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# Making the best interests of the child a substantive human right at the centre of national level expulsion decisions

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## Abstract

The best interests of the child has become an central facet of the jurisprudence of the European Court of Human Rights (ECtHR) in expulsion cases. This article argues that the indirect application of the best interests of the child as an interpretive benchmark for Article 8 ECHR is not the end point of State's responsibilities under Article 3 UN Convention on the Rights of the Child (UNCRC). This article argues that the ECtHR's case law presents significant limitations in the subject matter scope of the best interests of the child, and limitations to the way in which it incorporates them into the Article 8 ECHR balancing exercise. This article acts as a thought experiment by modelling an alternative mode of decision-making. It asks what the best interests of the child might look like as the substantive human right at the centre of decisions about the expulsion of foreign nationals.

## Keywords

Expulsion, children, best interests, UNCRC, ECHR

## I. INTRODUCTION

The best interests of the child has become an central facet of the jurisprudence of the European Court of Human Rights (ECtHR) in cases concerning the expulsion<sup>1</sup> of foreign nationals from the

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1. UK law differentiates between 'removal' (the expulsion of a foreign national who has entered or remains in the UK without legal permission to do so; s10, Immigration and Asylum Act 1999), and 'deportation' (the expulsion of a foreign national – who may otherwise have legal permission to reside – whose presence is determined by the Secretary of State

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territory of the State. The best interests of the child is routinely considered as part of the Court's balancing exercise when examining the right to private and family life under Article 8 of the European Convention on Human Rights (ECHR). A growing body of literature has examined this jurisprudence and found a lack of consistency in the ECtHR's case law.

This article does not seek to undermine the importance of the ECtHR's incorporation of the best interests of the child into its case law. The best interests of the child is a preeminent part of the UN Convention on the Rights of the Child (UNCRC), enshrined in Article 3; 'In all actions concerning children [...] the best interests of the child shall be a primary consideration'. The UN Committee on the Rights of the Child considers the best interests of the child to be a 'fundamental, interpretive legal principle'.<sup>2</sup> The ECtHR is therefore progressive in adopting the best interests of the child as a principle within its decision-making and norm setting functions, with respect to Article 8 ECHR in expulsion cases. The ECtHR should be applauded for not rejecting the best interests of the child as being inadmissible *ratione materiae*: the best interests of the child, after all, does not appear in the text of the ECHR, nor is the ECtHR a party to the UNCRC.

This article does argue, however, that the indirect application of the best interests of the child as an interpretive benchmark for Article 8 ECHR is not the end point of state's responsibilities under Article 3 UNCRC. Instead it takes as its starting point the UN Committee's observation – in its General Comment 14 – that Article 3(1) UNCRC is a 'substantive right' that 'creates an intrinsic obligation for States, is directly applicable (self-executing) and can be invoked before a court'.<sup>3</sup> This article acts as a thought experiment. It models what Article 3 UNCRC might look like as a substantive human right in the expulsion context if a standard human rights methodology were applied to its provisions.

Although this article refers frequently to UK domestic law arrangements, it is an argument which has relevance to all Council of Europe States, as all are also States Parties to the UNCRC. Section 2 explains and critiques the ECtHR's approach to the best interests of the child in its expulsion case law. It argues that the ECtHR's case law presents significant limitations in the subject matter scope of the best interests of the child, and limitations to the way in which it incorporates them into the Article 8 ECHR balancing exercise. This limitation is one which the UK Supreme Court has also encountered, and reference to this experience helps illuminate the problems which the text of the ECHR and UNCRC throw up when applied together.

Section 3 sets out the thought experiment of treating the best interests of the child as the central human right in expulsion cases. It works through the application of a human rights methodology. It is a methodology which has universal application, although it again uses UK law to explore specific issues or examples. Section 4 presents some limitations to the analysis in this article.

This article is not intended to be a comprehensive defence of the possibility that the best interests of the child could be a standalone human right. The primary purpose is to demonstrate that the best interests of the child *can* work consistently with human rights methodology, and thus *can* be applied as a substantive human right in expulsion cases.

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to not be in the public good, normally for reasons of national security or because of criminal offending by the foreign national; s3(5)(a), Immigration Act 1971). Other States do not have distinct legal categories and this article uses the term 'expulsion' to refer to both, in common with the ECtHR. The public policy foundations of 'deportation' and 'removal' are overlapping but distinct; a distinction which regrettably cannot be fully explored here.

2. Committee on the Rights of the Child, 'General Comment No. 14: The Right of the Child to Have his or her Best Interests Taken as a Primary Consideration' UN Doc CRC/C/GC/14 (29 May 2013).

3. *ibid.*

## 2. THE ECtHR'S APPROACH TO THE BEST INTERESTS OF THE CHILD

The overall approach of the ECtHR to considering the best interests of the child in its expulsion jurisprudence is to consider it as part of the Article 8 ECHR balancing exercise. This is evident through its case law and subsequent academic commentary. This is also the approach adopted by the UK Supreme Court. In this section, it is argued that this approach has significant limitations. Firstly, factors relevant to the best interests of the child extend beyond the private and family life interests of children, whereas the ECtHR's jurisprudence is substantially limited to these aspects. This is the subject limitation of Article 8 ECHR (Section 2.2.). Secondly, the structure of the balancing of Article 8 ECHR appears too one-dimensional to accommodate a proper position for the best interests of the child (Section 2.3).

### 2.1. THE BEST INTERESTS OF THE CHILD IN THE ECtHR JURISPRUDENCE AND UK CASE LAW

The best interests of the child have been recognised by the ECtHR as an essential part of the Article 8 ECHR balancing exercise, despite the fact that the ECHR 'contains no formula referring to the child's best interests'.<sup>4</sup> In the 2006 case of *Üner*,<sup>5</sup> the ECtHR found that one of the criteria for determining Article 8 ECHR claims in deportation cases was:

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.<sup>6</sup>

This was justified as a development of its own Article 8 ECHR jurisprudence and to be implicit in its previous judgments.<sup>7</sup> However, the application of the best interests of the child to Article 8 ECHR has been problematic. Academic commentary has chiefly been concerned with the inconsistent application of the principle in expulsion cases<sup>8</sup> in which a case-by-case 'lottery'<sup>9</sup> has developed. This complaint is not unique to expulsion cases: in a wide range of human rights questions, the ECtHR's application of the best interests of the child has been critiqued as being 'unpredictable'.<sup>10</sup>

In UK domestic law, a dualist legal system, the ECHR has effect through the Human Rights Act 1998. The decisions of public authorities – such as expulsion decisions – are unlawful if they are

4. Jane Fortin, *Children's Rights and the Developing Law* (Third Edition, Cambridge University Press 2009) 69.

5. *Üner v Netherlands* App no 46410/99 (ECtHR (GC), 18 October 2006).

6. *ibid* [57-58].

7. *ibid* [58].

8. Mathieu 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 *Netherlands Quarterly of Human Rights* 50, 52; Mark Klaassen, 'Between Facts and Norms: Testing Compliance With Article 8 ECHR in Immigration Cases' (2019) 37 *Netherlands Quarterly of Human Rights* 157, 158; Anette Faye Jacobsen, 'Children's Rights in the European Court of Human Rights - An Emerging Power Structure' (2016) 24 *International Journal of Children's Rights* 548, 566.

