

# Child Refugee Claimants: Procedural and Evidentiary Issues

IRB Guidelines, Immigration and Refugee Board, Ottawa

Children, persons under 18 years of age,<sup>1</sup> can make a claim to be a Convention refugee and have that claim determined by the Convention Refugee Determination Division (CRDD) of the Immigration and Refugee Board (IRB). The *Immigration Act* does not set out specific procedures or criteria for dealing with the claims of children different from those applicable to adult refugee claimants, except for the designation of a person to represent the child in CRDD proceedings.<sup>2</sup> The procedures currently being followed by the CRDD for an adult claimant may not always be suitable for a child claimant.

The international community has recognized that refugee children have different requirements from adult refugees when they are seeking refugee status. The United Nations *Convention on the Rights of the Child* (CRC)<sup>3</sup> has recognized the obligation of a government to take measures to ensure that a child seeking refugee status receives appropriate protection.<sup>4</sup> In addition, the United Nations High Commissioner for Refugees (UNHCR) has issued guidelines on the protection and care of refugee children.<sup>5</sup>

There are three broad categories of children who make refugee claims at the IRB. In all three categories, there are procedural and evidentiary issues which affect the child claimant:

1. The *first category* consists of children who arrive in Canada at the same time as their parents or some time thereafter. In most cases, the parents also seek refugee status. In these situations, the child should be considered an "accompanied" child. If the child arrives at the same

time as the parents, then his or her claim is usually heard jointly<sup>6</sup> with the parents but a separate refugee determination is made.

2. The *second category* consists of children who arrive in Canada with, or are being looked after in Canada by, persons who purport to be members of the child's family. If the CRDD is satisfied that these persons are related to the child, then the child should be considered an "accompanied" child. If the CRDD is not satisfied as to the family relationship, then the child should be considered an "unaccompanied" child.
3. The *third category* consists of children who are alone in Canada without their parents or anyone who purports to be a family member. For example, an older child may be living on his or her own or a child may be in the care of a friend of the child's family. These children should be considered "unaccompanied."

These *Guidelines* will address the specific procedural issue of the designation of a representative and the more general procedural issue of the steps to be followed in processing claims by unaccompanied children. The *Guidelines* will also address the evidentiary issues of eliciting evidence in a child's claim and assessing that evidence.

## A. Procedural Issues

### I. General Principle

In determining the procedure to be followed when considering the refugee claim of a child, the CRDD should give primary consideration to the "best interests of the child."

The "best interests of the child" principle has been recognized by the international community as a fundamental human right of a child.<sup>7</sup> In the

context of these Guidelines, this right applies to the process to be followed by the CRDD. *The question to be asked when determining the appropriate process for the claim of a child is "what procedure is in the best interests of this child?"* With respect to the merits of the child's claim, all of the elements of the Convention refugee definition must be satisfied.<sup>8</sup>

The phrase "best interests of the child" is a broad term and the interpretation to be given to it will depend on the circumstances of each case. There are many factors which may affect the best interests of the child, such as the age, gender,<sup>9</sup> cultural background and past experiences of the child, and this multitude of factors makes a precise definition of the "best interests" principle difficult.<sup>10</sup>

## II. Designated Representative

The *Immigration Act* requires<sup>11</sup> the designation of a representative for all child claimants. In cases where the child is accompanied by his or her parents, one of the parents is usually appointed as the designated representative of the child. This designation applies to *all* the "proceedings" of the refugee claim and not only to the hearing of the claim. The role of the designated representative is not the same as that of legal counsel.<sup>12</sup> In addition to the designated representative, the child has a right to be represented by legal or other counsel.<sup>13</sup>

There are certain *mandatory criteria* to apply when designating a representative:

- the person must be over 18 years of age;
- the person must have an appreciation of the nature of the proceedings;
- the person must not be in a conflict of interest situation with the child claimant such that the person must

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not act at the expense of the child's best interests;

- the person must be willing and able to fulfill the duties of a representative and to act in the "best interests of the child."

In addition, the linguistic and cultural background, age, gender and other personal characteristics of the designated representative are factors to consider.

The duties of the designated representative are as follows:

- to retain counsel;
- to instruct counsel or to assist the child in instructing counsel;
- to make other decisions with respect to the proceedings or to help the child make those decisions;
- to inform the child about the various stages and proceedings of the claim;
- to assist in obtaining evidence in support of the claim;
- to provide evidence and be a witness in the claim;
- to act in the best interests of the child.

