AN INVESTIGATION INTO THE BEST INTERESTS OF THE CHILD IN DECISIONS ABOUT THE DEPORTATION OF FOREIGN NATIONAL OFFENDERS IN UK LAW

by

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ABSTRACT

This thesis argues that UK deportation law exists in a state of tension. On the one hand, the political imperative to deport foreign national offenders, and on the other, to protect the human rights of children. The human rights of foreign national offender's children, are protected in UK law by their right to family life (under Article 8 ECHR, domesticated by the Human Rights Act 1998), and their right to their best interests as a primary consideration, and not to be blamed for the wrongdoing of their parent (under Article 3 UNCRC, domesticated by s55 of the Borders, Citizenship and Immigration Act 2009). However, the right to family life under Article 8 ECHR may be interfered with on the basis of the public interest in deporting foreign national offenders. This tension in UK deportation law is evinced by the apparently irreconcilable characteristics of these legal obligations. This thesis theorises this by arguing that deportation decisions are *polycentric* in nature, because of the multiplicity of human rights and interests at stake and which must, by law, be given effect to. Furthermore, UK deportation law creates a *plurality of decision-making norms*; multiple legal principles which must also be given simultaneous effect to. This thesis traces the attempts of UK law to give effect to the best interests of the child in deportation decisions through three distinct phases of decision-making approach. It concludes that no deportation decision-making approach adopted to date has effectively reconciled the human rights obligations and the best interests of the child by resolving the problems of *polycentricity* and the *plurality of decision-making norms*. Finally, this thesis demonstrates that UK deportation law is capable of giving effect to the best interests of the child by taking the human rights of children both seriously and literally.

My friend, Lucy Jane Tuckett Collinson,

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BRIEF TABLE OF CONTENTS

DETAILED TABLE OF CONTENTS

CHAPTER 3: *POLYCENTRICITY* AND A *PLURALITY OF DECISION-MAKING NORMS* IN DEPORTATION DECISIONS

CHAPTER 4: A "SIMPLE BALANCE APPROACH" AFTER *HUANG*

CHAPTER 6: AN "EXCEPTION APPROACH AFTER THE IMMIGRATION ACT 2014

CHAPTER 7: TAKING THE HUMAN RIGHTS OF CHILDREN SERIOUSLY AND LITERALLY: A "HUMAN RIGHTS APPROACH" TO DEPORTATION DECISION-MAKING

CHAPTER 8: CONCLUSION

LIST OF ABBREVIATIONS

Abbreviated forms are used, except when used in quotations. Abbreviations are identified in text (except where in common usage) and presented here for reference.

BCIA	Borders, Citizenship and Immigration Act 2009
Cafcass	Children and Family Court Advisory and Support Service
CIA	Commonwealth Immigrants Act 1962
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EEA	European Economic Area
EU	European Union
FNO	Foreign National Offender[1]
HRA	Human Rights Act 1998
ICCPR	International Covenant on Civil and Political Rights
LJ	Lord Justice
NIAA	Nationality, Immigration and Asylum Act 2002
SSHD	Secretary of State for the Home Department
UNCRC	United Nations Convention on the Rights of the Child
UTJ	Upper Tribunal Judge

[1] I abbreviate 'foreign national offender' to FNO in this thesis with great reluctance. It further distances our conceptualisation of foreign national offenders from their being first and foremost individual human beings. Whilst 'foreign national offender' at least retains the virtue of being a descriptive category, 'FNO' is an administrative label with no inherent meaning.

The use of 'FNO' also hides the essential 'foreignness' of those designated 'foreign national offenders', and thereby asks us to ignore the principle moral objection to deportation; that it is a discriminatory additional punishment which is visited solely on individuals who are 'foreign' (see *inter alia*: Daniel Kanstroom, 'Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases' (2000) 113 Harvard Law Review 1890; Victor S Navasky, 'Deportation as Punishment' (1959) 27 University of Kansas City Law Review 213).

However, given the significant limitations on word count inherent to a PhD thesis, I have reluctantly taken the decision to use the abbreviation FNO in order to facilitate the scope of the central argument that I am thereby able to pursue.

CHAPTER 1: INTRODUCTION

1. Deportation Decisions, Human Rights, and the Best Interests of the Child

This thesis investigates the best interests of the child in decisions about the deportation of foreign national offenders in the UK. A decade ago, in a 2008 review of the case law, the writer, campaigner and barrister Colin Yeo argued that, 'In immigration law, children are neither seen nor heard.'[2] This investigation concludes that although the best interests of the child are now seen and heard in UK deportation law, the law remains problematic for increasingly complex doctrinal legal reasons. This thesis unpacks and explains these doctrinal legal problems and traces their effect through three distinct chronological phases of UK deportation law since 2007. It also makes suggestion as to a solution.

When Yeo conducted his case law review, the UK had a reservation to the United Nations Convention to the Rights of the Child (UNCRC) which explicitly excluded the international legal obligations of that Convention to UK immigration law.[3] Yeo argued that this reservation was the barrier in deportation law to effectively considering the human rights of children who were family members.[4] UK deportation law was instead focused on the person of the foreign national offender:

[2] Colin Yeo, 'Protecting the Rights of Family Members' (2008) 22 Journal of Immigration, Asylum and Nationality Law 147, 150

[3] The reservation stated that, 'The United Kingdom reserves the right to apply such legislation, in so far as it relates to the entry into, stay in and departure from the UK of those who do not have the right under the law of the UK to enter and remain in the UK, and to the acquisition and possession of citizenship, as it may deem necessary from time to time.' (House of Commons Foreign Affairs Committee, 'First Report: Foreign Policy and Human Rights' (21 December 1998, HC 100-I – HC 100-III), Annex A <https://publications.parliament.uk/pa/cm199899/cmselect/cmfaff/100/100ap32.htm> accessed 3 December 2018)

[4] Yeo (n2) 150

> Like a well behaved ornamental cherry tree, we have been trained in certain directions. We focus on the human rights of the immigrant. We all but disregard the rights of family members who are more firmly rooted in the United Kingdom.[5]

The UK Borders Act 2007 introduced provisions for 'automatic deportation'; that any foreign national offender who had been sentenced to 12 months or more imprisonment was to be deemed automatically to be liable for deportation.[6] Those liable for deportation are those who the Secretary of State for the Home Department (SSHD) has considered their presence in the UK 'not conducive to the public good'.[7] Yeo was writing after both the UK Borders Act 2007, and the House of Lords case of *Huang.*[8] In that case, the House of Lords found that the right to family life – in Article 8 of the European Convention on Human Rights (ECHR) and domesticated into the Human Rights Act 1998 (HRA) – required deportation decision-makers to make a fact specific decision as to the proportionality of the deportation of the foreign national offender (FNO) with the interference with the FNO's family life.

This kind of decision – the importance of the public interest of deportation on the one hand, and the family life rights of the FNO on the other[9] – fits well into a standard human rights framework. This standard framework relies on the metaphor of the merchant's weighing scales, with two distinct sides to a human rights argument. Using the weighing scales metaphor,

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[5] Yeo (n2) 147

[6] UK Borders Act, s32(2)

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

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

[9] Article 8 ECHR: Right to respect for private and family life

> 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.

judges[10] and scholars[11] are able to think and talk in terms of a 'balance' that has to be struck between the human rights of the FNO, and the public interest in their deportation. The task of the deportation decision-maker is thereby to determine where the balance between these competing demands lies.

In chapter 2 of this thesis, I demonstrate that this focus accords with how FNOs are viewed in the public policy context. FNOs are presented in media and politics as individually responsible for their offending, that deportation should evidently follow, and that FNOs are 'manifest undesirables';[12] the epitome of the "bad migrant" paradigm.[13] But this is not the only relevant public policy context. The child – a human individual under eighteen years old[14] – is generally perceived as a special category of person who requires and deserves protection from and by the state. Therefore, when an FNO has a child (or children) who would be negatively affected by their deportation, this creates significant tension. The children of FNOs may be separated from the FNO if they remain in the UK after the FNOs deportation, or they may suffer 'constructive deportation'[15] if they leave the UK with the FNO. In either case, research shows that the deportation of a parent causes children emotional distress and material hardship.[16] From

[10] For example, see: *Keles v Germany* App no 32231/02 (ECtHR, 27 October 2005), [55]

[11] Aharon Barak, 'Proportionality (2)' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (First Edition, Oxford University Press 2012), 745

[12] Luke de Noronha, 'Unpacking the Figure of the "Foreign Criminal": Race, Gender and the Victim-Villain Binary' (2015, Criminal Justice, Borders and Citizenship Research Paper No. 2600568) <http://dx.doi.org/10.2139/ssrn.2600568> accessed 13 September 2016, 1

[13] Melanie Griffiths, 'The Convergence of the Criminal and the Foreigner in the Production of Citizenship' in Bridget Anderson and Vanessa Hughes (eds), *Citizenship and Its Others* (Palgrave Macmillan 2015)

[14] UN Convention on the Rights of the Child (UNCRC), Article 1

[15] Jacqueline Bhabha, 'The "Mere Fortuity" of Birth? Are Children Citizens?' (2004) 15 differences: A Journal of Feminist Cultural Studies 91, 100

[16] Kara Apland and Elizabeth Yarrow, 'Children's Voices: A Review of Evidence on the Subjective Wellbeing of Children Subject to Immigration Control in England' <www.childrenscommissioner.gov.uk/wp-content/uploads/2017/11/Voices-Immigration-Control-1.pdf> accessed 4 September 2018; Elaine Arnold, 'Separation and Loss Through Immigration of African Caribbean Women to the UK' (2006) 8 Attachment & Human Development 159; Kalina M Brabeck, M Brinton Lykes and Rachel Hershberg, 'Framing Immigration to and Deportation From the United States: Guatemalan and Salvadorian Families Make Meaning of Their

these public policy contexts, the law constructs a series of cognizable categories; the public interest in deportation, the FNO's own human rights (which elicit little popular sympathy), and the human rights of the FNO's children. This multiplicity of rights and interests (which in chapter 3 I label the *polycentricity* of deportation decisions) is made further complex when one also includes for consideration other adults who might be affected by the deportation of an FNO, such as the FNOs current partner, and any other caregivers to their children (who may or may not be the same person). Family life has, after all, a 'diversity of forms'.[17] Although this thesis is concerned with the best interests of the child in deportation decisions, the human rights of other adult family members should not be far from the reader's peripheral vision.

What Yeo's 2008 review could not have accounted for was a significant, later legal shift. In November 2008, the UK's reservation to the UNCRC was withdrawn.[18] In s55 of the Borders, Citizenship and Asylum Act 2009 (BCIA),[19] the welfare of children was required to

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Experiences' (2011) 14 Community, Work & Family 275; Kalina M Brabeck, M Brinton Lykes and Cristina Hunter, 'The Psychosocial Impact of Detention and Deportation on U.S. Migrant Children and Families' (2014) 84 American Journal of Orthopsychiatry 496; Children's Commissioner, 'Skype Families: The Effects on Children of Being Separated from a Mum or Dad Because of Recent Immigration Rules' <www.childrenscommissioner.gov.uk/wp-content/uploads/2017/06/SkypeFamilies-CCO.pdf> accessed 4 September 2018; Patricia Cole and Amanda Perez, 'A Guidepost to Shifting Sands: Child Well-Being and Immigration Policy' (2018) 39 Zero to Three 33; Regina Day Langhout and others, 'Statement on the Effects of Deportation and Forced Separation on Immigrants, Their Families, and Communities' (2018) 62 American Journal of Community Psychology 3; Joanna Dreby, 'The Burden of Deportation on Children in Mexican Immigrant Families' (2012) 74 Journal of Marriage and Family 829; Joanna Dreby, 'U.S. Immigration Policy and Family Separation: The Consequences for Children's Well-Being' (2015) 132 Social Science & Medicine 245; Megan Finno-Velasquez and others, 'Heightened Immigration Enforcement and the Well-Being of Young Children in Immigrant Families: Early Childhood Program Responses' (2018) 39 Zero to Three 27; Adrian Florido, 'When Parents Face Deportation, Their Children's Mental Health Suffers' (*NPR*, 22 June 2016) <www.npr.org/2016/06/22/483129579/when-parents-face-deportation-their-childrens-mental-health-suffers> accessed 9 April 2018; Saira Grant and others, 'Family Friendly? The Impact on Children of the Family Migration Rules: A Review of the Financial Requirements' <www.childrenscommissioner.gov.uk/sites/default/files/publications/CCO-Family-Friendly-Report-090915.pdf> accessed 7 June 2017; Jill D McLeigh, 'How Do Immigration and Customs Enforcement (ICE) Practices Affect the Mental Health of Children?' (2010) 74 American Journal of Orthopsychiatry 96; Fernando S Mendoza and others, 'Immigration Policy: Valuing Children' (2018) 18 Academic Pediatrics 723.

[17] *Singh v Entry Clearance Officer New Delhi* [2004] EWCA Civ 1075, [2005] QB 608, [72]

[18] Sandra Drew and Dragan Nastic, 'The Immigration Reservation to the Convention on the Rights of the Child: An Insuperable Difficulty No More' (2009) 23 Journal of Immigration, Asylum and Nationality Law 119

[19] Borders, Citizenship and Asylum Act 2009, s55:
(1) The Secretary of State must make arrangements for ensuring that—

be considered by the SSHD in carrying out her immigration functions, including deportation decisions. After that date, UK courts increasingly found space to consider the human rights of children, both as a consequence of the s55 duty and because of the case law of the European Court of Human Rights (ECtHR), which was giving the welfare of children a role in decisions about the right to family life under Article 8 ECHR.[20] In 2011, the Supreme Court in *ZH (Tanzania)* found that the s55 duty required more of the decision-maker in deportation cases than passively considering the welfare of children:

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

(a) the functions mentioned in subsection (2) are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom, and
(b) any services provided by another person pursuant to arrangements which are made by the Secretary of State and relate to the discharge of a function mentioned in subsection (2) are provided having regard to that need.

(2) The functions referred to in subsection (1) are—

(a) any function of the Secretary of State in relation to immigration, asylum or nationality;
(b) any function conferred by or by virtue of the Immigration Acts on an immigration officer;
(c) any general customs function of the Secretary of State;
(d) any customs function conferred on a designated customs official.

(3) A person exercising any of those functions must, in exercising the function, have regard to any guidance given to the person by the Secretary of State for the purpose of subsection (1).

[20] *Üner v Netherlands* App no 46410/99 (Grand Chamber, 18 October 2006); *LD (Article 8 – best interests of child) Zimbabwe* [2010] UKUT 278 (IAC), [2011] Imm AR 99; *R (MXL) & Ors v Secretary of State for the Home Department* [2010] EWHC 2397 (Admin); *R (TS) v Secretary of State for the Home Department* [2010] EWHC 2614 (Admin), [2011] Imm AR 164

created. But, as the Tribunal rightly pointed out, the children were not to be blamed for that.[21]

The logical consequence of this judgment, I argue in chapter 3, brought s55 BCIA much closer to the legal demands made by the 'best interests of the child' under Article 3 UNCRC.[22] However, how can the best interests of the child be weighed in a two-sided balance with the family life of the FNO, if the best interests of the child is to be considered first, and of primary importance? How can anything be balanced against the best interests of the child if the child should not be blamed for the actions of their parents?[23] Do the child's best interests exist inside the balance of the FNO's family life rights but separate of it, or entirely outside the balance of their parent's human rights claim? The metaphor of the balance seems to break down as being inadequate to contain all the relevant legal considerations.

Any investigation of the best interests of the child in deportation law immediately throws up these problems, and these are just the start. The reality of UK deportation law, with respect to the best interests of the child, is a complex knot of contradictions. This thesis therefore asks why and how UK law has found it difficult to give effect to the best interests of the child in deportation decisions. It is an exercise in finding, labelling, and untangling a series of threads which otherwise present an impenetrable knot.

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

[22] UNCRC, Article 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.

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

This thesis does not just do this with respect to the legal framework for deportation current as of January 2019, introduced by s19 of the Immigration Act 2014 and subject to a settled interpretation by the October 2018 Supreme Court judgment in *KO (Nigeria)*.[24] The Immigration Act 2014 is not in fact analysed in depth until chapter 6. The reason for this is that although the 2014 Act represents a distinct statutory intervention into deportation law, it is one which sits within a longer legal conversation. I suggest that to understand precisely how and why deportation law as it presently stands in the UK is problematic – to the extent that one of the conclusions of this thesis is that s19, Immigration Act 2014 ought to be repealed and replaced – it must be placed in the context of the *ad hoc* layering of legal obligations in UK deportation law from at least the House of Lords case in *Huang*,[25] mentioned above.

2. The Thesis Outline

Untangling the best interests of the child in UK deportation law requires this thesis to move forward in three stages. Stage one, encompassing chapters 2 and 3, identifies the political and legal context within which UK deportation law takes place. Chapter 3 seeks to make sense of the different, conflicting law relevant to deportation decisions in the UK – the Human Rights Act 1998, Article 8 ECHR, s55, BCIA, and Article 3 UNCRC – and explains why they are contradictory and apparently irreconcilable. Stage two, encompassing chapters 4 to 6, engages in a chronological review of UK deportation law. This helps illuminate how and why the legal obligations have arisen as they have, as well as providing insight as to why those obligations are, in practice, irreconcilable. Stage three, comprising chapter 7, suggests an alternative means by which the best interests of the child might be given effect in UK deportation law. This third stage is important because it evidences that it is not impossible to give effect to the best interests

[24] *KO (Nigeria) & Ors v Secretary of State for the Home Department* [2018] UKSC 53

[25] *Huang* (n8)

of the child in deportation decisions, but that UK law does not presently do so is because of the various choices about the law that have been made to date.

2(a) Stage One

The legal problem at the centre of this thesis occurs within the public policy contexts of deportation and the protection of children. Chapter 2 concludes that these public policy engines drive in different directions. One engine focuses on the foreign national offender as a "bad" migrant who must be deported, even to the exclusion of their human rights, whilst the other engine focuses on the child as a vulnerable and dependent individual who requires protection, including through heightened human rights protection. This presents a considerable tension where a child would be negatively affected by the deportation of an FNO. UK deportation law is a consequence of this tension; the creation of legal obligations which require and demand the deportation of the "bad" FNO, and at the same time legal obligations to protect the best interests of children as vulnerable individuals deserving of protection.

Deportation from the UK is carried out under s3(5)(a), Immigration Act 1971 which provides the Secretary of State for the Home Department (SSHD) with the power to determine that the deportation of a person, other than a British citizen, is 'conducive to the public good'. The deportation of a person from the UK may be conducive to the public good because of actions which have not been prosecuted[26] or prosecuted but led to no conviction.[27] However, criminal conviction is 'the most common basis'[28] for deportation to occur. This is not least because s32(2), UK Borders Act 2007 introduced a statutory presumption that the deportation

[26] For example, *Mahajna v Home Secretary (deportation hate speech - unacceptable behaviour)* [2012] UKUT B1 (IAC), in which the SSHD sought deportation on the basis of accusations that *Mahajna*'s past history included instances of anti-Semitic speech and support for terrorism.

[27] For example, *Farquharson (removal – proof of conduct)* [2013] UKUT 00146 (IAC), in which Farquharson was on multiple occasions arrested or prosecuted for various offences, but never convicted.

