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BAKER V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION) AND THE RIGHTS OF CHILDREN

SHARRYN AIKEN AND SHEENA SCOTT*

RÉSUMÉ

Les auteures analysent, du point de vue des droits des enfants, la portée de la décision de la Cour suprême du Canada dans la cause *Baker*. Après avoir délimité le cadre de réglementation et les faits relatifs à la cause, elles identifient les arguments clés présentés par les parties et donnent un aperçu de la réponse donnée par la Cour à ces arguments. Les aspects de l'arrêt concernant spécifiquement les droits des enfants sont analysés afin de faire ressortir les solutions positives du jugement et les réponses qu'il reste à régler. Les répercussions de l'arrêt sont analysées selon la réaction du public et la réaction judiciaire. Enfin, les auteures abordent le rôle des cours supérieures provinciales relativement aux approches contradictoires utilisées par ces tribunaux en ce qui a trait aux droits des enfants dans un contexte d'immigration. Les auteures concluent leur article en formulant des suggestions favorisant une meilleure connaissance administrative et judiciaire des droits des enfants dans les causes d'immigration, que ceux-ci possèdent leur citoyenneté ou non.

The law as it relates to children has traditionally considered them to be somehow inferior 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 interests ... 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.¹

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1. Justice C. L'Heureux-Dubé, "The Child and the Family Breakup/The Child in Need of Protection" in *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, Qc.: Les Éditions Yvons Blais Inc., 1999) at 358.

INTRODUCTION

Historically laws in Canada and around the world approached children as chattels, property to be allocated according to their parents' interests. Children were not fully legal persons with rights of their own deserving of protection. The latter part of the twentieth century witnessed dramatic progress in recognizing and respecting children's rights in Canada. In Ontario, for example, laws relating to child welfare and protection, mental health commitment, as well as custody and access reflect an evolved, albeit imperfect, recognition of the human rights of children.² An important watershed for children's rights was achieved in 1991, when Canada ratified the United Nations *Convention on the Rights of the Child*.³ The *Convention* is the fruit of a remarkable international consensus that children are persons with distinct rights and needs.⁴

In ratifying the *Convention*, together with one hundred and ninety other states, Canada pledged, *inter alia*, to ensure that the best interests of children would be a primary consideration in all actions concerning them, whether undertaken by public or private institutions, courts of law, administrative authorities or legislative bodies.⁵ Canada also pledged to ensure that children are provided an opportunity to be heard in any judicial or administrative proceeding affecting the child, in accordance with the age

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2. See e.g. *Child and Family Services Act*, R.S.O. 1990, c. C.11, as am. by *Advocacy, Consent and Substitute Decisions Statute Law Amendment Act, 1996*, S.O. 1996, c. 2. See also *Mental Health Act*, R.S.O. 1990, c. M.7, as am. by *Consent and Capacity Statute Law Amendment Act, 1992*, S.O. 1992, c. 32, and as am. by *Advocacy Consent and Substitute Decisions Statute Law Amendment Act*, *ibid.*, s. 72.
 3. 20 November 1989, Can. T.S. 1992 No. 3, 28 I.L.M. 1448, UN GAOR, 44th Sess., Supp. No. 49, UN Doc. A/RES/44/25 (entered into force 2 September 1990, entered into force for Canada 13 December 1991) [hereinafter *CRC* or *Convention*].
 4. See M.S. Pais, "The UN Convention on the Rights of the Child" in International Association of Women Judges, *supra* note 1 at 23. It is interesting to note that the *Convention* entered into force in less than a year, a unique achievement which no other United Nations instrument can claim.
 5. *CRC*, *supra* note 3, art. 3(1). For a discussion of the "best interests" principle in the domestic context, see N. Bala, "The Best Interests of the Child" (1995) 6 Supreme Court L.R. 453; M. Freeman, "The Best Interests of the Child: Is the Best Interests of the Child in the Best Interests of Children?" (1997) 11 Int'l J.L. Pol'y & Fam. 360; N. Bala, "The Best Interests of the Child in the Post-Modernist Era: A Central but Illusive and Limited Concept" in H. Niman & G.P. Sadvari, eds., *Special Lectures 2000: Family Law: A Colloquium on "Best Interests of the Child": New Perspectives on the Resolution of Custody Disputes* (Toronto: The Law Society of Upper Canada, Department of Continuing Legal Education, 1999). The full text of article 3 states:
 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.

and maturity of the child.⁶ Canadian immigration law and provisions relating to deportation in particular have lagged far behind in terms of according children rights to have their views and wishes considered as well as to participate directly in proceedings affecting them. The Committee on the Rights of the Child,⁷ in its *Concluding Observations on Canada* in 1995, identified this critical lacuna:

... The Committee regrets that the principles of non-discrimination, of the best interests of the child have not always been given adequate weight by administrative bodies dealing with the situation of refugees or immigrant children ... The Committee specifically regrets the delays in dealing with reunification of family in ... cases where refugee or immigrant children born in Canada may be separated from their parents facing deportation order.⁸

Contemporaneous with the U.N. Committee's comments on Canada's report, the Federal Court of Appeal determined that the Canadian born children of parents facing deportation to Poland had no relevant interests worthy of consideration. Speaking for a unanimous court, Décary J.A. noted that,

The appellant parents' decision to take their children to Poland with them or to leave them with family members living in Canada is a decision which is their own to make and which, to all appearances, they will make in the best interests of the children. The Canadian Government has nothing to do with this decision, which is of strictly private interest. There is no government action in this case which could bring the *Charter* into play.

6. *CRC, ibid.*, arts. 12(1), (2). The full text of article 12 states:

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 view of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative 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.

7. The Committee is a body of ten experts who are elected by states but serve in their personal capacity to monitor state compliance with the treaty. Members serve for a period of four years and are eligible for re-election if they are nominated again at the expiry of their term. Pursuant to art. 44 of the *CRC, ibid.*, Canada must submit a performance report with respect to measures it has adopted to give effect to the rights enshrined in the *Convention* every five years and defend the report before the Committee. Canada submitted its first report to the Committee in 1994 and the Committee evaluated Canada's report in its *Concluding Observations on Canada* the following year (Committee on the Rights of the Child, *Concluding Observations on Canada*, UN Doc. CRC/C/15/Add.37 (1995)).

8. Committee on the Rights of the Child, *ibid.* The full text can be found online: Canadian Heritage, Human Rights Directorate Homepage <<http://www.pch.gc.ca/ddp-hrd/ENGLISH/rotc/concobs.htm>>. The full text of Canada's reports to all U.N. treaty bodies, as well as the concluding observations of the treaty bodies in response to these reports, can also be found online: Canadian Heritage, Human Rights Directorate Homepage <<http://www.pch.gc.ca/ddp-hrd/ENGLISH/reports.htm>>. A record of the Committee's official documents is available online: United Nations High Commissioner for Human Rights Homepage <<http://www.unhchr.ch>>.

[T]he 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.

[A] child has no constitutional right never to be separated from its parents...⁹

The Supreme Court of Canada's recent decision in *Baker v. Canada (Minister of Citizenship and Immigration)*¹⁰ represents an incremental but important advance in the development of Canadian jurisprudence relating to the rights of children in immigration proceedings and beyond. One of the central issues in the case was the relevance of the *Convention's* provisions concerning the best interests of children to the exercise of administrative discretion.¹¹ The Supreme Court's decision reinforced the significance of the United Nations *Convention* in domestic law and decision making. The importance of valuing the rights, needs and interests of children in decisions affecting them has been affirmed. Yet the *Baker* decision leaves a number of critical questions unanswered. The participatory rights of children in "humanitarian and compassionate" applications¹² remain limited and there are disturbing signs, in the wake of the Court's decision in *Baker*, that the federal government remains uncommitted to the full realization of children's rights in the immigration context.

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9. *Langner v. Canada (M.E.I.)* (1995), 184 N.R. 230 at 233-234, 97 F.T.R. 118n, 29 C.R.R. (2d) 184 (C.A.), leave to appeal to S.C.C. refused (1995), 193 N.R. 400n, 30 C.R.R. (2d) 188n [hereinafter *Langner*]. See also *Naredo v. Canada (M.E.I.)* (1995), 184 N.R. 352, 96 F.T.R. 240 (C.A.), leave to appeal to S.C.C. refused (1995), 198 N.R. 397n; *Balaga v. Canada (Minister of Citizenship & Immigration)* (1995), 106 F.T.R. 71.

It should be noted that the right to family unity and protection of the family unit is recognized in both international and regional human rights instruments, but is not explicitly articulated in the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*]. See *Universal Declaration of Human Rights*, GA Res. 217 (III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948), arts. 16(3), 25(1), (2); *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47, 6 I.L.M. 368, arts. 17, 23(1), 24(1) (entered into force 23 March 1976, accession by Canada 19 May 1976) [hereinafter *ICCPR*]; *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 U.N.T.S. 3, Can. T.S. 1976 No. 46, arts. 10, 12 (entered into force 3 January 1976); *CRC*, *supra* note 3, arts. 8, 9, 16; OAS, Ninth International Conference of American States, Final Act, *American Declaration of the Rights and Duties of Man*, OR OEA/Ser.L/V/II.23/Doc.21, rev. 6, arts. V, VI (1948) [hereinafter *American Declaration*]; *African Charter on Human and Peoples' Rights*, O.A.U. Doc. CAB/LEG/67/3, rev. 5, 4 E.H.R.R. 417, 21 I.L.M. 58, art. 18 (entered into force 21 October 1986); *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 221, Eur. T.S. 5, art. 8(1).

10. (1999), 174 D.L.R. (4th) 193, 243 N.R. 22, 14 Admin. L.R. (3d) 173, online: QL (SCJ) [hereinafter *Baker* cited to S.C.J.].
11. A significant issue which the Court addressed but which will not be canvassed extensively in this paper is the appropriate standard of review to be applied to the exercise of administrative discretion. Other issues, also considered by the Court and which will be examined briefly below, include whether section 83 of the *Immigration Act* restricts the appellate jurisdiction of the Federal Court of Appeal to the question which has been certified by the Federal Court Trial Division and the scope of the doctrine of legitimate expectation.
12. Hereinafter H & C applications.

This paper examines the implications of the Supreme Court of Canada's decision in the *Baker* case from a "children's rights" perspective. The arguments raised by the various litigants regarding the relevance of the *CRC* in reviewing discretionary decisions under the *Immigration Act*¹³ as well as the Court's responses to those arguments are canvassed. The administrative law issues relating to the standard of judicial review to be applied to discretionary decision making and the scope of the duty of fairness are examined through a child-centred lens. While many facets of judgment do not impinge directly on children's rights, an overview of the broad sweep of the Court's reasoning is provided in order to assess the decision's impact on children as both stakeholders and participants in the immigration program.¹⁴ After commenting on the decision itself, we then examine both public and judicial reaction to the *Baker* ruling with a view to highlighting the gaps in the legal framework for protecting children's rights. Finally, the role of provincial superior courts in protecting the independent rights and interests of children threatened with a risk of harm within the immigration context will be addressed with reference to the conflicting approaches adopted by these courts. We conclude by urging greater administrative and judicial recognition of children's rights within a regulatory scheme that has become increasingly resistant to human rights claims.

I. THE IMMIGRATION ACT AND THE CONTEXT OF THE CASE

Section 9(1) of the *Immigration Act* provides that as a general rule, every immigrant shall apply for and obtain a visa before appearing at a port of entry. There are, however, some important exceptions to this rule, including special procedures for live-in care givers and Convention refugees to apply for permanent residence from within Canada.¹⁵ In addition, subsection 114(2) of the *Act* provides a residual authority to the Minister of Citizenship and Immigration to exempt anyone from any of the require-

13. R.S.C. 1985, c. I-2 [hereinafter *Act*].

14. An in-depth analysis of the administrative law dimensions of the *Baker* case is beyond the scope of this paper. For insightful commentary in that regard, see, D. Brown & J. Evans, "Discretionary Justice: Reasons and Reasonableness: Case Comment on *Baker v. Canada (Minister of Citizenship and Immigration)*", online: Canvasback Publishing Homepage <http://www.browndanedevans.com/case_comm.html>; L. Sossin, "Developments in Administrative Law: The 1997-1998 and 1998-1999 Terms (2000) 11 Supreme Court L.R. (forthcoming); D. Mullan, "*Baker v. Canada (Minister of Citizenship and Immigration)* – A Defining Moment in Canadian Administrative Law" (1999) 7 R.A.L. 145.

15. People accepted into the Live-in Care Giver Program must apply from outside Canada. They are granted an employment authorization and temporary visa to come to Canada. After satisfying an immigration officer that they have worked for two years of their first three years in Canada providing child care or other home support care, they are then eligible to apply for landing from inside the country. Section 2(1) of the *Immigration Regulations 1978* provides the definition of live-in care giver and s. 20(1.1) sets out the criteria for qualifying for the program (S.O.R./78-17 as am. by S.O.R./93-44 [hereinafter *Regulations*]). A Convention refugee must first be determined eligible to claim refugee status in Canada according to criteria set out in s. 46.01(1) of the *Act* and then they must satisfy the Convention Refugee Determination Division of the Immigration and Refugee Board that they have a "well-founded fear of persecution" as defined in s. 2(1) of the *Act*.

ments of the *Act* or otherwise facilitate their admission owing to the existence of "compassionate or humanitarian considerations." Section 2.1 of the *Regulations*¹⁶ implements the exemption in the same terms as those in subsection 114(2). Neither the *Act* nor the *Regulations* provide any indication of the meaning to be ascribed to "humanitarian or compassionate" nor of the procedures applicable to an individual seeking such an exemption. Administrative guidelines have been developed and are contained in the *Immigration Manual*.¹⁷ A series of changes introduced to the immigration guidelines in 1999, shortly before the Supreme Court considered the *Baker* case, did not substantially alter the basic formulation.¹⁸ Applicants bear the burden of satisfying an immigration officer that their personal circumstances are such that the hardship of having to obtain a visa outside Canada in the normal manner would be either (i) unusual and undeserved or (ii) disproportionate. There is an application fee of \$500 for the primary applicant and there is no limit on the number of times the process may be invoked.

In practice applications are rarely given favourable consideration unless the applicant can demonstrate successful establishment in addition to whatever hardship might be suffered in their home country. A request for humanitarian and compassionate consideration is processed as an administrative review. While the principles of fundamental justice have afforded a full oral hearing to refugee claimants,¹⁹ H & C applicants have

16. *Ibid.*

17. Citizenship and Immigration Canada, *Immigration Manual*. The *Manual* is available online: Citizenship and Immigration Homepage <<http://www.cic.gc.ca>>.

18. Two changes, however, merit some attention. Under the former guidelines a special category of "Public Policy" reasons for granting exemptions included a provision for "illegal de facto residents" who had established themselves in Canada after a period of many years and sought to regularize their status (*ibid.*, "Examination and Enforcement", Chapter IE-9, s. 9.06). This category was the only remedy for many women who came to Canada to take up positions as domestic workers outside legal channels. The underlying policy rationale for this category seemed to be a recognition that people who had severed their ties with their home country and demonstrated an ability to be self sufficient in Canada over a significant period of time should not be subject to indefinite penalty for gaining illegal admission. The new guidelines, however, specifically proscribe such recognition, noting instead that positive consideration may be warranted when individuals have been in Canada for a prolonged period of time due to "circumstances beyond their control" (*ibid.*, "Inland Processing", Chapter IP-5, s. 8.7). The second revision relates to the category under the former guidelines of "Situations Involving Family Dependency" (*ibid.*, Chapter IE-9, s. 9.07). In the new guidelines this category has been elaborated and clearly extended to address the case of "Separation of parents and dependent children" (*ibid.*, Chapter IP-5, s. 8.5). Immigration officers are advised that the "removal of a status-less individual from Canada may have an impact in relation to family members who do have a legal right to remain (ie., permanent residents or Canadian citizens). In evaluating such cases officers are directed to "balance the different and important interests at stake." Furthermore, international human rights standards such as the *Convention on the Rights of the Child* may be considered (*ibid.*). Notwithstanding the permissive language, the inclusion of this reference is an improvement over the former guidelines. The revised guidelines were not before the Court in *Baker* as Ms. Baker's case had been determined under the former IE-9 policy framework.

