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Via email: [Richard.StMarseille@cbsa-asfc.gc.ca](mailto:Richard.StMarseille@cbsa-asfc.gc.ca)

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Ottawa, ON K1A 0L8

Dear Mr. St Marseille:

**Re: IRPR amendments on the detention of children**

I am writing on behalf of the Canadian Bar Association Child and Youth Law and Immigration Law Sections (CBA Sections) with comments on the draft regulations to the *Immigration and Refugee Protection Act* on the detention of children, published in Canada Gazette Part I on October 6, 2018 (Draft Regulations).<sup>1</sup>

The CBA is a national association of over 36,000 members, including lawyers, notaries, academics and students across Canada, with a mandate to seek improvements in the law and the administration of justice. The Child and Youth Law Section considers issues related to children's rights and best interests, including the effects of legislative, legal policy and other legal developments on children in Canada. The Immigration Law Section is comprised of lawyers practicing in all aspects of immigration law and delivering professional advice and representation on the Canadian immigration system to clients in Canada and abroad.

Detaining minors or separating families for immigration purposes contravenes Canada's domestic and international human rights obligations,<sup>2</sup> including Canada's obligations under the United Nations *Convention on the Rights of the Child* (UNCRC).<sup>3</sup> As a ratifying party to the UNCRC, Canada is obliged to

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<sup>1</sup> [Canada Gazette, Part I, Volume 152, Number 40](#): Regulations Amending the Immigration and Refugee Protection Regulations

<sup>2</sup> The CBA, along with over 400 other signatories, endorsed the [Statement Against the Immigration Detention of Children](#) (2016). See also CBA Submission [New National Immigration Detention Framework](#) (June 2017) and, in particular, the section regarding 'Minors and Detention'.

<sup>3</sup> United Nations *Convention on the Rights of the Child* (UNCRC), 1577 UNTS 3, UN Doc. GA/RES/44/25. See also Universal Declaration of Human Rights, UN Doc. A/810, arts. 3 and 9 (1948); International Covenant on Civil and Political Rights (ICCPR), 999 UNTS 107, arts. 9 and 10, (1976) and Optional Protocol to the ICCPR. The UN Committee on the Rights of the Child has issued several General Comments referencing the need to avoid the detention of children: see *General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 Sep 2005, CRC/GC/2005/6, at paras. 61 and 63; and *General Comment No. 10 (2007): Children's rights in juvenile justice*, 25 Apr 2007, CRC/C/GC/10, at para. 11. The Joint General Comments on the human rights of children in the context of international migration, prepared by the Committee on the Rights of the Child and the Committee on the Protection of the Rights of All

ensure that in all actions concerning children, including those taken by courts or administrative bodies, the best interests of the child is a primary consideration. This includes ensuring the child has the protection and care necessary for their well-being.<sup>4</sup> The rights afforded to the child under the UNCRC also include non-separation from their parents except if in their best interests, education directed to the development of the child's fullest potential, the highest attainable standard of health, an adequate standard of living, and rest, leisure and play.<sup>5</sup>

The harmful effects of immigration detention on children are well-documented.<sup>6</sup> The detention of minors and their families must be avoided if at all possible. Unaccompanied minors and families with children should be offered non-custodial community-based alternatives to detention.<sup>7</sup> The CBA Sections offer several suggestions to better enshrine the best interests of the child in the Draft Regulations.

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Migrant Workers and Members of Their Families, confirm that immigration detention is never in the best interests of the child and constitutes a child rights violation (Nos. 4 and 23, at para. 5):

Every child, at all times, has a fundamental right to liberty and freedom from immigration detention. The Committee on the Rights of the Child has asserted that the detention of any child because of their or their parents' migration status constitutes a child rights violation and contravenes the principle of the best interests of the child. In this light, both Committees have repeatedly affirmed that children should never be detained for reasons related to their or their parents' migration status and States should expeditiously and completely cease or eradicate the immigration detention of children. Any kind of child immigration detention should be forbidden by law and such prohibition should be fully implemented in practice.

Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, *Joint General Comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration*, CMW/C/GC/3-CRC/C/GC/22 (2017), at paras. 30 and 32(e); and Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, *Joint General Comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return*, CMW/C/GC/4-CRC/C/GC/23 (2017), at paras. 5-13. See also UN Committee on the Rights of the Child, *Report of the 2012 Day of General Discussion: The Rights of all Children in the Context of International Migration*, at paras. 79 and 84; and Human Rights Council, *Report of the Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment*, A/HRC/28/68, 5 Mar 2015, at para. 85.

