LEGAL PROTECTION AND STATUS OF THE CHILD OF IMMIGRANTS, AND THE CHILD IMMIGRANT, IN CANADA; WITH COMPARISONS TO THE UNITED KINGDOM AND THE UNITED STATES OF AMERICA

By Nadine Sarah Silverman

Submitted to the Faculty of Graduate Studies in Partial Fulfillment of the Requirements for the degree of

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TABLE OF CONTENTS

INTRODUCTION

> Immigration made the last century a success for Canada.
>
> And when our grandchildren's children gather here in another 100 years, I am confident those words will still ring true.
>
> This is a country that owes so much to immigrants and refugees. It is a country that continues to thrive and prosper because of their hard work. With our birthrate, an aging work force and an increasingly global marketplace, immigration is essential to maintaining Canada's place as a leader in the economy of the 21st century.

-Remarks by the Honourable Elinor Caplan, Minister of Citizenship and Immigration, News Conference on Year 2000 Immigration Levels, 1 November 1999

It is widely acknowledged by the government that this country needs immigrants. Based on the concept that countries have an inherent right to control who may enter and remain in their country, there are rules in place. We have immigration legislation to review the process by which people enter, remain and eventually become permanent residents, and the legislation to deal with removals of persons. This thesis examines the impact of immigration legislation upon both children of immigrants and, more particularly on citizen children of immigrants.

In 1998, the decision in *Francis (Litigation Guardian) v. Minister of Citizenship and Immigration*[1] from the Ontario General Division was released. The court exercised its *parens patriae* jurisdiction by ordering a stay of removal order, reasoning that removing the mother and her son from the Canadian children would violate their Section 7 *Charter* rights. Shortly after the decision was released, then Minister of Immigration, Lucienne Robillard, made comments about the possibility of removing birthright

[1] 160 D.L.R. (4th) 557 (Ont. Gen. Div.)

citizenship in Canada.[2] The *Francis* case was interesting on its own; together with Former Minister Robillard's comments, my interest was sparked and so this thesis was born.

In order to appreciate the role of children in the immigration process and whatever rights they may have, I begin by providing a general background on children's rights in Chapter 1. The chapter provides some of the discussion and debate regarding the nature of childhood, rights based on the unique capabilities of the child, the debate between the concept of protecting the child while providing rights and providing the full spectrum of rights. I also review some of the international instruments that exist to provide rights for children.

One element of protection of people in international law is the existence of nationality. In Chapter 2, I examine how nationality has been defined, the tension between what could be termed *de facto* nationality with legal or *de jure* nationality. I also examine how the European Court of Human Rights has viewed nationality in cases concerning deportation orders for long time residents of the countries in question. In this Chapter, I also examine two cases of young boys in the United States, including the matter of Elian Gonzalez, and the role nationality played in their situations. I then turn to some of the nationality issues related to Hong Kong in the period before it became a Special Administrative Region ("SAR") of China.

The opposite condition of nationality is statelessness, which is discussed in Chapter 3 in addition to the issues related to refugees. I examine the issue of family

[2] There is reference to this issue made by N. Sabourin, "The Relevance of the European Convention on Nationality for Non-European States" in "1st European Conference on Nationality, Trends and Development in National and International Law on Nationality" CONF/NAT (99) PRO 1 PROCEEDINGS CONFNAT, Strasbourg, 3 February 2000.

separation in refugee cases where children arrive without any family members and children of refugees.

In Chapter 4 I take a closer look at the protections for children that exist in international law, in particular the *Convention on the Rights of the Child.* I then review how children have been considered in immigration (non-refugee) cases in Canada. The seminal decision of *Baker v. Canada* (1999) and how it has been interpreted is examined. In this chapter, I analyse the role of the provincial superior courts in immigration proceedings and the application of the principle of *parens patriae* in immigration matters.

The situations in the United Kingdom and the United States are discussed in Chapter 5. The change in nationality laws and the movement away from birthright citizenship is reviewed. I look at how policy plays a role in the interpretation of immigration cases in the United Kingdom involving deportation orders where there are British citizen children. Likewise, for the United States, I consider the issue of removal orders when there are American citizen children of immigrants.

My conclusion and recommendations are included in Chapter 6, where I advocate providing standing to children in immigration proceedings, when the parents face removal. I also suggest a system by which immigrants would have the option to apply for permanent residency from within Canada, as opposed to making that the exceptional circumstance.

1. CHAPTER ONE-CHILDREN'S RIGHTS

1.1 DEFINING THE CHILD

> The law as it relates to children has traditionally considered them to be somehow inferior human beings—not yet adults—and, therefore, not yet capable of expressing views of sufficient maturity and understanding to be considered legally relevant. Although genuinely concerned with promoting children's best interest, whether making custody determinations in the event of a family breakup, or protecting children from neglect and abuse, the law has tended to go about its business without the direct input of the children whose fate it is deciding. But if we are to achieve true and complete justice, we must recognize that children are an indispensable part of the process, who have the right to speak, and to be listened to with respect and understanding.
>
> - Justice Claire L'Heureux-Dubé[1]

In order to appreciate the question of the status of the child in immigration proceedings, it is imperative to understand the underpinnings of children's rights. I begin this voyage by first examining the concept of "child" and "childhood" in order to consider the child's entitlement to rights in the immigration arena.[2]

The definition of "child" has undergone transitions and phases throughout history. To this day, there is still no consensus regarding who is a child or what is a child. There are indicia of childhood, for example, the extent of responsibility given to the child.

Historically, children were not perceived as independent or autonomous beings but objects subject to parental jurisdiction or adult will. Minow (1986) believes that

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[1] Claire L'Heuruex-Dubé, "The Child and the Family Breakup/ The Child in Need of Protection" in Anne-Marie Trahan, ed., *A New Vision for a Non-Violent Word: Justice for Each Child* (Ottawa: Les Éditions Yvon Blais Inc., 1999) 357 at 358.

[2] A complete analysis of children's rights is beyond the scope of this work. For further reading on children's rights see also Michael Freeman, *The Rights and Wrongs of Children* (London: Frances Pinter (Publishers) 1983); Laura M. Purdy, *In their Best Interests? The Case Against Equal Rights for Children,* (Ithaca, N.Y.: Cornell University Press, 1992); A. McGillivray, "Why Children Do Have Equal Rights: in Reply to Laura Purdy," (1994) 2 *International Journal of Children's Rights* 243-258.

children are not autonomous persons but dependants entrusted to adults.[3] Since children are unable to exert or control their destiny, the hallmark of childhood is the nature of powerlessness. "While precise definition is evidently problematic, it seems apparent that childhood is a condition or circumstance characterised by powerlessness."[4]

Another hallmark of childhood is demarcation by age. However, this marker is complicated by the lack of uniformity around the world and within individual states. In Canada, under federal law there is no general age of majority for different matters and ages of majority vary among provinces.[5] Eighteen year olds are entitled to vote in federal elections. Eligibility to obtain a driver's licence occurs between sixteen and eighteen years of age across the country. Child witnesses under fourteen years of age may give evidence under the *Canada Evidence Act*.[6] There are special regulations regarding employment of persons less than seventeen years of age. Under the Federal *Divorce Act*,[7] a child of the marriage is one under the age of majority or still dependent upon the parents. Age of majority is defined as being the age of majority of the province in which one lives or if outside Canada, at eighteen. And under provincial legislation dealing with family law, children are often defined as persons under eighteen years of age or still in full time attendance at school. Death and disability benefits to children from adult or deceased contributors are given to children eighteen years of age or less, or between eighteen and twenty-five, if in full time attendance in school. It is a criminal offence to

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[3] Martha Minow, "Rights for the Next Generation: A Feminist Approach" (1986) 9 *Harvard Women's Law Journal* 1 at 18.
[4] Bob Franklin, "The Case for Children's Rights: a Progress Report" in Bob Franklin, ed., *The Handbook of Children's Rights, Comparative Policy and Practice,* (London: Routledge, 1995) at 8-9.
[5] Initial reports of States parties due in 1994: Canada. 28/07/94. CRC/C/11/Add.3 (State Party Report) online: <http://www.unhchr.ch/tbs/doc.nsf> (accessed 4 February 2001) at paragraphs 40-52.
[6] *The Canada Evidence Act,* R.S. 1985, c. C-5. In those circumstances, the parties assess whether or not the child understands the nature of an oath or affirmation and are able to communicate evidence.
[7] *The Divorce Act*, R.S. 1985, c. 3 (2nd Supp.)

have sexual relations with someone less than fourteen years of age unless the younger partner is at least twelve and the age difference is less than two years and where the older youth is not in a position of trust or authority. In order to be part of Canada's National Defence, a person must be at least seventeen years of age or, if under seventeen years of age, a person may join with parental consent for certain forces. Tobacco had been a prohibited sale to persons under sixteen years but this has been raised to eighteen years of age. There have been changes to the age demarcations in the new *Immigration and Refugee Protection Act.*[8] Here a young person can sponsor other family members at eighteen years, down from nineteen years of age.[9] On the other hand, the new Regulations extend the definition of "dependent child" from under nineteen years of age to under twenty-two years of age.[10] Under the *Youth Criminal Justice Act*[11] a child is a person who appears to be under the age of twelve years. Children cannot be charged with an offence; however, a young person, defined as someone between twelve and eighteen years of age, can be charged with an offence.[12] When it comes to doing bad things, adults are happy to consider "children" as "young persons" and to treat them more like adults than like children. Roche suggests that adults need to stop associating children as "trouble" or "being in trouble," but rather to pay attention to what children can offer in the present, based on their capabilities.[13]

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[8] *The Immigration and Refugee Protection Act,* 2001, C. 27 ["*IRPA*"].
[9] Immigration and Refugee Protection Regulations, SOR 2002-227, s. 130(1)
[10] *Ibid.*, s. 2. See appendix "G". The new definition recognises that while young adults may enter into their own family relationships at a younger age, there are those who remain with their parents for longer periods of time.
[11] *Youth Criminal Justice Act*, 2002, c. 1
[12] *Ibid.,* s. 2(1) "young person" means a person who is or, in the absence of evidence to the contrary, appears to be twelve years old or older, but less than eighteen years old and, if the context requires, includes any person who is charged under this Act with having committed an offence while he or she was a young person or who is found guilty of an offence under this Act.
[13] Jeremy Roche, "Children: Rights, Participation and Citizenship"(1999) 6(4) *Childhood* 475-493 at 486.

Clearly, there is a wide spectrum in Canada for identifying children based on age. Responsibility for crime begins at the age of twelve. But to protect the child's health the adult world has decided that the child cannot purchase cigarettes until the age of eighteen. The inability to vote until the age of eighteen appears to reflect beliefs regarding capacity. This points to a presumption that children do not have full capacity to exercise rational choice.[14] On the other hand, in some circumstances, age demarcations regarding when to view children as adults are based on policy rather than on beliefs about capacity. For example, in terms of the child in divorce and immigration situations, the law considers those who continue education to the post-secondary level as dependants. This does not necessarily represent an opinion about the child's capabilities or competency, but rather a policy decision to support higher levels of education that recognise the child's dependency on parents during pursuit of that education. If a young person commits a criminal offence, there is a policy decision that there ought to be punishment or rehabilitation on a scale different from adults.[15] A policy decision has been made that the child ought to bear some responsibility and that society has a responsibility to assist the child.

Does the lack of consensus impact upon a child's rights? Does this indicate that the system that governs children remains ambiguous about how to consider children? Can we understand from these differences how Canadian society perceives children's capacities?

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[14] Shulamit Almog & Ariel L. Bendor "The UN Convention in the Rights of the Child meets the American Constitution: Towards a supreme law of the world" (2004) II *The International Journal of Children's Rights* 273-289 at 278.

[15] With young offenders and the justice system in general, there is the tension between public expectations of punishment and the question of how best to address the situation of young offenders. Roche specifically recommends that in order to give effect to children's rights, there is a need to "move away from problematizing children". Roche, *supra* note 13 at 486.

1.2 DEVELOPMENT OF CONCEPTUALIZATION OF CHILDHOOD-HISTORICAL AND PHILOSOPHICAL

Childhood, and how it has been treated by the legal and social world, has largely followed four basic concepts. Thomlison and Foote (1987) state that there have been four principles or concepts directing the development of child related law in Canada.[16] From the Roman law, there is *patria potestas*, the power of the father over the family and often the extended family.[17] The second development is the concept of *parens patriae*, where the king or sovereign extended power or acted for children and those without capacity. This concept saw the state as the protector of the child's needs. The third development during the children's rights movement, and continuing today, is the concept of the "best interests of the child," based upon an adult's determining what will take place for the child. Developing at the same time has been the fourth concept of the child as a rights holder or as a person before the law. The child as rights holder has led to creation of international instruments recognising these rights.

a) *Patria Potestas*

> *Patria potestas*: The power of the father which continues to be recognized in today's society along with the integrity and power of the family, so that society is reluctant to interfere in family matters except in extraordinary circumstances.[18]

The concept of *parens patriae*, discussed below, originated in Roman law, with the origins beginning with *pater familias,* the "head of the household" in which the father held power over the family.[19] The power of the father or the *pater familias* is *patria*

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[16] Ray J. Thomlison and Catherine E. Foote, "Children and the Law in Canada: The Shifting Balance of Children's, Parents' and the State's Rights" (1987) 18 *Journal of Comparative Family Studies*, 231-245.
[17] "Legislation Related to the Needs of Children" (1979), 6 *R.F.L.* (2d) 1 (From the report of the Canadian Council on Children and Youth, "Admittance Restricted: The Child as Citizen in Canada". The report is the result of a three-year study by a task force of Canadian experts in child-related matters.), online: westlawecarswell.
[18] *Ibid.*
[19] McGillivray, *infra* note 22.

potestas, paternal power. This power extended to all in the *familias*, the extended family, including all members of the household, servants and relatives. In response or in order to seek relief from the father, family members could turn to *praetors*, akin to magistrates for family matters, to protect them from their fathers. Eventually, the Roman government was involved by punishing fathers for failure to support children. The government further limited *patria potestas* by limiting physical punishment or discipline of children. This can be evidence of a movement away from the father having power over the family to the state protecting family members.[20] However, it is a principle that remains a basic concept that the father (or parents) have control over the child and that the outside world should not interfere with the nuclear family.

b) *Parens Patriae*

> *Parens patriae:* The state as parent, which is the concept invoked today as the authority of certain courts to make decisions on behalf of those who cannot act for themselves.[21]

The term *parens patriae* comes from the Roman emperor's title *pater patriae*, the father of the state. The principle of *parens patriae,* gave the court authority to act on behalf of the interests of those who did not have capacity: that is the mentally unfit and children. English common law may have adopted the concept of *parens patriae* from Roman law, although that is not certain.[22] Under English medieval law, the sovereign and the law had a duty to protect people, including children. The history and application of *parens patriae* jurisdiction was discussed by La Forest J. of the Supreme Court of

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[20] *Ibid.*
[21] "Legislation Related to the Needs of Children", *supra* note 17.
[22] Anne McGillivray, "Childhood in the Shadow of *Parens Patriae*" in Sally Ross, Hillel Goelman and Sheila Marshall, eds., *Multiple Lenses, Multiple Images: Perspectives on the Child Across Time, Space and Disciplines,* (University of Toronto Press [in publication]).

Canada in *E. (Mrs.) v. Eve* (1986).[23] It was defined as the duty of the king to care for those who could not care for themselves. Lord Eldon stated in *Wellesley v. Beaufort* (1827)[24]

> It belongs to the King, as *parens patriae,* having the care of those who are not able to take care of themselves, and is founded on the obvious necessity that the law should place somewhere the care of individuals who cannot take care of themselves, particularly in cases where it is clear that some care should be thrown round them.

The House of Lords indicated that *parens patriae* jurisdiction had been adopted from the court's jurisdiction over mental incompetents. It was considered broad and would extend "as far as is necessary for protection and education."[25]

As noted by Justice La Forest in *Eve*, it is not clear when the Crown's *parens patriae* jurisdiction over mental incompetents began; but it is thought to have occurred as a result of feudal lords taking possession of the land of tenants unable to perform their feudal duties.[26] There are indications that it was a convenient method for authorities to increase revenues by taking over the estates of minors.[27] Some suggest that this jurisdiction was used to remove poor children from the care of their parents in order to ensure that these children were raised morally socialised, so that the children would be of greater assistance to the economy.[28]

The jurisdiction extended to matters of wardship of children. In England, the equity court of Chancery maintained the jurisdiction. Canada adopted a number of the

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[23] *E. (Mrs.) v. Eve* [1986] 2 S.C.R. 388 (Q.L.); also *Winnipeg Child and Family Services (Northwest Area) v. D.F.G.* [1997] 3 S.C.R. 925 (Q.L.)
[24] *Wellesley* v. *Duke of Beaufort* [1827] 38 ER 236.
[25] *Wellesley v. Wellesley* (1828), 2 Bli. N.S. 124, 4 E.R. 1078 at 2 Bli. At 136, 4 E.R. at 1083.
[26] *Eve, supra* note 23 at 407 referring to H. Theobald, *The Law Relating to Lunacy* (1924).
[27] McGillivray, *Parens Patriae*, *supra* note 22.
[28] Brend Walter, Janine Alison Isenegger, Nicholas Bala, "'Best Interests' in Child Protection Proceedings: Implications and Alternatives" (1995) 12 *Can. J. Fam. L.* 367-439 at 369-370.

jurisdictions of the British courts, including its superior courts with *parens patriae* jurisdiction.[29]

c) Best Interests of the Child

The third principle, best interests of the child, implies that the welfare of the child is the paramount consideration.[30] It is a phrase invoked in custody determinations both from divorce or child protection proceedings. It is a concept that is protective of the child, and although there may be consideration of the views of the child, the child is not always recognised as a player. The positive aspect is that the adults must stop to consider the needs of the child.

d) Child as Person before the Law - Rights Holder

The dramatic shift in the children's movement came with the fourth principle of the "child as a person before the law," recognising the child as a separate person entitled to rights.[31] Almog and Bendor (2004) point to the underlying tension between the discussion of best interests of the child, a concept that implies protecting the child, and of the child as a person with equal rights, implying equality with adults.[32] The section below discusses how children have been considered over the years, both historically and philosophically. This discussion provides the background to the development of the child as rights holder.

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[29] McGillivray, *Parens Patriae*, *supra* note 22. Under *The Judicature Act* (1873) the superior courts were granted equitable jurisdiction. Equity is not limited to the provincial superior courts. Under s. 3 of *The Federal Courts Act*, it is a court of equity.
[30] Thomlison and Foote, *supra* note 16 at 234.
[31] *Ibid.*
[32] Almog & Bendor, *supra* note 14 at 277.

e) Philosophical and Historical Concepts Regarding Children and Development of Children's Rights

The road to the concept of the best interests of the child and the child as rights holder is quite recent, so it is necessary to consider the philosophical and historical developments of concepts regarding children's rights and children. The philosophers' approach is that the capacity of the child is pivotal to the question of rights. According to Thomas Hobbes (1660), children do not have natural rights. Children lack the ability to enter into the social contract and children are to serve the father.[33] Locke (1698) discussed the rights of children as accruing upon gaining capacity,

> Children, I confess are not born in this full state of equality, though they are born to it. Their parents have a sort of rule and jurisdiction over them when they come into the world and for some time after, but 'tis but a temporary one. The bonds of this subjection are like the swaddling clothes they are wrapt up in, and supported by in the weakness of their infancy. Age and reason as they grow up, loosen them till at length they drop quite off, and leave a man at his own free disposal.[34]

Locke believed that the child ought to remain under parental care until capable of caring for him or herself.[35]

> *First* then, *paternal* or *parental power* is nothing but that, which parents have over their children, to govern them for the children's good, till they come to the use of reason, or a state of knowledge, wherein they may be supposed capable to understand that rule, whether it be the law of nature, or the municipal law of their country, they are to govern themselves by: capable, I say, to know it, as well as several others, who live, as freemen, under the law.[36]

Locke made clear that, upon the child developing the capability to reason and conduct his own affairs, the parent was no longer entitled to exercise power over the

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[33] Victor L. Warsfold, "A Philosophical Justification for Children's Rights." (1974) Vo. 44, No. 1 *Harv. Educ. Review*, at 142-157, at 29 in reprint at 30-31, quoting *Leviathan*, (Molesworth ed.) vo. 2 (London: J. Bohn, 1839-45) at 257.

[34] John Locke, *Second Treatise of Government,* ed. by Richard Cox (Arlington Heights, Illinois: Harlan Davidson Inc., 1982) at 33, para. 55.

[35] Warsfold, *supra* note 33 at 31 quoting Locke's *The Second Treatise of Government,* (New York: Bobbs Merrill, 1952), Sect. 60, at 34.

child.[37] Locke's principles of individualism are based upon self-ownership; every person has the right to own his person.[38] However, self-ownership was not discussed as it relates to children. Locke's approach did not answer the question, who owns children? David Archard (1993) discussed the question of whether parents own their children.[39] His conclusion was that it is necessary to determine whether children are self-determining moral agents. Therefore children are not owned by their parents and the control parents have over the child is not synonymous with ownership of property.

The issue of capacity became an important element of the conversation. To John Stuart Mill (1859), principles of liberty did not apply to children, because there was a need to protect children from injury from themselves and others.[40] Children were those in a state where they required being taken care of by others and required being protected against themselves or from outside injury.[41]

There is debate about children not participating fully in society due to lack of capacity; while there is also debate is about childhood as a specific phase of life. What makes childhood different? Is there something different that takes place with children, so that they ought to be treated differently during that stage of life? One debate is whether childhood itself is a social construct. There are theories that the concept of childhood is a relatively recent or modern manifestation. Rousseau's *Émile* (1762) broke ground by perceiving the child as an innocent, as opposed to the theory that children are born evil. *Émile* changed education by allowing parents to allow children to learn from direct

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[36] Locke, *supra* note 34 at paragraph 170, at 105-106.
[37] *Ibid.*, see also paragraphs 173-4, at 107-108.
[38] David Archard, "Do Parents Own Their Children?" (1993) 1 *The International Journal of Children's Rights* at 293-301 at 295.
[39] *Ibid.*
[40] Warsfold, *supra* note 33 at 32, referring to John Stuart Mill, *On Liberty* (New York: Washington Square Press, 1963) at 207.

experience. The English upper class families that had begun to question the premise of children as sinful and the focus on strict training eagerly greeted the concept of the child as someone special and full of innocence.[42]

Philippe Ariès in *Centuries of Childhood* (1963) posited that childhood is a recent notion.[43] By examining art and literature from past centuries Ariès perceived that there was a period where children were considered miniature adults. Over time there were changes in education of children, noted by the development of schools that taught children separately from adults. Ariès believed that the concept of the modern family began at the same time as the development of school. With the development of education by the church and the creation of separate schools for adults and children, this helped establish childhood as a separate time period in one's life.

Ariès' theory has been criticised, debated and discussed to the extent that theorists refer to "the Ariès discussion".[44] The fact that his analysis was predominantly based upon paintings, literature and toys has been criticised. Another criticism is that Ariès' theory reflected the upper classes and not children in different socio-economic classes.[45] Lawrence Stone in *The Family, Sex and Marriage in England 1500-1800* (1977) used a wider variety of sources than Ariès did. His conclusions were that the treatment of children ranged from repressive in the sixteenth and nineteenth centuries, when the child was subordinate to the parents, to permissive in the seventeenth and twentieth centuries,

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[41] John Stuart Mill, *On Liberty* (New York: Appleton-Century-Crofts, Inc., 1947) at 10 at 362.
[42] Anne McGillivray, "Governing Childhood" in McGillivray, ed. *Governing Childhood*, (Aldershot, England: Dartmouth Publishing Company Limited, 1997) 1 at 5-6.
[43] Philippe Ariès, *Centuries of Childhood*, trans. Robert Baldick (London: Jonathan Cape Ltd., 1973)
[44] Philip E. Veerman, *The Rights of the Child and the Changing Image of Childhood*, (Dordrecht, The Netherlands: Martinus Nijhoff Publishers, 1992) at 4.
[45] *Ibid.*, at 5.

when there was focus on individualism and individual happiness.[46] Linda Pollock's research (1987) discounted the foundation of Ariès' theory that infant mortality and family size were reasons behind the lack of concern or focus on the child in the early period.[47] Her research showed that in fact infant mortality increased between 1560 and 1750. Pollock's theory is that the emergence of childhood came from an emphasis on child centred family reorganisation.

Another concept is that society has chosen through social institutions to govern the child and that society equates the success of child behaviour with the success of the nation. McGillivray drew together a number of works that consider how childhood has been considered by governments and society.[48] Foucault (1975) believed that childhood is specifically controlled by society in order to create what are considered normal people. Jacques Donzelot in *The Policing of Families* (1979) suggested that the family became accountable for the creation of the child as citizen. Nikolas Rose in *Governing the Soul* (1989) noted the connection between good of the child and the good of the nation. Erik Erikson in *Childhood and Society* (1950, 1963) suggested that countries' perceptions of childhood reflect their collective identity. Marian Valverde in *The Age of Light, Soap and Water* (1991) examined the period of Canadian society from the 1880s to the First World War and the social purity vision of childhood within Canada. Part of that vision was for the creation of a strong Canadian race. These writings exhibited the existing tension between the shaping of a country and the development of its children as future citizens.

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[46] McGillivray, *Governing Childhood, supra* note 42 at 6-7.
[47] *Ibid.*, at 7.
[48] *Ibid.*, at 3.

The situation for children in Canada reflected these developments. In colonial Canada, children were considered objects of parental authority.[49] Child immigrants were considered a source of cheap labour during the early twentieth century and subjected to lack of controls over their conditions when brought to Canada from Britain.[50] From the period of Confederation until the mid-twentieth century, children were perceived as a separate and special class of "immature persons, vulnerable and in need of state paternalism and state protection."[51] During this time, the principle of *parens patriae* justified the need for state intervention and influenced child protection legislation.[52]

Following the Second World War, there was a shift in approach and to the perception that children are subjects with rights.[53] The 1960s and 1970s brought the Civil Rights movement and the Women's Movement. Around this time, attention turned to the growth of the children's liberation movement.[54] One major internal debate within the children's movement was between the liberationists and the protectionists.[55] Child liberationists argued in favour of providing children all adult rights and the right to self-determination.[56] Farson (1974) argued that these rights included the right to work, the right to vote, the right to have sexual relations and freedom from compulsory education.[57]

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[49] Katherine Covell and R. Brian Howe, *The Challenge of Children's Rights for Canada* (Waterloo, Ontario: Wilfred Laurier Press, 2001) at 16-17.
[50] Ninette Kelley and Michael Trebilcock, *The Making of the Mosaic: A History of Canadian Immigration Policy* (Toronto: University of Toronto Press, 1998), at 192-194, 223-4.
[51] Covell and Howe, *supra* note 49 at 17. See also Michael Freeman, *The Moral Status of Children, Essays on the Right of the Child* (The Hague, The Netherlands: Kluwer Law International, 1997).
[52] Thomlison and Foote, *supra* note 16 at 233; Covell and Howe, *supra* note 49.
[53] Covell and Howe, *supra* note 49 at 16 and 19.
[54] Freeman, *Moral Status*, *supra* note 51 at 51.
[55] Covell and Howe, *supra* note 49 at 21.
[56] Richard Farson, *Birthrights*, (New York: MacMillan Publishing Co., Inc. 1974); Stuart N. Hart, "From Property to Person, Historical Perspective on Children's Rights" (January 1991) *American Psychologist* at 53-65 at 56 referring to Farson and Holt (1974).
[57] Farson, *supra* note 56.

In contrast, the child protectionists believed in children's rights but maintained the need for protection based upon the level of capacity or maturity of the child.

The element of protection has been a strong element in children's rights movements, as justification for the need to set rules and exert limited power over children.[58] Feminist theory regarding citizenship has questioned the assumption that a person must be independent and totally autonomous to have citizenship rights.[59] This is the approach accepted by Freeman (1997). He believes in recognising a child's rights while remembering that children are different and require protection.

> We have to treat them as persons entitled to equal concern and respect and entitled to have both their present autonomy recognised and their capacity for future autonomy safeguarded. And this is to recognise that children, particularly younger children need nurture, care and protection. Children must not as Hafen (1976) put it, be 'abandoned' to their rights.[60]

Freeman supports a form of justified or limited paternalism, since children's rights require that there be both protection of children and recognition of children's autonomy.[61] Freeman finds direction from John Rawls' *Theory of Justice* (1971), of distributive justice[62] and the social contract model. The theory asks what persons in the 'original position', unaware of their own identity or interests, would choose as the structure of the society in which they will live. The 'original position' is with everyone having equal liberty and opportunity, combined with people who have economic or social inequalities, so that there are benefits to be gained for all.[63] This social contract model allows for limited paternalism and it recognises the limited capacities of the child while maintaining

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[58] Freeman, *Moral Status, supra* note 51.
[59] *Ibid.*, at 73, referring to Carol Gilligan and Marilyn Friedman.
[60] *Ibid.*, at 37.
[61] *Ibid.*, at 95.
[62] *Ibid.*, referring to John Rawls, *A Theory of Justice*, (Cambridge, Mass.: Harvard University Press, 1 971) See also John Rawls, *A Theory of Justice*, rev. ed. (Cambridge, Mass.: The Belknap Press of Harvard University Press, 1999)

equality and autonomy as the goals. Freeman's theory is that the parent or guardian would ask:

> [W]hat sort of action or conduct would we wish, as children, to be shielded against on the assumption that we would want to mature to a rationally autonomous adulthood and be capable of deciding on our own system of ends as free and rational beings?[64]

This concept he calls 'future-oriented consent' and the test is "can the restrictions be justified in terms that the child would eventually come to appreciate? Looking back, would the child appreciate and accept the reason for the restriction imposed upon him or her, given what he or she now knows as rationally autonomous adult?"[65] On the other hand, Roche (1999) is critical of the language of "futures", recommending that adults give "proper regard to the contributions and insights of children in the here and now."[66]

Underlying the discussion of children's rights is the importance of a child's ability to make a claim. Freeman draws on Ronald Dworkin's (1978) belief that rights provide human dignity and political equality, which provide people with the right to equal concern and respect.[67] It is the element of the right to make claims that establishes the personhood of children and therefore entitlement to rights. Roche then considers whether children also have the right to participate as citizens.[68] He observes that it is "the rights-bearing adult individual who is endowed with citizenship."[69] The problem is that adults usually speak on behalf of their children and "often it is adults

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[63] Freeman, *Moral Status*, *supra* note 51 at 96.
[64] *Ibid.*, at 97.
[65] *Ibid.*, at 98.
[66] Roche, *supra* note 13 at 486.
[67] Freeman, *Moral Status*, *supra* note 51 at 32.
[68] Roche, *supra* note 13 at 483.
[69] *Ibid.* Roche considers both cultural citizenship and political citizenship, and uses the term "partial citizenship" based on Bulmer and Rees, 1996: 275-6, who argue that there are groups of people who are "part in, and part out, of citizenship.'

who claim citizenship rights for children and do so on their behalf."[70] Even if there is recognition of holding rights, there is an argument that there must be a manner in which children can speak on their own behalf, that adults need to understand the child's language and to listen.

The children's rights movement has established two important components, the importance of considering the best interests of the child and that the child is a rights holder. The child is to have participatory rights and the argument is that society ought to ensure that children are given opportunities and assurances that they can actively participate.[71] I now turn to how international law has reflected or given effect to the child as a rights holder.

1.3 INTERNATIONAL INSTRUMENTS

These developments of the children's movement are reflected in the types of international documents created that specifically deal with children. One of the first international documents was the *League of Nations Declaration of Geneva*, 1924 that set out basic rights for the child such as food and shelter and protection from exploitation.[72] Welfare of the child and the ability of the state to intervene were primary concerns. In 1959 the *United Nations Declaration on Rights of the Child*[73] retained the focus on welfare, without recognition of the child's view.[74] However, it remained an important document and was used in support of children's rights when used in conjunction with the *International Covenant of Civil and Political Rights* (1966).[75]

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[70] *Ibid.*
[71] *Ibid.*, at 487.
[72] Records of the Fifth Assembly. Supplement no. 23 League of Nations Official Journal 1924.
[73] Adopted 20 November 1959, GA Res 1386 XIV; also Freeman, *Moral Status, supra* note 51 at 49.
[74] Freeman, *Moral Status, supra* note 51 at 50; also Van Bueren, *infra* note 80, Chapter 1.
[75] General Assembly Resolution 2200A (XXI) of 16 December 1966, *entry into force* 23 March 1976. Katherine Covell suggests that arguably children were entitled to rights under the *ICCPR* and the

The *Convention on the Rights of the Child* includes many of the rights from the 1959 Declaration and the *ICCPR*. It stands out for recognising that children have fundamental rights. It attempts to strike a balance between providing specific legal rights and providing protection to children.

1.4 CONVENTION ON THE RIGHTS OF THE CHILD ("*CRC*")

The *Convention on the Rights of the Child*[76] ("*CRC*") is a comprehensive international document that attempts to protect children and provide rights to children around the world. The substantive rights can be divided into the three "Ps": provision, protection and participation.[77] Covell noted four principles and themes in the *CRC*: 1) best interests, 2) participation, 3) non-discrimination, and 4) primary importance of the family.[78] The principle of participation given under Article 12 is the first time this right has been considered a children's right, which did not exist in any prior international document.[79]

International Covenant for Economic, Social and Cultural Rights ("*ICESCR*") but that this principle was never clarified; it was based on the assumption that children had the same rights as adults: Covell and Howe, *supra* note 49 at 20.

[76] *CRC,* 28 ILM 1448 (1989) UN General Assembly Document A/RES/44/25 (5 December 1989) The *CRC*'s provisions that affect immigration are analysed further in the thesis chapters below.

[77] Covell and Howe, *supra* note 49 at 23, referring to Thomas Hammarberg, "The UN Convention on the Rights of the Child and How to Make it Work," (1990) 12 *Human Rights Quarterly* 97-105. Although Bueren includes a four "P" for prevention of harm to children, although that would or could come under "protection", Van Bueren, *infra* note 80 at 15.

[78] Covell and Howe, *supra* note 49 at 24.

[79] *Ibid.,* at 25.

a) Defining a child

There was considerable debate among the drafters of the *CRC* regarding defining who is a child. There were a number of countries that perceived childhood as beginning with conception and opposed a definition that childhood begins only a time of birth. The final result reads:

Article 1

> 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.

In the end, the *CRC* compromise was to eliminate reference to the beginning of childhood at conception, allowing countries to provide a definition of child in accordance with their domestic laws.[80]

The upper age limit for the *CRC* was set at eighteen years of age. The drafters wanted to maximise the protection offered by the *CRC* and to apply the rights to as large an age group as possible.[81] There was debate on setting the age limit as different states have a variety of ages of majority. Some countries were concerned that the higher age limit would pose a financial burden upon the poorer states. For that reason, there was the inclusion of the phrase "unless majority is attained earlier."[82]

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[80] Sharon Detrick, *A Commentary on the United Nations on the Rights of the Child* (The Hague: *Martinus Nijhoff Publishers*, 1999) ["Detrick, *Commentary*"] at 56 and footnote 42 referring to A. Lopatka, "Importance of the Convention on the Rights of the Child", 91/2 *United Nations Bulletin of Human Rights: The Rights of the Child* (1992), at 56-65, at 64. In Canada, the Supreme Court of Canada in *Winnipeg Child and Family Services v. D.F.G.,* [1997] 3 S.C.R. 925, online: QL, held that Canada does not recognise the unborn child as a legal person possessing rights; also Geraldine Van Bueren *The International Law on the Rights of the Child* (Dordrecht, The Netherlands: Martinus Nijhoff Publishers, 1995) at 34.

[81] Detrick, *Commentary*, *supra* note 80 at 53, referring to P. Alston, "The Legal Framework of the Convention on the Rights of the Child", 91/2 *United Nations Bulletin of Human Rights: The Rights of the Child* (1992), at 1-115.

[82] Sharon Detrick, ed., *The United Nations Convention on the Rights of the Child, A Guide to the "Travaux Préparatoires"* (Dordrecht, The Netherlands: Martinus Nijhoff Publishers, 1992) ["Detrick, *TP*"] paras. 78-85, at 118-119.

1.5 HOW THE *CRC* IMPACTS CONCEPTUALIZING THE CHILD

The *CRC* is unique in that it extends beyond what are traditionally termed welfare rights by including equality rights. Article 7 mandates the right to a name and the right to acquire a nationality and includes the child's right to be cared for by his or her parents. Article 8 provides the right to preserve one's identity and one's nationality.[83] These are elements that "can be characterised as human rights which transcend the immediate welfare of a young child."[84]

Eekelaar finds that the *CRC*'s strength is its rights formulation:

> The strength of the rights formulation is its recognition of humans as individuals worthy of development and fulfillment. ...[I]t recognizes the insight that people can contribute positively to others only when they are respected and fulfilled. ...
>
> Childhood is not an end in itself, but part of the process of forming the adults of the next generation. The Convention is for all people. It could influence their entire lives. If its aims can be realized, the Convention can truly be said to be laying the foundation for a better world.[85]

Although Eekelaar's comments may sound utopian, they elucidate the importance of recognising how the development of the child affects the rest of society. Roche sees citizenship participatory rights as including governing and being governed, with a deficiency for children being that they are only governed.[86] He argues that children ought to be given the opportunity to participate as citizens earlier in life. Studies indicate that when children are given responsibility, they can rise to the occasion. He suggests

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[83] See relevant portions of the *CRC* in Appendix "D".
[84] John Eekelaar, "The Importance of Thinking That Children Have Rights" in P. Alston, S. Parker, J. Seymour, eds., *Children, Rights and the Law* (Oxford: Oxford University Press, 1992) 221at 232.
[85] *Ibid.*, at 234.
[86] Roche, *supra* note 13 at 484.

that communities need to give a more active role to the young person, to give effect to the child's rights, rather than speaking for or on behalf of the child.[87]

1.6 BEST INTERESTS

The preponderant share of the discussion regarding the *CRC* focuses on Article 3, the best interests provision:

> **Article 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.

"Best interests" is a term that has been examined and used in custody determinations, in separation proceedings and in child protection proceedings. Despite its common use in Canadian case law, it has not always been well defined but has traditionally been thought to mean consideration of a child's well being.

As the *CRC* is an international human rights treaty, best interests now incorporate a rights approach.[88] Van Bueren discusses how the *CRC* is concerned with the four 'P's: protection of children, provision of assistance for basic needs, participation of children in decisions affecting them and prevention of harm to children.[89] However, as mentioned above, Almog and Bendor suggest that there is an inherent contradiction between children having their best interests placed alongside equal "adult" rights:

> There is an immanent incongruity between perceiving children's rights as human rights –which are based upon principles of autonomy and subjective choice- and constructing them according to the "best interest" doctrine, which is based upon an objective paternalistic and protectionist approach.[90]

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[87] *Ibid.*, at 484.
[88] *Van Bueren, supra* note 80 at 47, 50.
[89] *Ibid.*, at 15. See footnote 77 above and Almog and Bendor, *supra* note 14 at 276-7.
[90] Almog and Bendor, *supra* note 14 at 277.

Consideration of best interests of the child in the immigration scheme became a significant issue following the Supreme Court of Canada decision in *Baker v. Canada.*[91] Justice L'Heureux-Dubé held that immigration officers reviewing humanitarian and compassionate (H & C) applications have a duty to consider the best interests of the child. While, the former *Immigration Act* (1985) did not include any statutory requirement to consider the best interests of the child in H & C applications, the new immigration legislation, *IRPA*, now incorporates a requirement to consider the best interests of the child in H & C applications.[92] However, due to the nature of judicial review, consideration of best interests is limited to whether the immigration officer took them into account when reviewing the application. It is usually not open to the reviewing court to conduct its own analysis although it can order that an application be reconsidered if it determines that the analysis, was insufficient or did not take place. In addition, even with the incorporation of this consideration in the legislation, best interests and how they are considered in H & C applications has since been defined narrowly by the court.[93] Furthermore, it is unclear whether the principle, best interests of the child, applies to consideration of the entire immigration scheme, or whether it is limited to those sections where it is specifically mentioned. For example, it is not clear whether the principle is to be applied in motions for injunctive stays of removal orders.[94] In some respects there may be an argument

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[91] *Baker v. Canada* [1999] S.C.J. No. 39, online: QL

[92] *IRPA,* s. 25, see Chapter Four for discussion on this issue. (Best interests of the child are also a statutory consideration in appeals of removal orders before the Immigration Appeal Division, ss. 67-69, see Chapter Two below.

[93] *Legault v. Canada (Minister of Citizenship and Immigration)* 2002 FCA 125, online: westlawecarswell: See Chapter Four below.

[94] See Chapter Four below.

that the legislature incorporated one aspect of international law while minimizing the totality of the *CRC*.

Canadian immigration case law has been focusing on the one tree in the forest, Article 3, to the exclusion of the others. Articles of the *CRC* are not supposed to be considered alone or isolated from the remainder of the *CRC*. As specifically noted in the *Implementation Handbook for the Convention on the Rights of the Child*:[95]

> The convention is indivisible and its articles are interdependent. Article 3(1) has been identified by the Committee on the Rights of the Child as a general principle of relevance to the implementation of the whole Convention. Article 3(2) provides States with a general obligation to ensure necessary protection and care for the child's well-being.[96]

Children ought to have their views considered in all matters affecting them, and to be heard in proceedings that may affect them, as provided for under Article 12; to have their best interests taken into account when the child is separated from his or her parents under Article 9, or where there would be deprivation of family environment under Article 20. Simply put, the concept of best interests cannot and is not supposed to begin and end at Article 3 of the *CRC*. It is my contention throughout this thesis that the *CRC* must be considered in immigration matters to give full effect to the intent of the Convention and to the rights of the child.

1.7 *PARENS PATRIAE*

Another possible form of protection is that the principle of *parens patriae* may apply to children in the immigration scheme. *Parens patriae* affirms the acceptance of the

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[95] Rachel Hodgkin and Peter Newell, *Implementation Handbook for the Convention on the Rights of the Child* (New York: UNICEF, 1998)

[96] *Ibid.* at 49. The handbook was prepared for UNICEF and was the first major publication to review the discussions by the Committee on the Rights of the Child. However, one book review questions whether the authors' personal opinions strayed into the explanations rather than being based upon the official documents. Yuji Hirano and Philip Veerman, Book Review of *Implementation Handbook for the Convention on the Rights of the Child* (1999), *The International Journal of Children's Rights* 7: 299-302.

state's right to intervene and that the state is the ultimate parent of every child.[97] From the discussion above, *parens patriae* is by definition paternalistic and, one would assume, incongruous with the concept of children as rights bearers.[98] The irony is that some parties have sought to use the principle as a tool to protect or promote the rights of the child.

Parens patriae is a concept that is still used in cases regarding the court's jurisdiction to protect children or mental incompetents and is usually a consideration in child protection proceedings.[99] But discussed below in Chapter Four are recent applications in Canada requesting that the courts exercise their *parens patriae* jurisdiction, in order to protect or give effect to a child's rights under the *Charter* or other rights instruments in immigration cases. However, this avenue has been curtailed by the fact that immigration matters come under Federal Court jurisdiction, where there is no *parens patriae* jurisdiction.[100]

1.8 REFLECTIONS

I have provided an overview as to how children are considered as both objects and subjects in the provision of rights. The four principles discussed remain part of the paradigm of the law concerning children. The original concept of *patria potestas* is a basic beginning block in which the general assumption is that parents retain control over children with the no state or government interference. This principle was given tacit approval recently in the case of the *Canadian Foundation for Children, Youth and the*

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[97] Joseph M. Hawes, *The Children's Rights Movement, A History of Advocacy and Protection* (Boston: Twayne Publishers, 1991) at 2, 6.
[98] In fact, Roche refers to Dalrymple & Burke's discrimination against children, that they term "adultism", "the oppression of children and young people by adults which they see as having the same power dimension in the lives of young people as racism and sexism." (Dalrymple and Burke, 1995: 141-2, Barford and Watton, 1991) in Roche, *supra* note 13 at 478.
[99] McGillivray, *Parens Patriae*, *supra* note 22.

Law v. Canada (Attorney General),[101] where the Supreme Court of Canada upheld the ability of the parent to administer corporal punishment under s. 43 of the *Criminal Code*.[102] One reason given not to criminalise this provision was the concern that the assault laws could cause unnecessary arrests of parents leading to family break-ups. Therefore, the case confirmed the strength of the family and the reluctance of the state to intervene, unless the force used was unreasonable or otherwise violated the provision.

The second principle of *parens patriae* is also an important living concept within legal systems. Although it too is a principle that is paternalistic in theory and is counterintuitive to children's rights, it appears to have a place in protecting the child, when there are no other avenues. Therefore, although it may have been a principle that was abused for the state's own interests, or it is still a highly controversial principle regarding when the court can interfere with children, it ought to not be thrown out with the bathwater. This is more apparent in the cases discussed in Chapter Four below.

The third and fourth principles, "best interests of the child" and the child as rights holder or person before the law, have been part of the more recent development in the children's rights discourse. Best interests of the child is the term that receives a great deal of attention. It is the basic principle of custody determination in family law and in child protection proceedings.[103] This approach is based on adult determination of how to best care for the child. Best interests as an important legal principle is widely accepted,

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[100] See Chapter Four below.

[101] The debate on the inclusion of corporal punishment in Canada's *Criminal Code* is an example of adults believing they have the right to administer physical punishment under the guise of religious authority. *Canadian Foundation for Children, Youth and the Law v. Canada* (Attorney General) [2004] S.C.J. No. 6.

[102] Criminal Code, R.S.C. 1985, c. C-46

43. Every schoolteacher, parent or person standing in the place of a parent is justified in using force by way of correction toward a pupil or child, as the case may be, who is under his care, if the force does not exceed what is reasonable under the circumstances.

[103] Walter, Isenegger, Bala, *supra* note 28.

although the Supreme Court of Canada held that it is not a fundamental principle of justice.[104] It has received more attention in consideration of the *CRC* at the expense of the other important rights in the *CRC*, that give greater effect to the rights of children as persons before the law.

The fourth principle of children as rights holder, or person before the law, has been an important movement that generated the momentum behind the international instruments for children's rights. The principles have been discussed and analysed; but the concern is that, despite the rhetoric, children's rights have not fully materialised. It may be that part of the problem is related to the debate on capacity and the tension between liberationist and protectionist positions. The recognition that children are not the same as adults is not to be ignored; but the question is, to what extent can or should adults make or act for children? Freeman advances the middle ground of trying to ascertain: what would the child want me to do? This is considered future oriented but does provide some protection. The more recent discussion, by Roche for example, advocates that more should be done to give effect to capabilities, with the understanding that children often rise to the occasion. Part of that is giving effect to one of the most important if ignored rights of the *CRC*: Article 12 that of the child to have his or her views heard.

Eekelaar points out that various writers on children's rights have reminded us of the need to hear what children say in order to recognise and understand their rights.[105] Isaiah Berlin stated:

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[104] *Canadian Foundation for Children, Youth and the Law v. Canada, supra* note 100, at paragraphs 7-11.
[105] *Ibid.* The children's rights movement dealt with a number of issues, primarily issues of placement or removal from families in abusive situations, custody and welfare matters. A full analysis of children's rights in all areas is beyond the scope of this work.

