Measures of First Resort: Alternatives to Immigration Detention in Comparative Perspective

Alice Edwards¹

1. Introduction

Many states have indicated an interest in non-custodial alternatives to immigration detention.2 "Alternatives to immigration detention" (or A2Ds) is the generic term for "any legislation, policy or practice that allows for asylum-seekers, refugees and migrants to reside in the community with freedom of movement while their migration status is being resolved or while awaiting deportation or removal from the country".3 The label is not a legal one, but rather refers to the range of measures employed by states that fall short of full deprivation of liberty or confinement in a closed space, although some still involve some form of restriction on movement, such as reporting requirements or designated residence. The ultimate alternative to detention is no detention at all, or release without conditions.

Notwithstanding the interest in and success of many alternative programmes, the rate at which asylum-seekers and immigrants are being detained is increasing in many countries. The Parliamentary Assembly of the Council of Europe recently noted that member states had "significantly expanded their use of detention as a response to the arrival of asylum seekers and irregular migrants". Incarceration rates of migrants in the USA have also increased exponentially over the last decade: the average daily population in

detention in 1997 was 9,011, yet by 2007, it was 30,295.5 Growing xenophobia and racism in many parts of the world have led to a surge in intolerance, violence, hate crimes and related tensions against refugees and other non-nationals.6 Fuelled by populist politics, these trends are also the context in which hardening policies in the area of detention take place and also in which such policies are justified, regardless of the evidence. Pragmatically, however, there is no empirical evidence that the prospect of being detained deters irregular migration, or discourages persons from seeking asylum.7 In fact, as the detention of migrants and asylum-seekers has increased in many countries, the number of individuals seeking to enter such territories has also risen, or has remained constant.8 Globally, irregular migration has been increasing regardless of governmental policies on detention.9

Except in specific individual cases, detention is generally an extremely blunt instrument of government policy-making on immigration. This may be explained by the complexity of choices and the mixed motivations of many migrants, which likely have little to do with the final destination country's migration policies.¹⁰ Statistics call into question any deterrence effect of detention. Regardless of any such effect, detention policies aimed at

deterrence are generally unlawful under international human rights law as they are not based on an individual assessment as to the necessity to detain.¹¹

Apart from noting the current political climate in some parts of the world in which asylum is being sought, not least an atmosphere of increasing hostility towards foreigners, the many political reasons why detention is an increasing phenomenon is not examined in this article in detail. However, the article does outline briefly the non-discrimination framework in which the right to liberty is situated and which is, in many contexts, the backdrop for increasingly harsh detention as well as asylum regimes. This article will examine the actual evidence that suggests that many alternatives to migration management. "Workability" for the purposes of this article is largely taken to mean cooperation of beneficiaries with the programmes in question. There is considerable evidence that shows, for example, that less than 10% of asylum applicants, as well as persons awaiting deportation,12 disappear when they are released to proper supervision and facilities. In other words, 90% or more of such persons comply with all legal requirements relating to their conditions of release. In addition, alternative options present significant cost savings to governments,13 whereas some governments have paid out millions of dollars in compensation or face unpredictable compensation bills for their unlawful detention policies.14 Counter-intuitively, alternative programmes that offer advice on the full spectrum of possible legal avenues to remain also enjoy higher voluntary return rates than those that do not.

The material presented in this article is drawn from empirical research conducted into a number of alternative to detention programmes between May and September 2010 in five countries, namely Australia, Belgium, Canada, Hong Kong, and Scotland. Field visits were made to each of the locations, and with the exception of Scotland, the author witnessed the schemes on site. Interviews were conducted with governments, non-governmental organisations (NGOs) and lawyers in each of the locations.¹⁵ This article looks at three types of alternatives: government-funded community-based supervision models (Australia and Hong Kong) in section 3; government-run return models (Belgium and Scotland) in section 4; and a hybrid model of government-funded bail with community supervision (Canada) in section 5. The material presented contradicts many of the general assumptions made by governments about migrant behaviour and the related arguments about the need for detention. In particular, it concludes that treating persons with dignity and humanity throughout the asylum and returns processes, and setting out clear guidelines on rights and responsibilities, can lead to improved compliance rates and cooperation, lower costs, better and more effective asylum systems and, at times, higher voluntary return rates. Not only is there a legal case that governments need to consider less intrusive measures other than detention to respect the right to liberty and the prohibition on arbitrary detention under international law on a non-discriminatory basis,16 but there are also pragmatic reasons for doing so. This article is focused primarily on the latter.

2. Non-discrimination and Detention

As a matter of international law, the right to liberty of person applies regardless of immigration status.¹⁷ Detention decisions are subject to guarantees against discrimination, including in the context of derogation in

situations of a threat to the national security of the country. Even in relation to the latter, states must be able to demonstrate that there was an objective and reasonable basis for distinguishing between nationals and nonnationals. It has been held by the UK House of Lords, for example, that the application of forms of indefinite detention to "foreign" terror suspects and not to nationals was not only discriminatory, but the discrimination in question contributed to the characterisation of the detention as disproportionate.¹⁸ Similarly, non-nationals cannot be deprived of their rights to challenge their detention before civil courts, irrespective of the legislation purporting to deny them this right and/ or their location outside the physical territory of the state.¹⁹ The Inter-American Court of Human Rights has also confirmed that even in times of emergency, the rule against non-discrimination applies in the context of habeas corpus guarantees.20

The United Nations Human Rights Committee has stated that the "general rule of [international human rights law] is that each one of the rights (...) must be guaranteed without discrimination between aliens and citizens",²¹ and it also confirms that such rights "apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness".²²

The freedom of movement provisions contained in the 1951 Convention relating to the Status of Refugees (1951 Convention) must also be applied in a non-discriminatory manner.²³ Detention policies may be discriminatory in purpose or effect.

States that impose detention on persons of a "particular nationality" may also be liable to charges of racial discrimination, including under the International Convention on the Elimination of All Forms of Racial Discrimination 1965 (ICERD).24 Discrimination under the ICERD includes direct as well as indirect discrimination.²⁵ If a particular measure applies disproportionately to a particular ethnic, racial or religious group, for example, without a reasonable and objective justification, the measure would be discriminatory under the ICERD.²⁶ Where the effects are discriminatory, the question of intent is no longer relevant to international law on discrimination.²⁷ Ouestions could also be raised around the legality of detention for the purposes of "fast-track procedures" used to determine the cases of individuals from so-called "safe countries of origin", as these accelerated procedures apply to persons from particular countries or regions and thus may discriminate against particular nationalities. At a minimum, an individual has the right to challenge his or her detention on such grounds; and the state must show that there was an objective and reasonable basis for distinguishing between nationals and non-nationals in this regard.²⁸ The Committee on the Elimination of Racial Discrimination has called in particular for states to respect the security of non-citizens, in particular in the context of arbitrary detention, and to ensure that conditions in centres for refugees and asylumseekers meet international standards.²⁹

A decision to detain "actuated by bad faith or an improper purpose" may also render the detention arbitrary. Discrimination against a particular group, for example, would be an improper purpose. Using detention to deter irregular migration in general may amount to an improper purpose, as it is not tailored to an individual case. It may also amount to collective punishment. Turthermore, being stateless cannot be a bar to release, and using the lack of any na-

tionality as an automatic ground for detention would run afoul of non-discrimination principles.³²

3. Australia and Hong Kong: Governmentfunded Community-based Supervision

3.1 Impetus to Act and Legal Frameworks

Both Australia and Hong Kong operate community release schemes, with varying restrictions that can be imposed on release - such as reporting requirements, payment of a bond, or designated residence - but ultimately individuals and their families are released into the community. Hong Kong was forced to release many immigration detainees owing to successful litigation that showed that it did not have an adequate detention policy, in particular because it failed to provide guidance to decision-makers and immigration officials on how to assess whether someone should be subject to detention. Several cases found a violation of Article 5 of the Hong Kong Bill of Rights, which mandates legal certainty and accessibility in connection with detention. A violation of both these legal principles was found because there was no policy statement setting out how the power of detention was to be exercised.33 Despite the Hong Kong government subsequently adopting policy documents as directed by the courts, a later case found that these were also inadequate.34

It is the author's view that its current policy is also challengeable,³⁵ albeit an improvement on previous versions. The Hong Kong government has produced a list of factors to consider in decisions to detain or release an individual. As it contains 15 reasons "for detention" and only six "against detention", it could be argued that the policy amounts to a presumption in favour of detention, which would be unlawful, and is not a balancing test at all.³⁶ Under this new policy, however,

the majority of asylum-seekers and torture claimants have been and are released from detention; and while there is no set maximum limit in detention, the average length appears to be around 14 days.³⁷

The Australian government did not have the same legal impetus to act as did the government of Hong Kong. Despite a number of international decisions castigating Australia's detention policy,38 Australia's High Court decision in Al-Kateb v Godwin found that the government's policy of mandatory and non-reviewable detention was not unconstitutional.³⁹ Nonetheless, in the mid-2000s, there was growing disapproval among the Australian public and among some government backbenchers that persons were being held in long-term and indefinite detention, including those wishing to return to their countries of origin (such as Al-Kateb) but who could not do so for reasons beyond their control or influence. Under the Australian immigration system, detention of an unlawful non-citizen is mandatory until the person obtains a visa (this could be refugee status or a bridging visa, for example) or is removed. 40 There is thus no consideration of the necessity of detention, or any other factors, in individual cases. Under this system, the only possibility of release from immigration detention is to provide a lawful status. This is achieved through a substantive visa (such as refugee status) or through a discretionary "bridging" visa.41 A "bridging" visa is a temporary visa granted at the discretion of the competent Minister to persons who are in the process of applying for a substantive visa or making arrangements to leave Australia. The Department of Immigration and Citizenship (DIAC) website adds that the visa can be granted "at other times when the 'non-citizen' does not have a visa (for example, when seeking judicial review) and it is not necessary for the person to be kept in immigration detention."⁴² The visa is granted for a specific period of time, or until a specified event occurs. ⁴³ While on the bridging visa, the person is entitled to live in the community.

