
Crimmigration and Crossover Youth

The Deportation of Former Wards of the State

BENJAMIN PERRYMAN*

1 Introduction

‘The most fundamental principle of [Canadian] immigration law is that non-citizens do not have an unqualified right to enter or remain in the country’.¹ Based on this principle, Canada, like many states, attaches immigration consequences to non-citizens who are convicted of criminal offences.² Deportation regularly follows criminal conduct. Citizenship, in this ‘crimmigration’ context, is formalistic and defined by the federal government, which has exclusive constitutional responsibility over naturalization and aliens.³ Conventionally, it is the state, and the state alone, that determines when a non-citizen can be deported on account of criminality.

A growing migration studies literature challenges this conventional account and posits that migration governance is multi-scalar, even in the context of deportation. This literature reveals a ‘multilayered jurisdictional patchwork’ that involves processes and actors at the substate, national, and international scales.⁴ In order to understand how deportation is truly governed, this literature contends, one must appreciate the

* Assistant Professor, Faculty of Law, University of New Brunswick. The author thanks Judith Resnik, Moritz Baumgärtel, and Sara Miellet, workshop participants at the Law & Society Association annual meeting, and the anonymous peer reviewer for their helpful comments on drafts of this chapter. The author was legal counsel to Mr. Abdoul Abdi who was the applicant in one of the case studies in this chapter.

¹ *Canada (Minister of Employment and Immigration) v. Chiarelli* [1992] 1 SCR 711.

² Bourbeau, “Detention and Immigration”; Menjivar et al., “The Expansion of ‘Crimmigration,’ Mass Detention, and Deportation”; Stumpf, “The Process Is the Punishment in Crimmigration Law”; Aiken et al., “Crimmigration, Surveillance and Security Threats”.

³ Macklin, “Citizenship Revocation, the Privilege to Have Rights and the Production of the Alien”.

⁴ Varsanyi et al., “A Multilayered Jurisdictional Patchwork”.

role that each of these scales plays, or as Resnik more bluntly observes, there is a ‘uselessness of using any single nation-state as the unit of analysis when thinking about the migration of people, law, or objects’.⁵

A multi-scalar account of deportation practices, however, does not determine the valence or contribution of a particular scale. Substate actors, such as local law enforcement, may contribute to deportation processes by criminalizing racialized migrants via traffic stops, other mundane offences, and local ordinances.⁶ Conversely, some cities across the globe, in very different national contexts, employ local-level policies with the common intention of providing ‘sanctuary’ or ‘refuge’ to migrants without status.⁷ Even within a single state, there can be significant site specificity despite the fact that local or other substate officials are implementing a common federal immigration policy.⁸ As a result, the specific impact of multi-scalar migration governance must be evaluated on a case-by-case basis.

What multi-scalar accounts of deportation practices reveal is that rescaling of migration governance can create opportunities for subnational forms of citizenship. For example, where local and state-level governments provide voting rights, protections against deportation, access to identification, and accessible education, migrants without formal citizenship may gain ‘membership via the mere fact of *presence* and *residence* in a city or state, in spite of the powerful boundaries still surrounding formal membership in the nation-state’.⁹ This type of ‘local citizenship’ challenges the normative foundation of citizenship as exclusively within the purview of the state.¹⁰ It does so by creating a form of ‘social legality’ that operates independently of formal legal status and produces a more complex meaning of citizenship.¹¹

⁵ Resnik, “Within Its Jurisdiction”, p. 119.

⁶ Armenta, “Racializing Crimmigration”; Armenta and Alvarez, “Policing Immigrants or Policing Immigration?”; Provine and Doty, “The Criminalization of Immigrants as a Racial Project”; Stuart et al., “Legal Control of Marginal Groups”; Varsanyi, “Immigration Policing through the Backdoor”.

⁷ Bauder and Gonzalez, “Municipal Responses to ‘Illegality’”.

⁸ Coleman, “The ‘Local’ Migration State”; Chavez and Provine, “Race and the Response of State Legislatures to Unauthorized Immigrants”.

⁹ Varsanyi, “Interrogating ‘Urban Citizenship’ vis-à-vis Undocumented Migration”, p. 244.

¹⁰ Spiro, “Formalizing Local Citizenship”; Villazor, “Sanctuary Cities and Local Citizenship”; Motomura, “Immigration Outside the Law”.

¹¹ Flores and Schachter, “Examining Americans’ Stereotypes about Immigrant Illegality”; Flores and Schachter, “Who Are the ‘Illegals’?”.

Beyond contributing to what citizenship means, social legality and presence-based forms of citizenship also engender multidimensional politics when states seek to include or exclude certain migrants.¹² Local protest over the morality and human cost of deportation, in specific cases, can alter how federal immigration officials implement deportation policies.¹³ Scaled up, the politics of belonging can even lead to legal and policy changes at the level of the state, for example, the attempt at formal recognition for undocumented migrants who arrived in the United States of America as children.¹⁴ Accordingly, the multi-scalar migration governance literature also provides a constructivist account of the social and political forces that can shape the creation, interpretation, and application of immigration law.

This chapter applies a multi-scalar account of deportation practices to a specific scenario in Canada: former crossover youth facing deportation as adults. Crossover youth are minors who grow up in the child welfare system and 'crossover' to the youth criminal justice system.¹⁵ Where crossover youth are non-citizens, a finding of guilt within the youth criminal justice system may prevent them from becoming a Canadian citizen.¹⁶ Such youth cannot be deported because youth sentences are exempted from 'cimmigration' consequences.¹⁷

'Crimmigration' consequences result from the intersection between criminal law and immigration law. While criminal courts in Canada do not sentence non-citizens to expulsion, a criminal conviction can lead to a loss of immigration status and deportation, often with minimal consideration of the actual circumstances of the criminal offence. In this sense, the immigration law implications are related to the criminal law and follow directly from the criminal offence even if they are not technically a criminal punishment.

As non-citizens, crossover youth are vulnerable to 'cimmigration' consequences, including deportation, if they are convicted of further offences as young adults. Canadian immigration legislation deems adult offenders

¹² Ellermann, "Discrimination in Migration and Citizenship".

¹³ Ellermann, "Street-Level Democracy".

¹⁴ Nicholls, *The DREAMers*; Olivas, *Perchance to DREAM*.

¹⁵ Finlay et al., *Cross-Over Youth Project*; Bala et al., "Child Welfare Adolescents & the Youth Justice System"; Bromwich, "Cross-Over Youth and Youth Criminal Justice Act Evidence Law".

¹⁶ Citizenship Act, R.S.C. 1985, c. C-29, s. 22.

¹⁷ Immigration and Refugee Protection Act, S.C. 2001, c. 27, s. 36(3)(e).

