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Version: Accepted Version

Book Section:

Yaqub, N. and Stalford, H. (2025) Children, Identity and the Impacts of Parental Deportation on Children: A Famigration Perspective. In: Freeman, M. and Taylor, N., (eds.) Children's Right to Identity, Selfhood and International Family Law. Elgar Studies in International Family Law. Edward Elgar Publishing, pp. 229-242. ISBN: 978 1 03531 392 1.

This is a draft chapter. The final version is available in Children's Right to Identity, Selfhood and International Family Law edited by Marilyn Freeman, Principal Research Fellow, Westminster Law School, University of Westminster, UK and Nicola Taylor, Faculty of Law, University of Otago, Dunedin, New Zealand, published in 2025, Edward Elgar Publishing Ltd. It is deposited under the terms of the Creative Commons Attribution-NonCommercial-NoDerivatives License (<http://creativecommons.org/licenses/by-nc-nd/4.0/>), which permits non-commercial re-use, distribution, and reproduction in any medium, provided the original work is properly cited, and is not altered, transformed, or built upon in any way.

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15. Children, identity and the impacts of parental deportation: a famigration perspective

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INTRODUCTION

Deportation is the subject of ongoing political debates and legal reform, and yet the implications for children seldom feature. In the United Kingdom (UK) alone, approximately 20,000 individuals are involved in deportation proceedings, with an approximate average of 4,000 people finally deported every year. These figures are likely to increase following a raft of immigration reforms in recent years aimed at strengthening borders and dealing with foreign national offenders.¹ Deportation is a process by which a foreign national, usually one who has been convicted of and received a custodial sentence of at least 12 months for a serious criminal offence, is removed from their country of residence.² Deportation in such cases is, for the most part, automatic and generally involves foreign nationals who have lived in the UK legally before their conviction; the majority, for many years. In that sense, deportation should be distinguished from the administrative removal of those who have no right to reside or remain in the UK, but who have not necessarily been convicted of an offence.

A deportation order requires a person to leave the UK and prohibits their return until the Home Office decides to revoke it. The authorities are also

¹ For example, the Nationality and Borders Act (NABA) 2022, introduced by the previous Conservative Government, created new offences relating to knowingly arriving in or facilitating entry into the UK without valid entry clearance and significantly increased the sentences that people receive for such offences. Furthermore, the Illegal Migration Act 2023 severely limits the conditions under which individuals can seek asylum in the UK and extends the circumstances under which those who arrive through so-called 'irregular methods' can be removed.

² UK Borders Act 2007, s 32(5).

authorised to detain the individual until they are deported.³ Whilst the number of children affected by deportation every year is likely to be in the thousands, data is not collected to reveal how many of those subject to deportation proceedings have children. Rather, government reports suggest that the focus is very much on improving the expediency and rate of removals, rather than on ensuring that such processes are protective of individual rights, including children's rights and welfare.⁴ Empirical research, campaigns by civil society organisations, and existing jurisprudence nevertheless reveal that deportation has serious implications for children. Those who accompany their parents face the momentous prospect of being removed to a country and culture with which they may have no connection, away from their friends, other family, and the society they have grown up with.⁵ Children who remain in the UK following the deportation of their parent may have to adapt to the care of someone else, including the local authority, and face protracted periods of separation from the deported parent, limited to virtual contact in the meantime. Such experiences can have a profound impact on children's sense of identity, well-being, and relationships, with empirical studies evidencing significant disruption to their sense of security and an acute susceptibility to depression, anxiety, cognitive difficulties, and social isolation.⁶

Insofar as deportation sits at the intersection of family rights and public order, this chapter explores the extent to which children's rights protections are assessed and persuasive in decisions around deportation. It considers, in particular, the extent to which family law mechanisms – notably welfare assessments conducted within the scope of the Children Act 1989 – might be necessarily and usefully deployed in this context. This family law-based approach to immigration issues, increasingly referred to as 'famigration',

³ Immigration Act 1971, sch 3(2).

⁴ See, for example, David Neal, *An Inspection of the Home Office's Operations to Effect the Removal of Foreign National Offenders* (Independent Chief Inspector of Borders and Immigration, 29 June 2023); CJ McKinney, Melanie Gower, Terry McGuinness, Hannah Wilkins, and Greg Oxley, *Deportation of Foreign National Offenders* (Research Briefing No. 8062, House of Commons, 2 August 2024).

⁵ In an empirical study published in 2021, two-thirds of the sample of parents affected by deportation had British children, and some had been in the UK for up to 30 years (five having arrived as children): Melanie Griffiths and Candice Morgan-Glendenning, *Deportability and the Family: Mixed-Immigration Status Families in the UK* (University of Birmingham, England, 2021). These findings are supported by other independent studies; see Stephen Shaw, *Assessment of Government Progress in Implementing the Report on the Welfare in Detention of Vulnerable Persons* (Commissioned by the Home Office, July 2018) at 89–90.

⁶ Discussed further below.

provides a fresh perspective from which to both critique and seek to address the vacuum in procedural and substantive justice for children affected by deportation proceedings.

The deportation legal framework pertaining to children in the UK is summarised, and an overview is provided of the relevant procedural requirements for assessing children's welfare in this context. The chapter also considers the widespread failings in children's welfare assessments in deportation proceedings and explores the extent to which the current family law framework should, and could, be applied. A call is made for greater correspondence and practice transplants between different legal sub-disciplines to ensure that universal children's rights protections are consistently upheld and promoted.