Bridging visas might be considered equivalent to "bail" in other jurisdictions - as various conditions on release may be attached.44 However, unlike bail, there is no independent administrative or judicial process or automatic right to apply: rather it is entirely an exercise of executive discretion. It is also distinct from normal bail in so far as the visa provides a "lawful status", albeit temporary; in many other countries, persons who are granted bail may still be considered unlawfully in the territory under domestic legal provisions.45 The discretionary nature of these visas is one of the weakest elements of the Australian system, and in other jurisdictions, it would be unlikely to survive human rights scrutiny. Another human rights concern with bridging visas is that they are an uncertain legal status, which can be revoked at any time by the competent Minister - and they can become a prolonged temporary legal status. The average length of time on a bridging visa between July and December 2008 was 79 days prior to departure from Australia. However, approximately 40% had been on the visa for more than two years and around 20% had been in Australia for more than five years at the relevant date. 46 As yet, there are no complementary forms of protection available in Australia, although there is a draft bill under consideration.47

At any one time, there are an estimated 56,000 persons on bridging visas,⁴⁸ the majority of whom are persons who had entered Australia lawfully on a tourist, student, temporary visitor or other visa and who initiated an immigration case while on that visa.⁴⁹ That is, the main beneficiaries of this visa (and associated alternative to detention

programmes) are persons who were already living in the community and who have "overstayed" or otherwise breached a condition of their visa. Bridging visas may also be granted to persons in immigration detention, allowing them release into the community. The latter have typically been granted only to persons who cannot be removed from Australia and not to the wider group of detained asylum-seekers.

The Australian system is structured in such a way that it creates a two-tier system of treatment. Those who enter Australia lawfully but who later overstay their visa and subsequently submit an immigration case are generally not detained, whereas persons attempting to enter Australia in an unauthorised manner (i.e. irregular boat and air arrivals) are routinely detained. It is arguable that this system of mandatory detention of asylum-seekers arriving in Australia in an unauthorised manner could constitute indirect discrimination, as the unauthorised entrants originate predominantly from a particular region.⁵⁰ As at May 2011, 6,730 persons were being held in immigration detention centres, the large majority of whom are irregular maritime or air arrivals (97%).⁵¹

In Hong Kong, in comparison, no legal status is provided to persons released from immigration detention. Persons remain "pending deportation". Like Australia, Hong Kong also operates a two-tiered system, but its system is not based on mode of arrival. Rather, as a non-signatory to the 1951 Convention and 1967 Protocol, Hong Kong has two parallel protection processes. Persons can apply for asylum directly to UNHCR, and/or they can apply to the government not to be returned owing to a fear of torture. Hong Kong is a party to the UN Convention against Torture and is thus responsible for processing the latter claims.⁵² It is still uncertain what legal

status persons obtain after it is found that they cannot be returned on torture grounds. At the time of writing, only one torture case had been decided.⁵³

One of the issues in Hong Kong has been the slow processing of torture claims. In fact, at the time of writing, there were 6,600 pending cases with an estimate of an additional 120 new cases every month in 2010 (this has been reduced from around 300 per month in 2009).54 The government has recently established what it calls "enhanced administrative screening", in which it now operates a "duty lawyer" service, provides legal aid to those without means, and has imposed some procedural regulations.55 Despite this, it is speculated that even with 300 duty lawyers, it will take between eight to ten years to clear the backlog. The duration of asylum procedures is also lengthy, with the average processing time ranging from eight to twelve months,56 while unaccompanied minors may wait five to six months for a decision.57 The question of whether Hong Kong has responsibility over asylum-seekers by virtue of the customary international law principle of non-refoulement is currently before the courts.58 No rights to work are granted.

3.2 Operational Context

Both the Australian and Hong Kong alternative to detention schemes introduce a "case management model" in which individuals are given immigration and other advice or directed to various services, and social security or other subsistence is provided by community-based organisations or NGOs directly funded by the government. In Hong Kong, the project is run through the International Social Service (ISS); in Australia, through the Australian Red Cross (ARC). Under both schemes, persons are housed in the community – using the private sector – rather than

being housed in government reception centres. There are some distinctions. The Australian programme is focused on vulnerability, whereas the Hong Kong project applies across the board.

The Australian "Asylum Seeker Assistance Scheme" (ASAP) is targeted at a specific group of "vulnerable" persons applying for refugee status in Australia. The scheme provides a living allowance, basic health care, pharmaceutical subsidies, and torture and trauma counselling. It is not as comprehensive as the hybrid government-NGO run Community Assistance Support Programme (CASP) (discussed briefly next), and it is means-tested. Ineligible applicants include those who are not in financial hardship and who are entitled to other government support or in a relationship with a permanent resident (either spouse, de facto or sponsored fiancé) or who have been waiting for less than six months for a primary decision. In other words, this scheme only starts after a six-month delay in an initial asylum determination. There are some exemptions to these criteria, such as unaccompanied minors, elderly persons, families with children under 18 years, or persons unable to work owing to disability, illness or the effects of torture and/or trauma.⁵⁹ In fact, 95% of the programme's beneficiaries have been waiting less than six months for a decision, but are eligible by virtue of the exemptions.60 The support ceases upon grant of refugee status, or after 28 days of notification of refusal of status.⁶¹ Extensions are available for those appealing to the Refugee Review Tribunal, but the support ceases after a decision of that body; and no extensions are available to those seeking judicial review of their decision, or the favourable exercise of ministerial discretion. It is at these latter stages that charities and other NGOs have stepped in to fill the gaps in support and to protect against destitution.62

Referrals to the programme are made by the DIAC, from other organisations, or self-referrals (every asylum-seeker is informed of the programme by letter).⁶³ In the financial year of 2009-2010, there were 1,797 new cases entering the programme, and another 1,464 cases that closed during the same period.⁶⁴

In comparison to Australia, both asylum and torture claimants in Hong Kong are provided with a "recognizance" document, which may be subject to a number of conditions, such as reporting to the nearest immigration office or payment of a bond. The "recognizance" document is issued only for six to eight weeks, on a renewable basis, so there is a need to report regularly to obtain an extension. Although the Hong Kong government disputes its responsibility over asylum-seekers, they are absorbed within the ISS project. These services include assistance with finding accommodation, the distribution of food and other material goods, transport costs, and counselling. The assistance is "in-kind" and no money is passed over except reimbursement for travel expenses. The ISS supports around 5,500 clients, and this is arguably the most expansive A2D programme worldwide. The ISS is an extremely well-organised NGO, with staff specialised in the various aspects of the case files. The ISS, for example: (i) runs an accommodation and a food department; (ii) conducts home visits and spot checks; and, through individual case managers, assesses and determines the needs of each individual. The ISS aims to operate on the basis of one caseworker to every 135 clients (it has a total of 38 caseworkers). At present however the rate is one caseworker to 200 clients. 65 The ISS operates out of three different offices (two in Kowloon and one in the New Territories). Like some of the other case management models studied (see Toronto Bail Program below), a contract is signed between ISS and the individual on their rights and responsibilities, and the contract is renewed every month. Failure to appear for two food collections will result in the agreement being terminated. Should persons fail to appear, there is no formal reporting between ISS and the government, although monthly statistics would reveal that food or other collection is down.

In both countries, absconding rates were said to be negligible (see Table 1). Both implementing organisations indicated that persons have to keep appearing in order to receive their weekly allowances or food and non-food items, and without the right to work, this is incentive enough. The costs are also far lower than incarceration costs (see Table 2).

3.3 Australia's Hybrid Government-NGO Alternative

In addition to the specific asylum-seeker programme outlined above, Australia also has a hybrid government-NGO alternative for the broader group of migrants. Sharing the "vulnerability" basis of the ASAP, the CASP (formerly Community Care Pilot or CCP) was set up in 2005 to provide health and welfare support and assistance to persons with particular needs or complex cases.66 Nonvulnerable asylum-seekers benefit from the Community Status Resolution Service, which is also a case management service but without the additional welfare component. The rationale behind the CCP pilot was that if you treat persons fairly, they are more likely to engage with the immigration process and the resolution of their cases will be more efficient.⁶⁷ There are four "guiding principles" to the various programmes running in Australia: (i) fair and reasonable dealings with clients; (ii) duty of care to individuals; (iii) informed departmental and client decisions; and (iv) timely immigration outcomes.68 The emphasis of the CASP is on "case management". In this programme, this means the assignment of a DIAC "case manager" for each individual case who is responsible for the person's file, including advice and preparation for all possible immigration outcomes as well as welfare issues. ⁶⁹ This might include referral to one of the other three actors in the programme, namely: (i) the ARC, which has delegated responsibility for health and welfare; (ii) a legal provider where eligible; and/or (iii) the International Organization for Migration (IOM) for counselling on assisted voluntary return (AVR).

Participation in the programme is based on eligibility criteria centred around "vulnerability".70 Non-vulnerable persons are eligible instead for the CASP and the Community Status Resolution Service, which essentially provides the case management component without the welfare support.⁷¹ The programme also applies to recognised refugees meeting the criteria to be released from immigration detention, as a form of transition support to aid their integration into the community.72 Importantly, the ARC and other actors do not have a role in approving or rejecting cases. The ARC stated that it does report on persons who consistently fail to appear, but it does not "chase them" (that is considered the role for the government enforcement agency).73 The pilot operated in Victoria, New South Wales and Queensland,74 and has now been accepted as a programme.

