Unshackled Discretion

Barriers to Procedural Justice in the Canadian Immigration Detention System

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Abstract
The growing Canadian immigration detention system spanning immigration holding centres, provincial prisons, short-term holding facilities, and a variety of other sites, touches upon the lives of thousands of people daily. This report examines a number of significant barriers to procedural justice for immigrants and asylum seekers detained in Canada. The report finds that the structure and realization of the Canadian detention system impede fair, unprejudiced, and non-arbitrary treatment for minorities and vulnerable people. Above and beyond the basic deprivation of liberty and setback to immigrants and asylum seekers' interests, detention inflicts irreparable psychological, physical, and social damage. The report outlines significant issues such as deteriorating daily detention conditions, far-flung facilities locations, unfair discretionary decision-making, a lack of options for women, children, and vulnerable people, the compounding reasons for indefinite detention, inadequate legal aid and access to counsel, and additional barriers to justice. It concludes by discussing how the Canadian system is costly and ineffective, and often in contravention of national and international standards on immigration detention.

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Introduction

This report examines key aspects of justice procedures in the current state of immigration detention in Canada. We find that the harm caused to detainees is undue, disproportionate, and wrongful. We explain the problems common to the Canadian detention system that currently spans prisons, immigration holding centres, and a variety of other sites. The architecture and enforcement conditions of immigration detention compromise the ability of detainees to participate competently and confidently in the Canadian legal system.

The procedural obstacles for immigrant and asylum applicants detained in Canada violate due process, Canadian immigration statutes, and international human rights law on detention. Immigration detainees are petitioning for enjoyment of their core rights - including liberty, autonomy, and family life – in the immediate term, and their rights to remain, settle, and realize a version of the good life in the long term. The current system of detention exaggerates divisions between people who migrate with preauthorization and those who use irregular means, the latter of whom is intentionally stigmatized.

This report begins with a discussion of the legislative and historical context of immigration detention in Canada. Next, we explore the daily conditions in the Canadian detention system, including the mandatory detention provision. We then examine the hurdles faced by immigration detainees, including limited access to legal information and counsel. In order to animate these issues of procedural justice, we provide a compose study of real-life cases of detainees in Ontario. The net result of detention conditions is a discretionary, open-ended system that is increasingly ineffective and often in contravention of established international human rights standards.

Immigration detention in Canada: legislative context

In 2010-2011, Canada officially detained 8838 people, of whom 4151 were either asylum seekers or refused refugee claimants.[1] At 76% of the population, men are disproportionately likely to be detained in Canada. As Stephen Harper's Conservative government continues to bulk up enforcement resources, the rate of deportations of refused refugee claimants continues to climb.[2]

The legislative grounds for detention in Canada can be found in sections 54 to 61 of the *Immigration and Refugee Protection Act*[3] (IRPA 2001), and in sections 244 to 250 of the *Immigration Refugee and Protection Regulations*[4] (IRPR). The IRPR and the Citizenship and Immigration Canada Policy Manual on Detention provide directions on how detention is to be administered.

There are three classes of persons who can be detained under the current administrative regime in Canada. As per section 55.1 of IRPA, an officer may issue a warrant for the arrest and detention of a permanent resident of a foreign national who the

[1] "Refused refugee claimants" refers to people who applied for asylum but had their claims denied. In some contexts, they are referred to as "failed asylum seekers" or "failed refugee claimants".

[2] JANET CLEVELAND, *Detention of asylum seekers in Canada*, *in* Immigration Detention: The Journey of a Policy and its Human Impact (Amy Nethery & Stephanie J. Silverman eds., Forthcoming).

[3] Immigration and Refugee Protection Act, SC 2001, c 27, <http://canlii.ca/t/529s2> retrieved on 2014-09-13

[4] Immigration and Refugee Protection Regulations, SOR/2002-227, <http://canlii.ca/t/529xj> retrieved on 2014-09-13

officer has reasonable grounds to believe is inadmissible to Canada,[5] is a danger to the public, or is unlikely to appear for an examination, an admissibility hearing, or removal from Canada. As per section 55.2 of IRPA, an officer may also without a warrant arrest and detain a foreign national (other than a protected person[6]), who the officer has reasonable grounds to believe is inadmissible, a danger to the public, unlikely to appear for examination, and in addition if the officer is not satisfied with the identity of the foreign national in the course of any procedure under the Act. Furthermore, section 55.3 of IRPA also allows for detention without a warrant upon entry to Canada, if an officer considers it necessary to detain the person in order for an examination to be completed or has reasonable grounds to suspect that the permanent resident or foreign national is inadmissible on grounds of security for violating human or international rights.

Although Canadian law provides for automatic review hearings at predetermined intervals, there is no express outer time limit to the total detention period under Canadian law. The lack of upper time limits on detention in Canada compares poorly with thresholds in other countries of destination across Europe, including Ireland (30 days), France (32 days), Spain (40 days), and Italy (60 days). When contextualized with other states that receive a high number of immigrants and asylum seekers annually and that lack upper limits on time spent in immigration detention, the shortcoming of contestation in Canada is notable. In the United States, for example, a series of Supreme Court cases has set presumptive – though not constitutional – limits on the time that an immigration detainee can be held.[7] It should be said, however, that while the Court deemed detention for six months presumptively reasonable, the US government has acknowledged that in

[5] Inadmissibility is governed by sections 33-43 of IRPA, and encompasses several grounds upon which a person may be deemed inadmissible to Canada, including serious criminality, participating in war crimes and crimes against humanity, and financial or health reasons.

[6] Protected person is a person who was granted refugee protection under s.96 and/or s. 97. Of IRPA or has had a positive Pre-Removal Risk Assessment Decision.

[7] There are three key Supreme Court cases challenging the indefinite nature of immigration detention in the United States. First, a five to four majority held in *Zadvydas v. Davis, 533 U.S. 678 (2001)* that the detention of a non-citizen who had a final deportation order where the government could not effectuate the removal because no country would accept the individual, was not grounds for indefinite detention. Yet, Congress had meant to create a real deadline for executing orders of removal, and the government needed to show progress on final removal execution and the necessity of continual detention. Second, a five to four majority in *Demore v. Kim, 538 U.S. 510* (2003) distinguished the limit on removal post the deportation or removal proceedings. Mandatory detention without the possibility of bond was not an unconstitutional deprivation of liberty for a permanent resident alien who had conceded removability due to a conviction and sought discretionary relief. The majority expressly assumed that the detention period would be brief. Third and finally, in *Clark v. Martinez, 543 U.S. 371 (2005)*, the Court extended the limited detention interpretation used in *Zadvydas*. This case involved a group of Cuban detainees held for much of twenty-five years as "inadmissible" aliens but who lacked any possibility of gaining regular status through immigration legislation. The majority of the Court concluded that Congress must have intended to allow individualized assessments and release where there was no possibility of deportation. See, e.g., Lenni B. Benson, *As Old as the Hills: Detention and Immigration*, 5 INTERCULTURAL HUMAN RIGHTS LAW REVIEW (2010); Ellis M. Johnston, *Once a Criminal, Always a Criminal? Unconstitutional Presumptions for Mandatory Detention of Criminal Aliens*, 89 GEORGETOWN IMMIGRATION LAW JOURNAL (2001); and Mark L. Noferi, *Cascading Constitutional Deprivation: The Right to Appointed Counsel for Mandatorily Detained Immigrants Pending Removal Proceedings*, 18 MICHIGAN JOURNAL OF RACE & LAW (2012).

2010 more than 100 asylum seekers remained in custody after a year of detention.[8] Likewise, in the United Kingdom where there is no official upper time limit for an individual's period of immigration detention, a body of case law has established that pre-deportation detention should not exceed six years.[9]

A Member of the Immigration Division (ID) of the Immigration and Refugee Board (IRB) reviews detention after 48 hours, then within the next 7 days, and then every subsequent period of 30 days. The Canadian Border Services Agency (CBSA) represents the government at the detention reviews and admissibility hearings. People who are released from detention may be subject to "any conditions" that the ID "considers necessary, including the payment of a deposit or the posting of a guarantee for compliance with the conditions."[10] The CBSA claims that 74 per cent of detainees are released within 48 hours.[11] It also indicates that 90-95 per cent of asylum applicants are released into the community.[12] Nevertheless, in summer 2014, at least 145 migrants were detained in Canada for more than six months.[13]

While the IRB oversees detention reviews, the CBSA is the detaining authority responsible for ports of entry and enforcing IRPA. So-called low-risk detainees are held in immigration holding centres (IHCs) and high-risk detainees – people with criminal backgrounds, potential for flight risk, and/or mental health of behavioural problems - are held in the non-CBSA operated provincial correctional or remand facilities.

The architecture of Canadian detention encompasses long-term, short-term, and makeshift holding facilities. The three immigration holding centres (IHCs) are located in the top cities of destination for migrants and asylum seekers. The Toronto IHC has a capacity of 200 beds and 69 cots for overflow. The Laval (Quebec) IHC has a capacity of 150 beds and is located near Montreal. Finally, the British Columbia IHC is located in the basement of the Vancouver International Airport and has a capacity of 24 beds (although this third facility only detains people for up to 72 hours). Private security companies provide the guards and workers that staff the IHCs.[14] Detainees are also held

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[8] Christina Elefteriades Haines & Anil Kalhan, *Detention of asylum seekers en masse: Immigration Detention in the United States*, *in* IMMIGRATION DETENTION: THE GLOBAL MIGRATION OF A POLICY AND ITS HUMAN IMPACT (Amy Nethery & Stephanie J. Silverman eds., Forthcoming);

[9] Amuur v. France (1996) EHRR 533; Chahal v. United Kingdom (1997) 23 EHRR 413; and R (Saadi) v Secretary of State for the Home Department (2002) UKHL 41. See, e.g., Cathryn Costello, *Human Rights and the Elusive Universal Subject: Immigration Detention Under International Human Rights and EU Law*, 19 INDIANA JOURNAL OF GLOBAL LEGAL STUDIES (2012); Helen O'Nions, *Exposing Flaws in the Detention of Asylum Seekers: A Critique of Saadi*, 17 NOTTINGHAM LAW JOURNAL (2008); and Daniel Wilsher, *The Administrative Detention of Non-Nationals Pursuant to Immigration Control: International and Constitutional Law Perspectives*, 53 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY (2008).

