

BACKGROUND PAPER 1

REFUGEE STATUS DETERMINATION PROCESS IN CANADA

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This background paper has been developed as reference material for the participants of the Network Meeting on Separated Children. It aims to provide an overview of the legal and policy provisions that relate to separated children seeking asylum in the refugee status determination process in Canada.

The Canadian refugee status determination procedure is outlined in the Immigration and Refugee Protection Act (IRPA). It currently consists of three phases: access, refugee status determination hearing and post-hearing processes. Access issues concern front end eligibility determination at port of entry or inland offices by Immigration Department officials who determine whether a refugee applicant meets the criteria for referral to the Refugee Protection Division (RPD) for a refugee status determination hearing.

If determined eligible, the applicant is referred to the RPD (part of the Immigration and Refugee Board "IRB" the quasi-judicial administrative tribunal responsible for refugee determinations in Canada) which provides for a hearing of the claimant and makes a determination on the merits of the refugee claim. If the claim is accepted, the applicant is granted protected person status and may apply for permanent residency in Canada. If the claim is rejected, the applicant may apply for leave for judicial review to the Federal Court Trial Division of Canada in the absence of an appeal on the merits in the refugee process (the new Refugee Appeal Division created under IRPA has not yet been implemented). Rejected claimants¹ are eligible for a pre-removal risk assessment prior to removal from Canada.

General Comments

References to minor children and "best interest of the child" appear in several instances in IRPA. The summary section of the new Act provides for recognition of Canada's commitment to the principle of the "best interest of the child." Specific relevant references to minor children or best interest of the child are made in: ss. 25 (1) - humanitarian and compassionate applications, s. 28 (2)(c) - residency obligation for retention of permanent residency status, s. 30 (2) - right to education, ss. 60-61- detention of minor children, s. 67(1) - best interests principle in Immigration Appeal Division reviews, s. 68 - best interests principle consideration in stay of removal orders at the Immigration Appeal Division.

Port of Entry

All refugee applicants, irrespective of age are examined for eligibility upon making a refugee claim. Given the discrepancy in the cut-off age for "child" and ensuing treatment of separated children in the various provinces in Canada², it would be fair to say that there is no uniform process at the ports of entry with respect to examination. In recent

¹ Subject to exceptions outlined in s. 112 of IRPA.

² Please refer to *Separated children seeking asylum in Canada, UNHCR, 2001, pp.44-66.*

months, the Department of Citizenship and Immigration (CIC) started reviewing the need for appointing a designated representative for minor children in immigration processes, including port of entry procedures such as examination for eligibility.

In light of the particular absence of an adequate mechanism for care and guardianship for separated children over 16 in Ontario, CIC recently started providing minor asylum seeking children with a designated representative at Pearson airport in Toronto. UNHCR is working closely with NGOS and CIC in developing written instructions for interviewing separated children at ports of entry.

Detention – see Background Paper No. 2

Refugee status determination

Section 167(2) of IRPA provides that the IRB shall designate a person to represent anyone who is under 18 years of age or unable, in the opinion of the applicable Division to appreciate the nature of the proceedings in any of the three Divisions. This is reiterated in the Rules for all three IRB Divisions under s. 15 of the RPD Rules, s 18 of the Immigration Division Rules and s. 19 of the Immigration Appeal Division Rules.

Children's Guidelines

In 1996 the IRB adopted its *Guidelines on Child Refugee Claimants* which set out: 1) issues relating to the appointment of a Designated Representative; 2) steps to be followed when processing the claim of an unaccompanied child; 3) evidentiary issues relating to all child claimants. The Guidelines state that the IRB “*decision-makers are expected to follow the guidelines unless there are compelling and exceptional reasons for adopting a different approach*” and that “*in determining the procedure to be followed when considering the refugee claim of a child, the Convention Refugee Determination Division (now called Refugee Protection Division) should give primary consideration to the ‘best interests’ of the child.*”

The Guidelines identify three categories of children: 1) children who are with their parents; 2) children who are being looked after by “persons who purport to be members of the child’s family”; 3) children “who are alone in Canada without their parents or anyone who purports to be a family member.” Only the last category of child is considered “unaccompanied”. It should be noted that the IRB’s definition of unaccompanied minor differs from the definition of a separated child found in the UNHCR 2002 position paper on Refugee Children³ as well as that found in the *Best Practice Statement on Separated Children in Canada*.

