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**Building Empirical Research into Alternatives to
Detention: Perceptions of Asylum-Seekers and
Refugees in Toronto and Geneva**

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Table of Contents

EXECUTIVE SUMMARY	5
I INTRODUCTION	6
1 LITERATURE REVIEW	8
2 QUALITATIVE INTERVIEW METHODOLOGY	9
3 METHODOLOGICAL SHORTCOMINGS	10
II WHAT IS AN “ALTERNATIVE TO DETENTION” (ATD)	10
1 ATD – NARROW AND BROAD SENSES	10
2 A SLIDING SCALE OF ATDs	11
III MAKING ATDs WORK – UNDERSTANDING COOPERATION AND COMPLIANCE	12
1 SUBJECTIVE COMPLIANCE FACTORS	12
1.1 THE REFUGEE PREDICAMENT AND FEAR OF RETURN	12
1.2 LAW-ABIDINGNESS AND COMMITMENT TO OBEY THE LAW	15
1.3 TRUST IN, AND PERCEPTIONS OF FAIRNESS OF THE HOST STATE SYSTEMS, IN PARTICULAR ITS RSD SYSTEM	15
1.4 THE DESIRE TO AVOID IRREGULAR RESIDENCE, IN PARTICULAR THE ATTENDANT HARDSHIP AND VULNERABILITY	16
IV OBJECTIVE FACTORS	18
1 RECEPTION CONDITIONS	18
1.1 LIFE AT LIBERTY: THE TORONTO SHELTER SYSTEM & CITY LIFE	18
1.2 LIFE CONSTRAINED: THE CEP AND GENEVA FOYERS	19
1.2.1 VALLORBE CEP	19
1.2.2 THE GENEVA FOYERS	20
1.2.3 THE BUNKERS	21
2 FAIRNESS OF RSD AND PROTECTION SYSTEMS	22
2.1 THE RIGHT TO BE HEARD	22
2.2 TREAT LIKE CASES ALIKE, UNLIKE CASES UNLIKE	23
2.3 DELAY AS UNFAIRNESS	23
2.4 LEGAL ASSISTANCE	24
2.4.1 LEGAL ASSISTANCE - TORONTO	24
2.4.2 LEGAL ASSISTANCE - GENEVA	25
3 HOLISTIC ADVICE & SUPPORT	27
3.1 TORONTO	27
3.2 GENEVA	28

V	FROM DETENTION TO RELEASE: DETENTION REVIEWS IN TORONTO AND GENEVA	29
1	DETENTION REVIEWS IN TORONTO	29
2	DETENTION REVIEWS IN GENEVA	31
3	CONDITIONAL RELEASE IN TORONTO – AN EXEMPLARY ATD?	31
	3.1 ASSESSMENT OF THE PROPOSED BONDSPERSON	32
	3.2 THE ROLE OF THE TORONTO BAIL PROGRAM (TBP)	32
	3.3 REASONS FOR COOPERATION AND COMPLIANCE	33
4	ASSESSMENT OF CONDITIONAL RELEASE AS AN ATD	34
	4.1 BAIL AND BOND AS INSTITUTIONS OF CRIMINAL JUSTICE UNSUITED TO THE REFUGEE PREDICAMENT	34
	4.2 DEVELOPING FURTHER ATDs ALONG THE LINES OF TBP	34
VI	CONCLUSIONS	35
	APPENDIX 1 - METHODOLOGY.....	37
	APPENDIX 2 – ETHICAL COMMITMENTS.....	43
	GLOSSARY	45
	LIST OF ABBREVIATIONS	47
	ACKNOWLEDGEMENTS	49

Executive Summary

This research study examines the workings of ‘alternatives to detention’ (ATDs) through empirical research in two contexts, Toronto, Canada, and Geneva, Switzerland. Relying on a detailed literature review, and qualitative research carried out in summer 2012 in Toronto and Geneva, the report attempts to capture the workings of ATDs in particular from the perspective of the asylum seekers, refugees and other migrants they most closely affect. The study identifies the cooperative predisposition of asylum-seekers, which seems to be rooted in four subjective factors, namely: (1) the refugee predicament and fear of return; (2) inclination towards law-abidingness and commitment to obey the law; (3) trust and perceptions of fairness of the host state, in particular in its Refugee Status Determination (RSD) process; and (4) the desire to avoid irregular residence, in particular the attendant hardship and vulnerability. The report crucially identifies the conditions that foster cooperation, by assessing the interviewees' experiences of the divergent reception conditions available in Toronto and Geneva. ATDs seem more likely to encourage this cooperative disposition if they entail and are perceived to entail suitable reception conditions; fair RSD and other legal processes; and holistic support to navigate legal processes and life in the host country. Perceptions of RSD fairness seemed to depend on (1) being afforded a proper hearing; (2) consistency of decision-making; and (3) taking decisions promptly. The single most important institutional feature that fostered trust was (4) access to early reliable legal advice and assistance. The report also addresses the processes for securing release from immigration detention in Toronto and Geneva, namely detention reviews, to the extent that these procedures determine access to some ATDs. In Toronto, the work of the Toronto Bail Program (TBP) in the context of conditional release is examined. While accepting that some limitations exist in the TBP system, it is concluded that the TBP provides a potential model for supervised release of some asylum-seekers from detention.

I INTRODUCTION

The aim of this study is to bring the perspectives of asylum-seekers, refugees and other migrants on the workings of alternatives to immigration detention (ATDs). Based on qualitative research in Toronto, Canada and in Geneva, Switzerland, as outlined in Part II, we have sought to understand how to best design ATDs. Geneva and Toronto were suggested by UNHCR as suitable venues for the research, as cities with significant accessible asylum-seeker populations, with various reception systems in place that seemed to avoid detention. We did not anticipate ahead of time that the qualitative research would lead us to draw sharp contrasts. In particular, we did not anticipate the stark contrast in the perceptions of asylum-seekers in relation to the functioning of the RSD systems in the two locations.

Our understanding of ATDs is broad. In Toronto, we examined the Toronto Shelter System, as well as more formal ATDs including registration requirements, deposit of documents, bond/bail or surety/guarantor, reporting` requirements, case management/supervised release, and designated residence.¹ In Geneva, we examined the reception system, which entails accommodation of various sorts, from the CEPs (Centres d'Enregistrement et de Procedure – Registration and Processing Centres), run by the Federal government, to other forms of accommodation in institutional accommodation known as 'Foyers', under the auspices of the Canton of Geneva. The legal basis for these arrangements were as of the time of the research, and do not take into account subsequent legislative developments.² As we sought to understand how ATDs 'work', taking into account the experiences of those subject to them, our approach was contextual, and engaged with their experiences of the Refugee Status Determination (RSD) and reception systems. This approach was important also as the official rationales for ATDs relate to how asylum-seekers engage with those systems.

In order to avoid any normalization of detention or excessively coercive ATDs, we focused on the most obvious alternative to detention, being at liberty, that is, residing in the community subject only to minimal restrictions, such as a duty to report any change of address to the authorities. The Toronto Shelter System is in this sense an exemplary ATD, and seems to provide the requisite support for asylum-seekers to ensure their cooperation with the RSD process. In contrast, the Geneva Foyers, while they provide similar open accommodation, do not seem to provide those other requisite holistic supports, as is demonstrated in Part V below. In part, the problems we identified in Geneva seem to reflect the fact that the reception system does not have the capacity to deal with the current volume of applications, leading in particular to long delays in asylum processing.

¹ On release from detention, the Canadian legislation also countenances other ATDs such as 'a curfew, refraining from using a cellphone or computer, house arrest, wearing of an electronic bracelet to track movements, allowing entry into the person's residence at all times by immigration officials and the restriction of contact with certain individuals.' Immigration and Refugee Board of Canada (IRB), 'Guideline 2: Guideline on Detention', para. 3.6.2, available online at www.irb.gc.ca/eng/brdcom/references/pol/guidir/Pages/GuideDir2.aspx. However, we did not encounter anyone subject to these stricter requirements.

² The empirical research was conducted in summer 2012.

We proceeded from the premise that ATDs ‘work’, from the point of view of asylum-seekers and refugees, if they prevent unnecessary detention and other excessive restrictions, support individuals in seeking protection and achieving a swift resolution of their claims, and accelerate their integration into the host society. Our research supports the finding that detention impedes access to the sorts of advice and support that create trust in, and understanding of the RSD process, and accordingly alternatives ‘work’ better in this sense both for individuals and the system as a whole.

From the governmental perspective, we take it that ATDs work if they achieve the legitimate official aims pursued, by using the least liberty-restrictive means appropriate. Concern for the public purse should also lead to the use of ATDs, which tend to be vastly cheaper than detention. The aims of ensuring that asylum-seekers do not abscond, and that they cooperate with the authorities in the determination of their claims, are both in principle legitimate. In the case of rejected asylum-seekers, the aim of detention in contrast is often to effectuate removal.³ In general, asylum-seekers whose claims have not been finally determined should not be held in pre-removal detention, as they are not amenable to removal.⁴ Broadly speaking then ATDs work, from the State’s perspective, if they encourage asylum-seekers to co-operate with the RSD system and immigration law more generally, or if they facilitate the removal of those who have no protection needs.

We should also recall the perspective of the host community. Practices which lead to long-term segregation and welfare-dependency of refugees and migrants are not in the interests of host communities. In contrast, measures which facilitate integration, understood as a two-way process between refugees/migrants and their host communities, are beneficial to host communities. Moreover, they are also likely to ensure greater support for the RSD system and break down negative stereotypes and prejudices against refugees and migrants.

The central conclusions of the study are that the asylum-seekers interviewed were predisposed to be cooperative with RSD and other procedures. This predisposition is explicable in light of four key subjective factors, which are discussed in Part III.1. The design of ATDs can create, foster, support, undermine or even negate this cooperative predisposition. As Part IV illustrates, ATDs work when they entail the following material conditions, which seem more likely to encourage the cooperation of those they seek to assist, namely suitable reception conditions; fair

³ Independent judicial scrutiny of the grounds of detention is necessary. See UNHCR, *Detention Guidelines: Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, (hereafter UNHCR Detention Guidelines) 4.1.4; 7. Available at <http://www.unhcr.org/505b10ee9.html>.

⁴ UNHCR Detention Guidelines, 4.1.4, para. 33. ‘As a general rule, it is unlawful to detain asylum-seekers in ongoing asylum proceedings on grounds of expulsion as they are not available for removal until a final decision on their claim has been made. Detention for the purposes of expulsion can only occur after the asylum claim has been finally determined and rejected. However, where there are grounds for believing that the specific asylum-seeker has lodged an appeal or introduced an asylum claim merely in order to delay or frustrate an expulsion or deportation decision which would result in his or her removal, the authorities may consider detention – as determined to be necessary and proportionate in the individual case – in order to prevent their absconding, while the claim is being assessed.’

RSD and other legal processes;⁵ and holistic support to navigate legal processes and life in the host country.

1 Literature Review

This research is informed by three sets of literature. Firstly, we studied key recent reports on ATDs.⁶ In particular, UNHCR's commissioned research published in 2012 stated that a gap of that study were the views of asylum-seekers as to why they complied with immigration rules and alternatives to detention.⁷ Our study was commissioned to fill that gap. Secondly, we examined the literature on Canadian and Swiss law and practice on detention and ATDs in the broad sense.⁸

Thirdly, we considered literature on regulatory compliance, in order to inform our understanding of when ATDs 'work.' There is a striking dearth of scholarship examining compliance in the refugee and migration law contexts.⁹ This study makes a very small contribution towards addressing this deficit, and opens the way for further research to understand compliance in this field better. Certainly, our findings are highly suggestive that the factors that tend to lead to compliance with the law in other fields also hold for asylum-seekers, refugees and migrants.