[10] Section 58 (3), Immigration and Refugee Protection Act 2002.

[11] NICHOLAS KEUNG, *Hundreds held in Canada's immigration cells*(2013), at http://www.thestar.com/news/canada/2013/11/18/hundreds_held_in_canadas_immigration_cells.html#.

[12] ALICE EDWARDS, *Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants*(2011), at http://www.unhcr.org/refworld/docid/4dc935fd2.html. 56.

[13] NICHOLAS KEUNG, *Report alleges 'political interference' in migrant detentions* (2014), at http://www.thestar.com/news/immigration/2014/06/09/report_alleges_political_interference_in_migrant_detentions.html.

[14] STEPHANIE J. SILVERMAN, *Detention and Asylum in Canada and Abroad*, *in* Detention and Asylum Research Cluster Working Papers (Jennifer Hyndman & Delphine Nakache eds., 2013).

while awaiting hearings or transfers in additional CBSA-operated facilities (such as the Pacific Region Enforcement Centre) and RCMP or other federal and/or provincial facilities in all provinces and territories save for tiny Prince Edward Island and the northernmost Northwest Territories. A "significant number of detainees" are also held short-term in local and municipal police detachments.[15]

Similar to the high financial costs in the US and the UK[16] the Canadian version is extremely expensive relative to its size and effectiveness. In Fiscal Year (FY) 2008-09, detention and removal programs cost approximately 92 million CDN, of which detention costs amounted to 45.7 million CDN or an average of 3,185 CDN per detained case. In FY 2008-09, the cost to Canadian taxpayers of detaining one person for one day in non-CBSA provincial facilities ranged from $120 to $207 CAD.[17] The cost now stands at around $239 CAD per person per day.[18] Thus, for the cohort of detainees held for over 6 months described above, the cost to taxpayers stands at over 6.2 million Canadian dollars. In addition, as we describe below in relation to the Toronto Bail Project, community release and other alternatives provide options that are far less financially costly than custodial detention.

Importantly, while the administrative detention regime described above is governed by IRPA and its regulations stipulating classes of person against whom it is possible to affect detention as well as guarding against indefinite detention, we hope to show that there is a serious discrepancy between the procedural and substantive regime and daily practices of immigration detention. These practices are often arbitrary and result in a problematic discretionary system where oversight becomes problematic, further marginalizing the detainees.

The mandatory detention provision

Forming a corollary to the detention system not featuring in normalized, every day practices, mandatory detention is still important for understanding the Canadian immigration detention system. C-31, the Protecting Canada's Immigration System Act (an amendment to IRPA 2001), was introduced in February 2012 and eventually passed that December. The Act gives the Minister of Public Safety broad discretion to designate

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[15] CANADIAN RED CROSS SOCIETY, Canadian Red Cross Society Annual Report on Detention Monitoring Activity in Canada, 2012 - 2013 (Canadian Red Cross Society 2013). 13.

[16] The US White House continues to request billions of dollars for the detention operations. For the Fiscal year 2014), 1.84 billion US dollars has been requested for Department of Homeland Security Operations. This funding level would amount to over $5 million per day spent on immigration detention, with a daily cost per detainee of approximately $159 at a capacity of 31,800. See National Immigration Forum, *The Math of Immigration Detention*(2014), *available at* http://immigrationforum.org/blog/themathofimmigrationdetention/.

The UK Home Office generally does not publish figures on the financial costs of its immigration detention system. Nonetheless, on 4 February 2010, the UK Government reported in Parliament that the average overall cost of one bed per day was £120. This figure enables us to estimate the annual operating costs of particular detention centres. For example, Campsfield House in Kidlington, Oxfordshire, usually operates at 90% capacity with 194 (of a possible 216) migrants detained there, and so we can estimate that this particular centre costs approximately £8,497,200 per year to run. See Stephanie J. Silverman & Ruchi Hajela, *Immigration Detention in the UK - Updated*, MIGRATION OBSERVATORY BRIEFINGS (2012).

[17] DELPHINE NAKACHE, The Human and Financial Cost of Detention of Asylum-Seekers in Canada (The United Nations High Commissioner for Refugees 2012). 39, 38.

[18] Keung, "Hundreds held".

two or more foreign nationals as a group of "irregular arrivals" on the basis that they cannot be examined in a timely manner or on suspicions of "smuggling." Such groups are given a two-week review of refugee admissibility. If the "Designated Foreign Nationals" (DFN) classification goes through, the group is liable for a one-year period of detention for all persons aged 16 or older; the Minister will use discretionary power to decide whether to detain children under 16 or to forcibly separate them from accompanying parents for one year. The 09 May 2012 amendments to Bill C-31 introduced the possibility of conducting a review every 180 days.[19] The Minister of Public Safety has only made an "irregular arrivals" designation once, for a group of Romanian asylum seekers in December 2012. This group opted to return to Romania rather than press their cases to stay in Canada and spend the year in detention.

C-31's mandatory detention provision is an exceptional tool aimed at curbing the mobility and deterring future entrants from particular classes of migrants. A growing body of literature focuses on how "exceptions" such as the irregular arrivals designation provide evidence of a securitisation turn in Canadian refugee policy, citing detention as a major outcome of this policy shift.[20]

Composite case study

Amir is a composite of a number of case histories from real immigration detainees in the Toronto IHC and the Lindsay Super Jail that have been compiled through one author's work at a community legal clinic in Ontario. *Amir* realistically sketches a typical journey through the Ontario branch of the federal immigration detention system on the path to release. The case highlights cross-sectional interaction amongst diverse factors in detention, such as immigration status, criminal history, date of arrival, and sending country conditions. Names, dates, geographic locations, and any other identifying features have been changed to protect identities.

Amir is a 31-year-old male from Somalia. He came to Canada as a Convention Refugee through the Office of the UNHCR in Nairobi, Kenya with his family in the late 1990's when he was still a minor. He gained Permanent Residence upon arrival to Canada as a Government Assisted Refugee.[21] *While the rest of his family obtained Canadian citizenship after a few years, Amir never completed his application and remained a permanent resident.*

Coming to Canada as a teenager, Amir did not have an easy time transitioning into Canadian social life. When the family moved from a small Quebecois town to Toronto, he started distancing himself from his family and fell into a pattern of escalating criminal

[19] STEPHANIE J. SILVERMAN, *In the Wake of Irregular Arrivals: Changes to the Canadian Immigration Detention System*, Refuge: Canada's Periodical on Refugees (Forthcoming).

[20] See, e.g., COLLEEN BELL, *Subject to Exception: Security Certificates, National Security and Canada's Role in the 'War on Terror'*, 21 Canadian Journal of Law and Society (2006); MIKE LARSEN & JUSTIN PICHé, *Exceptional State, Pragmatic Bureaucracy, and Indefinite Detention: The Case of the Kingston Immigration Holding Centre*, 24 Canadian Journal of Law and Society (2009); KIM RYGIEL, *Governing mobility and rights to movement post 9/11: Managing irregular and refugee migration through detention*, 16 Review of Constitutional Studies (2012).

[21] Government Assisted Refugees (GARs) are refugees whose resettlement to Canada is assisted by the Canadian Government, based on them qualifying for Convention Refugee Status through the UNHCR refugee status determination process in their countries of origin.

behaviour. In his mid-twenties, Amir spent a few years in jail for aggravated assault with a weapon. He also started heavily using drugs and alcohol, and did not have access to community supports to deal with his addictions.

Amir was arrested again for drug possession in 2012. Upon the start of his criminal proceedings, CBSA notified him that because of his serious criminal conviction and escalating pattern of criminality, the Minister of Citizenship and Immigration was commencing proceedings to have his Convention status vacated in order to strip him of his Canadian permanent residence, thus clearing the way to removal. This notification came as a surprise to Amir, who did not know that he could lose his permanent residence status due to his criminality.

The Canadian Government began the process of trying to remove Amir from Canada on grounds of serious criminality and national security, as per section 36(1)(a) of IRPA. Amir was being held in the Toronto IHC while CBSA started the process of trying to obtain travel documents in order to remove him from Canada. During this process, Amir was able to obtain a Legal Aid Certificate to have a lawyer assist him with a danger opinion, an application rebutting the Minister's allegations that Amir is a danger to Canadian public. Unfortunately, the danger opinion did not succeed, and Amir was declared to be a danger to the public pursuant to Section 115(2)(a) of IRPA.

Amir wanted to appeal his danger opinion to the Federal Court because the case officer who assessed the danger opinion made a number of errors and unfair assertions. However, Amir's Legal Aid lawyer deemed the application to be without merit and was not able to continue to represent Amir. While in the process of trying to find another lawyer, Amir was informed that in 48 hours, he would be transferred to the Lindsay Super Jail. Amir was told his transfer was due to a lack of space in Toronto. He was also told that he would be placed in the immigration holding wing of the provincial facility.

Upon arrival at Lindsay, Amir was given an orange jumpsuit and shown to his cell. He occasionally interacted with other men who were also facing removal from Canada. He frequently mingled with men who were incarcerated at the medium-security prison for serious crimes.

Once in the Lindsay Super Jail, Amir found it increasingly difficult to maintain contact with the outside world. He did not have Internet access and could not look up any information about his case. He was unable to find another Legal Aid lawyer and could not afford a private bar lawyer to represent him. No one at the community legal clinics that he contacted had the capacity to drive out to Lindsay to see him.

