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Best Interest Of The Child In The Context Of Canadian Immigration Law

by* *Edward C. Corrigan and Selvin Mejia

The "best interest of the child" has many applications. In Family Law one of the leading cases is the Supreme Court of Canada Decision in *Young v. Young*. [1] This article proposes to look at the "best interest of the child" in an Immigration context.

The *Immigration and Refugee Protection Act (IRPA)* makes specific reference to the best interest of the child. Section 25 of *IRPA* reads as follows:

Humanitarian and compassionate considerations — request of foreign national

25. (1) Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible or does not meet the requirements of this Act, and may, on request of a foreign national outside Canada who applies for a permanent resident visa, examine the circumstances concerning the foreign national 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.

.....

(1.21) Paragraph (1.2)(c) does not apply in respect of a foreign national

(a) who, in the case of removal, would be subjected to a risk to their life, caused by the inability of each of their countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, to provide adequate health or medical care; or

(b) whose removal would have an adverse effect on the best interests of a child directly affected.

The Supreme Court of Canada has recognized that "the best interests of a child" should be given careful consideration in the exercise of Humanitarian and Compassionate discretion by a Citizenship and Immigration officer. The most important case is the Supreme Court of Canada ruling in *Baker v. Canada (Minister of Citizenship and Immigration.* [2] Here the Supreme Court of Canadas ruled as follows on the best interest of the child.

Therefore, 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. While deference should be given to immigration officers on s. 114(2) [now IRPA S. 25] judicial review applications, decisions cannot stand when the manner in which the decision was made and the approach taken are in conflict with humanitarian and compassionate values. (emphasis added)

The Supreme Court of Canada further ruled that:

The principles discussed above indicate that, for the exercise of the discretion to fall within the standard of reasonableness, the decision-maker should consider children's best interests as an important factor, give them **substantial weight**, and be **alert, alive and sensitive to them**. That is not to say that children's best interests must always outweigh other considerations, or that there will not be other reasons for denying an H & C claim even when children's interests are given this consideration. However, where the interests of children are minimized, in a manner inconsistent with Canada's humanitarian and compassionate tradition and the Minister's guidelines, the decision will be unreasonable. [3] (emphasis added)

In *Thompson v. Canada (Citizenship and Immigration)*, 2003 the Immigration Appeal Division observed as follows:

In Baker, [10] the Supreme Court of Canada emphasized children's rights as important values in Canadian society and cautioned decision makers to take the best interests of

children into account when exercising discretionary powers under the former Act. In my view, the reference to the "best interests" of the child in section 67(1) of IRPA codifies this requirement. It does not necessarily bestow on it a higher value than other considerations. Indeed, viewing it this way would be contrary to Baker given that Madame Justice L'Heureux-Dube herself seemed to reject this notion:

…the decision maker should consider children's best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them. That is not to say that children's best interests must always outweigh other considerations or that there will not be other reasons for denying an H & C claim even when children's interests are given this consideration.[11]

In *Baker v. Canada (Minister of Citizenship and Immigration)* [1999] 2 S.C.R. 817 the Supreme Court of Canada noted the following principles from Canadian law and also International Law with respect to Humanitarian and Compassionate consideration and "the best interests of the child" at paragraph 7:114. (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.

Immigration Regulations, 1978, SOR/78-172, as amended by SOR/93-44

2.1 The Minister is hereby authorized to exempt any person from any regulation made under subsection 114(1) of the Act or otherwise facilitate the admission to Canada 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. [4]
The children's "best interest" means decisions are made with the ultimate goal of fostering and encouraging the child's happiness, security, mental health, and emotional development into young adulthood. The best interests of the child are best served by having both parents with [them] on a full time basis. However, a denial of the Humanitarian and Compassionate Application will lower the child's living standard, is in fact against the original purpose to focus on the child's "best interest." [5]

A subsequent Federal Court of Appeal decision in *Legault* which involved a parent who had serious criminal history in the United States, further clarified that the best interests of the child must be "well identified and defined" by a Humanitarian and Compassionate Immigration officer. The Court expanded on the analysis required by a Decision Maker:

The **mere mention** of the children is not sufficient. The interests of the children is [sic] a factor that must be examined with care and weighed with other factors. To mention is not to examine and weigh. [6] (emphasis added)

As to the issue of the proper "weight" to be accorded to the "best interest of the child" in the context of an H & C Decision, the Court held, that the presence of Canadian-born children does not guarantee a positive outcome, and further:

…the immigration officer must be "alert alive and sensitive" (*Baker*, at par. 75) to the interest 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. [7] (emphasis added)

In *Hawthorne* the Federal Court of Appeal dealt with the situation of a teenage girl whose mother was being deported from Canada. The Court of Appeal stated the following:

The "best interests of the child" are determined by considering the benefit to the child of the parent's non-removal from Canada as well as the hardship the child would suffer either from her parent's removal from Canada or her own voluntary departure should she wish to accompany her parent abroad. Such benefits and hardship are two sides of the same coin, the coin being the best interest of the child . [8] (emphasis added)

The Court noted that the Immigration Officer in that Decision had been insensitive to the child's own expression of her needs and also to the fact that she would be deprived of financial support if her mother was deported.

