



Ending immigration detention of children: Call for legislative amendment

Background

In 2001, Parliament passed the *Immigration and Refugee Protection Act* which included for the first time in Canadian immigration legislation the principle of the best interests of the child. As a signatory to the Convention on the Rights of the Child, Canada is required to make the best interests of the child a primary consideration in any decision taken that affects a child.¹

With regard to detention, Parliament approved a provision designed to minimize the detention of children:

For the purposes of this Division, it is affirmed as a principle that a minor child shall be detained only as a measure of last resort, taking into account the other applicable grounds and criteria including the best interests of the child. (IRPA s. 60)

While the intention was clear and detention of children has since been the exception rather than the rule, many children have nevertheless been detained, sometimes for long periods. Furthermore, the wording of the legislation has led to numerous children spending months and even years in detention accompanying a parent, in ways that the legislator did not anticipate.

The CCR examined the issue in detail in its 2009 report, *Detention and Best interests of the child*.² Research has shown that even short-term detention has a long-lasting negative impact on the health of children.³ More recently, Canadians were shocked to learn that an unaccompanied 16-year-old Syrian boy fleeing the conflict had been detained in isolation in Toronto for nearly three weeks.⁴ The University of Toronto's International Human Rights Program has published a report on children in detention⁵ and leading medical, legal and human rights organizations, along with hundreds of individuals recently signed a statement calling for an immediate end to the detention of children for immigration purposes.⁶

Internationally too, pressures are increasing to end the detention of children by immigration authorities. In 2012, the United Nations Committee on the Rights of the Child recommended that States “expeditiously and completely” cease the immigration detention of children, and clarified that it constitutes a human rights violation:

¹ The *Immigration and Refugee Protection Act* contains an explicit commitment to comply with Canada's international human rights obligations (IRPA s.3(3)(f)).

² ccrweb.ca/en/detention-and-best-interests-child

³ “Asylum-seeking children's experiences of detention in Canada: A qualitative study”, Kronick, Rachel; Rousseau, Cécile; Cleveland, Janet, *American Journal of Orthopsychiatry*, May 2015.

⁴ CBC, “Syrian boy seeking refugee status ordered deported to United States”, Maureen Brosnahan, Feb 16, 2016, www.cbc.ca/news/canada/toronto/syrian-teen-detained-toronto-1.3449595

⁵ International Human Rights Program - University of Toronto Faculty of Law, “No Life for a Child”: A Roadmap to End Immigration Detention of Children and Family Separation, September 2016, ihrp.law.utoronto.ca/news/no-life-child-roadmap-end-immigration-detention-children-and-family-separation

⁶ endchildimmigrationdetention.wordpress.com/

“Children should not be criminalized or subject to punitive measures because of their or their parents’ migration status. The **detention of a child because of their or their parents’ migration status constitutes a child rights violation and always contravenes the principle of the best interests of the child.** In this light, States should expeditiously and completely cease the detention of children on the basis of their immigration status.” [emphasis added]⁷

Since that time, a global campaign is in place to end the immigration detention of children.⁸ UN human rights bodies and others have come together to help States “expeditiously and completely” end the practice.⁹

Canada has been repeatedly criticized by United Nations human rights bodies for its immigration detention practices, including with respect to children. In 2012, the UN Committee on the Rights of the Child report on Canada included the following:

34. The Committee is concerned that the principle of the best interests of the child is not widely known, appropriately integrated and consistently applied in all legislative, administrative and judicial proceedings and in policies, programmes and projects relevant to and with an impact on children. In particular, the Committee is concerned that the **best interest of the child is not appropriately applied in asylum-seeking, refugee and/or immigration detention situations.** [emphasis added]¹⁰

At the UN Summit on 19 September 2016, Canada joined all other UN member States in committing to work towards ending the practice of detaining children for reasons related to their or their parents’ migration status.¹¹

The Minister of Public Safety Ralph Goodale has confirmed his intention to eliminate as much as possible the immigration detention of children.¹²

⁷ Committee on the Rights of the Child, Report on the 2012 Day of General Discussion: The Rights of All Children in the Context of International Migration

www.ohchr.org/Documents/HRBodies/CRC/Discussions/2012/DGD2012ReportAndRecommendations.pdf

⁸ Global Campaign to End Immigration Detention of Children, launched in 2012: endchilddetention.org/

⁹ Inter-Agency Working Group to End Child Immigration Detention, established in 2014, made up of over twenty-two UN and regional human rights bodies, inter-governmental actors and civil society organizations.

www.iawgendchilddetention.org/

¹⁰ Committee on the Rights of the Child, Concluding observations on the combined third and fourth periodic report of Canada, 6 December 2012, CRC/C/CAN/CO/3-4.

¹¹ refugeesmigrants.un.org/declaration

¹² “Our objectives are: [...] to try to avoid housing children in detention facilities, as much as humanly possible”, Statement, *Hard Work On Immigration Detention Issues*, July 19, 2016. “I have asked my officials to work on all of these alternatives, together with any issues around resources or budget that may be necessary, to make sure that detention is used only in the cases where it is absolutely essential and there are no alternatives, that the facilities are upgraded and **that we seek to avoid detention of children altogether.**” [emphasis added]. *Proceedings of the Standing Senate Committee on National Security and Defence*, May 30, 2016.