Further complicating his case is the fact that Somalia no longer recognizes Amir as a citizen, since he left Mogadishu as a minor during the conflict in the late 1990s and became a Convention Refugee. CBSA is unable to proceed in the removal of Amir from Canada; he does not have any valid travel documents and Somalia is refusing to recognize him as a citizen and admit him into the country. The Somali embassy has been refusing to cooperate, denying Amir any meaningful information about his status in Somalia.

In early 2014, the CBSA informed Amir that he was scheduled for deportation in one week. His removal officer told him that he was going to be flying with an escort of two guards and that he would be flown to Nairobi and then moved to Mogadishu. At this point, Amir has been in detention for two years and he was ready to leave Lindsay and begin trying to survive in Somalia, a country he had not seen in 16 years. Upon arrival in

Nairobi, however, he was not allowed to disembark the plane. His escorts did not give him much information, notwithstanding that the Kenyan government was refusing to let him enter due to his status as a "Canadian criminal." After 20 hours on the tarmac, Amir was escorted in handcuffs to another plane and flown back to Canada. Upon arrival, he was returned to the Lindsay Super Jail and given only minimal information about what to expect to him next[22].

Amir continues to attend his detention hearings every month, always without counsel. CBSA maintains that he is a danger to the Canadian public and national security, and that he cannot be released from Lindsay. Since CBSA has not been successful at obtaining travel documents for him, Amir faces the prospect of indefinite detention in Canada.

Locations of immigration detention sites

The Canadian immigration detention system is, relative to the United States or the United Kingdom, small in capacity.[23] The facilities are stretched across the entire breadth of Canada, meaning that dispersal amongst centres is a common complaint. There is good cause for concern: shuttling amongst IHCs and other holding centres can be disruptive to a detainee's legal case and to their emotional and psychological stability. Yet, due to the relatively small size of the system, dispersal amongst facilities is often the most viable strategy for housing after a large-scale detention order is made or when a large group of new arrivals is detained.[24] Although the IHCs are located close to the top three destination cities for migrants coming to Canada, the provincial jails are more difficult to get to without a car. The far-flung locations of the jails complicate the abilities of detainees' networks to visit and to provide support as well as to access and retain counsel.

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[22] Interestingly, a recent repost of The Current, a news radio program of CBC radio highlighted the story of Saeed Jama's problematic deportation from Canada to Mogadishu and CBSA's involvement in smuggling him across the Kenyan border with no travel documents. For more information, see: http://www.cbc.ca/thecurrent/episode/2014/11/04/no-mans-land-saeed-jama/

[23] As a snapshot, the US held 31,075 people in immigration detention on 1 September 2009 and the UK held 2,525 immigration detainees on 31 December 2010 (Dora Schriro, (2009). Immigration Detention: Overview and Recommendations. U.S. D.H.S. Reports. Washington, D.C., U.S. Department of Homeland Security**:** 35; UK Home Office, T. (2011, 24 February). "Control of Immigration: Quarterly Statistical Summary, United Kingdom: Quarter 4 2010 (October - December)." Home Office Statistical Bulletins. Retrieved 20 March, 2011, from http://rds.homeoffice.gov.uk/rds/pdfs11/control-immigration-q4-2010.pdf.)

[24] For example, after the arrival of the MV Sun Sea cargo ship carrying 492 Sri Lankan asylum seekers to the Pacific province of British Columbia in August 2010, nearly 200 male passengers and crew were housed in a makeshift detention area set up in the yard of the Fraser Regional Correctional Centre; women went to the Alouette Correctional Centre, and those with children went to the Burnaby Youth Custody Services Centre. These facilities are located in the district of Maple Ridge, over 40 kilometres away from Vancouver (STEPHANIE J. SILVERMAN, *In the Wake of Irregular Arrivals: Changes to the Canadian Immigration Detention System*, 30 Refuge: Canada's Periodical on Refugees (2014).). IRB statistics from June 2014 show that, of the 76 men on the Ocean Lady, 30 have been accepted as refugees and seven have been issued deportation notices. Another 27 had their claims rejected but are under review. One case is set to be heard by the Supreme Court in 2015. See MAUREEN BROSNAHAN, *Ocean Lady migrants from Sri Lanka still struggling 5 years later* (2014), at http://www.cbc.ca/news/politics/ocean-lady-migrants-from-sri-lanka-still-struggling-5-years-later-1.2804118.

The arbitrary dispersal of immigration detainees across Canada flags a related concern: namely, there is a correlation between some places recording statistically higher instances of arrest leading to detention than other places which do not detain suspected irregular immigrants quite so readily. In other words, the arbitrary location of arrest means a higher likelihood of detention. The advocacy group, the Canadian Council for Refugees, observes that

> Asylum seekers in Toronto and Montreal appear to be more readily detained than asylum seekers in other areas, because of the convenient availability of a detention centre. Furthermore, there are indications that in those cities the decision to detain or not detain is significantly influenced by how full the detention centre is and whether there is money in the detention budget or not.[25]

Numerous studies in the US and Australian contexts demonstrate that racial and ethnic prejudices are not uncommon factors in choices to arrest and detain suspected irregular residents;[26] obviously, these two factors are also not legally relevant to the arresting decision, and should be seen as unfair. In the Canadian context, the Transit Police officer who first detained Lucía Vega Jiménez during a Vancouver SkyTrain station fare check last December said her Spanish accent was one reason he decided to phone CBSA.[27] This situation may amount to an arbitrary deprivation of liberty, a contravention of international legal rules on practicing detention.[28] It is also another

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[25] Canadian Council for Refugees. "Submission on the occasion of the visit to Canada of the UN Working Group on Arbitrary Detention." 08 June 2005, accessed 01 May 2014 from https://ccrweb.ca/en/submission-occasion-visit-canada-un-working-group-arbitrary-detention.

[26] David Anton Armendariz, *On the Border Patrol and its Use of Illegal Roving Patrol Stops*, 14 ST. MARY'S LAW REVIEW ON MINORITY ISSUES (2012); Carrie L. Arnold, *Racial Profiling in Immigration Enforcement: State and Local Agreements to Enforce Federal Immigration Law*, 48 ARIZONA LAW REVIEW (2007); César Cuauhtémoc García Hernández, *La Migra in the Mirror: Immigration Enforcement, Racial Profiling, and Psychology of One Mexican Chasing After Another*, 72 ALBANY LAW REVIEW (2009); Mary Romero & Marwah Serag, *Violation of Latino Civil Rights Resulting from Ins and Local Police's Use of Race, Culture and Class Profiling: The Case of the Chandler Roundup in Arizona*, 52 CLEVELAND STATE LAW REVIEW (2005); and Leanne Weber, *'It sounds like they shouldn't be here': Immigration checks on the streets of Sydney*, 21 POLICING AND SOCIETY (2011).

[27] David P. Ball, *Deceased Deportee's Accent Led to Border Services Arrest*(2014), *available at* http://thetyee.ca/News/2014/09/30/Vega-Jimenez-Arrested-Accent/.

[28] Detention must be non-arbitrary to be considered legal. Article 9 of the International Covenant on Civil and Political Rights provides, *inter alia*, that no one shall be subject to arbitrary arrest or detention, and the Human Rights Committee's General Comment no. 8 on the Right to Liberty and Security of Persons, specifically includes immigration control. In soft law, the test for non-arbitrariness is based on the individual circumstances of the immigration detainee, and should proceed from a consideration of alternatives which are found to be inappropriate in the detainee's case (HELEN O'NIONS, *No Right to Liberty: The Detention of Asylum Seekers for Administrative Convenience*, 10 European Journal of Migration and Law (2008): 156 -161). On the difficulties of interpreting and proving arbitrariness in immigration detention proceedings, see CATHRYN COSTELLO, *Human Rights and the Elusive Universal Subject: Immigration Detention Under International Human Rights and EU Law*, 19 Indiana Journal of Global Legal Studies (2012); KAY HAILBRONNER, *Detention of Asylum Seekers*, 9 European Journal of Migration and Law (2007); BEN SAUL, Dark Justice: Australia's Indefinite Detention of Refugees on Security Grounds under International Human Rights Law (Sydney Law School 2013).

instance of the *refugee roulette* whereby asylum seekers must participate in an unfair judicial system, a concern which will be explored in more depth in another section.

Daily conditions in the Canadian detention system

The CBSA operates IHCs as akin to medium-security prisons, complete with uniformed guards, centrally-controlled doors, and razor wire outside and CCTV cameras inside. Personal effects, such as mobile phones, photos, and other paraphernalia, are confiscated. Guards must escort detainees from one area to another. Detainees are relegated to the common rooms of their allocated sections, with minimal access to the outdoor yard. Brief solitary confinement or suspension of privileges can be used as punishment for transgressing IHC rules.[29]

Detainees held in provincial facilities, such as the maximum-security Central East Correctional Centre (known as the "Lindsay Super Jail") in Lindsay, Ontario, face a more regimented and securitized environment. Unlike in the IHCs, detainees held in provincial prisons are required to wear orange jumpsuits instead of their street clothes. In 2012, an estimated 3952 immigration detainees were housed in correctional facilities across Canada.[30]

Additional daily conditions relevant to the discussion of procedural justice for immigration detainees in Canada include: the limited hours of visitation to detainees; the difficulties detainees experience gathering case-relevant evidence relevant from detention; overcrowding, particularly in provincial prisons; and the use of handcuffs on detainees as they travel from IHC to court or hospital. In addition, cultural and linguistic barriers compromise the abilities of some detainees to proceed fruitfully through their asylum and immigration adjudication procedures.

