



Canadian Council for Refugees

Conseil canadien pour les réfugiés

Detention and Best Interests of the Child



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.

Juan¹, 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.

¹ All names have been changed to protect privacy.

Introduction

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.²

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.³

“Children’s rights, and attention to their interests, are central humanitarian and compassionate values in Canadian society.”
- Supreme Court of Canada,
Baker, para. 67.

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
Total	58	77	31

² UN Committee on the Rights of the Child, 1995, para. 13 “...the Committee regrets that the principles of non-discrimination, of the best interests of the child and of the respect for the views of the child have not always been given adequate weight by administrative bodies dealing with the situation of refugee or immigrant children. It is particularly worried by the resort by immigration officials to measures of deprivation of liberty of children for security or other related purposes...”

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.

In 2008, 77 children on average were detained each month. Happily, the average has gone down to 31 in the first six months of 2009. However, these numbers do not give a full picture of children in detention, since they do not include children who are not legally detained, but are nevertheless in detention accompanying a detained parent.



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

³ *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817. The case concerned an application by Mavis Baker to remain in Canada on humanitarian and compassionate grounds. The Court overturned the decision rejecting her application because the immigration officer had not adequately considered the impact of her deportation from Canada on her children.

Why are Children Detained?

1. Decision to detain

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.

The officers making these decisions are officials of the Canada Border Services Agency (CBSA). They may detain the children on arrival, when they present themselves to an immigration office within Canada to make a refugee claim, or once they have been ordered removed from Canada.

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.

The Operational Manual guiding CBSA officers makes it clear that detention of children is to be avoided:

“Where safety or security is not an issue, the detention of minor children is to be avoided whether unaccompanied or accompanied by a parent or legal guardian. Alternatives to detention are to be considered. Detention of a minor child, however, is not precluded where the minor is considered a security risk or danger to the public.”⁴

In practice, however, children are detained even when they are in no way a security risk nor a danger to the public.

Despite the guidance from the manual, and the requirement in the law that the best interests of the child be considered and detention be a measure of last resort, it is not clear how the interests of children are weighed in many decisions to detain.

For example, 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.

If this were an isolated case, one might suppose that there were some particular reasons that compelled detention of this child and her mother. But detention of children in these circumstances is far from exceptional. This fact suggests that the weight the officer gives to the child’s interests is relatively small, so that it is frequently insufficient to outweigh the factors in favour of detention.

It is also unclear how actively CBSA officers consider alternatives to detention, as directed by the manual. Many detained children have family members in Canada: couldn’t the children (and their parents) be instead assigned to live with family

⁴ Citizenship and Immigration Canada, Enforcement Manual, ENF 20 (Detention), section 5.10.

members? For example, three-year-old Juan, who spent 30 days in detention with his mother, had two uncles in Canada, as was known to CBSA.⁵

2. Actions of CBSA after the decision to detain

Once a child is detained, priority of course should be given to resolving issues as quickly as possible so that the child can be released. No doubt in many cases CBSA acts promptly, for example, to facilitate clarification of identity. But there is evidence that this is not always the case.⁶

For example, in the case of Azadeh, an 11-year-old refugee claimant girl from Iran detained with her mother, the Immigration and Refugee Board member reviewing their detention commented:

“The last factor I’d like to mention is there is a minor involved in this case, which obviously flags CBSA in terms of ensuring that they act diligently, which I unfortunately don’t believe they have done in the past few days.”

In this case, CBSA had sent identity documents for expertise, but they had waited until the day before the detention review to interview the mother. They had also failed to contact the mother’s brother in Canada, although they had the telephone number. As the Immigration and Refugee Board member commented:

“what I do find disappointing and puzzling is that an interview with you was only held yesterday rather than earlier on in the week. So, unfortunately, this was what I would consider to be a little bit last minute. Even if they had found some pertinent information in the interview, I don’t see how they would have been able to act on it before today’s detention review. There is something to be said for the fact that you have stated that you do have a brother who is a Canadian citizen and you did apparently provide his contact information. That is not an avenue apparently that CBSA has explored since you’ve been detained.”

Azadeh and her mother were released from detention by the Immigration and Refugee Board because of the inadequacy of CBSA’s efforts.

