

Rights Violations Associated with Canada's Treatment of Vulnerable Persons in Immigration Detention

Joint Submission to the Working Group on Universal Period Review
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The submission's recommendations are endorsed by:

Human Rights Watch

Canada's Treatment of Vulnerable Persons in Immigration Detention

I. INTRODUCTION

1. This joint submission by the International Human Rights Program at the University of Toronto's Faculty of Law (IHRP), Amnesty International (AI), Justice for Children and Youth (JFCY), the Canadian Association of Refugee Lawyers (CARL), the Canadian Civil Liberties Association (CCLA), the British Columbia Civil Liberties Association (BCCLA), and the Refugee Law Office of Legal Aid Ontario (RLO) highlights shortcomings in Canada's treatment of children or individuals with psychosocial disabilities or mental health conditions in immigration detention.¹ Human Rights Watch (HRW) has endorsed the recommendations of this joint submission.

II. SUMMARY

2. In the period under review, Canada has begun to make progress in its treatment of immigration detainees, and demonstrated a willingness to address deeply embedded issues within the immigration detention system. Nevertheless, Canada's treatment of vulnerable individuals in immigration detention – including children and persons with psychosocial disabilities or mental health conditions – continues to violate binding international law, such as the rights to equality, liberty and security of the person, and the right to an effective remedy. In many cases, this treatment constitutes arbitrary detention, as well as cruel, inhuman, and degrading treatment. Canada's treatment of children in the context of immigration detention also violates the *Convention on the Rights of the Child*.
3. In the 2013 UPR, Canada accepted two recommendations² pertaining to the protection of non-citizens, and noted three recommendations with respect to

¹ This submission is based on 3 years of research by the IHRP. The full reports are attached: "We Have No Rights:" *Arbitrary imprisonment and cruel treatment of migrants with mental health issues in Canada* (Annex A); "*No Life for a Child*": *A Roadmap to End Immigration Detention of Children and Family Separation* (Annex B); and *Invisible Citizens: Canadian Children in Immigration Detention* (Annex C).

² **R.128.147:** "Ensure the protection of refugees, migrants and members of their families in full compliance with international standards" (Belarus), online: https://www.upr-info.org/sites/default/files/document/canada/session_16_-_april_2013/ahrc2411e.pdf; **R.128.148:** "Take the necessary measures to prevent cruel and discriminatory treatment against asylum seekers, migrants and refugees, especially if these are minors, and ensure compliance with the principle of non-refoulement of the Convention relating to the Status of Refugees" (Ecuador), online: <https://www.upr-info.org/sites/default/files/document/canada/session_16_-_april_2013/ahrc2411e.pdf>.

immigration detention.³ However, none of the previous UPR recommendations directly addressed the impact of immigration detention on vulnerable persons.

4. The IHRP welcomes the following positive developments in Canada's immigration detention regime:
 - a. The Canada Border Services Agency (CBSA) has taken important steps toward addressing systemic issues within the immigration detention regime. CBSA has embarked on several new programs to improve transparency, alternatives to detention, and detention infrastructure.⁴ CBSA has also engaged in a review of national detention policies and standards.⁵
 - b. Since 2013, the number of instances of detention has decreased from a total of 8,739 in fiscal year 2012-13, to 6,251 in 2016-17.⁶ The average length of detention during this period has ranged between 19.5 and 24.5 days.⁷ The number of children in detention has also decreased, from 232 in fiscal year 2014-15, to 162 in 2016-17.⁸ The average length of detention for children during this period has decreased from 16 to 13 days.⁹ However, it is unclear how many children are separated from their detained parents because CBSA has not collected this data.
 - c. In 2015, an Ontario Court of Appeal decision opened a new judicial avenue for immigration detainees to challenge their incarceration, namely, in

³ **R.128.146:** "Revise the legal provisions on mandatory detention of migrants and asylum seekers included in the category of irregular entries, in accordance with the recommendation of the Committee on the Elimination of Racial Discrimination (Committee on CERD)" (Mexico); **R.128.159:** "Investigate thoroughly all cases of the detention of persons who have entered Canada, including Russian citizens, on non-security grounds and also information about cruel treatment vis-à-vis these people, pressure being used against them and demands that they provide personal information and the unjustified searches that have been carried out as well" (Russia); **R.128.162:** "Reconsider its policy of using administrative detention and immigration legislation to detain and remove non-citizens on the ground of national security" (Egypt), online: <https://www.upr-info.org/sites/default/files/document/canada/session_16_april_2013/ahrc2411e.pdf>.

⁴ Canada Border Services Agency, "CBSA Comments – *Invisible Citizens: Canadian Children in Immigration Detention*" (3 February 2017) [CBSA Comments – *Invisible Citizens*]. 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.

⁵ *Ibid.*

⁶ Canada Border Services Agency, "Detention Statistics" *Government of Canada*, online: <<http://www.cbsa-asfc.gc.ca/security-securite/detent-stat-eng.html>> [CBSA "Detention Statistics"].