Neglect or abuse by medical and other professionals employed in detention centres can lead to distressing situations and even death. For example, the guards, doctors, and nurses who encountered Czech asylum seeker Jan Szamko at the Toronto IHC in 2011 did not detect that his odd behavior was due to a lethal fluid buildup that compressed his heart, lowered his blood pressure, and subsequently shut down his bodily functions. On 08 December 2011, Szamko became the first immigration detainee to die in a Canadian facility. After accounting for former detainees who die soon after release from detention or die because their health was directly corroded by detention, the number of detention-related deaths would continue to climb.[31] A 43-year-old Georgia man died in CBSA custody on 27 September 2014 after suffering undisclosed injuries at the Niagara Detention Centre in Thorold, Ontario. It is unclear who was guarding that facility.[32] There are also allegations of foul play after it was revealed that the 63-year-old US citizen Maxamillion Akamai died on the same day that he was released from the infirmary in Maplehurst, a provincial prison, where he had been detained under CBSA

[29] JANET CLEVELAND, *Detention of asylum seekers in Canada*, *in* Immigration Detention: The Journey of a Policy and its Human Impact (Amy Nethery & Stephanie J. Silverman eds., Forthcoming).
[30] CANADIAN RED CROSS SOCIETY, Canadian Red Cross Society Annual Report on Detention Monitoring Activity in Canada, 2012 - 2013 (Canadian Red Cross Society 2013). 24.
[31] SILVERMAN, In the Wake.
[32] MICHAEL FRISCOLANTI, *As inquest begins, another death in immigration custody*(2014), at http://www.macleans.ca/news/canada/as-coroners-inquest-begins-another-inmate-dies-in-immigration-custody/.

authority.[33] The death of Lucía Vega Jiménez, a 42-year-old failed refugee claimant from Mexico who hanged herself last December inside the Vancouver IHC, will be discussed below.

Barriers to obtaining high-quality legal counsel

On appointment, lawyers and counsel gain access to the facility after thorough security screening with a metal detector. Counsel must also remove all staples and paper clips from all documents. Appointments take place either in a glass-partitioned room with a two-way telephone which routinely cuts out, or a face-to-face meeting room can be arranged. There are also limited videoconferencing capabilities, to which the Refugee Law Office, a subsidiary branch of Legal Aid Ontario, has access. All personal effects are also confiscated.

Lawyers, friends, and family members are permitted to visit IHCs at prescribed times. A glass partition separates visitors from detainees in the Toronto IHC, while they may mingle in a common room at the Laval IHC. Guards search visitors with a metal detector. A private room is provided for lawyers to meet with their clients. Toronto and Montreal NGOs have agreements with CBSA to access the site and meet with detainees. In Toronto, they may use an on-site office for meeting detainees but are not allowed in the common rooms, whereas at Laval, they may enter the common rooms but have no designated office.

A further complication concerns the growing use of videoconference technology. Typically, an immigration judge in one courtroom will hear to hear the case of an immigration detainee located in another courtroom closer to the detention centre but miles away. Certain respondents to the IRB's 2004 commissioned review of the practice expressed beliefs that the Members "cannot see the faces of claimants or witnesses clearly, cannot look in the claimant's eyes, cannot see facial reactions, or other traditional credibility clues or nuances of the claimant's or witness's demeanor."[34] Indeed, studies have shown that videoconferencing technology negatively alters the way that an immigration judge perceives an asylum claimant's testimony, thus unfairly influencing the outcome of an asylum hearing.[35] Furthermore, if an interpretation is necessary, the interpreter will be located in the court where the judge presides, and so will be available to the detainee only through videoconference. This dislocation is a problem of realizing procedural justice because studies record a significantly higher number of interpreting problems, and a faster decline of interpreting performance over time, in remote legal

[33] MICHAEL FRISCOLANTI, *A free man—on paper*(2014), at http://www.macleans.ca/news/canada/a-free-man-on-paper/.

[34] S. Ronald Ellis, *Videoconferencing in Refugee Hearings: Report to the Immigration and Refugee Board Audit and Evaluation Committee*, Government of Canada(2004), *available at* http://www.irb-cisr.gc.ca/Eng/transp/ReviewEval/Pages/Video.aspx.

[35] Mark Federman, *On the Media Effects of Immigration and Refugee Board Hearings via Videoconference*, 19 JOURNAL OF REFUGEE STUDIES (2006); Commentators in the US context have argued that, as a matter of law, videoconferencing technology does not have a coherent rationale and it tests the limits of the Due Process Clause. See: Frank M. Walsh & Edward M. Walsh, *Effective Processing or Assembly-Line Justice? The Use of Teleconferencing in Asylum Removal Hearings*, 22 GEORGETOWN IMMIGRATION LAW JOURNAL (2008).

interpreting.[36]

Problems of comprehension are compounded if a detainee is suffering from a mental impairment and/or cognitive disability. Indeed, this concern is so great that legal arguments for assignation of a *guardian ad litem* for mentally disabled immigration detainees are not uncommon.[37] Further, since the open-ended nature of detention systems without time limits can be experienced as mental torture,[38] the deterioration of mental health in detention is not an insignificant barrier to procedural justice.

Telephone access

The subject of telephone communication is a perennial problem for immigration detainees. In the US context, unsatisfactory telephone access is highlighted in a report on 18,000 pages of court-ordered discovery[39] of portions of American Bar Association, UNHCR, and Immigration and Customs Enforcement detention facility review reports from 2001 through 2005.[40] In the Canadian context, problems arise from the policy of confiscating mobile telephones in both the IHCs and the provincial prisons. Detainees are limited to making calls out of the provincial prisons; they cannot receive incoming calls, even from counsel or offspring, unlike in the IHCs.

This reliance on local payphones for outside contact is far from sufficient for a number of reasons. Some correctional facilities limit phone calls to 20 minutes or less. This brief allowance makes discussing immigration cases with counsel at length very

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[36] Sophie Braun, *Keep your distance? Remote interpreting in legal proceedings: A critical assessment of a growing practice*, 15 INTERPRETING (2013).

[37] ALICE CLAPMAN, *Hearing Difficult Voices: The Due Process Rights of Mentally Disabled Individuals in Removal Proceedings*, 45 New England Law Review (2011); HUMAN RIGHTS WATCH, Deportation by Default: Mental Disability, Unfair Hearings, and Indefinite Detention in the US Immigration System (Human Rights Watch 2010); ALIZA B. KAPLAN, Disabled and Disserved: The Right to Counsel for Mentally Disabled Aliens in Removal Proceedings (Lewis & Clark Law School 2012); and FATMA E. MAROUF, *Incompetent but Deportable: The Case for a Right to Mental Competence in Removal Proceedings*(2013), at http://scholars.law.unlv.edu/facpub/809/.

[38] The medical literature is definitive on this point. See, e,g., JANET CLEVELAND & CéCILE ROUSSEAU, *Psychiatric symptoms associated with brief detention of adult asylum seekers in Canada*, 57 Canadian Journal of Psychiatry (2013); JANETTE P. GREEN & KATHY EAGAR, *The health of people in Australian immigration detention centres*, 192 Medical Journal of Australia (2009); NICHOLAS PROCTER, et al., *Suicide and self-harm prevention for people in immigration detention*, 199 Medical Journal of Australia (2013); KATY ROBJANT, et al., *Psychological distress amongst immigration detainees: A cross-sectional questionnaire study*, 48 British Journal of Clinical Psychology (2009); DERRICK SILOVE, et al., *Detention of asylum seekers: assault on health, human rights, and social development*, Lancet 1436(2001); NAYANAH SIVA, *Time in detention*, 381 The Lancet (2013);

[39] The US government released these documents only as a result of court-ordered discovery in *Orantes-Hernandez v. Holder*. *Orantes* is a lawsuit originally brought in 1982 to challenge coercive practices by immigration agents, including practices at immigrant detention facilities, that pressured nationals of El Salvador fleeing their country's civil war to forfeit meritorious claims to asylum (NATIONAL IMMIGRATION LAW CENTER, et al., A Broken System: Confidential Reports Reveal Failures in U.S. Immigration Detention Centers (National Immigration Law Center 2009: Footnote 6).

[40] "The most pervasive and troubling violations [related to telephone access] are lack of privacy afforded to detainees when making confidential legal calls, monitoring of legal calls by facility officials, failure to post instructions regarding free and other special access calls, arbitrary and unnecessary time limits placed on detainees' telephone calls, and refusal by facility staff to deliver phone messages to detainees." NATIONAL IMMIGRATION LAW CENTER, et al., A Broken System: Confidential Reports Reveal Failures in U.S. Immigration Detention Centers (National Immigration Law Center 2009): ix.

difficult.[41] Calling cards are needed to make long-distance calls. Detainees arrested upon arrival or picked up in a CBSA raid may have little or no Canadian currency to purchase calling cards, thus compromising communication from one of the provincial facilities located hours from a large urban area. Some facilities only allow collect-calls, costing on average 0.75 CDN, a cost that can be prohibitive for detainees looking to maintain contact with counsel and their support networks.[42] Beyond reaching counsel, access to telephones while in detention also allows detainees to maintain contact with family and friends, including their Canadian-citizen children.

Without adequate telephone access, detained asylum seekers who are transferred amongst facilities may not be locatable in the "black box"[43] of immigration detention. Since their cellphones and personal effects are confiscated upon arrival, detainees are not only unable to notify counsel and loved ones when they are transferred, but they may lose the contact information for these people. As mentioned, the fees for long-distance calling can be high, and so transfer to an IHC across the country can mean the *de facto* cutting off of telephone communications. In the experience of one of the authors, it is possible for counsel to phone specific IHCs and request notification of the whereabouts of a specific, named client. Anecdotally, this process typically involves calling around to the different facilities. For places like the Lindsay Super Jail that only function on outgoing collect-calls, this process is a non-starter. Nevertheless, usually if a client is transferred from an IHC to a provincial facility like the Lindsay Super Jail, counsel will be notified of the transfer when she calls the IHC. A simple though not wholly satisfactory solution to this problem would be to allow detainees to keep their mobile phones while implementing a free locating service not unlike the US's "Online Detainee Locator System". While imperfect, the US Locator is a free website for locating an adult detainee in US custody, or who was released from US custody for any reason within the previous 60 days.