The Court of Appeal also questioned the appropriateness of the expressions "unusual, undeserved and disproportionate hardship" when it comes to children. The Court of Appeal stated it's objection as follows: "[c]hildren will rarely, if ever, be deserving of any hardship". [9]

Mr. Justice Evans in *Hawthorne* concurred with the result (i.e. overruling the Immigration Officer's negative decision on the Humanitarian and Compassionate Application), but in a separate opinion had specific comments regarding the Immigration Officer's reasoning, and the proper approach to be taken in analyzing "the best interests of the child." According to Mr. Justice Evans, the Immigration Officer should address the question of the "hardship" a child would suffer from a negative decision, the officer must

clearly identify where the best interests of the child lie, taking into account all considerations.

In *Hawthorne* the Immigration Officer was of the opinion that separation from the mother would involve no "excessive hardship" for the teenage girl because they had been separated for an extended period in the past. Nor would the alternative of return to a poor and violent country be an "excessive hardship" for the girl, according to the officer, because she had lived there in the past. According to Mr. Justice Evans, this approach missed the fundamental point that it was strongly in the child's best interests to remain united with her mother in Canada.

It is thus only by carrying out a full and proper "best interest of the child" determination that an Officer is in a position to assess where the best interests of the children lie and, consequently, both the "benefit" and the "hardship" at stake for the child in the H & C decision. It was therefore fundamentally incorrect for the officer to assess the "unusual or excessive hardship" the child would suffer only with reference to what she had managed to endure in the past.

In the 2007 Federal Court of Appeal case *Somera Duque v. Canada (Citizenship and Immigration)* the Court made the following observation.

[32] It is true that the best interests of the child cannot be assessed in a vacuum and that it is but one factor to be considered by the Officer in the context of an H&C application. That said, consideration of the best interests of the child must be assessed in a reasonable manner. Where the interests of children are minimized, in a manner inconsistent with Canada's humanitarian and compassionate tradition and the Minister's guidelines, the decision will be unreasonable. The applicable Minister's guidelines in this instance, IP5 at section 5:19 provide that a child's emotional, social, cultural and physical welfare should be taken into account.

[33] I find that there is a defect in the process by which the Officer's conclusions were drawn in respect to the best interests of the child and as a result, the interests of the child were minimized. Consequently, the Officer failed to accord sensitive consideration to the best interests of the child. I am satisfied that this constitutes an unreasonable exercise of discretion and warrants the Court's intervention. [10]

It is not the purpose of this article to do an exhaustive analysis of the considerable jurisprudence on "the best interest of the child." However, in addition to the above cited Supreme Court and Federal Court of Appeal decisions which set out the main principles,

the following are some other important principles set out in Federal Court jurisprudence for the consideration of Humanitarian and Compassionate applications.

- Immigration officers must examine the best interests of all children concerned – not just Canadian-born children or children who are the applicants. For applications in-Canada, even the best interests of children living overseas must be examined (for example a child outside Canada who is being supported by a parent who is in Canada). Similarly, for an applicant outside Canada, the best interests of a child in Canada may be relevant. However, the onus is on the applicant to raise the issue clearly and provide the necessary evidence. [11]

- It is unreasonable for an Immigration Officer to simply state that the child is young and could adapt to life in the parent's home country. [12]

- It is unreasonable and insufficient for an Immigration Officer to dismiss the Best Interest of the Child issue by simply stating that it is up to the parent to decide whether to take the child with him/her, if the parent is removed.[11]

- Where parents need community support or medical services to function well as parents, it is unreasonable for an Immigration Officer who is reviewing a Humanitarian and Compassionate application to fail to consider the availability of such support in the home country. [13]

Immigration Departmental Guidelines

Immigration, Refugees and Citizenship Canada (IRCC) formerly known as Citizenship and Immigration Canada has prepared a number of Guidelines to help make decision making consistent. These are set out in Operation Manuals prepared by Canada Immigration and periodically updated. These resources address the "best interest of the child" in its Immigration Manuals and special Operation Bulletins, and provide important guidance to immigration officers.[13] The Supreme Court had the following to say on the importance of the Immigration guidelines in *Baker*:

The guidelines show what the Minister considers a humanitarian and compassionate decision, and they are of great assistance to the Court in determining whether the reasons of [the H& C officer] are supportable. [14]

The following is an excerpt on the Humanitarian and Compassionate considerations in "best interest of the child" decisions taken from Operations Bulletin dated 2016-

03-02. What follows is the entire text on the issue of Best Interest of the Child from the Operations Bulletin.

Humanitarian and compassionate assessment: Best interests of a child

This section contains policy, procedures and guidance used by Immigration, Refugees and Citizenship Canada staff. It is posted on the Department's website as a courtesy to stakeholders.

Applies to

- in Canada
- overseas

A decision on a humanitarian and compassionate (H&C) application must include an assessment of the best interests of any child **directly affected** by the decision. "Any child directly affected" in this context means a Canadian or foreign-born child (and could include children outside Canada).

The relationship between the applicant and "any child directly affected" need not necessarily be that of parent and child, but could be another relationship that is affected by the decision. For example, a grandparent could be the primary caregiver who is affected by an immigration decision that would in turn affect the child.

It must be sufficiently clear from the material submitted that an application relies in whole, or at least in part, on this factor. An applicant has the burden of justifying the basis of their H&C submission. For some applicants, it can be difficult to express themselves in writing and it may be warranted to invite the applicant to an interview. If an applicant provides insufficient evidence to support the fact that best interests of a child is a factor, the decision maker may conclude that the grant of the exemption is not justified.

