

# Short-term Detention, Long-term Effects: How Health Risks to Children in Immigration Detention are Weighed by Judges and Administrative Decision-makers in Canada

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*In response to growing international migration, nearly every state has adopted the practice of immigration detention as a component of state immigration policy. Emerging literature on the detrimental effects of immigration detention on the health and development of children, however, raises important questions about how children's rights can be upheld within legislative frameworks that allow for the immigration detention of children. Using the Canadian immigration matrix as a case study, this paper will examine how detention-related risks to children's health are weighed by judges and administrative decision-makers in immigration decisions affecting children. While noting encouraging improvements that have led to an overall reduction in the number of detained children in Canada in recent years, this paper will argue that Canadian decision-makers ought to afford greater weight to empirical evidence of the traumatic effects of immigration detention on children in their decisions – even in instances of short-term detention.*

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*En réaction à l'amplification des mouvements migratoires internationaux, presque tous les États ont intégré à leur politique nationale d'immigration une composante relative à la détention. La littérature émergente sur les effets néfastes de cette pratique sur la santé et le développement de l'enfant soulève toutefois d'importantes questions quant à la façon de faire respecter les droits des enfants au sein de cadres législatifs autorisant la détention d'enfants pour des motifs liés à l'immigration. À partir du cas de la structure de l'immigration canadienne, l'auteur examine comment les juges et les fonctionnaires chargés des décisions administratives soupèsent, au moment de leur décision, les risques liés à la détention sur la santé des enfants. Même si l'on note des améliorations encourageantes qui ont entraîné une réduction globale du nombre d'enfants détenus au Canada au cours des dernières années, l'auteur soutient que les décideurs canadiens devraient accorder davantage de poids aux preuves empiriques des effets traumatiques de la détention liée à l'immigration sur les enfants, même dans les cas de détention à court terme.*

## I. Introduction

In response to growing international migration, nearly every state around the world has adopted the practice of immigration detention as a component of their respective immigration policies.<sup>1</sup> Immigration detention, as an extra-judicial procedure, empowers a state's border agents and law enforcement officers to detain non-citizens on grounds related to their migration status.<sup>2</sup> While the length and nature of detention varies greatly across domestic legislation, the practice is commonly justified by states as a means to exert control over the number of people crossing state borders and as a way to facilitate the efficient administration of immigration processes including identification, claims for asylum and removals.<sup>3</sup> Such is the ubiquity of immigration detention that its practice is largely accepted within the international community as the legitimate exercise of a state's sovereignty over its own borders.<sup>4</sup>

As a policy that often authorizes the prolonged deprivation of migrants' liberty in prison-like conditions however, immigration detention has also been roundly criticized by domestic and international human rights advocates and scholars for its negative impact on the health and well-being of migrants.<sup>5</sup> This tension between sovereignty-based justifications for immigration detention and human rights-based advocacy is heightened when considering the well-being of child migrants who inevitably find themselves detained within the same immigration processes as adults. Emerging literature on the detrimental and irreversible effects of immigration detention on the health and development of children, as an especially vulnerable population that is owed greater protections in

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<sup>1</sup> See Stephanie J Silverman & Amy Nethery, "Understanding Immigration Detention and Its Human Impact" in Amy Nethery & Stephanie J Silverman, eds, *Immigration Detention: The Migration of a Policy and Its Human Impact* (Abingdon: Routledge, 2015) 1 at 1.

<sup>2</sup> See International Detention Coalition, "What is Immigration Detention? And other Frequently Asked Questions" (last visited 6 December 2020), online: *International Detention Coalition* <[idcoalition.org/about/what-is-detention/](http://idcoalition.org/about/what-is-detention/)> [perma.cc/Q43F-XHHK].

<sup>3</sup> See Silverman, *supra* note 1 at 2, 5.

<sup>4</sup> *Ibid* at 2, 5.

<sup>5</sup> See generally Jenna M Loyd, Matt Mitchelson & Andrew BurrIDGE, *Beyond Walls and Cages* (Athens: University of Georgia Press, 2011); Janet Cleveland, "Not So Short and Sweet: Immigration Detention in Canada" in Amy Nethery & Stephanie J Silverman, eds, *Immigration Detention: The Migration of a Policy and Its Human Impact* (Abingdon: Routledge, 2015) 79.

international law, raises important questions about what protections states ought to afford children within existing immigration agendas.<sup>6</sup>

Within this global context, this paper will explore how children's rights can be more effectively upheld within a legislative framework that allows for the immigration detention of children. Using the Canadian immigration matrix as a case study, this paper will examine how immigration detention-related risks to children's health are perceived by judges and administrative decision-makers and how these risks factored into immigration decisions affecting children. Part II of this paper provides the social and political context for understanding how the world's "children on the move" come to be detained as well as an overview of the current situation of children in detention in Canada. Part III highlights the severe and often irreversible impact of detention on children as an especially vulnerable population and related policy considerations for judges and administrative decision-makers in Canada. Part IV describes the legal framework from which Canada's obligations to children are derived by tracing obligations owed to child migrants in international conventions and Canadian domestic legislation. Part V focuses on how judges and administrative decision-makers have interpreted the best interests of the child principle within the context of immigration detention and identify areas for improvement. Ultimately, this paper argues that Canadian judges and administrative decision-makers ought to give greater weight to empirical evidence of the traumatic effects of immigration detention on children in their assessment of the best interests of the child in decisions involving even short-term detention.

## II. The Children in Immigration Detention – A Global Perspective

In international law a child is defined as "every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier."<sup>7</sup> As per this legal definition, around 12%, or approximately 33 million of the world's 272 million international migrants

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<sup>6</sup> See generally Ton Liefwaard, "Deprivation of Liberty of Children" in Ursula Kilkelly & Ton Liefwaard, eds, *International Human Rights of Children* (Singapore: Springer Nature Singapore, 2019) 32; Eleanor Drywood, "Challenging Concepts of the 'Child' in Asylum and Immigration Law: The Example of the EU" (2010) 32:3 J Soc Welfare & Fam L 309.

<sup>7</sup> See *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3, art 1 (entered into force 2 September 1990) [CRC].

are children.<sup>8</sup> In migration literature, the term “children on the move” is used to describe the diverse population of child migrants who have crossed international borders in a move away from their country of birth.<sup>9</sup> Children on the move include infants and small children who are entirely dependent on their guardians’ decisions to migrate, as well as teenagers who have independently chosen to migrate across an international border.<sup>10</sup> Diversity within the child migrant population is also reflected in the myriad forces and motivations, or “push-pull” factors, that compel children to leave their homes. While some children migrate seeking reunification with family members in other countries, others seek the promise of a better life through greater employment and education opportunities.<sup>11</sup> Still others, falling under the protection of international refugee law, are primarily fleeing persecution and violence in their country of birth.<sup>12</sup> As children’s motivations for migrating often involve a combination of the above-mentioned push and pull factors, scholars and policy makers have generally moved away from studying and describing child migration through the binary of “forced” versus “voluntary” migration.<sup>13</sup>

Within this diverse context of global child migration, the developmental concept of social age, in addition to biological age, is also important for understanding the children held in immigration detention.<sup>14</sup> Social age refers to the socially constructed meanings and roles attributed to different changes in a life cycle and can be used to explain child migrants’ varying degrees of agency in their own migration journeys.<sup>15</sup> Despite their relative youth, some migrant children in immigration detention may already be parents and breadwinners in their own communities, may have actively fundraised for their own migration journey and may be highly motivated to start a new life in the destination country of choice.<sup>16</sup> These varying degrees

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<sup>8</sup> See UNICEF, “Child Migration” (April 2021), online: *UNICEF Data* <[data.unicef.org/topic/child-migration-and-displacement/migration/](https://data.unicef.org/topic/child-migration-and-displacement/migration/)> [perma.cc/4VXR-W2BF] [Child Migration 2021].

<sup>9</sup> Jacqueline Bhabha, *Child Migration & Human Rights in a Global Age* (Princeton: Princeton University Press, 2014) at 5.

<sup>10</sup> See Bhabha, *supra* note 9 at 1.

<sup>11</sup> *Ibid* at 5.

<sup>12</sup> See UN High Commissioner for Refugees (UNHCR), “Children on the Run: Unaccompanied Children Leaving Central America and Mexico and the Need for International Protection” (13 March 2014) at 5, online (pdf): *UNHCR* <[unhcr.org/56fc266f4.html](https://www.unhcr.org/56fc266f4.html)> [perma.cc/4J9K-X9Z5] [Children on the Run].

<sup>13</sup> See Bhabha, *supra* note 9 at 5; Patrizia Rinaldi, “Unaccompanied Migrant Minors at the Frontier of Human Rights. The Spanish Case” (2019) 27 *Intl J Child Rts* 796 at 806–807.

<sup>14</sup> See Aida Orgocka, “Vulnerable Yet Agentic: Independent Child Migrants and Opportunity Structures” (2012) 136 *New Dir Child Adolesc Dev* 1 at 5.

<sup>15</sup> See Orgocka, *supra* note 14 at 5.

<sup>16</sup> See Bhabha, *supra* note 9 at 9–10.

of agency and maturity among migrant children are significant as the social age of child migrants poses a contemporary challenge for the development of immigration policy in destination states – including policy concerning immigration detention. Western states in particular have shown ambivalence in offering protection to children that do not conform to Western conceptions of childhood as a time of dependency and innocence and have struggled to adopt policies that recognize child migrants' agency.<sup>17</sup> Even while being held in immigration detention, child migrants often resist being "rescued" by the host state through policies that would place child migrants in alternative placements such as foster homes or institutionalized care. Child migrants, moreover, may also resist being labeled as "victims" by the host state independent of how dangerous or difficult their immigration journey may have been.<sup>18</sup>

While the precise breakdown of ages and other demographic data such as gender and ethnicity within the global child migrant population is difficult to glean given variance in destination states' reporting practices, almost all destination states reliably use the terms "accompanied minor" and "unaccompanied or separated minor" to distinguish between the child migrants arriving to their borders.<sup>19</sup> These two categories of child migrants, further explored in following sections, provide insight into the global child migration population and the broader migration patterns and risks to which children on the move are exposed. As this paper focuses on the impact of immigration detention on children's health and well-being, a survey of these two categories will place greater emphasis on the detention-related risks experienced by child migrants in the "post-migration" phase. That is, risks experienced by child migrants upon arrival to the destination country.<sup>20</sup> Reference made to the many dangers to child migrants that exist in transit to their country of destination, such as violence or human trafficking, will serve to highlight how migrant children may arrive in immigration

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<sup>17</sup> *Ibid* at 14.