'inadmissible' and assigns deportation consequences based on the maximum sentence possible *not* the actual circumstances of the offence.¹⁸

Research on crossover youth shows that their recidivism rates are higher than other youth and often linked to personal characteristics associated with involvement in the child welfare system.¹⁹ Race is also a factor that mediates placement, experience, and outcomes within the child welfare system.²⁰ This means that migrant youth are exposed to a non-trivial risk of deportation when placed in the Canadian child welfare system. As a result, non-citizen crossover youth are disadvantaged in two ways. First, they are more likely to become involved with the criminal justice system than children who are raised by their families. Second, they face more severe consequences for their actions than children who are citizens because they can be deported if their criminal involvement continues into young adulthood.

Building on the concept of 'emplacement', developed by Çağlar and Glick Schiller,²¹ this chapter argues that the apprehension of migrant children by the Canadian child welfare system deprives some children of the right to have rights. This deprivation is caused by the mutually reinforcing failures of local- and state-level institutions to properly protect migrant children in the child welfare system, including from the state's own threat of deportation. At the same time, the placement of crossover youth in local institutions enables a politics of resistance to deportation in the context of 'cimmigration'.

The politics of resistance has relational and legal dimensions, which are both informed by a multi-scalar account of deportation practices. Section 2 shows how placement of migrant children in cities and local child welfare systems creates relational obligations of care that demand a redefining of citizenship. Wards of the state are *of the* state. In other words, when the state exercises its coercive power to apprehend a migrant child because they are in the state's jurisdiction and in need of protection, the state assumes the role of parent, providing opportunities (and erecting

¹⁸ Ibid., s. 36.

¹⁹ Herz et al., "Challenges Facing Crossover Youth"; Cho and Lee, "Childhood Maltreatment and Repeat Offending in Juvenile Delinquents"; Guarnaccia et al., "Links between Adverse Childhood Experiences, Psychopathological Symptoms and Recidivism Risk in Juvenile Delinquents"; Robertson and Walker, "Predictors of Justice System Involvement".

²⁰ Pinderhughes et al., "Youth of Color in Care"; Boyd, "Individual Consequences of Racial Disproportionality and Disparities"; Bergen and Abji, "Facilitating the Carceral Pipeline".

²¹ Çağlar and Glick Schiller, *Migrants and City-Making*.

barriers) to that child's development, and through this process, accepting that child as a member of the state, even if that child is a non-citizen. This creates a 'social legality' of belonging. Section 3 explains how 'social legality' can transform into 'formal legality' via administrative, equitable, and constitutional legal reasoning. An administrative legal regime that grants discretionary power not to deport in compelling circumstances may need to account for the abysmal treatment of migrant children in care. The apprehension of migrant children by the child welfare system may also create fiduciary obligations – owed by the state to wards in its care – that if breached require an equitable remedy that puts former wards in as good a position as they would have been if there was breach of the duty. Government action, at the local and state levels, including a failure to act, may also violate the constitutional rights of migrant children in care. Laws that make it harder for certain groups of children to obtain citizenship, a child welfare system that systematically produces worse outcomes for certain groups, and deportation processes that ignore the experience of former crossover youth may constitute arbitrary and discriminatory disadvantage. To the extent that former crossover youth were denied the equal protection of law, they may be entitled to a constitutional remedy to confer citizenship or prohibit deportation.

The main claim of this chapter is that a multi-scalar analysis of deportation practices can shape legal argument and obligation. This is important because the migration studies literature is often framed in social, political, and moral terms that call for changes to policies for the benefit of migrants rather than in legal terms that demand application of existing principles to migrants. Using a detailed analysis of the interconnection between sub-national child protection services and federal deportation practices, the chapter challenges the traditional lens of analysis that primarily conceives of deportation as implicating only the role of the federal government. The chapter shows that the placement of non-citizen children in the child protection system demands a reconceptualization of citizenship that transforms notions of social legality into formal legality.

2 Emplacement and the Redefining of Citizenship

When children migrate to Canada, as immigrants or refugees, they arrive not just in a new country but in new legal, political, and social spaces. The multi-scalar migration governance literature, discussed earlier, demonstrates that the nature of those spaces can be local, nation-state, or international, depending on the specific jurisdictional context. Çağlar and

Glick Schiller²² conceptualize engagement within these different spaces as ‘emplacement’. They define ‘emplacement’ as:

the relationship between, on the one hand, the continuing restructuring of place within multi-scalar networks of power and, on the other, a person’s efforts, within the barriers and opportunities that contingencies of local place-making offer, to build a life within networks of local, national, supra-national, and global interconnections.²³

This definition recognizes that migrants are not simply governed by state and non-state institutions but also engage with those institutions at different levels. The act of leaving, arriving, and existing in these different spaces is thus relational, and these relations are shaped by a panoply of actors, legal regimes, and political processes that operate in a particular space.

For a migrant child apprehended by the child welfare system, the spaces and institutions of most apparent salience are substate, particularly provincial or municipal agencies responsible for child protection. As this section explains, migrants arrive disproportionately in Canadian cities. There, they engage with opportunities and barriers provided by substate institutions, especially in the context of service delivery. One of those services is child protection, which in Canada is implemented by provincial or municipal agencies. For migrant children in care, it is these agencies that shape the opportunities and barriers that influence their lives most immediately. The federal government still governs the acquisition of formal citizenship, but this space and reality is a distant horizon for migrant children in care as well as many social workers who are responsible for securing these children’s best interests.

The importance of federal responsibility for citizenship becomes more immediate and ominous when migrant children in care become involved in the youth criminal justice system. Such crossover youth may be prohibited from becoming Canadian citizens and gaining the full panoply of rights associated with citizenship, including the right not to be deported.²⁴ While many thought or assumed they were Canadian – an understandable assumption for a young adult who has grown up entirely in the care and control of the state – apprehension by the child welfare system does not confer formal citizenship status. This makes former crossover youth

²² Ibid.

²³ Ibid., pp. 20–21.

²⁴ Citizenship Act, R.S.C. 1985, c. C-29, s. 22.

vulnerable to ‘crimmigration’ consequences if they are convicted of crimes as young adults.

Far from being a fictitious scenario, this section highlights two recent case studies where a former crossover youth faced deportation from Canada on account of criminality. What is noteworthy about these cases is that they raised public dialogue on the meaning of citizenship and resulted in public calls for the redefinition of citizenship in the face of potential deportation.

