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Rights Claims of Citizen Children of Foreign National Parents in South Africa, the United Kingdom, and the European Court of Human Rights: hierarchies of 'illegality' and deservingness

Abstract

This article examines the South African High Court judgment in *TR & others v Minister of Home Affairs & others*, which is the first time that a South African court has addressed the constitutional rights of children in the immigration context. In this case, constitutional rights claims were made by South African citizen children because South African immigration law deemed a foreign national parent to be an 'illegal alien', subject to expulsion, as soon their spousal relationship with a South African citizen had broken down. The law allowed no other outcome, other than expulsion, regardless of the impact on the affected children. We argue, therefore, that although the High Court deployed the language of children's dignity and best interests, *TR* is not really a decision about *children* at all. Instead, it is a judgment about whether *the parents'* deserved the status of 'illegality', and its consequences, which had been imposed by South African immigration law. This focus on the deservingness of the parents, rather than the best interests of the children, can be found in other jurisdictions and this article explores how the law deals with similar circumstances in the UK and the European Court of Human Rights. This article concludes by arguing that Article 3 CRC requires that 'the sins and traumas of fathers and mothers should not be visited on their children' and that this should be foundational to the best interests of the child provision in the South African constitution in the immigration context.

Keywords: migration law; children; citizenship; visas; removal; deportation; expulsion; South Africa; European Convention on Human Rights; UN Convention on the Rights of the Child

1. Introduction

This article examines the June 2022 judgment in *TR & others v Minister of Home Affairs & others*[1] in the Western Cape Division of the High Court of South Africa, which is significant for being the first time that a South African court has addressed the constitutional rights of children in the immigration context. South African immigration law deemed a foreign national parent to be an 'illegal alien', subject to expulsion, as soon their spousal relationship with a South African citizen had broken down. The law allowed no other outcome, other than expulsion, regardless of the impact on any children born of the relationship. This is despite the South African Constitution providing that every child has the right to parental (or family) care and to be protected from maltreatment and neglect,[2] and in every matter concerning a child, their 'best interests' are of 'paramount' importance.[3]

This judgment is important because it appears to centre the best interests and dignity of the children by allowing some foreign parents of a child with South African citizenship or permanent residence to remain in South Africa to apply for a fresh visa which would allow them to reside and work in the country, in order to discharge their parental responsibilities and exercise their rights. This remedied the harsh, automatic consequences of the law and upheld the best interests of the child. However, this remedy was only made available to some of the applicants. We argue, therefore, that although the High Court deployed the language of children's dignity and best interests, *TR* is not really a decision about *children* at all. Instead, it is a judgment about whether *the parents'* deserved the status of 'illegality', and its consequences, which had been imposed by South African immigration law. Part 2 explains the background, facts, and judgement in *TR*.

This focus on the deservingness of the parents, rather than the best interests of the children, can be found in other jurisdictions. This article focusses on three – South Africa, the United Kingdom, and the jurisdiction of the European Convention on Human Rights – because each jurisdiction is linked by adherence to, or influence by, the UN Convention on the Rights of the Child (CRC). Constitutionally speaking, South African courts are directly bound to give

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[1] *TR & others v Minister of Home Affairs & others* 2022 (5) SA 534 (WCC). Henceforth cited as *TR*. This Order must now be confirmed by the Constitutional Court (under provisions made for review in s167(5), Constitution of South Africa) which is awaited at time of writing.

[2] Constitution of South Africa, s28(1)(b).

[3] Constitution of South Africa, s28(2).

effect to international treaties – including the CRC – which the country has ratified.[4] In UK immigration law the Home Secretary, responsible for immigration enforcement, must have 'regard to the need to safeguard and promote the welfare of children who are in the United Kingdom'.[5] This has been interpreted by the courts as corresponding to Article 3 CRC.[6] Finally, the best interests of the child has been recognised by the European Court of Human Rights (ECtHR) as an essential part of the balancing exercise inherent to the right to family life in Article 8 ECHR.[7]

For each jurisdiction we describe how the law addresses the issue of separating parents where one is a foreign national on a spousal visa. We find in all three jurisdictions a similar hierarchy of deservingness which conditions the legal response to the adult. Part 3 compares the categories of deservingness found in *TR* with the operation of UK law, arguing that a similar pattern of hierarchical rights can be found in that law too. Finally, Part 4 finds similar categories in European Convention on Human Rights jurisprudence on Article 8 family life.

We conclude by arguing that although the final order written by the High Court in *TR* is written in neutral terms, making no distinction between the applicants, the decision to exclude 'T' from the remedy provided by the order as a 'criminal alien' or 'undesirable person'[8] is unjustifiable. This is important because States frequently argue that both migration and (non)-compliance with immigration law – and any resultant consequences for family life – is a choice.[9] Yet this is a difficult proposition to sustain with respect to children: 'Children generally migrate because of decisions made by others. A correlate of the lack of agency in this choice is that child migrants are not responsible for their irregular movement.'[10] Likewise, children are also not responsible for the breakdown of their parent's relationships, although they

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[4] Julia Sloth-Nielsen, 'Children's rights in the South African Courts: An overview since ratification of the UN Convention on the Rights of the Child' (2002) 10 *The International Journal of Children's Rights* 137, 138-40.

[5] Borders, Citizenship, and Immigration Act 2009, s55.

[6] *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, [26]; *JO and Others (section 55 duty) Nigeria* [2014] [2014] UKUT 517 (IAC), [6].

[7] *Üner v Netherlands* App no 46410/99 (ECtHR (GC), 18 October 2006), [57-58].

[8] *TR* [81.7]

[9] M. Dembour, *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint* (OUP 2015), 106.

[10] J. Bhabha, '"Not a Sack of Potatoes": Moving and Removing Children Across Borders' (2006) 15 *Public Interest Law Journal* 197, 199.

undoubtedly are affected by it. The negative impacts on children of enforced separation from a parent – including emotional, social, psychological, financial, and educational – because of immigration enforcement is well documented.[11] Furthermore, the separation of a child and parent because of immigration enforcement has an arguably more profound impact on the child because the separation from the parent is near total, whereas separations caused by relationship breakdown are frequently mitigated by shared contact arrangements.