[28] Gina Clayton, *Immigration and Asylum Law* (7th edn, Oxford University Press 2016), 566

of foreign nationals sentenced to twelve months or more of imprisonment is conducive to the public good for the purposes of the 1971 Act. The UK Borders Act 2007 lists exceptions to deportation, including that deportation would breach the UK's obligations under the Refugee Convention,[29] or the Convention on Action against Trafficking in Human Beings,[30] or breach the rights of the individual under the ECHR.[31]

In contrast to deportation, removal is not contingent on criminality[32] and applies simply 'if the person requires leave to enter or remain in the United Kingdom but does not have it.'[33] Removal therefore applies to individuals who entered the UK without permission (known as leave to enter), or those who once had permission but have been refused, or failed to apply for, a further period (known as leave to remain). The effect of a deportation order is that it invalidates any extant leave to enter or remain,[34] whereas a removal order applies only where there is no leave in the first place. In 2017, the Home Office enforced the removal or deportation of 12,321 individuals, of whom 5,835 (i.e. 47%) were deported.[35]

As well as the distinction between removal and deportation, UK law distinguishes between EEA national[36] offenders and non-EEA national offenders. The legal framework under which an EEA national offender can legally resist deportation is The Immigration (European

[29] UK Border Act 2007, s33(2)(b)

[30] UK Border Act 2007, s33(6A)

[31] UK Border Act 2007, s33(2)(a)

[32] Although entry without leave or overstaying a period of leave is itself a criminal offence which may be prosecuted: Immigration Act 1971, s24

[33] Immigration Act 2014, s1

[34] Immigration Act 1971, 5(1)

[35] Home Office, 'How Many People Are Detained or Returned?' (21 March 2018) <www.gov.uk/government/publications/immigration-statistics-october-to-december-2017/how-many-people-are-detained-or-returned> Accessed 13 April 2018

[36] An EEA national is someone who is not a British citizen but is otherwise a national of an EU member state, or of Norway, Iceland, Liechtenstein, or Switzerland (The Immigration (European Economic Area) Regulations 2016, regulation 2(1)).

Economic Area) Regulations 2016.[37] The deportation of non-EEA national offenders is governed by a different legal regime. However, despite the current differences in protections against deportation afforded to EEA and non-EEA nationals (an issue returned to in chapter 7), the post-Brexit immigration White Paper envisages that the deportation law regime which currently applies to non-EEA national offenders will also be applied to EEA national offenders.[38]

This thesis is concerned with UK *deportation law*, as it applies to non-EEA national offenders. For simplicity, this thesis refers only to "foreign national offenders" (FNOs). Also for simplicity's sake, "FNO" should be understood as covering any individual whose deportation is determined by the SSHD to be conducive to the public good under the Immigration Act 1971. Finally, this thesis is concerned with the appeals of FNOs based on their right (and the right of their family members) to family life under Article 8 ECHR.

That deportation would breach the rights of an individual under the ECHR is a distinct ground of statutory appeal against deportation.[39] The Human Rights Act 1998 is the 'statutory domestication'[40] of the ECHR, including Article 8, into UK law. As noted at the outset of this introduction, deportation decisions have been traditionally perceived as a conflict between the public interest in preventing crime and disorder (which is typically invoked in order to support the deportation of FNOs) and the right of the FNO to family life (typically invoked to resist deportation). This conflict is a reflection of the basic structure of the right to family life under Article 8 ECHR which recognises that everyone has the right to respect for their family life, but that it may also be interfered with in some circumstances. These circumstances include the

[37] The Immigration (European Economic Area) Regulations 2016, regulations 23-28

[38] HM Government, 'The UK's Future Skills-Based Immigration System' (December 2018, Cm 9722), 36

[39] UK Border Act 2007, s33(2)(a)

[40] Michael Fordham, 'Common Law Proportionality' [2002] Judicial Review 110, 111

'prevention of disorder or crime', and a balance must be struck between this and the family life at stake, including the 'best interests and well-being of the children'.[41] Jacqueline Bhabha notes this two-dimensional, dichotomous conflict and its consequence that 'Torn between the sovereign state's prerogative to exercise border control and the human being's right to respect for family life, courts have had difficulty reaching unanimity.'[42]

However, the right to family life under Article 8 ECHR is not the only human rights regime which is applicable to UK deportation decisions. Recognising that children have independent human rights and interests – indeed, their *best* interests – at stake in deportation decisions is a recently new development. Until recently, children were 'considered appendages and possession of others'.[43] Legal recognition of the best interests of the child has developed slowly with a crucial turning point occurring in 1989 with the adoption internationally of the United Nations Convention on the Rights of the Child (UNCRC). In Article 3(1), the UNCRC states that 'the best interests of the child shall be a primary consideration'.[44] However, only in 2009 was the SSHD placed under a duty, in s55 of the Borders, Citizenship and Immigration Act 2009 (BCIA), to 'safeguard and promote the welfare of children'[45] in deportation (and other immigration) decisions. In a series of judgments, UK courts have effectively collapsed any distinction in language, meaning, interpretation, or approach between s55 BCIA and Article 3 UNCRC.[46]

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[41] *Üner v Netherlands* (n20) [58]

[42] Jacqueline Bhabha, *Child Migration & Human Rights in a Global Age* (Princeton University Press 2014), 48

[43] ibid 3

[44] UNCRC, Article 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.

[45] The Borders, Citizenship and Immigration Act 2009, s55

[46] Relying on the 'spirit' of the international obligation (*ZH (Tanzania)* (n21) [23]), the statutory guidance (*R (TS)* (n21) [31-32, 35]), and the similarity of outcome (*JO and Others (section 55 duty) Nigeria* [2014] UKUT 517

Lastly, the Immigration Act 2014 most recently applies to deportation appeals. The deportation provisions therein where designed, according to the government, to codify the Article 8 ECHR case law[47] and in so doing 'give a policy steer to the courts and tribunals',[48] whilst limiting questions as to the proportionality of individual decisions with human rights obligations to within the scope of the application of pre-determined rules.[49] This new, statutory intervention into deportation law is an unusual, if not unique, example of Parliament dictating how human rights provisions ought to be interpreted.[50]

It is these overlapping legal principles which are central to this thesis. They can be summarised as comprising the following propositions:

- That the best interests of the child are an 'integral' part of the right to family life under Article 8 ECHR;
- That the best interests of the child ought to be a primary consideration; that it ought to be considered separately and of no less inherent weight than other considerations (and preferably temporally first in the decision-making process);
- That the child should not be 'blamed' for the moral failings of their parent, including that they have offended. Therefore only rights-based considerations ought to be balanced against the best interests of the child;

(IAC), [6]). See also: Jane Fortin, 'Are Children's Best Interests Really Best? ZH (Tanzania) (FC) v Secretary of State for the Home Department' (2011) 74 Modern Law Review 947, 952

[47] Home Office, 'Immigration Bill: European Convention on Human Rights Memorandum by the Home Office' <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/249270/Immigration_Bill_-_ECHR_memo.pdf> accessed 9 May 2018

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

[49] ibid

[50] Bernard McCloskey, 'Human Rights, Governments and Judicial Independence' [2012] European Human Rights Law Review 478, 487

- That the legitimate aims for interfering with the right to family life include the maintenance of immigration control and preventing crime and disorder, including by the deportation of foreign national offenders in order to incapacitate, deter, and to communicate society's opprobrium for criminal offending.

In chapter 3, I establish the authority for each of the above principles of UK deportation law. I argue in this thesis that these legal demands have been introduced as an *ad hoc* layering of legal demands consequent to the UK's international legal obligations under Article 3 UNCRC and Article 8 ECHR. These have been domesticated into UK law in such a way that inconsistent legal principles must be given effect to simultaneously, and within a decision-making framework which is unable to effectively accommodate them.

These legal principles, and the problems that they create in reconciling them, go far beyond simply what weight the best interests of the child ought to have in the deportation decision-making process. Instead, the problems arise because the best interests of the child appear to demand to be treated both inside and outside the assessment of proportionality; as an 'integral' aspect of the Article 8 ECHR balancing exercise, but also treated as a separate consideration, that comes temporally first and has primary status. The best interests of the child requires to be treated both as part of the balancing scales and to break them. The difficulty that UK deportation law has faced is in finding a means by which both are possible.

In chapter 3, I argue that there are two theoretical problems which can be disentangled from these legal demands and I label these the problems of *polycentricity* and the *plurality of decision-making norms*. *Polycentricity* refers to the fact that where the deportation of a foreign national offender affects their child or children, multiple human rights and interests are at stake. Both the foreign national offender and their children (and additionally any partners/spouses or other relations) have family life rights that are engaged by the threatened deportation and each

can claim that their rights ought to be the centre of the human rights enquiry. At the same time, each child has their best interests to be considered and which is to be given primacy. Finally, there is a public interest in deportation so as to prevent crime and disorder and maintain immigration controls.

The *plurality of decision-making norms* relates to the different formal legal requirements of Article 8 ECHR (domesticated by the HRA) and Article 3 UNCRC (domesticated by s55, BCIA). Whereas Article 8 ECHR requires a simple balance between the family life and the public interest, Article 3 UNCRC demands that the best interests of the child be a primary consideration and that only rights-based considerations may be balanced against the best interests of the child. Separately and individually, *polycentricity* and the *plurality of decision-making norms* may be resolved relatively simply, at least in theory. However, because Article 8 ECHR and Article 3 UNCRC must be applied simultaneously in UK deportation decisions, the two issues therefore appear simultaneously and must be resolved together. It is in having to coherently apply both Article 3 UNCRC and Article 8 ECHR simultaneously that the issues arise.

2(b) Stage Two

The second stage of this thesis is to trace the implications of this layering of separate but concurrent legal demands arising from Article 8 ECHR/HRA and Article 3 UNCRC/s55 BCIA. I trace this through three distinct approaches adopted by UK deportation law; (a) that of a "simple balancing approach" after the House of Lords decision in *Huang*,[51] (b) that of a "modified balancing approach" after the Supreme Court judgment in *ZH (Tanzania)*,[52] and (c) an "exception approach" after the Immigration Act 2014. I identify throughout how the

[51] *Huang* (n8)

[52] *ZH (Tanzania)* (n21)

problems of *polycentricity* and the *plurality of decision-making norms* are persistent throughout each of these approaches and how these theoretical perspectives explain why each approach has found it difficult to give effect to the best interests of the child in UK deportation law.

The "simple balancing approach" to deportation decision-making, is evident in UK deportation law after the 2007 House of Lords authority of *Huang*[53] and is explored in detail in chapter 4. It is a decision-making approach that uses the familiar metaphor of a balance between two competing principles; in the case of deportation, the right to family life against the public interest in deporting the FNO. The decision in *Huang* required, for the first time, UK decision-makers to undertake a fact-sensitive proportionality exercise in deportation cases,[54] guided by the jurisprudence of the European Court of Human Rights (ECtHR).[55] Such guidance is found in the ECtHR case of *Üner*[56] in which the ECtHR states that it will consider a range of principles in deportation cases which come before it. I argue that this "simple balancing approach" consists of the subsuming of the best interests of the child into an assessment of family life as a right that is *commonly-held* by the family unit, rather than an approach which views family life or the best interests of the child as being individual rights. In addition, family life in the ECtHR deportation case law is determined with reference to how the decision-maker assesses the *value* of family life and the *gravity* of interference with family life by deportation. I argue that consequentially the "simple balancing approach" side-lines the best interests of the child (and is therefore not *polycentric* in character) and furthermore does not give effect to the aspects of the best interests of the child which give rise to the *plurality* of decision-making norms.

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[53] *Huang* (n8)

[54] ibid [20]

[55] ibid [18]

[56] *Üner v Netherlands* (n20)

Chapter 5 examines the seminal UK Supreme Court case of *ZH (Tanzania)*. I argue that the approach taken in this case was an attempt to modify the balancing approach to family life by bolting-on the requirement that the best interests of the child be a primary consideration. This is therefore a "modified balancing approach". In so doing, the court chose from a range of different viable options to interpret the best interests of the child in deportation decisions. However, the court was either unaware of, or ignored, the inherent theoretical difficulties of creating a solution which effectively incorporates Article 3 UNCRC and Article 8 ECHR into UK law in a way that gives effect to the *polycentric* nature of the human rights issue of deportation and to the *plurality* of decision-making norms inherent therein. The court provided no explanation as to the relationship between the family life and the separate, first, and primary consideration of the best interests of the child. Nor did it resolve the mutually exclusive requirements that the best interests of the child must not be outweighed by non-rights-based considerations, yet non-rights-based considerations are a relevant and necessary consideration under Article 8 ECHR.

Chapter 6 examines a third approach which is based around statutory exceptions to deportation. The Supreme Court in *KO (Nigeria)*[57] found that the Immigration Act 2014 created exceptions to deportation, including on the basis that the effect of deportation on certain 'qualifying' children is unduly harsh. However, I also argue that this "exception approach" is not *polycentric* because it excludes the best interests of some children entirely where they do not qualify for the exception, and those children which do qualify do not have their *best* interests considered. Nor does the exception approach resolve the *plurality of decision-making norms* because the best interests of the child are weighed against non-rights-based considerations. The "exception approach" is therefore in many ways the worst of all worlds.

[57] *KO (Nigeria)* (n24)

2(c) Stage Three

In the final stage, comprising chapter 7, I suggest an alternative means by which to formulate UK deportation law in a way that would resolve the difficulties that I have argued UK deportation law has thus far faced. It rejects the premise of the solutions in previous chapters that family life and the best interests of the child ought to be reconciled in one decision which balances the right and interests of all individuals against the deportation of the FNO. This rejection requires the repeal of s19, Immigration Act 2014, because the Act is itself an attempt to create one decision-making process which accommodates all the human rights and interests relevant to deportation decisions. Instead, I propose that UK law must begin with the premise that the best interests of the child is a human right in and of itself. Only rights-based considerations may be used by the state to justify an interference. Deportation must rationally protect the rights of others, and it must be necessary for such protection. Only then may deportation be balanced against the best interests of the child. I label this as the "human rights approach".

This stage three exercise is important because it evidences that it is not impossible to give effect to the best interests of the child in deportation decisions. By evidencing the existence of a rational, coherent alternative to the approaches to deportation decisions which have thus far been devised in UK deportation law, I seek to demonstrate that the contradictory nature of Article 8 ECHR/HRA and Article 3 UNCRC/s55 BCIA is not inevitable. Instead, it is a product of choices that have underplayed the transformative impact that the principle of the best interests of the child might have on UK deportation law.

3. The Importance and Original Contribution of this Thesis

The importance of this enquiry can be appreciated by both positivists and non-positivists. For the positivist, this enquiry matters because it is about how to make two positive law

requirements work together. If they do not, or cannot, then there must be some way to decide which should have priority because the positive law cannot exist in a state of cognitive dissonance whereby it remains committed to two equally important, but mutually inconsistent, legal rules. This points to the need for law reform in order to resolve this tension. For non-positivists, the importance of this thesis stems from the high stakes in deportation decisions and the importance of deportation decisions to the lives of those affected, particularly to the children of FNOs. The way in which decisions are made, whose rights and interests are central to the decision-making process, and the order in which those interests are considered, all influence the outcome of a deportation decision.

Academic interest in the development of the best interests of the child in the broader immigration context has been limited; and even more limited in the specific area of deportation. Some articles have described how the decision of *ZH (Tanzania)*[58] – the first Supreme Court decision which dealt with what s55 BCIA require of decision-makers – sought to incorporate the best interests of the child as a primary consideration into the Article 8 ECHR aspects of immigration decision making.[59] However, few have interrogated how the best interests of the child can be rationally incorporated into the Article 8 ECHR balancing exercise, as this thesis does. Jane Fortin is one of the few who have interrogated the decision in *ZH (Tanzania)* in greater depth, and she found that it is based on 'distinctions [which] are subtle and may be difficult to maintain',[60] but does not expand on this conclusion. Beyond the Supreme Court

[58] *ZH (Tanzania)* (n21)

[59] Patrick Glen, 'The Removability of Non-Citizen Parents and the Best Interests of Citizen Children: How to Balance Competing Imperatives in the Context of Removal Proceedings' (2012) 30 Berkeley Journal of International Law 1; Richard McKee, 'Unexpected Expansion: The Scope of Immigration Appeals Has Been Expanding in Some Unexpected Ways' (2013) 9 Journal of Islamic State Practice in International Law 216; Rebecca MM Wallace and Fraser AW Janeczko, 'The Best Interests of the Child in the Immigration and Asylum Process: The Case of ZH (Tanzania) v. Secretary of State for the Home Department' (2011) 31 Children's Legal Rights Journal 46; Colin Yeo, 'Case Comment: ZH (Tanzania) v Secretary of State' (2011) 25 Journal of Immigration, Asylum and Nationality Law 189

[60] Fortin (2011) (n46) 956

decision in *ZH (Tanzania)*, academic interest in the best interests of the child in the broader immigration context has been limited. Devyani Prabhat and Jessica Hambly investigated the impact of the best interests of the child on nationality decisions and they concluded that although the 'law on the books fully supports the welfare of children in all instances'[61] the law in practice restricted the role of a best interests assessment both by ignoring wider social relationships created by children, and by ignoring the positive benefits of obtaining British nationality.[62]

Because UK deportation law is an under-researched area in the academic literature, I make three original and interlinked contributions to knowledge. The first is to identify, on a theoretical basis, why the best interests of the child present a problem of coherency to UK deportation law. Disentangling and the problems of *polycentricity* and the *plurality of decision-making norms* is this first contribution. The second contribution is to trace three distinct approaches the best interests of the child in UK deportation law; (a) that of a "simple balancing approach" (b) that of a "modified balancing approach" and (c) an "exception approach". I further identify how the problems of *polycentricity* and the *plurality of decision-making norms* are persistent throughout each of these approaches and how these theoretical perspectives explain why each approach has found it difficult to give effect to the best interests of the child. My third contribution is, at chapter 7, a suggestion as to how UK deportation law might be formulated in a way that would resolve this difficulty.

[61] Devyani Prabhat and Jessica Hambly, 'Bettering the Best Interests of the Child Determination: Of Checklists and Balancing Exercises' (2017) 25 International Journal of Children's Rights 754, 768

[62] ibid 763-4

CHAPTER 2: THE PUBLIC POLICY CONTEXT OF DEPORTATION AND THE BEST INTERESTS OF THE CHILD

1. Introduction

Public policy pulls the decision-maker in competing directions in deportation cases. On one hand the foreign national offender (FNO) is cast as a "bad" migrant whose deportation is in the public good, and on the other hand is the innocent and vulnerable child who requires protection. When these tensions are replicated in the legal obligations under which deportation decision-makers must operate, it creates a tension in the law; one that this thesis demonstrates has been difficult for the courts to accommodate. This chapter outlines these competing public policy demands.

Deportation as a social policy tool arose in the 1960s as a means by which to distinguish the "good" immigrant and the "bad" FNO.[63] Deportation policy has continued to develop through the lens of the "bad" FNO and restrictions on the ability of FNOs to claim human rights protections against deportation have been central to government policy in this area.[64] This is the subject of part 1 of this chapter. Part 2 observes that at the same time, public policy has sought to protect children. Children have been constructed in the popular and legal imagination as vulnerable and in need of protection. This has resulted in greater legal protection for the rights of children, including that their best interests ought to be a primary consideration in decisions which affect them.[65] This part addresses what the best interests of the child substantively means. The subject of this thesis is how the best interests of the child ought to be accommodated within the deportation decision-making process, rather than what aspects of a child's circumstances ought to be considered as comprising the best interests of the child. However, this part demonstrates that the 'best interests of the child' is generally understood to encompass the physical and emotional welfare of children.

