immigration Division adjudicator] not to let you out, period.” According to Abigail, every time she brought up the impact of detention on her son’s well-being, the officers reiterated that Daevon was just visiting, and he could leave anytime. “But I’m his mom, I’m his caregiver, he’s breastfeeding, how can he leave?” she said.

In early 2015, Abigail was granted permanent resident status after filing a successful humanitarian and compassionate application.<sup>57</sup> Reflecting on her experience in immigration detention, Abigail said, “I think they robbed a lot from me and my baby. I felt like I failed [Daevon]. I didn’t feel like I was a good mom. ... I think he went through a lot. He doesn’t remember, but I’m trying to make up for those months. Sometimes I still blame myself. ... But you know, it’s not like all of us immigrants are bad. They don’t know the experiences that we have gone through back home.”

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## Oscar<sup>58</sup>

CBSA arrested Mariame with her five-month-old infant, Oscar, during a routine reporting appointment in October 2015. Mariame's refugee application had been rejected, but her humanitarian and compassionate application was still in process.<sup>59</sup> "My son was crying because they were searching me, and ... he was hungry," Mariame said. "I couldn't attend to him, I couldn't breastfeed him."<sup>60</sup>

When she protested that detention was harmful to her infant, she was told that she could give him to someone outside of detention to care for him. "But I can't give my baby to anyone," she said.

The detrimental impact of confinement on Oscar's well-being soon became evident. "My son could never sleep well. ... He didn't eat well, he lost a lot of weight, ... [and] he cried all the time. All the windows were always closed, and he had a lot of rashes on his body because the air was dry. Babies need fresh air." When Mariame's friend brought moisturizing cream for her son, she was told that she "didn't have the right to keep it," and it was confiscated. She was never given a reason for this: "When we would leave the room, they would come in, search everything, and throw it out."

To get fresh air, Mariame and Oscar had to go to the yard of the facility. But when they re-entered the building, they were both searched. "[Oscar] didn't know what was going on, but I was crying because they were treating us like prisoners."

According to Mariame, on one occasion, CBSA provided her with baby formula that had been expired for more than a year.<sup>61</sup> When she brought this up at her subsequent detention review hearing, the CBSA hearing officer denied any fault on CBSA's part "because the baby could be elsewhere. ... Every time they told me that it wasn't good for him to be in detention, but that it was my choice."

After three months in detention, Mariame obtained a guarantor, who agreed to abide by certain conditions and pay \$5,000 for her release. Mariame still has nightmares about being arrested. "I still get scared every time someone knocks on my door," she said. "We did not do any crime, why do they treat us as criminals?"

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## Aaliya<sup>62</sup>

Naimah was arrested in February 2015. Her eight-year-old daughter, Aaliya, was at school at the time, and CBSA picked her up during recess on the way to the detention centre. "The minute she saw me, she started to cry," Naimah said. The two remained in detention for a year and three weeks.

Once they arrived at the detention facility, Naimah and Aaliya were given food. Naimah refused to eat because she was fasting for religious purposes at the time. "They said if I did not eat, they would send me to prison. ... I told them, I'm not a criminal, I'm just here [in Canada] for my child to have a better life."

Aaliya had a difficult time adjusting to life in detention. She was "crying everyday, [saying] 'Mommy, I want to go to school,' because she loved to go to school," Naimah said. "I did everything I could do for this child — *Canadian* child — to go back to school." Aaliya would put on her school uniform in the detention cell and cry.

Several months into detention, Aaliya had a severe nosebleed and the nurse at the facility recommended that she go to the emergency room. However, CBSA initially refused to allow Naimah to accompany her daughter to

the hospital. “My child is bleeding, we need to go to the emergency, and [the CBSA officer] said, ‘No, you, the mother, can’t go.’ I said, ‘Why? ... What do you know about my child?’ ... I told [Aaliya], ‘If [the hospital staff] ask you any questions, say ‘Ask my mother.’ I want them to know that she still has a mother.” Finally, following the intervention of counsel, Naimah was allowed to accompany Aaliya to the hospital. However, she was handcuffed. “I’m not a criminal,” Naimah repeated. “Just because my child is sick, they put me in handcuffs.”

The nurse at the detention facility attributed Aaliya’s nosebleeds to the dry air in the facility. The nurse had previously given Naimah Vaseline to apply on top of Aaliya’s nose in order to prevent further nosebleeds, but the CBSA manager had confiscated it from their room. “I went back to the nurse, and she gave me another one. [The IHC manager] took it again,” Naimah said.

A psychological assessment revealed that living in detention had “numerous harmful physical and mental effects [on Aaliya], ... including bed-wetting, feelings of sadness and anxiety, thoughts of death, frequent nightmares and loss of appetite.”<sup>63</sup> Eight months into detention, Aaliya was diagnosed with severe depression and severe Post-Traumatic Stress Disorder.<sup>64</sup>

Naimah also experienced health issues in detention. On one occasion, she developed a severe toothache. The physician at the detention facility provided her with painkillers and antibiotics, but said that no other medical intervention is covered. “I struggled, and one night, I almost died [of pain],” Naimah said. When CBSA refused to take her to the hospital, she said she would call 911. “The [IHC] manager said that if I call 911, they would take me to prison. I said, ‘Take me to the hospital or take me to prison. I want my life, I don’t want to die and leave my child because of you. You are here to take care of me, not to punish me. I’m not a criminal. Even if I had killed somebody, you don’t have to treat me like this.’” Eventually, CBSA took Naimah to the hospital, and she had her tooth extracted a few months later. “Imagine, I was going through that pain ... with painkillers everyday.”<sup>65</sup>

A few months into detention, CBSA called the Children’s Aid Society to assess whether Aaliya should be separated from her mother. According to Naimah, the examiner who conducted her interview concluded: “You are not abusing your child, so I cannot take your child away from you. If I take her away from you, it would be worse for her.”

Detention review hearings were particularly stressful for both Naimah and Aaliya. According to Naimah, “[Aaliya] used to cry every time. So then, one day, they said she can’t come anymore.” Although Naimah tried to raise Aaliya’s best interests in her detention review hearings, adjudicators repeatedly refused to consider these arguments because they deemed them to be outside of the Immigration Division’s jurisdiction. Naimah also suggested a variety of alternatives to detention. “We begged them to put me under house arrest so that my child could go to school,” Naimah said. “I will never understand what is the benefit of putting my child in detention for a year.”

After nearly 13 months, Naimah and Aaliya were released from detention without conditions, on a temporary residence permit issued by the Minister of Immigration, Refugees and Citizenship Canada.

