



ADVOCACY

Introduction

In this Journal issue we would like to introduce our newest column, Advocacy. Advocacy is a critical role for psychiatrists and other health and mental health providers to advance the health and wellbeing of our patients, as well as the broader population of children and families. On behalf of our membership, the Journal and the Canadian Academy of Child & Adolescent Psychiatry (CACAP) are collaborating on this new initiative to advance a key strategic objective. In advocacy, dissemination is a very important tool for promoting change.

The Advocacy Committee of the CACAP regularly produces advocacy statements on critical contemporary issues impacting children and families. These are available on our website at: <https://www.cacap-acpea.org/explore/advocacy/>. These statements have allowed the CACAP to advance important causes in collaboration with other stakeholders on behalf of our members.

In this issue we highlight one of the recent statements “*Stopping deportation of parents of Canadian children: the need to prioritize the best interests of the child*”. The full statement is reproduced next, followed by two commentaries. The first commentary, by Rachel Kronick, calls for expanding this advocacy to extend to the protection of refugee and immigrant children from family separation in Canada, and the second commentary, by Andrew Brouwer and Allison Rhoades, provides a primer on aspects of the United Nations Convention on the Rights of the Child, and raises concerns as to how Canada has not adequately met its international commitment as it relates to ensuring the best interests of the child are fully considered.

[La traduction française de la déclaration de plaidoyer se trouve à la fin de cette colonne]

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Stopping deportation of parents of Canadian children: the need to prioritize the best interests of the child (A CACAP Advocacy Statement)

Forcible and prolonged removal of a parent from their child can substantially increase the risk for adverse child mental health outcomes. Such an action should only be considered when the risk to the child is greater if such removal did not occur, or when society is at high risk from the given parent.

However, the Canadian government sanctions such action in the absence of these exceptions. This can occur when the Canada Border Service Agency, under the Immigration and Refugee Protection Act, removes a parent who is a foreign national (or permanent resident) when deemed inadmissible to Canada, even when there is no risk to their Canadian child or to Canadian society. Recent examples of this occurring have been reported by CBC including an ongoing case of deportation of a mother of three young Canadian children and a previous case that resulted in a four-year separation of a mother from her two Canadian children (1).

Whereas it is acknowledged that the Canada Border Service Agency has a general legal obligation to remove foreign nationals and permanent residents who are inadmissible to Canada, that obligation is subject to certain constraints, including those imposed by the constitution and international law. Article 3 of the Convention on the Rights of the Child, to which Canada is a party, requires that **the best interests of the child** be a primary consideration in all government actions concerning children. Furthermore, **the best interests of the child** are specifically noted under the section on humanitarian and compassionate grounds within the Immigration and Refugee Protection Act.

The Canadian Academy of Child & Adolescent Psychiatry (CACAP) notes that **the best interests of the child** are almost always served by the parent NOT being removed. Furthermore, the mental health needs and rights of the child should supersede other state obligations except in situations in which there are specific and significant risks to the child and/or society if a deportation did not occur.

CACAP further argues that if there is an exception, then the compelling reasons to justify the child being placed at risk by the deportation should be clearly documented with opportunity for review and appeal. Furthermore, CACAP contends that a rationalization that the Canadian child could “simply” leave with the deported parent to prevent a separation is not adequate to circumvent consideration of **the best**

interests of the child, as it may allow the Canadian government to abdicate its responsibility to ensure the child’s Canadian citizenship rights are fully realized and that the child’s well-being is not endangered in the country of deportation.

CACAP strongly urges the Canadian government to consistently prioritize **the best interests of the child** when deportation involving a parent of a Canadian child is being considered, to prevent the risk of serious and long-term mental health harm to more Canadian children. We further urge the government of Canada to enshrine in law and policy **the best interests of the child** as a sufficient basis for staying the removal of a parent, independent of whether all legal avenues have been pursued and exhausted by the parent(s).