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[63] Cedric Thornberry, 'Law, Opinion, and the Immigrant' (1962) 25 Modern Law Review 654, 669

[64] David Robinson, 'Migration Policy Under the Coalition Government' (2013) 7 People, Place and Policy 73

[65] UNCRC, Article 3

Part 3 shows that the best interests of the child is context specific and how the best interests of the child ought to be protected in deportation decisions is therefore not predetermined. This is evident from sentencing law and from family law, where the best interests of the child play substantially different roles. Deportation decisions are not thereby bound by pre-existing patterns of decision-making and the application of the best interests of the child to deportation decisions must be devised from first principles.

This chapter is part of the key as to why it has been difficult for UK deportation law to give effect to the best interests of the child. The public policy demands pull decision-makers in two different directions between deporting FNOs, as "bad" migrants, and protecting the vulnerable and innocent child. In chapter 3, it becomes clear that these competing public policy demands have become central aspects of the UK's deportation law; the law replicates the public policy conflict described here.

2. The Public Policy Impetus for the Deportation of Foreign National Offenders

Two public policy themes regarding the deportation of FNOs are clearly established in the literature. The first is that the development of deportation law in the UK arose from (perceived) crisis and, yet, deportation as a public policy tool has become normalised.[66] The second theme is that policy has focused on the FNO and on distinguishing them as "bad" migrants in contrast to desirable "good" migrants.[67] These themes can be identified clearly in the history of UK deportation law.

[66] See, for example: Alice Bloch and Liza Schuster, 'At the Extremes of Exclusion: Deportation, Detention and Dispersal' (2005) 28 Ethnic and Racial Studies 491, 491

[67] Jordanna Bailkin, 'Leaving Home: The Politics of Deportation in Postwar Britain' (2008) 47 Journal of British Studies 852, 860

The 'first modern legislation'[68] which permitted the expulsion of foreign nationals was the Aliens Act 1905. This allowed the Secretary of State to require a foreign national to leave the UK if they have been convicted of a criminal offence punishable by imprisonment without the option of a fine, or other listed (mainly prostitution) offences.[69] However, the provisions for expulsion were mainly 'symbolic'[70] and expulsion was used only 'occasionally' and to 'execute *de facto* extraditions' of those fleeing prosecution or punishment for crimes committed abroad, rather than as a consequence of offences committed in the UK.[71] Likewise, the Aliens Order 1920 permitted deportation of those whose presence was not conducive to the public good, but 'deportation was still rarely used'.[72]

The Commonwealth Immigrants Act 1962 'transformed' the previous relationship between the British metropole and its colonial subjects.[73] It was 'the starting point in a process, culminating in [the Immigration Act] 1971, that would extend provisions of aliens' legislation to Commonwealth citizens.'[74] It was the CIA itself that extended the provisions of deportation from applying solely to 'aliens' (through the Aliens Act 1905) to encompass Commonwealth nationals. Both contemporary[75] and later[76] academic commentary agree that the CIA

[68] Thornberry (n63) 654

[69] Aliens Act 1905, s3(1)(a)

[70] Patrick Page and Toufique Hossain, 'State Violence Against Migrants: How Immigration Removal Became Normal and How We Are Challenging It Now' (2018) 32 Journal of Immigration, Asylum and Nationality Law 385, 387. Cedric Thornberry comments that 'its effects seem to have been more psychological than legal.' Thornberry (n63) 657

[71] Cedric Thornberry, 'Dr Soblen and the Alien Law of the United Kingdom' (1963) 12 The International and Comparative Law Quarterly 414, 429-430

[72] Bloch and Schuster (n66) 494

[73] Randall Hansen, *Citizenship and Immigration in Post-War Britain* (Oxford University Press 2000), 101

[74] ibid, 111

[75] Cedric Thornberry, 'Law, Opinion, and the Immigrant' (1962) 25 Modern Law Review 654

[76] Hansen (n73) 111; Bailkin (n67) 852

represented a watershed moment when the deportation of foreign national offenders transformed from a mainly symbolic idea into a concerted legal and policy reality.

The CIA was as a response to what the public in the 1950s increasingly viewed as a crisis of immigrant criminality.[77] Although the British government had been considering introducing deportation powers throughout the 1950s[78] the crisis point arose as a result of the Notting Hill race riots of 1958.[79] Initially, *post*-entry powers of deportation were promoted as a means of forestalling *pre*-entry immigration restrictions:

> The rationale was that deporting a small group of Commonwealth immigrants (i.e., convicted criminals) would salvage the rights of others, dichotomizing "good" and "bad" immigrants and keeping the right of entry open.[80]

However, deportation swiftly became an embedded facet of the UK's immigration control and, 'by the 1960s, deportation was increasingly used as a complement to restrict entry rather than as a substitute for it.'[81] The Parliamentary debates surrounding the deportation powers in the CIA indicated that the powers were intended by Parliament to be 'used sparingly, for the protection of the community, as a penalty for serious crime.'[82] Nevertheless the courts developed broader distinctions between 'desirable and undesirable residents […] policing the boundaries between different types of migrants: the incorrigible criminal versus the legitimate

[77] Bailkin (n67) 858; Mike Phillips and Trevor Phillips, *Windrush* (1998, Harper Collins), 163

[78] Bailkin (n67) 853

[79] ibid 858

[80] ibid 860

[81] ibid 861

[82] Thornberry (n63) 669

laborer.'[83] Thus the law reflected and supported popular notions of the "good" immigrant, and the "bad" FNO. Deportation powers were 'incrementally strengthened' throughout the 1960s.[84] The Immigration Act 1971 conferred a wide discretion on the Secretary of State for the Home Department (SSHD) to determine that the deportation of a person, other than a British Citizen, is 'conducive to the public good'.[85]

After a period of low public salience of immigration issues in the 1980s and 1990s,[86] deportation again came to public and political prominence in 2006 as a result of crisis. 1,023 foreign national offenders were released at the end of their custodial sentence between February 1999 and March 2006 without being considered for deportation.[87] Subsequent 'populist agitation'[88] led to legislative changes. The scandal had arisen as a consequence of the SSHD's failure to take positive action to decide whether an individual FNO's deportation was in the public good and that a deportation order should follow. As a direct immediate consequence, the Immigration Rules were amended,[89] and the UK Borders Act 2007 created, so as to remove the SSHD's discretion as to whether to seek deportation.[90] The UK Borders Act 2007 is scaffolded onto the legislative framework for deportation in the Immigration Act 1971. Whereas s3(5)(a)

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[83] Bailkin (n67) 866

[84] Bloch and Schuster (n66) 495

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

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

[87] BBC News, 'How the Deportation Story Emerged' (9 October 2006) <http://news.bbc.co.uk/1/hi/uk_politics/4945922.stm> accessed 23 May 2017

[88] Ian Macdonald & Ronan Toal, *Macdonald's Immigration Law & Practice* (8th ed, LexisNexis, 2010), 1272

[89] Gina Clayton, *Immigration and Asylum Law* (8th edn, Oxford University Press 2018), 558; 'a rule change in July 2006, HC 1337, abolishing consideration of the merits of the case in favour of a presumption that a deportation which the Secretary of State considered to be conducive to the public good would be in the public interest.'

[90] Laura Dubinsky, Hamish Arnott & Alasdair Mackenzie, *Foreign National Prisoners: Law and Practice* (Legal Action Group, 2012), 69

of the Immigration Act 1971 provide that 'A person who is not a British citizen is liable to deportation from the United Kingdom if the Secretary of State deems his deportation to be conducive to the public good', s32 of the UK Border Act 2007 creates a statutory presumption that deportation is conducive to the public good if an FNO has been sentenced to 'a period of imprisonment of at least 12 months'[91] or convicted of, and imprisoned for, certain offences considered by the SSHD to be particularly serious.[92] This statutory presumption remains in force.

The response to the foreign national prisoners scandal by both the government and the opposition presupposed that deportation ought to be a standard consequence of offending, regardless of whether the initial prison sentence was sufficient rehabilitation and/or deterrent.[93] An emphasis on deportation also reflected the Labour government's policy framework whereby the immigration system ought to reward "good" immigrants, with citizenship as the ultimate reward.[94] When immigration status is made conditional on integration and good behaviour, FNOs must be treated particularly harshly by the immigration system as a consequence of their offending. As both offenders and foreigners, FNOs are viewed popularly and in public policy as 'particularly undeserving of sympathy because they have betrayed the hospitality of the society'.[95] The intersection of being both foreign and offenders meant that FNOs are

[91] UK Border Act 2007, s32(2)

[92] UK Border Act 2007, s32(3)

[93] BBC News, 'Blair Sparks New Deportation Row' (*BBC News*, 17 May 2006) <http://news.bbc.co.uk/1/hi/uk_politics/4988756.stm> accessed 23 May 2017; BBC News, 'Five Foreign Prisoners Reoffended' (*BBC News*, 28 April 2006) <http://news.bbc.co.uk/1/hi/uk_politics/4954476.stm> accessed 23 May 2017; Michael White, 'Pressure on Clarke Grows over Fate of Prisoners' *The Guardian* (London, 2 May 2006) <www.theguardian.com/politics/2006/may/02/prisonsandprobation.ukcrime> accessed 23 May 2017

[94] Don Flynn, 'New Borders, New Management: The Dilemmas of Modern Immigration Policies' (2005) 28 Ethnic and Racial Studies 463, 482

[95] Matthew Gibney, 'Deportation, Crime, and the Changing Character of Membership in the United Kingdom' in Katja Franko Aas and Mary Bosworth (eds), *The Borders of Punishment: Migration, Citizenship, and Social Exclusion* (Oxford University Press 2013), 218

constructed in the public policy imagination as being 'fundamentally unwelcome and always, already, potentially dangerous.'[96]

The post-2010 Conservative governments sought to further normalise deportation and to restrict the recourse to human rights law by FNOs. The government sought to restrict the right to family life of FNOs, and of their children and families, through new Immigration Rules in July 2012 and through the Immigration Act 2014.[97] The government felt that it lacked control over the outcomes of deportation appeals, resulting from a 'public policy vacuum' and a 'democratic deficit'.[98] It is clear that the government, led by Theresa May (first as SSHD and then as Prime Minister) saw human rights claims to family life as a barrier to deporting all FNOs. In her 2011 party conference speech, May announced that, 'we need to make sure that we're not constrained from removing foreign nationals who, in all sanity, should have no right to be here.'[99] In lauding the 'deport now, appeal later' powers (since found to be unlawful)[100] the Immigration Minister stated that, 'the new powers have seen a number of criminals

[96] Mary Bosworth, 'Penal Humanitarianism: Sovereign Power in an Era of Mass Migration' (2017) 20 New Criminal Law Review 39, 44

[97] Gemma Manning, 'The Immigration Rules and Article 8 - A Complete Code for Deportation Cases?' (2014) 71 Student Law Review 34; Robinson (n64); Ala Sirriyeh, '"All You Need Is Love and £18,600": Class and the New UK Family Migration Rules' (2015) 35 Critical Social Policy 229; Sheona York, 'Revisiting Removability in the "Hostile Environment"' (2015) 3 Birkbeck Law Review 227; Sheona York, 'Deportation of Foreign Offenders - A Critical Look at the Consequences of Maaouia and Whether Recourse to Common-Law Principles Might Offer a Solution' (2017) 31 Journal of Immigration, Asylum and Nationality Law 8

[98] Home Office, 'Statement of Intent: Family Migration' <www.gov.uk/government/uploads/system/uploads/attachment_data/file/257359/soi-fam-mig.pdf> accessed 3 August 2017, [38]

[99] Politics.co.uk, 'Theresa May Speech in Full' (4 October 2011) <www.politics.co.uk/comment-analysis/2011/10/04/theresa-may-speech-in-full> accessed 9 April 2018

[100] *R (Kiarie and Byndloss) v Secretary of State for the Home Department* [2017] UKSC 17; Jennifer Davis, 'UK Supreme Court Rules "Deport First, Appeal Later" Power Is Unlawful' (*In Custodia Legis: Law Librarians of Congress*, 19 July 2017) <//blogs.loc.gov/law/2017/07/uk-supreme-court-rules-deport-first-appeal-later-power-is-unlawful/> accessed 9 April 2018; Bronwen Jones, 'The End of "Deport First, Appeal Later": The Decision in Kiarie and Byndloss' (*Oxford Law Faculty*, 21 March 2018) <www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2018/03/end-deport-first> accessed 9 April 2018

deported despite having family members in the UK'.[101] Family life, including with children, was not to be protected where it was disruptive of deportation as a normalised consequence of a foreign national's conviction.

Thus as a means of pursuing its political agenda, the government introduced new immigration rules in July 2012 to 'embed within the rules the Secretary of State's interpretation of Article 8 ECHR.'[102] This interpretation of Article 8 ECHR weighted the proportionality balance 'firmly on the side of removal and deportation.'[103] It did so by limiting relief from deportation where a child of an FNO is either a British Citizen or resident in the UK for seven years, and that 'it would be unduly harsh for the child to live in the country to which the person is to be deported and 'unduly harsh for the child to remain the UK without the person who is to be deported'.[104] Outside of these situations, only if 'there are very compelling circumstances' would a deportation order be cancelled.[105]

However, it was apparent that 'strong factual cases which would previously have been allowed under the application Article 8 ECHR would fall outside what was provided for by the Immigration Rules.'[106] The Court of Appeal responded by finding space within the Immigration Rules formulation that 'the public interest in deportation will only be outweighed by other

[101] Home Office and James Brokenshire, '"Deport First, Appeal Later" Measures Start to Bite' (*Gov.uk,* 6 January 2015) <www.gov.uk/government/news/deport-first-appeal-later-measures-start-to-bite> accessed 9 April 2018

[102] Clayton (n28)146

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

[104] Immigration Rules, paragraph 399(a)

[105] Immigration Rules, paragraph 398C

[106] Jonathan Collinson, 'The Troublesome Offspring of Section 19 of the Immigration Act 2014' (2017) 31 Journal of Immigration, Asylum and Nationality Law 244, 248

factors where there are very compelling circumstances'[107] for authority to continue to conduct 'a proportionality test as required by the Strasbourg jurisprudence.'[108]

Despite the SSHD's position in litigation in which '[counsel for the SSHD] has made it clear on behalf of the Secretary of State that the new rules do not herald a restoration of the exceptionality test',[109] in the political sphere the SSHD chose to interpret the decision in *MF (Nigeria)* as the judges ignoring Parliament[110] and instead pursued her agenda through primary legislation; in the form of the Immigration Act 2014, which is examined in depth in chapter 6.

Katherine Otto has noted that the number of successful Article 8 ECHR family life appeals against deportation was already small, and was decreasing, between 2010 and the first major legislative effort by the Conservative government to restrict successful family life appeals in 2012.[111] Otto concluded that the government's programme was 'overblown and unnecessary'.[112] In 2017, 5,835 FNOs were deported from the UK, of whom 1,954 (33%) were non-EU nationals.[113]

The effect of these two themes – crisis to normalisation, and the distinction between "good" migrants and "bad" FNOs – is that there is limited space in the public policy

[107] Immigration Rules, paragraph 398C

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

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

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

[111] Katherine E Otto, 'The Foreign National Prisoner's Dilemma in the United Kingdom: The Human Rights Implications of Restricting Article 8 Claims' (2015) 24 Transnational Law & Contemporary Problems 431, 438:

> '[…] a decrease in successful appeals of automatic deportations under the UKBA, from 385 out of 2709 up for deportation in 2010, to 355 out of 2276 in 2011, and 262 out of 2146 in 2012'

[112] ibid 438-9

[113] Home Office (n35)

imagination for consideration of children who are caught up within, and negatively affected by, the deportation of a parent. The public policy focus (and as this thesis demonstrates, the legal focus) is on the FNO and therefore on their status as "bad" migrants to be deported. This focus obscures from consideration the children of FNOs – who may themselves be British citizens – and obscures the children's essential innocence of the activity which has caused their parent to be labelled a "bad" migrant. The normalisation of deportation results in the effect of deportation on children also being normalised; the normal collateral consequence of the offending by the adult foreign national offender. Thus Lord Justice Sedley observed in one case that 'this family, short-lived as it has been, will be broken up for ever because of the appellant's bad behaviour. That is what deportation does.'[114]

When deportation and the effects of deportation on children is normalised as the effects of 'what deportation does', the negative effects on children which most frequently accompany the deportation of a parent become insufficient to require remedial attention. Only effects which are unusually harsh will then suffice to justify relief from deportation. This thesis finds that a focus on the FNO at the centre of the deportation enquiry results in the law finding it difficult to give effect to the best interests of the child.

3. The Best Interests of the Child as Public Policy Aim

The public policy demands for deportation, explored above, limit the space for human rights-based arguments in favour of FNOs. However, children are generally perceived in public policy context as a special category of person who require and deserve protection, both from and by the state. This pulls public policy in a different direction to the public policy on deportation which perceives children and family life as barriers to deportation. The public policy impetus to protect children is important because it fundamentally reformulates the human rights

[114] *AD Lee v Secretary of State for the Home Department* [2011] EWCA Civ 348, [2011] Imm AR 542, [27]

problem of deportation away from a two-dimensional problem of balance solely as between the FNO and the public interest, and towards a *polycentric* problem which requires a *polycentric* solution.

In part 2(a), I describe how the child is constructed in public policy as vulnerable and dependent and how this conception of children grounds their legal protection. In part 2(b) I summarise the evidence as to the effect of deportation on children; that children will typically experience some form of emotional distress and/or material hardship as a result of the deportation of a parent. In part 2(c) I describe how the concept of the best interests of the child has been substantively understood. The best interests of the child clearly includes considerations of the child's emotional wellbeing and life opportunities. The best interests of the child also include continuity of care and stability of life circumstances as being good in and of themselves; things which are clearly interrupted by the deportation of a parent. Finally, in part 2(d) I demonstrate that the way in which the best interests of the child is given legal effect in different areas of domestic law is not pre-determined, and that different areas of law have pursued different approaches to the best interests of the child. I examine briefly the paramountcy principle in family law and the limited footprint of the best interests of the child in sentencing law. I conclude that there is no single methodological means for giving effect to the best interests of the child in legal decisions affecting children. The implication is that the way in which the best interests of the child is given effect in deportation law is not constrained by prior patterns of incorporation. This thesis will explore in further chapters the choices that have been made in different phases of UK deportation law, and suggest a means of altering deportation decision-making in the future so as to give better effect to the best interests of the child.

