THE UNCERTAIN PLACE OF THE CHILD'S BEST INTERESTS IN ECtHR'S IMMIGRATION CASE LAW¹

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Summary: It has been highlighted that in the area of immigration law the protection offered by the European Convention of Human Rights (ECHR) to children and family life is arguably at its weakest. The European Court of Human Rights (ECtHR) immigration case law on Article 8 ECHR has shown an uneven and uncertain application of the child's best interests. Little significance is attached to the child's respect for family life when determining whether the immigration measure is compatible with the ECHR. This paper will explore how the Court is identifying the best interests of the child and analyse what weight the Court apportions to the best interests of the child when balancing the state's and the applicant's interests. It will also examine whether the Court prioritize migration control over the child's best interests in cases where both family matters and immigration matters are involved.

Keywords: Child's best interests, Human rights, Family life, Migration, Family reunification.

1 Introduction

It has been highlighted that in the area of immigration law the protection offered by the European Convention of Human Rights (ECHR) to children and family life is arguably at its weakest.² The European Court of Human Rights (ECtHR) immigration case law on Article 8 ECHR has shown an uneven and uncertain application of the child's best interests.³ Little significance is attached to the child's respect for family life when determining whether the immigration measure is compatible with the ECHR.⁴ This paper will examine the ECtHR's

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- 1 The paper was prepared under the research project "The problematic developments of the application of Article 8 of the ECHR in immigration and asylum case-law" IGA_PF_2020_008.
 - 2 VAN BUREN, Geraldine. *Child Rights in Europe: Convergence and Divergence in Judicial Protection*, Strasbourg: Council of Europe Publishing, 2007, p. 123.
 - 3 DRAGHICI, Carmen. *The Legitimacy of Family Rights in Strasbourg Case Law 'Living Instrument' or Extinguishing Sovereignty?* Oxford: Hart Publishing, 2017, p. 379.
 - 4 KILKELY, Ursula. *The Child and the European Convention of Human Rights*. Aldershot: Ashgate/Dartmouth, 1999.

application of the principle of the best interests of the child when determining compliance with Article 8 ECHR in immigration cases. It will explore how the Court is identifying the best interests of the child and which elements the Court takes into account. This paper will also analyse what weight the Court apportions to the best interests of the child when balancing the state's and the applicant's interests. The research suggests that the Court does not examine the full range of relevant rights in the CRC which means it is not applying a complete, rights based approach to interpreting and applying the principle of the best interests of the child. Even though there is an increased attention towards the principle of the best interests of the child in immigration case law, the ruling frequently goes very little beyond paying lip-service to the principle and often state's migration control takes priority over the child's respect for family life.

2 The principle of the best interests of the child

The principle of the best interests of the child derives in international law from Article 3 (1) of the UN Convention on the Rights of the Child (CRC).⁵ The CRC should be interpreted in the teleological manner usually employed when interpreting an international convention and by reference to the jurisprudence of the CRC's monitoring body, the Committee on the Rights of the Child.⁶ Such an approach is consistent with the ECtHR's growing practice of seeking interpretive guidance from general principles of international law and from other international human rights treaties and bodies.⁷ The ECtHR's position is that the interpretation of the ECHR does not take place 'in a vacuum' and that the ECHR must be interpreted 'according to other parts of international law of which it forms part'.⁸ Since all ECHR contracting states are also parties to the CRC, an interpretation of the ECHR in light of the CRC is coherent with the reference in Article 31 (3) Vienna Convention on the Law of Treaties, 1969 (VCLT), to relevant rules of international law applicable in relations between parties' as auxiliary tools for interpretation.⁹

The best interests of the child is one of four leading principles in the CRC which all interrelate with each other and other provisions in the CRC.¹⁰ The other three leading principles are Article 6, the right to life and development;

5 CRC Art 3(1) "*In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration*".

6 See, Article 31 Vienna Convention on the Law of Treaties, 1969.

7 Demir and Baykara v Turkey, Application No.34503/97, judgment of 12 November 2008.

8 LETSAS, George, Strasbourg's Interpretative Ethic: Lessons for the International Lawyer. *The European Journal of International Law*, 2010, vol. 21, no. 3, p. 521.

9 DRAGHICI, Carmen. *The Legitimacy of Family Rights in Strasbourg Case Law 'Living Instrument' or Extinguishing Sovereignty?* Oxford: Hart Publishing, 2017, p. 374.

10 KLAVERBOER, Margrite al. The Best interests of the Child in Cases of Migration – Assessing and Determining the Best Interests of the Child in Migration Procedures. *The international Journal of Children's Rights*, 2017, vol. 25, no. 1, p. 117.

Article 12, the right to be heard; and Article 2, the right to non-discrimination. The best interests principle is overarching in the way that even though all rights have equal validity, no right(s) is to be interpreted in a way compromising the child's best interests.¹¹ Thus, the best interests concept should be understood as an umbrella provision for the rights of the child laid down in the Convention.¹²

The best interests principle is found in all the domestic systems of Council of Europe member states and is included in Article 24 (2) of the European Union Charter on Fundamental Rights, 2000 (CFR).¹³ In the parental child abduction case of *Neulinger and Shuruk v Switzerland*, the Grand Chamber of the ECtHR held that 'there is currently a broad consensus – including in international law – in support of the idea that in all decisions concerning children, their best interests must be paramount'.¹⁴ This suggests that the principle of the best interests of the child has acquired the status of a general principle of international law.¹⁵ This development is important because the best interests principle may assist in resolving the balancing of rights in the ECHR by adding weight to a particular right and it is also relevant in considering proportionality and whether to permit a state a margin of appreciation.¹⁶

