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Collinson, J. orcid.org/0000-0001-7049-2192 (2017) The troublesome offspring of section 19 of the immigration act 2014. Journal of Immigration, Asylum and Nationality Law, 31 (3). pp. 244-261. ISSN 1746-7632

The Troublesome Offspring of Section 19 of the Immigration Act 2014

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My thanks go to Dr Adrian Hunt and Dr Bharat Malkani for comments on various iterations of this article. All errors are mine. With apologies to Louis de Bernières.

At A Glance

Section 19 of the Immigration Act 2014 is the UK government's attempt, through primary legislation, to define the paramiters of Article 8 ECHR claims made by foreign nationals subject to removal or deportation proceedings. It has resulted in competing and conflicting case law that articulates two competing and conflicting interpretations of that statute, which this article labels the 'weight' and 'exception' interpretations. After reviewing and critiquing the discordant case law – the troublesome offspring – this article argues that the proper statutory interpretation of section 19 of the Immigration Act 2014 is that it creates a child-centred exception to imperatives of removal or deportation.

Introduction

Section 19 of the Immigration Act 2014 is an attempt by the government to define, through primary legislation, the circumstances in which a foreign national can successfully rely on Article 8 of the European Convention on Human Rights (ECHR) to resist removal or deportation. The government's aim was to restrict judicial discretion and impose a more restrictive policy agenda in such cases. The desire of the executive, through Parliament, to communicate to the judiciary how precisely Article 8 ECHR should be interpreted in the immigration sphere has been identified by the current President of the Upper Tribunal's Immigration and Asylum Chamber as a front in the struggle between judicial independence, the rule of law and government power.[1] It was then perhaps inevitable that it would provoke a range of litigation.

Although the Immigration Act 2014 is part of a wider constitutional debate, this article focuses on the difficulties encountered by the courts in interpreting the Act's

[1] Bernard McCloskey, 'Human Rights, Governments and Judicial Independence' [2012] European Human Rights Law Review 478

prescriptions as to how the Article 8 ECHR balancing exercise should be conducted. In particular, the courts have struggled to reconcile the drafting of section 19 of the Immigration Act 2014, pre-existing case law on the best interests of the child, and the government's migration-control agenda. This struggle is articulated in two competing and conflicting strands of case law in both the Upper Tribunal (*MAB,*[2] *KMO,*[3] and *Kaur*[4]) and in the Court of Appeal (*MM* (*Uganda)*[5], and *MA (Pakistan)*[6]). This article is concerned with these cases; the troublesome offspring of section 19 of the Immigration Act 2014.

This article argues that the proper statutory interpretation of section 19 of the Immigration Act 2014 creates a child-centred exception to imperatives of removal or deportation. This eschews the balancing exercise between the rights of the individual and the interests of the state normally required by Article 8 ECHR in favour of an evaluation of whether the proposed removal or deportation of a child's parent is unreasonable or unduly harsh on the child. I label this as the 'exception' interpretation. I argue that this is the only logically coherent interpretation of the statute because it faithfully reflects Parliament's clear choice of words and statutory structure, and therefore Parliament's intention in legislating in the manner that it has. The alternative interpretation, which I label the 'weight interpretation', requires the courts to vandalise the words and structural architecture of the Act and Parliament's intent.

Part 1 of this article gives a brief account of the UK's Article 8 ECHR jurisprudence prior to 2014 and of the seminal case of *ZH (Tanzania)*[7] which represents a high-water mark in child-centred immigration jurisprudence. The retreat of the waters is briefly traced through the July 2012 iteration of the Immigration Rules. This was the precursor to the Immigration Act 2014 and the provisions of this are also introduced in detail in this first section. Part 2 will outline the two competing interpretations of the Immigration Act 2014 which are manifest in the case law; the 'weight' interpretation and the 'exception' interpretation. This part reviews and critiques the discordant case law in the Upper Tribunal and Court of Appeal.

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[2] *MAB (para 399; "unduly harsh") USA* [2015] UKUT 00435 (IAC)

[3] *KMO (section 117 – unduly harsh) Nigeria* [2015] UKUT 00543 (IAC)

[4] *Kaur (children's best interests / public interest interface)* [2017] UKUT 00014 (IAC)

[5] *MM* (*Uganda*) *and Another v Secretary of State for The Home Department* [2016] EWCA Civ 450

[6] *MA* (*Pakistan*) *v Secretary of State for the Home Department* [2016] EWCA Civ 705; [2016] 1 WLR 5093

[7] *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, [2011] 2 AC 166

It argues that the exception interpretation is the only logically defensible interpretation of the Act. Finally, part 3 will present and seek to address possible critiques of the arguments presented in favour of the exception interpretation.

1. Legislative Background

The UK's domestic jurisprudence on Article 8 ECHR has been subject to considerable evolution since the introduction of the Human Rights Act 1998. Article 8 ECHR requires the state to refrain from interfering with the private and family life of individuals, unless it is necessary to do so in a democratic society in order to give effect to a legitimate aim. In the immigration law context, the private and family life of migrants must be balanced against the public interest in maintaining immigration control[8] and, in the case of foreign national offenders, prevention of disorder and crime.[9] In the House of Lords decision of *Huang*[10] it was acknowledged that this Article 8 ECHR balancing exercise is fact sensitive[11] and that there could be no presumption that that there had to be something exceptional in the factual matrix of a case before the Immigration Rules could be found to deal disproportionately with a cases' disposal.[12]

In addition to the European Convention, the United Nations Convention on the Rights of the Child 1989 (UNCRC) also affects the UK's immigration jurisprudence. The UK has legislated to give effect in the immigration sphere to Article 3 UNCRC that 'the best interests of the child shall be a primary consideration.' Section 55 of the Borders, Citizenship and Immigration Act 2009 (BCIA) states that the Secretary of State for the Home Department (SSHD) must ensure that her immigration, asylum or nationality powers are 'discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom'. The UNCRC and ECHR are separate treaties with separate institutional

[8] *Nnyanzi v UK* Application No 21878/06 (ECtHR, 8 April 2008) [2008] ECHR 282

[9] *Shahzad (Art 8: legitimate aim) Pakistan* [2014] UKUT 85 (IAC)

[10] *Huang v Secretary of State for the Home Department* [2007] UKHL 11, [2007] 2 AC 167

[11] Robert Thomas, 'Agency Rulemaking, Rule-Type, and Immigration Administration' [2013] Public Law 135, 145. Although note that Helena Wray attributes this development to the later case of *Chikwamba*; Helena Wray, '"A Thing Apart": Controlling Male Family Migration to the United Kingdom' (2015) 18 Men and Masculinities 424, 436

[12] Brenda Hale, 'Families and the Law: The Forgotten International Dimension' (2009) 4 Child and Family Law Quarterly 413, 419

sources, and the ECHR makes no specific provision for children's rights.[13] However, the European Court of Human Rights (ECtHR) has recognised the best interests of the child to be an aspect of Article 8 ECHR.[14]

Although it could be said that the UK's case law was already moving in the direction of recognising the best interests as a primary consideration in Article 8 ECHR decision-making,[15] the seminal Supreme Court judgment in *ZH (Tanzania)*[16] cemented the trend. In brief, ZH was a national of Tanzania but her two children were British citizens. ZH was separated from their British father and was thus the children's primary carer, but he maintained contact.[17] Her immigration history was 'described as "appalling"'[18] and the appeal arose out of the Secretary of State's refusal to grant ZH leave to remain in the UK.