2.1 *Cities as Sites of Migration and Apprehension*

In Canada, between 2011 and 2016, fully two-thirds of all immigration was to the five most populated cities and nine out of ten migrants relocated to an urban centre.²⁵ This is not a uniquely Canadian phenomenon. Globally, migration to cities is ‘a constitutive element of modernity’.²⁶ This can place cities in tension with state authorities. Cities that attempt to integrate irregular migrants or prevent the removal of non-citizens ‘take a direct policy stance against national immigration and citizenship policies’.²⁷

Under Canada’s federal constitutional order, only the federal government and provincial governments have authority to regulate in their respective jurisdictional areas. Cities ‘are creatures of [provincial] statute and can only act within the powers conferred on them by the provincial legislature’.²⁸ Formally, they have no legal authority over immigration. However, practically, cities and other substate actors play a crucial role in the integration of migrants.²⁹ For example, the federal government may fund city libraries or non-profit organizations to deliver language classes and other integration services to migrants even though regulation of city libraries and non-profit organizations are not federal responsibilities.

Given the services many major Canadian cities are responsible for regulating and administering, either directly or by delegation from provincial or federal governments, it is unsurprising that cities are key actors in

²⁵ Statistics Canada, *Immigration and Ethnocultural Diversity*.

²⁶ Smith and Guarnizo, “Global Mobility, Shifting Borders and Urban Citizenship”, p. 614.

²⁷ Kaufmann, “Comparing Urban Citizenship, Sanctuary Cities, Local Bureaucratic Membership, and Regularizations”, p. 443.

²⁸ *London (City) v. RSJ Holdings Co. Ltd.* 2007 SCC 29, para. 37.

²⁹ Rodriguez, “The Significance of the Local in Immigration Regulation”; Motomura, “Immigration Outside the Law”.

integrating migrants. Though constitutional authority for civil and political rights is vested at the provincial level, in practice, major municipalities are responsible for public education, welfare provision, social housing, policing, and child protection. Each of these services comes with a unique legal regulatory regime as well as governmental and non-governmental employees who interpret and apply that regime. For many migrants, these are the government officers who matter the most – far more than any official in the federal immigration department.

Child protection falls under provincial jurisdiction in Canada, and in each province, there is a department or ministry that is responsible for child protection legislation and service delivery. In some provinces, service delivery is delegated to children's aid societies, which are agencies mandated by provincial law to deliver child protection services in a specified territorial jurisdiction. In practice, this means that there is often a children's aid society for a given city, for example the 'Children's Aid Society of Toronto'. Such societies develop local policies and deliver child protection services in their respective city. In cities where there is a sizeable population of non-citizen children in care, those policies may relate to the unique immigration and citizenship needs of non-citizen children. In other provinces, these frontline child protection services are delivered by provincial employees, often without any tailoring of the services to the unique needs of non-citizen children. Other than providing some funding for children who are refugee claimants or government-assisted refugees (and Indigenous children), the federal government is not responsible for child protection. The federal government does, however, retain jurisdiction over the naturalization and citizenship of children in care, but the initiation of such processes is left to provincial child protection authorities or their children's aid society delegates.

If emplacement entails migrants navigating networks of power to overcome barriers and make the most of opportunities, municipal service delivery becomes one site where multi-scalar migration governance takes shape. Migrants, like all people, have economic and social needs that involve engaging with state service delivery regimes. How these regimes treat migrants or specific classes of migrants influences the extent to which this multi-scalar governance acts as a barrier or opportunity. This is especially the case for municipal child welfare agencies that are responsible for apprehending children in need of protection.

Until recently, many child welfare agencies made little to no effort to secure Canadian citizenship for wards in their care, it was simply 'not something that has been required to be monitored' as part of standard

best practices.³⁰ Worse, research shows that migrant children in care regularly assume that their child welfare worker is taking care of their most pressing needs, including the acquisition of citizenship, but these assumptions are often misplaced.³¹

The reasons for this type of systemic failure are contested. At best, it is the result of child welfare workers who do not have an adequate understanding of the unique needs of migrant children or the resources to respond to those needs.³² Others point to a more pernicious explanation that situates the apprehension, inadequate care, and potential displacement of migrant youth within Canada's historic and ongoing race relations.³³

Anti-Black racism is part of Canada.³⁴ So is xenophobia.³⁵ At the nation-state level, Canada has a long history of immigration policies designed to exclude non-White migrants, either explicitly or substantively.³⁶ This racism has significant implications for the treatment of migrant children in the child welfare system.

While there is no formal discrimination in child protection in Canada, recent studies show stark disparities based on race. In Toronto, for example, when a report is made to children's services, Black families are twice as likely to be investigated and Black children are more likely to be apprehended. Poverty, not abuse, is the strongest predictor of placement in care. Once in care, Black children are more likely to be adopted or 'age out' of care, whereas White children are more likely to be reunited with their families. All in all, on a population basis, Black children are overrepresented in care by a factor of five times.³⁷

These racial dynamics do not mean that non-White migrant children are *per se* targeted by child protection services. It does, however, suggest that there is an intersectionality between immigration status and race that

³⁰ Hare, "Newcomer, Immigration, and Settlement Sectors", p. 65.

³¹ Ibid.

³² Ibid.

³³ Bergen and Abji, "Facilitating the Carceral Pipeline"; Nath, "Curated Hostilities and the Story of Abdoul Abdi".

³⁴ Maynard, *Policing Black Lives*; Inniss, "Toward a Sui Generis View of Black Rights in Canada".

³⁵ Zaman, "Racialization and Marginalization of Immigrants".

³⁶ Bashi, "Globalized Anti-blackness"; Aiken, "From Slavery to Expulsion"; Johnston, *The Voyage of the Komagata Maru*.

³⁷ Ontario Association of Children's Aid Societies, "Race Matters in the Child Welfare System"; Ontario Human Rights Commission, *Interrupted Childhoods*; Contenta et al., "CAS Study Reveals Stark Racial Disparities for Blacks, Aboriginals".

may affect emplacement for some migrants. Indeed, studies of separated refugee children show that they are subject to both anti-refugee and anti-youth discourses.³⁸ To the extent that Blackness intersects with non-citizenship, this disproportionate treatment of Black children and families has led some scholars to argue that the child welfare system is complicit in facilitating a ‘pipeline that first normalizes the separation of largely racialized, poor, and/or immigrant families and then reframes foster children as threats to the social order requiring their incarceration and expulsion’.³⁹

Even if we do not accept that Canada is consciously complicit in an apprehension to deportation pipeline, the emplacement of migrant children in the child welfare system functions as a barrier to their full integration in Canadian society, particularly with respect to gaining Canadian citizenship and all the inherent rights that such status entails. This makes former crossover youth vulnerable to deportation if they engage in criminal activity as young adults. At the same time, the emplacement of migrant children in poor systems of care may also challenge our conception of citizenship where former wards of the state face deportation because the state, as parent, failed to obtain citizenship on their behalf.