9. Leloup (n 8) 62.

10. Ursula Kilkelly, 'Protecting Children's Rights Under the ECHR: The Role of Positive Obligations' (2010) 61 *Northern Ireland Legal Quarterly* 245, 260.

incompatible with a Convention right.<sup>11</sup> UK courts must ‘take into account’ the judgments of the ECtHR when determining human rights questions.<sup>12</sup> Article 3 UNCRC has not been directly incorporated into legislation. However, in the immigration sphere, the Home Secretary is directed by Section 55 of the Borders, Citizenship and Immigration Act 2009 (BCIA) to discharge her immigration powers, ‘having regard to the need to safeguard and promote the welfare of children’.<sup>13</sup> This has been closely associated with Article 3 UNCRC. The Supreme Court has found that Article 3 UNCRC, ‘is a binding obligation in international law, and the spirit, if not the precise language, has also been translated into our national law’.<sup>14</sup> The Upper Tribunal (Immigration and Asylum Chamber) found that ‘While section 55 and Article 3(1) of the UNCRC are couched in different terms, there may not be any major difference between them in substance, as the decided cases have shown’.<sup>15</sup>

By taking into account the ECtHR’s Article 8 ECHR judgments, including those incorporating the best interests of the child, UK law also treats the best interests of the child as part of the Article 8 ECHR balancing exercise: indeed the UK Supreme Court has found that ‘The best interests of a child are an *integral* part of the proportionality assessment under article 8 ECHR’.<sup>16</sup> More so, it has also found that the best interests of the child is supposed to be ‘a primary consideration’<sup>17</sup> within ‘the assessment of proportionality under article 8(2) [ECHR]’.<sup>18</sup>

## 2.2. SUBJECT LIMITATIONS ON ARTICLE 8 ECHR

The substantive content of Article 8 ECHR protected private and family life is an inadequate proxy for the range of factors covered by the best interests of the child. There is academic debate as to what the ECtHR means when it refers to the best interests of the child because it ‘has not arrived at a well-defined formula for the “best interest of the child” principle’.<sup>19</sup> Smyth offers one possible analysis:

In both first-entry and expulsion cases, the Court generally considers the following factors in evaluating, expressly or impliedly, whether the impugned measure would be contrary to the best interests of the child: the extent of the child or children’s ties with the country of origin and the host country; the ages of the child or children involved; and the existence of an effective family bond. However [ . . . ] the issue of country ties is generally reduced to a question of adaptability.<sup>20</sup>

The factors taken into account in the ECtHR’s Article 8 jurisprudence fall short of what is required by a holistic assessment of the best interests of the child.

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11. Human Rights Act 1998, s 6.

12. Human Rights Act 1998, s 2.

13. Borders, Citizenship and Immigration Act 2009, s 55.

14. *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4 [23].

15. *JO and Others (section 55 duty) Nigeria* [2014] UKUT 517 (IAC) [6].

16. *Zoumbas v Secretary of State for the Home Department* [2013] UKSC 74 [10] (emphasis added).

17. *ZH (Tanzania)* (n 14), [26].

18. *ibid* [29].

19. Jacobsen (n 8) 553.

20. 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, 75.

That is not to say that there is agreement as to what is definitively required by Article 3 UNCRC.<sup>21</sup> There are a number of competing checklists of factors that are argued to reflect what the best interests of the child requires of decision-makers. For example, lists have been developed by the Committee on the Rights of the Child General Comment 14,<sup>22</sup> the *UNHCR Guidelines on Determining the Best Interests of the Child* for unaccompanied and separated refugee children,<sup>23</sup> and in academic writing by Margrite Kalverboer and colleagues.<sup>24</sup> In UK family law, there is a legislative checklist – a ‘welfare checklist’<sup>25</sup> – in Section 1(2) of the Children Act 1989. Each checklist includes and excludes different individual factors, but they all contain a shared nucleus of concern for the child’s physical, emotional, and material needs, and support for the child’s development. In addition, each checklist introduces factors for consideration which are considerably more diverse than those factors associated with Article 8 ECHR family and private life. As one example, Kalverboer *et al* argue the following list of factors comprises the best interests of the child:

- The child’s views;
- The child’s identity (sex, sexual orientation, beliefs, cultural identity, personality);
- Preservation of the family environment and maintaining relations with the family and preservation of the ties of the child in a wider sense. These ties apply to the extended family as well as friends, school and the wider environment;
- Care protection and safety of the child;
- The child’s vulnerability;
- The child’s right to health;
- The child’s right to education.<sup>26</sup>

Some of these aspects of the best interests of the child – such as the consideration of the child’s religious belief, and the provision of a safe physical environment – sit uncomfortably within even the broadest account of the Article 8 ECHR right to private life: ‘to ensure the development, without outside interference, of the personality of each individual with other human beings’.<sup>27</sup> Instead, these considerations seem to be part of the freedom of religion under Article 9 and the Article 3 ECHR freedom from inhuman and degrading treatment, respectively. Placing these within the right to private life risks turning Article 8 ECHR into a catch-all with no apparent definitional limits.

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21. Indeed, the best interests of the child is critiqued as being inherently indeterminable: Robert H Mnookin, ‘Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy’ (1975) 39 *Law and Contemporary Problems* 226.

22. Committee on the Rights of the Child, ‘*General Comment No. 14: The Right of the Child to Have his or her Best Interests Taken as a Primary Consideration*’ UN Doc CRC/C/GC/14 (29 May 2013).

23. United Nations High Commissioner for Refugees, ‘UNHCR Guidelines on Determining the Best Interests of the Child’ (2008) <[www.unhcr.org/uk/protection/children/4566b16b2/unhcr-guidelines-determining-best-interests-child.html](http://www.unhcr.org/uk/protection/children/4566b16b2/unhcr-guidelines-determining-best-interests-child.html)> accessed 20 April 2020.

24. Margrite Kalverboer et al, ‘The Best Interests of the Child in Cases of Migration: Assessing and Determining the Best Interests of the Child in Migration Procedures’ (2017) 25 *International Journal of Children’s Rights* 114, 135–137.

25. Jonathan Herring, *Family Law* (Eighth Edition, Pearson 2017) 535.

26. Kalverboer et al (n 24) 120.

27. *Von Hannover v Germany* App no 59320/00 (ECtHR, 24 June 2004) [50].

This problem of making Article 8 ECHR a definitional catch-all to accommodate the expansive notion of the best interests of the child is even more acute with respect to the provision of the *right* to education and health.<sup>28</sup> These rights are either absent from the ECHR (health) or explicitly listed elsewhere in the ECHR (the right to education in Article 2 of the First Protocol).

Taking full account of what the best interests of the child means therefore presents the ECtHR with a doctrinal conundrum. The ECtHR's doctrine is that it will not create new rights which do not appear in the text of the Convention.<sup>29</sup> Similarly, it will not give effect to a substantive right through the application of another. For example, in *Maaouia v France* the ECtHR determined that the expulsion of aliens is not covered by the Article 6 ECHR fair hearing guarantees because the creation of specific procedural guarantees against expulsion in Article 1, Protocol 7 'clearly intimated [the] intention not to include such proceedings within the scope of Article 6(1) of the Convention'.<sup>30</sup> If the ECtHR were to maintain consistency in its doctrine on these points, it cannot fully reflect the right to health (a new right) or the right to education (a Protocol right) within its Article 8 ECHR determinations. However, both health and education are integral aspects of the UN Committee's conception of the best interests of the child.

Incorporating the substantive aspects of the best interests of the child into the Article 8 ECHR determination presents two unappealing options. The first is to abandon definitional boundaries for Article 8 ECHR, risking the loss of internal coherence. The second is to limit the factors that the ECtHR is willing to consider under the auspices of the best interests of the child. In so doing, the transformational scope of the best interests of the child is considerably curtailed.

### 2.3. PLACING THE BEST INTERESTS OF THE CHILD INTO THE BALANCE

The *Üner*<sup>31</sup> criteria seek to impose a checklist of factors to guide decision-makers as to the content of Article 8 ECHR family life. However, the articulation of the *Üner* criteria as a linear checklist is problematic. As the dissent to the *Üner* judgment observed:

[...] apart from the seriousness of the offence, all the “[*Üner*] criteria” seem to us to point to a violation of Article 8. [...] Hence, the only way in which the finding of a non-violation can possibly be justified, when the “[*Üner*] criteria” [...] are applied, is by lending added weight to the nature and seriousness of the crime.<sup>32</sup>

The challenge is laid down for the ECtHR to explain whether the *Üner* criteria do indeed require that the factors which make up the family life are secondary or marginal to the offence committed. The Spartan use of language in ECtHR judgments can make it difficult to assess, as an external observer, how the ECtHR has weighed individual factors in specific cases. As Dembour observes

28. Committee on the Rights of the Child (n 2).

29. *Johnston and others v Ireland* App no 9697/82 (ECtHR, 18 December 1986). In *Johnston*, the ECtHR refused to find a right to divorce as existing implicitly within the Article 12 right to marry, finding instead that if the signatory states had intended to create such a specific right then they would have explicitly done so in the ECHR text.