ZH (Tanzania), and in particular Lady Hale's judgment, foregrounds the rights of the child. *ZH (Tanzania)* 'underscores that all decisions affecting children should be approached from an informed children's rights perspective.'[19] According to Lady Hale's judgment, this has a number of specific consequences. Firstly, children are not to be treated, as they had in the past, as mere 'parcels that are easily moveable across borders with their parents without particular cost'.[20] Secondly, the rights of a child may require that their parent(s) remain in the UK even where the parent's removal would not be disproportionate if the child were not part of the proportionality equation. This may also be the case where the parent's behaviour is 'blameworthy' in some manner (such as having, like ZH, an 'appalling' immigration history) which would otherwise point to removal; 'children cannot be blamed for anything their

[13] Ursula Kilkelly, *The Child and the European Convention on Human Rights* (Ashgate Dartmouth 1999), 3

[14] See in particular; *Neulinger and Shuruk v Switzerland* App no 41615/07 (Grand Chamber, 6 July 2010); *Üner v Netherlands* App no 46410/99 (Grand Chamber, 18 October 2006), [57-8]; *Jeunesse v The Netherlands* App no 12738/10 (Grand Chamber, 3 October 2014)

[15] Colin Yeo, 'Case Comment: ZH (Tanzania) v Secretary of State' (2011) 25 Journal of Immigration, Asylum and Nationality Law 189, 189; citing *LD (Article 8 – best interests of child) Zimbabwe* [2010] UKUT 278 (IAC), [2011] Imm AR 99, and; *R (on the application of TS) v Secretary of State for the Home Department* [*2010*] EWHC 2614 (Admin)

[16] *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, [2011] 2 AC 166

[17] *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, [2011] 2 AC 166, [2-3]

[18] *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, [2011] 2 AC 166, [5]

[19] Rebecca MM Wallace and Fraser AW Janeczko, 'The Best Interests of the Child in the Immigration and Asylum Process: The Case of ZH (Tanzania) v. Secretary of State for the Home Department' (2011) 31 Children's Legal Rights Journal 46, 46

[20] Jacqueline Bhabha, 'The "Mere Fortuity" of Birth? Are Children Citizens?' (2004) 15 differences: A Journal of Feminist Cultural Studies 91, 95

parents have or have not done.'[21] *ZH (Tanzania)* represents a high water mark for the rights of the child in UK immigration law. Ford, Jennings and Somerville[22] have noted that the UK government's priorities under the Coalition (2010-15) and Conservative (2015-17) administrations have turned towards 'restrictive'[23] policy outcomes in family migration; this can be contrasted with a relative liberalisation of family migration policy under the 1997-2010 Labour government[24] whose restrictive agenda was directed towards survival immigration.[25]

In pursuit of this restrictive agenda with respect to family migration, the July 2012 iteration of the Immigration Rules introduced a number of new requirements for a person to acquire leave to remain on the basis of a relationship with a child who is resident in the UK. In particular, these included a financial requirement that the parent be earning a minimum of £18,600pa (with additional sums of £3,800 added to the minimum for the first child, and £2,400 for each additional child).[26] The financial rules were created on top of pre-existing requirements that the parent not be present in breach of immigration law,[27] not be in receipt of public funds,[28] and must evidence 'adequate accommodation' for the family unit.[29] Prior to July 2012 parents who found themselves unable to meet the requirements of the Immigration Rules could apply for leave to remain based upon the Secretary of State's residual discretion. As the Secretary of State was bound to act in a manner compliant with the European

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[21] Jane Fortin, 'Are Children's Best Interests Really Best? ZH (Tanzania) (FC) v Secretary of State for the Home Department' (2011) 74 Modern Law Review 947, 947

[22] Robert Ford, Will Jennings and Will Somerville, 'Public Opinion, Responsiveness and Constraint: Britain's Three Immigration Policy Regimes' (2015) 41 Journal of Ethnic and Migration Studies 1391

[23] Robert Ford, Will Jennings and Will Somerville, 'Public Opinion, Responsiveness and Constraint: Britain's Three Immigration Policy Regimes' (2015) 41 Journal of Ethnic and Migration Studies 1391, 1401

[24] Don Flynn, 'New Borders, New Management: The Dilemmas of Modern Immigration Policies' (2005) 28 Ethnic and Racial Studies 463, 471

[25] Don Flynn, 'New Borders, New Management: The Dilemmas of Modern Immigration Policies' (2005) 28 Ethnic and Racial Studies 463, 478

[26] Immigration Rules, Appendix FM, E-LTRP.3.1

The lawfulness of these requirements were upheld, with caveats as to the sufficiency of the Secretary of State's guidance, in *MM (Lebanon) & Ors v Secretary of State and another* [2017] UKSC 10

[27] Immigration Rules, Appendix FM, E-LTRP.2.2

[28] Immigration Rules, Appendix FM, E-LTRP.3.3

[29] Immigration Rules, Appendix FM, E-LTRP.3.4

Convention,[30] applications for discretionary leave to remain were commonly argued under Article 8 ECHR. Hence the courts were required to interpret the requirements of Article 8 ECHR and thereby created a rich jurisprudence[31] over and above that already discussed in this article.

However, the level of (arguably proper and necessary) judicial intervention in immigration matters post-*Huang* was perceived by the government as an area in which the courts had overstepped their role vis-à-vis the legislature and executive.[32] The lack of control felt by the government over immigration matters was portrayed by it as an oversight by previous governments and a policy lacuna which had been filled by the courts for want of an expression of policy. As a corrective measure, the government introduced new immigration rules in July 2012 to 'embed within the rules the Secretary of State's interpretation of Article 8 ECHR.'[33] The Secretary of State's interpretation of Article 8 ECHR was, predictably, restrictive and weighted the proportionality balance 'firmly on the side of removal and deportation.'[34] As to the relationship between the courts and Article 8 ECHR, Robert Thomas describes the intended impact of the July 2012 Immigration Rules as being:

> … a clear attempt to give a policy steer to the courts and tribunals. They seek to confine *Huang* by defining proportionality though the rules and by re-introducing "exceptionality" as the criterion of success … The [SSHD]'s purpose is to attempt to "shift" the judicial role from reviewing the proportionality of individual administrative decisions to reviewing the proportionality of the Rules[35]

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[30] Human Rights Act 1998, s6

[31] Judith Farbey, 'Standing in the Home Secretary's Shoes? The Function of the Tribunal in Human Rights Cases' [2013] Journal of Immigration, Asylum and Nationality Law 331, 342

[32] Home Office, 'Statement of Intent: Family Migration' (June 2012) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/257359/soi-fam-mig.pdf> accessed 11 November 2016, [37]

[33] Gina Clayton, *Immigration and Asylum Law* (7th edn, Oxford University Press 2016), 146

[34] Tom Southerden, 'Dysfunctional Dialogue: Lawyers, Politicians and Immigrant's Right to Private and Family Life' (2014) 3 European Human Rights Law Review 252, 256

[35] Robert Thomas, 'Agency Rulemaking, Rule-Type, and Immigration Administration' [2013] Public Law 135, 147

However, family life is complex and the great complexity of Article 8 ECHR jurisprudence has developed to recognise the complexity in family life. As Mr Justice Munby in the Court of Appeal observed:

> such is the diversity of forms that the family takes in contemporary society that it is impossible to define, or even to describe at anything less than almost encyclopaedic length, what is meant by "family life" for the purposes of Article 8.[36]