⁷ *Ibid.*

⁸ *Ibid.*

⁹ *Ibid.*

the Superior Court of Justice through habeas corpus applications.¹⁰ This is an important remedy, although it is only available in a narrow set of cases.¹¹

- d. In 2017, the Immigration Refugee Board of Canada (IRB) announced that it would undertake an independent audit of detention reviews conducted by the Immigration Division in a sample of cases involving lengthy detentions.¹²
- 5. Despite these positive steps, immigration detainees continue to suffer significant human rights violations. In particular, non-citizens¹³ with psychosocial disabilities or mental health conditions are routinely held in maximum-security provincial jails,¹⁴ and children (including Canadians) continue to be detained or “housed”¹⁵ in detention, or separated from their detained parents.¹⁶ There is no legislatively prescribed limit to the length of detention, and as such, detainees have no way to ascertain how long they will spend in detention. A needlessly punitive culture persists within the immigration detention system, and it is enabled by a series of systemic issues that must be addressed through legislative, regulatory, and policy amendments.
- 6. This submission examines the following key issues within the Canadian immigration detention system.
 - a. Immigration detainees with psychosocial disabilities or mental health conditions held in maximum-security provincial jails (para. 8); and

¹⁰ *Chaudhary v. Canada (Public Safety and Emergency Preparedness)*, 2015 ONCA 700 (CanLII).

¹¹ Recent cases, including *Scotland v Canada (Attorney General)* (2017 ONSC 4850) and *Ali v Canada (Attorney General)* (2017 ONSC 2660), have developed this judicial remedy further.

¹² Immigration and Refugee Board of Canada, “Immigration and Refugee Board of Canada to carry out audit of long-term detention reviews” (17 August 2017), online: <<http://www.irb-cisr.gc.ca/Eng/NewsNouv/NewNou/Pages/aud-ver-det.aspx>>.

¹³ “Non-citizens” include migrants, asylum seekers awaiting a decision on their claim, asylum seekers whose claim has been denied, and permanent residents in the process of being stripped of their status.

¹⁴ International Human Rights Program, “*We Have No Rights*”: *Arbitrary Imprisonment and Cruel Treatment of Migrants with Mental Health Issues in Canada* (2015) at 78, online: <http://ihrp.law.utoronto.ca/utfl_file/count/PUBLICATIONS/IHRP%20We%20Have%20No%20Rights%20Report%20web%20170615.pdf> [“We Have No Rights”].

¹⁵ Children who are not under detention orders may stay – or be “housed” – in detention with their detained parents or legal guardians, if it is in the best interests of the child (Canada Border Services Agency, “*Statement by the Canada Border Services Agency on housing of Canadian children in immigration holding centres*,” (25 February 2017), online: <https://www.canada.ca/en/border-services-agency/news/2017/02/statement_by_thecanadaborderservicesagencyonhousingofcanadianchi.html>).

¹⁶ International Human Rights Program, “*No Life for a Child*”: *A Roadmap to End Immigration Detention of Children and Family Separation* (2016) at 5, online: <http://ihrp.law.utoronto.ca/utfl_file/count/PUBLICATIONS/Report-NoLifeForAChild.pdf> [“No Life for a Child”].

- b. Children detained or “housed” in immigration detention, or separated from their detained parents (para. 20).
7. Recommendations are listed at the end of this submission (para. 35).

III. RELEVANT ISSUES

(A) Canada’s treatment of individuals with psychosocial disabilities or mental health conditions in immigration detention

8. Every year, thousands of non-citizens are detained in Canada.¹⁷ Between 2012 and 2017, an average of 7,215 individuals were detained each year.¹⁸ While the majority of immigration detainees are held in Immigration Holding Centres (IHCs) designated for this population, approximately a third of all detainees and the vast majority of long-term detainees are held in facilities intended for a criminalized population.¹⁹ Immigration detainees with psychosocial disabilities or mental health conditions are routinely held in maximum-security provincial jails.²⁰ In fact, CBSA policy explicitly states that detainees may be transferred from IHCs to provincial jails due to their mental health conditions.²¹ Although CBSA claims that detainees can access more specialized care in provincial jails,²² research indicates that mental health care is woefully inadequate, and that the maximum-security conditions exacerbate existing mental health condition and trigger new illnesses.²³

¹⁷ CBSA “Detention Statistics”, supra note 6.

¹⁸ *Ibid.*

¹⁹ *Ibid.* There are two IHCs – in Toronto and Laval – that accommodate long-term detentions, and third IHC in Vancouver that accommodates stays of 48 hours or less. Immigration detainees who are held outside a region served by an IHC are detained in provincial jails. See also, Brendan Kennedy, “Caged By Canada: While Canada is celebrated as a safe haven for refugees, hundreds of unwanted immigrants like Ebrahim Toure languish indefinitely in jails across the country” *The Toronto Star* (17 March 2017), online: <<http://projects.thestar.com/caged-by-canada-immigration-detention/part-1/>>.

