

*may every humiliated mouth,
teeth like desecrated headstones,
fill with the angels of bread.
- Martin Espada*

Dedicated to the memory of Mike Akhinen, Lucia Vega Jimenez, Kevon O'Brien-Phillip, and Jan Szamko who died in immigration detention in Canada and the millions of migrants around the world striving for freedom.

End Immigration Detention Network

The End Immigration Detention Network (EIDN) is a coalition of migrant detainees, family members, and allies that fights against immigration detention and demands justice and dignity for all migrants and prisoners. We believe in the freedom to move, freedom to return, and the freedom to stay for migrants everywhere. EIDN is formed by members of No One Is Illegal - Toronto and Fuerza-Powersa Guelph to support 191 migrant detainees in Lindsay, Ontario that initiated protests against prison conditions and endless detentions in September 2013.

To download the full report, please go to:

www.truthaboutdetention.com



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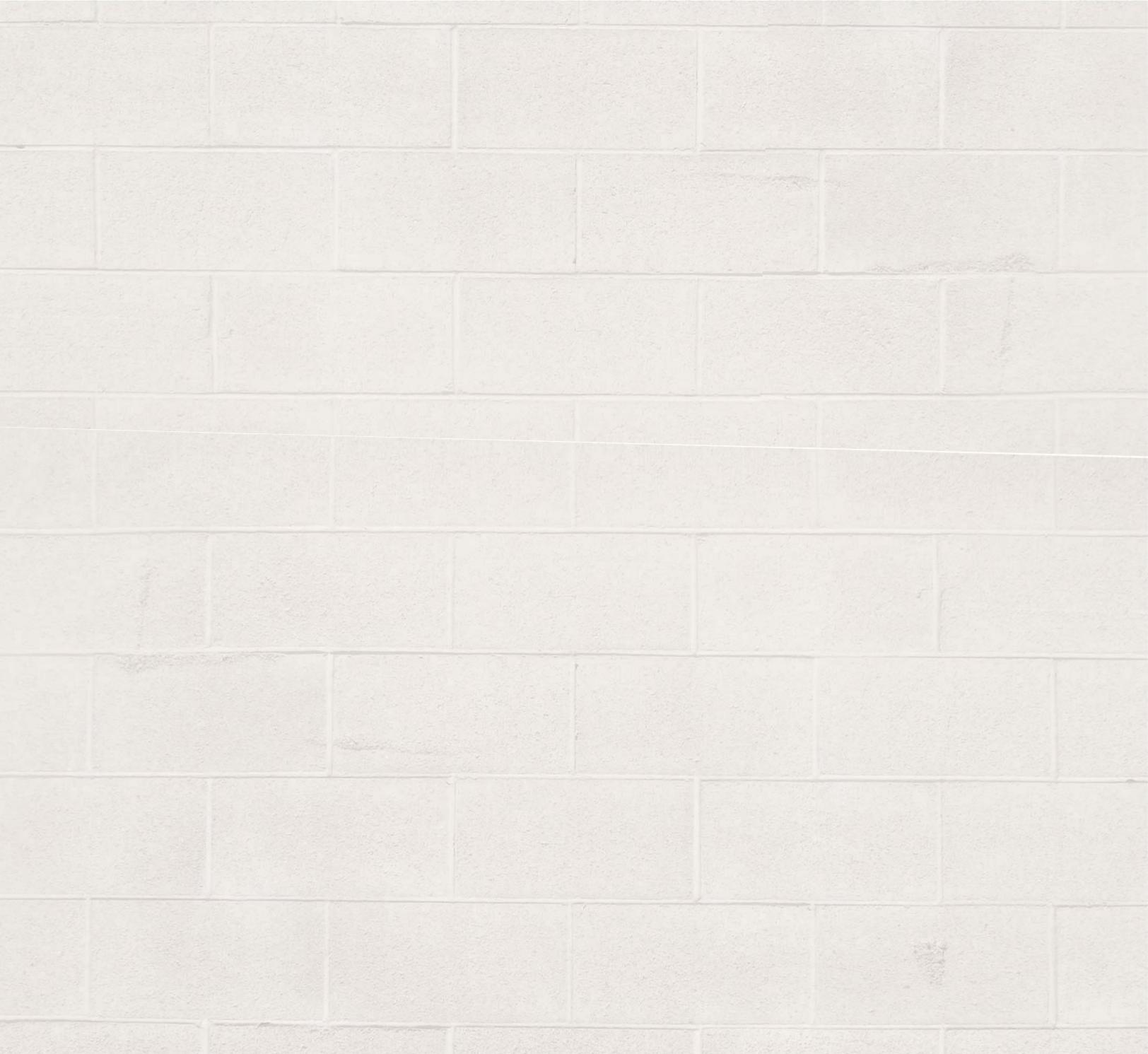


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PART 1:

Immigration and detention in Canada Findings



Moving towards temporariness

Today, more migrants enter Canada on temporary permits than as permanent residents. Though this has been the case with economic immigrants versus migrant workers since 1993,¹ Canadian policies over the last decade have accelerated this trend. The Federal skilled workers program is limited to 50 occupations requiring advanced degrees (an increase from 24 since April 2014), along with years of work experience. As a result, most low-income and racialized migrants can only come to Canada under various categories of the Temporary Foreign Workers Program (TFWP).

The move from permanent status towards temporary status is occurring in all aspects of the immigration system.² Today, many parents and grandparents enter Canada as temporary migrants under the so-called 'Super Visa' – and only if strict income requirements are met.³ Many spouses and common-law partners arrive in Canada with "conditional" permanent residence, which is a temporary permit that may force some women to remain in abusive situations rather than risk revocation of status on separation.⁴ Refugee applications have dropped in half just over the last year. All of these changes disproportionately impact women, and low-income and racialized families. The Federal government has enacted increasingly harsh measures to remove people's permanent residence, particularly from those who have already served a sentence for a crime, resulting in a 'double punishment'. In the last few years, over 3,000 people have had their citizenship revoked.

With more people in Canada in precarious immigration status, many migrants have to choose between living without full status in Canada or returning to places they may not want or be able to return. As a result, there are approximately 500,000⁵ undocumented migrants in Canada, while an unknown number of migrants on temporary visas are also engaged in unauthorized work.

Expanding detentions and enforcement

The legislated shift towards temporariness has been accompanied by an increase in immigration enforcement. As more people lose immigration status and become undocumented, immigration detention and deportation grows at an unprecedented rate. The Canada Border Services Agency (CBSA), established in December 2003, and overseen by the Ministry of Public Safety has seen its immigration enforcement budget balloon in recent years, rising from \$91 million in 2010-2011, to over \$198 million in 2012-2013.⁶ Though latest data on specific expenditure on immigration detention is not available, in 2008-09, when CBSA enforcement budget was \$92 million, immigration detention costs were \$45.7million.⁷ In 2009, immigration detention cost an average of \$3,185 per detained case. In the same year, CBSA was paying between \$120 and \$207 to jail migrants in provincial facilities per day.⁸

By mid-2013, approximately 80,000 immigrants had been detained under the current government.⁹ In 2013 alone, between 7,373 and 9,932 immigrants spent a total of 183,928 days in immigration hold.¹⁰ This is a combined total of 504 years in prison. Over the past seven years, the number of detained children has fluctuated between 807 children per year in 2008 to 205 in 2013.¹¹ The actual number is higher as many children are not tracked as detainees but as "accompanying their parents," or are themselves Canadian citizens and thus "not subject to" immigration detention. Advocates point to the particularly severe impacts of incarceration on women and mothers due to the lack of medical facilities for pregnancies and neo-natal care.¹²

Migrants in detention thus include those facing deportation; children 'accompanying' their parents; migrant workers who have acted outside the terms of their visas; detention upon arrival in Canada while applications are processed; those held on security grounds such as the Security Certificate detainees and others.

Indefinite detention

Living without immigration status in Canada falls under administrative law. Essentially, migrants have failed to meet complex and expensive requirements that would get them immigration status, similar to not paying a parking permit or not filing taxes on time. CBSA states that the purpose of detention is not “punitive” or “reformatory” but “preventative”. That is, migrants are detained to avoid their non-appearance for removal (termed a ‘flight-risk’) or because their identity cannot be verified.

There are three designated immigration holding centres in Canada. However in 2013, a total of 142 facilities were used to detain immigrants.¹³ In 2013, a third of all migrant detention took place in provincial prisons, most of which were maximum-security prisons. In 2006–2007, CBSA spent over \$20 million dollars in leasing out these spaces from the provinces and private facilities.¹⁴

What immigration detention looks like

“They are typically – I’ve visited two or three –they used to be hotels with good living conditions. They’re not prisons; they’re not jails. Anyone can leave immigration detention any time they want – they just have to leave Canada.”
- Jason Kenney, Former Immigration Minister

“When they were bringing me here to Lindsay they brought me here as a slave. They chained me with padlocks on my legs and my hands. They had handcuffs on my hands and legs with big padlocks. It looked like it was slave trade again when I watched the slave trade movies that what it looked like.”

- Nosakhare Osunbor, immigration detainee

“They don’t have enough staff and so you get locked in inside the cell. Some days you got a whole two days locked in and they let you out for a few hours. That is really maximum security and that’s for people who haven’t committed any crimes you know what I mean?” - J. M., immigration detainee

Canada is one of the only Western countries without a limit on immigration detention pending deportation. As a result at least one detainee, Mbuyisa Makhubu, has been held for over ten years.¹⁵ Termed a “presumptive period”, such limits have been recommended by the United Nations Working Group on Arbitrary Detention, and vary between 90 and 180 days in the United States and across Europe.¹⁶ Canada justifies the lack of a presumptive period through its use of a detention review – similar to a bail hearing in the criminal process – despite the fact that immigration detention is “administrative” in nature.