Therefore the strong possibility arose that, as with the application of the pre-*Huang* test of exceptionality, strong factual cases which would previously have been allowed under the application Article 8 ECHR would fall outside what was provided for by the Immigration Rules. In legal challenges to the new rules, of most concern to Mr Justice Blake in the Upper Tribunal was that the rules did not prima facie include any recognition of what the best interests of the child may require.[37] In confronting this problem, the Court of Appeal in *MF (Nigeria)* was assisted by the Secretary of State's last minute submission that 'the new rules do not herald a restoration of the exceptionality test.'[38] Instead, the exceptional circumstances test in the Immigration Rules was to be understood as requiring the application of 'a proportionality test as required by the Strasbourg jurisprudence.'[39]

The Secretary of State chose to interpret the decision in *MF (Nigeria)* as the judges ignoring Parliament[40] and pushed through primary legislation in the form of the Immigration Act 2014. This inserts a new Part 5A into the Nationality, Immigration and Asylum Act (NIAA) 2002. With respect to the Article 8 ECHR rights of a foreign national with children, the Act itself states that:

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[36] *Singh v Entry Clearance Officer New Delhi* [2004] EWCA Civ 1075, [72]

[37] *Izuazu (Article 8 – new rules) Nigeria* [2013] UKUT 45 (IAC), [44]

[38] *MF (Nigeria) v Secretary of State for the Home Department* [2013] EWCA Civ 1192, [39]

[39] *MF (Nigeria) v Secretary of State for the Home Department* [2013] EWCA Civ 1192, [44]

[40] Simon Walters and Glen Owen, 'Judges 'sabotaged' MPs' bid to deport rapists and thugs... but Theresa May vows to crush judges' revolt by rushing through tough new laws' (*Daily Mail*, 17 February 2013) <http://www.dailymail.co.uk/news/article-2279842/Theresa-May-Home-Secretary-vows-crush-judges-revolt-rushing-tough-new-laws.html> accessed 2 February 2017

117B(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom

Some of the words used in the Immigration Act 2014 have pre-existing, statutory meaning. For example, 'a person liable to deportation' is a person of whom the Secretary of State has deemed their 'deportation to be conducive to the public good'.[41] It is, under the statutory code, conducive to the public good to deport a person who is not a British citizen and who has been sentenced to a period of imprisonment of at least 12 months, or any length of imprisonment for specified offences.[42] Other terms are defined within the Act itself, so that a 'qualifying child' is 'a person who is under the age of 18 and who is a British citizen, or has lived in the United Kingdom for a continuous period of seven years or more'.[43] Separate statutory rules apply to foreign nationals who have been convicted of criminal offences:

117C(1) The deportation of foreign criminals is in the public interest.

(2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.

(3) In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.

…

(5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.

(6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless

[41] Immigration Act 1971, s3(5)(a)

[42] UK Borders Act 2007, s32

[43] Nationality, Immigration and Asylum Act 2002, 117D(1), inserted by the Immigration Act 2014, s19

there are very compelling circumstances, over and above those described in Exceptions 1 and 2

On their face, the statutory rules permit a foreign national with no criminal record to remain in the UK if it would be 'unreasonable' to expect their qualifying child to leave the UK. A foreign national offender who has been sentenced to less than four years imprisonment appears to be able to remain if the effect of their deportation on their qualifying child would be 'unduly harsh'. Finally, foreign national offenders sentenced to more than four years imprisonment must show 'very compelling circumstances' beyond those applying to other categories in order to remain in the UK. However, as this article will document, the meaning of these provisions has been contested.

2. Interpretations

There are two competing interpretations of s117B(6) and s117C(5) of the Nationality, Immigration and Asylum Act 2002. One interpretation is of a child-centred provision which asks whether removal/deportation is 'unreasonable' or 'unduly harsh' on the child and on the child alone. This I describe as being the 'exception interpretation'. The other interpretation is that s117B(6) and s117C(5) speak only to the weight that should be given to the existence of qualifying children in the normal Article 8 ECHR proportionality exercise. The provisions are therefore about whether removal/deportation is 'unreasonable' or 'unduly harsh' in all the circumstances. I label this the 'weight interpretation'.

The competing interpretations have been addressed directly by the courts in four cases thus far. *MAB*[44] and *KMO*[45] were decided in the Upper Tribunal in the deportation context and therefore address themselves to how to interpret 'unduly harsh'. *MAB* was decided first and endorsed the 'exception interpretation'. *KMO* was promulgated later in 2015 and endorsed the 'weight interpretation'. The Court of Appeal, in the 2016 case of *MM (Uganda)*,[46] examined both Upper Tribunal decisions and endorsed the 'weight interpretation'. The most recent case is that of *MA (Pakistan)*[47] and was the first to address

[44] *MAB (para 399; "unduly harsh") USA* [2015] UKUT 00435 (IAC)

[45] *KMO (section 117 – unduly harsh) Nigeria* [2015] UKUT 00543 (IAC)

[46] *MM* (*Uganda*) *and Another v Secretary of State for The Home Department* [2016] EWCA Civ 450

[47] *MA* (*Pakistan*) *v Secretary of State for the Home Department* [2016] EWCA Civ 705, [2016] 1 WLR 5093

the meaning of 'unreasonable'. Although Elias LJ concluded by endorsing the weight interpretation, he was clear that he felt constrained to do so because of the preceding decision in *MM (Uganda)* and that 'free from authority, I would favour the ['exception'] argument of the appellants.'[48] This section describes both interpretations and the reasoning underpinning each, using the case law and the arguments therein as a departure point.

This section takes as a starting point that the structure and content of the immigration rules[49] and Part 5A Nationality Immigration and Asylum Act (NIAA) 2002 (as inserted by s19 of the Immigration Act 2014. For clarity, and precision I shall henceforth refer to the provisions as they appear in the NIAA.) are effectively the same and that an interpretation of one applies to the other. I support this assumption with two statements; firstly that all the cases referred to above treat them as having overlapping meaning, and; secondly, the government altered the immigration rules so that they would reflect the statutory language adopted by Parliament.[50] This section also argues that s117B(6) and s117C(5) are sufficiently similar that the same interpretation must apply to both. Although not identical in language, the structural devices used appears to be the same and thus anything that can be said about one can be said about the other.

Weight Interpretation

The weight interpretation argues that 'in substance the approach envisaged … is not materially different to that which a court will adopt in any other Article 8 exercise.'[51] This means that a decision maker is required by s117B(6) and s117C(5) to undertake an Article 8 ECHR proportionality exercise, but with three statutory directions:

[48] *MA* (*Pakistan*) *v Secretary of State for the Home Department* [2016] EWCA Civ 705, [2016] 1 WLR 5093 [36]

[49] Immigration Rules, Appendix FM, Section EX.1; Immigration Rules 398-399

[50] See *KMO (section 117 – unduly harsh) Nigeria* [2015] UKUT 00543(IAC), [12]:

"There is no tension in the fact that there is an area of overlap between s117C(4)&(5) [Nationality, Immigration and Asylum Act 2002] and para 399 of the rules. When s117 was brought into effect by the Commencement Order, the vocabulary of para 399 was different […] The rule was amended to reflect the vocabulary of the statute and so the assessment now carried out under the rules is compliant with the requirements of the statutory provisions."