THE LEGAL FRAMEWORK RELATING TO PARENTAL DEPORTATION AND ITS IMPACT ON CHILDREN

Foreign nationals can be deported from the UK either when it is deemed 'conducive to the public good'⁷ or when a foreign national has been convicted of an imprisonable offence and sentenced to a period of imprisonment of at least 12 months.⁸ This is a mandatory duty. In such cases, deportation is automatic and also allows also for the deportation of family members of those subject to a deportation order.⁹ However, parents may avoid deportation where it would breach their rights under the European Convention on Human Rights (ECHR) and, in particular, their right to respect for private and family life under Article 8.¹⁰ Specifically, a parent may challenge a deportation where they can demonstrate they have a genuine and subsisting parental relationship with a 'qualifying child,' and that the effect of their deportation on the child would be 'unduly harsh'.¹¹ A 'qualifying child' includes children who are British nationals or who have lived continuously in the UK for at least seven years preceding the deportation decision. The 'unduly harsh' requirement poses the question of whether it would be unduly harsh for the child to live in the country to which the appellant is being deported (the 'go scenario'), and whether it would be

⁷ This is a discretionary power exercised by the Secretary of State under s 3(5) of the Immigration Act 1971. It is generally presumed to be conducive to the public good to deport foreign nationals who have committed either a serious criminal offence or have a long history of minor offences. See also Home Office, *Conducive Deportation*, Version 3.0, 15 March 2024.

⁸ UK Borders Act 2007, s 32(5).

⁹ Immigration Act 1971, s 3(5)(b); and Immigration Rules 2012, para 363(ii).

¹⁰ Borders Act 2007, s 33(2)(a); and Nationality, Immigration and Asylum Act 2002, s 117C.

¹¹ See Immigration Rules 2012, paras 398, 399 and 399A.

unduly harsh for the child to remain in the UK without the appellant (the ‘stay scenario’). Both scenarios must be addressed and both must be satisfied for an appellant to be successful.¹²

The Home Office acknowledges that the separation of a parent from their child has an impact on the ‘emotional development’ and ‘identity development’ of the child.¹³ However, Parliament has specifically mandated that it is generally acceptable for the children of foreign offenders to be separated from them, or to force the child to leave with them, and the courts have found that the test imposed for determining whether such a consequence is ‘unduly harsh’ is a high one to surmount inasmuch as it is ‘a considerably more elevated threshold’ than something that is ‘uncomfortable, inconvenient, undesirable or merely difficult’.¹⁴ The courts have nevertheless confirmed that regard must be had to the best interests of the child when making such an assessment.¹⁵ This, the courts have stated, requires an individual and comprehensive evaluation of the emotional, physical, social, cultural, and intellectual impact of the deportation on the specific child affected by the deportation.¹⁶

ASSESSING CHILDREN’S WELFARE IN DEPORTATION PROCEEDINGS: DOMESTIC AND INTERNATIONAL GUIDANCE

The authorities’ general duty to protect and promote the interests of the child in deportation decision-making is underpinned by the UK’s obligations under international human rights law. The most obvious reference point in this regard is Article 3 of the United Nations Convention on the Rights of the Child (UNCRC), which states that the best interests of the child shall be a primary

¹² *HA (Iraq) v Secretary of State for the Home Department* [2022] UKSC 22; *Sicwebu v Secretary of State for the Home Department* [2023] EWCA Civ 550, para 26.

¹³ Home Office, *Immigration Returns, Enforcement and Detention General Instructions: Family Separations*, Version 4.0, 11 December 2017, at 15–16.

¹⁴ *HA (Iraq) & RA (Iraq) & AA (Nigeria)* [2022] UKSC 22, *MK (section 55 – Tribunal options) Sierra Leone* [2015] UKUT 00223 (IAC); *KO (Nigeria) and Others v Secretary of State for the Home Department* [2018] UKSC 53.

¹⁵ *KO (Nigeria)* (n 14), per Lord Carnwath [15].

¹⁶ See also *HA (Iraq) (Respondent) v Secretary of State for the Home Department (Appellant)* [2022] UKSC 22 [37]–[38] on appeal from *HA (Iraq) and RA (Iraq) v Secretary of State for the Home Department* [2020] EWCA Civ 1176, per Jackson LJ [156]–[159]; *AA (Nigeria) v Secretary of State for the Home Department* [2020] EWCA Civ 1296 and *KB (Jamaica) v Secretary of State for the Home Department* [2020] EWCA Civ 1385.

consideration in all actions concerning children, 'whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies'. The UNCRC also states that children should not be separated from their parents except where 'such separation is necessary for the best interests of the child' (Article 9(1)).¹⁷ The UN Committee on the Rights of the Child has provided detailed guidance on how a best interests assessment should be carried out.¹⁸

Article 3 of the UNCRC should routinely be brought to bear on assessments of whether or not the right to family life under Article 8 of the ECHR has been breached.¹⁹ It has been embedded in UK immigration law, policy²⁰ and jurisprudence²¹ for over a decade. Specifically, s 55(1) of the Borders, Citizenship, and Immigration Act 2009 requires the immigration authorities to discharge their functions having regard to the need to safeguard and promote the welfare of children who are in the UK.²² This requires an orderly and thoughtful approach to avoid the risk of undervaluing or disregarding the best interests of a child when other public interest factors are at play. As Lord Hodge noted in *Zoumbas*:

¹⁷ See also Joint General Comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the UN Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration (CMW/C/GC/3-CRC/C/GC/22) at para 32.