3(a) The Child as Vulnerable and Dependent

Children are positioned in the public policy imagination as being vulnerable and dependent. The vulnerability of children makes them dependent on adult care, but their dependence also makes them vulnerable:

> Children are profoundly dependent on others for their well-being, because they cannot meet their own needs (emotional, physical, developmental), or negotiate the obstacles in the social world in such a way that their needs will be met. They are also (for this reason) profoundly vulnerable to the decisions of others.[115]

Recognising the dependence and vulnerability of children legitimises the placing of legal demands on both parents and the state to safeguard the welfare of children. As King and Piper argue, if children require adult care then they are also:

> …the recipients of parental (or adult) responsibilities, the object of parental duties. It is their welfare that must always be given the first and paramount consideration; it is their development that must be safeguarded by the law[116]

Thus the 'welfare principle' – that the child's welfare shall be the court's paramount consideration – was advanced in family law decisions in the nineteenth century and gradually displaced the absolute rights of fathers.[117] The Children Act 1989 puts the welfare principle at

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[115] Harry Brighouse, 'What Rights (If Any) Do Children Have?' in David Archard and Colin M Macleod (eds), *The Moral and Political Status of Children* (Oxford University Press 2002), 40

[116] Michael King and Christine Piper, *How the Law Thinks About Children* (Second Edition, Arena 1995), 72

[117] Shelley Day Sclater, Andrew Bainham and Martin Richards, 'Introduction' in Andrew Bainham, Shelley Day Sclater and Martin Richards (eds), *What is a Parent? A Socio-Legal Analysis* (Hart Publishing 1999), 8

the heart of UK family law.[118] Choudhry and Herring argue that the welfare principle is well understood by the public and forces parents to put children's welfare at the heart of their dispute resolution, rather than their own individual rights.[119]

As well as justifying the domestic legal schema of family law, governed by the welfare principle, the vulnerability of the child has been used to justify human rights standards in international law. The 1924 League of Nations Declaration and 1959 UN Declaration on the Rights of the Child both emphasised a child's protection needs, rather than the child's autonomy. Other instruments which relate to the rights of the child are also aimed at the protection of children in circumstances as diverse as the workplace and warzone, and when they are vulnerable to specific abuses such as trafficking.[120] In the UN Declaration on the Rights of the Child the child is solely 'an object of concern'[121] and paragraph 3 of the preamble reinforces the perception of the vulnerable child underpinning the rationale for the Declaration, declaring the need for the child's special protection 'by reason of his physical and mental immaturity.'[122] The UN Convention on the Rights of the Child (UNCRC) is similarly justified. The preamble 'reaffirms that children, because of their vulnerability, need special protection.'[123]

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[118] Children Act 1989, s1(1)

[119] Shazia Choudhry and Jonathan Herring, *European Human Rights and Family Law* (Hart Publishing 2010), 116

[120] Such as the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War, the 1951 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, the 1999 ILO Convention No. 182 on the Worst Forms of Child Labour, and ILO Convention No. 138 on the Minimum Age for Admission to Employment and Work (Cynthia Price Cohen, 'The Relevance of Theories of Natural Law and Legal Positivism' in Michael Freeman and Philip Veerman (eds), *The Ideologies of Children's Rights* (Martinus Nijhoff Publishers 1992), 61)

[121] Michael Freeman, 'Introduction: Children as Persons' in Michael Freeman (ed), *Children's Rights: A Comparative Perspective* (Dartmouth 1996), 3

[122] Philip E Veerman, *The Rights of the Child and the Changing Image of Childhood* (Martinus Nijhoff Publishers 1991), 167

[123] ibid 185

However, there has been a significant shift from an approach which protects children's welfare as being solely the object of obligations on parents or the state, to one which recognises that children possess individual human rights.[124] The best interests of the child have been recognised by the UN Committee on the Rights of the Child as being a human right.[125] The elevation of the best interests of the child to the status of a human right is important because, although children are considered to be vulnerable and dependent, assigning human rights to children signifies that they have moral status as individual human beings. Because children are recognised as individual human beings with human rights, it is recognised that their human rights may or may not be coincident with their parent's interests.[126]

3(b) The Effect of Deportation on Children

Given the widespread recognition of children as vulnerable it is alarming that there is a dearth of evidence about the effect of the deportation of parents on children, and that it is an under researched area.[127] From what is known about deportation and about other forced separations of parents and children it is clear that, because of their dependence and vulnerability, children are particularly susceptible to negative welfare outcomes arising from the deportation of their parents. Research in the United States suggests that two of the biggest impacts on children arising from the deportation of a parent are emotional distress[128] and financial disadvantage.[129]

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[124] Andrew Bainham, 'Can We Protect Children and Protect Their Rights?' (2002) 32 Family Law 279, 288

[125] Committee on the Rights of the Children, 'General Comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art.3, Para.1)' <docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsqIkirKQZLK2M58RF%2f5F0vEAXPu5AtSWvliDPBvwUDNUfn%2fyTqF7YxZy%2bkauw11KCpZ8VGFd%2fxi%2f1%2bqnSUbLGoXotjGq0RxAO4qsYpqHWlu7> accessed 27 June 2017, [6]

[126] David Archard and Colin M Macleod, 'Introduction' in David Archard and Colin M Macleod (eds), *The Moral and Political Status of Children* (Oxford University Press 2002), 5

[127] Dreby (2012) (n16) 832; McLeigh (n16) 98

[128] Dreby (2012) (n16) 839; Brabeck, Lykes and Hershberg (n16) 284-5

[129] Dreby (2012) (n16) 837-838; Brabeck, Lykes and Hershberg (n16) 285-6

A wider US study which included the effects of immigration detention found negative reactions amongst children including changes to eating and sleeping, crying and feeling afraid, anxiety, withdrawal and clinginess. [130] Although many negative effects reduced over the nine months of the research, other effects such as withdrawnness and aggression increased during the research period.[131] The same research recorded a larger number of negative experiences amongst those children who were separated for longer periods, and amongst older age groups.[132]

Research on the effect of deportation on children in the UK is less well established.[133] Research[134] on behalf of the Children's Commissioner for England showed results similar to the outcomes in US research. It showed that family separation caused by immigration issues led to both financial disadvantage and emotional distress:

> The main impacts on children emerged due to separation from a parent, as well as children internalising and reacting to their parents' anxiety and stress. Parents also reported that they found it more difficult to mediate and resolve their child's emotional and developmental needs due to separation from a partner.[135]

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[130] Ajay Chaudry, Randy Capps, Juan Manuel Pedroza, Rosa Maria Castañeda, Robert Santos, Molly M. Scott, 'Facing Our Future: Children in the Aftermath of Immigration Enforcement' (*The Urban Institute*, February 2010) <www.urban.org/research/publication/facing-our-future/view/full_report> accessed 7 June 2017, 41-43

[131] ibid 41-43

[132] ibid 43

[133] For a literature review on the effects of other causes of child-parent separation, see Grant, Kofman, Peel and Wray (n16) 128-137. For a literature review on the effects of divorce and separation on children, see Bryan Rodgers and Jan Pryor, 'Divorce and Separation: The Outcomes for Children' (*Joseph Rowntree Foundation*, 20 June 1998) <www.jrf.org.uk/report/divorce-and-separation-outcomes-children> accessed 8 June 2017

[134] Grant, Kofman, Peel and Wray (n16)

[135] Grant, Kofman, Peel and Wray (n16) 37. See also, Apland and Yarrow (n16); Children's Commissioner (n16)

Clearly the effects of deportation on most children is that of emotional distress, material disadvantage, and hindered development. These aggregated findings, however, inevitably mask a wide variety of responses by children which are impacted by their resilience. Resilience is itself an aspect of child development and is not pre-determined by the child's age.[136] Thus one can say that children are generally at risk of having their best interests substantially impaired by the deportation of a foreign national offender parent, but that the impact on individual children will be fact-specific.

Instead of separation from the deported parent, the child may be subject to *de facto* or constructive deportation; 'If a young child's parents are forced to leave a country, so in effect is the child.'[137] This may occur regardless of any leave to remain in the UK – or the right to abode of British citizen children – possessed by the child. Residence in the UK affects a range of the child's interests including 'life expectancy, their physical and psychological development, their material prospects, their general standard of living.'[138] Residence in the UK is also connected to identity, as Lady Hale observed:

> They will lose the advantages of growing up and being educated in their own country, their own culture and their own language. They will have lost all this when they come back as adults.[139]

This observation does not just apply to those children who are legally British citizens, but also theoretically to those who identify as British or -British because of their upbringing

[136] Center on the Developing Child, 'Resilience' (Harvard University) <https://developingchild.harvard.edu/science/key-concepts/resilience/> accessed 9 April 2018

[137] Bhabha (2014) (n42) 68

[138] ibid

[139] *ZH (Tanzania)* (n21) [32]

and cultural exposure. The deportation of an FNO parent therefore can negatively affect a child's welfare, identity, and development. All of these are encompassed by the principle of 'the best interests of the child'. What factors go into the decision as to what is in the best interests of the child will undoubtedly have an impact on the outcome of individual cases. However, my argument is that if 'the best interests of the child' is not given proper methodological consideration in deportation decisions then an outcome which supports the best interests of the child is less likely to emerge, regardless of what contextual factors the court considers.

For the purpose of this thesis I therefore do not propose to develop or defend a specific checklist of factors which must go into the best interests of the child. It is enough to show that those aspects of the best interests of the child which are negatively affected by the deportation of a parent are generally considered to be fundamental aspects of the best interests of the child. The deportation of an FNO parent may impair a child's identity, family ties and connections, physical, emotional, and material needs, and support for the child's development.[140] All of these factors are also explicitly or implicitly contained in three prominent checklists of factors relevant to the best interests of the child; the UK family law 'welfare checklist'[141] (s1(3) Children Act 1989), the Committee on the Rights of the Child General Comment 14 on the right of the child to have his or her best interests taken as a primary consideration,[142] and in the BIC-Model, created by academic Margrite Kalverboer and colleagues.[143] Table 1 identifies the

[140] HM Government, 'Every Child Matters' (Cm 5860, 2003) <www.gov.uk/government/uploads/system/uploads/attachment_data/file/272064/5860.pdf> accessed 23 March 2018

[141] Jonathan Herring, *Family Law* (Eighth Edition, Pearson 2017), 535

[142] General Comment No. 14 (2013) (n125)

[143] Margrite Kalverboer and others, 'The Best Interests of the Child in Cases of Migration: Assessing and Determining the Best Interests of the Child in Migration Procedures' (2017) 25 International Journal of Children's Rights 114, 135-137

factors included in, and excluded from, each of these. Each checklist comprises different factors, and each checklist and their sources use different language and their categorisations give different levels of specificity. As a consequence, whether any one term used in any one checklist is sufficient to implicitly encompass that in another is open to debate. For example, the BIC-model factor of 'To have an example (behavioural, cultural etc) set by the child's parent(s)' is marked in Table 1 as being implicitly contained within the welfare checklist's factors of 'child's emotional needs' and/or the 'Capability of the child's parents at meeting the child's needs'. To argue this definitively is not the purpose of this thesis, and reasonable commentators may disagree with my coding. However, the comparison of checklists in Table 1 is sufficient, I suggest, to establish the point relevant to this thesis; that there is some agreement as to the core content of the best interests of the child, and that the negative effects of deportation described in part 3(b) are covered by 'the best interests of the child'.

	BIC-Model; Kalverboer et al	**Committee on the Rights of the Child; General Comment 14**	**Welfare Checklist; s1(3) Children Act 1989**
Wishes, feelings, or views of the child	Explicit	Explicit	Explicit
Health and physical wellbeing	Explicit	Explicit	Explicit
Safe physical environment (immediate and wider)	Explicit	Explicit	Explicit
Relationship of mutual affection with parent(s) or care-givers(s)	Explicit	Implicit	Implicit
Supportive, flexible parenting structure	Explicit	Absent	Absent
To have an example (behavioural, cultural etc) set by the child's parent(s)	Explicit	Implicit	Implicit
To have an example (behavioural, cultural etc) set by the wider community	Explicit	Implicit	Implicit
Interest in the child shown by parent(s)	Explicit	Implicit	Implicit
Continuity in upbringing and care	Explicit	Explicit	Explicit
Stability in life circumstances	Explicit	Explicit	Explicit
Education	Explicit	Explicit	Explicit
Social network (including peers and friends)	Explicit	Explicit	Implicit
Capability of the child's parent(s) to meet the child's needs	Implicit	Explicit	Explicit
Consideration of individual characteristics (eg age, sex, religion, cultural background)	Absent	Explicit	Explicit
The child's identity	Absent	Explicit	Implicit

Table 1: Factors contained in the 'best interests of the child' in three different checklists

The absence of an agreed checklist of factors relevant to the best interests of the child can be perceived positively or negatively. The Committee on the Rights of the Child argue that the best interests of the child is a context specific and 'dynamic'[144] principle, whereas Mnookin argues that the best interests principle is 'indeterminate', value-driven,[145] and prone to

[144] General Comment No. 14 (2013) (n125) [1]

[145] Robert H Mnookin, 'Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy' (1975) 39 Law and Contemporary Problems 226, 230

inconsistent decision-making.[146] Because the checklists do vary in their inclusions, level of specificity, and emphasis, the adoption of one or other of these checklists will have an effect on individual deportation decisions. I recognise the value of creating a context specific and context appropriate list of factors to assist deportation decision-makers in their assessment of the best interests of the child. However, this is a different enquiry to the one that this thesis undertakes, and one that I argue must be determined separately to it.

In this thesis I argue that there is considerable legal confusion as to role that the 'best interests of the child' plays within deportation decisions in UK law. The consequence of this confusion, as I show in chapters 4-7, is that the best interests of the child are effectively excluded or side-lined from deportation decisions which affect children. An agreed checklist of factors comprising the best interests of the child cannot, no matter how empirically or theoretically sound it is, give effective protection to the best interests of the child if the best interests of the child is overall excluded or side-lined from deportation decisions.

3(c) How to give effect to the best interests of the child is not pre-determined (I)

As an aspect of decision-making, the way in which the best interests of the child is given effect in different legal decisions is not consistent. Two factors of particular importance account for this diversity of legal treatment. First, the way in which the best interests of the child has, or has not, been domesticated into UK law. Rather than direct incorporation of Article 3 UNCRC into UK law as a form of constitutional principle, the best interests of the child appears piecemeal in different parts of UK law.[147] Secondly, different areas of UK law have developed different cultural and political assumptions which either animate a child-centred jurisprudence

[146] ibid 263

[147] Jane Fortin, *Children's Rights and the Developing Law* (Third Edition, Cambridge University Press 2009), 50

or restrict the space for such a jurisprudence to develop. Both factors are evident from a short survey of UK family law (part 2(c)(i)) and sentencing law (part 2(c)(ii)).

3(c)(i) Family law

Family law promotes the best interests of the child through the welfare principle, found in s1(1), Children Act 1989.[148] The welfare principle treats the welfare of the child as paramount, so that 'the child's welfare automatically prevails over the right of other family members'[149] or otherwise 'determinative'.[150] Family law is directed to a statutory checklist of relevant factors, the 'welfare checklist'[151] in s1(3), Children Act 1989.[152] Furthermore, there is a common law presumption that children should be brought up by a parent and that 'maintaining current

[148] Children Act 1989, s1(1):

> 'When a court determines any question with respect to—
>
> (a) the upbringing of a child; or
> (b) the administration of a child's property or the application of any income arising from it,
>
> the child's welfare shall be the court's paramount consideration.'

[149] Shazia Choudhry and Helen Fenwick, 'Taking the Rights of Parents and Children Seriously: Confronting the Welfare Principle Under the Human Rights Act' (2005) 25 Oxford Journal of Legal Studies 453, 455

[150] Sonia Harris-Short, Joanna Miles and Rob George, *Family Law: Text, Cases, and Materials* (Third Edition, Oxford University Press 2011), 540

[151] Herring (n141) 535

[152] Children Act 1989, s1(3): 'a court shall have regard in particular to—

(a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);
(b) his physical, emotional and educational needs;
(c) the likely effect on him of any change in his circumstances;
(d) his age, sex, background and any characteristics of his which the court considers relevant;
(e) any harm which he has suffered or is at risk of suffering;
(f) how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs;
(g) the range of powers available to the court under this Act in the proceedings in question.'

arrangements (the status quo) and contact with the non-residential parent are each in the children's best interests.'[153]

The relationship between the welfare principle and the right to family life and other ECHR rights is much debated.[154] In Choudhry and Fenwick's analysis the welfare principle has been 'reconfigured'[155] so as to be made a legitimate aim for an interference with Article 8 ECHR. Thus the family life between parent and child 'ought not to be gratuitously interfered with and which, if interfered with at all, ought to be so only if the welfare of the child dictates it.'[156] The best interests of the child thus, 'becomes an automatic justification within Article 8(2) [ECHR]'.[157] The family courts have thereby maintained the welfare principle's status as automatically prevailing over other rights and the family courts have taken the view that if decisions meet the best interests of the child then they also fulfil the requirements of Article 8 ECHR.[158]

However, the kind of rights conflict that arises in family law do not map precisely onto the deportation context. In the kind of family law cases where the family life of the parent and/or child may be interfered with in order to further the best interests of the child, the state possesses the role of neutral arbiter (for example in custody disputes between parents).[159]

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[153] Judith Masson, Rebecca Bailey-Harris and Rebecca Probert, *Cretney's Principles of Family Law* (Eight Edition, Sweet & Maxwell 2008), 654

[154] See, *inter alia*: Choudhry and Fenwick (n149); Jane Fortin, 'Accommodating Children's Rights in a Post Human Rights Act Era' (2006) 69 Modern Law Review 229; Sonia Harris-Short, 'Family Law and the Human Rights Act 1998: Judicial Restraint or Revolution?' (2005) 17 Child and Family Law Quarterly 329; Jonathan Herring, 'The Human Rights Act and the Welfare Principle in Family Law - Conflicting or Complementary' (1999) 11 Child and Family Law Quarterly 223

[155] Choudhry and Fenwick (n149) 465

[156] *Re KD (A Minor) (Ward: Termination of Access)* [1998] AC 806, 825 quoted in Choudhry and Fenwick (n128) 462

[157] Choudhry and Fenwick (n149) 465

[158] Fortin (2009) (n147) 303-4

[159] ibid 302

Alternatively, the state instigates the interference, but for the purpose of furthering the child's best interests (for example in proceedings to take the child into care). In these cases the state is pursuing the private interests of the child, on behalf of the child, rather than a general public interest which is at odds with the best interests of the child.

In contrast, in deportation, the interference by the state is for a public policy reason that is independent from the child's best interests; i.e. the public interest in preventing crime and disorder by deporting the FNO parent. The child's best interests may ultimately be served by the deportation (e.g. where the FNO presents a risk to the child) but this is an ancillary benefit to the public interest championed by the state. In most cases, the best interests of the child are invoked in order to prevent the deportation of the FNO. In family law care proceedings, the conflict is whether the child's best interests are best served by their continued relationship with the parent. The state pursues the course of action which is in the child's best interests (even where this may interfere with rights to family life), whereas in deportation the state pursues deportation as a course of which may not be in the best interests of the child.

These kinds of family law decisions present a classic conflict of rights situation; the right to family life versus the welfare rights of the child. The rights conflict in deportation cases are, however, of a different character because the interference of a human right (the right to family life) is for a public interest (in deportation). The place of the best interests of the child within this balance is what gives deportation its *polycentric* nature – as explored in chapter 3 – and is at the heart of the problem which this thesis explores.