In assessing H&C submissions, the decision makers must be "alert, alive and sensitive" to the best interests of the children *(Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817) and should bear in mind that "[c]hildren will rarely, if ever, be deserving of any hardship" *(Hawthorne v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475, [2003] 2 F.C. 555). As children may experience greater hardship than adults faced with a comparable situation, circumstances which may not warrant humanitarian and compassionate relief when applied to an adult, may

nonetheless entitle a child to relief *(Kanthasamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61).

The codification of the principle of "best interests of a child" into the legislation **does not mean** that the interests of the child outweigh all other factors in a case. While factors affecting children should be given substantial weight, the best interests of a child is only one of many important factors that the decision maker needs to consider when making an H&C decision that directly affects a child.

The outcome of a decision under A25(1) that directly affects a child will always depend on the facts of the case. Decision makers must consider all evidence submitted by an applicant in relation to their A25(1) request. The following guidelines are not an exhaustive list of factors relating to children, nor are they necessarily determinative of the decision. Rather, they are meant as a guide and illustrate the types of factors that are often present in A25(1) cases involving the best interests of a child. As stated by Madam Justice McLachlin of the Supreme Court of Canada, "[t]he multitude of factors that may impinge on the child's best interest make a measure of indeterminacy inevitable. A more precise test would risk sacrificing the child's best interests to expediency and certainty" (*Gordon* v *Goertz* , [1996] 2 S.C.R. 27).

Factors to consider

Generally, factors relating to a child's emotional, social, cultural and physical welfare should be taken into account when raised. Some examples of factors that applicants may raise include but are not limited to:

- the age of the child
- the level of dependency between the child and the H&C applicant
- the degree of the child's establishment in Canada
- the child's links to the country in relation to which the H&C assessment is being considered
- the conditions of that country and the potential impact on the child
- medical issues or special needs the child may have
- the impact to the child's education
- matters related to the child's gender.

The facts surrounding a decision under A25(1) may sometimes give rise to the issue of whether the decision would place a child directly affected in a situation of risk. This issue of risk may arise regardless of whether the child is a Canadian citizen or foreign-born.

Children 18 years or over

BIOC must be considered when a child is under 18 years of age at the time the application is received. There may be cases in which the situation of older children is relevant and should be taken into consideration in an H&C assessment but if they are not under 18 years of age it is not a best interests of the child case. [14]

Relevant case law

- *Baker v. MCI* , [1999] 2 S.C.R. 817
- *Legault v. MCI* , [2001] 3 F.C. 277
- MCI *v. Hawthorne* , [2003] 2 F.C. 555
- *Owusu* v. *MCI* , [2004] 2 F.C. 635
- *Kanthasamy v. Canada (Citizenship and Immigration)* , 2015 SCC 61
- *See also Convention on the Rights of the Child* , [Can. T.S. 1992 No. 3].

The facts surrounding a decision under A25(1) may sometimes give rise to the issue of whether the decision would place a child directly affected in a situation of risk. This issue of risk may arise regardless of whether the child is a Canadian citizen or foreign-born. In such cases, it may be appropriate to refer to sections 13.1 to 13.6 of this chapter for further guidance. [15]

Canada's International obligations

One of the most important International Conventions on this issue of "best interest of the child" is the *International Convention of the Rights of a Child*. [16] Canada is a signatory, and it is the leading international human rights instrument on children's rights. [17] Article 3 of the *Convention* establishes the principle of the "best interests of the child." It reads as follows:

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. [18]

The rest of the *Convention of the Rights of the Child* is largely an explanation of how the "best interest of the child" applies in different contexts. Of particular relevance to the Canadian Humanitarian and Compassionate context are the following legal obligations:

- Not separating children from their parents (Art. 9 – "States Parties shall ensure that a child shall not be separated from his or her parents against their will…")

- Family reunification (Art. 10 – "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…")

- Child's right to be heard (Art. 12 – "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…") [19]

In Canadian law these obligations are binding. Section 3(3)(f) of the *Immigration and Refugee Protection Act* (IRPA) provides that:

(3) This Act is to be construed and applied in a manner that [...]

(*f*) complies with international human rights instruments to which Canada is signatory.

Further, the Federal Court of Appeal in *Guzman* has declared that unless there is a clear legislative intent to the contrary, the provisions of *IRPA* must be applied in a manner consistent with the international human rights instruments to which Canada is a signatory:

Paragraph 3(3)(*f*) should be interpreted in light of the modern developments in courts' use of international human rights law as interpretative aids. Thus, like other statutes, *IRPA* must be interpreted and applied in a manner that complies with "international human rights instruments to which Canada is signatory" that are binding because they do not require ratification or Canada has signed *and* ratified them. These

include the two instruments on which counsel for Ms. de Guzman relied heavily in this appeal, namely, the *International Covenant on Civil and Political Rights*, and the *Convention on the Rights of the Child*. **Thus, a legally binding international human rights instrument to which Canada is signatory is determinative of how *IRPA* must be interpreted and applied, in the absence of a contrary legislative intention.** [20] (emphasis added)

In its examination of Canada's compliance with its Convention obligations, the UN Committee on the Rights of the Child has highlighted the relevance of the Convention as applied to immigration law. In 1995, the Committee stated that it:

…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. [...] The Committee specifically regrets [...] cases where refugee or immigrant children born in Canada may be separated from their parents facing a deportation order. [21]

The Canadian Standing Senate Committee on Human Rights' 2007 report, *Children: The Silenced Citizens*, also raised a number of concerns about respect for the principle of best interests of the child in the immigration context. In light of their concerns, the Senate Committee emphasized:

that the best interests of the child should always be a primary consideration in immigration decisions affecting children. All immigration and border services officials dealing with children should receive orientation and ongoing training to ensure that they are fully aware of children's rights, as well as how to communicate effectively with children of different cultural backgrounds. The training programs that currently exist should be enhanced and revised to take into account the comments and criticisms expressed in this report (emphasis in the original). [22]

The doctrine of In Loco Parentis and De Facto Parent

In Canadian Family Law the doctrine of *in loco parentis* is often used by the courts' to establish parental responsibility for child support purposes. In *Andrews v Andrews*, the Saskatchewan Court of Appeal provided an in depth analysis of the Concept and Definition of *In Loco Parentis* stating:

[6] An examination of the concept and historical development of in loco parentis, the acquiring of the status, and the determination of the relationship and obligations under the relevant provisions of the *Divorce Act, 1985* is necessary in order to determine the issues.

[7] The term "in loco parentis" was used in s. 2(a) of the *Divorce Act,* S.C. 1967-68, c. 24 in the definition of "child" rather than the phrase "standing in the place of a parent" which is used in ss. 2(a) and (b) of the *Divorce Act, 1985*. Section 2 (a) of the *Divorce Act* read:

"2(a) 'child' of a husband and wife includes any person to whom the husband and wife stand in loco parentis and any person of whom either of the husband or wife is a parent and to whom either of them stands in loco parentis."

Nothing in the *Act* indicates that the change from the Latin term to the term "in place of a parent" was intended to change the accepted or judicially determined concept or meaning of in loco parentis to something else.

[8] The concept of in loco parentis, that is, the standing in the place of a parent or alternative parenthood and the obligations which flow from it grew out of the obligation or duty to provide for the support of one's child. This court defined the status of a person standing in the place of a parent, although not in the context of the *Divorce Act* but in the context of the *Fatal Accidents Act*, in *Shtitz v. C.N.R.*, 1926 CanLII 92 (SK CA) , [1927] 1 W.W.R. 193; 21 Sask. L.R. 345, where Turgeon, J.A., stated:

"A person in loco parentis to a child is one who has acted so as to evidence his intention of placing himself towards the child in the situation which is ordinarily occupied by the father for the provision of the child's pecuniary wants. In vol. 22 of the *Cyclopaedia of Law and Procedure,* at p. 1066, the following definition of the phrase in loco parentis is given:

'when used to designate a person it means one who has put himself in the situation of a lawful father to a child with reference to the office and duty of making provision for the child.'

"A full discussion of the subject will be found in *Powys v. Mansfield* (1838), 3 Myl. & Cr. 359, 7 L.J. Ch. 9."

[9] In *Powys v. Mansfield* (1838), 3 Myl. & Cr. 359, at 367; 40 E.R. 964, Lord Chancellor Cottenham stated:

"Lord Eldon, however, in Ex parte Pye (18 Ves. 140, 154) has given to it [in loco parentis] a definition which I readily adopt, not only because it proceeds from his high authority, but because it seems to me to embrace all that is necessary to work out and carry into effect the object and meaning of the rule. Lord Eldon says it is a person 'meaning to put himself in loco parentis, in the situation of the person described as the lawful father of the child'; but this definition must, I conceive, be considered as applicable to those parental offices and duties to which the subject in question has reference, namely, to the office and duty of the parent to make provision for the child. The offices and duties of a parent are infinitely various, some having no connection whatever with making a provision for a child; and it would be most illogical, from the mere exercise of any of such offices or duties by one not the father, to infer an intention in such person to assume also the duty of providing for the child."

There is an element of intention required. The alternate parent has voluntarily through his actions placed himself in the position which a parent would occupy for the provision of support and guidance and has assumed that obligation. In loco parentis indicates an intention on the part of the parent to fulfil the obligation and duty of the lawful parent of the child. See *Timmerman v. Timmerman,* [1976] 4 W.W.R. 296; 27 R.F.L. 312 (Man. Q.B.). [23]

Moreover, this premise most often addresses the role a “de facto parent” and relationship towards the child. In *Mills v Mills* a Supreme Court of Nova Scotia decision, Chief Justice Ian H. M. Palmeter’s considered the following scenarios to address an *in loco parentis* situation:

(a) the parental role which existed during the marriage;

(b) the parental role which existed after the separation;

(c) the contact between such parent and the child and, where appropriate,

(d) the wishes of the child. [24]

Accordingly, a *defacto parent*, or to use the legal terminology *loco parentis,* can qualify as a parent under any consideration of “the best interest of the child.”

Examples of Best Interest of the Child in Positive Humanitarian and Compassionate Decisions.