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## Alicia<sup>66</sup>

Selena had been living in Canada since 2001. Her refugee application was refused in 2010, when her daughter, Alicia, was two years old. Selena received a deportation order, but her date of removal was extended because her daughter required emergency surgery. “She was born with a medical condition; one of the ventricles in her brain was enlarged and accumulating fluid.” Selena did not report to CBSA following her deportation order. “Because my daughter had recently had the surgery — it wasn’t like the flu or a broken arm, it was something wrong with her brain — I didn’t want to take the chance to go back.”

In early November 2016, Selena was on the way to drop off Alicia, now eight, at school when CBSA officers intercepted her in her building’s hallway. According to Selena, upon her arrest, CBSA officers did not give her the option to keep her daughter with her in detention. “They just asked whether there was somewhere they could drop her, or someone who could take her.” But even if she were given the option, Selena said she would be torn: “I’ve never been apart from my daughter. If I die tonight, I will have died of a broken heart because I’ve never been away from her for so long. Since she was born I’ve always been there for her. But at the same time, being out there at least she has her dad, and for the most part she can go to school.”

On that November morning, Alicia “knew [CBSA officers] were here to take mommy away, so she was crying uncontrollably.” Her father came to pick her up that morning, but since then “she has been going from house to house” — sometimes staying at Senena’s partner’s house. “It’s really affecting her,” Selena said. Alicia’s school teacher informed Selena that Alicia is not playing as she used to during recess. “I know she’s depressed, because she’s always been a kid that loves to play,” Selena said. “She misses me and I miss her too. You can tell there’s a difference, everything is different, it’s just so hard.” Alicia’s father also told Selena that, “at night [Alicia] just wakes up and starts crying.”

“When I call her, she wants to know why they are separating us, and why it’s taking so long for me to come back home so things can be the same with us, so I could drop her to school,” Selena said. “But I don’t have the answer to give her, she’s so young and I can’t give her all the details she needs.”

“I always want to call her, ... when I hear her voice it puts me at ease,” Selena reflected. “But at the same time I don’t want to [call her] because it breaks my heart that I’m not there with her. It breaks my heart that when she comes to visit I cannot hold her.”<sup>67</sup>

According to Selena, none of these considerations were taken into account at her detention review hearing. “The [Immigration Division adjudicator] was very focused on the fact that ... he doesn’t trust me to follow instructions,” Selena reported. “He didn’t mention [Alicia] at all.”

Selena emphasized that she lives like a prisoner in immigration detention. “When you look out from the window, the bars — it feels like prison. ... Every corner you turn there’s a guard.” And yet, Selena did not receive the opportunities available even to alleged criminals. “People do all this crime and they get bail, they get to walk free until the proceedings. The only thing I did was ... I didn’t go back when I was supposed to, I wanted to live here to have a better life because I have a daughter here, and a boyfriend here who is a permanent resident. But I didn’t get bail. It is so unfair.”

Detention has had a serious impact on Selena’s mental health. “Sometimes I’m scared I’m going to go crazy.” The uncertainty of the circumstances makes it particularly difficult. “Not knowing what the outcome is going be — it makes it hard to sleep at night. Many nights I go without sleep. I don’t know if I can do it much longer.”

## Ameera and Kaia<sup>68</sup>

Jamal and Laila arrived in Canada as asylum seekers in 2006. They spent the next decade waiting for a response to their refugee application, and challenging the refusal of their claim. Although their daughters, Ameera and Kaia, are Canadian-born, they have never lived with the certainty that they would be able to grow up in Canada like other Canadian children.

In 2014, Jamal and Laila received a deportation order. CBSA told them that their daughters, aged six and eight at the time, could either stay in Canada without them, or leave Canada with them. “I don’t know how [CBSA] could tell us to bring two young Canadian girls to an [authoritarian] regime,” Jamal said. The prospect of being separated from their children was particularly concerning to Jamal and Laila because Ameera has a medical condition that requires constant care. “I don’t trust anyone else to give [Ameera] her medication,” Laila said.

In December 2014, following a routine traffic stop, Jamal was arrested and detained at the Laval IHC and subsequently deported. The impact on Laila and the children was “very harsh,” according to Jamal. Ameera experienced an immediate flare-up in her medical condition, and she needed to have her medical dosages augmented. Kaia became angry with her father because she was convinced that he had left them deliberately, and she stopped speaking with him for three months. Laila and both children were soon diagnosed with depression. According to Laila, her daughters lost weight, stopped eating regularly and had trouble sleeping. When Laila tried to explain why their father was gone, Ameera responded, “We’re Canadian, he could stay with us!”

“Instead of playing, they are trying to understand how immigration rules work,” Jamal said. “Instead of building them as citizens, [the immigration detention regime] is destroying their humanity. You can see the pain in their eyes, they’re lost.”

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## Nathan and David<sup>69</sup>

Rhea is a single mother of two boys, Nathan and David, aged 9 and 14 years. Rhea had been living in Canada since 1999, after fleeing her country of origin due to severe domestic violence. “My body is like a map of abuse,” she said. Both of Rhea’s sons have health issues that require her constant care.

Rhea was in her apartment with her sons when CBSA officers arrested her in October 2016. According to Rhea, the CBSA officers said, “We cannot take the children,” and asked whether there was someone who could take care of them. Ultimately, the officers left Nathan and David with Rhea’s estranged brother. “But my brother is busy, he doesn’t have children, and he has no way of taking care of my kids,” Rhea said. “[CBSA officers] don’t care about my children. They didn’t care that my children were crying, that they were a mess. They didn’t care about leaving my children on a street corner with a stranger to take care of them.”

Rhea did not have legal representation at her first detention review hearing. She notified the Immigration Division adjudicator that she is ready to leave Canada, but needs “a chance to pack [her] stuff and get [her] children ready.” The adjudicator refused to release her from detention. Although Nathan and David came to the detention centre to attend the hearing, they were not allowed inside the hearing room. “My sons wanted to hug me, but [CBSA] did not allow them to come inside. They didn’t give me a reason, they just said ‘no.’”

At the time of the interview, Rhea had been detained a few days, and her children were severely affected by her detention. “They call me and we just cry,” she said.

“What I really want are my children. I need to be there with them because they really need me. ... All that I’m fighting for is my kids.”

