



Submission on immigration detention of children to the UN Special Rapporteur on the human rights of migrants, May 2020

Information on any legislation or policy that prohibits or restricts the use of immigration detention of children and their families in Canada

Legislation

The Immigration and Refugee Protection Act (IRPA), in force since 2002, affirms “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)

The *Immigration and Refugee Protection Regulations* includes among the factors to be considered before a decision is made on detention or release: “the best interests of a directly affected child who is under 18 years of age” (s. 248(f)).

The regulations also provide, at s. 249, “Special considerations for minor children”:

For the application of the principle affirmed in section 60 of the Act that a minor child shall be detained only as a measure of last resort, the special considerations that apply in relation to the detention of minor children who are less than 18 years of age are

- (a) the availability of alternative arrangements with local child-care agencies or child protection services for the care and protection of the minor children;
- (b) the anticipated length of detention;
- (c) the risk of continued control by the human smugglers or traffickers who brought the children to Canada;
- (d) the type of detention facility envisaged and the conditions of detention;
- (e) 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
- (f) the availability of services in the detention facility, including education, counselling and recreation.

In 2019 the *Immigration and Refugee Protection Regulations* were amended to clarify that best interest considerations apply to every child directly affected by an immigration detention decision, adding section 248.1:

Best interests of the child

(1) For the purpose of paragraph 248(f) and for the application, in respect of children who are under 18 years of age, of the principle affirmed in section 60 of the Act, that a minor child shall be detained only as a measure of last resort, the following factors must be considered when determining the best interests of the child:

- (a) the child’s physical, emotional and psychological well-being;
- (b) the child’s healthcare and educational needs;
- (c) the importance of maintaining relationships and the stability of the family environment, and the possible effect on the child of disrupting those relationships or that stability;
- (d) the care, protection and safety needs of the child; and
- (e) the child’s views and preferences, provided the child is capable of forming their own views or expressing their preferences, taking into consideration the child’s age and maturity.

Degree of dependence

(2) For the purpose of paragraph 248(f), the level of dependency of the child on the person for whom there are grounds to detain shall also be considered when determining the best interests of the child.

2017 directives

In November 2017, the Minister of Public Safety Ralph Goodale issued the “**Ministerial Direction to the Canada Border Services Agency: Minors in Canada’s Immigration Detention System**” and the Canada Border Services Agency issued a “**National Directive for the Detention or Housing of Minors**”.

The directives importantly acknowledged that the best interests of the child must be a primary consideration when decisions about detention are being made, where a child is affected. This reflects a legal requirement under the Convention on the Rights of the Child.

The directives also clearly and repeatedly emphasize that non-detention is the rule and recognize the need to preserve family unity.

Immigration and Refugee Board (IRB) guidelines

The IRB **Guideline 2: Detention**, revised in 2019, includes a section on minors.

Non-custodial alternatives to immigration detention of children in your country (e.g. community-based reception solutions)

In 2018, the CBSA launched a new Alternatives to Detention (ATD) program. However, it has been of little or no benefit to children detained, or affected by a detained parent.

Challenges and/or obstacles in the development and/or implementation of non-custodial alternatives to immigration detention of children and their families

Despite the legislative and policy directions cited above, there continue to be children in immigration detention in Canada or separated from a parent because of immigration detention. This occurs on a regular basis, and not only in “extremely limited circumstances”, as indicated in the government policy.

Nevertheless, the CCR was concerned that the directives contain wording that could lead to inconsistent application, notably in stating that detention is to be avoided “to the greatest extent possible”, and in tying avoidance of detention to the availability of Alternatives to Detention (ATD).

Unfortunately, experience in the first two years has shown that the CCR was right to be concerned: the directives are being implemented inconsistently.

Statistics

Government statistics show that 118 children were detained or housed in a detention centre in 2018-19. While this is a decrease from previous years, it is clear that the directives are far from eliminating the presence of children in detention.

Also of serious concern is that the average length of detention for children has increased to 18.6 days (the highest average in five years).

| Housed/Detained minors (National) | | |
|--|--|-------------------------------------|
| Fiscal Year | Average length of time in a facility (days) | Total # minors in a facility |
| 2014-2015 | 16 | 232 |
| 2015-2016 | 14.1 | 201 |
| 2016-2017 | 13.1 | 162 |
| 2017-2018 | 14.9 | 151 |
| 2018-2019 | 18.6 | 118 |
| CBSA, Annual Detention Statistics – 2012-2019 | | |

Regional variation

The overwhelming majority (91%) of children housed or detained in the past year were in Montreal.

| Housed and detained minors by region, 2018-2019 | | | |
|--|------------|----------|----------|
| | Quebec | Ontario | Pacific |
| Housed minors | 97 | 0 | 6 |
| Detained minors | 7 | 3 | 0 |
| Total | 104 | 3 | 6 |
| CBSA, <i>Annual Detention Statistics – 2012-2019</i> | | | |

Children “housed” but not detained

Children are described as “housed” when they are not legally detained, but accompany a detained parent. This includes Canadian citizen children.