There are many good decisions are rendered each year by immigration officers who demonstrate genuine sensitivity towards children's interests. The following is an example of the best interests of the child assessment resulting in a positive Humanitarian and Compassionate decision involving four children. The children were all living with their grandmother in Ethiopia and separated from their mother, who was in Canada. What follows is an English translation of part of the Decision:

I am sensitive to the situation of the 4 children, of whom two are girls, aged between 8 and 13. I note that the applicant supports her children financially. The documentation consulted reports that, despite free access to schools, more than 30% of school-aged children do not avail themselves of this right. I note that this problem affects young girls particularly. Among other things, it is mentioned that the practice of female genital mutilation is commonplace, despite being prohibited in law. It is also mentioned that early marriages are very frequent. Moreover, I note the presence of a widespread practice in some regions, despite being illegal, consisting of kidnapping young girls and women with a view to marrying them." [25]

Here is another example, taken from an inland Humanitarian and Compassionate Decision involving a single mother with four children, from Pakistan. The mother was suffering from mental health problems which, according to a medical report, could be expected to deteriorate if the family were removed from Canada: Here is an English translation of the Decision.

Taking into consideration the best interests of the children who have practically spent their adolescence in North America and who seem to be well adapted to Canadian society, I consider that return to Pakistan would have significant repercussions on the children's lives.

…

I take into consideration that the children have adapted well to Canadian society and that their mother has demonstrated a will to adapt despite the handicap caused by her medical condition. I consider that the fact that they cannot rely on the support of a male member of their immediate family, who would take care of their welfare in Pakistan, would place them in a difficult situation in the case of a return. Taking into account the place of women in Pakistan, I consider that they, especially [the adolescent girl] would be left at the mercy of an essentially male society in which their mother would have difficulty providing for the four children's physical and moral wellbeing." [26]

Negative Humanitarian and Compassionate Decisions involving the Best Interest of the Child.

Three Mexican orphans

Three minor children (ages 6, 11 and 17 at the time of the Humanitarian and Compassionate Decision, October 2007) were orphaned when their parents were killed by drug traffickers and then fled to Canada with their elderly grandmother. The facts of the case were not disputed by CIC. In Canada, they were all in school and seemed to be coping reasonably well under the circumstances. Here is an excerpt from the Best Interest of the Child determination: What follows is the English translation:

The minor applicants are at the centre of a very sad life situation and I am very sensitive to the pain that they felt at the time of the tragic death of their parents […] Their lives were thrown into upheaval by their death, and the difficulties described by the social worker are plausible and confirmed. I am, however, of the opinion that these letters are insufficient to show that the return of these applicants to Mexico would cause them unusual, undeserved or disproportionate hardship, for the following reasons:

[…]

Although I am conscious of the links with Canada that the applicants have developed, I have no information that would permit me to believe that it would be impossible for them to resume their regular activities in Mexico, such as going to school, resuming contact with friends or making new ones. As of the date of the present decision, the applicants have been in Canada for less than two years. I am of the opinion that the short period of time in this country is not sufficient to demonstrate the creation of links so significant that it would involve a disproportionate hardship to break them, thus justifying the granting of an exemption. [27] (emphasis added)

This raises an important question: if returning children to the place where their parents were murdered is not an “unusual”, “undeserved” or “excessive” hardship for them, what is? The Immigration Officer seems to answer the question indirectly, apparently requiring proof that it would be “impossible” for the children to return to a semblance of normal life in their country of origin. This requirement is a very high threshold and almost impossible to meet.

Of course, even after a proper “best interests of the child determination,” it would have been open to the Immigration Officer to decide that the children’s interests were

outweighed by other factors in the file. However, the approach taken by the Immigration Officer here adopts an almost impossible threshold of looking at the children's previous life in Mexico and concluding that unless it is "impossible" for them to resume that life (minus their parents) there is no "excessive hardship" for them. This is an extremely harsh decision that minimizes the concept of "excessive hardship" in returning four orphans to Mexico without the support and love of their murdered parents. This decision caused a strong public protest against what was seen as a patently unreasonable decision. [28]

Another example of a negative decision involving "the best interest of the child" in the context of a claim for refugee protection is found in an Appeal to the Refugee Appeal Division (RAD) *X (Re).* ***[29]*** The Appellant made a claim for protection as a Convention refugee and received a negative decision from the Immigration Refugee Board. An Appeal was made to the RAD.

The facts are as follows the appellant was born in Georgia. She married a Greek national and moved to Greece in 2008. The minor appellant was born in Greece in 2009. Due to marital problems, the appellant left Greece with her son in 2012 and moved back to Georgia. The appellant lived with her family in Georgia. Her father and brother did not support the appellant's choice to leave her husband and her father was very abusive towards her. The appellant moved to get away from the abuse she endured from her father and brother at home. There, she met her boyfriend who lived in the same building as her. In 2013 the appellant's father and brother came to her apartment and beat her up when they found out about her relationship. They called her a whore and made her return to the family home where she was kept as a slave and prisoner. With the help from her mother, the appellant and the minor appellant fled Georgia. She made a refugee claim when she came to Canada.

The Decision in part deals with the issue of Standard of Review. However, on the question of "best interests of the child," the following observations were made:

…that the RPD or the RAD does not have the jurisdiction to consider the humanitarian and compassionate factors when assessing the merit of a refugee claim. The appellants refer to the *Gender Guidelines* and I note that these guidelines are procedural guidelines in making the refugee determination for such vulnerable individuals. The only context within which the concept of the "best interests of a child" is required for RPD proceedings would be with respect to procedural and evidentiary issues. I find that, by designating a representative who has acknowledged her role in the hearing, the best interests of the minor claimants have been met for these claims, in accordance with the Chairperson's Guideline 3. [37]

Furthermore, as the Guideline states:

GENERAL PRINCIPLE: In determining the procedure to be followed when considering the refugee claim of a child, the CRDD should give primary consideration the best interest of the child". The best interest of the child" principle has been recognized by the international community as a fundamental human right of a child. In the context of these guidelines, this right applies to the process to be followed by the CRDD. The question to be asked when determining the appropriate process for the claim of a child is "what procedure is in the best interests of this child?" With respect to the merits of the child's claim, all of the elements of the Convention refugee definition must be satisfied.