2. Background to *TR v Minister of Home Affairs*

The judgment in *TR v Minister of Home Affairs* was delivered on 22 June 2022 in the Western Cape Division of the High Court of South Africa. It is the first time that a South African court has addressed the constitutional rights of children in the migration context. This application was brought to seek orders declaring the Immigration Act 13 of 2002 ('the Act') and Immigration Regulations[12] to be inconsistent with the South African Constitution and, therefore, unconstitutional. The Act and Regulations require foreign nationals who are parents and caregivers of children who are South African citizens to cease working and to leave the country when their relationships with their South African spouses end, or they no longer cohabit together. The adult applicants had children with their South African spouses and their children are South African citizens, having either been born in South Africa (SA) or acquired South African citizenship through their parents. Further emphasising the similarity of factual circumstances of all the applicants, from the perspective of the children, according to the High Court:

> All the applicants had been living and working in SA for many years and all of them had been dutiful and supportive parents and caregivers to their children, sharing

[11] Research in the UK context: S. Grant et al, 'Family Friendly? The Impact on Children of the Family Migration Rules: A Review of the Financial Requirements' <https://www.childrenscommissioner.gov.uk/wp-content/uploads/2017/06/CCO-Family-Friendly-Report-090915.pdf> accessed 15 February 2023; Children's Commissioner, 'Skype Families: The Effects on Children of Being Separated from a Mum or Dad Because of Recent Immigration Rules' <https://www.childrenscommissioner.gov.uk/wp-content/uploads/2017/06/SkypeFamilies-CCO.pdf> accessed 24 April 2023.

Research in the US context: K. Brabeck, M. Lykes and C. Hunter, 'The Psychosocial Impact of Detention and Deportation on U.S. Migrant Children and Families' (2014) 84 *American Journal of Orthopsychiatry* 496; J. Dreby, 'U.S. Immigration Policy and Family Separation: The Consequences for Children's Well-Being' (2015) 132 *Social Science & Medicine* 245.

[12] GN R413 published n GG37679 on 22 May 2014.

parental responsibilities with their partners both during and after their spousal relationships.[13]

The adult applicants had been residing and working in SA on the basis of 'spousal' visas under s11(6) of the Act, but their residence rights ceased when the good faith spousal relationship between the parties no longer existed (s11(6)(a)). Furthermore, s43(b) of the Act provides that upon the expiry of their status, foreigners must depart from SA. If they do not, they are considered to be illegal foreigners,[14] and unless authorized by the Director-General to remain pending an application for status,[15] they become liable to be deported.

The applicants could not remedy their immigration situation by applying for permanent residence on the basis that they are relatives of their SA citizen children, because they lacked temporary residence rights in terms of s27(g) of the Act. Moreover, if they were to apply for a temporary status to be conferred on them afresh, they could only do so from outside SA.[16] In addition, following the termination of their spousal visas they could no longer be legally employed.

2(a) The constitutional challenge

The applicants contended that the law was unconstitutional because its effect was to unjustifiably limit their constitutional rights (and those of their children) to dignity[17] and equality, to parental care, and to legislative processes that give effect to the best interests of the children. As regards the right to dignity, which is a fundamental constitutional right, they averred that their need and ability to care for and nurture their children not only financially, but

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[13] *TR* [4].

[14] Immigration Act, s32(1).

[15] Immigration Act, s32(2).

[16] Immigration Act, s10(6), unless exceptional circumstances exist. The only exceptional circumstances currently prescribed pertain to visitors who require emergency, life-saving medical treatment for longer than 3 months, and those who are the accompanying spouses or children of foreigners who are in the country on a business or work visa, and who wish to apply for a study or work visa. In *Nandutu v Minister of Home Affairs* 2019 (5) SA 325 (CC), the Constitutional Court read into the regulation a third instance of exceptional circumstances: where the holder of a visitor's visa is the foreign spouse or child of a South African citizen or permanent resident. In their case, such persons would be able to apply for a change of status, or a status, from within SA. However, as this was formulated to assist foreign spouses, and not foreign parents of South African citizen children, it did not avail the applicants (*TR*, [17]).

[17] Provided for in section 9 of the Constitution 1996.

also emotionally and psychologically, impacted their right to dignity. In addition, they contended that were they compelled to leave SA, their family relationships would be damaged and they would be unable to continue providing for their children's financial, developmental, and emotional needs, contrary to their children's best interests.[18]

All persons in SA have the right to have their dignity respected: dignity has no nationality and is inherent in all persons.[19] In *Dawood and Anor v Minister of Home Affairs and Ors*,[20] the Constitutional Court had found that marriage and family were social institutions of 'vital importance', and that although the Constitution contained no express provision protecting the right to family life or the right of spouses to cohabit, their right to dignity would be infringed in the case of any legislation which significantly impaired spouses' ability to honour their marital obligations to one another. A constitutional right to family life was therefore inferred. The Constitutional Court said that 'Marriage imposed moral and legal obligations on both spouses including a reciprocal duty of support and cohabitation, and joint responsibility for supporting and raising children born of it.'[21] Consequently, provisions of the (then in force) Aliens Control Act, which compelled foreign spouses to make application for permanent residence from outside of the country, were held to have violated their right to dignity. More recently, in *Nandutu*, the Constitutional Court held that the right to family life was not a 'coincidental consequence of human dignity but a core ingredient' of it.[22]

As regards children's rights, the Constitution provides that every child has the right to parental (or family) care and to be protected from maltreatment and neglect,[23] and in every matter concerning a child, their 'best interests' are of 'paramount' importance.[24] The termination of the applicants' visa status occurred automatically, as a matter of law, on the termination of their spousal relationships, without regard for the nature and extent of their parental responsibilities.[25] Thus:

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[18] *TR* [20].

[19] *Minister of Home Affairs & others v Watchenuka & another* 2004 (4) SA 326 (SCA).

[20] 2000 (3) SA 936 (CC).

[21] *Dawood and Anor v Minister of Home Affairs & others* 2000 (3) SA 936 (CC), [30].

[22] *Nandutu v Minister of Home Affairs* 2019 (5) SA 325 (CC)

[23] Constitution of South Africa, s28(1)(b).

[24] Constitution of South Africa, s28(2).

[25] *TR* [38].