²⁰ “We Have No Rights”, supra note 14, at 78.

²¹ Canada Border Services Agency, “Arrests, detentions and removals: Detentions” (12 January 2017), online: <<http://www.cbsa-asfc.gc.ca/security-securite/detent-eng.html>> [CBSA, “Arrests, detentions and removals: Detentions”].

²² “We Have No Rights”, supra note 14, at 78.

²³ Public Services Foundation of Canada, *Services: Overcrowding and inmates with mental health problems in provincial correctional facilities* (2015) at 15, online: <http://publicservicesfoundation.ca/sites/publicservicesfoundation.ca/files/documents/crisis_in_correctional_services_april_2015.pdf> at 5, 14 [PSFC, Overcrowding and Inmates].

Legal Framework

9. Although immigration detention deprives individuals of their liberty, the system provides inadequate legal safeguards to ensure this deprivation is justifiable. Many of the legal safeguards present in the criminal justice system, including evidentiary standards and procedures required to justify deprivation of liberty, as well as the conditions of confinement, are absent in the immigration detention context.
10. Individuals are generally detained for three main reasons: flight risk, danger to the public, and unclear identity.²⁴ The legislative scheme is silent on mental health.²⁵ CBSA officers and Immigration Division adjudicators are not required by law to consider individuals' mental health in decisions to detain individuals or continue their detention.²⁶
11. Once detained, there are no established criteria in law to determine the site of confinement – the decision to transfer detainees from IHCs to provincial jails is entirely within the jurisdiction of CBSA.²⁷ Research indicates that detainees' counsel are not notified of transfer decisions or the reasons for transfers, and detainees do not have the right or a meaningful opportunity to challenge this decision.²⁸ There is no effective and transparent monitoring of the conditions of confinement for detainees held in provincial jails, as independent monitors are often barred access to these facilities and their reports are not published.²⁹
12. While CBSA makes the initial decision to detain, the decision to continue detention is under the jurisdiction of the Immigration Division of the Immigration and Refugee Board.³⁰ Detention review hearings are held within 48 hours of detention, 7 days of detention, and every 30 days thereafter until release.³¹ While the detention review process is meant to mitigate the risk of indefinite detention, a series of systemic flaws within this process make hearings futile in many cases,

²⁴ *Immigration and Refugee Protection Act*, SC 2001, c 27, s 55 [IRPA].

²⁵ "We Have No Rights", supra note 14, at 52.

²⁶ Mental health is not one of the factors to be taken into consideration when assessing whether a person is a flight risk, danger to the public, or has an unclear identity. For a list of factors, see *Immigration and Refugee Protection Regulations*, SOR/2002-227, ss 244-248 [IRPR].

²⁷ "We Have No Rights", supra note 14, at 75.

²⁸ *Ibid*, at 79.

²⁹ Canadian Red Cross Society, Annual Report on Detention Monitoring Activities in Canada (2011) (obtained through access to information request by IHRP, A-2014-09720) at 6; see also, "We Have No Rights", supra note 14, at 84.

³⁰ IRPA, supra note 24, s 54.

³¹ *Ibid*, s 57.

and actually facilitate indefinite detention.³² The following are only some of these systemic flaws: detention review hearings lack due process; Immigration Division adjudicators who preside over the hearings are not required to have legal training (including knowledge about human rights standards), and as a result, they often misconstrue basic legal principles; and adjudicators lack independence and often cede their jurisdiction over testing evidence to CBSA officers (or “Minister’s Counsel”), whose representations and allegations are accepted at face value.

13. Although the frequency of the detention review hearings is supposed to be a safeguard against indefinite detention, with each decision to continue detention, it becomes more difficult to secure release. This is because detention review hearings are quasi de-novo, which means that instead of reviewing previous decisions for potential mistakes, adjudicators take the findings of previous decisions at face value and only look for “clear and compelling reasons to depart from previous decisions.” In practice, this shifts the burden onto the detainees to prove that they should be released.³³ This is particularly challenging because detainees often do not have legal representation at detention review hearings.³⁴ Importantly, the totality of these systemic flaws are further aggravated because there is no limit to the length of detention, and instances of detention can continue for months and even years; the longest instance of immigration detention in Canada was 11 years.³⁵
14. Although CBSA and Immigration Division adjudicators are required by law to consider alternatives to detention,³⁶ in practice, there is a lack of meaningful or viable alternatives to detention for individuals with mental health issues.³⁷ Immigration detainees’ mental health issues are rarely seen as a factor favoring release. In fact, in many cases, there is a presumption toward continued detention as psychosocial disabilities or mental health conditions are often interpreted through a lens of flight risk and danger to the public.³⁸

³² "We Have No Rights", supra note 14. See also, *Scotland v Canada (Attorney General)*, 2017 ONSC 4850.

³³ "We Have No Rights", supra note 14, at 5; *Scotland v Canada (Attorney General)*, 2017 ONSC 4850.