At a detention review, migrants appear before an appointed member of the Immigration and Refugee Board’s Immigration Division, typically within the first 48 hours, then after 7 days, and subsequently every 30 days after their detention begins. As in a bail hearing, migrants need to bring forth a Canadian citizen or permanent resident who can provide cash or a performance bond to ensure compliance with immigration conditions. In a detention review, however, the onus to be released is placed on the detainee, which is a much stricter legal test to meet. Because of this review process, the Canadian government insists that immigrants are not held indefinitely but simply for a month at a time, with the opportunity to be released at every review. However, according to last reported data, there are at least 146 migrants in jail for over 6 months.¹⁷

In September 2013, 191 immigrants held in a maximum-security prison in Lindsay, Ontario went on a hunger strike to speak out against their endless detention. Two of the migrants remained on hunger strike for 65 days. In retaliation, immigration enforcement has deported some key strike organizers, released a few, moved others into prisons across Ontario, and locked up hunger strikers in segregation. Yet, strike actions have continued demanding an end to endless detention, maximum security incarceration of immigrants and the overhaul of the detention review process as the first step.

Our findings

At the end of 2013, members of No One Is Illegal – Toronto as part of the End Immigration Detention Network initiated a research project to assess key claims made by the CBSA, and other members of the federal government. These include:

- Immigration detention is a just and fair process where each case is assessed on its individual merits.
- Canada does not routinely detain migrants on an indefinite basis.
- Immigration detention is preventative and not punitive.

Through analyzing data released by the Canada Border Services Agency under federal *Access to Information and Privacy Act* legislation, we conclude that these claims are without merit. Our research shows that the detention review system is rife with disturbing discrepancies between different immigration detention board members' decisions. At the same time, the report highlights suspicious 'consistencies' which points to federal political pressure. This puts the justice and fairness of the entire immigration system into doubt. We found that:

- The rates of release between the 44 different members overseeing detention reviews in 2013 vary widely. For example, Valerie Currie ruled on 443 Detention Reviews but only released 21 migrants (5.0%); Marilou Funston ruled on 513 Detention Reviews but only released 33 migrants (6%). On the other hand, Yves Dumolin oversaw 325 Detention Reviews and released 76 migrants (24%) and Maria-Louise Cote oversaw 303 Detention Reviews and released 100 migrants (33%).¹⁸
- Members' rates of release also vary regionally. We found that in 2013, rates of release in Eastern and Western Canada¹⁹ were 24% and 27% respectively; 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%.**

Looking deeper into the Central region, we found that overall rates of release for Board Members in Central Region who worked in 2008, 2012 and 2013 (the three years we got data for) systematically fell each year. In 2008, the average release rate of the 13 members was 21.0%, which fell to 11.5% in 2012 and 9.3% in 2013.

It defies belief that such a systematic reduction took place in absence of a policy directive or a political decision. We requested all such policy memos and received no documents that showed an actual policy change. Any policy or decision to systematically reduce release rates would be political interference in the detention review process, throwing the entire detention system's fairness and integrity into doubt.

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.²⁰

Our research also showed a massive difference between the average numbers of days immigrants were incarcerated across the country. In the five year period 2009-2013, detainees were held for 10 days on average in Pacific Canada, and 12 days in Southern Ontario, but were held for an average of 32 days in the Prairies and 38 days in Northern Ontario.

During the same five year period, on average adult males were detained for 25 days, while adult women were detained for 15 days. No data was made available on immigration detainees that may not fit in this gender binary. Though women are held for fewer days on average, gendered experience of prisons including presence of male guards, fewer services in women's prisons, and the dilemma of giving up newborns to government agencies or keep them imprisoned, make female detainees' experience just as, if not more, traumatic than those of men.²¹

Conclusion

Seen together this data shows that the immigration detention review process, the fundamental structure that upholds the integrity of the entire immigration detention process, is unjust. Immense variances by member and region of incarceration shows that the length of migrant detention and possibilities of release are determined by which board member they appear in front of, and which geographical region of the country they are detained in.

As noted in a different report on the judicial review of refugee determinations, “the question therefore is not whether outcomes will vary with the judge who hears the case – surely they will. Rather, the question is whether the degree of variability is within acceptable bounds, and if not, what can be done about it.”²² In this case, the variations are not within acceptable bounds. This echoes the larger pattern of immense variations in decision-making processes in other areas of immigration policy, notably refugee arbitration and federal court decisions.²³

Not only that, many signs point to a decision to increase rates of immigrant incarceration. Such a decision has not been made legislatively and does not appear in internal memos provided. Any decision, of course, to interfere in the detention review process removes all aspects of fairness in the system. The systematic drop in release rates that this research shows must be explained.

Despite claims to the contrary, the detention review process is failing long-term detainees, as Detention Review decisions seem to duplicate past decisions rather than release migrants. We receive memos that directed board members to stop issuing decisions that “essentially consists of the member concurring with the decision of the previous member.”²⁴ No records indicate that such a change actually took place. The detention review process that is supposed to guarantee the fairness of all detentions appears to be entirely at the whims of an appointed board member, with devastating consequences on migrants and their families.

Recent reports have shown that CBSA used “fixers” to get false documents to deport migrants.²⁵ Public outrage erupted over immigration detention after Lucia Vega Jimenez attempted suicide in an immigration detention facility at Vancouver’s international airport in January 2013, from which she subsequently died. This report adds to the growing chorus of concerns about the immigration detention, and detention review processes. Furthermore, this report shows clear warning signs about a detention system that is set to expand with the adoption of legislation such as Bill C-31, which includes mandatory detention of refugees. The potential for expanding Canada’s designated detention infrastructure has been met with increased lobbying pressures for the privatization of immigration detention and service delivery.²⁶

Thousands of lives are wasting away inside prison cells. Many are separated from their families and loved ones merely for being born elsewhere. Immigrants are being locked up in a 5-metre square cell for 20 hours a day, without charges or a trial in which they can clear their names, as is the case with those going through the criminal justice system. Separating individuals from their support networks, the ability to earn money and/or acquire legal counsel, severely limits their ability to regularize their status. Immigration detention, particularly long term detention, serves to unduly punish migrants who cannot be deported and may otherwise be able to gain permanent residency. Detentions pending deportation serve to punish migrants before they are punished yet again through their forced removal. This punitive system carries immense costs for detainees as well as for the public purse.

Our research shows that the immigration detention system is systematically unfair. No practical processes exist through which this unfairness can be challenged. That’s a profound injustice. There is no reform or rehabilitation in immigration detention. It must end.

Endnotes

1. Nandita Sharma (2001) "On Being Not Canadian: The Social Organization of "Migrant Workers" in Canada" *Canadian Review of Sociology & Anthropology* 38.4 (415-439).
2. Goldring, Luin. "The Alarming New Blueprint for Canadian Citizenship and Immigration Policy" *The Broadbent Blog*, <https://www.broadbentinstitute.ca/en/blog/alarming-new-blueprint-canadian-citizenship-and-immigration-policy>.
3. Sponsorship of parents and grandparents has recently been reopened, but is strictly capped at 5,000 applications, <http://www.cic.gc.ca/english/information/applications/sponsor-parents.asp>.
4. "Statement on Proposed "Conditional Permanent Residence" for Sponsored Spouses" by the Ontario Council of Agencies Serving Immigrants (OCASI), <http://www.ocasi.org/statement-proposed-%E2%80%9Cconditional-permanent-residence%E2%80%9D-sponsored-spouses>.
5. Goldring, L. et al (2009). "Institutionalizing Precarious Immigration Status in Canada." *Citizenship Studies*, 13.3 (239-265).
6. CBSA Report on Plan and Priorities (2013-2014) <http://www.cbsa-asfc.gc.ca/agency-agence/reports-rapports/rpp/2013-2014/report-rapport-eng.html>.
7. Silverman, Stephanie J. "Detention in Canada" *Detention and Asylum Research Cluster*, <http://refugeereseach.net/ms/detention/detention-asylum-in-countries/detention-in-canada/>
8. Ibid.
9. For 2006-2009, see <http://www.cbsa-asfc.gc.ca/agency-agence/reports-rapports/ae-ve/2010/dr-rd-eng.html#s01x1>. For 2009-2011, see <http://www.globaldetentionproject.org/countries/americas/canada/introduction.html#c3905>. For 2011-2012, see <http://www.cbsa-asfc.gc.ca/media/facts-faits/121-eng.html>. For 2012 see http://www.thestar.com/news/canada/2013/11/18/hundreds_held_in_canadas_immigration_cells.html. However, detention numbers that CBSA released to us were different, so precise numbers are impossible.
10. The variation in the total number of immigration detainees arises from different CBSA statistics reporting different totals. Repeated emails and calls for clarification have not been responded to.
11. Global Detention Project, Canada Detention Profile: <http://www.globaldetentionproject.org/countries/americas/canada/introduction.html>.
12. Shahshahani, Azadeh 05/22/2013 "Time to Bring Moms Home: Impact of Immigration Detention on Women," *Latino Voices Huff Post*, http://www.huffingtonpost.com/azadeh-shahshahani/time-to-bring-moms-home_b_3315327.html
13. A map of all the facilities will be released on www.truthaboutdetention.com.
14. Silverman, Stephanie. "Detention in Canada" Detention and Asylum Research Cluster <http://refugeereseach.net/ms/detention/detention-asylum-in-countries/detention-in-canada/>
15. Keung, Nicholas. 12/11/13 "Could this man in Canadian jail be South Africa's missing anti-apartheid icon?" *The Star*, http://www.thestar.com/news/canada/2013/11/12/could_this_man_in_canadian_jail_be_south_africas_missing_antiapartheid_icon.html
16. See Legal Opinion on the Legality of Long-Term Immigration Detention: http://endimmigrationdetention.files.wordpress.com/2013/11/final-ilc-legal-opinion-on-detention_-nov-23-2013.pdf
17. "The Strange Case of Michael Mvogo" (see transcript), CBC Documentary <http://www.cbc.ca/thesundayedition/documentaries/2014/05/25/post-9/>.
18. Board members who saw less than 5 detainees were removed for the analysis to limit skewing of percentage data. Data for all Board Members can be requested through our website: www.truthaboutdetention.com.
19. Eastern Region is responsible for Quebec, New Brunswick, Nova Scotia, Prince Edward Island, Newfoundland, Nunavut, Ottawa and Kingston (Ontario); the Western Region is responsible for British Columbia, Alberta, Saskatchewan, Manitoba, Northwest Territories and Yukon; Central Canada is responsible for Ontario (except Ottawa and Kingston).
20. 1st review (within 48 hours): 794 released; 2nd review (within 7 days): 349 released; 3rd review: 253 released; 4th review (2 months): 159; 5th review (3 months): 92; 6th review (4 months): 51; 7th review (5 months): 27; 8th review: 23.
21. Shahshahani, Azadeh 05/22/2013 "Time to Bring Moms Home: Impact of Immigration Detention on Women" *Latino Voices Huff Post*, http://www.huffingtonpost.com/azadeh-shahshahani/time-to-bring-moms-home_b_3315327.html.
22. Rehaag, Sean. 22/03/2012 "Judicial Review of Refugee Determinations: The Luck of the Draw?" *Queen's Law Journal* 38.1; Osgoode CLPE Research Paper No. 9/2012. Available at SSRN: <http://ssrn.com/abstract=2027517>.
23. For example, see Rehaag (above) and also: Sean Rehaag (2008) "Troubling Patterns in Canadian Refugee Adjudication," *Ottawa Law Review*, 39.2. Available at SSRN: <http://ssrn.com/abstract=1468717>; Rehaag, Sean (2011) "The Role of Counsel in Canada's Refugee Determination System: An Empirical Assessment," *Osgoode Hall Law Journal*, 49.71. Available at SSRN: <http://ssrn.com/abstract=1873999>.
24. Memo: "Consistency in the delivery of oral reasons in detention reviews" by Susan Bibeau, Director General, Immigration Division to all members. Obtained through the Access to Information and Privacy Protection Act.
25. Humphreys, Adrian (20/12/13) "Canada's bizarre – and failed – attempt to send 'the Man With No Name' to Africa and the Mysterious Fixer Who Made it Happen," *National Post*, <http://news.nationalpost.com/2013/12/20/canadas-bizarre-and-failed-attempt-to-send-the-man-with-no-name-to-africa/>.
26. Poynter, Bilbo. 29/11/2012 "Private prison firms look to cash in on Canada asylum crackdown," *The Guardian*, <http://www.theguardian.com/world/2012/nov/29/canada-asylum-seekers-private-prison-companies>.