¹⁸ UN Committee on the Rights of the Child, *General Comment No. 14 (2013): The Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration* (CRC/C/GC/14).

¹⁹ Jonathan Collinson, 'Making the Best Interests of the Child a Substantive Human Right at the Centre of National Level Expulsion Decisions' (2020) *Netherlands Quarterly of Human Rights* 38(3), 169–190; Ursula Kilkelly, 'Protecting Children's Rights Under the ECHR: The Role of Positive Obligations' (2010) *Northern Ireland Legal Quarterly* 61(3), 245–261; 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) *European Journal of Migration and Law* 17(1), 70–103.

²⁰ See Immigration Rules 2012, para 13.2.5.

²¹ *ZH Tanzania (FC) v Secretary of State for the Home Department* [2011] UKSC 4 at [23].

²² See also *Every Child Matters: Change for Children - Statutory Guidance to the UK Border Agency on Making Arrangements to Safeguard and Promote the Welfare of Children*, November 2009, notably paras 1.15–1.18 which set out the principles that should underpin welfare assessments.

The best interests of a child are an integral part of the proportionality assessment under Article 8 [of the ECHR]. ... While different judges might approach the question of the best interests of a child in different ways, it is important to ask oneself the right questions in an orderly manner in order to avoid the risk that the best interests of a child might be undervalued when other important considerations were in play; it is important to have a clear idea of a child's circumstances and of what is in a child's best interests before one asks oneself whether those interests are outweighed by the force of other considerations; to that end there is no substitute for a careful examination of all relevant factors when the interests of a child are involved in an Article 8 assessment; and a child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent.²³

The landmark European Court of Human Rights (ECtHR) decision of *Nunez v Norway* is a useful authority for guidance on how children's interests should be treated in the context of immigration decisions that are likely to lead to separation from a parent.²⁴ Although this case concerned the removal of a parent who was unlawfully resident, rather than deportation following a criminal conviction, the judgment is noted for its 'laudably child-centred approach to the evaluation of the mother's deportation'.²⁵ It concerned action to return a mother who had given birth to two children while living illegally in Norway. She had been given primary responsibility for the children's care and upbringing after she separated from their father, but on discovering her illegal status, the authorities ordered that she be removed and prohibited from re-entering Norway for two years. Sole parental responsibility was subsequently transferred to the children's father in anticipation of her impending removal. The mother complained that the expulsion and ban on re-entry would breach her right to respect for family life as it would separate her from her small children. The ECtHR emphasised that her criminal behaviour (entering Norway under a false passport and living illegally in the country) must be balanced against the best interests of the children. In particular, the Court observed that the children were particularly vulnerable, having experienced significant stress due to the breakdown of their parents' relationship, their disrupted care situation, and the prospect of their mother being removed. The ECtHR also took into account the fact that the children were at a critical stage in their development and that the mother's expulsion and ban on re-entry implied a separation of at least two years, a particularly long period in the lives of young children. Furthermore, the Court noted that the children would have difficulty in understanding why they were separated from their mother, who had been their primary carer

²³ *Zoumbas v SSHD* [2013] 1 W.L.R. 3690 [10] per Lord Hodge.

²⁴ Application 55597/09, ECtHR 28/06/2011.

²⁵ Claire Fenton-Glynn, *Children and the European Court of Human Rights*, (Oxford University Press, 2021) at 115.

for most of their young lives. Importantly, the ECtHR drew on the UNCRC, including Article 3(1), and General Comment No. 14.²⁶

These children's rights-based directions have been more readily taken on board in some jurisdictions to guide removal and deportation.²⁷ In the UK, supplementing international law and guidance, the Home Office has provided even more detailed instructions on the substantive factors to take into account when assessing the impacts of deportation on children.²⁸ A range of indicators are listed as to whether there is a 'genuine and subsisting parental relationship' with the child,²⁹ and the relevant factors to take into account when assessing a child's best interests, including: the child's age and nationality; how long they have lived in the UK; whether they have lived in any other countries; whether they were born a British citizen, or naturalised or registered as such; who the child's primary carer is; where the other parent lives and has a right to reside in the UK; and whether the other parent could choose to go to the country of return with the foreign criminal parent and the child.³⁰

The guidance points to further evidence that might be advanced to override a deportation order, but with the caveat that this may not necessarily be deemed sufficient to satisfy the 'unduly harsh' test. Notably, a family:

... may highlight differences in the quality of education, health and wider public services and economic or social opportunities between the UK and the country of return and argue that these work against the best interests of the child. Other than in exceptional circumstances, such differences would not normally ... mean it is unduly harsh for the child to live in the country of return, particularly if one or both parents or wider family have the means or resources to support the child on return or the skills, education and training to provide for their family on return.³¹

Similarly, whilst consideration might be given to the child's age, length of residence, and family ties in the UK, 'in many cases it will not be unduly harsh, because ... many parents reasonably and legitimately take their children to live in other countries even though it will cause a degree of disruption'.³²

Those seeking to challenge their deportation on the basis of their parental relationship must also demonstrate that it would be unduly harsh for the child to remain in the UK without them. In particular, it will usually be considered

²⁶ *General Comment No. 14* (n 18).

