

## **BACKGROUND PAPER 2**

### **SEPARATED CHILDREN IN CANADA: IMMIGRATION PROCEDURES**

Prepared by Wendy Ayotte and Karine Peloffy, International Bureau for Children's Rights

This brief and non-exhaustive background paper is intended to provide an information on some immigration procedures as they apply to separated children who are in Canada or seeking to enter Canada. It is complementary to the paper on Refugee Processes and may also overlap with that paper. It provides an update to information contained in the UNHCR research paper "Separated Children Seeking Asylum in Canada" (2001).<sup>1</sup> Further information on child victims of trafficking can be found in the background paper of that title.

Separated or unaccompanied children are not referred to in the Immigration and Refugee Protection Act 2001 (IRPA), nor in the associated regulations and rules. As yet, no departmental policy on separated children has been developed within Citizenship and Immigration Canada (CIC). There are a number references to separated or unaccompanied children container in CIC's operational manuals (posted on website). Some of the manuals referred to below are still in the process of revision. Compared with a search of manuals done in early 2001, there are more references to the need for officers to deal sensitively with children.

#### IRPA - Best Interests of the Child and Canadian Charter of Rights (Age)

Canada has affirmed a commitment to best interests by way of Article 3(3)(f) of the Immigration and Refugee Protection Act (IRPA) stating that the Act is to be construed and applied in a manner that "*complies with international human rights instruments to which Canada is signatory*". This includes the Convention on the Rights of the Child (CRC) and its key Article 3 on the best interests of the child. IRPA also introduces consideration of best interests in certain areas (see further below). Under Article 3(3)(d) of IRPA the application of the Act should respect the Canadian Charter of Rights and Freedoms which requires that each person has the right to equal protection and equal benefit of the law without discrimination based (inter alia) on age (Article 15(1)).

#### Definition

Although there is no clear definition of a separated or unaccompanied child that is used consistently by CIC, definitions of an "unaccompanied minor" are found in manual ENF 20 on detention: "*An unaccompanied minor is a child under 18 years of age who is separated from both parents or from their legal guardian*" (p.20)

The Safe Third Country Agreement between Canada and the USA defines an "unaccompanied minor as an "*unmarried refugee status claimant who has not yet reached his or her 18th birthday and does not have a parent or legal guardian in either Canada or the United States*

---

<sup>1</sup> Available on the website of the Canadian Council for Refugees Ander UNHCR documents.

### Front End Processing (FEP)

This refers to the processing of refugee protection claims. CIC decides whether a separated child applicant is eligible to make a refugee claim in Canada. If they are considered eligible they will be referred to the Immigration and Refugee Board. The FEP consists of an in – person examination, security screening and criminality checks. The child will be photographed and fingerprinted and relevant forms will be completed. It is rare, but does nonetheless occur that a separated child could be considered ineligible. A decision will also be taken as to whether or not to detain the child (see below under detention). Under IRPA this must however be a measure of last resort.

Section 7 of CIC manual ENF 6 deals with an A44(1) inadmissibility report (this refers to children who may be inadmissible to enter Canada due to criminality, security or health reasons , being undocumented etc and who will have a conditional removal order issued against them if they are eligible to have their claim referred to the IRB) in relation to “unaccompanied minors and suspected incompetent persons”. Officers are expected to exhaust all reasonable efforts to procure representation for children. In this instance “representation” is not required by law (as is the case for in S.167 (2) of IRPA for children appearing before the IRB). The manual defines a representative as someone “*over 18 years of age, able to appreciate the nature of the proceedings, willing to represent the person concerned, readily able to do so and without an interest that is adverse to that of the person concerned.*” The preferred option is an adult relative travelling with or meeting the child. In the absence of such a person the child welfare authorities should be contacted to secure a representative. In the absence of a representative and in the case where the child has a legal counsel or has made a claim for refugee protection, the Immigration officer can still proceed to issue a removal order. Otherwise the interview must be adjourned until the child has found a representative, unless detention is considered warranted.