PART 2:

Data Visualization and Report Findings



**HARPER HAS DETAINED
NEARLY 80,000 MIGRANTS.**



12,714	13,987	14,362	9,500	8,838	9,929	9,571
2006	2007	2008	2009	2010	2011	2012
2007	2008	2009	2010	2011	2012	2013

IN 2013, BETWEEN 7,373–9,932 IMMIGRANTS SPENT

183,928 DAYS IN JAIL

504 YEARS IN TOTAL

THIS INCLUDES CHILDREN.



THE NUMBER OF DETAINED CHILDREN ANNUALLY HAS FLUCTUATED BETWEEN 807 IN 2008 TO 205 IN 2013.

(The real number is higher since many children are not tracked as detainees but as 'accompanying' their parents).

DETAINED PARENTS ARE GIVEN A CHOICE:



BRING THEIR CHILD INTO DETENTION

VS.

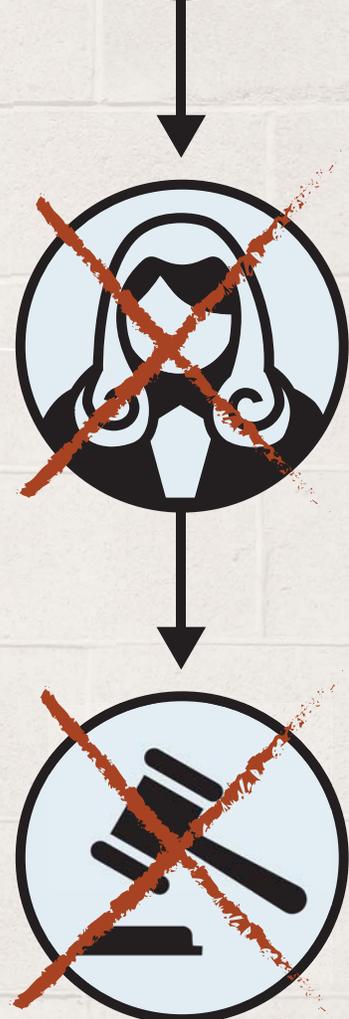


GIVE THEM UP TO CHILDREN'S AID.

IMMIGRATION IS AN ADMINISTRATIVE MATTER. BREAKING IMMIGRATION RULES IS LIKE NOT PAYING A PARKING TICKET.



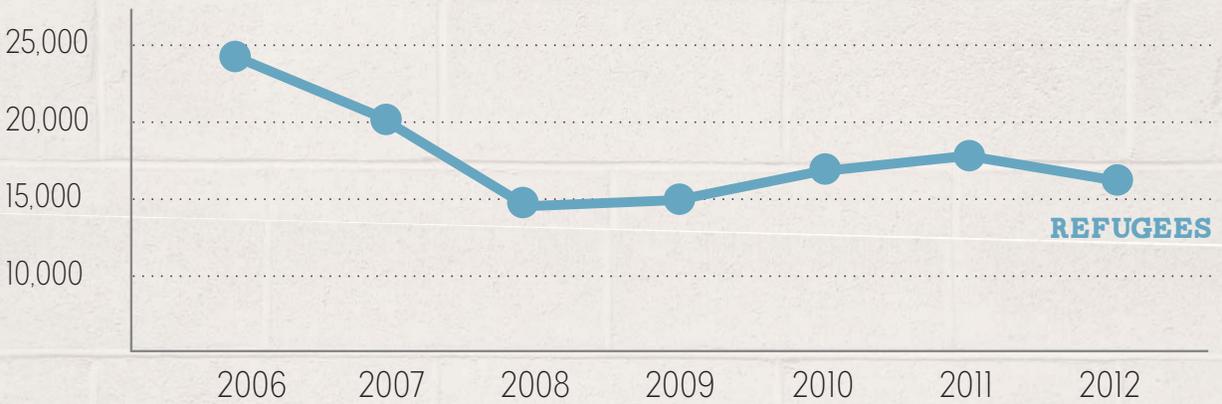
PEOPLE ARE DETAINED WITHOUT CHARGES. THERE IS NO TRIAL TO PROVE THEIR INNOCENCE.



MEANWHILE, PERMANENT STATUS IS OUT OF REACH FOR MOST.



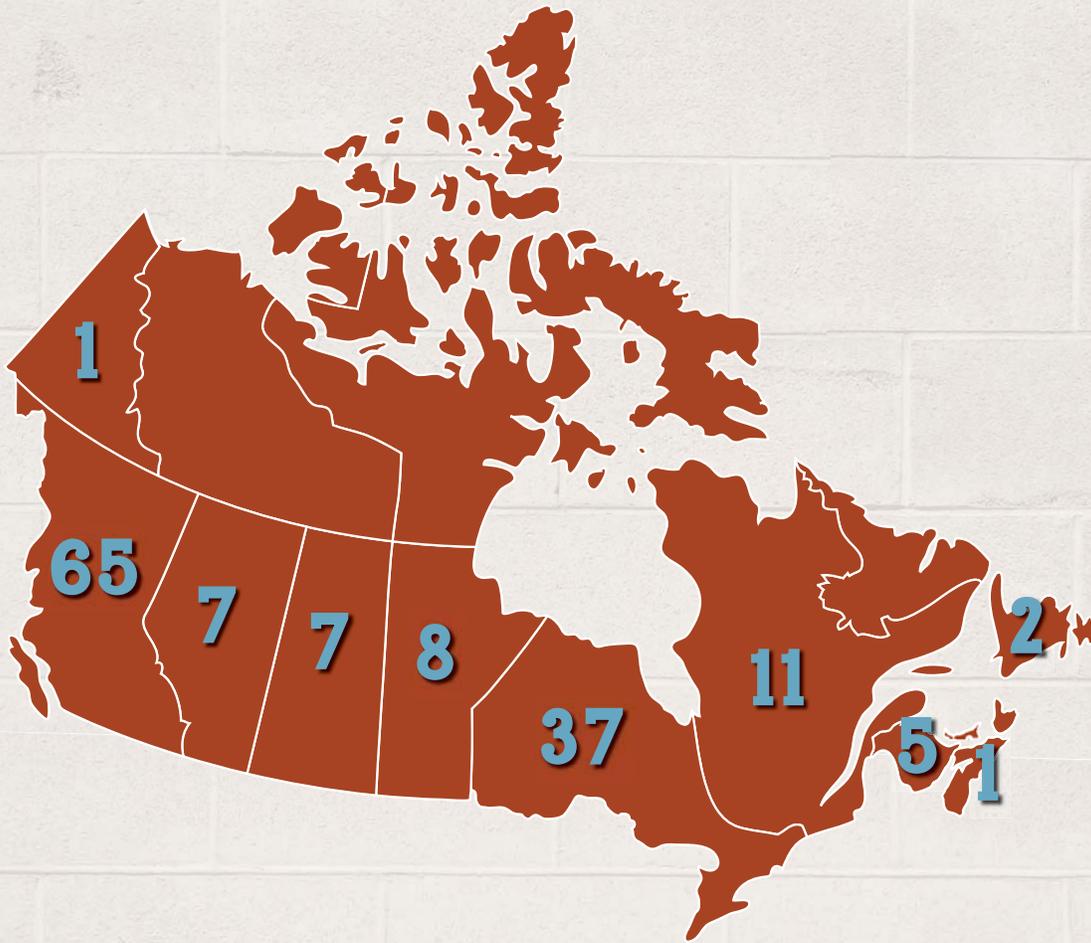
LESS REFUGEES ARE ACCEPTED



MOST PARENTS AND GRANDPARENTS CAN VISIT, BUT THEY CAN'T STAY.