The doctrine of margin of appreciation was first developed by the ECtHR in relation to children in *Handyside v UK*¹⁷. Generally the margin of appreciation has been developed by the Court to give to contracting states a measure of discretion in relation to the legislative, judicial and administrative action it takes in relation to a right in the ECHR. However, the status of the principle of the best interests of the child is problematic and one of the most vague and least understood legal concepts and allows huge leeway for a variety of interpretations.¹⁸

- 11 STRØMLAND, Monika et al. In Your Best Interest – A Discussion of How Capability Approach Could be Used as a Guideline to Strengthen and Supplement the Principle of the Child's Best Interests. *The international Journal of Children's Rights*, 2019, vol. 27, no. 3, p. 518.
- 12 KLAASSEN, Mark; RODRIGUES, Peter. The Best Interests of the Child in EU Family Reunification Law: A Plea for More Guidance on the Role of Article 24(2) Charter. *European Journal of Migration and Law*, 2017, vol. 19, no. 2, p. 198.
- 13 VAN BUREN, Geraldine. *Child Rights in Europe: Convergence and Divergence in Judicial Protection*, Strasbourg: Council of Europe Publishing, 2007, p. 33.
- 14 *Neulinger and Shuruk v Switzerland*, Application No. 41615/07, Judgment (GC) of 6 July 2010, para 135.
- 15 SMYTH, Ciara. 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? *European Journal of Migration and Law*, 2015, vol. 17, no. 1, p. 71.
- 16 VAN BUREN, Geraldine. *Child Rights in Europe: Convergence and Divergence in Judicial Protection*, Strasbourg: Council of Europe Publishing, 2007, p. 33.
- 17 *Handyside v The United Kingdom*, Application No. 5493/72, Judgement of the 7 December 1976.
- 18 SKIVENES Marit, SØRSDAL Line Marie, The Child's Best Interest Principle across Child Protection Jurisdictions. In FALCH-ERIKSEN, Asgeir, BACKE-HANSEN, Elisabeth (ed) *Human Rights in Child Protection, Implication for professional Practice and Policy*. Cham: Springer, 2018, p. 60.

These difficulties are especially shown in the ECtHR's case law on family immigration. It has been highlighted that in the area of immigration law the protection offered by the ECHR to children and family life is arguably at its weakest.¹⁹ In these cases the Court distinguishes between respect for family life and what it considers amounts to developing family life.²⁰ In other areas of family life, such as adoption, this differentiation is not being made.²¹ This difference in treatment in the immigration context creates inconsistency in the Court's case law when applying the best interests of the child principle. State practice shows a resistance to the concept of best interests in the immigration context, since the child may not have a right to what is in his/her best interests. In other words, whether or not it is in the child's best interests to enter or remain in the host country is independent of the question of whether the child has a substantive right to do so.²² In order to incorporate the child applicant's best interests the Court ought to limit the scope of a state's margin of appreciation, although this has not always been the practice of the Court when it comes to the application of Article 8 ECHR in immigration cases.

3 ECtHR's application of the principle of the best interests of the child

The best interests of the child does not appear in the text of the ECHR. Still, the ECtHR is adopting the best interests of the child principle within its decisions with respect to Article 8 ECHR in the immigration context. The jurisprudence shows that the principle is considered as part of the balancing exercise in Article 8 ECHR. It is interesting to note that the jurisprudence of the ECtHR with respect to the best interests of the child is based on Article 3(1) CRC which according to the Court in *Nunez v Norway*²³ is incorporated in Article 8 ECHR.²⁴ However, the indirect application of the best interests of the child is problematic. The Court is not interpreting or applying the full range of relevant rights in the CRC and, therefore, not adopting a complete rights based approach when interpreting the principle. Also the balancing exercise of Article 8 appears not to accommodate a proper position for the best interests of the child.

19 VAN BUREN, Geraldine. *Child Rights in Europe: Convergence and Divergence in Judicial Protection*, Strasbourg: Council of Europe Publishing, 2007, p. 123.

20 Ibid. p 123.

21 Compare *Keegan v Ireland*, 18 EHRR 342, 1994 regarding adoption, where only one meeting had taken place between father and child, capable of being protected by Article 8, with *Gül v Switzerland* Application No. 23218/94, ECtHR judgement of 29 February 1996, concerning family reunification.

22 SMYTH, Ciara. 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? *European Journal of Migration and Law*, 2015, vol. 17, no. 1, p. 72.

23 *Nunes v Norway* Appl. No., 55597/09, ECtHR 28 June 2011.

24 KLAASSEN, Mark; RODRIGUES, Peter. The Best Interests of the Child in EU Family Reunification Law: A Plea for More Guidance on the Role of Article 24(2) Charter. *European Journal of Migration and Law*, 2017, vol. 19, no. 2, p. 217.

3.1 Identifying the best interests of the child

The task of identifying the interests of the child in Article 8 ECHR migration context means identifying relevant rights of the child. When looking at the rights in the CRC, Article 16 (1)²⁵ corresponds with Article 8 in ECHR.²⁶ However, Article 16 (1) CRC is only one of many rights relating to the concept of family unity.²⁷ Hence, family unity can be seen as an established norm in the CRC. Family unity should, therefore, be the ECtHR's default position in family reunification cases concerning children.²⁸ The Court should be asking whether it is in the best interests of the child to remain or reunite with the family in the host country or in the country of origin and not, as it occasionally does, ask whether it is in the best interests of the child to be with the family. In the current case law the Court occasionally implies that family unity is not the best interests of the child, not for permissible reasons associated with the parent-child relationship, but for reasons associated with migration.²⁹ This can for instance be seen in *Gül v Switzerland* where the Court held that the parent's departure was voluntary and that the father caused the separation from his son by leaving Turkey.³⁰ This implies that the family unity is no longer in the best interest of the child.³¹

3.1.1 Relevant elements to be considered

When determining whether it is in the best interests for the child to remain or reunite with the family in the host country or in the country of origin, the Court takes certain elements into account relevant to the situation in question. In the current ECtHR's case law the Court is in general taking the child's adapt-

25 1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.

