****

**Questionnaire of the Special Rapporteur on the human rights of migrants:**

**Ending immigration detention of children and seeking adequate reception**

**and care for them**

**Questions:**

1. **Please provide information on any legislation or policy that prohibits or restricts the use of immigration detention of children and their families in your country. Grateful if you could kindly submit the original text of the legislation or policy, accompanied by an English translation if it is in a language other than English, French or Spanish.**

The Government of Kenya has put in place legislation that prohibits immigration detention of children and their families. The Refugees Act, No. 12 of 2006 revised in 2012 exempts persons who enter the country illegally from prosecution if they make their intention to seek asylum know immediately upon entry or within 30 days. The Children Act, Cap 141 revised in 2012 does not specifically contain provisions on immigration detention but in the alternative prohibits imprisonment of children in a detention camp.

In addition to the Children Act, the Penal Code, Chapter 63 revised in 2012 provides that a person under the age of eight years is not criminally responsible for any act or omission. This therefore means that a child cannot be prosecuted and subsequently detained for any immigration related offence.

**Refugees Act, No 13 of 2006**

**Recognition of Refugees- Section 11 (3)** Without prejudice to the provisions of this section, no person claiming to be a refugee within the meaning of section 3(1) shall merely, by reason of illegal entry be declared a prohibited immigrant, detained or penalized in any way save that any person, who after entering Kenya, or who is within Kenya fails to comply with subsection (1) commits an offence and shall be liable on conviction to a fine not exceeding twenty thousand shillings or to imprisonment for a term not exceeding six months, or to both.

**Children Act, Chapter 141 revised 2012**

**Restriction on punishment- Section 190 (1)** No child shall be ordered to imprisonment or to be placed in a detention camp.

**Penal Code, Chapter 63 revised 2012**

**Immature Age- Section 14(1)-** A person under the age of eight years is not criminally responsible for any act or omission.

1. **Please provide information on existing non-custodial alternatives to immigration detention of children in your country (e.g. community-based reception solutions) and elaborate how these alternatives effectively enhance the protection of the rights of migrant children and their families.**

The IDC defines alternatives to detention as any law, policy or practice by which persons are not detained for reasons relating to their migration status.[[1]](#footnote-1) Kenya practices screening and assessment of migrants and separation of asylum seekers to avoid automatic detention of illegal migrants.[[2]](#footnote-2) Once a migrants declare their intention to seek asylum, the government processes and registers such persons together with their family members. They are thereafter issued with identification documents know as asylum seekers pass that can be used as valid identification documents.

Through family reunification initiatives as provided for in Section 23 of the Refugees Act, children and other family members are reunited and given an opportunity to stay together in the community. This is an alternative to detention as the children are given the opportunity to join their family members and not be detained due to their immigration status.

Civil societies in Kenya, through financial assistance from donors and well-wishers operate shelters for asylum seekers ho are unable to secure alternative shelter of their own or through relatives and other vulnerable groups including survivors of gender violence more so in urban areas. Through the support of the NGOs, asylum seekers have the opportunity to reside in the community and not be detained. Asylum seekers who are taken to refugee camps, are provided with shelter and food assistance pending the determination of their cases. [[3]](#footnote-3)

1. **Please provide information on any existing good practices or measures taken in your country to protect the human rights of migrant children and their families while their migration status is being resolved, including inter alia their rights to liberty, family life, health and education(e.g. by ensuring effective access to inter alia adequate reception, healthcare, education, legal advice, family reunion).**

Article 43 of the Constitution of Kenya provides that every person has the right to the highest attainable standard of health, housing, clean and safe water, social security, education and free from hunger. The Constitution does not limit the rights to citizens only therefore migrant children and their families can enjoy these rights while their status is being resolved. However, in reality, implementation of the same is wanting, since even majority of poor Kenyans may not access these services to the fullest.

Children found in Kenya below the age of 7 years and whose nationality, residence and origin are not known are given Kenyan Citizenship though a legal process as opposed to detention. This provision is contained in the Kenya Citizenship and Immigration Act. The children are handed over to the government agency responsible for matters relating to children who thereafter are tasked with presenting the child before the Children’s Court which shall issue an order directing that such a child be presumed to be a citizen by birth or any other order that it deems fit to grant. [[4]](#footnote-4)

Children of asylum seekers and their families access free primary education and health care facilities in refugee camps as they wait for their status to be determined.[[5]](#footnote-5) Civil society organizations such as Refugee Consortium of Kenya offers free legal aid including representation at police stations and courts of law to asylum seekers charged with immigration related offences.[[6]](#footnote-6) RCK together with other CSOs in the sector also offer psychosocial support to refugees and asylum seekers who may be traumatized or require mental health support.

