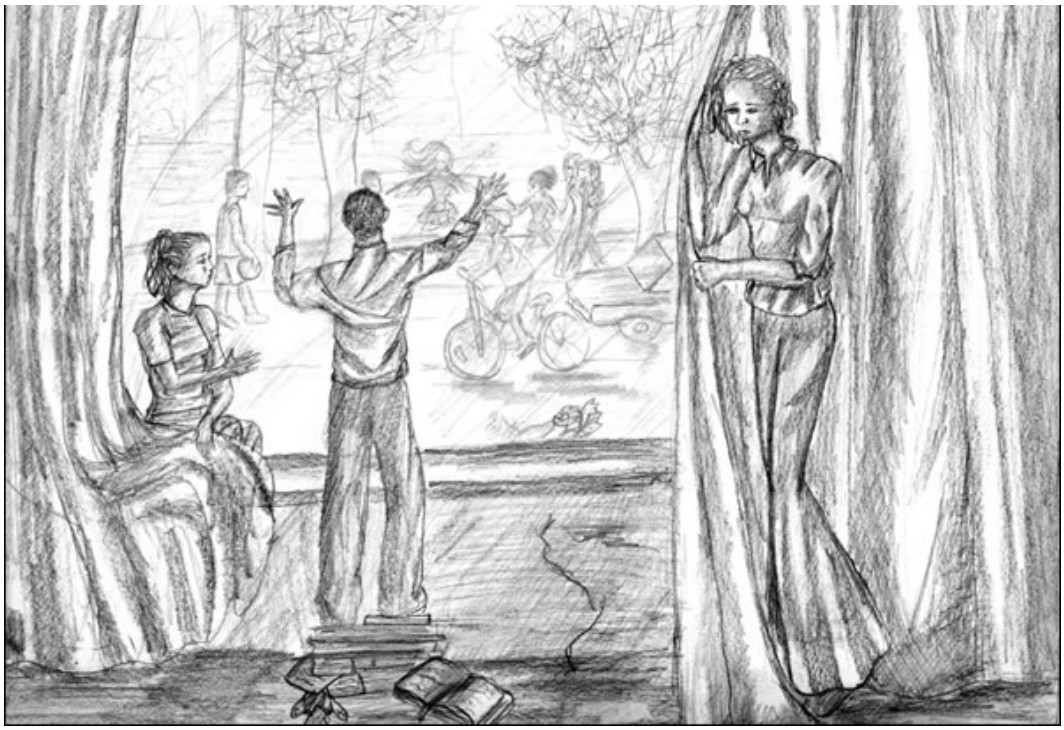
CANADIAN COUNCIL FOR REFUGEES



Drawing by one of a group of three children living in church sanctuary in Canada

Impacts on children of the *Immigration and Refugee Protection Act*

November 2004

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1. INTRODUCTION

On June 28, 2002, the *Immigration and Refugee Protection Act* (IRPA) came into force, replacing the old *Immigration Act* that had been in force since 1978. The new Act includes a number of welcome provisions requiring the best interests of the child to be taken into consideration at various points in immigration processes. In addition, the Act states that it is to be "construed and applied in a manner that […] (f) complies with international human rights instruments to which Canada is signatory." [IRPA 3(3)]. The human rights instruments to be complied with obviously include the United Nations Convention on the Rights of the Child.

Nevertheless, there are various ways in which the Act fails to address old problems that threatened the rights of children, and even creates some new problems.

This report examines and illustrates some of these problems, which have attracted international attention. As will be seen, the UN Committee on the Rights of the Child, in its examination of Canada in October 2003, expressed concern about a number of areas relating to migrant and refugee children.[1]

2. BEST INTERESTS OF THE CHILD

WHAT THE CONVENTION ON THE RIGHTS OF THE CHILD SAYS:

Art. 3 (1): "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."

The principle of the best interests of the child is central to the Convention on the Rights of the Child, and can be seen as a kind of summary of all the rest of the Convention. It articulates the obligation to make sure that all actions taken concerning children have their best interests at heart.

The *Immigration and Refugee Protection Act* makes a welcome step in this direction by including reference to the best interests of the child. Unfortunately, the Act is still some way from respecting the Convention. The Act only requires consideration of children's best interests in certain specific situations, in contrast to the Convention which requires it "in all actions concerning children." Secondly, while the Convention says that children's best interests must be a "primary consideration", the Act only requires that they be "taken into account."

[1] UN Committee on the Rights of the Child. Concluding observations: Canada. 27/10/2003. CRC/C/15/Add.215

WHAT THE IMMIGRATION AND REFUGEE PROTECTION ACT SAYS:

IRPA 25(1) requires the Minister, in considering applications for humanitarian and compassionate consideration, to take into account "the best interests of a child directly affected."

IRPA 28(2)(c) allows a permanent resident to retain permanent residence, despite the physical residency requirement, if an immigration officer determines that this is justified by humanitarian and compassionate considerations "taking into account the best interests of a child directly affected by the determination."

IRPA 60 affirms as a principle that children are to be detained only as a measure of last resort, taking into account other grounds and criteria "including the best interests of the child."

IRPA 67(1)(c) empowers the Immigration Appeal Division to grant an appeal if sufficient humanitarian and compassionate considerations warrant special relief "taking into account the best interests of a child directly affected by the decision."

Because the references in the Act to best interests are limited, the government has argued before the courts that they should not be considered in other situations. This has happened when the court is being asked to stay a person's removal so that an application for landing on humanitarian and compassionate grounds ("H&C") application can be considered. The government has argued that the Act does not direct that the best interests of the child be considered when a removal order is being executed. Under H&C, the best interests of the child are supposed to be examined, but if the person is removed first, it will be too late after the fact to consider whether the removal would be contrary to the child's best interests.

A similar position has been taken by the Federal Court, which has held that a removals officer was not required to consider the situation of the children affected by a decision to proceed with removal, if there was a pending H&C application, on the grounds that this would allow the removals officer to pre-empt the H&C officer.[2]

Even when the best interests of the child are considered, there is concern that it is not always done adequately.

In the Baker decision, the Supreme Court of Canada provided guidance about the principles to apply in dealing with the best interests of the child in an H&C application:

> The principles discussed above indicate that, for the exercise of the discretion to fall within the standard of reasonableness, the decision-maker should consider children's best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them. That is not to say that children's best interests must always outweigh other considerations, or that there will not be other reasons for denying an H & C claim even when children's interests are given this consideration. However, where the interests of children are minimized,

[2] *Simoes v. Canada (Minister of Citizenship and Immigration)*, IMM-2664-00, 16 June 2000. This case dealt with the old *Immigration Act*.

> in a manner inconsistent with Canada's humanitarian and compassionate tradition and the Minister's guidelines, the decision will be unreasonable.[3]

Since then, other courts have added further comments about how the best interests of affected children are to be considered. For example, the Federal Court of Appeal has held that:

> The "best interests of the child" are determined by considering the benefit to the child of the parent's non-removal from Canada as well as the hardship the child would suffer either from her parent's removal from Canada or her own voluntary departure should she wish to accompany her parent abroad. Such benefits and hardship are two sides of the same coin, the coin being the best interest of the child.[4]

These directions from the courts are not being uniformly followed by officials making H&C decisions, who in some cases reject the application with only the most cursory consideration of the best interests of affected children. According to one experienced refugee advocate: "Many immigration agents are simply dismissing the "best interests of the child" issue with a perfunctory sentence stating that, if the children are young, they will be fine as long as the family stays together."[5]

The Ayele family has been in sanctuary in a church in Montreal for over a year. Menen Ayele and her two daughters are from Ethiopia, while her youngest child is Canadian-born.