Jacob, who is from West Africa, was two years old when he was detained with his mother in the fall of 2008 for identity reasons. As reported by the Immigration and Refugee Board member, the lawyer for Jacob and his mother was concerned that CBSA was not giving sufficient priority to the case:

“She asked [the CBSA officer] if she had received the documents and if she could speed up the verification of the documents being that there is a minor child [...] and that if she could send the documents to the lab as soon as possible. It was indicated that the immigration officer did not seem to be overly concerned with the situation and indicated that it would take the time it took in order to have the documents verified.”

In this case also, an interview with the mother was only held the day before the detention review. The Immigration and Refugee Board member agreed that CBSA efforts “may seem a little bit lacking in some respect.” Jacob spent 50 days in detention before being released.

After a child has been detained, CBSA also has a responsibility to review its decision to detain in the light of new evidence, taking into consideration the best interests of the child. Before a detainee has been brought before the Immigration and Refugee Board (IRB) for a detention review, CBSA can decide to release the person. After the detainee has been brought before the IRB, CBSA can recommend release, with or without conditions.

In many cases, CBSA does indeed reconsider its position based on new information, leading to the release of children. However, in other cases, CBSA’s continued position in favour of detention again raises question about the weight given to the best interests of the child.

For example, in the case of Azadeh, the 11-year-old girl mentioned above, tests conducted on identity documents came back positive, confirming the documents had security features and were authentic. Nevertheless, CBSA still maintained that they were not satisfied of the identity of the mother and daughter. The Immigration and Refugee Board member outlined the situation as follows:

⁵ Juan and his mother made a refugee claim at the US-Canada border and were only exempted from the application of the Safe Third Country rule by the fact that Juan’s mother had family in Canada.

⁶ This evidence is drawn largely from the detention reviews before the Immigration and Refugee Board, where a CBSA representative presents information about the case and takes a position on whether detention should be maintained.

“Now, also, yesterday, CBSA received the results of the expertise on the identity documents you provided. So basically, the Driver’s License the result indicates that they have no specimen to compare it to, so the analysis was inconclusive. And as for the national identity card and the Birth Certificates, the analysis indicates that there is apparently no trace of alteration on the documents. The documents bear security features and, according to the analysis are most probably genuine. However, despite this, there is an opinion signed today by the Minister stating that they are not yet satisfied of your identity. Minister’s counsel has stated that she has no further information or explanation as to what is the preoccupation of the officer. And she states that CBSA is of the opinion that you have collaborated in order to try to establish your identity.”

Nor does CBSA necessarily change its position when a detained woman gives birth to a child. A woman was detained on arrival in December 2008 on identity grounds. A month later, she delivered a child. At the next detention review, in early February 2009, CBSA continued to argue that detention should be maintained: their position was that the woman was not collaborating reasonably and that they themselves were making reasonable efforts to establish her identity. The fact that there was now a three-week-old child in detention was not sufficient reason for CBSA to change its position.

The pursuit of alternatives to continued detention often seems to be given low priority by CBSA. For example, in the week following the detention of 16-year-old Abdi, in the company of his 19-year-old brother, CBSA had been in touch with their aunt in Canada. They asked her questions intended to help with the identification of Abdi and his brother. But although the aunt was willing to house her two nephews, if released, CBSA does not appear to have pursued this option, recommending instead that Abdi and his brother remain in detention while they continued efforts to establish their identity to their satisfaction.

Similarly, in the case of the three-year-old Juan, CBSA presented no alternative to detention at the first detention review, despite the fact that Juan had two uncles in Canada.

3. Review of detention by the Immigration and Refugee Board

Anyone, child or adult, detained under the Immigration and Refugee Protection Act, must be brought before the Immigration and Refugee Board after 48 hours, and thereafter, if they continue to be detained, after 7 days, and then once every 30 days. A member of the Immigration Division of the Immigration and Refugee Board hears from both CBSA and the person detained (and their lawyer, if any) and decides whether to order the release of the person or that detention be maintained.

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

Abdi, 16 years, detained with his brother, Said, 19 years

At the first detention review, the board member’s decision makes only the following references to Abdi’s status as a minor:

- > Abdi’s older brother, Said, was designated as his representative (by law all minors must have an adult designated to represent them).
- > A request will be made for a designated representative for Abdi from the social service agency that regularly provides this service.
- > In the case of Said, CBSA made some database searches and took fingerprints, but not in the case of Abdi, because he is a minor.

There is no reference to the principle of best interests of the child.