Participation in the programme is "voluntary". The programme consists of an assessment of the individual's needs and circumstances, and a tailored level of support, which might include any or all of the following: (i) help with basic living expenses and finding suitable accommodation; (ii) essential healthcare and medical expenses;

(iii) counselling; and (iv) other assistance to meet basic health and welfare needs.⁷⁶

Between May 2006 and 30 June 2008, the pilot assisted 746 persons in various ways. The most common nationalities in the pilot were Chinese, Sri Lankan, Fijian, Indonesian, Indian and Lebanese. Evidence suggests that many more persons are in need of this assistance than are currently eligible under the programme. In the financial year 2009-2010, the programme dealt with 184 cases, of which 102 were closed during the same reporting period. Of the closed cases, 38% were granted visas, 8% departed voluntarily and one client was involuntarily removed.

The CASP yielded a 94% compliance rate over a three-year period.⁷⁹ For all those on "bridging visas" of any kind, including those not being directly assisted by any of these programmes, the compliance rate was "about 90 per cent" in 2009-2010.⁸⁰ In addition, 67% of those found ineligible for a visa voluntarily departed Australia without recourse to detention.⁸¹

According to the International Detention Coalition (IDC), the two essential ingredients of the Australian "case management" programmes are early intervention and individual assessment of needs. Be The Australian government has moved from a "one-size-fits-all" enforcement model to an "individual case and risk management model" and the success is obvious. The IDC describes the "case management model" as follows:

"Case management is a comprehensive and coordinated service delivery approach widely used in the human services sector as a way of achieving continuity of care for clients with varied complex needs. It ensures that service provision is 'client' rather than 'organization' driven and involves an

individualized, flexible and strengths-based model of care. Case managers are often social workers and welfare professionals, but are also people who are skilled and experienced in the particular sector where the case management approach is being used."⁸⁴

It identifies three stages in this process: the initial needs assessment; the development of a plan to meet those needs; and continual monitoring and engagement.85 From the government's perspective, case management is a means of managing migration within the community. It facilitates voluntary returns, while treating persons with dignity and a minimum level of assistance and support. The programme is based on early intervention, and all possible outcomes are on the table, not only return, which has been found to assist with voluntary return. This is not dissimilar to the Belgium experience described below. Unfortunately, the Australian alternatives have not been extended systematically to asylum-seekers who reach Australia by boat or plane without prior clearance, who continue to be mandatorily detained. "Community detention" is being investigated as a way to release children and families from detention centres. "Community detention" is for all intents and purposes an A2D in practice, even if in law those within the programme remain under a detention order. It is similar in this way to the Belgium "return houses" as far as they operate in favour of asylum-seekers arriving at the border, which is described in the following section.

4. Belgium and Scotland (Glasgow): Government-run Return Models

4.1 Impetus to Act and Legal Frameworks

Both the Belgian and Scottish/Glasgow models focus on returns, so in this way they are slightly differently oriented to the Australian and Hong Kong programmes, which may include potential returnees but are respectively focused on a range of over-stayers or mostly focused on asylum (or torture) applicants. The other main distinction from Australia and Hong Kong is that the Belgium and Scottish/Glasgow pilots are run directly by the government, with individuals being channelled into normal, albeit enhanced, government services.

While the majority of asylum applicants are not detained in the UK, many are detained during the initial stages for identity or security checks,86 or during accelerated procedures. Until mid-2010, there were an estimated 2,000 children in detention for immigration purposes each year.87 Most children have now been released from detention under the Coalition Government's pledge to end the detention of children.88 Detention has also formed a regular part of return operations in the UK89 although a recent study indicates that the majority of long-term detained immigrants are not deported, thus raising questions of indefinite and therefore arbitrary detention.90 According to the UK Border Agency's (UKBA) Operational Enforcement Manual (OEM), there are three "alternatives to detention" in the UK: (i) temporary admission; (ii) release on restrictions; or (iii) bail. The distinction between these three options is that temporary admission and release on restrictions may be ordered prior to any detention being imposed, whereas bail is granted only after one has already been detained.⁹¹ The latter is not well utilised. These are not discussed in this article. The OEM specifies that A2Ds should be used wherever possible so that detention is used only as a measure of last resort and, further, that there should be a presumption in favour of temporary release. 92 Despite this guidance to the UKBA, the UN Human Rights Committee has observed that, in practice, A2Ds are applied only when detention space is unavailable, and that detention is frequently used for mere administrative convenience. Moreover, there is no statutory limit on periods in detention in the UK, leading to regular and costly judicial review of detention.

There have also been a number of projects piloted in the UK, of which the Glasgow "family return project" is but one example.94 The Glasgow project was introduced in June 2009 as an alternative to detention aimed at encouraging refused asylum-seekers to return voluntarily to their countries of origin by providing "intensive family support focused on helping families make sense of their stay in Scotland, confronting issues delaying a return and building up skills and preparedness for a voluntary return".95 The project is for families only and makes provision for four to five families to be accommodated at any one time in self-contained, open flats. The project notes that many more families are eligible than can be accommodated within it. The central feature of the pilot was described as "intervention" 96

The legal framework in Belgium provides that foreign nationals may be detained when they are either refused entry or when they request asylum at the border.97 Also subject to detention are foreign nationals who: (i) are staying in the country irregularly; (ii) pose a threat to public order and security; (iii) present false information regarding their situation to the authorities; (iv) have asylum claims being processed; or (v) who are awaiting the fulfilment of a removal order and are considered likely to impede the fulfilment of that order. 98 Asylum-seekers are, in principle, housed in non-secure reception centres or provided with private accommodation. However, asylum-seekers intercepted at Brussels airport, who are not considered to have formally entered Belgian territory, are systematically detained in "Transit Centre 127" until their claims have been processed. 99 Faced with a number of adverse European Court of Human Rights judgments, 100 especially in relation to its detention of children, the Belgian government sought to introduce an alternative to detention programme for families. The programme initially focused on families in the returns phase, but more recently, it has been expanded to include Dublin transfers and families at the border. There remains no legal interdiction on detention, but rather the decision rests in the realm of policy. This has been criticised by activists as being subject to political will.

4.2 Operational Context

In both Belgium and Glasgow projects, the programmes are oriented around the idea that in order to facilitate return you need to move persons from their existing accommodation to act as a "break" with reality so they can prepare for their return. As described by a Belgian caseworker, "they know we are serious about their removal".101 The Glasgow pilot did not bear this out. One of the problems identified that potentially undermines the "break with reality" concept in the Glasgow pilot is that the general community knew the whereabouts of the return houses as they were located very close to the social services centre and to where families had previously resided. In addition, children remained in the same schools - and so the "break" with the community did not operate as intended. In its first year in operation, not a single family voluntarily returned and the pilot has since been closed. Social workers suggest that the lack of cooperation in returns can be attributed to the fact that persons feel that they have not been fairly treated in the asylum procedure in the first place, and so they are not ready to cooperate in their return.

Both pilots operate case management arrangements: "coaching" in the Belgian context; and "caseworkers" in the Glasgow pilot. These are government employees, recruited from social services in the case of Glasgow, and from both immigration and social services in the case of Belgium. The main aim of such a separation is to maintain a distinction between the two entities in the eyes of the participants. Social workers in Glasgow, however, felt conflicted about being involved in the enforcement or reporting arm of immigration and believed this clashed with their "social work" principles.

Freedom of movement is enjoyed in both locations. Families are free to come and go, although in Belgium the families are subject to rules of the houses. They sign a "contrat de confiance", and they are supposed to observe a curfew between 10 p.m. and 8 a.m., although the apartments are not guarded and there are no morning checks. Both apartments have very small capacity, with just six flats in one location and three houses in another in Belgium. Belgium has plans for its expansion however. In Scotland, the pilot has one house with four apartments.

The Belgian model has a full case management system. The "coaches" re-examine each family's right to remain in Belgium. The focus was initially only on return, which made families feel as though they were not being listened to, and reportedly a higher rate of absconding occurred. Scotland retains the singular focus on returns, but so far in its oneyear period, not a single family has returned voluntarily. The average period of stay in the Belgian return houses is 21.4 days. This may increase as more asylum applicants at the border are moved to the return houses. although such persons have been processed more quickly than normal asylum applications. Families remain "in detention" as a legal status, but are free to come and go as they please. In comparison, families in Scotland spend up to three months in the houses, which arguably is too long to suggest any urgency to the process.

Over an almost two-year period (from 1 October 2008 to 2 September 2010), 106 families, with 189 minor children, have stayed in the Belgian family units. Of the 99 families over the same period who have departed the units. 46 families have returned to their countries of origin or been transferred to a third country (46%);102 19 families absconded (19%); 33 families were released into the community for various reasons (33%);¹⁰³ and one child was released to an open centre for minors.104 The Glasgow pilot has closed since this study was carried out. An independent report on the future of the family return project recommended its closure following the roll out of the UKBA's new family returns process. 105 The evaluation made the following observations on the main barriers to return, which this research also bore out:

- the length of stay of the family in the UK some had lived in the UK for many years;
- stories from their home country supporting the view that return was not safe;
- families being in a state of denial over their asylum decision;
- families protecting their children from worrying about return (and associated lack of access to children);
- continual legal appeals and representations: and
- "word of mouth" giving encouragement not to leave, as there may be the opportunity of a change in the policy in the future, or of another "legacy" decision (i.e. regularisation). 106

The Glasgow pilot aimed to achieve the dual purposes of increasing rates of voluntary

returns while keeping families out of detention. It achieved the latter, but not the former.

