Fragmenting the Family: A Failure to Follow Law, Policy and Common Sense

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by Patti Kemp and Edward C. Corrigan

The recent news that Canadian officials may have been preventing refugee claimants from coming to Canada, both from Hungary1 and Syria2, points to a worrying trend in immigration decision making.

The law says one thing, but decision makers say another. By ignoring domestic case law and international treaty obligations, Canadian immigration officials are doing the opposite of their immigration policies' stated aims. Unlawful decisions might just be pandering to politics rather than upholding Canadian law and ideals. Rather than reunifying families, they are fragmenting them, with clear risk of harm to those, particularly Canadian born children, affected by the decisions.

A specific case example

In a recent case involving a Jamaican national, his Canadian wife and newborn baby, Canadian immigration officers ignored their own policy, domestic law and international treaty obligations. Instead of considering the individual case, they made a decision which could be cynically summarized as “getting rid of the illegal Jamaican overstayer.”

The couple in question met while he worked as a temporary farm worker. Their relationship developed in a fairly typical way

during the course of their employment. He met her family, attended her church and became familiar to her community. At the end of the farming season, he returned to Jamaica. She visited him for his birthday and they got engaged. He returned for the next agricultural season, they were married and moved in together. Shortly afterward, she became pregnant but she miscarried at three months. She became pregnant again in September 2014 and was expecting their first baby in June 2015.

Unfortunately, the couple received some poor advice about their immigration status. They were negligently advised to wait until they had all of their documents gathered together before making an In-Canada Family Class Sponsorship application. While they waited to receive a copy of their marriage certificate, his seasonal farm worker visa expired.

As a further complication, he was arrested for residing illegally in Canada. In May 2015, he was detained at Rexdale Detention Centre in Toronto under an Exclusion Order. The Member of the Immigration Refugee Board Immigration Section agreed with CBSA that the husband would not report for removal if he was ordered to leave Canada. His baby was due less than a month later. Part of the problem was that he had requested his criminal record check from Jamaica and listed his residence as the return mailing address. This correspondence was intercepted by Canada Customs which in turn led the Canadian Border Services Agency (CBSA) directly to his door step where he was arrested and detained.

The couple then sought the assistance of an immigration lawyer, who submitted an In-Canada Family Class Sponsorship application. By the time this application was submitted, the baby's due date had passed, the wife was imminently pregnant and the husband was still in immigration detention.

In the past CBSA, in our experience, would halt any removal proceedings if there was an In-Canada Spousal Application being processed. However, in this instance Detention and Removal Proceedings proceeded despite the filing of the In-Canada Sponsorship. We are not aware of any Operations Memorandum or Directive that changed this practice but suspect that some direction was given by the Minister to strictly enforce Canada's Immigration laws and remove all individuals, including individuals married to a Canadian or Permanent Resident and who had submitted an In-Canada Spousal Sponsorship, who had violated Canada's Immigration law by an illegal overstay or by working illegally.

By the end of July, the wife was recovering from a caesarian section, she was at home caring for their newborn baby and she was unable to work. The husband was still in immigration detention. By detaining the husband CBSA prevented the husband for providing for his family and this cost the taxpayer a great deal of money by detaining the husband and forcing the mother to go on Social Assistance. In our opinion this action also put the child at risk.

The wife was then informed that a removal date had been set. However, immigration officers refused to confirm this information with their lawyer as required by law. Perversely, the lawyer was told that they could not submit representations to defer removal until a date for removal was set. The lawyers submitted those representations in a hurried fashion when advised by wife of the pending removal. A cursory review of the submissions requesting a Deferral of Removal was done and a decision to refuse any deferral was made. The husband was quickly removed to Jamaica.

The Law

The legal representatives argued that the husband's removal should be deferred and the In-Canada Spousal Sponsorship process should be allowed to proceed. The husband's application was very strong. In all likelihood, he would be granted permanent residence. If not, he met all the requirements for an Out of Canada Spousal Sponsorship Application, and so removal, with the accompanying one-year re-entry ban, would unnecessarily prevent him from being reunited with his wife and baby. However, it is almost guaranteed that the removed individual would be returning to Canada on the basis of a Spousal Sponsorship.

The arguments were fourfold: the CIC's own policy guidelines for In-Canada Spousal Sponsorship; the family reunification policy; the strong Humanitarian and Compassionate grounds in the application, in particular for the "best interests of the child"; and the aim to make efficient use of CIC and CBSA time and resources.

In-Canada Spousal Sponsorship Applications

Spousal applications are governed by *Inland Processing 8 Spouse or Common-law partner in Canada Class (IP8) Operations Manual 12*. According to this guideline, applicants can have removal directions stayed if they *"qualify for processing under the spousal public policy and satisfy the conditions outlined in Section F of the policy, who have submitted an application before the scheduling of their removal interview with the CBSA will receive an administrative deferral of removal for 60 days."* (p.51, emphasis added) This stay of removal is pending a decision on whether the individual will be eligible for permanent

residence. At this stage, they do not need to show that they will receive permanent residence – they need to show that they are eligible to apply and have their application considered.

Furthermore, under *Appendix A- Public Policy Under 25(1) of IRPA to facilitate Processing in accordance with the Regulations of the Spouse or Common-law Partner in Canada Class*, applicants may also benefit from an administrative deferral of removal under the spousal public policy. The regulatory stay of a removal order will apply if the Minister is of the opinion that under Section 25(1) of IRPA, humanitarian and compassionate or public policy considerations exists.