Furthermore, we caution that delay in action should not be justified on the grounds that the immigration and refugee system in Canada is currently overburdened with other demands as Canadian children should not have to suffer mental health consequences of inadequate resource provision and planning for this system.

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Reference

1. Huncar A. Motherhood issue: Federal gov’t urged to halt deportations that separate moms from children. CBC News. Edmonton. Oct 10, 2022. <https://www.cbc.ca/news/canada/edmonton/deportation-mothers-children-edmonton-1.6608925#:~:text=CBC%20News%20Loaded-,Motherhood%20issue%3A%20Federal%20gov%27t%20urged%20to%20halt%20deportations%20that,spousal%20application%20is%20being%20processed>

Commentary 1: The imperative for structural advocacy: protecting refugee and precarious migrant families from indefinite separations

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In this issue, the Advocacy Committee of the Canadian Academy of Child and Adolescent Psychiatry has released an important position statement on the deportation of parents of Canadian-born children. These removals of

foreign-born parents, many of whom were initially seeking refugee protection in Canada, often lead to the indefinite separation of a child from a parent. The position statement underlines that the human rights and legal principle of the *best interests of the child* must always be a primary and guiding consideration in decisions and policies pertaining to children. Research on refugee families and families affected by migration has accelerated over the past two decades, and there is now an evidence base to affirm that separation from caregivers threatens children's fundamental development (1), and increases emotional problems (2-4). Moreover, the substantial medical literature on childhood trauma affirms unequivocally that adversity in the early years, particularly cumulative trauma, is a significant determinant of mental and physical health throughout the lifespan (5) making clear that protecting children from the toxic stress of separation is always in their best interest.

While the position statement highlights two concerning cases exposed through media coverage of child separation as a result of deportation, these are not the sole circumstances in which refugee, migrant or other Canadian children of parents with precarious status may face indefinite separation. The children described in the statement are far from isolated. The following case vignettes are composites based on true scenarios encountered in this author's clinical and research work.

Case Vignette 1

Aliya (age 15) and Fatimah (age 19) are sisters who fled Sudan with their parents. They transited through Greece en route to Canada, but the family only had resources to buy plane tickets for their daughters. The parents believed that they would be able to follow their daughters shortly after, but this proved impossible due to immigration policies in Greece and Canada rendering the parents in limbo. In Canada, Fatimah and Aliya lived in a basement apartment, and initially integrated well in their high school. However, on realizing they were indefinitely separated from their parents, Aliya began to develop symptoms of depression, and anxiety and became preoccupied with suicide, requiring psychiatric intervention. "They break families apart," Fatimah explained at her sister's assessment. The legal counsel supporting the sisters warned it would be years before the family could be reunited in Canada, if ever.

Delays in refugee family reunification illustrated in the case of Aliya and Fatimah are far from exceptional. In their 2022 report (6), the Canadian Council for Refugees documents the years-long separations families face after seeking

protection in Canada because of backlogs and policy-decisions, resulting in children and parents spending years apart, while left-behind family members often remain in situations of risk and precarity. As those of us who work with refugees have seen, these separations impede recovery from past trauma leaving children and separated parents in protracted and potentially paralyzing states of insecurity symbolically, psychologically, but also, in some cases, legally with significant impact on function, adaptation and integration.

Case Vignette 2

David is an 8-year-old from Honduras who arrived in Canada with both his parents. On arrival, his father was put in immigration detention indefinitely while his identity was being verified, and David and his mother were temporarily housed in a hotel for refugee claimants. David and his mother had no means to visit their father in detention and were without legal counsel to understand how their father might be released, or to advocate for it. David, who was previously healthy, despite exposure to murders of family members in Honduras, developed nocturnal enuresis, nightmares, was tearful and listless, and fearful of people in uniform. Even after his father was released from detention three months later, David had difficulty leaving their new apartment as a result of his anxiety.