Before designating a person as a representative for the child, the CRDD panel should inform the proposed designated representative of his or her duties and should make an assessment of the person's ability to fulfill those duties.

There may be situations where the person who was designated to be the representative ceases to be an appropriate representative of the child. For example, the person may prove unwilling or unable to make themselves available for pre-hearing conferences. In these situations, the CRDD should remove the person as designated representative<sup>14</sup> and designate another appropriate representative.

### III. Processing Claims of Unaccompanied Children

The fact that children claiming refugee status can be unaccompanied raises many unique concerns with respect to the processing of their claims. The UNHCR has recognized that this group of refugees, due to their age and the fact that they are unaccompanied,

warrant special attention in the process of determining their claims to refugee status.<sup>15</sup>

The "best interests of the child" should be given primary consideration at all stages of the processing of these claims. This principle is reflected in the following procedures:

1. *Claims of unaccompanied children should be identified as soon as possible by Registry staff after referral to the CRDD.* The name of the child and any other relevant information should be referred to the provincial authorities responsible for child protection issues, if this has not already been done by Citizenship and Immigration Canada (CIC).<sup>16</sup> After referral, all notices of hearings and pre-hearing conferences should be forwarded to the provincial authority.
2. *The CRDD panel and Refugee Claim Officer (RCO) should be immediately assigned to the claim and, to the extent*

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*possible, the same individuals should retain responsibility for the claim until completion.* It may also be necessary in some cases to assign an interpreter to the claim as early as possible so that the child can develop a relationship of trust with the interpreter.<sup>17</sup> Before the panel, RCO and interpreter are assigned, consideration should be given to their experience in dealing with the claims of children.<sup>18</sup>

3. *The claim should be given scheduling and processing priority<sup>19</sup> because it is generally in the best interests of the child to have the claim processed as expeditiously as possible.* There may be circumstances, however, where in the best interests of the child the claim should be delayed. For example, if the child is having a great deal of difficulty adjusting to Canada, he or she may need more time before coming to the CRDD for a hearing.
4. *A designated representative for the child should be appointed as soon as*

*possible following the assignment of the panel to the claim.* This designation would usually occur at the pre-hearing conference referred to below, but it may be done earlier. CRDD panels should refer to Section II above for guidelines on designating an appropriate representative. In determining whether a proposed representative is willing and able to act in the "best interests of the child," the panel should consider any relevant information received from the provincial authorities responsible for child protection as well as any relevant information from other reliable sources.

5. *A pre-hearing conference should be scheduled within 30 days of the receipt of the Personal Information Form (PIF).* The purposes of the conference would include assigning the designated representative (if this has not already been done), identi-

fying the issues in the claim, identifying the evidence to be presented and determining what evidence the child is able to provide and the best way to elicit that evidence. Information from individuals, such as the designated representative, medical practitioners, social workers, community workers and teachers can be considered when determining what evidence the child is able to provide and the best way to obtain the evidence.

6. In determining what evidence the child is able to provide and the best way to elicit this evidence, the panel should consider, in addition to any other relevant factors, the following: the age and mental development of the child both at the time of the hearing and at the time of the events about which they might have information; the capacity of the child to recall past events and the time that has elapsed since the events; and the capacity of the child

to communicate his or her experiences.