³⁴ *Ibid.*

³⁵ Geoffrey York, “Freed from Canadian Detention, South African Man Left in Limbo” *The Globe and Mail* (14 June 2016), online: <<https://beta.theglobeandmail.com/news/world/freed-from-canadian-detention-south-african-man-left-in-limbo/article30462108/?ref=http://www.theglobeandmail.com&>>.

³⁶ IRPR, supra note 26, s 248(e).

³⁷ "We Have No Rights", supra note 14, at 5.

³⁸ "We Have No Rights", supra note 14, at 53.

International Law Violations

15. Canada is violating its international legal obligations by detaining migrants with mental health issues in provincial jails for immigration purposes. First, this system violates the right to be free from arbitrary detention³⁹ because key aspects of the immigration detention regime are not sufficiently prescribed by law.⁴⁰ Second, this system violates the right to be free from cruel, inhuman, and degrading treatment⁴¹ insofar as it routinely imprisons migrants with mental health issues in more restrictive forms of confinement, fails to provide adequate health care, and raises the spectre of indefinite detention.⁴² The Canadian immigration detention regime also discriminates against individuals with psychosocial disabilities or mental health conditions in terms of their liberty and security of the person,⁴³ as well as their access to health care in detention.⁴⁴ Finally, the legislative scheme for detention review hearings violates the right to an effective remedy⁴⁵ because the regime creates a *de facto* presumption against release, and judicial review of these hearings is largely ineffectual.⁴⁶

Mental Health Evidence

16. There is overwhelming evidence that immigration detention has a devastating impact on individuals' mental health. Although CBSA justifies transferring immigration detainees from IHCs to provincial jails in order to improve access to mental health services,⁴⁷ those who suffer from depression, post-traumatic stress

³⁹ *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, art 9(1) (entered into force 23 March 1976) [ICCPR].

⁴⁰ "We Have No Rights", supra note 14, at 88-89.

⁴¹ ICCPR, supra note 39, arts 7, 10; the prohibition against torture or cruel, inhuman or degrading treatment is elaborated further in the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 85 UNTS 1465 (entered into force 26 June 1987).

⁴² "We Have No Rights", supra note 14, at 91-94.

⁴³ ICCPR, supra note 39, art 9; *Convention on the Rights of Persons with Disabilities*, 30 March 2007, 2515 UNRTS 3 (entered into force 3 May 2008), arts 4, 5, 14 [CRPD]. See also, Committee on the Rights of Persons with Disabilities, "Guidelines on article 14 of the Convention on the Rights of Persons with Disabilities," September 2015, online:

<<http://www.ohchr.org/Documents/HRBodies/CRPD/GC/GuidelinesArticle14.doc>>.

⁴⁴ "We Have No Rights", supra note 14, at 94, 96-97.

⁴⁵ ICCPR, supra note 39, art 9(4).

⁴⁶ "We Have No Rights", supra note 14, at 97-98. First, an application for judicial review requires leave, which may result in a delay between three months to a year, all while the detainee remains in custody. Second, the Federal Court does not have the authority to order release of an individual in detention; the Court may only review the "reasonableness" of a detention review decision. Third, judicial reviews are rarely sought because they are incredibly resource intensive and expensive.

⁴⁷ *Ibid*, at 78.

disorder, or anxiety often do not receive any treatment at all.⁴⁸ Individuals who have expressed distress and the will to commit suicide are sometimes kept in solitary confinement.⁴⁹

17. Studies from Canada and around the world clearly indicate that detention causes psychological illness, trauma, depression, anxiety, aggression, and other physical, emotional, and psychological consequences.⁵⁰ Uncertainty about the end date of detention is one of the most stressful aspects of the system, especially for those who cannot be removed from Canada due to legal or practical reasons that are out of their control.⁵¹ Detention can be particularly damaging to vulnerable individuals, including asylum seekers and victims of torture.⁵²

Case Study

18. Uday⁵³ had a psychosocial disability for over a decade, and had managed his mental health long before he arrived in Canada in November 2011. CBSA officers stopped Uday at the border upon his arrival, because they could not obtain proof of his identity or nationality, and believed him to be a flight-risk. Despite his persistent requests to access his medication from his suitcase after a long flight from Europe, according to Uday, CBSA officers insisted that he complete his interview. Shortly after, Uday had a suspected seizure, was taken to hospital, and then transferred directly to the Toronto IHC. During a subsequent interview with CBSA, where Uday made his claim for asylum protection, he became agitated and caused some property damage. He was again taken to hospital, and then transferred directly to jail. Although he had no criminal record and was not held on criminal charges, Uday continued to be detained in the maximum-security facility for nearly three years until CBSA acknowledged that Uday was de facto stateless and allowed for his release.

⁴⁸ Interview of Michael L Perlin, Professor at New York Law School (5 February 2015).

⁴⁹ "We Have No Rights", supra note 14, at 27.

