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Preserving Family Unity: The Rights of Children to Maintain the Companionship of their Parents and Remain in their Country of Birth

GIOVANNA I. WOLF*

INTRODUCTION

The preamble of the United Nations Convention on the Rights of the Child¹ (U.N. Convention) exemplifies the world's recognition of the importance of a stable family life to the healthy development of children:

Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community,

Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding.²

Preserving family unity is a key feature in children's rights declarations and treaties. Yet, immigration laws and deportation practices continue to be structured in a manner that ignores the sanctity of family unity and the rights of citizens. Many of the world's children, if they happen to be deportable or born to deportable parents, are faced with the uncertainty of being forced to move to a strange land or grow up in a stranger's home. Despite the growing number of successes in keeping families together, nation-states continue to conduct deportation proceedings giving only perfunctory treatment to the rights of the child. In bowing to anti-immigration sentiment, immigration

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1. *Convention on the Rights of the Child*, U.N. GAOR, 44th Sess., Annex, Agenda Item 50, at 5, U.N. Doc. A/44/736 (1989) (adopted without vote on November 20, 1989) [hereinafter U.N. Convention].

2. *Id.*

reform has ignored the obligations to take into account the interests of minor children.

Although States have a legitimate power to control immigration and define their citizens and residents, they must also observe their international commitments through positive efforts aimed at keeping migrant families together. Immigrants and asylum seekers are not enemy invaders infiltrating borders to sabotage the State's integrity. On the contrary, when people migrate to escape from persecution or poverty they are more likely to have a deep respect for the host nation. After all, they would not enter the country if they did not believe it to be a better place. The argument that migrant families are an enemy force is even less convincing. Why should nation-states get away with simply declaring that national security overrides the interests of children and allows them to break up families?

This Note will focus on the issues of preserving family unity and managing States' obligations to children's rights. The primary issue is whether the parents of native-born minor children should be given preference to resident status or, at minimum, a stay of deportation. Part I will review and describe current international treaties, declarations, and conventions governing children's rights to family life, and analyze their application and effectiveness.³ Part II will discuss legal restraints and policy considerations which inhibit the fulfillment of children's rights goals.

Part III will analyze present practices and immigration schemes and conclude with some workable suggestions to find a balance between preservation of the family and preservation of the State. Immigration laws should reflect some preference for keeping families together, much like provisions which set aside a preference for family reunification. Considering the great importance of keeping minor children together with their natural parents, a balance may be reached, for example, by reducing quotas that reunite adult families, thereby preserving the nation's immigration policy goals.

3. This Note will be limited to a discussion of the Convention on the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, Europ. T.S. No. 5 (entered into force Sept. 3, 1953) [hereinafter Convention on Protection]; the U.N. Convention, *supra* note 1; and the Organization of American States: Additional Protocol to the American Convention of Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador), Nov. 14, 1988, 28 I.L.M. 156 (1989) [hereinafter Protocol of San Salvador]. These treaties have been given the greatest effect by the signing Parties, and have some measure of enforcement. For a study of other Declarations, national, regional, and ideological, see PHILLIP E. VEERMAN, *THE RIGHTS OF THE CHILD AND THE CHANGING IMAGE OF CHILDHOOD* (Martinus Nijhoff ed., 1992).

I.

Concern for the welfare of children reached a level of international consensus in 1959 with the passage of the United Nations Declaration on the Rights of the Child,⁴ which was unanimously adopted by the General Assembly. For the most part, the Declaration reiterated basic human rights principles and further emphasized special protection for the interests of the child.⁵ The subsequent passage of the U.N. Convention augmented the Declaration with regard to children's rights and created in the ratifying countries an obligation to respect those rights.

