



# Canadian Council for Refugees

## Conseil canadien pour les réfugiés

### Detention and Best Interests of the Child: Report summary



ABOVE: Akin, then two months old, and his mother were detained for identity reasons for 49 days. They are now waiting for their refugee hearing.

Juan<sup>1</sup>, aged three, spent 30 days in detention in the company of his mother, in the spring of 2009. Juan and his mother are refugee claimants from a Central American country. They were detained on arrival in Canada because the immigration officer was not satisfied with their identity documents. Juan's mother has two brothers in Canada, one of whom is a permanent resident.

According to his mother, Juan had difficulty sleeping and eating while in detention, and was acting out a lot, which was unusual. Juan's mother cried often and had difficulty understanding immigration procedures.

Ms Adebaya was detained in late 2008 when she was 8-months pregnant. After a month, still detained, she was admitted to hospital to deliver her child. The hearing to review her detention proceeded in her absence and the decision was taken to keep her in detention. Ms Adebaya's newborn baby was therefore taken from hospital to the detention centre where he spent 48 days before being released. His mother spent a total of 79 days in detention.

Baby Wilson was detained at the age of two weeks. She accompanied her mother, a woman from the Caribbean whose refugee claim had been rejected and who was facing removal. Ms Wilson had just delivered by caesarean section and while in detention was still in pain from the stitches.

Ms Wilson felt that her child was losing weight in detention, and complained that there was insufficient medical support. For example, there were no scales to measure her newborn's growth.

Ms Wilson and her baby girl were deported at the end of 2008, after 64 days in detention.

Abdi, a 16-year-old boy from the Horn of Africa, spent 25 days in detention at the end of 2008. He was with his older brother, Said, 19 years. They were detained because the immigration officer was not satisfied of their identity, although they had submitted several pieces of ID and had an aunt and uncle in Canada.

Because children are kept separate from adults in detention, Abdi and Said had to stay by themselves all day in their dorm room. Said became very concerned about his younger brother, because he was not sleeping well, was unwilling to eat and began to lose weight. Abdi wanted to sleep in the same bed as Said for security, but this was forbidden by the detention centre rules. When Abdi did fall asleep, he often had nightmares.

During the 25 days of detention, Abdi received no schooling. The two brothers have since been accepted as refugees.

<sup>1</sup> All names have been changed to protect privacy.

Children should not be held in immigration detention – or if they are, it should be a measure of last resort.

This was a principle guiding Members of Parliament in 2001 when they debated the bill that became the Immigration and Refugee Protection Act. They were anxious to ensure that Canada lived up to its obligations under the 1989 Convention on the Rights of the Child, according to which the best interests of the child must be a primary consideration in any action taken concerning a child.

Canada had in fact been criticized a few years earlier by the UN for giving insufficient weight to the best interests of the child in decisions affecting refugee and immigrant children, particularly in the area of detention.

The Supreme Court of Canada had also recently underlined the need to give “substantial weight” to the interests of affected children in the important *Baker* decision.

It was in this context that the Immigration and Refugee Protection Act, which came into force in June 2002, 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)

Despite this principle, children are regularly detained in Canada, sometimes for many weeks, and not only in exceptional circumstances.

Numbers of minors detained, monthly average

	2007	2008	2009 (Jan-Sept)
Atlantic	0	0	0
Prairies	1	1	0
Pacific	5	6	3
Quebec	7	13	10
Ontario	46	58	17
<b>Total</b>	<b>58</b>	<b>77</b>	<b>31</b>

## Why are Children Detained?

Most children are detained for one of two reasons: either an immigration officer believes they may not present themselves in the future (commonly known as “flight risk”), or an immigration officer is not satisfied of their identity.

### Detention on grounds of flight risk

Peter, aged 5, and Samuel, aged 3, were detained in the spring of 2009 with their mother, who was facing removal to her country of origin in the Caribbean. They were detained on the grounds of flight risk: an immigration officer did not believe the mother would appear for removal. The family was deported after spending 11 weeks in detention.

### Detention on identity grounds

Albert was 3 years old when he was detained in late 2008, along with his father, after they made a refugee claim at the immigration office in Montreal. They were detained on identity grounds. They had produced identity documents, but these were considered insufficient to establish identity. Albert and his father were released after 30 days in detention, once they had arranged for further identity documents to be sent.



ABOVE: Child crying as plane takes off carrying a parent. This picture was drawn by a child whose parents were in detention.

## Role of Canada Border Services Agency

Despite the requirement in the law that the best interests of the child be considered, it is not clear how the interests of children are weighed in many decisions to detain.