30. *Maaouia v France* App no 39652/98 (ECtHR, Grand Chamber, 5 October 2000)455 [37].

31. *Üner v Netherlands* (n 5).

32. *ibid*, 81 (Joint Dissenting Opinion of Judges Costa, Zupančič, and Türmen).

in this context, ‘Facts are vulnerable to contrasting interpretations and different people, including judges, dress them differently’.<sup>33</sup>

As well as the issue of content, the multitude of *Üner* criteria causes problems of weight and priority which the ECtHR does not address directly in the *Üner* judgment, nor its subsequent case law. The joint dissent in *Üner* asks rhetorically:

[...] how do we assign relative weight to the various factors on the basis of some ten guiding principles – are we not seeing here the implicit emergence of a method which gives priority to one criterion, relating to the offence, and treats the others as secondary or marginal?<sup>34</sup>

In the seminal case of *ZH (Tanzania)*,<sup>35</sup> the UK Supreme Court addressed this issue of priority in the Article 8 ECHR balance. Article 3 UNCRC and UK case law<sup>36</sup> requires that the best interests of the child be a *primary* consideration (a formulation absent from the *Üner* criteria). However, the priority afforded to ‘a primary consideration’ within the Article 8 ECHR determination fails to articulate what the relationship is between the best interests of the child and family life, especially that family life that is held by people other than the child. *ZH (Tanzania)* and subsequent case law have suggested that the best interests of the child is simultaneously of inherent weight (a weight that is both separate and primary),<sup>37</sup> but also ‘integral’,<sup>38</sup> to family life. But how can a consideration be determined separately and yet simultaneously be integral? Is the weight of the best interests of the child *added* to the weight of the family life of their adult parent and then balanced against the public interest in immigration control, or are they to be *weighed separately* against the public interest in immigration control and the weightiest of the three prevail? The failure to provide adequate answers to these questions undermines both the ECtHR jurisprudence (*Üner*) and UK case law (*ZH (Tanzania)*).

Leloup<sup>39</sup> argues for ‘procedural rationality’ as a means of correcting the case-by-case inconsistencies in the ECtHR case law:

This sort of review implies that the Court takes the quality of the decision-making process at the legislative, the administrative and the judicial stage as decisive factors for assessing whether government interference in human rights was proportional.<sup>40</sup>

Procedural rationality addresses the best interests of the child as an interpretive and procedural rule. General Comment 14 of the UN Committee on the Rights of the Child endorses both aspects of the best interests of the child. As an interpretive legal principle, when ‘a legal provision is open to more than one interpretation, the interpretation which most effectively serves the child’s best interests should be chosen’.<sup>41</sup> As a procedural rule, ‘the justification of a decision must show that

33. Marie-Bénédicte Dembour, ‘Human Rights Law and National Sovereignty in Collusion: The Plight of Quasi-Nationals at Strasbourg’ (2003) 21 *Netherlands Quarterly of Human Rights* 63, 82.

34. *Üner v Netherlands* (n 3), 82 (Joint Dissenting Opinion of Judges Costa, Zupančič, and Türmen).

35. *ZH (Tanzania)* (n 14).

36. *ibid* [33]

37. *ibid* [26]

38. *Zoumbas* (n 16) [10]

39. Leloup (n 8).

40. *ibid* 63.

41. Committee on the Rights of the Child (n 2).



the right has been explicitly taken into account'.<sup>42</sup> Procedural rationality requires the ECtHR to assess State's expulsion decisions on these dimensions. However, procedural rationality does not address the best interest of the child as a substantive right: the first aspect of the best interests of the child which creates 'an intrinsic obligation for States, is directly applicable (self-executing) and can be invoked before a court'.<sup>43</sup>

The Netherlands' Ombudsman for Children recommendeds that children should have an 'independent position' in immigration decisions, as 'Children have the right that their interests are assessed systematically and substantively on their own merits'.<sup>44</sup> However, it is unclear as to whether what is being recommended here is the best interests of the child be considered to be an independent, substantive human right as suggested by this article, or merely an independently assessed criterion within the overall decision taken about the family as a unit. The latter seems more likely, as the Ombudsman's report only appears to critique the absence of the best interests of the child as a constituent 'criterion' within the wider decision about the family unit:

[Children] only have a secondary importance, which means that they only get a residence permit if the parents get it. The interests of the child are not tested independently from the parents and do not constitute an independent criterion.<sup>45</sup>

However, to treat the best interests of the child as an independent criterion does not, by itself, resolve the issues of priority or weight identified as apparent whenever the best interests of the child is to be considered integral to the Article 8 ECHR balancing exercise. Something more substantial is required.

It can be argued that the ECtHR cannot treat the best interests of the child as a substantive right because there is no textual authority in the ECHR. This is a forceful point. However, this article is not addressed to the ECtHR directly. Instead, it is domestic legal systems which must give full effect to Article 3 UNCRC as a substantive right.

### 3. THE BEST INTERESTS OF THE CHILD AS A HUMAN RIGHT

This section outlines how the best interests of the child might work in practice as the central, substantive human right at stake in domestic immigration decisions about the expulsion of a foreign national. It is a thought experiment intended to demonstrate that it is rationally possible to treat the best interests of the child as the substantive human right at stake.

As a thought experiment, it has two limitations. The first is that it is grounded on UK domestic law. Section 2.1. above, outlines how both Article 8 ECHR and Article 3 UNCRC are incorporated into UK immigration law. This legislative framework has led to a large number of case law decisions which are instrumental in the UK's common law system. However, this analysis uses UK common law only to demonstrate a legal problem already encountered, to suggest possible answers to problems which arise, or to give examples of the sort of expulsion decisions which arise

42. Committee on the Rights of the Child (n 2).

43. *ibid.*

44. Netherlands' Ombudsman for Children, 'Waiting For Your Future: Advisory Report on the Position Of and Eligibility Criteria for Foreign Children' (8 March 2012) 37 <[www.dekinderombudsman.nl/system/files/inline/2012Advisoryreportonthepositionofforeignchildrenandtheadmissioncriteria.pdf](http://www.dekinderombudsman.nl/system/files/inline/2012Advisoryreportonthepositionofforeignchildrenandtheadmissioncriteria.pdf)> accessed 20 April 2020.

45. *ibid.* 18.

in domestic immigration proceedings, and so this articles' broader relevance beyond the UK is maintained. The second limitation is that of the comprehensiveness of the experiment. Different formulations of each step of human rights methodology exist – and form pre-existing norms in different legal systems – and it is not possible to canvass each of them. This article limits itself to the claim that treating the best interests of the child as a substantive human right in expulsion decisions is rationally possible, not that the means by which it suggests it is the only means, nor even necessarily the best way, of achieving it.

Regardless of its limitations, there are two good reasons for engaging in this thought experiment. The first is that General Comment 14 of the Committee on the Rights of the Child takes the view that the best interests of the child is in fact, '[a] substantive right [ . . . ] Article 3, paragraph 1, creates an intrinsic obligation for States, is directly applicable (self-executing) and can be invoked before a court'.<sup>46</sup> Taking this aspect of the General Comment seriously requires us to engage with its *prime facie* claims. Secondly, setting out how the best interests of the child might operate as a human right overcomes objections rooted in the claim that the best interests of the child is unsuited to application as a human right. Establishing that it is possible to treat the best interests of the child as a substantive human right permits us to move on to the question as to how best to do so.

This section proceeds on the basis that a human rights methodology requires five questions:<sup>47</sup>

1. Are the best interests of the child engaged?
2. Would the interference with the best interests of the child by the immigration decision secure a legitimate aim?
3. Would the interference with the best interests of the child *rationally* contribute to securing the legitimate aim?
4. Is the interference with the best interests of the child *necessary* to secure the legitimate aim?
5. Is the interference with the best interests of the child *strictly proportionate* to the pursuance of the legitimate aim?

The basis of each question is described below with an outline as to how each question would apply to the best interests of the child as the substantive human right in expulsion decisions.