26 "1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others"

27 See for instance CRC Articles 7(1), 8(1), 9, 10(1), 18(1) and 22(2).

28 Committee on the Rights of the Child, 'General Comment No. 14: The Right of the Child to Have his or her Best Interests Taken as a Primary Consideration' UN Doc CRC/C/GC/14 (29 May 2013) Supra note 61, para 66.

29 SMYTH, Ciara. 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? *European Journal of Migration and Law*, 2015, vol. 17, no. 1, p. 93. See also IM v The Netherlands Application No. 41226/98, ECHR, 25 March 2003 and *Berisha v Switzerland* Application No. 948/12, ECtHR Judgement of 30 July 2013.

30 *Gül v Switzerland*, Appl. No. 23218/94, ECtHR judgement of 29 February 1996

31 SMYTH, Ciara. 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? *European Journal of Migration and Law*, 2015, vol. 17, no. 1, p. 89.

ability to the country of origin or the issue of country ties and the existence of an effective family bond into consideration when determining the child's best interests.³²

Depending on the context, the age of the child has different impact on the Court's reasoning. The age is linked to the questions whether the child is adaptable or not to move to the country of origin with the expelled parent to enjoy family life there. Generally young children between the age of 1 and 6 years old are considered adaptable and, therefore, able to move to the country of origin.³³ But this reasoning is not consistent since the Court has in other cases found children of the age from 9 to 14 to be of an adaptable age.³⁴ This indicates that the assessment of adaptability and country ties is arbitrary and any age can be seen as adaptable without evidence to support the position.³⁵

Another element scrutinised by the Court when determining the child's best interests is the effective family bond. The Court assesses the extent to which there are genuine bonds of attachments. It is hard to draw any clear conclusions about what impact the child's ties and dependency on the parents has on the Court's decisions. However, in cases where parents have left children behind in the country of origin and the children later are seeking an entry to exercise family life, the Court tends to find the parent is to blame for leaving the child behind when emigrating.³⁶ Even though the Court's strict approach seemed to be abandoned with the *Sen* case³⁷ this judgement remains a rather isolated and fact-specific decision.³⁸ In the post *Sen* case law the parent is left with the option of continuing the level of contact after leaving the country of origin or continuing family life

32 See SMYTH, Ciara. 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? *European Journal of Migration and Law*, 2015, vol. 17, no. 1, p. 75 and LELOUP, Mathieu, The principle of the best interests of the child in the expulsion case law of the European Court of Human Rights: Procedural rationality as a remedy for inconsistency. *Netherlands Quarterly of Human Rights*, 2019, vol. 37, no. 1, p. 54.

33 See for instance *Sorabjee v UK*, App. No 23938/94, ECmHR, Decision of 23 October 1995, *Amara v NL*, Appl. No 6914/02, Decision of October 2004, *Üner v NL*, App. No 46410/99, Judgement (GC) of 18 October 2006 and *Omoregi v N*, Appl. No 265/07, Judgement of 15 November 2012.

34 See *Antwi and Others v N*, Appl. No 26940/10, Judgement of 14 February 2012, *Palanci v Switzerland*, Appl. No. 2607/08, Judgement of 25 March 2014, *Papashvillo v Belgium*, Appl. No. 41738/10, Judgement of 17 April 2014, and *Kaplan v Norway*, Appl. No. 32504/10, Judgement of 24 July 2014.

35 DRAGHICI, Carmen. *The Legitimacy of Family Rights in Strasbourg Case Law 'Living Instrument' or Extinguishing Sovereignty?* Oxford: Hart Publishing, 2017, p. 377.

36 See *Gül v Switzerland*, appl nr 23218/94, ECtHR judgement of 29 February 1996, *Ahmut v Netherlands* (1996) 24 EHRR 62.

37 *Sen v the Netherlands*, 21 December 2001 (2003) 36 EHRR 7.

38 DRAGHICI, Carmen. *The Legitimacy of Family Rights in Strasbourg Case Law 'Living Instrument' or Extinguishing Sovereignty?* Oxford: Hart Publishing, 2017, p. 349.

in the country of origin.³⁹ Although, a comparable exceptional scenario to the Sen case can also be found in the Tuquabo-Tekle case⁴⁰ where the Court stated that ‘parents who leave children behind while settle abroad cannot be assumed to have irrevocably decided that those children are to remain in the country of origin permanently and to have abandoned any idea of a future reunion.’⁴¹

In May 2013, the Committee on the Rights of the Child published a comment on Article 3 (1) CRC intended to accommodate the lack of common understanding of the principle.⁴² Part V of the Committee on the Rights of the Child, ‘General Comment No. 14 (GC No. 14), *Implementation: assessing and determining the child’s best interests*, outlines seven elements that should be considered when a decision about the child’s best interests is to be made (pp. 7ff.): (a) the child’s views; (b) the child’s identity; (c) preservation of the family environment and maintaining relations; (d) care, protection, and safety of the child; (e) situation of vulnerability; (f) the child’s right to health, and (g) the child’s right to education. However, because this principle covers all areas of a child’s life, the comment also underlines that the principle remains ambiguous, and states that; ‘*Not all the elements will be relevant to every case, and different elements can be used in different ways in different cases. The content of each element will necessarily vary from child to child and from case to case, depending on the type of decision and the concrete circumstances, as will the importance of each element in the overall assessment*’.⁴³

In order for the ECtHR to apply a complete, rights-based approach to interpreting and applying the principle of the best interests of the child, the full range of relevant rights in the CRC have to be examined for the situation in question.