Most relevant in the Convention is Article 9, which emphasized that "States Parties *shall ensure that a child shall not be separated from his or her parents against their will.*"⁶ This right is necessarily limited "when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child."⁷ Article 3 further directs consideration of the child's best interests by requiring 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.*"⁸ This Article itself may be interpreted as creating at least a legitimate expectation that the rights of the child will be observed.⁹

The Organization of American States (OAS) has its own human rights treaty which recognizes the right to formation and protection of families and the rights of children.¹⁰ Article 15 of the Protocol of San Salvador provides that "[e]veryone has the right to form a family The States Parties hereby

4. G.A. Res. 1386, U.N. GAOR, 14th Sess., Supp. No. 16, at 19, U.N. Doc A/4354 (1959) [hereinafter U.N. Declaration]. A detailed analysis of the history and contents of the U.N. Declaration appears in VEERMAN, *supra* note 3.

5. See, e.g., U.N. Declaration, principle 2, *supra* note 4.

6. U.N. Convention, *supra* note 1, at 8 (emphasis added). See also, *id.* at 9, which addresses family reunification:

In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner.

7. *Id.* at 8.

8. *Id.* at 7 (emphasis added).

9. Minister for Immigration and Ethnic Affairs v. Ah Hin Teoh, 183 C.L.R. 273 (1995) (Austl.). See *infra* note 38 and accompanying text.

10. Protocol of San Salvador, *supra* note 3. For the first American Convention on Human Rights, see American Convention on Human Rights, Nov. 22, 1969, 9 I.L.M. 673 (1970).

undertake to accord adequate protection to the family unit”¹¹ More specifically, Article 16 provides that:

Every child, *whatever his parentage*, has the right to the protection that his status as a minor requires from his family, society and the State. *Every child has the right to grow under the protection and responsibility of his parents*; save in exceptional, judicially-recognized circumstances, a child of young age ought not to be separated from his mother.¹²

Much like Article 9 of the U.N. Convention, an exception to keeping families together is allowed when it follows adjudicatory procedures. Some exceptions are, of course, necessary in cases of parental custody as well as State custody of juvenile delinquents. The addition of the clause “whatever his parentage” seems to address discrimination between immigrants of certain alienage, but may also be applicable to the discrimination against children of immigrant parents.

Perhaps the greatest source for protection of family is found in The European Convention on Human Rights (European Convention).¹³ The treaty provides for the protection of families and minors under Article 8 which reads:

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.¹⁴

11. Protocol of San Salvador, *supra* note 3, at 166-67.

12. *Id.* at 166 (emphasis added). *See also id.* at 166 (stating that “[t]he family is the natural and fundamental element of society and ought to be protected by the State . . .”).

13. Convention on Protection, *supra* note 3. This treaty is applicable only to the ratifying Member States of the Council of Europe.

14. *Id.* at art. 8.

While the European Convention does not separate children's rights from family rights generally, the European Court of Human Rights ("ECHR") has recognized the interests of the child as an integral part of the right to respect for family life.¹⁵

Article 8 of the European Convention has produced a rich amount of case law favoring family unity. Family members can challenge a deportation order by direct petition to the European Commission of Human Rights (the Commission) for alleged violations of the European Convention.¹⁶ If a violation of the Convention is found, the application is admitted and the Commission will render an opinion advising the state government. If a settlement cannot be reached, the case may then be referred to the ECHR.¹⁷

The case law under the European Convention provides a model for monitoring and enforcing protection of families. The usual case involves a deportation order against the nonresident alien (or illegal immigrant) family member. The execution of such action constitutes State interference with the right to respect for family life. Similarly, the denial of a residence permit to the nonresident parent or child results in an interference with family life.¹⁸ In some instances, a preliminary question may arise as to the existence of a protectable "family life." A valid and existing marriage will meet this requirement.¹⁹ As for children, the European Convention recognizes both legitimate and illegitimate children.²⁰ In the case of divorce or voluntary separation, in which the deportable family member is not cohabitating with the child, a sufficient family tie must be established.²¹

15. Examples of cases brought under article 8 concerning the family rights of children will be discussed. Also note that a European Charter of the Rights of the Child has been proposed by the Parliamentary Assembly of the Council of Europe (EUR. PARL. ASS., Rec. 1071 (1988)), although no action has yet been taken as of the time of this Note.