While there is no policy that systematically separates children from parents in Canada—as there was in the United States in 2018 (7, 8)—as the case of David illustrates, family separation can be inevitable when a parent is detained with a failure to weigh the best interests of the child. This author's research, and the work of legal scholars and advocates, have described the consequences of separating children from detained parents (9-11). Indeed in 2018, the Canadian Academy of Child and Adolescent Psychiatry was a signatory of an open letter calling for the end of child immigration detention *and separation* (12). Yet in 2019 the Canadian Council for Refugees made clear that the phenomenon is far from resolved (13). That year alone, over 100 children were separated indefinitely from detained parents (13). With the numbers of refugee claimants reaching an all-time high in Canada (14) as a result of the massive increases in global forced displacements (15), family separations will increase in Canada unless there are structural and policy changes.

When policy entrenches forms of structural violence, interrupting children's trajectories of resilience and recovery, advocacy is the best medicine. Child psychiatrists and mental health clinicians are uniquely positioned because of our

proximity to communities at risk, and our privileged role as experts on the psychosocial determinants of child mental health. As the Advocacy Committee has done with this statement, it is imperative that as a collective and as individuals we continue our core work of structural advocacy (16) to protect refugee and other precarious children from separation.

In truth, we should not need medical evidence or expertise to uphold the right of children to basic human rights. But when the protections of children and migrants are eroded, as physicians and mental health practitioners we have an ethical and public health imperative to respond. Much as we report incidents of domestic child abuse, when public policy neglects children's best interests, health practitioners can and must act to denounce the harm. As Canadian healthcare providers, we rarely have the opportunity to protect refugee children and their parents from dangers in their country of origin; but surely, we can and should protect them from mistreatment in Canada.

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Commentary 2: In the Best Interests of the Child?: Canada's practice of separating families in immigration enforcement, and paths forward

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The CACAP advocacy statement "*Stopping deportation of parents of Canadian children: the need to prioritize the best interests of the child*" mentions the United Nations Convention on the Rights of the Child. Knowledge of the requirements of this convention and how Canada's deportation practices currently measure up is critical to understanding the promise of the best interests of the child principle.

On December 12, 1991, the Government of Canada, under Brian Mulroney, signed on to the United Nations Convention on the Rights of the Child (subsequently referred to as "Convention").¹ In doing so, Canada committed to making the best interests of the child "a primary consideration" in all actions concerning children, "whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies."² Canada also agreed to be treaty-bound not to separate children from their parents unless it is in the best interests of the child to do so.³

A decade later, the Jean Chretien government added a clause to the *Immigration and Refugee Protection Act* (IRPA) explicitly requiring that all actions under the legislation comply with such treaties.⁴

It may come as a surprise to learn, then, that despite these voluntary legal commitments, Canada *routinely* separates children from their families through deportation, with little or no consideration of the impact of those separations on the best interests of affected children.

What international law requires

The requirement to always have the best interests of the child (“BIOC”) as a primary consideration in actions affecting a child is set out in Article 3(1) of the Convention, and is recognized as a guiding principle binding on all states that have signed on to the Convention. While it does not make the best interests of the child paramount - in the sense that they will always outweigh all other interests - it clearly elevates those interests in importance *vis-a-vis* other considerations.⁵ The Convention requires that the assessment of the best interests of a child reflect the unique circumstances of each particular case, in light of a child’s individual characteristics, while being mindful of their evolving capacity.⁶ Notably (for reasons that will become clear below), the best interests analysis is not temporally limited in the Convention – a child’s short, medium and long term interests are all valid considerations under Article 3.⁷

The Convention does not stop at broad statements of principle; it is, after all, a legal treaty with clear binding provisions with which states parties have undertaken to comply. Among those specific provisions is article 9, which provides:

States 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. (...)