### B. Evidentiary Issues

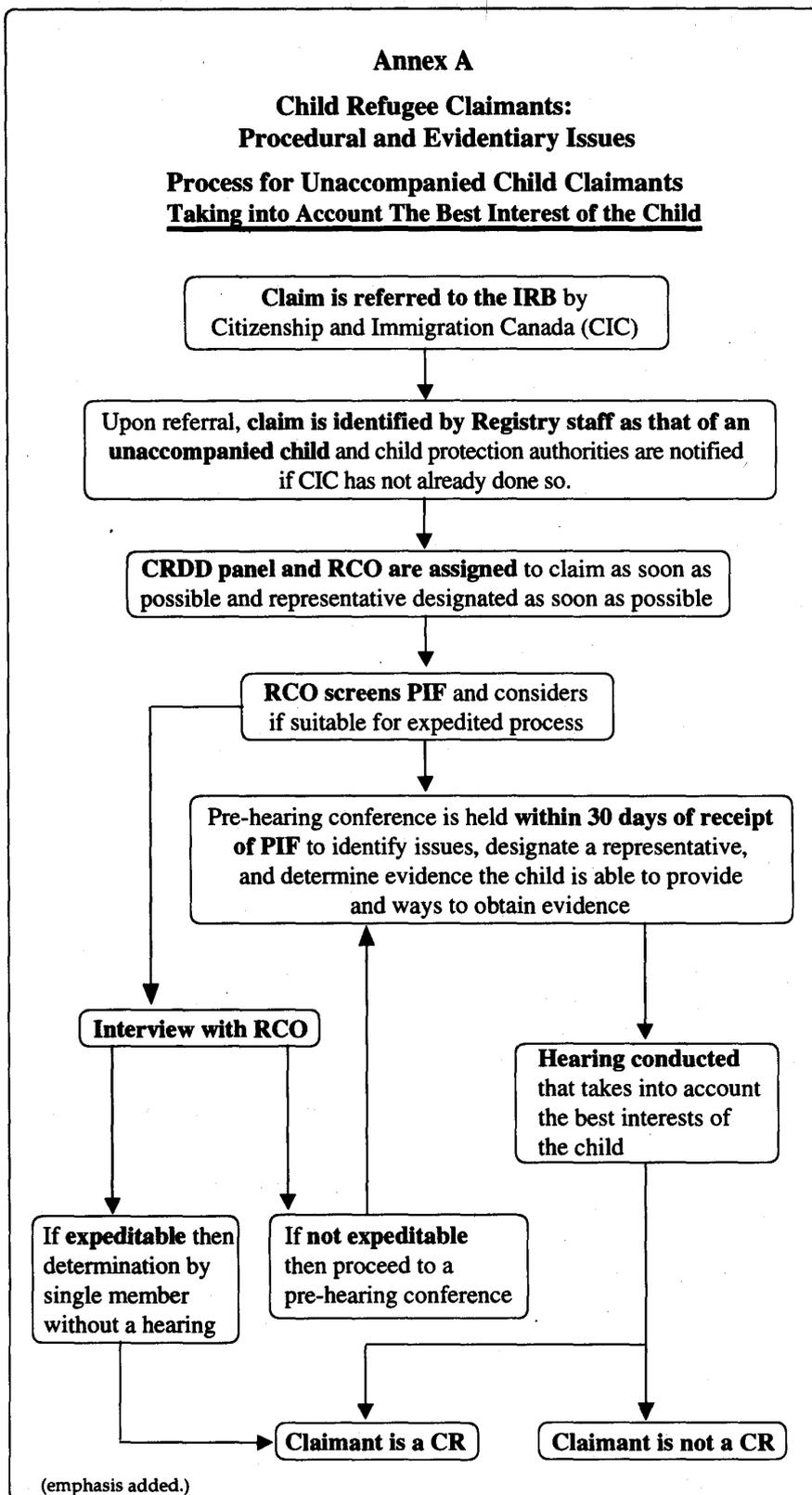
#### I. Eliciting the Evidence

Whether accompanied or unaccompanied, a child claimant may be called upon to provide evidence through oral testimony about his or her claim.<sup>20</sup> Like an adult claimant, a child claimant also has a right to be heard in regard to his or her refugee claim.<sup>21</sup> An assessment should be made as to what evidence the child is able to provide and the best way to elicit that evidence from the child.

In general, children are not able to present evidence with the same degree of precision as adults with respect to context, timing, importance and details. They may be unable, for example, to provide evidence about the circumstances surrounding their past experiences or their fear of future persecution. In addition, children may manifest their fears differently from adults.

If the panel determines that a child is able to give oral evidence and that the panel needs to hear from the child, the following should be considered:

1. *The process which is to be followed should be explained to the child throughout the hearing to the extent possible, taking into account the age of the child.* In particular, the various participants and their roles at the hearing should be explained as well as the purpose of questioning the child and the sequence of questioning (that is, the fact that counsel normally questions first, followed by the RCO and then the panel).
2. *Before hearing testimony from a child, the panel should determine if the child understands the nature of an oath or affirmation to tell the truth and if the child is able to communicate evidence.*<sup>22</sup> If the child satisfies both of these criteria then he or she can take an oath or solemn affirmation. A child who does not satisfy these criteria can still provide unsworn testimony. The weight to be given to the unsworn testimony depends on the child's understanding of the ob-



ligation to be truthful and his or her ability to communicate evidence.

