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ISSUE NOTES FOR THE UNITED NATIONS COMMITTEE ON THE RIGHTS OF THE CHILD IN ITS CONSIDERATION OF CANADA'S FIRST REPORT
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INTER-CHURCH COMMITTEE FOR REFUGEES
TABLE OF CONTENTS

General Background: The application of constitutional rights and freedoms to non-citizens.
A. Chiarelli v. MEI Federal Court of Appeal, October 16 and 17, 1989 Judgment: February 23, 1990.
B. Singh et al v. MEI Federal Court of Appeal, April 30, May 1, 1984 Judgment: April 4, 1985

C. Andrews v. Law Society of British Columbia Supreme Court of Canada, February 2, 1989
D. Hoang v. MEI Federal Court of Canada, November 26, 1990 Judgment: November 30, 1990

2.
Issue 2

Article 4: Implementation Protection of the Family and the Child
Article 12: Taking into Account Child's Opinion
A. Kretowicz et al v. MEI Federal Court of Appeal, March 31, 1987
B. Langner et al v. MEI Federal Court of Canada, Trial Division, January 11, 1994 Judgment: July 12, 1994
C. Langner et al v. MEI Federal Court of Appeal Reasons for Judgment of the Court in the Langner Case
March 21, 1995
D. Grace Robinson v. MEI Federal Court of Canada, January 17,1994
E. Berrehab v. European Court of Human Rights (3/1987/126/177) Judgment: Strasbourg, 21 June 1988

3.
Issue 3

Article 3: The Best Interests of the Child
A. Ingrid Harper v. Attorney General of Canada Ontario Court (General Division), 3 February 1994
B. Summary of outstanding cases in the British Columbia Courts Update on Cases dealing with the Rights of Canadian Born Children to have Parents Remain in Canada by Darryl W. Larson
C. Reza v. MEI April 25, June 9,1994 On Appeal from the Court of Appeal for Ontario

4.
Issue 4
Article 10: Family Reunification

ISSUE NOTES for the Committee on the Rights of the Child in its consideration of Canada's First Report
General Background: The application of constitutional rights and freedoms to non-citizens

1. Canada has entrenched human rights and freedoms in its Constitution Act, The Charter of Rights and Freedoms, 1982
But for rights explicitly granted to Canadians, such as the right to stand for election for public office and the right to enter and remain in Canada, the rights and freedoms in the Canadian Charter make no apparent distinction between citizens and non-citizens.

2. Canada will likely assure this Committee that the Charter applies to citizens and non-citizens alike, except to the extent that a meaningful distinction is made in the Charter, such as the right to stand for election to public office. In this respect Canada will likely point to two judgements of the Supreme Court of Canada which would appear to support the perception of - human rights protections guaranteed to non-citizens - these judgements being Singh et al v M.E.I. and Andrews v Law Society of B.C.

3. In 1985, the Canadian Council of Churches intervened as a public interest organization in Singh et al. v M.E.I.
, an appeal concerning the refugee determination process before the Supreme Court of Canada. The Court validated the position urged upon it by the CCC and recognized that the right to life, liberty and security, of the person applied to every person physically present in Canada. Canada by its own counsel accepted this interpretation before the Court and did not contest this point. This broad statement was welcomed by non-governmental organizations assisting non-citizens in respect of status proceedings.

4. In 1989, the Supreme Court of Canada determined in Andrews v The Law Society of B.C. , that the equality provisions under section 15 of the Charter were violated by a law that required that practising barristers and solicitors be Canadian citizens. This was found to be discriminatory in respect of permanent residents of Canada, recognized as a historically disadvantaged distinct and vulnerable group.