> In effect, the applicants have the Hobson's choice of either breaking the law by continuing to live and work in the country in order to maintain their parental responsibilities and relationships and contact with their children, or to uphold the law by leaving the country, thereby breaching their parental duties and severing their contact and relationships with their children.[26]

The High Court in *TR* found that the legislative scheme accordingly results in a violation of both the applicants' constitutional rights to dignity as well as those of their children, and the children's constitutional and parental rights.[27]

2(b) The limitations analysis

The respondents bore the onus of proving that interferences with the applicants' rights were reasonable and justifiable in an open and democratic society[28] and having regard for all relevant factors, including the nature of the rights that have been infringed and the importance of the purpose of the limitations.[29] The purpose of the limitation and its importance were addressed in *Nandutu*,[30] in which the respondent department argued that, as a sovereign state, South Africa (SA) is entitled to determine who enters and its borders and what requirements they must meet in order to do so, as well as on what basis they may thereafter remain. To give effect to this principle, SA has adopted a risk-based approach of externalising borders, or 'off-shore border management', which prevents undesirable individuals from establishing themselves within SA. Second, they argued that the provisions at stake in that case prevented persons from fraudulently overstaying by entering SA on a visitor's visa and remaining on a permanent basis by marrying a citizen or permanent resident. However, the court in *Nandutu* held that the respondents had not established that the limitation on the right to family life was

[26] *TR* [39].

[27] *TR* [40].

[28] As required by s 36 of the Constitution.

[29] *TR* [44].

[30] *Nandutu* (n22) [73].

a proportionate restriction and means to achieve the purpose of either preventing fraudulent marriages or protecting the states' sovereign interests.[31]

In *TR*, too, the court was of the view that the respondents had not adequately demonstrated why it is necessary for foreign parents to leave the country – and their children – in order to regularize their status. There appeared to the court to be no reason why the necessary security checks could not be conducted from within SA.[32]

2(c) Remedies

The parties argued for different means of reading-in provisions to the Act and its Regulations to render them constitutionally compliant. The Court rejected the applicants' proposal that a spousal visa shall remain valid and not expire notwithstanding the termination of the spousal relationship, as both constitutionally and conceptually unsound as it 'would subvert the legislative intent and open the door to abuse.'[33] In its discussion, the court introduced the concept of the "worthy parent" for the first time, noting that:

> the remedies proposed would perversely allow deadbeat foreign parents who are not contributing to their children's maintenance or care to continue living and working in the country, either by way of an extended spousal visa or by way of a relative's visa. Rather than promoting the due discharge of parental responsibilities by foreign parents it will therefore encourage the exact opposite.

The Court's solution was not to provide that a spousal visa will continue in the absence of any spousal relationship, but to accept and recognize that it has to come to an end. Instead, foreign parent of a child with South African citizenship or permanent residence would be allowed to remain in SA to apply for a fresh visa which would allow them to reside and work in the country, in order to discharge their parental responsibilities and exercise their rights. Such a visa would be conditional on the foreign parent having and discharging parental responsibilities and rights. The order fashioned included a direction that (most of the) applicants are granted leave to apply for a status change to the Director-General of the

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[31] Ibid, [78].

[32] *TR* [47].

[33] *TR* [66].

Department of Home Affairs, and that he shall consider granting them authorization to remain pending the outcome of their applications, thereby obviating the need for them to leave the country to regularize their status.

2(d) Citizen children of foreign national citizen parents: 'illegality' and deservingness

We argue that although the High Court deployed the language of children's dignity and best interests, *TR* is not really a decision about children at all. In this case, the anonymised adult applicants were all foreign national parents of children who were South African citizens, yet the applicants 'R', 'G1', 'A', and 'O' were granted the fullest remedy: their expulsion from SA suspended and the relevant immigration law was to be rewritten to accommodate their application to remain. The remedy for applicant 'G', however, was merely that his application was to be 'reconsidered' by the Department of Home Affairs, and applicant 'T' was denied any remedy whatsoever.

If this judgment were about children, then all the applicants would have been able to benefit from the same remedy because all the children were in the same factual situation. All the children were South African citizens. All faced the consequences – emotional, social, psychological, financial, educational – of separation from a parent arising from their parent's expulsion from SA. From the perspective of the children, they were all in the same factual circumstances, yet their cases were not treated alike. That they were not points to this judgment not being about the *children* but about whether *the parents'* deserved the status of "illegality", and its consequences, which had been imposed by South African immigration law.

Migration research highlights that "illegal" (or "irregular") immigration status is not a stable legal category, rather it is a policy construct,[34] one that is conditioned by the political and social as much as it is by the law.[35] Different individuals may be labelled "illegal" migrants, but the law responds differently depending on their level of "deservingness".[36] It is the different conditions of deservingness which accounts for the different outcomes for the individual claimants.

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[34] A. Bloch, N. Sigona and R. Zetter, *Sans Papiers: The Social and Economic Lives of Young Undocumented Migrants* (Pluto Press 2014), 21.

[35] F. Düvell, 'Paths Into Irregularity: The Legal and Political Construction of Irregular Migration' (2011) 13 *European Journal of Migration and Law* 275, 276.

[36] L. Mayers, '(Re)Making a Politics of Protection in Immigration Policy: The "Criminal Alien", Gendered Vulnerability, and the Management of Risk' (2019) 23 *Citizenship Studies* 61.

In *TR*, three levels of "deservingness" operate. First, the applicants 'R', 'G1', 'A', and 'O', were deemed by the judge in *TR* as being "illegal in name only". Their status as 'illegal foreigners' was solely because the law labelled them 'illegal foreigners' at the point that the relationship ceased to 'subsist'.[37] These applicants succeeded in obtaining the full remedy that they sought, namely a declaration that their situation was unconstitutional and words read-in to the Act to permit them to stay lawfully as parents of South African children.

Secondly, the applicant 'G' can be classed as having been "accidently illegal", because he 'failed to notice' that his visa had expired 'until it was pointed out to him by a day after it had expired, whereupon he immediately took steps to regularize his position.'[38] The judge in *TR* found that the immigration authorities must consider the best interests of 'G''s child when the reasons for illegality are mere 'forgetfulness or simple negligence',[39] and ordered a reconsideration of 'G''s case so that these factors could be fully considered. 'G' was not granted the full remedy issued to the "illegal in name only" applicants, but was instead granted a secondary remedy whereby the best interests of 'G''s children were ordered to be placed front and centre in the reconsideration of his case by the Department.

