

ENDING IMMIGRATION DETENTION OF CHILDREN IN CANADA AND SEEKING ADEQUATE RECEPTION AND CARE FOR THEM

AMNESTY INTERNATIONAL SUBMISSION TO THE UN SPECIAL RAPPORTEUR ON THE HUMAN RIGHTS OF MIGRANTS

Amnesty International opposes the detention of all children – whether accompanied or unaccompanied, whether migrants or asylum-seekers – solely for migration-related purposes, since such detention can never be in the child’s best interests. Amnesty International takes the position that a presumption against detaining family units of parents and children for immigration-related reasons should be enshrined in law.

The detention of children is strictly prohibited in international law as it can never be in their best interests. Further, according to the Working Group on Arbitrary Detention, “Children must not be separated from their parents and/or legal guardians. The detention of children whose parents are detained should not be justified on the basis of maintaining the family unit, and alternatives to detention must be applied to the entire family instead.”¹

Although Canada’s immigration legislation and policies reflect a commitment to restrict the use of immigration detention for children and their families, it is not fully realized in practice. Under section 60 of Canada’s *Immigration and Refugee Protection Act* (IRPA), a child should only be detained as a last resort, and their best interest taken into account. Section 60 of the IRPA is worded as follows:

For the purposes of this Division, it is 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.²

In November 2017, the Minister of Public Safety issued a policy directive on minors in Canada’s immigration detention system.³ The policy directive emphasizes non-detention of children and the need to preserve family unity. They also acknowledge that the best interest of the child must be a primary consideration,⁴ rather than only one factor weighed against many others. The principles from the policy directive are the following:

¹ UN Working Group on Arbitrary Detention, *Revised Deliberation No. 5 on deprivation of liberty of migrants* (7 February 2018), at para 40.

² *Immigration and Refugee Protection Act* (SC 2001, c 27) s 60.

³ Public Safety Canada, “Ministerial Direction to the Canada Border Services Agency: Minors in Canada’s Immigration Detention System,” (6 November 2016), online: <www.publicsafety.gc.ca/cnt/trnsprnc/ns-trnsprnc/mnstrl-drctn-cbsa-en.aspx>.

⁴ “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*, 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), Article 3.1. [CRC])

The National Directive on the Detention or Housing of Minors adheres to the following principles (a-d) and objectives (e-i):

- a) The CBSA's [Canada Border Services Agency] program legislation, the IRPA [Immigration and Refugee Protection Act], IRPR [Immigration and Refugee Protection Regulations], the Privacy Act, the Canadian Charter of Rights and Freedoms and Canada's international obligations concerning rights of minors shall be respected;
- b) The well-being of children, family unity and the use of ATDs [Alternatives to Detention] shall be core tenets underpinning policy direction, in accordance with the expectations and values of Canadians;
- c) The BIOC [Best Interest of the Child] shall be a primary consideration to be assessed against other primary and mandatory factors in legislation;
- d) Public safety and national security shall not be compromised while meeting the policy objectives of the National Directive on the Detention or Housing of Minors;
- e) Stop the detention or housing minors and family separation, except in extremely limited circumstances;
- f) Actively and continuously seek ATDs when unconditional release is inappropriate for the purpose of the above;
- g) Preserve the family unit;
- h) Ensure that the detention or housing of a minor or the separation of a minor from his/her detained parent(s) or guardian(s) is for the shortest time possible; and
- i) Never place minors in segregation or segregate them.

On April 1, 2019, the Immigration and Refugee Board of Canada released their updated Chairperson's Guideline on Detention.⁵ The section on minors states:

4.1.1 Pursuant to the requirements of the Convention on the Rights of the Child, members must take into account the best interests of any child, whether detained under the IRPA or not, and whether housed with a parent or not, as a key consideration in any detention-related decision of the parent or guardian. Where a child is neither detained nor housed, the parties who intend to rely on the best interest of a child must raise the issue before the Division.

4.1.2 Members must consider the prescribed factors in the IRPR when determining whether to release or continue detention, including the best interests of the child, as well as all other relevant circumstances. Members must only detain minors in the most exceptional circumstances, and for the shortest time possible.

