

**CANADIAN COUNCIL FOR REFUGEES
THE UNITED CHURCH OF CANADA
INTERNATIONAL BUREAU FOR CHILDREN’S RIGHTS**

**The understanding and application of “Best Interests of the Child”
in H & C decision-making by Citizenship and Immigration Canada**

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1. Introduction

This report has been produced by the Canadian Council for Refugees, the United Church of Canada and the International Bureau for Children's Rights in order to provide observations on how the notion of "best interests of the child" (hereinafter BIC) is being interpreted and applied within the context of inland and overseas applications for permanent residence on humanitarian and compassionate grounds (H & C applications), as well as recommendations for improvement.

In so doing, this report provides a partial update to the CCR's 2004 report *Impacts on Children of the Immigration and Refugee Protection Act*. As much as possible, in the present report, we have illustrated our concerns with reference to actual H & C decisions. As we point out below, we are aware that many good decisions have been rendered by immigration officers who have demonstrated genuine sensitivity and understanding regarding children's interests. However, we remain troubled by a number of issues in negative decisions which we believe represent persistent problems in the understanding and application of the BIC by many immigration officers. We will begin with an examination of the parameters (ie. the content) of the obligation of immigration officers to consider BIC within the H & C context, followed by a review of some concerns expressed about Canada's respect for that obligation. Then we will provide an analysis of the BIC determinations of a number of recent H & C decisions, and conclude with our recommendations.

H & C decisions are critically important for children, as they represent in some circumstances the only provision in the immigration legislation to allow them to reunite or remain with family members, including parents. H & C decisions also determine whether some children will live in Canada or in another country where their rights may be compromised. The following are some of the situations where children's rights depend on an H & C decision:

- Separated refugee children in Canada trying to reunite with parents and/or siblings. Children have no right in the law to apply for family reunification, and so must depend on an H & C application made by their parents or siblings.
- Excluded family members (R. 117(9)(d)). Children must rely on H & C for family reunification if they or their family members are "excluded family members", i.e. they were not examined by a visa officer when the sponsor immigrated to Canada.
- Deportation. Some children face deportation to a country where their rights and well-being may be at risk if they are not granted a positive H & C.
- Deportation of a parent. Some H & C decisions concern a parent who is threatened with deportation. If H & C is refused, the child in Canada will likely be separated from the deported parent.
- Nationals of moratoria countries. Nationals of moratoria countries who are not recognized as refugees are allowed to remain in Canada but must rely on an H & C application to obtain permanent residence. Children are affected both when they are part of the family in limbo in Canada (even if they themselves have citizenship by birth in Canada) and when they are overseas and deprived of the opportunity for family reunification until their parent in Canada has permanent residence.

2. Parameters of the obligation to consider BIC in the H & C context

The basis of the obligation of immigration officers to consider the BIC in the context of H & C decisions, and the content of that obligation, is derived from four sources: International Law, Canadian Law, Canadian Jurisprudence and Departmental Guidelines.

a. International Law

The *Convention on the Rights of the Child*, to which Canada is a signatory, is the leading international human rights instrument on children's rights.¹

Article 3 of the *Convention* establishes the principle of the "best interests of the child".

Article 3

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

The rest of the Convention is largely an explanation of how the "best interest of the child" applies in different contexts. Of particular relevance to the Canadian H & C context are the following obligations:

- Not separating children from their parents (Art. 9 – "States Parties shall ensure that a child shall not be separated from his or her parents against their will...")
- Family reunification (Art. 10 – "applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner...")
- Child's right to be heard (Art. 12 – "States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child...")

It should be noted that Section 3(3)(f) of the *Immigration and Refugee Protection Act (IRPA)* provides that:

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

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

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

¹ Children's rights are also, of course, guaranteed by other international instruments, including the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights* and the *Convention on the Elimination of All Forms of Discrimination against Women*.

Paragraph 3(3)(f) should be interpreted in light of the modern developments in courts' use of international human rights law as interpretative aids. Thus, like other statutes, *IRPA* must be interpreted and applied in a manner that complies with "international human rights instruments to which Canada is signatory" that are binding because they do not require ratification or Canada has signed *and* ratified them. These include the two instruments on which counsel for Ms de Guzman relied heavily in this appeal, namely, the *International Covenant on Civil and Political Rights*, and the *Convention on the Rights of the Child*. Thus, a legally binding international human rights instrument to which Canada is signatory is determinative of how *IRPA* must be interpreted and applied, in the absence of a contrary legislative intention.² (emphasis added)

b. Canadian Law

In addition to the legislated requirement that its provisions be construed in a manner that complies with human rights instruments, the *Immigration and Refugee Protection Act* enshrines the notion of "best interests of the child" directly into the section dealing with H & C applications:³

Humanitarian and compassionate consideration (H&C)

25. (1) The Minister shall [...] grant the foreign national permanent resident status [...] if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to them, **taking into account the best interests of a child directly affected**, or by public policy considerations.

c. Canadian Jurisprudence

The fundamental principles were established by the Supreme Court of Canada in the 1999 *Baker* case, in the following terms:

Therefore, attentiveness and sensitivity to the importance of the rights of children, to their best interests, and to the hardship that may be caused to them by a negative decision is essential for an H & C decision to be made in a reasonable manner. While deference should be given to immigration officers on s. 114(2) [now *IRPA* S. 25] judicial review applications, decisions cannot stand when the manner in which the decision was made and the approach taken are in conflict with humanitarian and compassionate values. (emphasis added)

And further:

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

² *De Guzman v. MCI 2005*, FCA 436 at par. 87

³ Other sections of *IRPA* refer to BIC in the context of retention of permanent residence (S. 28), detention reviews (S. 60) and appeals to the Immigration Appeal Division regarding removal orders (S.67)

with Canada's humanitarian and compassionate tradition and the Minister's guidelines, the decision will be unreasonable.⁴ (emphasis added)

The subsequent Federal Court of Appeal decision in *Legault*⁵ clarified that the best interests of the child must be "well identified and defined" by an H & C officer. The Court further added that:

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

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

In short, the immigration officer must be "alert alive and sensitive" (*Baker*, at par. 75) to the interest of the children, but once she has well identified and defined this factor, it is up to her to determine what weight, in her view it must be given in the circumstances.⁶ (emphasis added)

In *Hawthorne*⁷ the Federal Court of Appeal dealt with the situation of a teenage girl whose mother was facing removal from Canada, and stated the following:

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

The Court noted that the H & C officer in that case had been insensitive to the child's own expression of her needs and also to the fact that she would be deprived of financial support if her mother were removed.

The Court also questioned the appropriateness of the expressions "unusual, undeserved and disproportionate hardship" when it comes to children, since "[c]hildren will rarely, if ever, be deserving of any hardship".⁸

In a separate opinion, Mr. Justice Evans concurred with the result (ie. overruling the H & C officer's negative decision), but had specific comments regarding the H & C officer's reasoning, and the proper approach to be taken in analyzing BIC. According to Mr. Justice Evans, before addressing the question of the "hardship" a child would suffer from a negative decision, the officer must clearly identify where the best interests of the child lie, taking into account all considerations.

⁴ *Baker v. MCI* [1999] 2 S.C.R. 817 at pars. 74 and 75

⁵ In this case the interests of Canadian-born children were being weighed against the conduct of a parent wanted on serious criminal charges in the US.

⁶ *MCI v. Legault* 2002 FCA 125 at pars. 12 and 13

⁷ *MCI v. Hawthorne* 2002 FCA 475 at par. 4

⁸ *Hawthorne*, at par. 10

For example, in that particular case, the H & C officer was of the opinion that separation from the mother would involve no “excessive hardship” for the teenage girl because they had been separated for an extended period in the past. Nor would the alternative of return to a poor and violent country be an “excessive hardship” for the girl, according to the officer, because she had lived there in the past. According to Mr. Justice Evans, this approach missed the fundamental point that it was strongly in the child’s best interests to remain united with her mother in Canada.

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

It is not the purpose of this report to do an exhaustive analysis of the considerable jurisprudence on BIC. However, in addition to the above upper-court decisions which set out the main principles, the following are some other important principles set out in Federal Court jurisprudence:

- Immigration officers must examine the best interests of all children concerned – not just Canadian-born children or children who are the applicants. For applications in-Canada, even the best interests of children living overseas must be examined (for example a child outside Canada who is being supported by a parent who is in Canada). Similarly, for an applicant outside Canada, the best interests of a child in Canada may be relevant. However, the onus is on the applicant to raise the issue clearly and provide the necessary evidence.⁹
- It is unreasonable for an H & C officer to simply state that the child is young and could adapt to life in the parent’s home country.¹⁰
- It is unreasonable and insufficient for an H & C officer to dismiss the BIC issue by simply stating that it is up to the parent to decide whether to take the child with him/her, if the parent is removed.¹¹
- Where parents need community support or medical services to function well as parents, it is unreasonable for an H & C officer to fail to consider the availability of such support in the home country.¹²

d. Departmental Guidelines

Citizenship and Immigration Canada has included various references to BIC in its immigration manuals, which provide important guidance to immigration officers.¹³ The Supreme Court described the importance of the guidelines as follows in *Baker*:

⁹ *Owusu v. MCI*, 2004 FCA 38

¹⁰ *Raposo v. MCI* 2005 FC 118 at pars. 31 and 32; *Ahmad v. MCI* 2003 FCT 592 at par. 41

¹¹ *Singh Sandar* 2004 FC 1758 at par. 33; *Walker v. MCI* 2004 FC 1309 at pars. 2 and 3.

¹² *Nguyen v. MCI* 2004 FC 1629 at par. 11

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

The IP5 Manual, which deals with H & C decisions made in Canada, provides the principal reference in the immigration manuals to best interests of the child. The relevant section, 5.19, reads as follows:

Best interests of the child

The Immigration and Refugee Protection Act introduces a statutory obligation to take into account the best interests of a child who is directly affected by a decision under A25(1), when examining the circumstances of a foreign national under this section. This codifies departmental practice into legislation, thus eliminating any doubt that the interests of a child will be taken into account.