For example, Azadeh, an 11 year-old girl, was detained in late December 2008 with her mother, when they made a refugee claim. They were detained on identity grounds, despite the fact that they submitted documents at the border, and the girl's sister was already in Canada. What factors in favour of detention were found to outweigh the principle that a child should not be detained?

This young girl spent 31 days in detention, with no schooling or other stimulation suitable for a child.

The pursuit of alternatives to continued detention often seems to be given low priority by the Canada Border Services Agency (CBSA). For example, 16-year-old Abdi's aunt in Canada was willing to house Abdi and his brother, if released. CBSA does not appear to have pursued this option, recommending instead that Abdi and his brother remain in detention.

## Detention Review by the Immigration and Refugee Board

Anyone detained must be brought before the Immigration and Refugee Board (IRB) after 48 hours, and thereafter, if they continue to be detained, after 7 days, and then once every 30 days. The IRB decides whether to order the release of the person.

In some decisions by the IRB, there is only passing mention, or no mention at all, of the fact that a child is being detained.

At the first detention review for Abdi, aged 16, there was no reference to the principle of best interests of the child. At Abdi's 7-day detention review, the board member maintained detention although he recognized that Abdi and his brother were suffering in detention. "I sympathize perfectly with you, I know that this situation must be very difficult for you. Humanly speaking, it is very demanding, I am sure."

## Best Interests of the Child - Shortcomings of the Law

### > *Detention on the basis of identity is arbitrary*

The law gives CBSA an unreviewable right to detain someone based on their conclusion that a person's identity has not been satisfactorily established. The IRB can only release the person once CBSA decides that identity has been established or if CBSA is not making reasonable efforts to establish identity.

### > *Children in detention but not legally detained*

In practice, children are frequently in detention with a parent even though they are not legally detained. This happens when the child is a Canadian citizen, or for other reasons is not made subject to a detention order. The child may nevertheless accompany the parent into detention, because that is the best or only option available.

The law does not list best interests of the child among the factors to be considered in the review of detention of adults.

Ms Michael was detained in March 2009, for the purposes of removal. Her three Canadian-born children (aged 5, 3 and 1) accompanied her, since she was their primary caregiver. In upholding the detention, the board member made no mention of best interests of the child.

## Interpretation and Application of the Law

### > *Detention on the basis of identity*

One might expect that the IRB, taking the best interests of the child into account, would hold CBSA to a much higher standard regarding efforts to establish the identity of a minor. However, in many cases, the Board does not apply a higher standard for children. Sometimes the member offers an expression of discomfort. The child's best interests are not directly considered.

> *Best interests of children affected by an adult's detention*

The IRB has taken the position that because of the way the law is written, their members must not consider the best interests of a child affected by a detention decision, but not actually detained.

This leads to the strange and illogical situation where a board member considers the best interests of a non-citizen child detained with her mother, but not the interests of a Canadian citizen child, who for all practical purposes is just as much in detention.

Ms Okwuama was in detention with her two-year-old son, Jacob, and a second child born while she was in detention. The baby, as a Canadian citizen, was not legally detained and she is never mentioned in the 30-day detention review decision.

> *Lack of attention to children detained with their parents*

Even children who are legally detained are sometimes largely ignored during the detention review, when they are detained along with a parent.

## International human rights obligations

It is clear from international human rights standards that children should rarely, if ever, be held in immigration detention, and that asylum seeking children must be given particular protection.

“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

- *Convention on the Rights of the Child, Art. 3(1)*

The UN Committee on the Rights of the Child recommended that Canada:

“Refrain, as a matter of policy, from detaining unaccompanied minors and clarify the legislative intent of such detention as a measure of ‘last resort’...”

- Concluding Observations: Canada,  
27 October 2003

## Conclusion

Changes are urgently required so that children are no longer detained – or if they are, it is really as a measure of last resort.

- > Parliamentarians should amend the Immigration and Refugee Protection Act to address its shortcomings, including the lack of review of whether a person's identity has been satisfactorily established.
- > The government should amend the Immigration and Refugee Protection Regulations to clarify that the best interests of the child must be a primary consideration in all detention decisions that affect children.

- > The Canada Border Services Agency should review its practices so that detention of children is truly a measure of last resort.
- > The Immigration and Refugee Board should review its interpretation and application of the law, in light of Canada's obligations under the Convention on the Rights of the Child, and ensure that its members are adequately trained in considering best interests of the child.

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This document is a summary. The full report, *Detention and Best Interests of the Child*, is available at: [www.ccrweb.ca/documents/detentionchildren.pdf](http://www.ccrweb.ca/documents/detentionchildren.pdf)