> I wish to be an instrument of my own, not other men's acts of will, I wish to be a subject, not an object...deciding, not being decided for, self-directed and not acted upon by external nature or by other men as if I were a thing, or an animal, or a slave incapable of playing a human role, that is, of conceiving goals and policies of my own and realizing them.[106]

Refugee children have a statutory right to specific representation and there is provision to obtain the evidence of the child refugee.[107] There are no provisions for Canadian children to have their rights specifically represented when their parents face deportation, although they may be able to obtain counsel acting through a Litigation Guardian.[108]

> Parental rights also arise from the ancient legal concept of parents' ownership of their children. In the past these concepts have worked because it has been assumed that the interests of parents and children always coincide, and that the decisions of parents related to their children will always be made on behalf of the children.[109]

On the other hand, there may be situations where it is difficult to determine whether the child's views or expressions are unbiased or influenced by family and friends.[110] However, it is the next step that must be taken. Roche believes that there can be a way to value the contributions that children make and recommends that children have participatory rights of citizenship. This can be achieved by research to find out what children think, how they see the world, and how they view issues.[111]

The right of the child is important to this thesis because generally the courts in immigration proceedings have limited the discussion regarding the children involved or the inclusion of children in the discussion. The majority of the immigration cases, primarily in humanitarian and compassionate applications (H& C applications), or stays of executions of removal orders, refer to the best interests of the child. There is no or

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[106] Berlin (1969:131) as cited by Freeman, *Moral Status, supra* note 51 at 25.
[107] See Chapter Three below regarding the appointment of designated representatives for child refugees.
[108] The term "guardian *ad litem*" has been replaced in most litigation with the modern English term "litigation guardian", which is the term I use throughout this thesis.
[109] "Legislation Related to the Needs of Children", *supra* note 17.

minimal analysis or inquiry about whether the child has been allowed to express his or her views, whether the child is or is not a Canadian citizen.

In this thesis, I examine how, despite changes in Canadian jurisprudence and other common law countries' jurisprudence, the immigration schemes do not appear to fully appreciate or consider the rights of children. We are in a situation that, despite the accomplishments of the children's rights movement, despite the recognition of children's rights, there is a long way to go to give effect to these rights within immigration schemes.

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[110] See Chapter Two below regarding the case of Elian Gonzalez.
[111] Roche, *supra* note 13 at 487.

CHAPTER 2

THE IMPORTANCE OF NATIONALITY AND HOW IT IMPACTS OR PROTECTS CHILDREN

Nationality is a matter that many of us take for granted. Citizens living in countries that are not at war or in conflict do not live in fear or expectation of being apprehended and deported. We expect that as long as we are law-abiding citizens, we can live in peace. We do not expect to be forced to leave, nor do we expect that we may have to leave Canada because our mother or father is being deported. There are general rights and protections for citizens, such as rights to universal health care and education. However, protection and rights of citizens, not just residents of the country, are minimised within the immigration scheme. Canada and other nations minimise the interests and rights of their own nationals within their own borders, when child citizens have parents and siblings who face deportation. There are situations where a child's nationality may not be in the child's best interests. These children may face situations where no government will intervene to ensure that the child's best interests are considered. For example, some countries would not be concerned about a female child's well being where female genital mutilation is customary. This chapter will examine the meaning of nationality, the privileges conveyed by nationality and its limitations. This chapter considers whether or not nationality does in fact protect children.

2.1 MEANING OF NATIONALITY

a) Generally

The primary definition of nationality grows from birth, and nationality is by definition inherently connected to birth. The term nationality stems from the Latin word ***natio,*** which means born or ***nasci,*** to be born. ***Nascency*** is the process of being brought

into existence or birth and ***nascent*** is in the act of being born or being brought forth.[1] Nationality is obtained in most states at the time of birth in two ways: *jus soli,* means the acquisition of nationality by birth in the territory of the state, and *jus sanguinis* means the acquisition of nationality by parent, by bloodline descent.[2] Generally in Roman law countries, nationality depends upon where one's parents were born. Whereas, generally in common law countries, nationality depends upon where the person was born, without regard to the parents' nationality or birthplace.[3] It is this difference that at times leads to conflicts and problems regarding statelessness and the granting of nationality.

Nationality is important for children because it means the child belongs to a particular country by birth or naturalisation.[4] A national is a person entitled to protection of a specified country, as a citizen or subject.[5] Nationality and citizenship are not terms with clear-cut differences or separate meanings. Citizen is defined as "(o)ne who is a member of the political community, owing allegiance and being entitled to the enjoyment of full civil rights."[6] The apparent difference between nationality and citizenship is that citizenship includes reciprocal civic duties, by both the individual to the state and the state to the individual. For the purposes of this thesis, the terms are used interchangeably.

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[1] *The Oxford International Dictionary of the English Language,* Unabridged (Toronto: Leland Publishing Company, Ltd., 1959) at 1311.

[2] Historically, nationality in feudal countries was connected to the concept of allegiance to the Crown. *Calvin's Case* [1608] 7 Co. Rep. 1a., 77 Eng. Rep. 399, is considered the first case to codify the common law concept of *jus soli* and determine that all persons born in any territory held by the King owed allegiance to the King and were therefore protected by the King. Historically, nationality in feudal countries was connected to the concept of allegiance to the Crown. This case is discussed in detail in Chapter Four below.

[3] The experience of the United Kingdom has changed from a country that was historically *jus soli* to now solely *jus sanguinis*: *The British Nationality Act,* 1981. See Chapter Four below.

[4] *Webster's New World Dictionary*, 2nd College Edition, (Toronto: Nelson, Foster & Scott Ltd., 1976).

[5] *Ibid.* Citizen or citizenship is often used synonymously with nationality and American legal literature uses the term interchangeably. Both terms relate to membership in the state; however, national focuses on the international status and citizenship focuses on the domestic aspect. Weis, *Nationality and Statelessness in International Law*, 2nd ed. (Germantown, Md.: Sijthoff & Noordhoff, 1979) at 4-5.

[6] *Black's Legal Dictionary,* 5th ed. (St. Paul, Minn.: West Publishing Co., 1979) at 923.

b) Diplomatic Protection

Nationality brings with it privileges and rights, one being the ability to receive protection from one's country in relation to other countries.[7] The question is: if there is diplomatic protection to nationals in situations outside of one's home state, does this effort translate to protection of nationals within the home state?

A common form of national protection is diplomatic protection and it is a right of a country under customary international law.[8] Under principles of international law, injury to individuals is injury to the state of his nationality. As stated by Vattel (1714-67):

> Whoever ill-treats a citizen indirectly injures the State, which must protect that citizen. The sovereign of the injured citizen must avenge the deed and, if possible, force the aggressor to give full satisfaction or punish him, since otherwise the citizen will not obtain the chief end of civil society, which is protection.[9]

Historically, one of the most important elements of nationality is protection by one's own country in the event of another country interfering or hurting the national.

Since international law is primarily between countries, nationality provides the link between individuals and international law.[10] It is through the medium of nationality that individuals can normally enjoy the benefits of international law. Despite the existence of treaties to deal with stateless persons, there is limited protection if one does not have a nationality. "On the other hand, if individuals are wronged abroad, it is as a

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[7] Although one of the most important privileges of citizenship for non-Canadian born citizens is the right to remain in Canada, protection from removal.

[8] Weis, *supra* note 5 at 32-3.

[9] Myres S. McDougal, Harold D. Lasswell and Lung-Chi Chen, "Nationality and Human Rights: The Protection of the Individual in External Arenas" (1974) 83 *Yale Law Journal* 900 at 906, quoting from E. de Vattel, *Classics of International Law: The Laws of Nations or the Principles of Natural Law* 136 (C. Fenwick trans. 1916.)

[10] Oppenheim, Lassa, *Oppenheim's International Law,* Vol. 1, ed. By Sir Robert Jennings and Sir Arthur Watts, 9th ed., (Harlow, Essex: Longman, 1992) at 849.

rule, their home state exclusively which has a right to ask for redress, and these individuals themselves have no such right."[11] Since the individual is unable to fend for himself so to speak, individuals require their home state to act on their behalf in issues of international law.

Despite the desire and expectation of protection as a national outside one's borders, one's rights internally as a national regarding the right to remain are not given great consideration. Where family members are deported, although they may be permanent residents, they are vulnerable to deportation with citizenship, which thereby minimises the consideration of the child citizen. This is the case in the United Kingdom, the United States and in Canada. In these situations, does the fact that a child has nationality provide him or her with any special rights when a parent faces removal?

2.2 NATIONALITY AS IT AFFECTS CHILDREN

What protection can nationality provide for children? International instruments focus on ensuring that the child has a nationality or a right to acquire a nationality. This assists in identification. Identification can ensure that the child is counted or registered with the government. This in turn will sometimes lead to the government ensuring that services are provided or allow the child citizen to obtain benefits to meet physical needs, health care, food, and shelter. The point is that by being counted, the country to some extent can watch over the child. Where children are not registered, it is easier for parents to practice infanticide, or for children to go missing.

2.3 INTERNATIONAL INSTRUMENTS

Nationality has been a serious issue considered in a number of international documents. For example, during times of war, borders change and people are uncertain

[11] *Ibid.*

of the identity of the country in which they were born. Problems that arise from these situations lead to the development of international treaties regarding nationality. Early international treaty provisions that defined the nationality of children were included in the *Convention on Certain Questions Relating to the Conflict of Nationality Laws, 1930*: [12]

Article 13:

> Naturalisation of the parents shall confer on such of their children as, according to its law, are minors the nationality of the State by which the naturalisation is granted. In such case the law of that State may specify the conditions governing the acquisition of its nationality by the minor children as a result of the naturalisation of the parents. In cases where minor children do not acquire the nationality of their parents as the result of the naturalisation of the latter, they shall retain their existing nationality.

Article 14:

> A child whose parents are both unknown shall have the nationality of the country of birth. If the child's parentage is established, its nationality shall be determined by the rules applicable in cases where the parentage is known.
>
> A foundling is, until the contrary is proved, presumed to have been born on the territory of the State in which it was found.

Article 15:

> Where the nationality of a State is not acquired automatically by reason of birth on its territory, a child born on the territory of that State of parents having no nationality, or of unknown nationality, may obtain the nationality of the said State. The law of that State shall determine the conditions governing the acquisition of its nationality in such cases.

This is an earlier example of a treaty ensuring that the child will have a nationality. Regarding the naturalisation process, Article 13 seeks to ensure that there will be consistent nationality between parent and child. However, the *Convention* accepts that this may not always be the case, if it violates domestic laws.

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[12] *Convention on Certain Questions Relating to the Conflict of Nationality Laws, 1930,* 170 L.N.T.S.89

Several international treaties dealing with children's rights include protections based upon nationality. The Assembly of the League of Nations passed a resolution endorsing the *Declaration of the Rights of the Child* (1924) ("*Geneva Declaration*"), which had been promulgated by the non-governmental organisation "Save the Children International Union".[13] After the Second World War, the *Geneva Declaration* incorporated the importance of non-discrimination on the basis of nationality.[14] The United Nations General Assembly in 1948 created the seven point 1948 *Declaration of the Rights of the Child.* This *Declaration* extended protection to all children regardless of race, nationality or creed. It was not until the 1959 *United Nations Declaration of the Rights of the Child,* which is still valid today, in which **the right to nationality** was mentioned in relation to children.[15]

Principle Three

The child shall be entitled from his birth to a name and a nationality.[16]

The 1959 *Declaration* helped propel the movement behind the *Convention on the Rights of the Child* ("*CRC*").[17] Nationality protection was included in other treaties that focused on human rights. In the *International Covenant on Civil and Political Rights*,[18] (the "*ICCPR*")

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[13] Sharon Detrick, ed., *The United Nations Convention on the Rights of the Child, A Guide to the "Travaux Préparatoires"* (Dordrecht, The Netherlands: Martinus Nijhoff Publishers, 1992) at 19. ["Detrick, *TP*"]. See also, "Save the Children (UK)" website: <http://www.savethechildren.org.uk/functions/aboutus/history3.html> (accessed 29 October 2000).

[14] Cited by Lawrence J. LeBlanc, *The Convention on the Rights of the Child*, (Lincoln: The University of Nebraska Press, 1995); also Detrick, *TP, supra* note 13 at 19.

[15] Proclaimed by General Assembly resolution 1386(XIV) of 20 November 1959, Detrick, *TP, supra* note 13 at 19-20.

[16] Detrick, *TP, supra* note 13 at 19-20.

[17] *Ibid.*, at 19.

[18] UN Doc. A/6316 (1966) adopted 16 December 1966, entered into force 23 March 1979.

Article 24(3):

Every child has the right to acquire a nationality.

The 1969 *American Convention of Human Rights*,[19] (the "*American Convention*") has a strong guarantee:

Article 20- Right to Nationality

1. Every person has the right to a nationality.
2. Every person has the right to the nationality of the state in whose territory he was born if he does not have the right to any other nationality.
3. No one shall be arbitrarily deprived of his nationality or of the right to change it.

The *American Convention* entered into by the Organization of American States (the "OAS") provides a stronger guarantee than the *ICCPR* by stating that the person has the right to a nationality and not merely the right to acquire a nationality.[20] The OAS perceived and recognised the importance of assuring that persons have a nationality and ensured this by providing for granting nationality on a *jus soli* basis in the case of an otherwise stateless person. Presumably the OAS was aware of and wanted to address circumstances where a person would be required to obtain nationality on a non-automatic basis, due to the danger of being located in a country that would not facilitate this process.

The *Convention on the Rights of the Child* ("*CRC*") was a major accomplishment in the development of international law regarding children. It was adopted by the United Nations General Assembly in November 1989, came into force 2 September 1990,[21] and "is the first international human rights instrument to attempt a comprehensive definition

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[19] 1969 *American Convention on Human Rights "Pact of San José, Costa Rica"* (B-32)

[20] Also the *American Declaration Of The Rights And Duties Of Man*(Approved by the Ninth International Conference of American States,Bogotá, Colombia, 1948), to which Canada is bound as an OAS member: Article XIX. Every person has the right to the nationality to which he is entitled by law and to change it, if he so wishes, for the nationality of any other country that is willing to grant it to him.

[21] 28 ILM 1448 (1989) UN General Assembly Document A/RES/44/25 (5 December 1989)

of children's rights."[22] The *CRC* is considered the most comprehensive statement regarding the rights and protection of children and is notable for its attempts to empower children. As noted above regarding nationality, the *CRC* also provides only the right to acquire nationality.

Article 7 -Right to Name and Nationality:

1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.

2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under relevant international instruments in this field, in particular where the child would otherwise be stateless.

This article was drafted to ensure that a nationality would be conveyed to a child, even in situations where a country's laws could lead to statelessness, especially in countries that base nationality on *jus sanguinis* rather than *jus soli*.[23]

2.4 INTERNATIONAL LAW & *DE FACTO* NATIONALITY

Nationality indicates belonging, and it establishes a person's status, based on belonging to a country. "Nationality is the status of a person in relation to the tie binding such person to a particular sovereign nation."[24]

However, nationality is an issue where there are divergent definitions according to international law. International law may consider customary norms in order to arrive at accepted terms of nationality under international law.[25] International law appears to

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[22] Douglas Hodgson, "The International Legal Protection of the Child's Right to a Legal Identity and the Problem of Statelessness," (1993) 7 *International Journal of Law and the Family* 255-270 at 255.
[23] Detrick, *TP, supra* note 13 at 125.
[24] Weis, *supra* note 5 at 60, regarding the *Cayuga Indian* case, U.N. Reports vol. VI at 173 at 177, *Annual Digest 1925-1926* Cases No. 147, 149, 173, 181, (as cited by Weis at 60, footnotes 167 & 168.)
[25] Akehurst discusses nationality in international law and the concept of genuine link from the *Nottebohm case*, *infra* note 28, and he questions its application, suggesting that it would be better to consider "what is *normal* in nationality laws." Michael Akehurst, *A Modern Introduction to International Law* (London: George Allen & Unwin (Publishers) Ltd., 1982) at 98-99.

accept the existence of *de facto* nationality, finding nationality based upon a person's genuine link with a country.[26] In theory, the concept of *de facto* nationality could assist immigrants in deportation proceedings.[27] Child citizens of immigrants could benefit especially where the parents are established and have lived in the country for years.

In international law, there is a principle of non-interference with a country's legislation. Regarding nationality, *The Convention on Certain Questions Relating to the Conflict of Nationality Laws, 1930* specifies: [28]

Article 1:

> It is for each State to determine under its own law who are its nationals. This law shall be recognised by other States in so far at it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality.

Article 2:

> Any question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of that State.

Despite apparent deference to the sovereignty of each nation, in the *Nottebohm*[29] case the International Court of Justice ("ICJ") did not accept nationality as determined by the country's law regarding naturalisation. Mr. Nottebohm was a German national who did most of his work in Guatemala. Nottebohm was naturalised as a citizen of Liechtenstein in October 1939. His property in Guatemala was seized on the basis that he was a German national. Liechtenstein sought a declaration by the ICJ that the naturalisation it granted conformed to its law and was not contrary to international law.

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[26] Based on discussion regarding the *Nottebohm case*, *infra* note 28 and subsequent disucssion.
[27] However, many countries apply their statutory regimes on granting nationality and the concept of *de facto* nationality does not appear to prevent or resolve statelessness. For greater discussion on statelessness, see Chapter Three below.
[28] 179 L.N.T.S. 89
[29] *Nottebohm Case, (Second Phase),* I.C.J. Reports, 1955, 4.

The international arbiters looked at certain criteria in order to establish a factual tie. The factors considered were: habitual residence of the individual, family ties, and participation in public life. The evidence in this case was that Nottebohm maintained his family connections with Germany but that he had settled in Guatemala for 34 years. His actual connections with Liechtenstein were few. Therefore, the heart of the analysis was assessing the individual's bond with the state and this was lacking in Liechtenstein's legislation. The court's conclusion was that, although international law leaves it to each country to apply its own rules to nationality, a country cannot claim its rules are not being recognised if they do not establish some link between the country and the individual. The court held that nationality is not only a label. It creates a relationship between the national and the nation where, in exchange for loyalty, one expects certain rights from the nation.[30] In *Nottebohm* the court did not recognise *de jure* nationality but rather focused on the factual bond between the person and the country with which the person had a relationship. One dissenting judge questioned the requirement of proving a physical or real bond as a condition for the acquisition of nationality.[31]

The *Nottebohm* case has been criticised regarding the use of the "general link" theory because it could deprive an individual of the right to be protected by a state willing to pursue his claim. This could potentially lead to less protection of human rights of individuals.[32] Writers argue that the case in fact caused Nottebohm to become stateless and deprived him of any legal remedy.[33] In addition to the lack of convention or custom

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[30] Some would state that this definition is closer to definitions of citizenship. Nationality and citizenship are terms that do overlap. This paper will not assess citizenship in detail as it departs from the concept of nationality but will use the terms interchangeably. There will be some consideration of civil rights and benefits that are accorded to citizens.

[31] *Nottebohm Case (second phase),* Judgment of April 6th, 1955:7 I.C.J. Reports, 1955, 4 at pp. 29-30.

[32] McDougal, *et al.*, *supra* note 9 at 912.

[33] Joseph L. Kunz, "The Nottebohm Judgment (Second Phase)," (1968) 54 *Am. J. Int'l Law* 536 at 543; J.

to support the genuine link theory, Kunz noted that there were no judicial precedents quoted to support the theory in a single nationality context, since the reasoning in the decision was based on principles of dual nationality.[34] The two types of nationality, *jus soli* and *jus sanguinis,* do not require or are not dependent upon any genuine link; and in the first case, there is birth in the territory and in the latter there is biological descent. Considering that nationality is often determined at birth, there will not be a genuine link at that moment although it may develop over time. However, these two types of nationality have never been considered invalid.[35]

Although the case has been criticised, can it provide a useful principle of international law? Does *Nottebohm* stand for an international principle for a *de facto* nationality? Would this principle allow for people who have well-established links to a country without legal status claim citizenship? Could this prevent deportation of parents of a citizen child?

As discussed below, and in Chapters Three and Four, the concept of effective nationality or a genuine link does not provide protection in deportation matters outside of international law or with the European court.

2.5 CANADA

Canada's *Citizenship Act* includes both *jus soli*, granting citizenship by virtue of being born on Canadian soil, and *jus sanguinis*, recognising that children born of

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Mervyn Jones, "The Nottebohm Case," (1956) 5 *Int'l and Comp. L. Q.* 230; Hans Goldschmidt, "Recent Applications of Domestic Nationality Laws by International Tribunals," 28 *Fordham L.Rev.* 689,695 (1960) and McDougal, *et al.*, *supra* note 9.

[34] Kunz, *supra* note 33 at 553. In contrast to *Nottebohm,* see the decision of the Italian-U.S. Conciliation Commission in *U.S.A. ex re. Flegenheimer v. Italy* 20 September 1958, (1959) 53 *The American Journal of International Law* 944. The Commission specifically rejected reliance on a theory of effective nationality, finding it was limited to cases of dual nationality. Essentially international law is to respect and give effect to a nation's domestic laws.

[35] *Ibid.*

Canadian citizens in other territories will also have automatic Canadian citizenship. *The Citizenship Act*[36] defines citizens under Part One, the Right to Citizenship:

Persons who are citizens:

> 3. (1) Subject to this Act, a person is a citizen if
> (a) the person was born in Canada after February 14, 1977;
> (b) the person was born outside of Canada after February 14, 1977 and at the time of his birth one of his parents, other than a parent who adopted him, was a citizen;
> (c) the person has been granted or acquired citizenship pursuant to section 5 or 11 and, in the case of a person who is fourteen years of age or over on the day that he is granted citizenship, he has taken the oath of citizenship...[37]

The provision granting nationality to children of Canadians born outside of Canada protects them by ensuring they will have nationality in the event the child is born in a country which only grants nationality based upon *jus sanguinis.* For example, if a Canadian couple were living in a country that only grants nationality based upon ancestry, their child would have no other nationality except for Canadian citizenship. *The Citizenship Act* further tries to prevent statelessness by granting citizenship to children deserted before seven years of age:

Deserted child

> 4. (1) For the purposes of paragraph 3(1)(a), every person who, before apparently attaining the age of seven years, was found as a deserted child in Canada shall be deemed to have been born in Canada, unless the contrary is proved within seven years from the date the person was found.

Immigrants who are considered eligible to live in Canada become permanent residents after meeting residency requirements.[38] Permanent residents remain vulnerable to deportation or removal even if they have lived in Canada almost their whole lives. The

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[36] R.S.C. 1985, c. C-29.

[37] These provisions do not apply to children of foreign diplomats, s. 3.(2).

[38] *Immigration and Refugee Protection Act,* 2001, c. 27 ("*IRPA*") s. 2(1) "permanent resident" means a person who has acquired permanent resident status and has not subsequently lost that status under section 46. See Appendix "G".

need for permanent residency in order to obtain citizenship indicates Canada considers residency an important requirement for naturalisation. There is the desire to prove the element of a link between the applicant and Canada. However, this is not required for citizenship based upon birth in the territory or for birth to a Canadian parent.

Deportation occurs to permanent residents in situations where there are children who are Canadian citizens.[39] One wonders whether the principle of *de facto* nationality, as accepted in the *Nottehbohm* case, would be a method of assisting the nationality of parents of child citizens.

The question of *de facto* nationality was considered in *Solis v. Canada (Minister of Citizenship and Immigration).*[40] Solis had become a permanent resident in Canada and been physically resident for most of his life. One ground for appealing his deportation was that, for *Charter* purposes, he was a citizen. Although he was not a citizen under the *Citizenship Act*, he argued a *Charter*-based right to citizenship from his link to Canada by family ties and roots in Canada. The Federal Court of Appeal did not accept the link theory and concluded that there was no meaning to citizenship other than that based upon statute. The government and the court applied a positivist approach to interpretation of immigration legislation.

The determination of the immigration authorities to deport persons and to disregard the status of child citizens was evident in the case of *Umenyi v. Canada (Minister of Citizenship and Immigration).*[41] Two separate deportation orders were issued, one against the mother, a citizen of Nigeria, and one against her fifteen-year-old daughter, a Canadian citizen. The Minister conceded that it had likely been issued in

[39] Chapter Four discusses these cases in greater detail.
[40] *Solis v. Canada,* [2000] F.C.J. No. 407.

error. The judge held that it was either a deliberate or an unintentional mistake. As it raised a serious issue to be tried, it assisted the parties in obtaining a stay of the deportation orders. Although it may have been an unintentional mistake, this did indicate that the child citizen was in effect a casualty of the immigration scheme.

In Canada, the legislative scheme is paramount and there is no acceptance of the concept of *de facto* nationality. The question of links or identity with Canada is a matter that may be considered only in a humanitarian and compassionate application.

The issue of the importance of a link and consistency with Canadian mores and values came up recently in the situation with the Khadr family. The Khadr family members are Canadian citizens who left Canada some time ago and had lived outside of Canada for an extended period of time, although it is not clear for how long. The family has been connected with the terrorist organisation al-Qaida in Afghanistan.[42] The father was killed in October 2003. Abdurahman Khadr, the twenty-one year-old-son, admitted that his family had close ties to al-Qaida leader Osama bin Laden. He arrived in Canada in December 2003. The seventeen-year-old brother, Omar Khadr, is in U.S. custody in Guantanamo Bay having been arrested two years ago in Afghanistan.[43] In a CBC documentary, the mother, Maha Elsamnah, and her daughter discussed frankly their views about 9/11. The mother said she was happy when 9/11 occurred because America deserved it. Shortly after the documentary was shown, two members of the Khadr family, the mother and fourteen-year-old son Karim Khadr, who is paralysed from the

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[41] *Umenyi v. Canada (Minister of Citizenship and Immigration)* [1999] F.C.J. No. 573 (T.D.) QL

[42] "Wife, daughter of al-Qaida suspect ask for Canadian passports" *Canadian Press Wire Service* (9 May 2003) online: QL (NEWS)

[43] Rita Trichur, "Not Ont. health minister's job to decide if paralysed Khadr boy gets treatment" *Canadian Press Wire Service* (15 April 2004), online: QL (NEWS), "Children's Aid investigating whether Karim Khadr's was abused, says Post" *Canadian Press Wire Service* (20 April 2004), online: QL (NEWS)

waist down, arrived in Canada. They were issued emergency one-time-only passports.[44] Their return caused a public outcry with people leaving threats on the Khadrs' answering machine and petitions saying their citizenship should be revoked.[45] The federal government has taken the position that, as citizens, they are entitled to return and entitled to their opinions.[46] The only method by which their citizenship could be revoked is if there was evidence that their citizenship was obtained through fraud or misrepresentation.[47]

There is no indication in the media reports that there are pending proceedings for revocation of citizenship. The public outcry is an expression of outrage that the Khadr family would have assisted terrorists and then be allowed to return to Canada. The government is correct in that these people are citizens and entitled to remain and live in Canada. This is an actual example of where the boy has received medical benefits and protections he can obtain as a citizen by the government securing his return. In fact, the Children's Aid Society in Ontario is investigating whether the fourteen-year-old son, Karim was a victim of child abuse because of his parents' support of terrorism.[48] Regardless of how people feel about the mother's views or opinions, this is an example of where the child citizen did obtain the benefit of returning to Canada. There are some

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[44] Marlene Habib "Two members of family that has been linked to al-Qaida return to Canada" *Canadian Press Wire Service* (9 April 2004) online: QL (NEWS)
[45] Colin Freeze, "Khadrs' citizenship fuels public outcry" *GlobeandMail.com,* (17 April 2004), <www.theglobeandmail.com> (accessed 10 May 2004).
[46] Murray Brewster "Paul Martin defends Khadr rights" *CNEWS* (15 April 2004) <http://cnews.canoe.ca> (accessed 10 May 2004).
[47] S. 10, *The Citizenship Act*, see Appendix " E".
[48] "Children's Aid investigating whether Karim Khadr was abused, says Post" *Canadian Press Wire Service* (20 April 2004), online: QL (NEWS).

eligibility issues for obtaining health care but that is related to meeting the three-month residency requirement.[49]

Another issue related to citizenship has been the denial of the Abdurahman's request for a passport.[50] The government did not provide reasons for denial of the passport. Abdurahman is filing a notice of application seeking to overturn the government's decision.[51] Under the *Canadian Passport Order*[52] a passport remains the property of the Canadian government. The power to issue and revoke passports is considered to be a Crown prerogative.[53] There is authority to refuse to issue a passport for a number of listed reasons or for failure to provide requested information.[54] Therefore, although citizenship includes many rights, and the right of mobility, the concept of a passport is property that can be controlled by the government. Does this impede apparent expectations as a citizen? The mother and daughter "have been placed on a passport control list because they had repeatedly lost their passports and asked to have them replaced, beginning in 1999."[55] One can presume that the need for security and control over issuing passports would be considered an objective that would outweigh the need for no controls over passports.

Canadian citizenship can protect the child by ensuring that children outside the country are returned. Chapter Four will question how citizenship assists the children whose parents face deportation.

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[49] Freeze, *supra* note 45.
[50] Michelle Shephard "Khadr's application for passport denied" *Toronto Star* (23 April 2004) online: <www.thestar.com> (accessed May 10, 2004); "Member of Khadr family denied renewal of passport by Ottawa: CBC" *Canadian Press Wire Service* (22 April 2004) online: QL (NEWS).
[51] Michael Friscolanti "Khadr son to sue Ottawa over passport" *The National Post* (15 May 2004) A7.
[52] P.V. 1981-1472 4 June 1981 and *Order Amending the Canadian Passport Order*, P.C. 2001-2277, 10 December 2001. See Appendix "F".
[53] *Mobarakizadeh v. Canada* [1993] F.C.J. No. 1394 (T.D.) online: QL, *Mahmood v. Canada* [2000] F.C.J. No. 608 (T.D.) online: QL.

2.6 EUROPEAN COURT OF HUMAN RIGHTS

Following the Second World War, several European countries believed in the need to create a human rights convention. The United Nations passed the *United Nations Universal Declaration of Human Rights*[56] in 1948. Among the European countries, there was support for a system that would carry a Western European perspective that rendered decisions on issues that would be legally binding.[57] Initially, what made the European Court of Human Rights ("ECHR") more accessible to individuals was the two-tier system, with the Human Rights Commission available to individuals, followed by the right of appeal to the Court. The belief was that the Commission would be used as a "'kind of barrier...which would weed out frivolous or mischievous petitions.'"[58] The Commission could receive petitions from individuals, non-governmental organizations or groups of individuals.[59] There were the two levels, the Commission of Human Rights and the Court of Human Rights.[60] The two-tier system was changed in 1994 to eliminate the first level commission and to create a single court.[61]

Since 1950 the ECHR has considered deportation cases that illustrate the difficulties that arise when territories or colonies become independent and there are gaps in the conveying of nationality to some people. What distinguishes the ECHR from other international treaties and tribunals is the fact that the Convention is given effect and has actual impact on domestic jurisdictions.

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[54] Sections 9 and 8, Appendix "F".
[55] Brewster, *supra* note 46.
[56] G.A. Resolution 217A (III), U.N. Doc. A/810, at 71 (1948).
[57] Mark W. Janis and Richard S. Kay, *European Human Rights Law* (Bridgeport: The University of Connecticut Law School Foundation Press, 1990) at 23.
[58] *Ibid.*, at 39 citing Council of Europe, *Collected Edition of the Travaux Préparatoires,* at 48 (1975); speech by Teitgen to the Consultative Assembly, 19 August 1949.
[59] Originally Article 24 of *The European Convention of Human Rights* ("*European Convention*"), Rome, 4. XI.1950, ETS No. 5, see Appendix "B".

One key provision of the *European Convention* that the European Court has considered in deportation cases is Article 8:

Article 8 – Right to respect for private and family life

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The second part of Article 8 indicates that there is a balancing of interests that must take place. A number of deportation cases in Europe deal with persons who had lived in the subject country for most of their lives. In the *Beldjoudi* case, the subject was an Algerian national born in France of parents who had French nationality at the time of his birth and who had "special civil status".[62] The parents were required to make a declaration recognising French nationality failing which they would be deemed to have lost French nationality. Beldjoudi's parents chose not to make the declaration and therefore he was deemed to have lost French nationality.

From 1969 to 1991, Mr. Beldjoudi had several criminal convictions and sentences for assault and battery, driving without a licence, possession of weapons, aggravated theft, with periods of imprisonment amounting to about seven years. He married a French national in 1970.

A deportation order issued against him on 2 November 1979 on the ground that his presence on French territory was a threat to public order. Beldjoudi appealed to the

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[60] *Ibid.*, see Article 19, Appendix "B".
[61] Protocol No. 11, Strasbourg, 11.V.1994 (ETS No. 155)
[62] *Beldjoudi v. France* (1992), Eur. Court H.R. (Ser. A no. 234-A) 3 (Strasbourg).

French court for the deportation order to be set aside, on the ground that he had been born in France of French parents, who were considered French at the time; he had no ties to Algeria and had been married to a French woman for ten years. He included in his argument reference to Article 8 of the *European Convention*, that the deportation order would be a serious interference with his private and family life. The appeal was dismissed in April 1988 and the French court held that he was not entitled to take advantage of Article 8 of the *European Convention.*

Beldjoudi and his wife lodged a complaint with the European Commission on 28 March 1986, alleging that France's deportation order violated provisions of the *European Convention*, specifically Article 8, by infringing their right to respect for their private and family life.[63] The Commission examined Beldjoudi's ties to France balanced against France's policy objectives through the deportation. The Commission noted that:

> Although in law he is an alien, the first applicant has all his family and social ties in France and the nationality link, though a legal reality, in no way reflects the real situation in human terms.[64]

The Commission held that there were no exceptional circumstances to justify the deportation to Algeria and that it would interfere with Beldjoudi's private and family life.

Upon the matter being heard by the European Court in 1991, it examined the facts: the existence of a twenty-year marriage in France and that upon reaching adulthood he had taken steps to attempt to obtain French nationality. The Court also noted that uprooting the wife to Algeria would cause serious interference in her life and possibly threaten the marriage. The Court did find, based upon consideration of the facts, that the

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[63] They also included the following arguments: Article 3, that the likely refusal of the Algerian government to issue Beldjoudi a passport to leave Algeria would constitute inhuman and degrading treatment; Article 14 protection against discrimination on the grounds of religious beliefs or ethnic origin; Article 9, by interfering with freedom of thought, conscience and religion; and Article 12, by infringing their right to

deportation did not meet the proportionate test and would violate Article 8.[65] The concurring opinion of Judge Martens highlighted the court's perspective on what nationality means. He noted how nationals were protected from expulsion and suggested that this protection be extended to *de facto* nationals:

> [T]o aliens born and bred in a member State or who have otherwise, by virtue of long residence, become fully integrated there…(and segregated from their country of origin)…**In my opinion, mere nationality does not constitute an objective and reasonable justification for the existence of a difference as regards the admissibility of expelling someone from what, in both cases, maybe called his own country**.[66] [Emphasis added]

The European Court in other cases has given consideration to the existence of strong roots within the country of residence.

Both the *Nottebohm* and *Beldjoudi* cases indicated how international courts are concerned with the relationship between the individual and the nation in question. One might conclude that international law recognises the deficiencies of a positivist approach to the issue of nationality. Judge Martens recognised this gap that, despite the finding of a tie or relationship an individual may have with a nation, it will not provide protection from deportation laws. This is the key issue in most deportation proceedings. Could the concept of *de facto* nationality assist families where parents face deportation and where there are citizen children?

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marry and found a family.

[64] *Beldjoudi, supra* note 62 at 43-44.

[65] The Court applied the *Moustaquim* Case (1991), 193 Eur. Court H.R. (Ser.A) 2, *ECHR* 26/1989/186/246. Mr. Moustaquim was a Moroccan national who had arrived in Belgium with his mother when he was just under two years old in order to join his father in 1965. Three of his seven siblings were born in Belgium and one older brother had Belgian nationality. Moustaquim had been involved in criminal activities and prosecuted in juvenile court from the time he was fourteen years old and had spent significant periods in detention. His matter was heard after he was deported and the Court found that the subject's family life was seriously disrupted by the deportation in light of the fact that he had lived near or with is family for most of his life in Belgium and that there had been a violation of Article 8.

[66] *Beldjoudi, supra* note 62 at 37.

In deportation or removal proceedings, a permanent resident's or protected person's[67] link or establishment in Canada is considered on appeal of a removal order to the Immigration Appeal Division ("IAD"), which is a hearing *de novo*.[68] The IAD, if allowing an appeal under section 67 or a stay of a removal order under section 68, can take into account the best interests of a child directly affected by the decision, and determine whether sufficient humanitarian and compassionate considerations warrant special relief.[69] The factors that are considered are based on cases that predate *IRPA*. In *Chieu v. Canada (Minister of Citizenship and Immigration)* (2002),[70] the Supreme Court of Canada confirmed that factors from *Ribic v. Canada (Minister of Employment and Immigration)*(1985)[71] to consider staying or appealing a removal order apply. The *Ribic* factors are not exhaustive but are starting points in determining an appeal of a removal order and include:

- Seriousness of the offence leading to deportation and possibility of rehabilitation;
- Or the circumstances surrounding the failure to meet the conditions of admission which led to the deportation order;
- Length of time spent in Canada and the degree of establishment;
- Presence of family in Canada and the impact on it that deportation would cause;
- Efforts of the applicant to establish himself or herself in Canada, including the employment situation and education;
- Support available to the applicant, within the community in addition to the family; and

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[67] The term "protected persons" is now the term used for refugees as it applies to both Convention refugees and persons in need of protection, ss. 96 and 97 of *IRPA*, discussed in Chapter Three below.
[68] Section 63(3) *IRPA,* Appendix "G". One aspect of *IRPA* that is considered harsh is that under s. 64, permanent residents or foreign nationals who are held to be inadmissible on grounds of serious criminality (and security, violating human rights) are ineligible to appeal a deportation order. Under s. 64(2), serious criminality means that a person was convicted of a crime that was punished in Canada by a term of imprisonment of at least two years. This can apply to any crime, regardless of the nature of the crime, so that those convicted of property and non-violent crimes are ineligible to appeal their removal orders.
[69] Section 66 provides three options to the IAD, to allow the appeal under s. 67, to stay the removal order under s. 68 and to dismiss the appeal as provided for under s. 69.
[70] *Chieu v. Canada (Minister of Citizenship and Immigration)* [2002] 1 S.C.R. 84, online: QL.
[71] *Ribic v. Canada (Minister of Employment and Immigration)* [1985] I.A.B.D. No.4, online: QL.

- Potential hardship the applicant would face in the likely country of removal.[72]

The IAD cases indicate that serious consideration is given to level of the applicant's establishment in Canada, indicating that the concept of *de facto* nationality does have a role at the Board level. It is a question of balancing the degree of establishment, the effects on the child with the circumstances relating to the person inadmissibility.[73]

Interestingly, the *European Convention* has allowed the *ECHR* to override deportation orders without overriding domestic law regarding nationality. The effectiveness of the *European Convention* in giving effect to national ties is evident in several applications that involved families with children. In *Uppal v. U.K.*[74] the parents were considered over-stayers under British law, having overstayed their visa, as opposed to being considered illegal immigrants. They were deported but the children who were born to them in England were citizens under the law and entitled to stay. The matter was resolved by friendly settlement pursuant to Article 28 of the *European Convention.* In *Fadele Family v. U.K.*[75] where the mother who was British died, the father was Nigerian and the children were British. The father was deported and took the family with him. They had a difficult time adjusting to the extremely poor living conditions and the matter was settled with the British government paying for the family to return to the U.K. It is interesting that in these older cases, there are two examples of the British government giving effect to a link between deportees where there are British citizen children. Presumably, the existence of the European Court strengthened the interpretation of *de*

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[72] *Murray v. Canada (Minister of Citizenship and Immigration)* [2003] I.A.D.D. No. 833, online: QL; *Holness v. Canada (Minister of Citizenship and Immigration)* [2003] I.A.D.D. No. 473, online: QL.
[73] *Thiyagarajah v. Canada (Minister of Citizenship and Immigration)* [2001] I.A.D.D. No. 543, online: QL.
[74] No. 1 (1979) DR17 as cited in Geraldine Van Bueren, *The International Law on the Rights of the Child* (Dordrecht, The Netherlands: Martinus Nijhoff Publishers, 1995) at 81.
[75] *Fadele Family v. U.K.* (1991), Application No. 8355/78, Eur. Comm. H.R. 159, resolved by friendly settlement. See Chapter Four below.

facto nationality for the adults. The children's citizenship assisted in keeping their parents in the country.[76] It would appear that the existence of the European Court has effectively served as an instrument of persuasion that is simply not available to people in countries that are not part of the European Court's jurisdiction.

The enjoyment of the full rights of citizenship and especially protection from deportation is not to be taken for granted. The cases illustrate the precarious situation of people who have lived their entire lives as *de facto* nationals but who may be deported despite a lifelong identification with that country because, at the end of the day, they did not have that country's nationality.

A major issue that is not answered by international treaties or national laws concerns how to deal with competing views regarding best interests of a child: to either protect the child from being deported along with the child's parents or, effectively, enforcing no choice but to leave or live parentless. The other balancing issue to consider is whether giving effect to one's nationality may not serve the child's best interests. More importantly, who is entitled to make these kinds of decisions and how ought they be made? Two American cases discussed below highlight these tensions.

2.7 UNITED STATES

Nationality may give effect to the best interests of the child or it may limit any consideration of the best interests of the child. The existence of nationality often assumes that the country in question has a right to claim the child who may be outside its borders. Nationality in the case of Elian Gonzalez was one of the major issues that affected his

[76] However, as is noted in Chapter five below, the British government limits or categorises how it considers the importance of British citizen children in deportation of parent cases.

situation when he arrived in the United States.[77] He was a six-year-old Cuban child who arrived on the coast of Florida without any relatives, his mother having died en route. Elian had relatives in Florida, including a great uncle, Lazaro Gonzalez. His great uncle contacted the Immigration and Naturalisation Service ("INS") and applied for asylum on behalf of Elian, on the basis that Elian was "afraid to return to Cuba." Elian's father, who lived in Cuba, did not agree that Elian should remain in the United States and wrote requesting that Elian be returned to Cuba. The INS conducted interviews with the father and the great uncle. The father assured the INS that the Cuban government was not coercing him regarding his request, whereas the great uncle insisted that the Cuban government coerced the request for Elian's return to Cuba.

On 5 January 2000, the INS Commissioner rejected Elian's asylum applications as legally void on the basis that "six-year-old children lack the capacity to file personally for asylum against the wishes of their parents."[78] This decision was appealed.

The legal questions for the Florida Court of Appeal focused on whether or not INS policy to refuse Elian's asylum application was reasonable. One question was whether or not INS's rejection violated the U.S. legislation, specifically 8 U.S.C. § 1158 that provides "Any alien...may apply for asylum."[79] The INS took the position that it was free to adopt its own policy regarding children applying for asylum against the wishes of a parent, since the statute was silent on that matter. This included being

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[77] *Gonzalez v. Reno* [2000] CA11-QL 227 No. 00-11424-D, United States Court of Appeals, Eleventh Circuit (19 April 2000), and D.C. Docket No. 00-00206-CV-KMM, (1 June 2000). The details of this case are summarised from both court decisions.

[78] *Gonzalez v. Reno*, 1 June 2000 [hereafter *Gonzalez*, June decision.]

[79] INA: ACT 208 – ASYLUM, Sec. 208.(a) Authority to Apply for Asylum.-
(1) In general. - Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, section 235(b).

entitled to develop a policy requiring that the parent of the child be the one to file the asylum claim. The Court of Appeal accepted that Elian was entitled to apply for asylum. The problem they faced was whether the child had applied for asylum in accordance with the statute when it was a non-parental relative who signed and submitted the application against the express wishes of the child's parent. The court had to decide whether or not an application submitted on behalf of a child by a relative who was not a parent, against the child's parent's wishes, could be construed as the child's application.

The United States' executive has discretion to decide immigration issues.[80] Therefore, the court's review of the exercise of this discretion was limited. The court had the ability to check the policymaking for procedural compliance and arbitrariness but could not re-examine the wisdom of the policy. The INS policy in this case made the following determinations:

1. six-year-old children lack the capacity to sign and to submit personally an application for asylum;
2. instead, six-year-old children must be represented by an adult in immigration matters;
3. absent special circumstances, the only proper adult to represent a six-year-old child is the child's parent, even when the parent is not in this country; and,

[80] The executive branch derives its authority over immigration matters, based upon a presidential and executive offices dealing with matters related to foreign affairs. *Ibid.,* referring to *Aguirre-Aguirre*, 119 S.Ct. at 1445.

4. that the parent lives in a communist-totalitarian state (such as Cuba), in and of itself, does not constitute a special circumstance requiring the selection of a non-parental representative.[81]

The court accepted that the determination that a six-year-old child lacked sufficient capacity to assert his own asylum claim was not unreasonable. This was supported by the case of *Polovchak v. Meese*,[82] where a twelve year old asserted an asylum claim against the wishes of parent. Therefore, the Court accepted that it was reasonable policy that only a parent can act for the child in his or her asylum claim. In making this decision, the INS considered the following competing interests:

1. the interest of the child in asserting a non-frivolous asylum claim;
2. the interest of a parent in raising his child as he sees fit; and,
3. the interest of the public in prompt but fair disposition of asylum claims.

The court could not conclude that the emphasis on the parent's role in raising a child was unreasonable. The court noted that this approach was not the only reasonable approach but that it was obviously an important one. This policy does not give specific consideration to the child's best interests. Moreover, although there is recognition of the child's right to claim asylum, the parent's right to determine how to raise the child appears to be paramount. There was recognition that there are circumstances where a parent is not the proper guardian or where more distant relatives will better care for the child.[83] Here, the Court held that the INS determining that the father was not operating

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[81] *Ibid.*
[82] 774 F. 2d 731, 736-37 (7th Cir. 1985)
[83] *Gonzalez,* June decision, Court commented that the parent-child relationship is not the only one to be examined but that it was obviously an important one to consider. See Reasons, footnote 20.

under coercion from the Cuban government was not wrong and was not an abuse of discretion.

In fact, the INS policy did include that there would be circumstances where a child may have completely separate interests from the parent. In cases where there appears to be a substantial conflict of interest between the parent and child, the INS would consider the potential merits of the child's asylum claim.

> If the child would have an exceedingly strong case for asylum, the parent's unwillingness to seek asylum on that child's behalf may indicate, under the INS policy, that the parent is not representing adequately the child's interests.[84]

Presumably, this comment was made to assure people that if there were serious merit to the claim, the INS would act differently. The assumption is that the INS did not believe that this was a strong enough claim in which to deviate from its policy.

The other factor to consider was whether having the parent living in a totalitarian-communist state is a special circumstance. The court noted that Cuba does violate human rights and fundamental freedoms. However, the executive branch was entitled to the greatest amount of deference in the context of foreign affairs. Any decision would affect the President, and his role in international affairs. Therefore, at the end of the day, politics had a strong role in this decision.

Consideration of the child's best interests was limited to review by the INS. This is the case in most immigration cases where it is immigration officers who review decisions with limited review by the courts.

Nationality may or may not have assisted Elian. It certainly played a role in his case. However, it is difficult to assess whether it provided any protection. The reality is that it played a political role regarding how the U.S. government wished to deal with

Cuba. This could be an example where nationality had nothing or little to do with the child's best interests. In fact, it is arguable that the relationship between the two countries trumped actual meaningful consideration of the child's best interests. An example of where it is not clear that nationality would assist the child could be a situation involving a young Sudanese girl who is ten years old and who is facing the prospect in the near future of female genital mutilation. What would occur if her aunt took her away from Sudan, against the wishes of her parents and made an asylum claim in the United States or a refugee claim in Canada? The girl is Sudanese, her parents would be seeking her return. The question is: what would be in her best interests? Would it be to give effect to protection based on her nationality or based on her human rights?[85] Or would it be that, where the country that has the child does not care about its relationship with the country of origin, the best interests might actually be considered?