Vulnerable people

"Vulnerable people" is a quasi-legal category that sometimes provides for additional procedural safeguards in the refugee claim process. This category is understood to include minors, pregnant women, torture survivors, the elderly, the mentally disabled and unwell, and other people who are at particular risk of trauma from even short periods of immigration detention.

In Canada, there is no systematic screening process to identify vulnerable people caught up in the detention system. CBSA facilities do not offer any type of counseling services.[44] If detainees are identified as exhibiting certain behavioral problems – such as aggressiveness - or mental illness – such as suicidal tendencies – then they may be transferred to prisons; for example, male asylum seekers in Ontario who exhibit behavioural or mental health problems are usually transferred to the Lindsay Super Jail if it is for a long period of time, and to the Toronto West Detention Centre, if it is for a

[41] CANADIAN RED CROSS SOCIETY, Canadian Red Cross Society Annual Report on Detention Monitoring Activity in Canada, 2012 - 2013 (Canadian Red Cross Society 2013). 19.
[42] CANADIAN RED CROSS SOCIETY, Canadian Red Cross Society Annual Report on Detention Monitoring Activity in Canada, 2012 - 2013 (Canadian Red Cross Society 2013). 19.
[43] PETER L. MARKOWITZ, *Barriers to Representation for Detained Immigrants Facing Deportation: Varick Street Detention Facility - A Case Study*, 78 Fordham Law Review (2009): 558.
[44] Nakache *Human and Financial Cost*, 80.

shorter period of time or they exhibit suicidal tendencies.[45] It may be interpreted that two-tiered mental health care is being provided in prisons with Canadian-born people being prioritized over newcomers.[46]

Vulnerable people in immigration detention also do not have access to programming and support services that are often in fact available to the criminal inmate populations. For example, because access to IHCs and provincial prisons is incredibly restricted, very few organizations have access to the immigration detainee populations and no NGOs or community organizations are thus able to offer sustained support services or links with the wider community. Such lack of access to programming further exacerbates the isolation of immigration detainees and results in a bizarre environment in which provincial inmates have access to programming within the jails which they share with the immigration detainees because they are on the path of rehabilitation and eventual release. No such access is afforded to those in immigration detention.

There is a related concern about the co-mingling of immigration detainees with criminal inmates in the provincial prisons. In addition to shared usage of the common area, some detainees are reported to have been sharing cells or units with suspected gang members and violent offenders.[47] Exposure to violent or gang-affiliated criminals can inadvertently lead to emotional, physical, or psychological harm for detainees. Further, when immigration detainees are co-mingled in the same unit or cell with persons with mental health disorders, they are generally granted less time outside and there may be an overall negative impact on detainees' well-being.[48] Co-mingling may be especially harmful to detainees if they have experienced war, torture or are otherwise at risk of re-traumatisation, thereby compounding the issue of Canada's absence of an identification process for vulnerable persons.

Children

Men and women are detained in separate wings of the IHCs with a different section for children and their mothers. As there is no family section, fathers are separated from the family and must make do with daily visits. CBSA policy is to arrange for schooling for the children after 7 days in the IHCs although this requirement is not always fulfilled or is only fulfilled to a minimum standard.

In 2008, an average of 77 children per month were detained, with the monthly average dropping to 31 in the first 6 months of 2009.[49] In 2012, CBSA officially detained 291 minors under the IRPA, of whom 288 were held in federal facilities and three in provincial ones.[50] Since children who are being detained as "guests" of their detained parent are not included in the official statistical record, the true number of detained children in Canada is most likely higher than the official tally reflects. Further, some provinces such as British Columbia do not have CBSA-operated facilities equipped for

[45] Nakache *Human and Financial Cost*, 82.
[46] Nakache *Human and Financial Cost*, 84.
[47] CANADIAN RED CROSS SOCIETY, Canadian Red Cross Society Annual Report on Detention Monitoring Activity in Canada, 2012 - 2013 (Canadian Red Cross Society 2013). 24.
[48] CANADIAN RED CROSS SOCIETY, Canadian Red Cross Society Annual Report on Detention Monitoring Activity in Canada, 2012 - 2013 (Canadian Red Cross Society 2013). 25.
[49] Canadian Council for Refugees, "Detention", 8, 7.
[50] CANADIAN RED CROSS SOCIETY, Canadian Red Cross Society Annual Report on Detention Monitoring Activity in Canada, 2012 - 2013 (Canadian Red Cross Society 2013). 20.

families, and so the CBSA must rely on support from provincial facilities such as the Burnaby Youth Custody Services Centre to house families.[51]

As a legal rule, children and youth (minors under 18 years of age) should not be held in immigration detention; if they are detained, it should be as a measure of last resort. Section 60 of IRPA affirms "as a principle that a minor child shall be detained only as a measure of last resort, taking into account the other applicable grounds and criteria including the best interests of the child."[52] In those exceptional cases where they are detained, international law requires governments to hold children in facilities and conditions appropriate to their age.[53] As per Article 37 of the UN Convention on the Rights of the Child:

> No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.[54]

However, while Canada has ratified the UN Convention on the Rights of the Child, which insists that "the best interests of the child"[55] always be a primary consideration and that detention must be a complete "last resort," Canadian detention practices surrounding minors – accompanied or not - continue to be problematic.

The detention of children has received widespread condemnation across the world, and countries such as the U.K., Belgium, France, Sweden and Japan have stopped detaining children in immigration detention facilities all together. Detaining children has proven grave consequences on children's mental, physical, and emotional wellbeing:

> Regardless of the conditions in which they are kept, detention has a profound and negative impact on children. It undermines their psychological and physical health and compromises their development. Children are at risk of suffering depression and anxiety, as well as from symptoms such as insomnia, nightmares and bed-wetting. Feelings of hopelessness and frustration can manifest as acts of violence against themselves or others. Further, detention erodes the functioning of families, meaning that children can lose the support and protection of their parents or take on roles beyond their level of maturity. The detention environment can itself place children's physical and

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[51] CANADIAN RED CROSS SOCIETY, Canadian Red Cross Society Annual Report on Detention Monitoring Activity in Canada, 2012 - 2013 (Canadian Red Cross Society 2013). 21. See Footnote 19 for a description of when the CBSA contracted space in the Burnaby facility to house asylum seekers arriving by boat.

[52] CANADIAN COUNCIL FOR REFUGEES, *Detention and Best Interests of the Child*, Canadian Council for Refugees / Conseil canadien pour les réfugiés, (2009), at http://ccrweb.ca/documents/detentionchildren.pdf., 2.

[53] Nakache, *Human and Financial Cost*, 4.

[54] United Nations Convention on the Rights of the Child, Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 entry into force 2 September 1990, in accordance with article 4. Available at: http://www.ohchr.org/Documents/ProfessionalInterest/crc.pdf

[55] Ibid.

psychological integrity at risk.[56]

Despite knowledge of the enduring harms, CBSA detains children in Canada even when they are not security risks or dangers to the public.

Options for release? Discretionary decision-making regarding release from detention

Research is demonstrating considerable variation in how immigration judges decide seemingly similar asylum claimant cases, particularly those in the US context[57] and those making claims from detention.[58] Legal associations also note the moral and legal difficulties related to non-uniform treatment of vulnerable people.[59] Building on their study of nearly 175,000 immigration and asylum decisions, Ramji-Nogales and colleagues posited an influential argument in 2007 that a "refugee roulette" exists in the United States whereby the ability of an asylum claimant to find permanent protection or be deported to a country in which she or he claims to fear persecution "is very seriously influenced by a spin of the wheel of chance; that is, by a clerk's random assignment of an applicant's case to one asylum officer rather than another, or one immigration judge rather than another."[60] An analogous pattern of asylum claims being adjudicated on the basis of arbitrary factors such as the region where the Member is located, or indeed the Member him- or herself, has been documented in the Canadian context.[61]

The lack of uniformity in judgments correlates to the high degree of discretion afforded to the immigration officers making the initial decision to detain. In other words, the significant disparities in the rates of positive versus negative detention decisions

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[56] INTERNATIONAL DETENTION COALITION, *Captured Childhood: Introducing a New Model to Ensure the Rights and Liberty of Refugee, Asylum Seeker and Irregular Migrant Children Affected by Immigration Detention*(2012), at http://idcoalition.org/wp-content/uploads/2012/03/Captured-Childhood-FINAL-June-2012.pdf. 5.

[57] REBECCA HAMLIN, *International Law and Administrative Insulation: A Comparison of Refugee Status Determination Regimes in the United States, Canada, and Australia*, 37 Law and Social Inquiry (2012); BANKS MILLER, et al., Immigration Judges and U.S. Asylum Policy (University of Pennsylvania Press. 2014).

[58] CARRIE ANNE LOVE, Balancing Discretion: Securing the Rights of Accompanied Children in Immigration Detention (Available at SSRN: http://ssrn.com/abstract=1375645 or http://dx.doi.org/10.2139/ssrn.1375645 2009).

[59] The American Bar Association questions significant disparities in the rates at which immigration court judges grant favourable decisions in the US, even among judges on the same court and for cases involving nationals from the same sending country. See AMERICAN BAR ASSOCIATION & ARNOLD & PORTER LLP, *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases: Executive Summary*(2010), at http://www.abanet.org/media/nosearch/immigration_reform_executive_summary_012510.pdf.