The Ayeles submitted an application for humanitarian and compassionate consideration which drew attention to the significant and objective risk for her and her children in returning to Ethiopia, given the large-scale government-sponsored and inter-communal violence there. In addition, Ms. Ayele submitted a medical report concluding that she suffers from a post-traumatic stress disorder due to violence she suffered in her home country. Menen pointed out that she has three brothers and a sister who are Canadian citizens and who form a very important support network for her and her children. She produced an assessment from a social worker who found that all three children are well integrated here, and that a return to Ethiopia would be detrimental to their normal growth. Finally, obliging Ms Ayele to leave would require her to choose between leaving her youngest child behind in Canada (he can stay as he is a Canadian citizen) or taking him back to Ethiopia, where his prospects for a safe, healthy life would be immeasurably poorer than in Canada.

All in all, her humanitarian application appears to be a textbook case of great hardship if forced to leave, attachment to Canada, and best interests of the child. Nevertheless, it was rejected.

(continued over)

[3] [1999] 2 S.C.R. 917, paragraph 75
[4] Hawthorne v. Canada 2002 FCA 475, paragraph 4.
[5] The Gazette, "*Hardening attitudes toward refugees*", Richard Goldman, 6 July 2004

The "substantial weight" that the Supreme Court said was to be accorded to the best interests of the children was discharged with the comment that the children could flourish in any environment as long as they have one parent with them, that the children had only been in Canada for two years, and that they appear to have suffered no lasting damage from the disappearance of their father and the arrest and 20 day detention of their mother. The risks of living in Ethiopia were not considered.

In considering the distressed psychological state of the children, the decision-maker stated:
"I note that their anxieties flow directly from their attachment to their mother, which leads me to believe that no matter where they are, if they see that their mother has recovered her psychological stability, they will recover their happiness." [translation from French]

Recommendation: That the government adopt as a policy, consistent with Canada's obligations under the Convention on the Rights of the Child, that in all decisions under the *Immigration and Refugee Protection Act* that affect a child, the best interests of the child shall be a primary consideration.

Recommendation: That the government amend its guidelines to direct that officers considering the best interests of the child ensure that their written notes or reasons demonstrate that they have respected all the requirements of the relevant jurisprudence and departmental guidelines in arriving at their decision.

3. FAMILY REUNIFICATION/FAMILY SEPARATION

WHAT THE CONVENTION ON THE RIGHTS OF THE CHILD SAYS:

Art. 9 (1): State Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child.

Art. 10 (1): In accordance with the obligations of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner…

WHAT THE COMMITTEE ON THE RIGHTS OF THE CHILD SAID ABOUT CANADA:

47. […] the Committee recommends that the State party:
[…]
(f) Ensure that family reunification is dealt with in an expeditious manner.

Concluding observations: Canada. 27 October 2003

Some of the issues:

a) **Inability of a child protected person to secure reunification with parents/siblings**
IRPA provides no avenue by which refugee children in Canada can be reunited with their parents and siblings who are outside Canada. Adult refugees can apply to reunite with family members by applying for permanent residence and including their spouse and dependant children on the application. By contrast, minors who are found to be refugees in Canada can only apply for permanent residence for themselves, and cannot include their parents and siblings.[6] This means that the law offers separated children no way to be reunited with their family.[7]

Three sisters separated from their mother:
After the arrest and murder of their father, three Angolan sisters, Claudia, Yara and Elisangela (thirteen, sixteen and eighteen years old) were sent by their mother to seek refuge in Canada. Their mother had herself been arrested and afterwards suffered a stroke, which left her in a wheelchair. The Immigration and Refugee Board took only two hours to decide that the sisters needed Canada's protection. Elisangela said: "I was confident our case would be accepted. We also prayed a lot". Even though they have been accepted as refugees, the sisters have no way to bring their mother to Canada, even though she is still in danger in Angola, and they clearly need their surviving parent's care.[8]

Why keep refugee children separated from their parents?
It is difficult to see why a country that is committed to refugee protection, the rights of children and the principle of family reunification would have a law that fails to allow refugee children to reunite with their parents and siblings.

One possible argument is that the government wants to discourage families from sending children on their own to make a claim in Canada and then serve as "anchors" for the parents and other siblings to follow.

Some lawyers have challenged the exclusion of the parents of refugees who are minors from the definition of "family member", arguing that this exclusion contravenes the children's rights to "security of the person" under section 7 the *Charter,* and discriminates against them on grounds of age, contrary to section 15 of the *Charter.* The lawyers for the Department of Justice have said that this exclusion is necessary so that unscrupulous parents won't send their children alone to Canada to make refugee claims in order to establish a "beachhead" in Canada.

However, the government has offered no evidence that this is happening or likely to happen. Often where the children are accepted as refugees, it is because of persecution also faced by their parents (as in the case of the Angolan sisters). If the parents were able to accompany their

[6] See *Immigration and Refugee Protection Regulations*, 176(1) and 1(3) (definition of "family member").
[7] Family class sponsorship, which is the avenue for most family reunification under IRPA, is not available for minors, since sponsors must be at least 18 years of age. Even once they reach the age of 18, few young people are able to sponsor their parents since sponsors must meet certain income requirements.
[8] See Globe and Mail, "*Angolan sisters celebrate asylum*", Marina Jiménez, 13 April 2004.

children to Canada, they would likely also be accepted as refugees, so there is no advantage in sending the children ahead.

Even if there were a problem needing to be addressed, innocent children cannot be deprived of family reunification to act as a deterrence. Neither humanity nor the Convention on the Rights of the Child allows the government to sacrifice the rights of some children in order to prevent the hypothetical mistreatment of other children.

It might also be argued that refugee children should perhaps reunite with their parents where they are, rather than necessarily having the parents come to Canada. Certainly, there may be cases where it would make sense for the children to go to be with their parents. However, the Canadian government has no process for evaluating whether this in the best interests of the children or even feasible. Nor is there a process to help the children travel to the other country, where this is the best option. In many cases, it is simply not feasible or in the children's best interests. For example, the Angolan sisters' mother is still in the home country, where they have a well-founded fear of persecution.

Teenage boy alone
A young Sudanese boy – fourteen years old – has been accepted as a refugee in Canada, after being separated from his family. He is suffering from post-traumatic stress and depression and is in treatment. After desperately looking for his family, he was able to track down a brother living in Kenya: he is apparently the only family he has left. Medical authorities are unanimous on the fact that being reunited with this brother would significantly assist his recovery. But this reunification with his brother is impossible under IRPA.[9]

In response to cases such as those above, Citizenship and Immigration Canada (CIC) routinely points out that it is always possible to make an immigration application on humanitarian and compassionate grounds. Such applications are, however, discretionary, which means that the result depends on the individual officer making the decision. In addition, making a humanitarian and compassionate application is not obvious or straightforward. Separated refugee children are among the most vulnerable people approaching Citizenship and Immigration Canada: they need things to be made easy, not complicated. The right of refugee children to be reunited with their families should not depend on whether they have well-informed and diligent lawyers or advisers to help them.

The effect of the provisions of the law is to keep refugee children separated from their families, in violation of the *Convention on the Rights of the Child*.

Recommendation: That the *Immigration and Refugee Protection Regulations* be amended to allow refugee children to include on their application for permanent residence their parents and siblings.

[9] A refugee sponsorship group is attempting to sponsor the boy's brother as a refugee, though the procedures are uncertain, do not depend on the needs of the boy here in Canada and, even if successful, may take years.

b) **Families separated when a parent is deported from Canada**

The *Immigration and Refugee Protection Act* does nothing to prevent parents in Canada from being deported even when this means separating a child who has refugee status or is a Canadian citizen from their deported parent.

In theory, a parent facing removal from Canada can apply for humanitarian and compassionate (H&C) consideration and draw attention to the potential harm to the child, including separation from a parent. As noted above (page 3), Section 25 of the Act requires the Minister to take into account "the best interests of a child" in considering such applications.

In practice, however, a person may be removed from Canada before the H&C application is even considered. Even if the application is considered, it may be rejected despite the fact that this means that a child will be separated from their parent.

In some cases, the problem arises when a family makes a refugee claim and the children are accepted as refugees but their parents are refused. The parents then face the prospect of deportation.[10] One of the many drawbacks of applying on humanitarian and compassionate (H&C) grounds is that the parents applying under H&C can be refused on grounds of medical inadmissibility.[11] This happened to a mother who was refused because she was on dialysis and therefore faced deportation from Canada despite the fact that her children had been accepted as refugees. The Federal Court refused to stay the removal. She died before an appeal of this decision could be made.