2.2 *Redefining Citizenship in Response to Former Crossover Youth*

The importance of cities in multi-scalar migration governance, including in the context of former crossover youth, has implications for how citizenship is defined. Globalization has changed the social fabric of cities.⁴⁰ Transnational mobility, transnational migrant networks, neoliberal restructuring of states that deemphasizes public authority, and securitization of borders are factors related to changing cities that affect the national characteristic of citizenship.⁴¹ Through these changing dynamics of cities and their place within the world, citizenship is being:

- (1) rescaled – the hegemony of the national-scale political community is being weakened by the formation of communities at other scales; (2) reterritorialized – the link between the nation-state’s territorial sovereignty and citizens’ political loyalties are being challenged; and (3) reoriented – away from the nation as the predominant political community.⁴²

³⁸ Bryan and Denov, “Separated Refugee Children in Canada”.

³⁹ Bergen and Abji, “Facilitating the Carceral Pipeline”, p. 43.

⁴⁰ Netto, *The Social Fabric of Cities*.

⁴¹ Smith and Guarnizo, “Global Mobility, Shifting Borders and Urban Citizenship”.

⁴² Bhuyan and Smith-Carrier, “Constructions of Migrant Rights in Canada”, p. 217.

The rescaling, reterritorialization, and reorientation alter the role cities play in conceptualizing citizenship and belonging.

The implications of these changes are unsettled. Some scholars draw a connection between residence in cities and conceptions of 'local citizenship' that confer entitlement to services and possibly protection from deportation.⁴³ Others suggest that belonging within cities requires the development of non-legal roadmaps to establish the temporal meaning of community and to situate migration within that meaning.⁴⁴

These iterations of local citizenship propose alternative normative foundations of citizenship. In its most extreme form, local citizenship 'proposes an ideal in which citizenship is no longer bound to an a priori political community but is based on the mere reality of presence and residence in a place'.⁴⁵ This is not unlike conceptions of nation-state citizenship that require nothing more than birth in a country, it is just that the scale of place is different, shifting from the nation-state to the city. Relationally focused conceptions of local citizenship require something more. The concept of emplacement developed by Çağlar and Glick Schiller is capable of constituting that something more.⁴⁶ Emplacement recognizes that a migrant's engagement with local barriers and opportunities creates relations between that person and local networks. These relations then transform what it means to be a citizen and what it means to belong.

Just as the evolving approach to nationality at international law has not displaced the state, developing concepts of local citizenship also do not displace the state. 'The real significance of urban citizenship for cosmopolitan democracy is not that it would provide an alternative basis to territorial federation, but that it could transform national identities and nationalist ideologies from below and from within'.⁴⁷

The pathway through which this transformation takes place is relational. Citizenship is constituted through performative acts and social processes at the municipal level.⁴⁸ This does not have to be limited to engagement

⁴³ Spiro, "Formalizing Local Citizenship", p. 560; Villazor, "Sanctuary Cities and Local Citizenship", p. 576.

⁴⁴ Motomura, "Immigration Outside the Law", p. 209.

⁴⁵ Kaufmann, "Comparing Urban Citizenship, Sanctuary Cities, Local Bureaucratic Membership, and Regularizations", p. 444.

⁴⁶ Çağlar and Glick Schiller, *Migrants and City-Making*.

⁴⁷ Rainer Baubock, "Reinventing Urban Citizenship", p. 157.

⁴⁸ Çağlar and Glick Schiller, *Migrants and City-Making*.

through service provision, but service interactions will undoubtedly form part of this constitutive process, whether viewed as barriers or opportunities within the concept of emplacement.

What municipal citizenship also enables is space for migrants to more readily become political actors.⁴⁹ This does not alleviate tensions between residents and newcomers. What it does, however, is bring to the forefront the question of ‘who is an established resident, legitimate local actor, or who is acceptable as a new resident and, thus, who has the right to local sociopolitical, cultural, and economic space and who does not’.⁵⁰ Confrontation and consensus around this question need not exclude traditional nation-state conceptions of belonging, but it will not be limited to those formal definitions of citizenship.

In this context, migrant children who are apprehended by child welfare systems can make claims to both placed-based and relationally based citizenship. When children are apprehended by local child protection services, they are placed in care. For crossover youth, this often means residential care in group homes or other state-run institutions with concomitant poor outcomes on important determinates of development such as education, health, employment, and criminal involvement.⁵¹ The opportunities and barriers of these ‘care’ placements inevitably shape who migrant youth become. Relationally, migrant children who become wards of the state are legally *of the state*. The state stands *in loco parentis* (in the place of a parent) especially for apprehended children who are not placed in foster care or adopted. Thus, the act of apprehension becomes a relationship of both responsibility and control.

One important site of responsibility and control is applications for citizenship, which until 2017 could not be made directly by minors.⁵² Even today, the practice of applying for citizenship as a minor requires a guardian or the provision of additional information by the child.⁵³ As a result, responsibility and control of citizenship applications for migrant children

⁴⁹ Nyers and Rygiel, *Citizenship, Migrant Activism and the Politics of Movement*.

⁵⁰ Smith and Guarnizo, “Global Mobility, Shifting Borders and Urban Citizenship”, pp. 619–20.

⁵¹ Wright et al., “Responding to Crossover Youth: A Look Beyond Recidivism Outcomes”; Walsh and Jagers, “Addressing the Needs Crossover Youth”; Gharabaghi, *A Hard Place to Call Home*.

⁵² Citizenship Act, R.S.C. 1985, c. C-29, s. 5.

⁵³ *Ibid.*

in care continues until those children ‘age out’ of the child welfare system as young adults.

It is at this point of aging out where former crossover youth are most vulnerable to ‘crimmigration’ consequences. Non-citizens who are convicted of crimes are inadmissible to Canada and subject to deportation.⁵⁴ This applies equally to former crossover youth who spent their entire childhood in care, even where child protection agencies failed to apply for citizenship on their behalf.

The recent cases of Abdoul Abdi and Abdilahi Elmi show that this vulnerability to deportation is not fictitious for former crossover youth. Both Mr Abdi and Mr Elmi came to Canada as child refugees fleeing persecution in Somalia. Both were apprehended by child protection services, in Nova Scotia and Ontario, respectively, who failed to apply for Canadian citizenship on their behalf.⁵⁵ In Mr Abdi’s case, his family attempted to apply for citizenship on his behalf, but child protection services ‘intervened on the basis that as a ward of the state only DCS [Department of Community Services] could apply for citizenship’.⁵⁶ Both faced a tumultuous childhood and became crossover youth.⁵⁷ In Mr Abdi’s case, he was transferred between thirty-one different placements between the ages of 6 and 18, many of which were group homes or other institutionalized settings.⁵⁸ Because they were non-citizens, both Mr Abdi and Mr Elmi became inadmissible and deportable when, as young adults, they were convicted of criminal offences.