²⁷ Fabrice Langrogné, 'The Best Interests of the Child in French Deportation Case Law' (2018) *Human Rights Law Review* 18(3), 567–592.

²⁸ Home Office, *Criminality: Article 8 ECHR Cases*, Version 9.0, 9 May 2024.

²⁹ *Ibid.*, 19–21.

³⁰ *Ibid.*, 21–22.

³¹ *Ibid.*, 24.

³² *Ibid.*

unduly harsh if the parent's deportation would lead to the child being taken into local authority care (excluding care provided by a family member or a private fostering arrangement) unless there is evidence that the child's best interests would be better served in such care than in the care of their parent.³³ Such evidence might include the nature of the parent's offending history, the child's age, and the likelihood of the child losing all contact with, or visiting, their parent.

THE REALITY OF CHILDREN'S WELFARE ASSESSMENTS IN DEPORTATION CASE: LESSONS FROM RESEARCH

Despite the explicit legal requirement to place the best interests of the child, including their identity and family-related rights, at the heart of deportation decision-making, and the comprehensive guidance as to how this should be achieved, evidence points to significant and widespread failings in terms of both the substantive factors that are taken into account and the procedures by which that evidence is collected.

An empirical study with former clients facing deportation from the UK, published in 2021 by the UK charity, Bail for Immigration Detainees (BID), revealed not just widespread failures by the Home Office to properly engage in any welfare assessment of children affected by parental deportation, but also disproportionately heavy-handed and repeated periods of questioning and detention in the years leading up to the deportation.³⁴ An additional study following the lives of 30 families affected by deportation between 2014–2017 revealed gendered, racialised, and class-based biases in deportation proceedings, with significantly weaker attention to safeguarding and best interests assessments compared to children in domestic family proceedings.³⁵ A 2022 report by Families for Justice presents stark and heartrending testimony of the devastating effects of deportation on children and women, as the following account illustrates:

The law doesn't care if they have children and families here. It doesn't care if they've lived here since they were kids themselves. This law has made many of us into single parents, depriving our children of their fathers and leaving us financially and socially disadvantaged, with no additional support from the Government. ... We've answered the phone at 3am to our partner, saying that the Home Office has taken him to the plane and he's calling to say goodbye. We've rushed across the

³³ Ibid, 25.

³⁴ Bail for Immigration Detainees, "*Excessively Cruel: Detention, Deportation & Separated Families*" (London, June 2021).

³⁵ Griffiths and Morgan-Glendinning (n 5).

country so our kids can have twenty minutes to say goodbye to their dad in the visitors' room of a detention centre.³⁶

Additional empirical research undertaken over more than a decade reveals the multi-faceted impacts of deportation on children's identity, which are all the more profound and complex as a result of the intersecting disadvantages experienced by children of migrant backgrounds.³⁷ Integral to the child's identity, for instance, is their right to family relations (Article 8 of the UNCRC), and yet deportation significantly limits the conditions under which such relations can be meaningfully pursued and maintained. A shift may also occur in the child's identity from being the *cared-for* to becoming the *carer*, insofar as some children assume a new role as a carer to siblings or to the left-behind parent to meet ever more complex care and mental health needs that arise when the other parent is deported.³⁸

Deportation also impacts the child's cultural identity. It may disrupt the cultural and linguistic connections shared with their parent or cultivated through their long association with the country from which they have been removed.³⁹ The child's social identity may be impacted by consequent disruptions in their social and educational opportunities resulting from a change in financial

³⁶ Families for Justice, *Separated Families: Unjust Deportations and the Families Left Behind* (March 2022): <https://detentionaction.org.uk/wp-content/uploads/2022/03/Separated-Families.pdf>.

³⁷ Equality and Human Rights Commission, *England's Most Disadvantaged Groups: Migrants, Refugees and Asylum Seekers* (EHRC, March 2016); Matthew Wallace, Ben Wilson and Frances Darlington-Pollock, 'Social Inequalities Experienced by Children of Immigrants Across Multiple Domains of Life: A Case Study of the Windrush in England and Wales' (2022) *Comparative Migration Studies* 10(18), 1–21; Edward Shizha and Edward Makwarimba (eds), *Immigrant Lives: Intersectionality, Transnationality, and Global Perspectives* (Oxford Academic, New York, 2023).

³⁸ Joanna Dreby, 'The Burden of Deportation on Children in Mexican Immigrant Families' (2012) *Journal of Marriage and Family* 74(4), 829–845; Schuyler Henderson and Charles Baily, 'Parental Deportation, Families, and Mental Health' (2013) *Journal of the American Academy of Child & Adolescent Psychiatry* 52(5), 451–453; Brian Allen, Erica Cisneros and Alexandra Tellez, 'The Children Left Behind: The Impact of Parental Deportation on Mental Health' (2015) *Journal of Child and Family Studies* 24(2), 386–392.