<sup>18</sup> See Orgocka, *supra* note 14 at 3.

<sup>19</sup> See "Key Migration Terms" (last visited 6 December 2020), online: *International Organization for Migration* <iom.int/key-migration-terms> [perma.cc/7YJA-DED8]; Guy Abel, ed, *World Migration Report 2020* (2019) at 39, online (pdf): *International Organization for Migration* <publications.iom.int/system/files/pdf/wmr\_2020.pdf> [perma.cc/5T6T-VV2J].

<sup>20</sup> See Cecilia Menjivar & Krista M Perreira, "Undocumented and Unaccompanied: Children of Migration in the European Union and the United States" (2017) 45:2 *J Ethn Migr Stud* 197 at 208.

detention centres with already heightened and complex medical needs due to trauma experienced prior to detention.<sup>21</sup>

## A. Accompanied Minors

Children who arrive at a destination country under the care of their parents or another adult legally responsible for their care, are referred to as “accompanied minors”.<sup>22</sup> For accompanied minors travelling through regular channels, the migration journey in the company of parents can be a safe and comfortable experience. For those migrating along irregular pathways, however, the migration journey remains fraught with risks undertaken by all migrants travelling along dangerous routes.<sup>23</sup> Families with children, for example, risk being abandoned by smugglers along dangerous routes and remain at risk of being exploited or abused along the migration journey.<sup>24</sup>

Upon arrival to the country of destination, accompanied minors are owed special protection from signatory states to the *Convention on the Rights of the Child* (“CRC”). Article 9 of the CRC states that “a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review, determine ... that such separation is necessary for the best interest of the child.”<sup>25</sup> In the context of immigration detention, this typically means that children and their parents, or at least one parent, will be detained together unless it is demonstrated that the child’s best interest are not served by family unification, for example, in instances of domestic abuse within the child’s family.<sup>26</sup> Depending on the immigration policy of the state in question, accompanied children could be housed in family wings of detention centres with their mother, though still separated

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<sup>21</sup> See Menjivar & Pereira, *supra* note 20 at 203. Child migrants may still experience detention in the transit phase of migration. This due to States’ increasing adoption of “externalization” policies through which border enforcement, processing and detention practices are moved away from State borders. The creation of detention centres on islands such as Nauru, Christmas Island (Australia) or Manus Island (Papua New Guinea) are some examples of how a “border is dislodged” in an attempt to intercept migrants before they can claim asylum within a sovereign territory. See Alison Mountz, *The Death of Asylum: Hidden Geographies of the Enforcement Archipelago* (Minneapolis: University of Minnesota Press, 2020) at 36, 45.

<sup>22</sup> See Canada Border Services Agency, “Annual Detention Statistics – 2012–2019” (20 August 2019), online: CBSA <[cbsa-asfc.gc.ca/security-securite/detent/stat-2012-2019-eng.html](https://cbsa-asfc.gc.ca/security-securite/detent/stat-2012-2019-eng.html)> [perma.cc/P3P4-GTDG] [Annual Detention Statistics].

<sup>23</sup> See Bhabha, *supra* note 9 at 55–56

<sup>24</sup> *Ibid* at 211.

<sup>25</sup> See CRC, *supra* note 7, art 9.

<sup>26</sup> See Orgocka, *supra* note 14 at 7.

from their father.<sup>27</sup> Regrettably, state deviance from this principle of international law is well documented, and children are sometimes placed in the care of social services or simply detained separately from their parents.<sup>28</sup> The most harrowing recent example, albeit from the only country that has yet to sign and ratify the *CRC*, was the separation of 1030 children from their families in detention centres along the US-Mexico border in 2018. Of the separated children, some 545 children have yet to be reunited with their families.<sup>29</sup> The psychological trauma to children resulting from such cases of separation and detention will be examined in Part II of this paper.

## B. Unaccompanied or Separated Migrant Minors

According to the UNHCR, an unaccompanied minor migrant (“UMM”), is any person “under the age of 18 ... who is separated from both parents and is not being cared for by an adult who, by law or custom is responsible to do so.”<sup>30</sup> While it is not uncommon for small children to become separated from their families in what can be long and perilous migration journeys, the term UMM in migration literature and popular discourse more often refers to an older, more autonomous child migrant in their teenage years.<sup>31</sup> Since the UNHCR’s first definition of unaccompanied minors was published in 1997, the official term has changed to “unaccompanied or separated minors” in a move to recognize the distinct circumstances of children or youth who set out from their homes independently, and those of children who are separated from family members along the way.

Each year, numerous UMMs migrate along the same well-established, though highly dangerous, “mixed” migration routes utilized by adult asylum seekers and economic migrants alike.<sup>32</sup> For many, the decision to

<sup>27</sup> See Hanna Gros & Yolanda Song, “No Life for a Child: A Roadmap to End Immigration Detention of Children and Family Separation” (2016) at 10, online (pdf): *International Human Rights Program, University of Toronto Faculty of Law* <ihrp.law.utoronto.ca/utfl\_file/count/PUBLICATIONS/Report-NoLifeForAChild.pdf> [perma.cc/KNC6-WQ94] [Gros & Song].

<sup>28</sup> See Bhabha, *supra* note 9 at 57.

<sup>29</sup> See Jonathan Todres & Daniela Villamizar Fink, “The Trauma of Trump’s Family Separation and Child Detention Actions: A Children’s Rights Perspective” (2020) 95:1 Wash L Rev 377; Ed Pilkington, “Parents of 545 Children Still Not Found Three Years After Trump Separation Policy” (21 October 2020), online: *The Guardian* <theguardian.com/us-news/2020/oct/21/trump-separation-policy-545-children-parents-still-not-found> [perma.cc/2JGM-4KL2].

<sup>30</sup> See UN High Commissioner for Refugees (UNHCR), *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum*, February 1997, Geneva, Switzerland, art 3.1, online: UNHCR <unhcr.org/publications/legal/3d4f91cf4/guidelines-policies-procedures-dealing-unaccompanied-children-seeking-asylum.html> [perma.cc/BGZ9-WDKC].

<sup>31</sup> See Rinaldi, *supra* note 13 at 802.

<sup>32</sup> See Child Migration 2020, *supra* note 8.



migrate is inextricably linked to a broader societal context often rife with high levels of political and structural violence, as well as long-term social exclusion regarding education, healthcare and safety experienced by the migrant child in their country of birth.<sup>33</sup> In the Global North, UMMs account for the greatest number of children in immigration detention. UMM migration to the United States from predominantly Central American States is a well-documented phenomenon, as is UMM migration to Europe from source states like Afghanistan, Syria and other states along migration routes originating in Sub-Saharan Africa.<sup>34</sup> While the United States and the European Union use different measures for counting UMMs, both regions have reported greater numbers of unaccompanied migrants than ever before over the past 10 years.<sup>35</sup> Since 2008, over 198,500 UMMs have entered the EU and sought asylum.<sup>36</sup>

Like accompanied minors, UMMs are vulnerable to human rights abuses and exploitation along on their migration journeys at the hands of hired smugglers, human traffickers, local gangs or fellow migrants.<sup>37</sup> Women and girl UMMs remain especially vulnerable to sexual violence and human trafficking.<sup>38</sup> In post-migration however, upon reception within a destination country's immigration system, it is an UMM's biological proximity to adulthood that poses a unique risk to their health and safety. Because UMMs migrate along the same migration routes as adults, they are often indistinguishable from other adult migrants by immigration officials.<sup>39</sup> Within the context of immigration detention, this means UMMs' special status as children under international law and their accompanying rights are often ignored or violated by immigration officials.<sup>40</sup> UMMs have been

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<sup>33</sup> See Menjivar & Perreira, *supra* note 20 at 203–04.

<sup>34</sup> *Ibid* at 198.

<sup>35</sup> *Ibid*. At the height of UMM migration to the United States in 2014, 68,541 unaccompanied minors were apprehended along the U.S.-Mexico border, almost triple the number of UMM apprehended in 2012. At the height of increased migration to the EU in 2015, over 96,000 asylum claims were filed by UMM in a single year. See Rinaldi, *supra* note 13 at 796.

<sup>36</sup> See Menjivar & Perreira, *supra* note 20 at 198. The impact of Covid-19 on UMM migrating patterns has yet to be determined, though border closures to all migration along the U.S. and Mexico may contribute to a significant drop.

<sup>37</sup> See Benjamin J Roth & Breanne L Grace, "Falling Through the Cracks: The Paradox of Post-Release Services for Unaccompanied Child Migrants" (2015) 58 Child Youth Serv Rev 244 at 247.

<sup>38</sup> UNHCR, "Children on the Run: Unaccompanied Children Leaving Central America and Mexico and the Need for International Protection" (13 March 2014) at 27, online (pdf): *United Nations High Commissioner for Refugees* <[www.unhcr.org/56fc266f4.html](http://www.unhcr.org/56fc266f4.html)> [perma.cc/D93C-UALW].

<sup>39</sup> See Devyani Prabhat, Ann Singleton & Robbie Eyles, "Age is Just a Number? Supporting Migrant Young People with Precarious Legal Status in the UK" (2019) 27 Intl J Child Rts 229 at 236.