The vast social scientific literature seeking to understand when and why individuals comply with the law in other fields demonstrates that compliance is more likely to emerge through persuasion, and measures to encourage cooperation, than through harsh treatment. Moreover, legitimacy shapes compliance with the law. Legitimacy, in this context, is rooted in assessments of *procedural justice*, meaning not merely that government follows pre-ordained rules and procedures, but also that it acts in a manner perceived by individuals themselves to be fair.¹⁰ In

⁵ On fairness generally, see UNHCR Global Consultations on International Protection / Third Track: Asylum Processes, Fair & Efficient Asylum Procedures, 31 May 2001, available at: <http://www.unhcr.org/refworld/docid/3b36f2fca.html>

⁶ A. Edwards, 'Back to Basics: The Right to Liberty and Security of the Person and "Alternatives to Detention" of Asylum-Seekers, Refugees, Stateless Persons and Other Migrants', UNHCR, Legal and Protection Policy Research Series, April 2011, available online at <http://www.unhcr.org/4dc949c49.html>; R. Sampson et al., 'There are Alternatives: A Handbook for Preventing Unnecessary Immigration Detention', International Detention Coalition, 2011, available online at <http://idcoalition.org/cap/handbook/>; Jesuit Refugee Service (JRS) Europe, 'From Deprivation to Liberty. Alternatives to Detention in Belgium, Germany and the United Kingdom', December 2011, available online at <http://www.jrseurope.org/IRSEuropeFromDeprivationToLiberty20122011.pdf>.

⁷ Edwards, *Back to Basics: The Right to Liberty and Security of Person and "Alternatives to Detention"*, above note 6.

⁸ D. Nakache, 'The Human and Financial Cost of Detention of Asylum-Seekers in Canada' UNHCR, December 2011, available online at <http://www.unhcr.org/refworld/pdfid/4fafc44c2.pdf>; Global Detention Project (GDP), 'Immigration Detention in Canada: A Global Detention Project Special Report', March 2012, available online at http://www.globaldetentionproject.org/fileadmin/publications/Canada_special_report_2012_2.pdf

Flynn, M. and C. Cannon (2011) *Immigration Detention in Switzerland: A Global Detention Project Special Report*, October 2011, Global Detention Project (GDP): Geneva.

⁹ V. Braithwaite, *Compliance with Migration Law*, Report for the Department of Immigration and Citizenship Australia, July 2010, available online at <http://www.immi.gov.au/media/publications/research/pdf/compliance-migration-law.pdf>.

¹⁰ T. Tyler, *Why People Obey the Law* (Princeton: Princeton University Press, 2006).

some empirical studies, it has been shown that ‘relational criteria’ are key to assessment of procedural justice. These include assessments of the quality of interpersonal treatment; evaluations of the trustworthiness of authorities; judgments about the neutrality of decision-making; and the degree to which opportunities to participate are afforded.¹¹ Of particular relevance is the finding that procedural justice is all the more important to compliance when people question the legitimacy of the laws in question.¹²

2 Qualitative Interview Methodology

Primary research was carried out over two visits to Toronto and to Geneva respectively in summer 2012. In both cities interviews were conducted with stakeholders and a cohort of asylum-seekers, refugees and other migrants who were part of ATD programs, as is outlined in greater detail in Appendix 1.

The cohort in Toronto consisted of twenty-two interviewees, the majority of whom were current or past residents in the Toronto Shelter System. Ten of the interviewees were or had been clients of the Toronto Bail Program. The cohort comprised of fifteen separate nationalities and included equal numbers of men and women. In Geneva, the cohort included thirty interviewees with seventeen separate nationalities resident at various Foyers. Two thirds of this cohort were men. The mean length of time interviewees had spent in both Geneva and Toronto was less than one year. Both cohorts included interviewees at various stages of the asylum procedure, including those at the admissibility stage, asylum-seekers, recognised refugees and those with complementary protection, refused asylum-seekers with applications for complementary protection, and those facing removal. A target of twenty interviews with migrants had been established in connection with UNHCR. We surpassed this target in both cities, and felt that the number of interviews allowed us to reach thematic saturation, in particular with asylum-seeker interviewees. While the interview cohorts were highly diverse in terms of nationality, ethnicity and basis for their refugee claims, they had broadly similar experiences at the front-end of the asylum process.

The interviews followed a semi-structured schedule of questions, focusing on the following areas: basic personal information, journey to the ATD, living conditions in the ATD, perception of the ATD and outcome expectations. We developed the interview structure in light of our initial research into the Canadian and Swiss systems. We also studied the questions used in similar research projects, in particular that of the Jesuit Refugee Service (JRS),¹³ following helpful discussions with the latter’s principal author. The interviews generally lasted between 45 minutes and an hour and a half. Every effort was made to explain the nature of the research and

¹¹ T. Tyler and E. Lind, ‘A Relational Model of Authority in Groups’ (1992) 25 *Advances in Experimental Social Psychology* 115.

¹² K. Murphy, T. Tyler and A. Curtis, ‘Nurturing regulatory compliance: Is procedural justice effective when people question the legitimacy of the law?’ (2009) 3 *Regulation & Governance* 1; D. Kirk, S. David, A. V. Papachristos, J. Fagan, and T. Tyler ‘The Paradox of Law Enforcement in Immigrant Communities: Does Tough Immigration Enforcement Undermine Public Safety?’ (2012) *The Annals of the Academy of Political and Social Science*, v641 n1: 79-98.

¹³ Note 6 above.

its ethical constraints (see Appendix 2). We found interviewees in Toronto generally open and forthcoming. In contrast, those in Geneva were more reticent, and fewer agreed to have their interviews recorded.

3 Methodological shortcomings

Like many studies of compliance, this study is based on self-reported measures of compliance and willingness to cooperate. This method obviously relies on the honesty of the interviewees. However, they were made aware that all responses would be kept confidential and anonymous, in an effort to ensure the reliability of the testimony. In so far as possible, the researchers relied on their background knowledge and understanding of the asylum and detention systems to frame the questions, and probe the interviewees on their experiences of those systems. However, we did not have access to individuals' case files, so relied on their understandings of their legal predicaments, and did not triangulate their assertions with official records. The interviews are the key source of qualitative data for our project. Given the small sample involved, we were not able to draw quantitative conclusions from the interviews. However, the interviews helped meet the stated aims of the study, by providing invaluable insights into the personal experiences of those in the RSD system. And they have allowed us to identify important further avenues for study.

II. WHAT IS AN "ALTERNATIVE TO DETENTION" (ATD)?

1 ATD – Narrow and Broad Senses

ATD is not a term of art, but rather refers to a range of different practices. It is used in at least two distinct senses. In the narrow sense, it refers to a practice used where detention has a legitimate basis, in particular where a justified ground for detention is identified in the individual case, yet a less restrictive means of control is at the State's disposal and should therefore be used.¹⁴ In the broader sense, ATD refers to any of a range of policies and practices that States use to manage the migration process, which fall short of detention, but typically involve some restrictions.¹⁵ In this sense, ATDs encompass any legislation, policy or practice that allows for asylum-seekers, refugees and migrants to reside in the community while their migration status is being resolved or while awaiting deportation or removal from the country,

¹⁴ O. Field and A. Edwards, 'Alternatives to detention of asylum-seekers and refugees', UNHCR, April 2006, available online at

<http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=4472e8b84&page=search>. An examination of ATDs in this narrow sense is obligatory given states' legal obligations – under domestic administrative and constitutional law, as well as International Human Rights Law – to adopt means that are less (or even least) restrictive of human rights to achieve their policy objectives. The narrow approach places both the aims of the State in detaining, and the alternatives thereto as a means to achieve these aims, under close scrutiny. As is explored below, while the law in the books may enshrine legitimate grounds of detention, administrative practice may tend to apply these grounds too expansively.

¹⁵ UNHCR, Detention Guidelines, note 3 above, paras 8, 40.

albeit subject to some restrictions on movement or liberty.¹⁶ This broader approach helps to identify the systems which avoid detention altogether, and entail only those restrictions that are strictly necessary.

This report adopts the broader approach, so as to avoid one of the possible pitfalls of ATD research, namely an inadvertent tendency to normalize detention practices. Accordingly, we look at the practices that demonstrate that detention is not necessary at all. However, we are also attentive to the narrow meaning, particularly as some of the ATDs in Toronto, in particular bail and bond, fall within the narrow sense of ATD in that they aim to meet the same aims as detention and are premised on the legitimacy of grounds for the prior detention.

Secondly, ATD research may suffer from what we term ‘migration exceptionalism’, that is by focusing on alternatives to *immigration* detention, research may fail to integrate lessons from other areas of law and policy. For instance, a recurrent theme in the discussions of ATD is that immigration detention should not be conflated with punitive detention following conviction for a criminal offence. While maintaining the distinction is crucial, we also concluded that immigration bail may be stricter than bail for criminal suspects, a form of ‘migration exceptionalism’ that warrants further investigation.

‘Migration exceptionalism’ is also evident when states insist that migrants comply with bureaucratic requirements, such as reporting obligations, and duties to aid the authorities in determining their claims, in a manner that goes beyond what would be expected of insiders in their dealings with state bureaucracy. We refer to this phenomenon as the ‘expectation of ultra-compliance.’ This expectation may be particularly burdensome given that migrants, asylum-seekers and refugees in particular, often face language barriers and lack familiarity with the legal system.

2 A Sliding Scale of ATDs

ATDs encompass a range of different policies and practices, such as registration requirements, deposit of documents, bond/bail or surety/guarantor, reporting requirements, case management/supervised release, designated residence, electronic monitoring and home curfew/house arrest.¹⁷

The range of ATDs should not lead to the conclusion that there is a simple menu of options for governments and for decision-makers. Rather, there are measures of different degrees of coerciveness, and decision-makers must only use means that are necessary, reasonable and proportionate to the particular legitimate aim being pursued.¹⁸

¹⁶ UNHCR Detention Guidelines, note 3 above, para 8. Sampson et al., note 6; Human Rights Council, ‘Report of the Special Rapporteur on the human rights of migrants, François Crépeau’ A/HRC/20/24, 2 April 2012, para. 56.

¹⁷ UNHCR-OHCHR, ‘Global Roundtable on Alternatives to Detention of Asylum-seekers, Refugees, Migrants and Stateless Persons, Summary Conclusions, para. 20; UNHCR, Detention Guidelines, note 3 above, para. 40.

¹⁸ UNHCR-OHCHR, note 17 above, para. 18; UNHCR, Detention Guidelines, note 3 above, Annex A; Human Rights Council, ‘Report of the Special Rapporteur on the human rights of migrants, François Crépeau’, note 16

III. MAKING ATDs WORK – Understanding Cooperation and Compliance

All 22 interviewees in Toronto reported that they were compliant with both their legal obligations and the demands of organizations that were supporting them, including reporting obligations to the immigration authorities. Some, however, had been in breach of Canadian migration law, and lived irregularly for periods in the past.

In Geneva, of the 30 people we interviewed, all but one applied for asylum promptly upon arrival. However, a complicating factor in Switzerland is that the European Union Dublin System¹⁹ and Swiss asylum law mean that many applications are deemed inadmissible.²⁰ In addition, we met four refused asylum-seekers who remained in Switzerland for prolonged periods, who only had ‘papier blanc’, that is they had no formal legal status, but only a white paper indicating that they were required to leave the territory. However, this ‘white paper’ usually bore a ‘stamp’ indicating that deportation was temporarily suspended.²¹

1 Subjective Compliance Factors

The interviewees tended to explain their cooperation with RSD and other procedures in light of four key subjective factors:

- 1) the refugee predicament and fear of return;
- 2) existing inclination towards law-abidingness and commitment to obey the law;
- 3) trust and perceptions of fairness of the host state, in particular in its RSD process;
- 4) the desire to avoid irregular residence, in particular the attendant hardship and vulnerability.