What makes these case studies interesting, from the perspective of multi-scalar migration governance, is that neither Mr Abdi nor Mr Elmi was deported. Mr Abdi’s deportation order was overturned by the Federal Court on two occasions.⁵⁹ Mr Elmi’s deportation was temporarily halted by Canada following an interim measures request from the UN Human Rights Committee.⁶⁰

⁵⁴ Immigration and Refugee Protection Act, S.C. 2001, c. 27, ss. 33–53.

⁵⁵ *Abdi v. Canada (Public Safety and Emergency Preparedness)* 2018 FC 733; Keung, “At the UN’s Request, Canada Suspends Deportation of Former Child Refugee to Somalia”.

⁵⁶ *Abdi v. Canada (Public Safety and Emergency Preparedness)* 2018 FC 733, para. 13.

⁵⁷ *Abdi v. Canada (Public Safety and Emergency Preparedness)* 2018 FC 733; Keung, “At the UN’s Request, Canada Suspends Deportation of Former Child Refugee to Somalia”.

⁵⁸ *Abdi v. Canada (Public Safety and Emergency Preparedness)* 2018 FC 733, para. 12.

⁵⁹ *Abdi v. Canada (Public Safety and Emergency Preparedness)* 2018 FC 733.

⁶⁰ Keung, “At the UN’s Request, Canada Suspends Deportation of Former Child Refugee to Somalia”.

Central to both outcomes was advocacy that challenged the conventional account of citizenship as strictly within the purview of the nation-state. For example, Muscati and Macklin argued: 'The issue is not whether Mr Abdi is a model member of the Canadian community and so 'deserves' to stay. What matters is that he is already a product and member of this society'.⁶¹ Black Lives Matter – Toronto ensured that Canadians were aware of the federal government's efforts to deport a former crossover youth to a country too dangerous for Canadian officials to visit.⁶² These types of interventions recast the state at a different scale, highlighting not just the federal state's role in effecting deportation but also the provincial state's role in making migrant children in care precarious by preventing them from acquiring citizenship. This lack of status then became a 'gateway to a range of traumatic vulnerabilities that are systemic in nature [and] ... experienced disproportionality and specifically by poor and racialized people'.⁶³ At this scale, the 'local citizenship' of Mr Abdi and Mr Elmi mattered and challenged Canada's assertion that citizenship at the level of the nation-state was determinative politically and morally.

In Mr Abdi's case, the federal government decided not to pursue further deportation proceedings.⁶⁴ Mr Elmi's case remains pending while the UN Human Rights Committee considers a complaint that his deportation would violate international law. Following Mr Abdi's case, the federal government changed its policy manual that governs what factors immigration officials must consider before deciding whether to deport a long-term resident of Canada. The province of Nova Scotia implemented a new policy to ensure that the citizenship status of wards in its child welfare system was tracked and that there was an individualized plan for each to ensure that they gained status if needed. These changes are important insofar as they acknowledge that emplacement in the child welfare system may redefine citizenship in a manner that requires recognition, but like much of the multi-scalar migration governance literature, the changes are grounded more in political, social, and moral arguments than in legal arguments. This is something that is changing.

⁶¹ Muscati and Macklin, "Abdoul Abdi Case: A Test of Canada's Commitment to Rules and Compassion".

⁶² Maynard, "Black Life and Death across the U.S.-Canada Border".

⁶³ Nath, "Curated Hostilities and the Story of Abdoul Abdi", p. 12.

⁶⁴ Canadian Press, "Abdoul Abdi Relieved Federal Government Won't Pursue Deportation, Lawyer Says".

3 Courts and the Transformation of Social Legality to Formal Legality

At international law, no one can be arbitrarily deprived of the right to remain in their 'own country'. What constitutes one's 'own country' is determined based on residency and attachment to place *not* citizenship.⁶⁵ This has led the UN Human Rights Committee to develop a jurisprudence on the right to belong that focuses on a non-citizen's sociological connection to the state where they reside and comparing that attachment to their sociological connection to the state of citizenship. Where relative attachment is stronger to the country of residence, removal may constitute an arbitrary deprivation and violation of international law.⁶⁶ However, one of the problems with this international human right is that it is not always respected by states, including Canada. Decisions of the UN Human Rights Committee are not technically binding on Canada and have been largely ignored.⁶⁷

If a redefined conception of citizenship premised on 'social legality' is to be accepted legally in Canada, it needs to find recognition in domestic law. There are three avenues for this recognition: (1) administrative discretion, (2) fiduciary duties, and (3) equality rights. None of these avenues has been expressly applied in the context of former crossover youth facing deportation from Canada. Each has strengths and weaknesses in this context. Crucial to recognition of all three avenues will be insights from the multi-scalar governance literature discussed in this chapter, particularly the concept of emplacement, that highlight the interconnections of different scales and the role they play in shaping the people and the circumstances that appear before courts.

3.1 *The Administrative Discretion of Immigration Officials Not to Deport*

Canadian immigration law is punitive. Penal populism creates the political conditions for Parliament to pass laws, such as the *Faster Removal of Foreign Criminals Act*, that make it easier to attach 'cimmigration' consequences to the criminal conduct of non-citizens.⁶⁸ The Supreme Court

⁶⁵ Liss, "Right to Belong".

⁶⁶ Ibid.

⁶⁷ Sniderman, "Jama Warsame Is a Citizen of Nowhere".

⁶⁸ *Faster Removal of Foreign Criminals Act*, S.C. 2013, c. 16.

of Canada, for its part, has held that the objective of immigration legislation is to prioritize security over integration ‘by removing applicants with [criminal] records from Canada, and by emphasizing the obligation of permanent residents to behave lawfully while in Canada’.⁶⁹ This is part of the securitization of migration.⁷⁰

Nonetheless, immigration officials retain some discretion not to deport a long-term resident even where their criminality is well founded.⁷¹ The scope of this discretion is unsettled but may be broader where the person concerned is a long-term resident.⁷²

In Mr Abdi’s case, his counsel urged the Federal Court to recognize a broad scope of discretion not to deport in circumstances where the person concerned was a former crossover youth for whom the state had failed to obtain citizenship. As Nath notes, the Court was presented with excruciating detail on the intensity of harm Mr Abdi experienced in care, as well as the experience of similarly situated individuals, but this was not the focal point of the Court’s decision:

The series of losses facing Abdoul [and presented to the Court] are incredibly violent – the loss of home, the loss of one’s state’s protection, or in Arendtian terms, the loss of belonging to any community. These losses are recognized minimally. In the state’s submission to the court, all *Charter* and international human rights arguments are described as ‘speculative and premature’, leading one commentator to write: ‘Our government argues that the rights of children are so irrelevant that they should not even be spoken about’. [citations omitted]⁷³

In response, the Court resolved the case based on the failure of immigration officials to even consider the arguments that were presented, but the Court did not provide guidance on how those arguments should have been treated if they were properly considered.⁷⁴

Following *Abdi v. Canada (Public Safety and Emergency Preparedness)*, it may be possible to recognize an expanded scope of discretion not to deport in circumstances where the person concerned was failed as a child in care. This would require an explication of emplacement and a discussion

⁶⁹ *Medovarski v. Canada (Minister of Citizenship and Immigration)* 2005 SCC 51, para. 10.