<sup>40</sup> *Ibid*. See also EU Connect Project, "Always Migrants Sometimes Children: A Mapping of the Reception and Protection of Unaccompanied Children in the United Kingdom" (2014) at 18, online: (pdf): *Save the Children* <[connectproject.eu/PDF/CONNECT-UK\\_Report.pdf](http://connectproject.eu/PDF/CONNECT-UK_Report.pdf)> [perma.cc/Z6NR-VQK3].

subjected to mass removals to their countries of origin or push back tactics to neighbouring states despite international obligations prohibiting the practice of non-refoulement to potential refugees and asylum seekers.<sup>41</sup> Where high numbers of migrants are apprehended at once, UMMs are often detained alongside adults due to space limitations within detention facilities or are simply not afforded any shelter in situations of severe overcrowding.<sup>42</sup> In other instances, UMMs' rights as children in detention are suspended or denied by the destination state on the grounds that the migrant child is older than 18 years of age.<sup>43</sup> Until the destination state is able to verify the UMM's biological age, the UMM will suffer from the added stress and uncertainty of waiting for biological age test results that take a long time to process and are known to produce unreliable results.<sup>44</sup> Finally, UMMs on the cusp of adulthood remain particularly vulnerable to negative societal discourses that influence public and political will to safeguard their rights. UMMs are often associated with issues of criminality and other undesirable traits that would see them denied social services or entry into the country of destination.<sup>45</sup> As mentioned in the first section of this paper, UMMs' social age and demonstrated agency can deviate from prevalent cultural conceptions of childhood in the Global North as a time of innocence and dependency. UMMs' deviation from these norms through their demonstrated independence and agency contributes to states' ambivalence in safeguarding UMMs' immigration and children's rights owed to them under international law.<sup>46</sup>

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<sup>41</sup> See Ciara Smyth, "Migration, Refugees, and Children's Rights" in Ursula Kilkelly & Ton Liefwaard, eds, *International Human Rights of Children* (Singapore: Springer Nature Singapore, 2019) 421 at 429.

<sup>42</sup> See Harriet Grant, "'Moria is a Hell': New Arrivals Describe Life in a Greek Refugee Camp" *The Guardian* (17 January 2020), online: <[www.theguardian.com/global-development/2020/jan/17/moria-is-a-hell-new-arrivals-describe-life-in-a-greek-refugee-camp](http://www.theguardian.com/global-development/2020/jan/17/moria-is-a-hell-new-arrivals-describe-life-in-a-greek-refugee-camp)> [perma.cc/9XMR-GAVS].

<sup>43</sup> See Rinaldi, *supra* note 13 at 807.

<sup>44</sup> *Ibid* at 811–812. Advocates for UMM contest the legitimacy of using biological tests at all, claiming that the tests are used to legitimize the removal of migrants rather than their acceptance within the country. See also Devyani, *supra* note 39.

<sup>45</sup> See Bhabha, *supra* note 9 at 14. This criminalizing discourse is prevalent despite the fact that many UMMs may be victims of greater organized crime rings. The trafficking of Nigerian girls into the sex trade in Italy and the United Kingdom, for example, is well documented. See EU Connect Project, *supra* note 40 at 31; Ben Taub, "The Desperate Journey of a Trafficked Girl", *The New Yorker* (10 April 2017), online: <[newyorker.com/magazine/2017/04/10/the-desperate-journey-of-a-trafficked-girl](http://newyorker.com/magazine/2017/04/10/the-desperate-journey-of-a-trafficked-girl)> [perma.cc/JMH5-BWNT].

<sup>46</sup> See Bhabha, *supra* note 9 at 237.

### C. Children in Immigration Detention in Canada

In Canada, the accompanied and unaccompanied minor terminology utilized in international law and migration literature has been adopted by government agencies to distinguish between the approximately 118 to 230 children held in immigration detention each year.<sup>47</sup> In 2019, out of the 118 children reportedly held in immigration detention across Canada, 97% or 114 of children detained were accompanied by a parent or guardian, and only 4 children were unaccompanied.<sup>48</sup> As could be expected within a population of predominantly accompanied children migrating with their parents, the majority of children in detention in Canada are closer to infancy than adulthood. In 2018–2019 approximately 80% of all children detained in Canada were under the age of 12, and approximately 50% of all children were under the age of 5.<sup>49</sup>

Over the past 5 years, the number of children held in detention in Canada has steadily decreased, from a reported high of 232 in 2014 to a low of 118 in 2019.<sup>50</sup> This decline followed increased advocacy on the issue of child detention and subsequent efforts by the Canadian Border Services Agency (“CBSA”) to detain children only as a last resort and after careful consideration of the best interests of the child.<sup>51</sup> While the decrease in overall detention numbers is encouraging, the average length of time spent in detention has increased from 14.9 days in 2017–2018 to 18.6 days in 2019.<sup>52</sup> This increase, as reported by the CBSA, is due to accelerated numbers of adult migrants with children presenting at Canadian ports of entry without identity documents (an overwhelming increase of 350% in one year).<sup>53</sup> As the average wait time to receive an identity document is 28.9 days, accompanying children are subsequently held in detention for longer periods alongside their parents.<sup>54</sup> While the CBSA has the power to assign

<sup>47</sup> See Annual Detention Statistics, *supra* note 22 at table 2.1. The table includes data from 2014–2019.

<sup>48</sup> *Ibid.* This distribution between accompanied and unaccompanied children has remained stable in Canada over the past five years.

<sup>49</sup> *Ibid.* at table 2.2.1.

<sup>50</sup> *Ibid.* at table 2.1.

<sup>51</sup> *Ibid.* See also Gros & Song, *supra* note 27 at 33; Amnesty International, “Ending Immigration Detention of Children in Canada and Seeking Adequate Reception and Care for Them” (18 May 2020) at 1–3, online (pdf): [Amnesty International <amnesty.org/en/wp-content/uploads/2021/05/AMR2023362020ENGLISH.pdf>](https://www.amnesty.org/en/wp-content/uploads/2021/05/AMR2023362020ENGLISH.pdf) [perma.cc/T3GM-X7WK] [Amnesty]; Canada Border Services Agency, “National Directive for the Detention of Minors” (6 November 2017), online: CBSA <[www.cbsa-asfc.gc.ca/security-securite/detent/nidf-cndi-eng.html](http://www.cbsa-asfc.gc.ca/security-securite/detent/nidf-cndi-eng.html)> [perma.cc/6SCF-EF73] [CBSA, “National Directive”].

<sup>52</sup> See Annual Detention Statistics, *supra* note 22 at table 2.2.2.

<sup>53</sup> See *supra* note 22 at “Analysis Minors – FY 2018-2019”.

<sup>54</sup> *Ibid.*

migrants to immigration holding centres (“IHCs”) or provincial jails at its discretion, child detainees are typically held in family wards (mother-and-child wings) in one of the three IHCs in Toronto, Laval and Surrey while remaining subject to the same CBSA policies pertaining to surveillance, search and seizure as all other detainees.<sup>55</sup> A review of detention figures also reveals that the immigration detention of children in Canada is a regional phenomenon despite all provinces falling under the jurisdiction of the same border security and immigration legislation. Of the 118 children detained in 2019, for example, 91% of children were detained in Quebec.<sup>56</sup> These figures reflect broader social currents and migration patterns that incentivize families to present at ports of entry along the Quebec border, for example, and without documentation.<sup>57</sup>

Due to an enabling CBSA policy, the presence of *de facto* detainees among children in detention facilities is particular to the Canadian context. *De facto* detainees are children who, at the behest of their parents and independent of their own legal status, “may be permitted to remain with their detained parents in a CBSA immigration holding if it is in the child’s best interest and if appropriate facilities are available.”<sup>58</sup> In CBSA records these children appear as being “housed” in CBSA facilities instead of formally detained.<sup>59</sup> Paradoxically, despite often possessing Canadian citizenship, *de facto* detainees’ status as guests of the CBSA means they are deprived of legislative safeguards under the *Immigration and Refugee Protection Act* (“IRPA”) that protects formally detained children.<sup>60</sup> For example, important

<sup>55</sup> See Gros & Song, *supra* note 27 at 23–27; One minor was detained in a youth facility and two were detained at a CBSA Inland Office or CBSA port of entry during the relevant period, see Annual Detention Statistics, *supra* note 22 at table 2.2.2. The previously operational IHC at the Vancouver airport has been replaced by a newly constructed IHC in Surrey, British Columbia, see Immigration, Refugees and Citizenship Canada, “ENF 20 Detention Manual” (23 March 2020) at 29, online (pdf): *Government of Canada* <canada.ca/content/dam/ircc/migration/ircc/english/resources/manuals/enf/enf20-det-en.pdf> [perma.cc/M9C2-T7FY]. For the full map of facilities where immigration detainees are held across Canada, see Human Rights Watch & Amnesty International Canada, “‘I Didn’t Feel Like a Human in There’ Immigration Detention in Canada and its Impact on Mental Health” (2021) at (i), online (pdf): *Human Rights Watch* <hrw.org/sites/default/files/media\_2021/06/canada0621\_web.pdf> [perma.cc/EVJ7-3DCV] [HRW, “I Didn’t Feel Like a Human”].

<sup>56</sup> See Annual Detention Statistics, *supra* note 22 at “Analysis Minors – FY 2018–2019”.

<sup>57</sup> See Susan Ormiston, “How Thousands of Asylum Seekers Have Turned Roxham Road into a De Facto Border Crossing” *CBC* (29 September 2019), online: <www.cbc.ca/news/canada/the-national-roxham-road-immigration-border-1.5169249> [perma.cc/6M27-4EW4].

<sup>58</sup> See Canada Border Services Agency, “Arrests, detentions and removals: Detentions” (12 January 2017), online: *CBSA* <cbsa-asfc.gc.ca/security-securite/detent/menu-eng.html> [perma.cc/4GVC-SWG6].