In the winter of 2004, many Canadians were surprised to learn that Canada's refugee and immigration systems would consider deporting a North Korean refugee claimant even though his son had been recognized as a refugee. Song Dae Ri's refugee claim was rejected because he had worked for the North Korean government. In its decision, the Immigration and Refugee Board member wrote: "While I find that, on a balance of probabilities, he would face execution on return to North Korea either for treason or extrajudically [sic], it is my finding that the principal claimant is not deserving of Canada's protection according to the IRPA." His young son, Chang Il Ri, who was granted refugee status, therefore faced the prospect of being made an orphan, since his mother had already been killed in North Korea. Song Dae Ri told the Globe and Mail: "When I came to Canada, I was relieved to have escaped alive. Now I fear I will die and my son will be an orphan here. It is so terrible." [12]

Following considerable media exposure, the Government granted Song Dae Ri a stay of removal.

[10] The recommendation in the section above would address this situation.
[11] The medical inadmissibility provisions for refugees applying for permanent residence are much more restricted.
[12] "*Faces death at home, North Korean can't stay*" Globe and Mail, Marina Jiménez, 4 February 2004.

The threat of deportation of a parent also affects Canadian-born children.

In October 2004, Ammar Khatib faced deportation to Syria after his application to stay in Canada on humanitarian and compassionate grounds was rejected. Khatib believes that he faces torture or death if forced to return to Syria because his father was a member of a group opposed to the government. In addition, he is married to a Canadian citizen and has a young daughter. His wife can sponsor him but he must find way to apply from outside Canada. Khatib commented to CBC news, "You don't know what tomorrow is hiding for you. Don't know if you will be with your wife or daughter. It's been very hard. It's been very tough on all of us."[13]

An Ethiopian woman received a negative answer to an application for humanitarian and compassionate consideration, although this would mean her removal from Canada and separation from her husband and newborn child. The officer examining the application made minimal reference to the best interest of the child, stating: "I note that the applicant's sister is a close friend of the applicant's husband. I am satisfied that the applicant's husband would receive help from the applicant's sister in caring for the child."

c) **Bar on sponsorship if on social assistance or in debt to the government**

The Universal Declaration of Human Rights states that "everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as […] property". One of the rights in the Declaration is the entitlement of the family, as the "natural and fundamental group unit" to "protection by society and the State."[14]

Despite this, the *Immigration and Refugee Protection Regulations (IRPR)* bar mothers or fathers from sponsoring their children if they are on social assistance, thus denying children the basic right to family unity.[15]

The regulations also bar sponsorships from people who are in default with respect to repayment of debts to the government.[16] Many refugees who have been resettled to Canada arrive with a debt to the government to cover their travel to Canada as well as their medical exams. Unfortunately, refugees are considered in default not only if they have failed to make payments but also if they have negotiated a revised repayment schedule to take into account their limited income on arrival in Canada.

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[13] *CBC, Deportation looms for Syrian man, 29 October 2004, http://winnipeg.cbc.ca/regionalnews/caches/mb_khatib20041029.html.* Following appeals from rights advocates, Mr Khatib's deportation was postponed in early November to allow reconsideration of the humanitarian and compassionate application.

[14] *Universal Declaration of Human Rights*, articles 2 and 16(3) respectively.

[15] *Immigration and Refugee Protection Regulations*, 133(1)(k): a sponsor must not be "in receipt of social assistance for a reason other than disability."

[16] *Immigration and Refugee Protection Regulations*, 133(1)(h): a sponsor must not be "in default in respect of the repayment of any debt referred to in subsection 145(1) of the Act payable to Her Majesty in right of Canada."

Gisèle's dilemma
The assassination of Congo's President Laurent Kabila sparked violence that caused the brutal disintegration of Gisèle's life.[17] She came home from church to find her husband decapitated and her mother also killed. Gisèle fainted and when she woke up, she was in prison, where she was horribly tortured, causing her to be infected with HIV. While she was hospitalized, a priest helped her to escape. Not knowing where her four children were, she fled to Canada where she was quickly recognized as a refugee in November 2002.

Recently she has located her children, who are with her sister in Zambia. Their ages range from 18 to 13 years. Their situation is extremely insecure, because they are persecuted in the Democratic Republic of Congo and without status in Zambia. One of Gisèle's daughters was raped and had a baby in 2003.

Gisèle is of course deeply relieved to have found her children again, but also extremely anxious about how they will survive and how she can have them join her in Canada as quickly as possible. It is too late now for Gisèle to include her children on her own application for permanent residence, which is how most refugees recognized in Canada reunite with their families. There is the family sponsorship route, but, because of her physical and mental health, she is not working and could therefore be barred as a recipient of social assistance. There is an exception for people who are disabled and she may therefore qualify. However, if she sponsors her children, she will assume financial responsibility for them for years to come, something she cannot afford to do.

d) **Excluded relationships**
The *Immigration and Refugee Protection Regulations* have a category of "excluded relationships" which prohibit some family members, including children, from being sponsored in the Family Class. If a child is classified as a "non-accompanying" family member and is not examined by an immigration officer at the time the parent becomes a permanent resident, this parent can never sponsor the child.[18] Suppose, for example, a couple living in a country other than Canada separate. One parent, say the mother, is given custody of their child. The father immigrates to Canada. He lists his child as "non-accompanying" since the child is living with the mother, and CIC officials do not examine the child. Later, the situation changes (perhaps the mother dies or is otherwise unable to continue to care for the child) and the father wishes to sponsor the child. Under the regulations, the father can never sponsor the child.

Because the regulations define these children as not even being part of the definition of family, it is not possible to appeal the refusal to the Immigration Appeal Division, where humanitarian and compassionate considerations, and the best interests of the child, could be taken into account.

[17] Fictitious name.
[18] *Immigration and Refugee Protection Regulations*, 117(9)(d)

In March 2000 B.H. obtained his permanent residence in Canada along with his wife and son in March 2000. They had left behind a second child, Z., whose birth had not been declared to the Chinese authorities because of the one-child policy. Fearing that he might be penalized if he admitted while still in China that he had a second son, B.H. waited until after his arrival in Canada to report the existence of Z. to the Canadian authorities. At that stage, Z. was not yet five years old.

Citizenship and Immigration Canada decided not to pursue B.H. for misrepresentation and he was allowed to sponsor his second son. The processing took some time and had not been completed by 28 June 2002, when the *Immigration and Refugee Protection Act* came into effect. In November 2002, the visa officer sent B.H. a refusal letter saying that under the new law, Z. was refused because he was a non-accompanying family member who had not been examined.

Two years after IRPA came into effect, on 28 June 2004, the Immigration Appeal Division (IAD) ruled that Z.'s application had to be processed. However, the ruling only decided in favour of Z. because the application had been made before IRPA and processing continued after IRPA was implemented.[19]

Z. was by then nine years old. He had been separated from his parents for over four years.

Z.'s story is likely to have a happy, though long-delayed, ending. But in the future, children like Z. will be subject to the exclusionary provisions of IRPA. Z. was only allowed to join his parents because processing had been mostly completed before IRPA came into force. The harsh force of the law will apply to children like Z. who are sponsored after 28 June 2002.

In July 2004 the government changed the regulations to allow an exception if the visa officer decided that the family member didn't need to be examined.[20] This amendment is welcome in that it will allow families to be reunited if members of the family were not available for examination. This is a frequent situation for refugee families who become separated from each other through displacement or imprisonment.

However, the exception does not go far enough in that some non-accompanying family members will continue to be excluded from the Family Class. The implication of this exclusion is that there is no possibility of appeal to the Immigration Appeal Division, where humanitarian factors could be taken into consideration.

Recommendation: That the Regulations be amended to ensure that sponsorship applications can be made under the Family Class when the sponsorship would reunite a child with his or her parent, notwithstanding the fact that the non-accompanying family member was not examined.