Both the Belgium and Glasgow projects raise questions about whether the "case management" ethos could (and should) be applied early in the asylum process, rather than at the tail end of that process. Moreover, they also question whether guidance on legal stay and return could not have been carried out within the community or in their existing accommodation - rather than moving families temporarily to a separate facility to facilitate their return. In the later stages of the Glasgow pilot, the UKBA began to operate an "outreach" service in existing accommodation, although rates of voluntary return hardly improved - there were no departures, although there were some agreements to leave. 107 It could be argued that, at least in the Glasgow pilot, moving families to different accommodation in the same neighbourhood could be conceived as an abuse of power. Why not offer a programme similar to Australia or Hong Kong, which allows most persons to remain in their existing accommodation while providing advice and services alongside?

5. Canada's Toronto Bail Program: Automatic Bail Hearings and Governmentfunded Bail System

5.1 Legal Framework

In Canada, there is a right to automatic and periodic review of immigration detention under the Immigration and Refugee Protection Act (IRPA), which permits release with or without conditions. ¹⁰⁸ Canada operates a regular bail system, which is supplemented by a government-funded professional bail programme (the Toronto Bail Program or TBP). The TBP has been in operation since 1996. Immigration detention – in either a correctional facility or an immigration hold-

ing centre - is permitted in Canada if "they [the individual] pose a danger to the public, if their identity is in question or if there is reason to believe they will not appear for immigration proceedings". 109 Immigration officials are required to review the reasons for detention and have the power to order release with or without conditions within the first 48 hours. Automatic and periodic reviews of detention also occur after 48 hours or without delay thereafter and then again after seven days, and then every 30 days. 110 This is perhaps the most compatible with human rights guarantees of any of the systems examined. For example, Australia does not permit bail, whereas the UK does not operate automatic bail although they did consider it at one time. Detention reviews are conducted by a member of the Immigration Division of the Immigration and Refugee Board (IRB).111 Judicial review is also available. The Canadian Border Services Agency (CBSA) represents the government in the detention reviews and admissibility hearings, while the detainee has the right to legal counsel and legal aid, subject to a means and merits test. The aim of the system is to release persons from detention as soon as possible if there is no necessity to detain them, and where other conditions could satisfy the authorities to ensure appearance. In many ways, Canada operates a presumption against detention.

The CBSA indicates that 90 to 95% of asylum applicants are released into the community. The 2002 Immigration and Refugee Protection Regulations stipulate explicitly that "alternatives to detention" must be explored. The Canadian Supreme Court has also held that the "availability, effectiveness and appropriateness of alternatives to detention must be considered". The same regulations apply to asylum-seekers as well as those facing removal. Conditions of release may include depositing a sum of money (a usual

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

5.2 Operational Context

The Canadian immigration bail system is supplemented by the TBP, which aims to eliminate the "financial discrimination" inherent in the immigration bail system, 114 which is particularly likely to disadvantage asylum-seekers or other migrants who have no or limited resources and/or community or family ties. It is described by its director as "professional bail" in contrast to the more ad hoc community models in which diaspora groups or community organisations post bail or offer their names as guarantors for particular individuals (discussed below). The TBP operates differently to normal bond/bail systems in so far as no money is paid over to the authorities to secure the release of any migrants from detention under the programme, and no guarantee is signed. 115 Instead, the TBP, under a separate agreement with the CBSA, acts as the bondsperson for particular individuals who could not otherwise be released (at least in theory). The TBP accepts both asylum applicants as well as persons pending deportation. The TBP conducts an intensive selection interview with the individuals concerned to assess their suitability for supervision. The cooperation agreement between TBP and the CBSA means that, unlike normal bail proceedings, the CBSA relies on the judgment of the TBP in selecting its clients, and the system becomes streamlined as there is rarely an objection raised to their release of particular individuals by the government. The individual and/or family are then released to the "supervision" of TBP on particular conditions (described below).

5.3 Compliance Rates

The TBP has achieved considerable success in terms of its compliance rates. In the financial year 2009-2010, of the 250 to 275 clients released to the TBP, only 3.65% absconded, which equals 12 "lost" clients. The so-called "lost client" ratio has even improved over recent years. 116 There is minimal distinction between the "lost client" ratio of asylum applicants versus persons pending removal. 117 Many of these persons have been previously convicted of criminal offences, and hence would appear to be in the basket of hard cases, yet it is still possible to achieve very high compliance rates.

5.4 Essential Ingredients

According to the programme's director, a number of fundamental ingredients are the basis for the success of the programme. 118 The first is the concept of "voluntary compliance", in which persons "agree" to be supervised by TBP.¹¹⁹ This is not dissimilar to the concepts employed in the Australian and Hong Kong programmes. This is held to create a sense of dignity and responsibility in the individuals released to the programme, of which one part is the signing of an agreement between the individual and TBP on the duties of each party. Like the "contrat de confiance" in Belgium, the TBP contract notifies the individual that should they fail to appear for any appointments or otherwise breach the terms of the agreement, they will be reported to the CBSA (who will then issue a Canada-wide arrest warrant). 120 This is one of the points of difference between the TBP and some other non-government-run services. NGOs in Australia, for example, did not see a problem with reporting on non-compliant migrants, whereas one of the reasons the TBP has not been able to expand in Canada and operate, for example, in other provinces, is because Canadian NGOs do not want to be part of or be seen to be associated with the enforcement arm of the government. The TBP, for their part of the contract, agrees to provide information and advice relating to a range of services.

The second fundamental ingredient is the aspect of "community supervision", which TBP believes makes compliance more likely because asylum-seekers and others benefit from their engagement with the programme. That is, there is an incentive to comply. Individuals released to TBP are provided with assistance and advice on how to navigate the Canadian asylum, immigration and social services systems. The TBP assists individuals to find housing, and to access healthcare, social welfare, and work (where permitted), or to file necessary paperwork, including applications for asylum and work permits.

Persons released to TBP are initially required to report twice weekly to the offices of TBP in downtown Toronto. Reporting requirements are softened as trust develops between the two parties and there are no reporting lapses. Phone reporting can be later instituted, rather than reporting in person. The TBP requires proof that an individual has participated in any assigned programmes, such as receipts from English language courses, or pay stubs if working, or agreement to a treatment plan, if required, etc. Clients are also required to reside at an address approved by TBP, and must inform TBP if they change address. TBP assists with the finding of accommodation, often in conjunction with local shelters, and conducts spot checks. Furthermore, individuals must be doing "something productive" that is permitted under the IRPA (e.g. some are not permitted to work). There is also a requirement that they cooperate with the TBP and with any immigration procedures, including, for example, the attainment of documents to facilitate their removal. Failure to report or otherwise comply with conditions of release will lead to TBP informing the authorities, which in turn sets in enforcement action.

5.5 Concerns

Despite its high rates of release and compliance with release conditions, the TBP still faces a number of complaints. First, some NGO advocates complain that the TBP and the CBSA are too closely associated, with the TBP being "too selective" in its clients, thereby leaving a tranche of persons who cannot be released but for whom the programme was intended. One NGO described the vetting system of the TBP to be "akin to immigration interrogation" and thus, it was asserted, it has not expanded the pool of persons released to it. A second criticism is that many persons released to TBP ought to have been released on minimal conditions, and that the IRB relies on it too heavily (that is, it is over-used). For example, around 99% of TBP requests for release to their care were granted. 121 A final concern is the length of the selection or vetting process. The vetting process takes around one month, and can last longer. One reason for the delay is because the director of TBP personally vets every application. 122 Nonetheless, the TBP's response is that they sometimes delay their involvement in an individual case in order to ensure that they accept only those cases that have not been released on their own recognisance or under conditions that they can fulfil themselves. Getting the balance right seems to be one of the challenges of this process.

Other NGO advocates called for the programme to be replicated in the rest of Canada (currently it only operates in Toronto¹²³); and there was criticism that the numbers released to the programme remain too small. In financial year 2009-2010, 250 to 275 people were released to TBP, of which 113 (or 37%) were "new" releases (of which 42 were in the refugee category, and the remainder were existing cases). TBP received a total number of 412 requests over the same period, which amounts to 67% of requests to TBP which are accepted as clients (33% are not accepted). In comparison, Ontario detains an average of 377 new individuals per month (average per year is approximately 4,524). 124 While some referrals to the TBP derive from lawyers or refugee and immigrant communities, the majority come directly from CBSA.

Essentially, the TBP acts as the bondsperson for individuals and families who do not otherwise have sufficient resources, or family or other ties, to put up bail. It is therefore an A2D, but it can also act as an alternative to traditional forms of release where, for example, the authorities rely on it too heavily or if the IRB sees it as a precondition to release. The TBP states that it does not accept cases, for example, where the individual cannot be removed (e.g. Cubans) as these persons should be released on minimal conditions. The TBP indicates that it does accept, on the other hand, high flight risk and criminality-related clients. 125

5.6 Other Forms of Bail

There are other groups in Canada that perform a similar function to the TBP, although they are not government-funded. Many community groups and shelters will put forward their address or name as the relevant bondsperson/surety/guarantor in order to facilitate the release of an individual or fam-

ily. These might include diaspora groups or registered NGOs or other charities. There appears to be no distinction in the absconding rates between release to these groups and the more formal TBP,126 although this is disputed by the TBP as it is the only programme that monitors clients until departure. Immigration lawyers mentioned some unease with bail release to individuals from diaspora groups who put their names forward to act as bondspersons, but where there are no pre-existing or real links. As this side of the bail system is unregulated and unmonitored, it can lead to exploitation and abuse of those released to the care of individuals or groups. Cases were reported in which migrants were being forced to pay over their social welfare cheques to the bondsperson and others were found to be living in poor, squalid and overcrowded conditions. In other words, the system can operate as a repayment system, even verging on extortion in individual cases, with some individual bondspersons having five or more "clients". Other cases had surfaced of women being sexually and physically assaulted, or forced into prostitution, by their bondspersons. Lawyers indicated that in these circumstances, clients were reluctant to report the exploitation or abuse because in doing so, they risked being returned to detention. However, arguably these cases would be suitable to be transferred to supervision via TBP. Ironically, there is no automatic or systematic right to challenge the conditions of one's release in Canada. This highlights further reasons why a managed bond system has its merits, especially for those who have no "real" connections to the community. 127

6. Review of Findings

The research found a number of good alternative to detention programmes, which have reduced the need for detention and have treated persons humanely throughout asy-

lum and other immigration processes. The examples largely achieved an over 90% com-

pliance or cooperation rate, which is significant. None fell below 80% in this regard.