The Chairperson also states, as a part of the Guidelines, that:

These Guidelines do not lower the standard by which a child can be found to be a Convention refugee… The same burden of proof that is applied to claims presented by adults is applied to the claims made by children. They must establish that they have a well-founded fear of persecution in their country of origin.

I am also cognizant of the decision of Mr. Justice Shore in *Kim*, [38] as follows, which relates to the issue of best interests of a child in refugee claims. I find that this Federal Court case clearly defines what is considered to be the best interests of a child when dealing with a refugee claim and adequately relates to the issue in this RAD appeal. In *Kim*, the Justice Shore states the following:

[5] As considered by Justice de Montigny in *Munar*, … , the consideration of the best interest of the child must be read in the context of each specific decision to be rendered and differences may ensue, depending on the context as to whether it be a Refugee Protection Division (RPD) decision or an H&C decision.

[6] Turning to the context before the Court, it is noted that section 96 of the *Immigration and Refugee Protection Act* , S.C. 2001, c. 27 (IRPA) is not discretionary, but instead prescribes a certain test which must be met by a claimant. The IRPA does not permit the section 96 test to be compromised even if it is in the best interest of the child to remain in Canada. It is clear that the best interest of the child cannot substantively influence the answer with regard to whether a child is a refugee, but the best interest of the child are central to the procedure by which to reach a decision.

[7] The *Guidelines for Child Refugee Claimants* (Chairperson's Guidelines Refugee Protection Division. Guideline 3: Child Refugee Claimants effective September 30, 1996)

(Guidelines) direct the RPD to take the best interest of the child into consideration in a procedural, not a substantive, manner. The Guidelines state "[**i]n determining the procedure to be followed when considering the refugee claim of a child, the CRDD [now the RPD] should give primary consideration to the best interest of the child** " (Guidelines at p. 2). The majority of the Guidelines are devoted to ensuring the procedures used by the RPD are in the best interest of the child.

[8] The Court notes that Article 3(1) of the *Convention on the Rights of the Child* (CRC) does not stipulate how the best interest of the child are to be considered. Article 3(1) of the CRC states:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration.

[9] It is clear that Article 3(1) of the CRC does not state that the best interest of the child are to be a substantive consideration of every decision which affects children. The Court concludes that there is more than one manner by which decision-makers may consider the best interest of the child. Section 96 of the *IRPA* takes the best interest of the child into account because of the specific procedural and evidentiary considerations in the Guidelines. It is recognized that procedural and evidentiary considerations may be different for other determinations outside of the refugee framework; the key is to ensure that the best interest of the child are considered in context, within the framework of the determination to be made by a tribunal or entity deciding the case, dependent on its particular jurisdiction and legal purpose as set out in legislation. …
. . .

[75] It is the Court's conclusion that the Canadian immigration system is to be examined in its entirety, not as compartmentalized sections, when assessing whether due consideration has been shown to the best interests of children.

[76] The Canadian immigration system provides for several methods by which to gain entry into Canada, one of which is to be a refugee under section 96 . Section 96 provides a strict definition that is either met or not by the claimant in question. If the definition is met, then the claimant may be able to enter Canada as a refugee. If, on the other hand, the definition is not met, then the claimant may not enter Canada pursuant to that section and other options become available to him or her. One remaining option is pursuant to section 25, wherein the Minister in his discretion may grant an exemption "from any applicable criteria or obligation of" the IRPA . It is under section 25 that a substantive and thorough analysis of the best interest of the child is performed. At the

stage of a section 96 application, it is sufficient that the best interest of the child are taken into account procedurally, as directed by the Guidelines.The Court must reiterate that the best interest of the child cannot shoehorn a refugee claimant into the section 96 definition if the child's claim would otherwise be rejected, but it can influence the process which leads to that decision . [Emphasis found in original source document] [30]

Accordingly the best interest of a child," in the context of a refugee claim, "cannot shoehorn a refugee claimant into the section 96 definition if the child's claim would otherwise be rejected, but it can influence the process which leads to that decision . [Emphasis found in original source document]" [31]

Another interesting case considered whether or not "the best interest of a child" should be considered in assessing an individual who was over the age of 18. The Federal Court held in *Martinez:*

…..according to Justice de Montigny's reasoning above, an adult child could benefit from a best interest of the child analysis if he or she is dependent on their parent. Therefore, given that the Court has concluded, with regard to the first issue, that the applicants were unable to establish that Laura was financially dependent on her mother due to a lack of evidence, how could it then conclude that Laura was entitled to a best interest of the child analysis? Especially in light of the fact that, as she indicated and explained in her CAIPS notes, the immigration officer nonetheless examined humanitarian and compassionate considerations that might apply to the applicant's case before concluding that these were insufficient to compensate for fact that Laura did not meet the criteria of dependent child.