⁵⁰ Janet Cleveland & Cecile Rousseau, "Psychiatric symptoms associated with brief detention of adult asylum seekers in Canada" (2013) 58:7 Can J Psych 409; K Robjant, I Robbins & V Senior, "Psychological distress amongst immigration detainees: a cross-sectional questionnaire study" (2009) 48:3 Br J Clinical Psychology 275; AS Keller, B Rosenfeld, C Trinh-Shervin, et al, "Mental health of detained asylum seekers" (2003) 362(9397) Lancet 1721; Derrick Silove, Patricia Austin & Zachary Steel, "No Refuge from Terror: The Impact of Detention on the Mental Health of Trauma-affected Refugees Seeking Asylum in Australia" (2007) 44:3 Transcultural Psych 359. See also UNHCR & OHCHR, *Global Roundtable on Alternatives to Detention of Asylum-Seekers, Refugees, Migrants and Stateless Persons: Summary Conclusions*, 11-12 May 2011 at para 10 [UNHCR & OHCHR, *Global Roundtable on Alternatives to Detention*].

⁵¹ UNHCR & OHCHR, *Global Roundtable on Alternatives to Detention*, supra note 50, at para 11.

⁵² United Nations General Assembly, *Report of the Special Rapporteur on the human rights of migrants, François Crépeau*, UNGA, 20th Sess, A/HRC/20/24 (2012) at para 43 [UNGA, *Report of the Special Rapporteur on the human rights of migrants*].

⁵³ "We Have No Rights", supra note 14, at 61. Name changed to protect identity of the individual.

19. While in jail, Uday was provided medication but received minimal psychiatric attention. He met with a doctor for appointments that generally lasted only several minutes. Uday’s counsel confirmed that “[h]is mental health condition played a large role in his inability to confirm his identity, and also posed a large barrier to securing his release due to concerns about his access to treatment [outside of detention].”

(B) Canada’s treatment of children in immigration detention

20. Since 2013, more than 800 children have spent time in Canadian immigration detention.⁵⁴ Children are subject to the same legislative scheme that governs adult immigration detention, although adjudicators are required to consider the best interests of the child.⁵⁵ Accordingly, children may be placed under detention orders for the same reasons as adults.⁵⁶ However, even where there are no grounds for detention, children may be “housed” in detention in order to avoid separating them from their detained parents.⁵⁷ This subset of *de facto* detainees are subject to the same detention conditions as those under formal detention orders, and may include Canadian children.⁵⁸ Children who do not accompany their detained parents in detention are separated from their parents, and may be at risk of being transferred to government child protection services.⁵⁹ It is not clear how many children are separated from their detained parents, as CBSA has not collected this data.⁶⁰

21. In detention, children are generally held with their mothers in the “family wing” of IHCs, while their fathers are held in a separate “male wing.”⁶¹ Unaccompanied children may be placed in segregation in order to avoid co-mingling with non-

⁵⁴ Canada Border Services Agency, “Minors in detention – by client status” (4 November 2015) (obtained through access to information request by IHRP, A-2015-15845/MZM); CBSA “Detention Statistics”, *supra* note 6.

⁵⁵ IRPA, *supra* note 24, s 60.

⁵⁶ Immigration, Refugees, and Citizenship Canada, “ENF 20 Detention” (22 December 2015) at s 5.10, online: <<http://www.cic.gc.ca/english/resources/manuals/enf/enf20-eng.pdf>> [ENF 20].

⁵⁷ CBSA, “Arrests, detentions and removals: Detentions”, *supra* note 21.

⁵⁸ CBSA Comments – *Invisible Citizens*, *supra* note 4. In CBSA’s comments, the Agency confirmed that, “the national detention standards apply to minors detained or housed in an IHC.”

⁵⁹ Canada Border Services Agency, *Information for people detained under the Immigration and Refugee Protection Act* (2015) at 1, online: <<http://www.cbsa-asfc.gc.ca/publications/pub/bsf5012-eng.pdf>> [CBSA, Information for detainees].

⁶⁰ 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).

⁶¹ Canadian Red Cross Society, *Annual Report on Detention Monitoring Activities in Canada, Confidential* (2012–2013) (obtained through access to information request by IHRP, A-2014-12993) at 20 [Red Cross Report 2012–2013].

familial adults.⁶² Children who are detained outside of a region served by an IHC may be placed in provincial youth correctional facilities, which are not designed to accommodate immigration detainees.⁶³

22. Detention conditions are woefully inadequate and unsuited for children.

Immigration detention facilities resemble medium-security prisons, with strict rules and regimented daily routines, set times for meals, visitations, times for waking up in the morning and going to sleep at night.⁶⁴ There is constant surveillance by guards and through security cameras, and there is no privacy (except for the bathrooms).⁶⁵ Access to doctors and mental health counselling is limited, and children receive inadequate education and poor nutrition.⁶⁶ Recreational activities are generally sedentary, mobility is severely restricted, detainees have very limited access to any outdoor space at the facilities (typically for a brief period once a day), and children rarely get the opportunity to socialize with other peers their age.⁶⁷ Essentially, children are deprived of an environment where they can develop normally.