³⁹ Ajay Chaudry, Randy Capps, Juan Manuel Pedroza, Rosa Maria Castaneda, Robert Santos and Molly Scott, *Facing Our Future: Children in the Aftermath of Immigration Enforcement* (Research Report, The Urban Institute, 2010); Joanna Dreby, 'US Immigration Policy and Family Separation: The Consequences for Children's Well-Being' (2015) *Social Science & Medicine* 132, 245–251.

circumstances and loss of housing – areas in which migrant families are more likely to experience precarity. The profound sense of shame and stigma associated with deportation also impacts significantly on children's ability to progress academically, emotionally, and socially, as discussed by the following parent:

The hostile reporting and media narrative doesn't consider the impact on my children's identities and lives. The stigma attached to deportations and the highly publicised and negative coverage of "foreign criminals" tested our feelings of dignity. There are so many challenges to talking openly about our loss. Regardless of what happened, there is always the question of, "But what did he do?" It has felt like we are also being indirectly blamed by the Home Office. The guilt and dehumanisation of people and families in this situation, it doubles the punishment for the person deported and creates a third punishment for the families involved.⁴⁰

Our own, more recent, in-depth analysis of 15 case files of parents subject to deportation showed little or no acknowledgement of any of these identity issues.⁴¹ Indeed, at best, only tokenistic and fleeting consideration of any welfare factors was found, falling far short of the legal and procedural obligations summarised above. The evident failings in assessing children's welfare in the context of deportation can be attributed, at least in part, to inadequate legal representation: since 2012, there has been no automatic entitlement to legal aid in deportation cases,⁴² nor is there any mechanism for children's separate representation, unlike in public family proceedings. Despite the abundant guidance, our study found no evidence whatsoever of the Home Office proactively

⁴⁰ Families for Justice (n 36) 11.

⁴¹ Melanie Griffiths, Naomi Jackson, Sarah Woodhouse, Nazia Yaqub and Helen Stalford, "Unduly Harsh?": An Empirical Examination of Best Interests Assessments in the Context of Parental Deportation' (2024) *The International Journal of Children's Rights* 32(3), 690-720.

⁴² The Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) 2012, Schedule 1 Part 1, removed many areas of legal proceedings, including most immigration matters, outside the scope of legal aid support, leaving those subject to deportation to fund their own legal advice and representation. Whilst the Exceptional Case Funding scheme was introduced to provide individuals with legal aid funding where their human rights would otherwise be breached, it adds new complexities and delays to immigration proceedings. See also Kirsten Hudak and Emma Marshall, *The Case for Broadening the Scope of Immigration Legal Aid* (University of Exeter Public Law Project, 2021); Bail for Immigration Detainees, *Hurdle After Hurdle: The Struggle for Advice and Representation Through Exceptional Case Funding* (London, 2023); Jo Wilding, *The Legal Aid Market: Challenges for Publicly Funded Immigration and Asylum Legal Representation* (Policy Press, Bristol, 2023).

seeking out information – either via legal representatives or parents – concerning children's safety, identity, welfare, or their wishes and feelings regarding their parent's proposed deportation.⁴³ Rather, cases largely proceeded on the apparent presumption that the children's rights and welfare coincided with those of their parents. Where families had procured independent social work reports, children's interests, wishes, and feelings were much more likely to be elicited and conveyed to decision-makers. However, such reports are not routine and depend on the family having sufficient financial resources or charitable support to finance them. Moreover, there was a distinct lack of transparency, rigour, and consistency in whether and how the detail of such reports was brought to bear on deportation decisions; Home Office decision-makers engaged at only a cursory and tokenistic level with even the most detailed and compelling social work report. Indeed, in most cases, the Home Office actively sought to undermine or rebuff such evidence. It was only when matters went to appeal and the case was heard by a tribunal judge that such evidence was more likely to be seriously considered and brought to bear.⁴⁴

Research consistently highlights the profound psychological, social, and economic impacts of family separation on children in the short, medium, and long term – impacts that are overlooked or ignored as a result of the routine failure to attend to children's welfare in the deportation context. This causes detriment to almost every aspect of children's lives, including their standard of living, school attainment, mental health, and sense of identity and belonging.⁴⁵ It is not just the decision to separate children from a parent, or to force a child to relocate to a foreign (often totally unfamiliar) environment that causes distress and disruption; the uncertainty and intrusion accompanying what are commonly protracted and hostile proceedings also traumatise children who face months, if not years, not knowing if they will be separated from or moving with a parent.⁴⁶ Parents who are subject to deportation are not permitted to work while contesting their deportation, layering economic hardship onto the emotional stress of the deportation proceedings. The forced unemployment of fathers (most commonly subject to deportation), coupled with having to pay hefty legal fees, means that other primary carers (usually women) become the sole breadwinners. Some mothers relinquish maternity leave to return to work sooner, impacting their ability to care for, bond with, and, in some cases,

⁴³ Griffiths et al. (n 41).

⁴⁴ Ibid.

⁴⁵ Melanie Griffiths and Stephanie Silverman, *Immigration Detention in the UK* (COMPAS, England, 2019); Griffiths and Morgan-Glending (n 5).

