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A comparison of child protection and immigration jurisprudence of the European Court of Human Rights: what role for the best interests of the child?

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The obligation to consider the best interests of the child in all cases concerning children has a central status in the United Nations Convention on the Rights of the Child 1989. This article provides a systematic comparison of how the best interests concept is understood and used in child protection and immigration jurisprudence of the European Court of Human Rights. The article compares all child protection and immigration judgments where the court has referred to the best interests of the child until the end of 2017. It shows that the court assesses the best interests of the child differently in the two case groups. First, in child protection cases, the court assumes that it is in the child's best interests to live with her parents, whereas in immigration cases, family unity is not the starting point of the court. Secondly, in immigration cases, the child's young age is understood as adaptability, whereas in child protection cases, young age is associated with care needs. Thirdly, the court has considered children's views in several child protection cases but rarely in immigration cases. This article argues that, from the perspective of children's rights, the court's approach in immigration cases is problematic.

Introduction

The United Nations Convention on the Rights of the Child 1989 (CRC) requires in its Article 3(1) that 'in 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'. The Committee on the Rights of the Child, the monitoring body of the CRC, has elevated Article 3 as one of the 'general principles' of the Convention and stated that best interests have to be understood in a rights-based way,[1] ensuring the full and effective enjoyment of all the rights recognised in the CRC and the holistic development of a child. In addition, best interests have to be 'a primary consideration' in *all* cases concerning children, which means that they have special

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[1] Committee on the Rights of the Child, *Summary Record of the 11th Meeting*, 7 October 1991 (UN Doc CRC/C/1991/SR.11).

importance and are not only applicable in matters with an obvious connection to children's rights but also in areas where the children's rights perspective has traditionally not been prominent.[2] The concept of best interests has been criticised for being indeterminate and paternalistic, among other reasons.[3] To understand the validity of such criticism, further scrutiny of how the concept behaves in concrete situations where rights conflict is required.

This article compares how the European Court of Human Rights (ECtHR or the court) understands and uses the concept of the best interests of the child in child protection versus immigration jurisprudence. The jurisprudence of the ECtHR has been described as a measure of the practical significance that is attached to children's rights in the sphere of the protection of international human rights.[4] The best interests concept is not included in the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (the European Convention), but it is relatively well established in the jurisprudence of the ECtHR.[5] Overall, the European Convention is subject to the general rules of treaty interpretation, including that any relevant rules of international law applicable in the relations between the parties shall be taken into account.[6] All the contracting parties to the European Convention have ratified the CRC, which strengthens the CRC's role in the interpretation of the European Convention. Indeed, the ECtHR has acknowledged the CRC's importance on several occasions.[7] The ECtHR has noted that authorities must consider best interests in their proportionality assessments and that this balance must be safeguarded by taking into account international conventions, notably the CRC.[8] The need to apply the concept in various contexts has also been recognised.[9] However, the court's argumentation regarding best interests has been criticised for inconsistency and for relying on the concept as a rhetorical

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[2] Committee on the Rights of the Child, *General Comment No 14* (2013) on the right of the child to have his or her interests taken as a primary consideration (art 3, para 1) (UN Doc CRC/C/GC/14); see also M Freeman, 'Article 3. The Best Interests of the Child', in A Alen et al (eds), *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff, 2007); J Zermatten, 'The Best Interests of the Child Principle: Literal Analysis and Function' (2010) 18 IJCR 483.

[3] See, for example, RH Mnookin, 'Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy' (1975) 39 *Law & Contemporary Problems* 226; N Cantwell, 'Are Children's Rights Still Human?' in A Intervenizzi and J Williams (eds), *The Human Rights of Children. From Visions to Implementation* (Ashgate, 2011).

[4] C Breen, *The Standard of the Best Interests of the Child. A Western Tradition in International and Comparative Law* (Martinus Nijhoff Publishers, 2002), 241–242; C Draghici, *The Legitimacy of Family Rights in Strasbourg Case Law. 'Living instrument' or extinguished sovereignty?* (Hart, 2017), 278.

[5] A Faye Jacobsen, 'Children's Rights in the European Court of Human Rights – An Emerging Power Structure' (2016) 24 IJCR 548; U Kilkelly, 'The Best of Both Worlds for Children's Rights? Interpreting the European Convention on Human Rights in the Light of the UN Convention on the Rights of the Child' (2001) 23(2) HRQ 308.

[6] Vienna Convention on the Law of Treaties 1969, art 31(3)(c).

[7] See, for example, *Harroudj v France* (Application No 43631/09) 4 October 2012, [42] where the court stated that the European Convention obligations regarding children's rights must be interpreted in light of the CRC; *KT v Norway* (Application No 26664/03) (2008) 49 EHRR 82, [43]: 'The human rights of children and the standards to which all governments must aspire in realising these rights for all children are set out in the Convention on the Rights of the Child'. In addition to the rules of international law on treaty interpretation, evolutive interpretation and European consensus allow the ECtHR to rely on other Conventions, see *Tyrer v United Kingdom* (Application No 5856/72) (1979–80) 2 EHRR 1; *Rasmussen v Denmark* (Application No 8777/79) (1984) 7 EHRR 371.

[8] See, for example, *Senigo Longue and Others v France* (Application No 19113/09) 10 July 2014, [68].

[9] *Maslov v Austria* (Application No 1638/03) (2008) 47 EHRR 20, [82].

device that has no real effect on the reasoning.[10]

This article is based on all judgments concerning child protection and immigration until the end of 2017 in which the ECtHR has referred to the best interests of the child.[11] The cases were obtained from HUDOC using the index words 'best interests', 'best interest', 'intérêt supérieur', and 'intérêts supérieurs' amongst Chamber and Grand Chamber judgments.[12] As the objective was to analyse the ECtHR's understanding of best interests, argumentation by parties or national courts was not systematically analysed. It is important to remember, however, that the court's judgments are not created in a vacuum but are shaped by the arguments of the parties.[13] Furthermore, a reference to 'best interests' does not fully convey how the court understands the best interests of the child and what weight it accords to children's rights in different situations, nor does it guarantee an outcome that complies with the rights of the child. Use of the term is 'no substitute for proper argument'.[14] Conversely, an outcome that respects the rights of the child can be reached without mentioning best interests. However, analysing references to the term reveals the kind of connotations that the court attaches to it.

Child protection and immigration cases differ in several important respects. In child protection cases, as in most scenarios concerning interference in family life, the child's rights and interests are the reason for interference, and the competing rights are those of the child and those of parents. In immigration cases, the right to respect for family life of the child and parents is contrasted with state sovereignty with respect to border control. Public interest is conceptualised as the state's interest in controlling immigration. The margin of appreciation is usually wide in both case groups, although the breadth varies depending on the issue, but it concerns different factors.[15] Child protection cases are also characterised by a need to respond to the child's situation quickly, which is not a prominent feature in immigration cases.

Consequently, this article does not claim that the assessment of best interests in child protection and immigration cases should be identical. Nevertheless, questions about whether an interference in family life is justified and whether a child can be separated from her parents are relevant to both case groups. Therefore, the comparison explores whether the same rights are approached differently depending on the case group and whether the weight of best interests varies. While the current human rights system allows differential treatment based on immigration status,[16] it is important to highlight the implications of this

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[10] Breen, above n 4, 392.

[11] 65 child protection cases and 43 immigration cases. Immigration detention cases were excluded, since their focus differs from first-entry and expulsion cases.

[12] hudoc.echr.coe.int; index words were in English and French, the official languages of the Council of Europe – all cases are available in either language but not always in both.

[13] See, for example, H Heiskanen, *Towards Greener Human Rights Protection. Rewriting the Environmental Case-Law of the European Court of Human Rights* (Tampere University Press, 2018), 41–69. Analysing admissibility decisions is beyond the scope of the article, but analysing them would be important to obtain a more comprehensive view.

[14] *Gnahoré v France* (Application No 40031/98) (2002) 34 EHRR 967, joint partly dissenting opinion of Judges Tulkens and Loucaides.

[15] According to the doctrine of the margin of appreciation, states have certain leeway in how rights are balanced. See, for example, G Letsas, 'Two Concepts of the Margin of Appreciation' [2006] 26(4) OJLS 705.

[16] To an extent, differential treatment is embedded in the Strasbourg system. Although migrants are not excluded from the ambit of the European Convention, they were not granted specific rights either. See M

differentiation and to raise the question whether positioning human rights limits differently to such an extent is acceptable in light of the underlying principles of human rights. It has been argued that the oft-repeated idea that a state has, according to well-established international law, the right to control the entry of non-nationals into its territory, is not necessarily that well-founded or well-established.[17] Marie-Bénédicte Dembour has shown that the 'Strasbourg reversal' – the way that Strasbourg migrant case law frequently privileges state sovereignty over migrants' rights – is problematic from a human rights perspective.[18]

Comparing different case groups is especially important where children are concerned. In the CRC, the obligation to consider best interests extends to all decisions concerning children. Children are children regardless of their immigration status (or the immigration status or conduct of their parents), and possible discrepancies in the level of protection in different contexts merit scrutiny. Improving argumentation related to best interests is an essential step towards more child-friendly jurisprudence.