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# **BEST INTERESTS OF THE CHILD**

# BEST INTERESTS OF THE CHILD

Information obtained by the IHRP through access to information requests indicates that in 2013, CBSA developed a robust draft “Framework of Guiding Principles for the CBSA’s Treatment of Children.”<sup>70</sup> The aim of this draft Framework was to “improve awareness, ensure that children’s rights are taken into account when the Agency develops and implements policies and programs, adopts best practices and provides employee training.”<sup>71</sup> The draft Framework consisted of seven guiding principles, which were supported by the recommendations of the United Nations High Commissioner for Refugees (UNHCR) and the CRCS:

- “Best interest of the child;
- “Right to express views freely;
- “Measure of last resort;
- “Limitation of physical restraint and the use of force;
- “Separation from parents and maintenance of relationship;
- “Preventing crimes against children; and
- “Child development.”<sup>72</sup>

The draft Framework described the best interests of the child as a nuanced analysis that “refers to the overall well-being of the child,” and accounts for a host of specific criteria, including “the child’s safety needs, medical needs or emotional needs.”<sup>73</sup> Furthermore, the draft Framework noted that “decision makers are to determine which of the available options best respects the child’s rights,” and that the “best interest of the child shall be a primary consideration.”<sup>74</sup> Finally, the draft Framework noted that a child’s views “shall be given due weight,” and the child is to be provided with the “opportunity to be heard in any administrative proceeding affecting the child.”<sup>75</sup>

According to CBSA, while the draft Framework has not been formally introduced, “the document has been influential in changing our operational priorities over the last year,” and “relevant information in this draft policy has been included in our new policy Guidelines for the Detention of Minors.”<sup>76</sup>

## **Best Interests of the Child in Detention Review Hearings: *BB and Justice for Children and Youth v. Minister of Citizenship and Immigration***

As noted above, *de facto* detained children do not have access to detention review hearings. For this reason, the only legal avenue to consider the best interests of *de facto* detained children is through their detained parents’ detention review hearings. Section 248 of IRPR lists the factors that Immigration Division adjudicators must consider in detention review hearings.<sup>77</sup> However, this list does not include the best interests of the child. As a result, until the court challenge known as *BB and Justice for Children and Youth v. Minister of Citizenship and Immigration (BB & JFCY)*, Immigration Division adjudicators explicitly refused to consider the best interests of the child in detained parents’ detention review hearings.

In August 2016, the Federal Court confirmed in *BB & JFCY* that the list of factors set out under section 248 of IRPR is not exhaustive.<sup>78</sup> In addition to the listed factors in section 248, the Immigration Division must also consider “other relevant factors as determined by the facts of the specific case.”<sup>79</sup> In particular, “the interests of a child who is housed in an Immigration Holding Centre at the request of the detained parent can be considered under other relevant factors.”<sup>80</sup> Accordingly, the best interests of a *de facto* detained child are well within the jurisdiction of the Immigration Division’s range of considerations in reviewing a parent’s continued detention.

Although the Order of the Federal Court in *BB & JFCY* was issued on consent, there is no reason to treat it as having less precedential value than if it had included detailed reasons for judgment.<sup>81</sup> According to Andrew Brouwer, Senior Counsel in Refugee Law at Legal Aid Ontario, and a counsel on this case, the fact that the Order was issued by the Court is a confirmation by the Court that it is the correct interpretation of the law.<sup>82</sup>

As part of the settlement with the Department of Justice, CBSA distributed instructions to its hearings officers regarding “cases involving Canadian children who are housed at an IHC at the request of their detained parent” (see Appendix C).<sup>83</sup> The instructions require CBSA hearing officers to bring the *BB & JFCY* Order to the attention of Immigration Division adjudicators.

## Aftermath of *BB & JFCY*: Potential and Shortcomings

*BB & JFCY* is a crucial step toward making Canadian children “visible” in immigration detention law. It provides a procedural mechanism — the parent’s detention review hearing — in which the best interests of the child are taken into consideration. Furthermore, although the circumstances of this case required a focus on Canadian children housed in detention as “guests,” the Order has wider application. By confirming that the factors listed under section 248 of IRPR are not exhaustive, the Order should signal to the Immigration Division that it must also consider the interests of children who are separated from their detained parents.<sup>84</sup>

Ultimately, *BB & JFCY* is a recognition that — whether children are housed in detention or separated from their detained parents — the best interests of the child are clearly relevant to decisions concerning a parent’s continued detention. By confirming the Immigration Division’s wide jurisdiction to consider factors beyond those listed in section 248 of IRPR, *BB & JFCY* allows adjudicators the flexibility to make decisions that are more comprehensive and tailored to the circumstances of each case.

Nevertheless, the standard set by *BB & JFCY* continues to fall short of the standards prescribed by international law. The *Convention on the Rights of the Child* (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*” (emphasis added).<sup>85</sup> As it stands, while *BB & JFCY* puts the best interests of the child on the map, it remains only one of several factors that Immigration Division adjudicators are required to consider — instead of a primary consideration, as mandated by the CRC.

Furthermore, while *BB & JFCY* provides for a procedural mechanism to account for the best interests of the child, neither framework nor guidelines exist to ensure the best interests of the child are substantively accounted for in decisions concerning a parent’s continued detention. As a result, the IHRP is concerned that analysis of the best

## **BEST INTERESTS OF THE CHILD**

interests of the child in immigration detention cases could lack meaningful content and fall short of international standards. The United Nations Committee on the Rights of the Child has developed a non-exhaustive, non-hierarchical list of elements to be considered in assessments of best interests of the child.<sup>86</sup> This list makes it clear that identifying the best interests of the child is a complex and multi-faceted legal concept that requires a nuanced and comprehensive analysis of the case at hand.

The recommendations of *“No Life for a Child”* serve to mitigate the shortfalls remaining following *BB & JFCY*. In particular, the best interests of the child should be read into sections 60 of IRPA and 248 of IRPR as a primary consideration in detention-related decisions that affect children. The immense gravity of cases involving children demands strong legislative and regulatory safeguards.

### **Current Issues: *BB & JFCY* in Detention Review Hearings**

Although CBSA distributed instructions to its hearing officers regarding how *BB & JFCY* should be interpreted, concerns have arisen regarding the application of the Order by the Immigration Division. In at least one case, an adjudicator determined that he was not obliged to follow the Order.<sup>87</sup> This determination is particularly consequential in the current context, given that Immigration Division adjudicators must consider prior decisions before deciding whether continued detention is justified, and require “clear and compelling reasons” to depart from previous decisions.<sup>88</sup> In other words, previous decisions weigh heavily in detention review hearings, and any misinterpretations of the law risk establishing precedents that would derail the important objectives flowing from the *BB & JFCY* decision.