[29] Accordingly, given that the applicants were unable to establish the existence of dependency between them, it was reasonable for the immigration officer not to proceed with an analysis of the best interest of the child. [32]

In *Rezki v Canada (Citizenship and Immigration)*, an American born child was left out of his parent's Canadian Application for Permanent Residence. Apparently the parents thought that since the child was born in the United States he did not need to be added to the parents Landing Application. As a result the child was not examined and therefore could not be considered a member of the family class. The parents eventually tried to sponsor the child relying on IRPA s. 25 which deals with humanitarian and compassionate consideration and relying on "the best interest of the child." The sponsorship application was refused and the matter was sent for Judicial Review at the Federal Court. [33]

In most cases “the best interest of the child” is raised to allow a parent who is being deported to stay in Canada to look after the child. This case is somewhat unusual in that the parents has status as a permanent residents and the child who was not disclosed as part of the application for landing was the one facing removal. The Federal Court ruled:

[28] The factors that favour keeping a family together do not always outweigh upholding the integrity of the immigration system. In fact, if the interests of the child automatically prevailed, this would become an automatic exemption from paragraph 117(9) (*d*) of the Regulations , rendering that provision ineffective for a specific class of individuals.

[29] As the Federal Court of Appeal noted in *Kisana*, it is therefore clear that false or misleading statements may outweigh the interests of the child (para 27).

[30] In my view, it is clear that the immigration officer knew perfectly well that it would be in the best interests of the child to remain with his parents in Canada, if that is what they should decide to do. This is no way means that the assessment of the inherent hardship stemming from the rejection of an application based on humanitarian and compassionate considerations ignored the interests of the child.

As the Federal Court wrote in *Hawthorne v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475 (CanLII) , [2003] 2 FC 555:

[5] The officer does not assess the best interests of the child in a vacuum. The officer may be presumed to know that living in Canada can offer a child many opportunities and that, as a general rule, a child living in Canada with her parent is better off than a child living in Canada without her parent. The inquiry of the officer, it seems to me, is predicated on the premise, which need not be stated in the reasons, that the officer will end up finding, absent exceptional circumstances, that the “child’s best interests” factor will play in favour of the non-removal of the parent. In addition to what I would describe as this implicit premise, the officer has before her a file wherein specific reasons are alleged by a parent, by a child or, as in this case, by both, as to why non-removal of the parent is in the best interests of the child. These specific reasons must, of course, be carefully examined by the officer.

[6] To simply require that the officer determine whether the child’s best interests favour non-removal is somewhat artificial—such a finding will be a given in all but a very few, unusual cases. For all practical purposes, the officer’s task is to determine, in the circumstances of each case, the likely degree of hardship to the child caused by the removal of the parent and to weigh this degree of hardship together with other factors,

including public policy considerations, that militate in favour of or against the removal of the parent.

[31] I fail to see how the decision under review incorrectly applied the test under section 25 of the *IRPA* . As for the weight to be given to the factors to be considered, *Legault* establishes that this is up to the decision maker. I do think it is possible that the weight assessed could be inherently unreasonable: discretion cannot be exercised arbitrarily and with no grounding in reality (*Roncarelli v Duplessis*, 1959 CanLII 50 (SCC) , [1959] SCR 121).

[32] However, the immigration officer had serious grounds to question various aspects of this case.

[33] I cannot bring myself to conclude that this finding by the immigration officer does not fall within the range of possible outcomes, within the meaning of *Dunsmuir*. If the Court were to conclude otherwise, this would amount to recognition that subsection 117(9) of the Regulations is not in the public interest whenever the family member sponsored in the family class is a child. Here, although the applicants were expected to be as transparent as possible, such was not the case. In fact, the background information form that the mother filled out, at pages 15 to 18 of the certified record, states that Mehdi attended school at École Ernest Renan, in Casablanca, during the 2010–2011 school year. He did not become a student in Canada until September 2011, well after his parents were granted permanent residence, and clearly after he began school in Morocco. For every answer, the mother tersely replied that the form, which she herself signed on December 29, 2011, had to be wrong.

[34] In my view, someone who invokes humanitarian and compassionate considerations to seek an exemption from a legislative provision must do so in a perfectly transparent manner. The same is true for the obligation imposed in paragraph 117(9) (*d*) of the Regulations . The penalty is severe for those who do not act transparently. Section 25 exists to remedy certain situations, but it cannot be used to perpetuate grey areas. The applicants were not as transparent as they were required to be.

[35] The result was an application shrouded by doubts that the applicants did nothing to dispel, even though they were given many opportunities to do so. The immigration officer exercised her discretion, on behalf of the Minister, by giving full consideration, on the one hand, to the best interests of the child, concluding that he would not face unusual and undeserved or disproportionate hardship if he returned to the country of citizenship; and, on the other hand, to the provisions of the IRPA , which are clearly in the public interest and would have to be set aside to grant the application.