In contrast, 'T' was an archetypal "criminal alien"[40] whose 'illegal foreigner' status was because he had bribed an official to obtain a fraudulent work visa (for which he was convicted, fined and deported) and then 'crossed back into SA illegally'.[41] 'T' was denied any remedy on the basis that 'the Court should not come to his aid on the basis that he has a child'.[42] Because 'T' was deemed to be undeserving, 'T''s child was implicitly found to be undeserving of having their situation reviewed on the basis of their best interests.[43] That was the remedy granted to

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[37] *TR* [12 & 18].

[38] *TR* [76].

[39] *TR* [79].

[40] Mayers (n36) 61.

[41] TR [7].

[42] *TR* [75].

[43] It must be additionally pointed out that Article 2(2) of the CRC provides that state parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members. This obligation – protecting the child from discrimination because of attributes pertaining to his parents – has no counterpart in any other human rights treaties (W Vandenhole, G Turkelli and S Lembrechts *Children's Rights: A commentary on the Convention on the Rights of the Child and its Protocols* (Edward Elgar 2019)). In this case, therefore, discrimination against the child in relation to his enjoyment of parental care and

'G', the "accidently illegal" claimant. Thus, the distinction of deservingness operated to distinguish claimants who represented 'the "criminal alien" and its foil, the hard-working parent'.[44] The distinction between the remedies granted to 'T' and 'G' clearly impact their children: one child will have their best interests considered in full with the potential that their parent will obtain a visa to remain in SA in order to maintain contact, and the other will face separation from their father regardless of what might be in their best interests.

3. UK Immigration Law

In this section we consider how the hierarchy of deservingness established in *TR* compares to provisions in UK law for similarly placed foreign national parents of British citizen children.

3(b)(i) "illegal in name only"

The problems faced by the "illegal in name only" applicants ('R', 'G1', 'A', and 'O') in *TR* should not arise in the majority of cases of relationship breakdown in UK law. This is because, in effect, UK law recognises the deservingness of individuals in this situation through the operation of the existing law, rather than it needing to be effected through legal challenge. Whereas South African law meant that the partner's visa ceased to exist (rendering them an 'illegal foreigner')[45] at the same moment that the '"good faith" spousal relationship between the parties no longer "subsists"',[46] under the UK's immigration rules cancellation of a partner's dependant visa[47] is a discretionary power. Thus, a visa '**may be cancelled** if they cease to meet the requirements of the rules under which the entry clearance or permission was granted.'[48]

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support was occasioned by attributes relating to the immigration status of the child's parent, in direct contravention of the cited CRC provision.

[44] Mayers (n36) 61.

[45] *TR* [15]

[46] *TR* [12]

[47] UK immigration law uses the terms 'leave to enter' and 'leave to remain' rather than 'visa', where 'leave' has the archaic meaning of 'permission'. 'Leave to enter' can also be referred to as 'entry clearance'. For clarity, in this article we use the term 'visa' to cover any substantive legal status granted by the UK government which grants permission to enter and reside in the UK.

[48] Immigration Rule 9.23.1 [emphasis added].

Home Office guidance[49] states that the dependant visa will normally be cancelled, but only after 60-days from the date of decision to cancel.[50] This 60-days grace period enables the individual to make a further visa application in a different immigration category whilst lawfully present in the UK, including as the parent of a British citizen child. So long as a valid application is made within this 60-day period, the original visa is automatically extended as '3C leave' beyond its stated expiry date until such point as the new application is decided and accepted, or the applicant has exhausted their rights of appeal.[51] Therefore, cancelling the UK visa of a foreign partner is a deliberate administrative act, rather than an automatic consequence of the law. This means that the foreign partner is unlikely to be present without a valid visa (an 'illegal foreigner' in the parlance used in *TR*) and thus unable to make an in-country application to remain in the UK on the basis of their relationship with a British citizen child.

The applicants in *TR* also immediately ceased to have the legal right to work attached to their visa. In cancellations of UK visas, only the duration of the leave is curtailed and so other conditions (including the right to work) would persist during the 60-days grace period. Likewise, the condition to work would remain during the period of '3C leave'.[52] Additionally, the alternative visas that the applicants in *TR* qualified for to remain in SA with their children did not permit them to work, whereas UK law has specific visa categories for the parents of British citizen children and which permit work.[53]

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[49] Home Office guidance has a liminal constitutional position. 'Guidance is advisory in character; it assists the decision maker but does not compel a particular outcome': *R (Alvi) v Secretary of State for the Home Department* [2012] UKSC 33, [120]. However, whether the guidance has been followed by the decision-maker and the nature of the wording of the guidance, is relevant to determining whether an immigration decision is unlawful on administrative law grounds such as irrationality.

[50] Home Office, 'Cancellation and Curtailment of permission' (Version 1.0, 6 October 2021), 66 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1023269/Cancellation_and_Curtailment_of_permission.pdf> accessed 13 February 2023.

[51] Immigration Act 1971, s3C.

[52] In law, although there are practical problems with proving the existence of valid 3C leave so that in some cases the employee relying on 3C leave is practically prevented from continuing their employment. See Alice Muzira, 'In-time extension leave applications: Problem of online applications and the continuing effect of Section 3C leave' (9 November 2020, UK Immigration Justice Watch Blog) <https://ukimmigrationjusticewatch.com/2020/11/09/in-time-extension-leave-applications-problem-of-online-applications-and-the-continuing-effect-of-section-3c-leave/> accessed 13 February 2023.

[53] Immigration Rules, Appendix FM, Section E-LTRPT: Eligibility for limited leave to remain as a parent. However, any visa granted would prevent the parent from accessing welfare benefits (a 'no recourse to public funds' condition) and this condition may mean that the grant of a visa may not be practically effective in some circumstances where the foreign national parent would be unable to financially support themselves in the UK.

The constitutional remedy offered to the "illegal in name only" applicants in *TR* is a reflection of the judges' implicit assessment of their deservingness. The judge describes the situation as arising from a technical defect in the law itself which put these applicants in the wrong legal category of 'illegal'. They make a direct comparison between the deservingness of the 'criminal alien' and the 'hard-working parent'.[54] The law is found to place the hard-working parent in the wrong social-political category of 'illegal' – in a violation of 'the applicants' constitutional rights to dignity'[55] – and so the remedy was to create the conditions for their deservedness to be recognised. The primary difference with UK law is that the UK law does not create the initial Hobson's choice for parents of British citizen children, because the 60-day grace period before the cancellation of leave should normally mean that they are not labelled 'illegal foreigners' before they have the opportunity to make a further valid, in-country visa application.