<sup>59</sup> See Annual Detention Statistics, *supra* note 22 at table 2.2.3.

<sup>60</sup> See Hanna Gros, “Invisible Citizens: Canadian Children in Immigration Detention” (2017) at 14, online (pdf): *International Human Rights Program, University of Toronto Faculty of Law*

safeguards such as periodic detention review hearings are not available to *de facto* detainees.<sup>61</sup> The number of *de facto* detained children in Canada has increased over the past two years and remains concerning given the group's legal vulnerability.<sup>62</sup>

This statistical snapshot of Canada's immigration detention operation offers a useful point of departure for contemplating the scope of the impact of immigration detention on children's health and well-being, as well as for developing policy solutions to further reduce the overall number of children in detention. That children in detention in Canada tend to be younger for example, heightens concern over the impact of detention on children's health during key developmental ages. Moreover, that children in detention are mostly accompanied and are being detained for longer periods of time, albeit in fewer numbers, also raises concerns around the type of mid- to long-term living conditions and care that are provided to families in detention centres. Finally, the presence of "*de facto* detainees" in Canada exposes a legislative gap regarding the substantive and procedural rights of Canadian children in detention, suggesting comprehensive protection for children in immigration detention may require legislative as well as policy solutions.

### III. The Impact of Immigration Detention on Children's Health

The negative impact of detention on refugee and asylum seekers' health is a well-documented phenomenon in migration literature.<sup>63</sup> While much of global research has focused on long-stay detention camps with the most extreme living conditions, in recent years, qualitative research conducted at Immigration Holding Centres ("IHC") in Canada has contributed to a greater understanding of the specific aspects of Canadian detention that

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<ihrp.law.utoronto.ca/utfl\_file/count/PUBLICATIONS/Report-InvisibleCitizens.pdf>  
[perma.cc/YK6M-2UZ6] [Gros, "Invisible Citizens"]; *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

<sup>61</sup> See Gros & Song, *supra* note 27 at 35.

<sup>62</sup> See Annual Detention Statistics, *supra* note 22 at table 2.2.3. Since 2017, 176 *de facto* detainee children have been held in immigration detention in Canada.

<sup>63</sup> See Julie M Linton, Marsha Griffin & Alan J Shapiro, "Detention of Immigrant Children" (2017) 139:4 *Pediatrics* 1; Maaike P J Hermans et al, "Healthcare and Disease Burden Among Refugees in Long-Stay Refugee Camps at Lesbos, Greece" (2017), 32 *Eur J Epidemiol* 851.

most negatively impact children's health.<sup>64</sup> Detained children in Canada have been reported as having "high rates of psychiatric symptoms, including self-harm, suicidality, severe depression, regression of milestones, physical health problems, and post-traumatic presentations" among other grave health problems.<sup>65</sup>

## A. The Impact on Children's Health During Detention

Though immigration detention in Canada is an extra-judicial process that operates outside the criminal justice system, IHCs have nevertheless retained a "prison-like" quality that negatively affects children's health. The physical condition of IHC facilities, restrictions on detainees' movement, limited opportunities for education and play within IHCs as well as an environment of constant surveillance have a combined negative effect on children's health.<sup>66</sup>

### i. Restrictions on Movement

Limitations on detainees' movement while in detention is manifested in the many rules and restrictions detainees must respect during their stay in IHCs. While mothers and children may move freely within family wards in IHCs, permission from guards is still required to leave the ward for meals, time outdoors or visits with family members.<sup>67</sup> Scheduled visits include time with children's fathers who are detained in separate men's quarters for the time they are in detention. Children may only visit with their father for 15-30 minutes a day and are similarly restricted to two half-hour time blocks of outdoor yard time.<sup>68</sup> Visits with family members outside the detention centre are also limited to visits held through glass windows or via telephone.<sup>69</sup> As a consequence of these restrictions, detained mothers report

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<sup>64</sup> Moria camp in Lesbos, Greece and the former Calais camp in France are examples of refugee camps known for deplorable conditions. For an assessment of health conditions in Moria, see Hermans, *supra* note 63 at 853. For research specific to Canada see Rachel Kronick, Cecile Rousseau & Janet Cleveland, "Asylum-Seeking Children's Experiences of Detention in Canada: A Qualitative Study" (2015) 85:3 Am J Orthopsychiatry 287 [Kronick]. See also Lauren Vogel, "Health Professionals Decry Detention of Migrant Children in Canada" (29 June 2018), online (pdf): *Canadian Medical Association Journal (CMAJ) News* <cmaj.ca/content/cmaj/190/28/E867.full.pdf> [perma.cc/4MFX-LM4A].

<sup>65</sup> See Gros & Song, *supra* note 27 at 23 citing Human Rights Watch, "US: Surge in Detention of Child Migrants" (25 June 2014), online: *HRW* <hrw.org/news/2014/06/25/us-surge-detention-child-migrants> [perma.cc/W3WY-B84D].

<sup>66</sup> See Kronick, *supra* note 64 at 287.

<sup>67</sup> *Ibid* at 289.

<sup>68</sup> *Ibid*.

<sup>69</sup> *Ibid* at 290.

symptoms of heightened separation anxiety in their children due to being housed apart from their father, loss of appetite, weight loss and psychological distress.<sup>70</sup> Further, conditions within IHCs have been reported to endanger children's health. Detainees in a Toronto IHC attributed frequent nosebleeds among the children to the poor ventilation and air quality within the detention facilities. Other issues in IHCs including "problems with the heating system, lack of air conditioning and traces of mold and mildew" have also been reported.<sup>71</sup>

## **ii. Limitations on Education and Play**

Even when detained with family members, concerns about the impact of detention on a child's psycho-social development remain salient for accompanied minors. For children in detention, the austere IHC environment offers little stimulation in terms of education or play.<sup>72</sup> Parents describe television as being the main activity available to detainees in common areas. While some IHCs do provide children with access to donated toys, detained children may not encounter other children to play with for prolonged periods, depending on how many other families are detained around the same time.<sup>73</sup> Though children detained longer than seven days ought to be afforded some formal instruction as per their right to receive education, classes offered to children are often organized on an *ad hoc* basis and only offered a few days a week, sometimes by volunteers.<sup>74</sup> Such an environment is not conducive to children's development. After several weeks of detention, parents reported listlessness and lethargy in their children's behaviour stemming from this lack of age-appropriate stimulation.<sup>75</sup>

## **iii. A Surveillance Environment**

Detainees in IHCs are under the surveillance of guards throughout the day and night and must interact with guards throughout their highly scheduled day (mealtimes, visits, yard time etc.). This constant surveillance affects the health of children both directly and indirectly. Many children

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<sup>70</sup> See Gros & Song, *supra* note 27 at 23.

<sup>71</sup> *Ibid* at 15.

<sup>72</sup> See Kronick, *supra* note 64 at 289.

<sup>73</sup> See Gros & Song, *supra* note 27 at 15; Kronick, *supra* note 64 at 289.

<sup>74</sup> See Gros & Song, *supra* note 27 at 16; *Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention*, UNHCR, 2012, 1 at para 56.

<sup>75</sup> See Kronick, *supra* note 64 at 289.

became fearful of the presence of guards and exhibited distress during the search and security procedures that are part of detainees' daily rhythm.<sup>76</sup> This fear was heightened in children with existing trauma regarding authorities and uniforms among those that had witnessed the traumatizing arrest or handcuffing of a parent prior to detention.<sup>77</sup> In other children, the anxiety around guards reflects the heightened anxiety the surveillance provokes in their parents. Adult detainees often decry their treatment in IHCs as criminalizing and state that the constant vigilance interferes with their ability to care for their children.<sup>78</sup> If mothers wish to obtain special medication or food products outside of what is offered at the IHC, for example, the process requires approval from IHC guards.<sup>79</sup> Moreover, parents' decline in mental health while in detention also affects their ability to care for their children.<sup>80</sup> Taken together, the research findings in Canada suggest that "it is the fact of detention – not merely the conditions of detention that is fundamentally harmful to children's well-being."<sup>81</sup>

## B. The Impact on Children's Health Post-Detention

The negative impact of detention on children's health continues to be felt by children long after their release from immigration detention.<sup>82</sup> In the weeks and months following detention, parents reported their children continued to exhibit symptoms of extreme psychological distress as they struggled to adapt to school and home life. Observed symptoms in the children included lasting changes in mood such as anxiety, irritability and aggression, as well as symptoms of separation anxiety, depression, selective mutism, post-traumatic stress, nightmares and difficulty sleeping.<sup>83</sup> Other signs of the prolonged impact on detention in children were observed in the specific fears children developed about people and objects reminiscent of their time in detention. Some children developed fear of authorities in uniform, police cars and vans, and one child even developed a more generalized fear of institutional buildings including his local health care centre.<sup>84</sup>

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<sup>76</sup> See Gros & Song, *supra* note 27 at 16

<sup>77</sup> *Ibid.* See Kronick, *supra* note 64 at 289;

<sup>78</sup> See Gros, "Invisible Citizens", *supra* note 60 at 24.

<sup>79</sup> See Gros & Song, *supra* note 27 at 43.

<sup>80</sup> See Kronick, *supra* note 64 at 290.

<sup>81</sup> See Gros & Song, *supra* note 27 at 16.

<sup>82</sup> See Linton, *supra* note 63 at 6.

<sup>83</sup> See Gros & Song, *supra* note 27.

<sup>84</sup> *Ibid* at 17.