16. The applicant must first exhaust all domestic remedies before petitioning the Commission. Convention on Protection, *supra* note 3, at 20. Direct effect was recently given by the 9th Protocol to the European Convention, which grants individuals a right to bring a case directly to the ECHR. Protocol No. 9 to the Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 6, 1990, Europ. T.S. No. 140 [hereinafter 9th Protocol]. As of January 2, 1995, only 15 states ratified. See Chart of Signatures, Council of Europe.

17. Convention on Protection, *supra* note 3, at 28-30 (identifies which parties may refer cases to the ECHR). See also 9th Protocol, *supra* note 16, at 68-70.

18. *Berrehab v. Netherlands*, 138 Eur. Ct. H.R. (ser. A) at 14 (1988).

19. *Case of Abdulaziz, Cabales and Balkandali*, 94 Eur. Ct. H.R. (ser. A) at 5 (1985).

20. *Marckx Case*, 31 Eur. Ct. H.R. (ser. A) (1979). The ECHR held that "[a]rticle 8 presupposes the existence of a family . . . [and] makes no distinction between the 'legitimate' and the 'illegitimate' family." *Id.* at 14-15.

21. *Berrehab*, 138 Eur. Ct. H.R. (ser. A). Cohabitation is not "a *sine qua non* of family life between parents and minor children. . . . [F]rom the moment of the child's birth and by the very fact of it, there exists

Proving that an interference with family life has occurred is fairly routine. The difficulty arises in determining whether the interference falls under the justifiable exceptions set out in Paragraph 2 of Article 8. To justify a deportation, the State must show that (1) the interference is in accordance with law, (2) that the law serves a legitimate aim, and (3) the deportation must be necessary in a democratic society to achieve that aim.

When meeting these requirements, States are permitted a wide “margin of appreciation” to carry out their immigration laws.²² The deportation of an “overstayer,” or someone who otherwise enters and remains in the country illegally or violates a provision of his or her visa, will satisfy the “in accordance with law” requirement. Similarly, the legitimate purpose of the immigration law can be easily satisfied. For instance, the State may assert its interest in the economic well-being of the country,²³ the crime,²⁴ or the prevention of disorder.²⁵

The key limitation on State authority is whether the interference was “necessary.” While the prevention of crime is unquestionably a legitimate aim, it must be “justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued. This would be especially important when the state asserts the broader interest in preventing ‘disorder.’”²⁶ Otherwise, any petty crime could sound the alarm of a national crisis.

In the Moustaquim Case,²⁷ the son was deported on the grounds of his convictions for numerous criminal offenses. The ECHR took account of the facts that Moustaquim had lived in Belgium since he was an infant, had maintained close contact with his family,²⁸ had siblings who were Belgian citizens, and also noted the relatively long interval (two years) between his last conviction and the deportation order. In light of these circumstances, the

between him and his parents a bond amounting to ‘family life,’ even if the parents are not then living together.” *Id.* at 14. See also Moustaquim Case, 193 Eur. Ct. H.R. (ser. A) at 17-18 (1991).

22. Abdulaziz, 94 Eur. Ct. H.R. (ser. A) at 5.

23. Berrehab, 138 Eur. Ct. H.R. (ser. A) at 15 (recognizing that a concern to regulate the labour market due to population density, is a legitimate economic aim).

24. See, e.g., Moustaquim, 193 Eur. Ct. H.R. (ser. A); Beldjoudi v. France, 234 Eur. Ct. H.R. (ser. A) at 28 (1992); Nasri v. France, 322-B Eur. Ct. H.R. (ser. A) (1995).

25. Nasri v. France, *supra* note 24.

26. Moustaquim, 193 Eur. Ct. H.R. (ser. A) at 19.

27. *Id.* at 10-11.

28. The existence of a protectable “family life” was also at issue since Moustaquim had, on occasion, run away from home, had been imprisoned, and was separated from his family for five years after he was deported. Yet, the Court found that family ties had never been severed simply because he remained in contact with his family periodically by mail. *Id.* at 17-19.