Table 1: Compliance rates

Country/Programme	Compliance or cooperation rates (%) ¹²⁸	Absconding rates (%)
Australia ASAP (asylum-seekers)	99	Negligible
Australia CASP (mixed ¹²⁹)	94	6
Belgium (mixed)	80	20
Hong Kong (mixed)	97	3
Toronto Bail Program (mixed)	96.35	3.65
Scotland (Glasgow)	84	16 ¹³⁰

The study also bore out some evidence, albeit still small and somewhat piecemeal, that failed asylum-seekers and other migrants are more likely to opt for voluntary return within A2D processes than outside them. Treatment within asylum and other legal procedures seems to be one of the biggest factors contributing to positive engagement with the system. Where individuals are disgruntled with the system, or feel they have been dealt with unfairly, as in the Glasgow pilot, their ability to cooperate with the same system towards the end of the process and to make decisions about return is less likely. Five common factors can be distilled from the research, which should be used to guide the design and implementation of A2D programmes:

• the treatment of refugees, asylum-seekers, stateless persons and other migrants

with dignity, humanity and respect throughout the relevant immigration procedure;

- the provision of clear and concise information about rights and duties and consequences of non-compliance with any conditions:
- referral to legal advice, including advice on all legal avenues to stay, especially at an early state in the relevant procedure;
- access to adequate material support, accommodation and other reception conditions; and
- individualised "coaching" or case management services.

A second observable factor is that of cost. It is a simple one: detention costs considerably more than most A2Ds (see Table 2). More research is needed into this area, not least on how to quantify the long-term consequences of detention and the long-

term advantages of alternatives. Financial savings may not however be a sufficient motivator where political and/or electoral considerations override them; but they

do provide at least one incentive to consider alternative options and have become more attractive in the current economic environment.

Table 2: Crude cost comparisons

Country/programme	Detention per person per day ¹³¹	A2D per person per day	Saving per person per day
Australia	\$339 AUD (US \$364); ¹³² \$124 AUD (US \$133) for "community detention"	\$7 AUD ¹³³ (US \$7.5) - \$39 AUD ¹³⁴ (US \$42)	Between \$333 AUD (US \$358) and \$117 AUD (US \$126)
Belgium	Not available	Not available	Not available
Canada: Toronto Bail Program	\$179 CAD (US \$189)	\$10-12 CAD (US \$10.6–2.7)	\$167 CAD (US \$176)
Hong Kong	\$108 HKD (US \$13.9)	Not available	Not available
Scotland/Glasgow pilot	£130 GBP ¹³⁵ (US \$210)	£3.29 GBP ¹³⁶ (US\$5.3)	-

In relation to case management specifically, it is recommended that:

- case management should be introduced from the very start of an asylum procedure, and should include referrals to adequate legal advice, social and health services, and other needed services:
- it should be tailored to each individual based on three stages: (i) needs assessment; (ii) planning; and (iii) delivery;
- if desirable, contracts can be entered into between the individual and the delivery or-

ganisation or case managers to ensure that both parties are aware of their rights and responsibilities, and any consequences of noncompliance:

- as far as possible, principles of "voluntary engagement" should be promoted;
- participants may need to be carefully selected, especially in the returns phase and there is therefore a need for good screening tools (e.g. are the persons willing to engage with the process and to cooperate if not, why not?):
- safeguards need to be in place in law and

in practice to ensure that alternatives to detention do not become alternative forms of detention or alternatives to release;

- subject to the particular partner agreement, any official immigration reporting requirements that lead to sanctions and enforcement should be separated from the case management and service delivery component of the programme in order to build trust and improve cooperation in the process;
- the selection and referral of persons to the alternatives should be done by immigration officials and not by the service delivery organisation (although an exception might be the TBP which carries out its own screening):
- individuals should be informed about the full range of legal options to stay as well as the consequences of non-compliance with stay permits;
- the risks of A2Ds, such as risks of exploitation or other abuse, need to be acknowledged and addressed;
- contracts with delivery organisations that incentivise more restrictive measures than necessary need to be avoided;¹³⁷ and
- the primary and secondary purposes for an A2D need to be acknowledged (e.g. return versus liberty), which may have an effect on whether it is perceived as being a success and its longer-term survival.¹³⁸

7. Conclusion

The research presented in this article is only a partial picture. The way the various alternatives described herein are implemented is far more complex and nuanced than I have been able to indicate. More particularly, most countries studied are Janus-faced – while they explore non-custodial A2Ds, many have harsh detention policies and laws or are increasing rates of detention elsewhere or for particular groups. The political context also varies, and growing xenophobia and rac-

ism in some countries prevents open and frank dialogue on these issues and frames the detention debate around unproven assumptions. Nonetheless, a key problem for research in this area is how to explain why particular models work and what it actually means to say that a programme "works". This study only examined the workability from the state perspective, with a particular focus on compliance rates and costs. Nonetheless, against these indicators, there is ample evidence to show that programmes can work and that they can meet governmental objectives while respecting the rights and dignity of asylum-seekers and other migrants.

The models studied share an element of case management or supervision - including a good information flow to individuals about their rights and responsibilities and engagement with them as human beings with autonomy, and not as passive victims of the system. The exception appears to be Scotland, where disgruntlement with the asylum system was said to create resistance and hostility in the returns process. Good separation between the service arms and the enforcement arms was praised in some, while being less relevant in others. This appeared to depend on the governing ideologies of the engaged non-governmental partners. Some of the systems were tailored to families, while others engaged the full spectrum of individuals, yet differences in results between the two groups were not evident. There was also no discernible distinction between types of migrants.

Further research in this area is to be encouraged. Specifically, the research presented in this article did not conduct interviews with beneficiaries of the particular schemes. The study cannot therefore speak for the participants as to why they complied or what motivated them to cooperate or not, or what they found to be particularly beneficial. Had such

interviews been possible, it would certainly have added an important dimension to the research.

While it is clear that states have the right to control the entry or stay of persons on their territories, there are limits to its discretion in this regard – not least the right to liberty and security of person which applies regardless of immigration or other status, or in other words, on the basis of non-discrimination principles; the right to seek and enjoy asylum from persecution, which makes the irregular entry to the territory for such per-

sons not an unlawful act; and the obligation on states to consider less intrusive means of achieving the same objectives to meet proportionality requirements of detention. In other words, alternatives to detention, including no detention at all or release without conditions, should become measures of first resort. While the legal basis for implementing non-custodial alternatives to detention is clear, the empirical evidence is beginning to look convincing too. The political question for states remains however – whether they wish to regulate migration in a humane way, or otherwise.

¹Dr Alice Edwards is the Senior Legal Coordinator and Chief of the Protection Policy and Legal Advice Section, Division of International Protection, at the United Nations High Commissioner for Refugees (UNHCR), Geneva. Dr Edwards was previously on the law faculties at the universities of Oxford and Nottingham and she remains a Research Associate of the Refugee Studies Centre, University of Oxford, a Research Fellow of St Anne's College, Oxford and a Fellow of Nottingham's Human Rights Law Centre. This chapter is based on an expert background paper prepared for UNHCR for the first Global Roundtable on Alternatives to Detention of Asylum-Seekers, Refugees, Migrants and Stateless Persons, held in May 2011 in Geneva (see report available at: http://www.unhcr.org/3e5f78bc4.html), as well as a presentation entitled "Rethinking the Detention of Asylum-Seekers and Other Migrants: Exploring the Alternatives – A Comparative Perspective" which was delivered as part of the speaker series for the 60th anniversary of UNHCR and the 1951 Refugee Convention, organised by the University of London's Institute of Commonwealth Studies, London in October 2010 (further information available at: http://commonwealth.sas.ac.uk/fileadmin/documents/Seminar_Series_Flyers/IRLSeminarProgramme_final2.pdf). The views expressed herein are those of the author and do not necessarily reflect those of the UN or UNHCR. The author would like to thank the anonymous reviewers for the helpful comments and very keen eve for detail, which have improved the text.

² These include, for example, Australia, Belgium, Canada, the Hong Kong Special Administrative Region of the Peoples' Republic of China, Japan, the Netherlands, the USA and the UK. The European Union Agency for Fundamental Rights (EU-FRA) reports that most of the 27 member states of the EU have in law alternatives to detention, but they are not always applied in practice. (EU-FRA, *Detention of Third Country Nationals in Return Procedures*, 10 November 2010. conference edition.)

³ Sampson, R., Mitchell, G. and Bowring, L., *There are Alternatives: A Handbook for Preventing Unnecessary Immigration Detention*, International Detention Coalition, Melbourne, 2011, p. 2, available at: http://www.unhcr.org/4dde23d49.html.

⁴ Parliamentary Assembly, Council of Europe, *The Detention of Asylum Seekers and Irregular Migrants in Europe*, Doc. 12105, 11 January 2010, Para 1 (referring in particular to the UK, France and Italy).

⁵ Siskiin, A., CRS Report for Congress, Immigration-Related Detention: Current Legislative Issues, updated 30 January 2008, pp. 13-14.

⁶ UNHCR, Note on International Protection, EC/62/SC/CRP.12, 31 May 2011, Para 48.

⁷ Any reduction in global asylum numbers can be associated instead with *non-entrée* policies, including containment in regions of origin and interception/interdiction, or can be attributed to large-scale repatriation programmes.