As the research in Canada is still recent, one can only speculate as to how these children's experiences in detention will shape the trajectory of their lives beyond the scope of these initial studies. Given that approximately 50% of detained children in Canada are under the age of five, however, the importance of the early years in a child's development gives cause for serious concern on the lasting impact of the detention experience into adulthood.<sup>85</sup> Firstly, children in detention are deprived of the high-quality nutrition, stimulation and peaceable secure attachment with adults that they might otherwise have enjoyed living freely with their families at a critical age in their development. Secondly, given the emotional difficulties children experience upon release and their subsequent struggles to adapt to school, the long-term impact on children's academic achievement must also be contemplated.<sup>86</sup> Finally, children's deep-seated mistrust in authority and other important societal institutions as a result of detention has the potential to shape the way in which these children will interact with authority figures, society and institutions as adults. Taken together, the reported impact of immigration detention on children's health as well as the potentially life-altering impact of detention on a child's development and life trajectory ought to be very carefully weighed by judges, administrative decision-makers and border agents considering even the short-term detention of children.

## **IV. The Legal Framework for the Protection of Children in Immigration Detention**

### **A. The International Legal Framework for Children's Rights**

In international law, the *CRC* serves as the guiding legal instrument for understanding states' human rights obligations to children.<sup>87</sup> With 193 signatory state parties, the *CRC* is the most widely ratified human rights treaty in the world and is the first instrument to include the "full range of human rights including civil, cultural, economic, political and social

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<sup>85</sup> See Annual Detention Statistics, *supra* note 22 at table 2.2.1.

<sup>86</sup> See Kronick, *supra* note 64 at 288. These barriers are in addition to the traumatic experiences children may have already experienced. 60% of families in detention reported significant prior trauma or persecution experienced in their country of origin or during the migration process.

<sup>87</sup> See *CRC*, *supra* note 7.

rights.”<sup>88</sup> Since its entry into force in September 1990, the *CRC*, its additional protocols in 2002, and its accompanying monitoring Committee on the Rights of Children have served to delineate states’ obligations to children.<sup>89</sup> While some provisions in the *CRC* overlap with provisions in more general human rights instruments such as the *International Convention on Civil and Political Rights* (“*ICCPR*”) and the *International Covenant on Economic, Social and Cultural Rights* (“*ICESCR*”), the *CRC* as *lex specialis*, a specialized area of international law, imposes different and often greater obligations on states to safeguard children’s rights.<sup>90</sup> These added protections for children are in recognition of childhood as a special period in a person’s life with heightened physical, mental, spiritual, moral, psychological and social developmental needs.<sup>91</sup>

Central to the *CRC*, and key for understanding how states have implemented children’s rights in the context of immigration detention, is the “best interests of the child” principle introduced in article 3(1) of the *CRC*.<sup>92</sup> This principle gives a child the right to have “his or her best interests assessed and taken into account as a primary consideration in all actions or decisions [concerning] him or her, both in the public and private sphere.”<sup>93</sup> Article 3(1) further specifies that the best interests of the child are to be the primary consideration for social welfare institutions, courts of law, administrative authorities and legislative bodies in all actions concerning children. Concerning the protection of child migrants, the “best interests of the child” principle is activated from the moment a child comes into contact with a state’s immigration system and remains important for all decisions affecting the child thereafter in domains including child welfare, juvenile justice, education and family law.<sup>94</sup> In all decisions affecting children, the

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<sup>88</sup> See UNICEF, “The Convention” (last accessed 6 December 2020), online: *UNICEF* <[www.unicef-irc.org/portfolios/crc.html](http://www.unicef-irc.org/portfolios/crc.html)> [perma.cc/TV66-PDF3]; Jean-Francois Noel, “The Convention on the Rights of the Child” (7 January 2015), online: *Department of Justice Canada* <[justice.gc.ca/eng/rp-pr/fl-lf/divorce/crc-crde/conv2a.html](http://justice.gc.ca/eng/rp-pr/fl-lf/divorce/crc-crde/conv2a.html)> [perma.cc/YC5Z-S38P].

<sup>89</sup> See Noel, *supra* note 88.

<sup>90</sup> See Smyth, *supra* note 41 at 423. The interpretative doctrine of *lex specialis* in international law holds that if two laws govern the same factual situation, a law governing a specific subject matter (*lex specialis*) overrides a law governing only general matters (*lex generalis*). See Dorota Mariana Banaszewska, “Lex Specialis” in Rudiger Wolfrum ed, *The Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2015).

<sup>91</sup> See UNCRC, *General Comment No 14 (2013) on the Right of the Child to have his or her best interests taken as a primary consideration (art 3, para 1)*, 62nd Session, adopted 1 February 2013, UN Doc CRC/C/GC/14 [CRC, “General Comment No 14”]; Smyth, *supra* note 41 at 423.

<sup>92</sup> See *CRC*, *supra* note 7, art 3(1).

<sup>93</sup> See *CRC*, “General Comment No 14”, *supra* note 91 at 1.

<sup>94</sup> See Noel, *supra* note 88.

best interests of the child ought to be given primary consideration by decision-makers.

While the child's best interests are not defined in the *CRC*, the UN Committee on the Rights of the Child has specified that "the best interests of the child" is a flexible and dynamic threefold concept, with substantive, procedural and interpretative dimensions that guarantee the full enjoyment of all provisions in the *CRC*.<sup>95</sup> As a substantive right, "the best interests of the child" creates an obligation for states to consider the best interests of the child as a primary consideration whenever a decision is made concerning their lives.<sup>96</sup> As an interpretive principle, the "best interests of the child" ensures that in cases of overlapping interests or different interpretations of law, the interpretation which most effectively serves the child's best interests prevails. Finally, as a rule of procedure, the "best interests of the child" principle ensures that state parties demonstrate how the child's best interests were evaluated and appropriately weighed against other considerations.<sup>97</sup> Given that any provision of the *CRC* must be read within the context of the whole instrument, the "best interest of the child principle" is ever present – indeed, no right within the *CRC* can be "compromised by a negative interpretation of the child's best interests."<sup>98</sup>

Within the context of immigration detention, several provisions from the *CRC* are directly engaged concerning the protection of migrant children. The Committee on the Rights of the Child has clarified that article 2(1) of the *CRC*, which enjoins states to ensure children's rights without any discrimination, prohibits any discrimination on the "basis of the status of a child as being unaccompanied or separated, or being a refugee, asylum seeker or migrant."<sup>99</sup> Moreover, article 22 of the *CRC* explicitly states the rights of asylum seeking and refugee children to "receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the ... States are Parties."<sup>100</sup> Taken together, these articles ensure that child migrants are afforded full rights at the outset of accessing a state's immigration procedures and that they be

<sup>95</sup> See *CRC*, "General Comment No 14", *supra* note 91 at 6.

<sup>96</sup> *Ibid* at 4.

<sup>97</sup> *Ibid*.

<sup>98</sup> *Ibid* at 3.

<sup>99</sup> See UNHCR, *General Comment No 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 39th Session, adopted 3 June 2005, UN Doc CRC/GC/2005/6 [*CRC*, "General Comment No 6"] at para 18.

<sup>100</sup> See *CRC*, *supra* note 7, art 2.1.

assured further protection and humanitarian assistance following the determination of asylum seeker or refugee status. If a child is determined not to be an asylum seeker or refugee, the child may enter into the return phase of a states' immigration procedure – albeit in a manner that is still consistent with the best interests of the child.<sup>101</sup> Unaccompanied or separated children that are not in need of international protection “shall be protected pursuant to other relevant child protection mechanisms such as those provided under youth welfare legislation.”<sup>102</sup>

While the *CRC* introduces many checks on states' treatment of children, significantly, the detention of children in circumstances around immigration or juvenile justice is not expressly prohibited in international law. Rather, the *CRC* places conditions on how children may be detained, provided that detention is itself lawful. Article 37(b) states that cases of lawful deprivation of children's liberty, “[t]he arrest, detention or imprisonment of a child ... shall be used only as a measure of last resort and the shortest appropriate period of time.”<sup>103</sup> Article 37(c) and (d) further impose obligations on the environment in which children may be detained in keeping with children's rights to development in article 6 of the *CRC*.<sup>104</sup> In cases of detention, the age-specific needs and interests of the child must be provided for, and the individual needs of the child assessed through the interaction of the “best interests of the child” principle in article 3(1). Explicitly mentioned child-specific considerations in article 37 include ensuring children are detained separately from other detained adults, allowing ongoing communication and visits with the child's family and ensuring that the child has prompt access to legal and other appropriate assistance.<sup>105</sup> In all matters pertaining to children, the individual needs of the children must be assessed in conformity with the interacting “best interests of the child” principle.<sup>106</sup>

Due to the long and perilous nature of migration, child migrants may fall under the simultaneous protection of various international human rights instruments at different stages in their journey.<sup>107</sup> Obligations arising from the 1951 *Convention Relating to the Status of Refugees*, for example, are especially relevant to children in the “post-migration phase” upon their

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<sup>101</sup> See Smyth, *supra* note 41 at 426.

<sup>102</sup> See *CRC*, “General Comment No 6”, *supra* note 99 at para 18.

<sup>103</sup> See *CRC*, *supra* note 7, art 37(b).

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

<sup>105</sup> *Ibid.*, arts 37(c)–(d).

<sup>106</sup> See Liefwaard, *supra* note 6 at 334.

<sup>107</sup> See e.g. the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

reception within a state's immigration system. Article 33(1) of this *Convention* introduces the powerful principle of *non-refoulement*, a principle which prohibits states from returning a refugee to a territorial frontier where his or her life or liberty may be threatened.<sup>108</sup> Though not explicitly stated in the *Convention*, observance of this principle presupposes states possess a process by which an adult or child migrant's immigration status may be determined, and also presupposes that such a migrant would have access to that immigration system through access to their territory.<sup>109</sup> Children in detention are often at the initial stages of having their immigration status determined and may therefore not be refouled pending the result of that status.