CANADA HAS 3 DESIGNATED IMMIGRATION “HOLDING” CENTRES, BUT DETAINEES WERE HELD IN 142 FACILITIES IN 2013, MOSTLY MAX. SECURITY PRISONS.



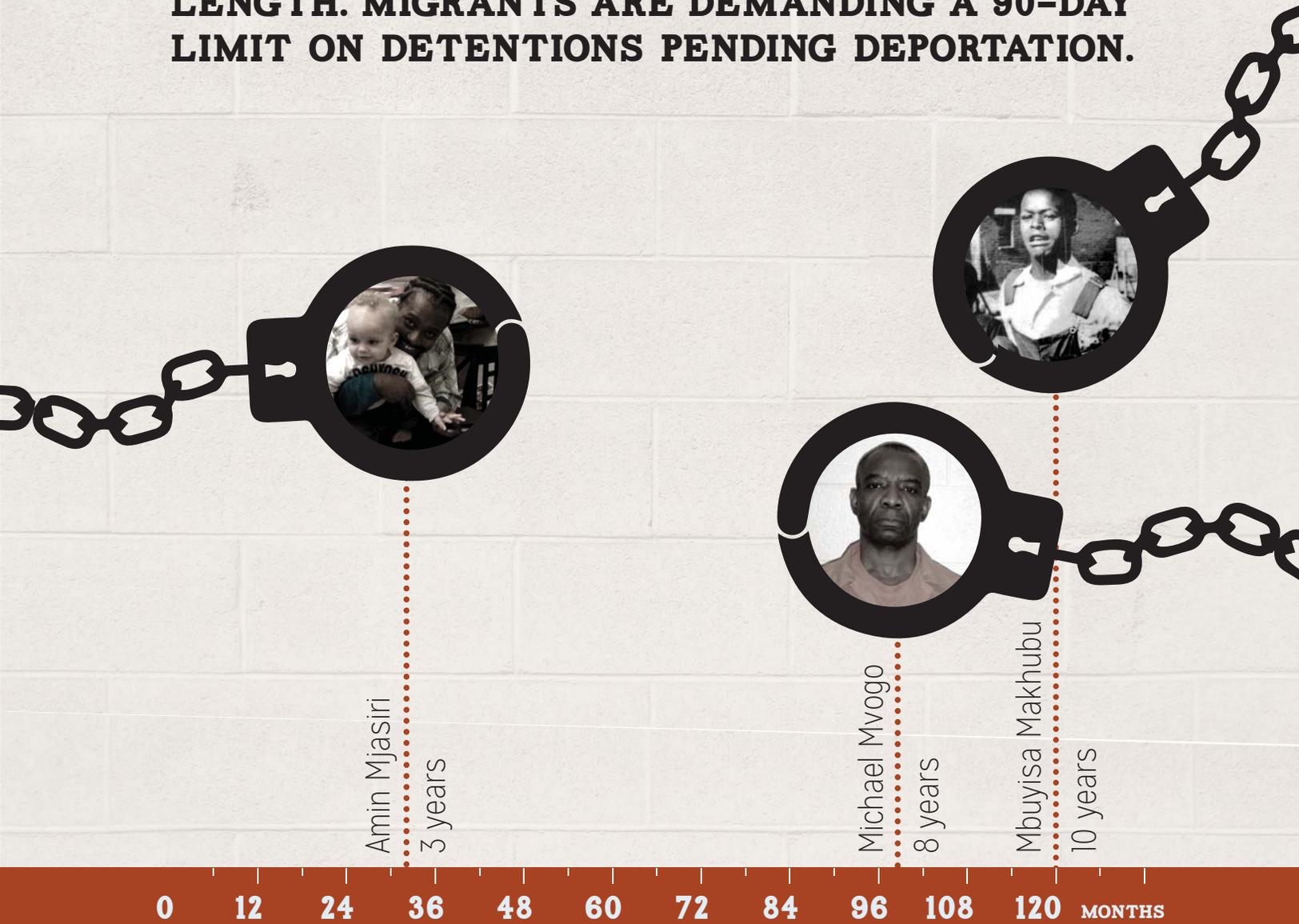
IMMIGRATION ENFORCEMENT SPENDING ROSE FROM \$91 MILLION (2010-11) TO \$198 MILLION (2012-13).

\$3,185 = COST TO DETAIN ONE PERSON A YEAR

\$120-207 = COST TO DETAIN ONE PERSON A DAY

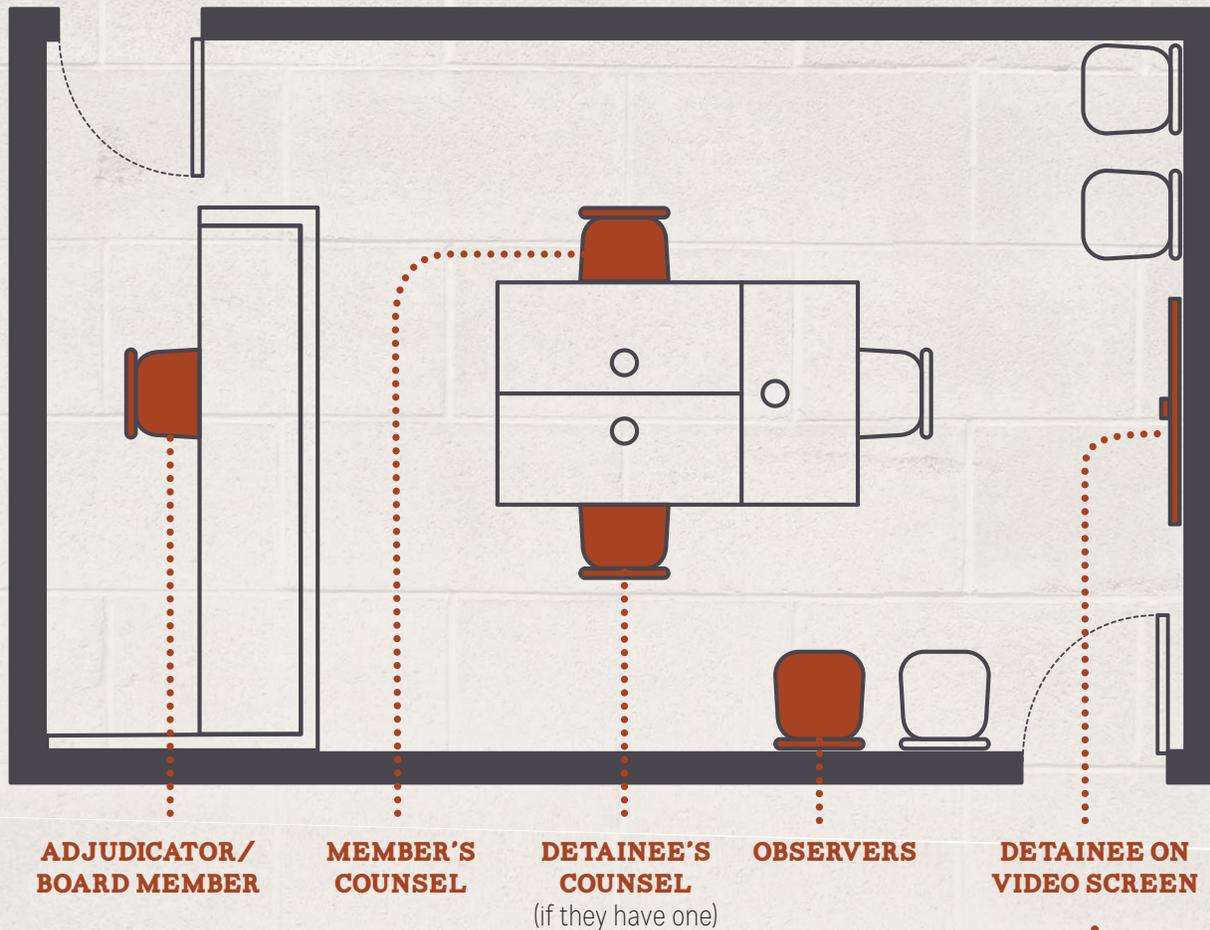
IN A NON-CBSA FACILITY (RENTED BEDS IN PROVINCIAL PRISONS).

CANADA IS THE ONLY “WESTERN” COUNTRY THAT DOES NOT HAVE A MAXIMUM DETENTION LENGTH. MIGRANTS ARE DEMANDING A 90-DAY LIMIT ON DETENTIONS PENDING DEPORTATION.



MIGRANTS ARE DETAINED INDEFINITELY. THEY CAN LOSE YEARS OF THEIR LIVES IN DETENTION WITH NO END DATE.

