Court File No: IMM-5754-15

FEDERAL COURT

B E T W E E N:

B.B. and Justice for Children and Youth

Applicants

- and -

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

MEMORANDUM OF ARGUMENT

PART I - FACTS

A. OVERVIEW

1. The applicant, BB, has been detained at the Immigration Holding Centre (IHC) since February 25, 2015 on the basis that she represents a flight risk. Her nine-year old Canadian daughter, C, has remained with her mother at the IHC because separation from her mother is not in C's best interests. As such, C has been *de facto* detained for the past year.

2. The Immigration Division of the Immigration and Refugee Board has consistently determined that it cannot consider C's best interests in deciding whether to continue her mother's detention.

3. The Applicant lived in Canada for many years under a false identity as a citizen of Ghana, the country where she had lived since childhood before coming to Canada, with a slightly altered name. Earlier this year, the Applicant informed Canada Border Services Agency that she is in fact a citizen of Togo and provided her true name. The Applicant is afraid for both herself and her daughter if returned to Togo and has applied for a Pre-Removal Risk

Assessment ("PRRA"). Processing of her PRRA was subsequently suspended pending investigation into her nationality. Ghanaian officials have now advised that they are unable to confirm that the Applicant is a national of that country, so Canada has approached Togo for confirmation of her Togolese nationality. That request remains outstanding with Togolese representatives. Notwithstanding her co-operation with CBSA attempts to confirm her nationality, the applicant has so far refused to sign a travel document application to Togo due to her fear and concern for her daughter's best interests.

4. The Applicant's detention has been continued for a year on the basis that she is not cooperating with removal. The Applicant has proposed alternatives to detention that include bondspersons and supervision which have been rejected. At the December 2 and 17, 2015 detention reviews, the Applicant submitted that, in light of the lengthy detention to date, and given her daughter's best interests and the traumatizing psychological impact of detention on her daughter, the Immigration Division should order release, and could include electronic monitoring as a condition if necessary. The Division explicitly determined that it lacked jurisdiction to consider the best interests of the Applicant's daughter.

B. FACTS

5. The Applicant, BB, was born in Togo on June 24, 1962. When she was about 8 years old, her family fled to Ghana because of political conflict in Togo. In Ghana, the Applicant experienced persecution on the basis of her gender, beginning from a young age.

Detention Review Transcript, December 2, 2015, Application record at 69ff

6. In Ghana, the Applicant had a daughter in 1989, and twins in 1996. Her persecutors continued to look for her, and she determined to leave the country. The Applicant was able to flee Ghana with the use of a false Ghanaian passport and Canadian visitor's visa. In the false Ghanaian passport, the Applicant's name is slightly altered and the listed date of birth is June 21, 1972.

Detention Review Transcript, December 2, 2015, Application record at 69ff

7. The Applicant entered Canada in 1999 under the false Ghanaian identity. She made a

refugee claim, which was refused in 2001. She eventually married and her husband applied to sponsor her; however, the marriage broke down and her sponsorship application was refused in 2004.

Detention Review Transcript, December 2, 2015, Application record at 69ff

8. The Applicant applied for a Pre-Removal Risk Assessment against Ghana in 2005 and her application was refused in 2006.

Detention Review Transcript, December 2, 2015, Application record at 69ff

9. In 2006, the Applicant was scheduled for removal but the removal was deferred because the Applicant was pregnant with her daughter. C was born in May, 2006. After C's birth, the Applicant did not report for removal as required. The Applicant applied for permanent residence on humanitarian and compassionate grounds, still under her Ghanaian identity. Those applications were refused.

Detention Review Transcript, December 2, 2015, Application record at 69ff

10. On February 25, 2015, the Applicant was arrested and detained for removal. Her daughter C was picked up from school during recess and brought to the Immigration Holding Centre. She has been living at the detention centre with her mother ever since. She has no one else to care for her in Canada.

Detention Review Transcript, December 2, 2015, Application record at 69ff

11. In March, 2016 the Applicant revealed her true name and Togolese nationality. She was eventually served with a fresh Pre-Removal Risk Assessment application so that she could make her claim against Togo. She submitted that application, along with an H&C application and an application for a Temporary Resident Permit. Consideration of the PRRA was subsequently suspended pending confirmation of nationality, while the H&C and TRP applications remain pending.

Detention Review Transcript, December 2, 2015, Application record at 69ff

12. Detention has had a grave impact on C. In October, 2015, C was assessed by Dr. Parul

Agarwal, a psychiatrist. In her assessment report, Dr. Agarwal described the severely deleterious impact of ongoing detention on C, a gifted student who had been forced to stop her education while in detention for over nine months and who has developed numerous harmful physical and mental effects during this time, including bed-wetting, feelings of sadness and anxiety, thoughts of death, frequent nightmares and loss of appetite. Dr. Agarwal diagnosed C with severe depression and severe Post-Traumatic Stress Disorder ("PTSD"). Dr. Agarwal writes in her October 6, 2015, report:

> **[C] is at a crucial stage of her development from every aspect**, including cognitive, social, emotional and behavioral. It is critical 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 well-being 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, [C's] mental health will continue to decline, and her overall development will also be adversely affected**.
>
> *Psychological Report of Dr. Parul Agarwal, October 6, 2015, Application Record at 264*

13. Throughout the period since her arrest, the Applicant has sought release at her statutorily mandated detention reviews before the Immigration Division. CBSA has consistently opposed release, and the division has ordered continued detention every time.