1.1 The Refugee Predicament and Fear of Return

In seeking to understand the actions of asylum-seekers, unsurprisingly, what we term the ‘refugee predicament’ looms largest. By this we mean the factors that motivated flight in the first place, and the attendant fear of removal back to the country of origin. This predicament acts as a strong inducement to comply with the RSD process, as long as that process is fair, well understood and trusted. Our findings are consistent with existing research suggesting asylum-

above, para. 53.

¹⁹ See Dublin Regulation (Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national [2003] OJ L50).

²⁰ For instance, in 2011, 22 551 asylum applications were made in Switzerland. In 2011, 19 467 first-instance decisions were made. In 9 688 cases, an inadmissibility decision was taken. Out of these, 7 099 were Dublin cases. Source: <http://www.dublin-project.eu/dublin/Switzerland>.

²¹ See Table 5 in Appendix 1.

seekers rarely abscond if they are in their destination country and awaiting the outcome of a status determination.²² Most interviewees felt they had no alternative but to comply with the legal processes in order to secure protection. They spoke of the 'lack of a Plan B', the impossibility of returning home due to the existential threats faced there, to explain their cooperation with RSD and ATD requirements. One of our interviewees' explanations typified this sentiment: 'The fact that we are in Canada, and we are stuck, that's what makes us refugees.'

For the interviewees who had been detained in Canada, when asked about the reasons for their compliance with ATDs, the refugee predicament was dominant over the previous detention experience. An interviewee, who believed that he was unfairly detained and was consequently subject to strict reporting obligations, explained his compliance therewith as follows:

'Where would I go, where would I live? (...) I don't want to put my family at risk. That's the main thing. I ended up here to be with my family.' (PRRA holder, The Americas, M)

This strongly suggests that fear of detention was not a strong motivator in the minds of interviewees. Some were simply unaware of detention practices in both Canada and Switzerland. One interviewee in Canada said that her agent had warned her against applying for asylum in the airport because she might be detained, but she was indifferent to this risk. She explained:

'I do know they do detention but (...) if anything happens it happens, I don't have control over it.' (Central African asylum-seeker, F)

However, the refugee predicament is double-edged: in the absence of a trusted RSD process, it is plausible that fear of return may lead asylum-seekers to make an understandable calculation that irregularity to evade removal is necessary for survival.

In the absence of information and advice on means to secure protection, the most vulnerable asylum-seekers and migrants may evade the authorities, or simply be unaware that protection or other relevant venues of stay are available to them. While governments often assume that individuals who make asylum claims after long periods of irregular residence have weak protection claims, our research contradicts any such general assumption. For instance, we interviewed two asylum-seeking women with seemingly strong protection needs, who explained that before they were told of the possibility of applying for asylum at their IRB (Immigration and Refugee Board of Canada) detention hearing, they understood that refugee protection only extended to those fleeing war, not to them:

'Until then [the detention hearing] we didn't know that you can be a refugee from [our country]. We had thought that it was for people in Africa who were escaping war or for specific countries.' (Caribbean asylum-seeker, F)

²² Edwards, note 6 above, 82; Sampson et al., note 6 above, 27; Field and Edwards, note 14 above, 248.

Similarly, another interviewee, an evidently traumatized woman, had fled state failure to protect her from extreme domestic violence. She explained: 'I was fleeing domestic abuse, I didn't know that [the Canadian authorities] can protect me from that. I didn't know anything about refugee.' This woman received early legal advice, fortuitously via TRAC (Toronto Refugee Affairs Council) as she was in detention, and was released to the Toronto Shelter System, where she seemed to be receiving the sort of support required.

The importance of providing advice on all avenues to regularize stay is particularly important in order to avoid unnecessary detention. In both Toronto and Geneva, we found that in the case of refused asylum-seekers who still fear return to their country of origin, fear of deportation was a risk factor for absconding to live irregularly. In Toronto, we interviewed two refused asylum-seekers who stayed in Toronto irregularly, and sought to evade detection as they did not wish to be deported. When we met them, they had been released from detention, were in full compliance with bail conditions and had made new attempts to regularize their position in Canada. The woman we met appeared to have a strong refugee protection need, while the man's country of origin had been uncooperative in his return. These two interviewees had the longest periods of irregular residence of the interviewees, as they sought to evade detection and possible removal.

Their stories may be contrasted with two prompt asylum applicants, who had their asylum claims rejected, but nonetheless remained cooperative with the authorities. One interviewee from the Americas had his asylum claim rejected, he felt unfairly, as he was deemed not to have a protection need due the existence of an internal flight alternative. Having spent three years in Canada, he was granted humanitarian and compassionate leave to remain. Another interviewee, also from the Americas, was subject to the US-Canada Safe Third Country Agreement, but had been granted a positive PRRA (Pre-Removal Risk Assessment) in Canada, meaning that his deportation was not permissible for human rights reasons. Both had been resident in the Toronto Shelter System from the outset, and in contrast to the two interviewees discussed in the previous paragraph, they did not abscond or go underground, but rather were supported in their attempts to regularize their status in Canada. These cases illustrate that early access to trusted advice and support within an ATD may help maintain the rejected asylum-seeker's cooperation with the authorities, even if the claim is rejected, in particular where further assistance is available to explore other avenues for protection or stay.

Return to the country of origin naturally arouses fear in refused asylum-seekers who continue to assert they are in need of international protection. In Geneva, there was also fear amongst some interviewees of the means used to remove those who resist, including reports of 'vol spécial' ('special flights') entailing the use of excessive restraints and degrading methods.²³

²³ See further, Commission Nationale de Prévention de la Torture (CNPT) (2011) *Rapport au Département fédéral de justice et police (DFJP) et à la Conférence des directrices et directeurs des départements cantonaux de justice et police (CCDJP) relatif à l'accompagnement par la Commission Nationale de Prévention de la Torture (CNPT) de rapatriements sous contrainte par voie aérienne en 2010 et 2011*, CNPT 1/2011, November 30, 2011, Bern; M Morel 'Mesures De Contrainte Et Dignité', *Le Courier*, 25 October 2011, available at http://www.lecourrier.ch/mesures_de_contrainte_et_dignite.

1.2 Law-abidingness and Commitment to Obey the Law

The other key motivational factor was law-abidingness and commitment to obey the law. Many interviewees conveyed the impression that making the refugee claim was a manifestation of faith in legal process, even if entry to the host country was by irregular means. The interviewees appeared to distinguish sharply in their own minds between the actions they must take to reach safety, usually involving the use of agents, and their behaviour and interactions with law and bureaucracy once in the host country. Some were simply unaware that their means of entry could be regarded as unlawful by the national authorities,²⁴ as they relied entirely on agents to escape their home countries. For instance one interviewee who came to Toronto from Asia had not even heard of an entry visa and never saw his travel documents.

1.3 Trust in, and Perceptions of Fairness of the Host State's systems, in Particular its RSD System

For the refugee predicament to encourage cooperation and compliance, the claimants must understand the RSD process, and perceive it to be fair and likely to recognize their protection needs. Once this is so, the motivational posture of asylum-seekers may be characterized as a commitment to the legal process.²⁵

Asylum-seekers coming to Toronto and Geneva did not always have a clear idea of their destination. Some simply entrusted their flight to agents, and found out their destination only after their journeys were well underway.

'I didn't choose Canada; I didn't know where I would be going. I hadn't travelled. You are not supposed to ask where you are going. [The agent] didn't tell me anything.' (West African asylum-seeker, M)

'Canada wasn't by choice. When we got on the plane, that's when we were told we're going to Canada.' (Asian asylum-seeker, M)

Some research posits a distinction between asylum-seekers/migrant behaviour in destination and transit countries, in particular in terms of their motivation to abscond.²⁶ However, our findings serve as a reminder that asylum-seekers often entrust their lives to agents, and simply seek safety, rather than a particular country of destination.

Nonetheless, in both Toronto and Geneva, a significant proportion did have a strong expectation that their destination would provide a safe haven, a place where human rights were protected. They expected not automatic protection, but a fair hearing. Some of the interviewees did make relatively informed decisions choosing Canada as their country of asylum. They often mentioned

²⁴ As a matter of international refugee law, seeking asylum is not an unlawful act and should not be considered as such. See UNHCR, *Detention Guidelines*, note 3 above, para. 11.

²⁵ V. Braithwaite, 'Dancing with Tax Authorities: Motivational Postures and Non-compliant Actions' in V. Braithwaite (ed.), *Taxing Democracy: Understanding Tax Avoidance and Evasion* (Aldershot, Ashgate, 2003), 15-40.

²⁶ Sampson et al., note 6 above, 17.

Canada's good reputation for treatment of refugees. For example an asylum-seeker from the Caribbean said:

'I read it is fair. They talk about refugee laws being fair.' (Caribbean asylum-seeker, M)

Similarly in Geneva, asylum-seekers often arrived with an expectation that they would be fairly treated.

Those in Toronto tended to deem their treatment in general and the RSD process in particular to have met their expectations of fair treatment. The striking exception was detention, which was generally regarded as being unfair.²⁷ Most awaiting their decision expressed some confidence that the RSD system would be fair. In Toronto, as discussed further below in Part IV.2.4.1, trust in the system was linked with understanding it, and having received independent legal advice:

'It is crazy, but yeah, I do have trust in the system because I understand it.' (East African asylum-seeker, M)

'It's going to be fair, I have to be positive. [Our lawyer] says we have a very strong case. I do believe that. It is going to be a positive one I have no doubt. I trust the system, I trust the hands of the people that I am in right now.' (Caribbean asylum-seeker, F)

Some refused asylum-seekers in Toronto identified particular sources of unfairness, but did not deem the entire system to be unfair.

In contrast, quite quickly after arrival in Geneva, the asylum-seekers we interviewed came to the view their treatment generally, and RSD in particular, was deeply unfair. The significance of this view is difficult to assess, but without that confidence in the process, the disposition of asylum-seekers in the two cities was strikingly different. Those who remained cooperative with the RSD process in Geneva did so out of a sense that they had no other option, and that they were simply at the mercy of the Swiss authorities. This is apt to lead to disaffection and despair, in evidence amongst most of the Geneva interviewees.

A typical comment, from an East African asylum-seeking man who had been in Switzerland for four years, and still was awaiting his first-instance decision on his claim, was that:

²⁷ In practice, interviewees understood that the Canadian authorities needed to check their identity, but felt that detention was a disproportionate and unsuitable means. An East African asylum-seeker noted that detention review was 'pretty fair' stating that he 'would also want to check the person who is coming to my country.' However he said he was 'disappointed' that he had been detained in prison for almost one month: 'I think I should have been better evaluated. I am not here to do something wrong, I am here to turn my life around. I am here for second chances.' A Caribbean asylum-seeker stated: 'Give me the benefit of the doubt, investigate, don't put me in prison. I haven't done anything wrong in Canada.' An asylum-seeker from the Americas similarly noted: 'I understand that they need to check who you are, but in the end it was too much. I understand that there were a lot of people when I was sent to jail and that's why I was sent to jail but they really don't see the trouble or damage that it can cause. It is really extreme what they did. I don't mind waiting in the airport for 2-3 hours.'

‘The asylum system is not fair at all. People don’t have confidence in the asylum system.’

Another asylum-seeker from East Africa who was still awaiting her first interview after six months in Switzerland stated:

‘Most people are without hope. It is difficult to live with people with no hope.’

While these perceptions may be surprising in light of Switzerland’s refugee recognition rate,²⁸ the objective factors which contributed to these subjective assessments of the unfairness of the RSD system are explored in Part IV.2 below.

1.4 The Desire to Avoid Irregular Residence, in Particular the Attendant Hardship and Vulnerability

As discussed above, some interviewees had resided irregularly for periods of time. Amongst the refused asylum-seekers, fear of deportation led some to reside irregularly aiming to avoid detection by the authorities. However, in Toronto, many were aware of the hardships and vulnerabilities that came with irregular residence. As asylum-seekers were able to study and work legally, and were supported by the Shelter System from the outset, there was a clear distinction between ‘regular’ and ‘irregular’ existences.

