# The "Best Interests of the Child" as a Factor in Allowing Foreigners with Criminal Records to Enter Canada and in Staying the Deportation of Foreign National Offenders from Canada

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**Abstract:** The Canadian Immigration and Refugee Protection Act provides that one of the objectives of immigration is "to see that families are reunited in Canada." The Act provides further that a foreign national with a criminal record for having committed an offence in a foreign country may be granted a visa to enter Canada if "it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected." The deportation of foreign nationals who have been convicted of offences in Canada may be delayed or cancelled if "it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected." Canada is a State Party to the Convention on the Rights of the Child and Article 31(1) of the CRC requires states to consider the best interests of the child as a primary consideration in all decisions affecting children. Jurisprudence emanating from Canadian quasi-judicial and judicial bodies shows that although there is not a single case in which Article 31(1) of the CRC has been invoked by the courts or the Immigration Appeals Division, in cases involving children, in assessing whether a person who has been convicted of an offence should be granted a visa to travel to Canada or should not be deported from Canada, the best interests of the child have been considered in these decisions. However, there are numerous cases in which Article 31(1) of the CRC has been considered, including in cases whether a parent should be recognised as a refugee in Canada. The purpose of this article is to demonstrate how courts or quasi-judicial bodies have invoked the best interests of the child in deciding whether or not a visa should be granted to an adult with a criminal record to enter Canada or the deportation of a foreign national who has been convicted of an offence to be stayed or cancelled.

**Keywords**: The Canadian Immigration and Refugee Protection Act; the Convention on the Rights of the Child; the Immigration Appeals Division; deportation of a foreign national

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## 1. Introduction

The Canadian Immigration and Refugee Protection Act[1] provides for different categories of foreign nationals or permanent residents who are inadmissible in Canada. These grounds include security (if the individual poses a security threat to Canada)[2], violating human or international rights[3], serious criminality[4], criminality[5], organised criminality[6], health grounds[7], financial reasons[8], or misrepresentation[9]. There are many foreign nationals in Canada[10]. Some of them have been convicted of offences in Canada. A foreign national convicted of a serious offence in Canada has either to be deported or transferred to serve part of his sentence in his country of nationality.[11] Deporting a foreign national who has children in Canada may mean leaving those children behind. Denying a foreign national who has children in Canada a visa to enter Canada may also mean that he will not be able to live with his children in Canada. However, the Canadian Federal Court held that "[s]erious criminals are subject to removal without discrimination no matter their race, national or ethnic origin, colour, religion, sex, age or mental physical disability…[T]he removal of those convicted of serious criminality did not engage section 7 of the Charter…The same holds true with respect to section 15."[12]

The Immigration and Refugee Protection Act provides that one of the objectives of immigration is "to see that families are reunited in Canada."[13] The Act provides that a foreign national with a criminal record for having committed an offence in a foreign country may be granted a visa to enter Canada if "it is justified by

[1] Immigration and Refugee Protection Act S.C. 2001, c. 27.
[2] Section 34(1). See generally Haqi v. Canada (Public Safety and Emergency Preparedness), 2014 FC 1246 (CanLII).
[3] Section 35.
[4] Section 36(1).
[5] Section 36(2).
[6] Section 37. See Venidas Patel v. Canada (Public Safety and Emergency Preparedness), 2007 CanLII 70651 (CA IRB) (where the appellant's deportation was ordered on this ground because he was involved in the smuggling of people to the United States).
[7] Section 38.
[8] Section 39.
[9] Section 40.
[10] Statistics Canada, "Foreign nationals working temporarily in Canada" http://www.statcan.gc.ca/pub/11-008-x/2010002/article/11166-eng.htm
[11] See generally (Mujuzi, 2014, pp. 120-154).
[12] Monge Monge v. Canada (Minister of Public Safety and Emergency Preparedness), (2010) 3 FCR 291, 2009 FC 809 (CanLII) para 36. See also Martin v. Canada (Minister of Citizenship and Immigration), 2005 FCA 347 (CanLII) para 4 (the appellant abandoned the human rights argument under section 7 because it was bound to fail).
[13] Section 3(1)(d).

humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected." The deportation of a foreign national who has been convicted of an offence in Canada may be stayed or cancelled if "it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected." This means that the best interests of the child are considered as one of the factors in assessing whether there are humanitarian and compassionate grounds to grant a visa to or not to deport, a foreign national who has been convicted of a serious offence. This is also only when the child is directly affected. Jurisprudence emanating from Canadian quasi-judicial and judicial bodies shows that although there is no case in which Article 31(1) of the CRC has been invoked by the courts or the Immigration Appeals Division, in cases involving children, in assessing whether a person who has been convicted of an offence should be granted a visa to travel to Canada or should not be deported from Canada[1], the best interests of the child are considered in some of these decisions. However, there are numerous cases in which Article 31(1) of CRC has been considered, including in cases dealing with the issue of whether a parent should be recognised as a refugee in Canada. The purpose of this article is to highlight that jurisprudence and show the role the best interest of the child have played in these visa and deportation decisions. Jurisprudence from the United Kingdom[2] and from the European Court of Human Rights on immigration cases also shows that courts have dealt with the best interests of the child in deportation decisions.[3] The author will start by discussing the jurisprudence from Canadian courts or quasi-judicial bodies relating to the best interests of the child before dealing in detail with the jurisprudence on granting visas to foreign nationals convicted of serious offences abroad or deporting foreign nationals from Canada who have been convicted of serious offences.

[1] The author bases this conclusion on the 500 cases he downloaded from the website of the Canadian Legal Information Institute using the search terms "is inadmissible on grounds of serious criminality" (from 18 – 25 June 2015). The system returned 1844 decisions but could not permit the author to go beyond page 20 (that is, 500 cases). The website is: http://www.canlii.org/en/.

[2] See (Eekelaar, p. 20).

[3] See generally (Smyth, 2015, pp. 70-103). Although the author argues that the Court's approach to the best interests of the child is not principled and recommends that the Court should invoked the principle as enshrined in the Convention on the Rights of the Child.

## 2. The Best Interests of the Child in the Jurisprudence of Canadian Judicial and Quasi-Judicial Bodies

As mentioned above, the best interests of the child is one of the factors that have to be considered in determining whether or not the foreign national who has been convicted of an offence should be deported from Canada or should be granted a visa to enter Canada. It is imperative that the author first deals with the principles governing the best interests of the child in Canada before the cases on denying visas or staying deportation orders are discussed. This background will form the basis for the analysis of those cases. Canada is a state party to the Convention on the Rights of the Child. Article 3(1) of the CRC provides that "[i]n 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."[1] Although there is a contested meaning of the word "concerning" in Article 3(1) (Eekelaar, 2015, pp. 4-5), the author argues that it can hardly be argued that the denial of a visa to a child's parent or the deportation of such parent does not concern his or her child directly or indirectly. Section 3(3)(f) of the Immigration and Refugee Protection Act provides that "[t]his Act is to be construed and applied in a manner that complies with international human rights instruments to which Canada is signatory." In *Martinez v Canada (Minister of Citizenship and Immigration)*[2], a case which dealt with the applicant's application for refugee status, the Canadian Federal Court held:

"Section 3(3)(f) of the IRPA has incorporated the Convention [on the Rights of the Child] into our domestic law to the extent that the IRPA must be construed and applied in a manner that is consistent with the Convention. In my view, it is contrary to Article 1 of the Convention to use the provisions of the IRPA to separate the Applicant and his children before a decision is made on the [humanitarian and compassionate] Application. This is so because it is only during the assessment of that application that the best interests of the children can be fully addressed and treated as a primary consideration."[3]

[1] See (Eekelaar, 2015) *The International Journal of Children's Rights* 3 – 26, on the different standards that should be used by courts in their application of the principle of best interests of the child in cases where the decisions will affect them directly or directly.