46. Committee on the Rights of the Child (n 2) 2.

47. See, for example in the academic literature: Robert Alexy, 'Constitutional Rights, Balancing, and Rationality' (2003) 16 *Ratio Juris* 131: 'The principle of proportionality consists of three sub-principles: the principles of suitability, of necessity, and of proportionality in the narrow sense'. And in UK common law: *Quila & Anor, R (on the application of) v Secretary of State for the Home Department* [2011] UKSC 45, [45]:

- a. is the legislative objective sufficiently important to justify limiting a fundamental right?
- b. are the measures which have been designed to meet it rationally connected to it?
- c. are they no more than are necessary to accomplish it?
- d. do they strike a fair balance between the rights of the individual and the interests of the community?

*Bank Mellat v Her Majesty's Treasury (No. 2)* [2013] UKSC 39, [20]:

'the question depends on an exacting analysis of the factual case advanced in defence of the measure, in order to determine (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community. These four requirements are logically separate.'

### 3.1. ARE THE BEST INTERESTS OF THE CHILD ENGAGED?

The first relevant question is to establish that the best interests of the child are engaged by an expulsion decision. Children are affected by an expulsion decision when it is taken against them personally, but they may also be affected in circumstances where their parent(s) face expulsion. There appears little reason to depart from the ECtHR practice of assuming that family life exists between biological parents and children, and conducting a short enquiry as to whether there are sufficient *de facto* ties – emotional, financial, residential etc – to amount to family life in step- and social-parental relationships.<sup>48</sup> However, the necessity of ties between parent and child in order to engage the child's human right to their best interests suggests that children would not always have a best interests right which is engaged. The immigration removal of a parent is unlikely to impact on the best interests of a child where there is an absence of ties, for example, where contact between the parent and child is prohibited with no prospect of being permitted in the future.<sup>49</sup>

Once the best interests of the child is engaged, it is necessary to consider what is in the best interests of the child. It should not be assumed that it is in the best interests of all children to remain in the deporting country. The child may be a recent arrival with limited ties to the deporting state, but with *de jure* and *de facto* ties to the receiving state. The challenge is to determine what is in fact in the child's best interests. In section 2.2., above, it is argued that the best interests of the child is a much broader concept than the Article 8 ECHR right to private and family life, as interpreted by the ECtHR. Although the ECtHR's principles include concern for the best interests of the child, the ECtHR's jurisprudence falls short of the holistic assessment of the child's interests envisaged by the Committee on the Rights of the Child.

There are examples of best interests checklists in UK family law (s1(3) Children Act 1989), the Committee on the Rights of the Child General Comment 14 on the right of the child to have his or her best interests taken as a primary consideration,<sup>50</sup> and in the BIC-Model, created by academic Margrite Kalverboer and colleagues.<sup>51</sup> The Committee on the Rights of the Child also argues that the best interests of the child is context specific and a 'dynamic'<sup>52</sup> principle and there may be need to create a new, context specific checklist.

What is most significant for this though experiment, however, is not how the best interests of the child ought to be determined, for that is a separate academic question. Of most significance is that on this account the best interests of the child operates independently of any Article 8 ECHR determination, rather than be accommodated within Article 8 ECHR to create a single decision-making process. However, putting the best interests of the child at the centre does not extinguish the Article 8 ECHR family life claims of any other person: human rights is not a zero-sum game. Instead, the right to family life must also be determined, but as a separate and independent human right. After determining whether or not expulsion is a disproportionate interference with the best interests of the child, the decision-maker would then turn to whether or not deportation is a

48. Sarah van Walsum, 'Comment on the Sen Case. How Wide Is the Margin of Appreciation Regarding the Admission of Children for Purposes of Family Reunion' (2003) 4 European Journal of Migration and Law 511, 511; Daniel Thym, 'Respect for Private and Family Life Under Article 8 ECHR in Immigration Cases: A Human Right to Regularize Illegal Stay?' (2008) 57 International and Comparative Law Quarterly 87, 89-90.

49. In the UK, contact can be prohibited by the Family Court; Family Law, 'Practice Direction 12 J - Child Arrangements and Contact Order: Domestic Violence and Harm' (2017) Fam Law 1230.

50. Committee on the Rights of the Child (n 2).

51. Kalverboer et al (n 24) 135-137.

52. Committee on the Rights of the Child (n 2).

disproportionate interference with the right to family life, particularly with the family life right of the child's parents. Considering Article 3 UNCRC and Article 8 ECHR as independent human rights sequentially may result in one of the following outcomes:

1. Violation of Article 3 UNCRC and Article 8 ECHR
2. Violation of Article 3 UNCRC, but not Article 8 ECHR
3. No violation of Article 3 UNCRC, but a violation of Article 8 ECHR
4. No violation of either Article 3 UNCRC or Article 8 ECHR

Outcomes 1, 2, and 3 would result in removal being prohibited on human rights grounds because it would result in a human rights breach of an individual and therefore should not take place. Any examples of each possible outcome based on fact patterns in existing case law must be necessarily imprecise and speculative, but there are some useful parallels.

Outcome 1 arises in situations where the expulsion of a foreign national violates the rights of everyone involved. For example, in *Omojudi*,<sup>53</sup> the expulsion of the applicant also violated the family life rights of those with whom he was connected to. He had a wife and he assisted with the care of their British citizen children (some were minors, some were young adults still living at home). He also had family life with British citizen grandchildren who lived with the applicant in a multi-generational household. Expulsion of the applicant would not just negatively impact on his family life, but his removal from this complex web would impact directly on the family life of his family members who relied on his emotional and financial support.<sup>54</sup>

Outcome 2 would arise in fact patterns similar to that of *Udeh*<sup>55</sup> or *Onur*<sup>56</sup> where the father (who was to be deported), had a parental relationship with their child (who was a national of the deporting state), but did not have a relationship with the child's mother. Although the fact pattern of these cases was very similar, an Article 8 ECHR breach was found in *Udeh* but not in *Onur*, emphasising the case-by-case lottery that exists in this area.

Outcome 3 could occur, for example, in situations where the foreign national has minimal contact with a non-resident child from a past relationship, but has a strong family life relationship with a current spouse. In such circumstances the Article 8 ECHR family life with the spouse may prevail over the public interest in expulsion, even when the best interests of the child may be outweighed. Alternatively, as in *AW Khan*, the applicant had very limited contact with a recently born British citizen child,<sup>57</sup> so the best interests of the child under Article 3 UNCRC is unlikely to demand the applicant's expulsion be halted. In contrast, the applicant's Article 8 ECHR private life was found to be violated due to the 'strength of ties with the UK', lack of ties with Pakistan, the length of his residence in the UK, and the young age at which he entered the UK.<sup>58</sup> In outcome 4, either the rights are not engaged at all, or the public interest in expulsion outweighs the rights (or either in combination).

The application of multiple human rights to the same factual situation, and their sequential consideration as equally important but separate human rights, is an everyday aspect of human

53. *Omojudi v The United Kingdom* App no 1820/08 (ECtHR, 24 November 2009).

54. *ibid* [22-23]

55. *Udeh v Switzerland* App no 12020/09 (ECtHR, 16 April 2013).

56. *Onur v The United Kingdom* App no 27319/07 (ECtHR, 17 February 2009).