⁴⁶ Ibid; Bail for Immigration Detainees (n 34).

breastfeed particularly young children. These families are often forced to resort to food banks and other charitable support to survive.⁴⁷

Moreover, the Home Office commonly detains parents where there is a perceived risk they will abscond, and this is often achieved through traumatic and intrusive 'dawn raids' on the family home. As BID reports:

All interviewees spoke about the increased stress that their family had been placed under, with particularly severe mental and physical health implications in some cases. Some interviewees' partners or children had been traumatised by periods that they had spent in detention, or by having the Home Office arrive at their home to detain them. Others were struggling to cope with the constant uncertainty and anxiety caused by the situation, knowing that family life can be brought to an abrupt end at any moment. A number of interviewees described the fear and anxiety their family members suffered when there was the slightest possibility that separation was going to occur – such as a knock at the door, or leaving the house to go to the shop. Interviewees described feeling that the Home Office is 'playing games' or 'trying to break them'.⁴⁸

The consequences of such experiences are enduring and can be devastating for children. In almost half of the cases in BID's research sample, respondents reported how their children had developed acute anxiety, cried constantly, withdrew from everything, lost their appetite, difficulty sleeping, experienced nightmares, and, in one particularly serious case, engaged in self-harm and attempted suicide.⁴⁹ US research has similarly underlined the destructive effects of deportation on children's attachments and adjustments to shifting family arrangements over time, with 'remote' and virtual contact – routinely endorsed by Home Office decision-makers in the UK as appropriate substitutes – proving woefully inadequate in sustaining vital family relationships.⁵⁰

The adverse impacts of forced separation from parents are supported by other studies, notably in the related field of parental imprisonment. Comparative

⁴⁷ Griffiths and Morgan-Glending (n 5) 23.

⁴⁸ Bail for Immigration Detainees (n 34) 13.

⁴⁹ Langrognat (n 27) 16.

⁵⁰ Cecilia Menjivar, 'Transnational Parenting and Immigration Law: Central Americans in the United States' (2012) *Journal of Ethnic and Migration Studies* 38(2), 301–322; Cecilia Menjivar and Leisy Abrego, 'Legal Violence: Immigration Law and the Lives of Central American Immigrants' (2012) *American Journal of Sociology* 117(5), 1380–1421; Ana Martinez-Donate, Gudelia Rangel, Jamile Tellez Lieberman, Eduardo Gonzalez-Fagoaga, Catalina Amuedo-Dorantes, Elizabeth McGhee Hassrick, Carmen Valdez, Kevin Wagner, Yosselin Turcios, Ahmed Asadi Gonzalez and Ziao Zhang, 'Between the Lines: A Mixed-Methods Study on the Impacts of Parental Deportation on the Health and Well-being of US Citizen Children' (2024) *Journal of Migration and Health* 11(9), 100233.

research across the globe has shown that children with a parent in prison are at significantly higher risk of acute mental health problems, low self-esteem, anger or aggression, separation anxiety, disturbed sleeping, and symptoms of post-traumatic stress than children in the general population.⁵¹ They are also much more likely to engage in anti-social behaviour and be charged with criminal offences than children whose parents are not incarcerated.⁵²

The evidence could not be more compelling, and yet the procedural and legal reality remains stubbornly resistant to accommodating children's rights and interests in the context of deportation decision-making. This has prompted calls to more meaningfully apply the decision-making principles and processes associated with family law in immigration decisions that implicate family members.⁵³ The proposed fusing of these two legal frameworks, 'famigration', is now explored.

BRINGING FAMILY LAW TO BEAR ON DEPORTATION DECISION-MAKING: A FAMIGRATION FRAMEWORK

The concept of 'famigration' describes how the principles, laws, doctrines, and processes associated with family law can be deployed to advance the rights and interests of families involved in immigration proceedings.⁵⁴ It is a relatively recent concept that has emerged only in the last decade but draws inspiration from the analogous concept of 'crimmigration,' which denotes the fusion of criminal law and immigration under conditions of mutual reinforcement.⁵⁵

⁵¹ Adele Jones and Agnieszka Wainaina-Wozna (eds), *Children of Prisoners: Interventions and Mitigations to Strengthen Mental Health* (University of Huddersfield, 2012); Francessa Maslin and Shona Minson, 'What About the Children? Sentencing Defendants Who are Parents of Dependent Children' (2022) *New Zealand Law Journal* 364–371; Erica Kane and Shona Minson, 'Analysing the Impact of Being a Sole or Primary Carer for Dependent Relatives on the Sentencing of Women in the Crown Court, England and Wales' (2022) *Criminology & Criminal Justice* 23(3), 366–386; Shona Minson, *Maternal Sentencing and the Rights of the Child* (Palgrave Macmillan, 2019); Drika Makariev and Phillip Shaver, 'Attachment, Parental Incarceration and Possibilities for Intervention: An Overview' (2010) *Attachment and Human Development* 12(4), 311–331.

⁵² Joseph Murray, David Farrington, Ivana Sekol and Rikke Olsen, 'Effects of Parental Imprisonment on Child Anti-Social Behaviour and Mental Health: A Systematic Review' (2009) *Campbell Systematic Reviews* 5(1), 1–105.

⁵³ Kari Hong, 'Famigration (Fam-Imm): The Next Frontier in Immigration Law' (2014) *Virginia Law Review* 100, 63–81.

⁵⁴ *Ibid.*

⁵⁵ Katja Franko Aas, 'Bordered Penalty: Precarious Membership and Abnormal Justice' (2014) *Punishment and Society* 16(5), 520–541, at 525.

