SOME NEW ISSUES RAISED BY EUROPEAN JURISPRUDENCE: CAN CITIZEN CHILDREN CONFER RESIDENCE RIGHTS ON THEIR FOREIGN NATIONAL PARENTS?

Notes of the presentation by Mainville J.A. on October 22, 2011, at the 2011 Colloquium of the Québec Immigration Lawyers Association (AQAADI)
(TRANSLATION FROM THE ORIGINAL FRENCH VERSION)

Paragraph 3(1)(*a*) of the *Citizenship Act*, R.S.C. 1985, c. C-29, provides that a person is a citizen if the person was born in Canada after February 14, 1977, subject to a few exceptions, notably children born in Canada of foreign diplomats.

Given the inherent delays in processing refugee claims and applications based on humanitarian and compassionate considerations under the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, it often happens that foreign nationals waiting for status in Canada give birth to children who thus acquire Canadian citizenship. As citizens, these children have the right to remain in Canada and to reside therein pursuant to section 6 of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, *1982*, being Schedule B to the *Canada Act 1982*, (U.K.), 1982, c. 11.

However, Canadian law distinguishes between the rights of citizen children and the rights of their foreign national parents, and no formal legal relationship is established between the children's citizenship and their parents' status for the purposes of immigration laws.

Thus, if the children and the parents wish to preserve the family unit, often the only choice they have, faced with a removal order against the parents, is for all of them to leave Canada. This is a practical reality that flows from the fact that the citizenship status conferred on the children has no legal effect on the parents' status.

To remedy this legal situation, Canadian law recognizes that children's interests must be considered and taken into account in the context of the discretionary measures provided

under the *Immigration and Refugee Protection Act*, particularly when assessing applications for status based on humanitarian and compassionate considerations. However, even in this discretionary framework, Canadian law does not distinguish between foreign children and citizen children since the interests of both must be taken into account. Thus section 25 of the *Immigration and Refugee Protection Act* provides that "the best interests of a child directly affected" must be taken into account in assessing an application based on humanitarian and compassionate considerations and, in this respect, does not distinguish between children who are citizens and those who are not.

These considerations stem largely from the well-known decision issued in 1999 by the Supreme Court of Canada in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 (*Baker*). In *Baker*, the Supreme Court of Canada determined that the best interests of children must be "a primary consideration when assessing" an immigration application based on humanitarian and compassionate considerations (*Baker* at para. 75). The decision-maker must therefore consider children's best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them. However, "that is not to say that children's best interests must always outweigh other considerations, or that there will not be other reasons for denying an H & C claim even when children's interests are given this consideration." (*Baker* at para. 75)

In *Baker*, the children in question were Canadian citizens, and, although Ms. Baker also had children in another country, it does not appear that their interests were a primary consideration of the Supreme Court of Canada. Nonetheless, the Court made no formal distinction between the interests of the Canadian children and the interests of the foreign children, thus maintaining the traditional Canadian legal approach that the status of citizen conferred on a minor child does not give rise to any formal residence right for the child's foreign national parents.

Moreover, and I point this out again, although the interests of children must be taken into account based on the *Baker* principles, they are not the only relevant factor. It often

happens therefore that the foreign national parents of Canadian children are denied the right to take up residence in Canada. In such cases, if this results in the parents being removed from Canada, the children often have no other practical choice but to follow their parents to another country.

In this regard, the decision in *Baron v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81, [2010] 2 F.C.R. 311 (*Baron*), issued in 2009 by the Federal Court of Appeal, clearly illustrates the Canadian approach. The dispute in this case involved a decision by an enforcement officer refusing to defer the removal of an Argentinean couple from Canada. The couple had tried unsuccessfully to claim refugee status. During their stay in Canada, the couple had given birth to two children, and an application for status based on humanitarian and compassionate considerations had been consequently submitted to the authorities. Although that application was still pending, a removal order was made against the couple. The couple asked that the removal be deferred pending the determination of their humanitarian application, but the officer refused this request.

In confirming the removal decision, the Federal Court of Appeal referred to the applicable law as follows [*Baron* at para. 57]:

> . . . The fact that the appellants intend to take their children with them to Argentina and that the children might not be able to return until their parents regularize their status in Canada or until they become adults is not, in my view, an impediment to the removal of the parents. The jurisprudence of this Court has made it clear that illegal immigrants cannot avoid the execution of a valid removal order simply because they are the parents of Canadian-born children . . . .