When children are housed and not detained, they ironically have fewer legal safeguards. In theory, they could leave the detention centre if their detained parent consents to have them under the care of another adult. In most cases, this is not practically nor humanely possible.

The Immigration and Refugee Board (IRB) reviews the situation of anyone detained, but a child who is housed is not detained and therefore does not legally “appear” before the IRB. Housed children thus do not have the same legal protections as detained children. They are legally speaking invisible to the IRB, and do not appear in IRB statistics.¹ From the IRB website it would appear that no children were subject to a detention review in 2019, when in reality children are regularly sitting in detention reviews in front of the decision-maker.²

Family separation when a parent is detained

The CCR is also concerned about the increasingly common practice of family separation as a result of immigration detention, a problem that is not captured in the CBSA statistics. This occurs when one or both parents are detained, while the children are not detained. For refugee families to be separated in this way on arrival in Canada, sometimes not even knowing how to contact each other, is extraordinarily traumatic.

A CCR member in Quebec has reported a new trend in 2019 by the CBSA of separating families at the border. Generally, the CBSA detains one parent while the other parent is sent to a temporary shelter with their children. Approximately 50 families have been observed to suffer this kind of separation in 2019.

¹ Until recently “housed” children were also invisible in CBSA statistics, but the CBSA has now rectified that omission.

² <https://irb-cisr.gc.ca/en/statistics/detentions-reviews/Pages/detenSub.aspx>. The statistics show that 11 minors were subject to a detention review by the IRB in 2018, all in the Eastern Region, which covers Quebec.

Children in detention on identity grounds

Most children in detention in Montreal are there because border officials are not “satisfied” that their parent’s identity has been established – a decision that is not reviewable by any independent tribunal. Montreal has long detained many more people on identity grounds than other regions, highlighting the arbitrary nature of decision-making. Many refugees are unable to travel with identity documents and need time after arrival to have ID sent to them.

In 2018–2019, identity was the ground for detention of the parents in **66% of the cases** where children were housed.

“Only in extremely limited circumstances may a minor be detained or housed if no suitable [Alternatives to Detention] can be found: [...]

when identity is a serious concern but only insofar as there are well-founded reasons to believe the minor or his or her [parent/legal guardian] may represent a risk to public safety and national security”

Canada Border Services Agency (CBSA) National Directive for the Detention or Housing of Minors.

In early 2018, the CCR was concerned that the CBSA’s plans for Alternatives to Detention (ATD) excluded people detained on identity grounds. The CCR raised concerns about this exclusion in written comments in January 2018.

We note that excluding people detained on the basis of identity is also inconsistent with the November 2017 Ministerial Direction to the CBSA on “Minors in Canada’s Immigration Detention System”, and the accompanying CBSA National Directive. Children are regularly detained on identity grounds (particularly in Montreal and in Vancouver). The Directive proposes to keep children out of detention in part through pursuing ATDs. If the CBSA’s ATD model excludes detention based on identity, it seems that children will be detained, contrary to the goal of the Ministerial Direction.

In February 2018, the CBSA responded to the CCR comments by clarifying the framework to state that ATDs may be appropriate for individuals detained on the grounds of identity.

Despite this clarification, messaging from the CBSA on this matter has continued to be inconsistent, and ATDs have rarely, if ever, been used for parents detained on identity grounds.

Best Interests of the Child – inconsistent practices

Article 3 of the Convention on the Rights of the Child requires that “in all actions concerning children [...], the best interests of the child shall be a primary consideration.” The CBSA directive correctly reflects this foundational principle with respect to the best interests of the child (BIOC).

In practice, however, the CBSA often fails to even mention the best interests of the child when presenting their arguments at detention reviews before the IRB, in cases where children are affected.

Fundamental considerations:

- The BIOC are a primary consideration and may only be outweighed by other significant considerations such as public safety (i.e. R245 Flight Risk (a) (f) and R246 Danger to the Public), or national security. [...]
- The BIOC assessment is to be conducted prior to any decision to detain or house a minor or separate a minor from his/her detained [parent/legal guardian]; and should also be conducted on a continual basis (Section 8(2))

Canada Border Services Agency (CBSA) National Directive for the Detention or Housing of Minors.

For its part, the Immigration and Refugee Board gives inconsistent consideration to BIOC. In some decisions where BIOC is considered, the Board concludes that it is in the interest of the child to remain housed with their detained parent. The question that the IRB should be addressing is not where the child should be housed, but rather whether to release the detained parent(s), taking into consideration the best interests of affected children.

Further information

CCR report, [Detention and Best Interests of the Child](#), 2009

CCR report, [Immigration detention and children: Rights still ignored, two years later](#), 2019