[2] Martinez v. Canada (Minister of Citizenship and Immigration), 2003 FC 1341 (CanLII).

[3] Martinez v. Canada (Minister of Citizenship and Immigration), 2003 FC 1341 (CanLII) para 13. In Vasquez v. Canada (Minister of Citizenship and Immigration), 2005 FC 91 (CanLII) the Court held

Canadian courts have held that the "best interests of the child" principle is only applicable to children. It ceases to apply when a child becomes an adult even if the court proceedings, by or about that child, were commenced when he was still a child.[1] As the Federal Court of Appeal observed, the CRC "is concerned with the interests of children while they are children. It does not purport to confer rights on adults."[2] Different provisions of the CRC have been incorporated in provincial and federal legislation in Canada.[3] It should be noted that in *Martinez v Canada (Minister of Citizenship and Immigration)*,[4] the Federal Court held that if the immigration officer has to determine whether or not to remove a person from Canada whose refugee application has been rejected, his children's best interests have to be treated as "a primary consideration." This means that they should not be treated as "the primary consideration." In a case which dealt with the placement of a child in foster care because her mother was a danger to the child, a court in Quebec referred to the CRC, to the relevant provisions of the Civil Code of Quebec and to the Youth Protection Act, and held that in decisions of foster care "the respect of the rights of a child and his best interest constitute the primary consideration in every decision. The interest of the child supersedes every other aspect related to a decision concerning him and taken by the State."[5] In this case it is clear that the Court considered the interests of the child as "the primary consideration. In *X (Re)*[6] in which the applicant and her children applied for refugee status in Canada, the Immigration Appeal Division held that:

"The 'best interests' of the child should therefore guide the panel in analysing the evidence presented in this case, because a Canadian tribunal may not dissociate itself from the international conventions that Canada has signed. According to the claimant's testimony, it is not alleged that the children were the subject of physical violence at the hands of their father; nonetheless, they suffered psychological abuse in witnessing the mistreatment inflicted by their father on their mother. A return to Egypt would expose the children to the conflicts between their parents and, specifically, to the fact that their mother would have little or no state protection

that the above principle is not applicable in all cases. See also Egharevba v. Canada (Citizenship and Immigration), 2013 CanLII 33228 (CA IRB) para 75 where it is stated that the CRC has not been incorporated in Canadian law.

[1] Basha v. Lofca, 2013 ABQB 159 (CanLII) para 34.

[2] Poshteh v. Canada (Minister of Citizenship and Immigration), 2005 FCA 85 (CanLII) para

[3] Francis v. Canada (Minister of Citizenship and Immigration), 1998 CanLII 14754 (ON SC) para 14.

[4] Martinez v. Canada (Minister of Citizenship and Immigration), 2003 FC 1341 (CanLII).

[5] X (Dans la situation de), 2006 QCCQ 9875 (CanLII) para 33.

[6] X (Re), 2003 CanLII 55219 (CA IRB).

against her husband. The claimant testified that her husband's behaviour towards her had a very negative impact on her children and made them feel insecure; the husband never tried to maintain a good family life and, among other things, abandoned them with no resources for three months. Since young children, who are much more emotionally fragile than adults, are involved, the opinion of the panel is that the treatment imposed on their mother and the fact that young children are powerless in such circumstances, that is, the entire situation could have a persecutory effect on them. These two young children belong to the social group of the family and have been exposed to severe and persistent treatment and would continue to be so exposed if they had to return to Egypt. Therefore, the panel finds, as is specified in the Guidelines on Child Refugee Claimants, that the best interests of these children warrant international protection."[1]

In the above decision, it is not clear whether the best interests of the children were "a primary" or "the primary" consideration. A similar approach is taken in another decision.[2] In a decision in which the Immigration Appeals Division dealt with the issue of whether the applicants were the child's genuine adoptive parents, it referred to Article 3(1) of the CRC and held that "the international law points the panel in the direction of considering the best interests of a child as a factor when examining the genuine relationship of parent and child."[3] In this case the best interests are not considered as "a primary" or "the primary" consideration but rather as "a factor". In *Akyol v Canada (Citizenship and Immigration)*[4] the Federal Court dealt with the reasonableness of the immigration officer's decision to reject the applicant's application for permanent residence and order his deportation although some of his children were Canadian citizens which would have necessitated the applicant to go with them to Turkey. The applicant had argued that his application should be allowed on humanitarian and compassionate grounds because his children were Canadian citizens and he wanted to stay in Canada with them. The immigration officer had based her decision on the hardship that the children were likely to suffer if they were to relocate with their parents to Turkey and found that it could not prevent their father's deportation. The Court, in setting aside the officer's decision, referred to earlier jurisprudence on the best interests of the child and held that "[i]t is incorrect to import an elevated hardship test into the best interests of the child analysis…The unusual and undeserved or

[1] X (Re), 2003 CanLII 55219 (CA IRB) p.2.
[2] Gill v. Canada (Citizenship and Immigration), 2008 CanLII 76539 (CA IRB) para 36.
[3] Chun v. Canada (Citizenship and Immigration), 2003 CanLII 68719 (CA IRB) para 19.
[4] Akyol v. Canada (Citizenship and Immigration), 2014 FC 1252 (CanLII)

disproportionate hardship test has no place in the [best interests of the child] analysis because children will rarely, if ever, be deserving of any type of hardship."[1] The Court added that in considering a residence permit application by the children's parents, "an immigration officer must be "alert, alive and sensitive" to, and must not "minimize", the best interests of children."[2] The Court added that being alert, sensitive and alive to the child's best interests requires the immigration officer to "have regard to the child's circumstances, from the child's perspective."[3] This requires, the Court added, "an appreciation and articulation of the interests of the children."[4] In holding that the immigration official failed to pay sufficient attention to the best interests of the children, the Court observed:

"[I]t is only once the best interests of each child affected by the [humanitarian and compassionate] application are identified and articulated can the Officer then weigh this against the other positive and negative elements in the [humanitarian and compassionate] application…Further, the decision-maker should consider children's best interests as an important factor in their analysis…[T]he best interests of the child must 'be given substantial weight in [humanitarian and compassionate] applications'. That does not mean that the children's best interests must outweigh other considerations; however, practical meaning must be given to Article 3(1) of the United Nations Convention on the Rights of the Child…"[5]

The Court concluded:

"Requiring evidence of severe harm or hardship to a child is incorrect in the analysis. The question is not: "is the child suffering enough that his "best interests" are not being met?" Rather, the question is "what is in the child's best interests?" …It is the child that must, first and foremost, be considered when conducting a BIOC analysis, rather than whether the child could adapt to another country, or accompany parents."[6]

Whether the best interests of the child are considered as "a primary" or "the primary' consideration requires the employment of different structures of reasoning. This is so because in cases of "decisions effecting children", their interests are "a primary" consideration and in cases of "decisions about children",

[1] Akyol v. Canada (Citizenship and Immigration), 2014 FC 1252 (CanLII) para 16.
[2] Akyol v. Canada (Citizenship and Immigration), 2014 FC 1252 (CanLII) para 18.
[3] Akyol v. Canada (Citizenship and Immigration), 2014 FC 1252 (CanLII) para 18.
[4] Akyol v. Canada (Citizenship and Immigration), 2014 FC 1252 (CanLII) para 19.
[5] Akyol v. Canada (Citizenship and Immigration), 2014 FC 1252 (CanLII) para 21.
[6] Akyol v. Canada (Citizenship and Immigration), 2014 FC 1252 (CanLII) para 24.

their interests are "the primary" consideration.[1] This fact has been recognised by Canadian courts. In *Basha v Lofca*[2], a custody matter, the Court of Queen's Bench of Alberta held:

"While Article 3 of [the CRC] indicates that the courts must consider the best interests of the child, the text is worded carefully and expresses the view that 'the best interest of the child shall be a primary consideration'…, but not 'the' or 'the only' primary consideration. Courts [including the Supreme Court of Canada] have been quick to note that this wording does not mean that the interests of children trumps [sic] everything else."[3]

In *Kim v Canada (Citizenship and Immigration)*[4] the Federal Court held that "[i]t is clear that Article 3(1) of the CRC does not state that the best interests of the child are to be a substantive consideration of every decision which affects children…There is more than one manner by which decision-makers may consider the best interests of the child."[5] Canadian Courts or quasi-judicial bodies have referred to Article 3(1) of the CRC in dealing with different issues affecting children.[6] The jurisprudence shows that courts or quasi-judicial bodies have

[1] See generally John Eekelaar, 'The Role of the Best Interests Principle in Decisions Affecting Children and Decisions about Children' (2015) 23(1) *The International Journal of Children's Rights* 3 – 26.

[2] Basha v. Lofca, 2013 ABQB 159 (CanLII).

[3] Basha v. Lofca, 2013 ABQB 159 (CanLII) paras 36 – 39. Emphasis in original.

[4] Kim v Canada (Citizenship and Immigration), 2010 FC 149 (CanLII) (the applicants who were children had their refugee recognition application dismissed).

[5] Kim v Canada (Citizenship and Immigration), 2010 FC 149 (CanLII) para 9.

[6] X (Re), 2004 CanLII 56764 (CA IRB) (application by a child to be recognised as refugee); Martinez v. Canada (Minister of Citizenship and Immigration), 2003 FC 1341 (CanLII) (father's argument that his deportation because of denial of refugee status would not be in the best interests of his child who was a Canadian citizen); Toronto Police Services Board (Re), 2000 CanLII 21001 (ON IPC) (whether disclosure of information on sexual assault on a school bus was in the best interests of the child); Child and Family Services v. E.T. & T.T, 2015 NUCJ 11 (CanLII) (whether the child should stay in a given community during the determination of a custody matter); Lennox & Addington Family & Children's Services v. T.S., 2000 CanLII 22581 (ON SC) (custody of the child); In the matter of M.V.(F.), 2002 CanLII 26507 (QC CS) (custody matter); Gill v. Canada (Citizenship and Immigration), 2008 CanLII 76539 (CA IRB) (granting a child's mother and the child visas to travel to Canada and live with the child's father); Vasquez v. Canada (Minister of Citizenship and Immigration), 2005 FC 91 (CanLII) (father's application for permanent residence); Basha v. Lofca, 2013 ABQB 159 (CanLII) (custody matter); Poshteh v. Canada (Minister of Citizenship and Immigration), 2005 FCA 85 (CanLII) (whether the applicant should be allowed to stay in Canada although as a minor he was a member of a terrorist organisation in Iran); Bhajan v. Bhajan, 2010 ONCA 714 (CanLII) (the role of the Office of the Children's Lawyer); Winnipeg Child and Family Services v. K.L.W., [2000] 2 SCR 519, 2000 SCC 48 (CanLII) (removing children from their parent for their protection); R.T., Re, 2004 SKQB 503 (CanLII) para 64 (adoption of aboriginal children); Alexander v. Canada (Solicitor General), [2006] 2 FCR 681, 2005 FC 1147 (CanLII) (removal of

adopted three approaches in cases where the best interests of the child have been considered in the analysis. In cases where courts have considered the interest of the child as "a primary consideration", the facts of the case have concerned other people, for example, the parents who raised the issue of their children to strengthen their application. In such cases, a parent's application may be rejected even if it means, for example, that his removal from Canada would require the children to live a less comfortable life in their father's country of nationality.[1] However, in cases which affect children directly, for example in adoption cases, the best interests of the child have been considered as "the primary" consideration. There are also cases where it is not clearly stated whether or not the best interests of the child were considered as "a primary" or "the primary" consideration. However, what is clear from these three approaches is that in cases where Article 3(1) of the CRC has been invoked, courts have taken the time to explain in detail how and why a child is likely to be affected by the decision reached. Our attention now turns to visa decisions in which children have been involved and how courts or the Immigration Appeal Division have dealt with the issue of children.

## 3. Applicant with a Criminal Record in a Foreign Country

Section 36(1)(b) of the Act provides that: "A permanent resident or a foreign national is inadmissible on grounds of serious criminality for having been convicted of an offence outside Canada that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years." For section 36(1)(b) to apply, the act of which the foreign national was convicted in a foreign country must also be an offence in

mother of two Canadian children from Canada for being in country illegally); Kwan v. Canada (Minister of Citizenship and Immigration), [2002] 2 FCR 99, 2001 FCT 971 (CanLII) (denying a visa to an adopted child); Pratten v. British Columbia (Attorney General), 2012 BCCA 480 (CanLII) (whether adopted children can obtain information about their biological parents); Director of Child and Family Services v. A.C., 2007 MBCA 9 (CanLII) (whether a child has a right to refuse medical treatment even if the refusal may result in their death or serious harm); Haberman v Haberman, 2011 SKQB 415 (CanLII) (parent's right to access child); Inglis v. British Columbia (Minister of Public Safety), 2013 BCSC 2309 (CanLII) (whether babies should stay with their incarcerated mothers); Adoption — 1212, 2012 QCCQ 2873 (CanLII) (adoption) and Canadian Doctors for Refugee Care v. Canada (Attorney general), 2014 FC 651 (CanLII) (government funded healthcare insurance for refugee children).

[1] Vasquez v. Canada (Minister of Citizenship and Immigration), 2005 FC 91 (CanLII).