23. Although the applicable legislation and policy guidelines provide for special considerations regarding children in the context of immigration detention, the best interests of the child are inadequately accommodated. This is the case whether or not children are subject to formal detention orders. Children who are not themselves subject to formal detention orders, but whose parents are detained, face the awful choice between separating from their parents, or living in detention with their parents as de facto detainees. Where detained parents elect to spare their children from detention, they are released to other family members, if possible, or to a child protection agency.⁶⁸ However, even where children remain in Immigration Holding Centres (IHCs) with their detained parents, family separation is not entirely preventable: children must live separately from their fathers because the family rooms are restricted to mothers and children.⁶⁹ Accordingly, children live with their mothers in detention, and may only visit

⁶² IHRP interview with Dr. Janet Cleveland, Psychologist and Researcher, Transcultural Research and Intervention Team, Division of Social and Cultural Psychiatry, McGill University (10 August 2016).

⁶³ Red Cross Report 2012–2013, *supra* note 61, at 21; see also, Canada Border Services Agency, “Minors in detention – by detention facility” (4 November 2015) (obtained through access to information request by IHRP, A-2015-15845/MZM).

⁶⁴ “No Life for a Child”, *supra* note 16, at 5.

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

⁶⁸ Canada Border Services Agency, *Information for people detained under the Immigration and Refugee Protection Act* (2015) at 1, online: <<http://www.cbsa-asfc.gc.ca/publications/pub/bsf5012-eng.pdf>>.

⁶⁹ Red Cross Report 2012–2013, *supra* note 61, at 20.

their fathers for a short period each day.⁷⁰ Both detention and family separation have profoundly harmful mental health consequences, and neither option is in a child's best interests.⁷¹

Legal Framework and International Law Violations

24. Children under formal detention orders have access to the same limited legal safeguards as adults; namely, through detention review hearings. Adjudicators must consider the best interests of the child in these detention review hearings; however, this is not a primary factor in the analysis, but merely one of several factors.⁷² Failure to make consideration of the best interests of the child a primary consideration is a fundamental violation of the United Nations *Convention on the Rights of the Child*.⁷³
25. Unlike formally detained children, *de facto* detained children do not have access to detention review hearings because they are not legally recognized as being detained.⁷⁴ For this reason, children who accompany their parents in detention cannot have their best interests considered in their own detention review hearings.⁷⁵ Instead, the best interests of *de facto* detained children are to be taken into account in their parents' detention review hearings;⁷⁶ however, in practice, adjudicators do not even apply this lesser safeguard consistently.⁷⁷
26. Children who are separated from their detained parents do not benefit from any procedure that considers their best interests.⁷⁸

⁷⁰ Rachel Kronick, Cécile Rousseau and Janet Cleveland, "Asylum-Seeking Children's Experiences of Detention in Canada: A Qualitative Study" (2015) 85:3 American Journal of Orthopsychiatry 287 at 290 [Kronick, Rousseau and Cleveland, "Asylum-Seeking Children"]; Janet Cleveland, "Not so short and sweet: Immigration detention in Canada," in Amy Nethery and Stephanie J Silverman, eds., *Immigration Detention: The Migration of a Policy and its Human Impact* (New York: Routledge, 2015) at 96.

⁷¹ *Ibid.*

⁷² IRPA, supra note 24, s 60.

⁷³ 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).

⁷⁴ Invisible Citizens at 14.

⁷⁵ Invisible Citizens, at 14.

⁷⁶ *BB and Justice for Children and Youth v. Minister of Citizenship and Immigration* (24 August 2016), Toronto IMM-5754-15 (Federal Court).

⁷⁷ Invisible Citizens, at 32.

⁷⁸ The Court in *BB and Justice for Children and Youth v. Minister of Citizenship and Immigration* is silent on the Immigration Division's jurisdiction to consider the interests of non-detained children who are separated from their detained parents. See *BB and Justice for Children and Youth v. Minister of Citizenship and Immigration* (24 August 2016), Toronto IMM-5754-15 (Federal Court).

27. International bodies have been resolute about the detention of children. The *Committee on the Rights of the Child* urged that “the detention of a child because of their or their parent’s migration status constitutes a child rights violation and always contravenes the principle of the best interests of the child.”⁷⁹ The United Nations General Assembly, the United Nations Working Group on Arbitrary Detention, and the Inter-American Court of Human Rights have all reaffirmed that the migration status of a child or their parent is insufficient to justify the detention of a child.⁸⁰ In fact, the UNHCR has noted that children “should in principle not be detained at all.”⁸¹ The United Nations Special Rapporteur on the Human Rights of Migrants has called on states to “preserve the family unit by applying alternatives to detention to the entire family.”⁸² Similarly, the United Nations Special Rapporteur on Torture and the Inter-American Court of Human Rights have concluded that “the imperative requirement not to deprive the child of liberty extends to the child’s parents, and requires the authorities to choose alternative measures to detention for the entire family.”⁸³

Mental Health Evidence

28. The detrimental effects of immigration detention on children’s mental health have been extensively documented worldwide and in Canada.⁸⁴ Studies confirm that detained children experience “high rates of psychiatric symptoms, including self-

⁷⁹ UN Committee on the Rights of the Child, *Report of the 2012 Day of General Discussion on The Rights of the Child in the Context of International Migration* (28 September 2012), at para 78.

