



Australian Refugee Rights Alliance

“No Compromise on Human Rights”

Draft Discussion Paper

**Devil in the Detail:
“Operationalising” the Conclusion
on Children at Risk**

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Comments invited

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Of the current 32.9 million people of concern to UNHCR in 2006, approximately 45 per cent (on the figures available) are children.¹ The focus of the key Conclusion at the 2007 UNHCR Executive Committee on children at risk is thus a welcome development and recognises the particularly vulnerable position occupied by children at every stage of the refugee experience.

However, the lived reality of many refugee children demonstrates the practical limitations of state approaches in this regard. Drawing on the well-documented accounts of refugee children's experiences in Australia, the USA, UK, Malaysia and Guinea Conakry, this paper highlights some of the complexities involved in establishing models of effective protection that are sensitive to the needs of children at risk, through an examination of: the impact of detention, deportation and deflection policies; age determinations and associated assessments of credibility; and the treatment of forced amputee children in camps. The issues have been selected not by way of suggested prioritisation of these areas over others, but rather, as illustrations designed to assist those working with and concerned about the needs of refugee children in implementing policies that can better meet some of the admirable aspirations of the draft Conclusion. This paper is also aimed at contributing to a more general discussion about how best to "operationalise" UNHCR ExCom Conclusions.

Detaining children

The draft Conclusion on Children at Risk makes special mention of the detention of children and calls on states to only detain children as a matter of last resort. There has been some legally esoteric discussion by some states that attempts to quarantine questions of detention away from the broader discourse about the adverse impact of such detention through emphasising the administrative, as opposed to punitive, nature of detention for immigration purposes. However, a purposive test should not be the marker of assessments of whether or not a policy of detention, especially one with a mandatory trigger, should be applied to refugee, internally displaced and stateless children. Rather, the starting point must be an acknowledgment that detention, through the mere fact that it deprives a child of his or her liberty when they are fleeing persecution, that is, at the point at which they are most vulnerable, regardless of its intention, is imprisonment and thus operates in a punitive manner.

The evidence of such operation rests in the wealth of anecdotes and scholarly analysis of the effects of detention on refugee children and includes:

1. Development and/or exacerbation of serious, prolonged mental health problems.²
2. Experiences of violence perpetrated against children and the witnessing of violence between and self-harm by adult detainees.³
3. Sexual harassment and assault when in contact with adult detainees and guards.⁴
4. Lack of appropriate educational and recreational facilities.
5. Even worse outcomes for unaccompanied children when compared with refugee children travelling in family or kinship groups. Due to their lack of immediate support networks, unaccompanied refugee children are at heightened risk in detention.⁵
6. Increased vulnerability for children with disabilities.⁶

Addressing these problems is not a question of simply providing "better services" for children in detention. While it is true that conditions of detention are a continuum and the provision of education, recreational areas and physical separation from some adults can help ameliorate the more severe effects of detention, it is the experience of detention itself that impacts most acutely and adversely on children at risk.

Given that neither the act of seeking asylum/humanitarian protection, nor being stateless are crimes, and in fact are statuses that are protected under international law, as well as the strong causal link between mental and physical health deterioration and detention, the default position adopted by states in relation to children of concern therefore must be one that militates against detention. Where this practice is implemented as a measure of last resort it must be for a short, defined period of time, not dependent on the fulfilment of a time-elastic external criterion (such as full completion of a refugee status determination process). In addition, decisions to avoid detaining refugee children should be matched by a fulfilment of other associated rights as outlined in the 1989 *Convention on the Rights of the Child*, most notably Articles 9, 10 and 18 that provide for the maintenance of the family unit.

The obligation to fulfil these rights should not encourage states to pursue detention policies based on a misconception that failure to apply a mandatory detention policy equally to adults and children would encourage parents to either send unaccompanied children to host countries as "pins", or to use their non-detained refugee children as the means for avoiding detention themselves. There is no evidence suggesting that detention of refugee children discourages families from fleeing peril or persecution. Nor is it legitimate to imprison children as a means of vicariously punishing their parents. Finally, detention of undocumented migrant children should not be justified on the ground that it is required at first instance to distinguish between refugee children and other undocumented migrants. In most states, imprisonment of children is reserved for those found guilty of serious criminal offences. To impose such a penalty as a preventative measure on

undocumented children, the overwhelming majority of which are likely to require state protection, is unduly harsh. Punishment of these children “to send a message” to others who might be considering migration also does not have a demonstrable impact on reducing the numbers of children who are forced to flee their homes. Instead, mandatory detention policies have a disproportionately negative impact on children who require the most significant degree of protection because they do not have a “choice” about their migration.⁷ Rather than expending resources on detention regimes, states should focus on developing rapid and rigorous status determination processes that facilitate protection, resettlement and repatriation/reintegration in concert with the child’s best interests. In addition, because detention itself places children at risk, refusing to detain refugee children is also an important way in which states can avoid augmenting the numbers of children at risk.