1. **Please indicate any challenges and/or obstacles in the development and/or implementation of non-custodial alternatives to immigration detention of children and their families.**

Lack of adequate resources and capacity to develop non-custodial detention centres in Kenya.[[7]](#footnote-7) The police are forced to detain irregular migrants and their children who have not yet been convicted of unlawful presence in police stations together with other alleged offenders.[[8]](#footnote-8)

There are 52,864 asylum cases in Kenya waiting for determination which is a huge number of persons waiting for the determination of their case.[[9]](#footnote-9) The asylum seekers are usually given identification documents with the next interview date with an expiry date and are at risk of immigration detention once their document expires.

Lack of information on alternatives to immigration detention by policy makers and stakeholders undermine the implementation of non- custodial alternatives to detention. There are no ready statistics of migrants in Kenyan prisons, as there is no categorization of foreigners in the Kenyan judicial system and no database with numbers publicly released.[[10]](#footnote-10)

Kenya lacks a clear legal provision prohibiting immigration detention for children and their families. Judicial officers and police officers more often than not are forced to detain person for immigration related offences. Between 2013-2014, 12,175 persons were detained in police cells for immigration offences[[11]](#footnote-11).

Terror attacks in Kenya has made the government authorities on several occasions in recent years to carry out mass arrests and detention of migrants and refugees as part of its security operations due to terror attacks in Kenya such as Usalama Watch. [[12]](#footnote-12)

1. **What support could other stakeholders (other than your Government) provide to strengthen the development and/or implementation of non-custodial alternatives to immigration detention of children and their families that enhance the protection of their rights?**
* The international community through platforms such as the United Nations, African Union and then Intergovernmental Authority on Development can issue recommendations to the government to increase non- custodial detention centers for migrant children and their families.
* Provide financial support or partner with civil society organizations as first responders to conduct research and collect updated data on detention of migrant children and their families. The data would be instrumental in advocacy and policy work including development of alternatives to custodial detention polices.
* Capacity building of stakeholders on alternatives to immigration detention, best practices and advantages of non- custodial detention.
1. International Detention Coalition, Alternatives to Immigration Detention in Africa, 2015- 2016, page 4 <https://www.refworld.org/pdfid/5a5f55e04.pdf> [↑](#footnote-ref-1)
2. International Detention Coalition, Alternatives to Immigration Detention in Africa, 2015- 2016, page 10 <https://www.refworld.org/pdfid/5a5f55e04.pdf> [↑](#footnote-ref-2)
3. International Detention Coalition, Alternatives to Immigration Detention in Africa, 2015- 2016, page 13 <https://www.refworld.org/pdfid/5a5f55e04.pdf> [↑](#footnote-ref-3)
4. Section 9 Kenya Citizenship and Immigration Act, No 12 of 2011 <https://admin.theiguides.org/Media/Documents/ImmigrationCitizenshipAct2011.pdf> [↑](#footnote-ref-4)
5. <https://www.wfp.org/operations/200737-food-assistance-refugees-0> [↑](#footnote-ref-5)
6. <https://www.rckkenya.org/> [↑](#footnote-ref-6)
7. International Detention Coalition, Alternatives to Immigration Detention in Africa, 2015- 2016, page 5 <https://www.refworld.org/pdfid/5a5f55e04.pdf> [↑](#footnote-ref-7)
8. National Council on the Administration of Justice, Criminal Justice System in Kenya an Audit, page 62 <http://kenyalaw.org/kenyalawblog/wp-content/uploads/2017/01/Criminal_Justice_Report.pdf> [↑](#footnote-ref-8)
9. UNHCR Statistical Package as at 29 February 2020 <https://www.unhcr.org/ke/wp-content/uploads/sites/2/2020/03/Kenya-Statistics-Package-29-February-2020.pdf> [↑](#footnote-ref-9)
10. National Council on the Administration of Justice, Criminal Justice System in Kenya an Audit, page 49 <http://kenyalaw.org/kenyalawblog/wp-content/uploads/2017/01/Criminal_Justice_Report.pdf> [↑](#footnote-ref-10)
11. National Council on the Administration of Justice, Criminal Justice System in Kenya an Audit, page 85 <http://kenyalaw.org/kenyalawblog/wp-content/uploads/2017/01/Criminal_Justice_Report.pdf> [↑](#footnote-ref-11)
12. National Council on the Administration of Justice, Criminal Justice System in Kenya an Audit, page 51 <http://kenyalaw.org/kenyalawblog/wp-content/uploads/2017/01/Criminal_Justice_Report.pdf> [↑](#footnote-ref-12)