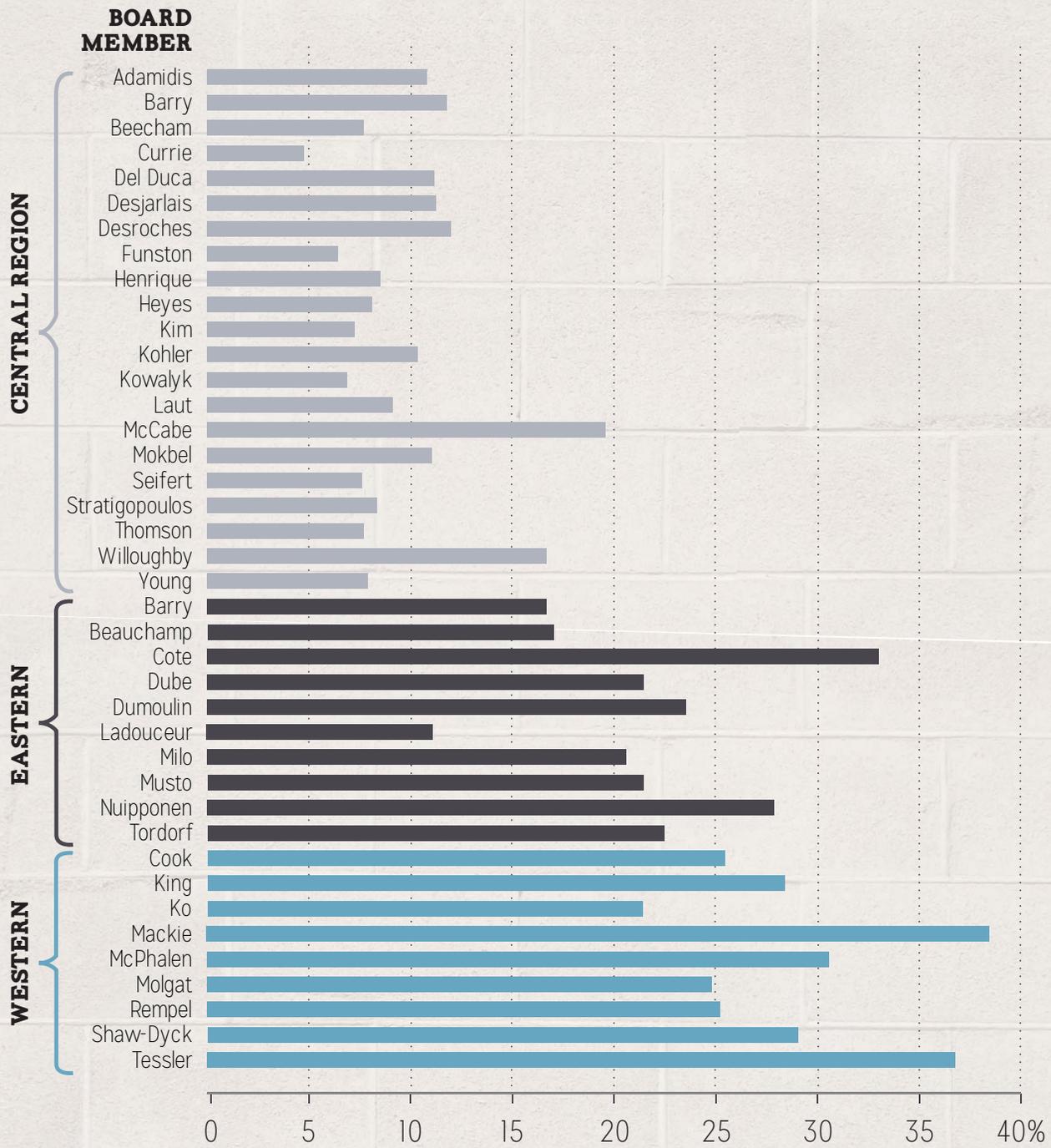
THE ONLY WAY YOU CAN GET OUT OF DETENTION IS IF YOU ARE RELEASED AT A DETENTION REVIEW BY AN APPOINTED “BOARD MEMBER.”

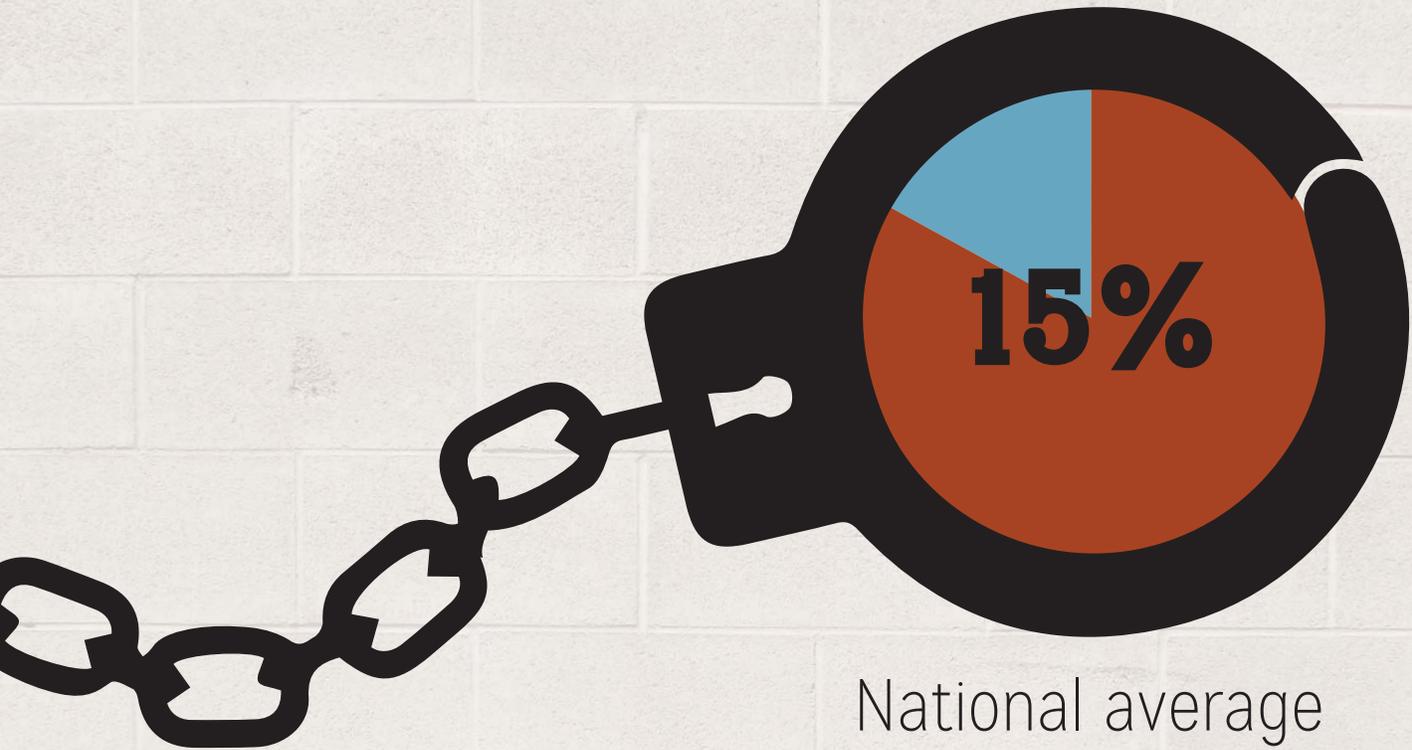


“Every time I go there it’s like they have already made up their minds before we even start the session. It doesn’t matter what I say, I am there only for a few minutes before they state that I a flight risk and to come back in 30 days. I’ve been in front of them 12 times and nothing is changing and I am tired of it.”

- A.K., JAILED AT CENTRAL EAST CORRECTIONAL CENTRE IN LINDSAY.

BOARD MEMBERS' RELEASE RATES VARY DRAMATICALLY FROM 5% TO 38%.





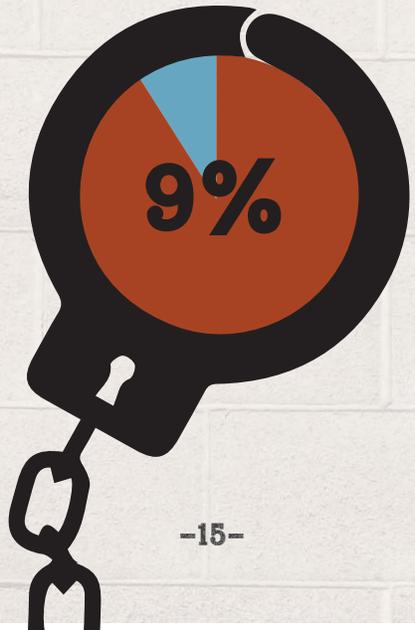
National average

RELEASE RATES ALSO VARY GREATLY BETWEEN REGIONS.