UN Member States, in the *New York Declaration for Refugees and Migrants* (2016), recognize that "detention for the purposes of determining migration status is seldom, if ever, in the best interests of the child", and have committed themselves to "work towards the ending of this practice", UN General Assembly, Resolution 71/1, *New York Declaration for Refugees and Migrants*, 3 Oct 2016, A/RES/71/1, at para. 33. This call is supported by the views of several UN human rights mechanisms, which consider the immigration detention of children to never be in the best interests of the child and to always constitute a violation of the rights of the child. The UN Working Group on Arbitrary Detention stressed that additional justification, beyond merely being a migrant in an irregular situation, is needed for the detention of children, *UN Report of the Working Group on Arbitrary Detention*, 18 Jan 2010, A/HRC/13/30, at para. 30. A similar call to end detention of migrant children and their families has been addressed to UN Member States by the Report of the Special Representative of the Secretary-General on Migration of February 2017, UN General Assembly, *Note by the Secretary General transmitting Report of the Special Representative of the Secretary-General on Migration*, 3 Feb 2017, A/71/728, at para. 52 (b). The UNHCR and OHCHR take a similar position, UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, Guideline 9 (for unaccompanied children), and *UNHCR's position regarding the detention of refugee and migrant children in the migration context*, Jan 2017 (for all children in the context of migration), and UN Office of the Commissioner for Human Rights (OHCHR), *Situation of migrants in transit*, A/HRC/31/35, 27 Jan 2015, at paras. 44-45.

<sup>4</sup> Art. 3(1) and (2), UNCRC.

<sup>5</sup> Arts. 6, 9, 16, 24, 27, 28, 29, 31 and 39, UNCRC.

<sup>6</sup> Rachel Kronick, Cécile Rousseau & Janet Cleveland, "Asylum-seeking Children's Experiences of Detention in Canada: A Qualitative Study" (2015) 85:3 *American Journal of Orthopsychiatry* 287. Findings are consistent with research in other countries, showing children subject to immigration detention have dramatically increased rates of depression, anxiety and suicidal thoughts, and may experience developmental delays or behavioural issues. Ann Lorek et al, "The Mental and Physical Health Difficulties of Children Held Within a British Immigration Detention Center: A Pilot Study" (2009) 33 *Child Abuse & Neglect* 573. See also, International Human Rights Program (IHRP), U of Toronto Faculty of Law, *No Life for a Child: A Roadmap to End Immigration Detention of Children and Family Separation* (2016).

<sup>7</sup> For suggested alternatives to detentions, see the *Statement Against the Immigration Detention of Children* (2016) and the CBA Submission on the *New National Immigration Detention Framework* (June 2017), at pp. 3-4.

## Best Interests of the Child

The CBA Sections fully support the best interests of the child as the primary consideration in making decisions regarding detention. However, in our view, the detention of children or their separation from parents or primary caregivers for immigration purposes is never in their best interests. The *Immigration and Refugee Protection Act* and Draft Regulations should be amended to create a presumption in favour of release for children and families with children.<sup>8</sup> At a minimum, the factors for consideration in determining the best interests of the child in the context of a detention decision must be expanded in the Draft Regulations to ensure that none of the child's rights under the UNCRC are violated. We recommend adding the following factors (marked in bold italics) to be considered when determining the best interests of the child.

**248.1 (1)** For the purpose of paragraph 248(f) and for the application, in respect of children who are under 18 years of age, of the principle affirmed in section 60 of the Act, that a minor child shall be detained only as a measure of last resort, the following factors must be considered when determining the best interests of the child:

- (a) the child's physical, emotional and psychological well-being ***and the most appropriate care or treatment to meet those needs;***
- (b) the child's ***right to the highest attainable standard of physical and mental health and education that corresponds to their aptitudes and abilities;***
- (c) the importance of maintaining relationships and the stability of the family environment, and the possible effect on the child of disrupting those relationships or that stability;
- (d) the care, protection and safety needs of the child;
- (e) ***the child's right to participate in cultural, religious and community activities;***
- (f) ***the child's right to participate in recreational, athletic and creative activities that are appropriate for their age and aptitudes and interests, in a community setting;***
- (g) ***the child's dietary needs, including food that is of good quality and well-balanced, and appropriate to the child's age, health and cultural and religious needs;***
- (h) the child's views and preferences, ***if*** the child is capable of forming their own views or expressing their preferences, ***given due weight in accordance with the child's age and maturity.***

## Right to Legal Representation

We recommend including in the Draft Regulations a paragraph to ensure the child is properly advised of the right to legal representation, and advised of the decisions and nature of the proceedings that affect their liberty and security and that of their family members:

***Before a decision is made on detention or release that would affect a child, the child shall be informed, in language suitable to their understanding, of the nature of the proceedings, the reasons for their possible detention, or the detention of their family members and/or caregivers, and of their right to legal representation, in addition to a designated representative.***

We trust that these comments are helpful. Please let us know if you have any questions.

Yours truly,

*(original letter signed by Sarah MacKenzie for Sarah Rauch and Marina Sedai)*

Sarah Rauch  
Chair, CBA Child and Youth Law Section

Marina Sedai  
Chair, CBA Immigration Law Section

<sup>8</sup> See CBA Submission on the [New National Immigration Detention Framework](#) (2017), at p. 4.