3. *The environment in which the child testifies should be informal.* It may be appropriate to use an interview-style room rather than a hearing room. It may also be appropriate to have an adult whom the child trusts present when the child is providing information about his or her claim. This person may or may not be the designated representative.<sup>23</sup>
4. *Questioning of a child should be done in a sensitive manner and should take into account the type of evidence the child may be able to provide.* Children may not know the specific circumstances that led to their flight from the country of origin and, even if they know the circumstances, they may not know the details of those circumstances.<sup>24</sup> The questions put to a child should be formulated in such a manner that the child will understand the question and be able to answer. Consideration should also be given to choosing the person who is best able to question the child.
5. *Even in an informal environment, some children may find it difficult to testify orally in front of decision-makers.* Where appropriate, the evidence of the child may also be obtained by using videotape evidence or an expert as a liaison between the CRDD and the child. For example, the panel may be able to indicate to a medical expert the questions which the panel would like the child to answer.
6. *The hearing should, if possible, conclude in one sitting. If this is not possible then the earliest possible resumption date should be scheduled.* Notwithstanding the desirability of concluding the hearing in one sitting, a child's possible need for breaks and adjournments should always be taken into consideration.
7. *During the course of the hearing, extensive use may be made of conferences with the hearing participants to resolve issues as they arise.* For example, the panel may hear some testimony on a particular issue from the child and

then hold a conference with the hearing participants to determine what further testimony, if any, is required.

In all cases, whether the child provides oral evidence or not, the following alternative or additional evidence may be considered:

- evidence from other family members in Canada or another country;
- evidence from other members of the child's community;
- evidence from medical personnel, teachers, social workers, community workers and others who have dealt with the child;
- documentary evidence of persons similarly situated to the child, or his or her group, and general country conditions.

## II. Assessing the Evidence

The CRDD is not bound by the technical rules of evidence and may base its determination on any evidence it considers credible or trustworthy in the circumstances of the case. When assessing the evidence presented in support of the refugee claim of a child, the panel should take note of the following:

1. If the child has given oral testimony, then the weight to be given to the testimony must be assessed. In determining the weight to be given, the panel should consider the opportunity the child had for observation, the capacity of the child to observe accurately and to express what he or she has observed, and the ability of the child to remember the facts as observed. These factors may be influenced by the age, gender<sup>25</sup> and cultural background of the child as well as other factors such as fear, memory difficulties, post-traumatic stress disorder and the child's perception of the process at the CRDD.<sup>26</sup>
2. A child claimant may not be able to express a subjective fear of persecution in the same manner as an adult claimant. Therefore, it may be necessary to put more weight on the objective rather than the subjective elements of the claim.<sup>27</sup> The Federal

Court of Canada (Appeal Division) has said the following on this issue:

... I am loath to believe that a refugee status claim could be dismissed solely on the ground that as the claimant is a young child ... he or she was incapable of experiencing fear the reasons for which clearly exist in objective terms.

3. When assessing the evidence presented in the claim of a child refugee claimant, the panel may encounter gaps in the evidence. For example: a child may indicate that men in uniforms came to the house but not know what type of uniforms they were wearing or a child may not know the political views of his or her family. The child may, due to age, gender, cultural background or other circumstances, be unable to present evidence concerning every fact in support of the claim. In these situations, the panel should consider whether it is able to infer the details of the claim from the evidence presented. ■

## Endnotes

1. For the purpose of these *Guidelines*, "child" refers to any person under the age of 18 who is the subject of proceedings before the CRDD. Section 69(4) provides special protection to refugee claimants under the age of 18 in the form of a designated representative in proceedings before the CRDD. Section 69(4) of the *Immigration Act*, as enacted by R.S.C. 1985 (4th Supp.), c. 28, s.18, provides in part as follows:  

Where a person who is the subject of proceedings before the Refugee Division is under eighteen years of age ... the Division shall designate another person to represent that person in the proceedings.

The age of 18 is consistent with the provisions of the *Convention on the Rights of the Child* (hereafter the CRC) which provides in Article 1 that "for the purposes of the present Convention, a child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier."
2. *Ibid.*
3. The CRC was adopted by the United Nations General Assembly on 20 November 1989. It was signed by Canada on 28

May 1990 and ratified on 13 December 1991, and came into force on 12 January 1992.

4. See Article 22 of the CRC:

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 ...

5. *Refugee Children—Guidelines on Protection and Care*, UNHCR, Geneva 1994.