Crimmigration represents an overwhelmingly punitive approach to immigration control evidenced in the proliferation of new criminal offences for a number of immigration-related infractions.⁵⁶ The interchangeability of these two systems allows the authorities to simultaneously reinforce existing immigration sanctions with a criminal conviction while also denying those subject to such measures the full protections otherwise available under criminal law.⁵⁷ Deportation is an important example of this toxic legal and administrative ‘cherry-picking’.⁵⁸ The Borders Act 2007 allows all foreign nationals who have been convicted of and sentenced to 12 months or more in prison to be automatically deported from the UK following their release from prison. However, insofar as this is categorised as an immigration measure rather than a criminal justice measure, those subject to deportation cannot avail themselves of the usual protections and proportionality assessment available to criminal sentencing. Specifically, criminal sentencing guidance has been amended to reflect the now compelling body of evidence that harm is caused to children when parents are given a custodial sentence that results in even temporary separation. The guidance requires that the court has regard to the offender’s personal circumstances when determining whether to impose a custodial sentence, in particular if the offender is ‘the sole or primary carer for dependent relatives’.⁵⁹ This requirement does not extend, however, to decisions around detention pending deportation or the more significant, long-term penalty of deportation.

Deportation manifests a similar legal and procedural obfuscation in relation to family law, despite the analogous effects of decisions on children.⁶⁰ For example, the fact that parents can be forcibly separated from their children through deportation without the obligation to have engaged in an independent, rigorous welfare assessment of the interests and needs of the child falls

⁵⁶ The Nationality and Borders Act (NABA) 2022 (n 1) is a case in point.

⁵⁷ Juliet Sumpf, ‘The Process is the Punishment in Crimmigration Law’ in Katja Franko Aas and Mary Bosworth (eds) *The Borders of Punishment: Migration, Citizenship and Social Exclusion* (Oxford University Press, 2013, 58–75).

⁵⁸ Benjamin Bowling, ‘Epilogue – The Borders of Punishment: Towards a Criminology of Mobility’ in Katja Franko Aas and Mary Bosworth (eds) *The Borders of Punishment: Migration, Citizenship and Social Exclusion* (Oxford University Press, 2013, 291–306); Benjamin Bowling and Sophie Westenra, ‘“A Really Hostile Environment”: Adiaphorization, Global Policing and the Crimmigration Control System’ (2020) *Theoretical Criminology* 24(2), 163–183.

⁵⁹ The most recent Guidelines date from October 2019 and are accompanied by ‘expanded explanations’ issued by the Sentencing Council.

⁶⁰ Kerry Abrams and Kent Piacenti, ‘Immigration’s Family Values’ (2014) *Virginia Law Review* 100, 629–709.

far short of the paramountcy principle⁶¹ and the high threshold that needs to be met (evidence of the existence or likelihood of significant harm)⁶² to justify removing children from their families in a child protection context. It also rides roughshod over the established family law principle that maintaining contact between children and their parents is an obligation as well as a fundamental right.⁶³ In the related context of extradition proceedings, the UK Supreme Court in *HH* acknowledged that separation for years from one or both parents would inevitably cause the children 'intense and long-lasting distress' and would be akin to taking the children compulsorily into care.⁶⁴ The Court went on to highlight the disparity between public family law proceedings and immigration proceedings in terms of the threshold that has to be met to justify separating children:

But whereas children are only taken compulsorily into care if they are already suffering or likely to suffer significant harm, these children have not so far suffered significant harm. On the contrary, they are doing well in difficult circumstances. It is the compulsory separation from their parents, and the move to live with strangers, which will do them harm; it is ... one of the most catastrophic events to befall any child, and represents a massive emotional and psychological challenge.⁶⁵

The veneration of the so-called 'primary carer' in deportation decision-making is also at odds with advancements in family law that recognise and seek to maintain the distinct role that both parents play in children's lives at different stages. Indeed, since 2014, a presumption that both parents should continue to be involved in the upbringing of their children is now enshrined in law.⁶⁶ Moreover, there is now compelling evidence that confining interactions between parents and their children to telephone and forms of digital

⁶¹ Children Act 1989, s 1(1).

⁶² *Ibid*, s 31(2).

⁶³ Andrew Bainham, 'Contact as a Right and Obligation' in Andrew Bainham, Bridget Lindley, Martin Richards and Liz Trinder (eds) *Children and Their Families: Contact, Rights and Welfare* (Hart Publishing, 2003, 61–88).

⁶⁴ *HH v Deputy Prosecutor of the Italian Republic Genoa* [2012] UKSC 25, at para 68.

⁶⁵ *Ibid*, para 63.