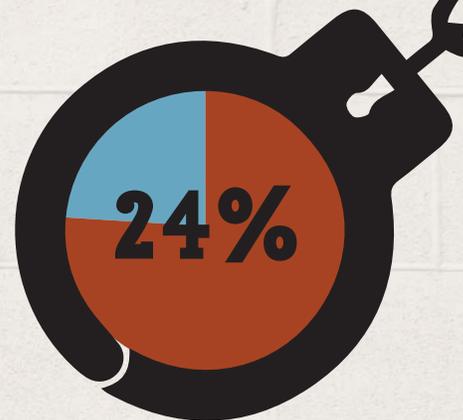
Western



Central

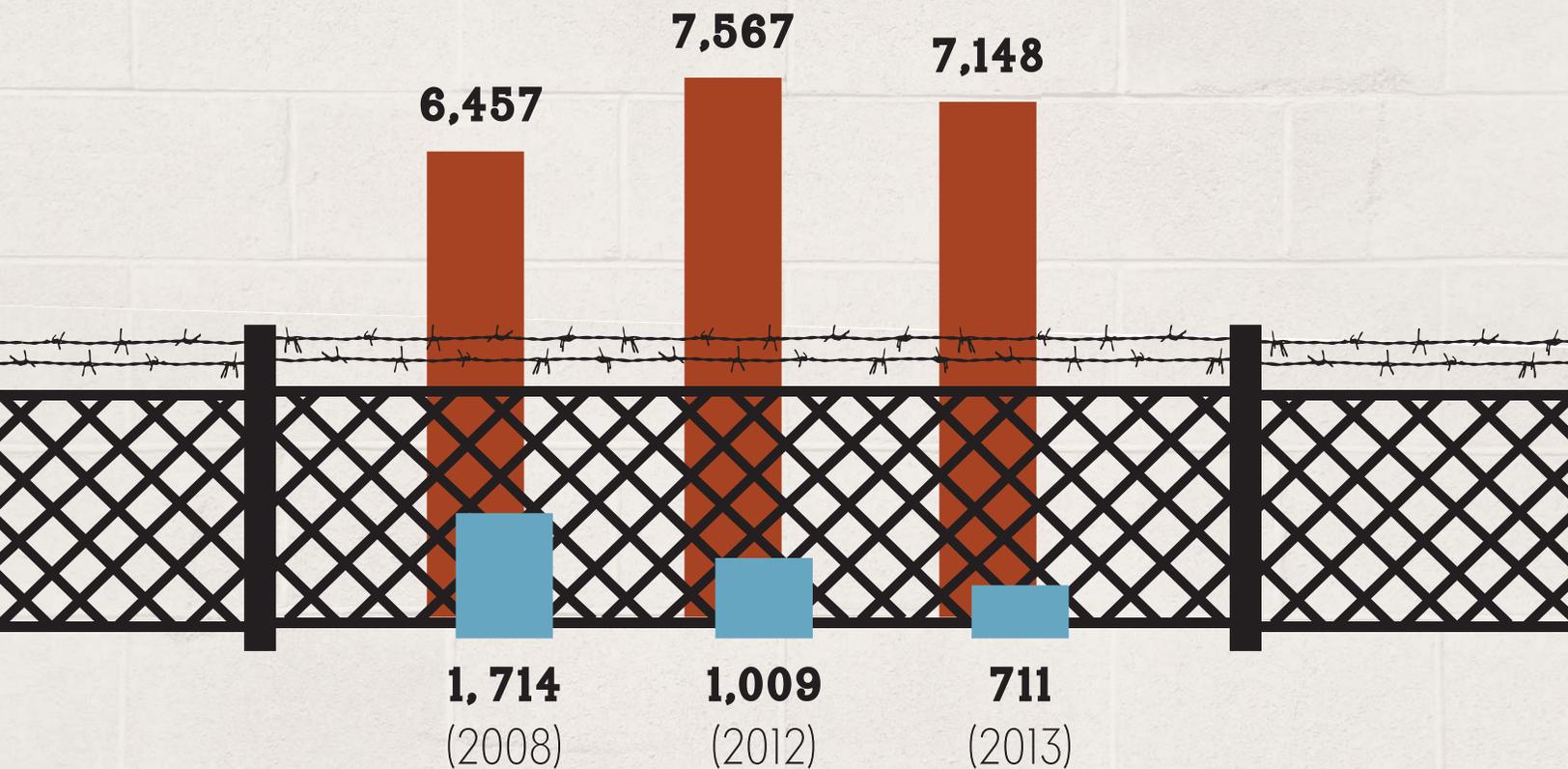


Eastern



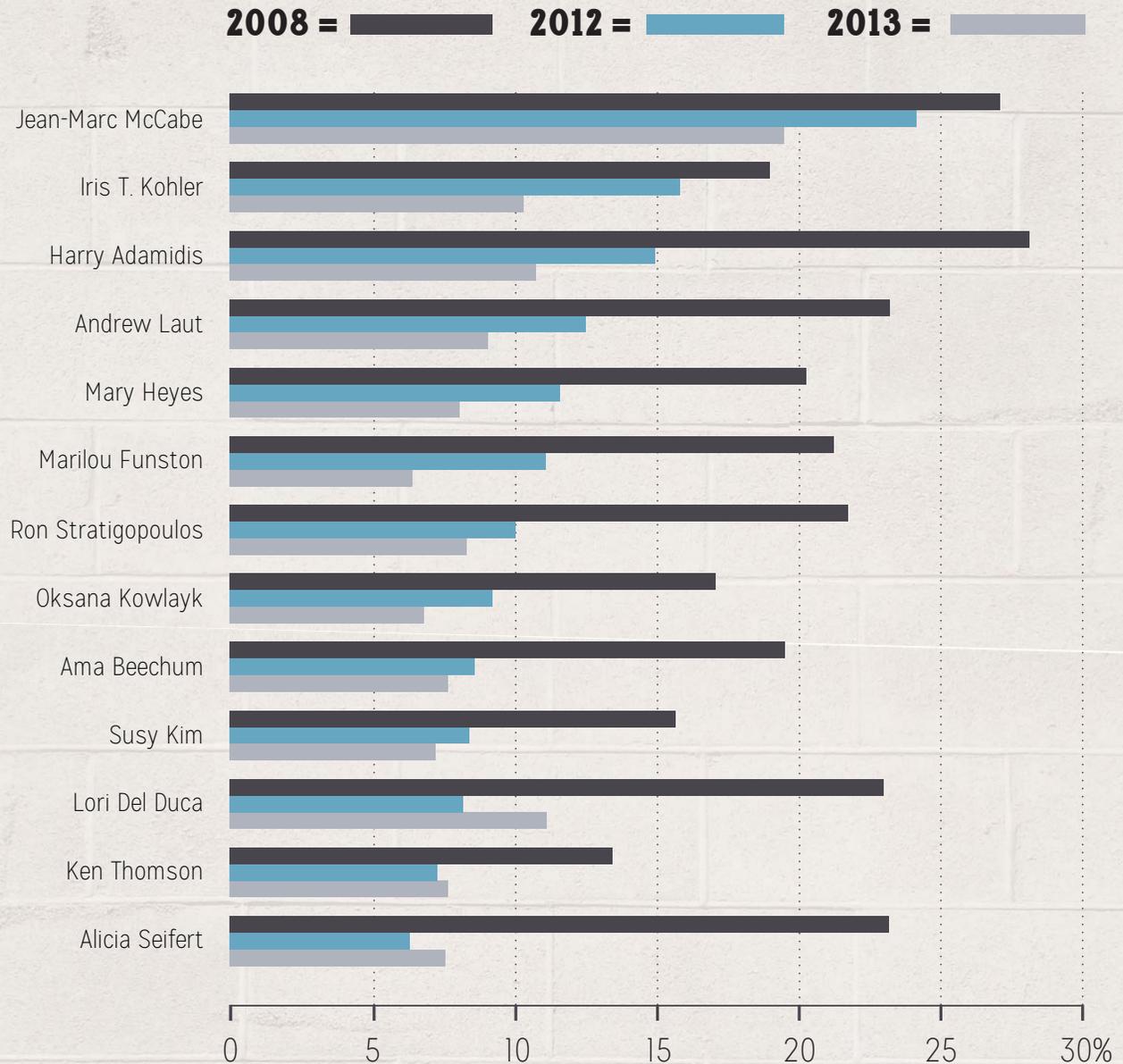
**EVERY YEAR,
THOUSANDS
ARE DETAINED
BUT LESS PEOPLE
ARE RELEASED.**

(This is data for the Central Region)



**WHAT HAS BEEN CAUSING THIS
REDUCTION IN RELEASE RATES?**

THESE 13 BOARD MEMBERS WORKED IN 2008, 2012, AND 2013 IN CENTRAL REGION (ONTARIO EXCEPT OTTAWA AND KINGSTON). EACH DRASTICALLY REDUCED THEIR RATES OF RELEASE.



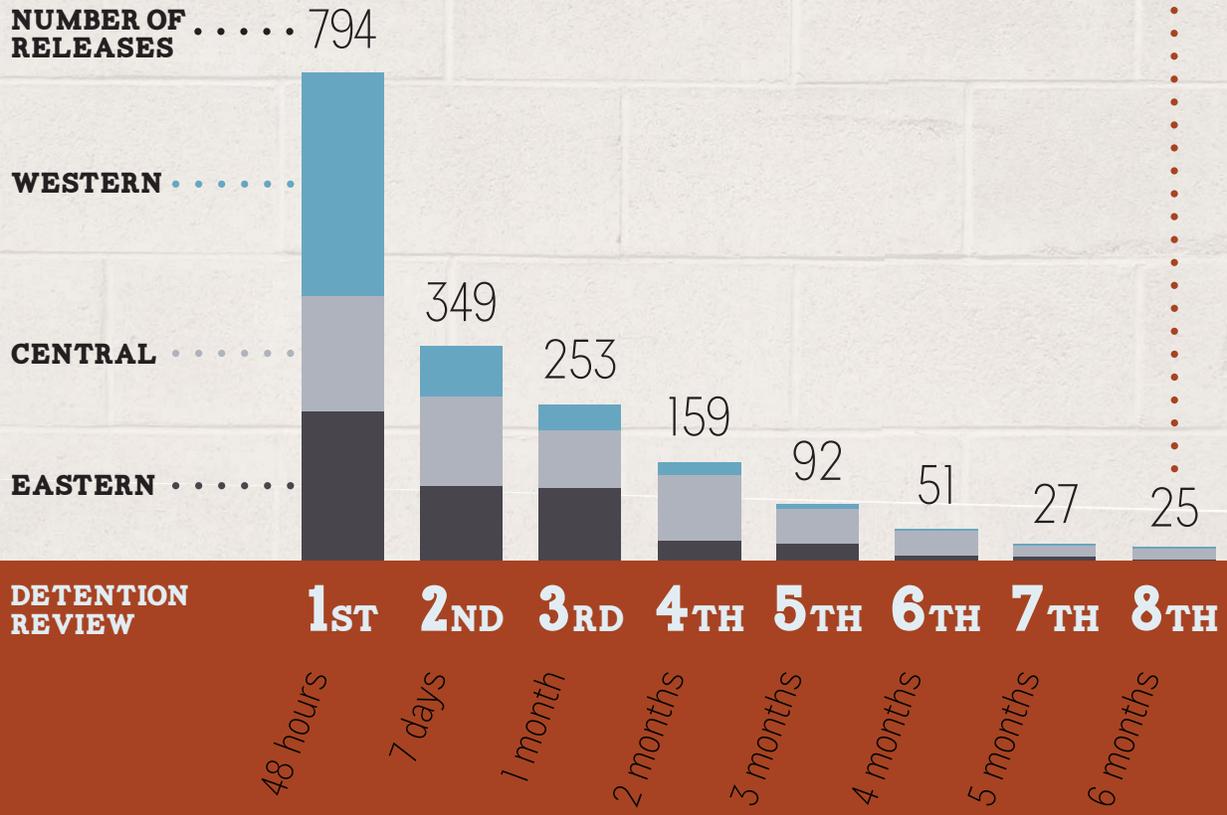
WAS POLITICAL PRESSURE EXERTED ON THESE MEMBERS TO RELEASE LESS MIGRANTS?