4.1.3 The Minister must submit its best interest of the child assessment at each detention review when it is detaining a child. The person concerned may also advance arguments regarding the best interest of a child, supported by evidence.

4.1.4 The best interests of a directly affected child who is under 18 years of age must be considered before making a decision on detention of the minor or their parent/guardian. The following is a non-exhaustive list of factors that the members must consider when determining a child's best interests with respect to detention and release of the minor and their parent/guardian, regardless of whether the child is detained or housed:

- the child's physical, emotional and psychological well-being;
- the child's healthcare and educational needs;

⁵ Immigration and Refugee Board, "Chairperson Guideline 2: Detention," online: <https://irb-cisr.gc.ca/en/legal-policy/policies/Pages/GuideDir02.aspx>.

- 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;
- the care, protection and safety needs of the child; and
- 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.

The level of dependence of the child on the person for whom there are grounds to detain (parent/guardian) should also be a consideration.

4.1.5 Members must explain in their reasons for decision how the best interests of the child were considered in the decision to detain the child or their parent/guardian.

4.1.6 Early detention reviews are strongly encouraged to ensure that the file is progressing rapidly and the impacted minor is not unduly affected.

4.1.7 In the extraordinary event that a minor is detained or housed, ATDs must be actively considered and continually reassessed taking into consideration all past release proposals. Conditions of release must be crafted to protect as far as possible the child's best interests.

Unfortunately, in practice, these guidelines and directives are implemented inconsistently,⁶ the best interest of the child is often left out of CBSA arguments at detention reviews before the Immigration and Refugee Board, and decision-makers frequently maintain the detention of parents, even when their detentions are reviewed after 30-days.⁷ Moreover, these policy directives do not have the force of law.

Despite Canada's commitment to reducing the rates of children in immigration detention "except in extremely limited circumstance,"⁸ recent government statistics reveal that 118 children were detained or housed in detention centres in 2018-2019.⁹ While the numbers have decreased from previous years, the average length of detention has increased to 18.6 days (compared to 14.9 days in 2017-2018).¹⁰ As such, Canada's treatment of children in the context of immigration detention continues to violate human rights standards, including rights enshrined under the Convention on the Rights of the Child.¹¹

Additionally, in order to avoid family separation,¹² children can be "housed" in detention as "guests" (de facto detainees) rather than under formal detention orders, subject to the parent/legal guardian's request and a best interest of the child assessment.¹³ From a children's rights perspective, being housed in a detention centre entails the same harms as those under formal detention orders.¹⁴ De facto child detainees are subjected to the same detention conditions, and in fact have access to fewer legal safeguards than those who are detained.¹⁵ Canadian research has documented the negative

⁶ Canadian Council for Refugees, "Immigration detention and children: Rights still ignored, two years later" (November 2019), online: ccrweb.ca/sites/ccrweb.ca/files/children-detention-nov-2019.pdf, at 3, 5 [CCR Report]; For instance, there is heavy regional disparity, where the majority of children housed or detained in 2018-2019 were in Montreal. More people (and their children) are also detained on identity grounds in Montreal than elsewhere in the country.

⁷ *Ibid* at 8.

⁸ Canada Border Services Agency, "National Directive for the Detention or Housing of Minors" (6 November 2017) online: <https://www.cbsa-asfc.gc.ca/security-securite/detent/nddhm-dndhm-eng.html>.

⁹ Canada Border Services Agency, "Annual Detention Statistics – 2012-2019" (20 August 2019) online: <https://www.cbsa-asfc.gc.ca/security-securite/detent/stat-2012-2019-eng.html>. Although these are the most recently available statistics on children in detention, there is currently no official data available on children released from immigration detention as a response to COVID-19.

¹⁰ *Ibid*.

¹¹ CRC, *supra* note 4, art 3; The CRC states that "no child shall be deprived of his liberty arbitrarily" and that detention must "be used only as a measure of last resort and for the shortest appropriate period of time" (Article 37(b)), and "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" (Article 3).