Previous research has shown that the court treats immigration matters as a distinct context in which people can legitimately be treated less favourably. According to Geraldine Van Bueren, the protection that the ECtHR offers children and family life is arguably at its weakest in immigration cases.[19] In 1999, Ursula Kilkelly observed that, with some exceptions, ECtHR jurisprudence in immigration cases lacks the child focus evident in all other Article 8 areas.[20] An important question of this article is whether the court has changed its approach.

The following sections analyse the most important elements that the court connects to the best interests of the child in child protection and immigration cases. Physical integrity in child protection cases and ties with the host country or country of origin in immigration cases are discussed first. The article then compares the case groups. The most remarkable differences relate to how the court assesses family unity, the child's age, and the child's views.[21]

Characteristics of child protection and immigration cases before the ECtHR

At the outset, the research for this article was not limited to a certain right or provision of the European Convention. However, all of the cases examined concern the right to respect for private and family life (Article 8), which is why a violation refers in this article to a violation

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Dembour, *When Humans Become Migrants. Study of the European Court of Human Rights with an Inter-American Counterpoint* (OUP, 2015), 35–61.

[17] In ECtHR case law, the principle first appeared in the first Strasbourg migrant case *Abdulaziz, Cabales and Balkandali v United Kingdom* (Application Nos 9214/80, 9473/81, 9474/81) (1985) 7 EHRR 471, [67]; B Schotel, *On the Right of Exclusion: Law, Ethics and Immigration Policy* (Routledge, 2012); Dembour, above n 16, 4–5, 117, 127–129.

[18] Dembour, above n 16, 117–118; see also T Spijkerboer, 'Structural Instability: Strasbourg Case Law on Children's Family Reunion' (2009) 11 EJML 271, 292.

[19] G Van Bueren, *Child rights in Europe. Convergence and divergence in judicial protection* (Council of Europe Publishing, 2007), 123.

[20] U Kilkelly, *The Child and the European Convention on Human Rights* (Ashgate, 1999), 219–221.

[21] Similarly, see C Smyth, 'The Best Interests of the Child in the Expulsion and First-entry Jurisprudence of the European Court of Human Rights: How Principled is the Court's use of the Principle?' (2015) 17 EJML 70, 75. Also, M Leloup, 'Some Reflections on the Principle of the Best Interests of the Child in European Expulsion Case Law', in W Benedek et al (eds), *European Yearbook on Human Rights* (Intersentia, 2018), 401.

of Article 8. The prerequisite for an application to be considered under Article 8 is the existence of private or family life. Article 8 can be limited by certain criteria: limitations must be in accordance with the law, serve a legitimate aim, and be necessary in a democratic society. The respondent state rarely contests that taking a child into care or expelling a parent constitutes an interference.[22] Similarly, the criterion of being in accordance with the law is usually satisfied easily. Protecting the best interests of the child – the reason for interference in child protection cases – is a legitimate aim since the list of acceptable aims in Article 8 contains the 'rights and freedoms of others'. In immigration cases, aims such as the economic well-being of the state or national security are also considered legitimate. Whether a limitation is necessary in a democratic society requires more scrutiny, and best interests are usually discussed at this stage of argumentation.

The earliest child protection case with a reference to best interests was decided in 1996,[23] whereas the earliest immigration case dates to 2006.[24] Despite being the first child protection judgment where best interests are explicitly referred to, *Johansen* relies on earlier case law to justify why best interests are an acceptable basis for intervening in family life. Indeed, the language of best interests has not necessarily led to a major change in the child-specific factors that the court assesses; according to established case law, '[t]he mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life'.[25]

In both case groups, the ECtHR has emphasised the importance of best interests and referred to the 'broad consensus, including in international law, that in cases concerning children their best interests have to be paramount'.[26] Interestingly, formulations used by the ECtHR are often stronger than in Article 3(1) CRC, which provides that best interests must be 'a' – not 'the' – primary consideration. The ECtHR has described children's interests as 'overriding',[27] 'paramount',[28] 'superior',[29] and 'determining',[30] but it has also used less obliging formulations, such as 'the Court will attach particular importance to the best interests of the child which, depending on their nature and seriousness, may override those of the parent'.[31] Often, however, there is a mismatch between the obliging vocabulary and the weight accorded to best interests. The court often emphasises best interests but does not always identify factors to be considered in applying the concept or what weight should be attached to each factor to ensure compatibility with Article 8.[32]

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[22] First-entry cases are more controversial since the European Convention does not encompass a general obligation to respect a married couple's choice of residence, see *Abdulaziz*, above n 17, [68]. The distinction between first-entry and expulsion cases has been criticised, see M Forowicz, *The Reception of International Law in the European Court of Human Rights* (OUP, 2010), 270.

[23] *Johansen v Norway* (Application No 17383/90) (1997) 23 EHRR 33.

[24] *Da Silva v Netherlands* (Application No 50435/99) (2006) 44 EHRR 729.

[25] *W v United Kingdom* (1988) 10 EHRR 29, [59]. For immigration cases, see Smyth, above n 21, 74.

[26] For example, *Akinnibosun v Italy* (Application No 9056/14) 16 July 2015, [65]; *Jeunesse v Netherlands* (Application No 12738/10) (2014) 60 EHRR 789, [109]; *R and H v United Kingdom* (Application No 35348/06) 31 May 2011, [73]–[74].

[27] *Bronda v Italy* (Application No 22430/93) (2001) 33 EHRR 81, [62].

[28] *Berisha v Switzerland* (Application No 948/12) 30 July 2013, [50].

[29] *M and C v Romania* (Application No 29032/04) 27 September 2011, [128].

[30] *Soares de Melo v Portugal* (Application No 72850/14) 16 February 2016, [91].

[31] *Assunção Chaves v Portugal* (Application No 61226/08) 31 January 2012, [101].

[32] Kilkelly, above n 20, 201–202; two decades later, these observations still hold true. See also R Taylor,

Child protection

In the majority of child protection cases in which the ECtHR has referred to best interests, the child has been taken into public care. Challenges usually concern the alleged unjustified nature of a care order or further restrictions, which perhaps reflects the fact that the state's main duty in the context of child protection is a negative one, although some allege omissions by national authorities.[33] The application may concern different aspects of the care proceedings, which are separately assessed. The first aspect is the legitimacy of taking the child into care. The second is the procedure: in child protection cases, the court considers that Article 8 has a procedural limb, requiring that decision-making procedures be fair and all parties be given a possibility to be heard or otherwise sufficiently involved. The third aspect concerns the period that the child has been in care, often with contact restrictions. The fourth concerns the refusal to end public care.[34]

The ECtHR has acknowledged that identifying the child's best interests requires courts to weigh numerous factors, but an exhaustive list has not been created because the factors vary so much.[35] Many child protection cases reflect a connection between best interests and physical integrity. If a conflict arises between maintaining family ties and ensuring development in a safe and secure environment, the latter tends to prevail.[36] In verdicts of violation, dissenters have often criticised the majority for not giving sufficient weight to the child's interests.[37] An important principle repeated in several cases is that a parent is not entitled to take measures that would harm the child's health and development.[38]

The court has been reluctant to find a violation because of the act of taking the child into public care when abuse or suspicions of abuse have occurred, invoking the 'obviously paramount interest' of protecting the child from a parent suspected of physical abuse.[39] Conversely, the fact that allegations of mistreatment have not been presented during the procedure has led the court to conclude that the act of taking into care has violated Article 8.[40] Expert evidence plays an important role in demonstrating abuse and in indicating

'Putting children first? Children's interests as a primary consideration in public law' [2016] 28 CFLQ 45.

[33] See, for example, *MP and Others v Bulgaria* (Application No 22457/08) 15 November 2011, where a father and a son alleged that authorities should have removed the son from his home where he was likely to continue to be a victim of sexual abuse. The ECtHR, in finding a non-violation of Articles 3 and 8, emphasised that numerous reports showed no indication of abuse, actually the contrary, and that the domestic courts had relied on substantial expert evidence.

[34] In addition, applications sometimes concern situations where the child has been declared available for adoption after public care not approved by the parents has taken place. The mechanism of involuntary adoption does not exist in all contracting states to the European Convention, and in some states, it is hardly used. See M Skivenes and Karl Søvig, 'Judicial discretion and the child's best interests: the European Court of Human Rights on adoptions in child protection cases' in E Sutherland and L Macfarlane (eds), *Implementing Article 3 of the United Nations Convention on the Rights of the Child* (CUP, 2016), 347.