3.1.2 *The child’s view and socio-economic rights*

Even tough adaptability, country ties and effective family bond are important elements to assess when determining the best interests of the child there are additional relevant rights in the CRC to consider. The ECtHR should adopt a complete, rights-based approach when interpreting and applying the principle of the best interests of the child and therefore examine the full range of relevant rights in the CRC. According to the GC No. 14 the assessment and determination of the best interests of the child should take place in a very systematic way. Assessing the child’s best interests is a unique activity, which should be under-

39 Chandra and Others v The Netherlands, App. No. 53102/99, ECtHR decision of 13 May 2003, Ramos Andrade v The Netherlands, App. No. 53675/00, ECtHR decision of 6 July 2004.

40 Tuquabo-Tekle v The Netherlands, App.No. 60665/00, ECtHR judgement of 1 December 2005.

41 Ibid para 45.

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

43 Ibid paragraph 80.

taken in each individual case, in the light of the specific circumstances of each child or group of children in general.⁴⁴

In addition to the elements currently applied by the court, when determining the best interests of the child in the immigration context, the child's views is an important element to consider.⁴⁵ The child's right to express its views and have them taken into account is vital in any decision-making and the child's views should be an essential element in the best interests assessment, making it less paternalistic.⁴⁶ The right of the child to be heard is laid down in Article 12 CRC. According to the Committee on the Rights of the Child, there is an intimate connection between the best interests of the child and the views of the child.⁴⁷ In the current case law the Court is not assessing or giving due considerations to the views of the child in the immigration context of Article 8 ECHR. One reason for the lack of consideration of the child's views in these cases could be that children involved are often not party of the proceedings. This has in some cases lead the Court to refuse to consider the interests of the child who is not considered party of the proceedings.⁴⁸ Although, in other cases the Court does consider the best interests of the child involved even where he or she is not party of the proceedings.⁴⁹

Other relevant elements to be considered when determining the best interests of the child in the immigration context could be certain socio-economic rights. One socio-economic right relevant in the immigration context is the right to an adequate standard of living. This right is defined in the CRC as the right to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.⁵⁰ Other relevant socio-economic rights are the right of the child to health and to education. In general the Court is not considering the relative qualities of the host and home country in light of relevant socioeconomic rights of the child but in some cases it has been considered.⁵¹

44 GC No.14, para 48.

45 See POBJOY, J. M., The best interests of the child principle as an independent source of protection, *International Comparative Law Quarterly*, 2015, vol. 64, no. 2, p. 26ff., where the author is reasoning about the child's views being one of three factors that must be taken into account in making an assessment as to what is in the best interests of a child.

46 SANDBERG, Kirsten, Children's Right to Protection under the CRC. In FALCH-ERIKSEN, Asgeir, BACKE-HANSEN, Elisabeth (ed) *Human Rights in Child Protection, Implication for professional Practice and Policy*. Cham: Springer, 2018, p. 32.

47 According to the General Comment No. 12 (2009), *The right of the child to be heard*, UN Doc. crc/c/Gc/12, para 74, there can be no correct application of article 3 if the components of article 12 are not respected.

48 See I.M. v NL, Application No. 41226/98, Decision of 25 March 2003.

49 See Nunez v Norway, Application No. 55597/09, Judgement of 28 June 2011.

50 See Article 27 CRC.

51 In Palanci v Switzerland, Application No. 2607/08, Judgement of 25 March 2014, the Court used the fact that there was a good education system in Ankara as an argument in favour of the family relocating to Turkey with their expelled father and in Josef v Belgium, Application No. 70055/10, Decision of 27 February 2014, the Court refused to countenance the argument that the children would receive a better education in Belgium than Nigeria,

In conclusion, when the Court is identifying the best interests of the child it needs to see the best interests of the child in the light of relevant rights of the child where the key right is the right of the child to family unity. As can be seen from the case law, the Court is not adopting a complete, rights based approach when interpreting and applying the principle of the best interests of the child and therefore not examining the full range of relevant rights in the CRC. All the elements in the GC No 14 might not be relevant to every case, and different elements can be used in different ways in different cases. However, when determining the best interests of the child in the immigration context the child's views and socio-economic rights are relevant elements to consider in addition to adaptability, country ties and effective family bond.

3.2 *Weighing the best interests of the child against state's interests in immigration control*

When determining if Article 8 ECHR and the right to family life has been violated in a case, the Court has to determine whether the contracting state has struck a fair balance between the personal interests of the immigrant, on one hand, and the public interest in ensuring an effective implementation of immigration control on the other. The Court has to balance the state's and the applicant's interests. The best interests of the child among other interests have to be considered. The question is what weight the Court apportions to the best interests of the child when balancing the state's and the applicant's interests. In the *Abdulaziz* case⁵² the Court's respect to state sovereignty in immigration matters was laid down. The Court established that such cases are '*concerned not only with family life but also with immigration that, 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*'.⁵³ This means that bilateral or multilateral treaties concluded by a contracting state may oblige that state to allow entry to a foreigner.⁵⁴

In order to determine whether there has been a violation of Article 8 ECHR the ECtHR uses different compliance tests for different immigration cases. The Court is differentiating between expulsion cases, admission cases, and hybrid cases. Expulsion cases concern foreign nationals with residence permit who have been convicted for a crime and are facing an expulsion. In these cases the question is whether the state has a negative obligation not to expel the foreign national. Admission cases concern foreign nationals who are seeking an entry to a contracting state to exercise family life. In these cases the Court has to deter-

reiterating its established line that Article 8 does not impose a general obligation on the state to respect the choice by immigrants of their country of residence.