5. The composition of the Supreme Court has changed over the last few years and with these changes has come a change in approach to the application of the Charter to non-citizens. In Chiarelli v M.E.I. , the Court resiled from its earlier position. Chiarelli was being deported from Canada on grounds of involvement in organized crime. He argued for the application of due process norms -the right to know the case against him, in the security proceedings which led to his deportation and the right to a balancing of his personal interests against state interests in respect of deportation. The Court's judgement is significant in several respects:
a. The Court did not decide if a permanent resident of Canada had a life, liberty or security of the person interest under section 7 of the Charter engaged by removal proceedings. The Federal Court of Appeal has decided that non-citizens, but for refugee claimants, do not have section 7 interests engaged by removal. Leave to appeal to the Supreme Court has been denied by that Court in several of these cases. The Federal Court of Appeal's judgements are contrary to the ruling in Singh, which decided that section 7 applied to all persons in Canada, regardless of status. Similarly, the Supreme Court of Canada's failure to recognize engagement of section 7 interests, qualifies and limits its previous position in Singh.
b. The Court decided that a "contextual" analysis was required in determining the scope of human rights projections under the
Charter

. Using this contextual approach, it determined that 'aliens' at common law had no right to enter or remain in Canada. From there it applied a contractual analysis, concluding that an 'alien' entering Canada as a permanent resident, entered into a contract with Canada. If the 'alien' breached this contract, Canada was entitled to resile from it and remove the person. Chiarelli had entered Canada as a permanent resident, and was therefore presumed to have entered into this contract even though he was only nine years old at the time of admission. This contextual approach appears to override the original "purposive" approach adopted by the Supreme Court to
Charter analysis. The purposive approach requires a Court to determine the nature of the rights which the Charter was meant to protect, taking into account the common law, other sections of the Charter and Canada's international human rights obligations. The contextual approach, on the other hand, makes primary the common law - the historical context of the issues raised - as opposed to the human rights entrenched in the Charter and in international Covenants.

6. The Supreme Court's judgement in Chiarelli makes a clear distinction between citizens and non-citizens in respect of recognition of constitutionally entrenched human rights. While this may be justified in some respects, it would appear in other respects to sanction discrimination based on nationality. Comment 15 of the United Nations Human Rights Committee indicates that while non-citizens in a state may have no right to enter or remain, this may be qualified where there are human rights engaged, such as family protection.

7. There are two levels of impact of the Chiarelli judgement - on non-citizens involved in status proceedings and on non-citizens involved in other proceedings. It is likely that the judgement will result in a further negation of the human rights of non-citizens in respect of status proceedings. It is unlikely, but not certain, that the judgement will result in a negation of the human rights of non-citizens involved in other proceedings, eg. such as criminal trials or employment proceedings, which do not involve the person's actual status in Canada. The judgement nevertheless gives a clear signal from Canada's highest court that non-citizens are different than Canadians and are to be treated differently in constitutional human rights analysis.

ATTACHMENTS

1. Chiarelli v Canada
2. Singh et al. v Canada

3. Andrews v Law Society of British Colombia
4. Hoang v M.E.I.

Article 4: Implementation Protection of the Family and the Child
Article 12: Taking into-Account Child's Opinion

1. Article 4 requires a state to undertake appropriate measures to implement the rights set out in the Convention. These rights include taking into account the child's best interests (article 3), respect for the role of parents in the child's life (article 5), non separation of parents from child, except where in the child's best interests (article 9), and the taking into account the child's opinion, where old enough, and the opportunity for the child to be heard in judicial or administrative proceedings affecting the child (article 12).

2. Canada has not implemented measures which ensure respect or compliance with Convention rights in relation to non-citizen children or citizen children with a non-citizen parent. The law does not provide that the child be heard, nor that the child's best interests be taken into account when removal of a parent or the child herself is being considered.

3. When Canada appeared before the Committee on Economic, Social and Cultural Rights, it indicated that although the
Charter of Rights and Freedoms does not explicitly recognize family integrity as a human right, the Supreme Court of Canada has interpreted the Charter to include the right. It cited Mills v The Queen as authority for this.

4. The Supreme Court of Canada in Mills did recognize the importance of family. In Morgantaler v The Queen it recognized that ,security of the person, in section 7 of the Charter covered not merely physical integrity but as well emotional integrity. In the Alberta Journal case, Mr. Justice Laforest made reference to Article 17 of the ICCPR, in the context of privacy interests. Although he was the only Judge referencing the ICCPR, the other justices did not disagree.

5. While the Supreme Court has made reference to the importance of 'family' it has not clearly recognized as a protected human right under the Charter. The majority of cases, where family has been put at issue in the lower courts, do not recognize family integrity as a constitutionally protected right. Further, if it can be said to be recognized, it is not so recognized when considered in the context of immigrant status in Canada.