One Toronto interviewee from West Africa who had lived irregularly for several years in order to avoid removal, expressed relief when she was finally discovered by the authorities: ‘I said I am tired of hiding and people taking advantage of me.’ She described her time living irregularly as the ‘miserable years of [her] life.’ Moving from place to place, staying ‘anywhere [she could] lay her head’, she was subject to regular intimidation, with the threat of calling the immigration authorities being used to coerce her in various ways. Her detention continued for a prolonged period of five months, and she was eventually released and sought to regularize her status. She was at the time of the interview living with her child in accommodation linked to one of the Toronto Shelters.

In contrast, in Geneva, the line between regularity and irregularity seemed less clear. Even those we interviewed who had been recognised as refugees still lived in the Foyers and were unable to find work or normal accommodation. While the right to work is notionally possible in Geneva for asylum-seekers after 6 months, only one asylum-seeker we interviewed was in paid employment, although many expressed the desire to work. Most explained that with ‘Permis N’ they had few real employment opportunities.²⁹

²⁸ In 2012, 24,941 first instance decisions were taken, of which 17,447 were closed without a decision in substance (mostly Dublin cases). Of the 7,494 first instance decisions taken in substance, Convention status was granted in 2,507 cases (33.45 %) and a complementary form of protection (provisional admission) in 1,585 cases (21.15 %). 3,402 asylum applications (45.40 %) were rejected in substance.

²⁹ ‘Permis N’ is the residence permit issued to asylum-seekers.

IV. OBJECTIVE FACTORS

1 Reception Conditions

1.1 Life at Liberty: The Toronto Shelter System & City Life

All but three of the Toronto interviewees had spent periods living in the Toronto Shelter System, mainly in shelters that cater specifically for asylum-seekers and refugees. We are foregrounding the Shelter System as it is the lynchpin of the reception system for asylum-seekers in Toronto, and ensures that they understand the RSD process, and come to trust it. Crucially for this report, it also seems to provide all the key factors to ensure asylum-seekers' cooperation, removing any need for detention at all.

In conjunction with the available legal rights and state entitlements, the shelters seemed to ensure the treatment of asylum-seekers with dignity, humanity and respect, in particular in providing a supportive environment with adequate material support and accommodation. The right to work, which seemed both practical and effective in Toronto, was crucial in this regard. The shelters facilitate access to legal advice and representation from the outset of the RSD process, subject to the limits of the legal aid system. Caseworkers in the shelters filled the role of providing a sort of advisor although this did not amount to formal case management. In this context, aside from some common minimal requirements regarding notification of change of address to the immigration authorities, most asylum-seekers lived at liberty, without restriction.

What we observed in Toronto was that the Shelter System provided an environment in which ties with the city were established quickly. Many interviewees displayed a remarkable degree of affection towards Canada. They appeared to feel part of Canadian society. This seems to act as a strong factor supporting cooperation with the Canadian authorities.

Shelter residents were permitted to come and go largely as they pleased. They were usually required to inform shelter staff if they stayed overnight elsewhere, but they tended to understand this simply as a welfare rather than control measure, citing for example fire safety concerns. That sense of freedom is captured in the following comment:

'You have your own freedom to go out and come in, to cook your own food. I think it is a good experience because you meet other people too. I learn from everybody I meet because everybody has different stories.' (West African asylum-seeker, M)

Interviewees reported overwhelmingly positive experiences living in the shelters. They described immensely helpful staff and a sense of community:

'They are my family.' *'I'm a foreigner but I feel like one of them.'* (East African refugee, F)

'I've never seen anything like this. They just help, help, help. (...) To me it is perfect. I don't have anywhere to compare it with, but I think Canada is the best.. (...)' (Central African asylum-seeker, F)

'They make me realise I am somebody. I know I am somebody now.' (Caribbean asylum-seeker, F)

In contrast, six interviewees had spent short periods in general homeless shelters, and reported negative experiences, in particular fear for their personal safety. We met two who then sought and were granted prompt transfer to refugee-specific shelters when space became available.

1.2 Life Constrained: The CEP and Geneva Foyers

Most of the interviewees passed through one of the five CEPs for short periods before being moved on to Foyers in Geneva.

1.2.1 Vallorbe CEP

Most of the interviewees had passed through the CEP in Vallorbe, in the Canton of Vaud.³⁰ Currently stays in the CEPs are short, typically around two weeks, apparently due to the pressures on the reception system as a whole. Although the stays are short, former residents usually recall the challenges of living in the large dormitories and the highly regimented system. Vallorbe, and the other CEPs, are characterized as 'semi-secure' or 'semi-carceral'.³¹ While asylum-seekers may come and go from the CEP at appointed times, these are heavily restricted, and it appeared that the Centre's private security guards search them on return. An interviewee explained the regimentation he experienced in the following terms:

'It is like a prison because the first day you arrive you can't leave because you need to wait for a paper for two days. Then you can leave with the papers. There is a time for everything. You have to respect time, the time to leave and come back, to go to sleep, to eat. You can't buy food from outside and bring it there. So that everybody eat the same things.' (West African asylum-seeker, M)

However, given the short duration of stays at the CEP, residents tended to accept the levels of regimentation without complaint. However, the conditions seemed to contribute to asylum seekers' despondency, as this quote illustrates:

³⁰ Eight interviewees were initially at other CEPs, while three entered Switzerland before the CEP system was established. The CEP in Vallorbe was the setting for the award-winning 2008 documentary, 'La Forteresse', directed by the Swiss filmmaker Fernand Melgar. See <http://www.laforteresse.ch/>.

³¹ According to GDP, semi-secure signifies some form of physical restraint to prevent people from leaving the facility at will, either for a certain portion of the population residing at the facility and/or for certain periods of time. M. Flynn and C. Cannon, 'Immigration Detention in Switzerland: A Global Detention Project Special Report', GDP, October 2011, 29, available online at http://www.globaldetentionproject.org/fileadmin/publications/GDP_Swiss_detention_report.pdf.

'There is nothing to do during the day. There are no activities. They won't bring anybody with inspirational stories. There is nothing [in the way of advice], they will say that this person is coming to tell you that they will give money for you to go home. ... There is nothing to do.' (East African asylum-seeker, M)

1.2.2 The Geneva Foyers

After the two weeks or so at the CEP, asylum-seekers are allocated to the Cantons. As our remit was to study the workings of ATDs in Geneva, we focused on the various shelters (known as 'Foyers') there, run by Hospice Général.³² The ones we visited differed significantly in the nature and quality of accommodation provided. Some are for men only (including the underground bunkers discussed below), while others accommodate men, women and families with children. Another common feature in Geneva was the co-mingling of persons at different stages of the asylum process and with different statuses.

The living conditions in the Foyers vary considerably, but adults sharing rooms for extended periods seemed commonplace. The living conditions might be tolerable, were it not for the protracted periods involved. We interviewed both asylum-seekers and recognized refugees who remained in the Foyers for many years. The years of enforced welfare dependency and uncertainty seem to take their toll. As mentioned, the right to work for asylum-seekers is not practically effective in Geneva. In general, prolonged unemployment made conditions particularly hard to endure:

'Until I came here (...) all my working life I left home at 6am and come home at 8pm. I didn't have much a family life. You get used to it. It is very difficult [not to work]. The mind wants a challenge. You get really bored.' (European/Middle Eastern asylum-seeker, M)

'Starting a new life is not easy. I went to [my social assistant], I asked him [for work]. I wanted to do anything, even if cleaning. I really need to do anything.' (East African asylum-seeker, F)

'[The Swiss authorities] keep people here (...) give money and food. So people they are losing their potentiality and their energy because they have nothing to do. People have some willingness to do something. We are stuck in the camp. We make food, wait, like that.' (Asian asylum-seeker, M)

Levels of welfare payment depended on legal status. Asylum-seekers with *Permis N* receive social assistance payments at a level that appeared to allow them to feed and clothe themselves and their families, but little else. However, some categories receive only '*aide d'urgence*',³³ which

³² Hospice général is responsible for the implementation of social policy in Geneva. It collaborates closely with the federal and cantonal administration, as well as private organizations. Its status is of an autonomous public organization, under its own governing statute, the *La loi sur l'Hospice général* (17 March 2006). See *L'Hospice général en bref* (2012), available online at <http://www.hospicegeneral.ch/notre-institution/presentation.html>.

³³ See further, M. Sutter *Aide d'urgence pour les requérant-e-s d'asile débouté-e-s Pratique de l'aide d'urgence dans*

seemed to leave them at risk of falling below the basic social minimum, as guaranteed under Swiss and international law.³⁴ Interviewees were acutely aware of the different rights that came with different legal statuses. As an asylum-seeker still awaiting her first instance decision after three years in Geneva stated:

‘It’s too difficult to live in this situation. In this camp there are N, F, B permits and there are differences. N permits, for instance, only get 426CHF a month and B get 1206 CHF and if you have B you can also work and do courses and have classes 5 days a week. If you have N Permit you can’t get a job, can’t do a course or anything like that – it’s a status problem.’ (Asian asylum-seeker, F)

1.2.3 The Bunkers

Underground nuclear bunkers are used to accommodate asylum-seekers and refused asylum-seekers. At the time we visited Geneva, three such bunkers were in use for this purpose.

The first author visited one bunker with the approval of the authorities, and found the living conditions sub-standard.³⁵ Residents slept in dormitory-style accommodation, with no natural light or ventilation. Many complained of respiratory, sleep and other health problems. While they were free to come and go as they pleased, some residents reported that they rarely left the bunker, as they feared police questioning about their migration status. While some were facing removal, others reported that they had asylum appeals pending. Residents generally expressed despair at their living conditions:

‘It’s like hell. If you want to talk to your family you can’t. Even when you are breathing you don’t have the fresh air. You must get oxygen. I think there are side effects. We got doctor in, he said no problem. But I know it is a problem because no oxygen is not good for the body. You are to maybe take six hours of fresh air. Inside smelling, everywhere is smelling.’ (West African asylum seeker, M)

‘This underground is giving too much people problem. This underground here, even white people, Switzerland, their dog can’t live here. The animal, it can’t live here.’ (West African asylum seeker, M)

Another interviewee had previously lived in a bunker in another city, and spoke of it in the following terms:

quelques cantons – Mise à jour du rapport sur l’aide d’urgence 2008, Organisation suisse d’aide aux réfugiés OSAR, Berne, 2011.

³⁴ Under ‘aide d’urgence’, migrants receive between 9.50 and 12 Swiss francs per day, or even less if there are deductions taken for accommodation or food in the shelter. For instance, those staying in the bunkers reported that deductions were taken for food.

³⁵ For a more detailed account of this, and other aspects of the Geneva receptions system, see C Costello & E Kaytaz ‘The Swiss Asylum System - The perspectives of asylum seekers and refugees’ *Schweizerische Flüchtlingshilfe (SFH) / UNHCR-Büro für die Schweiz und Liechtenstein (ed.), Wege zu einer glaubwürdigeren Asylpolitik, Tagungsband zum 5. Schweizer Asylsymposium vom 30. und 31. Januar 2013*, Stämpfli Verlag, Bern 2013, p. 21-23.

‘When I was there I was thinking, I hear about Guantanamo. I don’t what it was like there but it was like a bunker. There is a fixed time to go out and come in. You cannot take fresh air. Here there are also some places like that. It’s like a human misbehave.’
(Asian asylum seeker, M)

For those in the bunkers, such harsh conditions seemed to undermine all trust in the authorities, and contributed to fear, despair and despondency. Moreover, fear of the bunkers spread to other asylum-seekers. We learned of the bunkers from an asylum-seeker in one of the Foyers. When we asked about his future hopes and fears, he mentioned his terror of living underground. He had to explain that he meant literally living underground, in a bunker. His perception was that he could be moved there at any time.