    Detention Review Transcripts, Application record

14. At the December 2, 2015 detention review, the Applicant attempted to file as evidence three documents, Dr. Agarwal's psychological report, and two letters written by C, and to rely on those documents as evidence in support of an argument that the Division should consider the negative impact that continued detention was having upon the Applicant's child, C. However, the Division refused to admit the evidence and to consider C's interests, finding that they were not relevant. The adjudicator stated clearly that, notwithstanding his sympathy for C, he did not have the jurisdiction to consider her best interests in reviewing her mother's detention:

> I'm very concerned about your daughter even though she is here through your choice and she is missing opportunities that she would have if she was outside of this place. I am very concerned about her and her being here for the length of time that she has been here.
>
> I do not accept that it is a principle of law that I am permitted to consider the best interest of this child, but I am quite concerned about it.
>
> I don't think that the Majoob decision explicitly states that I can consider that and Ms Tordorf's case explicitly says that I can not in the decision that the federal court actually made on that point.
>
> *December 2, 2015 Detention Review decision, Application Record at 72*

15. At the December 17, 2015 detention review, counsel appeared and again argued that the division had the jurisdiction to consider C's best interests, and should do so. In a decision that forms the subject of the within application for leave for judicial review, the division rejected counsel's arguments and made a clear and explicit determination that the division lacked jurisdiction to consider her best interests. She found, *inter alia:*

> Very briefly, with respect to the arguments made by your counsel on the best interests of your daughter, I maintain my position that I do not have a jurisdiction to consider the best interest of a Canadian citizen child who is not detained for immigration purposes but who is simply accompanying you and you chose for your daughter to be here at this facility as opposed to in the care of the Children's Aid Society where your daughter could have continued her education.
>
> So I find that I do not have the jurisdiction to look at the best interests when it comes to your daughter
>
> *December 17, 2015 Detention Review decision, Application Record at 6*

16. In subsequent detention reviews, Board Members have maintained the Applicant's detention on the same grounds and have not considered C's best interests in determining whether to continue detention or release the Applicant.

> *Detention Review decision, January 11, 2016, Application Record at 17-20*

PART TWO – ISSUES

17. Preliminary Issue: Justice for Children and Youth meets the test for public interest standing.

18. The applicants have raised arguable issues warranting leave to judicially review the Immigration Division's continued detention order. Specifically, the Immigration Division erred in law in concluding that it cannot consider the best interests of the child.

PART THREE – ARGUMENT

A. PRELIMINARY ISSUE: JUSTICE FOR CHILDREN AND YOUTH MEETS THE TEST FOR PUBLIC INTEREST STANDING

19. Justice for Children and Youth meets the test for public interest standing set out by the Supreme Court of Canada in *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*.

    a. the case raises a serious justiciable issue;
    b. JFCY has a real stake in the proceedings and is engaged with the issues that it raises;
    c. the proposed suit is, in all of the circumstances and in light of a number of considerations, a reasonable and effective means to bring the case to court.

    Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society, 212 SCC 45, ("*Downtown Eastside*") at para 2

20. The Court further stated that a party seeking public interest standing must persuade the court that the above factors, applied purposively and flexibly, favour granting standing. All of the other relevant considerations being equal, a party with standing as of right will generally be preferred.

    Downtown Eastside, supra

The issues are serious and justiciable

21. The SCC described "serious issue" as one which raises a "substantial constitutional issue," or an "important" issue, one which is "far from frivolous," although the courts "should not examine the merits of the case in other than a preliminary manner." As the Applicants argue below, the Immigration Division's jurisdiction to consider the best interests of a child in detention or otherwise impacted by a parent's detention, is a serious, justiciable issue.

Downtown Eastside, supra at para 42

22. There is no question that this application raises serious and justiciable issues. It concerns the *de facto* detention of children or the separation of children from their parents during the immigration detention of a parent, and the Immigration Division's incorrect interpretation of its jurisdiction to consider this as a relevant factor when determining whether to detain or release a parent. In the specific facts of the case at bar, a nine year old Canadian child has been living in a detention centre for almost a year while Canada Border Services Agency works to remove her and her mother from Canada. Immigration Division adjudicators have sympathized with her situation; however, they have concluded that they have no jurisdiction to consider her best interests in assessing whether to continue the detention of her mother.

23. As is argued below, the Immigration Division's restrictive view of their jurisdiction is wrong. This is an important issue that is far from frivolous and needs to be addressed by this Court.