3(b)(ii) "accidently illegal"

UK law also recognises a category of "accidently illegal" but draws the qualifying line differently to the court in *TR* and still imposes some of the disabilities of being an illegal foreigner. UK immigration rule 39E permits applications to be determined by the Home Office regardless of the fact that the applicant is a visa overstayer, so long as the application is made within 14-days of the visa expiring and there is evidence of 'good reason beyond the control of the applicant or their representative' for the delay. Guidance provides examples of good reasons, including an unexpected hospital stay or bereavement of a close family member, although other reasons will be considered so long as they are plausible, supported by credible evidence, and 'whether the applicant is describing difficulties that could realistically have been surmounted'.[56] The applicant whose reasons for late submission are accepted is able to make a valid, in-country application, but their existing visa is not automatically extended and they will not therefore have permission to work in the UK for the duration of the decision-making process.[57]

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[54] Mayers (n36) 61.

[55] *TR* [40].

[56] Home Office, 'Applications from overstayers' (Version 8.0, 5 August 2019), 6-7 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/823299/applications-from-overstayers-v8.0.pdf> accessed 15 February 2023.

[57] Ibid, 7.

In *TR*, the "accidently illegal" applicant, was forgiven his 'forgetfulness or simple negligence',[58] but this would clearly not meet the requirement in UK law to provide good reason beyond the control of the applicant. However, again, the existence of a similar hierarchy of deservingness – including a category of broadly "accidently illegal" applicants – is apparent in both UK and South African law, even if the precise lines and resulting disabilities are drawn differently.

3(b)(iii) "criminal alien"

The consequences of being in the lowest category of deservingness, that of "criminal alien", is where there is greatest practical divergence between the South African and UK law. In *TR*, the applicant 'T' found himself labelled a 'criminal alien' and as a direct consequence of this label was denied any remedy, despite the impact on his children of his expulsion from SA being the same as on the children of the other applicants. It is the treatment of T which particularly demonstrates that the judgment in *TR* is not one about children – nor about upholding their best interests or dignity – but is about inscribing hierarchies of the deservingness of the adult applicants. That this is the case is also highlighted by UK immigration law which provides a means by which the best interests of the child *can* be considered in such circumstances, so that a 'criminal alien' parent in the UK, and in equivalent circumstances to T, may still be able to obtain a visa as the parent of a citizen child.

Both illegal entry and visa overstaying is a criminal offence in UK law, punishable by up to 12-months imprisonment and/or a fine,[59] but they are not barred from making an in-country application to remain in the UK on the basis that they are the parent of a British citizen child. If they are in the UK without an extant visa, they are disbarred from applying through the route available to those with a valid partner visa seeking to amend their status to that of a parent of a British citizen child at the point of relationship breakdown.[60] However, they can still make an application on the basis of Section EX.1(a), although this differs in the qualifying criteria and of the waiting time for settlement.

Qualification for a new visa as the parent of a British citizen child for those with extant partner visas is based solely on the existence of the parent-child relationship and the intention

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[58] *TR* [79].

[59] Immigration Act 1971, s24.

[60] Immigration Rules, Appendix FM, Section E-LTRPT.

to take 'an active role in the child's upbringing'.[61] In contrast, the 'criminal alien' must not only demonstrate the existence of a parent-child relationship but also that 'taking into account their best interests as a primary consideration, it would not be reasonable to expect the child to leave the UK'.[62] This is clearly an additional hurdle that the 'criminal alien' must establish and that the parent with an extant visa would not. However, significantly, it is an assessment about *what is reasonable for the child* – and the child only – and the relative seriousness of the parent's immigration transgressions are not relevant to this assessment.[63]

In *TR*, the Court denied any remedy to 'T' to have his case reconsidered and for the best interests of his child to be determined. This is not to say that an assessment of the best interests of 'T''s child would necessarily require 'T' to be able to remain in SA. However, the decision to exclude 'T''s child from any possibility of remedy illustrates that the nature of this judgment was about inscribing hierarchies of deservingness, rather than about the best interests of the children as rights bearers. The deservingness of the "illegal in name only" applicants was contrasted sharply with the essential un-deservingness of 'T' as a "criminal alien". 'T' did not face the 'Hobson's choice of either breaking the law…to maintain their parental responsibilities',[64] as he was already in 'blatant disregard for the law'.[65] The 'manifestly unlawful conduct'[66] of T also served in contrast to the "accidently illegal" applicant who was merely (and forgivably) forgetful or negligent.[67]

4. The European Convention on Human Rights

The European Convention on Human Rights (ECHR) is clearly different to the two domestic jurisdictions surveyed so far in this article, as it is a regional human rights treaty and the

[61] Immigration Rules, Appendix FM, Section E-LTRPT.2.4.

[62] Immigration Rules, Appendix FM, Section EX.1(a)(i)-(ii).

[63] *KO (Nigeria) v Secretary of State for the Home Department* [2018] UKSC 53, [17]. UK law does, though, inscribe further categories of "criminal alien" into its hierarchies of deservingness based on how "criminal" the criminal alien is, as described in J. Collinson, 'Disciplining the Troublesome Offspring of Section 19 of the Immigration Act 2014: The Supreme Court Decision in KO (Nigeria)' (2019) 33 *Journal of Immigration, Asylum and Nationality Law* 8; J. Collinson, 'The Troublesome Offspring of Section 19 of the Immigration Act 2014' (2017) 31 *Journal of Immigration, Asylum and Nationality Law* 244.

[64] *TR* [39].

[65] *TR* [75].

[66] *TR* [75].

[67] *TR* [79].

European Court of Human Rights (ECtHR) oversees human rights protection in 46 state parties though its judgments are often non-binding on these parties. That it can also be observed to operate a hierarchy of deservingness in its judgments in cases of foreign national parents of citizen children helps demonstrate how engrained this is in the attitudes and legal reasoning of states and their controlling courts.