[51] SSHD submission in *MA* (*Pakistan*) *v Secretary of State for the Home Department* [2016] EWCA Civ 705; [2016] 1 WLR 5093, [28]

(a) That the decision maker should 'give some additional weight to the fact that the child has been resident in the UK for seven years [or a British Citizen, i.e. a 'qualifying child'].'[52]

(b) That where an appellant is a 'foreign criminal' (who has been sentenced to less than four years imprisonment) it is disproportionate to deport them only when the effect is 'unduly harsh', but where an appellant is not an offender it is disproportionate to remove them merely when the effect is 'unreasonable'.

(c) That the 'the more pressing the public interest in his removal, the harder it will be to show that the effect on his child or partner will be unduly harsh.'[53] Therefore 'unduly harsh' or 'unreasonable' must be determined 'in the light of the seriousness of the offences committed by the foreign criminal and/or the public interest considerations that come into play'.[54] This also includes all the public interest statements at s117C(1)-(4).

To put it another way, when the public interest is in removal or deportation is greater (e.g. because the criminal conduct was more seriousness) then the harshness or unreasonableness must also be greater in order for the removal or deportation to be disproportionate.

I describe this as the weight interpretation because the statutory directions are specifically that additional weight should be given in the proportionality exercise to qualifying children (as opposed to other children), about what level of weight must be achieved (either 'unduly harsh' or 'unreasonable') before the imperative to remove/deport is outweighed as being disproportionate, and that all the public interest factors are weighed against the effect of the removal/deportation on the child.

Exception Interpretation

The exception interpretation argues that s117B(6) and s117C(5) stand outside of the Article 8 ECHR assessment and are therefore an exception to the normal proportionality assessment

[52] SSHD submission in *MA* (*Pakistan*) *v Secretary of State for the Home Department* [2016] EWCA Civ 705; [2016] 1 WLR 5093, [37]

[53] Laws LJ in *MM* (*Uganda*) *and Another v Secretary of State for The Home Department* [2016] EWCA Civ 450, [24]

[54] *KMO (section 117 – unduly harsh) Nigeria* [2015] UKUT 00543(IAC), [24]

required under this Article. The difference in approach is described in *MAB* as being that, 'There is no balancing exercise but rather an "evaluative" exercise'.[55] This evaluation is a narrow one as it:

> focuses upon the effect upon children … The wording of the provision, in itself, reflects that focus: "unduly harsh for the child". It seems to us, contrary to [the SSHD's] submissions, that the issue focusing on the individual child or partner affected by the appellant's deportation.[56] (emphasis original)

Therefore, unlike under the weight interpretation, the public interest imperatives of removal/deportation are irrelevant to the evaluation, other than that where the appellant is 'a foreign criminal', the higher threshold of 'unduly harsh' pertains. Also, whereas the weight interpretation argues that being a qualifying child is merely a factor of greater weight against removal/deportation, the exception interpretation positons these as criteria which must be met to be able to access the exception.

Discussion

I argue that the weight interpretation is inconsistent with the normal rules of statutory interpretation and makes a nonsense of both the structure of Part 5A NIAA 2002, and of the plain language used therein. The first argument considers the overarching structure of s117B and s117C. Both begin by making statements as to the public interest, namely that it is in the public interest;

- to maintain effective immigration control (s117B(1))
- that a person speaks English and is financially independent (s117B(2))
- to deport foreign criminals (s117C(1))

Furthermore, that 'The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal' (s117C(2)).

Section 117B(6) then goes onto say that 'the public interest does not require the person's removal where […] (b) it would not be reasonable to expect the child to leave the United Kingdom.' This appears that an exception is being made to what the public interest

[55] *MAB (para 399; "unduly harsh") USA* [2015] UKUT 00435 (IAC), [73]

[56] *MAB (para 399; "unduly harsh") USA* [2015] UKUT 00435 (IAC), [71]

would otherwise demand (removal), because then 'the public interest *does not require* the person's removal' (emphasis added).

Section 117C(3-6) is structured in the same way, being that what would otherwise be required by the public interest (deportation) is suspended where the effects of the deportation on the child is 'unduly harsh'. This is the plain reading of the direction in s117C(3-5) that 'the public interest requires C's deportation unless … the effect of C's deportation on the … child would be unduly harsh.' Furthermore, that s117C(3-6) is supposed to operate as an exception to the normal requirements of the public interest is highlighted by the use of the word 'exception' in the statute itself to describe the operation of the sub-section; 'the public interest requires C's deportation unless *Exception* 1 or *Exception* 2 applies' (emphasis added).

The weight interpretation requires one to ignore this structural device which appears to be clearly signposted by both s117B and s117C as an exception to the general rule of removal/deportation. We can see this operate in the Upper Tribunal decision of *Kaur*.[57] *Kaur* is concerned with how to reconcile the section 55 duty[58] (specific guidance on which is absent from the Immigration Act 2014), pre-2014 case law, and the new Part 5A of the NIAA 2002. In *Kaur*, Upper Tribunal President McCloskey finds that the Article 8 ECHR balancing exercise, under the statutory schema, the must be pursued in a structured manner:

(a) That the best interests of the child should normally be identified at the beginning of the balancing exercise.
(b) That best interests decision should not be devalued by the immigration record or criminal conduct of their parents[59] and so should be taken in isolation from and without reference to those factors.
(c) That the best interests assessment is to be placed in the balance with other factors relevant to the Article 8 ECHR balancing exercise.
(d) That the balancing exercise includes all the factors identified by statute in Part 5A of the Nationality, Immigration and Asylum Act 2002[60] but that statute is not an exhaustive list of relevant factors.[61]

[57] *Kaur (children's best interests / public interest interface)* [2017] UKUT 00014 (IAC)

[58] s55, BIAA

[59] Jane Fortin, 'Are Children's Best Interests Really Best? ZH (Tanzania) (FC) v Secretary of State for the Home Department' (2011) 74 Modern Law Review 947, 949

However, with all due respect to President McCloskey, the process outlined above in steps three and four require judicial decision makers to ignore the structural gap that Parliament creates between 117B(6) ('In the case of a person who is not liable to deportation, the public interest does not require the person's removal where…') and the preceding public interest factors at 117B(1-5), and the clear instructions at 117C(3) that a statutory exception operates. The decision in *Kaur* then appears to rely on an abandonment of the statutory language and framework. This leaves us again with the exception interpretation being the most logically consistent with Parliament's intention as expressed through statute.

Furthermore, the effect of the weight interpretation is extremely limited, doing no more than making statements about the weight to be given to different factors of the sort which are similar to those already made in s117B(1-4) and s117C(1-2). As Elias LJ commented in *MA (Pakistan)*, it is 'drafted in an extremely convoluted way to achieve so limited an aim. The objective could have been achieved much more clearly and succinctly.'[62]

I would go further; if Parliament could have expressed itself in much more simple terms to achieve the weight interpretation then its use of a different structural device suggests that it was seeking to achieve a different outcome. The adoption of the weight interpretation in *MM (Uganda)* thererfore substitutes the executive's policy objectives of removal for Parliament's clear intention to make an exception in favour of children. There are good reasons why Parliament may have wanted to shield children from the otherwise harsh consequences of the executive's intention to whittle away human rights protections. Again, as Elias LJ observed:

> there are powerful reasons why, [a qualifying child should be permitted to remain in the UK] even though the effect is that their possibly undeserving families can remain with them.[63]

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[60] See also *Dube (ss.117A-117D)* [2015] UKUT 90 (IAC); *AM (S 117B) Malawi* [2015] UKUT 260 (IAC)