⁸ For example, as Council of Europe member states have expanded their use of detention (see above, note 4, Para 1), migration into Europe has also surged: European migration figures have increased from an estimated 49 million in 1990 to 58 million in 2000 to 70 million in 2010. (See United Nations, Department of Economic and Social Affairs, Population Division, *Trends in International Migrant Stock: The 2008 Revision*, POP/DB/MIG/Stock/Rev.2008, July 2009, available at: http://www.un.org/esa/population/migration/UN_migStock_2008.pdf). Australian asylum figures after the introduction of mandatory detention in 1997 dropped only with the institution of comprehensive interception measures in the post-Tampa era from 2002-2008. (See Refugee Council of Australia, *Australian Immigration Detention and Trends in the Settlement of Former Detainees*, available at: http://www.refugeecouncil.org.au/docs/current/110407_background_stats.pdf).

⁹United Nations, Department of Economic and Social Affairs, see above, note 8. According to the UN, the global migration "stock" has been increasing as follows: between 1990-1995 (+1.3%); 1995-2000 (+1.5%); 2000-2005 (+1.8%); and 2005-2010 (+1.8%); in 1990, there was an estimated global migrant "stock" of 155 million; in 2000, it was estimated to be 178 million; and in 2010, this is estimated to be 214 million, constituting 3.1% of the global population.

¹⁰ See, for example, Castles, S., "Towards a Sociology of Forced Migration and Social Transformation" *Sociology*, Vol. 37(1), 2003, p. 26, available at: http://club.fom.ru/books/castels.pdf: "Migration policies fail because policy makers refuse to see migration as a dynamic social process linked to broader patterns of social transformation. Ministers and bureaucrats still see migration as something that [can] be turned on and off like a tap through laws and policies."

¹¹On the legal framework, see Edwards, A., Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Asylum-Seekers, Refugees, Stateless Persons and Other Migrants, UNHCR, Legal and Protection Policy Research Series, PPLA/2011/01.Rev.1, April 2011, available at: http://www.unhcr.org/4dc949c49.html; and idem, "Less Coercive Means: The Legal Case for Alternatives to Detention of Refugees, Asylum-Seekers and Other Migrants", in Juss, S. (ed.), Ashgate Research Companion on Migration Theory and Policy, Ashgate, forthcoming 2012.

¹² The term "deportation" is used synonymously with "removal" and "expulsion" for the purposes of this article, unless otherwise indicated. It is noted that the terms may have different usages and meanings in various national and international laws.

¹³ See Table 2.

¹⁴The UK, for example, has paid out at least £2 million to 112 individuals over the last three years where it has been proved that immigrants have been wrongly held. (See Medical Justice, *Review into ending the detention of children for immigration purposes: Response by Medical Justice*, July 2010). According to Medical Justice, the £2 million does not include the costs of legal advice, court costs, etc. Successful litigation in Hong Kong that forced the Hong Kong government to change its detention policy (discussed *infra*) has, for example, given rise to over 200 pending compensation claims. (Interview with Barnes and Daly, Lawyers, Hong Kong, 15 September 2010). South Africa's Lawyers for Human Rights (LHR) has also lodged 90 separate reviews of detention in South Africa. (Information provided by K. Ramjatham-Keogh, Head, Refugee and Migrants Rights Programme, LHR, 17 November 2010). For some of the cases, see Lawyers for Human Rights , *Monitoring Immigration Detention in South Africa*, Annex, September 2010.

¹⁵ Edwards, A., *Back to Basics*, above note 11. The full list of interviews can be found in the original report. The research was governed by the University of Oxford's ethics principles.

16 Ibid.

¹⁷ UN Human Rights Committee, *General Comment No. 15: The Position of Aliens under the Covenant*, CCPR/C/21/Rev. 1, 11 April 1986, Para 2; UN Committee on the Elimination of Racial Discrimination, *General Recommendation No. 30: Discrimination against Non-Citizens*, UN Doc. A/59/18, 10 January 2004, Para 19.

¹⁸ A and others v Secretary of State for the Home Department [2004] UKHL 56 ("Belmarsh Detainees" case).

¹⁹ See *Rasul v Bush*, 542 U.S. 466 (2004); 124 S. Ct. 2868 (US Supreme Court) (non-citizens have a statutory right to challenge their detention in USA courts); *Hamden v Rumsfeld*, 548 U.S. 557 (2006); 126 S. Ct. 2749 (despite legislative amendments introduced to deprive Guantanamo Bay detainees of the benefit of the decision in *Rasul*, the court held that detainees were entitled to continue with *habeas corpus* applications already pending); and finally, *Boumediene v Bush*, 553 U.S. 723 (2008); 128 S. Ct. 2229, where the majority held, *inter alia*, that the detainees had a constitutional right to *habeas corpus* and that the legislation purporting to deny it was unconstitutional.

²⁰ Inter-American Court of Human Rights, *Habeas Corpus in Emergency Situations (Arts. 27(2) and 7(6) of the American Convention on Human Rights)*, Advisory Opinion OC-8/87, 30 January 1987, Inter-Am. Ct. H.R. (Ser. A) No. 8 (1987), Para 19.

²¹ See above, note 17, Para 2.

²² Ibid., Para 1. See also UN Human Rights Committee, General Comment No. 31: Article 2: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13, 21 April 2004, Para 10.

²³ See Article 3 of the 1951 Convention Relating to the Status of Refugees in conjunction with Articles 26 and 31(2).

- ²⁴ International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106A (XX) (1965), Article 1(3).
- ²⁵ Committee on the Elimination of Racial Discrimination, *General Recommendation No. 14: Definition of Discrimination*, UN Doc. A/48/19, 22 March 1993, Para 1.
- ²⁶ Edwards, A., "Tampering with Refugee Protection: The Case of Australia", *International Journal of Refugee Law*, Vol. 15, 2003, pp. 192-211. The Australian policy of mandatory detention, which applies only to persons arriving in an unauthorised manner, has been criticised for indirectly discriminating against particular nationalities. Those more likely to arrive in an unauthorised fashion originate from Afghanistan, Iran, Iraq and Sri Lanka. The policy does not apply to those who arrive in an authorised manner, such as via a student, tourist or other lawful visa, and who later apply for asylum. This is to be compared with the most common beneficiaries of bridging visas, who were from the People's Republic of China, India, the UK, the Republic of Korea and Malaysia. (See The Parliament of the Commonwealth of Australia, Joint Standing Committee on Migration, *Immigration Detention in Australia: Community-based Alternatives to Detention*, Second Report of the inquiry into immigration detention in Australia, May 2009, Canberra, p. 29.)
- ²⁷ See, for example, above note 25, Paras 1-3.
- ²⁸ For example, in deportation proceedings there may be a justified distinction drawn between nationals and nonnationals, in the sense that the national has a right of abode in their own country and cannot be expelled from it. (See *Moustaquim v Belgium*, Appl. No. 26/1989/186/246, ECHR, 25 February 1991. See also *Agee v The United Kingdom*, Appl. No. 7729/76, ECHR, 17 December 1976.)
- ²⁹ Committee on the Elimination of Racial Discrimination, *General Recommendation No. 30: Discrimination against Non-Citizens*, see above, note 17, Para 19.
- ³⁰ See *Bozano v France*; *Shamsa v Poland*, Appl. Nos. 45355/99 and 45357/99, ECHR, 27 November 2003; *Gonzalez v Spain*, Appl. No. 43544/98, ECHR, 29 June 1999 and *Amuur v France*, Appl. No. 19776/92, ECHR, 25 June 1996.
- ³¹See Helton, A.C., "The Detention of Refugees and Asylum-Seekers: A Misguided Threat to Refugee Protection", in Loescher, G. and Monahan, L. (eds.), *Refugees and International Relations*, Oxford: Oxford University Press, 1989, p. 135: "Detention for the purposes of deterrence is a form of punishment, in that it deprives a person of their liberty for no other reason than their having been forced into exile." Guy Goodwin-Gill also concludes that: "[t]he use of detention for the purposes of deterrence is (...) impermissible" (p. 225) and "[d]etention is never a solution to the movements of refugees and asylum seekers" (p. 234, bullet point 20). (See Goodwin-Gill, G., "Article 31 of the 1951 Convention relating to the Status of Refugees: Non-Penalization, Detention, and Protection", in Feller, E., Türk, V. and Nicholson, F. (eds.), *Refugee Protection in International Law*, Cambridge University Press, 2003, pp. 185-253).
- ³² For more on detention, discrimination and statelessness, see The Equal Rights Trust, *Unravelling Anomaly: Detention, Discrimination and the Protection Needs of Stateless Persons*, London, July 2010.
- ³³ See Shum Kwok-sher v Hong Kong SAR [2002] 5 HKCFAR 318 and 'A' v Director of Immigration [2008] HKCU 1109, 18 July 2008 (HK Court of Appeal). Earlier cases include Tan Te Lam v Tai A Chau Detention Centre [1997] AC 97 (PC), which involved the detention of Vietnamese asylum seekers of Chinese ethnic origin who had been refused refusee status but who could not be removed to Vietnam since the Vietnamese Government would not readmit those it did not consider to be Vietnamese nationals. The Privy Council held that if such removal could not be accomplished within a reasonable time period, then further detention was unlawful. In 1996, the Privy Council reversed a decision by the Court of Appeal and determined, in Nguyen Tuan Cuong and Others and Director of Immigration and Others ([1996] 423 HKCU 1), that the Director of Immigration did not uphold his statutory duty under Part IIIA of the Immigration Ordinance by refusing to screen Vietnamese migrants who had arrived in Hong Kong from southern China. (See Loper, K., "Human Rights, Non-Refoulement, and the Protection of Refugees in Hong Kong", International Journal of Refugee Law, Vol. 22(3), 2010, pp. 404-39.)
- ³⁴ See Hashimi Habib Halim v Director of Immigration [2008] HKCU 1576 (HK Court of First Instance).
- ³⁵ Hong Kong Special Administrative Region Government, Security Bureau, *Notice on Detention Authority Section 29 of the Immigration Ordinance,* Cap. 115, January 2009 (on file with the author).
- ³⁶ See, for example, position in comparative jurisdictions: *N (Kenya) v Secretary for State for Home Department* [2004] INLR 612 (Court of Appeal for England and Wales) and *Ulde v Minister of Home Affairs* (320/2008 [2009] ZASCA 34 (31 March 2009) (The Supreme Court of Appeal, South Africa)).
- ³⁷ Interview with UNHCR Hong Kong, September 2010. Many individuals are still subject to detention for criminal offences as well as some immigration offences, although the latter has been challenged. (See also *Mohammad Rahman v HKSAR*, (2010) 13 HKCFAR 20, FACC 9/20009, 11 February 2010.) For more on the Hong Kong detention system, see Hong Kong Immigration Department, *Annual Report 2008-2009*, available at: http://www.immd.gov. hk/a_report_08-09/eng/ch4/index.htm.)
- ³⁸ See, in particular, Human Rights Committee, *A v Australia*, Communication No. 560/1993, 3 April 1997 and Human Rights Committee, *C v Australia*, Communication No. 900/2000, 13 November 2002.
- ³⁹ Al-Kateb v Godwin, [2004] HCA 37.