**A WAY FORWARD**

# A Way Forward

Over the past several months, the Canadian government has shown a strong commitment to addressing issues within the immigration detention regime. CBSA has committed to taking meaningful steps that aim to reduce child detention and family separation “as much as humanly possible.”<sup>89</sup> Viable alternatives to child detention and family separation involve community-based non-custodial programs that allow authorities to ensure that individuals abide by immigration proceedings.<sup>90</sup> Such programs also protect individuals’ fundamental human rights and ensure that children have the opportunity to develop in a healthy environment.<sup>91</sup>

Child detention and family separation come at a great price for Canada. From a financial perspective, alternative to detention programs are far more cost-effective than detention. For example, between 2010 and 2014, the yearly cost of the Toronto Bail Program (\$1.1 million) was about one-twentieth the cost of detention in IHCs (\$21.5 million).<sup>92</sup>

There are also additional long-term costs when it comes to Canadian children and those who will ultimately become members of Canadian society. The traumatic experiences associated with child detention and family separation have been widely shown to be detrimental to mental health.<sup>93</sup> Such experiences may inhibit children’s capacity to properly adjust to Canadian society, trust public authority figures, and become productive members in their communities. Compromising children’s mental health through detention and family separation risks setting them up for potential pathologies and social dysfunction, which may have to be remedied through educational support, social welfare and health-care coverage.

Finally, violating the human rights of some of the most vulnerable members of our society is a blemish on Canada’s reputation as a human rights defender. Such practices are especially out of step with Canada’s renewed efforts to become a global leader as a multicultural safe haven for refugees and migrants.

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# APPENDIX A

*“No Life for a Child”* 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). 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 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.



# APPENDIX B

*BB & JFCY v. the Minister of Citizenship and Immigration*  
Consent Order

Federal Court



Cour fédérale

Date: 20160824

Docket: IMM-5754-15

Toronto, Ontario, August 24, 2016

**PRESENT:** The Honourable Mr. Justice Hughes

**BETWEEN:**

**B.B. AND JUSTICE FOR  
CHILDREN AND YOUTH**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**ORDER**

**UPON MOTION** for judgment in writing, dated the 19<sup>th</sup> day of August, 2016, filed by the Respondent on the consent of both parties, for an Order:

- (a) Granting the application for leave and for judicial review;
- (b) Vacating the judicial review hearing date of August 30<sup>th</sup>, 2016 at 9:30 am;
- (c) Regulation 245 of the *IRPA* is non-exhaustive and can include the presence of a child in Canada and the interests of that child as a factor in assessing whether the

detained parent will be motivated (because of the specific needs or interests of their child) to comply with terms and conditions should the parent be released from detention. This factor could also fall under strong ties to the community as per R. 245(g). The interests of the child would not be a primary factor but would be a factor to be considered on a case by case basis. The overall focus of the analysis under R. 245 would remain on the detained parent.

- (d) Regulation 248 is not exhaustive. If the Immigration Division determines that grounds for detention exist it must consider all 5 mandatory factors listed in R. 248 as well as other relevant factors as determined by the facts of the specific case. The interests of a child who is housed in an Immigration Holding Centre at the request of the detained parent can be considered under other relevant factors. The interests of the child who is housed in an Immigration Holding Centre at the request of the detained parent is a factor to be weighed along with the other 5 mandatory factors listed in R. 248. The overall focus of the analysis under R. 248 remains on the detained parent.
- (e) No costs to be awarded to either party.

AND UPON READING the material filed;

**THIS COURT ORDERS that:**

- 1. The motion is granted on the terms recited.

I HEREBY CERTIFY that the above document is a true copy of  
 the original issued out of / filed in the Court on the \_\_\_\_\_  
 day of \_\_\_\_\_ A.D. 20\_\_\_\_  
 AUG 24 2016  
 Stated this \_\_\_\_\_ day of \_\_\_\_\_ 20\_\_\_\_

\_\_\_\_\_  
 "Roger T. Hughes"  
 Judge





# APPENDIX C

Instructions from CBSA to its Hearing Officers

# INSTRUCTIONS FROM CBSA TO ITS HEARINGS OFFICERS, DISTRIBUTED BY CBSA ON AUGUST 29, 2016:

**Subject:** URGENT PLEASE READ IMMEDIATELY: GUIDANCE FOR HEARINGS OFFICERS FOLLOWING COURT SETTLEMENT RE: DETENTION FACTORS

\*\*\* FRENCH TRANSLATION WILL FOLLOW

## PLEASE SHARE WITH HEARINGS OFFICERS WITHOUT DELAY

The Federal Court recently issued an Order for Judgement based on a Motion for Judgement on Consent of all parties in the case *B.B. and Justice for Children and Youth v. MCI* IMM-5754-15. The subject matter of this case was whether the Immigration Division (ID) had the jurisdiction to consider under R. 245 and R. 248 the interests of a Canadian child who is housed at an Immigration Holding Centre (IHC) at the request of the detained parent when considering if the parent should be released from detention.

The parties settled the case. The first part of the settlement agreement involved the parties making a Motion for Judgement on Consent to have the judicial review allowed on certain terms. Those terms are reflected in the Order for Judgement attached and **should be taken as the position of the government on these specific issues.**

The second part of the settlement involved the parties agreeing that certain instructions would be provided to Hearings Officers in order to clarify the government's position and the meaning of a previous Federal Court case *Shote v. MCI* 2004 FC 115 which until now the ID has relied on for the proposition that it does not have the jurisdiction to consider the interests of a Canadian child who is housed at an IHC at the request of the detained parent when considering if the parent should be released from detention.

The following text is the instructions that the government has agreed to provide to Hearings Officers and this text should be taken as the position of the government in cases involving Canadian children who are housed at an IHC at the request of their detained parent.

- a) The Respondent will instruct ID Hearings Officers to bring the Order on Consent to the ID's attention. The Respondent will instruct Hearings Officers that *Shote* is being misapplied by the ID and that *Shote* does not stand for the proposition the ID believes it does. While in *Shote*, the Court concluded that the ID erred in releasing the detained parent based on an irrelevant factor, namely the superior interests of the child, the Court did confirm at paragraph 29 that R. 245(g), which covers strong ties to the community when considering flight risk, may include the presence of children but that factor does not supersede other factors. Hence, the ID could have considered the Applicant's child as a tie to Canada and how the presence of that child and her interests could motivate or influence the detained parent to comply with terms or conditions of release in assessing whether the person concerned presents a flight risk.
- b) The Respondent will instruct Hearings Officers that in *Shote* the litigation centred on R.245. The Court therefore did not turn its mind to R. 248. *Shote* is silent as to what factors can be considered under R.248 as that issue was not before the Court.

# APPENDIX D

CBSA's Response to the Preliminary Draft of this Report  
February 3, 2017

Response from the Minister of Public Safety to the IHRP's  
*"No Life for a Child"*  
November 8, 2016

Response from the Minister of Immigration,  
Refugees and Citizenship to the IHRP's *"No Life for a Child"*  
October 11, 2016



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

Dear Dr. Muscati,

I am writing to acknowledge the receipt of your draft report, "Invisible Citizens, Canadian Children in Immigration Detention" and to thank you for sharing it in confidence prior to its public release. The Canada Border Services Agency (CBSA) is pleased to provide feedback to the International Human Rights Program (IHRP) on this latest report, which focuses on an issue of mutual interest and that is of vital importance to the Government of Canada.