CCR proposal

Canada has an opportunity to play a **global leadership role** in ending the detention of children for immigration purposes. By introducing key reforms, Canada can offer a realistic model for the rest of the world, contributing to ending the immigration detention of children in other countries where unfortunately it is widespread.¹³ Five elements are required to address the issue.

1. **End the detention of children under immigration legislation.**

The detention of children for immigration purposes is never in their best interests. Community-based alternatives should always be found. Detention should never be used to house separated children or to “protect” them (for example, from risk of trafficking): in such situations, child-appropriate alternatives should be found, and, where necessary and appropriate, child protection agencies should be called upon.

2. **Preserve children’s right to family unity** by not detaining accompanying parents and guardians (legal or de facto). Community-based alternatives to detention should be found for families, in order to avoid separating families or housing children in detention (in either case a violation of the child’s rights). This principle may not apply in exceptional circumstances, such as where a parent constitutes a danger to the public or to the child, and where the danger cannot be mitigated through alternatives.

3. **Make the best interests of the child a primary consideration** in all detention decisions. Currently the law directs that the child’s best interests only be considered when the child is detained. They need to be considered whenever a child is affected by a decision to detain an adult, and they need to be a *primary* consideration. This includes situations involving the detention of a parent, or of the older sibling of a separated child, and any other situations when the detention of adults would directly affect a child.

4. **Amend the law.** The current wording of “last resort” in the *Immigration and Refugee Protection Act* is outdated and vague and has proven ineffective. Many children, including refugee children, have been detained as a “last resort” even though there are no compelling grounds to detain and alternatives exist. The law is also inadequate in that it does not direct that the best interests of the child be a primary consideration where an adult is detained. This means that children, including Canadian citizen children, are often *de facto* detainees, accompanying a detained parent or other family member. Meaningful and lasting change will depend on the law providing strong protection of children’s rights.

5. **Provide designated representatives to separated children** immediately when they come into contact with immigration authorities and throughout their immigration process. Currently, the law provides for a representative to be designated only when children appear before the Immigration and Refugee Board. This leaves separated children without anyone to protect their interests during many critical parts of their immigration processing. The designated representatives must be properly qualified.¹⁴

¹³ “UNHCR is concerned about the growing use of immigration detention, particularly of children.” www.unhcr.org/detention.html. According to UNHCR’s “**Global Strategy Beyond Detention: Baseline Report**”, published 18 Aug 2016, UNHCR was aware of 52,141 children in immigration children in 2013 in the 12 focus countries (which include Canada).

¹⁴ This recommendation requires an amendment to the legislation. The current document does not provide a detailed recommendation on this matter, given the focus on detention. However, we underline the importance of addressing this crucial gap in Canada’s protection of the rights of non-citizen children.

Annex: Proposed amendments to Immigration and Refugee Protection Act (IRPA)

1. Amend IRPA 60 to read:

“Despite the other sections of this Division, no minor child shall be detained.”

2. Amend IRPA to state that the best interests of any child affected must be a primary consideration in decisions to detain any person and to continue detention of any person. Amend *Immigration and Refugee Protection Regulations* s. 248 to include in “other factors” the best interests of any child affected as a primary consideration, as well as adding a clause specifically mentioning “any other relevant considerations.”
3. Amend IRPA to assert the principle of family unity where children are involved and to prohibit detention on the basis of identity, flight risk or administrative examination when detention of an adult on those grounds would separate children from an accompanying parent or guardian (legal or de facto), or lead to children being “guests” in detention.
4. Repeal the IRPA provisions relating to Designated Foreign Nationals (55 (3.1), 56(2), 57.1, 58 (1.1), 58(4) including the provisions on mandatory detention for children over 16.
5. Amend the *Immigration and Refugee Protection Regulations* to replace 249 (*Special considerations for minor children*) with the following list of factors to be considered in decisions to detain any person or to continue detention of any person or to impose conditions of release on any person, where a child may be affected. The factors should include but not be limited to the following factors, which must be interpreted in accordance with the Convention on the Rights of the Child and other relevant human rights instruments:
 - i. The child’s physical, mental, and emotional health and other needs and the appropriate treatment or care to meet those needs;
 - ii. The impact on the child of the detention of an adult, taking into consideration the psychosocial and emotional consequences of detention for the adult;
 - iii. The child’s physical, mental, and emotional level of development;
 - iv. The child’s cultural, linguistic, religious, and spiritual background;
 - v. The child’s educational needs;
 - vi. The child’s relationships and emotional ties to a parent, sibling, relative, other member of the child’s extended family, member of the child’s community, or other significant persons in the child’s life;
 - vii. The importance of continuity in the child’s care and the possible effect on the child of disruption of that continuity;
 - viii. The child’s views and wishes, if they can be reasonably ascertained;

- ix. The risk that a child may suffer harm through being removed from or kept away from a parent or caregiver;
 - x. Where there has been a determination by a child protection agency or qualified third party, the impact on the safety and well-being of the child if he or she is returned to or allowed to remain in the care of a parent or caregiver;
 - xi. Any civil or criminal proceedings relevant to the safety or well-being of the child;
 - xii. Any other relevant circumstance.
6. Review and amend IRPA provisions relating to arrest and detention in order to correct provisions that currently fail to comply with rights under the Charter and international human rights instruments of which Canada is signatory.