Canada.[1] If the offence of which the applicant was convicted outside Canada would not have attracted a sentence of at least ten years a visa will be granted.[2] Under section 65 of the Act, if a visa is denied to a family member of a Canadian resident and he appeals against that decision, the Immigration Appeal Division may "consider humanitarian and compassionate considerations" in deciding whether or not to allow the appeal. One of the factors that a court or the immigration authority may consider is whether there are children involved in the relationship. If there are no children involved, the court or Immigration Appeal Division will expressly mention that and assess the appeal based on other grounds, such as the genuineness of the marriage[3]. The Immigration Appeal Division observed that in determining whether or not a visa should be granted to a foreign national who was convicted of an offence outside Canada, "while family reunification, which would involve the appellant and the applicant being reunited but also their child being reunited with the father, the applicant, is a positive factor, I have to be mindful of the objective of public safety."[4] If there is evidence that the immigration "officer's analysis of the best interests of the children is manifestly deficient"[5], his/her decision not to grant a visa to a person convicted of an offence abroad to enter Canada to live with his/her children will be set aside. The Court held:

"It is apparent from the officer's notes that the officer considered that the children: (a) would have access to good educational and social services in Israel, and (b) had spent much of their life without their father's presence. However, nowhere does the officer articulate what is in the best interests of the children. Nor does the officer assess the benefits of non-removal. Moreover, in indicating that the children would receive schooling and social services of comparable quality in Israel, the officer does not consider any adverse consequences were they to move to Israel, such as the reduction of their establishment in Canada, the disruption of their schooling in Montreal, their separation from their extended family in Montreal, or any linguistic or cultural challenges they might experience in integrating into Israeli society. In

[1] Notario v. Canada (Citizenship and Immigration), 2014 FC 1159 (CanLII) para 73 (failure to pay a debt is not an offence in Canada although it is an offence in the United Arab Emirates).
[2] Krysinsk iv Canada (Citizenship and Immigration), 2014 CanLII 83007 (CA IRB).
[3] Khakh v. Canada (Citizenship and Immigration), 2012 CanLII 91742 (CA IRB) paras 10 – 12; Shanmugavadivel v. Canada (Citizenship and Immigration), 2004 CanLII 56720 (CA IRB).
[4] Amrita Singh v. Canada (Citizenship and Immigration), 2012 CanLII 92776 (CA IRB) para 34. In this case the visa was granted because the applicant had committed a minor offence – attempting to enter the USA with a fake passport.
[5] Bargig v. Canada (Citizenship and Immigration), 2015 FC 392 (CanLII) para 30.

my view, this does not demonstrate that the officer was alert, alive, and sensitive to the children's best interests."[1]

The deportation of a foreign national who was convicted of an offence may be stayed or cancelled, and one of the factors to be considered is the foreign national's children. For example, in *Cassels v Canada (Public Safety and Emergency Preparedness)*[2] the applicant, a citizen of the United Kingdom who had lived in Canada since he was two years old, was convicted in the United States of the offence of reckless homicide and sentenced to eight years' imprisonment. After serving his sentence he was deported to the United Kingdom but later re-entered Canada. The Canadian Border Agency ordered his deportation from Canada because of the offence he had committed in the US. However, the Minister responsible for the Canadian Border Agency applied that the deportation order should be stayed for three years because, amongst other grounds, "Mr. Cassels is married and has two children, one of which is a Canadian citizen."[3] It is against that background that the Immigration Appeal Division accepted the submissions and ordered the stay of deportation for three years. The above case law shows that in assessing the visa application of a spouse or father of a Canadian citizen, serious attention should be paid to the impact a negative decision will have on the applicant's family members, including children, who are in Canada. The fact that the applicant has a criminal record in itself cannot be invoked to deny him a visa to stay with his family unless there is evidence that he is a danger to the Canadian public. The best interests of the child are considered as one of the factors in the humanitarian and compassionate assessment. They are not a stand-alone factor. This could be attributed to the fact that it was the parents, as opposed to the children, who were the main focus of the case.

## 4. Committing an Act Abroad that Would Constitute an Offence in Canada if Committed in Canada

Section 36(1)(c) provides that: "A permanent resident or a foreign national is inadmissible on grounds of serious criminality for committing an act outside Canada that is an offence in the place where it was committed and that, if

[1] Bargig v. Canada (Citizenship and Immigration), 2015 FC 392 (CanLII) para 36.
[2] Cassels v. Canada (Public Safety and Emergency Preparedness), 2007 CanLII 72575 (CA IRB).
[3] Cassels v. Canada (Public Safety and Emergency Preparedness), 2007 CanLII 72575 (CA IRB) para 4.

committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years."

It was held that "[s]ection 36(1)(c) does not require the appellant to have been convicted of a criminal offence in" a foreign country.[1] What this section requires is that "a foreign national is inadmissible if there is evidence to conclude that, on a balance of probabilities, he committed an act that, in Canada, would be an offence under a Federal Act punishable by a term of imprisonment of at least ten years."[2] If the conduct in a foreign country is not an offence in Canada, a visa will be granted even if the foreigner was convicted in the foreign country.[3] It is important that the appellant's family members based in Canada, a child for example, write to the Immigration Appeal Division in support of his visa application. For example, in *Chou v Canada (Citizenship and Immigration)*[4] the appellant's child, who was based in Canada, wrote a letter to the Immigration Appeal Division in support of her father's visa application in which she stated that "growing up with a single parent which she described as having been difficult. She described how opportunities, such as school events and parent-teacher meetings could not happen because there was not a parent available."[5] In granting the applicant a visa, the Appeal Division observed, inter alia,:

"It is in the best interests of the child… that she be allowed to know her father and that he become an immediate and continuing presence in her life. Under the circumstances the best interests of the chid [sic] strongly support the appeal which, when considered in respect to the other positive factor, creates sufficient grounds for the panel to exercise its discretionary jurisdiction in favour of the appellant."[6]

As in the previous section, here the best interests of the child are considered in granting a visa.

[1] Tcherkasski v. Canada (Public Safety and Emergency Preparedness), 2010 CanLII 88321 (CA IRB) para 14. See also Amrita Singh v. Canada (Citizenship and Immigration), 2012 CanLII 92776 (CA IRB) para 26.
[2] Tcherkasski v. Canada (Public Safety and Emergency Preparedness), 2010 CanLII 88321 (CA IRB) para 15. See laso Sztojka v. Canada (Citizenship and Immigration), 2014 FC 1155 (CanLII) para 19 – 27.
[3] Saliby v. Canada (Citizenship and Immigration), 2006 FC 906 (CanLII).
[4] Chou v. Canada (Citizenship and Immigration), 2007 CanLII 68866 (CA IRB).
[5] Chou v. Canada (Citizenship and Immigration), 2007 CanLII 68866 (CA IRB) para 17.
[6] Chou v. Canada (Citizenship and Immigration), 2007 CanLII 68866 (CA IRB) para 22.

## 5. Foreign Nationals Convicted of Offences in Canada and who have Children in Canada, and the Stay or Cancellation of their Deportation

Section 36(1)(a) of the Act provides: "A permanent resident or a foreign national is inadmissible on grounds of serious criminality for (a) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed."