52 *Abdulaziz, Cabales and Balkandali v the UK*, Application No. 9214/80; 9473/81; 9474/81, Judgement of 28 May 1985.

53 *Ibid*, para 67.

54 BOELES, Pieter et al. *European Migration Law*. Cambridge: Intersentia, 2009, p. 24.

mine if the state has a positive obligation to admit the foreign national. The third category, hybrid cases, concern foreign nationals who are remaining in the host country without a right to residence and are aware of the uncertain residence right while developing family ties. In these cases there is a mix of positive and negative obligations. It is common for all immigration cases in which the Court tested whether the state complied with the right to family life that states are granted a certain margin of appreciation which depends on the strength of the residence status of the applicant. Settled migrants with a right of residence enjoy a higher level of protection than foreign nationals seeking an entry or requesting to regularise their irregular migration status.

The case law of the expulsion of settled immigrants contains rather clear guidelines on how to determine whether the termination of lawful residence would lead to a violation of Article 8 ECHR. Therefore the focus in this paper will lay on admission cases and hybrid cases where the Courts case law is more unpredictable and uncertain. Although, there are some cases worth mentioning when it comes to expulsion cases.

3.2.1 Weight apportioned to the child's best interests in expulsion cases

In 2001, the Court tried to improve the somewhat unpredictable expulsion case law by developing the Boultif-criteria⁵⁵ which national courts should use when performing the proportionality assessment of the expulsion measure. In the Üner case, the Grand Chamber confirmed these criteria and added two additional ones. More specifically it stated that regard should also be had to:

- the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled; and,
- the solidity of social, cultural and family ties with the host country and with the country of destination.⁵⁶

In the Üner judgment, the Court thus expressly established the best interests of the child as a criterion to take into account when one of the parents is confronted with an expulsion measure. More specifically, regard should be had to the difficulties these children will encounter if they were to follow the expelled parent. It should be noted that these Üner-criteria only apply in cases where an adult is being expelled because of criminal offences he or she committed.⁵⁷

It is interesting to note that the principle of the best interests of the child have been more successful in cases where the deportee is a criminal offender who was a minor at the time when he or she committed the offence prompting

55 Boultif v Switzerland App. No. 54273/00 (ECtHR, 2 August 2001) para 48.

56 Üner v Netherlands App. No. 46410/99 (ECtHR (GC), 18 October 2006).

57 LELOUP, Mathieu, The principle of the best interests of the child in the expulsion case law of the European Court of Human Rights: Procedural rationality as a remedy for inconsistency. *Netherlands Quarterly of Human Rights*, 2019, vol. 37, no. 1, p. 53.

the removal measure.⁵⁸ In *Jakupovic v Austria* the Court held that very weighty reasons have to be put forward to expel a minor.⁵⁹ Similarly, in *Yildiz v Austria*,⁶⁰ and *Emre v Switzerland*⁶¹ the Court attached significant importance to the fact that the offences were committed while the applicants were still minors. This, however, does not mean that it is impossible to expel minors. In the *Maslov v Austria* case the Court explicitly held that the obligation to have regard to the best interests of the child also applies if the person to be expelled is himself or herself a minor, or if—as in the present case—the reason for the expulsion lies in offences committed when a minor.⁶² Although, the Court stated that very serious violent offences can justify expulsion even if they were committed by a minor.⁶³

3.2.2. *Weight apportioned to the child's best interests in admission and hybrid cases*

In admission cases, concerning foreign nationals seeking an entry, Article 8 ECHR will be violated if there are insurmountable obstacles to establishing family life in the country of origin. Only then will the state be held to have exceeded its margin of appreciation.⁶⁴ In hybrid cases where the applicant's immigration status was precarious at the time of family formation, the Court has stated that only in the most exceptional circumstances will the applicant's expulsion constitute a violation of Article 8 ECHR.⁶⁵ When looking at the current case law on admission cases and hybrid cases it is hard to understand what weight the Court has given the best interests of the child within the insurmountable obstacle and exceptional circumstances tests.

In *Josef v Belgium*⁶⁶ the Court did not accord with the best interests of the child. In this case the expulsion of a Nigerian single mother of three children, who was HIV positive and in need of high level of medical and psycho-social support did not violate Article 8 ECHR. The children, who the Court found would be able to adapt to family life in Nigeria, were at the age of six, four and one and a half by the time of the Courts decision. They were all born in Belgium and had lived there their whole life. The Court even appeared to accept the existence of a risk that, if returning to Nigeria, the mother would die a premature death.⁶⁷

58 DRAGHICI, Carmen. *The Legitimacy of Family Rights in Strasbourg Case Law 'Living Instrument' or Extinguishing Sovereignty?* Oxford: Hart Publishing, 2017, p. 378.

59 *Jakupovic v Austria* App no 36757/97 (ECtHR, 6 February 2003) paras 28–33.

60 *Yildiz v Austria* App no 37295/97 (ECtHR, 31 October 2002) para 45.

61 *Emre v Switzerland* App no 42034/04 (ECtHR, 22 May 2008) para 74.

62 *Maslov v Austria*, Application No. 1638/03 ECtHR judgement of 13 June 2008, (GC), para 82.

63 *Ibid*, para 85.

64 See *Gül v Switzerland*, appl nr 23218/94, ECtHR judgement of 29 February 1996 and *Ahmut v Netherlands* (1996) 24 EHRR 62.

65 See *Rodrigues da Silva and Hoogkamer v the Netherlands*, app. No. 50435/99, ECtHR 31 January 2006.

66 *Josef v Belgium*, Application No. 70055/10, Judgement 27 February 2014.

67 *Ibid*, para 145.