A recent example of the tension between parents and nationality versus best interest of the child took place in the United States, between the spring of 2000 and July 2001. The case of *Phanupong Khaisri v. Reno*,[86] dealt with the deportation order of a three-year-old boy (known as "Got") from Thailand, who was used as a decoy in the slave trade and who had AIDS. According to newspaper articles, the Thai authorities confirmed that the mother rented the boy to a trafficking ring. The father had committed suicide when he discovered he was HIV positive. If the boy were deported he would face returning to his mother in Thailand, a prostitute who consented to having her son used as

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[84] *Ibid.* See Reasons, footnote 21.

[85] The Immigration and Refugee Board in Canada has accepted that minor females are persons in need of protection when genital mutilation is practiced in every part of the country from which they seek protection. See for example RPD MA2-10373, 30 May 2003.

[86] *Phanupong Khaisri v. Reno,* Doc. No. CV 00-04883-DT.

a decoy.[87] The young boy's paternal grandparents came from Thailand to California and requested that the INS deport Got back to Thailand. Two people active in the Thai community were taking care of Got, who was very sick upon arriving in the United States. These people brought a motion for a preliminary injunction to prevent the deportation. The matter was heard on 17 July 2000, at which time District Judge Tevrizian granted the injunction. According to newspaper and television media reports, the judge rejected the grandparents' request for custody of Got because the grandmother had a past conviction for drug trafficking. The Judge also rejected the Thai government's request to return the child to Thailand.[88]

One issue in the case of Phanupong Khaisri cited Elian Gonzalez's father as subject to a number of interviews by the INS. The Khaisri case raised serious issues about the boy's mother's capacity to care for the child. There were also concerns regarding the grandparents' ability to care for the sick child and the concern that they would return Got to his mother's care. Despite his nationality and interventions by the Thai government, Judge Tevrizian indicated that no decision would be made until there was an asylum hearing. The Judge stated

> ...I think that in this particular situation there's a very strong showing that human rights violations are at issue, and as such, I just don't think it should be hastily requested that this child be returned to Thailand without some kind of investigation with regard to, you know, what his paternal grandparents are going to do for this child, what is the nature of the child's illness at the present time.[89]

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[87] Denise Hamilton, "This Boy's Life", *New Times, Los Angeles*, (6 July 2000), online, listserver: Notes1/PCMS@preludessystmes.com. Reuters, "Judge Bars Deportation of Thai Boy Pending Hearing." (11 August 2000), online: FindLaw, Legal News.

[88] *Ibid.* "Judge: Smuggled Thai boy is HIV positive, will stay in U.S.", *CNN,* Los Angeles, (July 17, 2000), online: <http://www.cnn.com/2000/LAW/07/17/thai.boy/index.html>. *Khaisri,supra* note 86.

[89] Transcript of Hearing before Judge Tevrizian, 9 May , p. 18 as cited in letter from Charles Song, counsel for Phanupong Khaisri dated 7 June 2001 to members of profession.

CNN quoted the Judge as stating: "This child has been dropped on my doorstep...[and] this is not the legal thing to do; it's the humanitarian thing to do."[90] However, the asylum application was denied on 8 May 2001 by the INS.[91] Got sought administrative review of the denial. A status conference was held and the judge refused to transfer custody of Got to the paternal grandparents or to remove the injunction preventing his removal. Counsel for Got applied for a non-immigrant *Trafficking Act* visa and began a letter-writing campaign to the U.S. President, Attorney General Ashcroft, the INS Commissioner and members of Congress.[92] On 23 July 2001, Attorney General Ashcroft personally intervened to halt the deportation of Got by granting him "humanitarian parole."[93] The paternal grandparents claim that they have not given up hope of gaining custody,[94] but it appears likely that the child will not be removed to Thailand.

Both the Elian Gonzalez case and the Got case are examples where the U.S. court system was faced with deciding how to measure the best interests of the child when sending the child to the country of which the child is a national may not be in the best interests of the child. In both cases, there were blood relatives who wanted the child. In Gonzalez, the father was interviewed and the INS was satisfied that he was not being coerced. Technically, the Gonzalez case was a review of the INS decision that the asylum application was void. Therefore, there was no in-depth analysis of the merits of the claim. As in Canada, immigration decisions are limited on judicial review. And since

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[90] "Judge: Smuggled Thai Boy", *supra* note 88.
[91] *Phanupong Khaisri v. Ashcroft*, unreported, docket CV 00-04883-DT (CWx), 4 June 2001.
[92] Charles Song letter, *supra* note 89.
[93] Dan Eggen, "Ashcroft Intervenes To Shield Thai boy, U.S. Agencies Ordered to Halt Efforts to Deport Ill Child Used as Decoy" *Washington Post*, 24 July 2001, (forwarded by listserver); Press Release "Statement of Senator Feinstein on the Decision by Attorney General Ashcroft to Allow Thai Boy to Remain in the United States" 23 July 2001.

immigration issues remain under the executive power, the level of deference ends up indicating that politics play a major role. That is not to say that if the evidence indicated that there were stronger grounds to claim asylum that there would have been a different outcome. However, in the case of Got, the Thai boy, the court did specifically consider his best interests, and the evidence was more compelling regarding his maltreatment in Thailand. Thus, the courts have questioned or assert the position of judging the country of origin. But it shows that "belonging" to a country may not help a child, in fact, it may hinder a child (which is when there are refugees), even if that child's status is in limbo. The irony is that we see situations where a country will do more to have its children returned, when the children have left, than while the children are at home.

2.8 HONG KONG

Hong Kong is an interesting example to consider for its originally Commonwealth jurisdiction. In 1980, Hong Kong was allowing illegal immigrant children from China to stay in Hong Kong if they reunited with family in Hong Kong.[95] However, this led to some in China taking advantage of the situation and charging large sums of money to smuggle children into Hong Kong illegally. There were reports of children being abandoned at sea and their lives being in danger.[96] The problem of Hong Kong indicated problems that arose from changes to British nationality and immigration laws.[97] Hong Kong was a British Colony but England passed the *Commonwealth Immigration Act 1962* which abolished the automatic right of citizens of the UK and its colonies to reside in the U.K. Under the U.K.'s *Immigration Act 1971*, only patrials, someone whose parents had

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[94] *Ibid.*
[95] Harriet Samuels, "Child Victims of Immigration Law and Policy: A Study of the Effect of Hong Kong immigration law on children and their families" (1997), 5/ 1 *International Journal of Children* 97.
[96] Samuels, citing Emily Lau, "Illegal Immigrant Children Amnestied," *Far Eastern Economic Review*, 14

been born or naturalised in the United Kingdom or lived there continuously for five years, had a right of abode in the U.K. China regarded all Hong Kong Chinese citizens as having Chinese nationality, even if they possessed foreign passports. China did not regard Hong Kong citizens with British passports as foreign nationals but as Chinese citizens not entitled to British consular protection.[98]

In order to obtain greater benefits for their children by obtaining special status, Samuels notes that there were problems with late stage pregnancies taking place in Hong Kong and the different treatment of the parties depending upon each parent's status.

> If an illegal immigrant mother or a woman visitor from China on a short term visa gives birth to a child in the territory provided that father is a permanent resident the child will be allowed to remain whilst the mother will be deported. This situation has been described by one legislative councillor as contrary to human rights because of the serious social implications leading to marriage difficulties and children being left to fend for themselves as the husband is often the main breadwinner and has difficulty in finding someone to look after the child.[99]

There were an increasing number of mainland women giving birth in Hong Kong and the government had been granting permission to children to stay where the father was a Hong Kong resident. "There have been discussions with China about preventing women who are in the late stages of pregnancy from travelling to Hong Kong as this is regarded by the Hong Kong government as abuse of the system."[100] There are Hong Kong cases that refer to statistics dating back to 1992 when there were on average more than two thousand babies born in Hong Kong each year of pregnant women who were illegal

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May 1987.

[97] Discussed in Chapter Five.

[98] Samuels, *supra* note 95 at 104.

[99] *Ibid.*, at 106, see footnote 41, accompanying text referring to comments of Elsie Tu reported in "Policy review demanded over mainland wives."

[100] *Ibid.* reference to Catherine Ng, "Ban Urged for Abuse of Permits," South China Morning Post 1995, Lou Palpal- Iatoc, "Government Warns Mainland Mothers" Hong Kong Standard, 30 May 1995.

immigrants.[101] Samuels states that women were trying to give birth in Hong Kong for reasons other than better medical services, for example, to avoid China's strict birth control policy, and to benefit from the *Basic Law*, the Hong Kong constitution. Under the *Basic Law*, a Chinese citizen born in the territory would be a permanent resident of Hong Kong, allowing for a right of abode to crystallise after 1997.[102] The *Basic Law* incorporated Hong Kong's previous legal system after 1 July 1997 when the People's Republic of China (PRC) resumed sovereignty over Hong Kong and created the Hong Kong Special Administrative Region (HKSAR).[103]

There were problems prior to creation of Hong Kong as a Special Administrative Region, ("SAR"). In the case of *Hai Ho-Tak & Attorney General v. Director of Immigration,*[104] there were two cases regarding the issues of whether children were born in Hong Kong and the residency of the mother. The first one dealt with Ho Tak who was seven years old. His father, mother and three older siblings all had rights of abode in Hong Kong. The mother claimed she entered Hong Kong illegally 20 September 1987 and that Ho Tak was born there on 15 December 1987. She returned to China with the baby and left him there with family and friends. On 13 May 1988 she returned to Hong Kong. In 1991 she tried to have her son attend school in Hong Kong but the authorities noted the son had never had his birth registered. The Director of Immigration made a removal order for the son, which was upheld at the lower court level. The lower court judge stated that Section 11 of the *Bill of Rights Ordinance* precluded his ability to rely on the rights claimed.

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[101] *Chong Fung Yuen v. Director of Immigration* (CACV000061/2000), accessed from Government of Hong Kong website, <http://www.info.gov.hk/justice/new/depart/right1.htm> (accessed 3 May 2004).
[102] For full text of Article 24 of *Basic Law* regarding right of abode, see Appendix "I".
[103] Elsie Leung, Secretary for Justice, Department of Justice website,

Section 11 of the *Bill of Rights Ordinance*:

Immigration Legislation-

> As regards persons not having the right to enter and remain in Hong Kong, this Ordinance does not affect any immigration legislation governing entry into, stay in and departure from Hong Kong, or the application of any such legislation.

Ho Tak applied for judicial review claiming the removal infringed Articles 1, 14(1), 15(4), 20 (1) and 22 of the Hong Kong *Bill of Rights Ordinance*.

Article 14

1. No one shall be subject to arbitrary or unlawful interference with his family.
2. Everyone has the right to the protection of the law against such interference...[105]

The second case dealt with Madam Cheng who had married her husband, a Hong Kong resident in 1986. There were five children born to them between 1986 and 1992. The children were Hong Kong residents with rights of abode. Cheng had come to Hong Kong illegally in 1985/1986 and was removed back to China. She returned illegally in 1987 and remained there until discovered. The second removal order was issued 9 May 1991. She appealed and the case was dismissed. Her husband and children applied for judicial review of the decision.

The Court of Appeal upheld the Director of Immigration's decisions. In part based upon the exception from Section 11 but also because of immigration pressures to enter Hong Kong. On the issue of separating members of the family, Godfrey J.A. stated:

> Like all other human rights, the rights of the family under the Ordinance are not absolute. ...The *Bill of Rights* will be debased and devalued if it is repeatedly invoked in cases to which its abstract concepts have really no application. The

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<http://www.info.gov.hk/justice/new/legal/right.htm> (accessed 16 December 2000).

[104] *Hai Ho-Tak & Attorney General v. Director of Immigration* [1994]2 H.K.L.R. 202 (C.A.)

[105] See also Article 19- The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

> court must hold the balance between the individual and society as a whole, and maintain a sense of proportion in doing so.[106]

Justice Godfrey's comments indicate an attempt to maintain deference to the executive in the area of immigration law. The comments regarding proportion echo Canadian case law on the use of Section 1 of the *Canadian Charter of Rights and Freedoms*[107] as a means of justifying breaches of *Charter* rights. [108]

Upon ratification of the *CRC*, the United Kingdom filed this reservation to ratification of the *CRC* that applied to Hong Kong:[109]

> The United Kingdom reserves the right to apply such legislation, in so far as it related to the entry into, stay in and departure from the United Kingdom of those who do not have the right under the law of the United Kingdom to enter and remain in the United Kingdom, and to the acquisition and possession of citizenship, as it may deem necessary from time to time.[110]

The Committee on the Rights of the Child did express concerns regarding the situation in Hong Kong, prior to power transferring to China in 1997:

> 'with respect to the question of families split between Hong Kong and China, the Committee is concerned that the increase in permits arranged for these children and their families, from 105 to 150, is manifestly insufficient to meet the needs of the estimated 60,000 children currently in China who may have the right of abode in Hong Kong after 1 July 1997.'[111]

It is not clear whether any action was taken. The *Basic Law* was passed and there have been interesting cases interpreting the provisions regarding permanent resident status in Hong Kong. The issue of trying to prevent abuse of the system was one issue.

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[106] *Hai Ho-Tak & Attorney General, supra* note 104 at 210.
[107] *Constitution Act*, 1982.
[108] See *R. v. Oakes,* [1986] 1 S.C.R. 103.
[109] See Chapter Five below for discussion regarding the United Kingdom.
[110] As cited in Samuels, *supra* note 95 at 117, text of footnote 84, see text to the Extension of the United Kingdom's Ratification of the Convention on the Rights of the Child to certain Dependent Territories, dated 6 September 1994, deposited with the United Nations on 7 September 1994. Reproduced (1994) 3 Bill of Rights Bulletin 64.
[111] UK dependent territory: Hong Kong IRCO, Add. 63, paras. 14 and 26 as cited in Rachel Hodgkin and Peter Newell, *Implementation Handbook for the Convention on the Rights of the Child*, (New York: UNICEF, 1998) at 134.

Since Hong Kong has become a Special Administrative Region ("HKSAR"), there have been several cases that have challenged the government's position regarding Article 24 and provisions regarding the right of abode in Hong Kong. Interestingly, the Director of Immigration took a position that there must be a "close and real connection" with Hong Kong when determining whether Chinese citizens born in Hong Kong before or after 1997 were permanent residents of the HKSAR. The Court of Appeal held that the only requirement is that the Chinese citizen be born in Hong Kong. The legislation did not require proof that a parent was a permanent resident in Hong Kong. This seems to suggest echoes of *Nottebohm* and the need for a real connection, with the court taking a positivist approach by noting that the language of the legislation was clear and unambiguous.[112]

At this stage, Hong Kong appears to be looking at the language of the legislation without focusing too much on the alleged ills that the legislation seeks to repair. Therefore, the interests of children when they fall into the specific clear-cut categories will provide them with the right of abode in Hong Kong.

Despite a country reaching outside of its borders to assist its nationals, the approach and considerations are entirely different in deportation matters. Some international law gives effect to the concept of *de facto* nationality. Most countries appear to ignore this concept when they issue deportation orders. On the other hand, the *European Convention* has proven to be an effective international system that does give effect to the reality of one's situation when the formality of the law is harsh. Canada's courts and government, similar to European countries, have in general deferred to their bureaucratic systems in immigration matters, even when they affect children. In certain

[112] *Chong Fung Yuen, supra* note 101.

situations nationality does not serve the best interests of the child. Nations are concerned about immigrants taking advantage of their laws. The question is how to draw the line between protection of children and enforcement of the state's laws.

Chapter 3 STATELESSNESS, REFUGEES AND CHILDREN

3.1 INTRODUCTION

While nationality may provide some protection for children in immigration situations, it is worthwhile considering other categories of those who are vulnerable and seeking protection. Stateless persons are those who may have lost their nationality or those who never had nationality and are therefore stateless. The other vulnerable category is refugees who have a nationality but have lost the protection of the country of origin. This chapter will focus on the issues in general and how they affect children.[1]

Although many countries include provisions regarding statelessness in their immigration and/or nationality/citizenship legislation, statelessness remains a pressing issue. There is not a great deal of case law on this issue and therefore, the case law affecting children will be discussed in greater detail in the refugee section of this chapter.

3.2 STATELESSNESS

3.3 DEFINITION

Statelessness is defined as being without nationality. Statelessness often occurs due to conflicting laws between states.[2] It can also occur through denationalisation decrees: countries declaring that certain peoples have lost their nationality. A person could be stateless at birth or by marriage or may become stateless because of conflicting

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[1] There is insufficient space to allow for a thorough analysis of both subjects. This chapter will highlight current and recent issues.

[2] Statelessness usually occurs because of "discrepancies between municipal nationality laws and the paucity of general and uniform international rules." Douglas Hodgson, "The International Legal protection of Child's Right to a Legal identity and the Problem of Statelessness" (1993) 7 *International Journal of Law and the Family* 255-270 at 259, see footnote 25.

laws and territorial changes.[3] For example, one may be stateless at birth where his or her parents are nationals of a country where *jus soli* (nationality from the country in which you are born) is applied but the child is born in a country, which recognises *jus sanguinis* (nationality based upon ancestry).[4] Statelessness at birth can occur from other combinations of factors:

- To children born abroad, in a *jus sanguinis* country with one parent stateless;
- Born in a *jus sanguinis* country of a stateless father and mother or without known nationality;
- A person born in a *jus sanguinis* country of unknown parents;
- Foundlings, persons born on ship or aircraft; or
- Born from a stateless person with diplomatic immunity.[5]

Without nationality, a person cannot claim the protection of a government against the abuses of other governments.[6] In addition, a stateless person is not necessarily entitled to basic civil rights extended to the citizen.[7] Statelessness may lead to extended family separation since stateless persons cannot bring their children or spouses into Canada.[8] If a stateless person leaves Canada, they have no right to return and they have no standing to enter another country. Stateless persons are ineligible to receive subsidized medical care and public assistance. Stateless children in Canada do have the right to education but post-secondary students require a student visa and often pay higher tuition fees.

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[3] Marc Vishniak, *The Legal Status of Stateless Persons,* (New York: The American Jewish Committee, 1945) at 11.

[4] See Chapter Two above. Vishniak gave the example (as of his time of writing in 1945) that a child born in Germany of Argentian parents would be stateless because under Argentine law, a person could have Argentinean nationality if born on its territory and German law did not provide nationality based only upon birth in its territory. Vishniak, *supra* note 3 at 11.

[5]Ellen H. Greiper "Stateless Persons and their lack of Access to Judicial Forums" (1985) II n.2 *Brooklyn Journal of International Law* 439-457 at 439 citing Cordova, Report on Elimination or Reduction of Statelessness [1953], 2 *Y.B. International L. Commission*, 192, 195, UN Doc. A/CN.4/64.

[6] Vishniak, *supra* note 3, preface, by Max Gottschalk, "The term stateless defines an individual whom no country recognizes as possessing its nationality."

[7] Greiper, *supra* note 5, at 440.

3.4 BACKGROUND AND INTERNATIONAL INSTRUMENTS

In the first half of the Twentieth Century, due to changing borders, territorial succession and wars, the issue of stateless persons became urgent. Following the First World War, nationals of Austrian, Hungarian, Russian and German origin were denied citizenship in new states created after the fall of the Austro-Hungarian and Tsarist Empires.[9] Before the First World War, stateless persons usually enjoyed the same rights as their neighbours, but following the war there were increased regulations governing all aspects of life.[10] The lack of a nationality meant the inability to travel in and out of a country and a tendency to avoid all contact with the authorities.[11] During the Second World War, Nazi decrees led to questions of nationality and statelessness. Under the 11th Ordinance Reich Citizenship Law of November 25, 1941, German Jews living abroad lost their nationality and were denationalised.[12] There were a number of countries that after the Second World War, refused to extend protection to their nationals although these people were never formally deprived of nationality and these people became *de facto* or effectively stateless.[13]

In the aftermath of the Second World War, there were meetings and commissions of the international community to deal with the issues of refugees and statelessness.[14]

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[8] Andrew Brouwer "Statelessness in Canadian Context: A Discussion Paper" (July 2003) (UNHCR) UNHCR website, <www.unhcr.ch/cgi-bin/texis/vtx/home> (accessed verified 17 July 2004).
[9] Vishniak, *supra* note 3 at 1 (preface).
[10] *A Study in Statelessness*, United Nations, E/1112; E/1112/Add.1, 1 Aug. 1949, Lake Success, New York at 9-10.
[11] McDougal, Lasswell & Chen, "Nationality & Human Rights: The Protection of the Individual in External Areas" (1973) 83 *Yale L.J.* 900 at 961.
[12] P. Weis, *Nationality and Statelessness in International Law*, (Germantown, Md.: Sijthoff & Noordhoff, 1979) at 122.
[13] Tang Lay Lee, "Stateless Persons and the 1989 Comprehensive Plan of Action Part 1: Chinese Nationality and the Republic of China (Taiwan), (1995) Vol. 7, No. 2, *International Journal of Refugee Law*, 201 at 224, see footnote 57 referring to *The Intergovernmental Committee on Refugees, Statelessness and Some of its Causes: An Outline*, (London, England, March 1946) at 3.
[14] Weis, *supra* note 12 at 160-169.

The Economic and Social Council of the UN adopted by resolution the appointment of an Ad Hoc Committee on Statelessness and Related Problems.[15] In 1949, the Ad Hoc Committee published *A Study in Statelessness*[16] that summarised the position of a stateless person without protection:

> Normally every individual belongs to a national community and feels himself part of it. He enjoys the protection and assistance of the national authorities. When he is abroad, his own national authorities look after him and provide him with certain advantages. The organization of the entire legal and economic life of the individual residing in a foreign country depends on his possession of a nationality. The fact that the stateless person has no nationality places him in an abnormal and inferior position, which reduces his social value and destroys his own self-confidence...[17]

The meetings culminated in creation of the *Convention Relating to the Status of Stateless Persons* (*1954 Convention*).[18] The stateless person was defined:

Article 1

> For the purpose of this Convention, the term 'stateless person' means a person who is not considered as a national by any State under the operation of its law.

However, there have been concerns that the *1954 Convention* applies in limited situations. The definition of stateless person is a *de jure* or legal definition as it specifies a person not being a national under the country's law. There is no protection for a *de facto* stateless person, someone who has a nationality but does not enjoy the protection of the state of his or her nationality.[19] There were those who argued that people who were

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[15] Nehemiah Robinson, *Convention Relating to the Status of Stateless Persons, Its History and Interpretation, A Commentary* (New York: Institute of Jewish Affairs) 1955 at 1. See also Weis, *supra* note 12.

[16] E/1112; E/1112/Add.1, 1 Aug. 1949, Lake Success, New York

[17] E/1112; E/1112/Add.1, at 9. See also Stephanie Grant, "The International Legal Regime: Prevention of Statelessness and Protection of Stateless Persons" in *Citizenship and Language laws in the Newly Independent States of Europe, Seminar Copehnagen, January 9-10, 1993* (Copenhagen: Danish Center for Human Rights, The Danish Helsinski Committee et al.)

[18] Adopted 28 September 1954 entered into force 6 June 1960, see Vo. 360 U.N.T.S. 117.

[19] Tang Lay Lee, *supra* note 13. Apparently at the 11th meeting Conference the *de facto* stateless person definition was dropped and *de jure* definition adopted in order to attract as many ratifications as possible and as there was concern that states would have conflicting views on what constitutes *de facto* statelessness. See footnotes 64 and 65: UN doc. E/CONF.17/L.11/Add.2 and Doc.E/CONF./17/SR.14

de facto stateless would usually be refugees and covered under the Refugee Convention.[20] The Final Act of the *1961 Convention* includes a "Recommendation" to extend the benefits of the Convention to *de facto* stateless persons.[21] "The Conference 'Recommend[ed] that persons who are stateless *de facto* should as far as possible be treated as stateless *de jure* to enable them to acquire an effective nationality.'"[22] As it turns out, the expectation that *de facto* stateless persons would receive the same treatment as *de jure* stateless persons was wrong and the issue of *de facto* stateless remains an active and current issue.[23]

The Convention does provide protection to a stateless person (the protection of her person and property), which he or she would not have enjoyed otherwise.[24] A country is to treat stateless persons as well as it would treat other foreign nationals in its country:

Article 7. - Exemption from reciprocity

> 1. Except where this Convention contains more favourable provisions, a Contracting State shall accord to stateless persons the same treatment as is accorded to aliens generally.

The *1954 Convention* did provide some basic rights to assist the stateless person and ensure that the person would be treated at least on the same level as other foreign nationals, minimising the effect of being stateless. Although the *1954 Convention* provided the basic rights, the international community recognised that it was necessary to

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respectively at 226. See also Robinson, *supra* note 15 at 16-18. And for a more recent consideration of the same point, see Brouwer, *supra* note 8.

[20] Robinson, *supra* note 15 at 14-18.

[21] "Note on UNHCR and stateless persons" EC/1995/SCP/CRP.2, 2 Jun 1995 at paragraph 9.

[22] *Ibid.*

[23] *Ibid.*, at paragraph 11. See also Carol A. Batchelor, "Stateless Persons: Some Gaps in International Protection" (1995) 7/2 *International Journal of Refugee Law* 232-259 and Brouwer, *supra* note 8.

[24] Robinson, *supra* note 15 at 42. The stateless person also has access to the courts, Article 16.

prevent statelessness. The *Convention on the Reduction of Statelessness*,[25] ("*1961 Convention*") requires nationality to be conferred upon or not withdrawn in certain circumstances.[26] This Convention attempts to reduce statelessness and deals primarily with future statelessness.[27]

Importantly, the *1961 Convention* prescribes that nationality cannot be revoked without assuring acquisition of another nationality.[28] Article 4 applies the *jus sanguinis* principle by granting nationality to a person not born in its territory, who would otherwise be stateless, if the nationality of one of his parents at the time of the person's birth was of that State.[29] These articles are attempts to ensure that there will always be a nationality conferred upon the child.

In the Western Hemisphere, the Organization of American States' ("OAS") *American Convention on Human Rights* includes Article 20(2), which applies the *jus soli* principle to guarantee rights to nationality:

Article 20. Right to Nationality

1. Every person has the right to a nationality.
2. Every person has the right to the nationality of the state in whose territory he was born if he does not have the right to any other nationality.
3. No one shall be arbitrarily deprived of his nationality or of the right to change it.[30]

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[25] Adopted on 30 August 1961, entry into force 13 December 1975.
[26] Article 1, Article 5, Article 6, Article 7, Article 8
[27] Hodgson, *supra* note 2 at 260, Greiper, *supra* note 5 at 449, fn. 81, citing McDougal *et al., supra* note 11. See Appendix "A". Batchelor, *supra* note 23 at 257 notes that the convention was originally intended to be on the *elimination* of statelessness but that was considered too radical and focused instead on reduction of statelessness.
[28] See articles 5 and 6 at Appendix "A".
[29] Appendix "A".
[30] *American Convention on Human Rights "Pact of San Jose, Costa Rica"* adopted at: San Jose, Costa Rica, date: 11/22/69, Entry into force: 07/18/78. See also Article 19, Rights of the Child: "Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state."

Canada, a member of the OAS, has not signed or ratified the *American Convention of Human Rights.* Presumably, Canada believes that its legislation addresses the issue. Although important matters are addressed, for example, a provision for foundlings, there are still legislative gaps that do not address statelessness.

Despite the international conventions and domestic legislation, statelessness continues to be a prevalent problem.[31] There are children, who are stateless, and often *de facto* stateless. Some people have formal nationality but no effective ties to that country or are unable to obtain nationality protection. Meanwhile because they have *de jure* nationality from a safe country, that person may be precluded from obtaining refugee status.[32] A serious problem for children is the number of countries that strictly apply the *jus sanguinis* principle. Therefore, there are children who inherit the stateless status of their parents and cannot acquire nationality. There are countries that prevent women from passing on their nationality to their children.[33] That is one reason why *jus soli* citizenship can be important, as it can assure nationality in these situations.

A more recent example of the international community's response to the issue is the *Draft Articles on the Nationality of Natural Persons in Relation to the Succession of States*, adopted by the General Assembly of the United Nations ("U.N.) at its fifty-fifth session.[34]

Article 4, Prevention of Statelessness:

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[31] "Note on UNHCR and Statelessness Activities" 30 May 1997, EC/47/SC/CRP.31. See also Brouwer, *supra* note 8.

[32] In one refugee case, the Refugee Division recognised that the stateless minor female claimant was entitled under Tanzanian Law to Tanzanian citizenship. However, it was not established that the father would submit her citizenship application. Therefore, although she had a technical right to citizenship, the reality was that it was not likely she would not obtain that citizenship and she was held to meet the definition of refugee. CRDD T99-10153, Filion, Graff, 5 September 2000.

[33] "Note on UNHCR and Statelessness Activities", *supra* note 31 at paragraph 2.

[34] A/RES/55/153, 30 January 2001.

> States concerned shall take all appropriate measures to prevent persons who, on the date of the succession of States, had the nationality of the predecessor State from becoming stateless as a result of such succession.

The Commentary on Article 4[35] is that although there are national laws dealing with statelessness, a more effective measure would be to have an agreement by countries to preclude the occurrence of statelessness.[36] The European Union recently adopted the *European Convention on Nationality,*[37] which is considered a more modern approach to statelessness, and nationality:

> The *European Convention on Nationality* fills a need in that area, as it is the first modern multi-lateral treaty to codify a full range of nationality issues, from basic matters such as the acquisition of nationality to the more complex problems that can arise in trying to manage nationality issues in the context of a state succession.[38]

The Conference on Nationality mentioned the concern regarding "birth tourism", that women are purposely visiting *jus soli* countries in order to give birth there and convey that nationality upon their children.[39] The Canadian official mentioned this as having been part of discussions for amending Canada's citizenship legislation in the mid-1990s. Norman Sabourin, who had been Registrar for Canadian Citizenship, Citizenship

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[35] Chapter IV, Nationality in Relation to the Succession of States, prepared by International Law Commission, from the fifty-first session, (prior to adoption.)
[36] *Ibid.* See para. (5) Commentary, re: Article 4.
[37] ETS 166, 14 May 1997, see "1st European Conference on Nationality: Trends and Development in National and International Law on Nationality" CONF/NAT (99) PRO 1 PROCEEDINGS CONFNAT, Strasbourg, 3 February 2000.
[38] Norman Sabourin, "The Relevance of the European Convention on Nationality for Non-European States" in "1st European Conference on Nationality, *supra* note 37 at 113.
[39] The issue of birth tourism was raised recently in a British Columbia newspaper and has been an issue in the United States. Susan Lazaruk, "Korean women aided in giving birth in Canada" *The Province* 3 June 2004, forwarded by email from Sun and Province Infoline on 4 June 2004. The article is about individuals who organize travel for women seven or eight months pregnant to come to Canada in order to give birth in Canada at a cost of about $22,000. The Korean women do this to assist their sons from being exempt from military service when they are older. The adult Canadian children can later sponsor family members when they turn 18 years old. This is a legal practice and CIC has said that it does not stop visitors who are pregnant from entering Canada. John Reynolds, a Conservative MP stated, "If its [sic] not illegal, it should be." Issue discussed on CBC's The Current, 4 June 2004. The practice has taken place in the United States for many years (and Canada) with Americans using the term "anchor" babies. See Byun Duk-kun

and Immigration Canada, discussed how there were recommendations to change citizenship to stem the tide of birth tourism. But Canada would have to ensure that any legislative changes would not contravene international law on statelessness:

> [I]f that recommendation were ever implemented, Canada could look to the 1961 Convention and the more recent articulation of this norm in the *European Convention on Nationality* for guidance when formulating legislation.[40]

The Canadian government drafting committee had provisions prepared to deal with that scenario. The concept was not included in the revisions to the citizenship legislation.[41] Here is one example of a country considering whether the legislation it wishes to draft to address a perceived mischief, would violate international law or the country's treaty obligations.[42] International Conventions regarding statelessness can protect children in Canada through influence over the legislature.

Another arguable protection for statelessness and possibly the concept of *de facto* nationality comes from the *International Convention on Civil and Political Rights* ("*ICCPR*")[43] where under 12(4) a person has the right to return "to his own country." This has been interpreted as being broader than formal nationality and may apply to the person's place of habitual residence. In *Stewart v. Canada,* [44] the Human Rights Committee considered the meaning of the term "his own country" in the *ICCPR*. Stewart

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"Education, Military Service Drive Women to Take US 'Birth Tours'" *Korea Times* (9 September 2003) online.

[40] Sabourin, *supra* note 38.

[41] *Ibid.*

[42] Another example is evident in the Regulatory Impact Analysis Statement ("RIAS") for Regulations Amending the Immigration and Refugee Protection Regulations, included in Part I of *Canadian Gazette*, October 26, 2002 created to meet Canada's obligations under the Safe Third Party Agreement with the United States. The RIAS includes reference to consultations with non-governmental organisations ("NGOs") and Canada consulting with the United Nations High Commissioner for Refugees ("UNHCR") and that the UNHCR was satisfied that both the United States and Canada meet their international obligations.

[43] Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 *entry into force* 23 March 1976, in accordance with Article 49.

was a British citizen born in Scotland who had immigrated to Canada with his family when he was seven years old. His parents never obtained citizenship for him. He argued before the Human Rights Committee that Canada violated his right not to be arbitrarily deprived of the right to enter his own country. The Committee did accept that the provision under 12(4) "embraces, at the very least, an individual who, because of his special ties to or claims in relation to a given country cannot there be considered to be a mere alien."[45] For example, it would extend to nationals stripped of their nationality in violation of international law or nationality denied because of country changes. The Committee denied Stewart's application because it was his own fault that he had not applied for citizenship. Despite the definition, a review of some Committee cases where persons subject to deportation brought complaints and included the right to enter their own country based on permanent residency has indicated that the Committee takes a limited approach to that provision.[46]

When reading Canada's immigration and citizenship legislation, it appears that statelessness is not an issue. And presumably, Canada believes that its legislation sufficiently addresses the problem of statelessness. Brouwer on behalf of the United Nations High Commissioner for Refugees ("UNHCR") provides a number of recommendations to Canada to improve the situation for stateless persons.[47] His concern is that only stateless persons who also meet the definition of refugees are obtaining

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[44] *Stewart v. Canada* No. 538/1993, Views adopted on 1 November 1996, fifty-eighth session, Human Rights Committee.
[45] *Ibid.*, at para. 12.4.
[46] *Sahid v. New Zealand*, Communication NO. 893/1999. 11/04/2003, CCPR/C/77/D/893/1999, *Canepa v. Canada,* Communication No 558/1993: Canada. 20/06/97. CCPR/C/59/D/558/1993. And see also discussion on the issue: Summary record of the first part of the 1775th meeting: 27/09/99. CCPR/C/SR.1775. (Summary Record)
[47] Brouwer, *supra* note 8.

protection.[48] One suggestion is that Canada ought to accede to the 1954 *Convention on the Status of Stateless Persons*. There are specific recommendations for legislative changes. For example, under section 4(1) of *The Citizenship Act*, a deserted child under age seven will be deemed to have been born in Canada unless proven otherwise. The recommendation is that if such a child is found to have been born outside Canada, that there be an exception to ensure that the child retain Canadian citizenship, if revoking the citizenship would make the child stateless.

Another major problem is that often the government seeks to remove people without status. The CIC provided statistics to the UNHCR that it removed 228 reportedly stateless individuals between 1997 and 2002. Another 152 people, who listed their nationality as "unknown" were also removed during this time. However, if a person is stateless, it is difficult to find a country to where they can deport the person. The CIC did not provide information or did not have information available regarding the countries to which these people were removed.[49] This remains an area where children are in situations where their status is questionable and there is little protection available.

3.5 REFUGEES

The term refugee defines an individual who because of persecution that occurred in his country of origin, voluntarily or involuntarily left the country and does not enjoy the diplomatic protection of any other country.[50] A refugee is not necessarily one who has lost nationality, although there are refugees who may have.

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[48] *Ibid.*, at 42.
[49] *Ibid.*, at 41.
[50] Vishniak, *supra* note 3 at 9. See also the League of Nations definition, "any person who does not enjoy or no longer enjoys the protection of the government of the state to which he previously belonged and who has not acquired or does not possess any other nationality." This definition was used in the *Convention Relating to the International Status of Refugees* adopted at Geneva on 28 October 1933. At that time statelessness and refugees were considered one problem.

Following the Second World War, there was a concerted effort by the international community to address the problems of refugees. The *Convention relating to the Status of Refugees*[51] ("*1951 Refugee Convention*") was drafted as a result of a recommendation by the newly established United Nations Commission on Human Rights and was a landmark in setting standards for the treatment of refugees.[52]

A refugee under **Article 1** of the *1951 Refugee Convention* as amended by the *Protocol relating to the Status of Refugees* ("*1967 Protocol*")[53] is a person who:

> Owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

The *1967 Protocol* specified that contracting states would be cooperating with the Office of the United Nations High Commissioner for Refugees.[54] This included the requirement that countries pass laws and regulations relating to refugees.

There are no specific references dealing with child refugees or children of refugees in either the 1951 Refugee Convention or the 1967 Protocol. However, *The Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons*[55] ("*Final Act*") includes a recommendation that governments ensure they take steps to maintain unity for refugee families. According to the

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[51] Adopted on 28 July 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly resolution 429(V) 14 December 1950. Entry into force 22 April 1954.
[52] Fact Sheet No. 20, Human Rights and Refugees, Office of the High Commissioner for Human Rights, United Nations website: < http://www.unhcr.ch/html/menu6/2/fs20.htm > (accessed: 31 December 2003).
[53] Entry into force 4 October 1967.
[54] Article 2. See also *Handbook on Procedures and Criteria for Determining Refugee Status*, (Geneva: Office of the United Nations High Commissioner for Refugees, 1988) at 1. Articles 35 and 36 of the *1951 Refugee Convention* also provided for cooperation between countries and the Office of the UNHCR and the passing of legislation.

UNHCR's *Handbook on Procedures and Criteria for Determining Refugee Status*,[56] (the "*Handbook*") although the principle of family unity is not included in the *1951 Refugee Convention*, most countries do observe that recommendation from the *Final Act*. The *Handbook* notes that generally, once the head of a family obtains refugee status, the dependants' will also gain refugee status. However, if a dependant obtains legal status from another country that could provide that person with protection, than it would not make sense to grant him refugee status. This does occur often and there is a number of Canadian immigration cases discussed below where one child does not receive refugee status due to having nationality or protection from a safe third country. Therefore, there is a gap between the rights of the child under the *Convention on the Rights of the Child* ("*CRC*") and international law for refugees.

3.6 INTERNATIONAL PROVISIONS FOR CHILDREN

The *Convention on the Rights of the Child* ("*CRC*") is the comprehensive document for children rights. In order to incorporate principles from the *CRC,* the United Nations High Commissioner for Refugees developed guidelines on protection and care of refugee children, the *Refugee Children- Guidelines on Protection and Care* ("*Refugee Children's Guidelines*").[57] In drafting the *Refugee Children's Guidelines*, considerations from the *CRC* were interwoven to address the special circumstances of refugee children.[58] The *Refugee Children's Guidelines* set out that the Refugee treaty standards

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[55] United Nations *Treaty Series,* vol. 189, p. 37
[56] *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/IP/4/Eng/REV.1 Re-edited, Geneva, January 1992, UNHCR 1979.
[57] *Refugee Children-Guidelines on Protection and Care*, (Geneva: UNHCR, 1994), ("Refugee Children's Guidelines").
[58] *Ibid.*

apply to children as they do to adults from the *1951 Refugee Convention* and *1967 Protocol*.[59]

> (1) a child who has a 'well-founded fear of being persecuted' for one of the stated reasons is a "refugee".
> (2) a child who holds refugee status cannot be forced to return to the country of origin (the principle of non-refoulement), (Article 23) and
> (3) no distinction is made between children and adults in social welfare and legal rights.[60]

The *Refugee Children's Guidelines* go further by incorporating the rights based approach of the *CRC*. In terms of substantial rights, the *Refugee Children's Guidelines* discuss how the *CRC* is based on the "Triangle of Rights" made up of the "best interests" (Article 3), non-discrimination (Article 2) and the right to participate (Article 12).[61] The *Refugee Children's Guidelines* also point to how the *CRC* emphasises relationships and the importance of the well-being of the child as tied to support from families and community. Accordingly, the *Refugee Children's Guidelines* stress the importance of helping families in order to help refugee children.[62] They also note the importance of the psycho-social well-being of the child and the need for "protection and care as is necessary for his or her well-being." Those that suffer abuse or neglect also have the right to "physical and psychological recovery and social integration."[63] Therefore, the family is important for the psychological well-being and proper development of the child:

> Children do not develop in isolation: the family is essential in providing the sense of self-esteem, security and identity that is necessary for the child to successfully learn from, and fit into, the rest of society.[64]

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[59] *Ibid.*, at 4.
[60] *Ibid.*, at 3.
[61] *Ibid.*, at 5-7.
[62] *Ibid.*, at 7, with reference to Articles 5, 14 and 18 and regarding issues of community, Articles 5, 13, 14, 15, 20, 29, 30.
[63] *Ibid.*, at 13.
[64] *Ibid.*.

The *Refugee Children's Guidelines* indicate that it is even more important for child refugees to remain with extended family if they have arrived without a parent or direct relative. This language notes the importance of the country to assist locating parents, as provided for in Article 22(2) of the *CRC*.[65]

Article 22 deals specifically with child refugees.

Article 22

> 1. States 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 set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

The intent of Article 22 is to protect all children within a country's jurisdiction while in the process of seeking status but even if refused refugee status.[66] The expectation is that a country will take special measures to ensure that the children have necessary rights, for example access to health care and education.[67]

To what extent are the *CRC* and *Refugee Children's Guidelines* being utilised by countries that are party to the conventions? Canada, for one, has given a fair degree of consideration to the refugee conventions in its legislation and standards but has incorporated to a far lesser degree the *CRC* and the *Refugee Children's Guidelines.*

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[65] See Appendix "D"
[66] Rachel Hodgkin and Peter Newell, *Implementation Handbook for the Convention on the Rights of the Child*, (New York: UNICEF, 1998) at 284, 287.
[67] Christine Lundy, *An Introduction to the Convention on the Rights of the Child* (St. Thomas, Ontario: Full Circle Press, 1997) at 38.

3.7 CANADA

3.8 LEGISLATION & GUIDELINES

Canada's immigration legislative scheme does not specifically address child refugees. However, Canada issued its own set of guidelines for dealing with child refugees in the mid 1990s. During the late 1990s and beginning of this century, Canada was in the process of revising the entire immigration legislation. After consultation with the public, various task forces and years of review, the result is the new *Immigration and Refugee Protection Act*, 2001, c. 27 ("*IRPA*").[68] Some objectives regarding refugees include providing assistance to those who are resettling in Canada and providing safety for persons suffering persecution.[69]

Under *IRPA,* there are two categories of persons entitled to refugee protection and are thus referred to as "protected persons". Those that are found to be "Convention" refugees, under section 96 and "persons in need of protection" under section 97 of *IRPA.*[70] The regulations then create separate classes of refugees. There are Convention

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[68] This paper will refer to *IRPA* as much as possible, although many of the cases predate the new legislation, when the *Immigration Act* R.S.C. 1985, c. I-2 was in place

[69] 3. (2) The objectives of this Act with respect to refugees are
(*a*) to recognize that the refugee program is in the first instance about saving lives and offering protection to the displaced and persecuted;
(*b*) to fulfil Canada's international legal obligations with respect to refugees and affirm Canada's commitment to international efforts to provide assistance to those in need of resettlement;
(*c*) to grant, as a fundamental expression of Canada's humanitarian ideals, fair consideration to those who come to Canada claiming persecution;
(*d*) to offer safe haven to persons with a well-founded fear of persecution based on race, religion, nationality, political opinion or membership in a particular social group, as well as those at risk of torture or cruel and unusual treatment or punishment;....-for complete section see Appendix "G".

[70] 96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,
(*a*) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or
(*b*) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

refugees from abroad, meaning an officer has interviewed the person outside of Canada and determined the person to be a Convention refugee.[71] Then there are Humanitarian-protected persons abroad who are in similar situations to Convention refugees.[72] This category includes two classes; the country of asylum class and the source country class. Members of the asylum class are those who an officer from Citizenship and Immigration Canada ("CIC") determines to be in need of resettlement because they have fled their countries of nationality and/or habitual residence and are seriously and personally affected by conflict in those countries.[73] Source countries are listed countries where people are in refugee like situations due to conflicts.[74] The source countries are included in Schedule 2 and are subject to revision.[75] These categories fall under the responsibility of the resettlement division of CIC for claimants from abroad and the Asylum Division-Refugee Branch for in-Canada refugee applications.[76]

In all of this, there are no specific provisions in the refugee section of *IRPA* regarding children, although "best interests of the child" are now incorporated into Part I

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97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally
(*a*) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or
(*b*) to a risk to their life or to a risk of cruel and unusual treatment or punishment if
(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,
(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,
(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and
(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

[71] *Immigration and Refugee Protection Regulations,* SOR/2002-227, ss. 144 and 145. See Appendix "G".
[72] *Ibid.,* s. 146(1) (2).
[73] *Ibid.,* s. 147.
[74] *Ibid.,* s. 148.
[75] *Ibid.,* ss. 148(1) and (2) and 149.
[76] Telephone conversation with Kim Gunshoner-Saucier, Asylum Division, Refugee Branch, CIC, June 2004.

of *IRPA*, section 25(1) regarding humanitarian and compassionate applications ("H & C") and to appeals before the Immigration Appeal Division, in particular sections 67-69.[77]

> **25.** (1) The Minister shall, upon request of a foreign national who is inadmissible or who does not meet the requirements of this Act, and may, on the Minister's own initiative, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligation of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to them, taking into account the best interests of a child directly affected, or by public policy considerations.

This section allows the application of discretion for any matter where a person may be inadmissible or may not meet the legislative requirements, for example, where a visa officer would deny an immigrant visa for a skilled worker who did not have enough points. This section would also apply to other applications that are exceptions to the standard immigration process, such as H & C applications and to appeals before the Appeal Division of the Immigration and Refugee Board.[78]

In 1994, the Immigration Refugee Board (the "Board")[79] in Canada created a Working Group on Child Refugee claimants to "ensure that the best interests of the children concerned would be taken into account in the determination process and that children would have a means of expressing their views in a safe and supportive environment."[80] The guidelines are not binding although persuasive "and the expectation

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[77] The appeal process is described in Chapter Two above. Sections 62-71 of *IRPA* deal with appeals of removal orders.

[78] See sections 25, 67(1)(c) and 68(1) of *IRPA*.

[79] The names of the levels of Boards within the Immigration system have changed somewhat under the new legislation. What used to be the CRDD- Convention Refugee Determination Division, is now called the RPD, Refugee Protection Division. Under *IRPA*, 2. (1) "Board" means the Immigration and Refugee Board, which consists of the Refugee Protection Division, Refugee Appeal Division, Immigration Division and Immigration Appeal Division.