[61] See also *Miah (section 117B NIAA 2002 - children)* [2016] UKUT 131 (IAC); *AM (S 117B) Malawi* [2015] UKUT 260 (IAC)

[62] *MA* (*Pakistan*) *v Secretary of State for the Home Department* [2016] EWCA Civ 705; [2016] 1 WLR 5093, [37]

[63] *MA* (*Pakistan*) *v Secretary of State for the Home Department* [2016] EWCA Civ 705; [2016] 1 WLR 5093, [44]

As well as the structure of s117B and s117C, the weight interpretation requires one to contort the plain meaning of the words used. If 'unreasonable' and 'unduly harsh' are simply expressions of the proportionality exercise then the weight interpretation re-writes the section in one of two ways. Elias LJ suggests that 'In effect it comes down to saying that "the public interest does not require removal … in circumstances where the application of the proportionality test does not justify removal."'[64] He describes this as being 'self-evident' and 'tautologous.'[65]

Alternatively, the section may be re-written in the formulation, "deportation/removal is disproportionate when the effect of deportation/removal is unduly harsh/unreasonable on a qualifying child". This avoids the section being tautologous because it says something substantive about the nature of what is required to find disproportionality, as per the weight interpretation. However, it also requires one to interpret 'the public interest does not require' and 'the public interest requires … unless' to mean "deportation/removal is disproportionate". This makes little sense because the effect is to make 'public interest' mean one thing in s117B(1-3) and s117C(1-2), and a different thing in s117B(6) and s117C(3). Although it avoids the flaw of tautology, it renders Part 5A NIAA 2002 internally inconsistent.[66]

The better transliteration of 'the public interest does not require' and 'the public interest requires … unless' is that "there is *no* public interest in removal/deportation". This follows the exception interpretation by finding that the existence of a qualifying child upon whom the

[64] *MA* (*Pakistan*) *v Secretary of State for the Home Department* [2016] EWCA Civ 705; [2016] 1 WLR 5093, [38]

[65] *MA* (*Pakistan*) *v Secretary of State for the Home Department* [2016] EWCA Civ 705; [2016] 1 WLR 5093, [38]

[66] This is because 'public interest' in s117B(1-3) and s117C(1-2) must be understood to mean 'legitimate aim' under Article 8 ECHR. An interference with an Article 8 ECHR right in pursuit of a public policy objective will be found unlawful if that objective does not fall within one of the six enumerated legitimate aims of Article 8(2). This is regardless of whether the public policy objective is considered to be in the public interest.

For example, the maintenance of an ethnically homogenous society may be held by some to be in the public interest, but as this is not one of the legitimate aims enumerated by Article 8(2) ECHR, any statement of the public interest to this effect in UK law would be an unlawful interference with Article 8 ECHR.

UK courts have found that the legitimate aims of Article 8 ECHR are exhaustive (*Shahzad (Art 8: legitimate aim) Pakistan* [2014] UKUT 85 (IAC)) but it is also settled doctrine of both the ECtHR and UK courts that the 'maintenance of effective immigration controls' (s117B(1)) and the 'deportation of foreign criminals' (s117C(1)) are facets of the enumerated legitimate aims (e.g. *Nnyanzi v UK* Application No 21878/06 (ECtHR, 8 April 2008) [2008] ECHR 282, [72]).

Finally, it is evident that Parliament intended the 'public interest' in Part 5A NIAA 2002 to be commensurate with the 'legitimate aim' of Article 8(2) because it explicitly relies on enumerated legitimate aims (the economic wellbeing of the country) to justify the statements that it is in the public interest that people can speak English and are financially independent (s117C(2-3)).

effect of deportation/removal is unduly harsh/unreasonable nullifies the public interest in deportation/removal that would otherwise exist. Again, as observed by Elias LJ, this maintains consistency with the plain language of the provisions:

> The focus in paragraph (b) [of s117B(6)] is solely on the child and I see no justification for reading the concept of reasonableness so as to include a consideration of the conduct and immigration history of the parents as part of an overall analysis of the public interest.[67]

If there is no public interest in removal then any decision taken to remove the parent would be unlawful because does not pursue a permitted legitimate aim under Article 8(2) ECHR. Because the unlawfulness is at the fourth stage of the *Razgar* test for determining compatibility with Article 8 ECHR,[68] it obviates the need to undertake the proportionality exercise at the fifth and final stage. This interpretation avoids both the tautology of the SSHD's submissions in *MA (Pakistan)* and the inconsistent interpretation of the 'public interest' required by the alternative formulation demanded by the weight interpretation. Finally, this gives effect to the notion that giving effect to the best interests of the child is in itself in the public interest.

I have argued that s117B(6) and s117C(5) of the NIAA 2002 create child-centred exceptions to deportation and removal. I argue that the interpretation of the statute prevailing in the case law, what I have labelled as the 'weight' interpretation, is inconsistent with the language and structure deployed in the NIAA 2002. It has further argued that the statute should be properly interpreted to require courts to enquire only whether the proposed removal or deprtation of the parent of a qualifying child is unreasonable or unduly harsh, depending on whether or not the parent is a foreign national offender, but that the public interest in

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[67] *MA* (*Pakistan) v Secretary of State for the Home* Department [2016] EWCA Civ 705; [2016] 1 WLR 5093, [36]

[68] R (*Razgar*) v Secretary of State for the Home Department [2004] UKHL 27, [2004] 2 AC 368, [17]:

> '(1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?
> (2) If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8?
> (3) If so, is such interference in accordance with the law?
> (4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?
> (5) If so, is such interference proportionate to the legitimate public end sought to be achieved?'

removing the parent is irrelevant to this assessment; only the child's circumstances are to be considered. I label this this 'exception' interpretation. It is argued that this the exception interpretation is logically consistent with the statute, and thus Parliament's intention.

3. Potential Criticisms and Responses

This section identifies and addresses some of the possible critiques of the argument outlined in this article. The first critique is that the exception interpretation does not accord with the standard methodology for human rights determination adopted by the European Court of Human Rights. However, as this same critique also applies to the weight interpretation, it is considered to be a weak argument. The second critique is that the exception interpretation is based on a radically expansive interpretation of pre-2014 case law, particularly of *ZH (Tanzania)*. The critique argues that the judgment in *ZH (Tanzania)* has a much narrower implication than that suggested by the exception interpretation.

Human Rights Methodology and Logical Inversion

The methodology of human rights protection which has generally been adopted by the European Court of Human Rights (ECtHR) is one whereby the state's action in interfering with the rights of the individual must be proportionate to the necessity of the action taken. The presumption in favour of rights and the need for the state to act proportionately and only when it is necessary to do so has been considered to provide a stronger level of protection for human rights than that traditionally provided for by the Immigration Rules.[69] The latter have generally required a balancing exercise 'to see whether the factors in favour of deportation are outweighed by compassionate factors.'[70]

The human rights methodology described above would appear to favour the exception interpretation of Part 5A NIAA 2002 because the exception recognises the importance of the child's interests first and foremost, and it is only when the social need becomes overwhelmingly pressing (ie when the parent is sentenced to over four years imprisonment) that the legitimate aim can justfy interference with the child's interests. On this basis, it is the

[69] Nicholas Blake, 'Judicial Review of Discretion in Human Rights Cases' (1997) 4 European Human Rights Law Review 391, 398

[70] Nicholas Blake, 'Judicial Review of Discretion in Human Rights Cases' (1997) 4 European Human Rights Law Review 391, 398

statute and Immigration Rules which can be said to have deviated from the Strasbourg jurisprudence.