In some cases where more attention is paid to the presence of the child in detention, the member expresses discomfort and sympathy but the decision itself does not seem to be affected.

Abdi's 7-day detention review

The board member states in his decision:

"I also heard the testimony of [Said] who stated to me that he and his brother had come to Canada to seek Canada's protection, that they are suffering in detention, particularly his brother, who is finding it very difficult to be detained and I understand that perfectly. 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.

Having concluded that CBSA has been making reasonable efforts to establish identity (and detention will therefore be maintained), the member continues, speaking about future steps to obtain and verify documents: "I hope that the Minister becomes satisfied with the new documents that have been produced today, becomes satisfied with who you are and with your identity so that an early hearing can be held as soon as possible, this is my hope, it is not within my jurisdiction, it is not under my control, these are just the hopes that I can express here for myself, for you and for everyone in the room today." [translation]

not been satisfactorily established. The law does not permit the Immigration and Refugee Board to release the person if the Board considers that the person's identity has in fact been established. Unreviewable detention is arbitrary detention.

The Immigration and Refugee Board can only release a person detained on identity grounds once CBSA decides that identity has been established or if the Board decides that CBSA is not making reasonable efforts to establish identity.

Thus, far from directing that the best interests of the child be a "primary consideration" in decisions regarding the detention of a minor (as required by the Convention on the Rights of the Child), the law limits or removes the IRB's jurisdiction to even consider the best interests of the child, so long as CBSA remains unsatisfied of the child's identity, and is making reasonable efforts to establish it. (See below regarding the IRB's interpretation of "reasonable efforts" in this context).

b) Children in detention but not legally detained

The Immigration and Refugee Protection Act and Regulations specifically require that best interests of the child be considered in cases involving the detention of minors, but do not list best interests of the child among factors to consider 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.

4. Detention review and best interests of the child – shortcomings of the law

The limitations of consideration of best interests of the child by the Immigration and Refugee Board stem in part from the law.

a) Detention on the basis of identity is arbitrary

The *Immigration and Refugee Protection Act* gives CBSA an unreviewable right to detain someone based on their conclusion that a person's identity has

In practice, children are frequently in detention with one or both parents even though they are not legally detained. This happens when the child is born in Canada and therefore 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.

c) Children not detained but affected by detention of a parent

The law similarly fails to direct the Immigration and Refugee Board to take into consideration the best interests of children who are not themselves in detention, but are affected by the detention of an adult. This occurs frequently when the detention of a parent deprives children of their main or sole caregiver, sometimes causing significant hardship.

5. Interpretation and application of the law by the Immigration and Refugee Board

In addition to the above-mentioned problems with the law itself, other limitations on consideration of best interests of the child stem from the interpretation and application of the law by the IRB.

a) Detention on the basis of identity

While the law does not allow the Immigration and Refugee Board to overrule CBSA's opinion as to whether a person's identity has been established, it does require that a detainee be released if CBSA's efforts to establish identity have not been reasonable.

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, and to order a minor's release under circumstances in which the detention of an adult might be maintained.

Indeed, some IRB decisions do reveal an expectation by the board member that, in the case of a detained child, "reasonable efforts" require greater promptness than usual on the part of CBSA.

However, in many other cases, the Board does not apply a higher standard for children. The member may simply explain what it views as its limited jurisdiction in this context. Sometimes the member also offers an expression of discomfort. The child's best interests are not directly considered.

The IRB views its jurisdiction as limited because it tends to accept CBSA's position about what it needs to do in order to establish identity. This usually involves obtaining documents and submitting them for expertise, and/or making inquiries in Canada and abroad. Since these procedures routinely take at least several days, and more often several weeks,

a child detained on the basis of identity is extremely unlikely to be released at the 48 hour review. Even at the 7 day review, the IRB generally considers it premature to conclude that CBSA has not been making reasonable efforts (although there are exceptions⁷).

The IRB regularly accepts that CBSA is making reasonable efforts if it is following usual (and time-consuming) procedures to satisfy themselves as to the detained child's identity. For example, in the case of 16-year-old Abdi and his older brother, Said, the IRB member at the 7-day review listed the following efforts of CBSA:

- > Documents were sent for expertise.
- > A telephone conversation with the boys' aunt.
- > US authorities were contacted to attempt to determine their status in that country.
- > Said had been interviewed.
- > Research had been done by internet and an email sent to a university to which Said had applied.