2 Fairness of RSD and protection systems

This study found that the key factor motivating asylum-seekers to cooperate with RSD and other legal processes is its perceived fairness. The interviewees tended to acknowledge the need for countries to run an RSD process, to discern who was in need of international protection. From the interviews in both Toronto and Geneva, there seemed to be remarkable consistency in the conception of fairness. The objective features needed to sustain the initial expectation of fair treatment included (i) being afforded a proper hearing; (ii) consistency of decision-making; and (iii) taking decisions promptly. We found that the single most important institutional factor that fostered trust was (iv) access to early trusted legal advice and assistance.³⁶

Detention was generally perceived as acutely unfair, particularly when it continued for prolonged periods, and so appears liable to undermine asylum-seekers’ trust in the system. Unsurprisingly, most Toronto interviewees whose claims had been recognized perceived the refugee process to be fair. Those who were awaiting decisions whilst resident in the shelter system seemed well-supported and well-informed. Interesting insights on the importance of legal and holistic advice may be gleaned from the refused asylum-seekers. It seemed that even those who felt that the RSD process did not reach a correct finding in their cases did not deem the entire system to be unfair, so they seemed to remain cooperative with authorities. In contrast in Geneva, the lack of information and advice meant that the interviewees overwhelmingly perceived the process as unfair.

2.1 The Right to be Heard

In general, the Toronto interviewees perceived the RSD process to be fair. One exception related to those asylum-seekers who felt their country of origin was erroneously viewed as not producing refugees. They spoke of bearing a ‘label’ which could not be overcome, which in effect denied the right to be heard and the right to have their case assessed individually. This concern was expressed by some asylum-seekers from the Americas, who felt the refugee system did not recognize their protection needs.

³⁶ This supports other research conducted into ATDs using different methodology. See Reports at note 6 above.

In contrast, in Geneva a variety of institutional factors seemed to contribute to the general perception that the system was unfair. On the right to be heard, the absence of advice meant that asylum-seekers were ill-prepared and often did not understand which elements of their stories were relevant to the RSD process. None of the interview cohort received legal advice before their main interview, although the Geneva legal NGOs (Caritas, CSP and ELISA) do apparently provide such advice to some asylum-seekers. In addition, the main interview was perceived as a gruelling interrogation, aimed at finding inconsistencies in their accounts. A typical account was as follows:

‘I spent 6 hours. I didn’t have any legal advice for the interview. I didn’t see any lawyers. It is normal that people don’t talk to a lawyer.’ (East African asylum-seeker, M)

Some asylum-seekers reported that they felt inhibited from speaking openly. One young woman, who had fled violent conflict, explained she felt unable to speak freely at both her registration and main interview. At the main interview, she explained that the questions brought up traumatic experiences she had previously tried to suppress. As the interviewer ‘repeated the questions again and again’ throughout the day, she found herself feeling ‘very tired and not well’.

2.2 Treat like cases alike, unlike cases unlike

While the right to be heard reflects the importance of individual assessment, consistent treatment in the sense of treating like cases alike was also noted as important. In terms of inconsistent treatment, some interviewees believed that asylum-seekers who had arrived at the same time from the same countries of origin were treated differently. Naturally, such perceptions may not indicate actual unfairness, as there may be many distinguishing features between individual claims. However, in the absence of proper explanation, it does indicate an objective institutional failure. For example, one interviewee from Central Africa, who had been in Switzerland for 13 years, and was currently residing irregularly, bemoaned the fact that amongst his cohort of those who applied for asylum at the same time from his home country, he understood that, ‘Everybody has permit B. It is not fair/right. (...) Have they cast a spell? Why not me?’

2.3 Delay as unfairness

In addition, delay and the prolonged periods of uncertainty it brought, were widely seen as unfair. Many in Geneva lamented the long periods of enforced welfare dependency and uncertainty they had endured:

‘I would prefer that somebody gave documents and said leave country. Instead of keeping 6-7 years, after trying to integrate, turn a leaf.’ (West African asylum-seeker, M)

‘I don’t think [the RSD system] is so fair. (...) They [take] a long time to take a decision. It is not fair. (...) I don’t need to waste my time for nothing, for staying at

home, doing nothing. Maybe some people came here for money, but the majority of people I hope they came here to save their life.’ (Asian asylum-seeker, M)

2.4 Legal Assistance

2.4.1 Legal assistance - Toronto

Asylum-seekers resident in the Toronto Shelter System from the outset reported receiving lists of experienced refugee lawyers. The shelters often provided legal orientations and general legal information on the process, but left it to private lawyers to represent clients. This division of labour seemed beneficial, in that having various sources of information and advice seemed to reinforce trust in the system. Interviewees generally received advice early, including on how to complete the personal information form (PIF), either from their own lawyer or from caseworkers in the shelter. There appeared to be a good understanding of the importance of fully explaining the reasons for flight in the PIF form, and that findings at first instance were crucial.

‘If the first assessment fails, then everything else can fail.’ (PRRA holder, Americas, M)

Most interviewees had been granted legal aid for their refugee claim, so they had proper legal representation for the crucial first instance of the process. Many expressed profound gratitude for the services of their lawyers. Those who were not granted legal aid tended not to understand the reasons for their detention, or perceived them to be unfair. One interviewee understood that his legal aid application had failed a merits test and felt that the notion that he should be denied legal aid on this basis was inherently dubious. On being asked about the fairness of the asylum process in general, he singled out the merits test as unfair:

‘They didn’t think that I could win the case. That’s it. How do you know if I can win the case? That is what really bothers me.’ ‘They are not judges, they are just looking at a piece of paper.’ (Caribbean asylum-seeker, M)

Asylum-seekers residing independently in Toronto appeared much more vulnerable to unscrupulous lawyers. We heard accounts of large sums of money paid to lawyers who failed to appear at IRB Refugee Hearings, or provided unsound advice. One interviewee explained this sentiment as follows:

‘When you come, you arrive vulnerable. It is another culture, another country. You are afraid, and you don’t trust. But also you leave yourself [in the hands of people] and say just walk me. If you get in the hands of untrustworthy people, you can get lost. People who believe in certain lawyers and paralegals, they can disappear at the hearing that’s the worst that can happen.’ (PRRA holder, The Americas, M)

Interviewees were exposed to several sources of advice, which were sometimes in conflict. These interviewees claimed that they trusted the advice they received from the shelters, NGOs and

their lawyers. Both in detention and in the shelters, asylum-seekers hear conflicting narratives of the Canadian system. As one interviewee explained:

‘What we hear from other refugees isn’t always the right thing, so I prefer to listen to my caseworker, because they know. (...) Yesterday somebody was telling to file for refugee claim, and then to file for humanitarian and compassionate. So I asked my caseworker, she said it is no good for me because I am not established here. Usually it is for people who have jobs and ties here. I trust my caseworker.’ (Central African asylum-seeker, F)

Sources of advice and support were diverse and the interviewees appeared to have some degree of agency in their choices. As mentioned, shelters offer their residents a list of lawyers to contact for their claims. But not all interviewees had contacted a lawyer from that list. One interviewee decided to take a lawyer that was recommended to him by other refugees from his country of origin, for instance. Shelters also direct residents to other NGOs for general information and support. Many interviewees were in contact with various NGOs, including LGBT (lesbian, gay, bi-sexual or transsexual) and diaspora groups. The shelters, and accordingly their residents, rather than being isolated from Toronto city life, appeared woven into it.

In contrast, all of the interviewees who had been detained in prison brought up difficulties in communicating with the outside world while detained, which created impediments to accessing legal advice.

2.4.2 Legal assistance - Geneva

There is no formal legal aid for refugee claims, so asylum-seekers who lack resources have to rely on NGOs for legal representation. In Geneva, these are principally the organizations, CARITAS, CSP and ELISA. In addition, there is a small refugee legal service in Vallorbe.³⁷ With only one exception, none of the Geneva interviewees stated they had received any legal advice or even legal information before either the registration or main interview. In the absence of proper legal advice, asylum-seekers rely on social workers, and each other, to navigate the asylum process. The widespread belief was that lawyers should only be consulted for the appeal stage, if at all. The registration interviews usually take place at the CEP. None of the interviewees had received any independent advice prior to the registration interview. Most were afraid and bewildered by the situation they found themselves in. A young East African asylum-seeker explained:

‘When I went [to Vallorbe] I was very scared, it was like military school.’

³⁷ Local church groups have set up a small café in portacabins in a secluded yard a short walk from the railway line in Vallorbe. It has internet access, a resource sorely missed by the CEP residents. The café, known colloquially as ‘Mama Africa’, also has a small office where volunteers from Service d’Aide Juridique aux Exilé-e-s (SAJE) provide legal advice. None of our interviewees was aware of its existence or had consulted its lawyers.

The International Organization for Migration (IOM), which offers support for voluntary return, has a presence at the CEP, but there is no organised independent advice on the RSD process. In the absence of any independent trusted source of advice, interviewees explained that they had failed to explain their claims properly. One interviewee mentioned she didn't trust the interpreter at the registration interview. Another asylum-seeker, who had fled violent conflict, relied on advice from other residents in Vallorbe, and explained that as a consequence, he concealed key aspects of his story:

'I didn't tell this story, I lied. I asked around in Vallorbe and said what would they say if you say you killed somebody. They said they will just take you back to your country. So I lied, I was afraid. I had to lie to escape. (...) I didn't tell them (...) I don't know what will happen to me because I don't know any of their law and procedure.' (Asian asylum-seeker, M)

This interviewee was still awaiting his first asylum interview, and at the time we met him, had been resident for a total of six months in three of the underground bunkers in Geneva. He had finally sought out the services of a lawyer.

Interviewees also reported serious inhibitions in the main interview, which usually takes place in Berne. For instance, an educated asylum-seeker, a former political dissident, explained:

'[B]ecause nobody explains to you before the interview what rights you have, you can't say anything.' (European /Middle Eastern asylum-seeker, M)

Not only did asylum-seekers not consult lawyers, many had no idea how to go about doing so. For instance, an interviewee awaiting his main asylum interview explained:

'I don't have a lawyer, I wouldn't know where to go, I don't have an interpreter to accompany me.' (Asian asylum-seeker, M)

When asked whether he had heard of the NGOs who provide legal advice to asylum-seekers in Geneva, he replied simply 'No'.

Some asylum-seekers reported that they had approached refugee lawyers, but that they had been advised that their claims were hopeless. One Asian asylum-seeker, an unaccompanied minor at the time, reported that he failed to secure legal representation from established providers of legal advice to asylum-seekers in seeking to resist Dublin removal to Italy. He explained that the lawyers said they 'couldn't do anything because I had fingerprints.' The reference to inability to challenge Dublin returns if the authorities reported a 'hit' in the Eurodac fingerprint database was not unique to this interviewee. Lack of such legal representation undermines the effective

protection of human rights and the proper application EU and human rights law on the operation of the Dublin System.³⁸

Lawyers were only consulted at the appeal stage, if at all:

‘They gave us a card. I am waiting for the response, what the response means. [If] [t]hey reject my application, I go to the lawyer to give them my documents.’ (Asian asylum-seeker, M)

‘Usually if the answer is negative after the 2nd interview, after that you go to a lawyer.’ (East African asylum-seeker, F)

(CC): Does anybody talk to a lawyer? ‘Yes, if they have a negative decision, there are lawyers.’ (East African asylum-seeker, F)

Another interviewee doubted both the independence of lawyers and the utility of appeals:

‘The lawyers there aren’t there to defend you, they advise you. They are the lawyers of the state, they are not independent. They are not really there for us. (...) They write something for you, they send it, I don’t even know if it matters. (...) The lawyer didn’t even do the appeals for the people I know who are rejected.’ (West African asylum-seeker, M)

The failure to front-load resources meant that asylum-seekers frequently misunderstand the RSD process, and were ill-equipped to explain their claims at first instance. The Foyers do not provide legal orientations, although social workers give some advice on what to expect from the asylum process. In addition, it seemed that even when legal advice was sought at appeal, the resources available were limited, so lawyers selected which appeals to pursue. These two features seemed to undermine faith in the fairness of the RSD process.