JFCY has a real stake in the issues

24. A public interest litigant must have a "real stake in the proceedings" or be "engaged with the issues they raise." Referring to the *Canadian Council of Churches*, the Court noted that the party had a "genuine interest" as it "enjoyed the highest possible reputation," and had demonstrated a "real and continuing interest in the problems of the refugees and immigrants."

Downtown Eastside, supra at para 43

25. There is also no doubt that JFCY has a real stake and a genuine interest in these proceedings, not only from the perspective of an organization with specific expertise on legal issues related to children, including the application of the best interests of the child principle, and the interpretation and applicability of the United Nations *Convention on the Rights of the Child* ("*UNCRC*"), but also from their specific involvement in this case.

26. JFCY is a specialty legal clinic that provides direct legal representation for low-income and otherwise vulnerable children and youth, across a range of legal issues. JFCY specializes in protecting and promoting the rights and dignity of children facing legal, social service, education, family, and immigration issues. JFCY conducts test case litigation on behalf of children and youth, and has been involved in test case litigation and other advocacy and consultation activities in Ontario and in Canada in respect of child and youth issues including the interpretation and application of the "best interests of the child", the *Charter*, and the *UNCRC* in various legal contexts including in the context of the *Immigration and Refugee Protection Act*, in criminal justice, family law, health and mental health, social welfare, education, and other legal contexts. JFCY works with migrant and refugee children and with children whose parents are migrants and refugees, and has first hand knowledge of the particular issues that they face in light of their status.

Affidavit of Cheryl Milne, 19 February 2016, Application record at paras 6 – 8

27. JFCY has worked with the Refugee Law Office and other refugee service providers, and has worked directly with migrant and refugee children and their families to access appropriate education, health, and mental health services, to deal with family law, social welfare, housing and immigration matters. JFCY continues to be concerned about the legal issues that arise for children who are detained, or who are *de facto* detained with their parents who are detained.

Affidavit of Cheryl Milne, 19 February 2016, Application record at para 10

28. JFCY is committed to public interest litigation. It has been recognized as a public interest litigant in *Canadian Doctors for Refugee Care et al.* v. *Canada (Attorney General) et al.* 2014 FC 651 (appeal discontinued December 2015), (the "IFHP case") and in *Canadian*

Foundation for Children Youth and the Law v. *Canada (Attorney General)*, [2004] 1 SCR 76.

Affidavit of Cheryl Milne, 19 February 2016, Application record at para 21

29. JFCY has been granted intervener status at the Supreme Court of Canada in numerous cases including: *Kanthasamy v. Canada (Citizenship and Immigration), 2015 SCC 61; Moore v. British Columbia (Education), [2012] 3 SCR 360; Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society, [2012] 2 SCR 524; Canada (Prime Minister) v. Khadr, [2010] 1 SCR 44; R. v. J.Z.S., [2010] 1 SCR 3; A.C. v. Manitoba (Director of Child and Family Services), [2009] 2 SCR 181; R. v. A.M., [2008] 1 SCR 569; R. v. S.A.C., [2008] 2 SCR 675; R. v. L.T.H., [2008] 2 SCR 739; R. v. D.B., [2008] 2 SCR 3; R. v. B.W.P.; R. v B.V.N., [2006] 1 SCR 941; R. v. C.D.; R. v C.D.K., [2005] 3 SCR 668;R. v. R.C., [2005] 3 SCR 99; F.N. (Re), [2000] 1 SCR 880; Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 SCR 817; Eaton v. Brant County Board of Education, [1997] 1 SCR 241; R. v. O'Connor, [1995] 4 SCR 411; and A. (L.L.) v. B. (A.), [1995] 4 SCR 536.*

Affidavit of Cheryl Milne, 19 February 2016, Application record at para 22

30. JFCY has also been granted intervener status, has acted as amicus curiae or been counsel of record in numerous cases involving child and youth rights issues in other courts.

Affidavit of Cheryl Milne, 19 February 2016, Application record at para 23

31. JFCY is currently part of an inter-organizational working group on the issue of children in immigration detention.

Affidavit of Cheryl Milne, 19 February 2016, Application record at para 14

32. Most recently, in the IFHP case JFCY argued that cuts to health care coverage for refugee children and refugee claimant children failed to meet the best interests of the child and violated the *Charter* and the *UNCRC*, and in *Kanthasamy* JFCY argued that the best interests of the child must be a primary consideration, and must be integrated into both the procedural and substantive analysis in an H&C application brought by a child.

Affidavit of Cheryl Milne, 19 February 2016, Application record at para 25

33. JFCY is the appropriate public interest applicant in this matter, is an established organization and public interest litigant with unique expertise and considerable experience with child refugees and children with refugee parents, and with a genuine interest in advocating on behalf of children like C. JFCY therefore meets the second part of the public interest standing test.

<u>This is a reasonable and effective means of bringing this issue to Court</u>

34. The SCC expanded the scope of the third branch of the test. While it has often been expressed strictly, satisfied only if there is "no other reasonable and effective manner in which the issue may be brought before the Court," the test has been clarified as requiring "consideration of whether the proposed suit is, in all of the circumstances… a reasonable and effective means to bring the challenge to court." The Court emphasized the "flexible, discretionary and purposive approach to public interest standing."