57. *AW Khan v The United Kingdom* App no 47486/06 (ECtHR, 12 January 2010) [15 & 44]

58. *ibid* [43]

rights adjudication. Two further expulsion cases emphasise this point. In *Paposhvili*, the applicant was a Georgian national resident in Belgium and who had been convicted of a number of criminal offences. He argued before the ECtHR that his deportation to Georgia would be a violation of Article 3 ECHR because of the lack of appropriate treatment there for his leukaemia and, consequently, his life expectancy would be considerably reduced by his deportation.<sup>59</sup> Furthermore, he argued that his deportation would be a breach of his Article 8 ECHR family life rights as it would entail his separation from his family who had Belgian residency papers.<sup>60</sup> In the second case, of *Mubilanzila Mayeka & Kaniki Mitunga*, a child (Mitunga) arrived in Belgium where she was sent to stay with an uncle and grandmother after her mother (Mayeka) had obtained refugee status in Canada.<sup>61</sup> Not realising that Mitunga had not automatically also been given refugee status by the Canadian authorities,<sup>62</sup> Mitunga arrived in Belgium without the necessary immigration documentation.<sup>63</sup> The Belgian authorities removed Mitunga unaccompanied to the DRC, her country of nationality, where there was no reception arrangements in place to ensure her safe arrival and future care.<sup>64</sup>

In both cases, a violation of Article 3 ECHR and Article 8 ECHR was found by the ECtHR. The findings were not of a violation of Article 3 in conjunction with Article 8, but of two separate human rights arising from the single action by the State. Successfully showing a violation of either right would have been sufficient to prevent the expulsion.<sup>65</sup> In neither case was there any question that a finding of non-violation of either right could possibly result in the removal being found to be permitted. Once an action of the State is shown to be a violation of any human right then the action is unlawful, no matter how many human rights are engaged and how many are actually found to be violated.

The first stage of any human rights enquiry is whether or not the human right is actually engaged. The expulsion of a parent or a child will not always interfere with the best interests of the child; sometimes the expulsion of a parent will have no effect on their child if family ties have been effectively severed, and sometimes it will not be in the best interests of the child to remain in the deporting State. In any event, the significant aspect of treating the best interests of the child as a human right is that the decision-maker must engage with an assessment of the child's whole life interests, rather than just with those interests covered under the rights to family and private life. The further doctrinal significance is that it resolves the proper relationship between the best interests of the child as an independent factor, the child's Article 8 ECHR family life, and the Article 8 ECHR rights of their parents.

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59. *Paposhvili v Belgium* App no 41738/10 (ECtHR (GC), 13 December 2016) [195]

60. *ibid* [208]

61. *Mubilanzila Mayeka & Kaniki Mitunga v Belgium* App no 13178/03 (ECtHR, 12 January 2007) [10]

62. *ibid* [14]

63. *ibid* [11]

64. *ibid* [31]

65. In *Mubilanzila Mayeka & Kaniki Mitunga* the ECtHR application was brought after deportation had taken place ((n 61) [31]). In *Paposhvili* the applicant died before his deportation could be carried out and the case was pursued by his relatives (n 59) [1])

### 3.2. WOULD THE INTERFERENCE WITH THE BEST INTERESTS OF THE CHILD BY THE IMMIGRATION DECISION SECURE A LEGITIMATE AIM?

The most difficult aspect of the best interests of the child as a substantive human right is that there is not a set of legitimate aims inscribed in the text. This is in contrast to those rights in the ECHR which are recognised to be ‘qualified’ (Articles 8-11 ECHR), and similarly framed UNCRC rights (Articles 13-15 UNCRC). These limitation clauses permit qualified rights to be balanced against interests held by the community as a whole, such as: public safety, order, health, or morals. However, the absence of an express limitation clause does not mean that the best interests of the child is an absolute human right. Article 3 UNCRC envisages the best interests of the child being a ‘primary consideration’, which implies that other considerations are relevant in decisions regarding a child. The question is therefore what those other considerations might be. There are two possible answers. The first is that only the rights and freedoms of others are permitted to be balanced against the best interests of the child. The second is to imply community interests as legitimate aims might be balanced against the best interests of the child.

That the best interests of the child as a substantive human right may only be limited by the human rights of others is textually supported by Article 3 UNCRC itself. Article 3 UNCRC has no limitation clause attached, and the existence of limitation clauses to Articles 13-15 UNCRC suggests that there is a substantive doctrinal difference between them. However, if the best interests of the child are not to be an absolute right, then there must be something which might be balanced against them. The only thing of equal status to a human right is another human right. This logic can be observed in UNICEF’s *Implementation Handbook* which recognises only ‘human rights interests’<sup>66</sup> which might compete or conflict with the primacy of the best interests of the child. It can also be observed in the Committee on the Rights of the Child guidance that unaccompanied asylum seeking children may be returned to their country of nationality even when it is not in their best interest to do so, but only so long as such a decision is taken:

[...] after careful balancing of the child’s best interests and other considerations, *if the latter are rights-based* and override best interests of the child. Such may be the case in situations in which the child constitutes a serious risk to the security of the State or to the society. Non-rights-based arguments such as those relating to general migration control, cannot override best interests considerations.<sup>67</sup>

This argument was dismissed by the UK Supreme Court in *ZH (Tanzania)*:

[...] it is difficult to understand this distinction in the context of article 8(2) of the ECHR. Each of the legitimate aims listed there may involve individual as well as community interests. If the prevention of disorder or crime is seen as protecting the rights of other individuals, as it appears that the UNCRC would do, it is not easy to see why the protection of the economic well-being of the country is not also protecting the rights of other individuals.<sup>68</sup>

66. UNICEF, ‘Implementation Handbook for the Convention on the Rights of the Child’ (3rd Edition, 2007) 38 <[www.unicef.org/publications/files/Implementation\\_Handbook\\_for\\_the\\_Convention\\_on\\_the\\_Rights\\_of\\_the\\_Child\\_Part\\_1\\_of\\_3.pdf](http://www.unicef.org/publications/files/Implementation_Handbook_for_the_Convention_on_the_Rights_of_the_Child_Part_1_of_3.pdf)> accessed 20 April 2020.

67. Committee on the Rights of the Child, ‘General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside Their Country of Origin’ UN Doc CRC/GC/2005/61 (September 2005) [86] (emphasis added).

68. *ZH (Tanzania)* (n 14) [28]

The first response to this is that the best interests of the child as a human right – which was not the legal framework in question in *ZH (Tanzania)* – may have a different form to that of Article 8 ECHR. The base assumption of this article is that Article 3 UNCRC can have an independent existence beyond the application of Article 8 ECHR, and therefore is not bound by the structure or wording of Article 8. The second response is that permitting only rights-based considerations to potentially outweigh the best interests of the child does not mean that all arguments based on crime and disorder are rights-based, and that there is no practical distinction. Contra the implication of *ZH (Tanzania)*, there is not a general human right to live in a society free from crime, and not all crimes directly interfere with the human rights of individuals. This is not an exercise in identifying victimless crimes, only a recognition that not all acts which are criminal interfere with the human rights of others, and not all interferences with human rights are crimes. Therefore, the best interests of the child cannot be balanced against the risk of crime and disorder if the crime in question cannot be shown to directly affect the human rights of others. For example, in the case of immigration offences such as entry by deception or overstaying a visa,<sup>69</sup> there is no human right that a victim could point to as being interfered with by someone else's offending. Consequently, the best interests of the child could not lawfully be interfered with in order to deport a foreign national offender because of their risk of committing such an offence.

If only the human rights of others may be balanced against the best interests of the child in expulsion decisions, then the assessment must be a forward-looking, future oriented one. Deportation cannot protect against a human rights interference by a foreign national offender which occurred in the past, because it has already happened. Expulsion can, however, contribute to the prevention of a human rights breach in the future. There must therefore be a risk of such an occurrence for there to be a legitimate rights-based justification for interfering with the best interests of the child. Deportation of non-EEA national offenders from the UK is currently justified on the basis of 'avoiding the risk of reoffending, deterrence and public revulsion'.<sup>70</sup> However, deterrence and public revulsion are not forward looking factors as they are based solely on the fact that offending has occurred in the past, and apply regardless of whether or not the foreign national offender presents a risk of interfering with the human rights of another person in the future.

For expulsion cases based on the deportation of a foreign national offender for criminal offences committed in the UK, treating the best interests of the child as a human right in this way would not be as radically different from the current norm as might be expected. General deterrence and public revulsion cannot be used to justify the deportation of an EEA-national offender from the UK. Instead, the decision to deport an EEA-national:

[...] must be based exclusively on the personal conduct of the person concerned and that matters that do not directly relate to the particular case or which relate to considerations of general prevention do not justify a decision to remove him. On the face of it, therefore, deterrence, in the sense of measures designed to deter others from committing similar offences, has of itself no part to play in a decision to remove the individual offender. Similarly, it is difficult to see how a desire to reflect public revulsion at the particular offence can properly have any part to play.<sup>71</sup>

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69. Immigration offences in UK law under Immigration Act 1971, s 24.