As you are aware, this represents the second time that the CBSA has received a written report from the University of Toronto's IHRP documenting the effects of immigration detention on children. The report will assist the Agency's ongoing efforts to implement the new National Immigration Detention Framework, including policy development and updated *Guidelines for the Detention of Minors*. The *Guidelines* are being developed pursuant to the Minister of Public Safety and Emergency Preparedness's recent direction to avoid housing children in detention facilities as much as humanly possible; and to use community-based alternatives to detention to limit the housing of children in detention facilities and minimize separation from parents. I hope to share a draft copy of the *Guidelines* for the review and comment of the IHRP and other stakeholders by the end of February 2017.

I must highlight the fact that I am very concerned with the characterization of events and the alleged level of care captured in the draft report as described by the six persons detained or formerly detained at the CBSA Immigration Holding Centers (IHCs). With a view to discussing and clarifying matters and any potential misunderstanding, and with the consent of persons interviewed by IHRP in the context of your report, I am pleased to extend an invitation to the IHRP to meet with the CBSA Regional management responsible for the IHCs in Laval and Toronto.

In addition, please find enclosed the CBSA's responses to your three questions as well as initial comments on the draft report for your consideration. Should you wish to discuss any of our comments, please do not hesitate to contact me at your convenience.

Yours sincerely,



Peter Hill  
Associate Vice-President, Programs Branch

3/21/17

Minister of Public Safety



Ministre de la Sécurité publique

NOV 08 2016

Ottawa, Canada K1A 0P8

Mr. Samer Muscati  
Director, International Human Rights Program  
Faculty of Law  
University of Toronto  
78 Queen's Park, Room 419  
Toronto, Ontario M5S 2C5

Dear Mr. Muscati:

Thank you for your correspondence of September 22, 2016, concerning immigration detention cases that involve children.

The Government of Canada takes its refugee protection obligations seriously as well as its obligation to protect the safety and security of Canadians. Balancing these considerations is a top priority for the Government.

In carrying out its mandate, the Canada Border Services Agency (CBSA) strives to follow international best practices while meeting domestic obligations, such as those included in the Canadian Charter of Rights and Freedoms. Key principles involve respecting the health, well-being, and safety of all people held for immigration purposes.

In August 2016, I announced a new National Immigration Detention Framework that will see \$138 million invested to improve immigration detention infrastructure, expand alternatives to detention, and reduce the number of minors in detention. The funding will also enhance medical and mental health services in immigration holding centres (IHCs).

In September 2016, CBSA officials launched cross-Canada consultations with key stakeholders, provincial partners, and civil society. These roundtable discussions will provide the Agency with meaningful input and recommendations to improve the immigration detention program. I note that the International Human Rights Program, of which the University of Toronto is a member, has been invited to consult.

The Government welcomes the International Human Rights Program's report on immigration detention and appreciates the public debate on these important issues. Following receipt of the draft report in August 2016, the CBSA replied, acknowledging the gaps related to the detention of children and families in the immigration detention system and recognizing that the issue is complex and requires a thorough review and substantive investments to enable alternatives to the current system. I note that, prior to the report's release, Agency officials met with you, the report's authors, and other key players in the University of Toronto's Faculty of Law to discuss and respond to its content. Thank you for including the CBSA's response as an appendix on page 61 of the report.

Canada

As acknowledged in the report, the Government is committed to reforming the immigration detention system with a particular view to protecting children and addressing mental health issues. The CBSA is working to issue policies that will avoid housing children in detention facilities and preserve family unity wherever possible. To this end, the Agency is also working on the development of community-based alternatives to detention.

The report characterizes the detention of a minor as "solitary confinement." The CBSA does not endorse the practice of isolation and only seeks to separate persons where it is necessary to ensure the safety of the person concerned, where a specific security risk needs to be mitigated, or where it is specifically requested by the person.

As part of the new National Immigration Detention Framework, the CBSA is working toward ensuring that alternatives to detention, together with partnerships and a new guideline for the detention of minors, will limit the housing of children in detention facilities and minimize instances where minors are separated from parents or guardians.

Detention is a measure of last resort and CBSA officers only detain foreign nationals and permanent residents when there are reasonable grounds to believe that the person is inadmissible and is either a danger to the public, unlikely to appear (flight risk) for immigration purposes, or is unable to satisfy the CBSA officer of his/her identity (foreign nationals only). For non-danger or non-security cases, detention is only exercised for the shortest period of time and is primarily focused on supporting removal. The detention of a minor, however, is not precluded where the minor is considered a security risk or a danger to the public.

There are instances where minors are not detained by the CBSA but are allowed to remain in the IHC to accompany their primary caregiver (usually a parent), provided that this is in the children's best interest. Please note that in all cases, minors are provided with classroom instruction with a certified teacher.

I appreciate your continued interest and engagement in this important issue.

Thank you again for writing.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Ralph Goodale', written in a cursive style.

The Honourable Ralph Goodale, P.C., M.P.

Minister  
of Immigration,  
Refugees and Citizenship



Ministre  
de l'Immigration,  
des Réfugiés et de la Citoyenneté

Ottawa, Canada K1A 1L1

**OCT 11 2016**

Mr. Samer Muscati, J.D, LL.M.  
Director, International Human Rights Program  
University of Toronto, Faculty of Law  
39 Queen's Park Crescent, Room 106  
Toronto ON M5S 2C3

Dear Mr. Muscati:

Thank you for your correspondence of August 24, 2016, regarding the findings and recommendations of the University of Toronto Faculty of Law's research into the immigration detention of children in Canada. I apologize for the delay in responding.

The Government of Canada seeks to avoid housing children in detention facilities, when possible. As such, I appreciate the contribution that you are making through your research and recommendations.

I note that you provided a copy of your letter to my colleague, the Honourable Ralph Goodale, Minister of Public Safety and Emergency Preparedness. Given that your recommendations fall within my colleague's portfolio, I am sure that he will take your recommendations into consideration.

Thank you for bringing this important issue to my attention.

Yours sincerely,

A handwritten signature in black ink, appearing to read "John McCallum".

John McCallum, P.C., M.P.  
Minister of Immigration, Refugees and Citizenship

cc: The Honourable Ralph Goodale, P.C., M.P.  
Minister of Public Safety and Emergency Preparedness

Canada





## ENDNOTES

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<sup>1</sup> International Human Rights Program, “No Life for a Child”: A Roadmap to End Immigration Detention of Children and Family Separation (2016), online: <[http://ihrp.law.utoronto.ca/utfl\\_file/count/PUBLICATIONS/Report-NoLifeForAChild.pdf](http://ihrp.law.utoronto.ca/utfl_file/count/PUBLICATIONS/Report-NoLifeForAChild.pdf)> [“No Life for a Child”].