[19] ***Reasons and decision***, IAD file no.: VA3-00412, 28 June 2004.
[20] SOR/2004-167, subsection 41(4) amending section 117 of the Regulations.

e) **DNA testing and "biological" children**

Anyone wanting to be reunited with family members through Canada's immigration process needs to satisfy an immigration officer that a family relationship exists. Because Citizenship and Immigration Canada relies heavily on official documents, this step is generally quite easy for people who come from countries which regularly issue high quality documents, but much more difficult for people from countries where the authorities don't produce documents considered trustworthy by the Canadian government. Refugees face particular challenges: documents may have been destroyed during war or persecution; refugees cannot ask the authorities that are persecuting them for documents; births, marriages and deaths may go unrecorded while refugees are displaced.

In some cases, CIC asks applicants to undergo DNA testing in order to establish the family relationship between children and parents. CIC's stated policy is to ask for DNA testing only as a last resort, but this has not always been the practice. In some cases, DNA is requested even though there is existing evidence to support the parent-child relationship and there does not seem to be any reason to doubt it.

DNA testing is expensive, time-consuming and intrusive. The cost, which must be borne by the applicants, is often a serious obstacle for those who have only recently arrived in Canada and in many cases are sending money to support their family overseas.

For the children waiting for reunification with one or both of their parents, DNA testing means further delay.

Ngadiadia [21] arrived in Canada in August 2000, having been forced to leave his four children and wife behind in the Democratic Republic of Congo. He was recognized as a refugee and applied for permanent residence for himself and his family. The family received a letter from the Canadian visa post in Abidjan saying that DNA tests were required to prove the relationship of three of the children to Ngadiadia. The visa post said that the birth certificates provided were false and threatened to close the file within three months if DNA tests were not provided. No explanation was given of why the certificates were considered false, or why DNA testing was not required for the fourth child.

In this case, the request for DNA testing was not used as a last resort. Ngadiadia had never been given an opportunity to provide other documents. After receiving the December 2002 letters, he and his wife did send in further documents. When no response was received, Ngadiadia and 3 of his children underwent DNA testing, after finding the money to pay for them. The results were positive and the family was finally reunited in June 2004, three years after Ngadiadia had been recognized as a refugee in need of Canada's protection.

[21] Fictitious name.

Fazel Salimi and Runek Qahramani were refugees in Iraq who had been granted resettlement in Canada. Before they left, they discovered that unfortunately their newborn baby was not included on the visa, leaving them with an excruciating choice: escape from war-torn Iraq without their baby, or risk losing the opportunity for the family to start a new life in Canada. In October 2003, they left baby Mohamed with his grandparents in Iraq, and came to Canada, on the understanding that Mohamed would be able to follow shortly after. But the process was not quick and Citizenship and Immigration Canada has asked for DNA testing.

Fazel explained, "I feared if I had stayed in Iraq with my baby, I would have been killed in the Ramadi refugee camp, where we lived, or lost my landing papers for Canada. But now I worry I made the wrong decision."

To get DNA testing, Fazel will need to get travel documents and visas to travel back to Iraq and take the baby to Jordan for the test and then on to Syria where the Canadian visa post is located. A community organization has helped the family raise $2,700 to pay for the trip. The DNA test itself will cost a further $900.[22]

Citizenship and Immigration Canada argues that delays in family reunification are required to protect the best interest of the child. According to a CIC spokesperson: "Our goal is to reunite close family members as quickly as possible. But we also have a responsibility to ensure the relationships are genuine. We definitely don't want to be participating in the trafficking of children, so we have to be extremely careful."[23]

Unless there is evidence that a child may be trafficked, it is a hypothetical danger that cannot outweigh the known harm of separation from parents and exposure to a conflict zone. The Convention on the Rights of the Child requires that Citizenship and Immigration give primary consideration to the best interests of the child, taking into account *all* of the relevant factors. There is no indication that CIC does this, when asking for DNA testing.

In fact, requests for DNA testing and other delays may actually put children at increased risk of trafficking and other forms of exploitation. For example, Charles,[24] a Liberian refugee in a refugee camp in Ghana, was asked to provide DNA tests to prove his relationship with his two daughters, whose mother's location was unknown. Since Charles did not have the money to pay for the tests, he left his daughters in the care of relatives and came to Canada, where he was able to raise the money for the tests. DNA showed that they were his daughters. The visa office, however, then asked that the girls' mother sign some documents, even though it had been stated from the outset that the family did not know where the mother was. As a result of these delays, the teenage daughters have for the past two years been left without parental supervision in a situation where they are vulnerable to forced prostitution and other forms of exploitation.

[22] "*Tough refugee rules create agony for parents: DNA tests to prove paternity is hurdle for those wanting to reunite families*," Globe and Mail, Marina Jiménez, 16 October 2004. The information from the article is supplemented by information from the community organization.
[23] Quoted in "*Tough refugee rules create agony for parents*", see note above.
[24] Fictitious name.

Recourse to DNA also causes problems where children believed to be the biological children of a father turn out not to be related by blood. Studies have shown that the percentage of unsuspected false paternity is considerable in the populations that have been tested.[25] The psychological impact for the child may be enormous, especially if the father and other family members turn against the child.

Even where the father continues to want to treat the child as his own, the *Immigration and Refugee Protection Regulations* block family reunification. The Regulations state that a child must be the biological child of the parent or the adopted child of the parent.[26] As a result, a child may be separated from the only family they know if it is discovered that they are not the biological child of their father.

A Federal Court case shows the damaging effects of emphasis on the biological relationship. In December 1998 M.A.O. applied to sponsor his three children from his first marriage (his first wife died in childbirth). The children were still in their native country, Somalia. Because of the civil war, M.A.O. couldn't obtain birth certificates for his children and CIC asked him to provide DNA testing to prove the family relationship. The test revealed that one of his sons (A.O.) was not his biological child. Despite the news, M.A.O. still considered A.O. his son. As a Muslim, he consulted with a religious leader who advised that under Islamic law, A.O. is considered his child. Because Canadian immigration law does not consider A.O. a child of M.A.O, A.O. was left behind, while his siblings came to Canada and are now finishing high school. Aged 12 when the appeal process began, A.O. is now 17. He remains living with friends of the family in Kenya where he has no legal status. His father continues to support him financially but the long separation and extended litigation has caused confusion and embarrassment to the boy and his family.[27]

This case dealt with the former *Immigration Act*. The *Immigration and Refugee Protection Act* is even clearer that someone like A.O. is not considered part of the family because the IRPA adds the word "biological" to the definition of child.

If a child is discovered through DNA testing not to be the biological child of the father, it may be possible for the child to be adopted and then included in their application. However, adoption is often complicated and time-consuming, leading to prolonged separation for the child. Also, in certain circumstances legal adoption is not an option to resolve the situation because it is not recognized, notably under Islam. Another option is to apply on humanitarian grounds based on the de facto family relationship. This however further delays reunification and depends on the

[25] "The rate of false paternity in the United States is estimated to be between two and five per cent", John Seabrook, *The Tree of Me*, NewYorker, 26 March 2001, http://www.booknoise.net/johnseabrook/stories/self/tree/. For a summary of sources that refer to rates of false paternity, see also http://www.childsupportanalysis.co.uk/analysis_and_opinion/choices_and_behaviours/misattributed_paternity.htm

[26] *Immigration and Refugee Protection Regulations*, 2.

[27] Federal Court of Canada, 2003 FC 1406. 12 December 2003, M.A.O. and the Minister of Citizenship and Immigration. http://decisions.fct-cf.gc.ca/fct/2003/2003fc1406.shtml. According to the Court, DNA testing is "qualitatively different" from providing documentary evidence of relationship and it is a very invasive procedure.

discretion of the visa officer. In one case in which this route was tried, the visa officer simply sent the application back, saying that a family class sponsorship should be submitted (even though the children are not considered part of the Family Class because they are not the non-biological children of the father).

It is important to emphasize that the problems caused by defining children according to biological connection don't affect everyone equally. Citizens of countries of the North, who are mostly white, rarely have to undergo DNA testing because they are able to provide documents. As a result, the cases of false paternity are not discovered. On the other hand, most of those asked to do DNA testing are people of colour.