[35] *YC v United Kingdom* (Application No 4547/10) [2012] 2 FLR 332, [135].

[36] Ibid, [146].

[37] *EP v Italy* (Application No 31127/96) (2001) 31 EHRR 463, partly dissenting opinion of Judge Bonello; *Johansen*, above n 23, partly dissenting opinion of Judge Morenilla.

[38] *Kocherov and Sergeyeva v Russia* (Application No 16899/13), 29 March 2016, [95]; *Buchberger v Austria* (Application No 32899/96) (2003) 37 EHRR 356, [40].

[39] *Gnahoré v France*, above n 14, [56]–[57].

[40] *Barnea and Caldararu v Italy* (Application No 37931/15) 22 June 2017, [74].

whether meeting the parents is harmful.[41]

In unclear situations, it is better to be careful. The court, for instance, regarded a care order as justified in a situation where it was issued after one of the applicant parents' children had been injured. Since the applicants had not proven that the injury was caused by an accident, national authorities could reasonably have considered that placing the children in public care for some time was in the children's best interests.[42] The same approach applies to contact restrictions and ending public care, although the margin of appreciation is narrower concerning decisions that restrict relationships further.[43] In *Jovanovic*, the applicant's son suffered from brain bleeding with lifelong consequences. The ECtHR found that, since it was unclear who had caused the injuries, the authorities had good grounds for keeping the child in public care. The parents had, at the least, failed to protect the child.[44] Similarly, sexual abuse or allegations of sexual abuse, even if not confirmed by a judicial finding, diminish the probability of the court finding a care order to constitute a violation. In such situations, the court has held that the placement or contact restrictions are in the child's best interests.[45]

Immigration

In immigration cases, best interests do not have an elevated status. The ECtHR usually emphasises that Article 8 does not establish a general obligation to respect immigrants' choice of residence or allow family reunification.[46] The court has explained that in cases concerning family reunification, it pays particular attention to the circumstances of the children concerned, especially their age, their situation in the country or countries concerned, and the extent to which they are dependent on their parents.[47] Best interests have been decisive in some cases, but the impact on children of decisions concerning parents is often under-rated or little discussed.[48] As Ciara Smyth has noted, considering a diversity of factors is appropriate: the Committee on the Rights of the Child has itself drafted a list of elements to be taken into account when assessing best interests. What the ECtHR infers from different factors, however, varies significantly.[49]

Immigration cases can be divided into first-entry cases, where the applicant has never been admitted to the state, and expulsion cases, where the applicant has a right to reside but faces a threat of deportation. First-entry cases can be further divided into cases concerning literal

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[41] *MP v Bulgaria*, above n 33, [117]–[118]; *M and M v Croatia* (Application No 10161/13) [2016] 2 FLR 18, [186]–[187].

[42] *Ageyevy v Russia* (Application No 7075/10) (2013) 34 BHRC 449, [130]–[132].

[43] *V v Slovenia* (Application No 26971/07) [2012] 2 FCR 132, [81]–[85]; *Dolhamre v Sweden* (Application No 67/04) [2010] 2 FLR 912, [107]–[119].

[44] *Jovanovic v Sweden* (Application No 10592/12) 22 October 2015, [78]–[85].

[45] *Clemeno and Others v Italy* (Application No 19537/03) 21 October 2008; *Errico v Italy* (Application No 29768/05) 24 February 2009; *HK v Finland* (Application No 36065/97) (2008) 46 EHRR 113; *KA v Finland* (Application No 27751/95) [2003] 1 FLR 696; *Covezzi v Italy* (Application No 52763/99) (2004) 38 EHRR 603; *Scozzari and Giunta v Italy* (Application Nos 39221/98 and 41963/98) [2002] 2 FLR 771; *Roda and Bonfatti v Italy* (Application No 10427/02) 21 November 2006; *L v Finland* (Application No 25651/94) [2000] 2 FLR 118.

[46] See, for example, *Tanda-Muzinga v France* (Application No 2260/10) 10 July 2014, [65].

[47] *Jeunesse v Netherlands*, above n 26, [118].

[48] See, for example, *AW Khan v United Kingdom* (Application No 47486/06) 12 January 2010; *Kaya v Germany* (Application No 31753/02) 28 June 2007. In *Kaya*, the applicant's child was deliberately ignored since the child had been born after the final domestic decision.

[49] Smyth, above n 21, 85; CRC/C/GC/14, [52]–[79].

first-entry and those in which the persons concerned have already resided in the host state without a valid residence permit. First-entry and expulsion cases have different implications for the right to respect for family life. In first-entry cases, the emphasis is on positive obligations, allowing the establishment of family life. In expulsion cases, negative obligations, not interfering with family life, are accentuated. Although the distinction between positive and negative obligations is not always clear,[50] the ECtHR applies somewhat different tests in expulsion and first-entry cases.

In *Üner*, the court complemented a previous list of criteria for assessing whether deportation of a non-national parent breaches Article 8 with 'the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled'.[51] The *Üner* judgment demonstrates problems related to the criteria because the court disagreed on their interpretation.[52] Another set of criteria used in expulsion cases applies to young adults with no family of their own. These '*Maslov* criteria' include the nature and seriousness of the offence, length of stay in the country, time elapsed after the offence and conduct since, solidity of social, cultural, and family ties with the host country and with the country of destination, and duration of the exclusion order. The obligation to have regard to best interests applies both if the person to be expelled is a minor and if the person is no longer a minor but the reason for the expulsion lies in offences committed while a minor. There is 'little room for justifying an expulsion of a settled migrant on account of mostly non-violent offences committed when a minor'.[53]

In first-entry cases, the court usually applies the obstacles test or the exceptional circumstances test and sometimes the reasonableness test. In the obstacles test, the state is regarded as exceeding its margin only if there are 'insurmountable obstacles' to establishing family life in the country of origin or elsewhere. The obstacles test does not apply to the family reunification of refugees because they cannot lead family life 'elsewhere'. In such cases, the court has underlined that applications for family reunification need to be examined with flexibility and humanity.[54] In the exceptional circumstances test, the court assesses whether exceptional circumstances exist that would lead to a violation in the case of expulsion. The reasonableness test, which focuses on whether family reunification is the most adequate means of developing family life, may be more favourable for the applicant.[55]

In immigration cases, the court assesses seriously the child's ties with the respondent state and the country of deportation or origin. Nationality has some significance in the assessment of ties. In *Kamenov*, a deportation case, the court considered 12- and 14-year-old daughters who were Russian nationals, had never lived in Kazakhstan, and had no ties to the country. Although it concluded that their 'resettlement would mean a radical upheaval', best interests

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[50] See, for example, Chamber judgment of *Paposhvili v Belgium* (Application No 41738/10), 17 April 2014, [138]; *Jeunesse v Netherlands*, n 26 above, [106].

[51] *Üner v Netherlands* (Application No 46410/99) (2006) 45 EHRR 421, [58].

[52] *Üner*, ibid, joint dissenting opinion of Judges Costa, Zupančič and Türmen.

[53] *Maslov*, above n 9, [68]–[76]; *Külecki v Austria* (Application No 30441/09) 1 June 2017, [39].

[54] *Tanda-Muzinga*, above n 46, [68]–[82]; *Mugenzi v France* (Application No 52701/09) 10 July 2014, [54]–[56]. In both cases, the children had been denied visas, and a violation was found because of procedural shortcomings including the length of the procedure. The authorities had questioned the genuineness of family ties in *Tanda-Muzinga* and the ages of the children in *Mugenzi*.

[55] Smyth, above n 21, 93–94.

were not decisive in finding a violation.[56] A violation was also found in a case where the Nigerian father of twin daughters, who had Swiss and Nigerian nationality, faced expulsion. The court held that it was in the daughters' best interests to grow up with both parents and that the children and the Swiss mother, who was no longer in a relationship with the father, 'could hardly be obliged' to settle in Nigeria.[57] On the other hand, a one-year-old Swiss national was considered able to integrate because of his young age when his mother was expelled.[58] The court has sometimes argued that possessing the nationality of the respondent state allows the children to return regularly if their parent is deported.[59] The court has also recognised that children were nationals of the country of expulsion and that it did not 'appear arbitrary to accept' that the presence of the parents, as well as other relatives, would alleviate their integration difficulties.[60]

Integration in the host state has led to judgments in the applicant's favour, especially concerning juvenile offenders. In *Maslov*, the Grand Chamber held that very serious reasons are required to justify the expulsion of aliens who have lawfully spent most of their childhoods in the host country. The court noted that the obligation to consider the best interests of the child includes an obligation to facilitate reintegration, an aim that should be pursued by the juvenile justice system, according to Article 40 CRC. That aim 'will not be achieved by severing family or social ties through expulsion, which must remain a means of last resort'.[61] It is notable that the ECtHR connected best interests to the relevant CRC right in *Maslov*.