19. In the case of *Singh v. Canada (M.E.I.)*, [1985] 1 S.C.R. 177, 17 D.L.R. (4th) 422, 58 N.R. 1 [hereinafter cited to S.C.R.], Wilson J. found that the procedures which were in effect at that time for determining refugee status did not comply with s. 7 of the *Charter supra* note 9. In particular,

no right to a hearing or even an interview. For many years the courts refused to accept that an applicant seeking judicial review of an immigration officer's decision was entitled to anything more than minimal fairness in what was otherwise characterized as a wholly discretionary decision.²⁰ Humanitarian and compassionate applications can be made in the context of any application to the Department but arise most frequently in cases like that of Mavis Baker, individuals already in Canada and seeking special consideration to remain.

Ms. Baker is a woman from Jamaica who came to Canada in 1981 as a visitor "looking for a better life."²¹ She overstayed her visit and remained in Canada, supporting herself as a live-in domestic worker for eleven years. During that time she had four children: the eldest was born in 1985, twins were born in 1989 and the youngest child was born in 1992. Ms. Baker was self-sufficient until suffering an attack of post partum psychosis following the birth of her youngest child. While undergoing treatment, the twins were placed in the custody of their father, a permanent resident of Canada, and the other two went into foster care. As her health improved, the two children placed in foster care returned to live with Ms. Baker. The other two remained with their father, but Ms. Baker and her former partner maintained a hybrid family in which the children visited back and forth between the two homes. It deserves mention that Ms. Baker's former partner had a new spouse and his life was rooted in Toronto. An affidavit clearly indicated that he lacked the means to support all four of the Baker children in addition to other children of his own and that he was not prepared to move to Jamaica in the event that Ms. Baker was deported.²² In effect the children faced the impossible situation of having to "choose" between siblings and parents on the one hand and their country on the other. At pre-removal and removal interviews for Ms. Baker, counsel requested that her children be permitted to speak and to have independent counsel. The children were not allowed to participate directly.²³

Ms. Baker learned that her H & C application was unsuccessful by a letter that simply indicated that her application had been denied. The letter was signed by a senior immigration officer and no reasons were provided. Ms. Baker's counsel subsequently requested and was provided with notes made by the first level immigration officer who had reviewed her file. These notes contained that officer's reasons for recommending that the superior officer deny the application. The notes included the following observations:

Wilson J. emphasized that where matters of credibility were at issue, the principles of fundamental justice required an oral hearing (*ibid.* at 212-216). This ruling resulted in a complete overhaul of status determination procedures and the creation of the Immigration and Refugee Board.

20. The nadir and leading case on this point is *Shah v. Canada (M.E.I.)* (1994), 170 N.R. 238, 81 F.T.R. 320n, 29 Imm. L.R. (2d) 82 (F.C.A.) [hereinafter *Shah*]. See M. Bossin, "'After a Thorough and Sympathetic Review': The State of Humanitarian Applications in Canada" (1999) 14 J.L. & Soc. Pol'y 107.
21. *Affidavit of M. Baker* (2 February 1997) at para. 3.
22. *Ibid.* at para. 27.
23. *Baker, supra* note 10 (Appellant's factum at paras. 4, 11).

This case is a catastrophe [*sic*]...

The PC is a paranoid schizophrenic and on welfare. She has no qualifications other than as a domestic. She has FOUR CHILDREN IN JAMAICA AND ANOTHER FOUR BORN HERE. She will, of course, be a tremendous strain on our social welfare systems for (probably) the rest of her life. There are no H&C factors other than her FOUR CANADIAN-BORN CHILDREN. Do we let her stay because of that? I am of the opinion that Canada can no longer afford this type of generosity.²⁴

Ms. Baker's counsel sought judicial review of the decision, asking that the refusal be set aside. The Federal Court - Trial Division dismissed the application and certified the following question for appeal to the Federal Court of Appeal:

Given that the Immigration Act does not expressly incorporate the language of Canada's international obligations with respect to the International Convention on the Rights of the Child, must federal immigration authorities treat the best interests of the Canadian child as a primary consideration in assessing an applicant under s. 114(2) of the Immigration Act?²⁵

The Federal Court of Appeal limited its consideration of the appeal to the question stated by the Trial Division. The answer it gave to that question was a definitive no. Strayer J.A. dismissed the relevance of the *Convention* as it related to the Baker children for three principal reasons. First, not having been incorporated into domestic law, the *Convention* could not constitutionally affect the discretion granted by a statute of Parliament (or a provincial legislature), as this would offend the separation of powers. Furthermore, although the interests of children of prospective deportees are relevant, the *Convention* could not prescribe, in a manner that is enforceable by the courts, a priority for the best interests of the child in a proceeding that concerned the deportation of a parent and not a child. Second, ratification of the *Convention* did not create a "legitimate expectation" that public administration would be conducted in accordance with its provisions. The Court concluded that the doctrine of legitimate expectation creates procedural rights only, while the interests of the children are a substantive matter.²⁶

24. *Baker*, *supra* note 10 at para. 5.

25. *Baker v. Canada (Minister of Citizenship & Immigration)* (1995), 101 F.T.R. 110, 31 Imm. L.R. (2d) 150 at 159, Simpson J. (T.D.).

26. *Baker v. Canada (Minister of Citizenship & Immigration)* (1996), 142 D.L.R. (4th) 554, [1997] 2 F.C. 127 (C.A.). See United Nations Children's Fund, *The United Nations Convention on the Rights of the Child: A Practical Guide to its Use in Canadian Courts* by V. Yolles (Toronto: UNICEF Canada, 1998) at 40. Note that the doctrine of "legitimate expectation" is a British concept that has been imported into Canadian law in a somewhat confused fashion. In *Bendahmane v. Canada (M.E.I.)* (1989), 95 N.R. 385, [1989] 3 F.C. 16, 8 Imm. L.R. (2d) 20, the doctrine was successfully applied to an immigration case. See D. Wright, "Rethinking the Doctrine of Legitimate Expectations in Canadian Administrative Law" (1997) 35 Osgoode Hall L.J. 139; P.A. MacPherson, "The Legitimate Expectation Doctrine and its Application to Administrative Policy" (1995-96) 9 Can. J. Admin. L. & Pract. 141; D. Shapiro, "Legitimate Expectations and its Application to Canadian Immigration Law" (1992) 8 J.L. & Soc. Pol'y 282.

Counsel for Ms. Baker appealed the decision to the Supreme Court of Canada and was joined by three public interest intervenors, the Canadian Council of Churches, the Charter Committee on Poverty Issues and a coalition consisting of the Canadian Foundation for Children, Youth and the Law, the Defence for Children International-Canada and the Canadian Council for Refugees. The Court agreed to consider the appeal, but refused the appellant's motion to set a number of constitutional questions. Thus the appeal did not encompass a direct challenge to subsection 114(2) of the *Immigration Act*. It was framed primarily in terms of the role of the *Charter of Rights and Freedoms* and the *CRC* in interpreting the limits of administrative discretion. It should be noted as well that the Court refused leave to intervene to the Baker children and a fourth group, a coalition consisting of the African Canadian Legal Clinic, the Congress of Black Women of Canada and the Jamaican Canadian Association.²⁷ This group sought to assist the Court in addressing the problem of racial bias in immigration law, policy and decision making.

II. AT THE SUPREME COURT: THE ARGUMENTS

At the Supreme Court, the appellant's arguments focused on the content of the duty of fairness in the exercise of executive discretion. The appellant argued that the immigration officer's notes gave rise to a reasonable apprehension of bias.²⁸ The appellant also argued that the *CRC* was binding on immigration officials when exercising their authority and discretion under the *Act*. The appellant acknowledged that in order for a treaty to be directly enforceable in Canadian courts, it had to be incorporated into domestic law.²⁹ However, the appellant asserted that, in the absence of the Convention's explicit incorporation into the *Immigration Act*, the Court could infer "implicit incorporation" by reference to the *Act's* overriding objectives and values. These objectives included an express recognition of the need to facilitate family reunification and to fulfil Canada's international legal obligations.³⁰

27. *Baker*, *supra* note 10 (Order of Major J., 31 March 1998); see also *ibid.* (Factum of proposed intervenors, African Canadian Legal Clinic *et al.*).

28. *Ibid.* (Appellant's factum).

29. Canada operates on the basis of the "transformation" theory where conventional international law is concerned. A treaty must be directly implemented by domestic legislation to become part of Canadian law. See generally H.M. Kindred *et al.*, *International Law: Chiefly as Interpreted and Applied in Canada*, 5th ed. (Toronto: Emond Montgomery, 1993) at 147-48; D. Bassan, "The Canadian Charter and Public International Law: Redefining the State's Power to Deport Aliens" (1996) 36 *Osgoode Hall L.J.* 583.

30. *Baker*, *supra* note 10 (Appellant's factum at para. 119). *Act*, *supra* note 13, ss. 3(c), (g). Arguably further support for the conclusion that the *Immigration Act* implemented the *CRC* is that ratification took place only after extensive federal-provincial consultation and that representations by officials in both domestic and international fora demonstrate a clear intention on the part of federal, provincial and territorial governments to give effect to its obligations under the *CRC*.

The theory of "implicit incorporation" has been advanced by Anne F. Bayefsky in *International Human Rights Law: Use in Canadian Charter of Rights and Freedoms Litigation* (Toronto: Butterworths, 1992) at 30-63. She argues that an absence of express reference to Canada's international human rights treaties in the *Charter* and other federal and provincial statutes, "should not be fatal to a

The appellant argued that the duty of fairness must be interpreted in light of Canada's obligations under the *CRC* and that therefore the best interests of the child should be a primary consideration in a humanitarian and compassionate application as part of the balancing of state and party interests.³¹ Other rights conferred by the *CRC* required that the applicant, her children and the other parent/parental figure should be given notice of the proceeding, notice of the right to counsel and an opportunity to make written and oral submissions on the removal of the parent; and reasons for the decision should be provided. The appellant also cited article 23(1) of the *International Covenant on Civil and Political Rights* and article VI of the *American Declaration on the Rights and Duties of Man*, both of which are ratified by Canada and recognize the right of everyone to establish a family and to have it afforded protection.³² The appellant relied on the doctrine of legitimate expectation to bolster these submissions. In this context, the appellant argued that an immigration officer's discretion must be exercised in accordance with principles enunciated in the *Charter* and which mirrored those in the *CRC*. The *Charter* arguments were grounded in section 7 and the principles of fundamental justice. Sections 2, 6 and 15 were also relied upon as informing the scope and content of section 7 and in their own right.³³

The intervenors elaborated on distinct facets of the issues presented by the appellant. The Charter Committee on Poverty Issues focused on the legal effect of the *CRC* as a human rights treaty over the exercise of discretion under subsection 114(2) of the *Immigration Act*. The Charter Committee set out the two main routes by which international human rights treaties to which Canada is a party structure administrative decision making.³⁴ First, international human rights law informs the content of *Charter* rights, which in turn can be used to interpret the statutory limits of administrative discretion. Second, international human rights treaties can be used in statutory interpretation, based on the presumption of legislative compliance with international law.

In their factum, the Charter Committee elaborated on the two interpretive principles established by the Supreme Court in *Slaight Communications v. Davidson*.³⁵ The first

determination that they are indeed implementing legislation, or intended to 'give effect to' Canada's human rights treaty obligations. On the contrary, the overall policy of facilitating Canada's adherence to its international obligations, without undermining the nature of Canadian federalism, would be adequately served by acknowledging the stated guideline of the Department of External Affairs that implementing legislation may be enacted "without express reference to the treaty" (*ibid.* at 62-3, citing Canada, Department of External Affairs, Communiqué (24 June 1987) at 1). This approach was not fully elaborated by the appellant in *Baker*, although it was advanced in a supporting affidavit by David Matas submitted with the appellant's application for leave to appeal to the Supreme Court. It has not been adopted by Canadian courts.

31. Appellant's Factum, *ibid.* at para. 100, citing *CRC*, *supra* note 3, art. 3(1).

32. *CRC*, *ibid.*, art. 12; *ICCPR* and *American Declaration*, *supra* note 9.

33. The appellant advanced the argument that freedom of association under s. 2 of the *Charter* includes the right of individual members of a family to associate with each other. This argument was not fully developed by any of the parties in the *Baker* case.

34. The Charter Committee did not adopt Bayefsky's theory of "implicit incorporation" as advanced by the appellant (Bayefsky, *supra* note 30).

principle, which the Charter Committee referred to as the “international human rights presumption”, was extracted from the following statement by Dickson C.J.C.:

... [T]he *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified.³⁶

The Charter Committee described the second principle as the “*Charter* compliance presumption”, requiring statutes to be interpreted as far as possible so as not to empower administrative actors to violate *Charter* rights.³⁷ They identified the presumption of conformity of statutes with international law as a “rule of law” doctrine tied to the institutional role of the Courts in promoting fundamental legality. Accordingly, it was submitted that there is no basis for the Federal Court of Appeal’s concern that the executive, by ratifying the *CRC*, is fettering the discretion of Parliament. Such reasoning would “undermine the very purpose of judicial review in a society based on rule of law.” While Parliament can legislate contrary to international law, it

must enact provisions that clearly and unavoidably conflict with international law to rebut the presumption of compliance with international law. Where it does so, international law will have no direct effect on the statute. Where it has not done so, courts must strive to interpret domestic statutes and the constraints on discretionary decision-making in compliance with international law.³⁸

The Charter Committee proceeded to develop the arguments raised by the appellant concerning, *inter alia*, the violations of the *Convention* and sections 7 and 15 of the *Charter*. They identified the specific examples of intersecting stereotypes reflected in the immigration officer’s notes concerning Ms. Baker’s identity and attributed status as a Black woman, single mother, social assistance recipient, psychiatric survivor and immigrant. The Charter Committee highlighted the extent to which the officer’s prejudices resulted in clear discrimination against Ms. Baker and her children. With regard to the children, the Charter Committee placed particular emphasis on the discriminatory treatment they suffered as result of their economic disadvantage. The children were directly harmed through the treatment of their mother and the fact that her status as a social assistance recipient counted heavily against allowing her to remain in Canada. The Charter Committee argued that article 2(1) of the *Convention*

35. [1989] 1 S.C.R. 1038, 59 D.L.R. (4th) 416, 93 N.R. 183 [hereinafter *Slaight Communications* cited to S.C.R.] as cited in *Baker*, *supra* note 10 (Factum of the Charter Committee on Poverty Issues).

36. *Slaight Communications*, *ibid.* at 1056; see also Factum of the Charter Committee on Poverty Issues at paras. 52-3.

37. The principle was articulated in the following terms by Lamer J.: “... Legislation conferring an imprecise discretion must therefore be interpreted as not allowing the *Charter* rights to be infringed. Accordingly, an [administrative] adjudicator exercising delegated powers does not have the power to make an order that would result in an infringement of the *Charter*, and he exceeds his jurisdiction if he does so.” *Ibid.* at 1078.