In this case, the Applicant's representatives were of the opinion that the applicant qualified to make an application for permanent residence. Indeed, they believed that application would most likely succeed. Furthermore, when they submitted the application, they pleaded Humanitarian and Compassionate grounds, so the spousal public policy should have also applied. In both instances, removal should have been deferred until a decision on the application was made.

The Family Reunification Policy

Looking at the application in a broader sense, the CIC and CBSA have a mandate to facilitate family reunification. Reunification is described as *"one of the three pillars of CIC's immigration program*[3]*."* Apparently, *"reuniting family members continues to be enshrined as one of the fundamental principles and objectives of Canadian immigration policy and legislation*[4]*."* One would think that keeping the family unit of husband, wife and newborn baby together would meet this objective. In removing the father, CIC and CBSA violated their own policy directive.

Humanitarian and Compassionate Grounds and "The Best Interests of the Child"

Worryingly, the Removal Order was set against the background of pleaded Humanitarian and Compassionate considerations that affected a Canadian born child. At the time of the initial application, that child's birth was imminent and overdue. By the time the removal order was set, that child was one-month old. The child by being born to a Canadian mother and also born in Canada automatically became a Canadian Citizen.

Under Section 25 of the *Immigration and Refugee Protection Act (IRPA)*, a foreign national can request the Minister to consider Humanitarian and Compassionate grounds and "*may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected."*

The Supreme Court of Canada in the *Baker* decision recognized that "the best interests of a child" should be given careful consideration in the exercise of Humanitarian and Compassionate discretion by an Immigration officer[5]*."Children's rights, and attention to their interests, are central humanitarian and compassionate values in Canadian society*[6]*."* Furthermore,

"*attentiveness and sensitivity to the importance of the rights of children, to their best interests, and to the hardship that may be caused to them by a negative decision is essential for an H & C decision to be made in a reasonable manner*[7]*."*

Canada is also a signatory to the UN Convention on the Rights of the Child[8]. The Convention has been ratified by Canada, although it has not been implemented by Parliament. Although the provisions have no direct application within Canadian law, their values the Supreme Court of Canada held that "*may help inform the contextual approach to statutory interpretation and judicial review*[9]*."* Under Article 3.1, "*the best interests of the child shall be a primary consideration."* Under Article 3.2:

"*State 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...and, to this end, shall take all appropriate legislative and administrative matters."*

Under Article 9.1, *"State Parties shall ensure that a child shall not be separated for his or her parents against their will."* Under Article 9.2, "*State Parties shall respect the right of the child who is separated from one parent to maintain personal relations and direct contact."*

The UN Convention on the Rights of the Child is celebrating its 25th anniversary. The Supreme Court's *Baker* decision is over 15 years old. The objective of maintaining the family unit when making an immigration decision is not new policy. Forcibly separating a parent from a newborn child by removing the father to another country is irreconcilable with Canadian policy and

law. In this case, CIC utterly failed to take the best interest of the child into consideration.

Shortly after the above-noted individual was removed from Canada a request was made to withdraw the In-Canada Spousal Sponsorship Application along with a request for the refund of the $1,040.00 CIC fee. Sometime after this written request was made CIC advised that they would keep the $490.00 CIC fee component and refund the Right of Landing portion ($550.00) as CIC processing had started. A subsequent letter to CIC advised that the withdrawal request was made in a timely manner and before CIC processing had started. CIC relented and decided to return the entire $1,040 CIC fee.

CIC Time and Resources

One final consideration in this case is the drain on CIC and CBSA time and resources. Given the processing times when the initial In-Canada application was submitted, the applicant should have expected a (most likely positive) decision about two weeks after his removal. If the CIC and CBSA had acted in line with its own law and policies, the applicant should not have been detained. He should have been able to work and support his wife, who was at home caring for their newborn baby and recovering from a caesarian birth. Instead, she was unable to work and had to resort to social assistance.

According to the CBSA, it costs $239 a day to detain an individual prior to removal[10]. Two months of detention would have cost taxpayers over $14,000, in addition to the cost of removal. This cost was entirely unnecessary if CIC and CBSA had simply followed their own policy. Clearly CBSA has far more important duties like removing criminals or even suspected terrorists or security risks from Canada than removing a spouse of a Canadian or Permanent Resident or the parent of a Canadian born child.

Fragmenting the Family

As a result of the failure to implement existing law and policy, this man will miss the first year of his baby's life. His wife will be without his support. And the baby, a Canadian citizen, will spend its first formative year without the love and support of its father. This case is a clear example of the failure to reunify a family. Instead, CIC actively fragmented it. When considering the larger context, Canada's immigration practices are worryingly out of step with what it purports are our fundamental values. This removal exercise was also a big waste of time and taxpayers' resources.

Patti Kemp *is a member of the Law Society of England and Wales and the Law Society of Upper Canada. She trained and practiced at Birnberg Peirce & Partners in London, England.*

Edward C. Corrigan *is certified as a specialist by the Law Society of Upper Canada in Citizenship, Immigration and Immigration and Refugee Law.*

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2. http://www.cbc.ca/news/politics/canada-election-2015-refugee-processing-pmo-1.3262423
3. http://www.cic.gc.ca/english/resources/evaluation/frp/index.asp#a1.2.1
4. Ibid.
5. Baker v Canada (Minister of Citizenship and Immigration), 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817; (1999) 1 Imm L.R. (3d) 1 (S.C.C.)
6. Baker, paras 66 -67
7. Baker, para 74.
8. Can. T.S. 1992 No. 3
9. Baker, paras 69-70
10. http://www.vice.com/en_ca/read/no-crime-no-problem-canada-is-spending-millions-keeping-immigration-detainees-in-jail-786