In first-entry cases, integration is assessed more strictly. In *Berisha*, the applicants' children had entered the respondent state clandestinely to live with their parents, who then applied for family reunification. At the time of the judgment, the children had been living in Switzerland for four years and were 10, 17, and 19 years old. The court considered that while they were well integrated, the stay was not long enough, and solid social and linguistic ties to the home country must still exist. In addition, their grandmother, who had looked after them for over two years, was still living in Kosovo, demonstrating the strength of family ties.[62]

The discrepancies in how family unity is assessed

Different default position

The ECtHR's starting point in child protection cases is that it is in the best interests of the child to grow up in her original family, which is why the threshold for taking a child into care is high. This starting point originates from the right to respect for family life and follows the logic of Article 9 CRC, which outlines that States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when necessary for the best interests of the child.

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[56] *Kamenov v Russia* (Application No 17570/15) 7 March 2017, [40].

[57] *Udeh v Switzerland* (Application No 12020/09) 16 April 2013, [52].

[58] *Kissiwa Koffi v Switzerland* (Application No 38005/07) 15 November 2012, [68].

[59] *Onur v United Kingdom* (Application No 27319/07) (2009) 49 EHRR 1057, [60].

[60] *Salija v Switzerland* (Application No 55470/10) 10 January 2017, [50].

[61] *Maslov*, above n 9, [78]–[84]. See also *Külecki v Austria*, above n 53, [41]; *AA v United Kingdom* (Application No 8000/08) 20 September 2011, [60].

[62] *Berisha v Switzerland*, above n 28, [60].

On the other hand, the ECtHR is reluctant to find a violation because of the care order itself. Once national authorities have considered it necessary to take a child into care, or to prolong the care or impose contact restrictions,[63] the court usually trusts that assessment because of subsidiarity and the margin of appreciation. Authorities, however, carry the burden of proof, having to demonstrate that they have proved the family unfit, acted diligently, and made sufficient efforts to preserve ties.[64]

According to the ECtHR, two factors must be considered in identifying the child's best interests in child protection cases. Firstly, the child's ties with her family should be maintained except when the family has proved particularly unfit. Secondly, the child should develop in a safe and secure environment.[65] Severing all ties between the parent and child cuts the child from her roots and can only be justified in exceptional circumstances or by the 'overriding requirement' of the child's best interests.[66] Best interests have a 'double role',[67] or are 'seen to comprise two limbs'.[68] Best interests are usually realised as protected by Article 8 when the child lives with her parents. However, they also justify interfering with family life because under no circumstances is a parent entitled to harm the child's health and development.[69]

In child protection cases, the ECtHR has often approached best interests through negation, by listing circumstances that cannot be considered as in the best interests of the child. These include physical abuse, sexual abuse, shortcomings in care or state of health, and parents' mental instability, among other things. Without allegations regarding the parents' ability to care for the children, economic reasons were considered an insufficient justification for a care order.[70] Similarly, without allegations of abuse, a care order because of circumstances at home and alleged neglect was not considered necessary.[71] When a care order had been issued because the applicant father allegedly had alcohol problems, was largely dependent on social benefits, and the home had no electricity, the court found the reasons for removal relevant but not sufficient; here, too, no allegations of abuse had been made.[72] Conversely, in a case where national authorities had good reason to be concerned and home conditions were not the sole reason for placement, a temporary placement of the applicants' seven children was considered in their best interests and in accordance with Article 8.[73] In another case, the parents' limited intellectual capacities were not an acceptable justification for public care in

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[63] *Dolhamre*, above n 43.

[64] *Lyubenova v Bulgaria* (Application No 13786/04) 18 October 2011; *Zhou v Italy* (Application No 33773/11), 21 January 2014; *Vautier v France* (Application No 28499/05) 26 November 2009; *Achim v Romania* (Application No 45959/11) 24 October 2017; *Akinnibosun*, above n 26.

[65] *Gnahoré v France*, above n 14, [59]; *T v the Czech Republic* (Application No 19315/11) 17 July 2014, [112].

[66] *HK v Finland*, above n 45, [110].

[67] *Schmidt v France* (Application No 35109/02) 26 July 2007, [82].

[68] *Gnahoré v France*, above n 14, [59].

[69] *Johansen*, above n 23, [78].

[70] *Wallová and Walla v the Czech Republic* (Application No 23848/04) 26 October 2006, [67]–[79].

[71] *Soares de Melo*, above n 30, [118]–[123].

[72] *Havelka and Others v the Czech Republic* (Application No 23499/06) 21 June 2007, [57].

[73] *Achim*, above n 64, [105]; cf *Couillard Maugery v France* (Application No 64796/01), 1 July 2004, [259]–[269]; cf *Haase v Germany* (Application No 11057/02) [2004] 2 FLR 39 where an emergency intervention breached Article 8.

the absence of sufficient consideration of alternative measures.[74]

Approaching best interests through negation has advantages from the original family's perspective. When assessing whether something is *against* the best interests of the child, the ECtHR may treat the family more fairly. According to the ECtHR, the fact that a child could be placed in a more beneficial environment will not alone justify a removal from biological parents; other circumstances must exist pointing to the necessity of the measure.[75] Unless child protection authorities are responding to an immediate risk, removal has not been found to be justified before other, less restrictive, measures have been taken. Authorities must demonstrate that they have considered less restrictive alternatives and fulfilled their positive obligations by supporting families. The court has taken the strictest stance towards emergency care orders carried out without the parents' involvement.[76]

Family unity is not similarly privileged in immigration cases, other than those concerning refugees. For refugees, the court has noted that family unity is an essential right and family reunification is fundamental to allowing persons fleeing from persecution to lead a normal life.[77] In other immigration cases, the ECtHR does not assume that living with the parents is in the best interests of the child. Instead, the court usually questions the ties between the parent and the child and assesses separately whether cohabitation with the parent is in the child's best interests at all. The court has, for example, held that 'it does not emerge that the third applicant [child] had any special care needs or that her mother would be unable to provide satisfactory care on her own'.[78] Similarly, it decided that there was 'no presumption' that reuniting the applicant child with the applicant father was 'per se' in his best interests.[79] While exceptions to this rule exist,[80] usually the nature of the relationship is an important factor when assessing whether refusal of entry or expulsion would be against the best interests of the child. If ties are assessed to be close, contact with both parents is favoured, which follows the logic of Article 9 CRC. Article 9 CRC, however, prohibits separation from both parents. Separation from one parent, if not required for the best interests of the child, breaches Article 9 CRC.

The expression 'exceptional circumstances' illustrates how differently the court assesses family unity in immigration cases. In child protection cases, family ties can be severed only in exceptional circumstances. In immigration cases, only in exceptional circumstances can a violation be found. In this respect, immigration case law can be criticised for inconsistency, since certain circumstances have been considered exceptional in some cases, such as *Jeunesse* and *Kaplan*, but not in others, such as *Antwi*. *Antwi* was an expulsion case where the deportee was a father with no criminal past other than violations of immigration rules – he

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[74] *Kutzner v Germany* (Application No 46544/99) (2002) 35 EHRR 25, [70]–[82].

[75] *KA v Finland*, above n 45, [92]; *Kutzner*, ibid, [69]; *Akinnibosun*, above n 26, [61]; *Havelka*, above n 72, [56].

[76] *Todorova v Italy* (Application No 33932/06) 13 January 2009; *Haase*, above n 73; *P, C and S v United Kingdom* (Application No 56547/00) [2002] 2 FLR 631; *K and T v Finland* (Application No 25702/94) [2001] 2 FLR 707.

[77] *Tanda-Muzinga*, above n 46, [75].

[78] *Antwi and Others v Norway* (Application No 26940/10) 14 February 2012, [99].

[79] *El Ghatet v Switzerland* (Application No 56971/10) 8 November 2016, [50]; however, a violation was found because of domestic courts' procedural failure to consider best interests.