[60] JAYA RAMJI-NOGALES, et al., *Refugee roulette: Disparities in asylum adjudication*, 60 Stanford Law Review (2007): 378.

[61] SEAN REHAAG, *Troubling Patterns in Canadian Refugee Adjudication*, 39 Ottawa Law Review (2009); SEAN REHAAG, The Luck of the Draw? Judicial Review of Refugee Determinations in the Federal Court of Canada (2005-2010) (Osgoode Law School 2012); SULE TOMKINSON, *Prove to me that you are a genuine refugee: Credibility Assessment during Refugee Hearings*, *in* Presentation at the Annual Conference of the Canadian Political Science Association, Brock University, St Catherines, Ontario. (2014).

amongst immigration officers[62] find analogous patterns in judicial decision-making in Canada, particularly concerning release from detention.

Research conducted by the End Immigration Detention Network, a coalition of NGO and advocacy groups in Canada, has found that the rates of release from detention vary widely amongst the 44 Members who were overseeing detention reviews in 2013.[63] There was also a regional finding whereby rates of release in Eastern and Western Canada were noted to be at 24% and 27% respectively whereas the rate of release for Central Canada (Ontario except Ottawa and Kingston) was only 9%. In fact, the rate of release of every member in the Central region was below the national average of 15%. Startlingly, the coalition also found a high bias against detainees who had been incarcerated for a lengthy period of time: "We also found that once an immigrant has had 8 detention reviews, i.e. six months into their detention, their chances of being released were very slim."[64] Since there is no express outer time limit for detention, immigrants and asylum seekers detained for prolonged periods tend to perceive detention reviews as increasingly meaningless as time wears on.[65] However, it is unproven whether there are any differences which are relevant to detention patters in the population of immigrants between eastern/western Canada and central Canada. Success at gaining release from Canadian detention centres is highly dependent upon appearances before particular IRB Members, CIC detention review officers, and federal court judges; these appearances depend solely on exogenous factors like location, which the previous section explained is another shifting piece that detainees do not control.

No release? Time limits and indefinite detention

Unlike in other legal regimes across the world, the administration of immigration detention in Canada can be indefinite.[66] Unfortunately, the general dysfunction of the detention system results in an incongruence between the statutory regime and actual day-to-day practices. This runs contrary to the legislative constraints on detention set out by IRPA as expressly stipulated in the strict system of detention review system. What is truly at issue is the discrepancy between statutorily mandated detention review section 57(1) and 57(2) of IRPA and the actual implementation of this detention review. The increased ministerial discretion in designating classes of detainees who are subject to a different detention review regime, compounded by lack of access to counsel to represent detainees at detention review hearing creates a discrepancy between what is statutorily mandated and the detention review practices that are actually implemented in practice.

For example, statutorily, in the current detention regime, immigration detention must be reviewed within 48 hours of the person first being detained, followed up by a

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[62] LEANNE WEBER, *Down that Wrong Road: Discretion in Decisions to Detain Asylum Seekers Arriving at UK Ports*, 42 The Howard Journal of Criminal Justice (2003).

[63] SYED HUSSAN, Indefinite, Arbitrary and Unfair: The Truth About Immigration Detention in Canada (End Immigration Detention Network 2014): 3.

[64] *Ibid*.

[65] CATHRYN COSTELLO & ESRA KAYTAZ, *Building Empirical Research into Alternatives to Detention: Perceptions of Asylum-Seekers and Refugees in Toronto and Geneva*, UNHCR: The UN Refugee Agency(2013), at http://www.unhcr.org/51c1c5cf9.html. 31.

[66] JANET CLEVELAND, "Immigration Detention in Canada", Global Detention Project Special Report (2012) page 6, available at http://www.globaldetentionproject.org/fileadmin/publications/Canada_special_report_2012_2.pdf

review within the next 7 days, and then every subsequent period of 30 days, as per section 57(1) and 57(2) of IRPA.[67] However, in the cases of Designated Foreign Nationals, the detention regime becomes much more discretionary and mandatory detention becomes possible for up to one year without review. Under C-31, the Protecting Canada's Immigration System Act (an amendment to IRPA 2001), the Minister of Public safely now has the power to designate two or more foreign nationals as "irregular arrivals" and to automatically detain them, with or without a warrant, as per section 55(3)(1) of IRPA. This designation is discretionary and no concrete evidence is required beyond mere suspicion of "irregular" activity, such as taking part in human smuggling. This regime also creates the possibility of indefinite detention, when for example designated foreign nationals are held until they are able to prove their identity. If they are not able to do so within two weeks, they will be detained for an additional 6 to twelve months without review.[68] Conditions of release are equally elusive, as an officer may deem that reasons for detention no longer exist, and as per section 56(1) of the IRPA, may impose any conditions, including payment of a deposit of order of compliance that the officer considers necessary.

Importantly, recent court rulings at the Supreme Court of Canada have addressed the issue of the length of detention allowable without review. In the case of Adil Charkaoui, a Moroccan-born permanent resident arrested on a security certificate in 2003, the Supreme Court ruled that detention without review for 120 days breached section 9 (arbitrary detention) and section 10 (legal rights upon arrest or detention) of the Canadian Charter of Rights and Freedoms.[69]

However, without access to competent counsel to represent them, many detainees are left to fend for themselves in a system of monthly detention reviews that become a cursory attempt at meeting the statutorily imposed review mechanisms. These monthly reviews actually legitimize a system which seemingly allows for detention review without actually giving the detainee the chance to competently and confidently meet the case against them with the assistance of counsel. Furthermore, a detainee does not have access to judicial review of the determination of the immigration officer who decides whether or not they must remain in detention until another review in 30 days. This differs from the availability of judicial review at the Federal Court level of other decisions rendered by administrative tribunals at the Refugee Protection Division, Immigration Division, and even certain requests made to the Canadian Border Services Agency.[70] Importantly, the decisions at detention reviews are made internally by immigration officials with dubious legal training and not by judges.

Indefinite detention: Overlapping, compounding reasons

A person can be detained indefinitely for a number of reasons, some of which overlap and interact. They can range from: having to corroborate one's identity if

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[68] For more information, see ERAT ARBEL AND PETER SHOWLER, "New immigrant detention policy tough on asylum seekers," Hans and Tamar Openheimer Chair in Public International Law, McGill University, 15 February 2013, available at http://oppenheimer.mcgill.ca/New-immigrant-detention-policy

[69] Charkaoui v. Canada (Citizenship and Immigration), [2008] 2 SCR 326, 2008 SCC 38 (CanLII), <http://canlii.ca/t/1z1c0>

[70] Such as a request to defer removal which can be made directly to CBSA and whose decision can be reviewed at the Federal Court.

detained at the point of arrival; lengthy immigration proceedings to obtain status in Canada using the refugee determination process; being deemed a flight risk upon being designated as "removal ready" by CBSA even if there are active applications under review, such as the Humanitarian and Compassionate Application for permanent residence (H&C); consequences of the "refugee roulette" (see previous sections); and the inability of Canada to obtain travel documents from the person's country of origin in order to successfully remove the detainee. Since asylum claimants are detained predominantly for identity reasons, they are at a greater risk of prolonged detention.[71] A detainee who refuses to "volunteer" for removal for fear of persecution remains detained; in these cases, the Immigration Division reasons that continued detention is justified as such detainees are frustrating their own removal from Canada.[72]

Some cases of detention cross a number of these categorisations. For example, detainees who have been designated to be a threat to national security or who are at risk of having their permanent residence stripped on the ground of serious criminality as per section 36(1)(a) of IRPA, may be left in legal limbo for years, resulting in indefinite detention. If they are not able to obtain travel documents from the country to which CBSA is planning to deport them, they face the prospect of being detained with monthly detention reviews, only be told that they are not able to be released because they pose a security risk to Canada, while not being able to be removed because their country of origin is refusing to recognize them as a national. While there are a number of travel documents that a refugee may be issued, Citizenship and Immigration itself states that while a refugee who does not have a passport from their country of origin can apply for a refugee travel document, this cannot be used as a document to enter the country from which they have claimed persecution.[73] A person may apply for a more general Adult Travel Document,[74] but this document does not guarantee entry into the detainee's country of origin, or the country to which they are being deported by CBSA.

The case of Michael Mvogo is instructive here. Canada has detained Mvogo for approximately eight years. He was first arrested in 2005 for possession of a small amount of cocaine and was found to have been travelling on a fraudulent American passport. Subsequent attempts to link him to the US, Haiti, and Guinea failed, and CBSA has not been able to deport Mvogo to any other state. Although Mvogo ultimately revealed that he is a Cameroonian national, he has yet to be recognized as such by Cameroon and has therefore been denied the travel documents to facilitate his removal from Canada. Due to a lack of documents linking him to Cameroon or any other state, CBSA deemed him to be "undeportable".

In 2013, after seven years of detention, a network of migrant rights organizations and individuals, the End Immigration Detention Network, filed an official complaint with the UN Working Group on Arbitrary Detention in 2013 on Mvogo's behalf. On 20 July

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[71] JANET CLEVELAND, *Detention of refugee claimants: Comments on the CBSA Detention and Removal Programs Evaluation Report*(2011), at http://oppenheimer.mcgill.ca/Detention-of-refugee-claimants.

[72] Amnesty International. 2014. CANADA SUBMISSION TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE 112TH SESSION OF THE HUMAN RIGHTS COMMITTEE (7 - 31 OCTOBER 2014). London: Amnesty International: 21.

[73] Citizenship and Immigration Canada, "Help Centre - I am a refugee and I need to travel outside Canada. What documents do I need to travel?", 27 August 2014, Available at http://www.cic.gc.ca/english/helpcentre/answer.asp?q=610&t=11

[74] See for example http://www.ppt.gc.ca/form/pdfs/pptc190.pdf

2014, the Working Group released its opinion, calling for Mvogo be immediately released, stating that "[t]he inability of a state party to carry out the expulsion of an individual does not justify detention beyond the shortest period of time or where there are alternatives to detention, and under no circumstances indefinite detention."[75] Mvogo remains in detention, in the Lindsay facility as of autumn 2014.