⁷⁰ Macklin, “Citizenship Revocation, the Privilege to Have Rights and the Production of the Alien”.

⁷¹ *Tran v. Canada (Public Safety and Emergency Preparedness)* 2017 SCC 50, para. 6.

⁷² *Cha v. Canada (Minister of Citizenship and Immigration)* 2006 FCA 126, para. 22.

⁷³ Nath, “Curated Hostilities and the Story of Abdoul Abdi”, p. 12.

⁷⁴ *Abdi v. Canada (Public Safety and Emergency Preparedness)* 2018 FC 733, para. 87.

of the different scales of failure that took place, especially substate policies that prevented non-citizen children in care from acquiring the protections of citizenship. A multi-scalar account of migration governance and deportation practices is helpful here because it reveals the causal pathway between the state's apprehension of migrant children and the state's deportation of those children who become former crossover youth. The strength of this avenue is the existing precedent that at least requires consideration by immigration officers of circumstances beyond the scale of the nation-state, including the provincial and city scales responsible for child protection. But the weakness of this avenue is the narrow jurisdictional scope of the Federal Court. In Canada's federal system of government, provincial superior courts are responsible for the family law and criminal law dimensions of former crossover youth. The Federal Court is traditionally focused on immigration consequences and security rather than what might be decades of emplacement that preceded a discrete criminal conviction that prompted the 'cimmigration' consequences at issue. The multi-scalar account of deportation practices challenges this traditional focus by revealing the interconnections between child protection and deportation. This may demand an expanded focus when the Federal Court reviews exercises of administrative discretion by immigration officials.

3.2 *The Fiduciary Duties Owed by Child Welfare Agencies to Wards of the State*

If responding to the multi-scalar dimensions of former crossover youth is beyond the scope of the Federal Court, an alternative avenue for transforming social legality into formal legality is to look to courts that have jurisdiction to consider the broader, multi-scalar circumstances of a former crossover youth. One possible avenue is a claim for breach of fiduciary duties in a provincial superior court responsible for family law.

Under Canadian law, a fiduciary duty can arise in various relationships where 'one party, the fiduciary, [must] act with absolute loyalty toward another party, the beneficiary ... in managing the latter's affairs'.⁷⁵ This duty arises from the power the fiduciary holds over the more vulnerable beneficiary and the potential misuse of that power to the detriment of the beneficiary. It protects the 'integrity of the relationships' not the rights of the parties.⁷⁶

⁷⁵ *Alberta v. Elder Advocates of Alberta Society* 2011 SCC 24 (2011), para. 22.

⁷⁶ Rotman, "Understanding Fiduciary Duties and Relationship Fiduciarity", p. 988.

Fiduciary relationships are characterized by ‘an undertaking of responsibility’ towards a ‘person or class of persons’ whose ‘legal or substantial practical interests’ are vulnerable to the fiduciary’s exercise of discretion.⁷⁷ They arise in social or economic interactions, deemed important by law, where the ‘high trust and confidence’ necessitated by the relationship creates ‘an *implicit* dependency and *peculiar* vulnerability of beneficiaries to their fiduciaries’.⁷⁸ Such relationships can be between private actors or between government and individuals or classes of individuals, though the general performance of government functions does not in itself create a fiduciary obligation.⁷⁹ Types of private fiduciary relationships include relationships between executor-beneficiary, lawyer-client, physician-patient, broker-investor, director-corporation, and parent-child. Types of public fiduciary relationships include the relationship between the Crown (as represented by government) and Indigenous peoples.⁸⁰

The fiduciary duty in the parent-child context arises from ‘obvious reasons’, according to the Supreme Court of Canada, that extend from the fact that ‘society has imposed upon parents the obligation to care for, protect and rear their children’.⁸¹ It is this relationship of care that grounds the fiduciary obligation in the family law context.⁸² Unlike other fiduciary duties, the parent-child duty does not require an undertaking of responsibility on the part of the parent.⁸³ As a result, a parent may be liable to their child for breach of their fiduciary duty if they do not act in the child’s best interests, for example, where they sexually abuse the child in their care, knowingly expose them to sexual abuse, or fail to intervene to prevent abuse when they knew or ought to have known that abuse was occurring.⁸⁴

When a child is apprehended by a child welfare agency, however, liability for breach of fiduciary duties becomes more complex. In Canada, constitutional responsibility for child protection rests with provincial governments who have a ‘transcendent statutory duty to promote the best

⁷⁷ *Alberta v. Elder Advocates of Alberta Society* 2011 SCC 24, paras. 29–34.

⁷⁸ Rotman, “Understanding Fiduciary Duties”, p. 988.

⁷⁹ *Alberta v. Elder Advocates of Alberta Society* 2011 SCC 24, para. 37.

⁸⁰ Aho, “Equitable Compensation as a Tool for Reconciliation”; Chamberlain, “The Crown’s Fiduciary Duties to Aboriginal Peoples as an Aspect of Climate Justice”.

⁸¹ *M.(K.) v. M.(H.)* [1992] 3 SCR 6, para. 62.

⁸² Scott and Chen, “Fiduciary Principles in Family Law”; *Kerr v. Baranow* 2011 SCC 10, para. 208.

⁸³ *M.(K.) v. M.(H.)* [1992] 3 SCR 6, para. 63.

⁸⁴ *M.M. v. R.F.* (1997) 52 BCLR (3d) 127, 1997 CanLII 14477 (CA), para. 46; *M.(K.) v. M.(H.)* [1992] 3 SCR 6, paras. 61–62; *R. A. v. J.M.* 2013 ONSC 5439, paras. 22–28.

interests, protection and well-being of the children in their care'.⁸⁵ But this does not necessarily mean that failure to adequately care for children who are wards of the state will constitute a breach of fiduciary duties.