70. *DW (Jamaica) v Secretary of State for the Home Department* [2018] EWCA Civ 797, [23]

71. *Secretary of State for the Home Department v Straszewski* [2015] EWCA Civ 1245, [14]

Applying an identical requirement to the best interests of the child as a human right is therefore not a radical development in the UK's deportation law, but rather an extension of part of the law that already applies to EEA-nationals (a position developed 'against the background of the right of free movement enshrined in the Treaties establishing the European Union').<sup>72</sup>

The biggest impact would be on the expulsion of a foreign national for administrative breaches of immigration regulations. Rather than expulsion for reasons of criminal offending, the reasons for immigration removal from the UK are said to be because an individual does not possess leave to enter or remain.<sup>73</sup> This does not appear to be human rights-based considerations because a failure to have an administrative immigration status does not obviously interfere with a human right possessed by another individual or group. However, the general grounds for refusal of immigration leave do permit the refusal of immigration leave because of:

[...] the undesirability of permitting the person concerned to remain in the United Kingdom in the light of his conduct [...], character or associations or the fact that he represents a threat to national security.<sup>74</sup>

This provision includes circumstances which do clearly engage human rights considerations. The case of *Farquharson* presents a compelling example. In this case, removal was premised on the basis that, although not convicted of a criminal offence, 'the appellant represents a source of future danger to vulnerable women'.<sup>75</sup> The immigration removal of *Farquharson* was clearly for reasons of protecting the human rights of others. However, this was an extreme and unusual case. Limiting what might be balanced against the best interests of the child to the human rights claims of others significantly restricts the State's ability to enforce immigration law governing the entry and stay of foreign nationals. This is unlikely to be politically viable.

The second possible approach would be to imply public interest, legitimate aims against which the best interests of the child could be balanced. However, the existence of textually limited legitimate aims is important. In the ECHR context (and there is no reason to believe that it should not also apply to qualified rights in the UNCRC), the legitimate aims are generally co-identified with the public interest,<sup>76</sup> but they are also exhaustive of which kinds of community interests might lawfully be balanced against the human right at stake.<sup>77</sup> This means that policies which may be considered by a government or the electorate to be in the public interest but are not encompassed within the express legitimate aims, would always be a violation of the right. Such would be the case, for example, if immigration policy was explicitly justified on the basis of maintaining an ethnically homogenous society. Permitting *any* public interest to be considered by the decision-maker is an instinct in some of the literature on human rights proportionality, but is forcefully challenged elsewhere:

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72. *ibid* [9]

73. Immigration Act 2014, s 1.

74. The Immigration Rules, Paragraph 322(5).

75. *Farquharson (removal – proof of conduct)* [2013] UKUT 00146 (IAC), [21]

76. For example, see Aileen McHarg, 'Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights' (1999) 62 *Modern Law Review* 671, 672-3. See also: Steven Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (Cambridge University Press 2006) 203.

77. *Shazad (Art 8: legitimate aim) Pakistan* [2014] UKUT 85 (IAC).



The decision to include all interests makes no room for the assertion that some interests are ill-founded or worthless or vicious or inhuman or irrelevant. It does not allow one to deny that every interest counts, every claim should be valued, every argument weighed; it makes no room for the assertion “your interest does not count,” “your claim is valueless,” “your argument is weightless”.<sup>78</sup>

If it is likely politically unviable to only balance human rights concerns against the best interests of the child, then it is likely that States would legislate for legitimate aims. For example, the UK’s Nationality, Immigration and Asylum Act 2002 refers to ‘the interests of the economic well-being of the United Kingdom’.<sup>79</sup> However, in devising permitted legitimate aims, States must be made to account for how its immigration policies pursue public policy goals. The ECtHR has been critiqued because ‘The defendant state does not have to explain in detail how it understands its duty to act in its country’s best interests as regard its policy and practice on the admission/rejection of aliens’.<sup>80</sup> To state (as UK statute does) that ‘The maintenance of effective immigration controls is in the public interest’<sup>81</sup> is insufficient. What makes immigration control ‘effective’? What public interests are being furthered by effective immigration control? What evidence is there that the public interests are furthered in the manner asserted?

To pursue immigration control for the sake of immigration control is not a legitimate aim. In *Chickwamba*, the House of Lords found that there must be rational reasons for enforcing a requirement that a person should apply for immigration leave from abroad, when they are already (lawfully or unlawfully) in the UK. Immigration control for the sake of immigration control was not an adequately rational reason.<sup>82</sup> Immigration control policies are based on a mixture of economic interests (for example, work and tourism visas), cultural interests (for example, spousal visas), and humanitarian interests (for example, refugee laws). Where the best interests of the child is considered to be a human right, the State must adequately account for how its immigration control policies pursues the public interest: including the idea that protecting the wellbeing and development of children is in itself a public interest good.

### 3.3. THE TESTS OF RATIONALITY AND NECESSITY

Requiring the State to account for how its immigration control policies pursues the public interest is an important precursor to the tests in human rights methodology of *rationality* and *necessity*. The test of rationality, ‘requires that the limitation contribute to the achievement of a legitimate end’.<sup>83</sup> The test of necessity requires<sup>84</sup> that the action be the ‘least restrictive means to further that end’.<sup>85</sup> Treating the best interests of the child as a human right demands that decision-makers must

78. Grégoire Webber, ‘Proportionality, Balancing, and the Cult of Constitutional Rights Scholarship’ (2010) 23 Canadian Journal of Law and Jurisprudence 179, 192.

79. Nationality, Immigration and Asylum Act 2002, s 117B(2).

80. Marie-Bénédicte Dembour, *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint* (OUP 2015) 106.

81. Nationality, Immigration and Asylum Act 2002, s 117B(1).

82. *Chikwamba v Secretary of State for the Home Department* [2008] UKHL 40, [40-44]

83. Carlos Bernal Pulido, ‘The Migration of Proportionality Across Europe’ (2013) 11 New Zealand Journal of Public International Law 483, 484; Moshe Cohen-Eliya and Iddo Porat, ‘Proportionality and the Culture of Justification’ (2011) 59 American Journal of Comparative Law 463, 464.

84. Although other formulations of the necessity test can be applied: see section 4, below, on limitations.

85. Pulido (n 83) 484; Cohen-Eliya and Porat (n 83) 464.

interrogate whether the legitimate aim (be it based on human rights or on some public interest) *rationaly* applies in the individual case, and whether removal or deportation is *necessary*. This is in part why treating the best interests of the child as the substantive human right at stake is important.

The *rationality* of an immigration decision must be considered. An obviously irrational immigration decision is one which cannot lead to the enforced immigration removal or deportation because the person is *de jure* or *de facto* stateless.<sup>86</sup> Irrationality might arise in individual decisions where the decision-making process is irrational.<sup>87</sup> Other cases of irrationality will arise where the rationale for immigration policies are undercut. For example, the UK's Home Office used powers to deny continued immigration leave to individuals who made dishonest tax returns, but in cases of innocent mistake and where amendment was permitted by accountancy law.<sup>88</sup> Such cases were not *rational* in human rights terms because they did not rationally contribute to the legitimate aim of preventing fraudulent visa applications.

The question of *necessity* seeks the 'least restrictive means'<sup>89</sup> of securing the legitimate aim and thus requires the State to show that there was not a less invasive action that would have achieved the same goals, but without interfering with individual human rights to the same extent. With respect to the deportation of foreign national offenders, the test of *necessity* requires careful consideration of various post-sentence devices to prevent reoffending. If any of these other measures are likely to be effective in preventing crime and disorder by a foreign national offender – a legitimate public interest goal – then deportation is not *necessary* and therefore constitutes a violation of the child's best interests as a human right.