3 Holistic Advice & Support

3.1 Toronto

The Toronto shelters assist asylum-seekers in many domains, including with their work permit applications and in ensuring access to healthcare. The provision of holistic support on starting a new life in Canada, and assistance in integration from the outset, are key features of the Shelter System. Typical accounts went as follows:

‘Living in the hostel [shelter] helped me with the hearings. There were talks. I met people who were in the similar situation. They have talks in the evening. They help

³⁸ Given Switzerland’s geographical location, many asylum-seekers are amenable to transfer to other European countries under the Dublin System. We formed the impression that few appeals against Dublin removals seemed to be brought. This was surprising given the recent rulings of both the ECtHR and the CJEU clarifying that removal should not take place if transfer would imperil the asylum-seeker’s human rights, and requiring effective appeals mechanisms to ensure that unlawful transfers did not occur.

us get lots of information, they tell you how to go to school, to get a student permit. I am studying hospitality. They advised me about what to study.’ (West African asylum-seeker, M)

‘We have meetings [on one day a week], they teach us how to integrate into Canadian society, the do’s and don’ts here. [Another day] we have meetings where they give us lectures about upcoming changes in the immigration law, what we should allow our lawyers to do and what we should not allow them to do. (...) Last week they were telling us about personal space, not to stand too close to people when you get on the bus or on the train and about the person who sits on priority seats.’ (Central African asylum-seeker, F)

‘They offered a lot of help and a lot of advice. They are really helpful.’ (West African asylum-seeker, F)

Interviewees did not feel that they were in need of more advice. One interviewee jokingly said ‘[i]f I have more [information] I may not be able to handle it!’

Crucially, since the shelter system is geared to assist asylum-seekers establish a normal life in Toronto as soon as possible, moving to regular rented accommodation is a key aim. Some shelters have dedicated advisers to help with finding housing; others have their own apartments to rent to which claimants can move as they establish themselves in Toronto. On average, the stay in rooms in the shelters tended to be relatively short. The longest an interviewee with a family spent in sheltered accommodation was 14 months. For single people, stays tended not to exceed five months.

The result of this holistic support appears to be that asylum-seekers in Toronto seem to integrate into normal city life quickly. If they are recognized as refugees, this is clearly beneficial for them and for the host community. If their claims are not recognised, it seemed that they nonetheless tended to remain cooperative with the authorities.³⁹

3.2 Geneva

Each Geneva Foyer has dedicated social workers (referred to as 'social assistants') working there, with the exception of the bunkers. The nature of the advice and support that interviewees receive from social workers is holistic, in that it is not only geared towards RSD, but also ranges across other issues. Social workers set up medical appointments, refer the residents to French classes and distribute welfare payments. Social workers are key actors in the reception system, in that they are usually the principal source of advice and support for asylum-seekers. However, they generally seemed overburdened, and at times conflicted in their roles. We encountered several social workers who seemed burnt out, and felt that the reception system had been left under-capacity, and under-resourced.

³⁹ See Part III.1.1 above.

Some residents clearly trusted their social workers. For example,

‘Yes, my assistant is good for me. Sometimes he has many things to help me with. (...) For me I am happy, we understand one another. First time was good, and up to now is good.’ (East African asylum-seeker, F)

Some interviewees, however, reported that they mistrusted some social workers. In particular, there were concerns about the independence of social workers from the migration authorities and in relation to their role in distributing welfare payments. On the latter, some interviewees reported payments being deducted, and felt that social workers treated them unfairly, but they had no obvious avenues of complaint. One interviewee commented that although his assistant was ‘very cooperative’, the system was open to abuse of power:

‘The assistants have too much power. You need a lawyer to change your assistant. A friend of mine, his money is given very late, his assistant does not respond to calls. Sometimes he would be given less money than he was entitled to. They can’t solve your problem. It’s as if you are coming just to collect the money.’ (East African refugee, M)

One asylum-seeker explained that his social worker advised him only that he should cooperate with the Dublin process and return to Italy, in spite of his previous experience of some dire reception conditions there. He explained that while he trusted one assistant in his Foyer, he mistrusted the other. Asked on whom he relied for advice about his asylum claim, he answered simply, ‘Nobody.’ Absent awareness of any other sources of advice and support, asylum-seekers seemed isolated, confused and anxious.

V. FROM DETENTION TO RELEASE: Detention Reviews in Toronto and Geneva

Although this report is concerned principally with ATDs, we also sought to understand detention practices in Toronto⁴⁰ and Geneva,⁴¹ to the extent that some ATDs, in particular bail and bond, are premised on a prior lawful detention. Bail and bond are often imposed after detention reviews, as conditions of release. Detention reviews in this way determine who gets access to ATDs, and often determine how the ATDs work.

1 Detention Reviews in Toronto

⁴⁰ As well as drawing on the interviewee material, we draw on two recent reports on Canadian detention practices: Nakache, note 8 above; GDP, ‘Immigration Detention in Canada’, note 8 above.

⁴¹ Swiss detention practices vary greatly from Canton to Canton. As GDP explains, because Switzerland delegates immigration powers to the cantons, regional authorities have broad discretion in how they apply the 2005 Federal Law on Foreigners, which can result in varying degrees of enforcement from one canton to the next. Flynn and Cannon, ‘Immigration Detention in Switzerland’, GDP, note 8 above. In Geneva, asylum-seekers are rarely detained on arrival, but there is a small men-only administrative detention centre, Frambois, which is predominantly used for pre-removal detention. In contrast, women are detained in Riant Parc Prison, Geneva, but on criminal grounds.

In our Toronto sample of 22 interviewees, 13 had been detained, of whom 4 were women. This is broadly reflective of the overrepresentation of males in detention. It is estimated that about 75 per cent of detainees are men, and only 25 per cent women.⁴² Canadian legislation provides that migrants must be released from detention unless one of the four grounds of detention is established. These are the 'danger to the public' ground; the 'flight risk' ground; the 'security certificate' ground'; and, the 'identity' ground.⁴³ In Toronto, the most common ground of detention was flight risk.⁴⁴ Amongst the interviewees, detention tended to be perceived as a punishment for wrong-doing, rather than as a preventative measure as the law stipulates.

An important element of good practice in Canada is automatic administrative review of immigration detention.⁴⁵ There is much to admire in the Canadian system of detention reviews: It appears to ensure the relatively prompt release of most asylum-seekers,⁴⁶ and give effect to the statutory presumption of liberty. Although we formed a positive general impression of the detention review system, we had a number of specific concerns. First, many detainees are unrepresented in the reviews, and feel unable to challenge their detention. One interviewee conveyed the challenges of the detention review as follows:

'There is you alone, nobody for you. They don't let you talk a lot. If you try to explain something, they say "no, no, no (...)"' (Caribbean asylum-seeker, M)

Another explained:

'I didn't have any legal advice, I was feeling a lot of pressure!' (East African asylum-seeker, M)

In Toronto, those detained in the Immigration Holding Centre (IHC) tended to have had contact with experienced and dedicated refugee lawyers via TRAC (Toronto Refugee Affairs Council), an umbrella NGO, which visits the IHC regularly. Concerning the RSD process, those in detention in prison appeared particularly vulnerable to poor advice and misinformation.

⁴² Nakache, note 8 above, 42, citing statistics from 2004 to 2009.

⁴³ Section 58(1) IRPA. See further the Immigration Refugee and Protection Regulations (IRPR) and the IRB Guideline on Detention, note 1 above.

⁴⁴ Nakache, note 8 above, 49

⁴⁵ The UNHCR Detention Guidelines stated that asylum seekers are entitled 'to be brought promptly before a judicial or other independent authority to have the detention decision reviewed' and that the review 'should ideally be automatic' (UNHCR, Detention Guidelines, note 3 above, Guideline 7, para. 47(iii)); Report of the Special Rapporteur on the human rights of migrants, François Crépeau', note 16 above, para. 23.

⁴⁶ Detention reviews take place after 48 hours, then within 7 days, and every 30 days thereafter (s. 57 IRPA). Within the first 48 hours, the CBSA officer may order release (s. 56 IRPA). Thereafter, only the IRB may do so. In addition, at any time a detainee may request an early review. In Canada, the average length of detention is approximately 25 days (GDP, 'Immigration Detention in Canada', note 8 above, 4). Amongst the interviewees, seven people were detained less than one month, three between one and two months, one interviewee for five months, another for eight months. The longest an interviewee had been in detention was approximately 18 months.

A second concern was that the legal framework does not include an express outer time limit for detention.⁴⁷ In effect, this meant that interviewees detained for prolonged periods perceived detention reviews as increasingly meaningless as time wore on. One interview conveyed the routine futility of repeated detention reviews in the following terms:

‘You dress up, go to hearing and then go back to the same cell.’ (West African asylum-seeker, F)

The detention review process seems to succeed in protecting most detainees from prolonged detention. Nonetheless, our sample included two former detainees whose detentions continued for protracted periods, ostensibly in order to effectuate removal.

2 Detention Reviews in Geneva

Swiss law provides a range of overlapping grounds of detention for asylum-seekers and refused asylum-seekers.⁴⁸ It appeared that two interviewees had been detained pursuant to such criminal convictions for immigration offences, while four had spent time in administrative detention.

An important element of good practice in Switzerland is the judicial review of immigration detention, although it is by no means comprehensive or automatic.⁴⁹ Detention reviews in Geneva are held in public at the Palais de Justice, with observers from the NGO Ligue Suisse des Droits de l'Homme usually in attendance. We observed two detention reviews both concerning pre-removal detention, which resulted in an extension of detention time to prepare for removal on the government's request. Concern has been expressed that detention is too frequently extended in this context, in a disproportionate manner.⁵⁰ Further research is required into the compatibility of detention reviews with international and domestic human rights law.

3 Conditional Release in Toronto – An Exemplary ATD?

When considering whether to release detainees, the Immigration Division (ID) of the IRB must consider the existence of ATDs, and may order conditional release.⁵¹ In Toronto, it appears that

⁴⁷ As GDP notes, ‘Canada’s lack of detention time limits places the country in the company of a dwindling number of states’ (GDP, ‘Immigration Detention in Canada’, note 8 above, 4).

⁴⁸ Flynn and Cannon, *Immigration Detention in Switzerland*, GDP, note 8 above, 8-9.

⁴⁹ Detention reviews take place automatically after the first 24 or 48 hours in detention. However, thereafter, they only take place every three months, although detainees can request the review of any extensions of their detention (Article 80, Foreigners Law).

⁵⁰ Commission des droits de l'homme de l'Ordre des avocats de Genève (Human Rights Commission of the Geneva Bar Association) *Vademecum: Avocat de permanence en matière de mesures de contraintes* (15 November 2012), 9.

⁵¹ The IRB Guideline on Detention provides that an alternative ‘works’ if ‘the imposition of certain conditions will sufficiently neutralize the danger to the public or ensure that the person will appear for examination, an admissibility hearing or removal from Canada.’ (IRB, note 1 above, para. 3.6.1). Conditional release may include ‘any conditions they consider necessary, including the payment of a deposit or the posting of a guarantee for compliance with the conditions.’ (s. 58(3) IRPA). Specified ATDs include ‘release on one’s own recognizance, cash deposit or performance bond, periodic reporting, confinement to a particular location or geographic area,

conditional release is the norm: Amongst the interviewees who had been in detention, all had been subject to conditional release. Four interviewees had a private bondsperson alone, while nine were clients of the Toronto Bail Program (TBP) and one was both a client of the TBP and had a private bondsperson. Private bondspersons post bail in the region of 2,000 CAD - 5,000 CAD. In addition, detainees must accept certain conditions, such as registering their address; appearing at immigration procedures; and presenting to the immigration authorities.