[80] *Kolonja v Greece* (Application No 49441/12) 19 May 2016, [56] where the court acknowledged that the likely consequence of the deportation would be that the child would grow up separated from his father, even though growing up with both parents would be in his best interests; however, the case was overall weak from the state's point of view.

had been granted a residence permit on the basis of a false identity. The court acknowledged that the father had an important role in the daily care and upbringing of his ten-year-old daughter, a Norwegian national. However, it held that no insurmountable obstacles prevented the applicants from settling in Ghana and the child had no special care needs. According to the court, no exceptional circumstances were present, and sufficient weight had been attached to the child's best interests in ordering the expulsion.[81]

The Grand Chamber case of *Jeunesse* concerned the refusal of a residence permit to a mother who had three children, all Dutch nationals, and had stayed in the Netherlands for a long time without a valid residence permit. She explicitly relied on the fact that the national decision was not in accordance with Article 3 CRC. The circumstances were exceptional because of the best interests of the children; the court considered it obvious that their interests would be best served if they continued to live with their mother, since she was the primary carer. While the national authorities had had 'some regard' for the children, the court was not convinced that 'actual evidence on such matters was considered and assessed'. There were additional factors in the applicant's favour, but best interests were decisive in finding a violation.[82] Best interests were also decisive in *Kaplan*, a similar case to *Antwi*, except that the reason for expulsion was criminal convictions and the youngest of the applicant father's three children was autistic. The court was not 'convinced in the concrete and exceptional circumstances of the case that sufficient weight was attached to the best interests of the child'.[83]

Jeunesse and *Kaplan* were concluded after *Antwi*. Later cases are divided as to whether best interests are accorded a more significant role. *Kaplan* has been referred to in one other case, which led to a finding of a violation.[84] *Jeunesse* has been referred to to emphasise national decision-making bodies' duty to 'advert to and assess evidence in respect of the practicality, feasibility and proportionality of any removal of a non-national parent in order to give effective protection and sufficient weight to the best interests of the children directly affected by it'.[85] In some cases, the court has recognised the importance of best interests but concluded that 'in the context of the removal of a non-national parent as a consequence of a criminal conviction, the decision first and foremost concerns the offender' and that the nature and seriousness of the offence or offending history may outweigh other criteria,[86] even that 'a State is entitled, as a matter of international law and subject to its treaty obligations, to control the entry of aliens into its territory and their residence there'.[87] This argumentation formally acknowledges the importance of best interests, but the real purpose of referring to *Jeunesse* seems to be to emphasise the case as an exception, not a new rule.[88]

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[81] *Antwi v Norway*, above n 78, [87]–[105]; cf dissenting opinion of Judge Sicilianos, joined by Judge Lazarova Trajkovska.

[82] *Jeunesse v Netherlands*, above n 26, [100]–[123].

[83] *Kaplan v Norway* (Application No 32504/11) 24 July 2014, [81]–[99].

[84] *Guliyev and Sheina v Russia* (Application No 29790/14) 17 April 2018, [57].

[85] *Ejimson v Germany* (Application No 58681/12) 1 March 2018, [57] (no violation); see also *Ustinova v Russia* (Application No 7994/14) 8 November 2016, [42] (violation); *Kolonja*, above n 80 (violation), [47]; *Sarközi and Mahran v Austria* (Application No 27945/10) 2 April 2015, [64] (no violation).

[86] *Assem Hassan Ali v Denmark* (Application No 25593/14) 23 October 2018, [55]–[56] (no violation); *Krasniqi v Austria* (Application No 41697/12) 25 April 2017, [47]–[48] (no violation); *Salem v Denmark* (Application No 77036/11), 1 December 2016, [75]–[76] (no violation).

[87] *Kamenov v Russia*, above n 56, [25] (violation because of other reasons).

[88] There are, however, undercurrents (a term used by Dembour, above n 16, 19); see concurring opinion of Judge Pinto de Albuquerque in *Biao v Denmark* (Application No 38590/10) (2017) 64 EHRR 1, suggesting that

Preserving ties: privileged or not

One key aspect of family unity, that of preserving ties between family members, is reflected in the child protection jurisprudence. Case law relating to contact restrictions demonstrates that if a child cannot live with her family, being in contact with parents and siblings and preserving family ties to the extent possible is generally in her best interests. The margin for imposing further limitations for a child taken into care is narrower than the margin for taking a child into care.[89] Nevertheless, even severe contact restrictions or placement in an external foster home, rather than with relatives, may be in the child's best interests, in providing a stable and secure environment.[90] Even an emergency care order, foster care, and the subsequent severing of legal ties leading to adoption do not necessarily violate Article 8.[91]

The court's attitude towards ending public care highlights the importance it places on preserving ties. In principle, a care order should be regarded as a temporary measure and implemented with the ultimate aim of reuniting the parent and child.[92] National authorities have a duty to reassess the situation regularly, and this duty weighs with progressively increasing force from the commencement of the period of care, 'subject always to its being balanced against the duty to consider the best interests of the child'. Furthermore, '[a]fter a considerable period of time has passed since the child was originally taken into public care, the interest of a child not to have his or her *de facto* family situation changed again may override the interests of the parents to have their family reunited'.[93] When the court has been persuaded that national authorities will continue to support the relations between the parents and children, it is less likely that a violation will be found.[94] If the biological family does not visit a child who has been taken into care, it may be argued that not returning to them is in the child's best interests.[95]

The court has been strictest when the child–parent connection, or connection between siblings, has been completely severed. In *EP*, a mother complained about the adoption of her daughter following a period in foster care. The court noted that even though the mother demonstrated obsessive medical care towards her daughter and acted impulsively, the contact ban should not have been total and meetings should have been arranged.[96] In *SH*, the applicant's children had been taken into care and then declared available for adoption after incidents of ingesting medication. Experts had been in favour of preserving family ties, and the parents claimed to be capable of caring for the children with assistance. The court found that safeguarding both the child's best interests and ties with the mother would have been possible. Furthermore, the three children had been placed in different families, leading to the

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the court could have criticised the insufficient weight of best interests, as in *Jeunesse*.

[89] *R v Finland* (Application No 34141/96) [2006] 2 FLR 923, [90]; *TP and KM v United Kingdom* (Application No 28945/95) [2001] 2 FLR 549, [71].

[90] *K and T v Finland*, above n 76; *Levin v Sweden* (Application No 35141/06) [2012] 1 FCR 569; *ML v Norway* (Application No 43701/14) 7 September 2017.

[91] *Strand Lobben and Others v Norway* (Application No 37283/13) [2018] 2 FLR 269, referred to the Grand Chamber.

[92] Ibid, [105].

[93] *KA v Finland*, above n 45, [138]; see also *RMS v Spain* (Application No 28775/12) 18 June 2013, [71]; *Haase v Germany*, above n 73, [93].

[94] *Mircea Dumitrescu v Romania* (Application No 14609/10) 30 July 2013, [83]–[84].

[95] *Zambotto Perrin v France* (Application No 4962/11) 26 September 2013, [101].

[96] *EP v Italy*, above n 37, [63]–[65].

severing of sibling ties. The court seems to have searched for the best solution for the children; adoption was in their interests, but living in the biological family was a better alternative. The key reason for finding a violation was the national authorities' failure to explore other options.[97]

In immigration cases, the applicant is often expected to prove that ties are strong or that best interests should weigh in the assessment.[98] In *AH Khan*, the applicant had not seen his six children for 11 years because of his imprisonment. The court held that, given the time that had passed and the lack of evidence of a 'positive relationship' between them, the applicant had not 'established that his children's best interests were adversely affected by his deportation'.[99] The judgment seems reasonable but it also raises questions as to how an imprisoned parent can prove the existence of ties without a possibility to meet the children.[100] In *MPEV*, the applicant father was able to prove his central role in the family; he had raised his daughter with his ex-spouse and had extensive contact rights. Best interests seem to have been decisive in finding a violation, though the moderate nature of the crimes and the child's integration pointed towards the same outcome.[101] The burden also falls on the applicant to prove that contact cannot be maintained over the phone or internet. The court has on several occasions considered that deportation does not rupture the parent–child relationship because the children can remain in the respondent state and maintain contact through visits and telecommunication.[102]

The court's assessment of whether separation is against the child's best interests is also affected by whether the parent and child have been living together before the expulsion. If a separation has occurred because of imprisonment or other reasons, the court is more likely to conclude that separation is not against best interests and that physical contact is not needed in the future.[103] A brief period of living together has not changed the assessment.[104] In *ME*, the court took into account the applicant father's two children but added that it 'cannot overlook' his very limited contact with them.[105] A different approach was taken in *Osman* concerning a refusal to reinstate the applicant's residence permit; the applicant, a minor at the time of the events, had not seen her mother for four years. However, the court held that this could be explained by 'practical and economical restraints, and can hardly lead to the conclusion that the applicant and her mother did not wish to maintain or intensify their family life together'.[106]

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[97] *SH v Italy* (Application No 52557/14) 13 October 2015, [43]–[58]; in *Soares de Melo*, above n 30, [114], placing siblings in three different institutions was also against their interests.

[98] *Shakurov v Russia* (Application No 55822/10) 5 June 2012, [201]–[203].

[99] *AH Khan v United Kingdom* (Application No 6222/10) 20 December 2011, [40].

[100] See also *Salem v Denmark*, above n 86, [78].

[101] *MPEV and Others v Switzerland* (Application No 3910/13) 8 July 2014, [52]–[59]; see also *Zakayev and Safanova v Russia* (Application No 11870/03) 11 February 2010, [45].