[80] Nurjehan Mawani, "Hearing Our Children's Voices: Making the Rights of Children a Reality in Canada's Refugee Process" in Anne-Marie Trahan, ed. *A New Vision for a Non-Violent World: Justice for Each Child, Proceedings of the 4th Biennial International Conference of the International Association of Women Judges* (Cowansville, Que.: Les Éditions Yvon Blain Inc., 1999) at 96.

is that in the absence of compelling reasons to the contrary, they will be followed in every applicable claim."[81] The *Guidelines on Child Refugee Claimants: Procedural and Evidentiary Issues* ("*Canadian Child Refugee Guidelines*")[82] were drafted with the assistance of NGOs, child psychiatrists and lawyers.[83] This group decided that the *Canadian Child Refugee Guidelines* would be procedural only rather than substantive due to the group's position that children have the same substantive rights as parents.[84] In terms of incorporating the *CRC*, the group adopted Article 3 regarding the best interests of the child into the guidelines as the primary consideration "when determining what procedures to follow when dealing with the claim of a child."[85]

The fact that a presumption was made that the substantive rights of the child refugee are the same as the adults arguably ignores the *CRC*. The point of the *CRC* is that it provides substantive rights to children. In light of the *CRC*, it is incumbent upon the Canadian government to take more proactive steps to ensure that it is addressing the substantive rights of child refugees.[86]

It is still valuable to consider how the *Canadian Child Refugee Guidelines* have given important procedural rights to the child. The *Canadian Child Refugee Guidelines*

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[81] *Ibid.*, at 97.
[82] *Guidelines concerning Child Refugee Claimants* (30 September 1996) ["*Canadian Child Refugee Guidelines*"]. An update from the IRB dated October 30, 2003 states that the *Canadian Child Refugee Guidelines* have not been updated to reflect changes made due to the passing of IRPA but that the need for updates is being reviewed.- Immigration and Refugee Board website, < http://www.cisr.gc.ca/end/notices/cgi_e.htm > (accessed 12 December 2003).
[83] Mawani, *supra* note 80 at 98.
[84] *Ibid.* The IRB also issued *Guidelines concerning Women Refugee Claimants Fearing Gender-Related Persecution* (13 November 1996) that is relevant to female refugee claimants in terms of substantive issues. (And are considered for female child refugee claimant who claim gender persecution.)
[85] *Ibid.*
[86] Geraldine Sadoway, "Refugee Children before the Immigration and Refugee Board" (1997), 35 *Imm. L.R.* (2d) 106, online: eCarswell. Sadoway noted that the Board had not yet addressed the substantive issues of what constitutes a well-founded fear of persecution for child claimants and how the Convention grounds for fear of persecution may be applied to cases involving child claimants." For guidance on addressing the

were drafted with the understanding that the procedure under Canada's legislation is not always appropriate for children. Under *IRPA* and the previous *Immigration Act*, the main procedural right for the child refugee is the appointment of a designated representative.[87] If a child claimant is not joined with the claim of an adult, there must be a designated representative for the child. However, if a child's claim is joined with an adult's, then the child may be in need of his or her own designated representative.[88] The requirements of the designated representative are included in the Refugee Protection Division Rule 15.[89] The designated representative is not the lawyer for the person, although they may be. The requirements are:

- That the designated representative be 18 years of age or older,
- Understand the nature of the proceedings,
- Be willing and able to act in the best interests of the claimant or protected person; and
- Not be in a conflict of interest with the claimant or protected person.[90]

The Board must be satisfied that the representative truly understands the nature of his or her position as a representative in the refugee proceedings.

In *Espinoza v. Canada (Minister of Citizenship and Immigration),*[91] the Federal Court held that the Board has a "duty to assess whether the person to be designated appreciates the nature of the proceedings." In this case, the parent was acting as the designated representative and he was submitting his own refugee claim. However, Justice Teitelbaum held that there may have been a conflict and that the father was not in the position to best represent the children's claims. The court made a finding that the

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issue, she suggests substituting the word "children" for "women" in some of the passages of the Board's *Guidelines on Women Refugee Claimants.*

[87] Section 167, *IRPA* (was s. 69(4) of *The Immigration Act,* 1985)

[88] *Refugee Protection Division Rules*, S.O.R./2002-228, s. 15(1) (2).

[89] *Ibid.*

[90] *Ibid.*, s. 15(3).

children may have been denied a fair hearing.[92] Therefore, although it may seem efficient or simple to apply or agree that a parent act as the designated representative, the *Espinoza* case makes it clear that this is not a matter to be undertaken without serious consideration. Both the child refugee claimants and the adult refugee claimants need to put in their best case, and this may mean that the child ought to have a non-family member as the designated representative.

The *Canadian Child Refugee Guidelines* recognise the difficulties involved with child refugees, providing evidence and the participation in the hearing process. Certain procedures are taken to facilitate the taking of the child's evidence.[93] Child refugee claimants have the right to tell their stories directly, depending on the age and maturity of the child. If the child is too young, the Designated Representative ("DR") may testify on the child's behalf.[94] The tribunals will allow un-sworn evidence as long as the child understands the importance of telling the truth.[95] If there are serious credibility problems, the Immigration and Refugee Board ("IRB") will give counsel notice and allow counsel to re-examine child.[96] There are many reasons to ensure that the child refugee, who has different experiences be given special treatment regarding providing evidence to substantiate a claim as a refugee.

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[91] *Espinoza v. Canada (Minister of Citizenship and Immigration)*, [1999] 3 F.C. 73 (T.D.), online: QL
[92] *Ibid.*, at paragraphs 26-27.
[93] Interpreters if required, are to be assigned early on in the process in order to develop a relationship with the child. There is consideration of the factors to consider regarding the child's ability to give evidence, the best way for the child to give evidence. There is consideration of the need for other practitioners and professionals that may need to be involved, such as physicians, social workers, and teachers.
[94] *Canadian Child Refugee Guidelines, supra* note 82.
[95] There cannot be a detailed cross-examination of a child one year after the initial testimony. In CRDD T95-06517, Cram, Mouemmar, 14 July 1997, the Division would not allow cross-examination of the 13 year old when he had given most of his testimony a year earlier. But the Division asked the claimant's counsel to ask him questions to respond to evidence that had not been presented when he had given his earlier testimony.
[96] *Ibid.*

Meanwhile, although Article 12 of the *CRC* is reflected in the procedure for child refugees, it does not seem that other provisions of the *CRC* are in effect in the refugee process.[97]

3.9 FAMILY UNITY & FAMILY REUNIFICATION

Family reunification is a stated objective under section 3(2)(f) of *IRPA*[98] and under Article 10 of the *CRC*.[99]

a) Family Unity

Family unity in refugee law is the principle that dependants will usually obtain status upon the head of the family receiving refugee status. This is not the same concept as family reunification that seeks to bring family members together.[100] The principle of family unity is discussed in the *Handbook on Procedures and Criteria for Determining Refugee Status* ("Handbook").[101] Canada's courts have made it clear that the principle of family unity does not apply to Canadian refugee cases. In *Casetellanos v. Canada (Solicitor General),*[102] the Federal Court Trial Division discussed the ambiguity in Canada's refugee case law regarding the concept of family unity. The definition of "Convention refugee" in the *Immigration Act*[103] did not include any reference to family

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[97] Presumably, a number of the articles that are part of customary international law are implicitly respected. The problem is if they are not statutorily incorporated, then the application of these rights will be inconsistent and do not provide any grounds for judicial review.

[98] 3. (2) The objectives of this Act with respect to refugees are
(*f*) to support the self-sufficiency and the social and economic well-being of refugees by facilitating reunification with their family members in Canada;

[99] *Article 10-* In accordance with the obligation 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. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family. For full provision see Appendix "D".

[100] Provisions that facilitate family reunification are discussed below.

[101] *Handbook on Procedures and Criteria for Determining Refugee Status*, (Geneva: Office of the United Nations High Commissioner for Refugees, 1988) ["*Handbook*"], paragraphs 181-185.

[102] *Casetellanos v. Canada (Solicitor General)* [1995] 2 F.C. 190, (T.D.), online: QL.

[103] *The Immigration Act,* R.S.C. 1985, c. I-2.

unity. Section 3(c) of the *Immigration Act* did refer to the importance of family reunification. However, the court clarified that family reunification did not extend to include the concept of family unity.[104] In order for a persecuted person's family members to be found to be refugees, there must be a finding that they themselves are at risk of persecution due to being the family members of the persecuted person. Canadian case law requires a nexus from the persecution suffered by one member as being persecution to the family as a social group.

In the *Casetellanos* case, the father was granted refugee status for political reasons from Cuba. The two daughters and wife were not entitled to refugee status, on the basis of family unity. Instead, Nadon J. recommended that the father sponsor the rest of his family members.[105]

The law on family unity has been largely consistent. In *Rafizade v. Minister of Citizenship and Immigration*[106] Justice Cullen stated:

> Given Parliament's express intent to deal with family unity, I agree with the conclusions reached by Mr. Justice Nadon and Mr. Justice Rothstein and I can see no justification for the development of a common law notion of indirect persecution to account for family unity situations not covered by the section. Parliament has determined which family members qualify for admission and landing. It is not the role of the court to expand the scope of the family for immigration purposes beyond that which Parliament has determined to be appropriate.

In order to establish that family members are part of the persecuted class as being family members of the persecuted person, Canadian case law does not accept that "indirect

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[104] But see Sadoway, *supra* note 86 at footnote 20, regarding how Justice Nadon in *Casetellanos, supra* note 102 considered the UNHCR handbook and how it was relied on by the Supreme Court of Canada in *Ward v. Canada (Minister of Employment and Immigration)*, [1993] 2 S.C.R. 689, online: QL.
[105] Section 46.04 of *The Immigration Act*, (1985) now s. 99(1)(4) of *IRPA*..
[106] *Rafizade v. Canada (Minister of Citizenship and Immigration)*, [1995] F.C.J. No. 359 (T.D.), online: QL.

persecution" can be grounds to obtaining refugee status. The Federal Court of Appeal in *Pour-Shariati v. Canada (Minister of Employment and Immigration)*[107] specifically overruled recognition of the concept of indirect persecution that had been accepted in *Bhatti v. Canada (Secretary of State).*[108] Although membership in a social group can be a basis for a finding that one is a refugee, the case law has maintained that the risk of persecution must be as against the family group.

b) Family Reunification

Cognisant of the difficulties in time delay during refugee sponsorships, Canada's new legislative scheme does provide for a number of avenues to facilitate family reunification. Canada's legislative scheme had been criticised for its failure to provide for family reunification for children. *The Canadian NGO Report on Women and Children Migrants* considered that the rights for family reunification (articles 9 & 10 of the *CRC*) and refugee protection (article 22, *CRC*) were not being respected or implemented.[109] *IRPA* now allows refugees to apply for landing or permanent residency, once they have made a claim for protected status, in order to speed up the process by which they would be able to bring over family members who do not obtain refugee status.[110] One of the four core principles of the Refugee and Humanitarian Resettlement Program is "rapid family reunification" and accordingly, there can be concurrent

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[107] *Pour-Shariati v. Canada (Minister of Employment and Immigration),* [1997] F.C.J. No. 810 (C.A.), online: QL. The position that Canada does not accept the principle of indirect persecution was recently applied in *Dombele v. Canada (Minister of Citizenship and Immigration),* [2003] F.C.J. No. 339, online: QL.

[108] *Bhatti v. Canada (Secretary of State),* [1994] F.C.J. No. 1346 (T.D.) online: QL (Jerome A.C.J.).

[109] "Canadian NGO Report on Women and Children Migrants" (February 2000) Canadian Council Refugee Website, <http://www.webnet/~ccr/fronteng.htm>(accessed 6 May 2003).

[110] *Immigration and Refugee Protection Regulations,* SOR/2002-227, s. 150.

processing of refugee families.[111] If there are non-accompanying family members, those members can submit an application from within one year from the day on which the principal applicant obtained refugee protection, referred to as the "One Year Window of Opportunity".[112]

As mentioned, there is little specific legislative reference to best interests of the child in the refugee legislation. However, there are policy considerations regarding children, for example in the discussion on *de facto* dependants, people who may or may not be blood relatives but do not fall under the *IRPA* definition of family members. The manual states that, if the person is a niece or nephew whose parents have been killed or are missing, the officer must take the best interests of the child into account to ensure that there are no custody or guardianship issues.[113] Presumably, based on these policy statements, the authorities would not remove other family members if an adult family member had obtained refugee status and was now in the process of sponsoring the rest of the family. A number of the NGO recommendations have been incorporated into the refugee policy manuals. One of the recommendations was that the *CRC* be incorporated into the immigration legislation itself and that the best interests of the child be a primary consideration.[114] This has not taken place. Rather the new legislation refers to the best interests of the child in the section that allows for Minister's discretion to exempt

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[111] *CIC Manual- IP 3*, "In Canada Processing of Convention Refugees Abroad and Members of the Humanitarian Protected Persons Abroad Classes" (Ottawa: Citizenship and Immigration Canada, 14 November 2003) online: < http://www.cic.gc.ca > (accessed 27 May 2004). See also CIC Manual - OP5, "Overseas Selection and Processing of Convention Refugees Abroad Class and Members of the Humanitarian-protected Persons Abroad Classes" (Ottawa: CIC, 19 November 2003) online: < http://www.cic.gc.ca > (accessed 27 May 2004). See paragraph 13.6, Concurrent processing of family members.

[112] Refugee Protection Division Rules, *supra* note 88, ss. 140 and 141. See Appendix "G" for full provision. Family members can still apply after the one year but would have to be sponsored by the principal applicant through the usual sponsorship provisions.

[113] *CIC Manual- IP 3, supra* note 111.

applicants from all of the legislative requirements, regarding detention as last resort, and to appeals of removal orders before the Appeal Division of the Immigration and Refugee Board.[115]

In terms of unaccompanied minors or separated children,[116] there is a moratorium on their resettlement. CIC is concerned regarding ensuring that there is an appropriate infrastructure in place for the separated children. UNHCR is or will have to deal with these and stateless children. There are two exceptions to the moratorium, *de facto* dependants and *con sanguinis* dependants, blood relatives. CIC's intent is to focus on setting up guidelines for these two categories of children first. The need to ensure that resettlement is successful is interesting and important as successful integration is key to the person's future in Canada.[117]

3.10 THIRD COUNTRY AND OTHER NATIONALITY

Under the *1951 Refugee Convention*, a person is ineligible for protection, if the person has been granted refugee protection in another country or arrived into a country from a "third country" where the person could have claimed refugee protection. The government will not provide protection or additional benefits to a party that may still have state protection from the party's state of residence or nationality.[118]

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[114] "Canadian NGO Report" *supra* note 109.
[115] Sections 25 (1), 28(2)(c), s. 60, s. 67(1)(c), s. 68(1) and s. 69(2) respectively.
[116] CIC has used both terms but intends to settle on the term separated children, meaning those who have no family members at all in Canada and are not *de facto* dependants. Anne-Marie Varicat, Responsible for Resettlement of Minors- CIC, conversation on 4 June 2004.
[117] In *Mai v. Canada (Minister of Citizenship and Immigration),* [2004] F.C.J. No. 175, online: QL, Justice Gibson considered a stay of removal of a refugee from Cambodia. The applicant lived with his brother when he was resettled in Canada and that relationship broke down. Gibson J. noted that Canada ought to have done more to ensure that the integration was successful and therefore ensure that there would not be refoulement or returning the applicant to Cambodia.
[118] *Espinoza v. Canada (Minister of Citizenship and Immigration),* [1999] 3 F.C. 73 (T.D.) online: QL at paragraph 39.

Canada now has a provision under *IRPA* under which certain countries can be designated as a "safe third country". The United States and Canada entered in a safe third party agreement, by which Canada effectively designates the United States as a safe third country, the only country so designated so far. The object is to prevent asylum shopping by claimants by stopping the practice of people making refugee claims in the other country if they had failed in the first country.[119]

The rationale underlying international refugee protection is for the receiving country to serve as "surrogate" shelter when the home country has failed to support the person.[120] Therefore, seeking protection elsewhere is necessary when that person cannot obtain protection from their own country. If someone lands in another country that can provide protection but moves on to Canada or elsewhere, the country they were in is considered a third country, where the claimant could have sought protection.

It will be interesting to observe whether the policy on family reunification will translate into practice. Canadian case law has resulted in family separation when a family member is found to be eligible to obtain protection from another country from which he or she is a national. In many cases, children born en route in third countries are held to be ineligible to be protected persons, even if the rest of the family obtained refugee status. In *O.M. (Designed representative) v. Canada (Minister of Citizenship and*

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[119] Canada and the United States entered into a "Safe Third Party Agreement" on 30 August 2002, CIC website <http://www.cic.gc.ca>. Canada drafted and submitted Regulations as Part I of Gazette, December 2002. After the Standing Committee made its recommendations, the Government responded in May 2003. "CIC Canada/Government Response to the Report of the Standing Committee on Citizenship and Immigration" CIC website <http://www.cic.gc.ca/english/pub/safe-third.html> (accessed 5 May 2004). Canada is waiting for the United States to complete its regulation process. -Conversation with Bruce Scofield, Director, Policy Development and International Coordination, Refugees Branch, CIC on 3 June 2004.

[120] *Canada (AG) v. Ward,* [1993] 2 S.C.R. 689, online: QL.

Immigration)[121] the applicant child was both a citizen of El Salvador based upon his mother's nationality *(jus sanguinis)* and of Belize, based upon his birth there *(jus soli)*. During the civil conflict in El Salvador, the mother was raped. When the rapist became aware that the mother was pregnant, likely with his child, he threatened her. The mother left El Salvador with her daughter and arrived in Belize where she gave birth to her son, the applicant. From there, she and her two children arrived in Canada and claimed refugee status. The Board made a finding that the son had not made out the case that he had a well-founded fear of persecution in Belize, as he could avail himself of protection in that country. The family argued that the son had formal but no effective nationality in Belize.[122]

On judicial review and in response to the argument regarding family unity, Justice Gibson upheld the Board's decision and held that principle of family unity is incorporated in Canadian refugee law by virtue of the ability of refugees to sponsor family members. This is an example where nationality is a double-edged sword. On the one hand, nationality provides valuable protection. This child had that protection on paper as a national of Belize. On the other hand, the availability of nationality protection could cause family separation if the child were removed while being sponsored by a parent or other family member. The intent is that countries wish to minimise claimants from choosing a preferred country in which to make a refugee claim. Hopefully, the new *IRPA* provisions and the Regulations that facilitate family reunification by earlier sponsorship applications will assist in resolving this dilemma.

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[121] *O.M. (Designed representative) v. Canada (Minister of Citizenship and Immigration* [1996] F.C.J. No. 790 (T.D.), online: QL.

[122] There was some evidence that new migrants from other Central American countries faced discrimination in Belize.

3.11 CHILD REFUGEE APPLICANTS

A child may obtain refugee status even if other family members do not. Child refugees are considered one of the world's most vulnerable groups and presumably are amongst those who most require their family members, a principle recognised in the *CRC*. In *Lakatos v. Canada (Minister of Citizenship and Immigration)*[123] the family sought Convention refugee status on the basis of persecution in Hungary due to being Roma. There was a violent incident in which skinheads threatened to rape the thirteen-year-old daughter because she was Roma. The father intervened and the attackers yelled at the father, "You dirty gypsy, we'll kill you! We will come back to kill you and rape your daughter!" Skinheads had beaten the father several years before.[124] The Board found the applicants to be credible and did accept that they faced discrimination in Hungary but that it did not amount to persecution, it was harassment. The Board did find that the daughter had been profoundly impacted by the attack on her and that to send her back to Hungary would amount to persecution. However, the rest of the family members were not determined to be refugees.[125] Justice Dawson accepted that there was sufficient evidence to support the Board's various findings, and accordingly dismissed the appeal. The result is a thirteen-year-old girl who had been threatened with violence based on her ethnic identity, obtaining refugee status in Canada but left without her family members in a new country.[126] She would have been too young to sponsor her family members until she turned eighteen years old and it would have been up to her parents to obtain landing

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[123] *Lakatos v. Canada (Minister of Citizenship and Immigration)*, [2001] F.C.J. No. 657 (T.D.), online: QL.
[124] In both incidents, the police said they could not investigate without witnesses.
[125] This was based on evidence that skinhead attacks had decreased and that Hungarian government was taking serious steps to curb racial violence and discrimination against minorities. *Lakatos, supra* note 123 at paragraphs 6-8. The Federal Court did not accept that the father, mother and brother as members of a social group, in this case the family, were subject to persecution. The persecution must be against the family members as a social group and not as individuals.

or be sponsored by others. The principles of international law regarding the importance of the family, the special needs of the refugee and the objective of family reunification in Canada's immigration legislation were ignored or minimised.[127] There are other cases of separation of family where one child is determined to be a refugee and other siblings are not.[128]

Children can be considered part of the family social group suffering persecution in cases of domestic abuse. There is a Board case where the two children of a woman who was abused by her husband were considered to be part of the social group being the family. The Board was satisfied that the children had suffered psychological abuse in witnessing the mistreatment of their mother.[129] The panel considered the *Baker v. Canada*[130] decision and the importance of consideration of the best interests of the child.

> Since young children, who are much more emotionally fragile than adults, are involved, the opinion of the panel is that the treatment imposed on their mother and the fact that young children are powerless in such circumstances, that is, the entire situation could have a persecutory effect on them.
>
> These two young children belong to the social group of the family and have been exposed to severe and persistent treatment and would continue to be so exposed if they had to return to Egypt. Therefore, the panel finds, as is specified in the

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[126] That is unless her family members were able to stay legally or illegally.

[127] The Canadian Council for Refugees ("CCR") prepared a "First Annual Report Card on Canada's Refugee and Immigration Programs", November 2003, reviewing the new legislation, *IRPA* and Canada's record. On the issue of family reunification, the CCR noted that many families wait years for reunification and that the UN Committee on the Rights of the Child has expressed concern over Canada not expediting family reunification. From the CCR website, <http://web.net/~ccr/reportcard2003.htm> (accessed 23 December 2003).

[128] *Rajasegaram v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 965 (T.D.), online: QL. The Board accepted that the ten-year old son of Sri Lanka was in an age group at risk of being recruited to be a soldier for the rebels. However, the Board could not make that determination regarding the younger children who were seven and four years old (or the parent) at the time of the Board's decision. The Court held that the splitting of the family would be a matter that could be considered within the context of a humanitarian and compassionate review application ("H & C application") but was not an issue for judicial review of the refugee determination. This case also turned on the issue of the inability to verify the identity of the claimants. In that case, it was possible that there could have been removal of the siblings before an H & C application is determined. See Chapter Four below for more explanation and case law regarding H & C applications in general immigration context.

[129] RPD MA1-11675, Fecteau, 16 June 2003.

[130] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] S.C.J. No. 39, online: QL.

> Guidelines on Child Refugee Claimants, that the best interests of these children warrant international protection.[131]

The determination of refugee status is obviously subjective and it is difficult to find whether there is some method by which there can be greater consistency of treatment.

3.12 SEPARATED CHILD APPLICANTS (UNACCOMPANIED MINORS)

Canada (and the United States) have seen a number of migrants attempt to enter the country illegally by being brought into the country on ships, in cargo tanks, in the backs of trucks. A ship full of people from the Fujian province of China arrived on the coast of British Columbia in the summer of 1999. All of the claimants from the ship were under eighteen years of age and had been smuggled out of China to Canada.[132] Part of the consideration of whether they were refugees dealt with how they would be treated upon their return to China.[133]

In the *Li v. Canada*[134] and *Bian v. Canada*[135] cases, the claimants sought judicial review of the Board's determination that they were not refugees. It appeared that the Board's decision focused on a finding that the claimants were simply economic refugees and therefore, did not fall under the definition of a Convention refugee. Regarding consideration of the rights of the child under the *CRC*, the Board noted that all of the claimants were between the ages of fifteen and eighteen and therefore were not of "tender years." Accordingly, the Board submitted that they could not assume that the claimants were "involuntary participants in an attempt to gain entry into North America by extra-

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[131] RPD MA1-11675, Fecteau, 16 June 2003. online: CIC website.
[132] *Li v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 2037 (T.D), online: QL, and *Bian v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 2038 (T.D.), online: QL.
[133] *Li v. Canada, supra* note 132.
[134] *Ibid.*
[135] *Bian v. Canada, supra* note 132.

legal means."[136] The Board did refer to the *Baker v. Canada*[137] case, which applied the *CRC* to Canada's immigration laws, in particular, some consideration of the best interests of the child.

In the application for judicial review, Gibson J. felt that that the Board had been overly dismissive of the *Baker* case. He held that the Board ought to have given more serious consideration to whether children from Fujian province, an area that is economically underdeveloped, with poverty and little education did form a "particular social group." Gibson J. also held that the Board ought to consider international human rights law to assist in determining the definition of "Convention refugee."

There are positive cases for unaccompanied children where there is consideration of different types of particular social groups and suffering persecution as a member of that group. The Board accepted that a physically disabled boy from Poland who was physically and verbally abused by his parents was a member of a particular social group and as there was no reliable state protection, the child did have a well-founded fear of persecution.[138]

Detentions by the Minister and detention conditions for minors have been the subject of criticism by the courts, by the UNHCR and by NGOs. In *Gao v. Canada*[139] Chapnik J. criticised the government's failure to expedite hearings for minor refugee claimants and to improve the conditions of detention. Canada's new legislation, IRPA

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[136] *Li v. Canada, supra* note 132, paragraph 10.
[137] *Baker, supra* note 130. (Case is discussed in greater details in Chapters Two and Four.)
[138] CRDD TA0-05472, Wolman, Siddiqui, 30 May 2001. online: CIC website. Other positive cases involve female children who suffer the prospect of female genital mutilation, a persecution under gender that also applies to children. See for example, RPD MA2-10373, Boisrond, 30 May 2003, online: CIC website.
[139] *Gao v. Canada (Minister of Citizenship and Immigration)*, [2000] O.J. NO. 2784 (S.C.), online: QL.

does improve the situation. It specifies that children should only be detained as a last resort:

> **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.

According to the Canadian Council of Refugees, there were on average seventeen minors in immigration detention each week from mid-June 2003 to October 2003.[140] On 29 December 2003, Immigration Canada announced that it was creating a new detention centre that would provide better accommodations for those detained. The current problem is that most detainees are housed in hotels that have been used as detention centres, which have been considered to provide or have provided substandard conditions.[141]

3.13 CANADIAN CHILD OF REFUGEES

A topic that does not earn a great deal of consideration in immigration case law is the situation of the Canadian child of refugees and immigrants. Chapter Four discusses in detail how, in the legislative scheme, there is no role for the Canadian child who is not a party to immigration proceedings because the child's status is not in question.

Furthermore, the Canadian child is left without any procedural or substantive rights to have his or her rights considered in the context of the parent or family members' refugee claim.

The Board has confirmed that a Canadian child of refugees cannot be a direct part of his parents' refugee claim. In *Shen v. Canada (Minister of Citizenship and*

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[140] Canadian Council for Refugees, "Report card 2003", *supra* note 127.
[141] "New Detention centre for foreigners being readied in Toronto" CBC News, Mon 29 December 2003, <http://www.cbc.ca/storyview/CBC/2003/12/29/detention_centre031229> (accessed January 13, 2004).

Immigration),[142] judicial review was granted and the matter sent back for re-determination as the Board had failed to give proper consideration to the evidence regarding enforcement of China's one-child policy. However, Kelen J. did comment upon the fact that if the Canadian born child experienced persecution in China due to enforcement of China's one-child policy and he being the family's second child, this could be direct persecution experienced by the parents.

> The Court of Appeal in *Pour-Shariati, supra*, recognized that there is a personal nexus between claimants and a member of one of their dependents, which would include a Canadian-born infant in this case. Accordingly, while the Refugee Division was correct in not considering the Canadian-born infant as a refugee claimant, any persecution which the second child Canadian-born infant will experience in China is directly experienced by the parents, and is not "indirect persecution". Persecution of an infant (or a child) is persecution of the parents, regardless of the infant's citizenship.[143]

This is an example of where the status or the existence of the Canadian child could be part of the parents' source of persecution and have an impact on the parents' refugee claim.

Another case that concerned the splitting of a family and consideration of the Canadian child is *Dan v. Canada (Minister of Citizenship and Immigration).*[144] The father was a Canadian citizen and sought reconsideration of a denial to reunite his Vietnamese wife and Canadian child. Prothonotary Hargrave pointed out that there could only be reconsideration if there had been a matter overlooked or accidentally omitted. In particular, there was the obligation that counsel bring all relevant authorities to the attention of the court. Hargrave did not believe the Board gave any consideration to the

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[142] *Shen v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 1246, online: QL.
[143] *Ibid.*, at paragraph 14.
[144] *Dan v. Canada (Minister of Citizenship and Immigration)*, Court File No.: IMM-5182-99, March 6, 2000, Fed. Ct. T.D. online: Federal Court website <http://decisions/fct.cf.gc.ca> (accessed 12 January 2004).

best interests of the Canadian child as required in the *Baker* case.[145] He found that, as the applicant was representing himself, counsel for the Minister ought to have referred to the *Baker* case. Based upon that factor, and that the interests of the child were overlooked, the application for reconsideration was allowed.

One method of attempting to give effect to the rights of the Canadian child is by seeking relief in the provincial superior courts.[146] This avenue has been largely curtailed on the basis of the courts finding that the Federal Court of Canada is the proper venue for immigration issues.[147]

Most recently, there was a case in which, through the course of divorce proceedings, the parties were able to temporarily ensure that the parent without status would not be removed.[148] However, in British Columbia, an attempt to do so was unsuccessful. In the case of *T.D.N. v. T.T.A.V.*[149] the father who was a refugee sought a custody order. The father, from Vietnam together with his wife and son were granted refugee status in 1992. A second son was born in Canada. The father and wife divorced and he remarried. The children lived with the father, as the mother was unable to look after them.

The father was convicted and sentenced for a number of offences. Immigration authorities made a finding that he posed a danger to the public of Canada and issued a deportation order against him. While he appealed that order, the father also made an

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[145] *Baker, supra* note 130.
[146] A large part of Chapter Four is devoted to this issue for non-refugee cases.
[147] *Reza v. Canada*, [1994] 2 S.C.R. 394, online: QL.
[148] *Wozniak v. Brunton*, [2003] O.J. No. 1679 (Sup. Ct., Fam. Ct.); Although at the hearing of the motion, the judge declined to include a non-removal order [2004] O.J. No. 939 (Fam.Ct.); and the mother has obtained leave to appeal to the Ontario Court of Appeal [2004] O.J. No. 2630 (Ont. S.C.), online: QL, discussed in Chapter Four below.
[149] *T.D.N. v. T.T.A.V.*, [2003] B.C.J. No. 1857 (Prov. Ct.), online: QL.

application for a custody order under *The Family Relations Act*[150] of British Columbia, seeking a non-removal clause to be included in the custody order as being in the best interests of the children. Section 24 of *The Family Relations Act* provides that the best interests of the child are paramount.[151] Gillis Prov. Ct. J. reviewed a few of the cases involving requests for non-removal clauses when there were also deportation orders.[152] However, the British Columbia Court of Appeal in *Torres-Samuels v. Canada (Minister of Citizenship and Immigration)*[153] confirmed its lower court judgment that the B.C. superior court could not exercise its *parens patriae* jurisdiction in order to ensure that the parent of the children not be deported. The Court followed *Torres-Samuels* and declined to make an order that the children not be removed from the jurisdiction, although it allowed sole custody to the father as requested.

3.14 COMMITTEE ON THE RIGHTS OF THE CHILD

In its concluding remarks to Canada's first state report, the Committee on the Rights of the Child expressed concerns regarding Canada's actions in refugee situations and the failure to incorporate article 22:

> 24. The Committee recommends that the State party pay particular attention to the implementation of article 22 of the Convention as well as of the general principles of the Convention, in particular the best interests of the child and respect for his or her views, in all matters relating to the protection of refugee and immigrant children, including in deportation proceedings. The Committee suggests 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. Solutions should also be sought to avoid expulsions causing the separation of families, in the spirit of article 9 of the Convention. More generally, the Committee recommends that the Government address the situation of

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[150] *The Family Relations Act* [RSBC 1996] CHAPTER 128.
[151] See Appendix "J".
[152] In a Manitoba Court of Queen's Bench judgment, *Gallardo v. Reyes* (9 May 2002) FD02-0166925, Madam Justice Guertin-Riley dismissed without reasons an application for inclusion of a non-removal clause where the woman was waiting for a decision from an H & C application.
[153] *Torres-Samuels v. Canada (Minister of Citizenship and Immigration)*, [1998] B.C.J. No. 2473 (C.A.). This case is discussed in detail in Chapter Four below.

> unaccompanied children and children having been refused refugee status and waiting deportation in the light of the Convention's provisions. Deprivation of liberty of children, particularly unaccompanied children, for security or other purposes should only be used as a measure of last resort in accordance with article 37 (b) of the Convention.[154]

In response to these comments, Canada stated in its Second periodic report that it had amended its legislation.[155] One of the key improvements to the legislation, as mentioned above, is that Convention refugees can simultaneously apply for permanent residence for themselves and dependants while applying for refugee status.[156]

In its response to Canada's second state report, regarding refugee children, the Committee specifically stated that it was pleased that *IRPA* incorporated the best interests of the child principle. But it did state:

> However, the Committee notes that some of the concerns previously expressed have been insufficiently addressed, in particular in dealing with family reunification, deportation, deprivation of liberty, priority is not accorded to those in greatest need of help. The Committee is in particular 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 lack of reliable data on asylum seeking children;
> d) adequate training and a consistent approach of the Federal authorities in referring vulnerable children to welfare authorities.[157]

It appears that some of these concerns are now being analysed and considered by CIC.[158]

The Committee recommended that Articles 2 (non-discrimination), 3 (best interests of

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[154] Concluding observations of the Committee on the Rights of the Child: Canada. 20/06/95, *CRC*/C/15/Add.37.

[155] CRC/C/83/Add.6 12 March 2003, released October 2003. The report was drafted before the new *Immigration and Refugee Protection Act* came into force and only refers to changes made under *The Immigration Act*. However, the Committee does refer to *IRPA* and updated information must have been provided to the Committee in the summer of 2003.

[156] CRC/C/83/Add.6 12 March 2003 at paragraphs 437-439. Change carried from *The Immigration Act* to *IRPA*.

[157] Concluding observations of the Committee on the Rights of the Child: Canada. 20/06/95. *CRC*/C/15/Add.37, paragraph 46.

[158] Conversation with Anne-Marie Varicat, *supra* note 116.

child), 22 (treatment of refugee children) and 37 (unlawful or arbitrary deprivation of liberty) regarding children be considered and in particular that Canada adopt and implement a national policy on separated children seeking asylum. The Committee also recommended that the government clarify the legislative intent of detention as a measure of last resort and ensure that any consideration of detentions are heard on an expedited basis. Another recommendation was that Canada should implement a process for appointment of guardians and ensure that family reunification be dealt with in an expeditious manner.

Steps have been taken, but Canada needs to do more to ensure that it is applying the rights of the *CRC* for children of refugees in Canada and for Canadian children. Substantive rights for children are different, especially the importance of ensuring that family members are able to remain together.

SUMMARY

The international world has provided important safeguards through the conventions on statelessness and refugees. There are gaps in the conventions for statelessness and this is a matter that is under current review.[159] The *Agenda for Protection* is a consultation process initiated by the UNHCR together with other agencies.[160] Children are vulnerable to being born in territories without a nationality. The good news is that most countries do provide in their legislation that if a child would otherwise be stateless, they will grant nationality.[161]

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[159] Batchelor, *supra* note 23.
[160] Preliminary Report concerning the Questionnaire on Statelessness Pursuant to the Agenda for Protection, Prepared by the Department of International Protection, September 2003.
[161] *Ibid.*, at 14.

The international community has taken steps to assist refugee children. The legislation and guidelines in Canada have limited special treatment of child refugees to procedural rights, most importantly, right to express their views in a manner that takes into account the child refugee's special circumstances and to have representation.

The other major concern is the many legislative gaps in the refugee process that result in splitting of the families, either between refugee claimants, or Canadian children and their families. The legislation has improved by allowing for simultaneous permanent refugee applications. Stated policy is to expedite and ensure family reunification. The question is whether the policy is reflected in decisions made by immigration officers and then in subsequent judicial review. Therefore, although the government is attempting to set up a legislative scheme that is responsive to children's needs, there ought to be greater assurances or a system to provide temporary status to other family members that cannot obtain refugee status and may be sponsored. Alternatively, a temporary status for parents is needed to determine what their next steps will be when there are children who are Canadian citizens within the family. Furthermore, it is critical that *CRC* be considered in its entirety as a body of substantive rights, in order to protect stateless or refugee children or children of refugees.

CHAPTER 4: PROTECTIONS IN INTERNATIONAL LAW AND ISSUES IN CANADA

The Convention on the Rights of the Child[1] ("*CRC*") is counted among one of the most important milestones in children's rights. This leads to the question of how it has been considered by Canada in its immigration scheme. As part of the analysis I will consider the protections of *The Charter of Rights and Freedoms* and options in the provincial superior courts of justice for enforcement or application of children's rights within the immigration scheme.

4.1 PROTECTIONS OF THE CHILD IN INTERNATIONAL LAW

An underlying element of human rights is the need to ensure that those without power are empowered and protected from those who are stronger. "Principles of human rights also determine how those with less power will be treated by those with more."[2] Children are a group with less power and are therefore vulnerable. Children require human rights protection.

4.2 *CRC* RIGHTS

a) Right to express views

The *CRC* was instrumental in being the first international treaty to provide substantive rights to children. The *CRC* provides rights for civil status including among others, the right of non-discrimination, the right to acquire nationality, the right to

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[1] *The Convention on the Rights of the Child* was adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989. It entered into force 2 September 1990, in accordance with article 49.

[2] Christine Lundy, *An Introduction to the Convention on the Rights of the Child* (St. Thomas, Ontario: Full Circle Press, 1997) at 1.

preserve one's identity, right to remain with parents, and the right to be reunited with family members.[3]

One important yet overlooked articles in the *CRC* is that children are to 'have a say' in the processes affecting their lives.[4] The article seeks to provide an indication that one must look to the child to determine their capabilities of forming a view. This is consistent with the more recent ideology on children's rights regarding the need to actually listen to children as equals and not to default to others speaking for the child.

Article 12

> 1. States 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 views 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 proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

As discussed in Chapter Three above, the child refugee has a statutory right to representation. In family sponsorships or humanitarian and compassionate applications to apply from inside Canada ("H & C applications"), there is not necessarily a specific avenue for the child to have their views expressed or known. If a parent is sponsoring his or her child, then in some respects there is counsel involved for both the parent and the child, although the lawyer or consultant would be primarily acting for the client, being the parent. The child's interests would be an element of consideration but their views may not be given any specific expression. When there is a Canadian child of the

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[3] See articles 2, 7, 8, 9 and 10.

[4] Philip Veerman, *The Rights of the Child and the Changing Image of Childhood*, (Dordrecht, the Netherlands: Maritime Nijhoff Publishers, 1992) at 184-185 notes that it is the first document to establish that the child is to have a say in matters that affect them.

immigrant or permanent resident, that child has no statutory right to have his or her views known. Since the child has Canadian citizenship, the child's status in Canada is legally stable. The courts have held that a Canadian child of immigrant parents is not a party to the immigration proceedings and cannot be entitled to relief on judicial review.[5] There are avenues for the authority to consider the child's interests, but the right to have a say is not being recognised.

In addition to Article 12, this situation appears to be contrary as well to Article 9(2),[6] which refers to interested parties having the opportunity to participate and to have their views known. Noteworthy is the fact that the immigration cases do not refer to Article 9(2) at all. It is in the application of the *Charter* or *parens patriae* that we see counsel attempting to argue that the rights of Canadian children ought to be considered. However, this avenue for the most part has not been successful. Simply put, it is difficult to have the Canadian child of immigrants' view considered within the immigration scheme.

b) Right To Be With Family

The importance of family has long been recognised. The *1959 Declaration*[7] includes the right to grow up with one's parents (Article 6). Article 23(1) of the *International Covenant on Civil and Political Rights,* ("*ICCPR*")[8] states that the family is the natural and fundamental group. The importance of the family unit as being important to the well-being of the child is specifically included in the Preamble to the *CRC*:[9]

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[5] See section under "Superior Courts" below.
[6] See Appendix "D".
[7] United Nations Declaration on Rights of Child 1959- Proclaimed by General Assembly resolution 1386(XIV) of 20 November 1959.
[8] Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 *entry into force* 23 March 1976, in accordance with Article 49.
[9] Relevant provisions of *CRC* attached to Appendix "D".

Preamble

....

Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community,

Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding,

...

Taking due account of the importance of the traditions and cultural values of each people for the protection and harmonious development of the child,

...

The language of the preamble sets out the values and objectives of the *CRC*.[10]

Articles 9 and 10 of the *CRC* deal with keeping the family together and avoiding family separation. There seems to be mixed interpretations as to whether both Articles 9 and 10 apply to immigration situations. Paragraph 9(4) indicates that Article 9 applies to immigration matters. However, other countries have noted that they disagree with that interpretation.

Article 9

1. 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. ...

2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.

3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

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[10] Justice L'Heureux-Dubé in *Baker v. Canada*, *infra* note 39, referred to both the preamble of the *CRC* and the *1959 Declaration* regarding the importance international instruments place upon children and their care.

> 4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family....

Article 9 deals specifically with separation from parents. The reference to deportation by a State Party in 9(4) implies that Article 9 applies to the immigration scheme. The general intent for Article 9 was for it to apply to separations between children and their parents in domestic situations including as a result of abuse or separation of the parents.[11] The discussion group working on the *CRC* wanted to ensure that a country would be required to give information to a family regarding an absent parent or child. The Chairman of the Working Group made a statement following the adoption of Article 9:

> It is the understanding of the Working Group that article [9] of this Convention is intended to apply to separations that arise in domestic situations, whereas article [10] is intended to apply to separations involving different countries and relating to cases of family reunification. Article [10] is not intended to affect the general right of States to establish and regulate their respective immigration laws in accordance with their international obligations.[12]

Technically this declaration has no legal force; however, some writers say it can be influential.[13] Not everyone agreed with the Working Group's declaration and several delegates indicated their belief that the *CRC* should be consistent with international

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[11] Sharon Detrick, *A Commentary on the United Nations on the Rights of the Child* (The Hague: *Martinus Nijhoff Publishers*, 1999) ["Detrick, *Commentary*"] at 170. Sharon Detrick, ed., *The United Nations Convention on the Rights of the Child, A Guide to the "Travaux Préparatoires"* (Dordrecht, The Netherlands: Martinus Nijhoff Publishers, 1992) at 163-7 ["Detrick, *TP*"]

[12] Detrick, *TP*, *supra* note 11 at 181, quoting from UN Doc. E/CN.4/1989/48, para. 203. Rachel Hodgkin and Peter Newell, *Implementation Handbook for the Convention on the Rights of the Child*, (New York: UNICEF, 1998) at 122-123.

[13] Hodgkin and Newell, *supra* 12 at 123 referring to E/CN.4/1989/48, pp. 32-37.

obligations, specifically United Nations legal instruments regarding human rights.[14] Canada's representative to the Committee on the Rights of the Child in answer to questions arising from Canada's first report in 1995 argued that international law did not provide an express right to family reunification.[15] Canada has concerns that it not encourage families sending their children ahead as a way of gaining admission into Canada. Japan included this reservation,

> The Government of Japan declares that paragraph 1 of Article 9 of the Convention on the Rights of the Child be interpreted not to apply to a case where a child is separated from his or her parents as a result of deportation in accordance with its immigration law.[16]

On the other hand, indications are that the Committee for the Rights of the Child believes that Article 9 does apply to the immigration scheme. In the Hodgkin and Newell Handbook prepared for UNICEF ("Implementation Handbook"), the writers include after a summary of each article, implementation checklists and information entitled "How to use the checklists." One question posed under Article 9 is "Do provisions for the family reunification of immigrants and refugees pay regard to the child's rights not to be separated from parents unless necessary for his or her best interests?"[17] The comments from the Committee on the Rights of the Child at the meeting for Canada's first report indicate the Committee's position that Article 9 does apply to immigration issues. One member, Mrs. Karp, not from Canada, specifically asked whether there were plans to incorporate Article 9 into the immigration legislation.[18] It appears therefore (and based on the Committee's comments, see Canada's record below) that the Committee on the

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[14] Detrick, *TP* note 11 at 181-2. Federal Republic of Germany reserved the right to declare that silence did not mean agreement with the Chairman's comments.
[15] CRC/C/SR.216, 1 June 1995, Summary record of the 216th meeting: Canada. 01/06/95. paragraph 46 & 47.
[16] Hodgkin and Newell, *supra* note 12 at 123, referring to *CRC/C/2/Rev.* 5, at p. 22.

Rights of the Child's position is that Article 9 does include matters of immigration.

Article 10 deals with the rights of the child upon the existence of family separation:

Article 10

> 2. A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances personal relations and direct contacts with both parents. Towards that end and in accordance with the obligation of States Parties under article 9, paragraph 1, States Parties shall respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country. The right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary to protect the national security, public order (ordre public), public health or morals or the rights and freedoms of others and are consistent with the other rights recognised in the present Convention.

Article 10 deals with separations that occur within the family that involve other countries.[19] It is worth noting that while Article 9 includes a reference to separation due to deportation, it also includes the guarantee of family reunification. The Implementation Handbook states that the wording of article 10 reflected concerns about immigration control, as this was an issue among "richer nations, which are haunted by the spectre of mass migrations of the world's poor."[20] As noted by Detrick, "States are reluctant to assume legal obligations under international treaties concerning the circumstances in which aliens are permitted to enter their country..."[21] This clause was included in the *travaux préparatories:*

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[17] *Ibid.*, at 128-129.
[18] Summary record 216th meeting, *supra* note 15, at paragraph 80.
[19] Detrick, *TP*, *supra* note 11 at 184.
[20] Hodgkin and Newell, *supra* note 12 at 131. Note Yuji Hirano and Philip Veerman, Book Review of *Implementation Handbook for the Convention on the Rights of the Child* by Rachel Hodgkin and Peter Newell (1999) 7 *The International Journal of Children's Rights* 299-302. The book reviewers' criticism is that it is not always clear whether conclusions in the Implementation Handbook were the authors' personal opinions rather than conclusions reached by the Committee's general discussions, preparatory works or other relevant provisions.
[21] Detrick, *Commentary*, *supra* note 11 at 186.

> It is the understanding of the Working Group that...article [10] is intended to apply to separations involving different countries and relating to cases of family reunification. Article [10] is not intended to affect the general right of States to establish and regulate their respective immigration laws in accordance with their international obligations.[22]

Several countries have expressed reservations regarding this article.[23] United Kingdom's reservation was that it would only allow children to enter if the parent has sole responsibility for the child or if there are "'serious and compelling" considerations. The Committee expressed concern about this reservation and has asked that the UK review its laws on nationality and immigration to ensure they conform to the principles of the *CRC*.[24] In *IRPA* and in the immigration policy manuals, there are provisions that directly address the goal of allowing for family reunification. As this is in the early stages, it is difficult to measure the policy to the reality. However, it is certainly an important step.

In further support of family stability, there are state obligations towards a child who has been deprived of the family environment:

Article 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.