Despite clearly defined legal obligations owed towards children as well as migrants in international law, recent state practices demonstrate a gap between existing law and implementation by signatory states.<sup>110</sup> As a response to increased migration, states have adopted restrictive immigration policies that violate, or at best circumvent, their international obligations. Individual and collective expulsions conducted at borders have resulted in the return of many child migrants to their country of origin without due process in the form of a formal, individualized immigration hearing.<sup>111</sup> Destination states' extra-territorial interception of migrants which aims to impede migrants from reaching a territorial border by land or sea is also on the rise.<sup>112</sup> Moreover, as a result of a general failure to distinguish child migrants from adult migrants, states have been known to detain children together with adults, in violation of article 37 of the CRC, and generally fail to provide age-appropriate living conditions conducive to children's development in long-stay detention arrangements.<sup>113</sup> While states may appeal to immigration-control agendas, or narratives invoking the criminalization of migration as a justification for restrictive policies, the position of international law is clear: "the child migrant is to be treated as a child first and foremost, with the backing of all the rights of the [CRC], and a migrant second."<sup>114</sup>

<sup>108</sup> See *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954).

<sup>109</sup> See Smyth, *supra* note 41 at 424.

<sup>110</sup> *Ibid.* See Roth, *supra* note 37 at 248.

<sup>111</sup> See Smyth, *supra* note 41 at 425.

<sup>112</sup> See Lorenzo Tondo, "Exclusive: 12 Die as Malta Uses Private Ships to Push Migrants Back to Libya" (19 May 2020), online: *The Guardian* <[theguardian.com/global-development/2020/may/19/exclusive-12-die-as-malta-uses-private-ships-to-push-migrants-back-to-libya](https://theguardian.com/global-development/2020/may/19/exclusive-12-die-as-malta-uses-private-ships-to-push-migrants-back-to-libya)> [perma.cc/BV2F-PB5G].

<sup>113</sup> See Grant, *supra* note 42.

<sup>114</sup> See Smyth, *supra* note 41 at 422.

## B. The Legal Framework for Children's Rights in Canada

In Canada, international treaties which are signed and ratified by the executive must be incorporated into domestic law via legislative action in order to be enforceable within Canadian law.<sup>115</sup> This is in keeping with Canada's dualist model which maintains a separation between the evolution of domestic and international law.<sup>116</sup> While Canada signed and ratified the *CRC* before its entry into force in 1992, the absence of an incorporating act by parliament following ratification means *CRC* provisions are not directly applicable in Canada and cannot form the basis of a cause of action in Canadian courts.<sup>117</sup> In so far as the *CRC* contains provisions relating to matters such as health and education, which fall under exclusive provincial jurisdiction, provinces must also adopt legislation that recognizes Canada's international commitments in those areas.<sup>118</sup> As such, the *Canadian Charter of Rights and Freedoms* remains the principal legal instrument through which rights of children are protected from state abuses in Canada, in conjunction with provincial legal instruments such as Québec's *Charte des droits et libertés de la personne*.<sup>119</sup> While there is no specific mention of children's rights in the *Charter*, children in Canada, as in international law, possess their own legal personality and may therefore invoke the *Charter* to protect any right that is extended to adults from encroachment by the state.<sup>120</sup>

Despite its limited applicability in domestic law, the *CRC* as a moral and normative standard setter towards the treatment of children in international law remains influential in all judicial and administrative decisions pertaining to the well-being of children in Canada. In *Baker v Canada (Minister of Citizenship and Immigration)*, while the Supreme Court of Canada ("SCC") affirmed the *CRC* is not directly applicable within Canadian law, the Court also held that the values in international human rights law "may help inform the contextual approach to statutory interpretation and judicial

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<sup>115</sup> See Michelle Giroux & Carmen Lavallée, "Les droits de l'enfant: Rapport du Canada" in Olga Cvejić Jančić, ed, *The Rights of the Child in a Changing World* (Cham: Springer International Publishing Switzerland, 2016) 61 at 63.

<sup>116</sup> *Ibid.*

<sup>117</sup> See Noel, *supra* note 88. Canada also entered two reservations to the *CRC* regarding art 21 and the provisions on adoption as well as art 37(c) regarding the deprivation of liberty of children in the criminal justice system, Canada has "reserved the right not to separate children and adults where it is not feasible or appropriate to do so", see Noel, *supra* note 88.

<sup>118</sup> *Ibid.*

<sup>119</sup> See *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11; *Charter of Human Rights and Freedoms*, CQLR, c C-12.

<sup>120</sup> See Giroux & Lavallée, *supra* note 115 at 65.

review.”<sup>121</sup> As such, the principles of the *CRC* that emphasize the importance of taking into consideration the interests, rights and needs of a child were held to be central values in determining the reasonableness of immigration proceedings.<sup>122</sup> Though the SCC would later go on to find that the best interests of the child principle, though important, is still not a principle of fundamental justice under section 7 of the Charter, the consideration of the child’s best interests remains integral to many areas of Canadian law and has been explicitly incorporated into legislation pertaining to family law, immigration law, youth justice and child welfare.<sup>123</sup>

## V. Interpretation of Children’s Rights by Canadian Judicial and Administrative Decision-makers

Having explored the legal framework from which children’s rights are protected in Canada, this section will identify how the best interests of the child are weighed in administrative and judicial decisions pertaining to immigration detention. Of particular interest is the extent to which evidence of the short- and long-term health risks of immigration detention on children is contemplated by decision-makers.

### A. CBSA Officers & IRB Members

Immigration detention of both adults and children in Canada is governed by the *IRPA* and its *Regulations*.<sup>124</sup> The *IRPA* authorizes two agencies, the Canadian Border Services Agency (“CBSA”) and the Immigration Division of the Immigration and Refugee Board (“IRB”), to determine whether an individual ought to be detained as well as the duration of that detention.<sup>125</sup> The initial decision to detain an individual under the *IRPA* and its *Regulations* is predicated on CBSA officers’ reasonable grounds to believe the foreign national is: a) unlikely to appear for an examination, hearing or removal; b) is a danger to the public; or c) has not established his or her identity.<sup>126</sup> Following a CBSA decision to detain, members of the Immigration and Refugee Board then decide whether to

<sup>121</sup> *Ibid* at 65. See also *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817 at paras 70–71, 174 DLR (4th) 193 [*Baker*].

<sup>122</sup> See *Baker*, *supra* note 121 at para 71. At issue in *Baker* was the judicial review of the reasonable exercise of the Ministerial humanitarian and compassionate power.

<sup>123</sup> See *Canadian Foundation for Children, Youth and the Law v Canada*, 2004 SCC 4 at paras 6, 9.

<sup>124</sup> See *IRPA*, *supra* note 60; *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*IRPR*].

<sup>125</sup> See *Gros & Song*, *supra* note 27 at 33.

<sup>126</sup> See *IRPR*, *supra* note 124, s 244.

continue or terminate the detention at legislatively mandated detention review hearings held after the foreign national has been in detention for 48 hours, seven days and then once every 30 days of detention.<sup>127</sup>

Within this legislative framework, the “best interest of the child” principle is an important consideration in CBSA officers’ and IRB members’ decisions to detain or continue detention for a minor. Article 60 of the *IRPA* states that “a minor 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.”<sup>128</sup> *IRPA Regulations* clarify that considerations of the best interest of the child involve the evaluation of several factors including: (a) the child’s physical, emotional and psychological well-being; (b) the child’s healthcare and educational needs; (c) the importance of maintaining relationships and the stability of the family environment; (d) the care, protection and safety needs of the child; and (e) the child’s own views and preferences concerning the circumstances of their detention.<sup>129</sup> CBSA officers, for example, should take into account the detention conditions within a particular IHC when contemplating the detention of a minor in a certain facility, weighing factors such as the anticipated length of detention, and the availability of education and counselling services at the IHC.<sup>130</sup> In recent guidelines issued by the IRB Chairperson regarding detention matters, it is further specified that after taking into account all prescribed factors in the *Regulations*, including the best interests of the child, “[m]embers must only detain minors in most exceptional circumstances, and for the shortest time possible.”<sup>131</sup>

For the purposes of legal analysis, the manner in which CBSA officers and IRB members weigh the best interests of the child, and, in particular, the above-mentioned impact of detention on children’s health in practice, is difficult to assess for several reasons. Firstly, a CBSA officer’s initial decision to detain a child at first instance, perhaps alongside the child’s parents due to circumstances giving rise to grounds for detention, is non-reviewable by IRB members. The first opportunity to examine CBSA officers’ reasons for

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<sup>127</sup> See *IRPA*, *supra* note 60, s 58(1.1); Janet Cleveland, “Not So Short and Sweet: Immigration Detention in Canada” in Amy Nethery & Stephanie J Silverman, eds, *Immigration Detention: The Migration of a Policy and Its Human Impact* (Abingdon: Routledge, 2015) 79 at 80.

<sup>128</sup> See *IRPA*, *supra* note 60, s 60.

<sup>129</sup> See *IRPR*, *supra* note 124, s 248.1(1).

<sup>130</sup> See *IRPR*, *supra* note 124, arts 248, 249.