38. *Baker*, *supra* note 10 (Factum of the Charter Committee on Poverty Issues at paras. 52-53). See also, R. Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Clarendon Press, 1994) at 206-207.

included a non-exhaustive list of prohibited grounds of discrimination and that economic disadvantage "can be viewed as being located in the interaction of the enumerated grounds of 'social origin' and 'property' and the open-ended 'other status.'"³⁹ It deserves mention at this juncture that neither the appellant nor any of the intervenors fully elaborated upon the anti-Black racism inherent in the officer's notes or provided an analysis of the extent to which the officer's individuated prejudices might be understood in terms of the broader and historic problem of systemic racism in Canada's immigration program.⁴⁰ In this regard, the appellant's litigation strategy was mapped out collaboratively with the intervenors and proceeded on the assumption that the African Canadian Legal Clinic would be the most appropriate voice to engage the Court on the issue of anti-Black racism. When Major J. denied the Clinic's motion for leave to intervene, the Court contributed to the erasure of race and racism as defining elements of the case. We will revisit this issue in our commentary on the Court's judgment.

The Canadian Foundation for Children, Youth and the Law *et al.* argued that security of the person, as guaranteed by section 7, afforded the Baker children a constitutionally protected right to psychological and emotional integrity as well as to protection and preservation of their family. Further, the children enjoyed a liberty interest in choosing their place of residence, which was supported by their right to remain in Canada pursuant to the mobility rights guarantee of section 6 of the *Charter*. These rights could only be violated in accordance with the principles of fundamental justice. They argued that the operative principles of fundamental justice were: the best interests of the child test, the right to be heard and the right to be free from discrimination. An integral part

39. *CRC*, *supra* note 3, art. 2(1); (Factum of the Charter Committee on Poverty Issues, *ibid.* at para. 42). The full text of art. 2 of the *CRC* states:

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.

40. Numerous scholars, public commissions and even the courts have recognized the extent to which anti-Black racism is a pervasive feature of the Canadian social and legal fabric. See e.g.: *R. v. Parks* (1993), 84 C.C.C. (3d) 353 (C.A.), leave to appeal to S.C.C. refused (1994) 72 O.A.C. 159n, 17 O.R. (3d) xvii, 87 C.C.C. (3d) vi, in which the court took note of the overwhelming evidence of anti-Black racism in Canada; F. Henry et al., *The Colour of Democracy: Racism in Canadian Society* (Toronto: Harcourt Brace & Co., 1995) at 59-101; C. Aylward, *Canadian Critical Race Theory: Racism and the Law* (Halifax: Fernwood Publishing, 1999); *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (Ontario: Queen's Printer, 1995) at ii (Co-chairs M. Gittens & D. Cole); *Stephen Lewis Report on Race Relations in Ontario* (Ontario: Queen's Printer, 1992). With regard to racism in the immigration program in particular, see D. Matas, "Racism in Canadian Immigration Policy" in C. James ed., *Perspectives on Racism and the Human Services Sector* (Toronto: University of Toronto Press, 1996); L.M. Jakubowski, *Immigration and the Legalization of Racism* (Halifax: Fernwood Publishing, 1997); and V. Knowles, *Strangers at our Gates: Canadian Immigration and Immigration Policy, 1540-1997* (Toronto: Dundurn Press, 1997).

of the best interests test and the right to be heard was consideration of the views and wishes of the child. The intervenors submitted that each one of these principles of fundamental justice had a counterpart in the *CRC*. The nature and content of the *CRC* was thereby incorporated into domestic law through the *Charter*. They noted the significance of Japan's formal reservation that article 9(1) of the *CRC* 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 immigration law." It was emphasized that Canada did not make any such reservation.⁴¹ The content of the rights and the appropriate tests to be employed coincided with the submissions of the appellant, focusing on the issue of standing for the children and consideration of best interests, including wishes as a primary consideration. In the coalition's submission,

Recognition of children as independent rights-bearers with rights separate and apart from their parents is integral to a legally sound analysis. To say that the parent can and will put forward a child's case is to ignore the child as an individual and legal entity and to fly in the face of the Convention, the Charter and the principles of natural and fundamental justice.⁴²

The Canadian Council of Churches framed its arguments on the basis of the importance of access to an effective remedy for Ms. Baker and for her children. The Council argued that international human rights instruments supported an independent right of access to a meaningful remedy. This right was specifically grounded in the *CRC* by

41. *Baker, supra* note 10 (Factum of the Canadian Foundation for Children, Youth and the Law *et al.*, at para. 24); R. Hodgkin & P. Newell, *Implementation Handbook for the Convention on the Rights of the Child* (New York: UNICEF, 1998) at 122-123. Canada has entered only two reservations to the *Convention*: to art. 21 with respect to aboriginal adoption and to art. 37(c) with respect to youth detention. The full text of art. 9 of the *CRC, supra* note 3, states:

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 child 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 custody of the State) of one or both parents or of the child, the State Party shall, upon request, provide 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.

42. *Ibid.* (Factum of the Canadian Foundation for Children, Youth and the Law *et al.*, at para. 4).

way of articles 9 (the right of children to maintain relations and contact with both parents and the corresponding duty on the state not to separate children from their parents unless it is in their best interests) and 10 (the right of children and their parents to leave any country and to enter their own for purposes of reunion or the maintenance of the child-parent relationship).⁴³ The Council emphasized that access to international and regional human rights tribunals is granted in cases where the complainant has not complied with the general requirement of exhausting domestic remedies prior to seeking international redress when those domestic avenues proved to be ineffective or "dead ends". According to the Inter-American Commission on Human Rights, a remedy is ineffective where the procedure fails to incorporate due process rights for the individual.⁴⁴ The Council called for due process rights in line with those raised by the appellant and a standard of judicial review based on "correctness". The Council suggested that a "fair process capable of providing an effective remedy can be accomplished within the present structure of the *Act*."⁴⁵

Another important argument raised by the Council addressed the relevance of citizenship "status" in the determination of human rights entitlements. This issue was key to Ms. Baker, who had no "status" in Canada. From a children's rights perspective, this argument has important implications for future cases as not all children of potential deportees will be Canadian-born. The Council submitted that the relevant context for ascertaining human rights in this case is an international one, in which all persons, regardless of country of origin, have access to basic human rights protections. The scope or parameters of a right may be delineated by status, but fundamental rights entitlements should not be based on status as such an approach would be inherently discriminatory.⁴⁶ The Council also raised concerns regarding the broadened "contextual approach" to rights in the immigration context that the Court had accepted in *Chiarelli v. Canada (Minister of Employment and Immigration)*.⁴⁷ The Council argued

43. *Baker, ibid.* (Factum of the Canadian Council of Churches at para. 10).

44. *Velásquez Rodríguez Case (Honduras)* (1988), Inter-Am. Ct. H.R. (Ser. C) No. 4, *Annual Report of the Inter-American Court of Human Rights: 1988*, OEA/Ser.L/V/III.19/doc.13 (1988) 35. See also Inter-Am. Ct. H.R. Advisory Opinion OC-11/90 (1990).

45. *Baker, supra* note 10 (Factum of the Canadian Council of Churches at para. 24).

46. In this regard the Council cited General Comment 15 on the position of aliens, issued by the U.N. Human Rights Committee, that requires each State Party ensure the rights in the *ICCPR* to "all individuals within its territory and subject to its jurisdiction." See Human Rights Committee, General Comments Adopted Under Article 40(4) of the *ICCPR*, GC No. 15, *CCPR/C/21/Rev. 1*, May 19, 1989, at 17, para. 1.

47. [1992] 1 S.C.R. 711 at 732-733, 90 D.L.R. (4th) 289, 135 N.R. 161 [hereinafter *Chiarelli* cited to S.C.R.]. In *Chiarelli* the Court reaffirmed that the *Charter* is to be interpreted in light of the context in which it arises. The Court indicated that the context for a non-citizen requires looking to the principles and policies underlying immigration law, the most fundamental being that "non-citizens do not have an unqualified right to enter or remain in the country. At common law an alien has no right to enter or remain in the country ... (at 733)." This reasoning has been followed in a series of immigration cases to further impede the ability of refugee claimants, permanent residents and other non-citizens to invoke *Charter* protection. It deserves mention that the notion advanced by Sopinka J. in *Chiarelli* is sharply contested. Historically, the English common law with regard to 'aliens' reflected the interplay of two competing principles, that of sovereignty and that of freedom of

against the extension of the contextual approach used in section 1 *Charter* analysis to an assessment of the content of the rights themselves. For the Council, if the existence of a right is determined in part by a person's status, discriminatory standards of protection are implicitly sanctioned. As the Council postulated, the Court would be promoting a " ... 'legal apartheid' whereby Canada's human rights protections are applied in such a manner as to confine non-citizens to a legal space inferior to that enjoyed by citizens."⁴⁸

In response to the arguments raised by the appellant and the three intervenors, counsel for the respondent Minister of Citizenship and Immigration outlined six broad contentions. It was asserted that the standard of review for a discretionary decision of an immigration officer pursuant to subsection 114(2) of the *Act* was not "correctness", but whether the officer made an error of principle in the exercise of discretion or exercised his discretion capriciously or vexatiously. The immigration officer, according to the respondent, had complied with the principles of fairness given that the Ms. Baker had an opportunity to present her case through counsel, submissions and supporting letters. Fairness required neither an interview nor reasons for decision. The respondent further suggested that the *Convention* did not apply because it had not been adopted in Canadian law. Even if the *Convention* did apply, it was submitted that it was not violated because any interference with the children's family was not arbitrary or unlawful. The respondent adopted the reasoning of Strayer J.A. that a proceeding relating to a parent's deportation and application to remain in Canada on humanitarian and compassionate grounds was not a proceeding "concerning" children within the meaning of Article 3(1) of the *Convention*, but rather was, at most, a proceeding "affecting" the children. Accordingly, the best interests of the child need not be a

movement. The *Magna Carta* of 1215, for example, included permissive provisions aimed at protecting the right of foreign merchants "to go and come out of England, and to stay in and travel through England by land and water ... in accordance with ancient and just customs". See A.E.D. Howard, *Magna Carta: Text and Commentary* (Charlottesville: University Press of Virginia, 1964) at 44; Coke, 2 Inst. 57, as cited in Dummett & Nicol, *Subjects, Citizens, Aliens and Others* (London: Weidenfeld & Nicholson, 1990) at 24-25, 29, 32. In *Baker*, the Council was attempting to persuade the Court to clarify its reasoning in *Chiarelli* and reassert *Charter* protection for non-citizens.

48. *Baker*, *supra* note 10 (Factum of the Canadian Council of Churches) at paras. 40-49. This is of particular concern where children's rights are at issue. The tendency to either minimize the existence of rights for minors or to argue that one is "protecting" children by denying them rights is not uncommon. See e.g. *Mohamed v. Toronto (Municipality of Metropolitan)* (1996), 133 D.L.R. (4th) 108, 89 O.A.C. 339, online: QL (OJ) (Div. Ct.), in which the Court upheld a decision of Ontario's Social Assistance Review Board that provincial legislation prohibiting children under the age of 16 from obtaining welfare violated s. 15 of the *Charter* but was justified under s. 1 in view of the important objectives of ensuring proper provision for all children including the receipt of support from an appropriate source, protecting the integrity of the family unit and not encouraging run-away children. In a similar vein, the Minister's representatives have argued that the continued detention of minor refugee claimants from Fujian province, China is justified based on the need to "protect" the children from kidnapping by the traffickers that brought them to Canada. These arguments have prevailed despite the fact that immigration detention is authorized under s. 103(3)(b) of the *Immigration Act* in only two circumstances, where there is evidence that the person is likely to pose a danger to the public and where the person is not likely to appear for an examination, inquiry or removal (*supra* note 13).

primary consideration in the proceeding. With regard to the application of the doctrine of legitimate expectation, the respondent asserted that Canada's ratification of the CRC did not require immigration officers to give more weight to the best interests of children when considering whether to exempt their parents from the requirements of the *Immigration Act*.⁴⁹

As for the role of the *Charter*, the respondent asserted that it did not confer on the parents of Canadian-born children a right to remain in Canada or an immunity from deportation. The *Charter* was not engaged in the private decision of a family as to whether a Canadian child should accompany a departing parent. In the alternative, the respondent argued that, if the *Charter* did apply, no *Charter* rights were infringed. In this regard the respondent canvassed a selective group of decisions from the Human Rights Committee and the European Court of Human Rights in support of the submission that fundamental justice in the context of deportation proceedings only required an evaluation and balancing of all relevant factors. The existence of Canadian children was just one factor that did not outweigh all of the other factors militating in favour of a negative decision, namely the appellant's mental illness and dependence on welfare as well as the government's "compelling interest" in ensuring compliance with the *Immigration Act* and discouraging abuse by others.⁵⁰ In oral argument before the Court the latter issue was characterized as a matter of the nation's fundamental, sovereign right to implement a policy of immigration control. Finally it was asserted that the government was not in breach of its international obligations to provide effective remedies to litigants domestically. The respondent emphasized that "lack of success does not mean that a remedy is ineffective" and that effective domestic remedies included the availability of judicial review with the opportunity to apply for a stay of execution of a deportation order by the Federal Court, together with the availability of recourse to provincial superior courts for *Charter* remedies.⁵¹

49. *Baker*, *supra* note 10 (Respondent's factum at paras. 21, 22, 24-26, 43, 56, 66-79, 91-94).

50. *Ibid.* at paras. 98, 111-114. The respondent cited *Stewart v. Canada* (Human Rights Committee, Comm. No. 538/1993, 8 November 1996) para. 12.10; *Canepa v. Canada* (Human Rights Committee, Comm. No. 558/1993, 3 April 1997) at paras. 11.5, 11.6; *Ahmut v. the Netherlands* (1996), Eur. Ct. H.R. No. 73/1995/579/665; *Dalia v. France* (1998), Eur. Ct. H.R. No. 154/1996/773/974. Both the appellant and the intervenors relied on an extensive list of cases as well as academic commentary to demonstrate support for the principle that maintaining the integrity of a family unit can prevail over a state interest in expulsion in a variety of immigration situations. See e.g. *Berrehab v. Netherlands* (1988), Eur. Ct. H.R. No. 3/1987/126/177; *Djeroud v. France* (1991), Eur. Ct. H.R. No. 34/1990/225/289; *Mostaquim v. Belgium* (1991), Eur. Ct. H.R. No. 31/1989/191/291; *Beljoudi v. France* (1992), Eur. Ct. H.R. No. 55/1990/246; *Nasri v. France* (1995), 21 E.H.R.R. 458. See also N. Mole, "Constructive Deportation and the European Convention" (1995), Launch Issue E.H.R.L.R. 63; G. Wolf, "Preserving Family Unity: The Rights of Children to Maintain the Companionship of their Parent and Remain in their Country of Birth" (1996) 4 Global Legal Studies 207; E.F. Abram, "The Child's Right to Family Unity in International Immigration Law (1995) 17 L. & Pol'y 397; G. Van Buren, "Protecting Children's Rights in Europe-A Test Case Strategy" (1996) 2 E.H.R.L.R. 171; D. Feldman, "The Developing Scope of Article 8 of the European Convention on Human Rights" (1997) 3 E.H.R.L.R. 265.

51. *Baker*, *ibid.* (Respondent's factum in Response to Intervenor's Facta at paras. 11, 15).

III. THE COURT'S DECISION

All seven Supreme Court justices who heard the case were unanimous in granting Ms. Baker's appeal, with the result that the matter was returned to the Minister for redetermination by a different immigration officer. L'Heureux-Dubé J. wrote the majority decision of the Court, on behalf of Gonthier, McLachlin, Bastarache and Binnie JJ. A separate concurring opinion was written by Iacobucci J., on behalf of Cory J.