3(c)(ii) Sentencing law

Sentencing convicted offenders is another area of domestic law where the best interests of children should arguably be a central issue. Sentencing is not just one phenomenon and encompasses a number of different situations; including in what sentence to impose; what

contact arrangements should be permitted; and, accommodation should be made in a mother and baby unit. In contrast to family law, the sentencing of convicted offenders with children presents a problem more similar to the deportation of FNOs in that, as Lady Hale observed in *P & Ors*:

> A more complex dilemma has been created, in which there are a number of interests to be balanced: those of the state in the proper management of prisons, of the mothers in their family life, and of the children in the protection, not only of their family life but also of their best interests.[160]

However, neither the right to family life nor the best interests of the child are established principles within sentencing law. Ashworth identifies the suffering of the family of the incarcerated to be considered a normal consequence of imprisonment,[161] consistent with the general assumption that prison and its consequences are 'natural'[162] and an 'inevitable and permanent feature of our social lives.'[163] The normalisation of the separation of prisoners from their families is paralleled in the normalisation of deportation. Both are considered to be a natural facet of state power and in both cases, this means that, as Dembour argues with respect to immigration law, 'European Convention law has nothing to say about the way in which […] laws force many families to live in a condition of dislocation'.[164]

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[160] *P & Ors v Secretary of State for the Home Department & Anor* [2001] EWCA Civ 1151, [2001] Fam Law 803, [88]

[161] Andrew Ashworth, *Sentencing and Criminal Justice* (Fifth Edition, Cambridge University Press 2010), 186

[162] Angela Y Davis, *Are Prisons Obsolete?* (Seven Stories Press 2003), 10

[163] ibid 9

[164] Marie-Bénédicte Dembour, *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint* (OUP 2015), 97

Ashworth gives examples of mothers and fathers having prison sentences reduced or suspended 'in order for them to look after young children',[165] but there are inconsistencies in approach.[166] For example, in *Bishop* the judge relied on Article 8 ECHR, finding that:

> …a sentencing judge should […] have at the forefront of his or her mind the consequences for children if their sole carer is sent to prison and consider whether on balance to seriousness of the offence or offences justifies the separation of child and carer.[167]

However, this provides no indication as to the relative weight to be given to either factor. It is also apt to provide little relief to offender parents where a judge considers the impact on children and family to be a normal consequence of imprisonment. Although *Bishop* invoked the ECHR, both Ashworth and Easton identify 'mercy' as the underlying discourse in most cases.[168] However, a discourse of mercy does not change the unyielding focus on the offender; mercy is granted to the offender alone, or at best, co-identifies the child with their offender parent. Mercy is also discretionary, whereas s55, BCIA requires that the best interests of the child be considered to be an independent human right that must be given primary status.[169] As a human right, the child affected by the deportation of an FNO parent can always require the

[165] Ashworth (n161) 187

[166] Christine Piper, 'Should Impact Constitute Mitigation?: Structured Discretion Versus Mercy' [2007] Criminal Law Review 141, 145. Inconsistency of approach is also identified in Susan Easton, 'Dangerous Waters: Taking Into Account of Impact in Sentencing' [2008] Criminal Law Review 105, 112

[167] *R v Bishop* [2011] EWCA Crim 1446, [9]

[168] Ashworth (n161) 187; Easton (n166) 105. Both argue that the courts should develop consistent principles of adjudication to the issue.

[169] See chapter 3, part 2(c)

decision-maker to give effect to their best interests, whereas under a discretionary process of mercy the child has no means to affect the outcome of the sentencing decision.

The question of accommodation in a mother and baby unit has, in *P & Ors*, attracted most authoritative judicial guidance which engages the best interests of the child. Lady Hale identified three competing aims that the prison service must balance when determining whether to accommodate together, and for how long, a mother and child;

> a) the necessary restrictions on liberty arising from the mother's imprisonment;
>
> b) the good order and discipline within the prison; and,
>
> c) the welfare of the child, taking into account; the extent of the harm of separation; the extent of harm of remaining in a prison environment; the quality of alternative childcare arrangements.[170]

Accommodation together in a mother and baby unit parallels with constructive removal, and the separation of mothers from children by imprisonment parallels with parent-child separation children caused by the deportation of a parent. In both mother and baby units and constructive deportation, the question is whether the child should be required to share the parent's position of exile (either their exile from "mainstream society" whilst in prison, or exile from the UK through deportation to another state).[171] Both present a dilemma as to whether the child's best interests are better served through maintaining parental contact despite this being in a state of exile, or through relieving the child of the burdens of exile despite the separation

[170] *P & Ors* (n160) [102-105]

[171] On deportation and prison sentences as forms of exile, see *inter alia:* Benjamin Gray, 'From Exile of Citizens to Deportation of Non-Citizens: Ancient Greece as a Mirror to Illuminate a Modern Transition' (2011) 15 Citizenship Studies 565; William Walters, 'Deportation, Expulsion, and the International Police of Aliens' (2002) 6 Citizenship Studies 265, 269; Lucia Zedner, 'Is the Criminal Law Only for Citizens? A Problem at the Borders of Punishment' in Katja Franko Aas and Mary Bosworth (eds), *The Borders of Punishment: Migration, Citizenship, and Social Exclusion* (Oxford University Press 2013), 48

from the parent. Likewise, there are parallels between the parent-child separation caused by not accommodating in a mother and baby unit[172] and deportation of an FNO parent, because either may lead to parent-child separation. As highlighted in the previous part, the best interests of the child are not necessarily protected simply by the presence of an alternative caregiver, nor are parent-child relationships immune from significant damage from prolonged separation.

However, a direct transposition of this decision-making methodology to deportation is inapt. The question of access to mother and baby units is one about how a sentence should be served, rather than whether a custodial sentence should be served at all. Transposition of this decision-making methodology would presuppose the deportation of the FNO because the decision about accommodation in mother and baby units cannot relieve the parent of their incarcerated status. As such, the decision is about what is in the child's best interests given the parent's imprisonment as a starting and unchangeable pre-condition. In contrast, even where deportation decisions presuppose deportation to be the normal consequence of a foreign national's offending, the deportation order itself can be lifted, unlike the mother's prison sentence.

3(c)(iii) How to give effect to the best interests of the child is not pre-determined (II)

Neither family law nor sentencing law present precise analogies to deportation and both have different approaches to the best interests of the child. In many aspects of family law the best interest of the child are paramount; 'children's welfare trumps and outweighs all other considerations; no other interests or values may affect the decision; children's interests are the only ones that count.'[173] In sentencing law, the best interests of the child may be promoted only

[172] And, indeed, the absence of any form of father and baby unit or accommodation of older children in prison. Not that I am advocating either to be desirable, only that imprisonment enforces a separation of parent and child.

[173] Helen Reece, 'The Paramountcy Principle: Consensus or Construct?' (1996) 49 Current Legal Problems 267, 267

within a nebulous understanding of 'mercy', or in decisions about mother and baby unit accommodation as one of a co-equal factors to be balanced alongside the mother's family life and the needs of prison discipline. One can argue that the difference of treatment of the best interests of the child is due to the different cultural assumptions about what are the natural, unremarkable consequences of divorce and prison, or to the difference in statutory context within which the best interests of the child are present (or absent) in the two areas of law, or both.

Deportation is *sui generis* in its combination of origin (offending and conviction), causes (state action), effects (either separation of child and parent or the constructive deportation of the child), and the consequence of decision-making (that the underlying cause, deportation, is precluded). However, what the case studies of family and sentencing law demonstrate is that the way in which the best interests of the child is given effect, and should be given effect, is different in different areas of law. This is consistent with the Committee on the Rights of the Child observation that the best interests of the child both context specific and 'dynamic'.[174] Therefore the way in which the best interest of the child ought to be given effect in deportation decisions is neither pre-determined nor bound by pre-existing patterns of incorporation. In evaluating the way in which UK deportation law has given effect to the best interests of the child, this thesis is guided by the nature of deportation and by the specific legal context in which deportation exists.

4. Conclusion

The public policy context of this thesis evinces a core tension between deportation on the one hand, and the protection of children on the other. The deportation of FNOs has become a

[174] General Comment No. 14 (n125) [1]

normalised tool of public policy to deal with what are perceived to be particularly "bad", "undeserving", or "unwanted" migrants. Legal changes have focussed on a desire to deport more FNOs and to reduce barriers to deportation. On the other hand, children are constructed in the public policy imagination as vulnerable and dependent and therefore appropriate objects of legal protection, including through the extension of specific human rights protections such as found in the principle of the best interests of the child. Tension between these two public policy strands occurs when the deportation of a FNO results in some kind of harm to the child's best interests. The available evidence strongly suggests that deportation does have negative effects on children, particularly in exposing them to emotional distress and financial disadvantage.

Finally, in this chapter I also demonstrated that the legal responses to the best interests of the child are different in different areas of law. Short case studies of family law and sentencing law demonstrate that the best interests of the child may be incorporated into UK law in different ways depending on the context in which it is applied. This implies that the way in which the best interests of the child ought to be considered in deportation law is not predetermined by previous patterns of incorporation but instead is specific to the context of deportation law. This also means that there is space for alternative decision-making approaches to give effect to the best interests of the child in deportation decisions; space which I use in chapter 7 to suggest a means by which to resolve the problems identified in this thesis.

In chapter 3, I outline the legal context of the deportation of FNOs and illustrate that the public policy tension between deportation and the protection of child in repeated in UK law. This tension manifests between the legal imperative to deport, and the legal command to give primary consideration to the best interests of the child. The focus on both the FNO and on the child is what I describe as giving deportation its *polycentric* nature. Chapters 4-6 of this thesis are therefore concerned with how UK law has attempted to address this tension.

CHAPTER 3: *POLYCENTRICITY* AND A *PLURALITY OF DECISION-MAKING NORMS* IN DEPORTATION DECISIONS

1. Introduction

In the previous chapter, I described how the *public policy* context in which deportation operates appears to pull in two competing directions; a public interest in deporting FNOs, and the protection of children as vulnerable and deserving objects of protection. In this chapter, I argue that the UK's *legal* obligations also pull decision-makers in deportation cases in two competing directions between the deportation of FNOs and the protection of children. The first direction is that of the right to family life under Article 8 of the European Convention on Human Rights (ECHR). This protects family life, but is subject to a public interest limitation under which the deportation of FNOs may be justified as preventing crime and disorder. The second direction is presented by Article 3 of the United Nations Convention on the Rights of the Child (UNCRC), under which the best interests of the child must be treated as a human right with a primary status. This chapter argues that these two human rights regimes create two inter-linked issues with which UK law must grapple; issues which I label as that of *polycentricity* and of the *plurality of decision-making norms*.

UK law must grapple with applying Article 8 ECHR and Article 3 UNCRC because both have been domesticated into UK deportation law.[175] The Human Rights Act (HRA) 1998 require public authorities (including the Home Office and the Immigration Tribunals) to act compatibly with Convention rights,[176] including Article 8 ECHR,[177] and to take into account

[175] Fordham (n40) 111; Jane Fortin, 'Children's Rights - Flattering to Deceive?' (2014) 26 Child and Family Law Quarterly 51

[176] Human Rights Act 1998, s6(1):

> 'It is unlawful for a public authority to act in a way which is incompatible with a Convention right.'

[177] Human Rights Act 1998, s1(1):

> 'In this Act "the Convention rights" means the rights and fundamental freedoms set out in— (a)Articles 2 to 12 and 14 of the Convention […

the jurisprudence of the European Court of Human Rights (ECtHR).[178] This has been emphasised in the immigration context by Lord Bingham in *Huang*.[179]

The domestication of Article 3 UNCRC in to UK immigration law is more circuitous. From the UK's ratification of the United Nations Convention on the Rights of the Child (UNCRC) on 16 December 1991 the UK had a treaty reservation to the effect that the Convention was not to apply to the regulation of immigration.[180] Article 3 UNCRC requires that:

> 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.

[178] Human Rights Act 1998, s2(1):

> 'A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any—(a)judgment, decision, declaration or advisory opinion of the European Court of Human Rights […]'

[179] *Huang* (n8) [8]:

> 'In the Human Rights Act 1998 Parliament not only enabled but required the Convention rights set out in Schedule 1 to the Act (including article 8) to be given effect as a matter of domestic law in this country. It did so (section 2) by requiring courts or tribunals determining a question which had arisen in connection with a Convention right to take into account any relevant Strasbourg jurisprudence, by requiring legislation, where possible, to be read compatibly with Convention rights (section 3) and, most importantly, by declaring it unlawful (section 6) for a public authority to act in a way incompatible with a Convention right. Thus immigration officers, the appellate immigration authority and the courts, as public authorities (section 6(3)), act unlawfully if they do not (save in specified circumstances) act compatibly with a person's Convention right under article 8. The object is to ensure that public authorities should act to avert or rectify any violation of a Convention right, with the result that such rights would be effectively protected at home, thus (it was hoped) obviating or reducing the need for recourse to Strasbourg.'

[180] The reservation stated that, 'The United Kingdom reserves the right to apply such legislation, in so far as it relates to the entry into, stay in and departure from the UK of those who do not have the right under the law of the UK to enter and remain in the UK, and to the acquisition and possession of citizenship, as it may deem necessary from time to time.' (House of Commons Foreign Affairs Committee, 'First Report: Foreign Policy and Human Rights' (21 December 1998, HC 100-I – HC 100-III), Annex A <https://publications.parliament.uk/pa/cm199899/cmselect/cmfaff/100/100ap32.htm> accessed 3 December 2018)

However, the reservation was withdrawn in November 2008 and as a direct result,[181] Parliament enacted s55 of the Borders, Citizenship and Immigration Act (BCIA) 2009. This requires that the Secretary of State must ensure that her immigration powers (including over deportation) are 'discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom'.[182]

However, notwithstanding the textual differences, UK courts have drawn an equivalence between s55 BCIA and Article 3 UNCRC; effectively collapsing any distinction in language, meaning, interpretation, or approach. Different reasons have been advanced for this. Lady Hale in *ZH (Tanzania)* relied on the 'spirit' of the UK's international obligations, finding that Article 3 UNCRC, 'is a binding obligation in international law, and the spirit, if not the precise language, has also been translated into our national law.'[183] In *R (TS)*,[184] Mr Justice Wyn Williams found that the statutory guidance[185] required the use of the UNCRC as an interpretive tool for correctly understanding the s55 duty[186] and, moreover, that 'the statutory guidance intends that when a decision maker is having regard to the need to safeguard and promote the welfare of a child he is for all practical purposes also having regard to the best interests of the child.'[187] In *JO (Nigeria)*, the Upper Tribunal relied on the similarity of substance and outcome:

[181] Ayesha Christie, 'The Best Interests of the Child in UK Immigration Law' (2013) 22 Nottingham Law Journal 16, 16; Fortin (2014) (n175) 55; *ZH (Tanzania)* (n21) [23]

[182] Borders, Citizenship and Immigration Act 2009, s55

[183] *ZH (Tanzania)* (n21) [23]

[184] *R (TS)* (n20)

[185] 'Every Child Matters' (n140)

[186] *R (TS)* (n20) [31-32]

[187] *R (TS)* (n20) [35]. See also: Fortin (2011) (n46) 952

> In the field of immigration, therefore, the enactment of section 55 discharges an international law obligation of the UK Government. While section 55 and Article 3(1) of the UNCRC are couched in different terms, there may not be any major difference between them in substance, as the decided cases have shown.[188]

In public international law terms, "incorporation" may not be the correct description of what has occurred and instead this thesis prefers "domestication".[189] Whatever term is used to describe the precise relationship between Article 8 ECHR and the HRA, and between Article 3 UNCRC and s55 BCIA, UK courts have undoubtedly understood UK law in the context of, and based its substantive decisions on, the international law. Although the issues addressed in this thesis arise from the application of international legal obligations, because of their domestication it remains an issue that is distinctly one of UK law. Therefore the purpose of this chapter is to explain the difficulty that UK law has encountered in giving effect to the best interests of the child in deportation decisions and I argue that this is because the legal obligations to the best interests of the child and to family life are ill-matching when they are required to be applied simultaneously in UK deportation law.

Parts 1 and 2 of this chapter disentangle *polycentricity* and the *plurality of decision-making norms* from the dual requirements of Article 8 ECHR and Article 3 UNCRC, as domesticated into UK deportation law. *Polycentricity* refers to the fact that where an FNOs deportation affects their child or children, multiple rights and interests are at stake. Both the FNO and their children (and additionally any partners/spouses or other relations) have family life rights that are engaged by the threatened deportation and each can claim that their rights ought to be the centre of the human rights enquiry. At the same time, each child has their best

[188] *JO and Others* (n46) [6]

[189] James Crawford, 'Brownlie's Principles of Public International Law' (8th ed, Oxford University Press, 2012), 63-67

interests to be considered, which are to be given primacy. Finally, there is a public interest in deportation so as to prevent crime and disorder and maintain immigration controls.

The *plurality of decision-making norms* relates to the different formal legal requirements of Article 8 ECHR and Article 3 UNCRC. Whereas Article 8 ECHR requires a simple balance between the family life and the public interest, Article 3 UNCRC demands that the best interests of the child be a primary consideration and that only rights-based considerations may be balanced against the best interests of the child.

Separately and individually *polycentricity* and the *plurality of decision-making norms* may be resolved relatively simply, at least in theory. However, because Article 8 ECHR and Article 3 UNCRC must be applied simultaneously in UK deportation decisions, the two issues must be resolved together. It is in having to coherently apply both Article 3 UNCRC and Article 8 ECHR simultaneously that the issues arise. Part 1 of this chapter is therefore about *polycentricity* and part 2 is about the *plurality of decision-making norms*. In each I explain in full how these issues emerge from Article 8 ECHR and Article 3 UNCRC. In part 3, I explain how the compound nature of the issues arises and how this makes the coherent resolution of both issues problematic on a theoretical and practical basis.

Finally, throughout the chapter I will use a fictional example of a family affected by the deportation of an FNO parent in order to explicate the issues addressed. I will introduce this fictional family and their circumstances when they appear in part 1. Part 1 also identifies a core theoretical distinction between human rights and interests which underpins some of the analysis of the application in UK law of Article 8 ECHR and Article 3 UNCRC.

2. *Polycentricity*: Deportation Decisions Engage Multiple Rights and Interests

This part argues that deportation cases involving children exhibit *polycentricity*. Deportation engages the human rights of many individuals. The FNO is to be deported, but their deportation

also affects their family members – their spouse/partner and children – whose life circumstances will be altered either by their own constructive deportation or by the enforced absence of the FNO. Each individual has a right to family life (Article 8 ECHR) and each child has a right to have their best interests considered as a primary consideration (Article 3 UNCRC). Moreover, each can claim to be a direct and primary victim of the human rights interference.

Following the claim, made in the previous part, that Article 8 ECHR and Article 3 UNCRC have been domesticated into UK immigration law (through the HRA and s55, BCIA respectively), for simplicity, this chapter will refer simply to legal obligations arising from Article 8 ECHR and Article 3 UNCRC. This should be understood as referring to UK legal obligations, except where it is contextually clear otherwise.