- ⁴⁰ Migration Act 1958, Section 189(1). Curiously, persons entering Australia via an "excised territory" are regulated by Section 189(3) of the Migration Act, which provides that "[i]f an officer knows or reasonably suspects that a person in an excised offshore place is an unlawful non-citizen, the officer *may* detain the person." It might appear that they are exempt from the mandatory detention policy that applies elsewhere, and could open up possibilities for litigation if no individual assessment is made. This has not been challenged however and in a recent High Court challenge in relation to procedural guarantees on Christmas Island, an "offshore excised place", both parties accepted the lawfulness of the detention itself. (See *Plaintiff M61/2010E v Commonwealth of Australia & Ors* and *Plaintiff M69 of 2010 v Commonwealth of Australia & Ors* [2010] HCA 41, 11 November 2010.)
- ⁴¹ Although their use has expanded in recent years, bridging visas have always been available under the Migration Act. (Interview with Department of Immigration and Citizenship, Melbourne, September 2010.)
- ⁴² Australian Government, Department of Immigration and Citizenship website, http://www.immi.gov.au/allforms/bridging.htm.
- 43 Ibid. For example, a bridging visa may cease when a substantial one is granted; or, for example, 28 days after withdrawal of a visa application, notification of a visa decision or notification of a merits review or judicial appeal outcome.
- ⁴⁴These conditions may include: (i) a requirement to live at a specific address and to notify the authorities of a change of address; (ii) a requirement to lodge a security bond, generally between \$5,000 and \$50,000 AUD; (iii) a no work condition, or a restriction on working hours; (iv) a no study condition, or restrictions on study; and (v) restrictions on overseas travel. (See above, note 26, The Parliament of the Commonwealth of Australia, Para 2.49.) In 2010, an agreement was reached that individuals on bridging visas may work, subject to an individual assessment, including whether they are cooperating with the authorities. This replaced the previous 45-day rule under which an individual was not entitled to work if they had not registered their intention to apply for a lawful visa within 45 days of their arrival. Difficulties in exercising this right to work remain, including language barriers, the temporary (4-6 weeks) nature of bridging visas, etc.
- ⁴⁵ They could be compared to "temporary admission" visas in the UK, which are granted at the discretion of the Minister; however, persons on temporary admission visas are not considered to have entered the territory of the UK and so continue to be unlawfully present.
- ⁴⁶ See above, note 26, The Parliament of the Commonwealth of Australia, p. 34.
- ⁴⁷ See Migration Amendment (Complementary Protection) Bill 2011, available at: http://www.austlii.edu.au/au/legis/cth/bill/mapb2011480/.
- ⁴⁸ See above, note 26, The Parliament of the Commonwealth of Australia, p. 25.
- 49 The Australian government confirms that only 10% of "over-stayers" were detained in 2009-2010. (See Department of Immigration and Citizenship, $Annual\ Report\ 2009-10$, p. 171, available at: http://www.immi.gov.au/about/reports/annual/2009-10/pdf/diac-annual-report-2009-10-full-version.pdf.
- ⁵⁰ See Edwards, above note 26.
- ⁵¹ Department of Immigration and Citizenship, *Immigration Detention Statistics Summary*, 13 May 2011.
- ⁵² On the Hong Kong system, see Loper, above note 33.
- ⁵³ Interview with UNHCR Hong Kong, September 2010.
- 54 Ibid.
- ⁵⁵ See FB v Director of Immigration [2007] HCAL 51/2007, 5 December 2008.
- ⁵⁶ Information supplied by UNHCR Hong Kong, 18 November 2010.
- ⁵⁷ Interviews with non-governmental organisations, Hong Kong, September 2010.
- ⁵⁸ C v Director of Immigration [2008] HKCU 256 on appeal.
- ⁵⁹ Australian Government, Department of Immigration and Citizenship, *Fact Sheet 62 Assistance for Asylum Seekers in Australia*, 17 November 2010.
- 60 Ibid.
- 61 Ibid.
- ⁶² For more information about these programmes, such as Hotham Mission, see Edwards, A., *Back to Basics*, above note 11.
- ⁶³ Interview with the Australian Red Cross, Melbourne, September 2010.
- ⁶⁴ Australian Red Cross, Migration Support Programs, *Annual Program Analysis FY2009-2010*, November 2010. There was no breakdown of how the closed cases had been resolved.
- ⁶⁵ Interview with the International Social Service, September 2010.

- ⁶⁶ Australian Government, Department of Immigration and Citizenship, *Fact Sheet 64 Community Assistance Support Program, 30 September 2009.*
- ⁶⁷ Interview with Department of Immigration and Citizenship, Melbourne, September 2010.
- ⁶⁸ International Detention Coalition, *Care Management as an Alternative to Immigration Detention: The Australian Experience*, June 2009, p. 1, available at: http://idcoalition.org/wp-content/uploads/2009/06/casemanagement-inaustralia.pdf.
- ⁶⁹ In some ways, the assignment of a "case manager" is not unlike the UK's "new asylum model" (NAM) in which the Home Office assigns a "case owner" who is responsible for dealing with all aspects of their case from initial interview to final integration or removal. The NAM was introduced in 2007. The difference is that the "case manager" in the UK has been limited to the refugee status determination process and later integration or removal, rather than related necessarily to other needs or services. Furthermore, case owners are assigned for those inside and outside detention. (See Immigration Law Practitioners' Association, *Information Sheet: New Asylum Model*, 5 March 2007.)
- ⁷⁰ See above, note 66. Eligible persons will generally indicate one or more of the following "vulnerabilities": (i) living with the effects of torture and trauma; (ii) experiencing significant mental health issues; (iii) living with serious medical conditions; (iii) lack of capability to independently support themselves in the community (for example, if elderly, frail, mentally ill, disabled); (iv) facing serious family difficulties, including child abuse, domestic violence, serious relationship issues, child behavioural problems; or (v) suicidal.
- ⁷¹ For more on this, see Edwards, A., Back to Basics, above note 11.
- 72 Ibid.
- ⁷³ Interview with the Australian Red Cross, Melbourne, September 2010. According to the Australian Red Cross, this has caused some concerns relating to one of its key founding principles confidentiality, but has overall been seen as a necessary component of the programme.
- ⁷⁴ The Parliament of the Commonwealth of Australia, above note 26, p. 36.
- 75 See above, note 66.
- 76 Ihid.
- ⁷⁷ The Parliament of the Commonwealth of Australia, above note 26, p. 37.
- ⁷⁸ See above, note 64, p. 13. There was no further explanation of what happened to the remaining closed cases.
- ⁷⁹ See above, note 68.
- ⁸⁰ See above, note 49, p. 171.
- 81 See above, note 68.
- 82 Ihid.
- 83 Ibid.
- 84 Ibid., p. 4.
- 85 Ibid.
- ⁸⁶ See, for example, Saadi v UK, Appl. No. 13229/03, ECHR, 29 January 2008.
- ⁸⁷ Edwards, A., *Thematic National Legal Study on Rights of Irregular Migrants in Voluntary and Involuntary Return Procedures: The United Kingdom*, prepared for the European Union Agency for Fundamental Rights, September 2009 (unpublished paper, on file with the author).
- ⁸⁸ According to the UK Border Agency, approximately 12 children are still entering detention each month. However, these children are not asylum-seekers and are said to be awaiting return or are in transit zones at the airport awaiting immediate return to their countries of origin. (Information supplied to the author by the UK Border Agency, London, November 2010.)
- ⁸⁹ The UK also has a system of assisted voluntary return options, which it implements in conjunction with the International Organisation on Migration. (See above, note 87)
- ⁹⁰ London Detainee Support Group, No Return, No Release, No Reason: Challenging Indefinite Detention, September 2010, available at: http://www.ldsg.org.uk/files/uploads/NoReasonReport0910.pdf.
- ⁹¹ UK Border Agency, *Operational Enforcement Manual*, 2008, Chapter 55.20. For more on the UK detention pending return process, see above, note 87.
- ⁹² *Ibid.*, Chapters 55.1.1 and 55.20; UK Secretary of State for the Home Department, *Fairer, Faster, Firmer: A Modern Approach to Immigration and Asylum*, 1998.
- ⁹³ UN Human Rights Committee, Concluding Observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland, UN Doc. CCPR/CO/73/UK and CPR/CO/73/UKOT, 6 December 2001, available at:

- http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.CO.73.UK;CCPR.CO.73.UKOT.En?Opendocument.
- ⁹⁴The Glasgow pilot has been closed since the study was conducted. However, for the purposes of this comparison, it will be described in the present tense to reflect how it operated at the time of writing. Other pilots included the Millbank Project in Kent (2007-2008) and the Liverpool Key Worker pilot (April 2009-March 2010).
- ⁹⁵ Glasgow City Council, UK Border Agency and the Scottish Government, *Memorandum of Understanding Family Return Project*, May 2009 (on file with the author).
- 96 Ibid.
- ⁹⁷ Aliens Act 1980, Article 74/5, Para 1. For more on Belgium's legal system, see Global Detention Project, Belgium Detention Profile, last updated February 2010, available at: http://www.globaldetentionproject.org/countries/europe/belgium/introduction.html.
- 98 Aliens Act 1980, Article 74/6.
- 99 Mitunga v Belgium, Appl. No. 13178/03, ECHR, 12 October 2006, Para 42.
- ¹⁰⁰ Ibid., and Muskhadzhiyeva et autres v Belgique, Appl. No. 41442/07, ECHR, 19 January 2010.
- ¹⁰¹ Interview with coaching staff, Tubize, Belgium, 7 June 2010.
- ¹⁰² Of these, 15 returned with the support of the International Organisation for Migration; 18 were Dublin II cases; 1 transferred on the basis of a bilateral agreement; 5 were "forced" removals; and 7 were border refusals. (See Verbauwhede, *Alternatives to Detention for Families with Minor Children The Belgian Approach*, 2010, p. 3.)
- ¹⁰³ Ibid. The reasons included regularisation, medical grounds, new asylum claim, temporary non-removable status, court decision, refugee/subsidiary status.
- ¹⁰⁴ *Ibid.* This was because it was established that the child was not related to the adult who was accompanying the child.
- ¹⁰⁵ ODS Consulting, Evaluation of the Family Return Pilot: Glasgow City Council, UKBA and the Scottish Government: Final Report, May 2011, available at: http://www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/workingwithus/296503/evaluation-family-return-project.
- ¹⁰⁶ *Ibid.*, p. iv.
- 107 Ibid., p. iii.
- ¹⁰⁸ Note that there is currently a bill before Parliament that may alter the legal landscape in relation to detention for those arriving as part of a "human smuggling event". (See Bill C-4, Preventing Human Smugglers from Abusing Canada's Immigration System Act.)
- ¹⁰⁹ Canadian Border Service Agency, *Fact Sheet: Arrests and Detention*, July 2009, available at: http://www.cbsa-asfc.gc.ca/media/facts-faits/007-eng.html; Part 14 of the 2002 Immigration and Refugee Protection Regulations, SOR/2002-227 (available at: http://laws-lois.justice.gc.ca/eng/regulations/sor-2002-227/page-75.html#h-107) sets out relevant factors to consider, including whether the person has (i) past criminal convictions; (ii) a history of non-compliance with immigration regulations; (iii) ties with the community; (iv) shown a willingness to cooperate with the authorities; (v) any links to organised crime, including smuggling and trafficking; and (vi) raised any public order and national security considerations.
- ¹¹⁰ Immigration and Refugee Protection Act, Section 57.
- ¹¹¹ Please note that the information presented herein was legally valid as at May 2010, although there have been a range of proposed changes to the asylum system in Canada on-going during the period of the research and throughout the subsequent period.
- ¹¹² Interview with CBSA, Toronto, May 2010.
- ¹¹³ See, for example, *Sahin v Canada (Minister of Citizenship and Immigration)* [1995] 1 FC 214, as cited in Immigration and Refugee Board of Canada, *Guidelines on Detention*, Guideline 2, Ottawa, Canada, 12 March 1998, p. 4.
- ¹¹⁴ Field, O. and Edwards, A., *Study on Alternatives to Detention*, UNHCR, Legal and Protection Policy Research Series, POLAS/2006/03, 2006, p. 86.
- ¹¹⁵ The Field and Edwards' study, *ibid.*, wrongly stated that there were financial incentives directly linked to the payment of bond for individuals over to the immigration authorities. Rather, a set sum of money is paid for the service by the CBSA to TBP on an annual basis and no "bond" is handed over by TBP to the authorities for the release of any specific persons. Should an individual abscond from the programme, there are no penalties and no money is lost as none has been handed over. Nonetheless, the TBP does have an incentive to ensure that persons comply with the requirements of the programme in order to ensure that it remains effective and is funded in subsequent years. This has led to some charges by NGOs that the TBP is "too selective" in who it agrees to supervise; charges are denied by the TBP.

- ¹¹⁶ For example, in the financial year 2002-2003, the total lost client ratio of all immigration applicants was 5.65%. (See above, note 114, p. 88.)
- 117 Interview with Dave Scott, Executive Director, TBP, May 2010.
- ¹¹⁸ Ibid.
- 119 Although there is a notion of "voluntary compliance" in so far as individuals agree to be released to the supervision of TBP, where no other release options are available, it is hardly an entirely voluntary process of equality of arms.
- ¹²⁰ The reporting by the TBP of non-compliance is considered by the programme itself to be one of its strengths as it is an important incentive to participate; however, it is this factor that has prevented Canadian NGOs from adopting a similar system with the government. The TBP stated that their interest in the programme is to ensure compliance, whereas the interest of the CBSA is to secure release of persons (largely owing to the cost factors involved in detention). Cf. the Australian model, where the NGO community appeared far less concerned about reporting on individuals that fail to comply with the terms of their release. An alternative option that may bridge the gap between these two viewpoints is that any reporting obligations are made to the immigration authorities, while the NGO sector provides assistance and other services without any duty to report on non-compliant clients. That is, the NGOs become the services delivery agency without enforcement responsibility, which remains with the immigration authorities.
- ¹²¹Interview with Dave Scott, above note 117. This would indicate that it is very rare that an immigration official of the IRB would release a detainee on minimal conditions where the TBP offers to provide "bail", even if such extensive supervision is not needed.
- 122 Ibid.
- ¹²³ The reason behind its focus on Ontario is that the province receives the lion's share of asylum applicants and other irregular migrants entering Canada and has the largest number of immigration detainees. In February 2010, for example, the total number of detained persons in Canada was 1180, of which 709 were in Ontario. Of the 574 asylum claimants detained, 344 were located in Ontario. (CBSA, National Detention Statistics, February 2010, on file with the author.)
- ¹²⁴ This figure is drawn from three months of statistics, so may not be entirely accurate for any year: 410 new detainees in December 2009, 340 in January 2010, and 380 in February 2010. This amounts to 58% of the total received into Canada (total 1,945 over the same three month period). Annual statistics were not readily available.
- ¹²⁵ See above, note 117.
- ¹²⁶ See above, note 114, p. 26. Hamilton House, for example, reported that 99% of its residents have complied with the full asylum procedure; Matthew House reported that only 3 out of 300 residents (or 1%) disappeared over a five-year period; Sojourn House reported statistics of 3 asylum applicants out of 3,600 over a six-year period had disappeared from its premises and the asylum procedure.
- ¹²⁷ Many bail/bond systems operate on the basis that having community links is an indicator in favour of appearance, yet it is not clear that there is evidence to support this assumption. The more crucial factor may be whether the individual has reached his or her preferred destination, which may or may not be related to family or pre-existing community ties; whether s/he is within a procedure for asylum or is otherwise cooperating with the authorities regarding return; and is otherwise treated with dignity and humanity while these procedures are ongoing.
- ¹²⁸ These rates do not take into account whether an individual at the end of a process returns voluntarily, but rather whether they comply with the various requirements while released to one of the alternatives.
- ¹²⁹ Mixed caseload means that the programme/pilot accepted both asylum-seekers, other migrants and/or return cases.
- ¹³⁰ This represents 4 families out of 25 entering the project. (See above, note 105, p. 22.)
- 131 Costs may vary depending on the number of detainees, as specially built immigration facilities bear a cost regardless of number of detainees.
- ¹³² Figures for financial year 2005-2006. (See above, note 26, The Parliament of the Commonwealth of Australia, Para 4.99.)
- ¹³³ \$7 AUD (US\$7.5) per person per day (pppd) under the Asylum Seeker Assistance Scheme in 2007-2008 is based on 1,867 persons at a total cost of \$4.79 million AUD (US\$5.15 million). (See above, note 26, The Parliament of the Commonwealth of Australia, Para 4.120.) Comparative data in the corrections field: parole \$5.39 AUD (US\$5.79) pppd; probation \$3.94 AUD (US\$4.24) pppd and home detention \$58.83 AUD (US\$63.24) pppd. (*Ibid.*, Para 4.125.)
- ¹³⁴ This is the figure for the CASP programme, which involves a more comprehensive approach.
- ¹³⁵ See above, note 105, pp. 23-24.
- 136 Note that this figure takes account of the full staff and running costs of the pilot (£120,000) but it does not

include the accommodation costs, which were not available. The evaluation of the pilot indicated that the accommodation costs were absorbed as those participating in the community would have had these costs met whether they were in the pilot or not. (See above, note 105, pp. 23-24.) The costs per person per day were calculated as: £120,000 (total cost) divided by 365 days divided by 25 families divided by 4 (average family size).

¹³⁷ For example, the USA government's contract with Behaviour Inc. included payments for how many ankle bracelets were employed and thus was seen as encouraging the unnecessary tagging of many persons. (Interview with USA NGOs, July 2010.)

¹³⁸ For example, the Scotland pilot is primarily about facilitating voluntary return, rather than necessarily keeping persons out of detention, although this is a secondary outcome/objective.