In this regard, paragraph 69 of *Baron* reads in part as follows:

> . . . As this Court and the Federal Court have constantly repeated, one of the unfortunate consequences of a removal order is hardship and disruption of family life. However, that clearly does not constitute irreparable harm. To paraphrase the words of Pelletier J.A. found at paragraph 48 of his reasons in *Wang*, above, family hardship is the unfortunate result of a removal order which can be remedied by readmission if the H&C application is successful. Further, the fact

> that the appellants' children might have to pursue their education in Spanish, because of their parents' removal to Argentina, clearly does not constitute irreparable harm.

This Canadian approach was also prevailing in the United Kingdom and in most other European countries. However, two recent decisions have considerably changed this approach in Europe. One is a judgment of the Supreme Court of the United Kingdom dated February 1, 2011 in *ZH (Tanzania) v. Secretary of State for the Home Department*, [2011] UKSC 4, [2011] 2 All ER 783 (*Tanzania*), and the other is a decision dated March 8, 2011, of the Court of Justice of the European Union in *Gerardo Ruiz Zambrano v. Office national de l'emploi*, Case C-34/09 (*Zambrano*).

Let us deal first with the decision of the Supreme Court of the United Kingdom in the *Tanzania* case. The facts of the case are simple. In 1995, a woman from Tanzania arrived in the United Kingdom and made three successive claims for asylum, of which two were made under false identities. All the claims were refused. It took quite a long time to process these multiple claims, and the woman formed a relationship with a British citizen. They had two children, who were entitled to British citizenship under British legislation. The couple subsequently separated. The father was diagnosed with HIV and could no longer work, and was reported to drink a great deal. He was unable to be the children's caregiver. The mother was responsible for the children, but she was in a difficult situation since she had no status in the United Kingdom. She therefore submitted an application for status under various British legislative provisions that allow humanitarian factors to be taken into account. However, her application was again refused.

The appeal to the Supreme Court of the United Kingdom dealt with the weight that the decision-maker must give to the interests of children and with the effect of article 8 of the European Convention on Human Rights, which deals with the right to respect for private and family life. Article 8 provides as follows:

> Article 8 – Right to respect for private and family life
> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.

> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Lady Hale wrote the principal reasons for judgment of the Supreme Court of the United Kingdom allowing the appeal. Relying on article 8, she found that the right to family life referred to in that article may only be infringed where the proportionality assessment in the second paragraph of the article justifies interference. Accordingly, Lady Hale maintained that, to meet the requirements of this article, the best interests of the children in question must be a primary consideration in the decision about their mother's status.

Although other factors may be considered, the best interests of children must be a very important factor even if those interests are not always decisive. The question that the decision-maker had to consider was whether it was reasonable for the children in question to live in another country as a result of their mother's removal. The relevant factors to be considered in responding to this question included the level of the children's integration in the United Kingdom, the arrangements for looking after the children in the other country, the impact on relationships with parents or other family members resulting from the children moving away, etc.

In conducting this analysis, Lady Hale maintained that the children's British nationality was an important factor in assessing their best interests because, in moving to another country, they would lose a number of benefits attached to this citizenship, including access to the British public education system. They also risked losing their knowledge of the English language and of British culture, which a subsequent return to the United Kingdom as adults would not remedy. Lady Hale reached the following conclusion [at paras. 32 and 33]:

> Nor should the intrinsic importance of citizenship be played down. As citizens these children have rights which they will not be able to exercise if they move to another country. They will lose the advantages of growing up and being

> educated in their own country, their own culture and their own language. They will have lost all this when they come back as adults. As Jacqueline Bhabha (in *The 'Mere Fortuity of Birth'? Children, Mothers, Borders and the Meaning of Citizenship*, in *Migrations and Mobilities: Citizenship, Borders and Gender* (2009), edited by Seyla Benhabib and Judith Resnik, p 193) has put it:
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> > 'In short, the fact of belonging to a country fundamentally affects the manner of exercise of a child's family and private life, during childhood and well beyond. Yet children, particularly young children, are often considered parcels that are easily movable across borders with their parents and without particular cost to the children.'
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> We now have a much greater understanding of the importance of these issues in assessing the overall well-being of the child. In making the proportionality assessment under article 8, the best interests of the child must be a primary consideration. This means that they must be considered first. They can, of course, be outweighed by the cumulative effect of other considerations. In this case, the countervailing considerations were the need to maintain firm and fair immigration control, coupled with the mother's appalling immigration history and the precariousness of her position when family life was created. But, as the tribunal rightly pointed out, the children were not to be blamed for that. And the inevitable result of removing their primary carer would be that they had to leave with her. . . .