Article 8 ECHR protects the right to respect for private and family life. Family life includes the relationship between a child and their parent (whether married or not, whether currently living with the child or not),[68] and usually[69] encompasses 'the mutual enjoyment by parent and child of each other's company.'[70] However, the right to family life is not absolute and the ECHR permits interference by the state where it:

> …is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing 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.[71]

The ECtHR defines minimum standards of protection for the rights contained within the ECHR but needs to take into account the wide variety of cultures and traditions in signatory states and recognise the importance of respect for democratic processes on social and economic issues, especially where there is a clear lack of consensus between states. The ECtHR is thus required to perform a difficult balancing exercise between setting meaningful minimum standards and providing states room to exercise discretion and judgement in policies relevant to family life: a margin of appreciation.[72] Respecting the margin of appreciation is important for the functioning of the ECtHR as regularly 'going too far' in terms of pushing states to change may be costly. There is no concrete way in which the ECtHR can enforce its judgments; rather, it relies on state voluntary compliance. So, if the ECtHR frequently sets minimum standards

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[68] *Berrehab v Netherlands* (1988) 11 EHRR 322.

[69] Only in exceptional circumstances will family life cease to exist between parent and child: *Gul v Switzerland* (1996) 22 EHRR 93.

[70] *B v United Kingdom* (1988) 10 EHRR 255, [150].

[71] Article 8(2) ECHR.

[72] See for example A. Legg *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (Oxford University Press 2012)

that are politically or socially highly unpopular there is a risk that judgments will be ignored, and it will lose its' authority. On the other hand, if the ECtHR is too meek and deferential in its judgments, its purpose as a check on state power and a means to protect individual rights will be lost and faith in it as an institution will decline.[73]

Given this delicate balancing exercise, it is perhaps not surprising that the ECtHR regularly defers heavily to state sovereignty and the goal of immigration control:

> The Court observes that no right of an alien to enter or to reside in a particular country is as such guaranteed by the Convention. As a matter of well-established international law and subject to its treaty obligations, a State has the right to control the entry of non-nationals into its territory[74]

This emphasis on the state's right to control immigration is present throughout much of the ECtHR's immigration case-law on Article 8 and more generally. Dembour refers to this phenomenon generally as the 'Strasbourg reversal' or 'state control principle',[75] while Costello calls it the 'statist assumption.'[76] This is certainly an important influence over separated foreign national parent cases, with the ECtHR stressing that a violation of Article 8 will only be found in 'exceptional circumstances.'[77] The test as to whether an applicant is in exceptional circumstances reflects the hierarchy of deservingness.

For example, in *Rodrigues da Silva & Hoogkamer* a Brazilian national who had never had legitimate residence wanted to remain in the Netherlands with her Dutch daughter after separating from her Dutch partner.[78] The ECtHR set out the criteria for determining whether there were exceptional circumstances amounting to a violation of Article 8:

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[73] S. van Walsum 'Against All Odds: How Single and Divorced Migrant Mothers were Eventually able to Claim their Right to Respect for Family Law' (2009) *European Journal of Migration and Law* 11 295, 303.

[74] See for example, *Al-Nashif v Bulgaria* (2003) 36 EHRR 655, [114].

[75] M. Dembour, *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint* (OUP 2015), 3-5.

[76] C. Costello, *The Human Rights of Migrants and Refugees in European Law* (Oxford University Press 2016), 9-12.

[77] *Rodrigues da Silva and Hoogkamer v Netherlands* (2007) 44 EHRR 34.

[78] Ibid.

1) the extent to which family life is effectively ruptured;
2) the extent of the family ties in the host state;
3) whether there are insurmountable obstacles to the family living in the country of origin of one or more of them;
4) whether there are factors of immigration control, such as a history of breaches of immigration law;
5) whether considerations of public order are applicable; and,
6) whether family life was created at a time when the persons involved were aware of the fact that the immigration status of one of them was precarious.[79]

These final three factors imply that those that are not 'accidentally illegal' but are in the state illegally ('criminal aliens') at the time that family life was formed, will find it harder to argue a refusal to allow them to remain amounts to a violation of Article 8.

The hierarchy of deservingness can also be seen in the unusual decision in *Jeunesse.*[80] The applicant was from Suriname, had overstayed her visa for 15 years, had married a Dutch national and had three children (the parents had not separated in this case). Although the ECtHR started with the 'exceptional circumstances' test, it then moved on to consider the fact that this applicant had Dutch nationality at birth and that this was only lost when Suriname gained independence from the Netherlands. It is difficult to know how much weight was put on this fact exactly, but it seemed to play an important role with the Court stressing that the applicant did not lose her Dutch nationality by choice, and thus was not in the same position as other irregular migrants who never held Dutch nationality.[81] The applicant was arguably 'illegal in name only' because of the loss of her Dutch nationality because of the operation of a law out of her control, much as the applicants in *TR* found themselves 'illegal foreigners' because of the fact of relationship breakdown.

This led to an unusually sympathetic approach to the case, first taking into account the fact that the applicant had no criminal record, that she was known to the Dutch authorities as residing illegally but that this was tolerated and had made attempts to regularise her status. Secondly, despite the fact that there would not be insurmountable obstacles for the family to

[79] Ibid, [39].

[80] *Jeunesse v Netherlands* (2014) ECHR 1309.

[81] Ibid, [115].

return to Suriname, it would cause some hardship to do so – a factor not typically taken into account.[82] Finally, the Court looked at the best interests of children and decided that the Dutch authorities had failed to adequately assess the case on this basis. It found that there was a violation of Article 8. As in *TR*, the idea that a person is not illegally residing by deliberate choice seemed to trigger a more sympathetic approach which incorporates greater consideration of the good character of the applicant, linked to the 'hard-working parent' narrative, and the best interests of the child.

This is not to say that this is the only time the best interests of the child have been incorporated into ECtHR judgments on this issue. There are certainly cases where the applicant would fall into the category of criminal alien but have been successful on the basis of what is in the best interests of the child. In *Nunez*,[83] for example, the applicant had used false documents to obtain residence but the ECtHR found that the fact that she had lost custody of her children to their father from whom she was separated, and that the immigration procedure had been so lengthy meant that, based on the best interests of the child, there had been a violation of Article 8. Dissenting judges in the *Nunez* case expressed concern at this possibility, and worried that the decision had sent the 'wrong signal'[84] that having children was a way to legitimise irregular status, but this does not seem to have been the case. Indeed, other cases similar to *Nunez* have not been successful. One example is *Antwi*,[85] where the applicant had used false documents to fraudulently obtain residence and the ECtHR agreed with the Norwegian High Court's finding that implementing the removal order against her father would not be in the best interests of the child.[86] Nevertheless, the ECtHR focused on the fact that there were no exceptional circumstances in this case, in that the child did not have any special needs and could be cared for by her mother in the event of her father's removal. It differentiated this case from *Nunez* by stating that in *Antwi* the child had not already been stressed by disruption to her care situation by lengthy immigration proceedings.[87] This seems to be an odd detail to focus on given that the ECtHR

[82] M. Costello 'Between Facts and Norms: Testing compliance with Article 8 in immigration cases' (2019) 37 *Netherlands Quarterly of Human Rights* 157, 168.