The working group intended that this provision would apply to removal as a result of state action including deportation of the child's parents.[25]

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[22] *Ibid.*, at 190 quoting from UN Doc. E/CN.4/1989/48, para. 203.
[23] *Ibid.*
[24] Hodgkin and Newell, *supra* note 12 at 133 referring to *CRC*/C/2/Rev. 5, p. 33-34 and UK IRCO, Add. 34, paras. 7 and 29. See also Summary record for the United Kingdom from its first report, CRC/C/SR.204, 27 June 1995 at paragraph 18. The United Kingdom is discussed in Chapter Five below.
[25] Detrick, *Commentary, supra* note 11 at 334, referring to UN Doc. E/CN.4/L.1575, para. 125 (1981). See also Detrick, *TP, supra* note 11 at 297-298.

c) Right To Preserve Identity

An important factor for protection in the immigration scheme is that of nationality, as discussed in Chapter Two. Article 8, provides, in addition to the right to acquire a nationality, the right to identity including preservation of child's identity:

Article 8

> 1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognised by law without unlawful interference.
> 2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.

National identity can come from identity established through residence, in addition to through birth or parentage.[26] There are children and adults for that matter, who have lived in Canada since they were children, and who upon deportation effectively lose the only identity they have known.[27]

In terms of civil rights, the *CRC* provides a number of articles that in theory should provide a great deal of protection to a child. I turn to Canadian case law as it relates to children in immigration proceedings and the issue of how the *CRC* has been applied in Canada.

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[26] Also relevant to identity are Articles 30, the right to enjoy culture, religion and language for minorities (or Indigenous people) and 20,providing special protection to children who have been deprived of their family environment. See Appendix "D".

[27] This is the problem of permanent residents who have lived in Canada through out their lives being deported to countries with which they have no affiliation, other than citizenship. See for example, *Sale v. Canada (Minister of Citizenship and Immigration)* [2003] I.A.D.D. No. 62 No. TA2-21801, where the adult applicant, born in Jamaica, had been living in Canada for thirty-three and a half years at the time he sought a stay of a removal order.

4.3 IS THE *CRC* CUSTOMARY INTERNATIONAL LAW?

The widespread ratification of the *CRC*, suggests that it is likely customary international law.[28]

a) International Law Generally

The concept of international law is that there are universal principles of justice, which create a legal system that governs relations between states.[29] The theory is that international law develops in response to people learning to live together, with the necessity for rules.[30]

The basis of international law was historically natural law based on the existence of a divine source or the principle of inherent rights; the focus was on entitlement to rights and protections. Over the years the term natural law has been displaced in favour of human rights:

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[28] Under international law, a Declaration is a statement of principles and is not binding. A Convention is a treaty between States that carries specific obligations. Veerman, *supra* note 4 at 26-7, see footnote 87, reference to Everett M. Ressler, Neil Boothby and Daniel J. Steinbock, *Unaccompanied Children, Care and Protection in Wars, Natural Disasters, and Refugee Movements*, (New York and Oxford: Oxford University Press, 1988, at 210).

[29] Michael Akehurst, *A Modern Introduction to International Law*, Fourth edition (London, U.K.: George Allen & Unwin (Publishers) Ltd., 1982) at 1, 12.

[30] According to Akehurst, there are two main schools of thought in the development of international law, the positivists and the naturalists. According to the naturalists, the principles of international law are universal and discovered by pure reason. Hugo Grotius (1583-1645), a founder of modern international law "considered that the existence of natural law was the automatic consequence of the fact the men lived together in society and were capable of understanding that certain rules were necessary for the preservation of society." - *Ibid.*, at 13. Whereas positivists believed that international law is man made, based upon the relations between states and out of customs or international treaties. See Dr. P. K. Menon, "An Enquiry Into the Sources of Modern International Law" based on lectures delivered at the Diplomatic Training Programme for Caribbean Countries sponsored by the Commonwealth Secretariat in Port-of Spain (Trinidad and Tobago) from 2 to 20 May 1983, at 180, and Akehurst, *supra* note 29. There are two theories regarding what is international law. 1) Adoption- international law is automatically part of the domestic law except where it conflicts with statutory law or well-established rules of common law. And 2) Transformation theories- laws only become part of domestic law when incorporated into domestic law. Anne Bayefsky, *International Human Rights Law, Use in Canadian Charter of Rights and Freedoms Litigation,* (Markham, Ont.: Butterworths Canada Ltd., 1992) at 5.

> Since the concept of *natural law* became a matter of great controversy, and the term *natural law* fell into disfavour, we have increasingly become used to talking about human rights, especially since the Second World War.[31]

There are two conditions that must be present to prove customary international law based upon Article 38 of *the Statute of the International Court of Justice*:

1) evidence of sufficient degree of state practice;

2) evidence of acceptance that the practice is law.[32]

There is debate as to whether treaties are evidence of customary international law or whether they become customary international law after time. Akehurst says that treaties can be evidence of customary law but one must be cautious regarding inferring rules of customary law from treaties.[33] This may be the case where a treaty claims to be declaratory of customary law and may "be quoted as evidence of customary law even against a state that is not a party to the treaty."[34]

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[31] Veerman, *supra* note 4 at 24, referring to Louis Henkin, "Rights: American and Human" (1979) No. 3, 79 *Columbia University Law Review*, pp. 405-425.

[32] Article 38(1)(b) of *Statute of International Court of Justice*-
1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
a. International conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
b. international custom, as evidence of a general practice accepted as law;
c. the general principles of law recognized by civilized nations;
d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.
The North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark, Federal Republic of Germany v. The Netherlands) I.C.J. Reports 1969, at 3, is a leading case regarding what is evidence of widespread practice. The Court held that in order for a principle to be established to be customary international law it was necessary that the provision be of a "norm-creating" character to be regarded as forming the basis of a general rule of law.

[33] Akehurst, *supra* note 29 at 26

[34] *Ibid.*

b) Does The *CRC* Meet the Requirements Of Being Customary International Law?

Every United Nations member except for the United States of America and Somalia has ratified the CRC. With almost universal ratification, is it fair to say that the *CRC* has become customary international law? Geraldine Van Bueren's opinion is that it would be an overstatement to say that the *CRC* is customary international law in part due to the number of reservations.[35] Cynthia Price-Cohen notes that normally natural law claims or human right claims become positive law through the creation of treaties, based on the examples of the *Universal Declaration of Human Rights*, the *ICCPR* and the *International Covenant for Economic, Social and Cultural Rights* ("*ICESCR*").[36] However, the *CRC* is exceptional as it includes children's right that had never been recognised or included in any other instrument, as rights children are entitled to claim.[37]

And it was anticipated that the *CRC* would be customary law thereby ratification of all members would not be necessary.

> [A]s Goonesekere notes, the universal nature of the Convention would place the treaty in the special category of customary international law... Gonnesekere further suggests that children's rights may also move into the realm of universally binding customary international law that will apply irrespective of the treaty basis of children's rights and whether or not a State has ratified or acceded to the Convention.[38]

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[35] Geraldine Van Bueren, *The International Law on the Rights of the Child* (Dordrecht, The Netherlands: Martinus Nijhoff Publishers, 1995) at 55.

[36] Cynthia Price-Cohen, "The Relevance of Theories of Natural Law and Legal Positivism" in Michael Freeman, Philip Veerman, eds., *The Ideologies of Children's Rights* (Dordrecht, The Netherlands: Martinus Nijhoff Publishers, 1992) 53 at 54.

[37] *Ibid.* Price-Cohen states, "In other words, the *CRC* is an anomaly among human rights treaties in that an important segment of the positive law of the Convention was not preceded by rights claims based on natural law nor does it faithfully replicate the content of its related declaration. In this case, positive law preceded claims for rights."

[38] Rebecca Rios-Kohn "The Convention on the Rights of the Child: Programs and Challenges" (1998) 5 *Geo. J. Fighting Poverty* 139 at 156 referring to Savitri Goonesekere, *UNICEF, Children, Law and Justice: A South Asian Perspective* 117 (1998) at 34.

In Canada's second report to the Committee of the Rights of the Child, it summarised the *Baker v. Canada (Minister of Citizenship and Immigration)*[39] (1999) ("*Baker*") decision. Canada was indicating how its Court had in fact used the *CRC* in order to reach its decision. Regarding the Supreme Court of Canada's consideration of international law and the *CRC*, the report states in parentheses "notably because the values set out in international human rights instruments ratified by Canada are themselves a reflection of Canadian values."[40] All indicators are that the *CRC* does meet the criteria of being customary international law.

4.4 CANADA'S CASE

One area of consideration in this thesis is the effective deportation of children who are Canadian but children of immigrants. There are cases where Canadian born children of immigrants are in situations where the parents face deportation. Does this create two levels of citizenship for Canadian children? Those whose parents are Canadian citizens have the reassurance that they are not subject to deportation. Whereas, those whose parents are non-citizens, even if permanent residents face the risk that their parents could be deported. As a result, with or without their own views expressed, these children follow their parents by choice or not, depending upon their age and other arrangements.[41]

Under Canada's immigration scheme applicants are to apply from outside of Canada. However, the legislation allows for a category of exemption from this principle.

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[39] *Baker v. Canada (Minister of Citizenship and Immigration* [1999] S.C.J. No. 39, online: QL.
[40] Second periodic reports of States parties due in 1999 Canada, 3 May 2001, CRC/C/83/Add.6 12 March 2003.
[41] Recommendations to address this situation are discussed in Chapter Six below.

One category of exemptions is application on the basis of what are known as humanitarian and compassionate ("H & C") considerations under *IRPA*:

> **25(1)** The Minister shall, upon request of a foreign national who is inadmissible or who does not meet the requirements of this Act, and may, on the Minister's own initiative, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligation of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to them, taking into account the best interests of a child directly affected, or by public policy considerations.[42]

As will be discussed below, the current H & C application sections mandates consideration of the best interests of a child affected by the proceedings, a provision that did not exist under the former immigration legislation.

4.5 DEVELOPMENT OF CASE LAW

A former minister of immigration, Lucienne Robillard said

> that having a Canadian child doesn't give the same citizenship right to the parents. 'They are not Canadians by the simple virtue of having a Canadian child, so the parents have to decide.'[43]

Her comments were made in response to the case of Carthusha Skyers, (1998) a woman who had come to Canada as a visitor from Trinidad and Tobago in 1980 and overstayed.[44] Although there is no disagreement that the non-Canadian parent does not have the same rights as the child, the question is: how can the rights of the Canadian child

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[42] The general rule is that foreign nationals seeking to apply as permanent residents to live in Canada must apply from outside of Canada. H & C applications are the exception and are filed by people who are already living in Canada, have become established and wish to apply under the exception to the rule as permanent residents. See s. 11 (1) (2) and 25 of *IRPA*. See Appendix "G". Under the old, *Immigration Act,* R.S.C. 1987, c. I-2, the H & C provision was s.114(2):
The Governor in Council may, by regulation, authorize the Minister to exempt any person from any regulation made under subsection (1) or otherwise facilitate the admission of any person where the Minister is satisfied that the person should be exempted from that regulation or that the person's admission should be facilitated owing to the existence of compassionate or humanitarian considerations.

[43] Nahlah Ayed, "Hundreds of mothers fear deportation" *Canadian Press* (29 April 1999), online: listserver <cittimmq@listserver.cba.org.>

[44] *Skyers v. Canada*, [1998] F.C.J. No. 1287 (T.D.) online: QL.

be protected? At the same time, how can there be assurances that others are not exploiting the system, which certainly does occur. The government has to balance what cases are before it and its policy to discourage people from jumping to the front of the line.

4.6 RIGHTS OF CANADIAN CHILD

Applicants have argued violations of the rights of a Canadian child whose parent face deportation. An early example is *Denis v. Canada* (1976),[45] where the child, a Canadian citizen, issued a statement of claim and sought an injunction against a deportation order to send her mother to Haiti. The child's position was that deporting her mother would have the effect of exiling her contrary to Section 2 of *the Canadian Bill of Rights*.[46]

The child also argued that she would be deprived of liberty contrary to the *Bill of Rights* if taken by her mother to Haiti. If she were left in Canada, she would be deprived of security of the person and would suffer cruel and unusual treatment. The Federal Court of Appeal made a finding that the result was not a violation of Section Two of the *Bill of Rights*. Rather, the situation that the child faced was the result of the mother's action and the court dismissed the case.

The *Charter* rights of a Canadian child whose mother faced deportation were argued in *Kretowicz v. Canada (Minister of Employment and Immigration)*(1987).[47] The

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[45] *Denis v. Canada* [1976] 1 F.C. 499 (C.A.), online: QL.

[46] Every law of Canada shall, unless it is expressly declared by an Act of Parliament of Canada that it shall operate notwithstanding *the Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to authorize or effect the arbitrary detention, imprisonment or exile of any person;
impose or authorize the imposition of cruel and unusual treatment or punishment;...- *Canadian Bill of Rights*, S.C. 1960, c. 44.

[47] *Kretowicz v. Canada* [1987] F.C.J. No. 280 (C.A.), online: QL.

mother and her child brought a motion seeking to prevent a removal order and sought relief under section 24 of the *Charter of Rights and Freedoms*. The applicants argued, *inter alia*, that upon the mother's deportation back to Poland, the daughter would have to follow her, putting her life and security at risk, thereby violating Section 7, and this would constitute cruel and unusual punishment, violating Section 12.

At the time of the motion, the mother had received notice that her Minister's permit would not be renewed, and there was a direction to leave the country but no removal order. Justice Marceau took the position that, since there was no removal order, any remedy the child could have was not yet applicable. Accordingly, he did not discuss the child's *Charter* rights. Justice Hugessen, along with Justice LaCombe, saw fit to address the *Charter* arguments but found that there was no evidence that the life or security of the child would be adversely affected if the child went to Poland with her mother; and also, the decision as to whether the child stayed or left was the parents' to make, not the government's. As such, he found no violation of Section 7 or Section 12 of the *Charter*. Further, the court was satisfied that the record indicated that the immigration officer had considered the child and her relationship with her father.

Many courts have held that the issue of the Canadian born child's rights is not an issue of rights if the parent faces deportation, but a parental decision regarding whether the child stays in Canada or leaves the country. However, as many cases note, deportation of the parent is often an effective deportation of the child. The underlying presumption is that children do not exist as subjects but rather as objects. Meaning, the child is not an actor but rather a receptor of the decisions that are made. As a Canadian citizen with all the rights of all other citizens, these Canadian children lose the ability to

effectively exercise their rights as citizens. They are Canadians who are essentially being deported without having a direct say in the process or separate representation.

There was a more aggressive attempt at arguing the importance of international conventions regarding children's rights and *Charter* rights of Canadian children in *Charran v. Canada (Minister of Citizenship and Immigration)* (1995).[48] The Canadian child had a serious medical condition that would require a series of operations when he reached age four or five. The father argued that due to the child's medical condition, he needed to stay in Canada. He further argued that separating the child from the parent affected his Section 7 rights of the *Charter*, the security of the person. Justice Wetston took the position that a removal order would not directly affect the legal status of the son who is Canadian or the son's right to remain in Canada. It would be a parental decision whether or not the son stayed or went with the family. Wetston J. quoted from *Sellakkandu v. Minister of Employment and Immigration*:[49] "Her child benefits in his own right from the protection of the *Charter* as a Canadian citizen. He is not subject to a removal order and is not a party to this application. The issue of whether or not his *Charter* rights have been infringed is not an issue before me."[50] The potential separation from his family was not a personal infringement of his *Charter* rights; rather the case was about the father's situation and not the rights of the Canadian child.[51]

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[48] *Charran v. Canada* [1995] F.C.J. No. 243 (T.D.), online: QL.
[49] *Sellakkandu v. Minister of Employment and Immigration* (1993), 68 F.T.R. 293, online: QL.
[50] *Charran, supra* note 48 at cited in paragraph 11. Based on *Borowski v. Attorney General of Canada*, [1989] 1 S.C.R. 341, the person seeking a remedy under section 24(1) would have to be the party directly having his or her *Charter* rights violated.
[51] The father argued that removing the Canadian child who needed serious medical attention only available in North America would violate Canada's international obligations, specifically *the International Declaration of Human Rights; the Declaration on the Rights of the Child; the International Covenant on the Rights of the Child* and *the International Covenant on Civil and Political Rights.* The court held that there was no evidence that the subsection dealing with H & C applications was inconsistent with Canada's international obligations or that the instruments had been specifically incorporated into Canada's domestic

The courts remain wary of applications for review that relied on the *CRC* and the *Charter*. In *Langner v. Canada (Minister of Employment and Immigration)*(1995)[52] the Federal Court of Appeal expressed its concerns regarding parents making H & C applications relying on their connection to their Canadian born child:

> Proceeding by way of an action for a declaratory judgment, the appellants are essentially asking this Court to do nothing less than to declare that the mere fact that these people, who otherwise have no right to remain in Canada, have had a child in Canada prevents the Canadian Government from executing a deportation order that has been validly made against them. In short, one would need only have a child on Canadian soil and argue that child's Canadian citizenship rights in order to avoid the effect of Canadian immigration laws and obtain indirectly what it was impossible to obtain directly by complying with those laws.[53]

These comments elucidate the tension between giving effect to the rights of the Canadian child and balancing the immigration legislative scheme. The court did not recognise that the children in such situations had any *Charter* rights that would be violated.

> The appellants have no *Charter* right to remain in Canada, since the deportation order made against them is entirely consistent with the requirements of the *Charter*. The appellant children have no *Charter* right to demand that the Canadian Government not apply to their parents the penalties provided for violation of Canadian immigration laws.
>
> Regardless of the decision made by their parents, the children will retain their Canadian citizenship and will be subject to no constraints in the exercise of the rights and liberties associated with their citizenship other than the constraints the parents impose in the exercise of their parental authority.[54]

The court's finding demonstrates the traditional or older conception of children as property of the parents. Although the court recognises that the children do have citizenship rights, the need to protect those inherent rights is essentially minimised as

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legislation. As the international instruments were not incorporated into domestic law, the court held that there were no *Charter* violations.

[52] *Langner v. Canada* [1995] F.C.J. No. 469 (C.A.), online: QL.

[53] *Ibid.*, at paragraph 4.

[54] *Ibid.*, at paragraph 7 and 8.

being subservient to parental control over the child.[55] It is clear in this judgment that the court at that time, despite ratification of the *CRC*, did not perceive it to be customary international law. Based on Articles 9 and 10 of the *CRC*, the court referred to the expectation or realisation that children may be separated from their parents in certain situations.

> Moreover, a child has no constitutional rights never to be separated from its parents: we need only consider imprisonment, extradition, and even divorce, for confirmation that the child's right is to be where its bests interests require it to be, and it is not necessarily in a child's best interests to be in the company of its parents.[56]

This is certainly true. However, if separation were to occur, there is an obvious difference from the situations mentioned. In addition, these comments minimise the objectives of family unity, an objective that was included in the immigration legislation at the time, not to mention international law.

4.7 BAKER DECISION AND THE *CRC*

Baker v. Canada (Minister of Citizenship and Immigration)[57] (1999) ("*Baker*") is the seminal case in Canadian immigration law regarding applying the *CRC* and consideration of best interests of children in the immigration scheme.[58] Mavis Baker had come from Jamaica in 1981 as a visitor, stayed and never obtained permanent residence or other legal status. She supported herself working illegally as a live-in domestic worker for eleven years. She had four children born in Canada but was diagnosed with

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[55] In Chapter One, I discussed the tension between the child liberationists and protectionists, referring to Freeman's belief in "future-oriented consent" by which parents or adults act as they believe the child would want them to act if the child were capable of making that decision.

[56] *Langner, supra* note 52 at paragraph 10. The Court did not accept that there was inequality under Section 15 of the *Charter* on the basis that the child sponsoring a family had to be age nineteen, and this did not discriminate against infant children. This was because the sponsor would be responsible and liable to support the applicant and therefore, the section could not apply to infant children.

[57] *Baker v. Canada, supra* note 39.

[58] It is also an important decision in administrative law.

schizophrenia after the birth of her last child. In 1992, she was ordered deported and she applied for an exemption to apply for permanent residency from within Canada by filing an H & C application. The immigration officer refused her application without any reasons shown. Her lawyer requested copies of the immigration officer's notes. These notes were critical of Ms Baker taking advantage of the immigration system by remaining in Canada illegally and highlighted the fact that she had many children, including four in Jamaica. One major issue was whether there was an apprehension of bias by the immigration officer.

Justice L'Heureux Dubé made findings that the immigration officer had been dismissive of the needs and interests of the children. In terms of international law, she considered that Canada had ratified the *CRC*. Although in principle international treaties and conventions are not part of Canadian law unless implemented by statute,[59] L'Heureux Dubé J. held that international human rights law reflects values that may assist in the contextual approach to statutory interpretation and judicial review. Regarding the *CRC*, she stated:

> The values and principles of the *Convention* 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. In addition, the preamble, recalling the *Universal Declaration of Human Rights*, recognizes that "childhood is entitled to special care and assistance". A similar emphasis on the importance of placing considerable value on the protection of children and their needs and interests is also contained in other international instruments. The *United Nations Declaration of the Rights of the Child (1959)*, in its preamble, states that the child "needs special safeguards and care". The principles of the Convention and other international instruments place special importance on protections for children and childhood, and on particular consideration of their interests, needs, and rights. They help show the values that are central in determining whether this decision was a reasonable exercise of the H & C power.[60]

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[59] *Baker, supra* note 39 at para. 69
[60] *Ibid.*, at para. 71

The importance of human rights as inalienable rights was a paramount concern to her analysis. The fact that the principles from the 1959 *Declaration* and other conventions include protection of children was evidence that this principle was part of customary international law and ought to be recognised by Canada's courts.

Although the *CRC* has now been given life in Canada through the case law, we need to examine the extent this treaty reflecting international law has in immigration matters. Specifically, how the *CRC* affects Canadians who are the children of immigrants without legal status and children immigrants. As part of this examination, I first review how attempts were made to use superior court's *parens patriae* jurisdiction in order to give effect to children's rights and then consider the *CRC* in cases since *Baker.*

4.8 *PARENS PATRIAE* CASES and SUPERIOR COURT CASES

Immigration decisions are subject to judicial review in the Federal Court. There have been attempts to protect the children of immigrants by taking cases to the superior court and asking it to apply its *parens patriae* jurisdiction. However, these attempts were affected by an earlier case in which a person facing deportation sought relief in the superior court arguing violations of his *Charter* rights. In *Reza v. Canada*[61](1994) the Supreme Court of Canada held that Parliament had created a "comprehensive scheme of review of immigration matters and the Federal Court was an effective and appropriate forum."[62] It was therefore found that although there is concurrent jurisdiction with the superior courts, the motions judge did not err in declining jurisdiction for the reason that the Federal Court is the forum with expertise in immigration matters.[63]

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[61] *Reza v. Canada* [1994] 2 S.C.R. 394, online: QL.
[62] *Ibid.*, at paragraph 21.
[63] The Supreme Court of Canada was in general agreement with Abella J.'s dissenting reasons, see *Reza v. Canada* [1992] O.J. No. 2300, online: QL.

The key case that led to a number of *parens patriae* jurisdiction applications is *Francis v. The Minister of Citizenship and Immigration and Maria Joyce Francis* (1998).[64] The Canadian born daughters of Ms Francis, and her son, Cleavon Francis, applied for a stay of a deportation order made against the mother and Cleavon in Ontario's superior court. The Minister took the position based on *Reza* that the Federal Court was the proper forum to hear immigration matters. Justice McNeely noted that the children chose the superior court of general jurisdiction with its inherent *parens patria* jurisdiction that can be exercised where there are dependent children who require the court to protect their interests and where the parents are unable to do so. McNeely J. referred to two cases dealing with immigration matters that considered the court's need to exercise this jurisdiction to protect the children from harm.[65] McNeely J. held that *Reza* stands for the principle that a superior court judge can exercise his or her discretion under s. 106 of the *Courts of Justice Act* as long as the judge carefully weighed the considerations involved in exercising that discretion.[66] However, for this matter, McNeely J.'s took a human rights perspective:

> A second particular fact of this particular case is that while the issues to be decided arise in an immigration context, they are not so much immigration issues as children's and human rights issues. Two of the three children are Canadian citizens living in Canada having an absolute right under section 6 of the *Charter of Rights* to remain in Canada. Their rights are in no way dependent on the status of their mother. The principle underlying the *Immigration Act* that no alien has any legal right to come to or remain in Canada has absolutely no application to the two girls. I am not satisfied that The Federal Court, whose jurisprudence and procedures in immigration matters are informed by the principle underlying the *Immigration Act*

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[64] *Francis (Litigation Guardian of) v. Canada (Minister of Citizenship and Immigration),* 160 D.L.R. (4th) 557 (Ont. Gen. Div.), online: QL.
[65] *Nunez v. Solicitor General of Canada*, unreported July 11, 1996 digested at 10 OFLR. 23 (BCCA) and *Kashica Juste et al. v. Attorney General of Canada*, (interim endorsement) June 25, 1997. (Also reported as *Harper v. Canada (A.G.)*, [1997] O.J. No. 3331 (C.A.).)
[66] *Francis, supra* note 64, at 560-561.

is a better forum for the determination of the constitutional rights of Canadian citizens than is this court.[67]

The Court held that deporting the mother would compel the Canadian children to leave, contravening Section 7 of the *Charter*. Regarding the government's position that the decision to take or leave the child is a parental choice, Justice McNeely stated:

> The choice referred to is the 'choice' between abandoning six and eight year old children by leaving Canada without them or taking them with her away from the country of their birth, residence, education and citizenship. If this is a choice at all, it is a choice compelled by government action. It is somewhat disingenuous to say that the Minister takes no part in this decision. The antecedent government action of deporting the mother compels the choice of the mother as a necessary consequence. This conclusion is less a conclusion of law than a recognition of reality. Most people would regard it as self evident that to deport the sole parent of six and eight year old children is to deport or exile the children themselves.[68]

In support of his reasoning McNeely J. referred to an American case, *Acosta v. McGaffney*,[69] that by deporting a parent, one is automatically deporting the child. McNeely J. ordered that it was in the best interests of the two Canadian born children that they remain in Canada. The son's deportation was to be stayed for 30 days following determination of the mother's case. The Minister appealed the decision to the Court of Appeal, which delayed rendering a decision to await the outcome of the *Baker* case.

Another application brought in the Ontario Court General Division was *John v. Canada* (1998).[70] The three Canadian born children of Nicole John sought a declaration that the deportation of their mother (that had already taken place) contravened their rights

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[67] *Ibid.*, at 561-562.
[68] *Ibid.*
[69] *Acosta v. McGaffney*, 413 F. Supp. 827.
[70] *John v. Canada,* [1998] O.J. No. 2215 (Gen. Div.), affirmed [2000] O.J. No. 883 (C.A.), application for leave to S.C.C. dismissed, [2000] S.C.C.A. No. 574.

under the *Charter* and would cause irreparable harm. This position was based in part on the *CRC*, the *Charter* and *The Canadian Bill of Rights*.[71] The children argued that:

> State action that has the effect of interrupting a child's entitlement to be raised by the parents of that child invites scrutiny under section 7 of the *Charter*. They argue further that where a deportation decision may result in the separation of a parent from its infant child or may force the infant child to leave the country of which it is a citizen, it violates section 15 of *the Charter* unless the child has the right to be heard and have its interests considered before the decision is made. The forcing of the child to leave Canada in such circumstances, where that occurs, is said also to violate the right of a Canadian citizen not to be exiled, contrary to section 2(a) of the *Canadian Bill of Rights*. They contend that they will suffer irreparable harm if their separation from their mother continues until the argument of their application.[72]

Justice Drambot disagreed with Justice McNeely judgment in *Francis* on the issue of the court's *parens patriae* jurisdiction. Drambot J. applied *Reza,* holding that the Federal Court is the appropriate forum to deal with immigration matters and that it would be able to consider the rights of children. Drambot J. noted that when McNeely J. in *Francis* relied on the American case, *Acosta v. McGaffney,* the court was not aware that the decision had been reversed.[73]

As mentioned above, the Ontario Court of Appeal reserved its decision in *Francis* pending the release of the Supreme Court of Canada decision in *Baker v. Canada (Minister of Citizenship and Immigration).*[74] The Ontario Court of Appeal in *Francis* (1999) held that *Baker* clarified that the interests of the child are to be considered under s. 114(2) of *the Immigration Act*, under "humanitarian and compassionate" applications. The Ontario Court of Appeal noted that McNeely J. was entitled to proceed with the

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[71] *The Canadian Bill of Rights,* S.C. 1960, c. 44.
[72] *John, supra* note 70 at paragraph 5 (Gen. Div.).
[73] *Ibid.,* at paragraph 15 referring to *Acosta v. McGaffney* 558 F. 2d 1153 (1977) -The U.S. appellate court considered the lower court's decision as opening a loophole in the immigration laws to benefit aliens that are subject to deportation who have had a child born in the U.S.
[74] *Francis v. Canada* [1999] O.J. No. 3853 (C.A.), online: QL, at paragraph 7 referring to *Baker v. Canada, supra* note 39.

application at the time it came before him, as the law had been uncertain regarding the issue of consideration of the best interests of the child. Since the issue was clarified in *Baker*, there was no need for a provincial superior court to consider its *parens patriae* jurisdiction in such situations. The Court stayed the order to allow Ms Francis and her son to remain in Canada while bringing forward a further humanitarian and compassionate application. Leave to appeal to the Supreme Court of Canada was granted without reasons on 1 June 2000,[75] but a motion to quash the appeal was granted on 6 November 2000 on the basis of mootness.[76] As such, the Supreme Court of Canada did not determine the question, nor have they since.

One of the few cases to give an in-depth analysis of *parens patriae* jurisdiction and how that interplays with the immigration scheme is *Torres-Samuel v. Canada* (1998).[77] Esson J. A. analysed La Forest J.'s judgment in *Re Eve,*[78] (1986) a leading case in Canada on the principle of *parens patriae* jurisdiction, and quoted from page 427 of that decision:

> Though the scope or sphere of operation of the *parens patriae* jurisdiction may be unlimited, it by no means follows that the discretion to exercise it is unlimited...It is a discretion, too, that must at all times be exercised with great caution, a caution that must be redoubled as the seriousness of the matter increases.[79]

On that basis Esson J.A. accepted that the motions judge had correctly held that H & C applications do consider the child's interests. Therefore, there would be no need for a superior court to exercise any *parens patriae* jurisdiction. As noted by the motions judge:

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[75] S.C.C. Bulletin, 2000, p. 1018.
[76] S.C.C. Bulletin, 2000, pp. 2027 and 2082.
[77] *Torres-Samuels v. Canada,* [1998] B.C.J. No. 2473, Online: QL.
[78] *Re Eve* [1986] 2 S.C.R. 388, online: QL.
[79] *Torres-Samuels, supra* note 77 as cited at paragraph 16.

> What the petitioners want the Court to do pursuant to the *parens patriae* jurisdiction is in effect to substitute a system of immigration with respect to foreign persons who have children born in Canada whereby it will be the superior courts of the provinces which will decide which of such persons shall be permitted to remain in the country rather than those agencies constituted by Parliament to deal with matters of immigration.[80]

The motions court judge, Paris J. had held that the *parens patriae* jurisdiction did not extend to that situation. Esson J.A. noted that judicial discretion could only be exercised if there is a gap in the legislation but the legislative requirement to consider matters other than the interests of the children meant that there was no legislative gap.[81] Therefore, the court applied *Reza* and refused to interfere with the immigration process.

There was reference to the case from Australia, *Minister for Immigration and Ethnic Affairs v. Teoh* (1995)[82] regarding a Malaysian citizen who entered Australia on a temporary entry permit in May 1988 and married an Australian citizen with four children of her own. They had three children together. He appealed the rejection of his application for permanent residence. The Court held that although the *CRC* had been ratified but not incorporated, ratification was sufficient to provide a legitimate expectation that administrative decision makers would consider the *CRC* in rendering its decisions.

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[80] *Ibid.*, at paragraph 19.
[81] *Ibid.*, at paragraph 24.
[82] *Minister for Immigration and Ethnic Affairs v. Teoh* (1995), 128 A.L.R. 353 (H.C.). In Australia, after the *CRC* was ratified, an instrument of declaration was made for the *CRC* to be an international instrument relating to human rights and freedoms for the purposes of the *Human Rights and Equal Opportunity Commission Act 1986.* See Sally Brown, "Minister of State for Immigration and Ethnic Affairs v. Ah Hin Teoh (1994-95), 183 CLR 273, the Convention, the Case, the Controversy and the Consequences" in Anne-Marie Trahan, ed. *A New Vision for a Non-Violent World: Justice for Each Child" Proceedings of the 4th Biennial International Conference of the International Association of Women Judges* (Cowansville, Que.: Les Éditions Yvon Blain Inc., 1999) 81 at 83. The court took the position that although Australia had only ratified the *CRC* and it was not part of Australian law, ratification was an adequate foundation for legitimate expectation that decision makers would act in accordance with the *CRC.* (*Teoh,* paragraph 34.) The court held that the Immigration Review Panel did not regard the best interests of the children as a primary consideration.

One judgment in that case focused on the rights of the Australian children as citizens:

> It (citizenship) involves obligations on the part of the body politic to the individual, especially if the individual is in a position of vulnerability. And there are particular obligations to the child citizen in need of protection. So much was recognised as the duty of Kings, which gave rise to the *parens patriae* jurisdiction of the courts. No less is required of the government and the courts of a civilized democratic society.[83]

At the time, the Federal Court in *Baker* had not followed *Teoh* or given consideration to the *CRC*. In addition, the Court held that since subsequent legislation in Australia overruled that decision, the B.C. court did not give it further consideration. Therefore, the court in *Torres-Samuel* did not place any weight on the *Teoh* decision. It appears that the Court was in error regarding the new legislation in Australia, as several bills were brought forward none have become law at the time of writing (August 2004.)[84]

Following the *Francis* decision at the superior court level, there had been a number of motions brought before provincial superior courts. Initially, a few applications were allowed. However, after the *Baker* decision, the courts took the position that since the immigration tribunals and Federal Court must consider the best interests of the child and that the provincial superior courts generally would not exercise *parens patria* jurisdiction in immigration related cases.

The best interests of the children are now incorporated by statute into *IRPA* for consideration by the Minister if she is to waive legislative requirements for example in H

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[83] *Teoh, supra* note 82 at para. 3, judgment of Gaudron J.

[84] On 10 May 1995, the Australian government issued a joint statement by the Attorney General and the Minister of Foreign Affairs, to the effect that people should not have a legitimate expectation that provisions of a treaty to which an Australian is a party would necessarily be applied in administrative decision-making. There were attempts to pass legislation by two subsequent governments but that has not taken place and contrary to the comments by the court in B.C., the principle of legitimate expectation remains the law in Australia as of December 2003. See Hilary Charlesworth, Madelaine Chiam, Devika

& C applications (s. 25).[85] Best interests is also incorporated into sections 67-69, the sections that deal with factors to consider on an appeal of a removal order to the Immigration Appeal Division. Therefore, there are two areas in which best interests are to be expressly considered in proceedings.[86]

There is a case decided under the new legislation that did allow for the superior court's jurisdiction in a limited context. *Wozniak v. Brunton* (2003)[87] was an application for joint custody in which the father, who was Canadian, applied for a non-removal order as a term of the joint custody order. This is a provision used to prevent one parent from taking the child outside of the country. The Minister of Immigration, who was not a direct party, brought a motion asking the superior court to decline jurisdiction on the basis that the matter belonged in the Federal Court. Under *IRPA,* there is a stay of removal order, if removal would amount to violation of an order from a proceeding in another jurisdiction.

> **50.** A removal order is stayed
>
> a) if a decision that was made in a judicial proceeding -- at which the Minister shall be given the opportunity to make submissions -- would be directly contravened by the enforcement of the removal order.

Justice Nelson held that there is a legislative gap, in that a removal officer has no discretion to consider the best interests of a child. It is only upon the H & C application being considered that best interests come into play; thus it was the superior court's role to fill the gap. *The Children's Law Reform Act*[88] gives authority to the court to consider any aspect of custody and to consider the best interests of the child in a custody application.

Hovell and George Williams, "Deep Anxieties: Australia and the International Legal Order" [2003] *Sydney L Rev 21*, online: <http://www.auslii.edu.au> (accessed 26 June 2004).

[85] For full section see page 120 above.

[86] See Appendix "G". For discussion on appeal of removal order to IAD, see Chapter Two above, at 51-52.

[87] *Wozniak v. Brunton* [2003] O.J. No. 1679 (Ont. S.C., Fam. Ct.), online: QL.

The question was whether the court should decline jurisdiction to determine the custody application when the mother was subject to a deportation order and there was a pending H & C application. It was accepted that any order of the family court would not be effective once a decision was rendered on the H & C application. Although the custody order would have the effect of staying the removal order, the court held that aspect would not stop the court from making its own custody determination. Since there was provincial legislation that gave statutory authority to determine custody, there was no need to consider the court's *parens patriae* jurisdiction.

The court at that stage made a finding that the applicant was not using the custody matter to circumvent the immigration process. Nelson J. did leave open that there could be cases where based upon the facts it may be that a custody application could be "so suspect that the Family Court of the Superior Court of Justice would decline to take jurisdiction."[89] Nelson J. referred to the Court of Appeal judgment in *Francis v. Canada.*[90] In particular he noted that the door had been left open with the comment that there would be situations where the Federal Court is not the most effective or appropriate forum. Nelson J. reasoned that a custody application could constitute such a circumstance.[91] On the issue of whether custody applications would create a loophole, the Court held that any loophole that could exist would be small, and enacting legislation could cure the issue. And the Court dismissed the Minister's motion to decline

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[88] R.S.O. 1990, c. C-12
[89] *Wozniak, supra* note 87 at paragraph 35.
[90] *Francis, supra* note 74.
[91] This hearing dealt with the procedural matters involved and the Minister's motion. The court noted that the applicants would still have to prove that there was a genuine custody issue; the request for a non-removal order would depend upon the result of the custody application and the status of the H & C application.

jurisdiction. Justice Nelson advised that he would consider the substantive issues at the motion for temporary relief.

Upon the matter come to hearing almost nine months later, the relationship between the two parents had become acrimonious.[92] The Court agreed to grant temporary custody of the child to the mother, Ms Brunton. The parties had agreed to the terms of access, but each party sought that the Court make a specific access order. However, the Court recognised that any access order could have an effect on the deportation order and therefore, declined to make an access order. Within his reasons for the second order, Nelson J. expressed his concerns that the applicants were in fact using the domestic proceedings as a method to bypass the immigration scheme.

Both parents also sought a non-removal order. The order is usually used to prevent one parent removing a child from the jurisdiction without the other parent's consent. The Court's findings were that neither parent had any intention of removing the child from Canada. The mother said if her son were to travel with her to Trinidad, which was the more likely situation upon her being deported, that he would be subject to a "detrimental environment." But since a non-removal order would have the effect of staying the deportation order, the Court declined to make a non-removal order. Justice Nelson did specify that he would have heard evidence of potential harm or danger to the son in Trinidad. He acknowledged that there would be a few situations where the potential for danger would lead to the granting of a non-removal order.[93] The Court

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[92] *Wozniak v. Brunton* [2004] O.J. No. 939 (Fam.Ct.), online: QL.

[93] In *Varvara v. Constantine,* 2003 CarswellOnt 5903, online: westlawecarswell.com, Justice Zuker did make a non-removal order within a custody case as there was evidence of potential harm to the children. The mother had left Italy and her abusive husband. If she were deported and the children returned to Italy with her, there was evidence that they would likely suffer harm from their father without intervention or protection from the authorities.

accepted that it would usually be in the child's best interests to have both parents involved in their life but that the best interests of the child, cannot preclude enforcement of the law.[94] Furthermore, the best interests of the child could be considered if and when the mother sought a stay of the deportation order in the Federal Court.[95] The Court declined to make a non-removal order.

Ms Brunton then applied for leave to appeal, which was granted.[96] Justice Ferrier accepted that there could be serious debate regarding what consideration should be given if there is an outstanding removal order under *IRPA* when the Court is making an interim custody or access order including restrictions on residency, when the order could probably operate as a stay of a removal order under s. 50(1) of *IRPA*. The appeal will not be heard until the fall of 2004 and will likely affect the consideration of this issue.[97]

Another interesting development occurred in the case of *McEyeson v. Canada (Minister of Citizenship and Immigration),*[98] where the mother faced deportation for lying about the existence of a child she had when she applied for permanent residency. She appealed from her deportation order to the Immigration and Appeal Division ("IAD") of the Immigration Refugee Board ("IRB"). She and her Canadian husband had divorced and she had custody of the child of the marriage. The applicant applied to vary her custody order, so that there was a provision that the father would not have access to the

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[94] *Wozniak v. Brunton, supra* note 92.
[95] Stays of deportation orders at the Federal Court are judicial review. Best interests of the child are a statutory consideration for the Immigration Appeal Division (IAD) under sections 67-69 of *IRPA*. Regarding appeal of deportation orders to the IAD see Chapter Two above. Regarding stays before the Federal Court, see below.
[96] *Wozniak v. Brunton* [2004] O.J. No. 2630 (Ont. S.C.), online: QL.
[97] As advised by Sheilaugh O'Connell, counsel for Ms Brunton on August 20, 2004. On August 23, 2004, Ms O'Connell advised that she had received a negative decision for Ms Brunton's H & C application. It will be interesting to observe how this issues plays out in light of the negative H & C.
[98] *McEyeson v. Canada (Minister of Citizenship and Immigration)* [2003] F.C.J. No. 939 (T.D.), online: QL.

child. The Ontario Court of Justice also provided that the mother would be entitled to remove the child from Ontario and from Canada, and that the father would execute all documentation necessary to facilitate the child obtaining a passport.

The mother sought to reopen her immigration appeal before the IAD in part on the grounds that the Ontario High Court of Justice had made a decision that it would be in the son's best interests to remain in Canada with his mother. The IAD interpreted the custody order as allowing the applicant to remove the child from the country, and it declined to reopen. On judicial review of that decision, Russell J. accepted the IAD's decision and interpretation of the custody order.

Ironically again, when parents have separated from each other for personal reasons, this has led to greater attention being paid to ensuring contact with the child. In *Reis v. Canada (Minister of Citizenship and Immigration)* (2002),[99] a stay was ordered in part because the judge held that the immigration officer failed to place sufficient weight on the child maintaining contact with both parents, who had split.

It is a strange situation in which the Canadian child of an immigrant could have a greater chance of staying in Canada with both parents if they separate than if they stay married. These scenarios are probably limited but seem to be one of the only avenues in which the superior court's jurisdiction may be of assistance to the Canadian child whose parent faces deportation.

4.9 POST *BAKER*

In the initial decisions considered following *Baker,* there were a number of applications allowing judicial review where the courts did find failure by immigration officers to consider best interests of the children. Most of these cases would have

involved reviewing notes of immigration officers that had been written prior to the *Baker* decision. These cases were followed by cases where the courts limited how much consideration by the immigration officers is necessary to meet the test in *Baker*.

The cases that granted judicial review were usually where the immigration officer's notes barely mentioned the children and their situation. In *Jack v. Canada (MCI)*[100] (2000) the immigration officer's notes regarding the effect on the Canadian child returning to Cuba was that the child was "young enough to adjust to change should the mother choose to take him with her... ."[101] Gibson J. noted that this was the only statement that considered the effect on the Canadian child and that there had not been any consideration of what the impact would be on the child if his mother were to leave and chose to leave the son in Canada.[102]

Referring to *I.G. v. Canada (MCI)*[103] (1999), and his own prior decision in *Navaratnam v. Canada (MCI)*[104] (1999) Gibson J. held that the decision ought to be set aside for the failure to consider the rights, interests and needs of the Canadian child.[105]

Other rights of the *CRC* such as the importance of family unity were noted in the *I.G. v. Canada (MCI)* [106] (1999) case. Lemieux J. held that *Baker* changed the law and that the case:

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[99] *Reis v. Canada* [2002] F.C. J. No. 431 (T.D.), online: QL.
[100] *Jack v. Canada (MCI),* [2000] F.C.J. No. 1189 (Trial Div.), online: QL.
[101] *Ibid.,* at para. 3.
[102] *Ibid.,* at para. 4.
[103] *I.G. v. Canada (MCI) infra* note 106.
[104] *Navaratnam v. Canada (MCI*), [1999] F.C.J. No. 1870 (Q.L.) (F.C.T.D.) In *Navaratnam v. Canada (MCI)* the immigration officer did not even mention the daughter and focused on whether there was a marriage of convenience: "...[I]n reaching the decision under review, the failure to emphasize the rights, interests and needs of Jerusha and to provide special attention to childhood in the rationale eventually provided for the decision that, whatever its ultimate merit, was simply not...'alive, attentive or sensitive...' to the interest of Jerusha and 'did not consider [her] as an important factor in making the decision,...' with the result that the decision, on the analysis provided, was simply not reasonably open to the decision maker." (At para. 14.)
[105] *Jack, supra* note 100 at para. 8.

> [M]andates a new perspective and a new emphasis by immigration officers when rendering humanitarian and compassionate decisions under the Immigration Act. Where children are involved the immigration officer must consider the children's best interests as an important factor, must give those interests substantial weight and be alert and alive to them.

Based on *Baker,* Lemieux J. noted the importance of the interests of the adult applicant regarding keeping the family together and not subjecting deportees to return to countries where they would no longer fit in, quoting from *Baker*:

> '...immigration officers are expected to make the decision that a reasonable person would make, with special consideration of humanitarian values such as keeping connections between family members and avoiding hardship by sending people to places where they no longer have connections.'[107]

Lemieux J. further noted that *Baker* places greater responsibility upon the reviewing judge to take a "hard look" at the H & C decision, and to examine whether it is reasonable based on a strong examination based on the facts. The judge is required to determine whether the facts support that immigration officer's decision was reasonable.[108]

In some cases, judicial review was allowed due to a failure to consider the conditions of schooling in the country to which the person would be deported, with the assumption that it would be most likely that the child would leave with the parent.[109] There are cases where there was little mention at all of the interests of the child, and no

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[106] *I.G. v. Canada (MCI)* [1999] F.C.J. No. 1704 (T.D.), online: QL.

[107] *I.G. v. Canada (MCI)* as cited at para. 38. The problem of deporting people to places where they no longer have an interest is an issue. This quote appears to be recognition of *de facto* nationality, or the hardship related to deportations for long time residents. Some of these cases are discussed under "Stays" below but space does not permit a greater analysis of this pressing issue.

[108] See also *Naredo v. Canada (MCI)*, [2000] F.C.J. No. 1250 (T.D) Online: QL, Gibson J. was not satisfied that as based on *Baker,* an immigration officer could simply state that it would be up to the parents whether to take their children with them (Canadian born) upon deportation. That approach would be completely dismissive of the interests of the children. (See also *Holder v. Canada (MCI)*, [2001] F.C.J. No. 267 (T.D) Online: QL.)

[109] See *Henry v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1699 (T.D.), online: QL.

attempt to discuss issues with the child, although present in the interview room.[110] Thus, although the court has not identified the issue this way, other parts of the CRC, such as Article 12, the right of the child to express their views in proceedings, have been overlooked.

There were cases that did not allow applications for judicial review following *Baker.*[111] One case that questioned the application of *Baker* is the judgment of Nadon J. in *Simoes v. Canada (MCI)*[112] (2000). At the motion for a stay of the removal order, Nadon J. denied the motion for the stay. He noted although the best interests of the child are an important consideration, this does not preclude the enforcement of the law especially since under Article 9 of the *CRC,* separation of parent and child is anticipated. "In my view, it is clear that the purpose of this Convention is to protect the child's well-being, not to prevent a government from deporting or imprisoning a parent."[113] Although it is fair comment that the *CRC* anticipates that parent and child may be separated, I believe Nadon J. minimises the underlying assumption that under the *CRC* separation

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[110] See *Sovalbarro v. Canada (Minister of Citizenship and Immigration),* [1999] F.C.J. No. 1394 (T.D.) Online: QL.

