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“Best Interests of the Child”

By Maria Deanna P. Santos

In last month’s issue, I wrote about the link between immigration and human rights. This month, I would like to discuss one specific principle of human rights that has often been invoked in immigration court decisions – the so-called “best interests of the child.”

In the landmark case of *Baker v. Canada*, decided by the Supreme Court in 1999, it was held that the best interests of the child principle enshrined in the United Nations Convention on the Rights of the Child, to which Canada is a party, should be given serious consideration. This means that, when there are children involved or affected by a court or administrative ruling, officers and decision makers are duty-bound to be “alert and sensitive” to the needs and well-being of children who will be affected by their decision.

This principle is especially relevant to applications based on humanitarian and compassionate considerations, where the applicant may invoke that his or her presence in or removal from Canada will have significant implications on the life of a child or children in Canada. However, this should not be readily taken to mean that anyone on whom a child depends or who may have Canadian-born children will have a guaranteed acceptance as a permanent resident in Canada.

While it may be a no-brainer to some that a Canadian-born child is entitled to live with his or her parents in Canada, this is not the automatic reaction of decision-makers. If it were so, then it would have been much simpler to enact a law or amend the current one to state that any parent of a Canadian-born child will henceforth obtain Canadian permanent resident or citizenship status.

Sad as any separation between a parent and child may seem, the principle of best interests of the child has not always been interpreted to lead to the logical conclusion of family reunification, at least within the context of the implementation of Canada’s immigration laws. Many families are still being broken apart by the strict application of Canada’s immigration laws, notwithstanding its humanitarian and compassionate tradition, its main objective of family unity, or even the incorporation of international human rights principles including the best interests of the child.

For those who may be thinking of or are being advised that one way to obtain legal status in Canada is to sire a Canadian child, please think again. In many cases decided by the Federal Court since *Baker*, it has been clarified that having a Canadian child does not automatically entitle a parent without status in Canada to become a permanent resident. The Court has also looked into the existence of alternative caregivers, the possibility of supporting the child while the parent is abroad, or even allowing the child to be looked after by a government agency. In other words, the Court wanted to be convinced that

there are indeed serious and compelling reasons why the best interests of the child should trump a violation of, or allow an exception to existing immigration laws. The Court requires strong and convincing evidence of irreparable harm to the child or children for instance, or that any separation between the parent and child is not just the resulting “inconvenience” or “usual consequence of deportation”.

Sounds pretty harsh, but true. Before one can get as far as arguing one’s case before the Court, one must have already suffered the trauma of being issued a removal order, or having tried various possible options for legalizing one’s stay in Canada. For those who have the resources, they may seek the assistance of a lawyer to help them convince the Court of the irreparable harm they will suffer if the parent is separated from the child. For the lucky ones, they may succeed. For most others, it is a long, difficult and often quixotic battle.

Meanwhile, the rest of us are left wondering if the “best interests of the child” principle is but another empty rhetoric or one that could have a truly more humane and compassionate application within the immigration context.

We sure hope that it will be more of the latter.

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