However, this idealised version of the ECtHR's jurisprudence has been shown to be an inaccurate description of the ECtHR's Article 8 jurisprudence in matters pertaining to migration. Dembour argues that Strasbourg's migration jurisprudence is the reverse of standard human rights methodology; what she describes as 'a problematic logical inversion':

> The Court conceives of the rights guaranteed in the Convention as exceptions which temper the general principle of state sovereignty regarding migration control, rather than the Court conceiving the state control prerogative as tempering human rights norms which would themselves be the foundational principle.[71]

This logical inversion has been identified by other writers. For example, Buquicchio-De Boer described the European Commission's Article 8 jurisprudence as revolving around the question as to 'whether there are factors connected with respect for family life which outweigh valid considerations relating to the proper enforcement of immigration controls.'[72]

Examples of the logical inversion in the ECtHR's jurisprudence are not difficult to identify. In the Court's decision on the facts of *Onur*[73] and *Grant*[74] the factors identified by the Court as having greatest bearing on the case were firstly those related to the criminal offences committed by the applicant and only afterwards were the facts related to the family of the applicant considered. In *Onur* and *Grant* the Court leaves unspoken that it is seeking an exception to temper the presumption of proper exercise of state power but in *AH Khan*[75] the process is made explicit:

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[71] Marie-Bénédicte Dembour, *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint* (OUP 2015), 4

[72] Maud Buquicchio-De Boer, 'Children and the European Convention on Human Rights' in Franz Matscher and Herbert Petzold (eds), *Protecting Human Rights: The European Dimension* (2nd edn, Carl Helmanns Verlag KG 1990), 81

That absolute state control over migration is 'valid', 'proper' or 'natural' is part of the reason that the logical inversion maintains its power. See Juliet Stumpf, 'The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power' (2006) 56 American University Law Review 367

[73] *Onur v The United Kingdom* App no 27319/07 (ECtHR, 17 February 2009)

[74] *Joseph Grant v The United Kingdom* App no 10606/07 (ECtHR, 8 January 2009)

[75] *AH Khan v The United Kingdom* App no 6222/10 (ECtHR, 20 December 2011)

> The Court must now consider the applicant's circumstances in the United Kingdom, with a view to determining whether his family and private life, and his consequent level of integration into British society, were such as to outweigh the seriousness of his criminal history.[76]

As Dembour identified, the logical inversion employed by the Court is that the general principle of state sovereignty over migration (the seriousness of the applicant's criminal history) may be tempered by a Convention based exception (the applicant's family and private life). In contrast, established human rights methodology would require the court to consider whether the deportation was a necessary interference which outweighed the presumption of continued family and private life.

In Part 5A of NIAA 2002 we can see the logical inversion mandated by statute. In s117C(1), 'The deportation of foreign criminals is in the public interest.' In s117B(1), it is in the public interest to maintain effective immigration control. These are the first considerations required by statute in both instances and are an expression of state sovereignty over migration. Sections 117B(6) and 117C(5) then temper the overriding principle.

However, the identification of the logical inversion at work does not favour either the weight or exception interpretations. Neither position contradicts or undermines the logical inversion as both still operate within its confines. Therefore it is not an adequate argument against the exception interpretation to argue that it does not comply with an idealised methodology of human rights protection as this is also a feature of the alternative.

Reflecting pre-2014 case law

The second critique of the exception interpretation argues that the Immigration Act 2014, and s117B(6) in particular, was intended to 'reflect' the extant case law,[77] with respect to the weight to be afforded to the best interests of the child in the Article 8 ECHR balancing exercise. This means that the Immigration Act 2014 should be interpreted consistently with the pre-2014 case law, and that case law can only be reconciled with the weight interpretation.

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[76] *AH Khan v The United Kingdom* App no 6222/10 (ECtHR, 20 December 2011), [39]

[77] 'Immigration Bill, European Convention on Human Rights, Memorandum by the Home Office', <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/249270/Immigration_Bill_-_ECHR_memo.pdf> accessed 24 May 2016, [74]

This critique seeks to limit the scope of Lady Hale's seminal injunction that 'a child is not to be held responsible for the moral failures of either of his parents.'[78] Laws LJ emphatically clarified the scope of Lady Hale's judgment:

> *that is not to say, as sometimes it is perhaps taken to say, that in a child case the importance of immigration control is in any way lessened. It is simply a question of what goes in the scale against it.* [79] (emphasis original)

And indeed this seems to be supported by Lady Hale herself in *ZH (Tanzania)*:

> In making the proportionality assessment under article 8, the best interests of the child must be a primary consideration. This means that they must be considered first. *They can, of course, be outweighed by the cumulative effect of other considerations.* In this case, the countervailing considerations were the need to maintain firm and fair immigration control, coupled with the mother's appalling immigration history and the precariousness of her position when family life was created.[80] (emphasis added)

The reasoning in *ZH (Tanzania)* maintains that the decision as to the best interests of the child is one that is come to independently of the immigration characteristics of the parents: what is best for the child is always best regardless of the immigration characteristics of the child's parent(s). However, the best interests of the child may still be outweighed by the public interest in removing or deporting the parent(s).[81] The error thus corrected by the Supreme Court in *ZH (Tanzania)* was a rather narrow one:

> the Court of Appeal, like the appeal tribunal below, allowed the parents' behaviour to colour their assessment of the children's best interests. … such behaviour

[78] *EM (Lebanon) v Secretary of State for the Home Department* [2009] 1 AC 1198, [49]

[79] *In the matter of LB, CB (a child) and JB (a child)* [2014] EWCA Civ 1693, [15]

[80] *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, [2011] 2 AC 166, [33]

[81] *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, [2011] 2 AC 166, [33]

> cannot be held against the children or devalue any assessment of their best interests.[82]

This suggests that when Lady Hales says that one cannot blame a child for the actions of its parent(s), this does not mean that the public interest in removing or deporting the parent(s) is extinguished. A balance must be struck between the best interests of the child (albeit that where the child's interests may be said to lie is determined in isolation from a moral judgement as to the parent(s) immigration characteristics) and the public interest in removal or deportation of the child's parents. Only the weight interpretation is compatible with this account of the pre-2014 case law. The exception interpretation extinguishes the public interest, whereas Lady Hale in *ZH (Tanzania)* is clear that not only does there remain a public interest, but that it is one that may outweigh the best interests of the child. The Immigration Act was intended to be a reflection, if not a faithful codification of this existing position. Therefore, the critique alleges, the exception interpretation could not have been intended by Parliament to create a position that was in excess of the provisions of case law that was already perceived to be too generous to foreign nationals.

However, I argue in response that this critique is fundamentally flawed. Firstly, the proper meaning of *ZH (Tanzania)* is contested and the above critique relies on a relatively conservative interpretation of the case law in order to support the weight interpretation. Secondly, that interpretation is philosophically problematic. Thirdly, and relatedly, the position held by the critique jars against the language of the Act, particularly the use of an 'unduly harsh' standard. Finally, there are positive reasons for adopting a more radically expansive interpretation of *ZH (Tanzania)* that are consistent with the exception interpretation. I set out each response in turn.