The member also noted that Said had been fully cooperative.

Because the board member in this case considered his role to be extremely narrow, there was effectively no room for consideration of the best interests of the child:

"What I must determine today, as I was saying to you, is whether efforts are reasonable. I cannot substitute myself for the Minister to decide if I should be satisfied as to your identity or as to the documents that you have presented so far. It is not my jurisdiction, it is not my job to do that. What I must assess is the efforts made and try to judge whether they are reasonable or not, taking into consideration your collaboration." [translation]

Given this, it is not surprising that the question of the best interests of Abdi, who is acknowledged to be suffering in detention, is not considered at all in the decision to detain or release. The best the board member feels he can do is to earnestly hope that

⁷ For example, the case of Azadeh mentioned above. On the other hand, in the case of Jacob, even at the 30 day review the IRB member decided to maintain detention, despite finding CBSA efforts "lacking in some respect."

CBSA will soon be satisfied as to Abdi and Said's identity. Their detention was maintained at this 7-day review.

Another case, involving a two-year-old boy, Jacob, detained with his mother and sister born in detention, illustrates the same problem. The board member stated at the 30-day review:

"CBSA is aware that the detention of minors is definitely an exception, but it takes time to receive expertise of documents and therefore, that is essentially not unreasonable in their eyes."

Although the board member found CBSA's efforts "lacking in some respect", she nevertheless decided that they met the test of reasonable. In this case also, the only difference the presence of children in detention seems to make is that the member expresses discomfort with the situation:

"So I am definitely sensitive to the issue of the two children being in detention. It is not something that is desirable, it is not something that is the norm obviously, it is definitely an exceptional situation."

The family was finally released after 50 days in detention, after a board member concluded that CBSA had not made reasonable efforts.

The Immigration and Refugee Board could give much more meaningful consideration to the best interests of the child, as required by the law. Instead of accepting CBSA's definition of "reasonable efforts" to establish identity, the IRB should take into account that detention of refugee claimants for identity reasons should be limited to a few days, in order to comply with our international obligations. The Convention relating to the Status of Refugees prohibits penalizing refugees for illegal entry. In the drafting of the Convention it was noted that States could however detain asylum seekers "for a few days" in order to make identity inquiries.⁸ Detaining claimants for weeks or even months, as Canada does, is therefore not in conformity with international obligations. This applies to all refugee claimants – in the case of children it should be respected all the more vigorously.

b) Best interests of children affected by an adult's detention

The Immigration and Refugee Board 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. As expressed in a letter dated 9 April 2009 from the Chairperson of the IRB to the CCR, the wording of the Act and Regulations "indicates to us a legislative intention in IRPA that the ID [Immigration Division] not consider the best interests of a child affected by an adult's detention."

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.

Board members following this interpretation of the law frequently reject arguments relating to the best interests of children who are in detention but not legally detained.

Peter, aged 5, and Samuel, aged 3, had been in detention for over a month in the company of their mother, who was facing removal from Canada. The family was kept isolated within the detention centre because Samuel had behavioural problems, which grew worse in detention. At the detention review, the mother's lawyer argued that the mother should be released and the family transferred to a shelter, in consideration of the best interests of the children. The board member rejected the best interests of the child arguments as being beyond the jurisdiction of the IRB, and maintained the detention.

⁸ Convention relating to the Status of Refugees, Art. 31. UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Thirty-fifth Meeting, 3 December 1951, A/CONF.2/SR.35.

Two young children, aged 2 and 5, spent four months in detention in the spring of 2009, accompanying their parents, who were detained on flight risk.

The children were able to leave the detention centre in the company of an adult for a few weekends, but they spent the vast majority of the four months in detention.

In detention reviews, the CBSA representative argued that the IRB had no authority to consider the best interests of the children, since they were not legally detained.

After the family had been detained for three months, an IRB member ruled that the impact on the children must be considered, based on the Supreme Court decision *Baker*. The member nevertheless maintained detention, on the grounds that there was a high risk that the parents would not comply with the removal order.

Finally, at the next detention review the parents were released on conditions. In the decision, the IRB member again ruled, against the pleadings of CBSA, that the children's interests should be considered. However, consideration of the children was not the key factor leading to release, the member found it only weighed "somewhat" in favour of release.

In the case of children detained with their parent, the IRB sometimes releases the children, but not the parent, even though in practical terms the release of the children is thus meaningless, since they remain in detention with the parent.