### Interviewing Children

Section 13 of CIC manual EFN 21 (Recovering Missing and Abducted Children) contains guidance on examining (interviewing) children whom an immigration officer suspects may be missing or abducted. These are the only guidelines on interviewing children that are found in CIC manuals. CIC is one of <sup>2</sup>five federal government departments participating in the “Our Missing Children” program.

### Search, Seizure, Fingerprinting and Photography

Manual ENF12 refers to the process of laying possible immigration charges. Section7.6 states that an officer requires approval of the Minister’s delegate to conduct a preliminary search involving a child and that the officer conducting the search must “*demonstrate particular sensitivity for the emotional well-being of the child*”. The accompanying adult if there is one and another officer must be present as witnesses. CIC policy is not to fingerprint children under 18 except under exceptional circumstances where it might be in the child’s best interests to be fingerprinted (eg. Abduction). Written permission to fingerprint should be obtained from parent or legal guardian or in the case of a separated child, from a supervisor.

---

<sup>2</sup> Other departments are Canada Customs and Revenue Agency, the RCMP, Department of Foreign Affairs and International Trade and the Department of Justice.

### Investigation and Arrests

“When officers are considering making a report on an “unaccompanied child under 18 years of age and enforcement action may be taken against the reportable minor, they must refer the case to the manager who will forward the report to the Regional Director General or Director of Immigration for a review of all the circumstances”. (ENF 7, section 25.7). For reporting procedures see ENF 5.

### Detention

Under Section 60 of IRPA children under 18 will only be detained as a measure of last resort “ taking into account the other applicable grounds and criteria including the best interests of the child.” The applicable grounds are risk of flight, danger to the public, identify not established and other grounds for example, alternatives to detention and length of detention. Under the detention regulations (para. 247(2), failure to cooperate in establishing ones identity will not be taken into account when deciding whether to detain a child under 18 years of age. The regulations (para. 249) also set out the special considerations that apply in relation to the detention of children under 18 years of age. They are:

- The availability of alternative arrangements with local child-care agencies or child protection services for the care and protection of the minor children;
- The anticipated length of detention;
- The risk of continued control by the human smugglers or traffickers who brought the children to Canada;
- The type of detention facility envisaged and the conditions of detention;
- The availability of accommodation that allows for the segregation of the minor children from adult detainees who are not the parent of or the adult legally responsible for the detained minor children; and
- The availability of services in the detention facility, including education, counselling and recreation.

At present separated children are known to be detained in CIC detention centres in Quebec (Laval) and Ontario (Celebrity Inn). Further information should be available from meeting participants in working group one.

### Pre Removal Risk Assessment (PRRA)

If a separated child is subject to a removal order that is in force she or he can apply for a PRRA. Certain persons are not eligible for a PRRA (S.112(2), IRPA). CIC has specialist officers to carry out assessments of the risks the applicant may face if returned to their country of origin. The nature of the risk that might be faced can be either: the person is at risk of persecution as defined under the 1951 Convention relating to the Status of Refugees; the person is at risk of torture as defined under the 1984 Convention against Torture; or the person is at risk to their life or at risk of cruel and unusual treatment of punishment if certain conditions apply. The effect of a positive PRRA decision is normally that the person will be granted refugee protection and allowed to make an application for permanent residence. However, only a very small percentage of PRRA applicants are likely to be successful as was the case with the earlier PDRCC procedure.

PRRA officers have not been provided with any particular written instructions for applying these criteria to a separated child applicant (See CIC manual PP3), although their training is likely to have made reference to children.