6. The jurisprudence concerning the removal of non-citizen parents who have Canadian citizen children indicates that integrity of the family and protection of a child's interests are private matters, not engaging state responsibility. In Kretowicz the Federal Court of Appeal, following its previous jurisprudence, indicated that the decision as to whether to take or leave a child was the parent's decision and could not 'be laid' at the government's door. The Court further concluded that its role was merely to review procedure in respect of fair treatment and this did not include a substantive review of an immigration officer's discretion, even though, on the facts before the Court in Kretowicz , the officer had concluded that the child's relationship with her father, who would remain in Canada, should not have any influence over a decision respecting the removal of the child's mother. The court noted that the parents were not even married.

7. In a more recent decision, the Federal Court Trial Division put it more succinctly. In Langner, which has recently been confirmed by the Federal Court of Appeal, one of the issues concerned whether the Canadian children had standing before the Court in an action relating to a review of the decision to remove the parents.

The Court stated:
First, the removal order does not cover the children, and second it has not even been challenged. It therefore cannot be a decision resulting from a government action that would open the way to a claim to Charter rights by the children, because there is nothing connecting them to that removal order. In the event of the children's departure with their parents, it will result only from the parents' decision, a personal decision, made without government

intervention and with which the government has nothing to do. On this point, given that if the children depart they will do so not as a direct consequence of the negative decision made with respect to their parents' humanitarian and compassionate reasons or of the removal order made against their parents, they cannot claim that their
Charter rights have been infringed.

8. Protection of the family and protection of the child within the context of the family has been seen by the Court to be a matter for Parliament to address, absent the foundation in human rights law from which to imply such protection. In Robinson v M.E.I.
, Mr. Justice Gibson of the Federal Court Trial Division, indicated in relation to an injunction application, that if Parliament had wanted to avoid family separation it could have legislated for this. There being no legislation, there could be no irreparable harm in separating a family pending a determination of the merits of the application which concerned family separation. Some judges have recognized that irreparable harm may occur if young children are separated from their parent(s) pending a determination of the merits of a case before the Court although these cases are not common.

9. There is no clear constitutional authority for the protection of the child within the context of the family in the Canadian Constitution. In the immigration context there is no explicit statutory protection of family integrity, although there are procedures which permit family reunification in defined circumstances.

10. There are essentially two procedures which cover family interests under the legislative scheme in Canada. The first is a regulatory program to permit family reunification in Canada through the sponsorship of close family members living outside of Canada. The regulations define the "Family Class", which at present includes parents, spouses, and children under 19 years of age, or over 19 years if remaining in full time attendance at school or mental or physically disabled to a degree that they remain dependent on their parents, and other classes of abandoned children or orphans under 19 years of age. Sponsoring relatives in Canada must be over 19 years of age and normally must be earning sufficient money to undertake resettlement responsibilities. This regulatory program only applies to sponsored applications made at a Canadian visa office outside of Canada. Sponsors applying under this program have a statutory appeal to a statutory tribunal, the Immigration Appeal Division, on questions of law and fact and on equitable grounds. Judicial review from the Appeal Division is with leave to the Federal Court Trial Division.

11. All other decisions which concern family interests fall into a second discretionary process. Family members in Canada who seeking to avoid removal, even if they fall within the "Family Class", can only remain if there is a positive exercise of discretion by an immigration officer for humanitarian or compassionate reasons, or in the case of permanent residents if there is a determination by an immigration appeal tribunal that "in all the circumstances of the case" the person ought not be removed from Canada. Persons outside of Canada who do not fall within the Family Class and are seeking to come to Canada for compelling family reunification reasons may come if there is a positive exercise of discretion by a visa officer for humanitarian and compassionate reasons. Discretionary decisions made by inland officers are subject to judicial review with leave in the Federal Court Trial Division. Discretionary decisions made by overseas officers are subject to judicial review in the Federal Court Trial Division, although by way of exception to the general rule, leave is not required.

12. The statutory rights created by the Family Class Regulations normally provide for adequate consideration of family interests for those falling within the class defined as Family, although the engagement of a human right is not recognized. Discretionary decisions not only do not recognize the engagement of a human right, the discretionary nature of the decision provides for limited and inadequate consideration of the interests.