Officers must always be alert and sensitive to the interests of children when examining A25(1) requests. However, this obligation only arises when it is sufficiently clear from the material submitted to the decision-maker that an application relies, in whole or at least in part, on this factor. An applicant has the burden of proving the basis of their H&C claim. If an applicant provides insufficient evidence to support the claim, the officer may conclude that it is baseless.

As with all H&C decisions, the officer has full discretion to decide the outcome of a case.

It is important to note that the codification of the principle of best interests of a child into the legislation does not mean that the interests of the child outweigh all other factors in a case. The best interests of a child are one of many important factors that officers need to consider when making an H&C or public policy decision that directly affects a child.

In reaching a decision on an H&C application, officers must consider the best interests of any child directly affected by the decision. “Any child directly affected” in this context could mean either a Canadian or foreign-born child (and could include children outside of Canada).

The relationship between the applicant and “any child directly affected” need not necessarily be that of parent and child, but could be another relationship that is affected by the decision. For example, a grandparent could be the primary caregiver who is affected by the immigration decision, and the decision may thus affect the child.

The outcome of a decision under A25(1) that directly affects a child will always depend on the facts of the case. Officers must consider all evidence submitted by an applicant in relation to their A25(1) request. Thus, the following guidelines are not an exhaustive list of factors relating to children, nor are they necessarily determinative of the decision. Rather, they are meant as a guide to officers and illustrate the types of factors that are often present in A25(1) cases involving the best interests of the child. As stated by Madame Justice McLachlin of the Supreme Court of Canada, “. . . The multitude of factors that may impinge on the child’s best interest make a measure of indeterminacy inevitable. A more precise test

¹³ Available on the CIC website, under Publications.

¹⁴ *Baker*, (supra) at par. 72

would risk sacrificing the child's best interests to expediency and certainty. . . ." (Gordon v Goertz, [1996] 2 S.C.R. 27).

Generally, factors relating to a child's emotional, social, cultural and physical welfare should be taken into account, when raised. Some examples of factors that applicants may raise include:

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

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

For overseas cases, OP4 (section 8.3) also addresses BIC, with a short text identical to the beginning of that quoted above. It fails however to provide detailed guidance on the application of BIC in overseas processing, concluding after three short paragraphs with a reference to IP5 for "detailed guidelines on the application of best interests of the child in an inland H&C context".

3. Concerns over Canada's respect for its obligations

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

Regrets that the principles of non-discrimination, of the best interests of the child and of the respect for the views of the child have not always been given adequate weight by administrative bodies dealing with the situation of refugee or immigrant children. [...] The Committee specifically regrets [...] cases where refugee or immigrant children born in Canada may be separated from their parents facing a deportation order.¹⁵

Eight years later, in 2003, the Committee reiterated concerns relating to refugee children. With respect to the best interests of the child,

The Committee recommends that the principle of "best interests of the child" contained in article 3 be appropriately analysed and objectively implemented with regard to individual and groups of children in various situations (e.g. Aboriginal children) and integrated in all reviews of legislation concerning children, legal procedures in courts, as well as in judicial and administrative decisions

¹⁵ Committee on the Rights of the Child, Concluding observations of the Committee on the Rights of the Child: Canada, CRC/C/15/Add.37, 20 June 1995, par. 13. The Committee also recommended at par. 24 that Canada pay particular attention to "the best interests of the child and respect for his or her views, in all matters relating to the protection of refugees and immigrant children, including in deportation proceedings."

and in projects, programmes and services that have an impact on children. The Committee encourages the State party to ensure that research and educational programmes for professionals dealing with children are reinforced and that article 3 of the Convention is fully understood, and that this principle is effectively implemented.¹⁶

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

that the best interests of the child should always be a primary consideration in immigration decisions affecting children. All immigration and border services officials dealing with children should receive orientation and ongoing training to ensure that they are fully aware of children's rights, as well as how to communicate effectively with children of different cultural backgrounds. The training programs that currently exist should be enhanced and revised to take into account the comments and criticisms expressed in this report. (emphasis in the original).¹⁷

4. Analysis of H & C Decision-Making

a. Examples of BIC determinations in positive H & C decisions

As noted above, we are conscious that many good decisions are rendered each year by immigration officers who demonstrate genuine sensitivity towards children's interests. The following is an example of the best interests assessment from a positive H & C decision involving four children, all of whom were living with their grandmother in Ethiopia, separated from their mother, the applicant, who was in Canada:

Je suis sensible à la situation des 4 enfants, dont deux filles, âgés entre 8 et 13 ans. Je note que madame soutient financièrement ses enfants. La documentation consultée rapporte que, malgré un accès gratuit à l'école, plus de 30% des enfants en âge de fréquenter l'école ne se prévalent pas de ce droit. Je note que ce problème touche particulièrement les jeunes filles. Entre autres, il est mentionné que la mutilation génitale se pratique de façon courante malgré une interdiction prévue à la loi. Également, il est mentionné que les mariages précoces sont très fréquents. De plus, je note la présence d'une pratique très répandue dans certaines régions, bien qu'illégale, et qui consiste dans d'enlèvement des jeunes filles et femmes dans le but de les épouser.