THESE BOARD MEMBERS PRESIDED OVER 6,618 DETENTION REVIEWS, BUT ONLY RELEASED 586 PEOPLE.



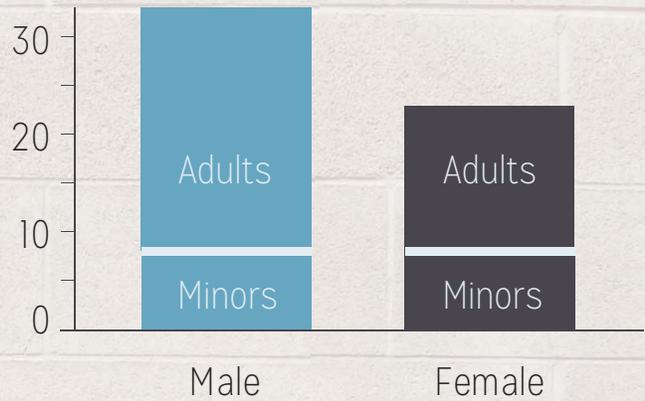
NUMBER OF PEOPLE THE MEMBER DETAINED

NOT ONLY THAT, ONCE YOU HAVE BEEN DETAINED PAST **SIX MONTHS, YOUR CHANCES OF RELEASE FALL CLOSE TO ZERO.**



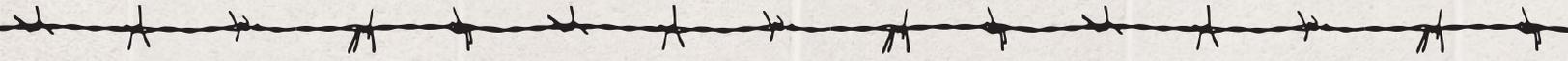
CANADA NEEDS A LIMIT ON THE LENGTH OF DETENTIONS PENDING DEPORTATIONS.

BETWEEN 2009–2013 ON AVERAGE MEN WERE HELD FOR 25 DAYS, WOMEN FOR 15 DAYS, AND MINORS FOR 8 DAYS.



IN 2013, THE AVERAGE NUMBER OF DAYS IN DETENTION VARIED GREATLY BY REGION.





**HOW LONG YOU STAY IN
IMMIGRATION JAIL DEPENDS ON
WHO IS DECIDING YOUR CASE AND
WHERE IN THE COUNTRY YOU'RE
ARRESTED. FOR SOME REASON,
ADJUDICATORS ARE RELEASING
LESS MIGRANTS EVERY YEAR.
DOES THIS SOUND FAIR TO YOU?**

PART 3:

Demands of the Campaign to End Indefinite Detention

Campaign to End Indefinite Immigration Detention

The End Immigration Detention Network (EIDN) has initiated the Campaign to End Indefinite Immigration Detention to make four simple, pragmatic demands:

1. Release all migrant on detentions pending deportations who have been held for longer than 90 days.
2. End arbitrary and indefinite detention: Implement a 90-day “presumptive period”. If removal cannot happen within 90 days, immigration detainees must be released.
3. No maximum security holds: Immigration detainees should not be held in maximum security provincial jails; must have access to basic services and be close to family members.
4. Overhaul the adjudication process: Give migrants fair and full access to legal aid, bail programs and pro bono representation.

If you are an organization or a person who would like to endorse the demands, email us at migrantstrike@gmail.com.

Endorsers

African Canadian Legal Clinic
Agricultural Workers Alliance/UFCW Canada
AIDS ACTION NOW!
Anakbayan-Toronto
Avi Lewis
Camp Sis
Canadian Centre for Victims of Torture
Canadian HIV/AIDS Legal Network
Canadian Union of Postal Workers
Casa Salvador Allende
Council of Canadians
Critical Criminology Working Group, Kwantlen Polytechnic University
CUPE Local 4772
CUPE Ontario International Solidarity Committee
Educators for Peace and Justice
Faculty for Palestine
Fuerza/Puwersa
Gerald and Maas
Greater Toronto Workers Assembly
Guelph Anti-Pipeline Action
Hamilton Sanctuary City Coalition
Health For All
HIV & AIDS Legal Clinic Ontario (HALCO)
Immigrant Workers' Centre
International Alliance in Support of Workers in Iran-Canada
International Socialists
Jane-Finch Action Against Poverty
John Greyson
Judy Rebick
Justice for Migrant Workers
Latin American and Caribbean Solidarity Network
Law Union of Ontario
Metro Toronto Chinese and Southeast Asian Legal Clinic
Migrant Workers Alliance for Change
Naomi Klein
No Deportations to Iran
No One Is Illegal - London
No One Is Illegal - Montreal
No One Is Illegal - Ottawa
No One Is Illegal - Toronto
No One Is Illegal - Vancouver, Coast Salish Territories
Ontario Coalition Against Poverty
Ontario Secondary School Teachers Federation
OPIRG York
Parkdale Community Legal Services
PASAN
People for Peace, London
Political Action Committee, CUPE 3906
Quaker Committee for Refugees
Queer Action Niagara
Rhythms of Resistance
Rising Tide - Vancouver, Coast Salish Territories
Rising Tide North America
Rising Tide Toronto
Rittenhouse
Sanctuary Health
Shit Harper DID
Socialist Action
Solidarity Across Borders - Montreal
South Asian Legal Clinic of Ontario
Student Christian Movement
The Coalition Against Israeli Apartheid
The International Jewish Anti-Zionist Network, Canada
Toronto Coalition to Stop the War
West Coast LEAF
Women's Coordinating Committee for a Free Wallmapu
Youth for Socialist Action

APPENDIX:

Immigration Legal Committee Legal Opinion on Legality of Long-Term Immigration Detention

Immigration Legal Committee

**A joint committee of the Law Union of Ontario and No One is Illegal - Toronto
immigrationlegalcommittee@gmail.com**

November 20, 2013

Introduction

In recent weeks, 191 immigration detainees held in the Central East Correctional Centre in Lindsay, Ontario, have taken action to protest the conditions of their detention. A number of the protesting detainees have been held in long-term detention, some for as many as seven years or even longer. This document addresses the legality of long-term immigration detention in Canada.

While detainees are entitled to monthly detention review hearings, there is no maximum period of time that an individual can be held while authorities seek their removal. Effectively, this means that as long as detained migrants are provided monthly detention review hearings, they can legally be held indefinitely. In practise, this means that some individuals can be held for several years at a time, with Canada's longest immigration detentions lasting over a decade.

It is our opinion that this practise violates Canadian constitutional law, runs contrary to standards set by other countries, and violates international law.

The Canadian legal framework for immigration detention

The legal foundation for Canada's immigration policies are found within the Immigration and Refugee Protection Act ("IRPA")¹ and Immigration and Refugee Protection Regulations ("IRPR")². The IRPA and IRPR outline the guiding principles with respect to detaining and releasing migrants. Non-citizens can be arrested and detained by immigration officers, sometimes without a warrant, either upon their entry to Canada or after their arrival.³

Generally speaking, once detained, individuals are provided with detention reviews within 48 hours and then one week after being detained, and every 30 days thereafter.⁴ However, a migrant who is deemed a "designated foreign national"⁵ can be kept waiting up to 14 days for an initial

detention review, and then are denied a second review for at least the next 6 months.⁶

Unfortunately, the detention review process often proves ineffective. In particular, many detainees are labelled as "not credible" from the outset, and as each hearing is not a de novo (i.e. "new") hearing, past decisions continue to follow individuals throughout the process. Moreover, many detainees are unrepresented at their 48-hour detention review hearings. It is thus unsurprising that the detention review hearings overall result in the release of detainees only 13.9% of the time.⁷

It is also important to note that in Canada, **immigration law is administrative and civil in nature, as opposed to criminal/penal**. Accordingly, Canadian immigration legislation does not permit authorities to place migrants in detention for punitive reasons. Rather, detention is only authorized in specific circumstances, namely if the individual is: 1) a danger to the public; 2) unlikely to appear for examination, a hearing, or removal; 3) under investigation for certain grounds of inadmissibility; or 4) in a situation where the individual's identity has not been established.⁸

However, **despite the fact that under Canadian immigration law, immigration detention is not considered to be a punitive measure, many migrants are held in detention for periods that far exceed prison sentences for serious crimes**. In light of this fact, it is our opinion that long-term immigration detention is a measure that harshly deprives the liberty of detainees, who may be detained for an indefinite period of time under Canadian law.

Canadian constitutional law

The current Canadian policy with respect to migrant detention is unconstitutional, and violates multiple sections of the *Canadian Charter of Rights and Freedoms* (“*Charter*”). Specifically, these policies violate sections 7, 12 and 15 of the Charter and cannot be saved under section 1 of the Charter.

Charter Violations

Section 7 of the Charter states that all individuals, including non-citizens, have the right to “life, liberty and security of the person.” The Supreme Court of Canada has held that this section protects three separate rights: the right to life; the right to act without being physically restricted by the government; and the right to be free from psychological harm caused by the government.⁹

Canada’s immigration detention policies restrict the rights protected under Section 7 through:

- a) The detention of migrants in provincial and federal jails, regardless of the fact that most of these migrants have no criminal records; and
- b) The indefinite nature of these detentions, which can continue for years.

This curtailment of physical mobility through indefinite detentions is aggravated by the fact that detainees have little ability to make international phone calls, often leaving them indefinitely disconnected from their families, who remain abroad. This may exacerbate the serious psychological harm that is caused from being detained with no concrete indication of when they may be released in Canada or deported.

Section 12 of the Charter protects individuals from being “subjected to any cruel and unusual treatment or punishment.” While Canadian courts have held that lengthy detentions alone do not violate this Charter right, as these detentions are regularly reviewed, they have also acknowledged that detentions with no end in sight

may violate both Sections 7 and 12.¹⁰ The existence of monthly detention reviews may not save a detention from being cruel and unusual if they become only a matter of procedural formality. Arguably, these monthly reviews are rendered meaningless if there is no indication that an individual’s circumstances will be changing from month to month. This is especially true when their removals are hampered by circumstances outside the migrant’s control, such as the co-operation, or lack thereof, of foreign governments in facilitating the removal, or Canada’s own oftentimes lengthy immigration processing times.