[83] *Nunez v Norway* (2014) 58 EHRR 7209.

[84] Ibid, Dissenting Opinion of Judges Mijovic and De Haetano, [1].

[85] *Antwi v Norway* (2012) ECHR 259.

[86] Ibid, [97].

[87] Ibid, [95].

acknowledged that the father was the primary caregiver. Despite this, the Court found that there was no violation of Article 8 in the removal of the father.

In other later cases, such as the admissibility decision in *IAA*[88] and the judgment in *El Ghatet*,[89] the ECtHR seemed to reflect on the concerns of the dissenting judges in *Nunez* explicitly stating that the 'best interests of the child cannot be a trump card'.[90] The best interests of the child thus seems to be just another factor that the Court may use in determining whether a state's interference in family life is justified, or whether the correct balance has been struck between the individual and community as a whole.[91] However, it does seem to be particularly helpful in separated foreign national parent cases.[92] It is notable that in many cases where the parents have separated, the ECtHR is reluctant to allow the state to deport one parent where a custody decision means that it would be very difficult for the Court to find that the children should simply follow the applicant there. This was the case in *Nunez* but also the eventual decision in *Rodrigues da Silva and Hoogkamer* rested on this point, that refusing a residence permit to the mother would break the ties between mother and daughter and make regular contact impossible.[93] Likewise in *Udeh*,[94] the Swiss authorities sought to deport a divorced father who had a criminal record for various drug offence having spent three years in prison. He had limited rights of access to the children with his Swiss ex-wife having primary custody. The ECtHR found that this meant that if he was removed he would likely not be able to maintain contact with his children, it would not be in the best interests of the children to grow up without both parents, and so there was a violation of Article 8. It is noteworthy for the 'illegal alien' narrative, however, that the Court seemed to put significance on the fact that the main offences leading to his expulsion were committed after he was married, and that the wife could not have known about this when

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[88] *IAA v United Kingdom* (2016) 6 EHRR SE19.

[89] *El Ghatet v Switzerland* (2016) ECHR 963

[90] Ibid, [46]; *IAA* (n88) [46].

[91] C. Smyth, 'The Best Interests of the Child in the Expulsion and First-entry Jurisprudence of the European Court of Human Rights: How Principled is the Court's Use of the Principle?' (2015) 17 *European Journal of Migration and Law* 70, 97.

[92] Ibid.

[93] *Rodrigues da Silva and Hoogkamer* (n77) [42].

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

entering into the marriage. These cases make an interesting contrast with *Antwi,* where the parents had not separated.

Indeed, the decision in *Antwi* suggests that where parents are still together and one is removed, it will be up to the remaining parent to settle the 'between a rock and a hard place'[95] situation as to whether remaining in the host state or growing up with both parents is in the best interests of the child. Again, though, the ECtHR jurisprudence is not clear cut. In *Useinov,* decided only months after *Rodrigues da Silva and Hoogkamer*, despite the fact that the relationship between applicant and his Dutch partner had ended and that she had primary custody of their daughter, the Court found that it would not be impossible for them to maintain contact. It based this on the idea that the distance between the Netherlands and the North Macedonia 'is not so great',[96] and that the mother could move with him to maintain family life. It is not entirely clear why the Court takes this approach, although the Court does refer to the mother as the applicant's partner despite the fact they had separated which may indicate some confusion (or disbelief) on the part of the judges.[97]

The multiple approaches outlined above mean that there is problem with consistency in the ECtHR case-law on separated foreign national parents.[98] Much of the outcome seems to depend heavily on the particular facts but also the 'divergent evaluation'[99] of those facts and the surrounding context by ECtHR judges. In other words, separated foreign national parents seem to be somewhat at the mercy of judges on this issue and a lack of legal certainty pervades the area.

5. Conclusion

TR concerns the situation under South African immigration law whereby a foreign national spouse was automatically an 'illegal foreigner', required to immediately depart South Africa (SA), upon the breakdown of the spousal relationship under which a spousal visa had been issued. This was argued by the claimants to be inconsistent with the South African constitution,

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[95] Smyth (n91) 98.

[96] *Useinov v the Netherlands* App No 61292/00 (ECHR, 11 April 2006).

[97] Ibid.

[98] Klaassen (n82) 169.

[99] Costello (n76) 126. See also, 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; Claire Fenton-Glynn, *Children and the European Court of Human Rights* (Oxford University Press 2021), 109.

under which every child has the right to parental (or family) care and to be protected from maltreatment and neglect,[100] and in every matter concerning a child, their 'best interests' are of 'paramount' importance.[101] The Western Cape Division of the High Court of South Africa agreed, issuing an Order declaring that the relevant immigration law provisions are invalid as inconsistent with the constitution. This Order must now be confirmed by the Constitutional Court,[102] a judgment still awaited at time of writing.

However, the judgment does not treat all the children at the heart of the dispute in *TR* the same, despite them all being in the same factual circumstances from their perspective. All are South African citizens, all had one South African citizen and one foreign national parent whose spousal relationship had come to an end. As a consequence of the South African immigration law, the foreign national parent ceased immediately to have a right to reside in SA and was required to leave the country. This would have negative consequences on the children as the departure from SA of the foreign national parent would mean that their contact with that parent would be severely curtailed or effectively ended, or at least suspended for a substantial period whilst they made an out-of-country application for a different visa category.

Yet, despite the fact that the dignity, family life, and best interests of all the applicants and their children would be affected in the same way, the judgment in *TR* provided different outcomes based on the way in which the Court drew distinctions as to the relative deservingness of the foreign national parents.

It cannot, of course, be alleged that the best interests of the child principle trumps all other considerations, in all circumstances, as South Africa constitutional jurisprudence clearly recognises.[103] The Constitutional Court, far from holding that section 28 of the South African constitution acts as an overbearing and unrealistic trump of other rights, has declared that the best interests injunction is capable of limitation. Nevertheless, section 28 must be seen as

[100] Constitution of South Africa, s28(1)(b).

[101] Constitution of South Africa, s28(2).