This case is in stark contrast with *Jeunesse v the Netherlands*⁶⁸ where the Court considered the best interests of the child as one of four factors making the case exceptional. The other factors given account were: that the applicant's husband and children were all Netherlands nationals and that the applicant held Netherlands nationality at birth but lost it when Surinam became independent; that the authorities in the Netherlands had been tolerating the applicant's irregular presence for 16 years and that the family would experience a degree of hardship if required to relocate to Surinam. When assessing the best interests of the child, the Court held that since the applicant was the mother and homemaker, it was obvious that it would not be in the children's best interests for their mother to be forcibly relocated to Surinam and for them to remain in the Netherlands and, thus, rupture their relationship with her, or relocate to Surinam themselves, a country to which they had never been.⁶⁹ In this case the Court also commented on the proper weight to be accorded to the principle of the best interests of the child. The Court held that while the best interests of the child alone could not be decisive, 'such interests certainly must be afforded significant weight'.⁷⁰ The national decision-making bodies should therefore '*advert to and assess evidence in respect of the practicality, feasibility and proportionality of any removal order in order to give effective protection and sufficient weight to the best interests of the child*'.⁷¹

The case law on admission and hybrid cases shows that the weight the Court attaches to the best interests of the child when determining the obstacle or exceptional circumstances tests varies depending on other factors in the balancing test. However, in most cases where the parents are divorced or separated and custody has been awarded to the parent with the right to remain, but there is an access arrangement in place in respect of the parent who is trying to regularise the stay or seeking an entry, the best interests of the child is given significant weight.⁷² In these cases a negative decision would automatically result in the forced separation of the child from one of the parents. Therefore, the Court rightfully gives significant weight to the best interests of the child. Although, in other cases where the parents are still together the Court is showing an inconsistent attitude.⁷³ In these cases, a negative decision will not necessarily result in a forced separation.

The question for the Court is therefore whether it is in the best interests of the child to continue family life in the host country or in the country of origin. In these kinds of cases the Court is inconsistent. The Court doesn't seem to take any certain elements into account relevant to the situation in question as long

68 *Jeunesse v Netherlands*, App No 12738/10, Grand Chamber, ECHR, 3 October 2014.

69 *Ibid*, para 119.

70 *Ibid*, para 109.

71 *Ibid*, para 120.

72 See *Rodrigues da Silva and Hoogkamer v the Netherlands*, app. No. 50435/99, ECtHR 31 January 2006 and *Nunez v Norway* (2011) ECHR 1047.

73 See *Antwi v Norway* (2012) ECHR 259.

as the family is together. All other elements, such as the country ties, the child's views or socio-economic rights seem to lose its relevance. As Ciara Smyth puts it *"In such cases, the Court is inconsistent on the amount of weight it gives to the best interests of the child, as if the principle of the best interests of the child loses its inherent significance once the family are together."*⁷⁴ This also suggest that the ECtHR legitimise a difference in treatment between children of harmonious families and single parents to whom the obstacle and exceptional circumstances tests applies. Children in harmonious families face a greater risk of having to leave their home country than children of separated parents. One can say, supporting a different stance would be to accept that domestic decision makers can justifiable penalise children for the unpleasant decisions of the adults responsible for them.⁷⁵

Even though there is no agreement on the precise weight apportioned on the child's best interests, it is generally accepted that the interests of the child should receive some hierarchical primary.⁷⁶ It can be questioned whether the child's best interests receives such weight in the balancing exercise when it has to be demonstrated that it would be insurmountable to relocate to another country. This test implies that a child may have to leave their own country in order to enjoy family life with a law-abiding non-national parent. The insurmountable obstacle criterion can be legitimate in situations where the non-national poses a threat to the community but it is difficult to defend it where the case is based on immigration policy alone. A fair balance has not been struck between two options, namely voluntary exile or termination of family life.⁷⁷ Leloup suggests that; *"the best interests of the child – and the right to family life in general – would be better protected if this burden of proof were to be reversed and if the proportionality test started from a family-centred approach. In this approach, the family – rather than having to prove that there were insurmountable obstacles for their relocation – would have to demonstrate that they were enjoying family life in the host state and had sufficient social and economic ties there. It will then be up to the host state to give sufficient reasons – for example serious threats to the public order – to justify the expulsion."*⁷⁸

74 SMYTH, Ciara. 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? *European Journal of Migration and Law*, 2015, vol. 17, no. 1, p. 99.

75 DRAGHICI, Carmen. *The Legitimacy of Family Rights in Strasbourg Case Law 'Living Instrument' or Extinguishing Sovereignty?* Oxford: Hart Publishing, 2017, p. 374.

76 POBJOY, J. M., The best interests of the child principle as an independent source of protection, *International Comparative Law Quarterly*, 2015, vol. 64, no. 2, p. 37 f., Neulinger and Shuruk v Switzerland, Application No. 41615/07, Judgment (GC) of 6 July 2010, para 135.

77 DRAGHICI, Carmen. *The Legitimacy of Family Rights in Strasbourg Case Law 'Living Instrument' or Extinguishing Sovereignty?* Oxford: Hart Publishing, 2017, p. 388.

78 LELOUP, Mathieu, The principle of the best interests of the child in the expulsion case law of the European Court of Human Rights: Procedural rationality as a remedy for inconsistency. *Netherlands Quarterly of Human Rights*, 2019, vol. 37, no. 1, p. 60.

3.3 *The migration control approach*

Another issue that arises in cases involving children and immigration is the order of priority of child proceedings and immigration proceedings. In the *Rodrigues case*⁷⁹ the family proceeding courts had chosen the father as the custodial parent mostly because the mother would be expelled from the jurisdiction even though the father did not play a significant role in the daughters care and upbringing.⁸⁰ In cases where both family matters and immigration matters are involved, the question is which issues should be determined first, the most suitable caregiver or the immigration status of the parent? In many cases the Court will prioritize migration proceedings. The immigration proceedings take priority and child proceedings need to be resolved in accordance with the immigration decision.