Canada’s immigration detention policies also violate Section 15 of the Charter, which protects individuals from discrimination. The Supreme Court of Canada has repeatedly held that the Charter extends to non-citizens, and that laws distinguishing between citizens and non-citizens may be unconstitutional.¹¹ Since there is no framework whereby Canadian citizens can be held indefinitely it is our legal opinion that Canada’s ability to indefinitely detain non-citizens who are awaiting the decisions of immigration processes that can take years to resolve, violates Section 15 of the Charter.

Section 1 of the Charter

Along with setting out a set of rights and protections, the Charter also provides the government with the opportunity to override those same rights and protections through Section 1, (“reasonable limits clause”), or through Section 33 (“notwithstanding clause”). The Supreme Court of Canada held in *R. v. Oakes*¹², that in order to justify curtailing an individual’s rights, the government must establish, among other things, that the negative effects of the law are proportional and connected to its objectives and that they minimally impair one’s rights. It is our legal position that the Canadian government has failed to establish these principles and cannot rely on Section 1 to justify their immigration detention policies.

Specifically, **the absence of a presumptive maximum**

period of detention demonstrates that Canada's immigration detention rules are not minimally impairing. Detention constitutes an extreme infringement on an individual's freedom and has severe consequences, such as a forced separation from one's family and the stigmatization that may arise from being locked up. Furthermore, these policies also fail to minimally impair one's rights under Section 15 of the Charter. The Supreme Court of Canada has reaffirmed that it is unconstitutional to discriminate against non-citizens based on their citizenship status. However, Canada's immigration detention laws do just this. Canadian citizens who face allegations of misconduct (e.g. criminal charges) are not subject to indefinite detentions while their cases are resolved, and are provided with clear timeframes for when their case may be decided. Indeed, specific constitutional protections exist to ensure that they face trial in a timely manner [Section 11(b) of the Charter]. This is a marked departure from Canada's immigration detention rules, which allow for effectively indefinite detentions as there are few controlled timelines for removal processes¹³. In fact, in the Ontario region the overall success rate at detention reviews (i.e the chance of being released) stands at a mere 13.9 percent.¹⁴

According to a statement released by the Canadian government prior to the enactment of the IRPR, the goal of both the IRPA and IRPR is to have clear codified practices, and enhanced transparency and consistency.¹⁵ Canada's unwillingness to set presumptive periods with respect to immigration detentions goes directly against these stated goals by creating a system that is neither codified, transparent or consistent. Rather, policies are purely decided on a case-by-case basis, with a minimal body of caselaw to help guide decisions. It is clear then that Canada's immigration detention policies are not sufficiently linked to the stated objectives of Canada's immigration laws and regulations to warrant the curtailing of migrants' rights through indefinite detentions.

We can find further evidence of the contradiction between Canada's stated immigration objectives and their actual practices by examining the IRPA itself. Section 3 of the IRPA states that the Act should both be consistent with the Charter, and comply with international human rights instruments.¹⁶ Detaining migrants without a presumptive period accomplishes neither of these codified objectives. Arguably, in light of Canada's detention policies failing to minimally impair the rights of non-citizens, and the lack of connection between our detention practices and the IRPA and IRPR's stated objectives, these policies would not satisfy the proportionality test required by Section 1 of the Charter.

Practices of other jurisdictions

Other countries, including the United States and many Member States of the European Union, have recognized that laws permitting the indefinite detention of migrants is unlawful, and that such practices violate basic human rights. The United States and the European Union have both set out a presumptive maximum period of detention for migrants pending removal.

United States of America

In the United States, the law limits detention to six months pending removal. The landmark United States Supreme Court decision of *Zadvydas v Davis* [2001] 99-7791 (Supreme Court of the United States) held that a foreign national may be detained for a period of 90 days in order to effect their removal, and that a further 90 days may apply if necessary, **amounting to a six month maximum**. After six months, if the migrant can provide good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, **then they must be released**.

In *Zadvydas*, the U.S. Supreme Court found that laws permitting the indefinite detention of migrants would

breach the Fifth Amendment of the United States Constitution, which forbids the government from depriving “any person of liberty without due process of law”.¹⁷ The Court held that U.S. immigration law is civil law and not criminal law, and that the legislative intent could not be construed to grant the government power to hold an alien in indefinite confinement.¹⁸

The *Zadvydas* decision has been upheld and expanded upon in more recent decisions. In the case of *Clark v Martinez* [2005] (03-878) 543 U.S. 371, the U.S. Supreme Court expanded on *Zadvydas*, by applying the ruling to all migrants, regardless of whether they were admissible or inadmissible to the United States. The Court affirmed the six-month maximum period for detention, and that it is only authorized for a period consistent with the purpose of effecting removal.¹⁹

European Union

In 2008, the Parliament of the European Union passed the European Union Directive on Return (Directive 2008/115/EC), which sets out common standards and procedures for Member States in their treatment of ‘illegally staying third-country nationals’.

Included in the Directive are explicit rules and principles around deportation. In particular, Article 15 of the Directive **sets out a presumptive maximum period of detention of six months.**²⁰ In addition to this, the Directive sets out that where it appears that a reasonable prospect for removal no longer exists, detention is no longer justified and the person shall be released immediately.²¹

International law

Without a maximum presumptive period of detention set out by law, the long-term detention of migrants takes an arbitrary character and is not permitted under international law.

Freedom from arbitrary detention is a basic human right under international law – it is expressly prohibited in a number of international human rights instruments. The International Covenant on Civil and Political Rights (“ICCPR”), to which Canada is a party, expressly prohibits arbitrary arrest or detention, and provides that individuals are entitled to a court process to challenge the validity of their detention.²² The chief interpretive body of the ICCPR, called the Human Rights Committee, has clarified that this protection extends to detention for immigration purposes.²³ The right against arbitrary detention is further supported by the Universal Declaration of Human Rights, which stipulates that no person shall be subjected to arbitrary arrest, detention, or exile.²⁴

Immigration detention in Canada is arbitrary insofar as it is indefinite, with no maximum period of detention set out in law. In many cases this leads to situations of long-term detention for migrants. In particular, migrants who are detained pending deportation can be held for years while authorities attempt to arrange deportation to countries that may not be willing to issue travel documents. While other countries set out a presumptive periods of detention within which authorities may deport an individual, Canada has set out no presumptive period in law.

As described, the detention review process in Canada is an extrajudicial process involving a series of hearings before the Immigration and Refugee Board, which are not de novo hearings. Assessments of a detainee’s credibility at one hearing, for example, will continue to follow her/him throughout the proceedings. Moreover, despite the gravity of the rights at stake, the decision makers in detention reviews are not judges, and are often non-licensed members of the legal profession. The above adds to the arbitrary character of detention, as the fairness of the process is highly questionable.

The United Nations Working Group on Arbitrary Detention has set out several principles in order to determine

whether the detention of a migrant is arbitrary, including that: **“a maximum period should be set by law and the custody may in no case be unlimited or of excessive length.”**²⁵ Furthermore, in *Opinion No. 37/2007 (Lebanon)* the Working Group held that indefinite detention can give a detention “an arbitrary character”.²⁶ In fact, the Working Group has already held that an eight-month detention was too long, as this was an unnecessarily excessive period of time to arrange a deportation.²⁷

In the case of asylum seekers, international law is clear that the detention of asylum seekers must be a last resort measure and for a minimal period of time. Article 31 of the *Convention Relating to the Status of Refugees* exempts refugees from being punished on account of their illegal entry or presence in a country.²⁸ In addition, the United Nations High Commissioner for Refugees has released guidelines relating to the detention of asylum seekers, wherein it states that, as a general principle asylum-seekers should not be detained, and that if detention is imposed on exceptional grounds, it should be for **a minimal period.**²⁹

In light of the fact that there is no presumptive period of detention set out in Canadian law for detained migrants, the long-term detention of migrants is not permitted under international law as it is arbitrary. This is supported by the *International Covenant on Civil and Political Rights*, the *Universal Declaration of Human Rights*, as well as the deliberations and opinions of the United Nations Working Group on Arbitrary Detention. Moreover, there is an even stronger prohibition under international law against the long-term detention of asylum seekers.

Recommendations

In light of the above analysis, it is our legal opinion that the long-term detention of migrants is not valid under Canadian and international law. While detention review mechanisms exist, these have proven to be ineffective and have failed those who have spent years in immigration detention with no end in sight. This is evidenced by the mere 13.9% of detainees that are released at Detention Reviews in the Ontario Region.

The use of immigration detention is a harsh measure that violates the freedom and dignity of those subjected to it. This is particularly so in cases of long-term detention, and its severe effects are worsened when detainees cannot be told when they may be released or when their detention must legally end. The government's objective to remove migrants does not justify the long-term detention of migrants who, often through no fault of their own, cannot be returned to their country of nationality.

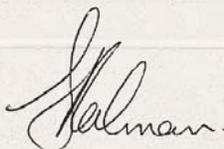
We demand that:

- The Federal Government of Canada enact changes in order to implement a presumptive maximum term of detention for migrants, in compliance with their obligations pursuant to the *Canadian Charter of Rights and Freedoms* and under international law;
- That the *Immigration and Refugee Protection Regulations* be amended to include a presumptive period of 90 days as per the United States model;
- That the Canada Border Services Agency seek and apply alternatives to detention in order to exercise their mandate; and
- That specific criteria be developed to determine when a detainee is held in a maximum security facility, and that this be done only in the most extreme cases³⁰.

Signed on behalf of the Immigration Legal Committee on the 20th day of November, 2013.



Matthew Oh
Barrister & Solicitor



Sharmin Rahman
Barrister & Solicitor

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