For section 36(1)(a) to be invoked, a foreign national does not have to be sentenced to 10 years' imprisonment.[1] In terms of section 67(1)(c) of the Act, the Immigration Appeal Division may allow an appeal against a deportation order "other than in the case of an appeal by the Minister, taking into account the best interests of a child directly affected by the decision, sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case." Under section 68, a removal order may be stayed if "the Immigration Appeal Division…[is] satisfied, taking into account the best interests of a child directly affected by the decision, that sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case." The Supreme Court of Canada held that "[n]ot only is it left to the I [mmigration] A[ppeal] D[ivision] to determine what constitute 'humanitarian and compassionate considerations', but the 'sufficiency' of such considerations in a particular case as well. Section 67(1)(c) calls for a fact‑dependent and policy‑driven assessment by the IAD itself."[2] The best interests of the child or compassionate and humanitarian grounds have been invoked as some of the factors to argue why the Immigration Appeal Commission or courts should stay or cancel the deportation of a foreign national.

[1] Chou v. Canada (Citizenship and Immigration), 2007 CanLII 68866 (CA IRB) para 22; Dawkins v. Canada (Public Safety and Emergency Preparedness), 2009 CanLII 59383 (CA IRB); Cross v. Canada (Citizenship and Immigration), 2005 CanLII 60190 (CA IRB); Challu v. Canada (Public Safety and Emergency Preparedness), 2009 CanLII 79217 (CA IRB); Wint v. Canada (Public Safety and Emergency Preparedness), 2009 CanLII 85222 (CA IRB); Sterling v. Canada (Public Safety and Emergency Preparedness), 2009 CanLII 79991 (CA IRB); Dacosta v. Canada (Public Safety and Emergency Preparedness), 2009 CanLII 85464 (CA IRB).

[2] Canada (Citizenship and Immigration) v. Khosa, [2009] 1 SCR 339, 2009 SCC 12 (CanLII) para 57.

### 5.1. The Question of Children in Deportation Decisions

As mentioned above, Article 3(1) of the CRC obliges Canadian authorities to have regard to the best interests of the child as a primary consideration in matters affecting children. This part of the article deals with the jurisprudence in which children have featured in deportation cases and examines whether or not, and if yes, the extent to which, courts and the Immigration Appeal Division have considered the best interest of the children. The child in question does not have to the appellant's. For example, in *Terrell Jenkins v. Canada (Public Safety and Emergency Preparedness)*[1] the appellant, an American citizen and permanent resident of Canada, had lived in Canada since childhood. He was convicted of an offence of breaking and entering and theft, and a deportation order was issued. He applied for the deportation order to be set aside because, inter alia, all his close family members lived in Canada.[2] The Immigration Appeal Division observed that "[t]he legislation requires that I consider and take into account the best interests of a child or children directly affected by the decision. The appellant confirmed that he is not in a relationship and does not have any children. He does, however, have a couple of nieces with whom he has some relationship."[3] The Division also observed that he had "established positive family relationships in recent years, including with his two sisters and…the brother."[4] The Division concluded that "there are sufficient humanitarian and compassionate factors in all the circumstances of this case, taking into consideration the best interests of a child directly affected by the decision, to allow the appeal."[5] In staying a deportation order, the Appeal Division has also considered "the practical help and the emotional support the appellant gives her grandchildren in Canada."[6] However, in

[1] Terrell Jenkins v. Canada (Public Safety and Emergency Preparedness), 2010 CanLII 94657 (CA IRB).
[2] Terrell Jenkins v. Canada (Public Safety and Emergency Preparedness), 2010 CanLII 94657 (CA IRB) para 8. See also Nguyen v. Canada (Public Safety and Emergency Preparedness), 2007 CanLII 68541 (CA IRB) para 7; De La Peña Tabares v. Canada (Public Safety and Emergency Preparedness), 2008 CanLII 75905 (CA IRB) para 11; Murray v. Canada (Public Safety and Emergency Preparedness), 2008 CanLII 74726 (CA IRB) para 11
[3] Terrell Jenkins v. Canada (Public Safety and Emergency Preparedness), 2010 CanLII 94657 (CA IRB) para 15. See also Samra v. Canada (Citizenship and Immigration), 2007 CanLII 67699 (CA IRB) para 15(grandchildren).
[4] Terrell Jenkins v. Canada (Public Safety and Emergency Preparedness), 2010 CanLII 94657 (CA IRB) para 16.
[5] Terrell Jenkins v. Canada (Public Safety and Emergency Preparedness), 2010 CanLII 94657 (CA IRB) para 23.
[6] Markovska v. Canada (Public Safety and Emergency Preparedness), 2010 CanLII 96958 (CA IRB) para 12.

most of the cases, the child in question has been a biological child of the appellant. In *Tcherkasski v Canada (Public Safety and Emergency Preparedness)*[1] in staying the appellant's deportation order, the Appeal Division emphasised his relationship with his daughter. It observed:

"An important factor in this case is the appellant's closeness with his daughter. He is very involved in her life. She testified that she does not get along very well with her mother. She has always had frequent contacts with the appellant since his divorce from her mother, in 2006 and she is currently living with him. It was quite obvious from both their testimonies that she would suffer if he were removed from Canada. She came to Canada as a very young child and has been schooled here. She plans to study law here. Although it would not be impossible for her to move to Russia to be with her father, I am of the opinion that it is in her best interest that her father remain in Canada."[2]

In *Amuta v Canada (Public Safety and Emergency Preparedness)*[3] in cancelling the applicant's stay of deportation order, the Appeal Division considered the following factors:

"[T]he Appellant is a long-time resident of Canada who resides with his wife and four children under the age of eighteen, all of whom are both financially and emotionally dependent upon him, and who would suffer a considerable degree of hardship if he were to be removed from Canada. There is no evidence of any further charges or convictions. The panel is satisfied that, on the balance of probabilities, the Appellant is not a danger to the public. The panel finds that, in light of all the circumstances of the case, in particular the best interests of the children affected by the decision, sufficient humanitarian and compassionate considerations exist to warrant allowing the appeal."[4]

[1] Tcherkasski v. Canada (Public Safety and Emergency Preparedness), 2010 CanLII 88321 (CA IRB).
[2] Tcherkasski v. Canada (Public Safety and Emergency Preparedness), 2010 CanLII 88321 (CA IRB) para 26.
[3] Amuta v Canada (Public Safety and Emergency Preparedness), 2013 CanLII 87229 (CA IRB).
[4] Amuta v Canada (Public Safety and Emergency Preparedness), 2013 CanLII 87229 (CA IRB) para 12. See also Williams v Canada (Public Safety and Emergency Preparedness), 2013 CanLII 98555 (CA IRB); Hernandez v Canada (Public Safety and Emergency Preparedness), 2013 CanLII 98591 (CA IRB) para 11; Ghotra v Canada (Public Safety and Emergency Preparedness), 2013 CanLII 98615 (CA IRB) para 11; Thuraisingam v Canada (Citizenship and Immigration), 2013 CanLII 98921 (CA IRB) para 7 (in which the Appeal Division considered the appellant's family members in Canada including children in cancelling the deportation order).