Firstly, the proper meaning of *ZH (Tanzania)* is contested. The critique argues that the exception interpretation extinguishes the balance from Article 8 ECHR and replaces it with a one-dimensional question of best interests. This was Rosalind English's critique of *ZH (Tanzania)* as she interpreted the implications of Lady Hale's judgment to be that:

> in other words a determination that takes into account the usual principles of Article 8 jurisprudence amounts to a verdict on the children which "blames" them

[82] Jane Fortin, 'Are Children's Best Interests Really Best? ZH (Tanzania) (FC) v Secretary of State for the Home Department' (2011) 74 Modern Law Review 947, 949

> for their parents bad behaviour. The objection to this line of reasoning is that it evacuates the balancing act of any content by first taking away the usual factors by which we measure whether one case is deserving and the other not and then substituting for these measures a mechanical test – the question: "is this in the child's best interests"?[83]

This interpretation has been questioned as being based on a misapprehension as to the premise established by the House of Lords:

> *ZH* does not establish a hierarchy in the unimpeachable sense that is implied in her article. Kerr L at para 46 clearly describes the importance of best interests but does not say it is a trump card as is asserted.[84]

The exception interpretation is a child-centred question that requires the decision-maker to enquire whether the removal or deportation of the parent would have 'unreasonable' or 'unduly harsh' consequences for the child. These are clearly two different standards; 'unduly harsh' requires a higher threshold of negative consequence to be suffered by the child than a standard of reasonableness. Parliament has determined that the public interest weighs more heavily in circumstances where a parent has committed a criminal offence than in circumstances where the parent has not, hence the statutory requirement that the impact on the child reach the higher threshold of 'unduly harsh' in the latter instance. What the exception interpretation does not allow, and what the weight interpretation in contrast requires, is for 'unreasonable' and 'unduly harsh' to become a variable threshold depending on the immigration characteristics or criminal conduct of the parents.

Let us take a few examples to illustrate. Imagine two foreign national offenders; offender A sentenced to 24 months, and offender B to 12 months imprisonment. Alternatively, offender A is convicted of a drugs offence and offender B of a non-drugs offence, but both imprisoned for the same length of time.[85] The s117C(X) requires, in order to

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[83] Rosalind English, 'Analysis: Children's "best Interests" and the Problem of Balance' (*UK Human Rights Blog*, 2 February 2011) <http://ukhumanrightsblog.com/2011/02/02/analysis-childrens-best-interests-prevail-in-immigration-decisions/> accessed 13 October 2015

[84] 'Children's Best Interests After ZH (Tanzania)' (*Free Movement*, 4 February 2011) <https://www.freemovement.org.uk/childrens-best-interests-after-zh-tanzania-2/> accessed 13 October 2015

[85] ECtHR case law has found that offences related to the distribution of drugs mean that the public interest in deportation is more weighty that other offences. See case law:

remain in the UK, both offender A and offender B to show that the effect on their qualifying children is 'unduly harsh'. On the exception interpretation, this is the same threshold for both offenders and so if their children were in identical positions both offender A and offender B would succeed or fail in their Article 8 ECHR claim. In contrast, on the weight interpretation offender A's children would need to show an impact on them that was harsher than the impact of offender B's deportation would be on their children. On the weight interpretation the child must experience increased harshness proportionate to the severity of the parent's offending; the worse the parent's offences, the more the child must atone by suffering 'unduly harsh' consequences.

In another example, with respect to whether is 'reasonable' for the child of a non-offender parent to leave the UK, imagine two foreign national parents. Parent A has an appalling immigration history, whereas parent B has an otherwise unblemished record. Alternatively, parent A has a 'precarious' immigration status, whereas parent B's status is not. Again, the weight interpretation would require the child of parent A to show that they suffered a higher degree of negative consequence than the child of parent B in order to statisfy the decision maker that it would be 'unreasonable' for them to leave the UK. In contrast, the exception interpretation operates the same threshold to define 'reasonable' in both contexts.

The exception interpretation therefore much more closely aligns with Lady Hale's requirement in *ZH (Tanzania)* that despite the mother's 'appalling immigration history and the precariousness of her position when family life was created […] the children were not to be blamed for that.'[86] The exception interpretation does still permit the child's best interests to be 'outweighed by the cumulative effect of other considerations'[87] because where a foreign national parent has been convicted to between one and four years imprisonment it is insufficient for them to show that the effect on their qualifying child is unreasonable. In such cases where the impact on the child is merely unreasonable rather than unduly harsh, the best interests of the child are outweighed by the effect of considerations of the parent's offending.

This response is not only supported by a proper understanding of the domestic case law in *ZH (Tanzania)*, but also of the case law of the ECtHR. It is a settled part of the Strasbourg jurisprudence that:

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[86] *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, [2011] 2 AC 166, [33]

[87] *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, [2011] 2 AC 166, [33]

> Knowledge on the part of one spouse at the time of marriage that rights of residence of the other were precarious militates against a finding that an order excluding the latter spouse violates Article 8.[88]

This can be observed in a range of case law at Strasbourg, covering both cases of deportation (such as *Biraga*,[89] *Antwi,*[90] and *Baghli,*[91]) and leave to remain (such as *Rodrigues da Silva and Hoogkamer,*[92] *Larbie*,[93] and *Olgun*[94]). Indeed, this has been written into Part 5A of the NIAA 2002 in s117B(4) in which it is said that little weight should be given to a private life[95] or relationship formed with a qualifying partner[96] when it is established at a time when the person is in the UK at a time when they are present unlawfully. Again, if Parliament had intended to include a relationship with a qualifying child within the scope of this public interest statement, it could have been expected to do so. Instead, s117B(6) hives off relationships with children into a separate category.

There are good reasons for doing so. Although an adult partner may be expected to enter a relationship with full knowledge of the immigration status of the partner and the possible consequences for their ability to live where they choose, the same cannot be said of children.[97] Children do not choose to be born to a particular family at a particular time. They have no prior knowledge of their circumstances of birth and they have no means by which to act on that knowledge. Although parents may choose the timing of their procreation, a child-centred approach starts from the perspective of the child.

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[88] Emmet Whelan, 'The Right to Family Life v Immigration Control: The Application of Article 8 of the European Convention on Human Rights in Ireland' (2006) 6 Hibernian Law Journal 93, 103

[89] *Biraga and others v Sweden* App no 1722/10 (ECtHR, 03 April 2012), [50]

[90] *Antwi and others v Norway* App no 26940/10 (ECtHR, 14 February 2012), [89]

[91] *Baghli v France* App no 34374/97 (ECtHR, 30 November 1999), [48]

[92] *Rodrigues da Silva and Hoogkamer v The Netherlands* App no 50435/99 (ECtHR, 31 January 2006), [39]

[93] *Larbie v The United Kingdom* (Admissibility)App no 25073/94 (Commission, 28 February 1996)

[94] *Olgun v The Netherlands* App no 1859/03 (Admissibility Decision), [43]

[95] s117B(4)(a)

[96] s117B(4)(b)

[97] Colin Yeo, 'Protecting the Rights of Family Members' (2008) 22 Journal of Immigration, Asylum and Nationality Law 147, 152

That the exception interpretation relies on the structural device of hiving off decisions regarding the child is also important for diagnosing where the courts have entered into error in following the weight interpretation. Recall the statutory direction at s117C(1) that 'The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.' The weight interpretation relies on this statement of policy to apply to in the application of the exception at s117C(5). But it is not obvious that this should be the case. Indeed, it is more readily apparent that s117C(1) should only apply to factual circumstances outside those provided for in the exception such as, for example, cases upon which reliance is placed by the foreign national offender on their Article 8 ECHR private life. Likewise, the exception interpretation means that the criteria of s117B(1)-(5) are only relevant to the determination of claims made on factual circumstances outside that of a parent-qualifying child relationship. The primary error that the courts have fallen into is to fail to appreciate that the Part 5A NIAA purposefully creates a distinct set of categories and that the relevant considerations to those categories are distinct from those considerations relevant to other cases.