In a recent review of the case, David Mullan notes that "the number of important legal issues the Court confronts in the judgment clearly far exceeds the norm in judicial review proceedings."⁵² Indeed the judgment contains pronouncements on many of the issues raised by the parties, including the appropriate standard of review for discretionary decisions, the application of the principles of procedural fairness, the reach of the doctrine of legitimate expectation and the relevance of ratified but unincorporated treaties. However, the judgment did not address the substantive constitutional arguments advanced by the appellant and intervenors, as it was held that it was possible to resolve the appeal on the basis of principles of administrative law.⁵³ The judgment also failed to consider any of the concerns raised by the Canadian Council of Churches with regard to the need to revisit the *Chiarelli* decision and the extent to which the H & C process did not meet international standards as an effective legal remedy.

The Court was unanimously of the opinion that, in disposing of the appeal, neither it nor the Federal Court of Appeal were limited in their review to the question that had been certified by the Federal Court - Trial Decision. Rather, certification of a question is simply the mechanism which allows for an appeal from a judgment of the Trial Division, which would not otherwise be permitted. Once a question has been certified, an appeal court is free to consider all aspects of the decision under review.⁵⁴

With regard to procedural fairness, the Court dealt with three sub-issues: whether the participatory rights accorded to both the appellant and her children were consistent with the duty of fairness; whether the failure to provide reasons was consistent with the common law duty of fairness; and, whether there was a reasonable apprehension of bias. L'Heureux-Dubé J., writing for the majority, granted the appeal on the ground that there was a denial of the duty of procedural fairness and on the ground that the exercise of discretion by the decision-maker was unreasonable. First, it was held that there was a violation of procedural fairness in the sense that the written reasons of the decision-maker created a reasonable apprehension of bias.⁵⁵ In reaching this decision, it was held that statutory and prerogative decision-makers had a duty to provide reasons, but that this duty should be interpreted flexibly. In the circumstances of the decision challenged in *Baker*, the reasons contained in the subordinate officer's notes were adequate reasons.⁵⁶ Although the Court held that H & C applicants were entitled

52. See D. Mullan, *supra* note 14 at 146.

53. *Baker*, *supra* note 10 at para. 11.

54. *Ibid.* at para. 12.

55. *Ibid.* at paras. 45-48.

to more than the *Shah* standard of minimal fairness, "it cannot be said that an oral hearing is always necessary to ensure a fair hearing and consideration of the issues involved."⁵⁷ The opportunity that was accorded to Ms. Baker to submit full written documentation regarding her situation and the situation of her children satisfied the requirements of the participatory rights required by the duty of fairness.⁵⁸

Second, in dealing with the issue of whether the decision-maker's exercise of discretion was reasonable, L'Heureux-Dubé J. held that by failing to seriously consider the interests of the appellant's four Canadian-born children, the decision-maker had exercised his discretion in an unreasonable manner. It was in reaching this conclusion that the majority decision considered the importance of children's rights and best interests, as set out in the *Convention* and other international law instruments which have been ratified by Canada. The relevant articles of the *CRC*, cited by the Court were articles 3, 9 and 12. The Court did not refer to article 10 which deals with family reunification or article 2 which prohibits discrimination on any grounds including the status of the parent. The majority held that a contextual approach was required to determine whether the officer's decision was consistent with the requirements of the statute and the values of administrative law. These international legal instruments were held to constitute an important part of the context within which the phrase, "compassionate or humanitarian considerations", is used in the *Act* and *Regulations*. Other indications of the importance of children's rights and best interests to society's humanitarian and compassionate values could be found in the preamble of the *Act*, which includes the objective of facilitating family reunification, and in the immigration guidelines, which emphasize that officers making decisions should consider hardship on applicants' families in exercising their discretion.⁵⁹

Iacobucci J., in his concurring judgment, agreed with the majority's disposition of the appeal as well as its reasoning, except with respect to the effect of international law on the Minister's exercise of humanitarian and compassionate discretion. He held that the *Convention* has never been implemented through legislation and therefore is of no force or effect within the Canadian legal system. By making reference to the values underlying an unimplemented treaty in the course of a contextual analysis to statutory interpretation and administrative law, he held that the majority had allowed the appellant to achieve indirectly what she could not achieve directly. In other words, it indirectly gave force and effect in domestic Canadian law to an international treaty that had not been implemented.⁶⁰

56. *Ibid.* at paras. 35-44.

57. *Ibid.* at para. 33.

58. *Ibid.* at paras. 30-34.

59. *Ibid.* at paras. 49-75.

60. *Ibid.* at paras. 78-81.

IV. COMMENTARY ON THE COURT'S DECISION

Children's rights issues were at the core of the stated question before the Supreme Court of Canada. Yet children's rights assumed a subordinate role in the Court's judgment. Ms. Baker's H & C application, reconsidered after the Supreme Court's ruling, has received "approval in principle". Thus, in concrete terms the decision was a victory for Ms. Baker and her children.⁶¹ The judgment also has positive implications for all children embroiled in immigration cases and other administrative matters. Both the positive and problematic dimensions of the judgment in terms of children's rights will be discussed in the following commentary.

Interestingly, the Supreme Court adopted a contextual approach to reviewing the duty of fairness and assessing the reasonableness of the immigration officer's decision and did not engage with *Charter* or statutory interpretation issues *per se*. The reluctance to directly apply the *Charter*, even as an interpretive tool, is consistent with the Court's recent tendency of narrowing the application of the *Charter* in immigration cases. A recent example of this trend is the 1992 decision of *Chiarelli*.⁶² In *Chiarelli*, at issue was the constitutionality of the statutory scheme providing for the deportation of a permanent resident on conviction of a serious criminal offence. Writing on behalf of a unanimous Court, Sopinka J. expressly integrated a common law principle that "non-citizens do not have an unqualified right to enter or remain in the country" into *Charter* standards, rather than ensuring that the common law standard measure up to the *Charter* standard.⁶³ In *Baker*, the Court chose to frame the case narrowly in its immigration context rather than investigating its wider ramifications in terms of children's rights. Even the references to the *Convention* and international human rights law generally, were relegated to an analysis of the reasonableness of the decision under review and did not inform the Court's reasoning on the scope or content of procedural fairness. It should be noted in this regard that the regulatory framework of the immigration program offers considerable discretion to decision-makers and procedural rights frequently give way to deference and administrative efficiency. The Court's recourse to the immigration scheme as the primary context, as opposed to a children's rights or *Charter* rights framework, was a profoundly limiting device that served to restrict the judgment's potential impact on the structures of administrative decision making within the Immigration Department. In contrast to the radical overhaul of refugee status determination procedures required by the Court pursuant to its decision in *Singh* in 1985,⁶⁴ the omission of *Charter* issues in the consideration of the

61. At the time of writing this paper, the authors learned that Ms. Baker's application was approved but that she has not been landed.

62. *Chiarelli*, *supra* note 47.

63. *Ibid.* at 733, 731-734. For a discussion of this case as well as this trend more generally, see F.P. Eliadis, "The Swing from Singh: The Narrowing Application of the Charter in Immigration Law" (1993) 26 Imm. L.R. (2d) 130. Similar observations have been made in the British context. See S. Sterett, "Narrowing it Down: Immigration Practices" in *Creating Constitutionalism? The Politics of Legal Expertise and Administrative Law in England and Wales* (Ann Arbor: The University of Michigan Press, 1997) at 151-182.

64. *Supra* note 19.

Baker case effectively ensured that the government would not be required to make any fundamental changes to the institutional practices and procedures related to H & C decision making.

Procedural Fairness and Participatory Rights

An important part of the Court's analysis in *Baker* was the nature of the decision in question. This is always a central issue in determining what is required by the common law duty of procedural fairness in a given set of circumstances. The Court held that a humanitarian and compassionate determination is "an important decision that affects in a fundamental manner the future of individuals' lives." Contrary to the submissions of the government and the ruling of the Federal Court of Appeal that a deportation proceeding and an application to remain in Canada on H & C grounds did not "concern" the children, the Court reached the obvious conclusion that such proceedings "... may also have an important impact on the lives of any Canadian children of the person since they may be separated from one of their parents and/or uprooted from their country of citizenship, where they have settled and have connections."⁶⁵

While the Court recognized the significance of the determination for children, it did not consider the question of procedural fairness through the lens of human rights, *Charter* rights or international law. By way of contrast, it is interesting to note the Court's recent decisions in *L.L.A. v. A.B.*⁶⁶ and *R. v. O'Connor*.⁶⁷ In these cases, the Court considered the rights of witnesses in criminal proceedings who were not direct parties. The Court examined the privacy interests at stake from the standpoint of the common law and the *Charter* and arrived at a process, standing and the right to appeal, which was based on the principles of natural justice and section 7 of the *Charter*. Like the children in *Baker*, witnesses in criminal proceedings are considered "third parties" to the main proceeding. Yet witnesses have been afforded considerable participatory rights on the basis of an interest in the outcome of a legal process which may have significant importance to them but is unlikely to be as fundamental as a proceeding in which children face the prospect of separation from their parents. Had the Court in *Baker* employed a similar approach to the "third party" interests of the Baker children, utilizing the *Charter* itself as part of the context, a higher standard of procedural fairness might have been exacted.

The Court examined the nature and extent of the children's right to participate in an H & C process involving their parent with reference to the duty of procedural fairness. The Court emphasized that the purpose of the duty of procedural fairness was "to ensure that the administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker."⁶⁸

65. *Baker*, *supra* note 10 at para. 15.

66. [1995] 4 S.C.R. 537, 130 D.L.R. (4th) 422, 190 N.R. 329 [hereinafter *L.L.A.*].

67. [1995] 4 S.C.R. 411, 130 D.L.R. (4th) 235, 191 N.R. 1 [hereinafter *O'Connor*].

The Court considered the issue of the legitimate expectation doctrine as a facet of determining the content of the duty of procedural fairness. In addressing this aspect of the case, L'Heureux-Dubé J. did not discuss the applicability of the reasoning in *Minister of State for Immigration and Ethnic Affairs v. Teoh*,⁶⁹ a decision of the High Court of Australia that had been relied upon by the appellant and expressly rejected by the lower courts. Mr. Teoh was a Malaysian citizen with temporary status in Australia. He was refused resident status and ordered deported because of a criminal record. The Australian High Court found that the decision maker had failed to make the best interests of Mr. Teoh's children a primary consideration consistent with the terms of article 3 of the *Convention*. The Court reasoned that ratification of a treaty gave rise to a legitimate expectation, in the absence of statutory or executive indications to the contrary, that decision-makers would act in conformity with the treaty. At the same time, the Court reaffirmed the principle that unincorporated treaties do not create legally enforceable rights. In concrete terms, the Court held that procedural fairness required that an individual subjected to deprivation of the protection afforded

68. *Baker*, *supra* note 10.

69. (1995), 69 A.L.J.R. 423, 183 C.L.R. 283 (Austr. H.C.) [hereinafter *Teoh*]. In support of its argument that the reasoning in *Teoh* should not be applied in *Baker*, the respondent cited the Australian government's immediate release of a press statement purporting to restrict the scope of the case: "...the act of entering a treaty does not give rise to legitimate expectations in administrative law which could form the basis of challenging an administrative decision" [*Joint Statement by the Minister of Foreign Affairs and the Attorney General and the Minister of Justice*, 25 February 1997, online: Australasian Legal Information Institute Homepage <http://www.austlii.edu.au/cgi-bin/disp.pl/au/other/ahric/Announcemnets/joint_statement.html>]. The respondent also made reference to pending legislation, the *Administrative Decisions (Effect of International Instruments) Bill* of 1997, which sought to reinforce the Australian government's position that *Teoh* was "not consistent with the proper role of parliament in implementing treaties in Australian law" (*ibid.* (Respondent's factum 45 at para. 84). Indeed after the release of the *Teoh* decision, a number of Australian judges attempted to narrow the application of the ruling or at least distinguish it. See *e.g. Brown v. Brown* (9 April 1996), SA 82 of 1995, ML6570 of 1994 (Fam. Ct.). By the end of 1998, however, after the hearing in *Baker*, the Australian government had adopted a policy guideline in the form of a *Ministerial Direction* (21 December 1998, at para. 16) clarifying that "the decision maker must determine the best interests of any children aged less than 18 years who are in a parent-child or other close relationship with the potential deportee." Subsequent decisions of the Australian Federal Court have followed *Teoh*, finding that it is an error of law if notice is not provided of a deliberate decision not to act in conformity with the *Convention*. See *Hui v. Minister of Immigration & Multicultural Affairs*, [1999] FCA 985 21 July 1999; *Kwong Leung Lam v. Minister for Immigration & Multicultural Affairs*, [1998] FCA 154 (4 March 1998); *Tevita Musie Vaitaiki v. Minister for Immigration & Ethnic Affairs*, [1998] 5 FCA (15 January 1998). More recently, the Australian Administrative Appeals Tribunal considered the effect of the Ministerial Direction and held that "the General Direction incorporates Australia's obligations under the Convention on the Rights of the Child" (*Durietz & Minister of Immigration and Multicultural Affairs* (1999), AATA/011 (21 December 1999). For a discussion of *Teoh* in its Australian context, see J. Chen, "Taking International Obligations More Seriously" (Address to 50th Anniversary Conference, Australasian Law Teachers' Association, Cross-Currents: Internationalism, National Identity and the Law, 1995); A. Nicholson, Chief Justice of the Family Court of Australia, "Advancing Children's Rights and Interests: The Need for Better Inter-Governmental Collaboration" (The 1996 Sir Ronald Wilson Lecture, 13 November 1996, Perth, Western Australia).

by the *Convention* was entitled to notice and an opportunity to present their case in a hearing.

In *Baker*, L'Heureux-Dubé J. found that the articles of the *CRC* did not give rise to a legitimate expectation that certain procedural rights would be afforded to the appellant (or, presumably, her children). The Court specifically stated that the *CRC* did not amount to a promise by the government that a humanitarian review would be conducted in a particular manner, nor did it guarantee more fulsome participatory rights.⁷⁰ However, as noted by Lorne Sossin, the Court "left the door somewhat ajar"⁷¹ by observing that "It is unnecessary to decide whether an international instrument ratified by Canada could, in other circumstances, give rise to a legitimate expectation."⁷² In some respects this is a positive signal of the Court's willingness to include treaty ratification as a relevant factor in future deliberations on procedural fairness, but the Court has provided no indication as to what circumstances might persuade it to do so. In this sense the Court may have clarified the scope of the doctrine of legitimate expectation generally but it has provided very little guidance as to how treaty ratification might be framed as a constituent element of anyone's expectations.

In considering whether notice and an oral hearing were required, the Court referred to the exceptional importance to the lives of those with an interest in its result: the claimant and his or her close family members. When weighed with other factors, this enhanced the content of the duty of fairness, making it a more exacting duty. However, despite the Court's explicit rejection of the *Shah* standard of "minimal fairness",⁷³ the Court refused to meaningfully extend participatory rights in the H & C process. Applicants and their children were entitled to an opportunity to present their case and to have it fully and fairly considered",⁷⁴ but in the eyes of the Court, this standard was satisfied by written materials put forward through counsel concerning Ms. Baker, her children and their emotional dependence on her. Thus, the Court concluded, the denial of notice and an oral hearing to the children did not violate the duty of fairness. It deserves mention, however, that the Court did not say that there was never any entitlement to an oral hearing. As David Mullan has observed, the ruling in support of the adequacy of a paper review is "firmly rooted in the circumstances 'of this case',"⁷⁵ leaving open the possibility that an oral hearing may be necessary in at least some instances.⁷⁶ Mullan appropriately queries: "What might those instances be? Would they include most, if not all situations that typically trigger claims to an in-person hearing in other contexts, namely where there is a concern with credibility?"⁷⁷ It could

70. *Ibid.* at para. 29.

71. Sossin, *supra* note 14, text accompanying note 81.

72. *Baker*, *supra* note 10 at para. 29.

73. *Shah*, *supra* note 20.

74. *Baker*, *supra* note 10 at para. 32.