Translation: "I am sensitive to the situation of the 4 children, of whom two are girls, aged between 8 and 13. I note that the applicant supports her children financially. The documentation consulted reports that, despite free access to schools, more than 30% of school-aged children do not avail themselves of this right. I note that this problem affects young girls particularly. Among other things, it is mentioned that the practice of female genital mutilation is commonplace, despite

¹⁶ UN Committee on the Rights of the Child, Consideration of reports submitted by States parties under article 44 of the Convention, Concluding observations: Canada, CRC/C/15/Add.215, 27 October 2003, par. 25. This recommendation responded to the Committee's concern, articulated at par. 24, that "the principle that primary consideration should be given to the best interests of the child is still not adequately defined and reflected in some legislation, court decisions and policies affecting certain children, especially those facing situations of divorce, custody and deportation, as well as Aboriginal children."

¹⁷ *Children: The Silenced Citizens. Effective Implementation of Canada's International Obligations with respect to the Rights of Children*, Final Report of the Standing Senate Committee on Human Rights, April 2007, p. 137.

being prohibited in law. It is also mentioned that early marriages are very frequent. Moreover, I note the presence of a widespread practice in some regions, despite being illegal, consisting of kidnapping young girls and women with a view to marrying them.”

Here is another example, taken from an inland H & C decision involving a single mother with four children, from Pakistan. The mother was suffering from mental health problems which, according to a medical report, could be expected to deteriorate if the family were removed from Canada:

Considérant l'intérêt supérieur des enfants qui ont pratiquement passé leur adolescence en Amérique du Nord et qui semblent bien adaptés à la société canadienne, y étudiant et travaillant, je considère que le retour en Pakistan amènerait des répercussions importantes sur la vie des jeunes.

[...]

Je prends en considération que les enfants ont démontré une bonne adaptation à la société canadienne et que madame a aussi démontré avoir une volonté de s'y adapter malgré le handicap que présente sa condition médicale. J'estime aussi que le fait qu'ils ne puissent pas bénéficier de l'appui d'un homme, membre de leur famille immédiate, qui assurerait leur bien-être au Pakistan les placera dans une situation difficile lors d'un éventuel retour. Compte tenu de la place accordée à la femme au Pakistan, je considère qu'ils seraient, surtout [la fille adolescente] à la merci d'une société essentiellement masculine où leur mère aurait de la difficulté à assurer, à tous les quatre, leur bien-être physique et moral.

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

[...]

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

b. Analysis of some recent negative H & C decisions involving BIC

i) Three Mexican orphans

Three minor children (ages 6, 11 and 17 at the time of the H & C decision, October 2007) were orphaned when their parents were killed by drug traffickers and then fled to Canada with their elderly grandmother, facts not disputed by CIC. In Canada, they were all in school and seemed to be coping reasonably well under the circumstances. Here is an excerpt from the BIC determination:

Les demandeurs mineurs sont au centre d'une situation de vie extrêmement triste et je suis sensible à la douleur qu'ils ont rencontrée lors du décès tragique de leurs parents [...] Leurs vies furent bouleversées par leur disparition et les inconvénients décrits par le travailleur social sont plausibles et avérés. Je suis cependant d'avis que ces lettres ne sont pas suffisantes pour

démontrer que le retour des demandeurs au Mexique leur causerait des difficultés inhabituelles, injustifiées ou excessives pour les raisons suivantes :

[...]

Bien que conscient des liens créés au Canada par les demandeurs, je ne dispose pas d'informations qui me permettent de croire qu'ils seraient dans l'impossibilité de reprendre leurs activités régulières au Mexique, comme notamment fréquenter l'école et reprendre contact avec des amis on s'en créer des nouveaux. Au moment de la rédaction des présentes, les demandeurs vivent au Canada depuis moins de 2 ans. Je suis d'avis que la courte période vécue au pays n'est pas suffisante en durée pour démontrer la création de liens si significatifs, que leurs ruptures pourraient emporter des difficultés justifiant l'émission d'une mesure d'exception. (emphasis added).

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

[...]

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

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

More fundamentally, and aside from this disturbing level of insensitivity, the officer completely failed in his duty to carry out a BIC determination. Had he carefully identified and examined all the factors pertaining to the children's best interests, it is hard to imagine he would not have concluded that their interests lie strongly in remaining in Canada for a number of compelling reasons: personal and economic security, some sense of stability, successful integration of the school environment over two years, etc.

As the Federal Court of Appeal pointed out in the *Hawthorne* (at par. 4, reproduced above), the “benefit” to the children's interests of a positive H & C decision and the “hardship” the child would suffer from a negative decision are “two sides of the same coin”. It is thus only by carrying out a full and proper BIC determination that an officer is in a position to assess both the “benefit” and the “hardship” at stake for the child.