<sup>2</sup> The IHRP did not interview CBSA officials for this report. However, the IHRP provided CBSA with a preliminary draft of the report, and incorporated CBSA’s comments into the body of the report.

<sup>3</sup> “A Statement Against the Immigration Detention of Children” (last updated on 24 January 2017), online: <<https://endchildimmigrationdetention.wordpress.com/>>.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*

<sup>6</sup> Canadian Council for Refugees, “Ending immigration detention of children: Call for legislative amendment” (December 2016), online: <<http://ccrweb.ca/sites/ccrweb.ca/files/ending-detention-children-proposal.pdf>>.

<sup>7</sup> Canada Border Services Agency, “CBSA Comments – *Invisible Citizens: Canadian Children in Immigration Detention*” (3 February 2017) [CBSA Comments]. This document contains the Canada Border Services Agency’s response to the preliminary draft of this report, and was provided in an email from Canada Border Services Agency on 4 February 2017.

<sup>8</sup> *Ibid.* According to CBSA, the Agency is “currently improving the reporting capabilities of its case management systems,” and in 2017, it will “publish more detention statistics, including on minors, on a quarterly basis.” See also, Canada Border Services Agency, “Arrests, detentions and removals: Detention Statistics” (1 November 2016), online: <<http://cbsa.gc.ca/security-secureite/detent-stat-eng.html>>.

<sup>9</sup> CBSA Comments, *supra* note 7.

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*

<sup>13</sup> According to CBSA, “Key stakeholders included the United Nations High Commissioner for Refugees, Canadian Red Cross, Canadian Council for Refugees, Canadian Bar Association, academic experts on immigration and health, provincial ministries responsible for children and families, mental health and corrections, and regional non-governmental organizations responsible for immigration. ... CBSA will open consultations to all stakeholders, including the general public, through the Consulting with Canadians website in February 2017,” in CBSA Comments, *supra* note 7.

<sup>14</sup> According to CBSA, the NIDF will include “new policy guidelines for the detention of minors and family unification,” with the aim to “limit housing of children in detention facilities, as much as humanly possible and minimize instances where minors are separated from a mother or father.” These guidelines will also “address the current gaps in procedural consistency for minors in situations of detention as well as the conduct of officers when performing an arrest involving minors,” and “provide officers with a non-exhaustive list of factors to be taken into account when determining the best interests of the child,” in CBSA Comments, *supra* note 7.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Immigration and Refugee Protection Act*, SC 2001, c 27, Division 6 [IRPA]; *Immigration and Refugee Protection Regulations*, SOR/2002-227, Part 14 [IRPR].

<sup>17</sup> Canada Border Services Agency, “Arrests, detentions and removals: Detentions” (12 January 2017), online: <<http://www.cbsa-asfc.gc.ca/security-secureite/detent-eng.html>> [CBSA, “Arrests, detentions and removals: Detentions”]. In CBSA’s response to the preliminary draft of this report, the Agency noted: “Alternatives to detention are always considered and used first to minimize the detention of minors. In Toronto, community-based arrangements are favoured alternatives to detention where bond and/or conditional release may not be suitable. Under the new National Immigration Detention Framework (NIDF), the CBSA is also pursuing the development of additional arrangements and protocols with child protective services, non-government organizations and community groups, to enhance alternatives to detention in all regions of the country. ... In exceptional cases where ATDs [alternatives to detention] may not be suitable for parents, such as when public safety is at risk, new purpose built facilities will facilitate family unification,” in CBSA Comments, *supra* note 7.

<sup>18</sup> CBSA, “Arrests, detentions and removals: Detentions,” *supra* note 17. The IHRP requested information pertaining to “the number of times child protection services or a local child-care agency has been contacted by CBSA,” but according to the CBSA, this record “does not exist” (access to information request by IHRP, A-2015-15858/LIB).

<sup>19</sup> In CBSA’s response to the preliminary draft of this report, the Agency confirmed that, “the national detention standards apply to minors detained or housed in an IHC.” Furthermore, CBSA reiterated that it provides “additional and more tailored accommodation for detained or housed minors in IHCs,” such as arrangements for recreational and nutritional requirements, in CBSA Comments, *supra* note 7. The national detention standards indicate that CBSA officers should continuously monitor children with respect to “psychiatric care,” but only to “identify and treat victims of torture,” in Canada Border Services Agency, “National Standards & Monitoring Plan for the Regulation and Operation of CBSA Detention Centres (DC)” (23 September 2014) (obtained through access to information request by IHRP, A-2015-18228) at 9.

<sup>20</sup> The special considerations that pertain to detained minors, listed in IRPR 249, include:

- (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, counselling and recreation.

<sup>21</sup> Canada Border Services Agency, “Detention of Minors: Greater Toronto Enforcement Centre, Greater Toronto Area Region” (2011) (obtained through access to information request by IHRP, A-2015-18228) at 3 [CBSA “Detention of Minors: GTEC”].

<sup>22</sup> *Ibid.* In CBSA’s response to the preliminary draft of this report, the Agency noted that, “[s]ince September 2016, CBSA regional operations are now

required to report every detention of minor(s) to national headquarters. The CBSA acknowledges that it does not consistently notify the CRC when children are in detention. The CBSA is making steps to correct this situation by implementing revised operational procedures to report all situations involving the detention or housing of a minor,” in CBSA Comments, *supra* note 7.

<sup>23</sup> Although the IHRP requested information regarding Canadian children housed in immigration detention across the country, CBSA only provided data for those held in one of the immigration detention facilities. CBSA did not specify the region in which this detention facility was located. However, the IHRP believes that this data pertains to the Toronto IHC, because several of the children profiled in this report were identified in the data. Canada Border Services Agency, “Minor Report” (1 January 2011–31 December 2015) (obtained through access to information request by IHRP, A-2015-18222) [CBSA, “Minor Report”]. It is also unclear how many children were separated from their detained parents, as CBSA did not collect this data.

<sup>24</sup> This total is less than the sum of the yearly averages between 2011 and 2015, because some children stayed in detention across more than one calendar year. *Ibid.*

<sup>25</sup> The daily logs included information pertaining to the number of children housed in the facility on the given day, as well as their age and gender. In the data set that CBSA provided to the IHRP, of the total 1826 days between 2011 and 2015, logs for 332 days are missing. *Ibid.*

<sup>26</sup> Canadian children have been housed in both the Toronto and Laval IHCs, according to IHRP interviews with lawyers, social workers, mental health experts and former immigration detainees.