6. Rule 10(2) of the *Convention Refugee Determination Division Rules*, SOR/93-45. These Rules also provide for claims to be heard separately if a joined hearing is likely to cause an injustice.

7. See Article 3(1) of the CRC:

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.

See also UNHCR Executive Committee Conclusion XXXVIII "Refugee Children," 1987:

The Executive Committee ... [s]tressed that all action taken on behalf of refugee children must be guided by the principle of the best interests of the child ...

8. In determining the child's fear of persecution, the international human rights instruments, such as the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights* and the *Convention on the Rights of the Child*, should be considered in determining whether the harm which the child fears amounts to persecution.

9. For female child refugee claimants, reference can also be made to the Chairperson's *Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution*, Immigration and Refugee Board, Ottawa, Canada, March 9, 1993.

10. Madame Justice McLachlin of the Supreme Court of Canada, in *Gordon v. Goertz* (S.C.C., no. 24622), Lamer, LaForest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci, Major, May 2, 1996, had occasion to discuss the interpretation to be given to the phrase "best interests of the child" and

the difficulty with giving the phrase a concrete definition:

The best interests of the child test has been characterized as "indeterminate" and "more useful as legal aspiration than as legal analysis" ... The multitude of factors that may impinge on the child's best interest make a measure of indeterminacy inevitable. A more precise test would risk sacrificing the child's best interest to expediency and certainty.

11. See endnote 1.

12. Although legal counsel for the claimant may also be appointed as the designated representative, the roles of the two are distinct.

13. Section 69(1) of the *Immigration Act*, as enacted by R.S.C. 1985 (4th Supp.), c. 28, s.18, provides as follows:

In any proceedings before the Refugee Division ... the person who is the subject of the proceedings may, at that person's own expense, be represented by a barrister or solicitor or other counsel.

14. When removing the person as a designated representative, the CRDD should clearly indicate, either in writing or orally on the record, that it is removing the person and briefly indicate the reasons for the removal.

15. UNHCR Executive Committee Conclusion XXXVIII "Refugee Children," 1987:

The Executive Committee ... underlined the special situation of unaccompanied children and children separated from their parents, who are in the care of other families, including their needs as regards determination of their status ...

16. An unaccompanied child claimant is by virtue of that status a child who may be at risk and the authority responsible for children at risk should be notified. Because CRDD proceedings are held *in camera* and disclosing information about the refugee claim of the child would involve releasing private information, the provisions of the *Privacy Act* (S. C. 1980-81-82-83, c.111, Sch. II "1") must be complied with.

17. An appropriate interpreter is vital to the processing of a refugee claim. It is important that the child trust the interpreter and that the interpreter be right for the child. The cultural and linguistic background, age, gender and other personal characteristics of an interpreter may be factors for consideration in selecting an appropriate interpreter for the child. See *Working with Unaccompanied Minors in the Community: a family-based approach*, UNHCR, 1994.

18. In the context of interviewing children in emergency situations, the International Social Service in *Unaccompanied Children in Emergencies*, J. Williamson, A. Moser, 1987, indicated that persons interviewing unaccompanied children need experience in working with children and an understanding of how refugee situations affect children.

19. The UNHCR document *Refugee Children—Guidelines on Protection and Care*, endnote 5 above, provides that "the refugee status determination must be made quickly ... Keeping children in limbo regarding their status, hence their security and their future, can be harmful to them." (Page 100.)

20. A child refugee claimant has a right to be present at his or her refugee proceedings. Section 69(2) of the *Immigration Act*, as enacted by R.S.C. 1985 (4th Supp.), c. 28, s.18, provides that:

69(2) Subject to subsections (3) and (3.1), proceedings before the Refugee Division shall be held in the presence of the person who is the subject of the proceedings, wherever practicable ...

21. Section 69.1(5)(a)(i) of the *Immigration Act*, as enacted by R.S.C. 1985 (4th Supp.), c. 28, s.18, provides that:

69.1(5) At the hearing into a person's claim to be a Convention refugee, the Refugee Division  
(a) shall give  
(i) the person a reasonable opportunity to present evidence, question witnesses and make representations ...

Further, Article 12 of the CRC provides that:

1. State Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the view of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceeding affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

22. In the case of a nine-year-old citizen of Russia (CRDD V93-02093, Brisson, Neuenfeldt, May 4, 1994), the CRDD panel agreed that given the young age of the claimant, she would not be asked to swear an oath or make a solemn affirma-