Sureties: A thwarted means to mitigate indefinite detention

Typical conditions of release from detention include "depositing a sum of money (usual minimum amount is $2,000 CAD with regular amounts being $5,000 CAD) or signing an agreement guaranteeing a specified amount (a guarantee of compliance), together with or separately from other 'performance' conditions, such as reporting, registering one's address, appearance at immigration procedures, etc. A third party is able to post bail in these circumstances."[76]

Newcomers may face particular challenges in gaining release due to difficulties securing housing and/or finding contacts who can act as sureties and provide bond payments. This problem is particularly acute for asylum seekers who may have fled without the benefit of having friends and family in the destination state. Such people may be at risk of exploitation by bondspeople who volunteer to act as their sureties.[77]

The Toronto Bail Program (TBP) was created in 1996 to providing financial assistance to those who cannot afford bond payments, while also helping individuals find a lawyer and housing. Detainees undergo a screening and assessment process before being accepted, which includes having their identity verified by CIC.[78] Boasting a 96.35% compliance rate in the 2009–2010 financial year, the TBP identifies eligible detainees through a screening and assessment process, supports their applications for release, and then monitors them in lieu of formal detention. The key components of the program are case management, support to access basic information and advice, reporting, and supervision. The cost is approximately $10– 12 CAD per person per day compared with $179 CAD for detention in a designated centre.[79] While a lifeline out of detention, the TBP papers over a deficit in the Canadian detention system by putting up bail for pre-selected individuals, leaving the rest to languish and shutting out community programs as

[75] UN Human Rights Council Working Group on Arbitrary Detention (2014). Opinion adopted by the Working Group on Arbitrary Detention at its sixty-ninth session, 22 April-1 May 2014: No.15/2014 (Canada). 66th Sess, UN Doc A/HRC/WGAD/2104/15. Geneva: UN Human Rights Council Working Group on Arbitrary Detention. Also cited with background in Amnesty International. 2014. CANADA SUBMISSION TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE 112TH SESSION OF THE HUMAN RIGHTS COMMITTEE (7 - 31 OCTOBER 2014). London: Amnesty International.

[76] ALICE EDWARDS, *Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants*(2011), at http://www.unhcr.org/refworld/docid/4dc935fd2.html. 56.

[77] ALICE EDWARDS, *Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants*(2011), at http://www.unhcr.org/refworld/docid/4dc935fd2.html. 60. CATHRYN COSTELLO & ESRA KAYTAZ, *Building Empirical Research into Alternatives to Detention: Perceptions of Asylum-Seekers and Refugees in Toronto and Geneva*, UNHCR: The UN Refugee Agency(2013), at http://www.unhcr.org/51c1c5cf9.html. 32.

[78] GLOBAL DETENTION PROJECT, *Canada Detention Profile*, Graduate Centre(2009), at http://www.globaldetentionproject.org/countries/americas/canada/introduction.html.

[79] STEPHANIE J. SILVERMAN, The Normative Ethics of Immigration Detention in Liberal States (University of Oxford 2013). 130 – 131.

potential bail bondspeople. There are also concerns that TBP's relationship with CIC is too unregulated, that the authorities rely too heavily on it, and that the TBP is no longer a release program but a *prerequisite* to release.[80]

Barriers to procedural justice

The benefits of legal representation for immigration detainees

The severity of the consequences of not being able to access counsel should not be underestimated. A large-scale study of US asylum cases found that having a legal representative is the most important factor in determining the outcome of an asylum claim.[81] Likewise, a study of New York City immigration detainees found that the most important variables impacting the ability to secure a successful outcome (defined as relief or termination) are having legal representation and being free from detention.[82] Of course, with representatives' resources overstretched, cases are often assessed on their merit and more complex or difficult to win cases may not readily be taken up by lawyers. The causation link between representation and success is over-determined. Nonetheless, without a lawyer, detained asylum seekers are much more likely to agree to removal, even if their claims have merit.[83]

Further evidence of the vital roles played by legal representatives can be found in studies of Alternatives to Immigration Detention Programs whereby detainees can apply for non-custodial release into the community before their migration statuses are finalized. Access to high-quality, free legal representation from the beginning of the asylum claims process is the foremost determinant in whether someone attempts to abscond from a Program.[84]

Access to high-quality, affordable legal representation is essential for allowing the detainee to exercise their legal rights. As an example, Robert E. Katzmann, Chief Judge of the United States Court of Appeals for the Second Circuit, describes the vital role played by lawyers in even the simplest interactions:

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[80] ALICE EDWARDS, *Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants*(2011), at http://www.unhcr.org/refworld/docid/4dc935fd2.html. 59 (italics not in original). See, also, CATHRYN COSTELLO & ESRA KAYTAZ, *Building Empirical Research into Alternatives to Detention: Perceptions of Asylum-Seekers and Refugees in Toronto and Geneva*, UNHCR: The UN Refugee Agency(2013), at http://www.unhcr.org/51c1c5cf9.html;

[81] JAYA RAMJI-NOGALES, et al., *Refugee roulette: Disparities in asylum adjudication*, 60 Stanford Law Review (2007).

[82] THE STEERING COMMITTEE OF THE NEW YORK IMMIGRANT REPRESENTATION STUDY REPORT, *Accessing Justice: The Availability and Adequacy of Counsel in Immigration Proceedings*(2011), at http://www.cardozolawreview.com/content/denovo/NYIRS_Report.pdf.

[83] SHARON BRADFORD FRANKLIN & PAUL S. BLOOM, *Limiting Immigration Detention and Promoting Access to Counsel*(2011), at http://www.bos.frb.org/commdev/c&b/2011/winter/Franklin_Bloom_immigrant_detention.pdf.

[84] JANE ASPDEN, Evaluation of the Solihull Pilot for the United Kingdom Border Agency and the Legal Services Commission (Parliament 2008); CATHRYN COSTELLO & ESRA KAYTAZ, *Building Empirical Research into Alternatives to Detention: Perceptions of Asylum-Seekers and Refugees in Toronto and Geneva*, UNHCR: The UN Refugee Agency(2013), at http://www.unhcr.org/51c1c5cf9.html.: 35; ROB EVANS, et al., *Supervised community treatment in Birmingham and Solihull: first 6 months*, 34 The Psychiatrist (2010).

> Proceedings before the immigration judge are fact-intensive. An immigrant often has limited fluency with the English language, and the immigration judge must work with a translator in the effort to understand the immigrant's case; frequently, because of the language difficulty, the judge must ask the immigrant the same question repeatedly in order to be secure about his or her complete answer. An immigrant who appears pro se or does not have the benefit of adequate counsel will be at a disadvantage in such proceedings.[85]

After attempting to provide legal counsel on a voluntary, *ad hoc* basis to the hundreds of women and children held in a family detention facility in Artesia, New Mexico, a coalition comprised of the American Immigration Council, the American Civil Liberties Union, and law firms and other legal advocacy groups are suing the government to stop removals from this "deportation mill." *M.S.P.C. v. Johnson,* filed in the U.S. District Court for the District of Columbia, alleges that the Obama administration is violating long-established constitutional and statutory law by enacting policies that have: categorically prejudged asylum cases with a "detain-and-deport" policy, regardless of individual circumstances; drastically restricted communication with the outside world; given virtually no notice to detainees of critically important interviews used to determine the outcome of asylum requests; and led to the intimidation and coercion of the women and children by immigration officers, amongst other concerns.[86]

Legal access for IHC detainees

Section 167 (1) of IRPA legislates a detainee's right to counsel: "A person who is the subject of proceedings before any division of the Board and the Minister may, at their own expense, be represented by legal or other counsel." Nevertheless, *realizing* this right to counsel is far from straightforward. As implied, access to reliable information regarding available legal counsel is extremely limited in IHCs and provincial facilities. There are no interpreters in the detention centres, with interpreters only being made available at the Immigration and Refugee Board Proceedings or in proceedings with CBSA. The isolation of immigration detainees is compounded by the fact that there is no Internet access in the detention centres.[87]

The issue of legal access is important for understanding the consequences for detainees of implementing and operating a detention system without upper time limits. Most immigration detainees are not represented by counsel at their monthly detention hearings, and dealing with the prospect of obtaining foreign travel documents and persuading a nation to recognize a detainee as their national in order for them to be resettled there is extremely difficult, particularly when the detainee has been designated a

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[85] ROBERT A. KATZMANN, *The Legal Profession and the Unmet Needs of the Immigrant Poor*, 21 Georgetown Journal of Legal Ethics (2008): 9 – 10.

[86] M.S.P.C. v. Johnson. 2014. Text of complaint available online at http://americanimmigrationcouncil.org/sites/default/files/M.S.P.C.%20v.%20Johnson.pdf
See summary at American Civil Liberties Union. 2014. *M.S.P.C. v. Johnson*, 22 August 2014 [cited 16 October 2014]. Available from https://www.aclu.org/immigrants-rights/mspc-v-johnson.

[87] For further discussion, please see JANET CLEVELAND, *Detention of asylum seekers in Canada*, *in* Immigration Detention: The Journey of a Policy and its Human Impact (Amy Nethery & Stephanie J. Silverman eds., Forthcoming).

threat to Canada's security and may have serious criminal convictions in Canada. Thus, detainees who find themselves caught up in this limbo are faced with the prospect of indefinite detention. This open-ended derogation of the right not to be indefinitely detained contravenes international law[88] and fuels a discretionary regime which can keep immigration detainees incarcerated for months or even years at a time.