13. The standard for judicial review in the Federal Court Precludes a consideration by the Court of the best interests of the child. This is in part because of the Court's substantive jurisprudence which negates a legal interrelationship between a parent and child, and therefore negates a legal interest on the part of the child in respect of what happens to a parent. However, it is also based on the Court's perception of its powers on judicial review. Mr. Justice

Marceau in the Kretowicz judgement indicated that the powers of the court in reviewing administrative decisions were limited to determining if procedural fairness was followed. He then stated:
A reading of the record ... leaves no doubt that, on the one hand, the presence of the child was indeed considered as a factor to be taken into account, and on the other, that the authorities knew the natural father was seeing his child. It is true that the immigration officer did not see the child as a relative who could assist the respondent to become established and did not think that the relations between the child and her natural father should have any influence over the decision to be made. However, these attitudes of the officer did not relate to what can be characterized as the procedure to be followed in considering and resolving the problem: rather they fell within the scope of his discretion. For my part, I find it impossible to say that the immigration officer was wrong on either point, but in any case I do not think it is for this Court to consider this matter in deciding whether the decision was made fairly.

14. Clearly common law principles, in other areas of administrative law in Canada, permit a consideration of whether a decision maker has ignored relevant evidence, such as the child's relationship to her father and the impact on her if her parents reside in distinct countries. Ignoring relevant evidence is characterized as an error of law. while the end result might not be that the non-Canadian parent should be permitted to remain, the court did not consider this an issue even to be considered, much less a relevant issue which was ignored. This is in stark contrast to the jurisprudence of the European Court of Human Rights, such as in Berrehab, which recognized that a child's interests are gravely impacted by a decision to remove one parent from the jurisdiction.

15. At the present time there is no general legislative provision which requires administrative officials or the Courts to take into account a child's interests or opinions respecting removal of a parent from Canada. The child has no legal opportunity to put forward her opinion or to promote her own best interests, as the Courts do not recognize that the child has a legal interest in respect of what happens to the parent or in respect of what happens to the child, herself, as a result of a decision made by the state to remove the parent. Protection of the integrity of the family is not viewed as a public law issue, but rather as a personal matter among family members. It is within this context that Canada has failed to implement provisions to ensure that the rights articulated in the Covention are respected domestically, particularly in respect of the child's opinion being taken into account in all matters affecting the child.

ATTACHMENTS
1. Kretowicz v M.E.I.
2. Langner v M.E.I., Trial Division
3. Langner v M.E.I., Court of Appeal
4. Robinson v M.E.I.
5. Berrehab, European Court

Article 3: The Best Interests of the Child

1. Article 3 provides that the best interests of the child shall be a primary consideration in all actions concerning children. Removal of a parent from Canada is not considered to be an action on the part of the state which concerns the child. Where the child's interests are affected by the removal process, the child cannot access a court to have her interests taken into account.

2. The provincial superior courts of the provinces are the constitutional courts of Canada. These courts have inherent and plenary jurisdiction over all legal matters, including constitutional matters. They are courts which cannot be divested of their constitutional jurisdiction. As well, the provincial superior courts have inherent jurisdiction over the protection of children, by virtue of that Court's
parens patriae jursidiction. This jurisdiction is far reaching, permitting the courts to consider the best interests of the child in relation to any apprehension of harm.

3. A Canadian or a non-Canadian child is effectively denied the right to access a provincial superior court to request the Court to protect her interests under the Court's parens patriae

jurisdiction when the issue involves the immigration status of the parent or the child. The Supreme Court of Canada has indicated in its recent judgement in Reza v Canada et al. that matters, including constitutional ones, which involve immigration status, effectively must be considered by the Federal Court of Canada. The provincial superior courts have consistently denied access to the Court in any case involving an immigration issue, even when the child was invoking the Court's
parens patriae jurisdiction. While :these courts can consider a child's best interests, they will not do so if that interest arises in the context of immigration proceedings.

4. The Federal Court of Canada, as a statutory court, is limited by its statutory mandate. It does not have direct constitutional jurisdiction, nor does it have any specific or general mandate to ensure the protection of a child or that the child's best interest be considered in relation to any decision made which may affect the child. The Court does not have any parens patriae jurisdiction. The Federal Court has taken a limited view of its role in relation to children who are affected by the removal process. It has determined that a child has no legal interest to pursue before the Court where a parent is being removed from Canada. The child has no standing and therefore no opportunity to be heard. The child's best interest cannot be put forward by the child directly.