This seems to be the case in *Berisha v Switzerland*.⁸¹ The case regarded the expulsion of three children to Kosovo, who illegally had entered Switzerland to join their lawfully settled parents. In this case the Court's analysis of the factual circumstances contradicts the paramountcy of the child's best interests affirmed in *Neulinger and Schuruk v Switzerland*.⁸² Instead of paying particular attention to the circumstances of the minor children concerned, especially their age, their situation in their country of origin and the extent to which they are dependent on their parents, as the court stated in the case,⁸³ the Court applied the traditional insurmountable obstacle test and attached particular weight to the illegal conduct of the parents. This is troublesome since the state can penalise behaviour in breach of immigration rules which the children can't be held responsible for.⁸⁴ Regarding the youngest child, 7 years old by the time of the application, the Court found that the parents are not prevented from travelling – or even staying – with her in Kosovo in order to ensure that she is provided with the necessary care and education.⁸⁵ The Court is clearly not taking the position that family unity can be seen as an established norm in the CRC and that family unity should be the Court's default position in family reunification cases concerning children.⁸⁶ Instead the state's interest *prima facie* trumps the welfare of the child.

79 *Rodrigues da Silva and Hoogkamer v the Netherlands*, app. No. 50435/99, ECtHR 31 January 2006.

80 *Ibid*, para 33.

81 *Berisha v Switzerland* Application No. 948/12, ECtHR Judgement of 30 July 2013.

82 *Neulinger and Shuruk v Switzerland*, Application No. 41615/07, Judgment (GC) of 6 July 2010, para 135.

83 *Berisha v Switzerland* Application No. 948/12, ECtHR Judgement of 30 July 2013 para 51.

84 DRAGHICI, Carmen. *The Legitimacy of Family Rights in Strasbourg Case Law 'Living Instrument' or Extinguishing Sovereignty?* Oxford: Hart Publishing, 2017, p. 378.

85 *Berisha v Switzerland* Application No. 948/12, ECtHR Judgement of 30 July 2013 para 60.

86 Committee on the Rights of the Child, 'General Comment No. 14: The Right of the Child to Have his or her Best Interests Taken as a Primary Consideration' UN Doc CRC/C/GC/14 (29 May 2013) *Supra* note 61, para 66.

Another case which exemplifies the migration control approach is the *Omorieg v Norway* case.⁸⁷ In this case a Nigerian asylum seeker was rejected and stayed in Norway without residence status. He got married to a Norwegian woman with whom he had a child who had Norwegian nationality. Mr Omorieg had not committed any crimes but merely breached immigration law. For the dissenting Judge Malinverni this act was purely administrative and in no sense criminal.⁸⁸ However, the Court accepted the government's argument that they should not be presented with family life as a *fait accompli* that overrides migration control prerogatives.⁸⁹ Further, the Court did not find that the national authorities of the respondent State acted arbitrarily or otherwise transgressed their margin of appreciation when deciding to expel the applicant and to prohibit his re-entry for five years.⁹⁰ Also, in view of the applicants' immigration status the Court did not find any exceptional circumstances in the case requiring Norway to grant him a right of residence.⁹¹ When assessing the best interests of the child the Court found that the child, who was two years old, was still of an adaptable age at the time when the disputed measures were decided and implemented and nothing should prevent the wife and child from coming to visit the first applicant for periods in Nigeria.⁹²

Migration control is clearly overriding the child's best interests and right to family life in this case since the Court held that Article 8 ECHR did not afford any protection to the family life in Norway, as the couple could have had no expectations of the asylum seeker's continued residence there. Likewise, the *Antwi* case⁹³ evidently shows the problematic development that the best interest of the child exercise in immigration cases will only prevail the State's interests when extreme hardship can be demonstrated.

This suggest that the whole spectrum of options available are not always considered.⁹⁴ In *Antwi* the Court found that the breaches of immigration law weighed heavy in the balance when assessing the proportionality of the expulsion of the applicant. It noted that the 10 year old daughter is a Norwegian national who spent her whole life in Norway, is fully integrated into Norwegian society and speaks Norwegian at home. She has only visited Ghana three times and has limited links to the country and little knowledge of the language. The Court stated that it most probably would be difficult for the daughter to adapt to life in Ghana and that the implementation of the expulsion order would not

87 *Omorieg and Others v Norway*, Appl. No 265/07, 2008.

88 *Ibid*, dissenting opinion of judge Malinverni joined by judge Kolver, para 12.

89 *Ibid* para 64.

90 *Ibid* para 68.

91 *Ibid* para 68.

92 *Ibid* para 66.

93 *Antwi v Norway* (2012) ECHR 259.

94 DRAGHICI, Carmen. *The Legitimacy of Family Rights in Strasbourg Case Law 'Living Instrument' or Extinguishing Sovereignty?* Oxford: Hart Publishing, 2017, p. 378.

be beneficial to her.⁹⁵ Despite admitting it would be difficult for the daughter to adapt to life in Ghana and that the implementation of the expulsion order would not be beneficial for her the Court found no exceptional circumstances in the present case and that sufficient weight was attached to the best interest of the child.

Due to the fact that the principle of the best interests of the child is not expressly enshrined in the ECHR the way the principle has been applied by the Court makes it difficult to determine when the principle will be applied as the overriding principle. Unfortunately the application of the principle of the best interests of the child has not added predictability to the Courts' case law on family migration. This is not necessarily the Court's fault as the principle itself lacks certainty. Some may regard such a lack of certainty as flexibility and as a morality that is essential in the case-by-case approach, which the best interest standard requires. However, it would be in the interests of certainty and in the best interests of children if the Court were to provide guidance on which factors the court would weigh more heavily in the balance when applying the best interests principle.⁹⁶ This would make the Courts' application of the principle less arbitrary and predictable.