The judgment of the Supreme Court of the United Kingdom in *Tanzania* seems to grant foreign national parents of British children ancillary residence rights in the United Kingdom. Although Lady Hale states that the interests of British-citizen children do not necessarily lead to a right of residence for their parents, in light of the facts of this case, it is difficult to imagine in what circumstances British authorities could refuse the right of residence to the parents of such children who come from so-called developing countries, given that these countries often do not offer the same educational, social and cultural advantages for children as those available in the United Kingdom.

However, it should be noted that the *Tanzania* case was decided in a context where the father of the children was unable to be their caregiver, and it is possible that a different result would be achieved in a case where a British-citizen parent is able to take care of the children in the United Kingdom. We must, of course, await the development of British jurisprudence subsequent to *Tanzania* to assess its true scope.

However, the decision of the Court of Justice of the European Union in the *Zambrano* case is quite clear. The decision is based on article 20 of the *Treaty on the Functioning of the European Union*, which confers a European citizenship that includes, *inter alia,* the right to reside freely within the territory of the Member States:

> Article 20 — 1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.
>
> 2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, *inter alia*:
>
> (*a*) the right to move and reside freely within the territory of the Member States;
> . . .

Mr. Zambrano and his wife, both Columbian nationals, applied for asylum in Belgium; the Belgian authorities refused their applications and ordered them to leave the country.

While living in Belgium pending the outcome of their application to regularize the situation, Mr. Zambrano's wife gave birth to two children who acquired Belgian nationality pursuant to the applicable legislation. Mr. Zambrano and his wife accordingly filed an application to take up residence in Belgium based on the fact that they were the parents of Belgian citizens. That application was rejected: the Belgian authorities ruled that Mr. Zambrano and his wife had intentionally not taken the necessary steps with the Columbian authorities to have their children's Columbian nationality recognized so that he and his wife could legalize their own residence in Belgium.

Mr. Zambrano also applied to the Belgian authorities for unemployment benefits, but this application was also refused on the grounds that he did not satisfy the requirements of the Belgian legislation governing the residence of foreigners and that he did not have the right to work in Belgium.

Mr. Zambrano brought court actions against both these refusals concerning his residence and his right to unemployment benefits. The Tribunal du travail de Bruxelles, dealing with the decision to deny unemployment benefits, referred to the Court of Justice of the European Union the issue of whether Mr. Zambrano could live and work in Belgium on the basis of European Union law. The national jurisdictions of European Union countries may indeed refer to the Court of Justice of the European Union questions regarding the interpretation of Union law.

The Court of Justice of the European Union stated that article 20, above, of the *Treaty on the Functioning of the European Union* "is to be interpreted as meaning that it precludes a Member State from refusing a third country national upon whom his minor children, who are European Union citizens, are dependent, a right of residence in the Member State of residence and nationality of those children, and from refusing to grant a work permit to that third country national, in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen."

According to the Court's reasoning, a refusal to grant a right of residence will result in the children having to leave the territory of the European Union in order to accompany their parents to another country. Similarly, in the view of the Court, if a work permit were not granted to the parents, they may not have sufficient resources to provide for their family. The consequence of either of these refusals would be that the children, who are European Union citizens, would, in fact, be unable to exercise the substance of their rights conferred by their status as citizens. In this context, the Court ruled that these measures would deprive the European Union-citizen children of the genuine enjoyment of the substance of the rights conferred by virtue of their citizenship.

Needless to say, the *Zambrano* decision has the effect of recognizing important residence rights to the foreign national parents of children who are European Union citizens.

The decisions of the Supreme Court of the United Kingdom in *Tanzania* and the Court of Justice of the European Union in *Zambrano* clearly have no precedential value in Canada. Their persuasive value can also be questioned given that (a) Canadian federal legislation does not *prima facie* seem to contain the equivalent of article 8 of the European Convention on Human Rights regarding the right to respect for family life and (b) section 6 of the *Canadian Charter of Rights and Freedoms* is not drafted the same terms as section 20 of the *Treaty on the Functioning of the European Union*, and there does not seem to be an equivalent of section 1 of the *Charter* providing for such reasonable limits as can be demonstrably justified in a free and democratic society.

These two European judgments may be criticized both from a legal perspective and with respect to their social and political impacts. Nonetheless, it is very possible that the issues raised in these two decisions will soon be echoed in Canada, considering that they are significant decisions from superior judicial entities dealing with very controversial issues.

Of course, I will not comment on the outcome of a potential Canadian court proceeding raising such issues; my comments are limited to informing you about an important European jurisprudential development concerning the rights of citizen children whose parents are foreign nationals.

THANK YOU.