Three-year-old Juan was detained along with his mother: they were both making refugee claims in Canada. At the 7-day review, the IRB decided that continued detention of Juan was not justified. However, Juan's mother was not released. Despite being legally released, Juan remained in detention with his mother.

In fact, given the way the IRB interprets the law, it may perversely be contrary to children's interests to be legally released if their parent is not also released.

As long as the child is legally detained, the board member must consider their best interests. On the other hand, if the child is "released", she becomes invisible to the Board, and her best interests are considered beyond the Board's jurisdiction, even when she remains in detention just as much as she was before "release".

Needless to say, arguments relating to the best interests of children not in detention, but deprived of their parent's care, are frequently rejected by the IRB.

Ms Tracy was detained in the winter of 2009. She had been in Canada for nearly 12 years but had no permanent status and was facing removal. She was the sole caregiver for her two young sons, aged 3 and 5. When she was detained, the boys went to stay with a friend of Ms Tracy. She was deeply concerned about their well-being. At the detention review, Ms Tracy's lawyer argued that she should be released, based on the best interests of the children. The board member rejected those arguments and continued the detention.

Ms Tracy was finally released after 32 days in detention, three days after her application to remain in Canada on humanitarian and compassionate grounds was accepted.

The belief that their jurisdiction is limited is perhaps responsible for an apparent confusion among some board members about how to give proper consideration to the best interests of the child. Decision makers should be taking into account how their decision (to continue to detain or not) will affect any children. Instead, some members offer their opinion that it is in the best interests of a child not legally detained to remain in detention in order to be with their parent (a matter that is most certainly beyond their jurisdiction). It is as if they are trying to comfort themselves for sending a child back to detention (where no child belongs) by finding a way to characterize it as after all in the child's best interests.

From the decision to continue detention of a woman who gave birth while in detention:

“... I do agree with [your lawyer] on one point, and it’s that there’s a newborn child which reduces your possibility to elude the Immigration Department, and the best place for him is probably not at the detention centre. But in his best interest, of course, it’s to be with you now.”

The baby spent 48 days in detention.

From the first detention review of 3-year-old Juan, a refugee claimant detained with his mother:

“There is an opinion for the little one too, to continue his detention. In any case, for the moment, I believe that it’s in his best interests to remain with you...”
[translation]

From the 7-day review:

“As I was saying, there is no reason to maintain your son’s detention, but it is preferable that he remain with you since you have evaluated that this would be in his best interests.” [translation]

c) Lack of attention to children detained with their parents

Even children who are legally detained are sometimes largely ignored during the detention review and in the decision of the Immigration and Refugee Board, when they are detained along with a parent. There are usually brief references to the presence of a child, but the attention is otherwise focused almost exclusively on the case of the parent. Consider, for example, the decision at the 30-day detention review of two-year-old Jacob and his mother, detained on the basis of identity.

The transcript of the oral decision runs to six pages. Jacob is mentioned at the outset of the decision when the board member states that his mother has been designated as his representative. The member also notes that a birth certificate in Jacob’s name has

been provided. Thereafter the focus of the decision is entirely on the question of the efforts to establish Ms Okwuama’s identity, with no reference at all to Jacob’s identity. There are several references to the undesirability of minors being in detention, but Jacob, whose detention is formally being reviewed along with his mother, does not merit any consideration of the grounds of his own detention (i.e. what continued concerns there are with his identity, and what efforts have been made to resolve them). He is treated purely as an appendage of his mother.⁹

6. 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.

The UN Convention on the Rights of the Child, to which Canada is party, is the leading instrument on children’s rights. It articulates the core principle requiring primary consideration of the best interests of the child.

“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 Convention also highlights the right to protection of asylum-seeking children.

“States Parties shall take appropriate measures to ensure that a child who is seeking refugee status [...] shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights [...]”

- Convention on the Rights of the Child, Art. 22(1)

⁹ Jacob’s baby sister, a Canadian citizen born after Ms Okwuama was detained, is never mentioned and is only visible in the decision through references to “minors” (in the plural) being in detention.

