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**In the Child's Best Interest?
The Consequences of Losing a Lawful Immigrant Parent to Deportation¹**

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Introduction

Universal Periodic Review of the United States human rights obligations provides the opportunity to examine the human rights impacts of U.S. immigration laws on citizen children. The United States currently deports lawful permanent resident (LPR) parents of thousands of U.S. citizen children, without providing these parents an opportunity to challenge their forced separations. U.S. law and practice jeopardizes the rights of U.S. residents and citizens under the International Covenant on Civil and Political Rights, particularly the right to the family which is protected by articles 17 and 23.

LPRs, also known as green card holders, have legal status to live and work in the United States. While many green card holders are eligible to become U.S. citizens through naturalization, immigration experts speculate that many do not take advantage of this option because of the hefty fees required to apply or a mistaken belief that their "permanent resident" status protects them from deportation.² In fact, LPRs make up nearly 10 percent of those who are deported from the United States.³ Most LPRs facing deportation on the basis of criminal convictions have already served their criminal sentences.⁴

In 1996, Congress passed the Antiterrorism and Effective Death Penalty Act (AEDPA)⁵ and the Illegal Immigrant Reform and Immigrant Responsibility Act (IIRIRA),⁶ which together introduced additional immigration restrictions on LPRs convicted of crimes. The law expanded the category of crimes designated as aggravated felonies to encompass a broad range of minor and non-violent offenses.⁷ Lawful permanent residents convicted of an aggravated felony are

¹ This piece is adapted from a policy brief under the same title, available at http://www.law.berkeley.edu/files/IHRLC/In_the_Childs_Best_Interest.pdf.

² See Ly Diem, *Deported! Surprising Details On Who Can Get the Boot*, IN'L EXAMINER, vol. 34, No. 24, Jan. 10, 2008, available at <http://www.detentionwatchnetwork.org/node/518> (accessed Feb. 21, 2010).

³ See HUMAN RIGHTS WATCH, FORCED APART (BY THE NUMBERS): NON-CITIZENS DEPORTED MOSTLY FOR NONVIOLENT OFFENSES, April 15, 2009 [hereinafter "Forced Apart (By the Numbers)"], available at <http://www.hrw.org/en/reports/2009/04/15/forced-apartnumbers-0> (accessed Feb. 21, 2010).

⁴ FORCED APART (BY THE NUMBERS), *supra* note 3, at 5 (stating that non-citizens convicted of crimes are "subject to deportation after they have finished serving their criminal sentences.").

⁵ Anti-Terrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (1996).

⁶ Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009 (1996).

⁷ When the category was first established in 1988, the term "aggravated felony" applied to serious crimes such as murder, drug trafficking crimes, and certain illicit trafficking offenses. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7342, 102 Stat. 4181 (1988). INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii), states that any alien who is convicted of an aggravated felony at any time after admission is deportable; INA § 240A(a)(3), 8 U.S.C. §

subject to mandatory deportation and other severe immigration consequences.⁸ Currently, a conviction may fall into this category without being a felony and without involving any aggravated circumstances.⁹

Until 1996, most lawful permanent residents with criminal convictions facing deportation were entitled to a hearing before an immigration judge who would balance an individual's criminal convictions against his or her positive contributions to the United States.¹⁰ At this hearing, an immigration judge could consider the impact that deportation of an LPR parent would have on U.S. citizen children and, if warranted, could decide to allow an LPR to remain in the country. However, the 1996 immigration laws eliminated such hearings for LPRs facing deportation based on convictions classified as aggravated felonies.¹¹

Despite claims by U.S. Immigration and Customs Enforcement (ICE) that it focuses on deporting the “worst of the worst” criminal offenders,¹² analysis of data from the U.S. Department of Homeland Security (DHS) by the nongovernmental organization Human Rights Watch found that more than 68 percent of LPRs are deported for relatively minor, non-violent offenses.¹³ Our independent analysis of data from DHS estimates that more than 100,000 children have been affected by parental deportation between 1997 and 2007, and that at least 88,000 of these children were U.S. citizens. This analysis is based on data provided by DHS as well as the 2008 American Communities Survey, a representative survey of the U.S. population administered by the U.S. Census Bureau. We note that all children, regardless of immigration status, may be impacted by forced separations from their parents. Although U.S. citizen children are the focus of this research, this policy brief does not assert that other children are any less deserving of protection under domestic law.