Downtown Eastside, supra at para. 44

35. The Court stated that, "whether a means of proceeding is reasonable, whether it is effective and whether it will serve to reinforce the principle of legality are matters of degree and must be considered in light of realistic alternatives in all the circumstances." The Court emphasized factors including a plaintiff's capacity to bring forward a case; whether the case is in the public interest; whether the case provides access to those who are disadvantaged and whose legal rights are affected; whether there are realistic alternative means which would favour a more efficient and effective use of judicial resources; the existence of other potential plaintiffs and the practical prospect of their bringing the matter to court; the existence of parallel proceedings; whether the applicant brings a useful and distinctive perspective; and the potential impact of the proceedings on the rights of others.

Downtown Eastside, supra at 50-51

36. When applied in the case at bar, these factors support JFCY as a public interest litigant in this case. Granting public interest standing to JFCY is further justified by the difficulties faced by

individual litigants trying to clarify the Immigration Division's jurisdiction to consider the best interests of children affected by a parent's detention. Because immigration detention is unpredictable in its length, with detainees either released or deported, it is difficult for immigration detainees to challenge detention decisions in the Federal Court.

37. In the case at bar, there are substantial advocacy efforts underway in an attempt to resolve the Applicant's underlying immigration issues. It is everyone's wish that those efforts will result in release of the Applicant and, therefore also her daughter, from the IHC prior to this Judicial Review being heard. It is not possible to know if and when this will happen. As such, given the potential for this specific case to become moot, it is necessary that JFCY be included as public interest litigant. The issues that underlie this Application impact children both inside and outside of the IHC on a daily basis. The immigration division's incorrect perception of its jurisdiction requires correction.

Affidavit of Nasrin Tabibzadeh/Azar, 4 February 2016, Application Record at 14

38. In light of the serious, justiciable issue raised in this case, JFCY's genuine interest in the proceedings, and the fact that, in the circumstances, this application is a reasonable and effective way to have the issues heard, JFCY has satisfied the criteria for public interest standing.

Affidavit of Nasrin Tabibzadeh/Azar, 4 February 2016, Application Record at 14

B. STANDARD OF REVIEW

39. This case raises a question of true jurisdiction and is subject to a correctness standard of review. If however the Court determines that the Applicant is wrong and the reasonableness standard applies, the Applicant maintains that the determination is also unreasonable and cannot be sustained.

Dunsmuir v. New Brunswick, 2008 SCC 9 at paras 57-8*; McLean v. British Columbia (Securities Commission)*, 2013 SCC 67 at para 38, per Moldaver J. (for the Court on this point)

C. THE IMMIGRATION DIVISION ERRED IN LAW BY FAILING ITS JURISDICTION OR FETTERING ITS DISCRETION IN CONCLUDING THAT IT CANNOT CONSIDER THE BEST INTERESTS OF THE CHILD

C.1 The Division Erred In Finding It Lacked Jurisdiction

40. The Immigration Division Board Member incorrectly determined that it lacked jurisdiction to consider C's best interests when deciding whether to continue the Applicant's detention.

41. There is no such limitation placed on the Immigration Division's jurisdiction.

42. The *IPRA* and its *Regulations* set out a framework that governs immigration detention and release. Once it is established that there are grounds for detention (ie: flight risk, identity not established, danger to the public), the adjudicator proceeds to determine whether the detainee can nevertheless be released. The legislative framework sets out factors deemed relevant to determining whether, despite grounds for detention, a person should be ordered released.

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.	**248.** S'il est constaté qu'il existe des motifs de détention, les critères ci-après doivent être pris en compte avant qu'une décision ne soit prise quant à la détention ou la mise en liberté : *a*) le motif de la détention; *b*) la durée de la détention; *c*) l'existence d'éléments permettant l'évaluation de la durée probable de la détention et, dans l'affirmative, cette période de temps; *d*) les retards inexpliqués ou le manque inexpliqué de diligence de la part du ministère ou de l'intéressé; *e*) l'existence de solutions de rechange à la détention.

43. When viewed through a statutory interpretation lens, "the ordinary and grammatical sense of the words used" is not restrictive of what factors can be considered when determining whether to continue detention or order release under section 248 of the *Regulations*. The section stipulates only the factors that must be considered. There is nothing in the provision, or anywhere else in the *Act* or *Regulations*, that purports to limit the decision maker's considerations to those five mandatory factors.

> *B10 v. Canada (Minister of Citizenship and Immigration)*, 2015 SCC 58 at para 30

44. More importantly, the jurisprudence clearly requires that all relevant factors must be considered in detention adjudication in order for the detention to comply with the *Charter*.