[102] *Salija v Switzerland*, above n 60, [50]; *Onur v United Kingdom*, above n 59, [59]; *Krasniqi*, above n 86, [53]; *Külecki v Austria*, above n 53, [49]; cf *Kamenov v Russia*, above n 56, [40].

[103] *Onur v United Kingdom*, above n 59, [59]; *Joseph Grant v United Kingdom* (Application No 10606/07) 8 January 2009, [40]. Cf *Omojudi v United Kingdom* (Application No 1820/08) 24 November 2009, where the family had been living together before the deportation.

[104] *Üner v Netherlands*, above n 51, [62].

[105] *ME v Denmark* (Application No 58363/10) 8 July 2014, [76]–[83].

[106] *Osman v Denmark* (Application No 38058/09) (2015) 61 EHRR 10, [74].

In cases of parental separation where the parent susceptible to expulsion or seeking regularisation does not have care of the child but a contact arrangement exists, the court is more likely to conclude that exclusion is against the child's best interests. Because the children will remain in the host state, the court cannot consider whether their best interests would involve moving elsewhere.[107] However, best interests can be outweighed by factors related to crime.[108] In *Udeh*, the applicant father had spent long periods in prison and had very limited contact rights. Parental divorce contributed to deciding the case in the applicant's favour, the court finding that growing up with both parents was in the daughters' best interests and the only way to maintain regular contact between the father and daughters was to allow him to remain.[109] In *Da Silva v Netherlands*, the court assessed whether a Surinamese mother who had resided illegally in the Netherlands should be allowed to continue residing there with her Dutch daughter. Parental authority had been awarded to the Dutch father, and refusing to allow the mother to stay would separate her from the daughter. In the custody proceedings, the national courts – following the advice of the child welfare authorities – assessed that it was in the three-year-old daughter's best interests to stay, which seems to have been decisive in finding a violation, combined with evidence that the mother was the primary carer.[110] In *Nunez*, the best interests of the applicant's daughters, aged eight and nine, were also decisive when the mother faced expulsion. The mother's interests were not sufficient to constitute a breach of Article 8; she had violated immigration rules and had never had a legitimate basis to reside. Yet 'particular regard to the children's best interest' changed the situation. As the daughters' father had custody, they would remain in Norway, but they had been living for a long period with the applicant. The children had experienced stress because of the situation, and even after the two-year entry ban, it was uncertain whether they would see the mother. A two-year separation was 'a very long period for children of the ages in question'. Hence, the court was not convinced that, in the 'concrete and exceptional circumstances of the case', sufficient weight had been attached to best interests.[111]

A pattern becomes apparent when contrasted with cases where parents are together. In *Kissiwa Koffi*, the court held that the applicant mother's Swiss husband could join his expelled wife in Ivory Coast, also his country of origin, even though he had two other children in Switzerland, where he had resided for about 20 years. The court considered it significant that the mother had left behind another child in Ivory Coast.[112] In *Antwi*, where the deportee was male, the court held that since both parents were raised in Ghana, there were 'no insurmountable obstacles in the way of the applicants settling together in Ghana or, at the least, to maintaining regular contacts'. The mother was a Norwegian citizen, employed in Norway, but the court still considered that no particular obstacles prevented her from

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[107] Smyth, above n 21, 98–99; M Leloup, 'The principle of the best interests of the child in the expulsion case law of the European Court of Human Rights: Procedural rationality as a remedy for inconsistency' (2019) 37 NQHR 50, 59

[108] *Chair and JB v Germany* (Application No 69735/01) 6 December 2007, [66]–[67].

[109] *Udeh v Switzerland*, above n 57, [52].

[110] *Da Silva v Netherlands*, above n 24, [40]–[44].

[111] *Nunez v Norway* (Application No 55597/09) (2014) 58 EHRR 17, [71]–[84].

[112] *Kissiwa Koffi v Switzerland*, above n 58, [67]–[69]. Blaming mothers has been criticised, see Smyth, above n 21, 83–84; F Staiano, 'Good Mothers, Bad Mothers: Transnational Mothering in the European Court of Human Rights' Case Law' [2013] EJML 155.

accompanying her deported husband.[113] Although no definitive conclusions can be made based on a small number of cases, the emphasis on origin in *Kissiwa Koffi* and *Antwi* raises concerns about discrimination.[114]

Moreover, cases like *Rodrigues da Silva* and *Nunez* call into question whether the court values the child's connection with the mother more than with the father. The court seems to require fathers to prove more fully their involvement in family life and more readily accepts that fathers can maintain contact via technology. In addition, the parents' relationship status has a significant role in immigration cases but not in child protection cases. From the perspective of child, this appears arbitrary.

Young age: care needs or adaptability

The child's age is relevant in both child protection and immigration cases. In child protection cases, the court has paid attention to the importance of protecting family unity, especially where young children are concerned. The court recently referred to the General Comment on young children, indicating that early childhood is a critical period for the realisation of rights safeguarded by the CRC and that 'young children are reliant on responsible authorities to assess and represent their rights and best interests in relation to decisions and actions that affect their well-being, while taking account of their views and evolving capacities'.[115]

In child protection cases, the court has also recognised that time is crucial as a prolonged rupture of contact can have irreparable consequences on relations between a parent and very young child.[116] Regarding a child taken into care as a three-year-old, the court noted that 'the breaking-off of contact with a very young child may result in the progressive deterioration of the child's relationship with his or her parent'.[117] If considerable time has passed since the child was taken into public care, protection of the new family life may take priority in the best interests' assessment.[118]

In immigration cases, the court often equates young age with 'adaptability', which has frequently been a decisive argument for expulsion. An adaptable child is considered able to adjust to a new environment, even with non-existent ties to that country.[119] Adaptability does not have a definition or benchmark age, but the court seems to consider that the younger the child, the more adaptable.[120] It is unclear whether adaptability is calculated from the initiation

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[113] *Antwi v Norway*, above n 78, [93]–[98].

[114] It has been suggested that the court treats native or white women more favourably than migrant women, see B de Hart, 'Love Thy Neighbour: Family Reunification and the Rights of Insiders' (2009) 11 EJML 235, 249.

[115] *Strand Lobben v Norway*, above n 91, [75]; Committee on the Rights of the Child, *General Comment No 7* (2005) on implementing child rights in early childhood (UN Doc CRC/C/GC/7/Rev.1), [13].

[116] *Pontes v Portugal* (Application No 19554/09) 10 April 2012, [80].

[117] *RMS v Spain*, above n 93, [79].

[118] *Ageyevy v Russia*, above n 42, [143]; *Glesmann v Germany* (Application No 25706/03) 10 January 2008, [106].

[119] Adaptability resembles the principle in child protection cases that after a considerable period of time in public care, protection of the new family life may take priority. In child protection cases, however, the focus is on which alternative would best serve the child's interests; adaptability assessments focus on whether the child is *able* to change environment.

[120] Older children can be considered adaptable too; girls aged 12, 10, and 7 at the time of the final domestic decision about the expulsion of their father were considered adaptable in *Palanci v Switzerland* (Application No 2607/08) 25 March 2014, [61]; *Jeunesse v Netherlands*, above n 26, [117], was decided in favour of the applicant because of best interests, but the court first accepted that the children were of 'relatively young age' –

of national proceedings, final national decision, actual expulsion, or the ECtHR judgment. This can lead to discriminatory outcomes, especially concerning older children who may reach the age of majority during the proceedings.[121]

Adaptability often trumps cultural and linguistic ties and, sometimes, nationality. Carmen Draghici shows that some cases imply that the citizen of a contracting state to the European Convention has no presumptive right to enjoy family life with a child who does not possess the same nationality.[122] Children aged six and one-and-a-half when the exclusion order was finalised were considered adaptable even though they were Dutch nationals and had always lived in the country.[123] A six-year-old Swiss national was considered able to adapt to the Ivory Coast, to where her mother was expelled.[124] Expulsion of a father of children aged eight and five,[125] as well as a father of children attending primary school and kindergarten,[126] was considered acceptable because of the children's presumed adaptability. Expulsion of a nine-year-old's father eventually breached Article 8 because of other factors, but the girl was initially found adaptable.[127] Adaptability has often outweighed the potential difficulties of moving to another country.[128] In *SJ*, the court noted on a general level that '[w]here there are children, the crucial question is whether they are of an age at which they can adjust to a different environment'. In that case, the ECtHR held that a mother of children aged six, four, and one could be expelled because the children's ages made their adaptability 'still sufficiently great' to make the resettlement realistic. The applicant, who had HIV, argued that the care she needed was not available in Nigeria. No violation was found even though the children were born in Belgium and had strong ties there. Surprisingly, the court's reasoning was partly based on family unity, as it found decisive that the expulsion would not separate the applicant and her children.[129]

Regarding immigration cases where parents have separated, Smyth has noted that the child's young age aids the parent's claim since the court considers it important for young children to maintain regular contact with both parents.[130] Conversely, a 15-year-old has been regarded 'not as much in need of care as young children'.[131] This line of reasoning contrasts with cases where parents are together. In *Berisha*, the parents had the right to reside in Switzerland and the issue was whether their children, who had resided there irregularly, should be allowed to

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the oldest was 14 when the ECtHR gave its judgment. In contrast, girls aged 12 and 14 were not adaptable (*Kamenov v Russia*, above n 56, [40]). See also Kilkelly, above n 20, 109–110.