Legal aid for immigration detainees

In Ontario, it is possible for detainees to obtain a Legal Aid certificate for a limited number of services. According to Legal Aid Ontario (LAO), an immigration detainee may be able to obtain counsel on certificate if their case meets the merit criteria set by LAO and are seeking legal help on their detention review, mainly through the Refugee Law Office, a subsidiary branch of LAO based in Toronto. In addition, a detainee may also be granted LAO funding for a danger opinion,[89] a Pre-Removal Risk Assessment,[90] and access to counsel at their refugee hearing, an application to the Refugee Appeal Division, as well as judicial reviews of decisions at the Federal Court of Canada.[91] However, it is unclear which percentage of detainees who formally request a Legal Aid certificate are actually successful in obtaining legal representation this way. It should be noted that a certificate does not guarantee counsel: detainees must act on their own volitions to find private bar lawyers and pay the full fee, or to convince the representative to take the case *pro bono.* Detainees are also known to contact community legal clinics in the areas bordering their detention centres, but again, there is no guarantee of retention of services, even with a LAO certificate. To underscore the point further, the aforementioned issues of access to telephone communications greatly cripple a detainee in his or her efforts not only to obtain a LAO certificate but also to discharge it with a competent, willing representative.

Additional barriers to access to counsel

Even if a detainee is able to make contact with and retain counsel, the security-focussed nature of the detention centres and their geographic segregation often present profound logistical issues of access. For example, private bar lawyers who represent detainees in provincial facilities such as the Lindsay Super Jail, must drive approximately 2.5 hours from Toronto to reach the facility. This is nearly impossible for lawyers who work on legal aid certificates or who are working out of a community legal clinic with

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[88] See for example the Universal Declaration of Human Rights, Article 9 of which stipulates: "No one shall be subjected to arbitrary arrest, detention or exile." The corresponding provision in the International Covenant on Civil and Political Rights (ICCPR) is Article 9, paragraph 1, which stipulates: "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law." UNTS, Vol. 999, p. 171, 16 December 1966, entered into force 23 March 1976.

[89] A danger opinion proceeding can be initiated to determine whether the Minister of Citizenship and Immigration will deem a detainee to be considered a danger to the Canadian public and to the security of Canada, based on a number of criteria enumerated in section 34, 35, and 37 of IRPA.

[90] A Pre-Removal Risk Assessment (PRAA) is an application available to detainees (and others) in Canada who are facing removal to their country of origin. A PRAA is governed by s s. 112 - 116 of IRPA and must include only new evidence that was not presented before as to the risk faced by the detainee if removed.

[91] For more information, see Legal Aid Ontario, "Services for Refugee Claimants," 2014, available at http://www.legalaid.on.ca/en/getting/type_immigration_supportref.asp.

already limited resources. Thus, high-quality client meetings, hearing preparation, and evidence collection become difficult.

Further, even if counsel is able to make contact with a detainee, meetings are often short and can be abruptly cut off if there is an alert or alarm in the facility. Counsel-client meetings are also generally disrupted by the mediated nature of the encounter: a glass partition separates the two, and a patchy two-way telephone system is the only means for interactive communication. Procedurally, preparing a client for a legal proceeding is greatly impeded by the isolation of the detention centres, and by the various mechanisms put in place to create as much distance as possible between an immigration detainee and his or her counsel.

Also, as discussed above, while immigration detainees do have the ability to make phone calls, these calls are only outgoing. If counsel is calling into an IHC, she must be connected through a central line which then calls the detainee to answer the phone. In provincial facilities, phone communication is even more limited: it is not possible to call directly to the facility, and so it is incumbent upon the detainee to call counsel and for counsel to be available and ready to converse at the time of phoning.

Thus, a simple meeting to discuss legal options becomes a complex web of procedural and geographic barriers that make it extremely difficult of the immigration detainee to gain access to information about their legal option, and for counsel to fully represent their client. For persons who face the prospect of deportation and risk of being sent back to adverse circumstances, access to legal representation is paramount.

Conclusion

The rhetoric of mobilizing popular beliefs and cultural constructions of the illegal migrant is evident in the banishment of certain people from public consciousness[92] and in incarcerating them behind bars. Laws of migration and refugee status "[impress] upon us the idea that the very legitimacy of the state may hinge on the nature of its (positive and negative) dealings with these individuals and draws attention to the complex relationship between membership and justice."[93] The growing literature on the criminalization of migration points out the heavy reliance on detention in the state-led delegitimization of mobility.[94]

While there has been some judicial discussion of the legal acceptability of the contemporary Canadian detention system,[95] courts have been reluctant to wade into the murky arena of detaining immigrants and asylum seekers. This reticence is particularly apparent in cases of people who have been in any way designated or construed as threats to national security. However, the rights (if any) of migrants continue to rub up against the conceptualization of a fair and free Canadian society. Indeed, as Wilsher notes, courts such as those in Canada "have been confronted with a deeper constitutional question:

[92] PETRA MOLNAR DIOP, *The 'Bogus' Refugee: Roma Asylum Claimants and Discourses of Fraud in Canada's Bill C-31*, 30 Refuge (2014).75.
[93] DONALD GALLOWAY, *Strangers and Members: Equality in an Immigration Setting*, 7 Canadian Journal of Law and Jurisprudence (1994). 149
[94] ALISON MOUNTZ, et al., *Conceptualizing detention: Mobility, containment, bordering, and exclusion*, 37 Progress in Human Geography (2013). 527. Italics in original.
[95] See, for example, Charkaoui v Canada, supra.

what residual rights, if any, do immigrants have if the government has declared that they are not unauthorized to be members of the community?"[96]

As mentioned, a person with any proceeding before the Immigration Board has a statutory right to counsel, as per section 167 of IRPA. Incongruence thus arises when immigration detainees are actively precluded from access to information and legal counsel, while still holding these statutory rights to be represented in their immigration proceedings. Their abilities to participate competently and confidently in the legal system of Canada is greatly compromised by virtue of their being held in detention. Indeed, immigration detainees are predisposed to failure because the legal framework within which they interact with the enforcers of their rights is predisposed to bias against them.[97]

The current immigration detention system in Canada is a free-for-all, with few serious legal controls, little accountability, and virtually no respect for international human rights standards on immigration detention. With the expansion of categories of "deportable" foreigners" in recent legislation, the Canadian state seeks to increase its control over those who migrate irregularly or autonomously. Asylum seekers, non-status persons, or migrants with serious criminality must be controlled, known, and managed in increasingly draconian ways. There is clearly a significant disconnect between detainees' rights in theory and how they are able to achieve them in practice.

Following a coroner's jury inquest into the death of Lucía Vega Jiménez, the Canadian public was forced to reckon with the consequences of their government's practice of immigration detention. Vega Jiménez was found hanging in a shower stall at Vancouver IHC in December 2013, although CBSA failed to announce her death until community groups publicized the information to media and called for an independent investigation.[98] The inquest found out that it took Vega Jiménez over three weeks to get a lawyer through legal aid, and when she finally got one it was only five days before the filing deadline for a Pre-Removal Risk Assessment (PRRA). It was other detainees at Alouette provincial prison that helped her access legal aid.[99] The inquest also revealed that room check records were falsified, and although Vega Jiménez was in the shower stall for at least 40 minutes, these falsified records show her as being in a cell at the time. The inquest's primary recommendations are for CBSA to build and staff a new facility in Vancouver[100] and to install "self-harm proofing" in washrooms as well as call buttons in each sleeping room and washroom. There are also a slew of secondary recommendations, including access to legal counsel, medical services, support organizations, family visits

[96] DANIEL WILSHER, Immigration Detention: Law, History, Politics (Cambridge University Press. 2012): xiii.

[97] Daniel Kanstroom develops an influential variation of this argument. He writes that immigration detention comprises a mode of officially sanctioned punishment for non-citizens who fall out of the state's favour. See, e.g., DANIEL KANSTROOM, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 Harvard Law Review 1890(2000); DANIEL KANSTROOM, Deportation Nation: Outsiders in American History (Harvard University Press First ed. 2007).

[98] HARSHA WALIA, *Death and despair in Canada's migrant dungeons*(2014), at http://rabble.ca/columnists/2014/09/death-and-despair-canadas-migrant-dungeons.

[99] HARSHA WALIA, *10 Key Facts about the Lucía Vega Jiménez Inquest*(2014), at http://themainlander.com/2014/10/06/10-key-facts-about-the-lucia-vega-jimenez-inquest/.

[100] At the time of Lucía Vega Jiménez's death, the private firm Genesis Security Group had been managing the Vancouver IHC under contract to CBSA; the significant issue of the privatization of immigration detention is discussed in, e.g., ALISON MOUNTZ, Seeking Asylum: Human Smuggling and Bureaucracy at the Border (University of Minnesota Press. 2010).

and be allowed to wear civilian clothing. The inquest asks that detainees be allowed outdoor access.[101]

As Canada increasingly turns to punitive detention strategies by incarcerating people in prisons and IHCs, it becomes imperative to recognize the human cost of these strategies of negligence, poor funding, and lack of transparency. It is not only detainees who are suffering serious harms from this system but their wider communities of friends, family, and supporters. Canada's reputation for fairness in asylum adjudication is severely damaged by its record on detention. If Canada continues to practice discretionary and open-ended detention, it is necessary that it produce convincing legal, practical, and ethical justifications for these manoeuvres beyond gestures to identity concerns, security threats, and irregular arrivals. If the justification is that Canada is living up to international standards, then perhaps it is time to change the global outlook on immigration detention.

[101] CBC NEWS, *Lucía Vega Jiménez inquest jury recommends dedicated immigration holding centre*(2014), at http://www.cbc.ca/news/canada/british-columbia/lucia-vega-jimenez-inquest-jury-recommends-dedicated-immigration-holding-centre-1.2791914