75. *Ibid.* at para. 34.

76. Mullan, *supra* note 14 at 150.

be argued that the Court placed some reliance on the fact that Ms. Baker had legal representation, given a specific reference to her lawyer in this section of the judgment. Many H & C applicants, if not the majority, are unrepresented. Considered a purely administrative matter, few legal aid plans across Canada fund these applications. The Court's reasoning gives rise to the possibility of an applicant, particularly a child, advancing an argument that their lack of legal representation, places them on a different and more disadvantaged footing than Ms. Baker and is sufficient to justify an in – person interview.⁷⁸

It is clear, however, that the Court's judgment falls far short of the "due process" requirements of Article 12 of the *Convention*, the benchmark of children's participatory rights. Indeed, the *CRC* is completely ignored in this portion of the Court's analysis with disappointing results. On the facts of the *Baker* case, the indirect presentation of the material in writing by the children's mother was seen to be sufficient even in the face of the children wishing to meet with the immigration officer directly. It would appear that the Courts focus on the adequacy of a paper review conflated this issue with the consideration of direct written presentations by children. Presumably, a child who wished to file independent written testimony of his or her views (and best interests), would be permitted to do so. However, this can only be inferred as a logical assumption from the Court's reasoning; it is not an articulated right. As a practical matter, without receiving notice of the proceeding or a mechanism to facilitate access to legal counsel, children are afforded little opportunity for meaningful input into a process in which their interests are to be considered as an important factor in the determination.

Administrative law principles have justified lower procedural safeguards in the context of discretionary decision making where, as here, the applicant is not seeking to enforce a right or entitlement, but rather a discretionary exemption from a statutory requirement. In effect, there has been a two-tier approach to procedural requirements based on the distinctions drawn between rights *versus* privileges or discretionary benefits.⁷⁹ However, apart from recourse to the provincial superior courts, which will be discussed in the latter part of this paper, the H & C process is the primary remedy for children with fundamental rights at stake in the deportation of their parent. The government represents the H & C process as an effective remedy for addressing the human rights entitlements for persons who may have fallen through the cracks in the immigration scheme,⁸⁰ but has afforded no mechanism for children to meaningfully

77. *Ibid.*

78. In Ontario, the community legal clinic system frequently fills the gaps in coverage on the part of the judicare side of the legal aid plan. A number of the Toronto based legal clinics provide assistance to H & C applicants. However the service is not uniformly provided and based on the geographic "catchment areas" of the clinics, an applicant may find that the only clinic that she is entitled to receive service from does not provide immigration related assistance. Interview with G. Sadoway, Immigration Division, Parkdale Community Legal Services, 14 March 2000.

79. See D. Galloway, *Immigration Law* (Concord, On.: Irwin Law, 1997) at 87-91 for a discussion of this two-tiered approach to procedural fairness in the context of immigration law.

80. Note that this view was offered in an oral statement by counsel for the Minister in response to a

participate in the process. It should be remembered in this regard that resident or citizen children are not permitted to apply for H & C consideration in their own right. If these children are not satisfied with an H & C decision, they have no direct right to seek judicial review or even obtain standing in judicial review proceedings initiated by their parent.⁸¹ As for non-citizen children, the *Act* treats them as mere dependants of the primary applicant – parent and, according to the ruling in *Baker*, the Court would presume that their interests would be adequately represented by their parent. The Court failed to embrace an important opportunity to enhance the participatory rights of children in *Baker*, within the existing statutory scheme of the *Immigration Act*, to ensure that public procedures were consistent with Canada's domestic and international human rights obligations.

A further concern under the rubric of procedural fairness relates to the question of whether the wishes of the child constitute a component of the best interests standard. The Supreme Court's prior decision in *Eaton v. Brant County Board of Education* may provide some assistance in this regard.⁸² In that case the Court stated unequivocally that, for older children who are capable of communicating, their views and wishes will "play an important role" in the determination of what is in their best interests. Future litigants will have to address the inevitable distinction that may be drawn between procedural rights afforded in the context of a dispute concerning access to a basic entitlement such as public education and those afforded in more discretionary matters such as an H & C application. Nevertheless, the *Eaton* case may prove to be the means of addressing some of the ambiguities and unresolved issues relating to participatory rights arising out of the *Baker* decision.

Procedural Fairness and Reasons/Bias

Through its ruling in *Baker*, the Court implicitly rejected a previous decision of the Federal Court of Appeal that the common law duty of fairness did not oblige admin-

general petition before the Inter-American Commission on Human Rights in *Canadian Council for Churches v. Canada* in October 1996. In its response to the Commission's draft report based on an on-site visit to Canada made the following year and triggered by the general petition, the government obliquely addressed the relationship between international guarantees and domestic law, asserting that, "Canada implements the relevant parts of the *American Declaration* and the *Covenant* using the standards and procedures set out in the *Immigration Act* and the general legal system in Canada." (see *infra* note 155 at para. 36) Canada's Third Report to the U.N. Committee against Torture (25 October 1999) at para. 50, also cites the H & C process in its catalogue of remedies for failed refugee claimants. In *Baker*, the Respondent stated that "the place for the interests of the family unit to be taken into account" is in the H & C process (*supra* note 10 (Respondent's factum at para. 109)).

81. *Supra* note 9. See also *Yanichevski v. Canada (Minister of Citizenship & Immigration)*, [1998] F.C.J. No. 1805, online: QL (FCJ), in which a motion brought by the Canadian daughter of parents who were about to be deported was dismissed. In its reasons, the Court indicated that it was bound by the decision in *Langner* and thus the daughter had no right under the *Charter* to remain with her parents (*Langner*, *supra* note 9).
82. [1997] 1 S.C.R. 241 at 277-78, 142 D.L.R. (4th) 385, 207 N.R. 171 [hereinafter *Eaton*]. In this case the Court held that the best interests of the child principle should be the focus for school board officials in determining the educational needs of a severely disabled child.

istrative decision-makers to provide reasons for discretionary decisions. In *Williams v. Canada (Minister of Citizenship and Immigration)*,⁸³ the Federal Court of Appeal had dismissed the argument that the Minister had a duty to provide reasons for a decision to declare a permanent resident who had been in Canada since he was ten years old a "danger to the public" and thereby subject him to deportation. In *Baker*, L'Heureux-Dubé J. recognized that the "profound importance of an H & C decision to those affected ... militates in favour of a requirement that reasons be provided. It would be unfair for a person subject to a decision such as this one which is so critical to their future not to be told why the result was reached."⁸⁴ Her subsequent conclusion that the notes of the first level immigration officer were sufficient to constitute reasons, however, set a very low standard in terms of the quality of reasons to be provided. As pointed out by Lorne Sossin, it also implicitly legitimates the delegation of reasons preparation to the first level officer rather than the decision-making officer, a practice that appears to run counter to the common law presumption against delegation of fairness related obligations.⁸⁵ Further, this dimension of the judgment could serve as a basis in subsequent cases to effectively immunize the Department from judicial review. Indeed in two post-*Baker* cases, the Federal Court appeared willing to accept as sufficient "reasons" a pre-prepared form modified subsequent to an interview to fit the facts of the application, and in another case, the ticking of the "denied" box on a form.⁸⁶ On the other hand, from the standpoint of the Baker children, the Court's finding was positive as it brought the reasons of the subordinate officer within the scope of judicial review and, thus, under scrutiny. As Brown and Evans suggest, this provided the Court with an opportunity to elaborate on the reasonable apprehension of bias doctrine in cases involving vulnerable persons or "those who belong to groups that have been marginalized or made the subject of discrimination".⁸⁷

In reviewing the tone and content of the reasons, the Court found that the well-informed member of the community would perceive bias when reading the line officer's comments. His notes ... do not disclose the existence of an open mind,"⁸⁸ and made several unfounded connections, including a link between "the fact that she had several children, and the conclusion that she would therefore be a strain on the

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- 83. [1997] 2 F.C. 646 (C.A.), leave to appeal to S.C.C. refused [1997] S.C.C.A. No. 332 (Q.L.) (October 16, 1997). Pursuant to s. 70 (5) of the *Act*, permanent residents have no right to appeal a deportation order where the Minister certifies that they constitute a "danger to the public" and they have committed a serious crime as defined in the legislation (*supra* note 13). Public danger certification is a paper procedure in which the person concerned is afforded minimal rights of due process. *Williams* was an unsuccessful attempt to challenge the fairness of the procedures.
 - 84. *Baker*, *supra* note 10 at para. 43.
 - 85. Sossin, *supra* note 14, text accompanying footnote 87. See also J.L.H. Sprague, "Another View of Baker" (1999) 7 R.A.L. 163 at 165.
 - 86. See *Xu v. Canada (Minister of Citizenship & Immigration)*, [1999] F.C.J. No. 1184 (T.D.); *Liang v. Canada (Minister of Citizenship & Immigration)*, [1999] F.C.J. No. 1301 (T.D.), as discussed in Sossin, *ibid.*, text accompanying footnote 89.
 - 87. Brown & Evans, *supra* note 14 at 5.
 - 88. *Baker*, *supra* note 10 at para. 48.

social welfare system for the rest of her life.”⁸⁹ The Court speculated that, to an objective viewer, the officer might have based his decision on the fact that Ms. Baker was a single mother with several children who had been diagnosed with a psychiatric illness. In applying the standards for reasonable apprehension of bias to the circumstances in the *Baker* case, L’Heureux-Dubé J. noted that these standards may vary, like other aspects of procedural fairness, depending on the context and the type of function performed by the administrative decision maker involved.”⁹⁰ The context here, L’Heureux-Dubé J. observed, was one which required special sensitivity. She continued:

Canada is a nation largely made up of people whose families migrated here in recent centuries. Our history is one that shows the importance of immigration, and our society shows the benefits of having a diversity of people whose origins are in a multitude of places around the world. Because they necessarily relate to people of diverse backgrounds, from different cultures, races, and continents, immigration decisions demand sensitivity and understanding by those who make them. They require a recognition of diversity, an understanding of others, and an openness to difference.⁹¹

In rendering this decision, the Supreme Court made a clear statement, although without reference to any human rights instruments, that discriminatory decision-making will not be tolerated. Children should not be viewed as a reason for devaluing the status of a woman, nor should single-parenthood. Somewhat striking in this aspect of the judgment, however, is the absence of any explicit reference to the social reality of racism and the extent to which Ms. Baker and her children were victims of racism – on the part of the individual officer as well as in a wider system which continues to operate on exclusionary principles, despite the formal eradication of racist selection criteria from the *Act*.⁹² As Carol Aylward has observed, “[l]aw in all its manifestations – in substance...in procedure and in interpretation – has been and continues to be an instrument that contributes to and maintains racial inequalities, divisions and tensions...” in Canada.⁹³ The facts presented to the Court in *Baker* provided an ideal context to conceptualize racism as a defining feature of the bias manifested in the case and to offer a more pointed rejection of decisions tainted by racism. The judgment’s failure to articulate racism – and its intersection with the other stereotypes attributed to the Baker family (concerning gender, number of children, economic and mental health status) – as the source of the bias may have been a function of the way the arguments were framed by the litigants themselves. In any event, as racism was swept

89. *Ibid.*

90. *Ibid.* at para. 47.

91. *Ibid.*

92. See A. Simmons, “Racism and Immigration Policy” in V. Satzewitch ed., *Racism and Social Equality in Canada* (Toronto: Thompson Educational Publishing, 1998) at 91; S. Aiken, “Racism and Canadian Refugee Policy” (1999) 18:4 *Refugee* 2.

93. C. Aylward, *Canadian Critical Race Theory* (Halifax: Fernwood Publishing, 1999) at 15-16.

under the proverbial judicial rug, the Court refused to confront a critical problem that continues to disadvantage H & C applicants and their children at the first instance.

Reasonable Exercise of Discretion

Although the case could have been disposed of on the issue of bias, the Court chose to examine the issue of the reasonableness of the decision, taking into account the certified question, namely, the relevance of the best interests of the child to the determination. In identifying the appropriate standard for judicial review of an exercise of administrative discretion, the Court adopted the "pragmatic and functional approach" articulated most recently in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*,⁹⁴ which recognizes that standards of review for errors of law are seen as a spectrum, with certain decisions being entitled to more deference and others to less.⁹⁵ The Court looked to the powers conferred by the legislation, the factual nature of the inquiry, its role within the statutory scheme as an exception, the expertise of the Minister as the formal decision-maker and the considerable discretion vested in the immigration officer. The Court balanced these factors against the absence of a privative clause, the existence of judicial review and the individual, rather than polycentric, nature of the decision to conclude that the standard of review was one of "reasonableness *simpliciter*", as opposed to the more deferential "patent unreasonableness" standard or the least deferential "correctness" standard.

The core issue in determining whether or not the decision was reasonable was the approach taken to the interests of the children. The Court found that the approach taken failed the reasonableness test as articulated in *Canada (Director of Investigation and Research) v. Southam*,⁹⁶ namely,

An unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination. Accordingly, a court reviewing a conclusion on the reasonableness standard must look to see whether any reasons support it. The defect, if there is one, could presumably be in the evidentiary foundation itself or in the logical process by which conclusions are sought to be drawn from it.⁹⁷

The Court commented on the immigration officer's dismissive approach to the children's interests and his failure to give serious weight and consideration to the interests of the children. L'Heureux-Dubé J. found that the reasons were "inconsistent with the values underlying the grant of the discretion" and as such, they could not "stand up to the somewhat probing examination required".⁹⁸

94. [1998] 1 S.C.R. 982, 226 N.R. 201, 43 Imm. L.R. (2d) 117, as am. by [1988] 1 S.C.R. 1222.

95. See H. Krever, "Judicial Review" (Canadian Institute for the Administration of Justice, New Federally Appointed Judges Seminar, Château Mont Tremblant, Mont-Tremblant, Qc., 27 February – 5 March, 1999) at 5-22 for an excellent review of the broader administrative law jurisprudence on the standard of review.

96. [1997] 1 S.C.R. 748, 144 D.L.R. (4th) 1, 209 N.R. 20 [hereinafter cited to S.C.R.].

97. *Ibid.* at 776-777, as quoted in *Baker*, *supra* note 10 at para. 63.

98. *Baker*, *ibid.* at para. 65.

As noted previously, the Supreme Court in *Baker* specifically declined to deal with the *Charter* arguments. The Court made only this comment in passing:

... [D]iscretion must still be exercised in a manner that is within the reasonable interpretation of the margin of manoeuvre contemplated by the legislature, in accordance with the rule of law ... in line with the principles of administrative law governing the exercise of discretion, and consistent with the *Canadian Charter of Rights and Freedoms*.⁹⁹

Since, as the Court acknowledged, it would have to interpret the duty of fairness in a manner consistent with the *Charter*, it remains an open question as to whether the benchmark set out in *Baker* disposes of the constitutional question or the case is confined to its facts. With respect to the *Charter*, it is of the utmost significance that Iacobucci J., in his concurring judgment, criticized the majority for transporting the *CRC* directly into the principles of administrative law but suggested, on the other hand, that there would be room for a *Charter* analysis. For future litigants, this may be the reference that will open the door to a fresh, *Charter* analysis.