While some other studies have reported concerns about bondspeople exploiting the former detainee,⁵² the interviewees did not report such exploitation. However, we did encounter cases where the exploitative potential was clear. For example, one interviewee turned to a man who had previously sexually exploited her as a potential bondsperson. Amongst the interviewees on conditional release some moved into the shelters, while some moved into private accommodation with friends or family, in some cases to live with their private bondsperson. In this way, the Shelter System sometimes acts as part of the conditional release system. Indeed, some refugee lawyers suggested that this practice could be formalized, and that some shelters were suitable to take on a more formal role.

3.1 Assessment of the Proposed Bondsperson

Interviewees provided a varied picture of IRB assessment of proposed bondspeople.⁵³ Lawyers reported inconsistencies in the assessment of proposed bondspeople, and overall deemed the availability of immigration bail as much tighter than in the criminal system. This reported 'migration exceptionalism' warrants further empirical investigation. Bondspeople are usually asked, under oath, whether they would be willing to help the authorities in effectuating the removal of the individual from Canada if they are not recognised as refugees. This produces what we have termed the 'bondsperson's dilemma'. Where the detainee is an asylum-seeker, assuming the bondsperson knows the basis for the refugee claim and believes it, this means that they must internally wager that the RSD process will accept the applicant's case. Otherwise, he or she is being asked to promise that they will return the migrant to face persecution or serious harm. Shelter staff reported that this requirement had the effect in some instances of precluding refugee advocates and activists from acting as bondspeople.

3.2 The Role of the Toronto Bail Program (TBP)

In Toronto, the TBP provides a crucial last-resort service for immigration detainees who have no

the requirement to report changes of address or telephone number, and detention in a form that could be less restrictive to the individual.' (IRB, note 1 above, para. 3.6.2).

⁵² Edwards, note 6 above, 60.

⁵³ The IRB Detention Guideline sets out that: 'In deciding on the appropriateness of a potential bondsperson, members must consider whether the proposed bondsperson is willing to supervise and influence the person concerned and whether they are in a position to monitor the activities of the person concerned. Members must also consider the length of time that the bondsperson has known the person concerned in detention and the knowledge that the bondsperson has of the background history of the person concerned.' (IRB, note 1 above, para. 3.6.4).

private bondsperson with the right credentials.⁵⁴ In effect, the outcome of the detention review is that detainees are released to the TBP. The former detainees to whom we spoke seemed in the main aware that acceptance by the TBP was an effective guarantee of release, or in other words, that the IRB was almost certain to order release if the TBP accepted the detainee. Some detainees approach TBP directly, while on other occasions IRB ID members suggest that the TBP gets involved in a particular case, if there is no individual bondsperson available.

TBP staff visit the places of detention and conduct interviews with the detainee in order to determine whether to take him or her on as a client. Interviewees flagged up two issues regarding the fairness of the TBP interview process: the uncertainty around TBP selection criteria and processes, and the requirement that they agree in writing to leave Canada if so required by the authorities.

TBP clients mainly expressed intense gratitude to be bailed out. They were generally aware that without the TBP, they would still be in detention and accordingly tended to comply with all reporting obligations.

3.3 Reasons for Cooperation and compliance

When asked why they complied with the sometimes onerous TBP reporting obligations, three different rationales emerged. Firstly, some interviewees simply explained that they were compliant as they wanted to demonstrate their law-abidingness. Secondly, the desire to avoid the sanction of being detained again was expressed. TBP makes it explicit that failure to report may result in return to detention.

‘Because I have to comply. I want to do the right thing. I don’t want to get into trouble.(CC): If not? They will pick you up. They will notify immigration and immigration will arrest you.’ (Caribbean asylum-seeker, M)

As another put it:

‘Why not comply? It is only 15 minutes of your time. It is a no-brainer. You may end up in jail.’ (East African asylum-seeker, M)

Thirdly, the TBP also rewards clients for complying with reporting obligations by reducing the frequency of reporting over time. One interviewee, for instance, explained her joy at her reporting obligation being reduced to a weekly one:

‘[My TBP caseworker] said: “I will give you one time a week, and I am like really, am I such a good girl?”’ (Asian asylum-seeker, F)

⁵⁴ For a detailed overview of the workings of the TBP, see Edwards, *Back to Basics*, note 6 above, 56-60; This type of arrangement is envisaged in the UNHCR Detention Guidelines, which suggest that asylum-seekers could ‘be “bailed” to an NGO – either upon the NGO acting as a guarantor (...) – or under agreement with the government’ (UNHCR, Detention Guidelines, note 3 above, Annex A, (vi)).

In this way, clients felt that their good behaviour was being rewarded, and that they had earned the trust and respect of their TBP caseworkers. TBP staff reported that this good relationship continued so far as explaining to some clients that establishing a right to stay in Canada was impossible, and helping them to leave the country voluntarily. However, our interview sample did not include anyone who had been assisted in this manner.

4 Assessment of Conditional Release as an ATD

Overall, our research suggests that detention reviews in Toronto lead to conditional release in most cases, with migrants almost invariably being subject to bail and bond arrangements. We were left with a lingering concern that the more coercive ATD, conditional release, is resorted to, when a less restrictive one, unconditional release, may well be appropriate in some cases.⁵⁵ This issue warrants further empirical investigation.

4.1 Bail and Bond as Institutions of Criminal Justice Unsited to the Refugee Predicament

Our second concern relates to bail and bond systems that have their roots in the common law criminal justice system. The TBP too is principally a programme for criminal detainees, with the immigration section having evolved as a relatively autonomous offshoot of the criminal programme. Most TBP Immigration clients are not asylum-seekers, and the organisation is geared principally toward other immigration detainees, who would otherwise not be released. Accordingly, it appears that many of its clients have been in detention on the 'threat to the public' ground, and so have also had past experiences with the criminal justice system, often in the US. As a result, we were struck by how often TBP clients likened their reporting obligations to be 'on probation' or 'parole'. Some also spoke of being given a 'second chance' by the TBP, and seem to have regarded their immigration detention as punishment for wrong-doing. The 'preventative nature' of the detention was lost on the interviewees. The TBP narrative, informed by the criminal justice model, seemed to inculcate a sense that immigration detainees were criminals under supervision, although that was not the basis for their immigration detention at all.

The criminal justice ethos led us to have concerns about TBP and asylum-seekers. As previously discussed, TBP takes pride in being able to ensure compliance with migration law, right up to leaving the territory. However, for refugees, such a fate is naturally terrifying. Moreover, in some cases, we had reservations about the 'tough talk' TBP staff appeared to use, given the evident vulnerability of some of their clients, particularly those who had pending refugee claims. This suggests that better screening systems may be warranted within TBP, in order to identify vulnerable former detainees, asylum-seekers in particular.

⁵⁵ Cf. 'The Special Rapporteur would like to stress that alternatives to detention should not become alternatives to unconditional release. Persons who are eligible for release without conditions should not be diverted into alternatives.' Human Rights Council, 'Report of the Special Rapporteur on the human rights of migrants, François Crépeau', note 16 above, para. 52.

4.2 Developing Further ATDs along the Lines of TBP

The TBP is a unique entity. There is no other organization providing an equivalent function in Toronto or elsewhere. Clearly, it provides an example of how supervised release can work, if the appropriate relationships are established. Refugee lawyers expressed concern that when they proposed in detention hearings that other organizations could also fulfil the supervision role taken on by TBP, this was rarely accepted, in contrast to criminal bail where various alternative organisations take on the supervisory function. The possibility for other organizations to take on an analogous role is worthy of consideration.⁵⁶

VI. CONCLUSIONS

The interviews revealed the generally cooperative disposition of asylum-seekers at the outset of their asylum process. Making an asylum claim seems to be an expression of trust in the host country. Asylum-seekers have expectations of fair treatment:

‘I heard about Genève being very pretty. It is a very famous place in the world. The internet has a lot on human rights. Red Cross, there are a lot of organizations that work all around the world. I heard about Switzerland, especially about Geneva. It is the country of human rights so I thought they would treat me as human.’ (Asian asylum-seeker, M)

However, whether that cooperative predisposition remains depends on treatment in the host country. There seems to be little justification for front-end detention of asylum-seekers, provided that reception conditions are suitable; RSD is perceived to be fair; and holistic support is provided to navigate legal processes and life in the host country. Perceptions of fairness tended to depend on being afforded a proper hearing; consistency of decision-making; and taking decisions promptly. The single most important institutional factor that fostered trust was access to early reliable legal advice and assistance. This finding supports research undertaken by others.⁵⁷

If asylum-seekers are detained, detention reviews by independent judicial bodies are crucial to ensure that detention is lawful, justified, and only used when strictly necessary. Conditional release may be a useful ATD, provided it is properly adapted to the situation of asylum-seekers and refugees. In Toronto, the work of TBP illustrates that release under supervision may work as

⁵⁶ The recommendation of the UN Special Rapporteur on the Human Rights of Migrants is noteworthy in this context, as he urges that ‘a network of NGOs could be encouraged to provide bail, bond or surety opportunities to (...) migrants.’ (Human Rights Council, ‘Report of the Special Rapporteur on the human rights of migrants, François Crépeau’, note 16 above, para. 59). The notion of a ‘network’ is ripe for development in Toronto, with the Shelter System and other NGOs apparently willing and able to act as immigration bondspeople, in addition to TBP.

⁵⁷ See Reports, note 6 above.

an ATD for some detainees. However, life at liberty, with suitable reception conditions, holistic support, and fair RSD,⁵⁸ seems to 'work' as a satisfactory ATD for most.

⁵⁸ UN High Commissioner for Refugees, *Canada/USA Bi-National Roundtable on Alternatives to Detention of Asylum Seekers, Refugees, Migrants and Stateless Persons*, February 2013, paragraph 21, available at: <http://www.refworld.org/docid/515178a12.html>

APPENDIX 1

Methodology

1. Primary Research in Geneva

The primary research was carried out in Geneva during two separate field trips in summer 2012.

Interviews with Asylum-Seekers, Refugees and Migrants

The Geneva interview cohort consisted of 30 interviewees who came from 17 different countries. A third of the interviewees were women.⁵⁹ The most recently arrived interviewee arrived one month before the interview and the longest an interviewee had been in Geneva was sixteen years.

Table 1- Regions of origin of interviewees in Geneva⁶⁰

Region of Origin	Number
East Africa	10
West Africa	7
Central Africa	3
Southern Africa	1
Europe & Middle East	3
Asia	6

Table 2: Ages of interviewees in Geneva⁶¹

Age Band	18-25	25-30	30-40	40-50	50-60
Number	6	10	8	4	1

⁵⁹ The higher number of male interviewees is explained by our decision to interview those who had experienced different aspects of the Swiss system, including the bunkers, where only men are accommodated, and the detention centre at Frambois, again where only men were held.

⁶⁰ These regional designations are designed specifically to provide an overview of the origins of the interviewees, whilst maintaining their anonymity.

⁶¹ Twenty-nine out of thirty people disclosed their ages.

Table 3: Gender of interviewees in Geneva

Female	Male
10	20

Table 4: Length of the interviewees had spent in Switzerland at the time of the interview

Length of time in Switzerland	Interviewees
Less than 1 month	0
1-6 months	6
6 months -1 year	12
1- 2 years	4
2-3 years	1
3-5 years	3
5-10 years	1
10-20 years	3

The interviewee cohort mainly included asylum-seekers waiting for their first instance interviewees at Bern but also included asylum-seekers who were waiting for first instance decisions, and at the appeal stage. We also met two recognised refugees and four refused asylum-seekers. Some of the interviewees were subject to Dublin proceedings.