In *Nguyen v Canada (Public Safety and Emergency Preparedness)*[1] the Appeal Division considered the fact that "it is not in the best interests of the appellant's children for him to be removed from Canada. There would be significant hardships for his wife and children if he was removed."[2] In one case the deportation was stayed because of, inter alia, "the support that the appellant has been receiving from his sister who has a son who is close to the appellant."[3] In another case the deportation order was stayed because, inter alia, the appellant "has a child here for whom he pays child support and he is apparently providing care in respect of the child's mother's medical condition."[4] In *Bui v Canada (Public Safety and Emergency Preparedness)*[5] the appellant, a permanent resident of Canada and citizen of Vietnam, was convicted of producing a controlled substance and sentenced to nine years "imprisonment and eight months" probation.[6] A deportation order was made against him. In staying the deportation order for three years, the Immigration Appeal Division considered, inter alia, the fact that he "also has a daughter in Canada that he supports and takes care of."[7]

However, a deportation order may be cancelled even if the appellant does not have contact with the child and does not pay maintenance for the child if there are other compelling reasons, including the best interests of the child, not to deport the appellant. For example, in *Ismirnoglou v Canada (Public Safety and Emergency Preparedness)*[8] the appellant, an American citizen who had lived in Canada for 48 years, was ordered to be deported for an offence he committed in the USA when he was still a teenager. In appealing against his deportation, he submitted that he had most of his family members, including his child, in Canada. In allowing the appeal, the Immigration Appeal Division observed, inter alia, that "I expressed a concern that the appellant has neither contact with his child nor is he paying child support. I go no further than to say, in relation to my decision I find that it is a neutral factor

[1] Nguyen v. Canada (Public Safety and Emergency Preparedness), 2006 CanLII 59722 (CA IRB).
[2] Nguyen v. Canada (Public Safety and Emergency Preparedness), 2006 CanLII 59722 (CA IRB) para 15. The appellant had five children all of whom were born in and lived in Canada with him and his wife.
[3] Wahbi v. Canada (Public Safety and Emergency Preparedness), 2011 CanLII 75231 (CA IRB) para 9.
[4] Hanson v. Canada (Citizenship and Immigration), 2008 CanLII 87017 (CA IRB) para 20.
[5] Bui v. Canada (Public Safety and Emergency Preparedness), 2009 CanLII 84861 (CA IRB)
[6] Bui v. Canada (Public Safety and Emergency Preparedness), 2009 CanLII 84861 (CA IRB) para 10.
[7] Bui v. Canada (Public Safety and Emergency Preparedness), 2009 CanLII 84861 (CA IRB) para 13.
[8] Ismirnoglou v. Canada (Public Safety and Emergency Preparedness), 2009 CanLII 74611 (CA IRB).

that he has a child living in Canada."[1] However, in *Mccann v Canada (Citizenship and Immigration)*[2] the Appeal Division held that the appellant could not invoke the best interests of the children as a reason to be granted a visa back to Canada whence he had been deported after having been convicted of an offence, because it was not satisfied that he was close to the children.[3] A foreign national whose family members and children are Canadian citizens will be deported if he poses a danger to Canadian society.[4] If the child is conceived with the aim of securing the father's return to Canada should he be deported, the Appeal Division will be critical of that and, in addition to other factors, will reject the visa application. For example, in *Dutra v Canada (Citizenship and Immigration)*[5] the Appeal Division in rejecting the applicant's visa application observed:

"The appellant and applicant have a two-year-old child together born March 30, 2010. When the child was conceived in July 2009, the appellant and applicant knew that the applicant was facing a deportation order that was already issued in May 2009. Despite the likelihood that the applicant would be deported to Portugal, the couple continued to conceive the child knowing the consequences of the deportation would be the father's separation from the child."[6]

If the appellant submits that he has a child or wife in Canada, he must submit the documents relating to the child's birth or the marriage, respectively.[7] However, in some cases although the appellant adduced evidence that he/she had young children in Canada, the best interests of those children were not emphasised in staying the deportation order.[8] The Appeal Division emphasised the fact that he/she was unlikely to re-offend should he/she be allowed to stay in Canada. For example, in *Hinton v Canada (Public Safety and Emergency Preparedness)*[9] the Appeal Division observed that the applicant had "two children, and two step-children living in Canada" and that he maintained a close relationship with his brother who

[1] Ismirnoglou v. Canada (Public Safety and Emergency Preparedness), 2009 CanLII 74611 (CA IRB) para 8.
[2] Mccann v. Canada (Citizenship and Immigration), 2010 CanLII 95617 (CA IRB).
[3] Mccann v. Canada (Citizenship and Immigration), 2010 CanLII 95617 (CA IRB) paras 31 – 37.
[4] Omar v. Canada (Citizenship and Immigration), 2013 FC 231 (CanLII).
[5] Dutra v Canada (Citizenship and Immigration), 2012 CanLII 101040 (CA IRB)
[6] Dutra v Canada (Citizenship and Immigration), 2012 CanLII 101040 (CA IRB) para 18.
[7] Sothilinham v Canada (Public Safety and Emergency Preparedness), 2013 CanLII 98484 (CA IRB) para 8.
[8] Li v. Canada (Public Safety and Emergency Preparedness), 2008 CanLII 75593 (CA IRB); Hinton v. Canada (Public Safety and Emergency Preparedness), 2008 CanLII 70413 (CA IRB).
[9] Hinton v. Canada (Public Safety and Emergency Preparedness), 2008 CanLII 70413 (CA IRB)

wanted him to remain in Canada.[1] However, the Appeal Division observed that this factor was "not significant" to the appeal[2] and concluded that "[t]here are no children in this case which would require the panel to look at the best interest of a child directly affected by this decision."[3] If there is evidence that the child and her mother will be able to join the applicant in a foreign country without facing hardship in that country, the Appeal Division will not grant a visa to the applicant.[4] If the applicant has cut off all contact with his family members in Canada, including children, this could be a factor considered in dismissing his application for a stay of a deportation order.[5] However, in some cases although the facts do not disclose that the applicant has a child to take care of in Canada, the best interests of the child have been mentioned in staying or cancelling a deportation order.[6]

There have been cases where the best interests of the child or children have been considered in addition to the position of other family members to stay or cancel a deportation order. In *Doirilus v Canada (Public Safety and Emergency Preparedness)*[7] the order to deport the applicant to Haiti was stayed because, inter alia, the applicant's son, elderly parents, sisters and brothers lived in Canada.[8] In another case, where the applicant had been convicted of producing cannabis and a suspended sentence of two years was imposed on her, the Appeal Division held that her deportation should be stayed because of, inter alia, the fact that her husband and son lived in Canada.[9] The Appeal Division has also considered the fact that the appellant "likely would survive in the U.S. without great hardship but I