1229b(a)(3) states that individuals convicted of any aggravated felony are not eligible for cancellation of removal. Additionally, Congress has taken further action to restrict the ability of federal judges to review immigration court decisions. *See* REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (2005) (barring federal courts from reviewing discretionary denials of relief).

⁸ In this policy brief, we use the term “mandatory deportation” to refer to deportation without a discretionary hearing to consider circumstances specific to the individual case. Individuals convicted of aggravated felonies are subject to mandatory detention, ineligible for asylum, permanently barred from entering the United States, and are subject to a sentence of up to twenty years if they re-enter the country without permission from the Secretary of Homeland Security. INA § 236(c), 8 U.S.C. 1226(c); INA § 208(b) (2)(B)(i), 8 U.S.C. 1158 (b)(2)(B)(i); § 212(a)(9)(A)(ii), 8 U.S.C. § 1182(a)(9)(A)(ii); § 276(b)(2), 8 U.S.C. § 1326(b)(2).

⁹ Many state law misdemeanor crimes which are punishable by sentences of one year are included in the aggravated felony category in federal immigration law. These crimes include non-violent offenses because the word “aggravated” has no legal bearing on the circumstances of the offense.

¹⁰ Before 1996, lawful permanent residents were eligible for relief from deportation under INA § 212(c) as long as they had not been convicted of aggravated felonies for which they had served sentences of five years or more. 8 U.S.C. § 1182(c) (1952), repealed by Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-208, Div. C., Title III, § 304(b), 110 Stat. 3009-597 (1996).

¹¹ INA 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii), states that any alien who is convicted of an aggravated felony at any time after admission is deportable; INA 240A(a)(3), 8 U.S.C. § 1229b(a)(3), states that individuals convicted of any aggravated felony are not eligible for cancellation of removal.

¹² U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (ICE), FISCAL YEAR 2008 ANNUAL REPORT, PROTECTING NATIONAL SECURITY AND UPHOLDING PUBLIC SAFETY, *available at* http://www.ice.gov/pi/reports/annual_report/2008/ar_2008_page1.htm (accessed Jan. 6, 2010).

¹³ The most common criminal offenses are driving under the influence of liquor, simple assault, and drug possession. *See* FORCED APART (BY THE NUMBERS), *supra* note 3, at 39.

U.S. Customs and Border Patrol recently confirmed that on October 1, 2009, it increased efforts to identify LPRs with criminal convictions.¹⁴ It is likely that a greater number of LPRs will be detained and placed into removal proceedings.

U.S. Deportation Law and Policy Should Be Informed by European Court of Human Rights Jurisprudence

The European human rights regime provides one model for addressing potential family separation in deportation hearings involving a lawful permanent resident parent of a U.S. citizen child. Many European nations have immigration systems that, like the United States, confront the problem of deporting long-term legal residents who commit crimes, but who have citizen children and extensive ties to the country. European countries have incorporated a judicial balancing test that considers the nation's interest in public safety in light of the right to the family and the best interests of the child.

The European Court of Human Rights has repeatedly upheld the right of a state to expel immigrants convicted of crimes to maintain public order.¹⁵ Further, the court has emphasized that the European Convention does not guarantee the right of an immigrant to live in a particular country, especially after committing a crime.¹⁶ However, the European Court has held that a state's decision to deport an individual is justified only if the interference with family life is not excessive compared to the public interest that is protected.¹⁷ In cases in which an individual convicted of a crime poses little threat to public security and has extensive family ties to the country, the European Court has held that deportation may violate the right to family unity protected by Article 8 of the European Convention.¹⁸

The Court has often found that the right to family unity outweighs the state's interest in deporting an immigrant convicted of a crime. In the case of *Mehemi v. France*, the European Court considered the case of an Algerian national sentenced to six years imprisonment for illegal importation of a controlled substance.¹⁹ The European Court weighed Mehemi's family connections, including his wife and three minor children of French nationality, and found that his right to family life outweighed the state's interest in deporting him. Because his crime was a

¹⁴ American Immigration Lawyers Association, AILA InfoNet, Doc. No. 09100122, available at <http://www.aila.org/content/default.aspx?docid=9826> (accessed Feb. 25, 2010).

¹⁵ See *Uner v. Netherlands*, 2006-XII, Eur. Ct. H.R. ____, available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Uner%20|%20v.%20|%20Netherlands&sessionId=47796967&skin=hudoc-en>.