The answer to the question as to whose rights are at stake in deportation decisions is that the human rights of each individual in the family is at stake; the rights issue is therefore *polycentric*. In contrast, to view the rights problem of deportation through the lens of only one rights holder affects our perception of the act of deportation. I have suggested that when public policy focuses on the FNO as a "bad" migrant it obscures the children of FNOs who are innocent of their parent's offending. This replicates itself in legal discourse. As Yeo observed, to focus on the human rights of the foreign national offender invites us to disregard the rights of other family members.[190] The lens through which we view family life can therefore fundamentally alter our perception. For example, an FNO who has entered into a 'precarious' relationship will frequently find their Article 8 ECHR claim to be dismissed. Yet 'a child cannot be accused of entering into a relationship with his or her parent in the knowledge that their immigration status was precarious'.[191]

[190] Yeo (n2) 147

[191] ibid 152

Polycentricity therefore requires the decision-maker to take seriously the individual rights claims of all the different individuals within a family affected by deportation. To explore this problem, I enlist the assistance of a fictional, but representative family. In our fictional family, 'Marcus' is a national of Freedonia. In the UK he committed a criminal offence and the Home Office seeks his deportation. Marcus is in a relationship with 'Samira', also a Freedonian national and lawfully resident in the UK. Together they have a child (Adam) who is a Freedonian national. Marcus is therefore the biological, social, and resident parent of Adam. Samira has a second child (Bryony) from a previous relationship with a British national. Because of the British nationality of Bryony's father (but with whom Bryony has no contact), Bryony is British. Marcus is the social and resident parent of Bryony, although he is not the biological parent. Finally, Marcus also had a previous relationship with a British national, 'Sharon'. Marcus and Sharon had a child (Claude) who is a British national by virtue of Sharon's nationality. Marcus is the social, biological, but not resident father of Claude. We can create a visualisation of these interconnected relationships by listing out the relevant individuals:

Marcus (FNO)	Samira (Partner)	Adam (Child)
		Bryony (Child)
	Sharon (Ex-Partner)	Claude (Child)

Engaging with different individual rights claims requires the decision-maker to engage with the different factual matrices which are relevant to each claim. Differences between a parent and child's (*inter alia*) nationality, length of residence, language spoken and caring relationships with extended family, present different relevant factual matrices for assessing the proportionality of deportation. Balanced against the human **rights** of individuals is the public

interest in deportation. A deportation decision will exhibit *polycentricity* if it takes into account all of these separate human rights and interests, and gives them the status appropriate to their being rights or interests (i.e. does not treat a mere interest as a right, or treat a right as a mere interest). I expand on the distinction between human rights and interests in part 1(a), below.

I argue that deportation decisions are ***poly***centric because deportation interferes with the rights of multiple individual rights holders whose factual circumstances are different in relevant ways, but whose cases are inextricably interlinked. The problem is poly***centric*** because each rights holder is affected directly by the rights interference and each rights holder has an equal claim to be a direct, primary victim of the interference, and because the public interest in deportation is argued in some of the deportation case law to be centrally relevant to the human rights question in deportation cases.

This part (at 2(a)) expands on and defends an interest theory of human rights and the distinction between human rights and interests. Part 2(b) observes that the Committee on the Rights of the Child establishes the best interests of the child in Article 3 UNCRC as a human right. Part 2(c)(i) establishes that the right to family life under Article 8 ECHR is a right that is held 'by everyone' and that this includes children. Part 2(c)(ii) examines the nature of the public interest in deportation. Part 2(d) concludes the part and explains how its *polycentric* nature distinguishes deportation from other kinds of human rights questions.

2(a) Distinguishing between human rights and interests

The analysis in this part, and the evaluation in following parts which flows from it, rests on an interest theory of human rights. I argue from the perspective of an interest theory of human rights that posits that human rights law protect interests. Where an interest is protected as a human right it may only be interfered with if the interference serves a legitimate aim, where the interference rationally contributes to the legitimate aim, is necessary, and is proportionate

to the aim pursued. These legal tests must be met in order that an interference with a right is lawful. Subjecting an interference to these tests gives the human right a presumption of priority;[192] enjoyment of the right is presumed, unless the tests are met so as to permit interference. Human rights are special because the presumption of priority applies exclusively human rights, and to no other form of legal right (such as contractual rights) or interest.

Not all interests are protected by corresponding human rights. However, these interests do not simply disappear from the decision-making process but exist independently, either as an individual's interests, or the public interest. What distinguishes interests from human rights is that interests do not have the legal protection of the presumption of priority. An interest may be interfered with lawfully by the state without the interference needing to pass any of the tests inherent to the presumption of priority; that the interference serves a legitimate aim, that the interference rationally contributes to the legitimate aim, is necessary, and is proportionate to the aim pursued.

Therefore, where the law demands that an interest be protected by a human right, to treat it as a mere interest devalues it. Similarly, to fail to have consideration of any specific interest that constitutes a human right leads to that protected interest being ignored. The public interest in deportation is also a form of interest which is intrinsic to the balancing exercise but its essential nature as a mere interest, distinguishes it from the nature of human rights. The difference in nature between interests protected as a human right and mere interests is essential to *polycentricity* because it is essential not to treat a mere interest as a human right, or treat a human right as a mere interest as each have different modes of legal protection.

Distinguishing between human rights and interests is important for evaluating whether the reconciliation of the requirements of Article 8 ECHR and Article 3 UNCRC in UK deportation decisions is effective. If it is the human **rights** of the child at stake the presumption

[192] Jack Donnelly, *The Concept of Human Rights* (Croom Helm 1985), 5

of priority holds, whereas if they are merely the **interests** of the child then they are more likely to be subsumed into the rights of others. However, to treat the **rights** of the child as a mere **interest** devalues the protection afforded to the best interests of the child at stake in deportation decisions. Finally, distinguishing between human rights and interests is also important to part 3(b)(ii) of this chapter as Article 3 UNCRC distinguishes between rights-based and non-rights-based reasons for interfering with the best interests of the child.

In the debate between the interest theory of rights and the will (also known as the agency or choice) theories of human rights,[193] I argue that people, fundamentally, have interests. Interests are those things which are important to the individual.[194] Interests are also the foundational basis for human rights; for example, I have an interest in bodily integrity and this interest is protected by the human right to life and freedom from torture.[195] The decision to elevate an interest to the status of human right is a consequence of political choice and societal agreement.[196] I argue that it is important for understanding the claim that human rights decisions in deportation cases are *polycentric*.

I argue from an interest theory of rights because it more readily sustains the claim that children have human rights. If children have human rights, then deportation decisions are *polycentric* because they involve multiple sets of human rights held by multiple individuals, including children. I argue that human children are still human, and any theory of human rights that denies children equal human rights is therefore under-inclusive. Will theorists such as

[193] Samantha Brennan, 'Children's Choices or Children's Interests: Which Do Their Rights Protect?' in David Archard and Colin M Macleod (eds), *The Moral and Political Status of Children* (Oxford University Press 2002)

[194] For a fuller discussion of the nature of individual interests, see: Susan A Wolfson, 'Children's Rights: The Theoretical Underpinning of the "Best Interests of the Child"' in Michael Freeman and Philip Veerman (eds), *The Ideologies of Children's Rights* (Martinus Nijhoff Publishers 1992).

[195] For example, the right to life is enshrined in Article 2 ECHR and Article 6 International Covenant on Civil and Political Rights (ICCPR) and freedom from torture in Article 3 ECHR and Article 7 ICCPR.

[196] What Dembour labels a 'deliberative' view of human rights: Marie-Bénédicte Dembour, *Who Believes in Human Rights: Reflections on the European Convention* (Cambridge University Press 2006), 11

Robert Noggle and Laura Purdy argue that children do not possess human rights equal to those possessed by adults because children lack the essential characteristic of rights holders. Noggle and Purdy argue that this is essential characteristics is the ability to rationally choose.[197] However, this results in an under-inclusive conception of human rights which excludes young children, and some adults, from holding human rights. Instead, the ability to choose and that my choices be respected (in all manner of things) is an interest that I have as a rational agent. However, ceasing to have the ability to choose does not extinguish my human rights; I still have a human right to life even if I am unconscious, and not being able to actively choose life does not invalidate my human right to life simply because I am in an unconscious state. My human rights must therefore be grounded in something more fundamental if my rights as a human being are not invalidated by circumstances which rob me of rational capacity to make choices. Interests are, I argue, this necessary foundational grounding of human rights. This is important because it means that children have human rights too.

The interest in choice gains weight and importance as children develop in maturity. Eekelaar argues convincingly that the content of children's human rights evolve as they get older.[198] For example, it is in the interests of children to have family. In chapter 2, I set out the research which suggests that its interruption through deportation impairs the child's emotional wellbeing and development. As children develop in maturity they have a developing interest in making choices about their family, until finally they are determined to have attained sufficient maturity to decide to cease all contact with what family they had before, and/or begin a new family through marriage and/or procreation. Before this point, the child's interests in

[197] Noggle labels it 'moral agency', whereas Purdy labels it the 'capacity for instrumental reasoning'. Robert Noggle, 'Special Agents: Children's Autonomy and Parental Authority' in David Archard and Colin M Macleod (eds), *The Moral and Political Status of Children* (Oxford University Press 2002), 100; Laura M Purdy, *In Their Best Interest? The Case Against Equal Rights for Children* (Cornell University Press 1992), 11

[198] John Eekelaar, 'The Interests of the Child and the Child's Wishes: The Role of Dynamic Self-Determinism' (1994) 8 International Journal of Law and the Family 42

choosing family are still present, but the weight given to this depends on their maturity. For example, the wishes of children are relevant considerations in contact hearings and will be given increasingly greater weight as they mature.[199] On a pure will theory of rights, the child's human right to family life only materialises at the point of complete 'moral agency'. However, that a will theory of rights denies children a human right to family life until the point of 'moral agency' renders it under-inclusive. A theory of human rights which would deny a child a right to family life until age 5, 10, or 16 years old (depending on the point at which moral agency is found) is clearly suspect because it denies such an important human right to some children. For this reason, I argue that interests are instead the foundation blocks of human rights.

The second importance in situating human rights in the protection of interests is that it makes coherent sense of how and why human rights may be legitimately interfered with. This is again relevant to understanding *polycentricity* because not all factors to be considered in deportation decisions are human rights factors. The public interest in preventing crime and disorder in Article 8(2) ECHR is a factor relevant to deportation decisions, but it evidently does not have the status of a human right. However, this public interest may justify an interference with a human right. There must be some form of mutually intelligible relationship between human rights and the public interest for this to be the case. I argue that this relationship is that both human rights and the public interest are made up of interests. The difference is that human rights are interests which are given special protection in the form of a presumption of priority.[200]

This means that an individual's interests are not exclusively those that by societal agreement attain protection as human rights. This is evident from the fact that the social

[199] Children Act 1989, s1(3)(a):

> '[…] court shall have regard in particular to (a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding)'

[200] Donnelly (n192) 5

agreement as to what interests to protect as rights may differ from place to place. For example, I clearly have an interest in an adequate standard of living for myself and my family, however, the ECHR does not protect this as a human right. These interests may be protected in the UK by other laws (e.g. minimum wage law, laws concerning the termination of employment), but these protections are not the same as the protections afforded by human rights because they do not possess the presumption of priority. In contrast, a domestic legal system which adopts the list of human rights found in the International Covenant on Economic, Social and Cultural Rights (ICCPR) would recognise the right to 'just and favourable conditions of work which ensure […] A decent living for themselves and their families'.[201]

This is significant because a qualified human right, such as the Article 8 ECHR right to family life, may be lawfully interfered with by an interest. These interests – such as 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[202] – are concerned with interests which are not otherwise protected as a human right of any one individual. They do not possess the presumption of priority that human rights possess. The presumption of priority holds that the human right of the individual can only be overridden by the interests of others in circumstances where it is proportionate to do so. This is not the same as making all human rights absolute and where the test of proportionality is met, the human right can be lawfully interfered with.[203] However, the application of the presumption of priority to human rights and not interests is an important and relevant distinction. Mere interests may be interfered with by the state without the state having to demonstrate that the four tests in the presumption of priority are met; the reason for interference with an interest need not be restricted to a limited range of legitimate

[201] International Covenant on Economic, Social and Cultural Rights, Article 7(a)(ii)

[202] ECHR, Article 8(2)

[203] Donnelly (n192) 5

aims, need not be demonstratively rationally capable of meeting that end, need not be the least intrusive means of meeting the state's aim, nor must it be proportionate to that end. In contrast, for an interference with a human right to be proportionate it must meet four tests which are generally recognised in the academic literature as being inherent to the presumption of priority:

(1) Where specified by the human rights measure in question, that the interference must be in pursuit of a legitimate aim. In the ECHR jurisprudence, the legitimate aims are generally co-identified with the public interest,[204] although policies which may be considered by a government or the electorate to be in the public interest but not encompassed within the express legitimate aims would always be a violation of the right. Some ECHR rights do not have legitimate aims; they are absolute rights (such as Article 2 and Article 3 ECHR) and it is therefore never proportionate to interfere with these rights.

(2) The second test, that of suitability or rationality, 'requires that the limitation contribute to the achievement of a legitimate end.'[205]

(3) The test of necessity requires that the action be the 'least restrictive means to further that end'.[206]

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

[205] Carlos Bernal Pulido, 'The Migration of Proportionality Across Europe' (2013) 11 New Zealand Journal of Public International Law 483, 484. See also: Moshe Cohen-Eliya and Iddo Porat, 'Proportionality and the Culture of Justification' (2011) 59 American Journal of Comparative Law 463, 464

[206] Cohen-Eliya and Porat (n205) 464; Pulido (n205) 484

(4) The final test of proportionality is that of 'balancing',[207] also referred to in the literature as 'proportionality *stricto sensu*'[208] or 'proportionality in the narrow sense',[209] inquires as to 'whether the benefits of the governmental objective are proportionate to the violation of the […] right'.[210] Thus the balancing test 'requires that the limitation achieve the pursued end to a degree that justifies the extent of the constraint on the […] right'.[211]

A strict delineation of each step in the presumption of priority does not necessarily reflect the practice of human rights adjudication in the UK or at the ECtHR.[212] However, even if the application of the tests inherent to the presumption of priority are made to run into each other does not mean that they do not exist. Their loose rather than strict application does not undermine their importance to the overall decision as to the proportionality of a human rights interference. Therefore, it follows that if the decision-maker takes into account a relevant interest that should be protected as a human right but does not grant to it a presumption of priority (by applying the tests above), the decision-maker treats what should be a human *right* as a mere *interest*. By treating it as a mere interest, the decision-maker denies it two things. One, the interest is denied the level of protection that it ought to be granted and which the

[207] Pulido (n205) 483

[208] Aharon Barak, 'Proportionality and Principled Balancing' (2010) 4 Law & Ethics of Human Rights 2, 6

[209] Pulido (205) 484

[210] Cohen-Eliya and Porat (n205) 464

[211] Pulido (n205) 484

[212] Tom Hickman, *Public Law After the Human Rights Act* (Hart 2010), 189; Steven Greer, '"Balancing" and the European Court of Human Rights: A Contribution to the Habermas-Alexy Debate' (2004) 63 Cambridge Law Journal 412, 433; Benedikt Pirker, *Proportionality Analysis and Models of Judicial Review: A Theoretical and Comparative Study* (Europa Law Publishing 2013), 216; Eva Brems and Laurens Lavrysen, '"Don't Use a Sledgehammer to Crack a Nut": Less Restrictive Means in the Case Law of the European Court of Human Rights' (2015) 15 Human Rights Law Review 1, 28

presumption of priority of human rights is designed to give by way of the special decision-making guarantees. Two, because only interests which are determined to be of special importance or value are elevated to the status of human rights, to fail to treat an interest as a human right when it should be robs that interest of that special importance or value. This is important because it reduces the decision-makers perception of the importance of the interest, and thus places the interest at a conceptual value equal to other interests which are of lesser importance. The *polycentricity* of deportation decisions requires that the human rights and interests inherent to deportation decisions are given their proper status as either human rights or interests, because their different status is a legally relevant distinction with specific legal consequences.

This distinction between human rights and interests is not about the relative weight that either have in the balancing exercise, but is based on their different characters; human rights can only be lawfully interfered with in pursuit of a legitimate aim, if the interference rationally contributes to the legitimate aim, is the least restrictive means to further that end, and is proportionate, whereas mere interests may be interfered with lawfully without meeting any of these tests. Distinguishing between human rights and interests is therefore important for being able to evaluate whether the reconciliation of the requirements of Article 8 ECHR and Article 3 UNCRC in UK deportation decisions is effective. If it is the *rights* of the child at stake then they share the presumption of priority, whereas if they are merely the *interests* of the child then their character is more likely to be subsumed into the rights of others. However, to cause to treat the *rights* of the child as a mere *interest* devalues the protection afforded to the child's interests at stake in deportation decisions.

Thus in the case of Marcus and his family, all the individuals have a *human right* to family life under Article 8 ECHR. However, on the other side of that balance is the *interest* in

deportation (the Article 8(2) ECHR public interest in preventing crime and disorder). We can add these to our visualisation:

Article 8 ECHR	**Article 8 ECHR**	**Article 8 ECHR**
Marcus (FNO)	Samira (Partner)	Adam (Child)
		Bryony (Child)
	Sharon (Ex-Partner)	Claude (Child)

Public Interest

Because the public interest in deportation is only an *interest*, it can only outweigh the human rights on the other side of the balance if, and only if, it is rational, necessary, and strictly proportionate to do so. In part (b), below, I outline what Article 8 ECHR requires in more depth.

2(b) Article 8 ECHR: the right to family life

Article 8 ECHR protects those interests which are connected to the relationships between individuals in a 'family'. Under the ECHR, children hold human rights as 'petitioners, victims and subjects' under the Convention regime.[213] Article 1 ECHR states that the rights of the Convention are to be enjoyed by 'everyone', which Kilkelly argues is 'significant' for the application of the ECHR to children and which is 'reinforced' by the non-discrimination clause in Article 14.[214] The family life of both the FNO and their children are therefore protected as a

[213] Bernardine Dohrn, 'Something's Happening Here: Children and Human Rights Jurisprudence in Two International Courts' (2006) 6 Nevada Law Journal 749, 772

[214] Ursula Kilkelly, *The Child and the European Convention on Human Rights* (Ashgate Dartmouth 1999), 3. Although Kilkelly also notes that Article 14 ECHR is limited by not being a freestanding right to non-discrimination, rather it is conjunctive to the other rights of the Convention.

right by Article 8 ECHR. What relationships and what aspects of their family life relationship is explained in part 2(b)(i) of this chapter. In the introduction to this part, I stated that when human rights are not absolute, they may be balanced against the public interest. Part 2(b)(ii) describes the public interest of preventing crime and disorder; the public interest which has textual and case law authority for being relevant to deportation decisions.