[111] See *Ramessar v. Canada (MCI),* [2000] F.C.J. No. 2052 (T.D.), online: QL. Also, in *Russell v. Canada (MCI)* [2000], F.C.J. No. 1276 (T.D.), online: QL. The applicant had been in Canada since he was seven years old but had a number of criminal charges for activities such as theft and stolen credit cards. A deportation order was used on 11 September 1996. The Applicant had a son born in April 1998. He married a woman who was not the mother of the child in June 1998. He had an active relationship with his son, regular visitation and paid child support. In August 1998, he filed his H & C application. He was deported to Jamaica in the fall of 1999. The reviewing officer's notes regarding the H & C application included consideration of the applicant's close relationship with the Canadian child. But the officer concluded that the applicant's criminal history prevailed over the H & C factors. The Court was satisfied that the relevant factors were considered and that the interests of the Canadian child were considered. The Court distinguished the case from *Baker* in part as the child did not live with the applicant.

[112] *Simoes v. Canada (MCI),* [2000] F.C.J. No. 936 (T.D.), online: QL.

[113] *Ibid.,* at paragraph 15.

ought to be avoided and that, if it occurs, steps must be taken to allow for the relationship to remain intact.[114]

Justice Nadon was critical of *Baker* in his reasons in *Legault v. Canada*[115] (2001). In the application for judicial review of the refusal of Legault's H & C application, Nadon J. essentially held that he was bound to follow *Baker* but that he found it to be too permissive.

> In my view, there will be few cases where the immigration officer will be able to conclude that the children's best interests do not require that their parent's application for an exemption be granted.[116]

This comment exaggerates the power of the court on judicial review, in that there will still be deference to the immigration officer's decision.[117]

Nadon J. interpreted *Baker* to mean that the consideration of the best interests of the child was a factor that would be given substantial weight by immigration officers, to the extent that the best interests of the child would only not prevail in exceptional cases. Nadon J. made it clear that he did not agree with this result, and he questioned or commented that there is nothing in the *CRC* that indicated that by signing the *CRC*, Canada would be limiting its right to remove illegal immigrants and that the purpose of the *CRC* was to protect the child's well being, not prevent deportation. Nadon J. held

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[114] Sharryn Aiken and Sheena Scott in their analysis of post Baker decisions state that there was an internal departmental policy to ignore Baker and still deport where there is an H & C application pending. "Baker v. Canada and the Rights of Children" (2000) 15 *Journal of Law and Social Policy* 211.

[115] *Legault v. Canada (MCI)*, [2001] 3 F.C. 277 (T.D.), online: westlawecarswell, reversed 212 D.L.R. (4th) 139, online: westlawecarswell, leave to appeal to S.C.C. refused [2002] S.C.C.A. No. 220, online: westlawecarswell.

[116] *Ibid.*, (T.D.) at paragraph 67.

[117] Nadon J. reviewed the case law that had developed post *Baker*, and noted that there had been six applications for judicial review allowed due to the Immigration Officer failing to consider the best interests of the children. By comparison, there were three applications that found the immigration officer had given sufficient consideration to the best interests of the children. *Ibid.*, (T.D.) at paragraphs 33-54.

that giving more weight to one factor over another amounted to fettering of the Minister's discretion and concluded:

> As I have made it clear, I do not share the view expressed by the Supreme Court in *Baker*. However, I am bound to apply its pronouncement.[118]

Essentially, he invited the appellate courts to respond to his interpretation of *Baker.*

Since it is the "normal" course that applications for residency are made from outside of Canada, it is the exception that people are entitled to apply from inside Canada. Therefore, it is true that best interests of the children would more often than not find that the parent ought to not be deported. The comments regarding the *CRC* are interesting when we realise the Committee on the Rights of the Child questioned Canada on this issue and continues to do so.[119]

The Minister appealed Nadon J.'s decision in *Legault* and in rendering its decision, the Federal Court of Appeal[120] gave the court directives to interpret *Baker*.[121] The Federal Court of Appeal stated:

> In short, the immigration officer must be "alert, alive and sensitive" (*Baker,* para. 75) to the interests of the children, but once she has well-identified and defined this factor, it is up to her to determine what weight, in her view, it must be given in the circumstances. The presence of children, contrary to the conclusion of Justice Nadon, does not call for a certain result.[122]

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[118] *Ibid.*, (T.D.) at paragraph 68.
[119] Committee on the Rights of the Child, 34th Session, Concluding Observations of the Committee on the Rights of the Child: CANADA, CRC/C/15/Add.215, 3 October 2003. See Chapter Six below.
[120] *Legault v. Canada*, 212 D.L.R. (4th) 139 (Fed. C.A.), online: westlawecarswell.
[121] It examined the Supreme Court of Canada's recent decision in *Suresh v. Canada (Minister of Citizenship & Immigration)* 2002 SCC 1, regarding the level of review regarding a Minister's exercise of discretion. In *Suresh,* the Supreme Court of Canada clarified that *Baker* did not change the traditional approach to judicial review. It supported that the immigration officer has certain obligations and a failure to consider the factors, would warrant allowing an application for judicial review.
[122] *Legault, supra* note 120 (C.A.) at paragraph 12.

The Court of Appeal further held that the interests of the children do not mandate that a parent should remain in Canada. The Court focused on the policy considerations from the Minister's perspective:

> In short, the *Immigration Act* and the Canadian immigration policy are founded on the idea that whoever comes to Canada with the intention of settling must be of good faith and comply to the letter with the requirements both in form and substance of the Act. Whoever enters Canada illegally contributes to falsifying the immigration plan and policy and gives himself priority over those who do respect the requirements of the Act. The Minister, who is responsible for the application of the policy and the Act, is definitely authorised to refuse the exception requested by a person who has established the existence of humanitarian and compassionate grounds, if he believes, for example, that the circumstances surrounding his entry and stay in Canada discredit him or create a precedent susceptible of encouraging illegal entry in Canada. In this sense, the Minister is at liberty to take into consideration the fact that the humanitarian and compassionate grounds that a person claims are the result of his own actions.[123]

The Court of Appeal reviewed the H & C guidelines and noted that there is a requirement to review all of the applicant's personal circumstances. Therefore, the interests of the children are an important factor, but it must be weighed with all the other factors. The application for judicial review was overturned, with the court confirming that *Baker* is good law but that Nadon J. had misapplied that decision. This judgment did not discuss the *CRC* and international law. Rather it focused on explaining the *Baker* decision and how the case ought to be applied.

It appears that the current state of the law is best summarised in *Hawthorne v. Canada (Minister of Citizenship & Immigration)*[124] (2002), in which the Federal Court of Appeal reconciled the law post *Baker* and *Legault*. Justice Décary, who had written the Court of Appeal judgment in *Legault,* sought to clarify both cases by noting that *Baker* stands for the principle that the best interests of the child are an important factor that must

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[123] *Ibid.*, at paragraph 19.
[124] *Hawthorne v. Canada (Minister of Citizenship & Immigration)*, [2002] F.C.J. No. 1687, Online: QL.

be given substantial weight. *Legault* stands for the proposition that the best interests of the child are not determinative of the issue of removal. Justice Décary noted that best interests of the child would almost always favour non-removal; therefore, the immigration officer's obligation is to assess the specific circumstances claimed by the applicant(s) as to why non-removal of the parent is in the best interests of the child. His answer to the question, regarding satisfying that the best interests of the child were considered, is:

> The requirement that the best interests of the child be considered may be satisfied, depending on the circumstances of each case, by considering the degree of hardship to which the removal of a parent exposes the child.[125]

Justice Evans, as the minority judge, agreed with the result but took a different and broader approach. Significantly, Evans J.A. did discuss how best interests of the child have an important place in international law, based on not only Article 3(1) of the *CRC*, but as well Article 12, which provides the child be given an opportunity to be heard. Evans J.A.'s findings in *Hawthorne* included that the officer seemed to have given no weight to the views of the daughter in determining her best interests, contrary to the *CRC*. Most courts have paid little attention to Article 12, although some cases have taken note where an immigration officer does not interview a child of the applicant, when the child is available and capable of expressing his or her interests. In *Gallardo v. Canada (Minister of Citizenship and Immigration)*[126] (2003), Kelen J. did not find that the officer erred by not directly questioning the children. However, in *Umed v. Canada (Minister of*

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[125] *Ibid.*, at paragraph 11.
[126] *Gallardo v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 52 (T.D.), Online: QL.

Citizenship and Immigration)[127](2002), the Court determined that the best interests of the child had not been considered as the applicant's son was not allowed into the interview.

In Chapter One, the more recent dialogue regarding children's rights focuses on the importance of listening to the child's language and views. Article 12 of the *CRC* sets out the right of the child to have his or her views expressed. However, there is a case where an immigration officer inserted his opinion of what would be in the child's best interests in determining whether to allow an H & C application, when his opinion was contrary to the child applicant's expressed views. In *Ek v. Canada (Minister of Citizenship and Immigration),*[128] (2003) the applicant came as a refugee from Cambodia with her mother. The mother returned to Cambodia, but the applicant stayed in Canada living with her uncle and aunt. She submitted an H & C application. In her application, she claimed she would face hardship if she had to leave her stable and happy environment. The immigration officer wrote:

> In my opinion it is an unusual and an undeserved hardship to be separated from her parents and siblings who still reside in Cambodia. I have considered the fact that applicant is living in a stable home with her uncle, but the best interests of the child in this case is to be reunited with her parents and siblings. By her presence in Canada, the applicant is deprived from the parental and emotional bond that each child is entitled to.

Justice Russell noted that the immigration officer did not consider the hardship that could result as a result of removal from Canada and return to Cambodia.[129] Accordingly, he held that the immigration officer failed to adequately consider the best interests of the child.

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[127] *Umed v. Canada (Minister of Citizenship and Immigration),* 2002 CarswellNat 982 (Fed. T.D.), Online: westlawecarswell.
[128] *Ek v. Canada* [2003] F.C.J. No. 680 (T.D.), online: QL.

4.10 STAYS EXECUTION OF REMOVAL ORDERS

One issue regarding the role of best interests of the child in *IRPA*, is how it applies to stays of execution of removal orders. In order to obtain a stay of execution, the applicant must establish three matters: 1) that there is a serious issue; 2) that the party seeking the stay would suffer irreparable harm; and, 3) determination of the balance of convenience between the two parties, or which party would suffer the greater harm.[130] Normally, the threshold for the first test is a low one since the court will not be resolving the issue on its merits. However, if the application for the stay would effectively amount to judicial review of the matter itself, meaning that it would put an end to any other proceedings, then according to *Wang v. Canada (Minister of Citizenship and Immigration)*[131] a higher test applies: "Thus, where a motion for a stay is made from a removal officer's refusal to defer removal, the judge hearing the motion ought not to simply apply the "serious issue" test, but should closely examine the merits of the underlying application." In terms of the test of irreparable harm, there must be more than the difficulties that arise from deportation; the prejudice is to be beyond those inherent from deportation.[132] An example of meeting the test was in a situation where a removal order was executed with only four days notice to the applicant and there were issues concerning who would care for the children. The removal officer's notes indicated that the mother and extended family would look after the children. However, the evidence

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[129] In *Koud v. Canada (Minister of Citizenship and Immigration)*[2001] F.C.J. No. 1237 (T.D.), online: QL (Lemieux J.), the court made it clear that consideration of the best interests of the child extends to non-Canadian children.

[130] *Manitoba (A.G.) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110; *R.JR MacDonald Inc. v. Canada (AG)*, [1994] 1 S.C.R. 311; See also Barbara Jackman, "Stays in the Federal Court" (April 2004) [unpublished, obtained from Canadian Bar Association, Immigration subsection]

[131] *Wang v. Canada (Minister of Citizenship and Immigration)* [2001] F.C.J. No. 295, online: QL (Pelletier J.).

[132] *Melo v. Canada (Minister of Citizenship and Immigration)* [2000] F.C.J. No. 403 (T.D.), online: QL.

was that care for the children had not been secured, and in fact the mother had kicked the children out of the house. There certainly had not been time to secure care for the children and the harm that could come to them would be more than the natural consequences flowing from deportation.[133]

At this time, the case law is inconsistent and confusing. Despite the number of cases on the issue of stays of removal orders, there is no clear indication of how the courts will rule. More importantly, the case law is not clear regarding the weighing of the best interests of the children in these cases. Some cases indicate that best interests of the children are only considered in the determination of the H & C application itself but that a removal officer is under no obligation to make that consideration. In not allowing a stay in *Buchting v. Canada (Minister of Citizenship and Immigration),*[134] (2003) Snider J. specified based on *Baker,* that the removal officer has no obligation to consider the best interests of the child in removal proceedings. On the other hand, some judges have granted stays on the basis that Canada is violating its international obligations if the best interests of the child have not been considered, and that consideration will not take place until the H & C application is determined. This was the case in *Martinez v. Canada (Minister of Citizenship and Immigration)*(2003).[135] Simpson J. considered provisions of the *CRC,* Articles 3(1) best interests, 7(1) the right to a name, to acquire nationality and to be cared for by parents and 9(4) that if there is separation caused by the state, that the state ensures that child and parent have information about each other. Section 3(3)(f) of *IRPA* regarding interpreting the act as consistent with international human rights was also

[133] *Sowkey v. Canada (Minister of Citizenship and Immigration)* [2004] F.C.J. No. 51, online: QL.
[134] *Buchting v. Canada (Minister of Citizenship and Immigration),* [2003] F.C.J. No. 1216, 2003 FC 953, online: QL.

noted. Justice Simpson held that whether a removal officer should defer a removal pending the outcome of an H & C application in order to give effect to Canada's obligations under the *CRC* was a serious issue. She held that it is only once the H & C application is assessed that the best interests of the child are fully considered, therefore, there was a serious issue to be tried, specifically whether the existence of an undecided H & C application ought to be a bar to removal.[136] From this case, it has been accepted that the best interests of the child do have to be considered when a pre-removal risk assessment decision or removal order is made but that this will not always lead to a stay.[137]

Regarding the application of the *CRC* in Canada's case law, one shortcoming is that the courts have focused on Article 3(1) of the *CRC* to the exclusion of the other Articles, when the intent is that the entire Convention be considered. When it comes to the rights of the child, the importance of expressing one's views as it affects their best interests is such a substantial right, that it is amazing it has been overlooked.

Does this limit the *CRC* as customary international law in Canada? L'Heureux-Dubé accepted that, although the *CRC* has not been directly incorporated into Canada's law, the "values reflected in international human rights law may help inform the

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[135] *Martinez v. Canada (Minister of Citizenship and Immigration),* [2003] F.C.J. No. 1695, 2003 FC1341, online: QL.

[136] *Ibid.*, at paragraph 12 and 13.

[137] *Rimoldi v. Canada (Minister of Citizenship and Immigration)* [2003] F.C.J. No. 1877, 2003 FC 1481 (T.D.), online: QL. See also *Dennis v. Canada (Minister of Citizenship and Immigration)* [2004] F.C. J. No. 223, 2004 FC 196, online: QL, where a stay was granted. Part of the irreparable harm was the effect the removal would have on the well-being of the two children. *Courtney v. Canada (Solicitor General)* [2004] F.C.J. No. 723, online: QL, in which a stay was also allowed on the basis that the removal officer assumed that the applicant's sister would care for the child if he were removed. The court made it clear in this case that it was a close call as the applicant had not conducted himself in the best manner in order to regularize his status. Compare this to appeals of removal orders at the tribunal level before the IAD where, there is a statutory requirement to take into account the best interests of the children, s. 68(1), in Appendix "G". See *Faryabi v. Canada (Minister of Citizenship and Immigration)* [2003] I.A.D.D. No. 870, online: QL, as an

contextual approach to statutory interpretation and judicial review."[138] Can one say that by doing so the majority judgment was effectively giving force and effect in Canadian law to an international treaty?[139] Iacobucci J. in his dissent thought so and specifically disagreed with the approach taken.[140] This implies that therefore, the *CRC* was likely customary international law and arguably part of Canada's domestic law. However, the failure to fully incorporate provisions of the *CRC* and other human rights into immigration practice has been noted by outside organizations.

4.11 INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

The Organization of American States (OAS) has two separate arms, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights.[141] The *American Declaration of the Rights and Duties of Man* ("*American* Declaration") was adopted in April 1948.[142]

The Commission can receive individual petitions if an individual alleges that a member state is responsible for a human rights violation. The *American Convention on Human Rights* (1969) applies to cases brought against states that are parties to it and the *American Declaration* is applies to those parties that are members of the OAS. The *American Declaration* includes three articles that relate specifically to family and children.

> **Article V.** Every person has the right to the protection of the law against abusive attacks upon his honor, his reputation, and his private and family life.

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example of where a family custody order from the Ontario Family Court was considered an important factor.

[138] *Baker, supra* note 39 at paragraph 70.

[139] Aiken and Scott, *supra* note 114 at 228.

[140] *Baker, supra* note 39 at paragraphs 78-81.

[141] Inter-American Commission on Human Rights website: <http://www.cidh.org/what.htm> (accessed 28 August 2004).

[142] Approved by the Ninth International Conference of American States, Bogotá, Columbia, 1948.

Article VI. Every person has the right to establish a family, the basic element of society, and to receive protection therefor.

Article VII. All women, during pregnancy and the nursing period, and all children have the right to special protection, care and aid.

A function of the Commission is to carry out on-site visits to countries to analyse situations. An On-Site visit to Canada was carried out in October 1997 leading to the creation of the *Report on the Situation of Human Rights of Asylum Seekers Within the Canadian Refugee Determination System.*[143]

The report referred to concerns it had received regarding the procedures and issues surrounding deportation of non-citizen parents, especially when there were Canadian-born children involved.[144] The Commission referred to Article VI that prohibits arbitrary interference with family life. Moreover, Article VII, provides that children are entitled to measures of special protection and that this duty requires states to ensure that the best interests of the child are taken into account. In light of these articles and the *CRC*, the Commission recommended that the government take measures to avoid expulsions that cause the separation of families.[145] It related that it had received submissions that the right to family life had not been sufficiently taken into account in removal proceedings. Based on Canada being a member of the OAS, the report stressed that interference into family life due to removal ought to be carefully balanced by the Articles.[146]

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[143] OEA/Ser.L/V/II.106, Doc. 40 rev., February 28, 2000, Inter-American Commission on Human Rights website: < http://www.cidh.org/countryrep/canada2000en > (accessed 28 August 2004).
[144] *Ibid.*, at paragraph 158
[145] *Ibid.*, at paragraph 165.
[146] See Appendix "M" for quote from the Report.

4.12 CONCERNS OF THE COMMITTEE FOR THE RIGHTS OF THE CHILD

The Committee for the Rights of the Child commented on how the best interests of the child are considered in Canadian law in its Conclusion Report on October 3, 2003, regarding Canada's second and most recent State report.[147] Regarding Article 3, best interests of the child:

> [T]he Committee remains concerned that the principle of primary consideration for the best interests of the child is still not adequately defined and reflected in some legislation, court decisions and policies affecting certain children especially those facing situations of divorce, custody, deportation as well as aboriginal children.[148]

Under the heading of Refugee children, the Committee recognised that the best interests principle has been incorporated into *IRPA*. But the Committee noted concerns that it had previously expressed, (see comments below) that have been insufficiently addressed, "in particular in dealing with family reunification, deportation, deprivation of liberty, priority is not accorded to those in greatest need of help."[149]

The Committee's review of the initial state report expressed concerns that Canada was not protecting rights of children.[150] The Committee's concerns from the initial state report were considering situations where Canadian born children would be separated from their parents, when the parents would be deported to their countries of origin. The Committee noted that separations could be long, as the child would have to wait until he or she reached nineteen to sponsor the family back.[151]

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[147] CRC/C/15/Add.215. In Chapter Six I discuss the reporting process. Essentially, every country must submit a state report approximately every 5 years. The Committee on the Rights the Child meets with NGOs and the government representative. The Committee may submit a number of questions and the state party then responds. Then the Committee publishes a Concluding Report.
[148] CRC/C/15/Add.215, paragraph 24.
[149] CRC/C/15/Add.215, paragraph 46.
[150] Lisa Schlein, "UN Panel hits Canada for failing to safeguard the rights of Children" *The Winnipeg Free Press* (28 May 1995), in which she reported that "Most of the Committee's concerns were over the treatment of children under *The Immigration Act*."
[151] For quotes from the report, see Appendix "K"

The Committee on the Rights of the Child foresaw problems due to *CRC* not being specifically implemented into Canada's legislation. It noted problems that would be created for children immigrants and children of immigrants. Canada's Second Report did refer to legislative changes.[152] The Committee welcomed incorporation of the best interests principle into *IRPA* but maintained its concerns regarding family re-unification and deportation.[153] When one reviews Canada's statutory regime, *IRPA* and the Regulations, the policy manuals, the impression is that Canada is taking many steps to ensure family unification. In terms of case law review, the Minister continues to take positions to deport those who have pending H & C applications, even when there are children who may be separated from their parents. The case law is inconsistent although there have been a number of stays of executions when children are involved. The question is whether this is the best way to manage the system. Does it make sense to spend the time and money litigating to remove applicants when the government may have to spend the money to bring them back to Canada. Is this cost effective? And in light of international obligations, and objectives in domestic legislation, why are steps taken to deport those whose proceedings are not final?

SUMMARY

The application of the *CRC* as a result of *Baker* and as part of the immigration legislation has been primarily limited to Article 3, consideration of the best interests of the child. There has been little if any discussion on the other articles of the *CRC*, the right to remain with the family, the right to express their views. In cases where children

[152] CRC/C/83/Add.6 12 March 2003. The report also includes a date of 3 May 2001. The initial report was CRC/C/11/Add. 3. Therefore, it appears that references to the legislative changes refer to the now older Immigration Act 1985 and not to *IRPA*.

who are not subject to the immigration proceedings have attempted to participate in the legal proceedings, this has been denied, as they are not parties to the actual proceedings.[154]

The extent of consideration of the *CRC* and the *Charter* or the substantive matters is limited by the nature of the proceedings, which are usually a judicial review of an immigration officer's decision. Therefore, there is no jurisdiction or little jurisdiction to consider these factors substantively.

The forum of the superior court system has been pursued as an avenue by which the rights of the Canadian children of immigrants could be considered. However, the case law supporting the Federal Court as the proper forum, together with the language of *Baker,* has limited any relief being granted by the superior courts. The one window that has been opened is through the method of seeking a non-removal order as part of a custody application. That window is very small and remains a live issue.

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[153] "Concluding Observations on the Committee on the Rights of the Child: Canada" CRC/C/15/Add.215 3 October 2003.

[154] Mavis Baker's counsel asked that the children be allowed to speak and to have independent counsel at the pre-removal and removal interviews. Aiken and Scott, *supra* note 114 at 217 referring to the Appellant's factum.

Chapter 5: NATIONALITY IN THE UK, DEPORTATIONS WHEN THERE ARE CITIZEN CHILDREN IN THE UK AND THE US

5.1 INTRODUCTION

This chapter examines protection of people, specifically children in the immigration context for the United Kingdom and the United States. There is insufficient space to analyse the complete immigration systems and case law from both countries. I focus on how child immigrants or children of immigrants in both countries have been treated in terms of nationality and citizenship[1] and in situations involving deportations.

Both Canada and the United States inherited their legal systems from the United Kingdom. The experiences of immigration control for these three countries may provide some lessons for recommendations to be discussed in Chapter Six.

The United Kingdom

5.2 NATIONALITY- FROM TERRITORIAL BIRTHRIGHT TO NATIONALITY BASED ON DESCENT

In Chapter Two, I discussed nationality based on *jus soli,* territorial birthright and *jus sanguinis,* nationality based on descent or ancestry. Most common law countries convey citizenship based on *jus soli,* while including provisions to allow children of citizens born outside the country to obtain that citizenship. The fact is that most common law countries were colonies originally established by the United Kingdom and consequently adopted these common law principles. Therefore, it was a momentous turn around when the United Kingdom removed the right of territorial birthright to 'colonies'. *The British Nationality Act 1981*[2] eliminated territorial birthright in favour of citizenship

[1] As discussed in Chapter two, I am using the terms nationality and citizenship interchangeably.
[2] *British Nationality Act 1981* (1981 c. 61), *The Nationality, Immigration and Asylum Act 2002,* c. 41 amends both the *BNA 1981* and *the Immigration Act 1971.*

based on parentage. Before that, the *British Nationality Act 1948* incorporated the British common law,[3]

> **1. (1)**
> Every person who under any enactment for the time being in force in any country mentioned in subsection (3) of this section is a citizen of that country shall by virtue of that citizenship have the status of a British subject.
>
> **4.**
> Subject to provisions of this section, every person born within the United Kingdom and Colonies after commencement of this Act shall be a citizen of the United Kingdom and Colonies by birth.

One writer suggests that the United Kingdom later regretted its affirmation of citizenship:

> In 1948 when other Commonwealth countries were more concerned to relate immigration control to their own citizenship, the U.K. decided to reaffirm the right of all Commonwealth citizens to enter the U.K. without restriction. It was, with hindsight, a sentimental and idealistic gesture which soon turned sour when too many Commonwealth citizens, predominately coloured, decided to exercise that right, too many for the comfort of the native population.[4]

Due to increasing racial tensions, together with problems with settling immigrants, the United Kingdom began to institute strict immigration control.

Regarding the origins of nationality in the United Kingdom, *Calvin's Case* (1608)[5] is considered to be the influential common-law decision that provided the foundation of territorial birthright.[6] The case dealt with the question of whether people born in Scotland after the Scottish King James VI held the English Crown (its King

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[3] *The British Nationality Act 1948* (11 & 12 Geo. 6 c. 50)
[4] Vaughan Bevan, *The Development of British Immigration Law* (London: Croom Helm Ltd., 1986) at 75-76.
[5] *Calvin's Case* (1608) 77 Eng. Rep. 377.
[6] Polly J. Price, "Natural Law and Birthright Citizenship in Calvin's Case (1608)" (Winter, 1997) 9 *Yale J.L. & Humanities* 73. Price's footnotes refer to a belief that the common law principle of *jus soli* or territorial birthright may date back to the 1290 case of Elyas de Rababyn, that all persons born on English soil were King's subjects, fn 109.

James I), were "subjects" of England.[7] The case was decided based on the feudal concept that, upon birth in the territory, one becomes a subject of the Sovereign:

> [F]or if he hath issue here, that issue is (g) a natural born subject; *a fortiori* he that is born under the natural and absolute ligeance of the King (which, as it hath been said, is *alta ligeantia*) as the plaintiff in the case in question was, ought to be a natural born subject.[8]

Allegiance to the King included the reciprocal expectation of protection by the King. Implicitly, this was a rule divined by God or natural law, since the King held power by divine right.[9] Citizenship gained as a result of birth within a territory became an underlying principle of citizenship in common law countries, including Canada and the United States.

Three hundred and seventy-five years after *Calvin's Case*, the United Kingdom terminated territorial birthright. As a result of increases in immigration from the Commonwealth colonies and countries from India, Africa, Asia and the Caribbean, there was increasing immigrant and race based tension in the United Kingdom. Legislation was passed during the 1960s to try to control immigration, specifically, the *Commonwealth Immigrants Act of 1962*[10] and the *Commonwealth Immigrants Act of 1968.*[11] The two acts were overhauled by the *Immigration Act 1971.*[12]

The Immigration Act 1971 ("*1971 Act*") remains the principal immigration act in the United Kingdom. The *1971 Act* was controversial for creating two classes of people,

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[7] *Ibid.*
[8] *Calvin's Case, supra* note 5 at 384.
[9] *Ibid.*, at 388-392.
[10] *Commonwealth Immigrants Act of 1962* (1962, ch. 21).
[11] *Commonwealth Immigrants Act of 1968.*
[12] *The Immigration Act 1971* (1971 c. 77), and as most recently amended by the *Nationality, Immigration and Asylum Act 2002, supra* note 2.

"patrials", those who have a right of abode[13] and "non-patrials", those without a close connection to the United Kingdom by either birth or descent. The class of patrials includes those who have a grandparent who was born in the United Kingdom; they have a right to enter and indefinite leave to stay.[14] Commentators note that this gives greater rights to people who are white or to thousands of people in Australia, New Zealand and Canada, and that the *1971 Act* was motivated more by racial tension than concern for the numbers of immigrants.[15] The *1971 Act* strengthened the government's power to deport, including the ability to deport for illegal entry.[16]

Although the *1971 Act* is the principal act regarding who can come into the United Kingdom to reside, it is directly connected to the *BNA 1981* based on the citizenship provisions. The first category of citizenship is:

1. **Acquisition by birth or adoption**
   (1) A person born in the United Kingdom after commencement shall be a British citizen if at the time of the birth his father or mother is
      (a) a British citizen; or
      (b) settled in the United Kingdom.[17]

There must be a parentage component. The person must have had a father or mother who either had British citizenship or was "settled" in United Kingdom.[18]

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[13] Michael Robert W. Houston, "Birthright Citizenship in the United Kingdom and the United States: A Comparative Analysis of the Common Law Basis for Granting Citizenship to Children Born of Illegal Immigrants" (May 2000) 33 *Vanderbilt Journal of Transnational Law* 693 at 704.
[14] Bevan, *supra* note 4 at 83.
[15] Ian A. MacDonald, 2nd ed., *Immigration Law and Practice in the United Kingdom* (UK: Butterworths & Co., 1987) at 15-20; Bevan, *supra* note 4 at 83-84.
[16] MacDonald, *supra* note 15 at 4.
[17] *British Nationality Act 1981* (1981 c. 61).
[18] s. 50 (1)"Settled" shall be construed in accordance with subsections (2) and (4);(2) Subject to subsection (3), references in this Act to a person being settled in the United Kingdom or in a dependent territory are references to his being ordinarily resident in the United Kingdom or, as the case may be, in that territory without being subject under the immigration laws or any restriction on the period for which he may remain.
(4) A person to whom a child is born in the United Kingdom after commencement is to be regarded for the purposes of section 1(1) as being settled in the United Kingdom at the time of the birth if-
(a) he would fall to be so regarded but for his being at that time entitled to an exemption under section 8(3) of the Immigration Act 1971; and

Children who are not citizens under Section 1 do have rights to later register as a British citizen under certain circumstances. If a parent was a British citizen by descent and the child is born outside of the United Kingdom, the child must satisfy certain residency requirements.[19] In *Ullah v. Secretary of State for the Home Department*,[20] Mr. Ullah and his wife were British citizens by descent. They lived in the U.K. and two of their children were severely disabled. They wished to return to Bangladesh for a few years to obtain assistance from their extended family in caring for their children. However, the family wanted assurance that if they had any children while in Bangladesh, that child would be automatically entitled to British citizenship without having to register for citizenship. Therefore, Mr. Ullah applied for naturalisation, since he would become a British citizen "otherwise than by descent" and a child born to him would be automatically entitled to British citizenship.[21] He was refused because he was already a British citizen. Mr. Ullah argued that children of British citizens by descent were at a disadvantage compared to children of British naturalised citizens, since those children did not have to register for citizenship. The Secretary of State conceded that the scheme might allow for apparent unfairness but that the legislature specifically wished to ensure a

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(b) immediately before he became entitled to that exemption he was settled in the United Kingdom; and

(c) he was ordinarily resident in the United Kingdom from the time when he became entitled to that exemption to the time of the birth;

but this subsection shall not apply if at the time of the birth the child's father or mother is a person on whom any immunity from jurisdiction is conferred by or under the Diplomatic Privileges Act 1964. I am not addressing the naturalization provisions. For information on nationality applications, see the Immigration Advisory Service website <http://www.iasuk.org/advice> (accessed 20 February 2004). Also "RDS Occasional Paper No. 67, Migration: an economic and social analysis", below note 26.

[19] *BNA 1981*, s. 3 and s. 4.

[20] *Ullah v. Secretary of State* [2001] E.W.J. No. 2139 (England and Wales, Court of Appeal (Civil Division)), online: QL.

[21] *BNA 1981*, s. 2 Acquisition by descent (1) A person born outside the United Kingdom after commencement shall be a British citizen if at the time of the birth his father or mother- (a) is a British citizen otherwise than by descent; or ....

connection between potential citizens and the United Kingdom. The court accepted that acquisition by registration[22] would be the method by which the children would have to apply and declined to allow Mr. Ullah's appeal that he ought to be granted naturalisation. The case made it clear that the legislative intent was to stem the tide of people inheriting British citizenship, if they do not have active ties to the United Kingdom.[23]

5.3 UNITED KINGDOM, THE *ECHR* AND THE *CRC*

Despite ratification of the *CRC*, the United Kingdom has specified that it will not apply the *CRC* to its immigration legislation. When the United Kingdom ratified the *CRC*, it included a reservation regarding immigration and citizenship:

> The United Kingdom reserves the right to apply such legislation, in so far as it relates to the entry into, stay in and departure from the United Kingdom of those who do not have the right under the law of the United Kingdom to enter and remain in the United Kingdom, and to the acquisition and possession of citizenship, as it may deem necessary from time to time.[24]

The United Kingdom is unapologetic about maintaining this reservation, while claiming that its legislation complies with the *CRC*. Meanwhile, the Committee on the Rights of the Child has raised its concerns regarding the reservation in its Concluding

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[22] *BNA 1981*, s. 3 (1) If while a person is a minor an application is made for his registration as a British citizen, the Secretary of State may, if he thinks fit, cause him to be registered as such a citizen. (2) A person born outside the United Kingdom shall be entitled, on an application for his registration as a British citizen made within the period of twelve months from the date of the birth, to be registered as such a citizen if the requirements specified in subsection (3)...(3) The requirements referred to in subsection (2) are- (a) that the parent in question was a British citizen by descent at the time of the birth; and ....

[23] Regarding the issue of statelessness in the United Kingdom, the *BNA 1981* does include provision to reduce statelessness for infants born in the United Kingdom, Section 36, Schedule 2 Provisions for reducing statelessness, 1. - (1),but it may not assist in cases where children born in the United Kingdom of illegal immigrants or immigrants without status in United Kingdom, for example if parents are from a country that only grants nationality based on *jus soli* may not have any nationality when born in United Kingdom. An abandoned infant is deemed to have been born in the United Kingdom to the parent of a United Kingdom citizen in order to obtain citizenship, *BNA 1981*, s. 1(2).

[24] Reservations, United Kingdom of Great Britain and Northern Ireland from United Nations High Commissioner of Human Rights Website, <http://www.unhchr.ch/html/menu2/6/crc/treaties/declare-crc.htm> (accessed 21 January 2004).

Observations to the U.K.'s initial (1994) and second (1999) periodic reports.[25] In its 1994 State report, the United Kingdom claimed that it facilitates foreign children joining parents but that there is no absolute right to join family members. For example, under the Immigration Rules, unmarried children under eighteen can join their parents in the United Kingdom if both are settled. If one parent is deceased, then a child can join the other if that parent is settled. If only one parent is settled and the other is not, or one parent remains outside the United Kingdom, then the child has no automatic right to join the parent. In that case, the parent in the United Kingdom must establish that he or she will have sole responsibility for raising the child.[26]

> It is a general policy to ensure that a family unit is not separated on deportation. Although there is the power under section 3(5)(c) of the *Immigration Act 1971* to deport the families of deportees, in fact this power is rarely used. Our general presumption is that the family of deportees, including all children, will accompany them on removal and the expenses can be met out of public funds. Everything possible is done to encourage the parents to take the child with them on removal, but we do not accept that a foreign national should not be removed simply because they threaten to abandon their child(ren) in this country.[27]

By changing the nationality laws, there are fewer children born in the United Kingdom with nationality rights if neither parent has status. This limits the need to consider the citizenship rights of citizen children of immigrants. Having said that, the objective of controlling immigration together with the presumption that the children go where the

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[25] CRC/C/15/Add. 34 (15 February 1995) and CRC/C/15/Add.188 (9 October 2002) respectively.
[26] Paragraph 297 of the Immigration Rules. Peter Newell, *The UN Convention and Children's Rights in the UK* (London: National Children's Bureau, 1991) at 37. Immigration Advisory Website, www.iasuk.org accessed February 20, 2004. See also Stephen Glover, Ceri Gott, Anaïs Loizillon, *et al.* "RDS Occasional Paper No 67, Migration: an economic and social analysis""(2001) Home Office Research, Development and Statistics Directorate, online: <http://www.homeoffice.gov.uk> that refers to policy to have family members reunited subject to the requirement that the person coming into the UK can maintain themselves without recourse to public funds.
[27] 1994 Initial State Report of the United Kingdom of Great Britain and Northern Ireland CRC/C/11/Add.1 at paragraph 246.

parents go, limits the authority's need to consider any of the child's rights. In further support of its position, the United Kingdom mentioned in its initial state report:

> The report of the working group which drafted the Convention included a formal statement by the Chairman that article 10 was not intended to affect the general rights of States to establish and regulate their respective immigration laws in accordance with their international obligations. Thus, the Convention is not intended to establish new rights in relation to immigration.[28]

The United Kingdom maintained this position in its second periodic report.[29] Upon the Committee raising concerns regarding immigration, the United Kingdom wrote in reply in August 2002:

> The Government remains of the opinion that the Reservation is justified in the interests of effective immigration control. However, this does not prevent the UK from having regard to the Convention in its care and treatment of children...The UK acceded to the UNCRC on the basis of the Immigration and Nationality Reservation because this was believed necessary to preserve the integrity of our immigration laws and procedures. The UK did not want entry to be gained by those simply wishing to make use of UNCRC Rights and with no other justification for coming to the UK. When it was drafted, the UK did not intend that the Convention should confer any new rights in relation to immigration cases.
>
> [In response to the reservation being broad]...The UK believes there is a need for a broad Reservation because of the fact that Immigration and Nationality law and policy cover a wide area. We think its right that the UK should retain control over such decisions so that it can fairly exercise discretion in favour of children where appropriate, instead of being under a duty to do so such that procedures are open to abuse. ...[30]

It may or may not then be surprising that when it comes to cases related to deportation that will lead to a splitting of the family unit, the Secretary of State and the British courts do not appear to consider the *CRC*. But they do consider the *European Convention on*

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[28] CRC/C/11/Add.1 at paragraph 251.
[29] CRC/C/83/Add.3 25 February 2002, paragraph 7.31
[30] Written Replies by the Government of the United Kingdom of Great Britain and Northern Ireland concerning the List of Issues (CRC/C/Q/UK/2) received by the Committee on the Rights of the Child relating to the Consideration of the Second Periodic Report of the United Kingdom of Great Britain and Northern Ireland (CRC/C/83/Add.3), CRC/C/RESP/12, received 30 August 2002.

Human Rights ("*ECHR*"), in particular Article 8, non-interference with family.[31] The United Kingdom incorporated the *ECHR* into *The Human Rights Act 1998,*[32] which came into effect in October 2000. Under section 2 of *the Human Rights Act 1998,* there must be consideration of jurisprudence of the European Court of Human rights. However, the courts are still entitled to make an assessment of balancing the rights between the *ECHR* and the country's objectives. In effect, incorporation of the international instrument, allows the U.K. to give some consideration to its international obligations while allowing its domestic legislation play a larger role in the final decisions.

The United Kingdom prefers to use discretion and policies to deal with immigration issues. For example, there is a British policy to consider a marriage or relationship if it predates removal by approximately two years in order to prevent a deportation order. The British cases also take a very hard line against people who abuse the immigration scheme, even when there are extenuating circumstances.

In *Mahmood v. Secretary of State*[33] there was a review of the Secretary of State's decision to remove Mr. Mahmood from the United Kingdom. One issue was the application of the *Human Rights Act 1998* that took effect on 2 October 2000. The question was whether a decision made by the Secretary of State, before the Act came into effect, required him or any public body to make its decision as if the *ECHR* had already been incorporated into its domestic law by *the Human Rights Act 1998.*

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[31] *The European Convention of Human Rights* ["*ECHR*"], Rome, 4. XI.1950, ETS No. 5. Article 8: 1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedom of others.
The *ECHR* and cases considering Article 8 are considered in Chapter Two above.

[32] *Human Rights Act 1998*, c. 42.

The applicant married a British citizen and they had two children who were born after enforcement of removal proceedings. The Secretary of State had considered the case in light of the government policy document DP3/96, which sets out guidelines and deals with marriages to someone who is settled in the United Kingdom.[34] Paragraph 7 of DP 3/96 deals with the situation when there are children with rights of abode. It suggests that in most cases, children who are ten years old or younger can be expected to adapt to life abroad. Since the marriage will not be a compassionate factor on its own, the applicant would have to provide compelling reasons why he or she should not be removed.[35] In this case, the marriage did pre-date enforcement, but not by the required two years prior to enforcement of removal order. The Secretary of State noted that Article 8 of the *ECHR* had not yet become part of the domestic law, and that in any event he did not accept that removal to Pakistan would amount to a breach. On judicial review, the court considered whether the decision was reasonable, whether there had been an interference with a fundamental right and whether there had been direct consideration of a breach of Article 8.[36]

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[33] *Mahmood v. Secretary of State for the Home Department* [2000] E.W.J. No. 6692 (England and Wales, Court of Appeal (Civil Division)) online: QL.

[34] DP 3/96 Para. 5 "As a general rule, deportation action...or illegal entry action should not normally be initiated in the following circumstances: (a) where the subject has a genuine and subsisting marriage with someone settled here and the couple have lived together in this country continuously since their marriage for at least two years before the commencement of enforcement act; and (b) it is unreasonable to expect the settled spouse to accompany his/her spouse on removal." (As cited in *Mahmood, supra* note 33.)

[35] Paragraph 8: Where a person marries after the commencement of enforcement action removal should normally be enforced. The criteria set out in paragraph 5 do not apply in such cases. Paragraph 284 of the Immigration Rules makes it clear that one requirements for an extension of stay as the spouses of a person present and settled in the United Kingdom is that 'the marriage has not taken place after a decision has been made to deport the applicant or he has been recommended for deportation or has been given notice under s. 6(2) of the Immigration Act 1971' [sc. Which relates to illegal entrants.] Marriage cannot therefore in itself be considered a sufficiently compassionate factor to militate against removal...The onus is on the subject to put forward any compelling compassionate factors that he/she wishes to be considered which must be supported by documentary evidence. Only in the most exceptional circumstances should removal be stopped and the person allowed to stay." (As cited in *Mahmood, supra* note 33 at paragraph 8.)

[36] Regarding the reasonableness of the decision, British case law refers to a principle of a decision being "Wednesbury" reasonable based upon the decision of *Associated Provincial Picture Houses Ltd. v.*

The court referred to cases that consider the role of judicial review of administrative decisions within a human rights context. Although the administration can take into account an international instrument, it will not necessarily bind the executive: "It is often said that, while the convention [sc. the *ECHR*] may influence the common law, it does not bind the executive."[37]

The court noted that the Secretary of State had considered all factors and at the end of the day, removal was based on the fact that Mr. Mahmood was there illegally. Therefore, the Secretary of State was entitled to act so as to meet the objective of immigration control:

> Firm immigration control requires consistency of treatment between one aspiring immigrant and another. If the established rule is to the effect-as it is- that a person seeking rights of residence here on grounds of marriage...must obtain an entry clearance in his country of origin, then a waiver of that requirement in the case of someone who has found his way here without an entry clearance and then seeks to remain on marriage grounds, having no other legitimate claim to enter, would in the absence of exceptional circumstances to justify the waiver, disrupt and undermine firm immigration control because it would be manifestly unfair to other would-be entrants who are content to take their place in the entry clearance queue in their country of origin.[38]

The court held that Article 8 of the *ECHR* did not apply. The Court held that the United Kingdom was still entitled to strike the balance between the need for immigration control and the immigrant's Article 8 rights. In addition, the court did not accept that it had the jurisdiction under the *Human Rights Act 1998* to substitute its own decision on the merits. The concurring judgment noted a number of European Court of Human Right cases where there was deference to the balance to be struck between the government's objectives and where people choose to live. Justice May summarised that the European

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Wednesbury Corporation [1948] 1 K.B. 223. It is the principle that one must be satisfied that all relevant factors have been considered leading to a rational or reasonable decision.

[37] *Ex p. Launder* [1997] 3 AER 961, 988 as quoted in *Mahmood, supra* note 33 at para. 18.

Court does recognise the State's right to control immigration. As long as all family members could move to the country of origin of the family member who is removed, or not allowed in, there will not be interference with the family (Article 8 of the *ECHR*). However, if the family has been established in the country for a long time and it is not likely that the rest of the family members would be able to join the person removed, then that may be an Article 8 violation. In a fashion, the United Kingdom does appear to recognise a concept of "connection" to the country, at least for the children. However, this is a largely subjective determination.

Interestingly, *Mahmood* and other cases, often focus on Article 8 but look at the United Kingdom policies regarding the marriage, without much consideration of the children. In another case, there was reference to the children having been in the United Kingdom for a long period of time. In *Chaumun v. Secretary of State,*[39] there was a family in which one daughter had been in the United Kingdom for seven years. There was a change in Parliament's policy, that if there were family members under age eighteen who had spent ten years or more in the United Kingdom, they would not enforce removal action unless there were exceptional circumstances. However, the fact that the father had been able to maintain his presence (and consequently the daughter's) by manipulating the system, the time spent did not count towards the daughter having lived in the United Kingdom for seven years.

The United Kingdom makes no apologies for its objective of restricting immigration control. The cases show how the government uses policy as a starting point and then may give more specific consideration for the facts of each case. For example,

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[38] *Mahmood, supra* note 33 at para. 23.

its policy presumes that children under ten can adapt with relative ease to a new place, although, presumably there is room for compelling factors for a child with special needs. There is recognition that it could be difficult for children who had lived in the United Kingdom for an extended period of time to adapt to a new country.

Although there is policy regarding the child's length of time spent in the U.K., there is no policy to consider the child's rights as a United Kingdom citizen *per se*. There is minimal concern for the rights of the child as a citizen: the right to remain, the right to the benefits of living in the country of which he or she is a citizen, or right to participate or right to counsel being expressed in these considerations.[40] It is up to the court to determine what it determines is best.

Despite the immigration practices focusing on benefits from policies as opposed to inherent rights, there is the fact that the *ECHR* has been incorporated into the United Kingdom's domestic law. Meanwhile, the case law and decisions by the Secretary of the State give no consideration or reference to the *CRC*.[41] We know that the United Kingdom specifically filed reservations against the articles that call for family unity in the *CRC*. The Committee on the Rights of the Child did express its concern that the *ECHR* was incorporated while the *CRC* was not.

> While noting the entry into force of the *Human Rights Act 1998*, which incorporates the rights enshrined in the *European Convention on Human Rights* into domestic law, the Committee is concerned that the provisions and principles of

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[39] *Chaumun v. Secretary of State for the Home Department* [1999] E.W.J. No. 2329 (England And Wales, Queen's Bench Division), online: QL.

[40] As noted by Ms Karp in the Summary Record of the Consideration of the Second Periodic Report of the United Kingdom of Great Britain and Northern Ireland, CRC/C/SR.811 at paragraph 10: "The State party has done little to adopt a rights-based approach. Its culture of human rights was still based on a philosophy of service, welfare and interest. The tone and language of the report and written replies indicated that the Government did not perceive human rights as justiciable legal obligations to be incorporated into the legislation , but rather as a set of guidelines."