Identifying children: “screening in”, age determinations and credibility issues

While the draft Conclusion focuses on the identification of factors that may place children at risk and the appropriate response, there is little emphasis on the identification of children as children per se, and thus the arguably more fundamental question of how states’ immigration policies screen children in or out of asylum and protection regimes at first instance.

Practices such as requiring children to articulate the precise nature of their asylum claim in initial interviews by saying the appropriate “magic words” that will engage a state’s protection obligations;⁸ making children complete complex documentation with limited assistance; or accepting prima facie that adults accompanying children are playing positive guardianship roles,⁹ work against effective triggering of states’ responsibilities in relation children at risk and allow vulnerable children to slip through the cracks.

Further, default distrust of assertions of child status by children who do not “appear”, in the visual assessment of border control/immigration staff, to be below 18 years of age, places children who fail this arbitrary “test” in the difficult position of having to prove not only their protection needs under the *Refugee Convention* or associated instruments, but also their identity as children. In this context, the concern that young refugee adults pose as children to access preferential treatment reflects exceptional practice rather than the more common experience of refugee children being incorrectly treated as adults.¹⁰

In addition, where age is disputed, medical procedures used to determine age have been found to be unnecessarily invasive and have very large margins of error. In critiquing the use of wrist or dental x-rays in such determinations, the Royal College of Paediatricians and Child Health (UK) argues, “an age determination is extremely difficult to do with certainty, and no single approach to this can be relied on. Moreover, for young people aged 15–18, it is even less possible to be certain about age.... Age determination is an inexact science and the margin of error can sometimes be as much as 5 years either side.... Estimates of a child’s physical age from his or her dental development are [only] accurate to within + or – 2 years for 95% of the population.”¹¹

The most problematic aspect of such practices is the impact it has on a child’s credibility assessment which is often the determining factor in accepting or rejecting children’s protection applications. Credibility assessments must be made in a manner that is sensitive to the reality of children’s experiences both *as children* and as children requiring protection. To that end, an understanding of the differential importance of birth days for children from certain cultural groups, as well as their fluid language acquisition that is likely to be influenced by contact with speakers from different dialects, rudimentary knowledge of political events, relationship with and responses to authority, and responses to trauma and torture, are just some of the considerations that can help establish a more effective approach to determining the veracity of children’s protection applications. Ultimately there needs to be a recognition that protection application processes developed to deal with adult claims cannot be simply massaged to fit child applicants; processes applying to children must instead begin with rights and experiences of children as central and fundamental tenets.

Amputee children in refugee camps: protection and resettlement

The draft Conclusion on Children at Risk articulates a range of factors that can contribute to and/or exacerbate children’s vulnerability. These factors mirror the risks noted by Barbara Harrell-Bond as confronting children in refugee camps stemming from the particular nature of that environment, including: a sub-nutritional diet, statelessness (for children born in refugee camps), lack of physical safety, detrimental impacts on family life, limited access to education, and long-term adverse psychological impacts.¹² The negative effects of exposure to these risks can be compounded by individual risk factors that can also operate in a cumulative manner, such as separation from family and adult protectors, protracted displacement, disabilities, and trauma resulting from violence and/or torture.

For forced amputee children in camps, these environmental and individual risk facts operate in a cumulative manner, placing them at greater risk of abuse and exploitation within refugee camps, and posing serious challenges to states that express a commitment to protecting vulnerable children. In the first instance, amputee children are not only victims of deplorable physical torture, they also experience mental anguish and threats to their very identity through the experience of severe

violence at a young age. The wider, longer-term effects of forced amputation thus need to be appropriately managed by host and resettlement states.