Recommendation: That CIC accept uncontradicted affidavit evidence by parents and third parties as evidence of relationship in the absence of birth certificates, before requesting DNA testing.

f) **Slow processing**

Processing of applications for family reunification (both Family Class sponsorships and family members abroad included on the applications of refugees in Canada) is often very slow, leading to prolonged separation. This is particularly the case in certain parts of the world.

Family Class: Dependant children
July 2003 - June 2004, Processing times by regions

	# of months to process 30% of cases	# of months to process 50% of cases	# of months to process 70% of cases	# of months to process 80% of cases
Visa offices in all regions	**5**	**7**	**12**	**16**
Africa and Middle East	9	18	24	29
Asia and Pacific	3	6	9	12
Europe	4	6	9	11
Western Hemisphere	5	8	13	16

The statistics above[28] of processing times for children sponsored under the family class show that children in Africa and the Middle East wait on average significantly longer than children elsewhere. Within the region, there are also striking discrepancies, with three visa posts - Abidjan, Accra and Nairobi - reporting particularly long delays.

[28] The statistics are taken from the CIC website: http://www.cic.gc.ca/english/department/times-int/index.html

Family Class: Dependant children July 2003 - June 2004, Processing times by visa post in Africa and Middle East				
	# of months to process 30% of cases	# of months to process 50% of cases	# of months to process 70% of cases	# of months to process 80% of cases
Visa offices in all regions	**5**	**7**	**12**	**16**
Africa and Middle East	**9**	**18**	**24**	**29**
Abidjan	18	22	31	36
Accra	18	22	28	32
Cairo	2	5	12	14
Damascus	5	8	13	16
Nairobi	11	15	22	26
Pretoria	4	6	7	11
Tel Aviv	4	5	6	8

A child being processed in Abidjan or Accra has one chance in two of waiting more than 22 months. In the quickest posts (Beijing and Ankara) half of the children are processed in 2 months.

Children outside Canada also often wait long periods to be reunited with their refugee parents in Canada.[29]

Dependants of refugees abroad July 2003 - June 2004, Processing times by regions				
	# of months to process 30% of cases	# of months to process 50% of cases	# of months to process 70% of cases	# of months to process 80% of cases
Visa offices in all regions	**8**	**13**	**21**	**26**
Africa and Middle East	10	16	25	29
Asia and Pacific	8	13	22	26
Europe	8	11	18	23
Western Hemisphere	8	11	17	21

[29] The problem of long delays in family reunification for refugees is discussed in the recent CCR report, *More than a Nightmare: Delays in Refugee Family Reunification*, November 2004.

Again, certain visa posts are particularly slow.

Dependants of refugees abroad July 2003 - June 2004, Processing times by selected visa posts				
	# of months to process 30% of cases	# of months to process 50% of cases	# of months to process 70% of cases	# of months to process 80% of cases
All Points of Service	**8**	**13**	**21**	**26**
Abidjan	23	27	32	36
Accra	17	24	32	44
Cairo	11	13	21	24
Damascus	13	18	27	32
Nairobi	14	19	25	29
Beijing	9	18	25	28
Colombo	9	13	19	24
Islamabad	15	20	25	29
New Delhi	11	20	27	31
Singapore	16	20	28	31

Delays are largely a result of the lack of resources of visa offices, combined with communications challenges. The effect of delays on children is profound, because it means separation from one or both parents. In the case of refugee families, the damage is compounded by risk: they may be vulnerable to violence, extreme poverty, exploitation and ill-health. Girls are particularly at risk of rape and sexual exploitation.

The longer families wait, the harder their reunification becomes. Separation makes them strangers to each other. Resentments are created, especially when children feel that they have been abandoned by their parents.

However, even where children are separated from both parents, and even when they are in a war zone or otherwise at serious risk, Citizenship and Immigration Canada has no policy to expedite processing.[30]

Mindondo (not her real name) came to Canada in August 2000, having left her two children with a friend in the Democratic Republic of Congo. Her husband fled separately and later was able to join her in Canada. In January 2002, Mindondo was accepted as a refugee. In December 2002, her 13 year old son was assassinated, having been targeted as a member of a persecuted family, the reason that led Mindondo to be recognized as a refugee. Despite this killing of the son, processing of Mindondo's daughter does not appear to have been expedited. She is still in the Democratic Republic of Congo, running from village to village to hide from the rebels, sometimes unable to contact Mindondo.

[30] In September 2004, Citizenship and Immigration Canada told the Canadian Council for Refugees that they would consider such a policy.

Shirin (not her real name) was recognized as a refugee from Afghanistan in April 1998. She applied for permanent residence and included her husband and five children on her application. At the time her oldest child was 10 and the youngest 2 years old. Over the next five years she received very little communication from CIC.

Finally in May 2003, Shirin was informed that her file was delayed because her husband was inadmissible. CIC suggested that if she removed her husband from the application, she would soon be reunited with her children. In July 2003, she removed her husband from the application realizing that she would likely never see him again.

In September 2003, CIC called into question whether Shirin was in fact the mother of the five children and asked for DNA testing. Shirin complied and testing was completed in February 2004 (at a cost of $1800).

Six months later she was still waiting to be reunited with her children. It is six and a half years since she applied for reunification.

A child from the Democratic Republic of Congo waiting for his father to come to Canada told his classmates: 'You know, Papa left us with Mama. He won't be coming back. I've prayed a lot for him to come, but he won't. Now I have to look for another Papa.'

This problem of slow processing is not inherent in the *Immigration and Refugee Protection Act*. It should be possible within the framework of the law to ensure that applications are dealt with "in a positive, humane and expeditious manner" as required by the Convention on the Rights of the Child. However, experience has shown that CIC is not able to meet the Convention standard of expeditious processing. The problem is chronic: Canada was criticized by the UN Committee on the Rights of the Child on this matter in 1995. At that time the committee recommended "that every feasible measure be taken to facilitate and speed up the reunification of the family in cases where one or more members of the family have been considered eligible for refugee status in Canada."[31] In its next report, in October 2003, the Committee noted that its concerns in this regard "have not been adequately addressed."[32]

The Canadian Council for Refugees therefore considers it necessary to amend the policy so that the Committee's concerns can be effectively addressed.

Recommendation: That the spouses and children of people recognized as refugees in Canada be brought immediately to Canada, to be processed here.

[31] UN Committee on the Rights of the Child. Concluding observations of the Committee on the Rights of the Child: Canada. 20/06/95. CRC/C/15/Add.37, para. 21.
[32] UN Committee on the Rights of the Child. Concluding observations: Canada. 27/10/2003. CRC/C/15/Add.215, para. 46.

g) **Length of sponsorship undertakings**

The duration of spousal sponsorship undertakings has been reduced from 10 to 3 years in order to reduce the vulnerability of women to spousal violence. However, sponsorship undertakings for children are still for 10 years, or up to age 25, whichever comes first.[33] Being tied to a sponsor makes children vulnerable, because it puts them in a relationship of dependency. A child between the ages of 15 and 25 who is experiencing abuse or exploitation may be forced to remain in a sponsored relationship because they fear they will be unable to access social assistance.

Recommendation: That the length of sponsorship undertakings for children be reduced in order to make them less vulnerable to abuse or exploitation.

4. SEPARATED REFUGEE CHILDREN

> "*Start looking at the separated child first of all as a child that needs care and protection instead of someone without status in the country.*"
> Deborah Isaacs, SCION, a project for separated children in British Columbia

WHAT THE CONVENTION ON THE RIGHTS OF THE CHILD SAYS:

Art. 20 (1): A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.

Art. 22 (1): State Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures, 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…

(2) … In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason…

WHAT THE COMMITTEE ON THE RIGHTS OF THE CHILD SAID ABOUT CANADA:

46. […] The Committee is especially concerned at the absence of:
(a) A national policy on unaccompanied asylum-seeking children;
(b) Standard procedures for the appointment of legal guardians for these children;
(c) A definition of "separated child" and a lack of reliable data on asylum-seeking children;
(d) Adequate training and a consistent approach by the federal authorities in referring vulnerable children to welfare authorities.