[41] As of the time of writing (August 2004).

> the *Convention on the Rights of the Child*- which are much broader than those contained in the *European Convention*- have not been incorporated into domestic law, nor is there any formal process to ensure that new legislation fully complies with the *Convention*.[42]

However, arguably the United Kingdom faced greater compulsion to incorporate the *ECHR* because of the fact that it was already affecting British case law. As discussed in Chapter Two and mentioned in the cases above, there were a number of British cases that had been heard and continue to be heard before the European Court.[43] One presumes that there may have been pressure for the United Kingdom to incorporate the *ECHR* and to specify the role of the *ECHR* in its case law. This suggests that perhaps the *CRC* needs teeth to its enforcement, an issue that is discussed below in Chapter Six.

The approach of the United Kingdom is difficult to pin down. It has established policies in immigration matters. On the one hand, in some cases the policy will be beneficial to families when there is recognition of legitimate marriages, or if the family with children has been established and living in the United Kingdom for an extended period of time. At the same time, if the child involved is under ten years old, at the time of writing, the policy was that this would not mitigate in favour of allowing the family to stay due to the presumption that under that age, children adapt quickly. This presumption ignores the attachments that children may make or does not take the time to consider the child's best interests in every situation. In addition, the *CRC* articles, the best interests of the child, the child's right to representation and the right to be with family are all important factors that ought to be considered. However, it remains apparent that even

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[42] Concluding Observations: United Kingdom of Great Britain and Northern Ireland CRC/C/15/Add.188, 9 October 2002 at paragraph 8.
[43] *Abdulaziz & Ors v UK* (1985) EHRR 471, *Poku v. United Kingdom* (1996) 22 E.H.R.R. C.D. 94

with incorporation of the *ECHR,* the United Kingdom will consider interference with the family balanced against its goal of immigration control.

What the cases from the United Kingdom indicate are consistent with immigration issues in Canada and the United States. Immigration is a matter to be controlled and it remains an area under power of the executive. As will be noted below, the American level of review has become more limited since there is no longer any review of discretionary decisions to prevent removal.

5.4 THE UNITED STATES OF AMERICA

5.5 CITIZENSHIP

Both the United States and Canada incorporate the principle that one obtains citizenship upon being born within their territory.

Amendment Fourteen (1868) of the U.S. Constitution, Section One:

> All persons born or naturalised in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Fourteenth Amendment has been interpreted as conveying citizenship based on territorial birthright. In *U.S. v. Wong Kim Ark,*[44] the defendant was born in San Francisco to Chinese immigrant parents who were permanently domiciled in the United States. When Wong Kim Ark was twenty-one years old, he was detained upon his return from China on the ground that he was not a U.S. citizen. The INS[45] argued that he was not American because his parents remained subjects of the Emperor of China and that

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[44] *U.S. v. Wong Kim Ark*, 169 U.S. 649 at 655(1898), see also *Smith v. Alabama*, 124 U.S. 465, 478 (1888)

[45] Immigration and Naturalization Services used to be the American department in charge of immigration matters. It has since been replaced by the Department of Homeland Security post 9/11.

they had transferred their status to their son. The court considered that the Fourteenth Amendment declared that all persons born or naturalised in the U.S. are citizens of the U.S. Furthermore, the court noted that this interpretation of the case law along with other American cases was based on British common law, specifically *Calvin's Case*:

> The fundamental principle of the common law with regard to English nationality was birth within the allegiance – also called 'ligealty,' 'obedience,' 'faith,' or 'power' –of the king. The principle embraced all persons within the king's allegiance, and subject to his protection...Children, born in England, of such aliens, were therefore natural-born subject.[46]

The court noted that the rules regarding being a subject from the moment of birth was in force in the English colonies in North America.

> The term 'citizen' as understood in our law, is precisely analogous to the term 'subject' in the common law, and the change of phrase has entirely resulted from the change of government. The sovereignty has been transferred from one man to the collective body of the people; and he who before was a 'subject of the king' is now 'a citizen of the state.'[47]

The court examined the history of legislation leading up to the Fourteenth Amendment and the fact that the *Civil Rights Act of 1866* specified citizenship for blacks. The Fourteenth Amendment's "main purpose doubtless was, as has been often recognised by this court, to establish the citizenship of free negroes, which had been denied in the opinion delivered by Chief Justice Taney in *Scott v. Sandford.*" (*Dred Scott* case)[48] Accordingly, the court felt that it was axiomatic that the Fourteenth Amendment extends

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[46] *U.S. v. Wong Kim Ark, supra* note 44 at 655-6. On the term subject, see Chapter Two, above; P.T. Weis, *Nationality and Statelessness in International Law*, 2nd ed. (Germantown, Md.: Sijthoff & Noordhoff, 1979) at 4: "In English the term "subject" is used as a synonym for national. It stresses the quality of the individual as being subject to the Sovereign, and is typical of the feudal concept of nationality prevailing in Anglo-Saxon law, which regards nationality as a territorially determined relationship between subject and Sovereign by which the subject is tied to his Sovereign (liege lord), the King in person, by the bond of allegiance." Referring to Blackstone, *Commentaries,* vol. 1, Chap. 10, pp. 366-75.

[47] *U.S. v. Wong Kim Ark, supra* note 44 at 664 quoting *State v. Manuel* (1838) 4 Dev. & B. 20, 24-26.

[48] *Scott v. Sanford,* (1857) 19 How. 393 as cited in *Wong Kim Ark, supra* note 44 at 676. In the *Dred Scott* decision, Justice Taney held that anyone of African descent born in the United States, whether a slave or free person, could not be an American citizen.

citizenship to all persons born in the U.S., not only people of African descent. The court also indicated that the INS' position was racist:

> To hold that the fourteenth amendment of the constitution excludes from citizenship the children born in the United States of citizens or subjects of other countries, would be to deny citizenship to thousands of persons of English, Scotch, Irish, German, or other European parentage, who have always been considered and treated as citizens of the United States.[49]

Therefore, the court held that as long as a person was born in the U.S. and subject to its jurisdiction, he was a U.S. citizen.[50]

There has been debate in the United States regarding whether it should revoke or change the Fourteenth Amendment, in order to restrict citizenship to children born of illegal immigrants.[51] Peter Schuck and Roger M. Smith wrote *Citizenship Without Consent,*[52] questioning the accuracy of the American common law's interpretation of the Fourteenth amendment. The writers suggest that the status of children born to illegal immigrants in the U.S. is still not clear. The writers claimed that under the Fourteenth Amendment, there is a requirement that citizenship be based upon mutual consent between the potential citizen and Congress.[53] Despite this debate,[54] the United States has

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[49] *U.S. v. Wong Kim Ark*, *supra* note 44 at 694.

[50] Houston, *supra* note 13 at 712, quoting *Wong Kim Ark* at 694. There is insufficient space to discuss the issue of citizenship of children born abroad to U.S. citizens. There was a great deal of case law on that specific issue which is now superseded by *The Child Citizenship Act of 2000*, Pub. L. 106-395, that facilitates automatic acquisition of U.S. citizenship for biological and adopted children of U.S. citizens born abroad.

[51] Houston, *supra* note 13.

[52] Peter H. Schuck and Rogers M. Smith, *Citizenship Without Consent: Illegal Aliens in the American Policy* (New Haven: Yale University Press, 1985) For a review of this book see David S. Schwartz, " The Amorality of Consent", Book Review of *Citizenship Without Consent: Illegal Aliens in the American Policy* by Peter H. Schuck and Rogers M. Smith, (1986) 74 *Calif. L. Rev.* 2143.

[53] They claim that John Locke's theories support citizenship based on consent, in part because he recognised that children were entitled to choose once they were able to do so. Schuck and Smith, *supra* note 52 at 24:

> He [Locke] denied that political membership and allegiance were natural in any sense: far from acquiring a civic identity at birth, a child could not truly become a subject of any political ruler until adulthood. Political allegiance could originate only from an act of personal consent, which only adults were competent to perform.

used legislative changes to deal with immigration issues without amending its Constitution.

5.6 IMMIGRATION PROVISIONS

Over the course of its history, like other countries, the United States has gone through various stages where it used its immigration legislation to limit entry of certain people.[55] The parent immigration law is *The Immigration and Nationality Act of 1952*.[56] That has been amended to reflect different concerns over the years.[57] The major legislative overhaul came about with *Illegal Immigration and Reform and Immigrant Responsibility Act (IIRIRA)*.[58]

Some amendments have been in response to terrorism aimed at the United States. Other amendments were brought to deal with the huge number of illegal immigrants in the country. *The Immigration Act 1990* and the *LIFE Act* include provisions to allow for family unity. However, *IIRIRA*, severely limits the ability of non-citizens to remain in the United States and to avoid deportation. The ability for judicial review has been

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[54] The debate included a Bill being introduced by Representative Montjoy recommending that the Constitution be amended to limit citizenship at birth to those who mothers are either U.S. citizens or are in the country legally. See Robert J. Shulman, "Children of a Lesser God: Should the Fourteenth Amendment be Altered or Repealed to Deny Automatic Citizenship Rights and Privileges to American Born Children of Illegal Aliens?" (1995) 22 *Pepp. L. Rev.* 669 at 670 and referring to fn 24.

[55] For historical background see Milton R. Konvitz, *Civil Rights in Immigration* (New York: Cornell University Press, 1953) and John Higham, *Strangers in the Land: Patterns of American Nativism 1860-1925* (New York: Atheneum, 1963).

[56] Title 8 is Aliens and Nationality. The current provisions under the *Immigration and Nationality Act* (INA) are found in Chapters 11, 12, 13 and 14.

[57] In the United States, Public Laws can either amend an existing law or create a new law. In either case, it is included in the Titles of Code. The American statutes are known either by their popular name or the Code name. As the context of the laws is under discussion, I will be using the popular name but will attempt to provide the Title and Code numbers. The regulations are codified in the *Code of Federal Regulations* (CFR) that are divided into 50 Titles, some of which correspond to the Titles in the U.S. Code. For example, Title 8 is "Aliens and Nationality."

[58] *IIRIRA*, Pub. L. 104-208. Other relevant acts are: *Immigration Reform and Control Act of 1986, ("IRCA")* Pub. L. 99-603; *The Immigration Act of 1990*, Pub. L. 101-649; *Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA")*, Pub. L. 104-132; *Legal Immigration and Family Equity Act (LIFE Act)* Pub. L. 106-553 and amended Pub. L. 106-554; *USA Patriot Act of 2001* Pub. L. 107-56; *Child Status Protection Act* Pub. L. 107-208; and *Homeland Security Act*, Pub. L. 107-296.

limited with the initial Boards of inquiry limiting or narrowing the class of people who are entitled to remain. Recent changes have led to more children who are United States citizens who face removal from their country of birth or separation of their families.[59]

5.7 CHILD CITIZENS IN THE US- REMOVAL OF PARENTS

This thesis concerns the status of children of immigrants, in particular the rights of child citizens of the host country whose parents are immigrants. Citizen children in the U.S. face the same problems as citizen children in Canada, regarding deportation of parents.

> Citizen children, for example, have not been successful in pressing the view that the deportation of their undocumented parents is tantamount to the *de facto* deportation of the child- a violation of the child's constitutionally protected rights to live in this country, to associate with family members and to be guaranteed due process and equal protection of the laws.[60]

The deportation process and the determination of admissibility to immigrate under American legislation underwent significant changes under *IIRIRA*. This act diminished the ability of non-citizens to overcome bars to admission.[61] One provision that underwent an important change is the provision to allow for cancellation of a removal order.[62] The previous provision used the term suspension of deportation. The new provision has been changed and now, instead of being entitled to prove "extreme

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[59] The *INA* does include provisions for family sponsored immigration, brought in through *the Immigration Act 1990.* This give a preference of allocating a number of immigrant visas to children of citizens and lawful permanent residents and for siblings, *INA,* s. 203 (8 U.S.C. 1153), s. 204. There are exceptions to removal or inadmissibility for smuggling when the person was an eligible immigrant under s. 112 of *the Immigration Act 1990* (s. 203 INA) and who was only assisting an immediate relative into the country. See *INA*, s. 237, s. 212(a)(6)(E(ii), s. 212(d)(11), allowing the Attorney General to exercise his discretion for humanitarian reasons or to assure "family unity" and waive inadmissibility for smuggling.

[60] Bill Piatt, "Born as Second Class Citizens in the U.S.A.: Children of undocumented parents." (1988) 63 *Notre Dame Law Rev.* 35, at 41 referring to *Acosta v. Gaffney*, 558 F. 2d 1153 (3rd Circ. 1977).

[61] Gerald P. Seipp, "Waivers of Inadmissibility—From Basic Principles to Advanced Practice Considerations Part I" (August 2003) (03-08 Immigr. Briefings 1) Westlaw, "Waivers of Inadmissibility—From Basic Principles to Advanced Practice Considerations Part II" (September 2003) (03-09 Immigr. Briefings 1) online: westlawecarswell.

hardship" to oneself as the applicant, the non-citizen must prove that removal would have an "extremely hard and unusual" effect on immediate family members, and any hardship upon him or herself is irrelevant.[63]

> ***INA* §240A**[64]
> (b) Cancellation of removal and adjustment of status for certain nonpermanent residents.-
> (1) In general-The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien-
>
> (A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application;
>
> (B) has been a person of good moral character during such period;
>
> (C) has not been convicted of an offense under section 212(a)(2), 237(a)(2), 237(a)(3) 2a/ (except in a case described in section 237(a)(7) where the Attorney General exercises discretion to grant a waiver); and
>
> (D) establishes that removal would result in **exceptional and extremely unusual hardship** to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence. [Emphasis added.]

Under *IIRIRA,*[65] this section was amended to include the residency period from seven to ten years, although the period is seven years for permanent residents.[66] The applicant must prove that deportation would result in "exceptional and extremely unusual" hardship to the applicant's immediate family members but not to the applicant.

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[62] I am focusing on this element of the legislation because I am looking at how citizen children are treated. It is most often in the deportation or removal context that their rights may or may not be considered.
[63] Interestingly, the standard for "extreme hardship" remains in other provisions dealing with waivers of inadmissibility, such as § 212(h) and (i). For some background on the legislative changes see *St. Cyr v. INS*, 229 F. 3d 406; 2000 U.S. App. LEXIS 22472 (2d Circ. 2000) online: QL.
[64] 8 U.S.C. 1229b. Section 240 deals with Removal Proceedings. Section 240Adeals with cancellation of removal for lawful permanent residents (LPR) and does not include a provision to consider any extreme hardship. Section 237 (8 U.S.C. 1227) is General Classes of Deportable Aliens. S. 239 (8 U.S.C. 1229) is Initiation of Removal Proceedings. S. 240 is Removal Proceedings.
[65] *IIRIRA,* Pub. L. 104-2 Stat. 3009 (30 September 1996).
[66] *INA* s. 240A (a).

The predecessor provision only required proof of "extreme hardship".[67] The hardship determination is a discretionary judgment by the Attorney General and no longer subject to review by the courts.[68] Therefore, the Court of Appeals has no jurisdiction to review decisions of the Board of Immigration Appeals on the merits.[69] However, the Court of Appeals do retain jurisdiction to consider constitutional claims related to discretionary decisions made by the Board of Immigration Appeals (BIA).[70]

The BIA is now placing little weight on case law predating April 1997, regarding determining extreme hardship when it considers the term "exceptional and extremely unusual hardship" for the cancellation of removal hearings.[71] The BIA has stated that it is applying a higher standard towards the hardship provision. The Court of Appeals in *Ramirez v. Perez,*[72] noted that the BIA has supported its application of the higher standard in order to follow Congress' intention to require an alien to 'provide evidence of harm to his spouse, parent, or child substantially beyond that which ordinarily would be expected to result from the alien's deportation.'

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[67] *Mendez-Moranchel v. Ashcroft*, 338 F. 3d 176; U.S. App. LEXIS 15040 (3d Circ. 2003), online: QL at n2 referring to 8 U.S.C. § 1254(a)(1) (repealed.)
[68] *Ibid.* For text of s. 242, see Appendix "H".
[69] The Attorney General makes the initial determination. His decision can be appealed to the Immigration Judge. That decision can be appealed to the Board of Immigration Appeals, that may have one members sitting or more. Appeals from the BIA are made to the United States Court of Appeals, made up of 11 Circuit courts.
[70] See *Ramirez –Perez*, 336 F. 3d 1001 (9th Circ.), online: westlawecarswell, where the Court of Appeals upheld that it had the jurisdiction to consider whether the BIA's interpretation of the hardship standard violates due process. See also *Bravo v. Ashcroft*, 341 F.3d 590 (5th Circ.) that similarly upheld that the Court of Appeals retains jurisdiction to consider *habeas corpus* petitions on constitutional issues.
[71] For example, *Wang v. INS,* 622 F. 2d. 1341 (9th Circ. 1980) rev'd other grounds 450 U.S. 139 (1981), *Tovor v. INS*, 612 F. 2d 794, 797 (3d Circ. 1980). Whereas, the standard of "extreme hardship" is still relevant for the waivers of ineligibility (for admission), see s. 212(h) and (i).
[72] *Ramirez v. Perez, supra* note 70.

The BIA cases that have set out the hardship standard to be considered are *Matter of Monreal-Aguinaga*[73] and *Matter of Andazola-Rivas.*[74] What is apparent from the new body of case law is that it is now extremely difficult to satisfy that standard. The statute does not define "exceptional and extremely unusual hardship." Based upon rules of ordinary interpretation, the BIA in *Monreal* held that the hardship standard is higher than the one that existed for suspension of deportation under the prior provision. The panel did not consider that the hardship standard was that the effect would be unconscionable. But based upon the legislative history behind *IIRIRA,* and on discussions within the House of Representatives,[75] the BIA held that removal was to be limited to "truly exceptional" situations. The same factors that had been considered in "extreme hardship" cases applied, for example age, health and circumstances of the qualifying lawful permanent resident or United States citizen, but with a higher standard.

In *Monreal,* the thirty-four year old non-citizen had been in the United States for twenty years, having arrived from Mexico when he was fourteen. He had two school aged children and one infant child. The wife was unable to obtain status and voluntarily left the U.S. to live in Mexico with the infant child. The husband's parents were lawful permanent residents in the United States. Monreal had been steadily employed. The BIA stated that, had this case been considered under the old standard of extreme hardship, the test would have been met. Based on the panel's opinion on the application of the standard, the majority dismissed his application.

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[73] *Matter of Monreal-Aguinaga,* 23 I & N Dec. 56, Interim Decision # 3447 (BIA 2001), online: U.S. Department of Justice, Executive Office for Immigration Review <http://www.usdoj.gov.eoir/vll/intdec/lib-vol23inxnet.html> (last accessed 4 July 2004).

[74] *Matter of Andazola-Rivas,* 23 I & N Dec. 319, Interim Decision #3467, (BIA 2002), online, <http://www.usdoj.gov.eoir/vll/intdec/lib-vol23inxnet.html>

[75] H .R. Conf. Rep. No. 104-828.

The language of the dissent in this case and in the *Matter of Andazola-Rivas* demonstrates the tension (or lack of unanimity) regarding the application of the standard. In both decisions, Board member Rosenberg rejected the majority's interpretation that the standard was now higher. Board member Rosenberg felt the case should have been remanded to allow the non-citizen to put his case in differently, to focus on the hardship to the children since the majority had changed its interpretation of the standard without any notice to the applicants, (and this was the first time the provision had been considered). Her comments in *Monreal* regarding the effect of removal on the children highlights the distinctly different treatment those citizens of non-citizens are subject to:

> The significance of the respondent's 8-12 year old children's acculturation as United States citizens in an American family is very likely far greater than what is suggested by the minimal amount of evidence that was presented at the hearing or considered by the Immigration Judge. Specifically, the children's birthright citizenship status, their ties to their grandparents and extended family in the United States, the substantial amount of time they have been schooled in the United States educational system, and their socialization in the United States generally are all factors that are unique to these children.[76]

She comments that the BIA's finding, that it would be ordinary hardship for the children to accompany their father, ignored the fact that the children are American citizens.

In the *Matter of Andazola-Rivas*, the non-citizen from Mexico was a single mother with two school age children. She had no close relatives in Mexico. Her mother lived close to her in the United States and looked after her children. All her siblings lived in the United States, although without legal status. She had a steady job with health benefits, had purchased a house, two cars and had savings. The Immigration Judge had granted cancellation of removal. However, on appeal to the BIA, the majority overruled that decision. Regarding the standard of "exceptional and extremely unusual hardship"

the majority held that the case was indistinguishable from *Monreal.* In response to the dissent's comments that there are lower educational standards in Mexico, the majority stated that the education factor could not be determinative since every applicant from a developing country would have a successful claim to cancel removal.

Board member Espenoza in dissent expressed concern about the anti-Mexican results from these cases:

> Taking the majority opinion to its inevitable conclusion, it appears that no United States citizen child of a Mexican national will be able to demonstrate exceptional and extremely unusual hardship because he or she is deprived of educational opportunities for financial reasons.[77]

Espenoza questioned that the interpretation of the legislation might lead to precluding certain nationalities from relief. She also focused on the importance of education for future citizens. Removing the children to Mexico would essentially deprive the citizen children of the education that they were enjoying in the United States. A separate dissent took the position that the case was completely distinguishable from *Monreal.* Board member Osuna noted that the class of people entitled to cancellation of removal had already been narrowed under the provision that required ten years of residence from seven. The provision had also been narrowed by the fact that the hardship can only be considered as it affects a qualifying permanent resident (either US citizen or lawful permanent resident) and no longer includes hardship to the applicant.

Each case is to be decided on its individual merits but the cases of *Monreal* and *Andazola* are the starting points. A case that finally did find that the standard had been

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[76] *Matter of Monreal-Aguinaga, supra* note 73 at 70.
[77] *Matter of Andazola-Rivas, supra* note 74 at 325.

met is *Matter of Recinas.*[78] The BIA considered as key factors that the mother was raising her six children on her own, four of whom were United States citizens. She had divorced the father and he was not involved in their lives. The mother would leave the children with her mother who was a lawful permanent resident while she went to school to help her establish her business. The BIA accepted that the hardship to the children would be the difficulty of the mother to re-establish herself or to find employment in Mexico. Both cases discussed how life was difficult for single mothers in Mexico. In *Andazola,* the mother raised the issue that it would be difficult for her to find employment with only a grade six education. This case seems very close to *Andazola* and the BIA recognised that they were similar but held that this case added additional factors that raised the level of hardship. Presumably the pivotal difference was that this woman was raising six children as opposed to two. "In considering the hardship that the United States citizen children would face in Mexico, we must also consider the totality of the burden on the entire family that would result when a single mother must support a family of this size." One cannot help but think that *Andazola* and *Monreal* cases were very close and that they were in fact being penalised for being well-established in the U.S.[79]

In previous chapters, I examined whether the *Convention on the Rights of the Child* ("*CRC*") has been a method of protecting the child's rights and interests. The United States is the only country, other than Somalia, that has not ratified the *CRC* although it is a signatory. However, as discussed there is a strong argument that due to

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[78] *Matter of Recinas*, 23 I & N Dec. 467, Interim # 3479 (BIA 2002), online: <http://www.usdoj.gov.eoir/vll/intdec/lib-vol23inxnet.html>.

[79] It would seem that these two cases would also be successful to appeal a removal order in Canada to the Immigration Appeal Division based on the *Ribic* factors (*Ribic v. Canada* [1985] I.A.B.D. 4, online: QL, discussed in Chapter Two above. The *Ribic* factors include dislocation to family members that would arise from the person's removal and the degree of hardship the person would experience in the receiving country.

widespread ratification, the *CRC* constitutes customary international law. In the cases considering the question of hardship to the family in cancellation of removal cases, there has been no discussion about the rights of the child, the best interests of the child, the right to express his or her views.

American case law indicates that domestic legislation passed subsequent to ratification of international instruments means that the Acts of Congress trump the treaty. In *Verissimo v. INS*[80] the Court held that the amendments to the INA "displaced any obligations assumed by the United States as a signatory to the *International Covenant for Civil and Political Rights*." The fact that the United States Court of Appeals would not apply international law to immigration issues was also made clear in *Beharry v. Ashcroft.*[81] In the district court decision of *Beharry v. Reno*[82] the Senior District Court Judge Weinstein held that the United States was obligated to apply customary international law and international law to its immigration legislation. This case dealt with the applicant attempting to obtain discretionary relief from removal, although he had been convicted of an aggravated felony.[83] Judge Weinstein referred to Congress having a policy of either not ratifying human rights treaties or attaching "reservations, understandings and declarations" ("RUDs") to them, often declaring them non-self executing.[84] Judge Weinstein referred to a case that had considered the *ICCPR*, in

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The statutory provisions in *IRPA* add in the consideration of the best interests of the child and this is broader or more accepting than proving a threshold of extreme hardship to family members.

[80] *Verissimo v. INS,* 71 Fed. App. 859 (1st Circ. Mass.), online: westlawecarswell. (Not selected for publication in Federal Reporter, not precedental.)

[81] *Beharry v. Ashcroft,* 329 F.3d 51 (2nd Circ. N.Y.), online: westlawecarswell.

[82] *Beharry v. Reno,* 183 F. Supp. 2d 584 (U.S.Dist.Ct., E.D. New York), online: westlawecarswell.

[83] Beharry had committed a robbery when he stole $716.00. His sentence was 27 to 54 months. However, since he was not a citizen, although he was a lawful permanent resident having come to the U.S. from Trinidad and Tobago when he was seven years old, he was subject to removal and inadmissible to the re-enter the United States without a waiver of inadmissibility. See section 212(a)(2)(C) of the *INA.*

[84] *Beharry v. Reno, supra* note 82 at 9.

particular Article 17 regarding not subjecting a person to arbitrary or unlawful interference with his family and Article 23(1) that the family is the fundamental group unit of society. He also referred to the *CRC* and noted that although the United States has not ratified it, it still has an impact on American law.

> Congress's failure to ratify the *CRC* is not a sufficiently clear statement to constitute repudiation of the customary international law principles contained in and underlying this treaty. This ruling of law does not mean that other, more novel sections of the *CRC* which Congress has specifically sought to repudiate, such as provisions intended to regulate the application of the death penalty.

After a lengthy discussion on the role of international law in the United States, Judge Weinstein granted a writ of *habeas corpus* on the basis that the INA had to be interpreted as complying with international law.

> As noted above, the CRC, because of its broad acceptance, collects and articulates customary international law. It is a codification of now longstanding, uniformly-accepted legal principles. If read as the government suggests, the INA would violate the principles of customary international law that the best interests of the child must be considered where possible.[85]

Although this judgment is exciting in its worthy goal of applying international law to immigration legislation, the Court of Appeals reversed the District Court decision on different grounds. The Court of Appeals made a finding that the person ought to have exhausted all of his judicial remedies before filing a *habeas* petition. However, regarding the rest of Judge Weinstein's judgment:

> Nothing in our decision to reverse on other grounds the judgment of the district court should be seen as an endorsement of the district court's holding that interpretation of the INA in this case is influenced or controlled by international law.[86]

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[85] *Ibid.*, at 17.
[86] *Beharry v. Ashcroft, supra* note 81 at para. 7.

The reality is that immigration law is a matter over which the executive maintains discretion. This is consistent with a country's right to govern itself in foreign affairs and to control those who enter its boundaries.

> That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. If it could not exclude aliens it would be to that extent subject to the control of another power.[87]

The United States' plenary power doctrine provides "the legislative and executive branches broad and exclusive authority to regulate immigration matters."[88] This has allowed the government to limit judicial review in matters affecting non-citizens.[89] In fact, the Attorney General has authorisation to review decisions of the BIA *de novo* and to substitute his own decision, which took place recently in *Matter of Jean.*[90] Therefore, with limited judicial review, there is limited consideration of the rights of neither the child, nor consideration or protection of their children.

SUMMARY

There is a serious problem in that there is no recognition of the rights of the citizen child. Citizenship provides that the child will be able to return as a citizen when older. However, the child's right to live as a national of his or her country as a child is minimised or ignored. Nations are entitled to deal with immigration control but why should some citizens be ignored in achieving this goal? How can an adequate balancing

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[87] *Chae Chan Ping v. United States* (1889) 130 U.S. 581 (Affirming 36 Fed. Rep. 431), online: westlawecarswell.
[88] Cynthia S. Anderfuhren-Wayne, "Family Unity in Immigration and Refugee Matters: United States European Approaches" (1996) Vol. 8, No. 3 *International Journal of Refugee Law* 347 at 353-354.
[89] See Gerald P. Seipp, "Waivers of Inadmissibility—From Basic Principles to Advanced Practice Considerations Part II" (September 2003) (03-09 Immigr. Briefings 1) online: Westlawecarswell.
[90] *Matter of Jean* 23 I & N Dec. 373, Interim Decision #3472 (A.G. 2002), online: <http://www.usdoj.gov.eoir/vll/intdec/lib-vol23inxnet.html> review taken under 8 C.F.R. § 3.1(h)(l)(i)(2002).

of the countries' objective with protections of the citizen child be established? The United Kingdom has some allowance by balancing the rights between Article 8 of the *ECHR* against its immigration objectives. However, its policy-based approach can be harsh, or at least rigid and gives less strength to the consideration of the facts of each case. The United States has made it more difficult and is now giving less consideration to the rights of the child in cases where the government will only cancel removal orders in the most desperate of cases. In both countries, the *CRC* has been ignored, explicitly in the United Kingdom regarding how it applies to immigration law and implicitly in the United States since it would only apply as customary international law.

Chapter Six will discuss options for protection of the child, including whether this includes some means of providing teeth to the *Convention on the Rights of the Child.*

CHAPTER 6: CONCLUSIONS AND RECOMMENDATIONS

> One of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter that State, to annex what conditions it pleases to the permission to enter it, and to expel or deport from that Sate, at pleasure, even a friendly alien, especially if it considers his presence in the State opposed to its peace, order, and good government, or to its social or material interests: VATTEL LAW OF NATIONS, bk. 1, s. 231; bk. 2, s. 125.

- *Attorney-General for Canada v. Cain, Attorney-General for Canada v. Gilhula*[1]

> The *Citizenship Act* currently provides that any person born in Canada is a citizen, with the exception of the children of diplomats and diplomatic personnel. Recently, some have questioned this automatic right to citizenship by birth because of concerns that the provision may be subject to abuse. In particular, it appears that some women may be coming to Canada as visitors solely for the purpose of having their babies on Canadian soil, thereby ensuring Canadian citizenship for their children. The Committee recognizes that this does not appear to be a major problem. Nevertheless, the possibility of abuse remains.[2]

Immigration is an issue that is engaged in a love-hate relationship. There is the desire to bring in immigrants for economic reasons such as: skilled labour, cheap labour, entrepreneurship, and knowledge base. On the other hand, there is concern for abuse of the welfare system, or reliance on the public purse. Some apprehensions of abuse are legitimate, some are perhaps more imagined than real. There is no doubt that people can abuse the immigration scheme, and there is no doubt that there are qualified and legitimate foreign nationals. For this reason, there is a schism between the legislation, the steps countries take in signing international instruments (and other efforts taken to attract immigrants) and what ends up happening in practice. Immigration issues come down to a question of balancing rights.

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[1] [1904-07] All E.R. Rep. 582 at 586, Also reported [1906] A.C. 542; 75 L.J.P.C. 81; 95 L.T. 314; 22 T.L.R. 757; C.R. [1906] A.C. 92.

[2] House of Commons, Minutes of Proceedings and Evidence of the Standing Committee on Citizenship and Immigration, "Canadian Citizenship: A Sense of Belonging" Issue No. 23 (20 June 1994, 22 June 1994) at17 (Chairperson: Judy Bethel).

In terms of human rights, there are international instruments that provide protections and rights to people. In some cases countries may be a signatory but have not ratified the instrument or perhaps ratified with reservations. In some cases the instruments may be considered customary international law. However, when it comes to the immigration scheme, national sovereignty usually reigns supreme. Canada appears to be cognisant of ensuring it does not directly violate international law in setting its legislation. The U.K. incorporated the *ECHR,* into its domestic legislation. However, arguably this allows the British government and the judiciary to control how the international instrument is considered. The United States is a signatory to a number of international instruments but remains one of two U.N. members that has not ratified the *CRC.*[3]

6.1 EXECUTIVE POWER

The executive government usually controls the immigration scheme because of its connection with foreign affairs. As such, for all three countries, there is substantial deference to the administrative process involved and consequently, limited judicial review. The United States has a strong history of including immigration as a plenary power and this provides greater discretion to the Attorney General. The decisions of the Attorney General can be appealed to the Board levels with limited judicial review. The United Kingdom's Secretary of State renders decisions and these may be subject to appeal and review. In Canada, decisions are made in the name of the Minister, usually by

[3] Shulamit Almog and Ariel L. Bendor, "The UN Convention on the Rights of the Child meets the American Constitution: Towards a supreme law of the world" (2004) II *The International Journal of Children's Rights* 273-289 and also Cynthia Price Cohen and Howard A. Davidson, eds., *Children's Rights in America: U.N. Convention on the Rights of the Child Compared with United States Law* (American Bar Association Center on Children and the Law, 1990) regarding reasons the United States should ratify the *CRC.*

the Minister's delegate, with certain matters determined by certain Boards, then some types of appeals allowed to the Immigration Appeal Division of the IRB and with limited judicial review to the Federal Court.[4] There are many avenues of ministerial discretion that have remained intact, although some regulatory provisions have removed all rights of appeal and do not allow for any exercise of ministerial discretion.[5] Therefore, it is the professional bureaucracy that creates the decision-making system. The initial decisions are left in the hands of bureaucrats who may or may not have appropriate training or background. In addition, there may be other systemic biases built into that system.[6]

6.2 CANADA

Canada's immigration legislation (both the former and current acts) include in its objectives, the importance of family reunification. However, case law seems to indicate that there is limited consideration of this objective, since the cases refer to best interests of the child but downplay the issue of separating family members in deportation cases.[7] The *Baker* case was an important milestone that came into play for immigration cases. However, although the case discussed the *CRC*, it only focused on Article 3, the best interests of the child without very much discussion on the other provisions, notably Article 12, the right to have the child express his or her own views. In addition,

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[4] For the beginnings of Immigration control coming under executive control see Ninette Kelley and Michael Trebilcock, *The Making of the Mosaic: A History of Canadian Immigration Policy* (Toronto: University of Toronto Press, 1998)

[5] Permanent residents determined to be inadmissible for serious criminality lose any right of appeal under section 64(1). There is no consideration of the factors related to the conviction, the type of crime involved, only that it be one in which the person received a sentence of at least two years of imprisonment. The loss of the exercise of this discretion is discussed by John A. Dent, "No Right of Appeal: Bill C-11, Criminality, and the Human Rights of Permanent Residents Facing Deportation" (2002), 27 *Queen's L.J.* 749-784, online: QL.

[6] Not to mention corruption, as evidenced by the recent bribery scandal regarding the Immigration Refugee Board in Canada. Tu Thanh Ha, Colin Freeze, "11 charged in immigration probe, Former refugee board adjudicator faces 98 counts of fraud, breach of trust", *The Globe and Mail* (19 March 2004) < www.theglobeandmail.com>.

consideration of the best interests of the child in immigration cases is a statutory consideration for permanent residents appeals of deportation orders to the Immigration Appeal Division of the IRB, sections 62-71 and to situations where a party seeks the Minister's discretion to waive requirements of the act under section 25. However, in other immigration proceedings, it is not clear how and if best interests are a factor to consider for example in stay applications.[8]

For refugee children, the best interests of the child are specifically considered in the legislation. There are guidelines for refugee children in Canada, but they are not legislated and are limited to procedure. The role of the Canadian child in cases of permanent residents may be considered as part of the best interests consideration, but that child has no say in the process. The avenue of seeking the superior court's assistance either through *parens patriae* jurisdiction or other equitable relief is limited. There may be some relief to be had in custody cases if someone is able to obtain a non-removal order,[9] and this would depend upon the law of each province. But any kind of relief sought in this fashion would depend upon the judge since the case law is inconsistent across Canada. There is something fundamentally iniquitous that a Canadian child of immigrants whose parents separate from each other may have a better chance of being raised by both parents where one of those parents is deported, than if the parents stay together, even if one parent is subject to a deportation order.

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[7] Chapter Four above. Although *I.G. v. Canada (Minister of Citizenship and Immigration)* [1999] F.C.J. No. 1704 (T.D.), online: QL is one case that specified family unity.

[8] And although, the Immigration Appeals Division is to consider best interests of the child when it is reviewing an appeal for an application for a stay under sections 67-69 of *IRPA,* it is not a legislated factor on appeal to the Federal Court.

[9] It will be interesting to see how the Ontario Court of Appeal will deal with the issue of non-removal orders in custody situations when it hears *Wozniak v. Brunton* [2004] O.J. No. 2630 (Ont. S.C.), online: QL.

6.3 UNITED KINGDOM

The United Kingdom takes a policy approach rather than a rights approach. This can be beneficial for some but can be inflexible by giving less consideration to the individual facts of the case. There are policies in place to recognise that it would not be proper to have a family removed if a child has lived in the U.K. for extended periods of time. However, the government also has a policy that it generally does not believe that it is a problem for children under ten to relocate with family. Therefore, where children are under the age of ten, irrespective of whether they are British citizens, the odds are that they will be deported without significant consideration of the individual facts. In addition, the courts are very critical of any illegal acts or manipulation of the system by immigration applicants involved in the immigration process, regardless of the circumstances of the case.

On the other hand, it is interesting that the United Kingdom enacted its *Human Rights Act* in order to incorporate the *European Convention on Human Rights.* This indicates the power of a convention that allows complainants an avenue to seek relief against their own country. There may be a lesson here regarding the enforcement or application of the *CRC.*

6.4 THE UNITED STATES

The government has made overtures to deal with the huge problem it has with millions of people without legal status. Like other countries, the United States does not wish to put those who have jumped the queue to the front of the line:

> President Bush does not support amnesty because individuals who violate America's laws should not be rewarded for illegal behavior and because amnesty perpetuates illegal immigration.[10]

[10] The White House, News Release "Fact Sheet: Fair and Secure Immigration Reform" (7 January 2004).

The United States has made it difficult to prevent cancellation of removal orders or prevent deportations from being executed. Therefore, there are more cases where people with American children are facing deportation.

President Bush proposed a temporary worker program to match foreign workers with willing U.S. employers.[11] The program would be open to undocumented men and women currently working in the U.S. The program is intended to bring out those in hiding so that they discontinue further illegal behaviour. The government claims that it wishes to provide incentives for these workers to return to their home countries and families. This then requires that the workers would have to return to their home countries once the period of work has ended. This does not assist families or people who have become settled, especially if they now have U.S. citizen children.

For the United States, as in Canada and the United Kingdom, there is the administrative or executive desire for control of the process. What can be done to give effect to the rights of a child, regardless of how the child ended up there? Especially, assuming that these countries would never change their underlying legislative starting point, that foreign nationals must apply from outside the country.

6.5 RECOMMENDATIONS

The question remains, with the combination of the *CRC* and other international instruments and looking at the legislation for the three countries in question, what can be done to improve consideration of the interests of children in the immigration regime? One possibility is to change how the *CRC* is considered, perhaps by inclusion of an individual petition or complaint system. The second recommendation is that child

[11] *Ibid.*

immigrants including refugees or family sponsored members and child citizens of immigrants have a statutory right to express their views in accordance with Article 12 of the *CRC*. Another option would be a system to provide children rights of standing in immigration cases that affect them and rights to counsel, even when traditionally the child is not a party. A third recommendation would be to include a category of temporary status of families currently in the immigration legislation, so that there is protection from deportation if and when there are outstanding immigration proceedings. This could be balanced by certain limitations on the number of H & C applications that foreign nationals can pursue. The intent would be to prevent premature deportations and to provide some stability to families who are in the process of securing their status in Canada.

6.6 *CRC*- IMPLEMENTATION/ EFFECTIVENESS

The *CRC* was and has been hailed as the most important instrument of child rights. A review of immigration decisions from developed common law countries illustrates the tension between the desire for immigration control and minimal concern for children's rights. Therefore, there is an outstanding issue regarding how this all-important convention is implemented. Freeman, at the time the *CRC* was implemented, noted that the "burden now shifts to monitoring how well governments honour the pledges in their national laws and carry out their international obligations."[12] Eekelaar noted that there could not be rights unless the claims are protected by duties on others.[13] The heart of his argument is that there must be reciprocity within the relationship. In

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[12] Michael Freeman, *The Moral Status of Children, Essays on the Right of the Child* (The Hague, The Netherlands: Kluwer Law International, 1997) at 99.

[13] John Eekelaar, "The Importance of Thinking that Children Have Rights" in Alston, Parker, Seymour, eds., *Children, Rights and the Law* (Oxford: Clarendon Press, 1992) at 227 (Eekelaar, 1986).

order for the child to receive benefit of the claim, and therefore the right, those in authority must be obliged to the child in someway. "*Ubi ius, ibi remedium*, where rights exist redress is possible."[14] The lack of requiring reciprocal duties maybe a deficiency in the *CRC* and weakens its effectiveness. Do governments really feel that they are obliged to the child, and does that extend to all children, regardless of citizenship or the status of their parents? Or do they feel that their obligations are limited only to their citizen children of other citizens, not the citizen children of immigrants? Is implementation of the *CRC* working as it applies to immigration and can implementation be improved?

6.7 *CRC*- REPORTING

There are five methods of enforcement under international law for promotion and protection of human rights.

1) Complaint procedure- individuals or groups can change the violation by a State;
2) Inter-state complaint procedure;
3) Reports of impartial experts- fact-finding on alleged violations;
4) The human rights treaty body system to receive reports from State parties;
5) Provision of technical assistance to States.[15]

The *CRC* uses methods four and five, reporting and providing technical assistance. When the *CRC* was drafted, the Working Group decided that it would be implemented with a reporting system and not with a complaint procedure. Apparently, the NGO *ad hoc* Group on the Convention on the Rights of the Child attempted to persuade the working group that there ought to be both an individual petition system together with a reporting system. But there was a lack of support and the proposal was never tabled or discussed in

[14] Freeman, *supra* note 9 at 21.
[15] Rebecca Rios-Kohn "The Convention on the Rights of the Child: Programs and Challenges"(1998) 5 *Geo. J. Fighting Poverty* 139 at 155.

the Working Group sessions.[16] The reporting system is considered a means of encouraging countries to implement the *CRC* into the day to day affairs of the country.

> [T]he function of the Committee is only to engage in a continued constructive dialogue with States Parties. The Committee is not a court and does not intervene in individual cases. It is, therefore, at the national level that the implementation of the Convention is most critical and that the role of the judiciary is fundamental. Although reports to the Committee show that in many countries the ratification of the Convention has brought about legislative reform and other important measures, the only option currently available is for an individual to claim his or her rights under the Convention through the domestic courts.[17]

But without an individual petition system, there is no individual right to bring a claim against one's own country for a violation of the *CRC*.

The provisions for reporting come under Article 43 and 44.[18] It is a two-stage process.[19] Each country report normally has a "pre-sessional working group." The Committee does not act as a judgmental body but works on the basis of implementing the *CRC*. The Committee may issue questions or issues to be answered by the country. The Committee's final step is to issue its "Concluding Observations."

The reaction to the effectiveness of implementation of the *CRC* is mixed. One of the major concerns is the follow up to the Concluding Observations issued by the

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[16] Geraldine Van Bueren *The International Law on the Rights of the Child* (Dordrecht, The Netherlands: Martinus Nijhoff, 1994) at 389, see f.n. 75. See also Dominic McGoldrick, "The United Nations Convention on the Rights of the Child" (1991) *5 International Journal of Law and the Family*, 132-169 at 157.

[17] Rios-Kohn, *supra* note 15 at 156.

[18] Article 43- 1. For the purpose of examining the progress made by States Parties in achieving the realization of the obligations undertaken in the present Convention, there shall be established a Committee on the Rights of the Child, which shall carry out the functions hereinafter provided.
2. The Committee shall consist of ten experts of high moral standing and recognized competence in the field covered by this Convention. The members of the Committee shall be elected by States Parties from among their nationals and shall serve in their personal capacity, consideration being given to equitable geographical distribution, as well as to the principal legal systems.

[19] Christine Lundy, *An Introduction to the Convention on the Rights of the Child* (St. Thomas, Ontario: Full Circle Press, 1997) at 91-92.

Committee.[20] Freeman suggested in his writing, shortly after the Convention was completed, that the Committee on the Rights of the Child should have more power, for example the model under the *European Convention of Human Rights*.[21] He also suggested the use of a commissioner or ombudsperson to promote compliance with the minimum standards of the *CRC*.[22] According to Lundy, who worked with the Committee, the Committee has been looking at different ways to implement and monitor the *CRC*, either through the creation of a Child's Rights Commissioner or Children's Ombudsman.[23] Rios-Kohn (1998) states that most of the initial reports are compilations of laws and policies regarding children in each State party. However, she says the reports provide minimal analysis of obstacles regarding the implementation process or any underlying causes preventing realization of children's rights.[24] Although the reports are written by bureaucrats and sometimes without input from organisations dealing with children, there is usually some opportunity for increased dialogue between NGOs and governments.[25] Sometimes NGOs provide their own reports and have opportunities to comment on state reports.

> The act of ratification requires a State to demonstrate its good faith efforts to comply with the treaty obligations. Signing the treaty is not an adequate demonstration of good faith efforts, although it creates 'an obligation of good faith' that the signatory will refrain from any action contrary to the spirit of the treaty.[26]

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[20] Lisa Woll, "Reporting to the UN Committee on the Rights of the Child: A catalyst for domestic debate and policy change?" (2000) 8 *The International Journal of Children's Rights* 71-81.
[21] Freeman, *supra* note 12 at 71-72.
[22] *Ibid.*, at 75-78.
[23] Lundy, *supra* note 19 at 93.
[24] Rios-Kohn, *supra* note 15.
[25] *Ibid.*, at 151.
[26] *Ibid.* referring to principle based on *The Vienna Convention on the Law of Treaties (1980)*

6.8 COMPLAINT SYSTEM (FIRST RECOMMENDATION)

One recommendation is to consider incorporation of an individual petition system into the *CRC* as part of its implementation. The most compelling factor in favour of this option is the example of the United Kingdom and its incorporation of the *ECHR* into its *Human Rights Act*. The question is whether the existence of a complaint system will force contracting countries to incorporate the *CRC* into domestic legislation. There are some weaknesses with this recommendation. First of all, regarding the whole of the *CRC*, the purpose of reporting, is to assist countries to make children's rights issues important. The goal is to have the child's life improved in all avenues through the *CRC*. A complaint system may not compel countries to expand the meaning of the *CRC* to its social and educational programs.