[1] Hinton v. Canada (Public Safety and Emergency Preparedness), 2008 CanLII 70413 (CA IRB) para 15.
[2] Hinton v. Canada (Public Safety and Emergency Preparedness), 2008 CanLII 70413 (CA IRB) para 15.
[3] Hinton v. Canada (Public Safety and Emergency Preparedness), 2008 CanLII 70413 (CA IRB) para 20.
[4] Dutra v Canada (Citizenship and Immigration), 2012 CanLII 101040 (CA IRB).
[5] Mayenge v Canada (Public Safety and Emergency Preparedness), 2014 CanLII 69862 (CA IRB).
[6] Parra Gumbana v. Canada (Public Safety and Emergency Preparedness), 2009 CanLII 86045 (CA IRB); Tabares v. Canada (Public Safety and Emergency Preparedness), 2011 CanLII 87434 (CA IRB); Wilson v Canada (Public Safety and Emergency Preparedness), 2013 CanLII 98143 (CA IRB); Perrotte v Canada (Public Safety and Emergency Preparedness), 2013 CanLII 98089 (CA IRB); Jegathiswaran v. Canada (Public Safety and Emergency Preparedness), 2012 CanLII 64239 (CA IRB); Saud v. Canada (Public Safety and Emergency Preparedness), 2012 CanLII 52057 (CA IRB); Wahab v. Canada (Public Safety and Emergency Preparedness), 2011 CanLII 87422 (CA IRB); and Le v. Canada (Public Safety and Emergency Preparedness), 2009 CanLII 86047 (CA IRB).
[7] Doirilus v. Canada (Public Safety and Emergency Preparedness), 2009 CanLII 76235 (CA IRB).
[8] Doirilus v. Canada (Public Safety and Emergency Preparedness), 2009 CanLII 76235 (CA IRB) paras 10 – 11.
[9] Pham v. Canada (Public Safety and Emergency Preparedness), 2009 CanLII 76237 (CA IRB).

consider that there would be some loss to the appellant's nieces and nephews, if he were to be removed from Canada."[1] In some cases where the issue of the best interests of the child did not rise, deportation orders have been stayed or cancelled because of the offenders' other family members. However, these cases fall outside the scope of this article. The above discussion shows that although Article 3(1) of the CRC has not been considered in the above decisions, the best interests of the child have not been ignored in deciding whether or not the offender's deportation should be stayed or cancelled. However, it is not clear whether the best interests of the child were assessed as "a primary" or "the primary" consideration. In the light of the fact that these cases did not concern children directly, had Article 3(1) been referred to the best interests of the children would most probably have been taken into account as "a primary" consideration.

### 5.2. Automatic Deportation of Offender on Subsequent Conviction Irrespective of Family Ties: the Need for the Best Interests of the Child to be considered?

However, a stay of a deportation order will be cancelled should the appellant be convicted of a serious offence. The result of the cancellation is that the appellant will be deported from Canada irrespective of the fact that he has children in Canada. This is because section 68(4) provides:

"If the Immigration Appeal Division has stayed a removal order against a permanent resident or a foreign national who was found inadmissible on grounds of serious criminality or criminality, and they are convicted of another offence referred to in subsection 36(1), the stay is cancelled by operation of law and the appeal is terminated."

In *Hines v Canada (Public Safety and Emergency Preparedness)*[2] the appellant, a permanent resident of Canada and citizen of Jamaica, was convicted of drug trafficking and ordered to be deported. However, his deportation order was stayed for three years. He was subsequently convicted of another drugs-related offence and a deportation order was issued. In his submission before the Immigration Appeal Division as to why he should not be deported, he argued, inter alia, that: "his father was not involved with his life…[H]e was currently living with his

[1] Ismirnoglou v. Canada (Public Safety and Emergency Preparedness), 2009 CanLII 74611 (CA IRB) para 10.
[2] Hines v. Canada (Public Safety and Emergency Preparedness), 2012 CanLII 98546 (CA IRB).

mother and six-year-old son. His son's mother sees the child on weekends…"[1] He "expressed the desire to continue to raise his son and to remain in Canada. He indicated that he had not lived in Jamaica since he was a child."[2] In dismissing his appeal, the Immigration Appeal Division held that in the light of section 68(4) it "has no discretion to exercise any kind of relief either on humanitarian and compassionate considerations or on any other basis."[3] In other words, it has "no option" but to dismiss the appeal, hence allowing the authorities to deport the accused.[4] Therefore, a second conviction during a stay of deportation means that the accused has to be deported because "stay is automatically cancelled by operation of law."[5] On the basis of section 68(4) the Appeal Division has ordered the deportation of permanent residents or non- permanent residents who have been convicted of subsequent offences.[6] In *Dufour v Canada (Citizenship and Immigration)*[7] the Federal Court held that section 68(4) was not contrary to sections 7, 12 and 15 of the Canadian Charter of Rights and Freedoms. The Court also held that "section 68(4)… is to protect the public against criminals, such as the applicant, who failed to take advantage of the second chance they were given."[8] However, the offender still has an opportunity to have the Federal Court review the decision on the basis of section 72. In all cases in which appeals have been dismissed on the basis of section 68(4) the Immigration Appeals Division has

[1] Hines v. Canada (Public Safety and Emergency Preparedness), 2012 CanLII 98546 (CA IRB) para 13.
[2] Hines v. Canada (Public Safety and Emergency Preparedness), 2012 CanLII 98546 (CA IRB) para 14.
[3] Hines v. Canada (Public Safety and Emergency Preparedness), 2012 CanLII 98546 (CA IRB) para 19. See also Meeks v Canada (Public Safety and Emergency Preparedness), 2013 CanLII 98541 (CA IRB) para 20; James v Canada (Public Safety and Emergency Preparedness), 2013 CanLII 98690 (CA IRB) para 18.
[4] Tulloch v Canada (Public Safety and Emergency Preparedness), 2013 CanLII 97606 (CA IRB) para 7; Matharu v. Canada (Public Safety and Emergency Preparedness), 2012 CanLII 52081 (CA IRB) para 6; Abeeb v. Canada (Public Safety and Emergency Preparedness), 2012 CanLII 52082 (CA IRB) para 6.
[5] Cardozo v Canada (Public Safety and Emergency Preparedness), 2013 CanLII 97286 (CA IRB) para 10.
[6] Dufour v. Canada (Public Safety and Emergency Preparedness), 2011 CanLII 37156 (CA IRB); Cardozo v Canada (Public Safety and Emergency Preparedness), 2013 CanLII 97286 (CA IRB);; Guiragossian v. Canada (Public Safety and Emergency Preparedness), 2009 CanLII 84357 (CA IRB); Din v. Canada (Citizenship and Immigration), 2008 CanLII 76844 (CA IRB); Watson v. Canada (Public Safety and Emergency Preparedness), 2011 CanLII 53826 (CA IRB); Powell v. Canada (Public Safety and Emergency Preparedness), 2012 CanLII 61444 (CA IRB); Vasquez-Hernandez v. Canada (Public Safety and Emergency Preparedness), 2011 CanLII 77771 (CA IRB).
[7] Dufour v. Canada (Citizenship and Immigration), 2012 FC 580 (CanLII). See also Bhoonahesh Ramnanan v. Canada (Citizenship and Immigration), 2008 FC 404 (CanLII).
[8] Dufour v. Canada (Citizenship and Immigration), 2012 FC 580 (CanLII) para 4.

advised offenders that they may approach the Federal Court for judicial review under section 72. Section 72(1) provides that "judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court." In the few reported cases in which the offenders have applied for judicial review under section 72(1), their cases have been unsuccessful.[1] In one case the Federal Court did not hear the case on its merits because the offender had not come to court with "clean hands" for failure to appear at several immigration hearings.[2] It is argued in the light of Article 3(1) of the CRC and the jurisprudence developed by the Canadian courts on the issue of the best interests of the child, that in cases of review the best interests of the child should be considered as one of the factors in determining whether or not the offender should be deported.