⁶⁶ The Children and Families Act 2014 amended s 1 of the Children Act 1989 (s 1(2A)) to include a presumption that parental involvement in a child's life will further the child's welfare unless there is evidence to suggest the involvement of that parent would put the child at risk of suffering harm.

communication – an inevitable consequence of many deportations – is far less satisfactory than regular, more organic face-to-face contact.⁶⁷

It is hardly surprising that criminal law and immigration law are such easy bedfellows in crimmigration: both are designed to control, punish, protect public interests, and respond to specific state emergencies and needs. However, the routine manipulation or disregard of family law principles and processes to meet border control and public security measures is rather more strained insofar as family law is designed to protect the sanctity of intimate relationships from the tyranny of state intrusion, with any overstepping of that boundary requiring specific justification under established human rights law.⁶⁸ Moreover, legal definitions of family have been advanced and extended to capture a much broader range of genetic, biological, social, contractual, and emotional interdependencies, potentially extending the reach of family-based challenges to deportation. Importantly, the protection of family relationships is seen as intrinsic to the promotion of individuals' rights of identity.⁶⁹ As Baroness Hale noted in the case of *Re B*:

... taking a child away from her family is a momentous step, not only for her, but for her whole family. ... Families in all their subversive variety are the breeding ground of diversity and individuality. In a free and democratic society we value diversity and individuality. Hence the family is given special protection in all the modern human rights instruments.⁷⁰

Looking at deportation decisions and processes through a famigration lens highlights just how dispensable children's welfare is when 'public policy' imperatives seek the removal of 'undesirable' migrants. However, it also reveals the untapped opportunities to bring family law concepts and processes to bear more constructively on immigration decision-making in ways that could serve children's, families', and the public's interests.

⁶⁷ Padmini Iyer, Muslihah Albakri, Helen BurrIDGE, Molly Mayer and Valdeep Gill, *The Effects of Digital Contact on Children's Wellbeing: Evidence from Public and Private Law Contexts – Rapid Evidence Review* (Nuffield Family Justice Observatory, London, 2020).

⁶⁸ Notably, Article 8(2) of the ECHR was incorporated into UK law by virtue of the UK Human Rights Act 1998.

⁶⁹ John Eekelaar, 'Family Law and Identity' (2018) *Oxford Journal of Legal Studies* 38(4), 822–840; Fenton-Glynn (n 25) at 57.

⁷⁰ *In Re B* [2008] UKHL 35 at [20].

How Famigration can Support Children's Welfare Assessments in a Deportation Context

A more constructive and deliberate application of family law – and particularly the framework of the Children Act 1989 – to deportation decision-making would ensure that the substantive and procedural obligations relating to children's welfare assessments, summarised earlier, are upheld. This integration is justified on the grounds that deportation engages the State in life-changing decisions that directly affect the welfare of children, in some cases leading to the child concerned being taken into the care of the State or another family member.

First and foremost, a family law-based approach would create an expectation and process for rigorous and independent welfare assessments, akin to those obtained in the context of domestic child proceedings under the Children Act 1989. It has been noted that, despite the availability of the right to challenge deportation on the grounds of family life and the requirement that children's welfare be assessed to support such a challenge, it is not incumbent on the Home Office to procure such an assessment. Nor is there any suggestion in the guidance that an assessment, if provided, should be undertaken by an independent welfare officer. The implication is that it is perfectly legitimate—indeed, presumed—that the parent who is subject to the deportation order will initiate and rely on the welfare assessment only insofar as it supports his/her appeal to remain in the UK. This not only places the financial and legal burden on the family to produce the evidence but also creates a conflict of interest, encourages the instrumentalisation of children's welfare assessments to meet the adult's ends, and militates against an authentic, independent, and comprehensive assessment of the *child's* welfare. A family law-based approach would bring the welfare reporting obligation within the scope of the Children Act and place the focus firmly on the rights and interests of the child for the sake of the child. Specifically, under the Children Act 1989, a court considering any question with respect to a child in private proceedings (s 7) or public proceedings (s 37) can appoint a welfare officer or local authority to report independently to the court on such matters relating to the child's welfare, either orally or in writing. Extending this reporting mechanism to deportation would ensure that *all* cases in which a parent seeks to challenge deportation on the basis of their parental relationship with a child would be supported by a timely, *independent* assessment of the child's needs in accordance with the factors set out in the welfare checklist⁷¹ and Home Office deportation guidance.⁷²

⁷¹ Children Act 1989, s 1(3).

⁷² Langrognet (n 27).

Second, a family law-based approach would bring deportation decisions affecting children more firmly within the scope of legal aid, on a par with decisions relating to public care proceedings.⁷³ This would ensure that the obligation to have regard to the impact of such decisions on children would be duly resourced rather than dependent on the financial and charitable resources available to the family. Such evidence, if publicly resourced and routinely available, would also be more likely to be brought to bear in a meaningful, robust way on the decision and lead to better outcomes for children.

CONCLUSION

This chapter has highlighted a number of disparities in the protection of children caught up in deportation proceedings: the vertical disparities – between the obligations to which the UK authorities are bound under international and domestic law and guidance and the reality on the ground; and the horizontal disparities – between the protections and processes in place in other family-related proceedings and those pertaining to deportation. Ever more stringent border-control measures, a worrying and widespread growth in civic anti-immigration extremism, and the strangling of resources for the justice system and other public services have left thousands of children more vulnerable to unfair and unsafe deportation processes and decisions. In spite of clear and abundant guidance relating to children's welfare assessments in a deportation context, the procedural ambiguities around how and when this should take place, coupled with the lack of resources to ensure this is discharged consistently, mean that children's perspectives and interests are more likely to be ignored, instrumentalised, selectively procured, and ultimately inadequately accommodated. The adverse and long-term impacts of this on children's identity and well-being are already well-documented through empirical studies across the world. The prevalence of a two-tiered system, therefore, that so readily disregards the rights, welfare, and care of children solely on the basis that their parents are involved in immigration proceedings remains indefensible.

⁷³ See (n 42).