¹² To justify the detention of children with their parents, states like Canada often rely on Article 9 of the CRC which asserts that a child should not be separated from their parents against their will. However, Article 2 of the CRC also states that children are not to be punished for the acts of their parents or guardians.

¹³ While a "detained" minor is a child who is has been deemed "inadmissible" in their own right and is subject to a formal detention order, a "housed" minor is a child who remains in detention with a parent or legal guardian but is not subject to a formal detention order, and thus may leave or re-enter detention facilities with the parent or legal guardian's consent.

¹⁴ CCR Report, *supra* note 6 at 5.

¹⁵ CCR Report, *supra* note 6 at 4, "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."

psychological impact on children who have been held in detention, revealing that even a short period of time in a detention facility has a long-lasting negative impact on a child's health and wellbeing.¹⁶

Detention can never be in a child's best interest¹⁷ and alternatives to immigration detention that prioritize family unity should be considered.¹⁸ This has been reaffirmed by previous United Nations Special Rapporteurs on the Human Rights of Migrants,¹⁹ as well as the United Nations Committee on the Elimination of Racial Discrimination, which has expressed regret about Canada's use of immigration detention in relation to children.²⁰

In order to strengthen the development of non-custodial alternatives to immigration detention of children and their families, Amnesty International recommends that governments:

- Preserve children's rights to family unity and ensure that the best interest of the child is, in law and in practice, a primary consideration in all immigration and refugee decision-making.
- End the practice of detaining or housing children under immigration legislation.
- Implement independent accountability mechanisms to oversee detaining authorities and ensure that they have additional training and capacity to address the specific rights and needs of children and their families in asylum-seeking and immigration detention cases.
- Develop alternatives to immigration detention that accommodate the entire family, including children, such as non-custodial, community-based measures that may include reporting requirements, case-management or supervised release, and reasonable bail or surety/guarantor. Alternatives to detention must respect children's rights to liberty, to family life, to education, to the highest possible standard of health, to religion and language, to an adequate standard of living, and to rest, leisure and play.

¹⁶ Society for Research in Child Development, "The Science is Clear: Separating Families has Long-term Damaging Psychological and Health Consequences for Children, Families, and Communities" (June 2018) online: <<https://www.srcd.org/briefs-fact-sheets/the-science-is-clear>>; Janet Cleveland et al, "Asylum-seeking children's experiences of detention in Canada: A qualitative study" (2015) *American Journal of Orthopsychiatry* 85(3) 287.

¹⁷ See: Joint General Comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, 16 November 2017, CMW/C/GC/4-CRC/C/GC/23, available at: <https://www.refworld.org/docid/5a12942a2b.html> (e.g. para 5: "Every child, at all times, has a fundamental right to liberty and freedom from immigration detention. The Committee on the Rights of the Child has asserted that the detention of any child because of their or their parents' migration status constitutes a child rights violation and contravenes the principle of the best interests of the child. In this light, both Committees have repeatedly affirmed that children should never be detained for reasons related to their or their parents' migration status and States should expeditiously and completely cease or eradicate the immigration detention of children. Any kind of child immigration detention should be forbidden by law and such prohibition should be fully implemented in practice.")

¹⁸ CCR Report, *supra* note 6 at 8: "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"; UN High Commissioner for Refugees, UNHCR's position regarding the detention of refugee and migrant children in the migration context, January 2017, available at: <https://www.refworld.org/docid/5885c2434.html>; UN Special Rapporteur on Torture, Thematic Report on torture and ill-treatment of children deprived of their liberty, 5 March 2015 (A/HRC/28/68) – (e.g. para. 80 "Within the context of administrative immigration enforcement, it is now clear that the deprivation of liberty of children based on their or their parents' migration status is never in the best interests of the child, exceeds the requirement of necessity, becomes grossly disproportionate and may constitute cruel, inhuman or degrading treatment of migrant children [...] The Special Rapporteur shares the view of the Inter-American Court of Human Rights that, when the child's best interests require keeping the family together, the imperative requirement not to deprive the child of liberty extends to the child's parents, and requires the authorities to choose alternative measures to detention for the entire family).