4 Conclusions

The ECtHR's immigration case law on Article 8 ECHR has shown an uneven and uncertain application of the child's best interests.⁹⁷ Little significance is attached to the child's respect for family life when determining whether the immigration measure is compatible with the ECHR.⁹⁸ The Grand Chamber of the Court affirmed the paramountcy of the child's best interests in *Neulinger and Shuruk v Switzerland*,⁹⁹ which implies that the principle of the best interests of the child has acquired the status of a general principle of international law. However, state practice shows a resistance to the concept of best interests in the immigration context, since the child may not have a right to what is in his/her best interests.

The task of identifying the interests of the child in Article 8 ECHR migration context means identifying relevant rights of the child. The Court needs to see the best interests of the child in the light of all relevant rights of the child where the key right is the right of the child to family unity. As can be seen from the case law,

95 *Antwi v Norway* (2012) ECHR 259, para 94–97

96 VAN BUREN, Geraldine. *Child Rights in Europe: Convergence and Divergence in Judicial Protection*, Strasbourg: Council of Europe Publishing, 2007, p. 36.

97 DRAGHICI, Carmen. *The Legitimacy of Family Rights in Strasbourg Case Law 'Living Instrument' or Extinguishing Sovereignty?* Oxford: Hart Publishing, 2017, p. 379.

98 KILKELY, Ursula. *The Child and the European Convention of Human Rights*. Aldershot: Ashgate/Dartmouth, 1999.

99 *Neulinger and Shuruk v Switzerland*, Application No. 41615/07, Judgment (GC) of 6 July 2010, para 135.

the Court is not adopting a complete, rights based approach when interpreting and applying the principle of the best interests of the child and, therefore, not examining the full range of relevant rights in the CRC. In the current ECtHR's case law the Court is in general taking the child's adaptability, country ties and effective family bond into consideration when determining the child's best interests¹⁰⁰ and leaving out other important elements such as the child's views and socio-economics rights. The ECtHR should therefore examine the full range of relevant rights in the CRC in order to adopt a complete, rights based approach when interpreting and applying the principle of the best interests of the child.

When looking at the current case law on admission cases and hybrid cases it is hard to understand what weight the Court has given the best interests of the child when balancing the state's and the applicant's interests against each other. The weight the Court attaches to the best interests of the child when determining the insurmountable obstacle or exceptional circumstances tests varies depending on other factors in the balancing test. In most cases where the parents are divorced or separated and custody has been awarded to the parent with the right to remain, but there is an access arrangement in place in respect of the parent who is trying to regularise the stay or seeking an entry, the best interests of the child is given significant weight.¹⁰¹ Although, in other cases where the parents are still together the Court is showing an inconsistent attitude.¹⁰² The Court doesn't seem to take any certain elements into account relevant to the situation in question as long as the family is together. It also suggests that the ECtHR legitimises a difference in treatment between children of harmonious families and single parents to whom the obstacle and exceptional circumstances tests applies.

It can be questioned whether the child's best interests receives sufficient weight in the balancing exercise when it has to be demonstrated that it would be insurmountable to relocate to another country. A fair balance has not been struck between two options, namely voluntary exile or termination of family life.¹⁰³ In order to better protect the best interests of the child scholars suggest that the burden of proof should not be on the citizen to demonstrate that they have exhausted all other jurisdictions where they could possibly relocate with their non-national partner or child, but rather on the State to put forward a cogent motivation as to why the citizen needs to leave the country in order to enjoy family life.¹⁰⁴

100 SMYTH, Ciara. 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? *European Journal of Migration and Law*, 2015, vol. 17, no. 1, p. 75.

101 See Rodrigues da Silva and Hoogkamer v the Netherlands, app. No. 50435/99, ECtHR 31 January 2006 and Nunez v Norway (2011) ECHR 1047.

102 See Antwi v Norway (2012) ECHR 259.

103 DRAGHICI, Carmen. *The Legitimacy of Family Rights in Strasbourg Case Law 'Living Instrument' or Extinguishing Sovereignty?* Oxford: Hart Publishing, 2017, p. 388.

104 LELOUP, Mathieu, The principle of the best interests of the child in the expulsion case law

In many cases where both family matters and immigration matters are involved the Court will prioritize migration proceedings. The immigration proceedings take priority and child proceedings need to be resolved in accordance with the immigration decision. Due to the fact that the principle of the best interests of the child is not expressly enshrined in the ECHR the way the principle has been applied by the Court makes it difficult to determine when the principle will be applied as the overriding principle. Unfortunately the application of the principle of the best interests of the child has not added predictability to the Courts' case law on family migration. Even though there is an increased attention towards the principle of the best interests of the child in immigration case law, the ruling very often goes very little beyond paying lip-service to the principle.¹⁰⁵ As Vandenhoe and Ryngaert put it *"Notwithstanding recent efforts of the Court to clarify how the best interests of the child may be operationalised in migration cases, it remains a very vague and open-ended concept that is often invoked as a trump card without clarification of its meaning. Given the fundamental uncertainty about the notion's meaning due to the absence of solid criteria to substantiate it, the notion of best interests of the child may be invoked to justify basically whatever decision is reached."*¹⁰⁶

The Court cannot be entirely blamed for this development as the principle itself lacks certainty. However, it would be in the interests of certainty and in the best interests of children if the Court were to provide guidance on which factors it would weigh more heavily in the balance when applying the best interests principle.¹⁰⁷ This would make the Court's application of the principle of the child's best interests less arbitrary and predictable.

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