¹⁶ European Convention, *supra* note 70, art. 8. Article 8 of the European Convention on Human Rights provides: "Everyone has the right to respect for his private and family life, his home and his correspondence. 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."

¹⁷ *Berrehab v. the Netherlands*, 138 Eur. Ct. H.R. (ser. A) (1988); see also *Beldjoudi v. France*, 234 Eur. Ct. H.R. (1992), *Mehemi v. France*, 1997-VI Eur. Ct. H.R. 1959; and *El Boujaïdi v. France*, 1997-VI Eur. Ct. H.R. 1980.

¹⁸ *Boultif v. Switzerland*, 2001-IX Eur. Ct. H.R. 120.

¹⁹ *Mehemi v. France*, 1997-VI Eur. Ct. H.R. 1959.

non-violent drug offense, the court found his deportation was disproportionate to the public interest aims pursued, and thus violated Article 8.²⁰

The Inter-American Commission has followed a similar balancing test to determine whether the deportation of a parent violates the right to family under the American Convention on Human Rights²¹ and the American Declaration of the Rights and Duties of Man.²² The Commission's report on Canada's immigration system concedes that while states have the right and duty to maintain public order through expulsion of immigrants, they must balance this right with the potential harm to the rights of the individuals in a specific case.²³ The Commission also accepted the European Court's determination that a balancing test should be applied on a case-by-case basis and that states must have a compelling justification for interference with the right to family.²⁴

The current European model provides a feasible alternative to mandatory detention and deportation. This model could be adapted to restore the authority of U.S. immigration judges to conduct a practical balancing test that considers the rights of the LPR parent, the U.S. citizen child, and the state. Because of the particular vulnerabilities of children, U.S. immigration judges need flexibility in applying a multi-factored analysis to ensure that the needs of all parties are given proper consideration. Such an approach would bring current immigration laws in line with the basic American values of public safety and family unity, as well as with international human rights standards.

Conclusions and Recommendations

Reform of the U.S. immigration system is urgently needed. Thousands of U.S. citizen children have been adversely impacted by the expansion of the "aggravated felony" definition. The U.S. should be encouraged to restore judicial discretion in all cases involving the deportation of LPRs who have U.S. citizen children in order to give parents a meaningful opportunity to present evidence of the adverse impact that their deportation will have on their U.S. citizen children.

²⁰ See also *Amrollahi v. Denmark*, (No. 56811/00) Eur. Ct. H.R. (July 11, 2002) available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Amrollahi%20%20v.%20%20Denmark&sessionid=47796967&skin=hudoc-en>. It is important to note that the European Court often does not find an Article 8 violation. *Grant v. United Kingdom*, (No. 10606/07), Eur. Court. H.R. (Jan. 8, 2009) available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=Grant%20%20v.%20%20United%20%20Kingdom&sessionid=4796967&skin=hudoc-en>.

²¹ American Convention on Human Rights, Nov. 21, 1969, O.A.S. T.S. No. 36; 1144 U.N.T.S. 143, 150, art.17(1), art. 19, (1969).

²² American Declaration of the Rights and Duties of Man, Res. XXX, Final Act of the Ninth International Conference of American States (Pan American Union), Bogota, Colombia, Mar. 30-May 2, 1948, at 38; *reprinted in* Handbook of Existing Rules Pertaining to Human Rights, OEA/Ser.L/V/II.23 Doc. 21 Rev. 6, at 5 (1979); 1 Annals of the O.A.S. 130 (1949); Basic Documents Pertaining to Human Rights in the Inter-American System, OAS/Ser.L/V/I.4 Rev. 9 (2003); and 43 Am. J. Int'l L. Supp. 133 (1949). Art. V, Art. VI.

²³ Report on the Situation of Human Rights of Asylum Seekers Within the Canadian Refugee Determination System, Inter-Am. C.H.R., OEA/Ser.L/V/II.106, doc. 40 (2000) [hereinafter Report on Canadian Refugee System]. The Commission found that in instances in which immigration proceedings may potentially separate families, the resulting interference with family life may only be justified where necessary to meet a pressing need to protect public order, and where the means are proportional to that end.

²⁴ Report on Canadian Refugee System, *supra* note 23.

Such modification will also bring the United States in line with international human rights standards.

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