5. Similarly, the child's parent cannot put forward the child's best interests as a matter for judicial consideration. This is because the Federal Court considers that any decision relating to the removal of a parent does not concern the child and that the child's interests need not be taken into account as a matter of public law.

6. At the present time, a Canadian child cannot seek the parens patriae protection of a provincial superior court where an apprehension of harm is raised by the removal of her parent (s). A non-Canadian child, herself, facing an apprehension of harm through removal from Canada, cannot invoke the court's parens patriae jurisdiction. These children cannot pursue their interests in the Federal Court because they are not considered to have standing before the Court as they are not recognized as having any justiciable interest.

ATTACHMENTS
1. Harper v The Queen et al.
2. Summary of outstanding cases in the British Colombia Courts
3. Kretowicz v M.E.I. (attached under Issue Note 2)
4. Langner v M.E.I. (attached under Issue Note 2)
5. Reza v The Queen et al.

Article 10: Family Reunification

1. Article 10 provides that applications for family reunification are to be dealt with in a positive, humane and expeditious manner. Canadian laws provide for family reunification within Canada of Canadians and permanent residents with their relatives from abroad who are defined as members of the Family Class. While this process exists there are a number of factors which impede full implementation of Article 10.

2. Costs: Presently processing fees are $500 for each adult applicant over 19 years of age and $100 for each dependent child. A
right of landing fee of $975 for each adult applicant over 19 yers of age in addition to the processing fees. These fees impact negatively on new refugees, new immigrants and women, in particular as these classes are less likely to have sufficient savings to be able to pay the fees.

3. Time: Processing of applications vary in respect of the time it takes effect family reunification. While Family Class applications are to be given first priority along with refugee resettlement applications, in practice reunification times vary from visa post to visa post. The busier visa centres appear to be unable to effectively prioritize family class processing, so that centres located in countries such as India, Trinidad and the Philippines are more often than not unable to process applications in under a year and some applications drag on for several years.

If an application is refused for any reason and an appeal commenced, this extends the processing time where the appeals are successful into five years or longer.

4. Attitudes: There appear to be institutional attitudes ingrained in particular visa posts. For example, applications for adopted children do not appear to pose a problem in any region of the world but for India, where it is common to have such applications refused, often for trivial reasons. one common ground of refusal is that a parent child relationship has not been created - difficult at best when the child being sponsored for admission remains in the home country and the adoptive parents remain in Canada.

5. Refugees: The legislation now provides that immediate members of a refugee's family, as defined in the Family Class, may be processed for admission to Canada at the same time as the refugee. This applies to family members both in and outside of Canada. However the processing can and does often extend into years and there is rarely any consideration given to early admission Minister's Permits of family members so that the family can be together while processing is completed. This is true even whereboth parents are in Canada in process for landing and young children remain abroad with friends or relatives.

6. Special Classes: There is no provision for the processing of family members who are outside of Canada at the same time that a person is processed for landing in Canada under a special program. Canada does accept persons for landing while in Canada for humanitarian reasons, which often includes persons in refugee like situations. The immediate family members of such persons cannot be processed towards landing until the person in Canada is landed, although these family members must undergo medical examinations and background clearances in order for the family member in Canada to be landed. Landing from within Canada can take several years. Once the person is landed in Canada, then a sponsorship application must be commenced which again can take several years to complete. There is no provision for the early admission of immediate family members to reunite the family while processing is being completed. This is true even where it is young children that have been left behind. There were many instances of extended family separations when Canada implemented its Refugee Backlog Program in 1989. Thousands of persons were caught in a backlog of unresolved refugee claims, often waiting five years or longer to have their cases considered. A special program was implemented which was to have taken two years to complete. To date there remain cases unresolved in this program. Even when a parent was approved in principle for landing, Canada would not permit children to come forward to join the parent(s) and await processing in Canada. The parent had first to be landed and then commence a sponsorship application.

7. It is fair to say that Canada pays no particular attention to the needs of children who are separated from their parents or guardians. While family reunification is a principle of Canada's immigration legislation, this does not translate in practice to measures being taken to ensure timely reunification of children with their parents in Canada, even though such children are eventually permitted to land in Canada.

Home