In addition, forced amputee children are children with disabilities who not only require appropriate care within camps but also real resettlement options. Resettlement programmes that discriminate against amputee (and other disabled) children on the grounds that such children represent too large a health care burden for resettlement states both apply an incorrect test to assessments of resettlement eligibility and misunderstand the nature of the protection obligations of state parties under the *Refugee Convention*. Not only does such discrimination fail to acknowledge the fact that disabled children can and do make positive contributions to society, but it can lead to amputee children being separated from able-bodied family members who are accepted for resettlement.

Similar problems are confronted by amputee children who are attempting to reintegrate upon repatriation. These children need to be provided with sensitive and useful assistance that recognises their special vulnerability and actively involves them in decision-making processes about their return.

Conclusion

The draft Conclusion on Children at Risk provides important guidance to states as to the key considerations that should inform the development of protection regimes that accommodate the special needs of vulnerable children. However, the above discussion illustrates, the real value of those aspirational goals lies in the extent to which states are able to translate them into policy initiatives that create a child-centred approach to securing effective protection outcomes.

Recommendations

1. In developing policies on immigration detention:
 - (a) States should adopt a presumption against the detention of children for immigration purposes;
 - (b) Detention of children must be a measure of last resort and for the shortest appropriate period of time with the best interests of the child as *the* primary consideration;
 - (c) An independent body should assess whether there is a need to detain children for immigration purposes within 48 hours of any initial detention (for example for the purposes of health, identity or security checks) with periodic review by a court of the legality of continuing detention of children for immigration purposes;
 - (d) The preservation of family unity must be a major consideration;
 - (e) Special protection and assistance must be provided for unaccompanied children, children with disabilities and children at risk of gender-related violence; and
 - (f) Minimum standards of treatment for children in immigration detention should be codified in state legislation.
2. An independent guardian should be appointed for unaccompanied children and, where the best interests of the child dictates, for all other children at risk.
3. Where a child identifies her- or himself as a child, in the absence of conclusive counter-evidence obtained from more than one source, this self-identification should be presumed accurate and the child treated as such. Disputation over a child's age should not be used as a contributor to adverse credibility findings during refugee status determinations.
4. States should prioritise the needs of refugee, internally displaced and stateless children with disabilities, particularly forced amputees, both within refugee camps and in resettlement programmes. In recognition of the special vulnerability of these children, states with resettlement quotas should allocate a set portion of that quota specifically for disabled refugee children.

¹ UNHCR, *2006 Global Trends: Refugees, Asylum-seekers, Returnees, Internally Displaced and Stateless Persons* (UNHCR, online: <http://www.unhcr.org/statistics/STATISTICS/4676a71d4.pdf>, 2007), pg 9. Note that the age breakdown of individuals of concern to UNHCR is only available for approximately one quarter of the total population.

² Zachery Steel (2003) "The Politics of Exclusion and Denial: The Mental Health Costs of Australia's Refugee Policy" Paper presented at the 38th Congress of Royal Australian and New Zealand College of Psychiatrists, Hobart.. See also, Human Rights and Equal Opportunity Commission (HREOC) (2004) *A Last Resort? National Inquiry into Children in Immigration Detention*. HREOC, Sydney.

³ Anna Samson (2007) *Refugee Children in Detention in Malaysia*, International Detention Coalition, forthcoming.

⁴ HREOC, *ibid*, p 12

⁵ Jacqueline Bhaba and Mary Crock (2007) *Seeking Asylum Alone - A Comparative Study of Unaccompanied and Separated Children and Refugee Protection in Australia, the UK and the US*, Federation Press, Sydney

⁶ HREOC, *ibid.*, p 15

⁷ It is arguable that mandatory detention for undocumented children operates in a discriminatory fashion that breaches Article 2(1) of the *Convention on the Rights of the Child 1989*.

⁸ Jacqueline Bhaba and Mary Crock (2007) *ibid*, p 81.

⁹ Jacqueline Bhaba and Mary Crock (2007) *ibid*, p 79.

¹⁰ Jacqueline Bhaba and Mary Crock (2007) *ibid*, p 83.

¹¹ *The Health of Refugee Children : Guidelines for Paediatricians*. (1999). Para. 5.6.3., cited in *Seeking Asylum Alone: Comparative Report*, p 85.

¹² (2000) "Are Refugee Camps Good for Children?" *New Issues in Refugee Research, Working Paper No. 29*. [online]