ECHR found that "a proper balance was not achieved between the interests involved, and that the means employed [deportation] was [sic] therefore disproportionate to the legitimate aim pursued."²⁹

Most recently, the ECHR gave considerable weight to extenuating circumstances in suspending the deportation of a convicted rapist.³⁰ This case involved the deportation of a deaf and mute Algerian, Nasri. His family had lived continuously in France since 1965 and they did not have close ties to Algeria. Also, six of his siblings became French nationals. Due to his handicap, Nasri was completely dependent on the support of his family. He had no formal education and could not effectively communicate in sign language; only his family could understand his needs. The ECHR held that even though the offense of rape was "a grave threat to public order," it did not outweigh these special circumstances.³¹

The ECHR seems to favor leniency to uphold the right of respect for family unity. However, it is clear that the outcome of a case will depend largely on its particular circumstances. More importantly, the effect given to the principles set out in treaties and case law will vary according to the laws and policies of each state.

II.

International acknowledgment of the importance of family unity and commitments to uphold children's rights has not been a sufficient safeguard to preserve these rights. Conformity depends largely on the States themselves and the extent to which their obligations under the treaty are incorporated into the domestic law.³²

Article 4 of the U.N. Convention mandates that "States Parties shall undertake all appropriate legislative, administrative, and other measures for the

29. Moustaquim, 193 Eur. Ct. H.R. (ser. A) at 20.

30. Nasri, 21 Eur. H.R. Rep. 458 (1995).

31. *Id.* at 476-477. Note that cases arising in France involve the deportation of the child rather than the parent(s). France follows the policy that parents of minor children will not be deported. Dominique Simonot, *France Takes to the Fortress*, THE GUARDIAN, Jan. 3, 1996, at 10, available in LEXIS, World Library, ALLNWS File. However, these parents will not be granted any rights as residents. On the other hand, children convicted of committing crimes can be deported. *Id.*

32. Vojin Dimitrijević, *The Monitoring of Human Rights and the Prevention of Human Rights Violations Through Reporting Procedures*, in MONITORING HUMAN RIGHTS IN EUROPE 1 (Arie Bloed et al. eds., 1993).

implementation of the rights recognized in the present Convention."³³ The extent of enforcement, however, is merely the encouragement made by the Committee on the Rights of the Child and its suggestions and recommendations made to the General Assembly.³⁴ Monitoring of progress is performed mainly through periodic reporting by the States themselves.³⁵ Although violations of United Nations treaties fall under the jurisdiction of the International Court of Justice,³⁶ the internal nature of immigration policy prevents a case involving the deportation of a family member from reaching the Court.³⁷

Despite enforcement problems, treaties are not devoid of effectiveness. The U.N. Convention was recently invoked in an Australian case challenging an administrative decision to deny the father of citizen children a permanent entry permit. The High Court ruled that the ratification of the U.N. Convention on the Rights of the Child provides parents and children with a legitimate expectation that the principles will be adhered to even though the Convention has not been incorporated into Australian law.³⁸

In this Australian case, Mr. Ah Hin Teoh, a Malaysian citizen, had been residing and working in Australia on a temporary entry permit. He married an Australian citizen and had three native-born children from that marriage. While his application for a permanent entry permit was pending, Mr. Teoh was convicted of importation and possession of heroin. The permit was subsequently denied on the grounds of his criminal record. After the expiration of his temporary permit and rejection of his application for reconsideration, Mr. Teoh was ordered by the Minister of Immigration to be deported.

The basis for the appeal to the Federal Court was the Minister's failure to take into account the hardship to Mr. Teoh's wife and children in accordance

33. U.N. Convention, *supra* note 1, at 1459.

34. *Id.* at 1474.

35. *Id.* at 1473-74.

36. HERMAN MOSLER ET AL., *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 987 (Bruno Simma ed., 1994).

37. *Id.* The International Court of Justice is not empowered to adjudicate cases between an individual and a state. *Id.* Another state, such as the alien's country of origin, would have to intervene, but for obvious political reasons, this will never occur. For an overview of existing mechanisms of supervising human rights treaties, see Dimitrijević, *supra* note 32 at 2-7.

38. Ah Hin Teoh, *supra* note 9, at 287. The significance of ratification, even without incorporation, is the presumption that "Parliament, *prima facie*, intends to give effect to Australia's obligations under international law" and courts should favor construction which conforms with those obligations. *Id.*

with Articles 3 and 9 of the U.N. Convention.³⁹ Mrs. Teoh had a total of six children under ten years old and she was addicted to heroin.⁴⁰ The family depended on Mr. Teoh for financial and emotional support.