The significant *ratio* of the decision from a children's rights standpoint is:

In my opinion, a reasonable exercise of the power conferred by the section requires close attention to the interests and needs of children. Children's rights, and attention to their interests, are central humanitarian and compassionate values in Canadian society.¹⁰⁰

In terms of children's specific interest in maintaining family unity, the Court acknowledged the significance of section 3(c) of the *Act*, affording a large and liberal interpretation to its underlying values and thus, "[t]he obligation to take seriously and place important weight on keeping children in contact with both parents, if possible, and maintaining connections between close family members..."¹⁰¹ The Court also cited the Minister's guidelines and concluded that humanitarian values included "...avoiding hardship by sending people to places where they no longer have connections."¹⁰² It is interesting to note, however, that in its consideration of family unity, the Court omitted any reference to international human rights standards and in particular, article 9 of the *Convention* which prohibits the separation of a child from his or her parent under all circumstances unless "necessary for the best interests of the child." A "necessity" requirement, as advocated by the Canadian Foundation for Children, Youth and the Law would have ensured that family unity would always trump state interests, subject to the best interests of the child. Further, in its judgment, the Court registered a significant *caveat*: "...[t]hat is not to say that the 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 the children's interests are given this consideration."¹⁰³ The best interests of children must be treated as an important factor

99. *Ibid.* at para. 53.

100. *Ibid.* at para. 67.

101. *Ibid.* at para. 68.

102. *Ibid.* at para. 72.

and given substantial weight, but they are not determinative – not *the* primary consideration, even in cases where separation of the child from his or parents is directly at issue. Unfortunately this statement by L’Heureux-Dubé J. sets a much lower standard than article 9 of the *CRC*. It also provides very little guidance as to the criteria relevant for determining whether or not the interests of children have been accorded adequate weight. Would a more detailed analysis of these interests in a line officer’s notes be sufficient? In what circumstances would countervailing state interests outweigh the best interests of children? The judgment leaves these important issues unresolved and the Court’s lack of clarification in this regard is certain to give rise to further litigation.

Unimplemented Treaties and Domestic Law

The final dimension of the *Baker* ruling that merits attention concerns the Court’s articulation of the relationship between international human rights law and domestic law. The Court held that international treaties have no direct application in Canadian law unless they have been expressly incorporated by statute.¹⁰⁴ Nevertheless, the presumption of compliance with international law included Canada’s legal obligations under unincorporated treaties. Thus the Court found “the values reflected in international law may help inform the contextual approach to statutory interpretation and judicial review”.¹⁰⁵ Such values and principles generally recognized “the importance of being attentive to the rights and best interests of children when decisions are made that relate to their future” and the entitlement of children to “special care and assistance.”¹⁰⁶ The Court noted that the important role of international human rights law as an aid in interpreting domestic law has also been emphasized in other common law countries”, including New Zealand and India.¹⁰⁷ Further, the Court found that “international human rights law ... is ... a critical influence on the interpretation of the scope of the rights included in the *Charter*.”¹⁰⁸ In this regard the Court adopted the arguments advanced by the appellant and the Charter Committee on Poverty Issues, reaffirming and possibly even extending, the principles established in *Slaight Communications* a decade earlier. Commenting on the significance of the Court’s characterization of international human rights law as a “critical influence”, Craig Scott suggests that the judgment embraces a “cosmopolitan conception of the rule of law”

103. *Ibid.* at para. 75.

104. The cases cited in support of this principle were *Francis v. R.*, [1956] S.C.R. 618 at 621; and *Capital Cities Communications Inc. v. Canadian Radio-Television Commission*, [1978] 2 S.C.R. 141 at 172-73.

105. *Baker*, *supra* note 10 at para. 70. In addition to *Slaight Communications*, *supra* note 35, the Court relied upon *R. v. Keegstra*, [1990] 3 S.C.R. 697, and *R. Sullivan, Driedger on the Construction of Statutes*, 3rd ed. (Toronto: Butterworths, 1994) at 333.

106. *Baker*, *ibid.*, at paras. 70-71. In addition to the *CRC*, the Court made specific reference to the United Nations *Universal Declaration of Human Rights* and the *Declaration on the Rights of the Child* (*supra* note 9).

107. The Court cited *Tavita v. Minister of Immigration*, [1994] 2 N.Z.L.R. 257 (C.A.) at 266; and *Vishaka v. Rajasthan*, [1997] 3 L.R.C. 361 (S.C.India) at 367.

108. *Baker*, *supra* note 10 at para. 70.

which requires Canadian courts to “show fidelity to the international legal order by seeking to harmonise domestic law with international law as much as interpretive space allows.”¹⁰⁹ In previous family law judgments, however, the Supreme Court had referred to the *CRC* to defend the constitutionality of the “best interests” standard already present in Canadian law.¹¹⁰ In *Baker* the Court was presented with its first opportunity to use the *CRC* in a more direct manner, in an area of domestic law which did not afford parallel protections. It was an opportunity which the Court did not fully seize.

Outcome

As noted by Daiva Stasiulus, the *Baker* decision challenges the Immigration Department’s treatment of migrant domestic workers and their children.¹¹¹ There is no doubt that the case has set an important precedent in terms of procedural justice. The Court has mandated a new approach by immigration officers in H & C applications, an approach which recognizes the importance and interdependence of the family unit and the critical impact of separation or relocation on children. Further, the Court has paved the way for consideration of the best interests of children as a facet of all reasonable, executive decisions.

The outcome of the *Baker* decision was fairly clear for the children of Ms. Baker: their interests had been disregarded and the matter was sent back for a redetermination. For other children, less clarity exists, but certain limited rights can be safely articulated. A child whose parent is about to be deported as the result of a negative H & C determination, now has the following entitlements:

- the right to have their parents present the case for their best interests in writing
- the right to submit their own case in writing
- the right to have their best interests – that is, rights, interests and needs - treated as an important factor and given substantial weight

In our view it remains somewhat unclear whether these entitlements will translate into any fundamental advances for the children of foreign-born women. The following sections of this paper represent our attempt to gauge the impact of the judgment and

109. C. Scott, “Canada’s International Human Rights Obligations and Disadvantaged Members of Society: Finally into the Spotlight?” (1999) 10 *Constitutional Forum* 97 at 100. Professor Scott was counsel for the Charter Committee on Poverty Issues in the *Baker* case.

110. See *P.(D.) v. S (C.)*, [1993] 4 S.C.R. 141 at 180; *Gordon v. Goertz*, [1996] 2 S.C.R. 27 at 76; *W.(V.) v. S.(D.)*, [1996] 2 S.C.R. 108 at 153. In *Young v. Young*, the Court considered the right of a parent with visiting rights to expose his children to religious activities. The Court stated: “[T]he need to make the best interests of the child the primary consideration in all actions concerning children, including legal proceedings, is specifically recognized in ... the *Convention on the Rights of the Child*... [T]his amply demonstrates both the enduring value of the best interests test as a legal norm capable of meaningful application and the broad recognition of children in the field of human rights.” [1993] 4 S.C.R. 3 at 75 (per L’Heureux-Dubé J. dissenting, but not on this point).

111. D. Stasiulus, “Negotiating the Citizenship Divide” (Paper presented to National Forum on Equality Rights, West Coast LEAF, Vancouver, B.C., 4-7 November 1999) at 13.

highlight some of the challenges ahead in terms of children's rights in the realm of immigration.

V. THE AFTERMATH OF THE DECISION

A great deal of media interest followed the Supreme Court's release of its decision in the *Baker* case in July 1999 and much of the commentary was negative. Even Margaret Wente, in an otherwise sympathetic column in the *Globe and Mail*, opined that "some people are worried that the Baker case opens its doors to hordes of passport babies and their exploitative mothers. Maybe they should worry instead about an immigration system so clumsy, so inefficient, and so dumb that it can't even catch and deport a nearly illiterate Jamaican cleaning lady."¹¹² Wente's description of Ms. Baker was not only offensive, it belied the same taint of racial and gender bias evident in the immigration officer's notes that the Supreme Court found so unacceptable. In an editorial in the same newspaper the following comments were offered,

... We would suggest that the court doesn't know the meaning of the word "bias" and hasn't done much community polling recently ... Ms. Baker has had a sad life, but she is the author of many of her misfortunes, beginning with staying here illegally. But the essential problem with the court's ruling is that it is hard to imagine any case in which separating a mother and/or father from children will not have deleterious effects on the children. The logical response to a parental deportation would be for children to return to their parents' native country.

Nonetheless, if the parents wish their children to stay here because they are Canadian citizens by virtue of birth, so be it. But this country cannot go down a road in which illegal immigrants think if they have a child here, that translates into a free passage for themselves into Canada. This will throw into disarray the distinction between those who choose Canada and those whom Canada chooses.

This country must not permit the immigration process to become the legal equivalent of a shotgun wedding.¹¹³

An editorial in the *National Post* suggested that the Court had "stepped beyond the aegis of judicial review and into the realm of law making" and further admonished that

... Canada may have signed the convention, but it has never incorporated into domestic law. This should have sent a signal to the courts that Ottawa does not wish for illegal immigrants who bear children on Canadian soil to be thrust to the front of the immigration queue.

Instead, Parliament deliberately chose to vest immigration officers with considerable discretion ... Moreover, Parliament never ordered immigration officers to blindly follow the dictates of international human rights documents when they decide on cases ...¹¹⁴

112. M. Wente, "On Canada's porous immigration system" *The Globe and Mail* (13 July 1999) A20.

113. "Having children can't be the path to a passport" *The Globe and Mail* (12 July 1999) A10.

Within a few weeks of the Court's decision in *Baker*, the country's attention was diverted to the more sensational news of boats arriving off the west coast carrying passengers from Fujian province, China. Media reports described the migrants as "bogus refugees" and "queue jumpers" who should be sent back immediately. Once again Canada's porous borders were a cause for derision and alarm.¹¹⁵ The fact that a number of the migrants have since been recognized as Convention refugees seems to have done little to stem the tide of negative publicity. Yet the men, women and children desperate to reach "golden mountain" share a similar trajectory with Mavis Baker and her children. The media reports extracted above fail to consider that deteriorating economic conditions, in which Canada is clearly implicated through its participation in global capitalism, have resulted in massive unemployment and displacement in countries as diverse as Jamaica and China.¹¹⁶ At the same time, the Canadian economy thrives on the labour of low wage earning migrants in the shadow economy. Women like Mavis Baker are employed in the homes of middle and upper class Canadians and meet a critical demand for live-in care givers and other household workers.¹¹⁷ As the government clamours to defend the territorial sovereignty of the nation, many Fujianese children languish in Canadian jails without access to education, and the children of other undocumented workers struggle to survive in the face of the precarious existence of their parents. Frequently, children are the most vulnerable victims of a system that treats their parents as "expendable and deportable labour."¹¹⁸

In contrast to the media backlash against the decision, the Federal Court has embraced the ruling and used it to contest the absolute authority of the Immigration Department in circumstances ranging from the procedures for "public danger" certification, the issuance of minister's permits, student and immigrant visas overseas as well as "in-land" humanitarian and compassionate applications. In a series of Trial Division judgments, the *Baker* case has been applied to overturn discretionary decisions and send the matter back for a new determination in accordance with the principles

114. "Separation anxiety" *National Post* (13 July 1999) A19.

115. See e.g. W. Bauer, "The People Smugglers" *Reader's Digest* (August 1999). Bauer is a former ambassador who recently shared his views with the Parliamentary Standing Committee on Citizenship and Immigration. The Committee's study, "Refugee Protection and Border Security: Striking a Balance," was tabled in March 2000. A transcript of Bauer's testimony as well as the Committee's full report is available online: <<http://www.parl.gc.ca>>.

116. See K. D'Aoust, "Canada's policies on refugees: an issue of responsibility"; N. Sharma, "Exposing the real snakeheads" (Oct./Nov.1999) *Kenisis* at 9-11; and, in the American context, P. Kwong, *Forbidden Workers: Illegal Chinese Immigrants and American Labor* (New York: The New Press, 1997).

117. An in-depth analysis of the interplay between globalization, migration and immigration law is beyond the scope of this paper. For further reading, see D. Stasiulis & A. Bakan, "Negotiating the Citizenship Divide: Legal Strategies of Foreign Domestic Workers" in R. Jhappan, *Women's Legal Strategies: A Friendly Assessment* (Toronto: University of Toronto Press, forthcoming); and A. Macklin, "Women as Migrants: Members in National and Global Communities" (1999) 19:3 C.W.S. 24.

118. See D. Stasiulis, *supra* note 111.

enunciated by the Supreme Court.¹¹⁹ As noted in *I.G. v. Canada*, a recent judgment of the Federal Court - Trial Division,

Not only does Baker require a more focused approach by immigration officers, it places a new and more "hands-on" responsibility by a reviewing judge. A reviewing judge must take a "hard look" at the "H & C" decision, must assess whether it is reasonable by examining the reasons to see if they stand up...¹²⁰

In *Sovalbarro v. Canada (Minister of Citizenship and Immigration)* a judicial review of a negative H & C decision involving a family that included both citizen and non-citizen children, the Federal Court set aside the immigration officer's decision for failing "to give proper consideration to the interests of the applicants' Canadian born son and their other children."¹²¹ Similarly, in *Navaratnam v. Canada (Minister of Citizenship and Immigration)*,¹²² the Federal Court set aside a reviewing officer's decision in the case of a Sri Lankan woman who was a failed refugee claimant. During her time in Canada Ms. Navaratnam met and married a Canadian citizen and the couple had a daughter. The applicant's husband sought to sponsor her for landing within Canada, which even for spouses, is a discretionary application requiring an H & C exemption. When the application was denied Ms. Navaratnam sought judicial review. The Court allowed the application on the basis that the officer's notes failed to emphasize the rights, interests and needs of their young daughter.¹²³

There are signs, however, that the Federal Court may be less willing to follow the Baker ruling in cases where the applicant's criminality is identified as the counterpoint to any rights of the applicant's child or the family as a unit. In *Martin v. Canada (Minister of Citizenship and Immigration)*¹²⁴ the applicant had been ordered deported in 1984 as a result of his criminal convictions, a decision that was challenged but ultimately upheld by the Appeal Division of the Immigration and Refugee Board in 1995. In the meantime he married and had a child and subsequently attempted to

119. See e.g., *Liang v. Canada* *supra* note 86; *Lewis v. Canada* [1999] F.C.J. No. 1367 (T.D.), online: QL (FCJ); *Teresa v. Canada* [1999] F.C.J. No. 1200 (T.D.), online: QL (FCJ); *Haghighi v. Canada* [1999] F.C.J. 1367 (T.D.), online: QL (FCJ); With regard to the application of the principles in *Baker* for persons who are outside Canada, see *Khairoodin v. Canada* [1999] F.C.J. 1256 (T.D.), online: QL (FCJ); *Xu v. Canada* *supra* note 86; *Ali v. Canada* [1999] F.C.J. No. 1649, online: QL (FCJ). Note, however, that two recent judgments have declined to follow *Baker*. In *Veluppilai v. Canada (Minister of Citizenship and Immigration)* [1999] F.C.J. No. 1955 (T.D.) at para. 38, Teitelbaum J. held that a "danger to the public" determination was not comparable to an H & C decision, and that the Minister does not have to give specific reasons for this purely discretionary decision." Interestingly the case of *Bhagwandass v. Canada* [1999] F.C.J. No. 1227 (T.D.), a decision of Gibson J., came to exactly the opposite conclusion in very similar circumstances. The second case to explicitly refuse to apply *Baker* is *Martin v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 1517 (T.D.), online: QL (FCJ), discussed *infra*.

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

121. *Sovalbarro v. Canada* [1999] F.C.J. 1394 (T.D.) at para. 9, online: QL (FCJ).

122. [1999] F.C.J. No. 1870 (T.D.), online: QL (FCJ).

123. *Ibid.* at para. 14.

124. *Supra* note 119.

reopen his case based on the interests of his young child. His application for a stay of the removal order was denied by the Federal Court on the basis that Martin had failed to demonstrate irreparable harm. The Court's failure in *Baker* to clearly restrict the state interests that may be invoked to justify a departure from the best interests principle led to the following reasoning by Blais J.:

This case is different from the *Baker* case, in this case the applicant has a child and this child probably will stay with his mother and be safe. If the applicant is deported pursuant to the deportation order, he will obviously suffer some inconvenience but he is aware since 15 years that this deportation order is pending and he was also aware that when they made the decision to have this child, the deportation order could be executed at any time.