What Canada does

While the Convention, like other international human rights treaties, is not directly enforceable in Canadian courts, Parliament has directed that the provisions of the *Immigration and Refugee Protection Act* (IRPA) - including those dealing with removals from Canada - must be construed and applied in a manner that complies with “international human rights instruments to which Canada is signatory.”⁸ The requirement to consider the best interests of the child in certain immigration decisions has also been stipulated in the IRPA, notably with respect to applications for permanent

residence on humanitarian and compassionate grounds, a requirement that has been repeatedly affirmed by the Supreme Court of Canada.⁹ More recently, as a result of litigation, BIOC has been incorporated in the immigration regulations as a consideration in the detention of a parent or caregiver, and immigration detention is to be considered only as a last resort for minors.¹⁰ The Immigration and Refugee Board (IRB) of Canada is also currently reviewing its Guideline relating to minors,¹¹ with potential of incorporating the BIOC principle.

And yet

Despite the clear requirement under the Convention to make BIOC a *primary* consideration, without temporal limitation,¹² Canada consistently limits them to simply *one factor for consideration among many*; and when it comes to removals, only the child’s *short-term* interests are taken into account.¹³ It is not difficult to see how this narrowing of BIOC by immigration enforcement officers, whose *raison d’être* is the prompt removal of people from Canada,¹⁴ can mean the difference between keeping a family intact and separating children from parents, caregivers and siblings through deportation. At the Refugee Law Office, this is something we see daily.

As Rachel Kronick explains in her commentary, the consequences for children of being separated from their caregivers are toxic, threatening children’s fundamental development and increasing emotional problems.¹⁵ This is never in their best interests.

Canada’s improper and attenuated approach to its obligations under the Convention has not gone unnoticed. In its June 2022 formal evaluation of Canada’s compliance with its obligations under the Convention, the UN Committee on the Rights of the Child - whose jurisdiction Canada accepted upon signing on to the Convention - formally “reminded” Canada about “the indivisibility and interdependence of all the rights enshrined in the Convention” including specifically “the human rights of children in the context of international migration.”¹⁶ Specifically, the UN Committee recommended that Canada “*intensify*” work to “ensure that legislation and procedures use the best interests of the child as a *primary* consideration in all immigration and asylum decision-making processes” and ensure that “determination of the best interests is consistently conducted by professionals” who have been adequately applying such procedures (or more critically, in the French version, “*qui appliquent correctement ces procédures*”).¹⁷

Where do we go from here

Even within the constraints of immigration enforcement, Canada has a duty of good faith to comply with international law. To bring removals up to the standards required by the Convention, there are some immediate steps to be taken.

Critically, the best interests of the child must be recognized in Canadian law and practice as a *primary* consideration in all matters affecting a child, meaning it cannot easily be outweighed by other considerations. Equally importantly in the immigration enforcement context, best interests determinations must no longer be artificially limited to short-term best interests. If we take seriously our obligation, as a party to the Convention of the Rights of the Child, to protect children, their best interests must always guide government actions that will have such a profound impact on their wellbeing.

One way to ensure that the best interests of the child are properly considered in the deportation context would be to establish a separate, arms-length office or tribunal tasked with best interests determinations prior to any removal impacting a child, in much the same way that the risk of persecution or torture is assessed prior to removal through a Pre Removal Risk Assessment (PRRA).¹⁸ There may also be less ambitious but equally effective solutions. But what is clear is that the status quo is causing serious harm and must come to an end. We as advocates for children from all disciplines must work together to ensure that our government takes the rights of children seriously.