It was accepted that as a matter of procedural fairness, the Minister of Immigration was required only to give notice and an opportunity to respond if his decision was inconsistent with the principles of the Convention.⁴¹ While the Court was careful not to give an unincorporated treaty the effect of a rule of law, it essentially afforded a basis for reviewing administrative decisions with regard for the principles embodied in the U.N. Convention. Upon review of the decisionmaker's record, the Court found references to the hardship on the family and concluded that due regard for the best interests had been given.

This case illustrates the problem that the weight of treaty obligations is lessened both by domestic law and policy, and the limiting language in the treaty itself. As one scholar points out "[t]he Convention's reference to 'applicable law and procedure' [in Article 9] provides an important reminder that while 'best interests' is a necessary basis for removing a child from a family, it is not a sufficient basis."⁴² Also, it is rare, indeed, that a State court will reason from external sources not incorporated by the political bodies of the State.

In some instances, an intergovernmental organization may make inquiries into possible violations of international law. Most recently, the OAS began investigating a case in Canada to stay deportations of the Polish parents of two Canadian-born children.⁴³ The couple had been filing for refugee status and during the time their case was pending, they had two children now ages five and six. The refugee claims were denied and the couple was ordered to be deported. The family will invoke both Canada's obligations under the International Covenant on the Rights of the Child as well as Canada's Charter of Rights and Freedoms to appeal the order.⁴⁴

39. *Id.* at 281-82.

40. *Id.* at 279. The Court accepted that it was Mrs. Teoh's addiction that played a part in her husband's heroin smuggling activities. *Id.*

41. *Id.* at 291-92.

42. Jane Ellis, *The Best Interests of the Child*, in CHILDREN'S RIGHTS IN AMERICA: U.N. CONVENTION OF THE RIGHTS OF THE CHILD COMPARED WITH UNITED STATES LAW 3, 6 (Cynthia P. Cohen and Howard A. Davidson eds., 1990).

43. Allan Thompson, *Policy on Deportation of Parents Being Probed: OAS Body Wants Canada to Await International Investigation*, THE TORONTO STAR, Sept. 3, 1995, at A5.

44. *Id.*

Much like other countries, Canada's policy concerning native-born children of illegal parents is that the "children are welcome to stay . . . but the parents must go."⁴⁵ The policy stems from the fear that immigrants and temporary visa holders will have "babies of convenience" to secure residency.⁴⁶ Lawyers for the family countered this argument by pointing to the approach taken by the European Court of Human Rights (ECHR) which recognizes the right to protection of family unity and yet Europe has not seen an increased number of so-called "babies of convenience."⁴⁷

The approach taken by the Council of Europe as discussed in Part I is, by far, the best suited to monitor human rights violations.⁴⁸ It is unique in that the enforcement provisions in the Convention itself provide adequate remedies.⁴⁹ Furthermore, the case law generated by the Commission and ECHR "not only has the role of precedent within the system itself, but it also operates as a normative standard for the domestic application and interpretation of human rights law."⁵⁰ In many instances, application to the Commission or the Commission's report will result in friendly settlement.⁵¹

Yet, the European approach is not without its difficulties. Ultimately, the weight of the decisions of the Commission and ECHR depends on the extent to which the State has incorporated the Conventions into its immigration laws. For example, in Great Britain, decisions concerning the impact of deportation on the family are "entirely a question for the Secretary of State's discretion."⁵² This discretion, however, is not unbridled. The immigration rules require a balancing of public interest against compassionate circumstances.⁵³ Furthermore, the High Court has held that "even though there is no

45. *Id.*

46. Diane Francis, *Immigration to Canada is a Privilege, Not a Right*, FINANCIAL POST, Nov. 8, 1994, at 21, available in 1994 WL 6189455.