Table 5: The legal status of interviewees in Geneva at the time of their interview

Status	Number of Interviewees
Permis N –Awaiting 1 st Interview	16
Permis N- Awaiting 1 st Decision	3
Permis N- Appeal Pending	2
Permis F	1

Permis B	2
Papier Blanc- Débouté	4
Papier Blanc- NEM	2

Access to the interviewees was arranged via several sources. Firstly, information about this project was circulated to several Social Assistants in the Geneva Foyers, who in turn approached Foyer residents, compiled lists of contacts for us, and/or set up interviews. In addition, officials put us in touch with a number of former detainees. Accordingly, we had several different sources of contact with the target population. Not all of those who were available for interview were actually interviewed, due both to practical issues such as time clashes and to protect the anonymity of the interviewees. Most of the interviews were conducted in private offices in the Foyers. In the bunker, it was harder to ensure the same degree of privacy. On one occasion an interview was conducted in the private room of an interviewee. Three interviewees wanted to meet outside of the Foyers, so interviews were conducted in a private apartment, a café of the interviewee's choosing and in a public park.

The majority of interviews were conducted in English and five in French without interpreters. On seven occasions, we used Red Cross interpreters for other languages. Given the logistical challenges in setting up interviews, where possible English or French speakers were given preference, although we were nonetheless able to ensure a diverse range of nationalities.

Stakeholder Meetings

We conducted a short visit to the Vallorbe CEP, and had a useful meeting with its Director, who took time to explain the Swiss reception system and gave us a tour of the CEP. We saw the large dormitories, eating and communal leisure areas, and storage areas where clothes, in particular warm winter-wear, were kept. We held meetings with Social Assistants at four different Foyers. At the Frambois Detention Centre, we spoke with a number of members of staff and were also given a tour of the detention centre. We interviewed one refugee lawyer in private practice, another former practicing lawyer, and others in one of the Geneva legal advice NGOs. We also held an informal meeting with members Ligue Suisse de Droits de l'Homme, who acts as observers to detention reviews and also visit immigration detainees.

Primary Research in Toronto

The primary research was carried out during two field trips to Toronto in summer 2012.

Interviews with Asylum-Seekers, Asylum-Seekers, Refugees and Migrants

In total 20 interviews were carried out with 22 interviewees. In brief, 15 nationalities and an equal number of male and female claimants were interviewed. 13 of the interviewees had been

detained in Canada. The cohort included interviewees fleeing from persecution on various grounds (including sexual orientation, race, gender, and political opinion), as well as those fleeing generalised violence and sexual- and gender-based violence.

Table 6: Regions of origin of interviewees in Toronto⁶²

Region of Origin	Number of Interviewees
The Americas	3
Caribbean	5
East Africa	5
West Africa	2
Central Africa	1
Europe & Middle East	4
Asia	2

Table 7: Ages of interviewees in Toronto

Age Band	18-25	25-30	30-35	35-40	40-50	50-60
Number	2	5	5	4	1	5

Table 8: Genders of interviewees in Toronto

Female	Male
11	11

Table 9: Length of the interviewees had spent in Canada at the time of the interview

Length of time in Canada	Number of Interviewees
Less than 1 month	3

⁶² See note 62 above.

1-6 months	4
6 months -1 year	7
1- 2 years	1
2-3 years	3
3-5 years	2
5-10 years	1
10-20 years	1

The interviewee who had been in Canada the longest arrived in the mid-1990s, and the most recent arrived two weeks prior to the interview. Consequently, there was a variation in the stages of their claims and experiences of the system. At the time we interviewed them, eighteen were awaiting the first instance decision on their refugee claims, while the IRB had rejected three applicants. Of these, two had received definitive rejections of their refugee claims, but were seeking to regularise their positions by applying for PRRA or humanitarian and compassionate leave.

Table 10: The legal status of interviewees in Toronto at the time of their interview

Status	Number of Interviewees
Recognised Refugee	1
Refugee Claimant (awaiting decision)	18
Migrant with positive PRRA / humanitarian leave to remain	3

The research was conducted just as the Canadian asylum legislation underwent significant changes. The political debate on the merits of Bill C-31 was the backdrop to our visits. We deal with the law in force at the time of our visits.

Every effort was made to ensure diversity in terms of gender, nationality and aspects of immigration history such as experience of detention, stage of the refugee claim and length of time in Canada, in the selection of interviewees. Contact with potential interviewees was made through three diverse routes. The researchers contacted all the main refugee shelters in Toronto, the TBP and the Refugee Law Office. Staff of these organisations distributed a short background

document explaining the nature of the research to their clients. In addition, a researcher for this study visited a shelter and gave a talk to its residents on the research, in order to inform potential interviewees about the study.

The interviews were conducted in private offices in the Shelters, in a café of the interviewee's choosing and in legal offices. Most of the interviews were conducted in English. Only four interviews required the services of an interpreter. On two occasions, a staff member of the particular shelter acted as interpreter, once we were satisfied the interviewee in question was comfortable with the staff member taking on that role, and trusted the interpreter. In all other instances, experienced professional interpreters were hired.

Interviews with Stakeholders

In addition to the asylum-seekers and refugees, we also interviewed key stakeholders and experts. Those we met included lawyers from the Refugee Law Office, caseworkers from various key shelters (including Christie Street Refugee Welcome Centre, Faithful Companions of Jesus (FCJ) Refugee Center and Sojourn House), the director of the Toronto Bail Program (TBP), and the representative from UNHCR Toronto.

APPENDIX 2 - Ethical Commitments

The University of Oxford Social Science Division granted ethical approval for the research in May, 2012.

1. Interviewee Consent

Once we met the potential interviewee in person and before each interview commenced, the potential interviewee was given a detailed Participant Information Sheet. We explained its contents carefully, to ensure that the nature and purpose of the research were understood. The Participant Information Sheet contains the contact information of the lead researcher, and we invited interviewees to contact us should they have any further questions, or should they wish to withdraw consent after the interview. We explained the researchers' commitment to maintaining the confidentiality and anonymity of the interviewees. Accordingly, the principal researcher signed a Confidentiality Undertaking and gave it to each interviewee. In addition both part-time researchers and the interpreters involved in the project signed confidentiality agreements with the lead researcher. All of the interviewees indicated their consent to the interview by signing the Consent Form.

2. Interviewee Anonymity

We did our utmost to ensure that the interviewees' anonymity is protected throughout, from the interviewee selection process, attribution of the quotes in the study, and description of the interviewees throughout.

Staff and Foyer staff were aware of the identity of some (but not all) of their residents interviewed. To protect interviewees' anonymity, we do not attribute their views to any particular Foyer or Shelter. Since the TBP is a unique program, we had two distinct methods of selecting its clients and former clients for interview. First, we contacted a random sample of the clients from a long list the TBP itself provided of their clients who had expressed an interest in our project. We also met current and former TBP clients contacted via other sources, the shelters and refugee lawyers in particular. These precautions were essential to avoid further distress to an already vulnerable population, who may still depend on the support of the organisations concerned.

In Toronto, interviewees were compensated for their travel with two TTC (Toronto Transit Commission) tokens. In Geneva, interviewees were at first compensated with travel vouchers. Upon the realisation that interviewees already received free transport within the city and inter-city travel was too expensive, transport vouchers were not given as compensation.

3. Interview Recording, Transcription & Analysis

In Toronto all but one interviewee consented for the interview to be recorded. In Geneva only 19 out of 30 interviewees consented to having the interview recorded using a digital audio

recording device. The approach to the interview analysis involved a qualitative approach, which involved revisiting interview notes, transcripts and recordings, in order to identify patterns of responses.

Further information can be obtained from Cathryn Costello, Fellow and Tutor in EU and Public Law, University of Oxford, at cathryn.costello@law.ox.ac.uk.

GLOSSARY

Asylum-seeker: A person who has made a claim for refugee protection (or more generically 'asylum') which has yet to be finally determined.

Débouté: Rejected [asylum seeker]

Detention: Deprivation of liberty in a confined space, such as a prison or closed holding centre.

Dublin: Procedures to transfer asylum-seekers under the EU Dublin Regulation (Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national [2003] OJ L50. Switzerland is also a party to this system.

Failed asylum seeker: A person whose claim under the RSD process has been rejected.

Failed refugee claimant: See 'failed asylum seeker' above.

Failed asylum seeker with outstanding protection needs: We acknowledge that no bureaucratic system is infallible. This term accordingly refers to any person whose asylum claims have been rejected, but who continues to face human rights impediments to their return.

Geneva Foyers: The various shelters used to accommodate asylum-seekers, refugees and failed asylum seekers in Geneva.

Immigration detention: Detention of refugees, asylum-seekers, stateless persons and other migrants, either upon seeking entry to a territory (front-end detention) or pending deportation, removal or return (back-end detention) from a territory. It refers primarily to detention that is administratively authorised, but it also covers judicially sanctioned detention.

Irregular migrant: Someone who has entered, travelled through or resides in a country without the permissions and/or documentation required by that country.

Legal assistance: Any form of information on legal processes, from formal legal representation, which is normally provided by a qualified lawyer or in some instances a legal consultant. Legal representation may be government funded under legal aid schemes, pro bono or privately funded. It also includes less formal forms of legal counselling, legal orientations and information sessions, and other types of legal advice and information.

Migrant: In a broad sense, to refer to any person who changes her country of residence, so it encompasses 'asylum-seekers', 'refugees' and other all others who are outside of their country of origin.

Papier Blanc: A White Paper indicating that the holder must leave the territory, usually with a 'Tampon' indicating that deportation has been postponed.

Permis B: Refugee residence permit issued to those granted asylum.

Permis C: Residence permit granted after five years.

Permis F: Temporary Residence permit which is issued if deportation to country of origin is not possible or is unreasonable because of serious dangers, such as civil war.

Permis N: Residence permit issued to asylum seekers.

Refugee claimant: See 'asylum-seeker' above.

RSD: We take a long and broad view of the RSD process, to include both applications for refugee status under the Refugee Convention and on the basis of other international obligations preventing *refoulement* at first instance and appeal, and any pre-removal processes that involve assessments of the risks posed in the country to which removal is countenanced.

Tampon: Stamp granting a stay of deportation.

Toronto Shelter System: The various shelters used to accommodate asylum-seekers, refugees and failed asylum seekers in Toronto.

List of Abbreviations

ATD	Alternative to Detention
APAA	Africans in Partnership Against AIDS
CBSA	Canada Border Services Agency
CEP	Centre d'Enregistrement et de Procédure/Registration and Processing Centre
CJEU	Court of Justice of the European Union
DFJP	Département Fédéral de Justice et Police/Federal Department of Justice and Police
ECtHR	European Court of Human Rights
FCJ	Faithful Companions of Jesus (FCJ) Refugee Center
Frambois	Frambois Certified Establishment for Administrative Detention (Etablissement concordataire de détention administratif de Frambois), Vernier, Canton of Geneva
GDP	Global Detention Project
ICE	Immigration and Customs Enforcement (USA)
ID	Immigration Division (of IRB)
IDC	International Detention Coalition
IFA	Internal Flight Alternative
IHC	Immigration Holding Centres
IOM	International Organization for Migration
IRB	Immigration and Refugee Board of Canada
IRPA	Immigration and Refugee Protection Act
IRPR	Immigration Refugee and Protection Regulations
JRS	Jesuit Refugee Service
NEM	Non-entrée en matière/substantively inadmissible asylum claim(ant)
NEM-Dublin	Non-entrée en matière, as categorized as due for removal under the Dublin Regulation
ODM	Swiss Federal Office for Migration
OSAR	Organisation Suisse d'Aide aux Réfugiés
PIF	Personal Information Form
PRRA	Pre-Removal Risk Assessment
RLO	Refugee Legal Office
RSD	Refugee Status Determination
SAJE	Service d'Aide Juridique aux Exilé-e-s
TBP	Toronto Bail Program

TRAC Toronto Refugee Affairs Council
TTC Toronto Transit Commission
UNHCR United Nations High Commissioner for Refugees

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Cathryn Costello & Esra Kaytaz, Oxford, 29 May 2013