45. In *Sahin*, Justice Rothstein (as he then was) determined that the *Charter* applies to immigration detention. As he explained:

> I think it is obvious that section 7 Charter considerations are relevant to the exercise of discretion by an adjudicator under section 103 of the *Immigration Act*. While trivial limitations of rights do not engage section 7 of the Charter, section 103 of the *Immigration Act* clearly confers on an adjudicator **a necessary, but enormous power over individuals**. The power of detention is normally within the realm of the criminal courts. The *Criminal Code* and other statutes prescribe fixed periods of incarceration for various offences. Under section 103 of the *Immigration Act* an adjudicator, without finding that an individual is guilty of any offence, has the power to detain him or her if the adjudicator is of the opinion that the person may pose a danger to the public or will not appear for removal. Without intending to minimize these valid considerations, the power of detention in respect of them is, while necessary, still, **extraordinary**. **This power of detention cannot be said to be trivial.**
>
> Canada (MCI) v. Sahin, [1994] F.C.J. No. 1602 (Emphasis added)

46. Justice Rothstein concluded:

> … In my opinion, when making a decision as to whether to release or detain an individual under subsection 103(7) of the *Immigration Act*, an adjudicator must have regard to whether continued detention accords with the principles of fundamental justice under section 7 of the Charter.
>
> *Sahin, supra*

47. As no equivalent to the list of factors in s. 248 then existed, Justice Rothstein provided some guidance for future adjudicators confronted with the requirement to consider whether the principles of fundamental justice allowed for continued deprivation of liberty in individual cases:

> The following list, which, of course, is **not exhaustive of all considerations,** seems to me to at least address the more obvious ones. Needless to say, **the considerations relevant to a specific case, and the weight to be placed upon them, will depend upon the circumstances of the case**.
>
> (1) Reasons for the detention, i.e. is the applicant considered a danger to the public or is there a concern that he would not appear for removal. I would think that there is a stronger case for continuing a long detention when an individual is considered a danger to the public.
>
> (2) Length of time in detention and length of time detention will likely continue. If an individual has been held in detention for some time as in the case at bar, and a further lengthy detention is anticipated, or if future detention time cannot be ascertained, I would think that these facts would tend to favour release.
>
> (3) Has the applicant or the respondent caused any delay or has either not been as diligent as reasonably possible. Unexplained delay and even unexplained lack of diligence should count against the offending party.
>
> (4) The availability, effectiveness and appropriateness of alternatives to detention such as outright release, bail bond, periodic reporting, confinement to a particular location or geographic area, the requirement to report changes of address or telephone numbers, detention in a form that could be less restrictive to the individual, etc.
>
> Sahin, supra (Emphasis added)

48. The factors proposed by Justice Rothstein in *Sahin* are now listed in section 248 of the *Regulations*. They were also confirmed by the Supreme Court of Canada in *Charkaoui* and the Court of Appeal in *Li*. However, both Courts also affirmed Justice Rothstein's unambiguous finding that the list of factors **is not closed**.

49. In *Charkaoui*, the Court was considering arguments that the very lengthy detention of non-citizens subject to security certificates violated the detainees' rights under s. 7 and 12 of the *Charter*. Chief Justice McLachlin, after quoting the same portion of Justice Rothstein's reasons in *Sahin* as are quoted herein above, found:

> 110 I conclude that extended periods of detention under the certificate provisions of the *IRPA* do not violate ss. 7 and 12 of the *Charter* if accompanied by a process that provides regular opportunities for review of detention, taking into account **all relevant factors**, **including** the following:
>
> (a) Reasons for Detention…
>
> (b) Length of Detention…
>
> (c) Reasons for the Delay in Deportation …
>
> (d) Anticipated Future Length of Detention…
>
> (e) Availability of Alternatives to Detention.
>
> *Charkaoui v Canada (MCI),* 2007 SCC 9, at paras 108-110

50. Likewise in *Li*, the Federal Court of Appeal confirmed that, while the 5 now-listed factors *must* be considered in *every* case, "the list is not exhaustive and all relevant factors have to be taken into account."

> *Canada (MCI) v Li*, 2009 FCA 85 at para 56

51. In light of the fundamental nature of liberty interests and the extraordinary detention powers conferred on Immigration Division adjudicators, section 7 *Charter* considerations are relevant to an adjudicator's exercise of discretion whether to detain or release. As such, any decision ordering continued detention must accord with the principles of fundamental justice.

52. That the best interests of the child were not engaged in the *Sahin* case and therefore were not enumerated in the *Sahin* list does not mean that they will never be relevant, nor does it limit an Immigration Division adjudicator's consideration of a child's best interests where the child is impacted by a parent's detention. The Federal Court has, in fact, considered the best interests of the child when determining release conditions.

53. In the context of security certificate conditions of release, the Federal Court was asked to consider the best interests of a child when determining whether to modify release conditions in *Mahjoub*. Without deciding the issue, Justice MacTavish assumed, for the purpose of that

review, "that the best interests of the child is one factor, among others, to be considered when determining whether the conditions of release require modification or amendment." She stated, "In short, in balancing Mr. Mahjoub's liberty interests and national security interests, I will be mindful of the best interests of his children."