47. THOMPSON, *supra* note 43.

48. See generally Merja Pentikäinen and Martin Scheinin, *A Comparative Study of the Monitoring Mechanisms and the Important Institutional Frameworks for Human Rights Protection within the Council of Europe, The CSCE and the European Community*, in MONITORING HUMAN RIGHTS IN EUROPE, *supra* note 32, at 93.

49. See *European Convention*, *supra* note 13.

50. Pentikäinen and Scheinin, *supra* note 48, at 105.

51. See, e.g., *Taspinar v. Netherlands*, 44 Eur. Comm'n H.R. Dec. & Rep. 262 (1985).

52. *R. v. Secretary of State, Egueye-Gbemre*, CO/1284/95 (Q.B. Aug. 3, 1995) (LEXIS, UK Library, ALLCAS File). Lord Bridge notes that this is a significant restriction on judicial review: "[W]here Parliament has conferred on the executive an administrative discretion without indicating the precise limits within which it must be exercised, to presume that it must be exercised within convention limits would be to go far beyond the resolution of an ambiguity." *Brind v. Secretary of State*, 1 All E.R. 720, 723 (1991).

53. Statement of Changes in Immigration Rules, R. 162, HC 251 (1990).

presumption that the Secretary of State's discretion has to be exercised in accordance with the convention, restrictions of the rights upheld by it need to be justified. They require particular scrutiny."⁵⁴

The recognition of family rights enumerated in these treaties has at least brought the plight of immigrant families to the forefront. Many families have been allowed to stay together. But for many, abstract principles that promise protection are inadequate. The force of the obligations reflected in these treaties will remain uncertain unless changes are made in domestic immigration laws.

III.

Regardless of the progress achieved at the more abstract "universal" level, the true test of conformity with international law must occur at the national level. The reality is that families continue to be adversely affected by the deportation of the parents and the consequential forced deportation of the citizen-child.⁵⁵ Controversy swelled in Britain over the case of three-year-old Jasmine Sorabjee, a British citizen forced to accompany her mother who was being deported to Kenya.⁵⁶ Mrs. Sorabjee originally entered the country in the early 1980s as a student and married a British national. They were later divorced and the husband did not keep contact with his daughter, Jasmine. Without any other family ties to Britain, the European Commission on Human Rights dismissed her application, finding that Jasmine was at an adaptable age to relocate.⁵⁷

Shortly thereafter, in another case, an entire family was uprooted as a result of the deportation of the wife and mother of three British citizens.⁵⁸ The woman, a Nigerian national, was ordered deported for having violated

54. *R. v. Secretary of State for the Home Dep't, ex parte Kuteyi*, (Q.B. July 20, 1995) (LEXIS, INTLAW Library, ENGCAS File).

55. See Sonia Purnell, *British Children Forced Abroad by Marriage Law*, THE DAILY TELEGRAPH (London), Nov. 27, 1995, at 5, available in LEXIS, World Library, TXTLNE File (reporting on the crackdown on marriages of convenience which may lead to the "deportation" of hundreds of British-born children if their parents are deported).

56. *Id.* See also Martin Delgado, *Jasmine: Hundreds Losing British Rights*, EVENING STANDARD (London), Dec. 1, 1995, at T15, available in LEXIS, World Library, TXTLNE File [hereinafter *Hundreds Losing British Rights*].

57. Purnell, *supra* note 55.

58. Martin Delgado, *Jasmine Row: Now Another British Family Must Leave*, EVENING STANDARD, Dec. 4, 1995 at 2, available in LEXIS, World Library, TXTLNE File. The case was appealed to the Commission and is currently pending consideration.

immigration laws five years prior. The charge was a violation of her visitor's visa for working a two-month temporary job. Rather than move to a completely foreign country, the family could move to Ireland, where they could find protection from deportation. Oddly enough, in other EU states the "foreign wife or husband has an unassailable right to live [in that country] simply because the spouse is British."⁵⁹ Movement within the EU becomes necessary because "Britain is the only EU country which deports the custodial parents of its own citizens."⁶⁰