Second, even with an individual petition system, the effectiveness of the *CRC* could be undermined if a country incorporates it into its domestic legislation. For example, the U.K.'s *Human Rights Act* may weaken the effect of the *ECHR* in the United Kingdom since individuals may not petition the European Court on the basis that there is an expectation that the *ECHR* applies in the United Kingdom. And then, although there is some consideration of European jurisprudence, the British interests will likely be given greater weight. On the positive side, under *The Human Rights Act,* on judicial review, the British Courts must at least consider the European jurisprudence. Therefore, if there were to be a body of case law on children's rights in terms of regional or international jurisprudence that has to be considered by domestic courts, this would strengthen how the *CRC* is considered. (Since the extent of *CRC* consideration in Canada's jurisprudence remains limited.) In addition, the individual petition system does give recourse to

individuals to bring forward their respective cases to a specialised court. In The Netherlands, a person can have a direct appeal based on the *CRC*, depending on the formulation of the relevant article and whether or not the judge decides that the Article has so called "direct applicability."[27]

Third, a right of individual petition may not be a well-utilised route either for lack of awareness, perception of accessibility or cost. Although Canadians have a right of individual petition to the Inter-American Commission on Human Rights,[28] for violations of the *American Declaration*, this remedy is not pursued often.[29] Perhaps a recommendation is for individual applicants to pursue this right more often, although it is not to apply until all domestic remedies have been exhausted.[30]

The right of individual petition would be a dramatic change to the initial plan for implementation of the *CRC*, but it is an option that ought to be revisited and reconsidered.

6.9 STANDING IN IMMIGRATION PROCEEDINGS (SECOND RECOMMENDATION)

Another consideration is a system of conveying standing to children in immigration proceedings even if they are not considered traditionally to be a party to the proceedings.[31] The other option is to allow citizen children to be joined as parties on the basis that they are interested parties with a vested interest in the outcome. Based on the

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[27] Coby de Graaf, "The Relevant of the Convention on the Rights of the Child of Holland," in Freeman, ed., *Children's Rights: A Comparative Perspective,* (Aldershot, England: Dartmouth Publishing Company Limited, 1996), 113-123 at 114.
[28] Discussed in Chapter Four above.
[29] A review of published cases from the present to 1993 include few cases from Canada.
[30] See Report No. 7/02, Petition 11.661, Suresh, 27 February 2002, online: Inter-American Commission on Human Rights website < http://www.cidh.org > (accessed 28 August 2004).
[31] I did not come across cases in the United Kingdom and the United States where child citizens of immigrants were parties or attempted to be represented in proceedings, similar to some of the attempts in the Canadian superior courts.

failed attempts in Canadian courts to obtain relief in the superior courts, there is limited opportunity for a Canadian child to have his or her views considered or expressed. Generally, the interests of the Canadian child are limited to an immigration officer considering the best interests of the child, without a great deal of guidance to the immigration officer. Upon judicial review, the court can only consider whether the immigration officer actually did weigh the child's best interests. In addition, for consideration in H & C applications the child's best interests constitute only one factor. This stands in direct contrast to divorce or family proceedings where the best interests of the child are the primary consideration.[32] Madsen argues that the standards used in family law to consider the best interests of the child ought to be incorporated into immigration matters. She recommends that the immigration legislation set out how the decision makers ought to consider those interests, what factors are relevant and what weight to be given to those factors. This is a logical and attractive proposal since at the current state it is difficult to determine to what extent an immigration officer really considers the child's best interests.

The provision of standing would help children in British and American proceedings as well. As noted regarding the British cases, the children's interests are categorised based on certain principles. There is no avenue for having the child's actual interests considered. Although Canadian courts do not look favourably upon those who have caused themselves to remain without legal status, the British cases seem to disregard all other mitigating factors if the evidence is that the applicants were the cause of their illegal status. In terms of standing for United States citizen children, presumably this

[32] Lene Madsen, "Second Class: Law Meets Family in the Immigration Context" (2003), 21 CFLQ 103, online: westlawecarswell.

would give much greater consideration to children's rights in terms of procedure and substantive law. In a country that places so much emphasis on due process and the right to counsel, it seems odd that this has not been an avenue of advocacy for these children, where their parents face removal orders.[33] An office of ombudsperson could assist in the child's right to standing or other matters related to the child immigrants or child of immigrants.[34]

6.10 BALANCE SYSTEM (THIRD RECOMMENDATION)

The government keeps the gates closed, in order to maintain control over the process. The Canadian government has specified its concern about "birth tourism" and people purposely taking advantage of Canadian laws. In its second report to the Committee on the Rights of the Child:

> It is a cornerstone of the *Immigration Act* that prior to their arrival in Canada, persons who wish to live permanently in Canada must submit an application outside Canada, qualify for and obtain an immigrant visa. [para. 426]
>
> Canada is cognizant of the need to balance the different and important interests at stake: Canada's interests in protecting society and regulating immigration are to be carefully weighed in relation to the interests of the individual facing removal and the impact of this removal on his/her family members. [para. 444][35]

Certainly, this is a concern in the United States and was a concern in the United Kingdom, leading to the changes in its nationality laws. Developed countries recognise that they are attractive destinations and have concerns about those who enter and remain illegally. I question what the problem is if people end up in the country without status, either because they overstayed a limited stay permit or entered illegally? Would it be

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[33] I have not found any cases on this point.

[34] Freeman discusses the concept of creating a child's ombudsperson. This position would be responsible for a number of matters related to the *CRC*, and not be limited to immigration matters which is why it is not explored in detail here but is an option that can be explored.

more effective to allow foreign nationals to apply for permanent residency from within Canada rather than allocating resources dealing with those without status? How much is spent investigating those who stay in Canada illegally, the costs involved in deportation proceedings, litigation from appeals, deporting the person and then bringing the person back? One wonders whether the costs involved in policing, deportations and proceedings related to stays of deportation outweigh the benefits of having a system that would actually be less prone to abuse. The response from the government is that it does not wish to condone or advance the cause for those who "jump the line." In response, the governments ought to institute processes that allow people to apply for permanent residency from within Canada.[36] However, those who apply from within Canada would not have any procedural advantages over those who apply from outside Canada. For example, in-country applications would take longer than visa posts around the world. This would be a disincentive for people to try to get into Canada, become established and then apply for citizenship. In fact, this would prevent the need for foreign nationals to apply for waiver of statutory requirements under H & C applications and the levels of appeals that run with those issues. Considering that Canada will be facing work shortage with its large, aging population, one would think that the requirement for more immigrants is greater than ever. The government has specified its desire to do a better

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[35] Committee on the Rights of the Child, *Second periodic reports of States parties due in 1999: Canada*, (2001) CRC/C/83/Add.6 (2003).

[36] A 1966 regulation to the *Immigration Act* at the time permitted applying for landed-immigrant status from within Canada: Kelley and Trebilcock, *supra* note 4 at 369-377, see fn 125 referring to 'Report of the Department of Manpower and Immigration,' *ADR 1966-67*, 19. This provision together with existing backlogs lead to excessive delays and in November 1972, the 1966 regulation was revoked, fn 131- P.C. 2502 (3 November 1972).

job integrating the valuable talent that exists within Canada.[37] The United States has millions of illegal immigrants. It knows that people are there and part of American society. Thousands of people enter Canada and the United States in any event in order to attempt to become residents or citizens. Why not deal with those who arrive in a proper manner? The result would be that the children of those who are born in Canada and the United States have a better prospect of staying with their families. This would assist situations where only one family member obtains refugee status and the rest do not. Family members would obtain temporary status while their applications are pending.

The use of deportations has to be revisited. Deportations in Canada that take place while H & C applications are being considered are unnecessary and are a waste of taxpayers' money. Although there are provisions to argue for a stay, this can be a difficult test to meet. Why does the government pay to send someone away and in limited situations the government does pay to bring him or her back again?[38] Within that are the associated legal costs to deal with the inevitable motions for stays of removals. It would cost less to simply wait and see the result of the application, not to mention the cost and time involved in counsel applying for a stay of removals. Presumably the government has concerns with the H & C application process being abused by those who fail to take steps to regulate their status for many years and then attempt to do so late in the day. Perhaps what is required is greater discretion in cases seeking enforcement of removals when there are pending H & C applications.

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[37] Judy Sgro, "Innovation in Integration: Toward a Practical Approach to Integration" (Calgary Catholic Immigration Society Symposium, Kahanoff Centre, Calgary, Alberta, 27 May 2004) CIC website <http://www.cic.gc.ca/english/press/speech-sgro/calgary.html> (accessed 23 August 2004).

[38] In *Sowkey v. Canada (Minister of Citizenship and Immigration)* [2004] F.C.J. NO. 51, online: QL, Phelan J. allowed a stay of a removal order and mentioned, "The respondents have no real response to the question of why this applicant had to be removed from Canada so quickly and before the expiry of the statutory deadline of challenging such decisions."

The recommendation regarding changing the legislative scheme to allow for applications for permanent residency from within the country may sound idealistic. However, when we consider the costs involved, there is an argument that it is a viable possibility to consider.[39]

It is time to treat citizen children of immigrants as equal to other citizens. Do children need to suffer for the sins of the parents?[40] Why are there two classes of people, citizens who face *de facto* deportation and citizens who do not? Is there an abuse problem, with parents purposely giving birth in Canada or the United States? Perhaps. Should those children then be removed with their parents? And if not, is that fair to the immigration system? There must be a way to achieve balance yet respect the rights of children as active participants within the system.

[39] It is difficult to determine the actual costs involved. Any appeal process includes costs involved to have a panel of the IAD consider an appeal of deportation order, the cost of counsel for the Minister, the costs incurred if the matter is appealed to the Federal Court. Perhaps there needs to be a realistic cost effectiveness assessment.

[40] Max Stier, "Corruption of Blood and Equal Protection: Why the Sins of the Parents Should Not Matter" (1992) 44 *Standford Law Review* 727-757 regarding the justification for ensuring that the undocumented children of aliens in the United States receive education and welfare benefits.

APPENDIX "A"

Convention Relating to the Status of Stateless Persons (1954 Convention)

Adopted 28 September 1954 by a Conference of Plenipotentiaries convened by Economic and social Council resolution 526 A (XVII) of 26 April 1954, entered into force 6 June 1960, see Vo. 360 U.N.T.S. 117.

Article 1

1. A Contracting State shall grant its nationality to a person born in its territory who would otherwise be stateless. Such nationality shall be granted:
   (a) At birth, by operation of law, or
   (b) Upon an application being lodged with the appropriate authority, by or on behalf of the person concerned, in the manner prescribed by the national law. Subject to the provisions of paragraph 2 of this article, no such application may be rejected. ...

3. Notwithstanding the provisions of paragraphs I (b) and 2 of this article, a child born in wedlock in the territory of a Contracting State, whose mother has the nationality of that State, shall acquire at birth that nationality if it otherwise would be stateless.

4. A Contracting State shall grant its nationality to a person who would otherwise be stateless and who is unable to acquire the nationality of the Contracting State in whose territory he was born because he has passed the age for lodging his application or has not fulfilled the required residence conditions, if the nationality of one of his parents at the time of the person's birth was that of the Contracting State first above-mentioned. ...

Article 2

A foundling found in the territory of a Contracting State shall, in the absence of proof to the contrary, be considered to have been born within that territory of parents possessing the nationality of that State.

Article 4

1. A Contracting State shall grant its nationality to a person, not born in the territory of a Contracting State, who would otherwise be stateless, if the nationality of one of his parents at the time of the person's birth was that of that State. If his parents did not possess the same nationality at the time of his birth, the question whether the nationality

of the person concerned should follow that of the father or that of the mother shall be determined by the national law of such Contracting State. Nationality granted in accordance with the provisions of this paragraph shall be granted:

(a) At birth, by operation of law, or

(b) Upon an application being lodged with the appropriate authority, by or on behalf of the person concerned, in the manner prescribed by the national law. Subject to the provisions of paragraph 2 of this article, no such application may be rejected.

Article 5

1. If the law of a Contracting State entails loss of nationality as a consequence of any change in the personal status of a person such as marriage, termination of marriage, legitimation, recognition or adoption, such loss shall be conditional upon possession or acquisition of another nationality.
2. If, under the law of a Contracting State, a child born out of wedlock loses the nationality of that State in consequence of a recognition of affiliation, he shall be given an opportunity to recover that nationality by written application to the appropriate authority, and the conditions governing such application shall not be more rigorous than those laid down in paragraph 2 of article I of this Convention.

Article 6

If the law of a Contracting State provides for loss of its nationality by a person' s spouse or children as a consequence of that person losing or being deprived of that nationality, such loss shall be conditional upon their possession or acquisition of another nationality.

The Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons
United Nations *Treaty Series,* vol. 189, p. 37

B. The Conference,

Considering that the unity of the family, the natural and fundamental group of society, is an essential right of the refugee, and that such unity is constantly threatened, and
Noting with satisfaction that, according to the official commentary of the *ad hoc* Committee on Statelessness and Related Problems, the rights granted to a refugee are extended to members of his family,
Recommends Governments to take the necessary measures for the protection of the refugee's family, especially with a view to:

(1) Ensuring that the unity of the refugee's family is maintained particularly in cases where the head of the family has fulfilled the necessary conditions for admission to a particular country,

(2) The protection of refugees who are minors, in particular unaccompanied children and girls, with special reference to guardianship and adoption.

APPENDIX "B"

The European Convention of Human Rights
Rome, 4. XI.1950, ETS No. 5

Article 25 (before amendment):

The Commission may receive petitions addressed to the Secretary-General of the Council of Europe from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in this Convention, provided that the High Contracting Party against which the complaint has been lodged has declared that it recognises the competence of the Commission to receive such petitions. Those of the High Contracting parties who have made such a declaration undertake not to hinder in any way the effective exercise of this right.

Article 19 (before amendment):

To ensure the observance of the engagements undertaken by the High Contracting Parties in the present Convention there shall be set up:

1. A European Commission of Human Rights hereinafter referred to as 'the Commission''
2. A European Court of Human Rights, hereinafter referred to as 'the Court'.

Amending provisions removing Commission:

Article 1

The existing text of Sections II to IV of the Convention (Articles 19-56) and Protocol No. 2 conferring upon the European Court of Human Rights competence to give advisory opinions shall be replaced by the following Section II of the Convention (Articles 19 to 51):

Section II- European Court of Human Rights

Article 19- Establishment of the Court

To ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the protocols thereto, there shall be set up a European Court of Human Rights, hereinafter referred to as "the Court". It shall function on a permanent basis.[1]

Article 35 -Admissibility criteria

1 The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.

The new Article 35 merges the former Article 26 and Article 27 that had previously set out that petitions will be rejected if considered incompatible with the Convention or ill founded. The former Article 26 stated the Commission could only deal with the matter after all domestic remedies had been exhausted.

APPENDIX "C"

International Covenant on Civil and Political Rights

Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966

entry into force 23 March 1976, in accordance with Article 49

Article 12

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

4. No one shall be arbitrarily deprived of the right to enter his own country.

Article 13

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

APPENDIX "D"

Convention on the Rights of the Child

Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989

entry into force 2 September 1990, in accordance with article 49

Preamble

The States Parties to the present Convention,

Considering that, in accordance with the principles proclaimed in the *Charter* of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Bearing in mind that the peoples of the United Nations have, in the *Charter*, reaffirmed their faith in fundamental human rights and in the dignity and worth of the human person, and have determined to promote social progress and better standards of life in larger freedom,

Recognizing that the United Nations has, in the Universal Declaration of Human Rights and in the International Covenants on Human Rights, proclaimed and agreed that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,

Recalling that, in the Universal Declaration of Human Rights, the United Nations has proclaimed that childhood is entitled to special care and assistance,

Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community,

Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding,

Considering that the child should be fully prepared to live an individual life in society, and brought up in the spirit of the ideals proclaimed in the *Charter* of the United

Nations, and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity,

Bearing in mind that the need to extend particular care to the child has been stated in the Geneva Declaration of the Rights of the Child of 1924 and in the Declaration of the Rights of the Child adopted by the General Assembly on 20 November 1959 and recognized in the Universal Declaration of Human Rights, in the International Covenant on Civil and Political Rights (in particular in articles 23 and 24), in the International Covenant on Economic, Social and Cultural Rights (in particular in article 10) and in the statutes and relevant instruments of specialized agencies and international organizations concerned with the welfare of children, '

Bearing in mind that, as indicated in the Declaration of the Rights of the Child, "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth",

Recalling the provisions of the Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally; the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) ; and the Declaration on the Protection of Women and Children in Emergency and Armed Conflict,

Recognizing that, in all countries in the world, there are children living in exceptionally difficult conditions, and that such children need special consideration,

Taking due account of the importance of the traditions and cultural values of each people for the protection and harmonious development of the child,

Recognizing the importance of international co-operation for improving the living conditions of children in every country, in particular in the developing countries,

Have agreed as follows:...

Article 1

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.

Article 2

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language,

religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

Article 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.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

Article 4

States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

Article 5

States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

Article 6

1. States Parties recognize that every child has the inherent right to life.

2. States Parties shall ensure to the maximum extent possible the survival and development of the child.

Article 7

1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and. as far as possible, the right to know and be cared for by his or her parents.

2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

Article 8

1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.

2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.

Article 9

1. 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. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.

3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the

information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.

Article 10

1. In accordance with the obligation 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. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.

2. A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances personal relations and direct contacts with both parents. Towards that end and in accordance with the obligation of States Parties under article 9, paragraph 1, States Parties shall respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country. The right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary to protect the national security, public order (ordre public), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention.

Article 12

1. States 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 views 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 proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Article 19

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and

for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

Article 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.

2. States Parties shall in accordance with their national laws ensure alternative care for such a child.

3. Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

Article 21

States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:

(a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary;

(b) Recognize that inter-country adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin; (c) Ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;

(d) Take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it;

(e) Promote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.

Article 22

1. States 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 set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

2. For this purpose, States Parties shall provide, as they consider appropriate, co-operation in any efforts by the United Nations and other competent intergovernmental organizations or non-governmental organizations co-operating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family. 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 , as set forth in the present Convention.

Article 37

States Parties shall ensure that:

(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;

(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;

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

Article 43

1. For the purpose of examining the progress made by States Parties in achieving the realization of the obligations undertaken in the present Convention, there shall be established a Committee on the Rights of the Child, which shall carry out the functions hereinafter provided.

2. The Committee shall consist of ten experts of high moral standing and recognized competence in the field covered by this Convention. The members of the Committee shall be elected by States Parties from among their nationals and shall serve in their personal capacity, consideration being given to equitable geographical distribution, as well as to the principal legal systems.

3. The members of the Committee shall be elected by secret ballot from a list of persons nominated by States Parties. Each State Party may nominate one person from among its own nationals.

4. The initial election to the Committee shall be held no later than six months after the date of the entry into force of the present Convention and thereafter every second year. At least four months before the date of each election, the Secretary-General of the United Nations shall address a letter to States Parties inviting them to submit their nominations within two months. The Secretary-General shall subsequently prepare a list in alphabetical order of all persons thus nominated, indicating States Parties which have nominated them, and shall submit it to the States Parties to the present Convention.

5. The elections shall be held at meetings of States Parties convened by the Secretary-General at United Nations Headquarters. At those meetings, for which two thirds of States Parties shall constitute a quorum, the persons elected to the Committee shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

6. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if renominated. The term of five of the members elected at the first election shall expire at the end of two years; immediately after the first election, the names of these five members shall be chosen by lot by the Chairman of the meeting.

7. If a member of the Committee dies or resigns or declares that for any other cause he or she can no longer perform the duties of the Committee, the State Party which nominated the member shall appoint another expert from among its nationals to serve for the remainder of the term, subject to the approval of the Committee.

8. The Committee shall establish its own rules of procedure.

9. The Committee shall elect its officers for a period of two years.

10. The meetings of the Committee shall normally be held at United Nations Headquarters or at any other convenient place as determined by the Committee. The Committee shall normally meet annually. The duration of the meetings of the Committee shall be determined, and reviewed, if necessary, by a meeting of the States Parties to the present Convention, subject to the approval of the General Assembly.

11. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Convention.

12. With the approval of the General Assembly, the members of the Committee established under the present Convention shall receive emoluments from United Nations resources on such terms and conditions as the Assembly may decide.

Article 44

1. States Parties undertake to submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made on the enjoyment of those rights:

(a) Within two years of the entry into force of the Convention for the State Party concerned;

(b) Thereafter every five years.

2. Reports made under the present article shall indicate factors and difficulties, if any, affecting the degree of fulfilment of the obligations under the present Convention. Reports shall also contain sufficient information to provide the Committee with a comprehensive understanding of the implementation of the Convention in the country concerned.

3. A State Party which has submitted a comprehensive initial report to the Committee need not, in its subsequent reports submitted in accordance with paragraph 1 (b) of the present article, repeat basic information previously provided.

4. The Committee may request from States Parties further information relevant to the implementation of the Convention.

5. The Committee shall submit to the General Assembly, through the Economic and Social Council, every two years, reports on its activities.

6. States Parties shall make their reports widely available to the public in their own countries.

Article 45

In order to foster the effective implementation of the Convention and to encourage international co-operation in the field covered by the Convention:

(a) The specialized agencies, the United Nations Children's Fund, and other United Nations organs shall be entitled to be represented at the consideration of the implementation of such provisions of the present Convention as fall within the scope of their mandate. The Committee may invite the specialized agencies, the United Nations Children's Fund and other competent bodies as it may consider appropriate to provide expert advice on the implementation of the Convention in areas falling within the scope of their respective mandates. The Committee may invite the specialized agencies, the United Nations Children's Fund, and other United Nations organs to submit reports on the implementation of the Convention in areas falling within the scope of their activities;

(b) The Committee shall transmit, as it may consider appropriate, to the specialized agencies, the United Nations Children's Fund and other competent bodies, any reports from States Parties that contain a request, or indicate a need, for technical advice or assistance, along with the Committee's observations and suggestions, if any, on these requests or indications;

(c) The Committee may recommend to the General Assembly to request the Secretary-General to undertake on its behalf studies on specific issues relating to the rights of the child;

(d) The Committee may make suggestions and general recommendations based on information received pursuant to articles 44 and 45 of the present Convention. Such suggestions and general recommendations shall be transmitted to any State Party concerned and reported to the General Assembly, together with comments, if any, from States Parties.

APPENDIX "E"

Citizenship Act

R.S.C. 1985, c. C-29

Deserted child

4. (1) For the purposes of paragraph 3(1)(a), every person who, before apparently attaining the age of seven years, was found as a deserted child in Canada shall be deemed to have been born in Canada, unless the contrary is proved within seven years from the date the person was found.

Rights and obligations

6. A citizen, whether or not born in Canada, is entitled to all rights, powers and privileges and is subject to all obligations, duties and liabilities to which a person who is a citizen under paragraph 3(1)(a) is entitled or subject and has a like status to that of such person.

S.C. 1974-75-76, c. 108, s. 5.

PART II
LOSS OF CITIZENSHIP

No loss except as herein provided

7. A person who is a citizen shall not cease to be a citizen except in accordance with this Part.

Order in cases of fraud

10. (1) Subject to section 18 but notwithstanding any other section of this Act, where the Governor in Council, on a report from the Minister, is satisfied that any person has obtained, retained, renounced or resumed citizenship under this Act by false representation or fraud or by knowingly concealing material circumstances,

(a) the person ceases to be a citizen, or
(b) the renunciation of citizenship by the person shall be deemed to have had no effect,

as of such date as may be fixed by order of the Governor in Council with respect thereto.

Presumption

(2) A person shall be deemed to have obtained citizenship by false representation or fraud or by knowingly concealing material circumstances if the person was lawfully admitted to Canada for permanent residence by false representation or fraud or by knowingly concealing material circumstances and, because of that admission, the person subsequently obtained citizenship.

S.C. 1974-75-76, c. 108, s. 9.

APPENDIX "F"

Canadian Passport Order

P.C. 1981-1472 4 June, 1981

3. Every passport

(a) shall be in a form prescribed by the Minister;
(b) shall be issued in the name of the Minister on behalf of her Majesty in right of Canada;
(c) shall at all times remain the property of her Majesty in right of Canada;
(d) shall be issued on the condition that the bearer will return it to the Passport Office forthwith when requested to do so by that office;

...

4.(1) Subject to this Order, any person who is a Canadian citizen under the Act may be issued a passport.

8.(1) In addition to the information and material than an applicant is required to provide in the application for a passport, the Passport Office may request an applicant to provide further information respecting any matter relating to the issue of the passport.

(2) The further information referred to in subsection (1) and the circumstances in which such information may be requested includes the information and circumstances set out in the schedule.

Refusal of Passports and Revocation

9. The Passport Office may refuse to issue a passport to an applicant who
(a) fails to provide the Passport Office with a duly completed application for a passport or with the information and material that is required or request

(i) in the application for a passport, or
(ii) pursuant to section 8;

(b) stands charged in Canada with the commission of an indictable offence;
(c) stands charged outside Canada with the commission of any offence that would, if committed in Canada, constitute an indictable offence

APPENDIX "G"

***Immigration and Refugee Protection Act*, 2001, c. 27**

3. (2) The objectives of this Act with respect to refugees are

(*a*) to recognize that the refugee program is in the first instance about saving lives and offering protection to the displaced and persecuted;
(*b*) to fulfil Canada's international legal obligations with respect to refugees and affirm Canada's commitment to international efforts to provide assistance to those in need of resettlement;
(*c*) to grant, as a fundamental expression of Canada's humanitarian ideals, fair consideration to those who come to Canada claiming persecution;
(*d*) to offer safe haven to persons with a well-founded fear of persecution based on race, religion, nationality, political opinion or membership in a particular social group, as well as those at risk of torture or cruel and unusual treatment or punishment;
(*e*) to establish fair and efficient procedures that will maintain the integrity of the Canadian refugee protection system, while upholding Canada's respect for the human rights and fundamental freedoms of all human beings;
(*f*) to support the self-sufficiency and the social and economic well-being of refugees by facilitating reunification with their family members in Canada;
(*g*) to protect the health and safety of Canadians and to maintain the security of Canadian society; and
(*h*) to promote international justice and security by denying access to Canadian territory to persons, including refugee claimants, who are security risks or serious criminals.

DIVISION 1
REQUIREMENTS BEFORE ENTERING CANADA AND SELECTION

Requirements Before Entering Canada

11. (1) A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document shall be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.

(2) The officer may not issue a visa or other document to a foreign national whose sponsor does not meet the sponsorship requirements of this Act.

25. (1) The Minister shall, upon request of a foreign national who is inadmissible or who does not meet the requirements of this Act, and may, on the Minister's own initiative, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligation of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to them, taking into account the best interests of a child directly affected, or by public policy considerations.

36. (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for

(*a*) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;

(*b*) having been convicted of an offence outside Canada that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years; or

(*c*) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years.

(2) A foreign national is inadmissible on grounds of criminality for

(*a*) having been convicted in Canada of an offence under an Act of Parliament punishable by way of indictment, or of two offences under any Act of Parliament not arising out of a single occurrence;

(*b*) having been convicted outside Canada of an offence that, if committed in Canada, would constitute an indictable offence under an Act of Parliament, or of two offences not arising out of a single occurrence that, if committed in Canada, would constitute offences under an Act of Parliament;

(*c*) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an indictable offence under an Act of Parliament; or

(*d*) committing, on entering Canada, an offence under an Act of Parliament prescribed by regulations.

(3) The following provisions govern subsections (1) and (2):

(*a*) an offence that may be prosecuted either summarily or by way of indictment is deemed to be an indictable offence, even if it has been prosecuted summarily;

(*b*) inadmissibility under subsections (1) and (2) may not be based on a conviction in respect of which a pardon has been granted and has not ceased to have effect or been revoked under the *Criminal Records Act*, or in respect of which there has been a final determination of an acquittal;

(*c*) the matters referred to in paragraphs (1)(*b*) and (*c*) and (2)(*b*) and (*c*) do not constitute inadmissibility in respect of a permanent resident or foreign national who, after the prescribed period, satisfies the Minister that they have been rehabilitated or who is a member of a prescribed class that is deemed to have been rehabilitated;

(*d*) a determination of whether a permanent resident has committed an act described in paragraph (1)(*c*) must be based on a balance of probabilities; and

(*e*) inadmissibility under subsections (1) and (2) may not be based on an offence designated as a contravention under the *Contraventions Act* or an offence under the *Young Offenders Act*.

DIVISION 7
RIGHT OF APPEAL

62. The Immigration Appeal Division is the competent Division of the Board with respect to appeals under this Division.

63. (1) A person who has filed in the prescribed manner an application to sponsor a foreign national as a member of the family class may appeal to the Immigration Appeal Division against a decision not to issue the foreign national a permanent resident visa.

(2) A foreign national who holds a permanent resident visa may appeal to the Immigration Appeal Division against a decision at an examination or admissibility hearing to make a removal order against them.

(3) A permanent resident or a protected person may appeal to the Immigration Appeal Division against a decision at an examination or admissibility hearing to make a removal order against them.

(4) A permanent resident may appeal to the Immigration Appeal Division against a decision made outside of Canada on the residency obligation under section 28.

(5) The Minister may appeal to the Immigration Appeal Division against a decision of the Immigration Division in an admissibility hearing.

64. (1) No appeal may be made to the Immigration Appeal Division by a foreign national or their sponsor or by a permanent resident if the foreign national or permanent resident has been found to be inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality.

(2) For the purpose of subsection (1), serious criminality must be with respect to a crime that was punished in Canada by a term of imprisonment of at least two years.

(3) No appeal may be made under subsection 63(1) in respect of a decision that was based on a finding of inadmissibility on the ground of misrepresentation, unless the foreign national in question is the sponsor's spouse, common-law partner or child.

65. In an appeal under subsection 63(1) or (2) respecting an application based on membership in the family class, the Immigration Appeal Division may not consider humanitarian and compassionate considerations unless it has decided that the foreign national is a member of the family class and that their sponsor is a sponsor within the meaning of the regulations.

66. After considering the appeal of a decision, the Immigration Appeal Division shall

(*a*) allow the appeal in accordance with section 67;

(*b*) stay the removal order in accordance with section 68; or

(*c*) dismiss the appeal in accordance with section 69.

67. (1) To allow an appeal, the Immigration Appeal Division must be satisfied that, at the time that the appeal is disposed of,

(*a*) the decision appealed is wrong in law or fact or mixed law and fact;

(*b*) a principle of natural justice has not been observed; or

(*c*) other than in the case of an appeal by the Minister, taking into account the best interests of a child directly affected by the decision, sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.

(2) If the Immigration Appeal Division allows the appeal, it shall set aside the original decision and substitute a determination that, in its opinion, should have been made, including the making of a removal order, or refer the matter to the appropriate decision-maker for reconsideration.

68. (1) To stay a removal order, the Immigration Appeal Division must be satisfied, taking into account the best interests of a child directly affected by the decision, that sufficient humanitarian and compassionate considerations warrant special relief in light

of all the circumstances of the case.

(2) Where the Immigration Appeal Division stays the removal order

(*a*) it shall impose any condition that is prescribed and may impose any condition that it considers necessary;

(*b*) all conditions imposed by the Immigration Division are cancelled;

(*c*) it may vary or cancel any non-prescribed condition imposed under paragraph (*a*); and

(*d*) it may cancel the stay, on application or on its own initiative.

(3) If the Immigration Appeal Division has stayed a removal order, it may at any time, on application or on its own initiative, reconsider the appeal under this Division.

(4) If the Immigration Appeal Division has stayed a removal order against a permanent resident or a foreign national who was found inadmissible on grounds of serious criminality or criminality, and they are convicted of another offence referred to in subsection 36(1), the stay is cancelled by operation of law and the appeal is terminated.

69. (1) The Immigration Appeal Division shall dismiss an appeal if it does not allow the appeal or stay the removal order, if any.

(2) In the case of an appeal by the Minister respecting a permanent resident or a protected person, other than a person referred to in subsection 64(1), if the Immigration Appeal Division is satisfied that, taking into account the best interests of a child directly affected by the decision, sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case, it may make and may stay the applicable removal order, or dismiss the appeal, despite being satisfied of a matter set out in paragraph 67(1)(*a*) or (*b*).

(3) If the Immigration Appeal Division dismisses an appeal made under subsection 63(4) and the permanent resident is in Canada, it shall make a removal order.

70. (1) An officer, in examining a permanent resident or a foreign national, is bound by the decision of the Immigration Appeal Division to allow an appeal in respect of the foreign national.

(2) If the Minister makes an application for leave to commence an application for judicial review of a decision of the Immigration Appeal Division with respect to a permanent resident or a foreign national, an examination of the permanent resident or the foreign national under this Act is suspended until the final determination of the application.

71. The Immigration Appeal Division, on application by a foreign national who has

not left Canada under a removal order, may reopen an appeal if it is satisfied that it failed to observe a principle of natural justice.

***Immigration and Refugee Protection Regulations*, SOR/2002-227**

s. 2

"dependent child", in respect of a parent, means a child who

(a) has one of the following relationships to the parent, namely,

(i) is the biological child of the parent, if the child has not been adopted by way of a full adoption by a person other than a spouse or common-law partner of the parent, or

(ii) is the adopted child of the parent, if the adoption was a full adoption and took place before the child was 18 years of age; and

(b) is in one of the following situations of dependency, namely,

(i) is less than 22 years of age and not a spouse or common-law partner,

(ii) has depended substantially on the financial support of a parent since the age of 22 - or if the child became a spouse or common-law partner before the age of 22, since becoming a spouse or common-law partner - and is a student

(A) enrolled in a post secondary institution that is accredited by the relevant government authority, and

(B) actively pursuing a course of academic, professional or vocational training on a full-time basis, and

(iii) is 22 years of age or older and has depended substantially on the financial support of a parent since at least the age of 22 and is unable to be financially self-supporting due to a physical or mental condition.

Non-accompanying family member

141. (1) A permanent resident visa shall be issued to a family member who does not accompany the applicant if, following an examination, it is established that

(*a*) the family member was included in the applicant's permanent resident visa application at the time that application was made, or was added to that application before the applicant's departure for Canada;

(*b*) the family member submits their application to an officer outside Canada within one year from the day on which refugee protection is conferred on the applicant;

(*c*) the family member is not inadmissible;

(*d*) the applicant's sponsor under subparagraph 139(1)(*f*)(i) has been notified of the family member's application and an officer is satisfied that there are adequate financial arrangements for resettlement; and

(*e*) in the case of a family member who intends to reside in the Province of Quebec, the competent authority of that Province is of the opinion that the foreign national meets the selection criteria of the Province.

(2) For greater certainty, subsection 150(1) does not apply to the application of a non-accompanying family member.

Family members

142. For the purposes of this Division, to be considered a family member of an applicant, a person must be a family member of the applicant

(*a*) at the time the application referred to in subsection 150(1) was made; and

(*b*) at the time of the determination of the application referred to in paragraph 141(1)(*b*), without taking account of whether the person has attained 22 years of age.

Memorandum of understanding

143. (1) The Minister may enter into a memorandum of understanding with an organization for the purpose of locating and identifying Convention refugees and persons in similar circumstances if the organization demonstrates

(*a*) a working knowledge of the provisions of the Act relating to protection criteria; and

(*b*) an ability abroad to locate and identify Convention refugees and persons in similar circumstances.

Content of memorandum of understanding

(2) The memorandum of understanding shall include provisions with respect to

(*a*) the geographic area to be served by the organization;

(*b*) the number of referrals that may be made by the organization and the manner of referral;

(*c*) the training of members or employees of the organization; and

(*d*) the grounds for suspending or cancelling the memorandum of understanding.

Convention Refugees Abroad

Convention refugees abroad class

144. The Convention refugees abroad class is prescribed as a class of persons who may be issued a permanent resident visa on the basis of the requirements of this Division.

Member of Convention refugees abroad class

145. A foreign national is a Convention refugee abroad and a member of the Convention refugees abroad class if the foreign national has been determined, outside Canada, by an officer to be a Convention refugee.

Humanitarian-protected Persons Abroad

Humanitarian-protected persons abroad

146. (1) For the purposes of subsection 12(3) of the Act, a person in similar circumstances to those of a Convention refugee is a member of one of the following humanitarian-protected persons abroad classes:

(*a*) the country of asylum class; or

(*b*) the source country class.

Classes

(2) The country of asylum class and the source country class are prescribed as classes of persons who may be issued permanent resident visas on the basis of the requirements of this Division.

Member of country of asylum class

147. A foreign national is a member of the country of asylum class if they have been determined by an officer to be in need of resettlement because

(*a*) they are outside all of their countries of nationality and habitual residence; and

(*b*) they have been, and continue to be, seriously and personally affected by civil war, armed conflict or massive violation of human rights in each of those countries.

Member of the source country class

148. (1) A foreign national is a member of the source country class if they have been determined by an officer to be in need of resettlement because

(*a*) they are residing in their country of nationality or habitual residence and that country is a source country within the meaning of subsection (2) at the time their permanent resident visa application is made as well as at the time a visa is issued; and
(*b*) they
(i) are being seriously and personally affected by civil war or armed conflict in that country,
(ii) have been or are being detained or imprisoned with or without charges, or subjected to some other form of penal control, as a direct result of an act committed outside Canada that would, in Canada, be a legitimate expression of freedom of thought or a legitimate exercise of civil rights pertaining to dissent or trade union activity, or
(iii) by reason of a well-founded fear of persecution for reasons of race, religion, nationality, political opinion or membership in a particular social group, are unable or, by reason of such fear, unwilling to avail themself of the protection of any of their countries of nationality or habitual residence.

Source country

(2) A source country is a country
(*a*) where persons are in refugee-like situations as a result of civil war or armed conflict or because their fundamental human rights are not respected;
(*b*) where an officer works or makes routine working visits and is able to process visa applications without endangering their own safety, the safety of applicants or the safety of Canadian embassy staff;
(*c*) where circumstances warrant humanitarian intervention by the Department in order to implement the overall humanitarian strategies of the Government of Canada, that intervention being in keeping with the work of the United Nations High Commissioner for Refugees; and
(*d*) that is set out in Schedule 2.

Minister's consultations on Schedule 2

149. The Minister may, for the purpose of advising the Governor in Council of circumstances in a country that may justify amending Schedule 2, consult with the Department of Foreign Affairs and International Trade, the United Nations High Commissioner for Refugees, the provinces and non-governmental organizations with substantial knowledge of the country in question.

Application

150. (1) An application for a permanent resident visa submitted by a foreign national under this Division must be made at the immigration office outside Canada that serves the applicant's place of residence and must be accompanied by
(*a*) a referral from a referral organization; or
(*b*) an undertaking.

Exception -- requirement for referral or undertaking

(2) A foreign national may submit a permanent resident visa application without a referral or an undertaking if the foreign national resides in a geographic area that the

Minister has determined under subsection (3) to be a geographic area in which circumstances justify the submission of permanent resident visa applications not accompanied by a referral or an undertaking.

Minister's determination

(3) The Minister may determine on the basis of the following factors that a geographic area is an area in which circumstances justify the submission of permanent resident visa applications not accompanied by a referral or an undertaking:

(*a*) advice from referral organizations with which the Minister has entered into a memorandum of understanding under section 143 that they are unable to make the number of referrals specified in their memorandum of understanding for the area;

(*b*) the inability of referral organizations to refer persons in the area;

(*c*) the resettlement needs in the area, after consultation with referral organizations that have substantial knowledge of the area; and

(*d*) the relative importance of resettlement needs in the area, within the context of resettlement needs globally.

Travel document

151. An officer shall issue a temporary travel document to a foreign national who has been determined to be a member of a class prescribed by this Division and who

(*a*) holds a permanent resident visa or a temporary resident permit;

(*b*) does not hold a valid passport or travel document issued by their country of nationality or the country of their present or former habitual residence;

(*c*) does not hold a valid travel document issued by the United Nations or the International Committee of the Red Cross and is unable to obtain such a document within a reasonable time; and

(*d*) would be unable to travel to Canada if the temporary travel document were not issued.

Refugee Protection Division Rules SOR/2002-228

DESIGNATED REPRESENTATIVES

Duty of counsel to notify

15. (1) If counsel for a party believes that the Division should designate a representative for the claimant or protected person in the proceedings because the claimant or protected person is under 18 years of age or unable to appreciate the nature of the proceedings, counsel must without delay notify the Division in writing. If counsel is aware of a person in Canada who meets the requirements to be designated as a representative, counsel must provide the person's contact information in the notice.

Exception

(2) Subsection (1) does not apply in the case of a claimant under 18 years of age whose claim is joined with the claim of a person who is 18 years of age or older.

Requirements for being designated

(3) To be designated as a representative, a person must
(*a*) be 18 years of age or older;
(*b*) understand the nature of the proceedings;
(*c*) be willing and able to act in the best interests of the claimant or protected person; and
(*d*) not have interests that conflict with those of the claimant or protected person.

APPENDIX "H"

Immigration and Nationality Act (United States)

Sec. 242.

1 (a) Applicable provisions.-

(1) General orders of removal.-Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section **235(b)(1)** is governed only by chapter 158 of title 28 of the United States Code, except as provided in subsection (b) and except that the court may not order the taking of additional evidence under section 2347(c) of such title.

(2) Matters not subject to judicial review.-

(B) Denials of Discretionary Relief.-Notwithstanding any other provision of law, no court shall have jurisdiction to review-

(i) any judgment regarding the granting of relief under section, **212(h), 212(i), 240A, 240B,** or **245,** or

(ii) any other decision or action of the Attorney General the authority for which is specified under this title to be in the discretion of the Attorney General, other than the granting of relief under section **208(a).**

APPENDIX "I"

Hong Kong

Basic Law :Chapter III: Fundamental Rights and Duties of the Residents

Article 24

Residents of the Hong Kong Special Administrative Region ("Hong Kong residents") shall include permanent residents and non-permanent residents.

The permanent residents of the Hong Kong Special Administrative Region shall be:

(1) Chinese citizens born in Hong Kong before or after the establishment of the Hong Kong Special Administrative Region;

(2) Chinese citizens who have ordinarily resided in Hong Kong for a continuous period of not less than seven years before or after the establishment of the Hong Kong Special Administrative Region;

(3) Persons of Chinese nationality born outside Hong Kong of those residents listed in categories (1) and (2);

(4) Persons not of Chinese nationality who have entered Hong Kong with valid travel documents, have ordinarily resided in Hong Kong for a continuous period of not less than seven years and have taken Hong Kong as their place of permanent residence before or after the establishment of the Hong Kong Special Administrative Region;

(5) Persons under 21 years of age born in Hong Kong of those residents listed in category (4) before or after the establishment of the Hong Kong Special Administrative Region; and

(6) Persons other than those residents listed in categories (1) to (5), who, before the establishment of the Hong Kong Special Administrative Region, had the right of abode in Hong Kong only.

The above-mentioned residents shall have the right of abode in the Hong Kong Special Administrative Region and shall be qualified to obtain, in accordance with the laws of the Region, permanent identity cards which state their right of abode.

The non-permanent residents of the Hong Kong Special Administrative Region shall be persons who are qualified to obtain Hong Kong identity cards in accordance with the laws of the Region but have no right of abode.

The Immigration Ordinance, Cap. 115:

Schedule 1 (prior to amendment in 1999)

A person who is within one of the following categories is a permanent resident of the Hong Kong Special Administrative Region -

> (a) A Chinese citizen born in Hong Kong before or after the establishment of the Hong Kong Special Administrative Region if his father or mother was settled or had the right of abode in Hong Kong at the time of the birth of the person or at any later time.

Schedule was subsequently amended by Resolution of the Legislative Council on 16 July 1999 to read:

> (a) A Chinese citizen born in Hong Kong -
>
> > (i) before 1 July 1987; or
> >
> > (ii) on or after 1 July 1987 if his father or mother was settled or had a right of abode in Hong Kong at the time of his birth or any later time.

APPENDIX "J"

The Family Relations Act RSBC 1996, Chapter 128

Best interests of child are paramount

24 (1) When making, varying or rescinding an order under this Part, a court must give paramount consideration to the best interests of the child and, in assessing those interests, must consider the following factors and give emphasis to each factor according to the child's needs and circumstances:

(a) the health and emotional well being of the child including any special needs for care and treatment;

(b) if appropriate, the views of the child;

(c) the love, affection and similar ties that exist between the child and other persons;

(d) education and training for the child;

(e) the capacity of each person to whom guardianship, custody or access rights and duties may be granted to exercise those rights and duties adequately.

APPENDIX "K"

Committee on the Rights of the Child, *Summary record of the 216th meeting: Canada.* CRC/C/SR.216 (1995).
(Canada's first state report to the Committee for the Rights of the Child)

In the Committee's meeting to consider Canada's report, these comments were made:

28. Mrs. SANTOS PAIS said she wished to raise the issues of immigration and refugees in relation to the discussion on family environment and alternative care. It appeared from Canadian case law that a situation could arise where non-Canadian parents could be deported from the country and their children remain there. That situation was connected with articles 9 and 10 of the Convention, especially in relation to separation. Under article 9, States parties should ensure that there would be no separation unless it was in the best interests of the child concerned and determined by competent authorities subject to judicial review. Concern had been expressed as to how a child's best interests were taken into consideration when decisions to deport parents were made. Were family values taken into account by decision-makers? Article 9 also referred to the need for judicial proceedings to give to all interested parties the right and opportunity to be heard. It was unclear when and how a child could make his or her views known and with what legal support. Article 12, paragraph 2, established the right of children to be heard in any administrative and judicial proceedings.

29. In cases of deportation where children remained in Canada, they were only able to request family reunification once they had reached the age of 19. How was the Convention applied to those under the age of 18? Article 10 of the Convention encouraged States to consider in a positive, humane and expeditious manner all requests for family reunification. A target of six months existed for the resolution of such requests. In cases where that did not happen, what means could be used to take account of a child's best interests and to make the process positive, humane and expeditious? Article 10 also stated that when parents were separated from children or vice versa, children should have the right to maintain on a regular basis personal relations and direct contacts with their parents.

Committee on the Rights of the Child, *Concluding observations of the Committee on the Rights of the Child: Canada. CRC/C/15/Add.37* (1995).

Principal subjects of concern

13. The Committee recognizes the efforts made by Canada for many years in accepting a large number of refugees and immigrants. Nevertheless, the Committee regrets that the principles of non-discrimination, of the best interests of the child and of the respect for the views of the child have not always been given adequate weight by administrative bodies dealing with the situation of refugee or immigrant children. It is particularly worried by the resort by immigration officials to measures of deprivation of liberty of children for security or other related purposes and by the insufficient measures aimed at family reunification with a view to ensuring that it is dealt with in a positive, humane and expeditious manner. The Committee specifically regrets the delays in dealing with reunification of the family in cases where one or more members of the family have been considered eligible for refugee status in Canada as well as cases where refugee or immigrant children born in Canada may be separated from their parents facing a deportation order.

APPENDIX "L"

Canadian Charter of Rights and Freedoms

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

2. Everyone has the following fundamental freedoms:
a) freedom of conscience and religion;
b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
c) freedom of peaceful assembly; and
d) freedom of association.

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

APPENDIX "M"

Report On The Situation Of Human Rights Of Asylum Seekers Within The Canadian Refugee Determination System

OEA/Ser.L/V/II.106, Doc. 40 rev. February 28, 2000

166. In view of the foregoing principles, it may be observed that, while the state undoubtedly has the right and duty to maintain public order through the control of entry, residence and expulsion of removable aliens, that right must be balanced against the harm that may result to the rights of the individuals concerned in the particular case. In this regard, the Commission has also received submissions alleging that the right to family life is not sufficiently taken into account in removal proceedings, particularly where the removal of long term permanent residents is at issue. Given the nature of Articles V, VI and VII of the American Declaration, interpreted in relation to Canada's obligations under the Convention on the Rights of the Child, where decision-making involves the potential separation of a family, the resulting interference with family life may only be justified where necessary to meet a pressing need to protect public order, and where the means are proportional to that end. The application of these criteria by various human rights supervisory bodies indicates that this balancing must be made on a case by case basis, and that the reasons justifying interference with family life must be very serious indeed.

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