> *Canada (Minister of Citizenship and Immigration) v Mahjoub*, 2009 FC 248 at para 80.

54. As the case law demonstrates, in order for immigration detention to comply with section 7 of the *Charter*, consideration of all relevant factors is required when determining whether to continue detention or order release. There is no limitation placed on those factors. The Member's finding to the contrary – that she did not have the jurisdiction to consider C's best interests – was clearly incorrect and contrary the principles of fundamental justice.

C.2 The Division Erred in Failing to Consider the Relevant Factor of the Best Interests of the Child

55. It is further submitted that the best interests of the child is a clearly relevant consideration that should be taken into account whenever a detention adjudicator renders a detention decision that will directly affect a child. The Member's failure to consider this relevant factor is a further reviewable error.

56. That the particular situation and interests of children are relevant considerations in the detention context cannot be seriously disputed. Parliament explicitly required that children should be detained "only as a measure of last resort" and with a view to their best interests:

60. For the purposes of this Division, it is affirmed as a principle that a minor child shall be detained only as a measure of last resort, taking into account the other applicable grounds and criteria including the best interests of the child.	**60.** Pour l'application de la présente section, et compte tenu des autres motifs et critères applicables, y compris l'intérêt supérieur de l'enfant, est affirmé le principe que la détention des mineurs doit n'être qu'une mesure de dernier recours.

57. The *Regulations* set out factors relevant for consideration when minors are detained:

249. For the application of the principle affirmed in section 60 of the Act that a minor child shall be detained only as a measure of last resort, the special considerations that apply in relation to the detention of minor children who are less than 18 years of age are	**249.** Pour l'application du principe affirmé à l'article 60 de la Loi selon lequel la détention des mineurs doit n'être qu'une mesure de dernier recours, les éléments particuliers à prendre en considération pour la détention d'un mineur de moins de dix-huit ans sont les suivants :
(*a*) the availability of alternative arrangements with local child-care agencies or child protection services for the care and protection of the minor children;	*a*) au lieu du recours à la détention, la possibilité d'un arrangement avec des organismes d'aide à l'enfance ou des services de protection de l'enfance afin qu'ils s'occupent de l'enfant et le protègent;
(*b*) the anticipated length of detention;	*b*) la durée de détention prévue;
(*c*) the risk of continued control by the human smugglers or traffickers who brought the children to Canada;	*c*) le risque que le mineur demeure sous l'emprise des passeurs ou des trafiquants qui l'ont amené au Canada;
(*d*) the type of detention facility envisaged and the conditions of detention;	*d*) le genre d'établissement de détention prévu et les conditions de détention;
(*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	*e*) la disponibilité de locaux permettant la séparation des mineurs et des détenus adultes autres que leurs parents ou les adultes qui en sont légalement responsables;
(*f*) the availability of services in the detention facility, including education, counselling and recreation.	*f*) la disponibilité de services dans l'établissement de détention, tels que des services d'éducation, d'orientation ou de loisirs.

58. Sections 60 of the *IRPA* and 249 of the *Regulations* appear to apply only to non-citizens who are detained at law. It is conceded that, as a Canadian citizen, C is not strictly speaking detained at law; that is, she is not the named subject of a detention. But Parliament's silence on the circumstances of children in C's situation cannot reasonably be taken to mean that the best interests of Canadian citizen children who have no viable alternative but to reside in the detention centre with their detained parents are somehow irrelevant.

59. C is clearly directly affected by the detention of her mother. She was taken out of school a year ago by CBSA officers and driven to the immigration detention centre where she has resided ever since. For the first nine months of her mother's detention C was unable to leave the detention centre. She was unable to attend school. Since January she has begun to attend her school but whenever not in school she is in the detention centre with her mother.

    Affidavit of Nasrin Tabibzadeh/Azar, 4 February 2016, Application Record, at paras 2, 5, 7

60. The psychological evidence demonstrates that this situation is having a serious detrimental effect upon her mental health.

    Psychological Report of Dr. Parul Agarwal, October 6, 2015, Application Record at 264

61. The only reason that C is living in a detention centre is that Immigration Division members repeatedly order continued detention of her sole custodial mother. She is therefore clearly directly affected by the decisions of the Division. Her interests are relevant.

62. The Applicant is supported in this argument by ss. 3(3)(d) and (f) of the *IRPA* and by international law.

63. *IRPA* as a whole is to be construed and applied in a manner that, *inter alia*, ensures decisions made under it are consistent with the *Charter* and comply with international human rights instruments to which Canada is a signatory.

    IRPA, s. 3(3)(d) and 3(3)(f)

64. The Supreme Court of Canada has "repeatedly endorsed and applied the interpretive presumption that legislation conforms with the state's international obligations." With reference to section 3(3)(f) of the *IRPA* and the Federal Court of Appeal's 2005 *De Guzman* decision, the Supreme Court of Canada again confirmed that we must look to "relevant international instruments at the context stage of statutory interpretation."