<sup>131</sup> See IRB Chairperson, “Chairperson Guideline 2: Detention” (Ottawa: IRBC, April 2021), s 4.1.2, online: *Immigration and Refugee Board of Canada* <[irb.gc.ca/en/legal-policy/policies/Pages/GuideDir02.aspx](http://irb.gc.ca/en/legal-policy/policies/Pages/GuideDir02.aspx)> [perma.cc/W8UV-6Q8H] [IRB, *Guideline on Detention*].



initial detention is only at the first IRB detention review hearing held after 48 hours of detention, as mandated by the *IRPA*. Secondly, at this first hearing, a CBSA officer's initial considerations for detention are not related to the presiding IRB member by the CBSA officer who made the initial decision, but are communicated through Hearing Officers that present the case against the detainee based on the officer's file notes and correspondence.<sup>132</sup> As hearing officers are permitted to make oral representations in support of continued detention, and are not required to disclose the information upon which they will rely in a hearing to the detainee's counsel, the reasoning process of the CBSA officer who first made the decision to detain remains difficult to ascertain without the disclosure of key documentation within the detention review hearing.<sup>133</sup>

Thirdly, contrary to other administrative tribunals which are mandated to publish all decisions and rulings, only a selection of IRB decisions are available to the public via the Canadian Legal Information Institute's database ("CanLII").<sup>134</sup> Of the decisions available to the public via CanLII, few are detention review decisions, and fewer still offer examples of members explicitly weighing the best interests of the child in cases involving the detention of a minor.<sup>135</sup> The lack of available cases relating to the detention of children is a great obstacle to the legal analysis of CBSA officers' or IRB members' weighing of the best interests of the child. Though CBSA statistics record that at least 118 minors were detained in IHCs in 2019, the detention review hearings for these and subsequent instances of detention involving minors were not publicly available for analysis. Finally, in the absence of an independent civilian oversight body for the CBSA, qualitative data concerning how the best interests of the child are weighed by CBSA officers at first instance and at detention hearings is not collected by any

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<sup>132</sup> See Siena Anstis, Joshua Blum & Jared Will, "Separate but Unequal: Immigration Detention in Canada and the Great Writ of Liberty" (2017) 63:1 McGill LJ 1 at 10. This practice reflects IRB procedure that is not "bound by any legal or technical rules of evidence", see *IRPA*, *supra* note 60, s 173(c).

<sup>133</sup> See Anstis, Blum & Will, *supra* note 132 at 11.

<sup>134</sup> See "Decisions" (last modified 12 August 2021), online: *Immigration and Refugee Board of Canada* <[irb.gc.ca/en/decisions/Pages/index.aspx](http://irb.gc.ca/en/decisions/Pages/index.aspx)> [perma.cc/2ET2-A2ZC] [IRB, Decisions].

<sup>135</sup> Research for this article involved searching IRB detention review decisions available on CanLII as well as immigration decisions involving the detention of a minor on judicial review before the Federal Court. The relative paucity of detention review hearings available is perhaps due to the sheer volume of decisions rendered by the IRB on refugee protection and immigration matters each year (some 40 thousand), see IRB, Decisions, *supra* note 134. Or, perhaps it is due to *IRPA* s 169(c), which allows Members to choose to render their decisions orally or in writing for certain cases. Where an oral decision is rendered, a recording of the hearing is made available to the person who is the subject of the proceedings, who may still request written reasons from the Board as per *IRPA* s 169(e). Transcripts of decisions that were rendered orally, including decisions for detention reviews, appear less frequently in CanLII.

institution, or if collected internally by CBSA, is similarly not publicly available.<sup>136</sup>

For the above-mentioned reasons, the following Federal Court and IRB decisions *Munar v Canada* and *Hernandez v Canada*, both of which concern removal orders, are insufficient for drawing strong conclusions on the manner in which decision-makers weigh the best interests of the child.<sup>137</sup> However, these cases still offer insight into the considerations that surround an administrative decision on whether to place a child in detention. In both cases, considerations around the impact of detention on the child's health and psychological well-being are not explicitly mentioned by CBSA officers or IRB members. Rather, the circumstances around the parents' grounds for detention appear to bear a greater influence on the decisions made regarding the child's housing arrangements. In *Munar*, an application for judicial review of a CBSA decision was submitted to the Federal Court on the grounds that the CBSA failed to consider the best interests of the applicant's two young Canadian-born children in refusing to defer their mother's removal order.<sup>138</sup> At issue in *Munar* was whether the CBSA removal officer had properly exercised their discretion while being sufficiently "alive and sensitive to the short-term interest of children facing the removal of a primary caregiver from Canada."<sup>139</sup> Of particular relevance from this decision, is the inclusion of the CBSA removal officer's file notes in the court record which make reference to discussions on where to house the children affected by the removal order. In these case notes, an IHC officer recommends the children not be placed in detention with their mother, "as [their mother] has used [the children] to delay her removal from Canada."<sup>140</sup> Notably, no mention of the impact of detention on the children's health or general well-being is made in the notes suggesting the mother's prior conduct vis-à-vis ongoing immigration proceedings rather than the

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<sup>136</sup> The lack of an independent civilian oversight body for the CBSA as well as the lack of an independent ombudsperson to hear complaints from immigration detainees has been criticized by Canadian human rights advocates. To date, the CBSA remains "the only public safety agency in Canada without an independent civilian oversight body", see Human Rights Watch & University of Toronto International Human Rights Program, "Joint Submission by Human Rights Watch and the University of Toronto's International Human Rights Program to the Committee on the Rights of the Child's Consideration of Canada's Fifth and Sixth Periodic Reports" (March 2020) at 2, online (pdf): *Human Rights Watch* <[hrw.org/sites/default/files/supporting\\_resources/hrw\\_crc\\_submission\\_canada\\_final\\_1.pdf](http://hrw.org/sites/default/files/supporting_resources/hrw_crc_submission_canada_final_1.pdf)> [perma.cc/PCG5-4VQB].

<sup>137</sup> See *Munar v Canada (Minister of Citizenship and Immigration)*, 2006 FC 761 [*Munar*]; *Hernandez v Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 725 [*Hernandez*].

<sup>138</sup> See *Munar*, *supra* note 137.

<sup>139</sup> *Ibid* at para 19.

<sup>140</sup> *Ibid* at para 12.

children's best interest had a greater influence on the CBSA officer's decision to house the children outside the detention centre.

In *Hernandez*, by contrast, the best interests of the child affected by the immigration decision were directly considered in determining the child's housing arrangements. In this case, Ms. Hernandez, the applicant, was denied release from detention on the grounds that she posed a high flight risk.<sup>141</sup> When deciding where to place the applicant's 13 year-old daughter, counsel for the daughter argued that the best interests of the child were for her to be housed in an alternative to detention, and that given the applicant's history of child abduction, that youth protection services remain involved even following the applicant's potential release.<sup>142</sup> The IRB Member acknowledged alternative housing arrangements should be made for the applicant's 13 year-old daughter, however, given the lack of viable alternatives presented at the hearing, the child was ultimately placed in detention with her mother pending the proposal of a viable housing alternative, or the next detention review scheduled in seven days. The Member acknowledged the child's own wish to be detained with her mother but further specified that the child would not be released with the mother given the circumstances of child abduction. While no mention was made of the possible impact of detention on the child's health and well-being, this decision could still be said to align with IRPA directives that minors 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."<sup>143</sup> Only closing remarks by the IRB Member at the end of the hearing suggested the decision on the child's housing arrangements was shaped not only by considerations around the child's well-being, but also by considerations around her mother's flight risk. At the end of the hearing, the Member commented that housing the daughter separately from the applicant will have an impact on subsequent assessments of the applicant's flight risk, stating "you [the applicant] will not leave if you are not leaving without your daughter and that will be an incentive for you to obey by all conditions."<sup>144</sup>

*Munar* and *Hernandez* offer two examples of how considerations around the best interest of the child can quickly become subsidiary considerations vis-à-vis the grounds giving rise to a parent's detention. The cases offer a window into understanding how considerations around the best interests of

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<sup>141</sup> See *Hernandez*, *supra* note 137.

<sup>142</sup> *Ibid.*

<sup>143</sup> *Ibid.*

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

the 118 minors that were held in detention in Canada in 2019 could have similarly been outweighed by decision-makers' concerns for the parents' flight risk or verification of identity.<sup>145</sup> This reality in decision making is in part explained by the language around the best interests of the child found in the *IRPA*. While the UN Committee on the Rights of the Child has specified that the best interests of the child principle ought to be a "primary consideration" by States in the "adoption of all measures of implementation", in *IRPA* section 60, the best interests of the child need only be "taken into account" as one factor among others to be considered by an administrative decision-maker.<sup>146</sup>

Growing awareness of the harmful impact of both short- and long-term detention on children's well-being in Canada and around the world, however, makes any decision to detain a child after consideration of that child's best interest an increasingly untenable position. A recent joint report from the UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, and the UN Committee on the Rights of the Child affirms that detention is never in a child's best interest.<sup>147</sup> The report states that "every child, at all times, has a fundamental right to liberty and freedom from immigration detention"; that "children should never be detained for reasons relating to their parents' migration status"; and that States ought to eradicate the practice of immigration detention of children. In a 2017 periodic report on Canada, the UN Committee on the Elimination of Racial Discrimination recommended Canada undertake to "immediately end the practice of the detention of minors."<sup>148</sup>

<sup>145</sup> See Annual Detention Statistics, *supra* note 22.

<sup>146</sup> The CRC clearly states that "primary consideration" means that "a child's best interest may not be considered on the same level as all other considerations" in recognition of vulnerabilities connected to a child's dependency, maturity and legal status. See CRC, "General Comment No 14", *supra* note 91 at para 37; "Right in Principle, Right in Practice" (1 November 2011) at 71, online (pdf): *Canadian Coalition for the Rights of Children* <rightsofchildren.ca/wp-content/uploads/2016/01/CCRC-report-on-rights-of-children-in-Canada.pdf> [perma.cc/RVN5-D8RR].

<sup>147</sup> See Amnesty, *supra* note 51 at 4 citing UNCMW, *Joint General Comment No 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return*, 16 November 2017, CMW/C/GC/4-CRC/C/GC/23 at para 5.

<sup>148</sup> See International Convention on the Elimination of All Forms of Racial Discrimination: Committee on the Elimination of Racial Discrimination, *Concluding observations on the combined twenty-first to twenty-third periodic reports of Canada*, 13 September 2017, CERD/C/CAN/Co/21-23 at para 34(b), online: *United Nations* <docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhstz6Kqb8xvveVxiwIinyzEnrSQTalmuyolPtH1p%2B%2FBoA9aSpHnHOaSTR3D%2BGaG21xFo2B95JnqHNgalSwJoOiSGBGOUk6xxJIGD9T1UIJq2pb%2BLbXWwAtxj%2FiP6NJCzvYQ%3D%3D> [perma.cc/NY3S-WR73].