[121] Smyth, above n 21, 75; Spijkerboer, above n 18, 289.

[122] Draghici, above n 4, 347.

[123] *Üner v Netherlands*, above n 51, [64]; see also *Onur v United Kingdom*, above n 59, [60].

[124] *Kissiwa Koffi v Switzerland*, above n 58, [68].

[125] *Bajsultanov v Austria* (Application No 54131/10) 12 June 2012, [90]; non-violation despite the fact that the children had an independent asylum status in Austria.

[126] *Salija v Switzerland*, above n 60, [50].

[127] *Kaplan v Norway*, above n 83, [87].

[128] *Adeishvili (Mazmishvili) v Russia* (Application No 43553/10) 16 October 2014, [83].

[129] *SJ v Belgium* (Application No 70055/10) (2015) 61 EHRR 585, [142]–[147]; cf dissenting opinion of Judge Power-Forde. The case was eventually struck out and solved by a friendly settlement by which the applicant and her children were granted leave to remain.

[130] Smyth, above n 21, 77–78; see for example, *Da Silva v Netherlands*, above n 24, and *Nunez v Norway*, above n 111.

[131] *El Ghatet v Switzerland*, above n 79, [51].

join them. The court acknowledged the paramount status of best interests and broadly referred to the CRC but found no violation. The court held that the applicants were not prevented from travelling to Kosovo to ensure that the youngest child, a ten-year-old, was provided with adequate care and education, so her best interests were safeguarded.[132] The dissenters noted that such a young child was heavily dependent on her parents, and her return to Kosovo would cause significant uprooting and difficulties.[133] In *Berisha* and other cases in which the children or parents have initially entered the country unlawfully, the court's approach may be explained partly by an unwillingness to condemn national authorities for deterring illegal conduct. From a children's rights' perspective, however, children should not be blamed for their parents' actions. Adaptability is relied on in expulsion cases, too, as shown earlier.

Assessing adaptability based on a child's age does not accommodate the child's individual situation. The assessment of adaptability in immigration cases should as a minimum be combined with an assessment of the special care needs of young children and of relevant rights, such as the right to education, because the children concerned often attend school in the host country.[134] In *Zakayev and Safanova*, the children's vulnerability was recognised. A factor in the applicant couple's favour was that they and their children had already twice been subjected to the stress of forced migration. This was demonstrated by the children's fragile health and their integration in their current environment. The court accepted that moving to an unfamiliar place would be contrary to the children's interests and lead to a deterioration of their well-being.[135] Interestingly, the court has been more understanding of difficulties faced by migrants in child protection cases than in immigration cases that do not involve child protection. In *EP*, the court held that adoption following the taking into care of the child was 'so severe a measure against a mother who had just arrived in Italy with her little daughter who spoke only Greek, and about whose past the authorities dealing with the case knew very little'.[136] In *KAB*, the court criticised the failure to recognise that a Nigerian national whose expulsion was ordered had a one-year-old child who had subsequently been taken into care and declared available for adoption. The court considered the situation especially serious because of the child's age.[137]

Obtaining children's views and giving them due weight

Another difference between child protection and immigration cases is the importance of children's views. Following Article 12 CRC, a child who is capable of forming his or her own views has the right to express those views freely in all matters affecting him or her, the views being given due weight in accordance with his or her age and maturity. In some child protection cases, the child's opinion (or lack of availability) has been decisive, which is promising for the alignment of the European Convention and the CRC. The Committee on the Rights of the Child has underlined the interdependent nature of best interests and participation; an outcome cannot be in the child's best interests if the child has not had an

[132] *Berisha v Switzerland*, above n 28, [60].

[133] *Berisha v Switzerland*, above n 28, dissenting opinion of Judges Jočienė and Karakaş.

[134] *Üner v Netherlands*, above n 51, dissenting opinion of Judge Baka; Leloup, above n 21, 403.

[135] *Zakayev and Safanova v Russia*, above n 101, [46].

[136] *EP v Italy*, above n 37, [63]–[65].

[137] *KAB v Spain* (Application No 59819/08) 10 April 2012, [108].

opportunity to express her views.[138] The children concerned are sometimes too young to be heard, but acknowledging the importance of their views is nonetheless essential.[139]

The ECtHR has, for example, stressed the fact that a child, aged 14 when the ECtHR gave its judgment, had 'always firmly indicated' her wish not to leave her foster home.[140] In *Aune*, the court mentioned the child's wishes, as heard by national courts, as an important factor.[141] In *Gnahoré*, the fact that authorities had sought the child's views was a factor in proving that neither renewing the care order nor contact restrictions breached Article 8.[142] In *L*, the denial of a grandfather's contact was acceptable partly because the two children had indicated their wish not to meet the grandfather, who was suspected of sexual abuse.[143] In *Nanning*, the court found a non-violation regarding a continued placement in a foster family largely based on an expert assessment that the child's 'firm wish to remain with the foster family' should be respected. The court observed that the child had not been heard in person but still considered the assessment valid.[144] In assessing contact restrictions, the court has acknowledged the views of children who did not want to meet the applicant mother more than twice a year, as well as the fact that the children reacted negatively to the meetings.[145]

The effect of external circumstances on the child's opinion has been recognised in some cases. In assessing contact restrictions in *Glesmann*, the court found a non-violation largely because the child, then aged 12, had consistently declared her wish not to have contact with the applicant and only gave up her resistance to end the court proceedings.[146] The minority in *Gnahoré* held that even if the boy's opinion was an important factor, it was not sufficient justification for the prohibition of contact because the opinion was understandably affected by the fact that he was physically distant from his original family.[147]

In child protection cases, the court has also criticised national authorities for not hearing the children. In *Saviny*, where the children had been removed from the home because of inadequate living conditions and shortcomings in care, the court noted that at no stage had the children been heard, although the eldest was 13.[148] In *NTS*, three brothers had been returned to their biological father, who had drug problems, after being placed with their aunt for years. The court found that the 'two fundamental aspects' of the case were whether the children had been duly involved in the proceedings and whether the decisions were 'dictated' by their best interests. Domestic courts had not heard the children, considered the possibility of hearing at least the eldest boy, or given reasons for not hearing him. The children's judicial representation had, therefore, been insufficient. The court extensively quoted the General Comments on best interests and on the right to be heard, implying the relationship between them. Domestic courts had 'failed to give adequate consideration to one important fact: the

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[138] CRC/C/GC/14, [43]–[45].

[139] See also Kilkelly, above n 20, 279–280.

[140] *Bronda v Italy*, above n 27, [62].

[141] *Aune v Norway* (Application No 52502/07) (2012) 54 EHRR 32, [72].

[142] *Gnahoré v France*, above n 14, [57]–[63].

[143] *L v Finland*, above n 45, [127]–[128].

[144] *Nanning v Germany* (Application No 39741/02) 12 July 2007, [70]–[71].

[145] *Levin v Sweden*, above n 90, [67].

[146] *Glesmann v Germany*, above n 118, [110].

[147] *Gnahoré v France*, above n 14, [57]–[63]; joint partly dissenting opinion of Judges Tulkens and Loucaides.

[148] *Saviny v Ukraine* (Application No 39948/06) (2010) 51 EHRR 33, [59].

boys did not want to be reunited with their father'. An expert opinion, which indicated that forced return would be contrary to the boys' best interests, seems to have been relevant in the assessment. Best interests consideration had been 'inadequate and one-sided', and the boys' 'emotional state of mind was simply ignored'.[149]

In immigration cases, the court has rarely paid attention to the children's views. Even in cases where the court conducts a separate best interests assessment, the child's opinion usually is not considered regardless of whether the applicant has argued that the child(ren) involved should be heard or whether the child is also an applicant. In *Palanci*, the applicant father, who faced deportation, alleged that the authorities had never conducted a hearing with his family and consequently had not sufficiently taken his children's best interests into account. This aspect was not addressed by the court.[150] In *Kissiwa Koffi*, the son's status as the second applicant was mostly ignored, which is reflected in the language: 'as to the common child . . . the court cannot speculate on the decision of the parents concerning his fate'.[151]

On the other hand, in *Osman,* it was decisive that the national authorities had ignored the opinion of the applicant, a minor at the time of the events, whose residence permit had not been reinstated. The court noted that the applicant's view – that her father's decision to send her to Kenya for a long time had been against her will and not in her best interests – had been disregarded by the authorities. The court held that even though the care and upbringing of children normally require parents to decide where the child resides, authorities cannot ignore the child's interest, including Article 8 rights.[152]

As Smyth has noted, the ECtHR cannot shoulder all the blame for the rare appearances of children's views in immigration cases since frequently the children involved are not party to the proceedings at the national level.[153] The scarce attention to children's views in immigration cases may be partly explained by the differences in national procedures in child protection cases as opposed to immigration cases. In the former, child welfare authorities often conduct a hearing with the child. On the other hand, children are applicants more often in immigration cases before the ECtHR. Moreover, the uneven role assigned to the child's views may partly relate to the aspects on which those views are gauged. One might easily argue that the child should not be reunited with a potentially harmful parent if the child opposes it, but claiming that domestic authorities should regularly respect the child's choice of country of residence is more difficult. Here, again, the different role of best interests in child protection and immigration cases is obvious.