Of course, even after a proper BIC determination, it would have been open to the officer to decide that the children's interests were outweighed by other factors in the file. However, the approach taken by the officer here amounts to nothing more than looking at the children's

previous life in Mexico and concluding that unless it is “impossible” for them to resume that life (minus their parents) there is no “excessive hardship” for them.

It may be of interest to note that, following a public protest campaign led by the United Church of Canada, CIC issued Temporary Residence Permits to this family for the purposes of filing a new H & C application. It should be pointed out, however, that an application for judicial review of this negative H & C decision was not even granted “leave” to proceed to a hearing by the Federal Court. This illustrates the difficulty of rectifying a deficient BIC determination, particularly given that many refused applicants cannot even afford the significant costs of applying for judicial review.

ii) Tamil family from Sri Lanka

A Tamil couple with a five-year-old daughter and two younger Canadian-born children faced removal from Canada. The negative H & C decision was rendered in late December 2007, just as the fragile and largely fictional “cease-fire” in Sri Lanka was completely unravelling, and there was mounting evidence that Tamils, particularly Tamils from the North of Sri Lanka (from where the wife comes), were at risk of arbitrary detention, torture or death in all of Sri Lanka. The H & C officer even conceded that the applicants might be temporarily detained by Sri Lankan authorities, but that it should not have “severe consequences”. The officer concluded there was no personalized risk sufficient to merit a positive H & C decision.

With regard to the BIC, the officer states:

In the event of return to Sri Lanka, all of the children affected by this application would commence living in an unfamiliar country. The resulting impact would differ according to the respective ages of the children. However all three are still at an age where the family remains the centre of their social development.

If the applicants were required to apply for permanent residence from Sri Lanka, the children would continue to benefit from contact with both parents. With such guidance, I am satisfied they would be able to transition successfully into Sri Lankan society. As a result, I find that their re-integration would not cause the children unusual and undeserved or disproportionate hardship. (emphasis added).

Thus, the decision ignores the fact that, even if they and their parents have the good fortune to be spared physical harm, the children would be going to live in a war zone. There is no recognition that it is strongly in their interests to remain in Canada, nor even any discussion of where the best interests of the children lie. In other words, as in the previous example, there is no actual BIC determination.

In essence, the officer is dismissing the entire BIC question with the notion that “the children are young and as long as they have their parents with them, they can adapt”. This formulation is a perfunctory dismissal of children’s interests which the CCR decried in its 2004 report¹⁸ and

¹⁸ *Impacts on children of the Immigration and Refugee Protection Act*, supra, at page 2.

which has also been chastised in Federal Court jurisprudence.¹⁹ However, it has clearly not gone away it is being used here and we have seen it in other recent decisions.²⁰

The officer also bases his BIC analysis on the fiction that a return to Sri Lanka for the family would be just a temporary one, ie. for the purposes of applying for permanent residence in Canada. While this is consistent with the IP 5 Manual (S. 6.7) which states that an officer should examine “the hardship (of having to apply for a permanent resident visa from outside of Canada) that the applicant would face”, the reality is that for the vast majority of H & C applicants, a departure for Canada will be permanent, not temporary. As Mr. Justice Evans stated in *Hawthorne*:

[21] I should note at this point that, in many cases, the outcome of a subsection 114(2) application determines not only whether an applicant may apply for permanent residence from within Canada, but also whether she will be granted permanent residence status at all. Thus, if Ms. Hawthorne’s H & C application is unsuccessful, she will almost certainly be removed from Canada. If she were then to apply from outside Canada for a visa to enter as a permanent resident in the independent category, a visa would likely be refused because she lacks the educational qualifications and job skills required to meet the selection criteria. However, if her H & C application succeeds, she will be granted permanent residence status in Canada on satisfying health and security requirements. (emphasis added).

The Supreme Court of Canada also recognized this reality in *Baker*:

In addition, while in law, the H & C decision is one that provides for an exemption from regulations or from the Act, in practice, it is one that, in cases like this one, determines whether a person who has been in Canada but does not have status can stay in the country or will be required to leave a place where he or she has become established.²¹ (emphasis in original)

Thus, it artificially minimizes the “hardship” involved for the children (whether lack of access to education, health care, risks from war, child exploitation, etc) by operating under a fiction that they will be exposed to a difficult situation for just a year or two, rather than for the duration of their childhood (and possibly the rest of their lives). In other words, the stakes are really much higher than the formulation in the IP 5 Manual would lead one to believe.

iii) Single mother from Honduras and teenaged daughter

An 11-year-old girl arrived in Canada with her single mother, who is from Honduras. The girl was born in the US and has never lived in Honduras. The mother was in an abusive relationship and finally left when she lost everything in hurricane Katrina. Mother and daughter are following a program of psychotherapy in Canada to deal with the consequences of the family violence they endured in the US. The mother’s five brothers and mother (the child’s grandmother) are all in Canada with legal status. The only other relative is the child’s grandfather, who is in Honduras. The daughter enjoys the contact with her grandmother, uncles and many cousins. She is adapting

¹⁹ *Raposo*, (supra)

²⁰ In a recent judgment, the Federal Court quashed an H & C decision containing a similar formulation. The officer had rejected the conclusions of psychologists’ reports and substituted his own “unsubstantiated generalization” that “children are resilient by nature”. See *Mughrabi v. MCI* 2008 FC 898

²¹ *Baker*, (supra) at par. 15

well to the French language school system in Québec. The girl is a US citizen but the mother cannot legally return to the US. A negative H & C decision was issued in September 2007, when the child was 14.