To date, no amendments to the *IRPA* or *IRPR* have been proposed to end the practice of the detention of minors as suggested by international bodies. Moreover, while the immigration detention of children has been widely criticized by domestic and international advocates, the practice still finds some support among Canadian stakeholders. In 2017, members of the public, academia, government, NGOs and select CBSA employees were engaged in a CBSA initiated consultation on the immigration detention system in Canada. Of the stakeholders engaged, 78% were in strong agreement that minors may be held in IHC facilities in exceptional circumstances; that the detention of a parent with accompanying minor children may be justified in cases where the parent may be a danger to the public; and that minor children could be held in a detention facility where no alternative child care agreements are available.<sup>149</sup> Furthermore, when immigration detention is framed as a necessary measure to “safeguard the integrity of Canada’s immigration system, public safety and security”, the practice finds even stronger support among Canadians with 87.5% of respondent expressing strong agreement.<sup>150</sup>

Within this social context, barring any significant legislative changes that may come about through changes in public opinion on immigration detention and increased advocacy on the issue of the immigration detention of children, the decision-making powers of judges and administrative decision-makers to initiate, continue or terminate detention for children become the most important means through which the rights of children can be further upheld. Indeed, nothing within the *IRPA* legislative framework prevents judges and administrative decision-makers from drawing upon the growing body of empirical research on the negative impact of detention on children in their assessments of the best interests of the child under section 60 of *IRPA*. As judges and decision-makers become increasingly aware of the negative impacts of even short-term detention on children’s health, the threshold of tolerated risk to children, even in cases where there are legitimate grounds for detaining their parent, could diminish over time,

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<sup>149</sup> These findings were drawn from a sample of 298 individuals who provided responses to the CBSA questionnaire (approximately 5000 individuals had the opportunity to respond to the survey based on recorded visits to the consultation splash page). Of survey responses received, 54.2% were identified as being from the public, 27.1% were from CBSA employees, 6.6% were from academics, 5.9% were from government employees, 4.8% were other and 1.4% were NGOs. For more on survey findings and methodology, see Canadian Border Services Agency, “Consultation on CBSA’s National Immigration Detention Framework: Summary Report of Consultations with Canadians” (April 2017), online: CBSA <[cbsa-asfc.gc.ca/agency-agence/consult/consultations/nidf-cnmdi/report-rapport-eng.html](http://cbsa-asfc.gc.ca/agency-agence/consult/consultations/nidf-cnmdi/report-rapport-eng.html)> [perma.cc/2TQA-Y7J9] [CBSA, “Consultation with Canadians”].

<sup>150</sup> *Ibid.*

leading to a different interpretation of what may constitute detention as a “last resort.”<sup>151</sup>

## B. Federal Court Judges

Detainees in immigration detention in Canada may apply to the Federal Court for a judicial review of an IRB decision, with leave of that Court, as per section 72(1) of the *IRPA*.<sup>152</sup> During this process, a Federal Court judge may find an IRB decision-maker was unreasonable in their assessment of grounds for detention and order the release or conditional release of a foreign national. In evaluating the reasonableness of considerations around the best interests of the child, several key SCC decisions concerning the application of the principle in immigration law are especially relevant. In *Baker*, the SCC held that in applications seeking equitable relief under section 25 of the *IRPA* on humanitarian and compassionate grounds, administrative decision-makers had clear directives to “consider the child’s best interest as an important factor, give them substantive weight, and be alert, alive and sensitive to them.”<sup>153</sup> Consequently, where the best interests of children are minimized by the decision-maker, in a manner inconsistent with Canada’s humanitarian and compassionate tradition, the decision will be found to be unreasonable.<sup>154</sup> Furthermore, as held in *Kanthasamy v Canada*, consideration of a child’s best interests must be holistic and take into account the child’s age in assessing the potential hardship the child may suffer as a result of the decision.<sup>155</sup> Because children are rarely deserving of any hardship, the SCC held that the decision-maker must also acknowledge that because children may experience greater hardship than adults faced with a comparable situation, the child may be entitled to relief that would not be warranted for an adult.<sup>156</sup>

Notably, in these key decisions that clarified the application of the “best interests of the child” principle in immigration law, it was the impact of an immigration decision on the child’s well-being that was being weighed by decision-makers. In *Baker*, the impact of Ms. Baker’s pending removal to Jamaica on her four children, all of whom would have remained in Canada without their mother, was contemplated in the best interests of the child

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<sup>151</sup> See *IRPA*, *supra* note 60, s 60.

<sup>152</sup> *Ibid*, s 72(1).

<sup>153</sup> See *Baker*, *supra* note 121 at para 75.

<sup>154</sup> *Ibid*.

<sup>155</sup> See *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 41 [*Kanthasamy*].

<sup>156</sup> *Ibid*.

assessment.<sup>157</sup> In *Kanthisamy*, the Court considered the potential harm of deportation to Sri Lanka to Mr. Kanthisamy as he was a 17 year-old child at the time his case was being determined.<sup>158</sup> In cases concerning the immigration detention of children however, it is not only the result of an impending immigration decision, such as the outcome of a parent's refugee application that has a direct effect on the child, but also the process of moving through the immigration system itself that adversely affects the child's well-being. Under the current legislative framework, it is conceivable that a family which receives a favourable outcome to an asylum claim on humanitarian and compassionate grounds may nonetheless remain scarred by their time in detention. In identifying judicial review of detention decisions therefore, special effort was made to identify a relevant case where a judicial decision-maker explicitly acknowledges the impact of detention on a child's health in their assessment of the best interests of the child, in addition to considerations around the outcome of the immigration decision in question.

The most encouraging case concerning the evaluation of research on the impact of immigration detention on children is observed in a recent 2018 case before the Federal Court. In *Calin v Minister of Public Safety and Emergency Preparedness*, the applicant, an asylum seeker from Romania and mother of two small children, sought an interlocutory mandatory injunction for her and her daughters' immediate release from detention.<sup>159</sup> Calin and her two daughters, ages four and six, had been in detention for 18 days at the time of her urgent hearing and sought immediate release after an IRB detention review hearing extended her detention until the next 30 day review hearing.<sup>160</sup> In deciding whether the application for injunction met the *prima facie* "serious issue" threshold necessary needed to bring forward an application, the presiding Judge explicitly considered the adverse impact of continued detention on the health of her children stating: "the extension of the Applicant's detention effectively applies to her children, and in addition to a loss of liberty, raises issues of irreparable psychological harm that can only worsen if the children remain in confinement with their mother."<sup>161</sup> The *Calin* decision went on to find that the IRB had not been alert and sensitive to the best interests of the children in housing them with their mother in

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<sup>157</sup> See *Baker*, *supra* note 121 at para 2.

<sup>158</sup> See *Kanthisamy*, *supra* note 155 at para 7.

<sup>159</sup> See *Calin v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 731 [*Calin*].

<sup>160</sup> *Ibid* at paras 5–9.

<sup>161</sup> *Ibid* at para 17.

detention as there was insufficient evidence that alternatives to detention were sufficiently considered by the CBSA.<sup>162</sup> Despite the fact that the children were not considered to be formally detained by the CBSA, the presiding judge considered the effects of detention on the “housed” children to be effectively the same and reiterated the need to only detain children by extension of their parent’s situation “only as a last resort.”<sup>163</sup> The Calin family was granted the mandatory injunction and were subsequently released from detention.

Apart from the outcome of the case, what is particularly significant in *Calin* is the degree to which recent Canadian research pertaining to the effects of immigration detention on children factored into the Judge’s reasoning. The Judge noted that based on empirical evidence, even short-term detention presented a serious risk of harm to children and also noted the evidentiary limitations detainees face in demonstrating the extent of the harm suffered before a court:

[b]ecause these risks occur over the longer time period and do not manifest themselves until after release from detention, it is not possible to present personal evidence of the harm to children who have been detained or housed with parents in detention. Likewise, it is not possible to demonstrate a serious likelihood of jeopardy to the children’s health or safety from confinement in immigration detention centres.<sup>164</sup>

The finding of this case, while recent, is an encouraging example of evidence that a greater consciousness of the impact of detention on children, based on empirical evidence, is being integrated into judicial reasoning at the level of judicial review.

## VI. Conclusion

While recently adopted national policy directives in Canada regarding the immigration detention of children and families have served to reduce the number of children held in detention since 2015, the current legislative and policy framework still allows for the immigration detention of children in IHCs across the country each year. Given the severe impact of both short- and long-term detention on children’s health, any instance of detention remains a cause for concern in the protection of children’s rights. While many involved in the human rights discourse on immigration detention,

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<sup>162</sup> *Ibid* at para 24.

<sup>163</sup> *Ibid* at paras 30, 31.

<sup>164</sup> *Ibid* at para 58, citing research by Gros and Song, *supra* note 27.



echoing directives from prominent international human rights organizations, are advocating for the complete abolishment of immigration detention practice, this article has sought to explore a way of increasing protection for children within the existing *IRPA* and *IRPR* legislative framework as a potentially concurrent and complementary approach.

This article argues that incorporating empirical evidence of the short- and long-term effects of detention on children's health into evaluations of "the best interests of the child" within section 60 of *IRPA* is one way in which the rights of children can be more robustly protected by administrative decision-makers and judges within the existing legislative framework. The *Calin* case before the Federal Court offers an example of how serious consideration of the harms to children in detention can lead to children's immediate release from detention. This article has also highlighted the many barriers that exist in accessing CBSA decisions in support of initial detention and IRB detention review decisions involving children. Obtaining access to these decisions is essential for understanding how the best interests of the child are actually weighed by administrative decision-makers in detention decisions involving children and remains an important area for future research.