Post-sentence measures take a variety of forms in different countries. In the UK, the law does not require the permanent incapacitation of UK national offenders beyond the length of their prison sentence. Indeed, the indeterminate prison sentence was abolished in 2012.<sup>90</sup> Instead, some level of risk of reoffending is accepted as a consequence of an offender being released back into the community. That risk is managed by post-sentence measures. For those sentenced to less than two years imprisonment a mandatory period of post-sentence supervision now applies<sup>91</sup> so that all offenders must spend twelve months under the care of the probation service, either on licence or under supervision.<sup>92</sup> The stated rationale for post-sentence supervision is the effective

86. Alison Harvey, 'Statelessness: the "de facto" statelessness debate' (2010) 24 *Journal of Immigration, Asylum and Nationality Law* 257.

87. As was found repeatedly to be the case in the UK's *Windrush* scandal; Wendy Williams, 'Windrush Lessons Learned Review' (HM Government, March 2020) 13 <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/876336/6.5577\\_HO\\_Windrush\\_Lessons\\_Learned\\_Review\\_LoResFinal.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/876336/6.5577_HO_Windrush_Lessons_Learned_Review_LoResFinal.pdf)> accessed 15 June 2020.

88. *Balajigari v Secretary of State for the Home Department* [2019] EWCA Civ 673.

89. Eva Brems and Laurens Lavrysen, "'Don't Use a Sledgehammer to Crack a Nut': Less Restrictive Means in the Case Law of the European Court of Human Rights' (2015) 15 *Human Rights Law Review* 1, 1.

90. The Howard League for Penal Reform, 'The Never-Ending Story: Indeterminate Sentencing and the Prison Regime' (2013) 1 <<https://howardleague.org/wp-content/uploads/2016/05/never-ending-story-IPP.pdf>> accessed 5 July 2018.

91. Criminal Justice Act 2003, s 256AA. See also: Nicola Padfield, 'The Magnitude of the Offender Rehabilitation and "Through the Gate" Resettlement Revolution' [2016] *Criminal Law Review* 99, 103.

92. National Offender Management Service, 'Post-Sentence Supervision Requirements' (1 May 2014) 2 <[www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=11&cad=rja&uact=8&ved=0ahUKewj-4cWGuYjcAhVE0RQKHQLgCWcQFghXMAo&url=https%3A%2F%2Fwww.justice.gov.uk%2Fdownloads%2Foffenders%2Fprobation-instructions%2Fpi-29-2014-post-sentence-supervision.doc&usg=AOvVaw0ad\\_BvY\\_c6Rwog7y0ZkOpv](http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=11&cad=rja&uact=8&ved=0ahUKewj-4cWGuYjcAhVE0RQKHQLgCWcQFghXMAo&url=https%3A%2F%2Fwww.justice.gov.uk%2Fdownloads%2Foffenders%2Fprobation-instructions%2Fpi-29-2014-post-sentence-supervision.doc&usg=AOvVaw0ad_BvY_c6Rwog7y0ZkOpv)> accessed 5 July 2018.

rehabilitation of offenders.<sup>93</sup> Other post-conviction measures in use in the UK include Sexual Harm Prevention Orders<sup>94</sup> which apply to sex offenders and those deemed to be future potential sex offenders.<sup>95</sup> Criminal Behaviour Orders<sup>96</sup> may be imposed after conviction of an offence if ‘the offender has engaged in behaviour that caused or was likely to cause harassment, alarm or distress to any person’.<sup>97</sup> Mere suspicion of terrorism can result in the imposition of a Terrorism Prevention and Investigation Measures.<sup>98</sup> In the case of domestic violence, Non-Molestation Orders have been around in one form or another since 1976.<sup>99</sup>

A separate investigation is required to provide empirical or theoretical justification of any particular measure(s). Here it is sufficient to observe that there is a range of post-sentence measures which are currently in widespread use in order to prevent reoffending, and thereby are a potentially less restrictive means of pursuing the public interest in preventing crime and disorder. There is also no reason to believe that such measures are effective for a State’s citizen offenders, but ineffective when applied to foreign national offenders.

Applying the tests of *necessity* and *rationality* to the best interests of the child as a human right is important in order to address what Dembour critiqued as the problematic logical inversion in the ECtHR’s jurisprudence which put the State’s interest in immigration control at the centre of the human rights enquiry.<sup>100</sup> When the best interests of the child is required to dislodge the presumption in favour of State sovereignty, then the tests of *necessity* and *rationality* are clearly met; cancelling immigration removal of a parent is axiomatically a rational and necessary response to protecting the best interests of the child, and the question is reduced to one of balancing the interests of child and State. In contrast, when the State’s interest must dislodge a presumption in favour of the human right, the tests of *necessity* and *rationality* present more serious hurdles which the State must overcome in order to justify its interference with the best interests of the child. Importantly, the tests of *rationality* and *necessity* might find the State in violation of the best interests of the child before the balancing stage of human rights review.

### 3.4. IS THE INTERFERENCE WITH THE BEST INTERESTS OF THE CHILD STRICTLY PROPORTIONATE TO THE PURSUANCE OF THE LEGITIMATE AIM?

The final test in human rights methodology is that of balancing. State actions might be rational and the least restrictive means, but there must still be a strict proportionality between the importance of what is being sought to be achieved and the human rights interference. How decision-makers might come to a decision as to the balance between a human right and an interference is by no means settled in the academic literature or judicial decisions.<sup>101</sup> After all, the idea of the merchant’s

93. *ibid.*

94. Sexual Offences Act 2003, s 103A–s 103 K.

95. Terry Thomas and David Thompson, ‘New Civil Orders to Contain Sexual Offending — A Matter of “Purposive Logic”?’ (2013) 177 *Criminal Law & Justice Weekly* 703.

96. Anti-social Behaviour, Crime and Policing Act 2014, Part 2.

97. Phil Edwards, ‘New ASBOs for Old?’ (2015) 79 *Journal of Criminal Law* 257, 266; Gov.uk, ‘Punishments for Antisocial Behaviour’ <[www.gov.uk/civil-injunctions-criminal-behaviour-orders](http://www.gov.uk/civil-injunctions-criminal-behaviour-orders)> accessed 5 July 2018.

98. Terrorism Prevention and Investigation Measures Act 2011.

99. David Burrows, ‘Protection From Molestation: Orders and Legal Aid’ (2018) *Family Law Journal* 429.

100. Dembour (n 80) 4.

101. Aharon Barak, ‘Proportionality and Principled Balancing’ (2010) 4 *Law & Ethics of Human Rights* 2.

balance is only a metaphor,<sup>102</sup> one that is capable of accommodating multiple formal decision-making processes.

It is in the balancing stage that the idea of the best interests of the child as a ‘primary consideration’ – as textually required by Article 3 UNCRC – makes most sense. For this we can turn to Alexy’s breakdown of the different elements which go into the balancing exercise. Regardless of the advantages and disadvantages which might be attributed to Alexy’s system, rationalising the different elements permits us to consider independently the different factors that impact on a balancing decision.<sup>103</sup> Alexy suggests that there are three core ingredients in the balancing of constitutional or human rights: (1) the intensity of the interference with the right and the importance of satisfying the public interest in the individual case, (2) the ‘reliability of the empirical assumptions’ applied in the case, and (3) the abstract weight of the principles or rights at stake.<sup>104</sup> The primacy of the best interests of the child is relevant to the abstract weight.

The abstract weight is the weight a human right has, independent of the individual case.<sup>105</sup> This means that one type of human right may have a greater abstract weight than others.<sup>106</sup> For example, with respect to freedom of expression under Article 10 ECHR, the ECtHR frequently grants a greater intrinsic weight to certain forms of expression (for instance, political opinion or reportage) than to others (for example, entertainment or art),<sup>107</sup> and a greater intrinsic weight to expressions which contain criticism of government than of private individuals.<sup>108</sup> This does not mean that political expressions that critique the government are inviolable – the intensity of the interference might be light and the importance of satisfying the public interest great – but the granting of greater abstract weight means that the competing public interest must be even stronger in the specific case in order to displace the right.

If the best interests of the child are to be treated as being ‘primary’, the decision-maker must not ‘treat any other consideration as inherently more significant than the best interests of the children’.<sup>109</sup> If the best interests of the child are a primary rather than paramount consideration it makes sense for it to carry more, or as much, abstract weight into the balancing exercise as the public interest in expulsion (whatever that public interest might be). The intensity of the interference with the best interests of the child varies in individual cases depending on the age of the child, their length of residency, nationality (and so on), but the abstract weight of the best interests of the child remains the same as between cases. To give the best interests of the child less abstract weight than any other human right consideration or public interest will mean that it no longer has primary status.