The notion that a child should be deprived of access to one of his or her parents simply because the father made the inconvenient decision of having the child in the first place serves to underscore the extent to which *Baker* has yet to fully permeate the judicial landscape. Nevertheless, it is certainly evident that the Federal Court is attempting to respond to the implications of the Supreme Court's decision. In contrast, the immigration bureaucracy has resisted any direct engagement with the ruling. Nine months after the Court's decision, the Department has not integrated the ruling into operational guidelines and appears to be committed to restricting the scope of its application. An internal memorandum issued in September 1999 from the Ontario Region concerning the removal of persons with pending H & C applications is indicative of the Department's approach. The memorandum indicates that the removal officers should "exercise good judgment when prioritizing their removal workload" and that "barring any exceptional circumstances where deferral may be justified pending the H.C. application, removal should proceed in the normal manner."¹²⁵ The memorandum fails to make any mention of the best interests of children as a relevant factor in the officer's exercise of "good judgment", nor is there any indication that the *Baker* ruling might have implications for the manner in which removal decisions are made.

Another manifestation of the Department's resistance to reforming the practices in the post-*Baker* era is a recent decision of an immigration officer that is currently the subject of a pending judicial review application. In *Antonio v. Minister of Citizenship and Immigration*¹²⁶ the applicant is the mother and sole care giver of her two Canadian daughters who are respectively, six and three years of age. Ms. Antonio came to Canada from the Philippines with her husband in 1990. In addition to her children, she has an extensive network of family and friends who are citizens or permanent residents. In 1999 an H & C application was submitted on behalf of the family but before it was even considered Ms. Antonio's husband was deported. Supporting the H & C application was a report by a respected psychologist indicating that the children would suffer irreparable harm if separated from either their Canadian family or the

125. Citizenship and Immigration Canada, "Removal of Persons with pending H.C. applications" by R. Manzel, Director, Enforcement, Ontario Region, (23 September, 1999).

126. [2000] IMM-217-00 (T.D.), (Applicant's Memorandum of Argument) [hereinafter *Antonio*].

applicant and that it was in the best interests of the children that they remain in Canada with the applicant.

Ms. Antonio was arrested by Department officials while in the office of her lawyer and she and her children were detained. They were released the following day after her lawyer sought an order of a provincial superior court judge.¹²⁷ In November 1999 the applicant was given approximately four days notice of an interview related to her H & C application. Her lawyer's request for a brief postponement was denied and the interview proceeded in the absence of counsel. During the interview the immigration officer cross-examined Ms. Antonio's six year old child, asking her whether she wanted to live in the Philippines and whether she had seen a psychologist. The young girl replied that she hadn't seen a psychologist. At the interview the officer showed the applicant a letter from a social services agency of which the applicant had no prior knowledge and had been the subject of a specific disclosure request by her lawyer. There were numerous other procedural problems in the course of the interview, including inadequate interpretation.¹²⁸

The officer rejected Ms. Antonio's H & C application, suggesting that the psychologist's report was not credible given her daughter's response that she had not seen a psychologist. Although the officer's notes included several references to the applicant's children, he concludes that even the six year old "was not so immersed as to make her incapable of adapting to life in the Philippines. She acknowledges a comprehension of Filipino though her mother states that she only understands but cannot speak it."¹²⁹ It would appear, at least in the *Antonio* case, that the *Baker* ruling has not resulted in any greater attention on the part of Department officials to issues of fairness on the front lines of decision-making. As Ms. Antonio's counsel aptly asserts, given the age of the child and the likelihood of the child's knowledge of the meaning of the term "psychologist", there was an insufficient basis to discount the credibility of the psychologist's report.¹³⁰ He has cited the ruling in *Baker* and the CRC to support his submissions and argues that the cumulative conduct of the Minister constitutes bias.¹³¹

127. *Ibid.* at para. 14-15. It deserves mention that immigration detention is considered preventive rather than punitive. The only basis upon which individuals may be subject to arrest and immigration detention, is where there are reasonable grounds to believe that they pose a danger to the public or that they would not appear for an examination, inquiry or removal. When someone has an H & C process pending, has maintained contact with the Department through their counsel and where there are no criminality or security concerns, as in the case of Ms. Antonio and her daughters, jurisprudence suggests that detention would not be justified. While the children, as Canadian citizens, would not have been subject to the detention order, as a practical matter, their mother may have had no recourse but to have them accompany her. See *Sahin v. Canada (Minister of Citizenship & Immigration)*, [1995] 1 F.C. 214 (T.D.).

128. *Ibid.* at paras. 2-29, 40-52.

129. *Ibid.* at paras. 47, 50-51.

130. *Ibid.* at para. 51.

131. *Ibid.* at para. 52.

It is evident that as the courts confront a changed judicial landscape in the aftermath of *Baker*, the immigration bureaucracy is resisting reform. Currently, the fate of Ms. Antonio and her daughters is pending before the Federal Court. For the Antonio children, the *Baker* ruling has not afforded much protection. In the event that the Federal Court fails them, they could consider returning to the provincial superior court for a remedy. In the following section we trace the evolution of provincial superior court involvement in immigration matters with a particular focus on child litigants seeking to maintain their families together in Canada.

VI. PROVINCIAL SUPERIOR COURTS AND THE RIGHTS OF CHILDREN

While *Baker* affirmed the right of children to have their interests considered in a humanitarian and compassionate application initiated by their parents, the ruling leaves significant gaps in legal protection for children. First, at the procedural level, there remains an absence of meaningful participatory rights. Children do not have independent rights of notice and participation at the first instance. In terms of judicial recourse, children are unable to challenge the constitutional validity of a deportation order involving their parent in Federal Court. Second, at the substantive level, there is no parallel in Canadian law to the child's right to family unity as affirmed in the *Convention* as well as other international and regional human rights instruments. As we will elaborate subsequently, Canadian law does give expression to the "best interests" principle, but it in the post-*Baker* universe, this principle has not found full expression in the scheme of immigration law, policy and decision-making. In an effort to address this human rights gaps for children in immigration matters, litigants have sought redress in provincial superior courts. A brief review the jurisdictional interplay between the Federal Court and provincial superior courts will assist in our discussion of the way forward for children's rights in the immigration context.

In 1986, only a few years after the *Charter of Rights* had been adopted, the Supreme Court held that there must always be a court to grant an appropriate remedy.¹³² The implication of that decision was that in cases where the Federal Court and provincial superior courts shared concurrent jurisdiction, applicants could count on seeking relief before a section 96 court where recourse to the Federal Court had been exhausted or where such recourse presented a juridical disadvantage. In 1994, in the case of *Reza v. Canada (Minister of Employment and Immigration)*, the Supreme Court restricted the opportunity for applicants to seek relief in provincial superior courts in immigration related matters.¹³³ The Court held that a failed refugee claimant fearing removal to Iran and the violation of his rights under sections 7 and 12 of the *Charter*, did not

132. *R. v. Mills*, [1986] 1 S.C.R. 863 at 882, Lamer J.

133. [1994] 2 S.C.R. 394 [hereinafter *Reza*]. See also *Pei-roo v. Canada (M.E.I.)* (1989), 69 O.R. (2d) 253 at 261 (C.A.). In that case the issue was whether a provincial superior court should intervene in an immigration matter through the exercise of its *habeus corpus* jurisdiction. The appeal court concluded that before doing so it would have to be demonstrated that the available review and appeal process established by Parliament is inappropriate or less advantageous than the *habeus corpus* jurisdiction of the Supreme Court of Ontario.

have guaranteed access to a provincial superior court, even in circumstances where all remedies before the Federal Court had been exhausted. For applicants seeking to enforce their *Charter* rights in immigration cases, the Supreme Court had reduced access to the provincial superior courts to a matter of judicial discretion.¹³⁴ Although the provincial superior court had the jurisdiction to consider Mr. Reza's application, the judge declined to exercise that jurisdiction and the Supreme Court ruled that such an exercise of discretion would not be interfered with, provided sufficient weight had been given to "relevant considerations." While the Federal Court and provincial superior courts share a concurrent jurisdiction with regard to Constitutional matters, *Reza* supports the proposition that provincial superior courts should defer to the Federal Court because of its "greater expertise in and an exclusive mandate over the review of immigration matters."¹³⁵ The objectives of avoiding forum shopping, inconsistency of decisions and multiplicity of proceedings have been cited by the Minister in subsequent cases in support of a narrow reading of the ruling in *Reza*.¹³⁶

Despite the ruling in *Reza*, a range of constitutional issues arising in the context of immigration proceedings continues to be litigated in provincial superior courts. Judges at first instance have been willing to intervene to stay deportation orders where serious human rights issues have been at stake, the applicant has demonstrated that Federal Court remedies are less than comprehensive and the issues have been successfully characterized as constitutional.¹³⁷ Recourse to provincial superior courts has been particularly important for the children of non-citizen parents seeking to halt the imminent deportation of a family member. In this context the children have invoked

134. See Eliadis, *supra* note 63 at 146-147.

135. *Reza*, *supra* note 132 at 404-5.

136. See e.g. *Torres-Samuels v. Canada (Minister of Citizenship & Immigration)* (1998), 166 D.L.R. (4th) 611 (B.C. C.A.).

137. See *Re Suresh & R.* (1998), 38 O.R. (3d) 267 (Gen. Div.). In this case security certificates had been issued against a convention refugee on the basis that there were reasonable grounds to believe that he was a member of a Sri Lankan terrorist organization. Mr. Suresh was ordered deported. He commenced an application in Federal Court for judicial review challenging the constitutionality of the deportation order and the legislation that it was based on. He also applied for a stay of his removal order on the grounds that he was at serious risk of imprisonment, torture and death if he was returned to Sri Lanka. That application was refused by an order of the Federal Court from which there was no appeal. The applicant brought an application in Ontario Court (General Division) seeking a declaration that the removal order and the *Immigration Act* provisions on which it was based were unconstitutional and seeking a stay of removal, pending the outcome of the application. The Minister moved for an order staying the proceedings in the Ontario Court on the basis that the matter was still before the Federal Court and "discretion and comity" should justify a decision by the provincial superior court not to intervene. Ultimately the motions judge stayed the declaratory component of the application (as that component was the basis of ongoing litigation in the Federal Court) but granted injunctive relief to Mr. Suresh, restraining the government from removing him until after his application for judicial review in the Federal Court was determined. Lane J. stated that "... to offer the Applicant a forum to review his constitutional rights, and then to deport him before the constitutionality of his deportation is resolved would be an affront to Canadian ideas of justice" Lane J.'s decision was approved by the Divisional Court (*R. v. Suresh* (1998), 42 O.R. (3d) 793). See also *Francis v. Canada (Minister of Citizenship & Immigration)* (1998), 40 O.R. (3d) 74, discussed above.

the residual *parens patriae* jurisdiction of the provincial superior courts, a jurisdiction which the Federal Court lacks. The *parens patriae* jurisdiction evolved from the ancient tradition of common law courts intervening in circumstances where dependant children were in need of protection.¹³⁸

In the case of *Juste v. Canada*, the Ontario Court of Appeal affirmed the important role of provincial superior courts in protecting the rights of children at risk of harm.¹³⁹ Ingrid Harper was a woman who fled Dominica as a result of a severely abusive relationship. Her refugee claim, based on a prolonged history of domestic violence, was rejected by the Immigration and Refugee Board. At the time her claim was considered, the tribunal had not yet adopted guidelines with regard to women fearing gender-related persecution. Her two children and one grandchild applied to the provincial superior court for a remedy, requesting that the court exercise its *parens patriae* jurisdiction to ensure that the interests of the children were protected. Before the court could consider the merits of the children's case, the Minister's counsel objected on jurisdictional grounds, arguing that immigration matters should be dealt with by the Federal Court under the comprehensive statutory scheme of the *Immigration Act*. The Ontario Court of Appeal adjourned the Minister's appeal until the final status of Ms. Harper had been determined, given that the government had consented to considering a fresh humanitarian and compassionate application. The Court of Appeal exercised its jurisdiction for the purpose of monitoring the children's interests until they had been determined to its satisfaction. The interim endorsement stated that the circumstances of this case raised "very real concerns to this court in its *parens patriae* jurisdiction and the need to protect the children from harm to them through harm to their mother."¹⁴⁰

In a similar vein, the Ontario Court (General Division) quashed a deportation order against Maria Joyce Francis, a woman from Grenada who was the sole parent of three children, two girls aged six and eight years and a boy with special needs aged fifteen years.¹⁴¹ The two sisters were Canadian citizens born and living in Canada. Their

138. See *Gamble v. R.*, [1988] 2 S.C.R. 595; *Beson v. Newfoundland (Director of Child Welfare)*, [1982] 2 S.C.R. 716; In *Eve v. E.*, [1986] 2 S.C.R. 388 at 425, the Supreme Court analyzed the history and scope of the *parens patriae* jurisdiction: "In early England, the *parens patriae* jurisdiction was confined to mental incompetents, but its rationale is obviously applicable to children and, following the transfer of that jurisdiction to the Lord Chancellor in the seventeenth century, he extended it to children under wardship, and it is in this context that the bulk of modern cases on the subject arise. The *parens patriae* jurisdiction was later vested in the provincial superior court of this country, and in particular, those of Prince Edward Island. The *parens patriae* jurisdiction is ... founded on necessity, namely the need to act for the protection of those who cannot care for themselves. The courts have frequently stated that it is to be exercised in the "best interest" of the protected person, or again, for his or her "benefit" or "welfare" ... 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. This is particularly so in cases where a court might be tempted to act because failure to do so would risk imposing an obviously heavy burden on some other individual."

139. *Juste, Winston and Harper through their Litigation guardian June Callwood v. Canada*, (A.G.), [1997] O.J. No. 3331 (C.A.), online: QL (ORP).

140. *Ibid.* at para. 9.

brother was born in Grenada and came to Canada at age seven. The Court at first instance found that the *Charter* was engaged on behalf of the Canadian children of a potential deportee. Specifically, the children had a liberty interest grounded in part on the right to remain in Canada pursuant to section 6 of the *Charter*. McNeely J. noted that it was self-evident that to deport the sole parent of the children was to deport or exile the children themselves. The so-called "choices" available to the children to go with their mother or remain in Canada were not genuine choices, but, rather, state compelled. The Court dealt with the participatory rights of the children as principles of fundamental justice and relied upon articles 3, 9 and 12 of the *Convention* as indicators of the "views of justice".¹⁴² McNeely J. held that forcing the removal of the children by deporting their mother was a sufficiently direct interference with the section 7 liberty rights of the Canadian children that the procedures leading to such action must comply with the requirements of natural justice. In immigration proceedings pertaining to a parent, those requirements at a minimum would encompass the identification of children, some notice to them of the proceedings and some method of seeing that their rights and interests were considered. The Court found that the oldest child, as an alien "with no right to remain in Canada", raised different considerations. The Court was unable to review the merits of his claims due to the absence of information in the record before it. Nevertheless, McNeely J. ruled that it would be inappropriate to dismiss his application. The Court concluded that all three children would be severely and adversely impacted by any removal from Canada and that it was in the best interest of all three that they remain in Canada with their mother and in her care.¹⁴³

The Minister appealed McNeely J.'s ruling and in October 1999 the Ontario Court of Appeal released a brief decision granting the appeal on the basis that the *Baker* decision had eliminated the uncertainty in the law with regard to children. In particular, the appeal court reasoned, it was clear after *Baker* that the interests of children could be properly considered where a parent makes an application under subsection 114(2) of the *Immigration Act* and there was no need to resort to the *parens patriae* jurisdiction of the provincial superior court. The exercise of jurisdiction by the provincial superior court would be justified only in "rare cases." This decision is currently on leave to appeal to the Supreme Court.¹⁴⁴ The appellant is arguing, *inter alia*, that the effect of

141. *Francis (Litigation Guardian of) v. Canada (Minister of Citizenship & Immigration)* (1998), 40 O.R. (3d) 74 [hereinafter *Francis*]. See also *Ratnavel v. Canada (Minister of Citizenship & Immigration)* (12 March 1999), 99-CV-163413 (Ont. Gen. Div.), where the Court issued injunctive relief in an application brought by children of a parent under a deportation order; *Nunez v. Canada (Solicitor General)* (11 July 1996), CA 018241, CA 018242, CA 019595, CA 019596 (B.C.C.A.), digested at 10 O.F.L.R. 23, where decisions by motions judges staying proceedings in four cases were set aside because their reasons did not disclose sufficient consideration to the existence of their *parens patriae* jurisdiction before the applications were stayed. In contrast, a completely opposite approach was adopted in *John (Litigation Guardian of) v. Canada (Minister of Citizenship & Immigration)* (1998), 46 Imm. L.R. (2d) 112 (Ont. Gen. Div.); *Jones v. Minister of Citizenship & Immigration*, [1999] O.J. No. 1379 (QL).