The BIC determination mentions three main points:

Sans sous-estimer le fait qu'elle devra se réadapter à un système scolaire différent si elle doit quitter le Canada, que ce soit de retrouver le système scolaire américain ou de s'adapter au système scolaire hondurien, il y a peu d'élément au dossier indiquant quelles seraient les répercussions qu'elle subirait à ce niveau si elle devait quitter le Canada avec sa mère.

[....]

La présence des membres de la famille de sa mère au Canada, y compris sa grand-mère et de nombreux cousins et cousines, fut alléguée dans les soumissions de la demande. Cet élément n'a pas été appuyée par des exemples concrets ou des preuves probantes indiquant quelles seraient les répercussions directes ou indirectes en cas de rupture temporaire des liens familiaux établis.

[...]

J'ai tenu compte du fait qu'elle ne connaît pas le Honduras, bien qu'elle en ait la citoyenneté, mais je conclus que le plus important est qu'elle demeure en tout temps avec sa mère, puisque cette dernière est vraisemblablement le seul parent qui en a la garde actuellement selon l'information au dossier. (emphasis added)

This decision takes an excessively formalistic approach and fails to take into account the realities facing the child if removed. With regard to the school system, it was not disputed that, if the child is obliged to leave Canada, she will be facing her third school system (and language of instruction) in three years, in a country (Honduras) in which she has never lived (her only alternative being the choice to be separated from her mother and return to the US, where she has no adult guardian). This is taking place at an extremely sensitive time in her growth and development (ages 11 to 14). What proof of “repercussions” does anyone require that this is an “unusual” hardship for a young adolescent?

Likewise, it is not clear why the officer felt that “concrete examples or probative evidence” were required to demonstrate the hardship of being removed from a large extended family, or what sort of evidence was needed. Did the officer need a psychological report? The cost of such a report is beyond the means of many applicants, but if the officer felt that was essential, the officer could have offered the family an opportunity to provide one.

Did the officer need to hear the child say “I will miss hugging my grandmother” or “I don't want to start at another new school and I will lose the friends I have now”? If so, the officer should at least have afforded the child the opportunity of an interview.

Though the jurisprudence makes clear that the applicant has the onus of proving their case,²² S. 5.26. of the IP 5 Manual does provide:

Although officers are not expected to delve into areas that are not presented, officers should attempt to clarify possible H&C grounds if these are not well articulated by the applicants. (emphasis added)

²² *Owusu vs. MCI*, 2004 FCA 38

In a separate section of the H & C decision, the officer describes the unfavourable country conditions in Honduras, including human rights abuses, impunity of officials, trafficking in persons, arbitrary arrest and detention, extrajudicial executions by authorities, violence towards women and children and problems with street gangs. The officer notes that two-thirds of the population lives in poverty and that Honduras ranks 116th out of 117 in the world in terms of human development. However, the officer concludes that the applicants have not proven personalized risk and never considers any of this evidence in the context of the “best interests of the child”.

As in the previous case, this decision relies on the dismissive notion that being with her mother will allow the child to overcome any obstacles she will face going to an unknown country. Like the previous case, the decision also relies on the fiction that the absence from Canada will only be temporary.

Finally, the decision gives no apparent weight to the importance of the program of therapy that mother and daughter have undertaken to deal with the consequences of the abusive relationship the mother fled, although Federal Court jurisprudence has held that reliance on such support services are relevant to the best interests of the child determination.²³ The Convention on the Rights of the Child also states, at article 39:

States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse [...].

iv) Two teenagers living in Bangladesh without their mother

Two minors, a brother and a sister, were living in Bangladesh with their aunt. Their father abandoned their mother when she was pregnant with the younger child. The children were later abducted by their paternal grandmother, who held them for six years, barring any contact with the mother, but then subsequently decided to abandon them as well. When the mother immigrated to Canada, she was unable to provide proper documentation for the children. Based on faulty advice, she did not declare them on her application for permanent residence. Consequently, she cannot sponsor the children as part of the Family Class due to Reg. 117(9)(d). They therefore filed an overseas H & C application. Here is an excerpt from the decision, issued to each of the children in April 2007 when they were 15 and 16:

I considered the best interest of the child and came to the conclusion that this is not justifying H&C considerations. I note that you are soon to be an adult, you have completed your primary education in an International School and you are soon to complete your Secondary Education also in an International School. You have lived all your life in Bangladesh and you speak Bengali, the local language. You[r] mother in Canada can continue to provide you with financial support until the end of your studies or even after if she wishes. She provides support to you since 9 years while being in foreign countries, she can continue to do so at a distance. You have several close and extended family member[s] in Bangladesh. Your father is still alive and living in Bangladesh. Your mother still has siblings in that countr[y]. You are a student, you have therefore a social network in Bangladesh, your classmates and school friends; you are not left

²³ *Nguyen*, (supra)

alone. You presented no evidence that you are currently under undue hardship in Bangladesh. The photos on file show a nice house interior in terms of Bangladesh standard suggesting that your life in Bangladesh is at least in the upper middle class. I see that rejoining with your mother and having the opportunity to continue your life in Canada would be of great interest to you, but it is not sufficient to overcome the exclusion from the family class.”²⁴ (emphasis added)

Once again, this is an example of remarkable insensitivity. It is also a direct result of failing to perform an actual BIC determination (ie. properly analyze where the best interests of the children lie), before applying the “excessive hardship” test. The officer examined the children’s current situation, and decided that, since they have endured lengthy separation from their mother, it is not an excessive hardship for them to continue to endure it. In so doing, he failed to even acknowledge that it is the right²⁵ (and strongly in the best interests) of the two teenagers, who have been separated from their mother for many years, and are not living with either parent, to be reunited with their mother.

The fact that this decision has been overturned by the Federal Court adds little comfort as this is an expensive and uncertain process, inaccessible to many applicants. Even when it succeeds, the file is sent back to another officer for a re-determination, which frequently takes considerable time, with no guarantee of a better outcome.²⁶

v) **Baby girl separated from her mother**

A small baby was left behind in Pakistan when her refugee mother was resettled to Canada. The mother, who gave birth to the baby while her Canadian application was being processed, had not declared the baby to Canadian officials due to circumstances relating to her vulnerability as a refugee woman. Given that the baby was an excluded family member under R. 117(9)(d), an H & C application was submitted. The visa office refused the application without ever considering the best interests of the child, as is clear from the notes in the file.

[Applicant] is a 15-month child, and currently lives with her biological father in Pakistan. [Applicant] was not declared and examined in sponsor’s application and is described at R117(9)(d) and is an excluded member of family class. As a procedural fairness and in order to double check [applicant’s] current circumstances, called at the contact number on [...]. This phone number belongs to [applicant’s] biological father [name] who informed me that he and sponsor married [date] and [applicant] was born in [date]. Biological father confirmed that he is the father of [applicant] and that [applicant] lives with him in Pakistan. I note from sponsor’s file that sponsor did not inform change of her marital status to Islamabad and spouse was also not examined in sponsor’s application. Given [applicant] lives with her biological father in Pakistan, father is not being sponsored at this time, I am not satisfied that grounds exist to warrant special relief under section A25(1) of IRPA.

This case is not the only one known to us in which the best interests determination is **completely absent**. The nearest the visa officer appears to come to consideration of the child’s interest is in implying that the fact that she is living with her biological father will satisfy her well-being. There is no evidence that the visa officer has considered whether the father can in fact adequately

²⁴ This decision was overturned by the Federal Court.

²⁵ Convention on the Rights of the Child, articles 9 and 10.

²⁶ Happily in this particular case, the second visa office determination led to a positive decision and the children have since been reunited with their mother in Canada.

meet her needs, whether her interests might be better met by being with her mother nor what the future prospects of the child are if she remains in Pakistan separated from her mother.²⁷

The notes also reveal a predominant preoccupation with the mother's failure to declare the child (and her marriage), which gets in the way of any fair assessment of the child's interest. The visa officer does not reflect upon the circumstances that might explain why the mother did not report her change of family status, but even aside from the question of whether the mother should bear blame, there is no justification for penalizing a child for the alleged wrongdoing of the parent.²⁸

Since this case was refused, Citizenship and Immigration Canada has issued additional guidelines for R. 117(9)(d) cases. Appendix F, added to OP4, addresses some of the very basic failures illustrated in this case. It states:

The conduct of an applicant or sponsor which led to the R117(9)(d) exclusion is a factor to consider; however, this conduct does not preclude the need to consider H&C submissions put forward by an applicant on their own merits. It also does not prevent officers from exercising their discretion to consider H&C in the absence of a formal request from the applicant. There may be compelling reasons for not disclosing the family member which should be considered.

The new appendix also directs officers to assess all factors relevant to H & C, including best interests of the child. It does not, however, provide any more specific guidance on BIC determination, nor address the question of how the conduct of the parent should be balanced against the best interests of the child.

5. Conclusion and Recommendations

We believe the above decisions attest to a number of problems in the understanding of the notion of the "best interests of the child" within the context of H & C decisions. The fact that several of the problems are repeated across different H & C decisions, and that such decisions are being issued five years after the implementation of IRPA and despite considerable BIC jurisprudence, leads us to believe that they represent systemic problems, which must be addressed in a number of ways. We have set out our suggestions below in the form of eight recommendations:

A. A full and proper BIC determination is required

Recommendation #1: That the IP 5 and OP 4 manuals be modified to clarify that:

- a full and complete BIC determination is required prior to an assessment of the hardship the affected children would suffer from a negative decision. Indeed, it is only through a full BIC determination that it is possible to identify the hardship which would befall the affected children.