As to determining the intensity of interference with the best interests of the child, this article has previously noted that different checklists of factors already exist to help decision-makers: for

102. Iddo Porat, ‘The Dual Model of Balancing: A Model for the Proper Scope of Balancing in Constitutional Law’ (2006) 27 *Cardozo Law Review* 1393, 1398.

103. Matthias Jestaedt, ‘The Doctrine of Balancing - Its Strengths and Weaknesses’ in Matthias Klatt (ed), *Institutionalized Reason: The Jurisprudence of Robert Alexy* (Oxford University Press 2012) 157.

104. Robert Alexy, ‘The Construction of Constitutional Rights’ (2010) 4 *Law & Ethics of Human Rights* 20, 30.

105. Robert Alexy, ‘On Balancing and Subsumption. A Structural Comparison’ (2003) 16 *Ratio Juris* 433, 440.

106. *ibid.*

107. *Von Hannover v. Germany (no. 2)* App no 40660/08 and 60641/08 (ECtHR (GC), 7 February 2012) [109]

108. *Castells v Spain* App no 11798/85 (ECtHR, 23 April 1992) [46]

109. *ZH (Tanzania)* (n 14) [26]

example, s1(2) Children Act 1989, General Comment 14,<sup>110</sup> and the BIC-Model.<sup>111</sup> This article is not concerned with defining and defending a particular checklist for determining the best interests of the child because, although it is an important enquiry, it is one which is logically separate from how the best interests of the child ought to be treated within the wider decision-making process in deportation cases.

#### 4. LIMITATIONS

This article is not intended to be a comprehensive defence of the possibility that the best interests of the child could be a standalone human right. The primary purpose is to demonstrate that the best interests of the child can work consistently with human rights methodology. As such, it leaves a number of questions for further debate. Firstly, Kilkelly raises objections to UN Commission's claim that the best interests of the child should be treated as a substantive human right. She argues that 'a plain reading of the text does not support the view that Article 3(1) contains a right'.<sup>112</sup> Even if it did, Kilkelly argues that it is a leftover from a 'paternalistic' age, 'conceived at a time when the child was perceived as more object than subject' and as such is out of place in a human rights treaty.<sup>113</sup>

Second, the best interests of the child seems to itself encompass most of the substantive rights of the UNCRC. In Kalvelboer *et al*, the best interests of the child is said to encompass issues related to the child's nationality (Article 7 UNCRC), family (Article 16 UNCRC), health (Article 24 UNCRC), and education (Article 28 UNCRC).<sup>114</sup> The Netherlands' Ombudsman for Children further identifies the best interests of the child with the right to development (Article 6 UNCRC) and identity (Article 8 UNCRC).<sup>115</sup> The Committee on the Rights of the Child has emphasised the 'interrelationships'<sup>116</sup> between Article 3 UNCRC and other substantive UNCRC rights, and consistency 'with the spirit of the entire Convention'.<sup>117</sup> In this sense, the best interests of the child appears to mean everything, or nothing. Perhaps the best interests of the child is the ultimate expression of the indivisibility of human rights: that the best interests of the child as a substantive human right requires decision-makers to see the child as a whole being with multiple, entwined, and sometimes contradictory, interests. Kilkelly describes this as a 'gateway' function of the principle of the best interests of the child in politically contested areas, such as immigration, where other substantive human rights lack political traction.<sup>118</sup> This begs the question as to why the Article 8 ECHR jurisprudence cannot achieve the same goal? Are the textual, subject matter limitations in Article 8 ECHR sufficient reason to restrict its scope? Here, the answer may have to

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110. Committee on the Rights of the Child (n 2).

111. Kalverboer *et al* (n 24) 135–137.

112. Ursula Kilkelly, 'The Best Interests of the Child: A Gateway to Children's Rights?' in Elaine E Sutherland and Lesley-Anne Barnes Macfarlane (eds), *Implementing Article 3 of the United Nations Convention on the Rights of the Child* (Cambridge University Press 2016) 57.

113. *ibid* 56.

114. Kalverboer *et al* (n 24) 120.

115. Netherlands' Ombudsman for Children, 'Waiting For Your Future: Advisory Report on the Position Of and Eligibility Criteria for Foreign Children' (8 March 2012) 13 <[www.dekinderombudsman.nl/system/files/inline/2012Advisoryreportonthepositionofforeignchildrenandtheadmissioncriteria.pdf](http://www.dekinderombudsman.nl/system/files/inline/2012Advisoryreportonthepositionofforeignchildrenandtheadmissioncriteria.pdf)> accessed 20 April 2020.

116. UNICEF (n 66) 37.

117. *ibid* 38.

118. Kilkelly (n 112) 65–66.

revert to the complaint that the ECtHR's jurisprudence does impose subject matter limitations when considering what is meant by the best interests of the child (section 2.2). As per Smyth, the ECtHR jurisprudence reduces the best interests of the child to questions of adaptability or age, and 'the existence of an effective family bond'.<sup>119</sup> Effectively breaking out of these boundaries is likely to require the centring of a different human right: an option available to domestic legal regimes, if not to the ECtHR.

Third, in the detail of the human rights methodology applied to the best interests of the child in this article, there are alternative methods available. For example, the necessity test does not necessarily imply a test of 'least restrictive means', and other standards such as 'reasonableness' or 'manifest unreasonableness' could apply.<sup>120</sup> This is a particularly acute question as the UNCRC does not itself textually impose a particular test. Straightforwardly, this article has engaged in a thought experiment in which the highest level of human rights protection has been consistently preferred, where it is rationally possible to do so. A necessity test based on 'reasonableness' or 'manifest unreasonableness' requires a lower intensity of review than that of 'least restrictive means'.<sup>121</sup> Already, the ECtHR takes for granted the suitability and necessity of deportation for the legitimate aim pursued by the state,<sup>122</sup> imposing the lowest possible standard of review. This article has demonstrated that a generally accepted version of human rights methodology does work when applied to the best interests of the child as a substantive human right, and moreover, one containing a higher level of review than currently employed by the ECtHR. However, this article lacks the scope to identify and debate all the possible nuanced iterations of human rights methodology which might be applied.

## 5. CONCLUSION

The dual requirement to give effect to both the right to family life under Article 8 ECHR and the best interest of the child under Article 3 UNCRC is complex. This article has critiqued the way in which the ECtHR and UK courts have attempted to read the best interests of the child into the Article 8 ECHR right to family life. This article has instead proposed an alternative framework for removal and deportation decisions, one that puts the best interests of the child at the centre of the decision-making process. It starts by taking literally and seriously the claim made by the Committee on the Rights of the Child that the best interests of the child is a free-standing, self-executing human right. By applying a standard human rights methodology to the best interests of the child, this article has demonstrated that the best interests of the child can function as the central human right at stake in immigration decisions. Human rights methodology would require decision makers to ask five questions in deciding removal and deportation decisions, where such decisions might impact the best interests of a child:

1. Are the best interests of the child engaged?
2. Would the interference with the best interests of the child by the immigration decision secure a legitimate aim?

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119. Smyth (n 20) 75.

120. I am grateful to the NQHR's anonymous reviewer for this observation.

121. Julian Rivers, 'Constitutional Rights and Statutory Limitations' in Matthias Klatt (ed), *Institutionalized Reason: The Jurisprudence of Robert Alexy* (Oxford University Press 2012) 253.

122. *ibid* 169.

3. Would the interference with the best interests of the child *rationally* contribute to securing the legitimate aim?
4. Is the interference with the best interests of the child *necessary* to secure the legitimate aim?
5. Is the interference with the best interests of the child *strictly proportionate* to the pursuance of the legitimate aim?

Pursuing the best interests of the child as the human right at the centre of deportation and removal decisions resolves the theoretical difficulties that bedevil attempts to treat the best interests of the child as a mere facet of the Article 8 ECHR right to family life.

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