⁸⁰ United Nations General Assembly, Third Committee, Migrant children and adolescents, 69th Sess, UN Doc A/C.3/69/L.52/Rev.1 (19 November, 2014) at para 3; United Nations Working Group on Arbitrary Detention, Report of the Working Group on Arbitrary Detention: UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, 30th Sess, UN Doc. A/HRC/30/37 (6 July 2015) at para 113; Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection (19 August 2014), Advisory Opinion OC-21/14, Inter-American Court of Human Rights at para 154.

⁸¹ United Nations High Commissioner for Refugees, *Detention Guidelines: Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* (2012), at para 51.

⁸² UNGA, *Report of the Special Rapporteur on the human rights of migrants*, supra note 52, at paras 40 and 72(h); United Nations General Assembly, *Report of the Special Rapporteur on the human rights of migrants, Jorge Bustamante*, 11th Sess, UN Doc A/HRC/11/7 (14 May 2009) at para 62 (“Migration-related detention of children should not be justified on the basis of maintaining the family unit”).

⁸³ United Nations General Assembly, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez*, 28th Sess, UN Doc A/HRC/28/68 (5 March 2015) at para 80.

⁸⁴ See Kronick, Rousseau and Cleveland, “Asylum-Seeking Children”, supra note 70. See also Ann Lorek et al, “The mental and physical health difficulties of children held within a British immigration detention center: A pilot study” (2009) 33:9 Child Abuse & Neglect 573; Zachary Steel et al, “Psychiatric status of asylum seeker families held for a protracted period in a remote detention centre in Australia” (2004) 28:6 Australian and New Zealand Journal of Public Health 527.

harm, suicidality, severe depression, regression of milestones, physical health problems, and post-traumatic presentations.⁸⁵ Younger children in detention also experience developmental delays and regression, separation anxiety and attachment issues, and behavioral changes, such as increased aggressiveness.⁸⁶ Even brief periods of confinement can be acutely stressful and traumatic for children,⁸⁷ and the mental health impact can last long after release.⁸⁸ Importantly, research also shows that family separation also has severe detrimental psychological effects on children.⁸⁹ It is clear that neither detention, nor family separation, is in the best interests of children.

Case Study

29. Glory⁹⁰ was two months pregnant when she arrived in Canada in February 2013; she was detained upon arrival. Seven months later, after she gave birth to her son, Alpha, the two were transported back to detention and remained there for another 28 months before being deported in late 2015.
30. Alpha, a Canadian citizen, had lived his entire life in detention prior to being deported with his mother. “It’s hard for him … this is what he thinks is a normal life,” Glory explained. “He knows the rules, the routines, the time for room search (they search the room everyday) … he knows the things that are confined in this area.” Alpha’s first words were “radio check” – a phrase the guards used when changing shifts.
31. Glory described living at the IHC. She and Alpha shared a room with two beds, in a wing designated for women detained with their children. The room was equipped with a bathroom and a window that could not be opened, resulting in poor air quality and “no ventilation.” Alpha had to accompany Glory everywhere she went, including detention review hearings. Glory and Alpha were only able to go outside for short periods of time each day, where he played with the few playground toys, but Alpha and his mother had to be searched upon return. “[Alpha] is used to it,” Glory noted, “he just goes straight to the wall and puts his hand up … He thinks that’s just how it goes.” Alpha would even search the other children “as a game.”

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

⁸⁷ Kronick, Rousseau and Cleveland, “Asylum-Seeking Children”, *supra* note 70, at 292.

⁸⁸ *Ibid.*, at 291-292.

⁸⁹ *Ibid.*, at 290-291.

⁹⁰ “No Life for a Child”, *supra* note 16, at 42.

32. Glory noted that the IHC was not adequately equipped to house children. Alpha was deprived of many things that children need growing up, including basic nutrition, a healthy environment and educational opportunities. For example, Glory had to obtain CBSA's consent before the kitchen could provide baby cereal for Alpha. She was also concerned about her son's lack of opportunity to socialize with other children his age. Alpha found it particularly distressing when other detained children are released: "He thinks he is doing something bad because his friends will come and go after two weeks."
33. Glory described her experience in the dozens of detention review hearings that she attended. When Glory's lawyer would raise Alpha's best interests, the Immigration Division adjudicators consistently responded that Alpha has Canadian citizenship, that "he is not detained," and that it is Glory's "choice to have him in [detention]." One adjudicator stated, "I understand it may be a difficult choice for you to turn [Alpha] over to Children's Aid Society or someone to look after him, but he is not in detention, he is accompanying you here as a visitor."
34. "Every mom would prefer to stay with her children," said Glory. Ultimately, "it doesn't even matter if [Alpha] is a citizen...he lives the same life as a detained child."