The UN High Commissioner for Refugees (UNHCR) has made clear that minors who are asylum-seekers should not be detained. This has been forcefully expressed in the UNHCR Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers (February 1999). The Executive Committee of UNHCR (of which Canada is a member) endorsed this position in Conclusion No. 107 (LVIII) – 2007 – Children at Risk:

(b) xi. In recognition that detention can affect the physical and mental well-being of children and heighten their vulnerability, States should refrain from detaining children, and do so only as a measure of last resort and for the shortest appropriate period of time, while considering the best interests of the child.

Canada has already been criticized by the UN Committee on the Rights of the Child for its detention of children. In its first report on Canada in 1995, the Committee regretted:

[...] that the principles of non-discrimination, of the best interests of the child and of the respect for the views of the child have not always been given adequate weight by administrative bodies dealing with the situation of **refugee or immigrant children**. It is particularly worried by the **resort by immigration officials to measures of deprivation of liberty** of children for security or other related purposes [...]¹⁰

The Committee recommended that Canada pay particular attention to:

[...] the general principles of the Convention, in particular the best interests of the child and respect for his or her views, **in all matters relating to the protection of refugee and immigrant children**, including in deportation proceedings.¹¹

Eight years later, in 2003, the Committee continued to have concerns over detention of non-citizen children and recommended that Canada:

(c) Refrain, as a matter of policy, from detaining unaccompanied minors and clarify the legislative intent of such detention as a

measure of “last resort”, ensuring the right to speedily challenge the legality of the detention in compliance with article 37 of the Convention.¹²

Canada is due to be examined again by the UN Committee on the Rights of the Child.

The Senate Human Rights Committee in April 2007 raised similar concerns:

[...] children should be detained only as a last resort and for a minimal amount of time. When in detention, they should also be provided with access to education, counseling, and recreation.¹³

[...] the best interests of the child should always be a primary consideration in immigration decisions affecting children.¹⁴

Canada has also been criticized for the provisions in the law that make detention on the basis of identity unreviewable, leading to arbitrary detention. Following a visit to Canada in 2005, the UN Working Group on Arbitrary Detention expressed its concerns:

“One of the grounds on which an immigration officer can detain a foreign national is that she is not satisfied as to the foreigner’s identity. When the immigration officer relies on this ground, as they often do, the law does not allow the Immigration Division to review whether the immigration officer was reasonable in concluding that the identity of the detainee was not established. The legislation thus fails to offer judicial oversight of the decision to detain based on identity.”¹⁵

“The Working Group is concerned, however, about several aspects of the immigration law, which give the immigration officers wide discretion in detaining aliens and limit the review of decisions ordering detention.”¹⁶

¹² Second report, 2003, UN Committee on the Rights of the Child Concluding Observations: Canada, 27 October 2003, para. 47.

¹³ Report of the Standing Senate Committee on Human Rights “Children: the Silenced Citizens. Effective implementation of Canada’s obligation with respect to the rights of children”, April 2007, Chapter 11, E, p. 133.

¹⁴ *Ibid.*, G, p. 137.

¹⁵ Report of the Working Group on Arbitrary Detention, Visit to Canada, (1-15 June 2005), UN Economic and Social Council, E/CN.4/2006/7/Add.2, 5 December 2005, para. 74.

¹⁶ *Ibid.*, para. 91.

¹⁰ UN Committee on the Rights of the Child: Concluding Observations: Canada, 20 June 1995, para. 13; emphasis added.

¹¹ *Ibid.*, para. 24; emphasis added.

Conclusion

When Parliament passed the Immigration and Refugee Protection Act in 2001, it seemed that new legislative provisions would address the UN criticisms of Canada in the area of detention of children, by ensuring that their best interests would be taken into consideration and detention used only as a measure of last resort.

The reality, however, is that children continue to be detained on a regular basis, with little meaningful consideration of their best interests. Children are not only detained in exceptional circumstances: they are sent into detention on routine grounds of identity or flight risk, without any suggestion that the need for detention is particularly compelling.

Among the children detained are a significant number of children who are seeking asylum in Canada: these are children for whom detention is doubly inappropriate – first, because they are children, and second, because refugee claimants should not normally be detained.

There are also children who spend long periods in detention accompanying a detained parent, without themselves being formally detained. One might expect that not being legally detained would be to the advantage of a child, but in practice it is often actually a disadvantage. Because of the way the law is worded and interpreted, these children are “legally invisible” and their interests are not taken into consideration in the decision that will lead to their release or continued detention.

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

- > To ensure that Canada lives up to its obligations under the Convention on the Rights of the Child:
- > 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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