However, it is important to underline that hearing children is a procedural guarantee. According to Article 12 CRC, children have the right to express their views in all matters affecting them, regardless of the outcome. Child protection cases clearly affect children but so do decisions about family reunification and the child or parent's expulsion. The ECtHR itself has affirmed that in light of Article 12 CRC, 'it cannot be said that the children capable of forming their own views were sufficiently involved in the decision-making process if they

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[149] *NTS and Others v Georgia* (Application No 71776/12) [2017] 1 FLR 898, [40]–[42] and [73]–[84]; Committee on the Rights of the Child, *General Comment No 12* (2009) on the right of the child to be heard (UN Doc CRC/C/GC/12); CRC/C/GC/14.

[150] *Palanci v Switzerland*, above n 120.

[151] *Kissiwa Koffi v Switzerland*, above n 58, [68], author's translation (original French passage: 'quant à l'enfant commun . . . la Cour ne saurait spéculer sur la décision des parents concernant le sort de cet enfant'); cf dissenting opinion of Judges Raimondi and Pinto de Albuquerque.

[152] *Osman v Denmark*, above n 106, [73].

[153] Smyth, above n 21, 91.

were not provided with the opportunity to be heard and thus express their views'.[154] In assessing an issue with long-lasting consequences, the children concerned should have the opportunity to express their views, irrespective of the context.

Conclusions

Several patterns emerge in the different ways that the ECtHR treats the best interests of the child in child protection and immigration cases. In child protection cases, the best interests of the child are the focus of the assessment and are often decisive. Some differences are explained by the different nature of the two case groups and some differences are common sense, such as the emphasis on physical integrity in child protection cases and on ties with the country of origin or respondent state in immigration cases; but some differences appear unjustified in light of Article 3 CRC.

The most notable difference relates to a child's right not to be separated from her parents. In child protection cases, the court assumes that it is in the child's best interests to live with her parents. Taking a child into care can only be justified if required because of best interests. If the child has been taken into care, contact with her parents is considered to be in her best interests, in conformity with Article 9 CRC. In immigration cases, however, the court does not assume that best interests require living with both parents, but assesses this as a separate question. Furthermore, the burden of proof operates differently in child protection and immigration cases. In child protection cases, the state has to prove that the limitations to the right to family life are necessary. In immigration cases, the applicant – especially the applicant father – often has to demonstrate a significant role in the family or close relationship with the child.[155] Refugees, however, receive more favourable treatment.

A second difference is the significance of the child's age. In child protection cases, the ECtHR has considered the care needs of young children. In immigration cases, young age demonstrates 'adaptability'; 'adaptable' children are considered able to integrate into another country, often even if they are nationals of the respondent state. A third difference is that children's views have been important in several child protection cases but rarely in immigration cases.

Considering these disparities, the court should take family unity as its starting point in immigration cases, as it does in child protection cases. This does not mean that close ties should not serve as an argument against deportation or for family reunification, or that exclusion would never be permissible.[156] Rather, family unity should be the default position in all case groups, and the court should require the state to justify the deportation or refusal of entry.[157]

The following improvements can be enacted to make argumentation in immigration cases more child-friendly. All aspects listed in Article 9 CRC, including separation, the procedural limb, and maintaining contact, are separately assessed by the ECtHR in child protection cases but not in immigration cases. Applying the structure of Article 9 CRC to immigration cases as well, would better serve children regardless of nationality and immigration status.[158]

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[154] *M and M v Croatia*, above n 41, [180]–[181].

[155] See also Draghici, above n 4, 344–347; Leloup, above n 107, 59–60.

[156] See, for example, *Husseini v Sweden* (Application No 10611/09) 13 October 2011.

[157] Smyth, above n 21, 88; Spijkerboer, above n 18, 292.

[158] Similarly, see U Kilkelly, 'The CRC Litigation under the ECHR. The CRC and the ECHR: The Contribution of the European Court of Human Rights to the Implementation of Article 12 of the CRC', in T Liefaard and

Underlining the procedural side of Article 8, identified in child protection cases, would be particularly beneficial. Some indications of the procedural side in other case groups can be found; in *M and M*, for example, the court stated that the procedural requirements identified in a number of child-care cases 'apply *mutatis mutandis* in any judicial or administrative proceedings affecting children's rights under Article 8 of the present Convention'.[159]

Another way to align argumentation is to refer deliberately in immigration cases to judgments from other case groups. The ECtHR often refers to other cases when discussing the weight of best interests on a general level in immigration cases, but references are rarer when the facts of the case are examined. In addition, the court could more actively oversee that national authorities do not conflate the assessment and weight of best interests; separating the two is possible even when no violation is found.[160] Applying a more nuanced adaptability assessment is also recommended to better account for each child's individual situation; there are some promising examples where the court has been sensitive to circumstances contributing to children's vulnerability. Furthermore, a more applicant-friendly burden of proof could be applied in immigration cases, and *Üner* criteria and other checklists should be applied transparently.[161] Finally, in accordance with Article 12 CRC, the court could oversee whether national authorities have respected the child's right to be heard.

Reconceptualising public interest in immigration cases is also essential. In immigration cases, public interest is equated with the state's interest in immigration control and presented as a counter-argument to the rights of individuals.[162] This juxtaposition is not self-evident; it could be argued that preserving family life is the state's interest, too.[163] In the context of adoption and the child's right to know her origins, the court has declared the child's best interests primary to public interest.[164] At a minimum, the state should be required to examine public interest further and not take it for granted.[165] As Judge Turković has summarised:

> 'it is of utmost importance to balance wisely society's impulse to attach greater weight to the public interest than to private and family life claims under Article 8 of the Convention. After all, it is impossible to make a sharp distinction between the two. It is in the public interest to protect the private- and family-life claims of long-term migrants.'[166]

This article has identified problems in the court's use of the best interests concept, especially

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JE Doek (eds), *Litigating the Rights of the Child. The UN Convention on the Rights of the Child in Domestic and International Jurisprudence* (Springer, 2015). Article 9 CRC has been referred to in: *NP v Moldova* (Application No 58455/13) 6 October 2015, [42]; *Kocherov and Sergeyeva v Russia*, above n 38, [58]; *Ageyevy v Russia*, above n 42, [110]; *AK and L v Croatia* (Application No 37956/11) 8 January 2013, [34]; *X v Croatia* (Application No 11223/04) (2008) 51 EHRR 511, [23] (child protection); *Jeunesse v Netherlands*, above n 26, [73], and *Berisha v Switzerland*, above n 28, [33] (immigration).

[159] *M and M v Croatia*, above n 41, [181].

[160] See, for example, *Sarközi and Mahran v Austria*, above n 85, [72].

[161] *Üner v Netherlands*, above n 51, joint dissenting opinion of Judges Costa, Zupančič and Türmen.

[162] See, for example, *Da Silva v Netherlands*, n 24 above, [44].

[163] H Stalford and K Hollingsworth, 'Judging Children's Rights: Tendencies, Tensions, Constraints and Opportunities' in H Stalford, K Hollingsworth and S Gilmore (eds), *Rewriting Children's Rights Judgments: From Academic Vision to New Practice* (Hart, 2017).

[164] *Todorova v Italy*, above n 76, [77].

[165] See, for example, *Alim v Russia* (Application No 39417/07) 27 September 2011, [96].

[166] *Ndidi v United Kingdom* (Application No 41215/14) (2017) *The Times* 9 October, dissenting opinion of Judge Turković.

in immigration cases. An approach focusing on the limitations of legitimate expectations for adults, such as whether the immigration status was precarious when the family was formed, risks overlooking the interests of children.[167] From the perspective of children's rights, it is problematic that parents' choices and immigration status often determine the extent to which their children can effectively exercise their human rights. The European Convention system has the potential to protect children's rights in the immigration context, too, but so far that potential has not been fully realised.

[167] Draghici, above n 4, 357.