A description of the procedural and evidentiary issues in the IRB Guidelines on child refugee claimants can be found in Annex C 3.3 of the *Best Practice Statement on Separated Children in Canada*.

³ EC/GC/02/9 April 5, 2002, Global Consultations on International Protection.

Designated representative

The criteria and duties of the designated representative are outlined in the Guidelines on Child Refugee Claimants and in the IRB Rules.

Criteria

- Over 18 years of age
- Understand the nature of the proceedings
- Not be in conflict of interest with the situation with the minor claimant
- Willing and able to fulfil the duties of representative and act in the "best interest of the child"

Duties

- Retain and instruct counsel
- Make decisions with respect to the proceedings
- Inform the child of various stages of the process
- Assist in obtaining evidence in support of the claim
- Act in best interest of the child

The role of the designated representative is important at the following immigration and refugee processes:

- eligibility interview at the first instance conducted by CIC
- detention review
- roll call, a process in Quebec where the designated representative accompanies the child to a preliminary procedure (available to all refugee claimants) that provides information about the refugee status determination process and their entitlements.
- The refugee status determination hearing including the pre-hearing conference at the RPD.

The right to be heard is generally provided under s. 170 (2)(e) of IRPA: "*the RPD, in any proceedings before it, must give the person and the Minister a reasonable opportunity to present evidence, question witnesses and make representations.*"

Upon appointment, RPD Members receive training on the Guidelines on child refugee claimants limited to issues of the role and duties of the designated representative and jurisprudence on minor refugee claimants, and one year later on procedural issues as part of their follow up training. It is important that they also receive training on the assessment of the appropriateness of the designated representative.

Priority Issues

The *Best Practice Statement on Separated Children in Canada* outlines best practices with regard to the refugee status determination process. See in particular section B1, B4, B7, B8 and B12 and annexe C3 of the Statement.

The following recommendations are taken from the UNHCR discussion paper "Separated Children seeking asylum in Canada"⁴

1. The IRB Guidelines on child refugee claimants should be expanded to include substantive issues and a fuller explanation of how to communicate with child claimants.
2. The role of the designated representative should be clarified. The designated representative should be considered a participant in the proceedings and should assist in communication of the child's views (as per Article 12 of the CRC).
3. Clear procedures for the appointment of the designated representative should be developed, emphasizing means by which aptitude for this function is to be assessed. (Currently CIC in Ontario is trying to develop a policy on designated representative in the immigration processes)
4. Provinces which have not already done so should consider establishing a contractual arrangement with an appropriate agency to act as the designated representative for separated children, and for those whose family members are unsuitable or unable to fulfill this role.
5. Consideration should be given in all provinces to the recruitment and training of designated representatives from the cultural communities of asylum-seeking children. (Currently the IRB in Toronto is working on expanding its list of appropriate designated representatives).
6. Specialist IRB Members should be designated to hear children's refugee claims.
7. IRB Members designated to hear children's cases should be provided with comprehensive training including: child development issues; communicating with children; children as witnesses; the impact of violence, trauma, exile and separation on children; and cross-cultural issues.
8. Consideration should be given to allocating a particular venue for hearing children's cases. The layout and decor should be informal.
9. A separated child who turns 18 during the refugee determination procedure should continue to have the assistance of a designated representative. Despite reaching the age of majority, such young people without family support remain vulnerable.

⁴ Separated children seeking asylum in Canada, A discussion paper adapted from an original report researched and written by Wendy Ayotte, July 2001.