IV. RECOMMENDATIONS

35. In light of these concerns, the IHRP, HRW, AI, JFCY, CCLA, BCCLA, CARL and RLO make the following recommendations to the government of Canada:

Recommendations to address systemic issues affecting all immigration detainees

- a. Create an independent body/ombudsperson responsible for overseeing and investigating the Canada Border Services Agency (CBSA), and to whom immigration detainees can hold the government accountable (akin to the federal Office of the Correctional Investigator).
- b. Amend the *Immigration and Refugee Protection Act* (IRPA) and the *Immigration and Refugee Protection Regulations* (IRPR) to:
 - i. Revise section 248 of IRPR to incorporate the rights of persons with disabilities, including psychosocial disabilities or mental health conditions, for any detention related decision and make clear that the list of factors that decision-makers must account for is non-exhaustive;

- ii. Make clear that, in all decisions related to the deprivation of liberty of migrants, the government must use the least restrictive measures consistent with management of a non-criminal population, and protection of the public, staff members, and other detainees;
 - iii. Create a rebuttable presumption in favour of release after 90 days of detention;
 - iv. Specify the factors to be considered when deciding to transfer a detainee to more restrictive conditions of confinement (i.e. a provincial jail), and create an effective process by which a detainee can challenge such a transfer;
 - v. Create a presumption against more restrictive forms of detention for migrants, especially asylum-seekers, pregnant women, persons with physical disabilities, mental health conditions or psychosocial disabilities, and victims of torture;
 - vi. Ensure disability is never considered a factor in favour of transferring a detainee to more restrictive conditions of confinement, and that detention of migrants with disabilities is compatible with international human rights law;
 - vii. Ensure that transfer of detainees to more restrictive forms of detention only occur in exceptional circumstances for adults, and never for children;
 - viii. Ensure that the Minister of Public Safety and Emergency Preparedness has ultimate authority over the conditions of confinement for treatment, and health and safety of detainees, regardless of where they are detained;
 - ix. Clarify that mental health and other vulnerabilities are factors that must be considered in favour of release in detention review hearings;
 - x. Require meaningful and regular oversight by a court for any detention over 90 days.
- c. Expedite the current consultations with provincial and territorial governments so as to be able to accede to the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment as soon as possible, which would allow for international inspection of all sites of detention.
- d. Ensure regular access to and fund adequate in-person, health care (including mental health care), social workers, community supports, and spiritual and family supports at all places of detention.

- e. Ensure that where children are detained, they have regular access to adequate in-person health care professionals, social workers, and other care providers with expertise in working with children;
- f. Create a screening tool for CBSA front-line officers to assist with identification of vulnerable persons, such as asylum-seekers, those with mental health issues and victims of torture, and to accurately assess the risk posed by an individual detainee.
- g. Provide training to CBSA officers on human rights, diversity, and viable alternatives to detention, and empower them to exercise their existing discretion to release persons within 48 hours.
- h. Ensure that appropriate mental health assessments occur before the initial decision to detain individuals, as well as within 48 hours of the initial decision to detain, and at regular intervals thereafter, regardless of where the detainee is held.
- i. Create a national committee composed of representatives of government, mental health professionals, civil society, including persons with disabilities, and lawyers to develop detailed policy recommendations on how to provide services to immigration detainees that have disabilities, including psychosocial disabilities or mental health conditions.
- j. Wherever possible, employ alternatives to detention. Meaningfully explore, assess, and implement alternatives to detention that build on the positive best practices already in place in other jurisdictions, and especially in respect of vulnerable migrants, but which do not extend enforcement measures against people who would otherwise be released.
- k. Provide support for detainees released into the community, including adequate transportation, personal assistance if so required for persons with disabilities, translation and interpretation services, and ensure consistency in terms of health care and treatment, based on the free and informed consent of the person concerned.
- l. Ensure that Immigration Division Members receive adequate training on human rights, diversity, and viable alternatives to detention, as well as extensive legal training.
- m. Ensure that all migrants are able to access essential health care services, including mental health care and medication, in the community.

Recommendations to address systemic issues affecting children

- n. Amend existing laws and regulations in the following ways:
 - i. Revise section 60 of IRPA to clarify that the best interests of the child should be a primary consideration in all decisions affecting

- children. Children and families with children should not be detained, or housed in detention, except as a last resort and in exceptional circumstances; 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.
- ii. 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.
 - iii. 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.
 - iv. 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.
 - v. 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.
 - vi. 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.
- o. 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.
- i. Expand and increase the transparency of existing third-party risk management programs and develop other community-based

- programs in coordination with nongovernmental organizations and civil society partners.
- ii. Provide individualized case management to children and families with children who are benefiting from community-based programs.
- p. 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.
- q. 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.
- r. 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.