The principle of preserving family unity has also been found in national constitutional law. In Ireland, the Supreme Court held that Irish-born children have a constitutional right to family life which must be taken into consideration when applying Ireland's immigration statute, the Alien's Act of 1935.⁶¹ Article 41 of the Irish Constitution gives great regard to family rights and obligates the State to protect the family unit by recognizing certain natural rights: "[T]he Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law."⁶²

The case of Fajujonu was brought in the name of a six year old child born in Ireland to African parents residing in Ireland without a permit.⁶³ Although the parents were at all times "illegal immigrants" there was no evidence that they attempted to defraud or evade the immigration law. Mr. Fajujonu was ready and willing to work but was denied employment for lack of a permit. At the time the proceedings were brought, a deportation decision had not been contemplated, but the Fajujonus feared deportation after inquiries were made as to their residence status.

The Court concluded that where

an alien has in fact resided for an appreciable time in the State and has become a member of a family unit within the state containing children who are citizens, that there can be no question but that those children, as citizens, have got a constitutional right to the company, care and parentage of their parents within a family unit. . . . [A]lso that *prima*

59. *Hundreds Losing British Rights*, *supra* note 56.

60. *Id.* (quoting Nuala Mole, director of the Centre for Advice on Individual Rights in Europe).

61. *Fajujonu v. Minister for Justice*, [1989] 2 I.R. 151, 160-66.

62. IR. CONST. art. 41, §1(1).

63. *Fajujonu*, 2 I.R. at 153. The couple had two additional infant children, also Irish citizens, who were not joined as parties but whose interests were also considered. *Id.*

facie and subject to the exigencies of the common good that is a right which these citizens would be entitled to exercise within the State.⁶⁴

Having established this right and its limitations for the “common good,” the matter was remanded to the Minister of Justice for reconsideration giving due regard to the constitutional interests of the family.

Similarly, although more elusively, constitutional protection is found in the United States. It should first be made clear that the United States is not a party to any children’s rights treaty. However, the fundamental rights of the family have received some recognition as a substantive right under the Due Process clauses of the 5th and 14th Amendments.⁶⁵ Theoretically, this right could be invoked by citizen-children deprived of the companionship of their parents if they are deported.⁶⁶ The Attorney General has the discretion to suspend deportation in cases where deportation would “result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.”⁶⁷

In practice, establishing “extreme hardship” has proven extremely difficult.⁶⁸ In *INS v. Jong Ha Wang*,⁶⁹ the United States Supreme Court gave great deference to the Attorney General’s office stating they “have the authority to construe ‘extreme hardship’ narrowly should they deem it wise to do so.”⁷⁰ Moreover, review of a decision denying a request to suspend deportation is difficult to attain and the standard of review is limited.⁷¹

64. *Id.* at 162.

65. See, e.g., *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (“Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation’s history and tradition.”); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (recognizing “a private realm of family life which the state cannot enter”); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

66. For a detailed history and discussion of the status of the law in the United States regarding family rights and deportation practices affecting those rights, see Edith Z. Friedler, *From Extreme Hardship to Extreme Deference: United States Deportation of its Own Children*, 22 HASTINGS CONST. L.Q. 491 (1995).

67. 8 U.S.C. § 1254(a)(1) (1994). Two other conditions must also be met: the deportable alien must have been “physically present in the United States for a continuous period of not less than seven years immediately preceding the date of . . . application” and must prove that “he was and is a person of good moral character.” *Id.*

68. For a discussion of cases dealing with suspending the deportation of children, see Friedler, *supra* note 66, at 518-25.

69. 450 U.S. 139 (1981) (per curiam).

70. *Id.* at 145.

71. Judicial review of discretionary administrative decisions is limited to whether the decision was arbitrary and/or capricious. See generally *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). There is also a Separation of Powers problem and the Supreme Court has been

Since the making and enforcement of immigration policy is traditionally a power reserved for the political bodies of a State, reforms will be subject to the pressures of popular sentiment. The current trend is decidedly toward tougher immigration laws.⁷² Much like the problem of sham marriages to gain citizenship, those opposed to giving residence to parents of citizen children fear that immigrants will have babies to secure residency.⁷³ This reasoning also underlies the movement to deny citizenship to native-born children of noncitizen parents. In a recent United States Congressional hearing on automatic citizenship, a former journalist testified as to the ease and frequency with which pregnant Mexican women cross the border into El Paso, Texas, just to give birth to an American citizen.⁷⁴