In *K.L.B. v. British Columbia*, the Supreme Court of Canada held that the province did not owe fiduciary duties to state wards placed in abusive foster care settings, though the Court did find that the province could be vicariously liable for a failure to properly supervise such settings.⁸⁶ Following this reasoning, the Court held in a later case that there is no general fiduciary duty imposed on government actors responsible for children to secure their best interests:

The maxim that parents should act in their child's best interests may help to justify particular parental fiduciary duties, but it does not constitute a [general] basis for liability. The cases on the parental fiduciary duty focus not on achieving what is in the child's best interest, but on specific conduct that causes harm to children in a manner involving disloyalty, self-interest, or abuse of power — failing to act selflessly in the interests of the child. This approach is well grounded in policy and common sense. Parents may have limited resources and face many demands, rendering it unrealistic to expect them to act in each child's best interests. Moreover, since it is often unclear what a child's 'best' interests are, the idea does not provide a justiciable standard. Finally, the objective of promoting the best interests of the child, when stated in such general and absolute terms, overshoots the concerns that are central to fiduciary law. These are ...: loyalty and 'the avoidance of a conflict of duty and interest and a duty not to profit at the expense of the beneficiary'.⁸⁷

The absence of a general fiduciary duty, however, does not prohibit liability for specific conduct that causes harm where the beneficiary is a defined person or class of persons who is under the requisite degree of control needed to establish a fiduciary relationship.

Under the guise of such specific circumstances, several class action proceedings have been initiated against provinces for systemic failure that caused harm to children in care. In *Papassay v. The Queen (Ontario)*, the Court refused to summarily dismiss a class action brought by former children in care who alleged that the province had breached its fiduciary duty to them in failing to seek compensation on their behalf for 'physical or sexual abuse before and/or during their Crown wardships'.⁸⁸ This failure

⁸⁵ *Syl Apps Secure Treatment Centre v. B.D.* 2007 SCC 38, para. 41.

⁸⁶ *K.L.B. v. British Columbia* 2003 SCC 51.

⁸⁷ *E.D.G. v. Hammer* 2003 SCC 52, para. 23.

⁸⁸ *Papassay v. The Queen (Ontario)* 2015 ONSC 3438, para. 3.

to secure the wards' legal interests was considered a potential breach of the fiduciary duty owed by guardians to children in their care.⁸⁹ In *T.L. v. British Columbia (Children and Family Development)*, the Court approved a class action settlement between former children in care and the province resulting from a guardianship social worker's breach of fiduciary duties.⁹⁰ The parties agreed that the social worker had harmed children in his care by neglecting them, misappropriating their funds, and failing to plan for their welfare, and that the province was vicariously liable for this harm.⁹¹ In the specific context of migrant children in care, a class action has also been commenced against a province alleging, amongst other things, that the failure to apply for citizenship for wards of the state is a breach of fiduciary duties and that the province knew or ought to have known that the failure secure citizenship for migrant children in care would cause them immediate- and long-term harm.⁹² The multi-scalar governance literature is likely to play a role in explicating these harms should this case advance to trial. By showing the connection between the child protection system's failure to acquire citizenship for non-citizen children in care and the subsequent risk of deportation of those children as former crossover youth, the multi-scalar governance literature can qualify harm caused by state failure of non-citizen children in care.

The strength of the fiduciary avenue for transforming social legality into formal legality is that it transforms emplacement into obligation not discretion. Fiduciary duties are premised on relationships and the implications of asymmetrical power in those relationships. In this sense, the emplacement of migrant children in the child welfare system, followed by a failure to secure them citizenship, is not just a denial of the right to have rights, it is also a fundamental breach of the obligation to preserve the integrity of the relationship between guardian and child. Fiduciary law better captures the social dimension of the relationship breakdown and the juridical reason that law provides a responsive remedy.

Two doctrinal aspects of fiduciary law also make it a promising avenue for former crossover youth facing deportation. First, there is no limitations period for fiduciary claims, which means that such claims can be raised well after a migrant child ages out of care. This is important because

⁸⁹ *Ibid.*, para. 75.

⁹⁰ *T.L. v. British Columbia (Children and Family Development)* 2020 BCSC 1728.

⁹¹ *Ibid.*, para. 14.

⁹² Gallant, "Lawsuit Accuses Ontario Government of Leaving Foreign-Born Crown Wards in the Lurch".

former crossover youth may not even realize that child welfare agencies failed to apply for citizenship on their behalf. Second, the remedies available following a breach of fiduciary duty include 'equitable compensation'. In *Frame v. Smith*, Justice Wilson, dissenting but not on this point, explained that the purpose of equitable compensation is 'to restore to the plaintiff what has been lost through the defendant's breach or the value of what has been lost'.⁹³ If what has been lost from the state's neglect of migrant children in care is access to Canadian citizenship and the safety from deportation it provides, then equitable compensation for that loss could include a grant of Canadian citizenship or a stay of deportation.

The weakness of the fiduciary avenue is the need to bring such claims in provincial superior courts that do not normally consider immigration law. Additionally, actions in provincial superior court can easily take two to three years to be heard and cost tens of thousands of dollars. Given these access to justice barriers, it is unsurprising that to date, the fiduciary claims advanced in this context have occurred through class action proceedings. A pre-requisite of such proceedings is that there are common issues between class members, which diminishes the ability of this mechanism to respond to particularized harms of individuals.

3.3 *The Constitutional Right to Equality and Non-discrimination*

The final avenue for transforming social legality into formal legality is the Canadian constitution and its guarantee of equality rights. Section 15 of the *Canadian Charter of Rights and Freedoms*⁹⁴ provides: 'Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability'.

The test for discrimination under section 15 requires a claimant to prove: (1) that a law or government action 'creates a distinction on the basis of an enumerated or analogous ground' and (2) that this distinction constitutes arbitrary or discriminatory disadvantage.⁹⁵ A law will amount to arbitrary or discriminatory disadvantage where it 'fails to respond to the actual capacities and needs of the members of the group and instead

⁹³ *Frame v. Smith* [1987] 2 SCR 99, para. 149.

⁹⁴ Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c. 11.

⁹⁵ *Kahkewistahaw First Nation v. Taypotat* 2015 SCC 30, paras. 19–20.

imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating their disadvantage'.⁹⁶

In Mr Abdi's case, he argued before Canadian immigration officials that the state's denial of citizenship to him as a child was discriminatory. Canada's *Citizenship Act* prevented him from applying for citizenship directly, and it made the application process more onerous for state wards who, like him, were not adopted. The *Citizenship Act* also prohibited crossover youth from obtaining citizenship because of their record of youth offences. These barriers were magnified by the provincial child welfare agency's failure to have any internal policy on securing citizenship for migrant children in its care and its efforts to prevent Mr Abdi's family from applying for citizenship on his behalf on the basis that he was a state ward. On judicial review, the Federal Court found that immigration officials had completely ignored these submissions:

Mr. Abdi provided detailed submissions on his particular and unique facts, including the fact that he was a long-term ward of the state. With respect to his lack of Canadian citizenship, he highlighted the fact that the [child welfare agency] intervened to remove his name from his aunt's citizenship application. These factors may be relevant considerations with respect to a s. 15 *Charter* value of non-discrimination in the [delegate]'s referral decision. But they were not considered. There is no indication in the record or in the [delegate]'s decision that she turned her mind to any of these considerations.⁹⁷

As a result, the Court held that the decision to refer Mr Abdi to a deportation hearing – a *pro forma* process that resulted in an automatic deportation order in the circumstances – was unreasonable and set it aside.⁹⁸

Had immigration officials or the Court engaged with the constitutional arguments, there are strong reasons to believe that the test for discrimination would have been met in this context of a former crossover youth facing deportation. The *Citizenship Act* makes a distinction between state wards who are adopted and state wards who are not adopted. The former are entitled to citizenship on application regardless of the amount of time they have been in Canada and even if they have certain involvement with the youth criminal justice system, whereas the latter require three years of residence before applying and are prohibited from taking

⁹⁶ *Ibid.*, para. 20.