### Removal of Children

The only requirements regarding the conditions that should be met prior to the removal of separated children from Canada are that “*reception with the family members or representatives of government departments or agencies responsible for child welfare should be arranged prior to departure.*” (ENF 10 Removals, section 23.6). According to the same manual, unaccompanied minors under 13 should be removed with an escort. Those aged from 13-18 can be returned to their countries of origin without an escort on direct flights where the airline accepts responsibility for the child and no other safety or security risks exist. Conversely children aged 13-18 should be accompanied by an escort where safety or security risks exist or the airline cannot accept responsibility.

### Education

Section 30(2) of IRPA provides that: “Every minor child in Canada, other than the child of a temporary resident not authorized to work or study, is authorized to study in Canada.” Children are entitled to attend at pre-school, primary and secondary school levels.

### Best Interests in Humanitarian and Compassionate Applications and Immigration Appeals

Separated children within Canada can apply on Humanitarian and Compassionate grounds to waive the requirement to have a visa to enter Canada. If they are successful they can then make an application for permanent residence. Section 25 of IRPA furthermore gives the minister power to grant permanent residence on H&C grounds where the best interests of the child are a factor.

Following on the Supreme Court ruling in the Baker Case (Baker v. Canada, Minister of Citizenship and Immigration) [1999] 2.S.C.R.819) the best interests of the child has been introduced in a limited number of areas under IRPA. In these areas the Act requires that the best interests of a child directly affected by a decision be “taken into account”. Note this is a lower test than required by Article 3 of the Convention on the Rights of the Child which requires that “in all actions concerning children ... the best interests of the child shall be a primary consideration.”

The following are the relevant sections in IRPA:

s.25(1) re Granting of Permanent Residence Status

S. 28(2)(c) re Loss of Permanent Residence Status

SS.67(1) (c), 68(1) and 69(2) re Appeals to Immigration Appeal Division (IRB)

### **Safe Third Country Agreement: Canada and USA**

The Agreement between the USA and Canada provides for an exemption for separated children defined as an “*unmarried refugee status claimant who has not yet reached his or her 18th birthday and does not have a parent or legal guardian in either Canada or the United States.*” If they present at the border they will be allowed to enter Canada and make a refugee claim (if they are found to be eligible). There are a number of concerns regarding the implementation of this Agreement and they can be summarized as follows:

1. How will the definition be interpreted? For example, how will the relationship between a child and any accompanying adult be scrutinized? How can a child prove that he or she does not have a parent or guardian in either country? What is the relevance of the child’s marital status? In some cases forced marriage will in fact be the refugee motive.

2. Will family groups be separated? For example, if a sibling group containing an adult sibling arrives, will the adult be turned back and those children under 18 be allowed to enter Canada?
3. How will the age of a child be determined in cases of doubt or absence of documentary proof? None of the methods currently in use to assess the age of a child are “exact science” and the margin of error is considerable.
4. In the event that a child is wrongfully denied access to Canada and returned to the USA, there are serious concerns that despite positive changes regarding undocumented separated children container in recent USA legislation, the USA cannot presently be regarded as a safe country. Thousands of separated children are still detained and approximately one half go through immigration proceedings without counsel.

### **Priority Action Areas**

Many sections of the Best Practice Statement refer to immigration processes. Of particular relevance are sections: B1, B3, B4, B7, B8, B9, B10, B13, B14.

The following is a list of suggested priority action areas:

Urgent need for CIC to develop a national policy on separated children that is consistently applied across the regions. Particularly urgent areas include:

- Adoption of a uniform definition of a separated child
- Accurate systems for monitoring and data gathering with respect to separated children in all immigration procedures,
- Transparent and comprehensive age assessment policy which allows for a considerable margin of error and gives the benefit of the doubt to the applicant
- Front end processing procedures for separated children including presence of designated representative
- Guidelines and training on identifying and interviewing separated children for immigration officers
- Automatic referrals by immigration authorities to child welfare authorities,
- Comprehensive safeguards for removals of separated children to country of origin
- Guidelines on treatment of separated children under the Safe Third Country Agreement
- Development of clear alternatives to detention
- All separated asylum-seeking children should have access to qualified legal counsel.