Endnotes

1. Ratified in 1991, the instrument of ratification was deposited at the UN in January 1992. See United Nations, Office of the High Commissioner for Human Rights, Status of Ratifications of the Principal International Human Rights Treaties, available at: <https://www2.ohchr.org/english/bodies/docs/status.pdf>, accessed March 8, 2023.
2. UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: <https://www.refworld.org/docid/3ae6b38f0.html>, accessed 9 March 2023, at Article 3(1).
3. *Ibid.*, at Article 9.
4. *Immigration and Refugee Protection Act (IRPA) S.C. 2001, c. 27*, at s. 3(f)(f).
5. *Ibid.*, at 37-39. Note the wording of the provision, being “a primary consideration” vs. “the primary consideration.”
6. *Ibid.*, at paras 32, 48, 84.
7. Committee on the Rights of Children, General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), CRC/C/GC/14, available at: https://www2.ohchr.org/english/bodies/crc/docs/gc/crc_cAlth_gc_14_eng.pdf, accessed February 26, 2023, at para 37.
8. *Immigration and Refugee Protection Act (IRPA) S.C. 2001, c. 27*, at s. 3(f)(f).
9. *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817: “[T]he values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review.” (at 69) and “The values and principles of the UNCRC recognize the importance of being attentive to the rights and best interests of children when decisions are made that relate to and affect their future.” (at 71). “ See also: *R v. Sharpe* [2001] 1 S.C.R.; *Kanhasamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61. Note, however, that a pending H&C determination does not confer an automatic Stay of removal, rendering families vulnerable to separation in the interim.
10. *B.B. v. Canada (Citizenship and Immigration)*, 2016 FC 1423; *Immigration and Refugee Protection Act (IRPA) S.C. 2001, c. 27*, at s. 60; *Immigration and Refugee Protection Regulations (IRPR)*, (SOR/2002-227), at s. 248(f), s. 248.1, and s. 249; see also Section 4: Minors, of the Immigration and Refugee Board of Canada’s *Chairperson Guideline 2: Detention*, dated September 2010, Amended April 2021. Notwithstanding these improvements, Canada’s immigration detention regime continues to fall far short of the requirements of international law, including with respect to the treatment of the best interests of children. However, that issue is beyond the scope of this brief article. See also: Hannah Gros, Yolanda Song, *No Life for a Child: A Roadmap to End Immigration Detention of Children and Family Separation*, University of Toronto’s International Human Rights Program (IHRP), 2016.
11. Chairperson Guideline 3: Child Refugee Claimants: Procedural and Evidentiary Issues, Immigration and Refugee Board of Canada (IRB), September 30, 1996.
12. Committee on the Rights of Children, General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), CRC/C/GC/14, Available at: https://www2.ohchr.org/english/bodies/crc/docs/gc/crc_c_gc_14_eng.pdf, accessed February 26, 2023, at para 37.
13. *Lewis v. Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130, at para 24. See also, *Simoes v. Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 15668 (FC), 187 FTR 219, at paras 11-15.
14. *Immigration and Refugee Protection Act (+IRPA) S.C. 2001, c. 27*, at s. 48(2): “(2) If a removal order is enforceable, the foreign national against whom it was made must leave Canada immediately and the order must be enforced *as soon as possible*.” [Emphasis Added]
15. Dr. Rachel Kronick, *The imperative for structural advocacy: protecting refugee and precarious migrant families from indefinite separations*, *Journal of the Canadian Academy of Child and Adolescent Psychiatry*, 32 (2).
16. UN Committee on the Rights of the Child, *Concluding observations on the combined fifth and sixth periodic reports of Canada*, CRC/C/CAN/CO/5-6, 23 June 2022, available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CR%2FC%2FCAN%2FCO%2F5-6&Lang=en, accessed February 28, 2023, at 42.
17. UN Committee on the Rights of the Child, *Concluding observations on the combined fifth and sixth periodic reports of Canada*, CRC/C/CAN/CO/5-6, 23 June 2022, available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CR%2FC%2FCAN%2FCO%2F5-6&Lang=en, accessed February 28, 2023, at 42(a) [emphasis added].
18. *Immigration and Refugee Protection Act (IRPA) S.C. 2001, c. 27*, at s.112.

Cesser la déportation des parents d'enfants canadiens : le besoin de donner la priorité à l'intérêt supérieur de l'enfant (Une déclaration de plaidoyer de l'ACPEA)

Le retrait forcé et prolongé d'un parent de son enfant peut substantiellement accroître le risque de résultats de santé mentale indésirables chez l'enfant. Un tel retrait devrait être considéré seulement lorsque le risque pour l'enfant serait plus grand si ce retrait n'avait pas lieu, ou quand la société court un risque élevé en raison de ce parent.