Undoubtedly, such abuses will occur. But as the Chair of the Commission of Immigration Reform in the United States observed:

the vast majority of illegal aliens do not come to America to bear children, although it does happen. In three years and dozens of hearings, consultations and expert discussions, no one has ever reported to the Commission that the vast majority of births to illegal aliens are anything more than a reflection of the large numbers of illegal aliens who are here.⁷⁵

Paradoxically, many immigration laws set aside large quotas for reuniting families of adult citizens.⁷⁶ Meanwhile, minor citizens, who have a greater need for the companionship of their parents, are being separated from their

reluctant to intervene in matters of immigration because the admission of aliens falls under Congress' broad legislative powers. *Fiallo v. Bell*, 430 U.S. 787, 792 (1977).

72. This trend is evident in the new wave of laws patterned after California's Proposition 187. Other countries are similarly "reforming" immigration laws to tighten borders. [cite Canada, France, Britain, Germany, Argentina]

73. *Immigration to Canada is a Privilege, Not a Right*, *supra* note 46, at 21.

74. *Societal and Legal Issues Surrounding Children Born in the United States to Illegal Alien Parents: Joint Hearing on H.R. 705, H.R. 1363, H.J. Res. 56, H.J. Res. 64, H.J. Res. 87, H.J. Res. 88, and H.J. Res. 93 Before the Subcommittee on Immigration and Claims and the Subcommittee on the Constitution of the House Comm. on the Judiciary*, 104th Cong., 1st Sess. 121-24 (1995) [hereinafter *Hearing*] (prepared testimony of Emily Jauregui Alcantar, Former Reporter, *El Paso Times*). As a pregnant woman of Mexican descent, the reporter went undercover and found and tapped into a system set up by smugglers to transport pregnant women to the El Paso County hospital to have their babies and receive welfare benefits. *Id.*

75. *Hearing*, *supra* note 74, at 50 (prepared testimony of The Honorable Barbara Jordan, Chair, U.S. Commission on Immigration Reform).

76. For example, the United States reserves a large percentage for family reunification and family members are given a higher preference ranking. Immigration Act of 1990, §201(b).

parents or must be deported with them. After growing up in a foreign country, they may choose to return to their country of birth and, as adults, reclaim their parents under special provisions for family preference or family reunification.

Unless the State takes the extreme measure of denying citizenship to children of noncitizens, the only benefit of current policies is the "temporary" removal of some immigrants, which comes at the great cost of breaking up homes and families and disrupting children's lives. The message seems absurd: "If you wish to be with your parents, you must follow them to a foreign country. When you grow up, you can move back and bring your parents to live with you." Perhaps the waiting period to gain residency will act as a deterrent against "babies of convenience." However, making this assumption implies the birth of children is the source of immigration problems. Moreover, short term policymaking is not the proper solution.

CONCLUSION

Cracking down on immigration should not be practiced by punishing children with the threat of deportation.⁷⁷ Tough immigration laws should be directed to the control of borders and blatant cases of abuse of the system. The issue is not whether residence should be automatic once a child is born. If a deportation order or denial of residence is appealed, the decisionmaker should take into account family hardship, as well as the existence of a bona fide family relationship.

Since deportation proceedings are usually *ex parte* and appeals are difficult to attain, the fate of families rests in the discretion of the decisionmaker. For this reason, it is imperative that immigration laws and administrative rules of procedure reflect the rights that the decisionmaker must observe to better guide his or her judgment. It is not enough to direct the decisionmaker to consider overall hardship to the family. General concepts such as "extreme hardship," "adverse effects," or "special circumstances" do not draw attention to the most important interest at stake: the healthy development of the child. Laws guiding the decisionmaker should reflect a presumption in favor of family unity. In addition, respect for the rights of the child should be explicitly stated.

77. When the parents of a citizen child are classified as illegal immigrants and ordered deported, the child facing the choice of either separation or relocation is, in effect, punished for the sins of his or her parents.