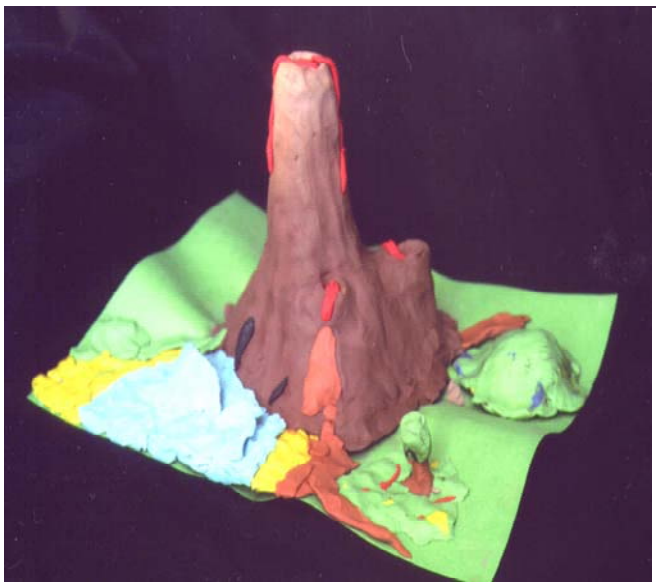
[33] *Immigration and Refugee Protection Regulations*, 133.

47. In accordance with the principles and provisions of the Convention, especially articles 2, 3, 22 and 37, and with respect to children, whether seeking asylum or not, the Committee recommends that the State party:
(a) Adopt and implement a national policy on separated children seeking asylum in Canada;
(b) Implement a process for the appointment of guardians, clearly defining the nature and scope of such guardianship; […]
(d) Develop better policy and operational guidelines covering the return of separated children who are not in need of international protection to their country of origin.

Concluding observations: Canada. 27 October 2003

"Separated children" are children who are separated from both of their parents or usual care-giver.[34] It is a broader category than "unaccompanied minors" since separated children may be accompanied by an adult, including a family member. Even if accompanied by an adult, separated children need special attention, because the adult may not be able to take the parental role (for example, a 19-year old sibling should not be expected to fulfill the role of a parent) or may not even have the best interests of the child at heart (there are cases where the accompanying adult's intention is to exploit the child).

Though separated refugee children represent a small proportion of all refugees worldwide, special attention needs to be paid to them because they are extremely vulnerable.



Artwork of T., a 14-year-old refugee who arrived in Canada as a separated child from Central Asia. He experienced neglect and abuse in his country: physically abused first by his mother, then by his maternal grandmother and his mother's lovers, he lived in fear of being killed by them as his father was. He was referred for art therapy because he suffers symptoms of trauma (insomnia, nightmares, poor concentration), with physical manifestations (chest and back pains without organic cause) and avoidance behaviour. The picture to the left, titled "Volcano" reflects his perception of the traumatic effects of his family history and his experience in a new country. Courtesy of Nicole Heusch, art therapist working with refugee families and children for the past 14 years.

[34] The Inter-agency Guiding Principles on Unaccompanied and Separated Children defines separated children as "those separated from both parents, or from their previous legal or customary primary care giver, but not necessarily from other relatives. These may, therefore, include children accompanied by other adult family members." January 2004. ICRC Publication 2004 ref. 1101. Available from http://www.icrc.org.

In many cases, they have been through traumatizing hardships, such as witnessing the violent death of their family members, being targeted or recruited in armed conflicts, being sexually assaulted, trafficked, persecuted, in addition to being denied their more basic rights to education and health. Their parents may be missing, dead, ill or in jail, or they may have been forced to separate from their children as they sought a way to protect their children from persecution.[35]

In July 2004 the United Nations High Commissioner for Refugees issued "*Trends in separated and unaccompanied children seeking asylum in industrialized countries, 2001-2003*", a document that could have helped to reveal the situation in Canada.[36] However, Canada wasn't included in the study because "data was not available, incomplete or not comparable enough to be included."[37]

The proportion of separated children among refugee claimants in Canada may be about to increase, as a consequence of the US-Canada safe third country agreement.[38] According to this agreement, most people trying to make a refugee claim at the US-Canada border will be turned back, but there is an exception for unaccompanied minors, who in most cases will be able to pursue a refugee claim in Canada. The agreement is not yet in force, but the two governments continue to move towards implementation. The impact on children will need to be carefully monitored.

a) **Designated representatives for separated children**

The *Immigration and Refugee Protection Act* provides for a special representative to be designated to represent a minor in proceedings before the Immigration and Refugee Board (which include refugee claims and detention reviews).

> "If a person who is the subject of proceedings is under 18 years of age or unable, in the opinion of the applicable Division, to appreciate the nature of the proceedings, the Division shall designate a person to represent the person." IRPA, 167(2)

This is an important protection for minors, and particularly for separated children. Unfortunately, however, the Act does not require that a representative be designated at the beginning of the refugee claim process, when a child needs guidance in the preparation of their Personal Information Form (PIF), and other crucial steps that take place before the hearing. A representative designated only for the hearing has limited opportunity to defend the minor's rights.

Furthermore, the role that the designated representative is allowed to play by the Immigration and Refugee Board is sometimes quite limited. The Act does not spell out the role, leaving a lot of room for members to make their own decisions about how and when the representative may intervene. This limits the ability of the designated representative to protect the child's rights.

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[35] *Separated children seeking asylum in Canada*, discussion paper of the UNHCR, July 2001. Available at http://www.web.ca/~ccr/separated.PDF

[36] Available from http://www.unhcr.ch/statistics

[37] Other countries such as France, Australia and the United States are not included in this report for the same reasons, even though they are important asylum countries.

[38] Agreement between the Government of the United States and the Government of Canada For Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries, signed 5 December 2002.

The Act does not require or authorize Citizenship and Immigration Canada (or the Canada Border Services Agency) to designate a representative for minors. Minors may therefore be interviewed by immigration officials without the presence of an adult to protect their interests (as happened in the case of a detained minor, Safia, described below).

In July 2004, the government introduced amendments to the Regulations requiring that unaccompanied minors or persons who are incapable of understanding the proceedings be referred to the Immigration and Refugee Board before a removal order is issued.[39] This will offer better protection of the rights of vulnerable children, because a representative will be designated to act on their behalf. However, the protection is limited given that Citizenship and Immigration Canada and the Canada Border Services Agency are not required to involve the designated representative when they interview the child.

b) **Lack of national policy for responding to separated children claiming refugee status**
Despite the extreme vulnerability of separated children claiming refugee status, there is no national policy to ensure that their rights are properly taken care of. Separated children seem to fall into the gap between federal responsibility for immigration and provincial responsibility for youth protection.

There is not even a consistent definition of the term "separated children." Practices have differed widely across the country, with some children lacking anyone in the role of guardian of their best interests.

Significant work has already been done in identifying the elements that should be included in a national policy on separated children. The government can benefit from this detailed advice by consulting the *Best Practice Statement: Separated Children in Canada.*[40]

In November 2004 CIC added a section on procedures for "minor children" to the manual chapter on Processing Claims for Protection in Canada.[41] These new procedures go some way towards clarifying obligations towards separated children and making procedures more uniform. The amendments also provide a definition of "separated child": "a child not accompanied by a person who has a legal right to that child." However, there are some areas of concern. For example, the procedures state that the burden of proving age rests with the minor and the level of proof is "on a balance of probabilities."[42] This means that a minor who is unable to satisfy an immigration officer that they are more likely than not a minor will be treated as an adult, instead of being given the benefit of the doubt.

Recommendation: That the government implement a national policy that is consistent with the *Best Practices Statement,* and that the policy be developed in consultation with the CCR, NGOs and the UNHCR.