    B10, supra, at paras 48-49; See also: *Baker v Canada (MCI)*, [1999] 2 SCR 817 at para. 70 and *Guzman v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 436, [2006] 3 F.C.R. 655, at paras. 82-83 and 87.

65. Canada has signed and ratified the United Nations *Convention on the Rights of the Child ("UNCRC")*, an international instrument that identifies the best interests of the child principle as a primary consideration. It should be noted that the best interests of the child is the only primary consideration. As the Federal Court of Appeal stated in *De Guzman*, "a legally binding international human rights instrument to which Canada is signatory is determinative of how *IRPA* must be interpreted and applied, in the absence of a contrary legislative intention." Therefore, unless the legislation explicitly prohibits the Immigration Division from considering the best interests of a child impacted by a parent's detention, it should be assumed that adjudicators are not restricted from considering this factor.

> *De Guzman v Canada*, 2005 FCA 436 at para 87; see also *B010*, *supra*, and *R. v Hape* 2007 SCC 26

66. The UN *Convention on the Rights of the Child* ("*UNCRC"),* and its consequent guidelines, commentary and reports provide interpretive guidance. Article 3(1) of the *UNCRC* 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."

> *Convention on the Rights of the Child*, 28 May 1990, 1577 UNTS 3 (entered into force 2 September 1990, ratified by Canada 13 December 1991) [*UNCRC*], art 3(1)

67. The scope of what actions "concern" children is not defined, and Canadian jurisprudence has clarified that assessment of a child's best interests is highly contextual and will vary depending on the circumstances.

> *Kanthasamy v Canada (MCI),* 2015 SCC 61 at para. 35

68. The Australian Courts provide guidance as to which actions "concern" children. In *Minister of State for Immigration and Ethnic Affairs v Teoh*, the High Court of Australia stated:

> The ordinary meaning of "concerning" is "regarding, touching, in reference or relation to; about". The appellant argues that the decision, though it affects the children, does not touch or relate to them. That, in our view, is an unduly narrow reading of the provision... A broad reading and application of the provisions in

> Art.3, one which gives to the word "concerning" a wide-ranging application, is more likely to achieve the objects of the Convention. [1]
>
> *Minister of State for Immigration and Ethnic Affairs v Teoh* [1995] HCA 20.

69. The ordinary meaning for the term "concerning" as provided by Merriam-Webster Dictionary is "relating to." In applying a wide-ranging application to the term "concerning", the Immigration Division's decision to detain a sole-custodial parent clearly relates to the life of the child, even if they themselves are not directly subject to the detention order.

> *"Concerning," Merriam-Webster Dictionary*, www.merriam-webster.com, Accessed on February 19, 2016

70. The Supreme Court of Canada has recently defined the "best interests of the child" in the immigration law context to mean "[d]eciding what… appears most likely in the circumstances to be conducive to the kind of environment in which a particular child has the best opportunity for receiving the needed care and attention": *MacGyver v. Richards* (1995), 22 O.R. (3d) 481 (C.A.), at p. 489.

> *Kanthasamy v Canada (MCI),* 2015, SCC 61 at para. 36

71. The best interests of the child has also been identified as a fundamental principle of law. The Supreme Court of Canada has held that Canadian laws must be interpreted to comply with Canada's international treaty obligations and that "(c)hildren's rights, and attention to their interests, are central humanitarian and compassionate values in Canadian society". The recognition of the inherent vulnerability of children and the importance of attention to their unique interests has consistent and deep roots in Canadian law and has been repeatedly recognized by the Supreme Court.

> *AC v Manitoba (Director of Child and Family Services),* 2009 SCC 30 at para 151, 2 SCR 181; *AB v Bragg Communications Inc*, 2012 SCC 46 at para 17, 2 SCR 567; *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, 2004 SCC 4 at para 32, 1 SCR 76; *Baker, supra* at para 67;

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[1] *Teoh* concerned the decision to deport a Malaysian citizen who had Australian children, who, on account of drug dealing convictions, was denied a permit for permanent residency. The majority held that ratifying the *UNCRC* gave rise to a legitimate expectation that administrative decision-makers would act in accordance with the *UNCRC* and treat the best interests of the children of a potential deportee as a primary consideration.

Gordon v Goertz, [1996] 2 SCR 27 at para 44, 134 DLR (4th) 321; *R v DB*, 2008 SCC 25 at para 48, 2 SCR 3

72. The supporting principles of the *UNCRC*, as described in the Preamble, also frame the best interests of the child. The Preamble emphasizes that "childhood is entitled to special care and assistance," that "the family [is] the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children," and that "the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding."

Convention on the Rights of the Child, supra, Preamble

73. The primacy of the best interests of the child identified in Article 3(1) of the *UNCRC* is consistently identified in the UNHCR and the Committee on the *UNCRC* materials regarding the rights of children. In the context of detention, the Committee on the *UNCRC* recently stated that: "In particular, primary consideration should be given to the best interests of the child in any proceeding resulting in the child's or their parent's detention, return or deportation," and, "States should make clear in their legislation, policy, and practice that the principle of the child's best interests takes priority over migration and policy or other administrative considerations."