[36] It may well be that others could have come to a different conclusion. However, this is not what the reasonableness standard is about. As the Supreme Court wrote in *Dunsmuir*, this does not mean that reviewing courts "may be content to pay lip service to the concept of reasonableness review while in fact imposing their own view" (para 48). The decision under review is reasonable in every respect and must be treated with deference. [34]

In other words "the best interest of the child" arguments may not overcome serious breaches of *IRPA*. It is also important to understand that the role of a judicial review is not to overturn decisions made by an Immigration Officer but to consider the reasonableness of the decision and whether or not the finding by the immigration officer does not fall within the range of possible outcomes. The Federal Court is required to give considerable deference to the Decision Maker and intervene in only the most egregious cases and where there is an error of law.
There also is a lot of academic articles that address the issue of harm caused by separation of children and their parents who are deported. [35]

Focusing on the children's "best interest" means decisions are made with the ultimate goal of fostering and encouraging the child's happiness, security, mental health, and emotional development into young adulthood. The best interests of the child are best served by having both parents with the child on a full time basis. [36]

The loss of a parent and caregiver would lower the child's living standard and adversely affect the child's social and psychological development. The argument "the best interest of the child" is a powerful tool that can be used to help prevent the removal of a parent, or both parents, but does not guarantee that the parent will not be removed when considered together with all the other factors. It is important to marshal all of the positive facts and address all of the negative aspects in the case but "best interest of the child" is only one of many consideration that will affect the decision.

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[2] *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.); See also *Ribic, Marida v. M.E.I.* (I.A.B. 84-9623), D. Davey, Benedetti, Petryshyn, August 20, 1985; *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] S.C.C.3.
[3] *Baker v. MCI* [1999] 2 S.C.R. 817 at pars. 74 and 75
[4] *Thompson v. Canada (Citizenship and Immigration), 2003 CanLII 54277 (IRB), <http://canlii.ca/t/1rqg7> retrieved on 2017-04-08).*
[5] *Lee v Canada (Citizenship and Immigration),* 2014 CanLII 95518 (CAIRB).
[6] *MCI* v. *Legault* 2002 FCA 125.
[7] *Ibid* , at pars. 12 and 13.
[8] *MCI* v. *Hawthorne* 2002 FCA 475 at par. 4.
[9] *Hawthorne* , at par. 10
[10] *Somera Duque v. Canada (Citizenship and Immigration), 2007 FC 1367 (CanLII), <*http://canlii.ca/t/1vbp5 >, retrieved on 2019-02-18
[11] Owusu v. MCI, 2004 FCA 38
[12] Raposo v. MCI 2005 FC 118 at pars. 31 and 32; Ahmad v. MCI 2003 FCT 592 at par. 41 [11] Singh Sandar 2004 FC 1758 at par. 33; Walker v. MCI 2004 FC 1309 at pars. 2 and 3.
[13] Nguyen v. MCI 2004 FC 1629 at par. 11
[14] Link found at https://www.canada.ca/en/immigration...sts-child.html . Downloaded February 18, 2019.
[15] Ibid
[16] *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 Link found at https://www.ohchr.org/en/professiona...pages/crc.aspx
[17] Children's rights are also, of course, guaranteed by other international instruments, including the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights* and the *Convention on the Elimination of All Forms of Discrimination against Women.*
[18] Ibid.

[19] Ibid.
[20] De Guzman v. Canada (Minister of Citizenship and Immigration), [2005] 2 FCR 162, 2004 FC 1276, para 87, (CanLII), < http://canlii.ca/t/1jwmk >, retrieved on 2019-03-27.
[21] *U.N. Committee on the Rights of the Child - Canada's 1st Report* **,** Consideration of Reports submitted by the States Parties under Article 44 of the Convention, Convention on the Rights of the Child CRC/C/15/Add.37
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[25] CANADIAN COUNCIL FOR REFUGEES THE UNITED CHURCH OF CANADA
INTERNATIONAL BUREAU FOR CHILDREN'S RIGHTS: The understanding and application of "Best Interests of the Child" in H & C decision-making by Citizenship and Immigration Canada, September 2008, p. 10. Link found at https://ccrweb.ca/files/bicreport.pdf , Downloaded February 18, 2019.
[26] Ibid, pp. 10-11.
[27] Ibid, pp. 11-12.
[28] Ibid, p. 12.
[29] X (Re), 2015 CanLII 111002 (CA IRB), < http://canlii.ca/t/hp1mr >, retrieved on 2019-03-27
[30] Ibid. para 27.
[31] Ibid. para 27.
[32] Martinez v. Canada (Citizenship and Immigration), 2014 FC 109 (CanLII), < http://canlii.ca/t/g2zkz >, retrieved on 2019-03-27
[33] Rezki v Canada (Citizenship and Immigration), 2014 FC 492 (CanLII), <http://canlii.ca/t/g7x4r >, retrieved on 2019-03-27
[34] Ibid.
[35] See for Example "Health and Social Service Needs of US-Citizen Children with Detained or Deported Immigrant Parents" by Migration Policy Institute and Urban Institute, dated September 2015; "What Happens to A Child After A Parent Is Deported?" by Emily Deruy, National Journal, dated September 21, 2015; "Statement on the Effects of Deportation and Forced Separation on Immigrants, their Families, and Communities" by the Society for Community Research and Action, Am J Community Psychology, dated 2018.; "Sudden and Lasting Separation From Parent Can Permanently Alter Brain Development," NEUROSCIENCE, June 21, 2018; and "Report: Immigrant

Deportation, Separation Can Have 'Lifelong Impacts'" by Kristen Thometz, Chicago Tonight, August 3, 2018.
[36] Lee v Canada (Citizenship and Immigration), 2014 CanLII 95518 (CAIRB)).

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