<sup>27</sup> CBSA Comments, *supra* note 7. See also, “No Life for a Child,” *supra* note 1 at 17.

<sup>28</sup> CBSA, “Minor Report,” *supra* note 23.

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*

<sup>36</sup> “No Life for a Child,” *supra* note 1 at 10.

<sup>37</sup> CBSA Comments, *supra* note 7. The 2016-17 data was provided to the IHRP in summary form and did not reveal important details that were reflected in the daily logs that the IHRP obtained through access to information requests for the 2011-2015 period.

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

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.*

<sup>42</sup> In CBSA’s response to the preliminary draft of this report, the Agency noted that, in light of the overall decrease in the number of detentions (see Table 5), “[t]here is no reason to believe that there has been an increase in family separation over the last several years,” in CBSA Comments, *supra* note 7. Given that CBSA has not provided any data concerning family separation, the IHRP has refrained from making a definitive statement regarding an increase in family separation. However, the IHRP’s concern arises out of evidence gathered through interviews with frontline workers, as well as detainees and former detainees. These individuals indicated that, in practice, CBSA officers often fail to engage in an adequate analysis of the best interests of the child to meaningfully evaluate alternatives to detention, or determine whether children should be housed in detention or separated from their detained parents.

<sup>44</sup> Canada Border Services Agency, “Policy for Housing of Accompanied Children in Immigration Holding Centres” (obtained through access to information request by IHRP, A-2015-18228) at section 3.2 [CBSA, “Policy for Housing Accompanied Children”]. According to CBSA, while this draft policy has not been formally introduced, “the document has been influential in changing our operational priorities over the last year,” and “relevant information in this draft policy will be included in the Guidelines for the Detention of Minors.” In CBSA’s response to the preliminary draft of this report, the Agency confirmed that “children are housed at an IHC at the request of their parent(s) and with that/those parent(s)’ permission. A parent may withdraw their consent to house their non-detained minors at the IHC at any time, by informing a CBSA official. Moreover, both the CBSA and the child’s parent must provide their written consent prior to housing their non-detained child at the IHC,” in CBSA Comments, *supra* note 7.

<sup>45</sup> IHRP interview with Abigail (name changed), a former detainee at an Immigration Holding Centre (November 2016); IHRP interview with Mariame (name changed), a former detainee at an Immigration Holding Centre (December 2016). Both women had been released from detention at the time of the interview.

<sup>46</sup> IHRP interview with Naimah (name changed), a former immigration detainee at an Immigration Holding Centre (October 2016). Naimah had been released from detention at the time of the interview.

<sup>47</sup> *Ibid.* IHRP interview with Andrew Brouwer, Senior Counsel – Refugee Law, Legal Aid Ontario (August 2016).

<sup>48</sup> As Irwin Elman, the Provincial Advocate for Children and Youth, noted in “No Life for a Child,” that, “It is absolutely not appropriate to remove a child from their family unless they are being physically, emotionally, sexually abused or neglected.” He further noted that, the housing of a child in immigration detention “does not meet the threshold for apprehension by a child protection agency.” “No Life for a Child,” *supra* note 1 at 41.

<sup>49</sup> According to CBSA, “[b]eyond potential issues of neglect and abuse, other reasons may justify contacting CPS, such as:

“access to trained professionals;

“trauma experience by a minor in custody;

“the minor may have witnessed domestic violence;

“parents may be facing criminal charges and subsequent removal from Canada and, due to the nature of the charges, may be separated from their children (i.e. incarcerated in separate institutions);

“the minor may have been attending school and may have to leave their friends/family if they are subject to an enforceable removal order; and,

“the minor may not have the capacity to comprehend what has happened to them,” in CBSA Comments, *supra* note 7.

<sup>50</sup> The IHRP conducted qualitative interviews, and received informed consent from the interviewees to be included in the report. Given confidentiality

## ENDNOTES

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concerns, the IHRP did not share any identifying information or interview CBSA officials regarding the case studies. The IHRP is only able to share such information when it receives the express consent of those affected by the release of that information. The IHRP does not claim that these case studies are representative of all immigration detention cases, but aims to provide a glimpse into the lived experiences of Canadian children who are affected by the immigration detention system in Canada.

<sup>51</sup> The names of the interviewees and their children have been changed to protect their identities.

<sup>52</sup> This case study is based on an interview the IHRP conducted with Abigail, a former immigration detainee (November 2016), as well as her Humanitarian and Compassionate Application submissions (January 2015). The names of the individuals in this case study have been changed to protect their identities.

<sup>53</sup> In CBSA's response to the preliminary draft of this report, the Agency noted: "When off-site medical services appointments are required for a minor child, the CBSA will make all necessary arrangements to ensure that the minor and parent can attend those appointments," in CBSA Comments, *supra* note 7.

<sup>54</sup> In CBSA's response to the preliminary draft of this report, the Agency noted: "The use of handcuffs/restraints is covered under a variety of CBSA national policy manuals and regional standard operating procedures. In most circumstances, the CBSA does not handcuff detained parent(s) in front of children. Some operating procedures clearly indicate that a child should not witness their parent being handcuffed. However, the new Guidelines for the Detention of Minors will clarify the national baseline on the use of restraints in situations of detention involving minors," in CBSA Comments, *supra* note 7.

<sup>55</sup> In CBSA's response to the preliminary draft of this report, the Agency noted: "Room searches are conducted without any unnecessary force and in ways that respect and preserve the dignity of detainees. IHC staff may search a detainee's housing and work area, and personal items contained within those areas, without notice or approval from the detainee and without the detainee's presence," in CBSA Comments, *supra* note 7.

<sup>56</sup> In CBSA's response to the preliminary draft of this report, the Agency noted: "It is the policy of the CBSA to ensure that minors and/or families are not isolated in an IHC. Minors and mothers are housed in the family wing of an IHC. On occasion, where a minor is accompanying a father, they will be housed in a separate living unit. Families can also be placed in a separate living unit for medical reasons," in CBSA Comments, *supra* note 7.

<sup>57</sup> "People who would not normally be eligible to become permanent residents of Canada may be able to apply on humanitarian and compassionate (H&C) grounds. H&C grounds apply to people with exceptional cases. Applications to become a permanent resident based on H&C grounds are assessed on a case-by-case basis. Factors that are looked at include: how settled the person is in Canada, general family ties to Canada, the best interests of any children involved, and what could happen to the applicant if the request is not granted." Government of Canada, "Humanitarian and compassionate grounds" (6 June 2016), online: <<http://www.cic.gc.ca/english/refugees/inside/h-and-c.asp>> [Government of Canada, "Humanitarian and compassionate grounds"].