⁹⁷ *Abdi v. Canada (Public Safety and Emergency Preparedness)* 2018 FC 733, para. 87.

⁹⁸ *Ibid.*, para. 94.

the oath of citizenship if similarly involved with the youth criminal justice system.⁹⁹ The *Citizenship Act* makes a distinction for applications by minors, including state wards, by requiring such applications to be made by ‘a person who has custody of the minor or who is empowered to act on their behalf ... unless otherwise ordered by a court’.¹⁰⁰ These distinctions make it more difficult for migrant children in care to obtain citizenship – difficulties that are compounded where provincial child welfare agencies lack policies and expertise for migrant children in care. By making it more difficult for migrant children in care to obtain Canadian citizenship, the law reinforces, perpetuates, and exacerbates the disadvantage of an already vulnerable group, imposing an insecure status upon them. Rather than provide for them, as children in need of protection, the law makes it more likely that they will be deportable should they become involved in the criminal justice system as young adults. This is discriminatory and contrary to section 15 of the *Charter*.

The strength of the constitutional avenue for transforming social legality into formal legality is that it transforms emplacement into a rights violation, one that can capture the multi-scalar nature of the state conduct that makes former crossover youth vulnerable to deportation. Placement of non-citizen children in care, even for *bona fide* child protection reasons, imposes discriminatory disadvantage on those children because of Canada’s multi-scalar deportation practices. Those practices make non-citizen children in care more likely to be involved in the criminal justice system and less likely to acquire the protections of citizenship, resulting in a non-trivial risk of deportation. Understood as a rights violation, this imposition of discriminatory disadvantage requires an appropriate remedy. Section 24(1) of the *Charter*¹⁰¹ provides that ‘[a]nyone whose rights or freedoms ... have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances’. This is a broad remedial power that could include remedies akin to those provided for breach of a fiduciary duty, including a grant of citizenship or a stay of deportation. Importantly, this type of remedy can be provided by the Federal Court in the context of an immigration proceeding.

⁹⁹ Citizenship Act, R.S.C. 1985, c. C-29, ss. 5, 5.1, 22.

¹⁰⁰ *Ibid.*, s. 5.

¹⁰¹ Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

The weakness of the constitutional avenue is its complexity and increased cost. Constitutional cases turn on having an adequate evidentiary record to explain the relevant social facts that shape the underlying rights claim.¹⁰² For example, a claimant would need to present evidence on the vulnerable nature of children in care and the phenomenon of crossover youth since this is beyond the scope of ordinary judicial knowledge. In Mr Abdi's case, such evidence was provided by two university professors with expertise in child protection and youth justice.¹⁰³ But this evidence is costly to obtain and likely beyond the capacity of most former crossover youth on account of their marginalization.

4 Conclusion

The multi-scalar migration governance literature reveals that migrants are emplaced in different state and substate spaces when they arrive in a new country. One of those spaces is cities, which often provide the services and points of engagement that are of most immediate significance to migrants as they build their lives in a new country.

The enhanced role of cities in place-making has redefined citizenship or at least added new conceptions of citizenship that challenge the notion that the national scale is the predominant political community that confers belonging. What has emerged is a conception of 'local citizenship' that is based on residence and relationships at the local scale, and which extends from a migrant's engagement with opportunities, barriers, and networks at that scale to create a form of social legality. This has implications for the politics of belonging where federal immigration authorities seek to deport a person who lacks formal citizenship but possesses 'local citizenship'.

Emplacement, redefining citizenship, and the politics of belonging are shaped by the specific migratory context. This chapter examined these concepts in the context of migrant children in Canada who are apprehended by provincial child welfare agencies. The literature and case studies discussed show that migrant children in care often do not receive the support they need, particularly in obtaining Canadian citizenship. At the same time, migrant children are at risk of crossover into involvement with the criminal justice system that can expose them to deportation precisely because of

¹⁰² Perryman, "Adducing Social Science Evidence in Constitutional Cases".

¹⁰³ *Abdi v. Canada (Public Safety and Emergency Preparedness)* 2018 FC 733, para. 42.

the state's failure to secure citizenship on their behalf. Where deportation is threatened, redefined conceptions of citizenship and competing authority over belonging leads to political confrontation. This confrontation can prevent federal authorities from deporting former crossover youth where the social legality they possess is politically powerful.

Social legality, however, does not confer formal legality. One of the shortcomings of the multi-scalar migration governance literature is that it rests on political, social, and moral claims rather than on legal claims. If a redefined conception of citizenship is to be transformed into formal legality, there must be an avenue for recognizing these political, social, and moral claims in domestic law.

In this chapter, three such avenues were explored in the context of former crossover youth facing deportation from Canada: (1) administrative discretion, (2) fiduciary duties, and (3) equality rights. Each of these avenues comes with strengths and weaknesses, both theoretically and practically. Administrative discretion confers legal authority on immigration officials to temper the punitive force of 'cimmigration' consequences in compelling circumstances, such as where the state played a role in depriving a former crossover youth of obtaining citizenship and the right to have rights. But the inherent nature of discretion is that it does not have to be exercised and when applied in the context of immigration law, it may not fully capture the multi-scalar dimensions of the experience of former crossover youth. Fiduciary duties transform relationships of care into obligations that if breached may require an equitable remedy. But this area of law is highly technical and such claims would have to be brought in courts that are not normally engaged with immigration law. The constitutional guarantee of equality may transform emplacement into a rights violation where citizenship laws and the failure of child welfare agencies disadvantage migrant children by denying them the protections afforded by citizenship. But constitutional claims are complex and expensive, requiring legal submissions and an evidentiary record that many former crossover youth would be unable to generate.

Nonetheless, what is common across all these avenues is the transformation of 'social legality' into a legitimate legal claim. As multi-scalar migration governance continues to redefine citizenship, these avenues may be pressed into force in domestic courts when former crossover youth face deportation from Canada. This will shape both political and legal contestation of the principle, recognized under immigration law, that non-citizens do not have an unqualified right to enter or remain in Canada.