[39] SOR/2004-167, subsection 63(2) amending section 228 of the *Immigration and Refugee Protection Regulations*.
[40] Document issued by the International Bureau for Children's Rights (IBCR), Montreal, February 2003. http://www.ibcr.org/Best_Pratice_eng.pdf
[41] PP1, section 14.
[42] Section 14.3, Identification and Age-related issues.

c) **Resettlement**

In the refugee context, orphaned or separated children are frequently integrated into (although not formally adopted by) another family. If that family is being resettled to Canada the question arises as to what happens to the children who have been taken in. Canada's refugee program encourages these children to be accepted for resettlement to Canada as "de facto family members." In some cases, however, there may be difficulties in the relationship with the surrogate family and occasionally there are allegations of exploitation. For such situations, a mechanism is needed to establish a guardian of the de facto family member, to ensure that the child's best interests are cared for in Canada. [43]

d) **Resettlement – slow processing**

A serious problem for privately sponsored refugees is the slow processing times.[44] Refugees, including refugee children, routinely wait two to three years, often in very precarious situations, for resettlement to Canada. Children may be at particular risk due to insufficient food, inadequate health care, lack of access to schooling for children, forced recruitment of child soldiers and, in the case of girls, sexual exploitation and rape. Separated children are among the most vulnerable. Nevertheless, they are not necessarily priorized for faster processing.

A sponsorship was submitted in November 2001 for a family of four Ethiopian siblings, of whom the oldest was 19 years and the youngest 8. The family had been living without legal status in Nairobi, in constant fear of being stopped by police and extorted for money or thrown in jail. To reduce risks, the siblings avoided leaving the apartment unless necessary. The eldest brother, with the burden of caring for his siblings, was desperate for their security. The children could not go out to school: their brother paid for a tutor to come to the apartment to give them lessons.

Given the lack of a mature adult to take charge, the sponsor suggested that this be treated as a vulnerable case. Yet the sponsor saw other refugees who were less vulnerable processed more quickly.

Finally, after many inquiries, most of which went unanswered, the family arrived in September 2004, nearly three years after the sponsorship was submitted.

On being offered breakfast after arrival in Canada, one of the siblings told the sponsor: "I am used to eating only one meal a day."

[43] CIC is developing a policy for the resettlement and guardianship of defacto dependent minors and consanguineous minors.

[44] The CCR has discussed these problems in its recent report, *No Faster Way. Private sponsorship of refugees: Overseas processing delays*, October 2004.

5. DETENTION

WHAT THE CONVENTION ON THE RIGHTS OF THE CHILD SAYS:

Art. 37: States Parties shall ensure that:
… (b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.

WHAT THE IMMIGRATION AND REFUGEE PROTECTION ACT SAYS:

IRPA 60: 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.

IRPR 247(2): Consideration of the factors set out in paragraph (1)(a) [i.e. identity not established] shall not have an adverse impact with respect to minor children referred to in section 249.

IRPR 249: 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, counseling and recreation.

WHAT THE COMMITTEE ON THE RIGHTS OF THE CHILD SAID ABOUT CANADA:

47. […] the Committee recommends that the State party: […]
(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.

Concluding observations: Canada. 27 October 2003

From mid-June 2003 to the end of December 2003, there were on average 20 minors in immigration detention each week. Most were minors accompanying an adult (15 on average a week), but some were unaccompanied minors (5 on average a week). In 2004 (January to October), the total average number of children in detention fell to 15 a week, but the number of unaccompanied minors remained constant at 5 on average a week.[45] The reduction in numbers may largely reflect the reduction in the numbers of refugee claims made in 2004 compared to preceding years.

Safia (not her real name) arrived in Canada in August 2004. She is from Somalia and does not know her age. Because of the war and the lack of any government in Somalia, she has had only three years schooling. She was detained on arrival on the grounds of identity. The Immigration and Refugee Board decided to consider her a minor, given the uncertainty about her age and a designated representative was appointed. Through enquiries made by Safia's designated representative and her lawyer, a cousin of Safia's father was located in Toronto. She signed an affidavit stating that she had visited the family in 1990 when Safia was one or two years old.

Meanwhile Canada Border Services Agency (CBSA) pursued their enquiries. They called Safia to interviews, but without contacting the designated representative. Safia was very upset by how she was questioned during these interviews. She said afterwards that the officer told her she would spend the rest of her life in detention and that "everyone from your country lies."

Because Safia had mentioned that she had been in a refugee camp in Kenya, CBSA decided to see whether her presence in the camp could be confirmed. They sent off an inquiry, but received the response that the name was not enough. Safia's fingerprints were therefore sent off to Kenya.

While this went on, Safia's health was suffering in detention: she was not sleeping, suffering headaches and vomiting. She saw a doctor in the detention centre, but no interpreter was provided so communication was minimal. He prescribed her some pills, but she didn't know what they were.

About a month after she was detained, Safia appeared before the Immigration and Refugee Board for a detention review. The member decided to keep her in detention. The member explained in his reasons that "the legislator mentioned that if the Minister was making reasonable efforts to investigate identity, no distinction is made between the identity of a minor and the identity of an adult. When these efforts are reasonable, it is not legally open to me to examine alternatives to detention." [translation from French]

Safia was finally released after 6 weeks of detention.

[45] The average has been calculated by the CCR from statistics provided by CIC/CBSA on weekly detention activities. The statistics report persons detained for part or whole of a week. CIC began providing statistics in this form starting the week of 22 June 2003.

As suggested by the Committee on the Rights of the Child, it is not altogether clear how the government is applying the IRPA provision making detention of children a measure of last resort. Although there is more awareness among immigration officials about detention of minors, there is no consistent or coherent application of the principle of last resort. Nor is the law necessarily being interpreted in a manner that gives priority to children's rights. According to the Immigration and Refugee Board, the Act gives the Board very little room to release a minor from detention if the child is being held on the basis that the child's identity has not been established. The Board takes the position that if the Minister declares herself not satisfied as to the identity of the child, the only question the Board can ask is whether the Minister's officials are making "reasonable efforts" to establish the child's identity.[46]

The regulations promote detention as a response to minors who are vulnerable to exploitation from smugglers and traffickers, by making it a factor in favour of detaining a minor.[47] Children in this situation should be given protection, not punished by being deprived of their freedom. Yet detention is the *only* response of the *Immigration and Refugee Protection Act*, showing that the Act is not interested in protecting the children, but only in ensuring that children are available for the execution of the Act's enforcement provisions.

In October 2003, the Immigration and Refugee Board decided to keep a youth in detention, based on the fact that the evidence pointed to him being part of a smuggling operation. He had been traveling in a group of 15 people on a long journey through many countries in Asia, Africa and South America. In his reasons for prolonging the detention, the adjudicator declared: "One has to bear in mind that it certainly cost your family a lot to pay the organization for this kind of trip and in all likelihood your family is indebted for many future years and I think that on your part, if I were to order release, you would feel obligated to meet your part of the deal and of the contract, so your family does not lose all that money. I am also of the opinion that the smuggling organization will remain around you, so to exercise control over you and influence you in your decisions."

Recommendation: That the government adopt as a policy that no minors be detained under the *Immigration and Refugee Protection Act*.

[46] IRPA 58(1)(d) states that detention will be maintained if "the Minister is of the opinion that the identity of the foreign national has not been, but may be, established and they have not reasonably cooperated with the Minister by providing relevant information for the purpose of establishing their identity or the Minister is making reasonable efforts to establish their identity."

[47] Immigration and Refugee Protection Regulations, 249(c).

6. EDUCATION

WHAT THE CONVENTION ON THE RIGHTS OF THE CHILD SAYS:

Art. 28: 1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:

(a) Make primary education compulsory and available free to all…

WHAT THE IMMIGRATION AND REFUGEE PROTECTION ACT SAYS:

IRPA 30(2): Every minor child in Canada, other than a child of a temporary resident not authorized to work or study, is authorized to study at the pre-school, primary or secondary level.