[102] Constitution of South Africa, s167(5).

[103] See for instance the discussion of Justice Sachs in *M v S* [2007] ZACC 18 where he says that "This cannot mean that the direct or indirect impact of a measure or action on children must in all cases oust or override all other considerations. If the paramountcy principle is spread too thin it risks being transformed from an effective instrument of child protection into an empty rhetorical phrase of weak application, thereby defeating rather than promoting the objective of section 28(2). The problem, then, is how to apply the paramountcy principle in a meaningful way without unduly obliterating other valuable and constitutionally-protected interests." (at par 25).

responding in an expansive way to international obligations as a State party to the United Nations Convention on the Rights of the Child (the CRC).

This is also implicitly recognised in the CRC Committee's General Comment no 14, specially in relation to the procedural aspects of the bests interests principle. According to para 6(c):

> whenever a decision is to be made that will affect a specific child, an identified group of children or children in general, the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned. Assessing and determining the best interests of the child require procedural guarantees. Furthermore, the justification of a decision must show that the right has been explicitly taken into account. In this regard, States parties shall explain how the right has been respected in the decision, that is, what has been considered to be in the child's best interests; what criteria it is based on; and how the child's interests have been weighed against other considerations, be they broad issues of policy or individual cases. [104]

The judgment in *TR* provided the fullest constitutional remedy to those parents the Court reasoned were "illegal in name only" as they were victims of an unduly harsh quirk of the law which brought their legal residence to an automatic end at the point of spousal break-up, with no consideration of the impact of this on their children. Another applicant was "accidently illegal" when, through carelessness, he had overstayed his visa and he was provided only with the assurance that his case would be reconsidered. In contrast, the "criminal alien" who had entered South Africa illegally, in defiance of a previous deportation order, was provided no remedy despite the strength of his parental relationship not being questioned.

The constitution provides that the best interests of the child are of 'paramount' importance, but we have demonstrated that this paramountcy ceased to apply in *TR* as soon as the Court was asked to apply this to an applicant who the Court considered 'undeserving' because of his "criminal alien" status. This decision undercuts the child-centred, best interests logic underpinning the finding that the immigration law is inconsistent with the South African constitution, and which is otherwise followed throughout the judgment.

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[104] CRC/C/GC/14 "The right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)."

The abandonment of the paramountcy of the best interests of the child in favour of a 'statist assumption'[105] in *TR* is not justified – morally or legally – by reference to similar hierarchies of deservingness in the other jurisdictions surveyed in this article. We have demonstrated that the decision in *TR* is not unique in inscribing into law hierarchies of deservingness when it comes to providing continued residence rights to foreign national parents of citizen children, at the point of spousal relationship breakdown. We have identified similar categories in UK immigration rules and in the human rights regime of the ECHR. These categories – the "illegal in name only", the "accidently illegal", and the "criminal alien" – are defined slightly differently and come with different consequences in each jurisdiction, but they share the fact that they evaluate the perceived deservingness of the parents. Only the children of 'deserving' parents are provided remedies which maintain the fullest potentials of parent-child contact. The children of 'undeserving' parents must suffer the consequences of ongoing separation from their parents. Thus, contact is sacrificed on the altar of immigration control.

The differential treatment of children in identical factual circumstances is sustained by 'the general belief that immigration measures are not punitive.'[106] Instead, states claim a right to control the entry of foreign nationals into their territory. This right may be tempered by constitutional or human rights obligations, but these obligations are then balanced against the need to regulate migration. This balance is weighted especially against those deemed "criminal aliens". Immigration decisions are, therefore, generally perceived by courts as decisions which only indirectly *affect* a child, rather than ones which are directly *about* a child.[107] Consequently, the rights of children of 'undeserving' parents come off second best. This is not least because there are generally higher procedural and substantive human rights standards for all affected by a decision when a state action is recognised as being punitive in nature.[108]

The CRC Committee's General Comment 14 on best interests notes specifically that the obligation to ensure that the child's best interests are appropriately integrated and consistently applied in every action taken by a public institution, especially in all implementation measures, administrative and judicial proceedings which directly or indirectly

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[105] Costello (n76) 126.

[106] A. Spalding, *The Treatment of Immigrants in the European Court of Human Rights* (Hart 2022), 7.

[107] J. Collinson, 'Beyond Decisions About a Child and Decisions Affecting a Child in Deportation Cases' (2022) 30 *The International Journal of Children's Rights* 703.

[108] Spalding (n106) 174-6.

impact on children, which extends clearly to immigration decisions. [109] It is here that the ultimate rationale of the judgment in *TR* falls short.

Children are not the architects of the situations in which they find themselves. Children often have little or no agency in migration decisions, and their parent's migration may have occurred before the child was even born. Children also have no control over, and have no responsibility for, their parent's decision to breach immigration controls. For this reason, the Lady Hale argues that an important aspect of Article 3 CRC is that 'A child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent.'[110] According to the now famous words of Justice Sachs in *M v S*:[111]

> Every child has his or her own dignity. If a child is to be constitutionally imagined as an individual with a distinctive personality, and not merely as a miniature adult waiting to reach full size, he or she cannot be treated as a mere extension of his or her parents, umbilically destined to sink or swim with them. The unusually comprehensive and emancipatory character of section 28 presupposes that in our new dispensation *the sins and traumas of fathers and mothers should not be visited on their children*.[112]

This important insight should be foundational to interpretating the best interests of the child provision in the South African constitution in the immigration context.

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[109] CRC/C/GC/14 , [14(a)]. See too para 29 which emphasises its application to immigration and asylum proceedings, and para 58 which deals with the need to avoid separation from parents and family.

[110] *Zoumbas v Secretary of State for the Home Department* [2013] UKSC 74, [2014] 1 All ER 638, [10]. Endorsing a principle articulated in *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, [2011] 2 AC 166, [33], and itself endorsed as a principle of law at *KO (Nigeria) & Ors v Secretary of State for the Home Department* [2018] UKSC 53, [15].

[111] [2007] ZACC 18.

[112] [2007] ZACC 18, [18], emphasis added. At para 20, the judgment continues: 'It follows that section 28 requires the law to make best efforts to avoid, where possible, any breakdown of family life or parental care that may threaten to put children at increased risk. Similarly, in situations where rupture of the family becomes inevitable, the State is obliged to minimise the consequent negative effect on children as far as it can.'