2(b)(i) The right to family life

Neither family life, nor the interests that it protects, are defined in the ECHR and this definitional vacuum is filled by the case law of the ECtHR. Whilst the ECtHR has defined the nature of family life, it is UK case law that has defined in more concrete terms the status of the right vis-à-vis children. The ECtHR has found that protected under the rubric of Article 8 ECHR are relationships between biological parent and child (even where a parent is non-resident),[215] parent and adopted child,[216] and de facto parents.[217] Likewise, relationships between two adults may be deemed family life through a lens of legality – i.e. marriage[218] – or through the factual status of the relationship.[219] Relationships outside of this nuclear family paradigm have previously been recognised by the Strasbourg organs as family life under Article

[215] *Berrehab v Netherlands* App no 10730/84 (ECtHR, 28 May 1988)

[216] *Söderbäck v Sweden* App no 113/1997/897/1109 (ECtHR, 28 October 1998); *Pini and others v Romania* App nos 78028/01 and 78030/01 (ECtHR, 22 June 2004); *Kurochkin v Ukraine* App no 42276/08 (ECtHR, 20 August 2010)

[217] Sometimes called 'social' parents. The de facto parent is not the biological parent of the child and may or may not be married to the biological parent and may or may not have formally adopted the child. However, they act as a parental figure in the child's life. (*X, Y & Z v the United Kingdom* App no 21830/93 (ECtHR, 22 April 1997); *X and others v Austria* App no 19010/07 (ECtHR, 19 February 2013), [95])

[218] *Abdulaziz, Cabales and Balkandali v UK* App nos 9214/80, 9473/81, and 9474/81 (ECtHR, 28 May 1985) (1985) 7 EHRR 330, [62]

[219] *Schalk and Kopf v Austria* App no 30141/04 (ECtHR, 22 November 2010), [94]; *X and others v Austria* (n196) [95]

8 ECHR,[220] but the more recent case law has tended to treat these relationships to be an aspect of a person's private life rather than their family life.[221] Although Article 8 ECHR protects both private *and* family life, the ECtHR treats these as being two separate areas for protection.[222]

UK law has emphasised that children have equal status to adults as rights holders under Article 8 ECHR. In *Beoku-Betts*[223] it is stressed, 'that the Article 8 rights of *all* family members concerned, including children, must be taken into account when making a decision to remove a family member.'[224] This finding was re-emphasised in *Chikwamba* which stated that the rights of all the appellant's family members 'must also be taken into account'.[225] *EM (Lebanon)* reaffirmed that the decision-maker 'must take account of the article 8 rights of all those who are affected by their decisions. This means […] that they call for separate consideration.'[226] UK law also stresses the diversity of family life, the Court of Appeal having found that 'it is impossible to define, or even to describe at anything less than almost encyclopaedic length, what is meant by "family life" for the purposes of Article 8.'[227] The child's family life rights are important in deportation decisions because, as discussed in chapter 2, when family life is interfered with by deportation, children suffer a range of negative effects on their interests,

[220] Such as uncle/nephew, grandparent/grandchild (Jane Liddy, 'The Concept of Family Life Under the ECHR' [2008] European Human Rights Law Review 15, 20)

[221] Daniel Thym, 'Residence as De Facto Citizenship? Protection of Long-Term Residence under Article 8 ECHR', in *Human Rights and Immigration*, ed. Ruth Rubio-Marin (Oxford: Oxford University Press, 2014), 116. c.f. *Khoroshenko v Russia* App no 41418/04 (Grand Chamber, 30 June 2015)

[222] Charlotte Steinorth, 'Üner v The Netherlands: Expulsion of Long-Term Immigrants and the Right to Respect for Private and Family Life' (2008) 8 Human Rights Law Review 185, 191

[223] *Beoku-Betts v Secretary of State for the Home Department* [2008] UKHL 39, [2009] AC 115

[224] Christie (n181) 17 (emphasis original)

[225] *Chikwamba v Secretary of State for the Home Department* [2008] UKHL 40, [2008] 1 WLR 1420, [8]

[226] *EM (Lebanon) v Secretary of State for The Home* Department [2008] UKHL 64, [2009] 1 AC 1198, [43 & 48]

[227] *Singh* (n17) [72]

such as financial disadvantage and emotional distress. Family life is a right that his held equally by the FNO, their spouse/partner, and their children as individual rights holders.

In our example family, all of the family members have a human right that are engaged by the possibility of deporting Marcus to Freedonia. Marcus (the FNO) has an Article 8 ECHR right to family life (with Samira, and with all three children). Samira has an Article 8 ECHR right to family life (with Marcus, and Adam and Bryony). Sharon has an Article 8 ECHR right to family life with Claude (which would be engaged by deportation if one possible outcome was for Claude to accompany Marcus to Freedonia). Adam has an Article 8 ECHR right to family life (with Marcus, Samira, and Bryony). Bryony has an Article 8 ECHR right to family life (with Marcus, Samira, and Adam). Claude has an Article 8 ECHR right to family life (with Marcus and Sharon).

2(b)(ii) The public interest in deportation

Although the protection of family life under Article 8 ECHR is as a human right, it is not an absolute right. Article 8(2) ECHR permits the state to lawfully interfere with family life if it is proportionate to do so for one of the six enumerated legitimate aims.[228] UK courts have found that the legitimate aims of Article 8 ECHR are exhaustive[229] but it is also settled doctrine of both the ECtHR and UK courts that the maintenance of effective immigration control[230] and the deportation of FNOs are facets of the enumerated legitimate aim of preventing crime and disorder. Thus in *Üner*, the ECtHR found that, 'in pursuance of their task of maintaining public

[228] The legitimate aims in Article 8(2) ECHR are those: '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.'

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

[230] Regarding the maintenance of immigration control, see for example, *Nnyanzi v UK* Application No 21878/06 (ECtHR, 8 April 2008) [2008] ECHR 282, [72]. For commentary, see: 'Nnyanzi v The United Kingdom' (2007) 18 Human Rights Case Digest 753. See also: *Keles v Germany* (n10) [54]

order, Contracting States have the power to expel an alien convicted of criminal offences.'[231] In the UK case law, the public interest in deportation has been found to stem from the deterrent and communication functions of deportation.[232]

The public interest in deportation is an *interest* rather than a *right* because the right to family life enjoys a presumption of priority whereas the public interest does not. Marie-Bénédicte Dembour would dispute this analysis. She argues that the ECtHR's state sovereignty-first approach in immigration cases contrasts starkly with its rights-first approach in other non-immigration cases and she argues that there is a 'problematic logical inversion' in the ECtHR's immigration jurisprudence:

> …the Court conceives of the rights guaranteed [to immigrants] in the Convention as exceptions which temper the general principle of state sovereignty regarding migration control, rather than the Court conceiving the state control prerogative as tempering human rights norms which would themselves be the foundational principle.[233]

I agree with Dembour's analysis as a critique of the balance stuck by the ECtHR between the human rights of immigrants versus the public interest in immigration control. However, I want to distinguish the two stages of the ECtHR's decision-making process. The first are the tests of legitimate aim, of rationality, and of necessity (i.e. the tests required by the presumption of priority excepting balancing). The problem is not that the ECtHR does not

[231] *Üner v Netherlands* (n20) [54]. See also: *Gablishvilli v Russia* App no 39328/12 (ECtHR, 26 June 2014), [44]; *Palanci v Switzerland* App no 2607/08 (ECtHR, 25 March 2014), [49]; *Amrollahi v Denmark* App no 56811/00 (ECtHR, 11 July 2002), [33]

[232] *DW (Jamaica) v Secretary of State for the Home Department* [2018] EWCA Civ 797

[233] Dembour (2015) (n164) 4

apply them, rather the problem is that it gives them only lip service and assumes them to be met. As Dembour notes herself, the ECtHR takes for granted the suitability and necessity of deportation for the legitimate aim pursued by the state; 'A detailed reasoning was manifestly not considered to be necessary. […] [They] presumably believe the link to be obvious.'[234] This means that the ECtHR's analysis is focussed entirely on the question of balancing and at this stage Dembour correctly identifies that the ECtHR's rhetorical approach to balancing begins with the imperatives of state sovereignty over migration rather than the rights of the individual. Giving full attention to the tests of legitimate aim, rationality, and necessity, may allow the rights of individuals in deportation decisions to be safeguarded. In chapter 7, I expand on how a deportation decision-making process may be devised which fully realises each of the tests inherent to the presumption of priority.

Finally, when the test of balancing is considered, the relationship between the right to family life of the individual and the public interest protected by the legitimate aim is described by the ECtHR variously as requiring 'a fair balance between the relevant interests'[235] or that the interference is 'proportionate to the legitimate aim pursued'.[236] The structure of the balancing exercise has great potential for altering the outcome of individual cases, and identifying this is the aim of chapter 4 of this thesis.

Because the relationship between the family life of the individual and the public interest is one of 'balance', we can represent this in Marcus' case by adding the public interest on the other side of the balancing scales:

[234] ibid 169

[235] For example, see: *Keles v Germany* (n10) [55]

[236] For example, see: *Palanci v Switzerland* (n231) [49]

Article 8 ECHR	**Article 8 ECHR**	**Article 8 ECHR**
Marcus (FNO)	Samira (Partner)	Adam (Child)
		Bryony (Child)
	Sharon (Ex-Partner)	Claude (Child)

Public Interest

The public interest is therefore included in the *polycentricity* of rights and interests which must be taken into account in deportation decisions.

2(c) Article 3 UNCRC: protecting the 'best interests of the child' as a human right

If human rights are the means by which certain interests are granted special protection through the presumption of priority, then a human right highly relevant to deportation decisions involving children is the human right that is concerned exclusively with the interests of children; Article 3 UNCRC. Chapter 2 identified that the child is constructed in public policy as vulnerable and dependent, and that as a result, they are appropriate objects of concern and protection. The UNCRC is justified on these grounds and its preamble 'reaffirms that children, because of their vulnerability, need special protection.'[237] The lynchpin of the protective

[237] Veerman (n122) 185

However, it must also be identified that as well as protection, the UNCRC is intimately concerned with rights that may be characterised as mandating 'provision' and 'participation' (Nigel Cantwell, 'The Origins, Development and Significance of the United Nations Convention on the Rights of the Child' in Sharon Detrick (ed), *The United Nations Convention on the Rights of the Child: A Guide to the 'Travaux Préparatoires'* (Martinus Nijhoff Publishers 1992), 28) and that a proposal that the UNCRC be called 'The Convention on the Protection of Children' was rejected by the drafting committee as a 'step backwards.' (Joachim Wolf, 'The Concept of the "Best Interest" in Terms of the UN Convention on the Rights of the Child', *The Ideologies of Children's Rights* (Martinus Nijhoff Publishers 1992), 128)

Furthermore, Article 12 UNCRC contains the right for children to express their views and have those views be given 'due weight' in matters affecting them, including judicial and administrative proceedings. This is also 'often singled out as being one of the most important in the Convention.' (Fortin (2009) (n147) 42)

regime of the UNCRC is Article 3; the best interests of children must be the primary consideration in decisions that may affect them. Both the UN Committee on the Rights of the Child and academic commentators[238] agree that Article 3 UNCRC has three identifiable functions. Article 3 UNCRC acts as, to quote General Comment 14 of the Committee on the Rights of the Child:

> (a) A substantive right […] Article 3, paragraph 1, creates an intrinsic obligation for States, is directly applicable (self-executing) and can be invoked before a court.[239]
>
> (b) A fundamental, interpretative legal principle: If a legal provision is open to more than one interpretation, the interpretation which most effectively serves the child's best interests should be chosen. […][240]
>
> (c) A rule of procedure […] Assessing and determining the best interests of the child require procedural guarantees.[241]

We can thereby identify two key features of the best interests of the child. Firstly, drawing on the analysis in the previous part, the 'best interests of the child' is a *human right*

[238] Philip Alston, 'The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights' (1994) 8 International Journal of Law and the Family 1, 15; Jorg Werner and Martine Goeman, 'Families Constrained: An Analysis of the Best Interests in Family Migration Policies' (Defence for Children, The Netherlands, October 2015) <http://www.childrenslegalcentre.com/userfiles/Defence-for-Children-Families-constrained-an-analysis-of-the-best-interests-of-the-child-in-family-migration-policies-15-November-2015.pdf> accessed 13 September 2016, 6

[239] General Comment No. 14 (2013) (n125) [6]

[240] ibid

[241] ibid

rather than simply an *interest*. It should therefore enjoy the presumption of priority inherent in the status of being a human right. Secondly, the force of Article 3 UNCRC is that it is a right that does not just protect the interests of children, but the *best* interests of children.

In the consideration of Marcus' family, each of the children affected by Marcus' deportation all have a human right to their best interests. This requires a decision as to Marcus' deportation to include consideration of the best interests of all the children, and that their best interests have the status of a human right, rather than a mere interest. This adds another set of human rights to the visualisation of the deportation decision regarding Marcus:

Article 8 ECHR	**Article 8 ECHR**	**Article 8 ECHR**	**UNCRC Article 3**
Marcus (FNO)	Samira (Partner)	Adam (Child)	Adam (Child)
		Bryony (Child)	Bryony (Child)
	Sharon (Ex-Partner)	Claude (Child)	Claude (Child)

Public Interest

This visualisation of multiple human rights, held by multiple individuals, plus the public interest, helps us to understand what it means to say that *polycentricity* is the multiplicity of human rights and interests.

2(d) **Polycentricity** *as the multiplicity of human rights and interests*

In this part, I have developed the claim that deportation decisions regarding FNOs with children are a *polycentric* human rights issue. By this, I mean that the rights and interests at stake are not a simple dyad of one individual's rights and the interference of the state in the name of the public interest. Nor is it a case of the horizontal application of rights between two individuals

in which the state plays the role of arbiter. The rights problem is ***poly***centric because the interference is with the rights of multiple individual rights holders whose factual circumstances are different in relevant ways, but whose cases are inextricably interlinked. The problem is poly***centric*** because each rights holder is affected directly by the rights interference and each rights holder has an equal claim to be a direct, primary victim of the interference.

Viewing deportation as a polycentric rights problem requires decision-makers to consider all the relevant factual differences between the different rights holders. Differences between individuals in respect to their (*inter alia*) nationality, length of residence, language spoken and caring relationships with extended family, mean that different individuals present to the decision-maker different relevant factual matrixes. These factual issues may be different as between the FNO and their children, and between multiple children in the same family. The existence of different factual matrixes multiplies when one also considers the FNO's partner/spouse and if they have multiple children. These again potentially multiply if the FNO had children with other partners, who themselves may have dependent children from other relationships; as in Marcus' family in our example. To take into account all of these rights holders as having independent, separate and unique human rights is what *polycentricity* demands of the decision-maker.

On the other side of the balancing scale is the public interest in deportation. It is settled doctrine of both the ECtHR and UK courts that the maintenance of effective immigration control and the deportation of foreign national offenders are facets of the enumerated legitimate aims of preventing crime and disorder under Article 8(2) ECHR.

Deportation is therefore a polycentric rights problem because it engages each of these various rights and interests:

1. The foreign national offender's interest in maintaining family life with their children and spouse/partner (this can be expressed as the foreign national offender's *right* to a family life);
2. The interests of the foreign national offender's spouse/partner in maintaining family life with the foreign national offender and with their children (also expressible as the spouse/partner's *right* to family life);
3. The child's interest in maintaining family life with the foreign national offender, any other parent(s), and siblings (the child's *right* to family life);
4. The child's other multi-faceted interests (the child's *right* that their best interests shall be a primary consideration);
5. Society's interest in preventing crime and disorder through the deportation of foreign national offender s (the public *interest*).

This is the essential *polycentricity* of deportation decisions addressed by this thesis. Not only must each right and interest be reflected in deportation decisions, each must be given appropriate status as either a *right* or an *interest*.

3. The *Plurality of Decision-Making Norms* in Article 3 UNCRC and Article 8 ECHR

The second consequence of the existence of two different human rights regimes which apply to deportation law – Article 8 ECHR and Article 3 UNCRC – is that both regimes require different things of the decision-maker. I label this a *plurality of decision-making norms*. This second feature of deportation decisions arises because the two different human rights regimes present the decision-maker with two different sets of decision-making norms and they both claim priority. These different norms of decision-making present conflicting requirements to the decision-maker; like two pieces of a jigsaw puzzle which do not fit together.

What is the *plurality of decision-making norms*? Firstly, the Article 8 ECHR jurisprudence of the ECtHR requires a simple balance between the family life and the public interest in deportation. In its more recent jurisprudence it has also adopted the best interests of the child as a facet of the right to family life. In part 2(a) of this chapter, I briefly describe these top level structural requirements of Article 8 ECHR. The second set of decision-making norms arises from Article 3 UNCRC. In part 2(b), I argue that Article 3 UNCRC makes two demands of the decision maker that Article 8 ECHR does not. The first is that the best interests of the child must be a primary consideration; it must be considered separately, and no other consideration may be given more inherent weight than the best interests of the child. Secondly, only rights-based considerations may outweigh the best interests of the child. These present a clear theoretical challenge to the balancing exercise under Article 8 ECHR because, as part 2(c) observes, there is no account of the proper relationship between the best interests of the child as a separate, primary consideration, and the right to family life. Nor is there a resolution of the conflict between Article 8 ECHR which permits non-rights-based considerations to be placed in the balancing exercise, and Article 3 UNCRC which does not permit this. In effect, the jigsaw pieces of Article 8 ECHR and Article 3 UNCRC appear irreconcilable.

Polycentricity and the *plurality of decision-making norms* present themselves simultaneously and must both be resolved in making deportation decisions. This is because they are both a consequence of the requirement in UK law to apply both Article 8 ECHR and Article 3 UNCRC (or at least, their statutory domestications). However, separating out these issues in this way enables us to see why the problem is difficult to resolve in both theory and practice; it enables us to make sense of what would otherwise be an impenetrable problem when viewed as a whole.

3(a) Article 8 ECHR

In part 2(c)(ii) I stated that the ECtHR jurisprudence on Article 8 ECHR requires a balance between the right to family life and the public interest in deportation. The ECtHR places the best interests of the child into the balancing scale when weighing family life. Part 3(a)(ii) outlines this, and this is followed up in chapter 4 which explains how the best interests of the child sits (or fails to sit) alongside the other interests inherent to the human right to family life under Article 3 UNCRC.

3(a)(i) Article 8 ECHR as requiring balance

The relationship between the right to family life of the individual and the public interest protected by the legitimate aim, is described by the ECtHR as requiring that the interference is 'proportionate to the legitimate aim pursued'.[242] Proportionality is central to the decision-making of the ECtHR.[243] The ECtHR's role is:

> ascertaining whether the expulsion order in the circumstances of the present case struck a fair balance between the relevant interests, namely the applicant's right to respect for his family life, on the one hand, and the interests of public safety and the prevention of disorder and crime on the other.[244]

[242] For example, see: *Palanci v Switzerland* (n231) [49]

[243] Greer (2004) (n212); Alec Stone Sweet and Jud Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008) 47 Columbia Journal of Transnational Law 72, 147; Pirker (n212) 188. See also: *Üner v The Netherlands* (n20) [54]:

> 'decisions in this field must, in so far as they may interfere with a right protected under paragraph 1 of Article 8, be in accordance with the law and necessary in a democratic society, that is to say, justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued'

[244] *Keles v Germany* (n10) [55]. See also, *inter alia*: *El Boujaïdi v France* App no 123/1996/742/941 (ECtHR, 26 September 1997), [40]; *Dalia v France* App no 1541996/773/974 (ECtHR, 19 February 1998), [52]; *Amrollahi v Denmark* (n210) [34]; *Aponte v Netherlands* App no 28770/05 (ECtHR, 3 November 2011), [53]

Proportionality analysis 'helps judges manage disputes that take a particular form; it does not dictate correct answers to legal problems.'[245] Both the individual right and the public interest have value, but 'Saying that something is a value does not yet say anything about the relative priority of that value over another, either abstractly or in a specific context.'[246] This thesis is concerned with the abstract value, priority, and relationships between the right to family life, the best interests of the child, and the public interest in deportation decisions.