## 6. Conclusion

This article has demonstrated the role that could be played by factoring in the best interests of the child principle in deciding whether or not to grant visas to foreign nationals convicted of offences to travel to Canada or to deport foreign nationals who have been convicted of serious offences in Canada. It is not clear why the courts and the Immigration Appeals Division, in cases involving children, have not invoked Article 3(1) of the CRC in deciding whether or not a visa should be granted to the child's parents or those parents should be deported, yet they have done so in other cases concerning children including cases dealing with refugee status and permanent residence applications. This could be explained by the fact that it is the applicants in these cases who have invoked "the best interest of the child" principle in their argument.[3] This gives the court or Appeal Division no

[1] Ferri v. Canada (Minister of Citizenship and Immigration), [2006] 3 FCR 53, 2005 FC 1580 (CanLII); Caraan v. Canada (Public Safety and Emergency Preparedness), 2013 FC 360 (CanLII).
[2] Moore v. Canada (Citizenship and Immigration), 2009 FC 803 (CanLII).
[3] See for example Akyol v. Canada (Citizenship and Immigration), 2014 FC 1252 (CanLII) para 5; Gill v. Canada (Citizenship and Immigration), 2008 CanLII 76539 (CA IRB) para 4; Vasquez v. Canada (Minister of Citizenship and Immigration), 2005 FC 91 (CanLII) para 29; Poshteh v. Canada (Minister of Citizenship and Immigration), 2005 FCA 85 (CanLII) para 57; Poshteh v. Canada (Minister of Citizenship and Immigration), 2005 FCA 85 (CanLII); Baker v. Canada (Minister of Citizenship and Immigration), [1997] 2 FCR 127, 1996 CanLII 3884 (FCA) and Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 SCR 817, 1999 CanLII 699 (SCC); Kim v Canada (Citizenship and Immigration), 2010 FC 149 (CanLII); Egharevba v. Canada (Citizenship and Immigration), 2013 CanLII 33228 (CA IRB) (refusal of permanent residence visa); De Guzman v.

choice but to resolve that issue. However, the mere fact that the applicant has himself invoked Article 3(1) of the CRC does not mean that the court will refer to it in its analysis. For example, in *Jankovic v Canada (Minister of Citizenship and Immigration)*[1] the applicant, a child, invoked, inter alia, Article 3(1) of the CRC to argue that it was in his best interests to be granted permanent residence to join his father in Canada. In dismissing his application because his father had failed to follow the relevant procedure under the immigration regulations, the Federal Court does not deal with the best interests argument at all. There is also jurisprudence which shows that even in cases where the applicants have not invoked the best interests of the child argument, courts[2] and quasi-judicial bodies[3] have referred to Article 3(1) in resolving the issues in the cases before them. It should also be recalled that in some of the deportation decisions the age of the children is not mentioned. It could be that the word "children" was used in the broad sense and was invoked even in cases where the "children" were actually adults but were dependent on the people against whom deportation orders had been issued. If this was the case, then, as the jurisprudence above from the Canadian courts shows, the CRC would not have been applicable. As the Federal Court put it "[e]very child is a dependent but not every dependent is a child."[4] It could also be explained by the fact that the Act requires the courts or the tribunal to consider the best interests of the children in their analysis where such children will "directly" be affected by the immigration officer or judge's decision. Canadian courts have emphasised that once a court or tribunal is confronted with "the best interests of the child" issue, it cannot pay lip service to it. It must engage with it and carefully analyse how the decision it has made will affect children. It is important that judicial or quasi-judicial bodies clarify whether or not the best interests of the children were taken into account as "a primary" consideration or "the primary" consideration in making decisions. The fact that Article 3(1) has not been invoked directly could also be explained by the fact that courts or immigration tribunals have preferred to cite

Canada ( Minister of Citizenship and Immigration ), [2005] 2 FCR 162, 2004 FC 1276 (CanLII) para 48; S v. S, 2004 BCPC 354 (CanLII) (children's right to legal representation at state expense); Alexander v. Canada (Solicitor General), [2006] 2 FCR 681, 2005 FC 1147 (CanLII);

[1] Jankovic v. Canada (Minister of Citizenship and Immigration), 2003 FC 1482 (CanLII) para 36.

[2] See for example, R. v. B. (D.), 2004 SKPC 43 (CanLII) para 64; Children's Aid Society of Toronto v. C.(S.A.), 2005 ONCJ 274 (CanLII)

[3] Commission des droits de la personne et des droits de la jeunesse c. Centre à la petite enfance Gros Bec, 2008 QCTDP 14 (CanLII) paras 80 – 81 (discrimination against child by a private association); X (Re), 2006 CanLII 62239 (CA IRB) (refugee application);

[4] Saporsantos Leobrera v. Canada (Citizenship and Immigration), 2010 FC 587 (CanLII) para 1.

cases in which that Article was dealt with directly and therefore found it unnecessary to refer to the Article itself.

## Bibliography

Eekelaar, John (2015). The Role of the Best Interests Principle in Decisions Affecting Children and Decisions about Children. 23(1) *The International Journal of Children's Rights* 3 – 26

Mujuzi, J.D. (2014). The transfer of offenders from other countries to Canada: analysing the theory and practice. 2 The Chinese, *Journal of Comparative Law,* pp. 120 – 154.

Smyth, Ciara. The best interests of the Child in Expulsion and First-entry jurisprudence of the European Court of Human Rights: How Principled is the Court's use of the Principle?' (2015) 17 *European Journal of Immigration* 70 – 103.23(1), *The International Journal of Children's Rights,* 3 – 26, 20.

*** Akyol v. Canada (Citizenship and Immigration), 2014 FC 1252 (CanLII).

*** Akyol v. Canada (Citizenship and Immigration), 2014 FC 1252 (CanLII).

*** Chun v. Canada (Citizenship and Immigration), 2003 CanLII 68719 (CA IRB).

*** Francis v. Canada (Minister of Citizenship and Immigration), 1998 CanLII 14754 (ON SC).

*** Kim v Canada (Citizenship and Immigration), 2010 FC 149 (CanLII).

*** Martinez v. Canada (Minister of Citizenship and Immigration), 2003 FC 1341 (CanLII).

*** Martinez v. Canada (Minister of Citizenship and Immigration), 2003 FC 1341 (CanLII).

*** Martinez v. Canada (Minister of Citizenship and Immigration), 2003 FC 1341 (CanLII).

*** Monge Monge v. Canada (Minister of Public Safety and Emergency Preparedness), (2010). 3 FCR 291, 2009 FC 809 (CanLII).

*** Poshteh v. Canada (Minister of Citizenship and Immigration), 2005 FCA 85 (CanLII)