This leads directly to the second response to the critique, namely that the weight interpretation is philosophically problematic, both in terms of its coherence and its ethicality. In order to blame someone for an act, they must have at least the capacity to refrain from the blameworthy act or to follow the non-blameworthy course of action.[98] However, a child cannot be blamed for the act of their birth into a particular family in which one or more of their parents have a precarious immigration status or has committed criminal offence. Furthermore, blame is a necessary condition for punishment and, indeed, one would be hard pressed to define punishment without some reference to moral culpability. One may withhold punishment from someone who is blameworthy, but one cannot legitimately punish someone who is not blameworthy.[99] The imposition of negative immigration consequences is a choice that is made by the state; it is not a natural or inescapable consequence that is divorced from concepts of blameworthiness. Although blame as a form of moral communication[100] may

[98] Edward Sankowski, 'Blame and Autonomy' (1992) 29 American Philosophical Quarterly 291, 292; Gareth Williams, 'Blame and Responsibility' (2003) 6 Ethical Theory and Moral Practice 427, 432

[99] JER Squires, 'Blame' (1968) 18 The Philosophical Quarterly 54, 55

[100] Matthew Talbert, 'Moral Competence, Moral Blame, and Protest' (2012) 16 The Journal of Ethics 89, 103

impose different levels of stigma on the individual,[101] the negative immigration consequences must still flow from some element of blameworthiness. Therefore, imposing negative immigration consequences stemming from unblameworthy behaviour is philosophically incoherent.

Therefore it is problematic to alter the threshold of 'unreasonable' or 'unduly harsh' with reference to the actions of the foreign national parent. To do so, as under the weight interpretation, requires the child to suffer more negative consequences before removal or deportation in cancelled. The reason the weight interpretation requires more suffering is directly because of the parent's blameworthy criminal offending or blameworthy immigration characteristics. However, the blame falls on the parent, not the child.

The third response to the critique takes this argument a step further. The philosophical problem with the weight interpretation interacts directly with the wording of s117C(5) NIAA 2002. That sub-section requires that leave to remain be granted to a parent where 'the effect of C's deportation on the partner or child would be unduly harsh.' In the Secretary of State's submissions in *MAB,*[102] it was said that the weight interpretation means that:

> the words "unduly" had a sense of unfairness to the individual and required an evaluation of whether the consequences were or were not 'due' to that individual.[103]

The problem lies in the determination that the consequences are 'due' to the individual because s117C(5) clearly and explicitly states that the consequences of deportation must be unduly harsh *for the child*. The effect of the Secretary of State's submissions is to require the child to suffer the negative consequences of the parent's actions as what is 'due' to the child. This directly shifts the blame onto the child, who is in fact blameless. To directly balance the parent(s) offending or negative immigration characteristics against the best interests of the child is therefore philosophically suspect, and clearly contrary to the wording of the statute.

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[101] c.f. JER Squires, 'Blame' (1968) 18 The Philosophical Quarterly 54, 57; 'there is a question what punishment he deserves, but not what blame he deserves. He just gets *the* blame.' On this understanding stigma is a part of the punishment arising from blame, not a facet of the blame itself.

[102] *MAB (para 399; "unduly harsh") USA* [2015] UKUT 00435 (IAC)

[103] *MAB (para 399; "unduly harsh") USA* [2015] UKUT 00435 (IAC), [50]

The Secretary of State may attempt to argue that her submissions in *MAB* do not mean that the negative immigration consequences of deportation are what is due to the child, but what is due to the parent. However, this is neither what the statute nor her submissions plainly say. The statute instead explicitly requires that the exception operates when the effect of deportation is unduly harsh *on the child*. If it had meant otherwise Parliament could have been expected to say so.

The final response to the critique is that there are clear positive reasons for adopting the exception interpretation. It aids legal certainty. The inconsistency of the European Court of Human Rights jurisprudence and decision making in Article 8 ECHR cases is a common complaint from academics[104] and from within the Strasbourg Court itself.[105] To create a more determinative framework would also fit with Parliament's project of codification[106] and restricting judicial discretion in individual cases.

Furthermore, if it is philosophically wrong to blame the child for the immigration characteristics of their parents (as argued above), then it makes sense to create a child-centred, total exemption to removal or deportation to benefit children, rather than to limit the effect to the assessment of the child's best interests if those best interests are still susceptible to being overwhelmed by the public interest in removing their parents. If all *ZH (Tanzania)* and *Kaur* requires the decision-maker to do is shift the apportioning blame to a later stage in the decision-making process, then the change proscribed seems relatively marginal. It is clear that in Part 5A of the 2002 Act Parliament 'focused special attention on children'[107] and the exception interpretation is consistent with this, and a child-focussed understanding of *ZH (Tanzania)*.

Conclusion

[104] AM Connelly, 'Problems of Interpretation of Article 8 of the European Convention on Human Rights' (1986) 35 International and Comparative Law Quarterly 567, 577;

Thomas Spijkerboer, 'Structural Instablitiy: Strasbourg Case Law on Children's Family Reunion' (2009) 11 European Journal of Migration and Law 271, 279;

Ciara 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 European Journal of Migration and Law 70

[105] Ann Sherlock, 'Deportation of Aliens and Article 8 ECHR' (1998) 23 European Law Review 62, 70;

[106] *Kaur (children's best interests / public interest interface)* [2017] UKUT 00014 (IAC), [19]

[107] *Kaur (children's best interests / public interest interface)* [2017] UKUT 00014 (IAC), [19]

This article pursues an argument of relative narrowness; that the proper interpretation of Part 5A into the Nationality, Immigration and Asylum Act (NIAA) 2002, as introduced by section 19 of the Immigration Act 2014, is that it creates a child-centred exception to removal or deportation. This means that it is argued that the prevailing case law on the interpretation of the Act has taken a wrong turn. Although the ratios of *MM (Uganda)*[108] and *MA (Pakistan)*[109] do not conflict, it was made clear by Elias LJ in the latter case that he felt constrained by the norms of precedent to maintain consistency. This is a shadow dispute that the Supreme Court needs to address authoritively.

In doing so, the Supreme Court will find itself pulled between need to reconcile the statutory drafting, pre-existing case law on the best interests of the child, and the government's migration-control agenda. This can be seen to be part of the wider tension that President McCloskey identified between judicial independence, the rule of law and government power. One could add to this list the tension between Parliamentary sovereignty and the power of the executive. The argument pursued in this article is one that relies on a close reading of the text of the statute and, through that, a divination of Parliament's intention. Although the Immigration Act 2014 arose from government policy, Parliament be assumed to have passed into law a faithful transcription of that policy; 'ministers' intentions are not law'.[110] This point has particular force in circumstances such as this when the executives intentions are vaguely expressed in terms of the meaning of the Act being 'self-explanitory'.

[108] *MM* (*Uganda*) *and Another v Secretary of State for The Home Department* [2016] EWCA Civ 450

[109] *MA* (*Pakistan*) *v Secretary of State for the Home Department* [2016] EWCA Civ 705, [2016] 1 WLR 5093

[110] *Miller v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2017] 1 All ER 593, [35]