<sup>58</sup> This case study is based on an interview the IHRP conducted with Mariame, a former immigration detainee (December 2016). The names of the individuals in this case study have been changed to protect their identities.

<sup>59</sup> Government of Canada, "Humanitarian and compassionate grounds," *supra* note 54.

<sup>60</sup> In CBSA's response to the preliminary draft of this report, the Agency noted: "Frisk searches are required prior to any escort within or outside the centre and following in-person visits, including visits with counsel, legal aid, clergy, etc. In the course of regular IHC routines, the frisk search is the most frequently used procedure. It is used to carry out spot checks for contraband as part of the IHCs overall security program. Each facility has established procedures to detect contraband, prevent escapes, maintain sanitary standards, ensure the safety of personnel and other detainees, and eliminate fire and other safety hazards," in CBSA Comments, *supra* note 7.

<sup>61</sup> In CBSA's response to the preliminary draft of this report, the Agency noted: "The CBSA national detention standards apply to minors detained or housed in an IHC. It includes providing a secure and sanitary environment (e.g. providing diapers), proper nutrition (e.g. baby formula, if required), access to fresh air and recreational activities, as well as access to the health care services provided in IHCs or at an hospital if the appropriate level of care cannot be offered onsite. The CBSA ensures that food goods in the IHC are maintained in accordance with industry standards," CBSA Comments, *supra* note 7.

<sup>62</sup> This case study is based on an interview the IHRP conducted with Naimah, a former immigration detainee (October 2016), as well as her court submissions (February 2016). The names of the individuals in this case study have been changed to protect their identities.

<sup>63</sup> The psychological assessment further noted: "[Aaliyah] is at a crucial stage of her development from every aspect, including cognitive, social, emotional and behavioral. It is crucial for her to be able to live in a safe environment free of coercion and confinement. She needs to be able to go to school and socialize with peers. This forced and prolonged detention has already taken a toll on her emotional wellbeing and mental health. Not only is she experiencing symptoms of depression and PTSD, she is also developing a negative sense of self, believing that no one loves her or cares about her. If she and her mother are not released from detention soon, [Aaliyah's] mental health will continue to decline, and her overall development will also be adversely affected." *BB and JFCY v. Minister of Citizenship and Immigration* (24 Aug 2016), Toronto IMM-5754-15 (Federal Court) (Memorandum of Argument of Justice for Children and Youth at para 12), online: <<http://jfcy.org/wp-content/uploads/2016/11/BB-and-JFCY-v-MCI-Factum-FINAL-REDACTED.pdf>>.

<sup>64</sup> *Ibid.*

<sup>65</sup> In CBSA's response to the preliminary draft of this report, the Agency noted: "All detainees held in a CBSA IHC have access to medical services and prescription drugs provided either onsite in detention facilities or offsite when medically necessary. Detainees are provided timely access based on medical need and urgency to other medical services providers (i.e., dental, medical specialist) outside the IHC," in CBSA Comments, *supra* note 7.

<sup>66</sup> This case study is based on an interview the IHRP conducted with Selena, an immigration detainee at an Immigration Holding Centre (November 2016). At the time of the interview, Selena had been in detention for approximately 10 days. The names of the individuals in this case study have been changed to protect their identities.

<sup>67</sup> Detainees at the Toronto Immigration Holding Centre have to communicate with their visitors over the phone through plexiglass separation.

<sup>68</sup> This case study is based on interviews the IHRP conducted with Jamal, former immigration detainee, and his wife, Laila (January 2017). The names of the individuals in this case study have been changed to protect their identities.

<sup>69</sup> This case study is based on an interview the IHRP conducted with Rhea, an immigration detainee at an Immigration Holding Centre (November

2016). Rhea was in detention at the time of the interview. The names of the individuals in this case study have been changed to protect their identities.

<sup>70</sup> Canada Border Services Agency, "Framework of Guiding Principles for the CBSA's Treatment of Children" (30 October 2013) (obtained through access to information request by IHRP, A-2015-18228) [CBSA, "Framework of Guiding Principles"]. According to CBSA, while the Framework has not been formally introduced, "the document has been influential in changing our operational priorities over the last year," and "relevant information in this draft policy has been included in our new policy Guidelines for the Detention of Minors," in CBSA Comments, *supra* note 7.

<sup>71</sup> CBSA, "Framework of Guiding Principles," *supra* note 67 at 3.

<sup>72</sup> *Ibid* at 4.

<sup>73</sup> *Ibid* at 5.

<sup>74</sup> *Ibid*.

<sup>75</sup> *Ibid* at 6.

<sup>76</sup> CBSA Comments, *supra* note 7.

<sup>77</sup> "248 If it is determined that there are grounds for detention, the following factors shall be considered before a decision is made on detention or release:

(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."

IRPR, *supra* note 16 at s 248.

<sup>78</sup> *BB and Justice for Children and Youth v. Minister of Citizenship and Immigration* (24 August 2016), Toronto IMM-5754-15 (Federal Court).

<sup>79</sup> *Ibid*.

<sup>80</sup> *Ibid*.

<sup>81</sup> IHRP interview with Andrew Brouwer, Senior Counsel – Refugee Law, Legal Aid Ontario (2 January 2017) [Interview with Brouwer, 2 Jan 2017].

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

<sup>83</sup> "Instructions from CBSA to its Hearing Officers, Distributed by CBSA on August 29, 2016," online: <<http://jfcy.org/wp-content/uploads/2016/11/Instructions-to-CBSA-Officers.pdf>>.

<sup>84</sup> Interview with Brouwer, 2 Jan 2017, *supra* note 78.

<sup>85</sup> *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), Article 3.1.

<sup>86</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 50.

<sup>87</sup> Interview with Brouwer, 2 Jan 2017, *supra* note 78.

<sup>88</sup> "No Life for a Child," *supra* note 1 at 35; International Human Rights Program, "We Have No Rights": *Arbitrary imprisonment and cruel treatment of migrants with mental health issues in Canada* (2015) at 55, online: <[http://ihrp.law.utoronto.ca/utfl\\_file/count/PUBLICATIONS/IHRP%20We%20Have%20No%20Rights%20Report%20web%20170615.pdf](http://ihrp.law.utoronto.ca/utfl_file/count/PUBLICATIONS/IHRP%20We%20Have%20No%20Rights%20Report%20web%20170615.pdf)>. See also *Canada (Minister of Citizenship and Immigration) v. Thanabalasingham*, 2004 FCA 4 at paras 6-8.

<sup>89</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>>.

<sup>90</sup> "No Life for a Child," *supra* note 1 at 46.

<sup>91</sup> *Ibid*.

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

<sup>93</sup> *Ibid* at 23-24.





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