Toutefois, le gouvernement canadien sanctionne cette action en l'absence de ces exceptions. Cela peut se produire quand l'Agence des services frontaliers du Canada, en vertu de la Loi sur l'immigration et la protection des réfugiés, retire un parent qui est un ressortissant étranger (ou un résident permanent) quand il est jugé inadmissible au Canada, même en l'absence de risque pour leur enfant canadien ou pour la société canadienne. Des exemples récents de cette situation ont été rapportés par la CBC y compris le cas actuel de la déportation d'une mère de trois jeunes enfants canadiens et un cas précédent qui a entraîné la séparation de 4 ans d'une mère de ses deux enfants canadiens (1).

Alors qu'il est reconnu que l'Agence des services frontaliers du Canada a l'obligation légale générale de renvoyer les ressortissants étrangers et les résidents permanents qui sont inadmissibles au Canada, cette obligation est soumise à certaines contraintes, notamment celles imposées par le droit constitutionnel et international. L'article 3 de la Convention relative aux droits de l'enfant, que le Canada a ratifiée, exige que l'intérêt supérieur de l'enfant soit une considération principale dans toutes les actions du gouvernement en ce qui concerne les enfants. En outre, l'intérêt supérieur de l'enfant est spécialement noté en vertu de la section sur les considérations d'ordre humanitaire et de compassion dans la Loi sur l'immigration et la protection des réfugiés.

L'Académie canadienne de psychiatrie de l'enfant et de l'adolescent (ACPEA) remarque que l'intérêt supérieur de l'enfant est presque toujours servi par le parent qui n'est pas DÉPORTÉ. D'ailleurs, les besoins et les droits de santé mentale de l'enfant devraient avoir préséance sur les autres obligations de l'état sauf dans les situations où il y aurait

des risques spécifiques et importants pour l'enfant et/ou la société si une déportation n'avait pas lieu.

L'ACPEA soutient en outre que s'il y a une exception, alors les raisons impérieuses pour justifier que l'enfant soit placé à risque par la déportation devraient être nettement documentées et accompagnées d'une possibilité d'examen et d'appel. De plus, l'ACPEA maintient que la rationalisation selon laquelle l'enfant canadien pourrait « simplement » quitter avec le parent déporté pour éviter une séparation n'est pas adéquate pour contourner la considération de l'intérêt supérieur de l'enfant, car elle peut permettre au gouvernement canadien d'abdiquer sa responsabilité d'assurer que les droits de citoyenneté canadienne de l'enfant sont pleinement réalisés et que le bien-être de l'enfant n'est pas menacé dans le pays de déportation.

L'ACPEA demande instamment au gouvernement canadien d'accorder systématiquement la priorité à l'intérêt supérieur de l'enfant, quand la déportation impliquant un parent d'un enfant canadien est envisagée, pour prévenir le risque de dommages sérieux et à long terme à la santé mentale de plus d'enfants canadiens. Nous demandons en outre au gouvernement du Canada d'enchâsser dans la loi et les politiques l'intérêt supérieur de l'enfant comme raison suffisante de prévenir le déplacement d'un parent, indépendamment de ce que toutes les avenues légales aient été empruntées et épuisées par le ou les parents.

En outre, nous prévenons qu'un délai de l'action ne devrait pas être justifié au motif que le système d'immigration et de réfugiés au Canada est présentement surchargé par d'autres demandes, car les enfants canadiens ne devraient pas avoir à souffrir de conséquences sur la santé mentale d'une offre et d'une planification inadéquates de ressources pour ce système.

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Référence

1. Huncar A. Motherhood issue: Federal gov't urged to halt deportations that separate moms from children. CBC News. Edmonton. Oct 10, 2022. <https://www.cbc.ca/news/canada/edmonton/deportation-mothers-children-edmonton-1.6608925#:~:text=CBC%20News%20Loaded-.Motherhood%20issue%3A%20Federal%20gov't%20urged%20to%20halt%20deportations%20that,spousal%20application%20is%20being%20processed>