142. *Francis*, *ibid.* at paras. 10, 12

143. *Ibid.*

144. [1999] O.J. No. 3853 (QL) (C.A.), leave to appeal to S.C.C. pending, Court File 27615.

the *Federal Court Act*,¹⁴⁵ in the circumstances of Canadian children, cannot be to exclude the "superintending and reforming" power of the superior court as it relates to children whose interests will otherwise not be directly and independently considered. A further issue relates to the appeal court's ruling that exercise of a *parens patriae* jurisdiction is an act that must necessarily be assigned to a rare case.¹⁴⁶

One concern about the manner in which the issues in *Francis* have been framed in the applicants' leave application is that a distinction has been drawn between the rights of the eldest son, who is not a citizen, and the younger children, who are seeking *Charter* relief based on their status as *Canadians*.¹⁴⁷ This is a potentially dangerous invitation for the privileging of certain children over others based on status, a distinction that the *CRC* tells us should be irrelevant in determining the best interests of children. This point deserves particular attention as the government has increasingly invoked lack of statutory citizenship as a basis for stripping away the right to remain in Canada even in cases of long-term domicile in the country. Why should children who may have lived in Canada since infancy, but by the mere fact of their place of birth and parents' nationality, be subject to lesser protection than those who happened to have been born in here? In an effects based analysis, as mandated in *R. v. Big M. Drug Mart*,¹⁴⁸ the impact of a negative H & C decision would be the same for all children, regardless of status. It should be noted that the ruling in *Baker* was not confined to citizen children.

In *Solis v. Canada (Minister of Citizenship and Immigration)*,¹⁴⁹ a long-term resident sought to challenge the public danger procedures which resulted in his deportation from Canada. The appellant argued that the word "citizen" in the *Charter* should be accorded a meaning independent of the *Citizenship Act*. He asserted that whether or not a person is a member of the Canadian community for the purposes of section 6 of the *Charter* should be a question of fact, determined with reference to the nature of the person's connections to Canada.¹⁵⁰ The Federal Court of Appeal ruled against *Solis*, holding that citizenship is entirely a "creature of federal statute law."¹⁵¹ However, there is some support for the position advanced by the appellant in *Solis* in American jurisprudence as well as in international law with regard to nationality.¹⁵²

145. R.S.C. 1985, c. F-7.

146. *Francis (Through their Litigation Guardian) v. Minister of Citizenship & Immigration*, Court File No. 27615 (22 November 1999) (S.C.C.) (Appellant's factum).

147. *Ibid.* at para. 29.

148. [1985] 1 S.C.R. 295, 18 D.L.R. (4th) 321, 58 N.R. 81.

149. (28 March 2000), 360-98 (F.C.A.).

150. *Ibid.* (Appellant's factum).

151. *Ibid.* at para. 4 The Court cited P. Hogg, *Constitutional Law of Canada*, 3rd ed. (Toronto: Carswell, 1992) at 833 as support for its view that citizenship has no meaning apart from statute. The decision will be appealed to the Supreme Court of Canada. In *Frankowski v. Canada*, T-1663-99 (F.C.T.D.), scheduled for hearing in August 2000, the Federal Court will be afforded an opportunity to revisit its views about citizenship. Mr. Frankowski will raise the arguments advanced in *Solis* in his challenge of the Department's decision rejecting his citizenship application.

In the immigration context the issues for children are identical whether they themselves are the subject of a deportation order or it is one of their family members. A principled way of resolving this dilemma would be to use the *CRC* as the starting point and proceed on the basis that all children have a right to family unity, subject to their best interests, as well as the right not to be evicted from their community, subject to the links they have established and the harm they would suffer if forced to leave.

VII. CONCLUSION

The Supreme Court has yet to recognize an unqualified right to family unity, the entitlement of children, in their own right, to a relationship with their family members under either section 2 or 7 of the *Charter*, or more radically, to import a constitutional notion of citizenship into deliberations concerning the expulsion of long-term residents. In addition to the somewhat confusing and contradictory rulings of various provincial superior courts with regard to the interplay between the provincial domain of "protection and civil rights" and the federal domain of immigration law, there are conflicting decisions with regard to the application of section 7 of the *Charter* to the interests of children in their relationship with family members.

In *R.(B). v. Children's Aid Society of Metropolitan Toronto*, a constitutional challenge to provincial child welfare legislation, the Supreme Court recognized a parental right to care for one's children, ruling that the right to nurture a child, to care for its development and to make decisions for it in fundamental matters such as medical care, are part of the liberty interest of a parent, as guaranteed by section 7 of the *Charter*. Eight of the nine justices in their minority judgments recognized a constitutionally protected right of family integrity, subject only to state interference on the basis of measurable grounds such as best interests of the child. Cory, Iacobucci and Major JJ. approached the analysis from the standpoint of the section 7 rights of the child to life, liberty and security of the person, emphasizing that there was no room within section 7 for parents to override the child's right to life and security of the person. To hold otherwise would be to risk undermining the ability of the state to exercise its legitimate *parens patriae* jurisdiction and jeopardize the *Charter* goal of protecting the most vulnerable members of society.¹⁵³

In view of the Supreme Court's recent decision in *New Brunswick (Minister of Health and Community Services) v. G. (J.)*,¹⁵⁴ in which the right of a mother to legal aid

152. American courts have found that the notion of citizenship in the U.S. Constitution has a meaning which may differ from the statutory meaning. On this basis various statutory schemes revoking citizenship have been held unconstitutional. See, for example, *Trop v. Dulles* 356 U.S. (1958); *Kennedy v. Mendoza-Martinez* 372 U.S. 144 (1953); *Schneider v. Rusk* 377 U.S. 163 (1964); *Afroyim v. Rusk* 387 U.S. 353 (1967); *Vance v. Terrazas* 444 U.S. 252 (1980). In the *Nottebohm Case (Liechtenstein v. Guatemala)* [1955] I.C.J. Rep. 4 at 23, the International Court of Justice found that a person's factual situation and in particular, whether they had a "genuine and effective link" with a territory should be the criteria for determining nationality.

153. [1995] 1 S.C.R. 315 at 431-434.

154. (1999), 50 R.F.L. (4th) 62, 66 C.R.R. (2d) 267 (S.C.C.) [hereinafter *G.(J.)* cited to R.F.L.].

assistance for a child protection proceeding was recognized as a section 7 security interest, it would appear that there is an opening to raise the matter of the child's right to association with their family members under the rubric of section 7. In *G. (J.)* the Court held that the right to security of the person guaranteed by section 7 protects both the physical and psychological integrity of the individual and that state removal of a child from parental custody constitutes a serious interference with the psychological integrity of the parent. The Court noted the "obvious distress arising from loss of companionship of the child".¹⁵⁵

The challenge in addressing the needs of children in the immigration context is that in order to give meaningful expression to their rights, a broader human rights framework must necessarily be adopted. To the extent that resistance to this framework continues to inform decisions and policies that have an impact on children, this can be understood as a function of an overarching unwillingness to afford primacy to human rights in the face of a state interest in immigration control. In this regard it is instructive to consider state resistance from the wider optic of the government's recent responses to the views and recommendations of international and regional human rights bodies. Whereas in the past the federal government had an uneven record in terms of how quickly remedial action was taken to comply with the rulings of these bodies, there appears to have been a policy shift in the past few years. Now the problem is not a matter of the how slowly the government responds but whether it will respond at all. In 1997 Canada flouted an interim measures request from the United Nations Committee Against Torture not to execute a deportation order and in 1998, ignored a similar request from the Inter-American Commission on Human Rights.¹⁵⁶ In 1999, in its concluding observations concerning Canada, the United Nations Human Rights Committee expressed concern about the Canadian government's view that it was not required to comply with interim measures requests. The Committee also indicated its continuing concern about Canada's policy in relation to the expulsion of long-term illegals without giving full consideration to the protection of children and the family.¹⁵⁷ Most recently, in *Waldman v. Canada*,¹⁵⁸ a ruling of the United Nations Human

155. *Ibid.* at 101.

156. The cases were *Tejinder Pal Singh v. Canada* and *San Vicente v. Canada*, respectively. Interim or precautionary measures are akin to temporary injunctions. A state may be requested, for example, to refrain from doing a particular action pending the tribunal's review of the admissibility and merits of the complaint or petition. See "Canada deports Venezuelan" *The Globe and Mail* (13 March 1998) A7. For an overview of both the U.N treaty bodies and the Inter-American Commission on Human Rights with specific reference to relevant jurisprudence concerning non-citizen's rights in Canada, see S. Aiken, ed., *Human Rights for Refugees and Immigrants: The Canadian Guide to International and Regional Human Rights Mechanisms* (Canadian Bar Association, forthcoming 2000); and S. Aiken and T. Clark, "International Procedures for Protecting the Human Rights of Non-Citizens" (1994) 10 J.L. & Soc. Pol'y 182.

157. Human Rights Committee, *Concluding Observations on Canada*, 65th Session, UN Doc. CCPR/C/79/Add.105 (7 April 1999) at paras. 14-15. The full text can be found online: Canadian Heritage, Human Rights Directorate Homepage <<http://www.pch.gc.ca/ddp-hrd/ENGLISH/Covenant.htm>>.

158. CCPR/C/67/D/694/1996 (4 November 1999); in this case the Committee found that Canada was engaging in religious discrimination because Roman Catholics in Ontario receive full funding for

Rights Committee, on a non-immigration matter, the federal government asserted that the decision was not binding as the Committee has merely "advisory jurisdiction".¹⁵⁹ The government's cavalier response to the Human Rights Committee seems to be indicative of an increasingly anti-international and anti-human rights sensibility. This sensibility has particularly serious consequences for the children of foreign-born parents regardless of the children's own citizenship status.

The Supreme Court's decision in *Baker* was a step forward in terms of taking children's rights seriously in the immigration context, an area in which notions of privilege and national interest, rather than rights, permeate both legal and political discourse. Nevertheless, the absence of explicit legislative protection for both resident and domiciled alien children in matters related to deportation, remains a serious deficiency in Canada's immigration scheme. In 1995 the Committee on the Rights of the Child suggested that Canada was not meeting its international obligations to protect children and families. Five years have passed since Canada received its UN report card but there is still no reference to the *Convention on the Rights of the Child* in the *Immigration Act* and its inclusion in policy guidelines in permissive, discretionary terms rather than as a mandatory requirement, underscores just how little substantive progress has been achieved. In March of this year the Inter-American Commission released its long awaited report concerning an on-site visit to Canada made in 1997 to observe, *inter alia*, the "availability and scope of judicial protection for the rights of Canadian-born children directly affected by proceedings to remove a non-citizen parent or parents from Canada."¹⁶⁰ The report, although couched in typically diplomatic language, highlights a number of concerns with regard to the legislative and administrative framework for immigration and refugee protection. In relation to respect for the rights of the child and family life in removal proceedings, the Commission recommended action aimed at enhancing:

1. The compliance of decision-making at all levels of the process with the obligation to take the best interest of the child into account in all decisions that affect him or her, and to assure that, where a child is capable of expressing his or her views, those will be taken into account...[I]n view of the importance of ensuring

religious schools while every other religion receives nothing. The ruling stated that funding was not required but where a government chooses to fund religious schools it must do so on a non-discriminatory basis. The Human Rights Committee was clear in its statement that Canada was in violation of its treaty obligations.

159. Letter from Hon. L. Axworthy to A.H. Waldman (24 February 2000). Note that one of the explanations offered by the federal government for failing to comply with the Committee's decision in *Waldman* was that education is within provincial jurisdiction and therefore beyond its control. This rationale runs counter to art. 50 of the *ICCPR*, which states that treaty provisions extend to all parts of federal states, without any limits or exceptions. While unincorporated treaties may not be directly enforceable in Canadian law, by becoming a party to the Optional Protocol of the *ICCPR*, Canada explicitly undertook to give effect to the decisions of the Human Rights Committee and to provide a remedy when the Committee determines that there has been a treaty violation.
160. Inter-American Commission on Human Rights, *Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System*, adopted March 2000, online: Inter-American Commission on Human Rights Homepage <www.cidh.org>.

that the best interests of such a child are properly considered in any determination affecting him or her, the Commission recommends that further steps be taken to clarify how that standard is to be applied by decision-makers at all levels, in accordance with ... the American Declaration, interpreted in conjunction with the Convention on the Rights of the Child.

2. The conformity of decision-making at all levels with the international obligation to consider the principle of family reunification and family unity.
3. The adherence of such decisions to the standard by which removals separating families are a highly exceptional measure requiring as extremely serious justification to override the resulting interference with family life.¹⁶¹

The Commission's blueprint for reform is one we strongly endorse. In this regard it should be noted that Citizenship and Immigration Minister Elinor Caplan recently introduced Bill C-31, *Immigration and Refugee Protection Act*.¹⁶² An attempt to respond to the Commission's observations and the *Baker* ruling can be seen in the Bill's explicit reference to the "best interests of the child" in a number of provisions. With regard to H & C decisions, the Bill states that "the Minister must take into account the best interests of a child directly affected by the decision."¹⁶³ That the language is mandatory and proposed for the statute itself rather than a policy guideline, is significant. Yet the Bill still fails to incorporate the more exacting norms and standards required by the *CRC*. In the absence of any direction regarding the priority to be ascribed to a child's interests, both immigration officials and judges are likely to view the Bill's new provisions as little more than symbolic window dressing.

The courts occupy an intermediate space in the balance of power between the children of non-citizen parents and the state seeking to maintain its grip on immigration control. While judicial pronouncements rarely generate fundamental, systemic reform, by granting leave in the *Francis* case, the Supreme Court could seize the opportunity to narrow the gaps between Canada's international human rights commitments and its domestic practice. Weaving together the disparate strands of *L.L.A.* and *O'Connor, R.(B.)*, *G.(J.)*, *Eaton* and *Baker*, the Court could make a definitive statement that affirms both the due process and substantive rights of children. In order for the Court to fully embrace this opportunity, it must approach such issues as the right to parental care and family unity as well as the right to remain, from the standpoint of children. The framework must be one of "children's rights as human rights" in order to arrive at a long over-due, comprehensive recognition of children as independent, rights-bearing individuals. In terms of the broader spectrum of children's rights, the future will be informed by the responses of both the courts and government. As we inch our way toward true justice for children, the judgment in *Baker* provides a useful starting point but the *Convention on the Rights of the Child* should be the beacon.

161. *Ibid.* at para.180.

162. 2d Sess., 36th Parl., 2000 (1st reading 6 April, 2000).

163. *Ibid.*, s. 22(2).