²⁷ The visa officer should also have considered the best interests of the young girl's brother in Canada, who was suffering from the fact that his mother was profoundly distraught about the separation from her daughter and thus unable to provide him with the parental support he needed.

²⁸ The young girl in this case was eventually issued a Temporary Resident Permit allowing her to be reunited with her mother and brother in Canada, over a year after the visa office refused her H & C application.

- A full and complete BIC determination involves carefully identifying and examining all the factors that bear on the child’s interests, in order to determine where their best interests lie.
- Consideration must be given of the best interests of **all children** affected by a decision (including, for example, siblings not covered by the application who are affected by the stresses of family separation).
- The rights outlined in the Convention on the Rights of the Child and other international human rights instruments should be guiding factors in assessing a child’s best interests.
- It is only after a full and proper BIC determination that it is open to an officer to consider whether the children’s interests are “outweighed” by other factors present in the file.
- It is therefore fundamentally incorrect to assess “unusual hardship” only with reference to what a child has endured in the past or is presently enduring.

Recommendation #2: That the OP 4 manual be modified to provide clearer guidelines for BIC determinations overseas.

B. Sensitivity and Flexibility

Recommendation #3: That IP 5 and OP 4 Manuals be modified to stress the need for sensitivity and flexibility in determining the best interests of children. Psychological reports (often beyond the means of applicants) should not be required to demonstrate impact of family separations, uprooting and repeated displacements. Common sense is sufficient to show that such events present an “unusual hardship” for children. Officers should also be aware of the particular vulnerabilities of refugees and other oppressed people, for whom it is often difficult in practice to provide detailed submissions about the realities faced by the children (e.g. because they are unable to afford a lawyer and have limited English or French). Alternatively, should an officer require more information to assess the children’s interests and the impact of a negative decision, the officer should either conduct an interview with the applicants or clearly inform them of the type of evidence required and allow them a reasonable opportunity to provide it. Officers should be encouraged to meet the child and trained in child-adapted and child-friendly interviewing methods.

C. Fiction of temporary departure from Canada

Recommendation #4: That the IP 5 Manual be modified to remove the reference to the hardship “of having to apply for a visa outside Canada”. As Supreme Court and Federal Court jurisprudence have held, this is in most cases a fiction as the departure from Canada will almost certainly be a permanent one. Aside from cases where the officer is able to identify an apparent right to return to Canada (e.g. sponsorship in the Family Class) the hardship to be evaluated should be that of permanently leaving Canada.

D. Implications of country conditions on children’s interests must be fully assessed

Recommendation #5: That the IP 5 and OP 4 Manuals be modified to stress that the BIC determination must contain a full assessment of the impact of country conditions on children. For example, if country conditions are prejudicial to the children (civil war, widespread violence and poverty), their impact on the children must be addressed in the context of the BID.

Consideration must also be given to gender issues and to the legal status of the children in the country. It is insufficient to discuss conditions only as they pertain to adult applicants in the context of “personalized risk”.

E. Appropriate “weight” to be given to BIC determinations in H & C decisions

Recommendation # 6: Given some confusion as to the appropriate “weight” to be accorded to the best interests of the child (the Supreme Court in *Baker* stating “substantial weight” and the Federal Court of Appeal in *Legault* stating it is up to the officer to decide “what weight” to accord the best interests of the child) and given that, to the extent that there is any contradiction or inconsistency, the Supreme Court judgment is paramount, the IP 5 and OP 4 manuals should be modified to clearly indicate that the best interests of the child must be accorded “substantial weight” in an H & C decision. This is also consistent with art. 3 of the Convention on the Rights of the Child and the recent Federal Court of Appeal decision in *De Guzman*.

F. Training of H & C officers on best interests determinations

Recommendation # 7: That officers deciding H & C cases, both inland and at visa offices abroad, receive regular updates on new developments in jurisprudence on best interests (for example, that it is insufficient to dismiss the interests of the child with a statement that they are young and can adapt or that it is up to the parents to choose if the child stays in Canada). In addition, examples of the BIC sections of positive H & Cs decisions should be provided as training materials. Officers should also receive training on country conditions as they relate to human rights and on effective ways of communicating with children of different cultural backgrounds.

G. Monitoring of H & C decision-making

Recommendation # 8: That CIC conduct regular monitoring of decision-making inland and at visa offices, to ensure that BID is done, and done appropriately. Although the discretion of officers rendering H & C decisions cannot be “fettered” by their superiors, it is important that there be some mechanism for internal quality control to prevent officers from deviating seriously from established law and jurisprudence. It is particularly urgent that action be taken to ensure that visa officers live up to their obligation to take into consideration the best interests of the child, given the complete absence of such consideration in some decisions abroad.