Committee on the Rights of the Child, Report of the 2012 Day of General Discussion: The Rights of all Children in the Context of International Migration, UNCRCOR at paras 72-73

74. The Committee on the *UNCRC's* Report regarding Canada's compliance with the *UNCRC*, urged Canada, inter alia, to:

> Ensure that legislation and procedures use the best interests of the child as the primary consideration in all immigration and asylum processes …", and, "the Committee stresses the need for the State party to pay particular attention to ensuring that its policies and procedures for children in asylum seeking, refugee and/or immigration detention give due primacy to the principle of the best interests of the child and that immigration authorities be trained on the principle and procedures of the best interest of the child.
> *Committee on the Rights of the Child, Report of the 2012 Day of General Discussion, supra* at para 74

75. It is the Applicants' submission that the consideration of the best interests of a directly affected child is required by *IRPA*, and that the *UNCRC* supports a finding that the best interests of a directly affected child are a relevant consideration for Immigration Division members. To find otherwise would be to construe the *Act* in a manner that does not comply with Canada's international obligations.

WEIGHT

76. As stated above, the weight to be placed on the best interests of a child varies depending on the context. In *Kanthasamy*, the SCC stated where legislation specifically dictates that the best interests of the child must be considered, "those interests are a singularly significant focus and perspective."

> *Baker*, *supra* at para 67
> *Kanthasamy v Canada (MCI)*, 2015 SCC 61 at para 40

77. At the other end of the spectrum, in the criminal law context, where there is no legislative direction to consider the best interests of the children in sentencing adults, the interests of children and preservation of the family unit remain relevant considerations. They may not outweigh other factors, particularly where a grave crime has been committed, but they are nevertheless relevant and considered:

> [47] The fact that Ms. Spencer has three children and plays a very positive and essential role in their lives cannot diminish the seriousness of her crime or detract from the need to impose a sentence that adequately denounces her conduct and hopefully deters others from committing the same crime. Nor does it reduce her personal culpability. It must, however, be acknowledged that in the long-term, the safety and security of the community is best served by preserving the family unit to the furthest extent possible. In my view, in these circumstances, those concerns demonstrate the wisdom of the restraint principle in determining the length of a prison term and the need to tailor that term to preserve the family as much as possible. Unfortunately, given the gravity of the crime committed by Ms. Spencer, the needs of her children cannot justify a sentence below the accepted range, much less a conditional sentence.
>
> *R v Spencer*, 72 O.R. (3d) 47; [2004] O.J. No. 3262 (OCA)

78. The weight ascribed to a child's interest in the detention context will similarly vary, depending on the circumstances. The best interests of a child legally detained will be a

paramount consideration. The best interests of a child not in detention will be a primary consideration, but may have less weight when considering the continued detention of her parent. The best interests of a child who like C is *de facto* detained – that is, living in a detention centre with a parent for wont of a viable alternative – will, as required by the *UNCRC*, be a primary consideration, and we submit must be an important factor in a decision whether to release the parent.

79. In any context, regardless of the weight assigned, it cannot be said, as the adjudicator in the case at bar has stated, that the Immigration Division is barred at law from considering the best interests of an affected child when determining whether to continue a parent's detention.

D. TEST FOR LEAVE MET

23. For these reasons, the Applicant has disclosed a fairly arguable case, on fairly arguable grounds and has disclosed a fairly serious question or questions, either singly or in combination, to be determined. It is submitted that it is not plain and obvious that the applicant would have no reasonable chance of succeeding on the proposed application for leave. It is further submitted that the applicants have demonstrated that there is a serious issue to be determined and that leave should therefore be granted.

Wu v. MEI [1989] F.C.J. No. 29 (TD)
Saleh v. MEI [1989] F.C.J. No. 825 (TD)
Bains v. MEI [1990] F.C.J. No. 457 (CA)

PART FOUR – ORDER SOUGHT

24. The Applicant respectfully requests leave to judicially review the Immigration Division's decision to continue the Applicant's detention.

25. If leave is granted, the Applicant requests that the Immigration Division decision be quashed, and that the matter be remitted to a different Member for re-determination within one week of the Court's decision.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

AT Toronto, this 22nd day of February, 2016

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Aviva Basman

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Andrew Brouwer

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Allison Rhoades

Barristers and Solicitors
Refugee Law Office
20 Dundas Street West, Suite 201
Toronto, ON M5G 2H1

Telephone: 416-977-8111
Fax: 416-977-5567

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Mary Birdsell

Barrister and Solicitor
Justice for Children and Youth (JFCY)

415 Yonge Street, Suite 1203
Toronto, ON M5B 2E7

Telephone: 416-920-1633
Fax: 416-920-5855

Counsels for the Applicant

To: Registrar, Federal Court of Canada
180 Queen Street West, 2nd Floor

To: Department of Justice
Ontario Regional Office
2 First Canadian Place
130 King Street West
Exchange Tower
Suite 3400, Box 36
Toronto, Ontario M5X 1K6