Instead of protecting the absolute right to free education for children, the *Immigration and Refugee Protection Act* provides for exceptions for the children of some temporary residents. The Act's intention was to ensure that refugee claimant children and children of persons without legal status would be authorized to study, while tourists could not simply register their children free of charge in Canadian schools. However, the exception leads to children being deprived of their fundamental right to education. In some cases, the problem arises because the law causes schools to ask about the student's or the parent's immigration status. As a result, out-of-status parents may be frightened to register their children. In addition, some refugee claimant children are caught by the provision because they arrive with a visitor visa and are being asked to wait until they are out-of-status before the section applies (although this is not actually in accordance with the Act). In some cases, schools are refusing to admit children of persons without legal status (who should according to the law be authorized to study) on the basis that the children themselves are in Canada on a valid visitor's visa.

Anna Tcherkasski came to Canada with her parents as visitors, having been misled into thinking that they could immigrate by coming here. They were able to pursue an immigration application with Quebec Immigration, but processing was slow. In the meantime, CIC kept renewing the family's visitor visas. Because of the family's status, the Quebec government said Anna would need to pay fees to go to school, which the family could not afford. She spent three years in Canada without going to school. Only when she was 10 years old did Anna's situation came out in the media and politicians intervened so that she was able to go to school.[48]

[48] "*Otage de la bureaucratie de l'Immigration*" (prisoner of immigration's bureaucracy) , Laura-Julie Perreault, La Presse, September 2003

WHAT THE COMMITTEE ON THE RIGHTS OF THE CHILD SAID ABOUT CANADA:

44. [...] The Committee nevertheless reiterates the concern of the Committee on the Elimination of Racial Discrimination (A/57/18, para. 337) about allegations that children of migrants with no status are being excluded from school in some provinces…

45. The Committee recommends that the State party further improve the quality of education throughout the State party in order to achieve the goals of article 29, paragraph 1, of the Convention and the Committee's general comment No. 1 on the aims of education by, inter alia:

(a) Ensuring that free quality primary education that is sensitive to the cultural identity of every child is available and accessible to all children, with particular attention to children in rural communities, Aboriginal children and refugees or asylum-seekers, as well as children from other disadvantaged groups and those who need special attention, including in their own language …

Concluding observations: Canada. 27 October 2003

7. FEES TO APPLY FOR PERMANENT RESIDENCE

Protected persons have 180 days in which to apply for permanent residence.[49] To complete the application they must pay the fee up-front, which is $550 for each adult and $150 for each child. However, separated children must pay $550 as the principal applicant.[50] If there are several siblings without a parent, each of them must make a separate application and pay $550 each. Thus, 3 siblings who are separated children must pay a total of $1650 for their applications, whereas if they were accompanied by one parent, they would pay a total of $1000 *including the parent*. The fee structure thus has the perverse effect of imposing higher fees on children, precisely because they are separated from their parents.

Most separated children, of course, have very limited financial resources. They are generally in school and relying on some form of social assistance. This means that, unless funds are provided by a charitable organization, the child may not be able to apply for permanent residence as a protected person. Without permanent residence, the child is in a legal limbo.

Rose is a 16-year-old refugee from Rwanda. She came to Canada with her older sister but is now living in a shelter for refugees. She is in Grade 11 and receives an income from Children's Aid - the equivalent of welfare. She was accepted as a refugee two months ago but has not yet applied for permanent residence because it is not clear where the $550 fee will come from. The shelter staff are asking Children's Aid to cover the fees, but they say it is not in their mandate. The staff are reluctant to ask Rose to take a job in addition to her schoolwork to raise the money.

49 *Immigration and Refugee Protection Regulations*, s. 175.
50 *Immigration and Refugee Protection Regulations*, s. 301(b).

Recommendation: That all protected persons (refugees), but particularly separated children, be exempted from processing fees for permanent residence applications.

8. PERMANENT RESIDENT CARD

The *Immigration and Refugee Protection Regulations* create a problem for some separated minors attempting to apply for a Permanent Resident Card. The Regulations require, for children who have a living parent, that their application be signed by a parent or a person whom a Canadian court has made responsible for the child. However, separated children often have at least one parent alive but not with them (or they don't know whether their parents are alive or not) and yet no Canadian court has made a person responsible for them. The Regulations neither allow such minors to sign for themselves nor for someone else to sign for them.

The Regulations thus deny some children the ability to apply for a document attesting to their status, clearly not in their best interests.

Article 22 of the Convention on the Rights of the Child obliges Canada to ensure that refugee children, including unaccompanied refugee children, have access to all the rights in human rights instruments. This covers the right of refugees, under the 1951 Refugee Convention, to administrative assistance (Art. 25) and to travel documents (Art. 28).

The Canadian Council for Refugees urged Citizenship and Immigration Canada to amend the regulations to take into account the situation of separated minors. CIC declined to do so. In the Regulatory Impact Analysis Statement, they explained:

> Having taken these comments into consideration, the Department's position is, that it has not been a problem to date, as flexibility has been demonstrated on a case by case basis.[51]

9. TRAFFICKED CHILDREN

WHAT THE CONVENTION ON THE RIGHTS OF THE CHILD SAYS:

Art. 35: States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.

Art. 36: States Parties shall protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare.

Canada has no provisions to offer protection to children suspected of being victims of trafficking. As mentioned above, the only special provisions make them more likely to be detained: according to the regulations, among the special considerations applying to detention of

[51] *Canada Gazette*, Part II, Vol. 138, No. 16, 22 July 2004, p. 1117.

minors is "the risk of continued control by the human smugglers or traffickers who brought the children to Canada." [52] As a result, children who may be subject to trafficking get extra attention from the enforcement end of the law, but nothing at all from the protection side.

WHAT THE COMMITTEE ON THE RIGHTS OF THE CHILD SAID ABOUT CANADA:

52. […] The Committee is also concerned about the increase of foreign children and women trafficked into Canada.

53. The Committee recommends that the State party further increase the protection and assistance provided to victims of sexual exploitation and trafficking, including prevention measures, social reintegration, access to health care and psychological assistance, in a culturally appropriate and coordinated manner, including by enhancing cooperation with non-governmental organizations and the countries of origin.

Concluding observations: Canada. 27 October 2003

In January 2003, two Chinese boys, aged 10 and 15, arrived at Vancouver airport with two adults. It soon became clear to Canadian immigration officers that the adults were not their parents and that they were traveling with false documents. During an interview, the older boy said that he came to Canada to work and the younger said that he was coming on a visit. As they did not mention any fear of danger if they were to return to China, they were not allowed to make a refugee claim and were sent back immediately to China. Upon their arrival, Chinese authorities refused them because they lacked ID and they were sent back to Canada.

It is not clear from this information that the boys were being trafficked but the scenario is one to raise concerns. However, instead of investigating the possible protection needs of the boys, the immigration authorities' response was to enforce the law by deporting them immediately, without even checking whether the Chinese authorities would accept them or if there would be someone to receive them upon their arrival.

A further negative impact of trafficking on children is the use by government representatives of reference to a hypothetical risk of trafficking as a justification for actions against the interests of a child (for example, prolonged separation of a child from parents).[53] This is another way that trafficking is used by the government to penalize children, rather than to protect them. In the absence of any concrete measures to protect trafficked children in Canada, the concern expressed by officials who use such justifications may seem more expedient than genuine.

[52] *Immigration and Refugee Protection Regulations*, s. 249 c) re. grounds for detention.
[53] See above, page 13.

Recommendation: That the government commit itself to stop using the risk of trafficking as a justification for overriding the best interests of the child and violating children's rights, for example through detention or prolonged family separation.

Recommendation: That the government put in place measures to protect trafficked persons, including children.

10. CONCLUSION

In signing the Convention on the Rights of the Child, Canada recognized the particular responsibility of the government to protect children. A central commitment made by the Canadian government was to make the best interests of the child the primary consideration in all decisions affecting them. As we have highlighted in this report, Canada is a long way from consistently living up to this commitment when it comes to refugee and immigrant children. To address the gaps in the protection of these children, Canada needs to review the *Immigration and Refugee Protection Act* and its application from a child's eye view. This report is intended as an invitation to make such a review and to make the changes necessary to ensure that Canada respects the Convention on the Rights of the Child.