3(a)(ii) The best interests of the child as an aspect of Article 8 ECHR

The best interests of the child have been recognised by the ECtHR as an essential part of the Article 8 ECHR balancing exercise, despite the fact that the ECHR 'contains no formula referring to the child's best interests.'[247] In the 2006 case of *Üner*,[248] the ECtHR found that one of the criteria for determining Article 8 ECHR claims in deportation cases was 'the best interests and well-being of the children'.[249] This was justified as a development of its own Article 8 ECHR jurisprudence and to be implicit in its previous judgments.[250] It is not then obvious that the ECtHR at this stage was attempting to set out a principle of best interests of equal content or status as to that in the UNCRC. However, the Court later found in *Neulinger and Shuruk* that the principles of the UNCRC were relevant for the proper interpretation of Article 8 ECHR:

[245] Stone Sweet and Mathews (n243) 77

[246] Mattias Kumm, 'The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review' (2010) 4 Law & Ethics of Human Rights 141, 147

[247] Fortin (2009) (n147) 69

[248] *Üner v Netherlands* (n20)

[249] ibid [58]

[250] ibid [58]

> The Court notes 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[251]

The background of the decision of *Neulinger and Shuruk* was an inter-country abduction[252] and the relationship between The Hague Convention[253] and Article 8 ECHR. Although in its judgment the ECtHR drew on its jurisprudence on 'the expulsion of aliens',[254] the ECtHR did not preface its judgment with its standard recitation of what it perceives as the inherent limitations of the ECHR's role in oversight of the immigration (including deportation) decisions of Contracting States, namely that:

> …a State is entitled, […] to control the entry of aliens into its territory and their residence there […] The Convention does not guarantee the right of an alien to enter or to reside in a particular country.[255]

Given that the factual matrix in *Neulinger and Shuruk* was like, but not the same as, other migration cases it is perhaps surprising that the principle of the best interests of the child was carried over into the wider Article 8 ECHR jurisprudence with respect to migration. Barely a

[251] *Neulinger and Shuruk v Switzerland* App no 41615/07 (Grand Chamber, 6 July 2010), [135]

[252] ibid [39]

[253] Hague Convention on the Civil Aspects of International Child Abduction 1980

[254] *Neulinger and Shuruk v Switzerland* (n251) [146]

[255] *Nunez v Norway* App no 55597/09 (ECtHR, 28 June 2011), [66]. In all migration cases heard at Strasbourg, some version of this has been recited ad nauseam since *Abdulaziz, Cabales and Balkandali v United Kingdom* (n218). See, Dembour (2015) (n164) 5 & 96-97

year later the ECtHR placed reliance on both Article 3 UNCRC and *Neulinger and Shuruk* to ground its finding of a violation of Article 8 ECHR in *Nunez*,[256] which centred on the removal of an unlawful resident. The ECtHR referred to the best interests of the child in both its recitation of general principles, and in judgment on the specific case, finding that:

> …the Court will examine whether particular regard to the children's best interests would nonetheless upset the fair balance under Article 8.[257]

> …the Court is not convinced in the concrete and exceptional circumstances of the case that sufficient weight was attached to the best interests of the children for the purposes of Article 8 of the Convention. Reference is made in this context also to Article 3 of the UN Convention on the Rights of the Child, according to which the best interests of the child shall be a primary consideration in all actions taken by public authorities concerning children[258]

In part 1(d) I argued that a human right does not necessarily protect a single interest, but a number of different ones; for example, the human right to freedom of religion protects both the interest in private worship and the interest in congregational worship. In different circumstances an individual may invoke the same right to protect one or more than one specific interest. In *Üner* and Neulinger *and Shuruk*, the ECtHR appear to recognise the best interests of the child as an interest which is protected under the umbrella of family life. The ECtHR in

[256] *Nunez v Norway* (n255) [84]

[257] ibid [78]

[258] ibid [84]

both cases is concerned in part with the weight that the best interests of the child has, given that it exists under that umbrella with other interests.

This is significant because in the rest of this chapter, I argue that treating the best interests of the child as a constituent *interest* to the *human right* to family life under Article 8 ECHR is problematic for UK courts because they are required by Article 3 UNCRC to treat the best interests of the child as a *human right*. That this is the case, and is problematic to achieve, is part of the *plurality of decision-making norms* which this thesis argues is created by Article 8 ECHR and Article 3 UNCRC in UK deportation law.

3(b) Article 3 UNCRC

In developing an understanding of the *plurality of decision-making norms* which arise from Article 3 UNCRC, this thesis draws heavily on General Comments of the Committee on the Rights of the Child. Despite the soft-law character of General Comments, I argue that I am justified in doing so. Although the existence of the Committee on the Rights of the Child is established in Articles 43-45 UNCRC, its only stated role is to receive state reports as to examine progress in 'achieving the realization of the obligations undertaken'[259] Neither the drafting of General Comments, nor the status of such comments, are established by the Convention. The importance of General Comments of UN Treaty Bodies as a whole, and the Committee on the Rights of the Child in particular, is therefore disputed. It is clear that General Comments are not binding in the legal sense; Kanatake describes them as being 'formally non-binding', in that they are not themselves treaties nor reflect customary international law or general principles of law.[260] However, the formally non-binding nature of General Comments

[259] UNCRC, Article 43(1)

[260] Machiko Kanetake, 'UN Human Rights Treaty Monitoring Bodies Before Domestic Courts' (2018) 67 International and Comparative Law Quarterly 201, 201-202

does not mean that they are without any kind of status. Kanatake finds no shortage of evidence for the conclusion that:

> Domestic courts have frequently taken account of General Comments and Recommendations, which not only inform judges about the substance of law, but also give flexibility to judges in determining how they should be reflected.[261]

Despite the General Comments as formally non-binding, the status of the UN Treaty Bodies within the UN treaty system affords their General Comments an authoritative status. This applies to the Committee on the Rights of the Child:[262]

> The CRC Committee elaborates its general comments with a view to clarifying the normative contents of specific rights […] General comments constitute an authoritative interpretation as to what is expected of States parties as they implement the obligations contained in the CRC.[263]

Thus, although not binding, the General Comments present an authoritative statement as to the meaning of Article 3 UNCRC. In this part I expand on two such authoritative

[261] ibid 207

[262] C.f. van Alebeek and Nollkaemper who prefer the more ambivalent status of 'principal interpreters' (Rosanne van Alebeek and André Nollkaemper, 'The Legal Status of Decisions by Human Rights Treaty Bodies in National Law' in Helen Keller and Geir Ulfstein (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge University Press 2012))

[263] Child Rights International Network, 'CRC General Comments' <https://www.crin.org/en/library/publications/crc-general-comments> accessed 19 April 2018. See also: Child Rights Connect, 'General Comments' <www.childrightsconnect.org/connect-with-the-un-2/committee-on-the-rights-of-the-child/general-comments/> accessed 19 April 2018; Sonia Livingstone, Gerison Lansdown, and Amanda Third, 'The Case for a UNCRC General Comment on Children's Rights and Digital Media' (Children's Commissioner and LSE Consulting, April 2017), 35

statements as to the content of Article 3 UNCRC; that the best interests of the child has a primary status, and that in the balancing exercise only rights-based arguments may outweigh the best interests of the child. I will return to these also in chapter 6 where I explain how the Supreme Court domesticated these principles into UK deportation law in its judgment in *ZH (Tanzania)*[264]

3(b)(i) Article 3 UNCRC as having a primary status

Article 3(1) UNCRC states clearly that 'In all actions concerning children […] the best interests of the child shall be a primary consideration.' The UN Committee on the Rights of the Child have stated that as a 'primary' consideration the best interests of the child 'may not be considered on the same level as all other considerations.'[265] This has two logical consequences.

Firstly, the best interests of the child must be considered separately; i.e. that it is a distinct and independent consideration to which the deportation decision-maker must concern itself with. Considering the best interests of the child separately ensures both that they are considered at all, and that they possess primary status. As the UN Committee on the Rights of the Child observe, 'If the interests of children are not highlighted, they tend to be overlooked.'[266]

The second logical consequence is that no other consideration may have more intrinsic weight than the best interests of the child, and that this applies to whether the best interests of the child are considered a *right* or an *interest*. Alston suggests that Article 3(1) UNCRC, and its provision of primary status to the best interests of the child, acts as 'a mediating principle which can assist in resolving conflicts between different rights where these arise within the

[264] *ZH (Tanzania)* (n21)

[265] General Comment No. 14 (2013) (n125) [37]

[266] ibid [37]

overall framework of the Convention.'[267] This would mean that in any conflict between the Article 3 UNCRC right of the child and the right of another, that the other right must not be treated as being inherently more significant. This does not mean, however, that the best interests of the child must always outweigh other human rights.[268] Instead, no other right may be treated as having greater intrinsic or *a priori* weight, or greater weight in the abstract. An example illustrates this distinction. With respect to freedom of expression (Article 10 ECHR), the ECtHR frequently grants a greater intrinsic weight to certain forms of expression (e.g. the political) than to others (e.g. for entertainment),[269] and a greater intrinsic weight to expressions which contain criticism of government than of private individuals.[270] This does not mean that political expressions that critique the government are inviolable, only that they immediately weigh more heavily in the balance.

As a primary consideration the best interests of the child cannot, therefore, go into the balance with an intrinsic level of weight less than the right being balanced against it. Where the weight of circumstances on both sides are equal the best interests of the child cannot be outweighed, although the individual circumstances of the case may result in the best interests of the child being outweighed.

3(b)(ii) Proportionality in Article 3 UNCRC – rights-based arguments only

In this part I argue that Article 3 UNCRC anticipates that the best interests of the child may be outweighed where other human rights are engaged, and where the other human right is more weighty. This might be the human rights of others, or of the child. The flip-side of this is that

[267] Alston (n238) 16

[268] A point emphasised in *Zoumbas v Secretary of State for the Home Department* [2013] UKSC 74, [10]

[269] *Von Hannover v. Germany (no. 2)* App no 40660/08 and 60641/08 (Grand Chamber, 7 February 2012), [109]

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

only rights-based considerations may outweigh the best interests of the child. I address each side of this in turn.

The primary status – rather than a be-all-and-end-all paramount status – afforded to the best interests of the child strongly suggests that the UNCRC anticipates that Article 3 UNCRC is subject to a proportionality assessment; i.e. other human rights might outweigh the best interests of the child.[271] The Committee on the Rights of the Child interprets Article 3 UNCRC as requiring a careful balance between the rights of all parties, and:

> If harmonization is not possible, authorities and decision-makers will have to analyse and weigh the rights of all those concerned, bearing in mind that the right of the child to have his or her best interests taken as a primary consideration means that the child's interests have high priority and not just one of several considerations. Therefore, a larger weight must be attached to what serves the child best.[272]

Deportation may affect a child directly in one of two ways. Firstly, it may result in the constructive removal of the child where the child leaves the UK to accompany the parent, despite the child's own right to residency in the UK or, secondly, in the separation of parent and child. With respect to the first possible outcome, the closest parallel to the constructive deportation of a child through the deportation of a parent can be found in the asylum context in which a child may be directly removed. The Committee on the Rights of the Child argues that unaccompanied asylum seeking children (UASC) may be returned to their country of

[271] Choudhry and Herring (n119) 227

[272] General Comment No. 14 (2013) (n125) [39]

nationality even when it is not in their best interest to do so, but only so long as such a decision is taken:

> after careful balancing of the child's best interests and other considerations, **if the latter are rights-based** and override best interests of the child. Such may be the case in situations in which the child constitutes a serious risk to the security of the State or to the society. Non-rights-based arguments such as those relating to general migration control, cannot override best interests considerations.[273]

To permit only rights-based considerations to outweigh the best interests of the child also makes sense because there are not any apparent limitation clauses in Article 3 UNCRC, nor in some of the other Articles, such as Article 16 UNCRC which merely provides that 'No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence'. This is considerably different to the equivalent Article 8(2) ECHR obligations to family life which specifically list non-rights-based circumstances which may limit the rights of the individual 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.' The absence of a limitation clause which permits specific non-rights-based arguments, and yet the recognition that Article 3 UNCRC may be subject to a balance between the best interests of the child and other considerations, strongly suggests that only considerations grounded in other human rights claims are legitimate under the UNCRC. These rights claims may arise from conflicts within the child's rights (e.g. between family life and best interests in the case of parental abuse or

[273] Committee on the Rights of the Child, 'General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside Their Country of Origin' <http://www2.ohchr.org/english/bodies/crc/docs/GC6.pdf> accessed 27 June 2017, [86] (emphasis added)

neglect), between the child's rights and the rights of their parents (e.g. the right of the child to family life and the parent's rights on divorce), or between the child's rights and the rights of other individuals in society

Finally, we must recall the interpretative function of Article 3 UNCRC; 'If a legal provision is open to more than one interpretation, the interpretation which most effectively serves the child's best interests should be chosen.'[274] Thus, if in doubt, Article 3 UNCRC requires us to give the maximum protection to the best interests of the child. In this context, that means restricting the kinds of considerations which may outweigh the best interests of the child to rights-based considerations only.

This part highlights the importance of the distinction between human rights and interests that I drew in part 1(a). It is a distinction that appears crucial to giving full effect to Article 3 UNCRC but one that even Lady Hale in the UK Supreme Court case of *ZH (Tanzania)*[275] admits to finding 'difficult to understand' in the context of Article 8(2) ECHR.[276] She argued that 'Each of the legitimate aims listed there may involve individual as well as community interests.'[277] But the ECHR rights and freedoms of others are different in character to the public interest to the prevention of crime and disorder and of maintaining immigration control.

To help explicate the difference between rights and interests in this context, let us consider an example case under Article 8 ECHR. The ECHR permits the state to interfere lawfully with the Article 8 ECHR rights of others in order to (where proportionate) uphold the economic wellbeing of others.[278] For example, in *Gillow*, the ECtHR has upheld a requirement

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[274] General Comment No. 14 (2013) (n125) [6]

[275] *ZH (Tanzania)* (n21)

[276] ibid [28]

[277] ibid

[278] McHarg surveys the different theoretical approaches to how the public interest ought to be determined (McHarg (n204) 674-7)

for state authorisation to occupy a home on Guernsey in order to ensure that the population was limited to promote the economic development of the island.[279] However, at stake in *Gillow* was not the individual right of any one resident of Guernsey but rather the collective public interest. The public interest is protected by the limitation clause in Article 8(2) ECHR rather than as a separate right.

In contrast, where two interests *are* protected as rights, conflict may arise but the conflict is of a different character. For example, a parent may argue an interest in maintaining family life with their child, which is protected by a right. The child may argue that it has an interest in bodily integrity, which is also protected by a right; to be free from inhuman and degrading treatment (Article 3 ECHR). Therefore in a situation of child abuse two interests are in conflict, but unlike in *Gillow* both have the character of individual rights. Whilst there may be a general public interest in preventing child abuse, the interest primarily at stake for the child is the individual right to freedom from inhuman and degrading treatment. This conflict between the child's Article 3 ECHR and the parent's Article 8 ECHR rights is relatively easy to resolve; Article 8 ECHR explicitly permits interference on the basis of protecting the rights of others, in this example, the Article 3 ECHR right of the child.

Therein lies the distinction between an argument based on individual rights and an argument based on the public interests which Lady Hale overlooks. Whereas I have a general *interest* in living in a society free from crime or disorder, I only have a personal *right* in circumstances where there is a real and immediate risk to me as an identifiable individual.[280] Lady Hale acknowledges that it will be a more weighty consideration that a person 'poses a specific risk to others' and thus 'more easily outweigh the best interests [of the child]' than

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[279] *Gillow v United Kingdom* App 9063/80 (ECtHR, 24 November 1986), (1986) 11 EHRR 355

[280] *Osman v United Kingdom* App no 23452/94 (Grand Chamber, 28 October 1998), (1998) 28 EHRR 245; *Opuz v Turkey* Ap no 33401/02 (ECtHR, 9 June 2009)

arguments based on 'a more general threat to the economic well-being of the country'.[281] It may also not be immediately obvious where the line lies between a specific risk to another and a general threat. However, I argue that the text and authoritative interpretations of Article 3 UNCRC preclude the possibility that arguments founded in a generalised public interest are incapable of outweighing the best interests of the child. Lady Hale's analysis does not distinguish between human rights and interests and their different modes of protection, which I argued to be essential in part 1(a) of this chapter, and therefore the essential difference between what considerations Article 3 UNCRC permit to be balanced against the best interests of the child, and why they are more restrictive than those permitted under Article 8 ECHR to limit the right to family life.

I argue therefore that the UNCRC does envisage a balancing exercise of the kind found in the proportionality analysis. However, Article 3 UNCRC permits only a narrower set of permitted limitations than those under Article 8(2) ECHR; under Article 3 UNCRC only human rights-based considerations may outweigh the best interests of the child, whereas Article 8 ECHR permits some (listed) interests to outweigh the individual's right to family life, including the prevention of crime and disorder.

3(c) The Plurality of Decision-Making Norms

The *plurality of decision-making norms* refers to the different requirements that Article 3 UNCRC and Article 8 ECHR place on decision-makers in deportation decisions. Article 3 UNCRC makes two demands on the decision maker that Article 8 ECHR does not make. The first is that the best interests of the child must be a primary consideration; it must be considered separately, and no other consideration may be given more inherent weight than the best

[281] *ZH (Tanzania)* (n21) [28]

interests of the child. Secondly, only rights-based considerations may outweigh the best interests of the child. This is different to Article 8 ECHR which permits consideration of a wider range of public interest considerations.

We can visually map these onto the range of rights and interests that are engaged in the deportation decision in the case of our fictional family. Article 3 UNCRC must be considered separately and not be given less inherent weight than other considerations. We can therefore draw a box around these rights in order to emphasise their separation and special treatment. We can also separate out the two conceptions of the public interest. The first allows a broader range of considerations to be considered under the public interest; the human rights and freedoms of others, the prevention of crime and disorder, and the maintenance of immigration controls. whereas under Article 3 UNCRC only rights-based considerations – the rights and freedoms of others – may be balanced against the best interests of the child.

Article 8 ECHR	**Article 8 ECHR**	**Article 8 ECHR**	**UNCRC Article 3**
Marcus (FNO)	Samira (Partner)	Adam (Child)	Adam (Child)
		Bryony (Child)	Bryony (Child)
	Sharon (Ex-Partner)	Claude (Child)	Claude (Child)

Rights and Freedom of Others

Prevention of Crime and Disorder

Maintaining Immigration Control

Rights and Freedom of Others

Two theoretical problems clearly emerge from this visualisation. The first is what is the proper relationship between the Article 3 UNCRC best interests of the child (when they are considered separately, and of no less weight than other considerations) and the Article 8 ECHR

family life right? The second theoretical problem is that there are two different conceptions of the public interest; one that is more expansive than the other because it permits consideration of the prevention of crime and disorder and the maintenance of immigration controls, as well as the human rights and freedoms of others. Article 3 UNCRC does not permit us to balance the best interests of the child against the more expansive public interests (crime and disorder and immigration control), only the human rights of others. But to place into the balance only rights-based considerations means that these other interests (crime and disorder and immigration control) are not considered. Resolving these theoretical issues in the application of Article 8 ECHR and Article 3 UNCRC in UK deportation decisions is therefore a core requirement against which we can evaluate the approaches to deportation decision-making present in UK law and explored in chapters 4-6, and my own suggestion as to how this might be achieved in chapter 7.

4. *Polycentricity* and the *Plurality of Decision-Making Norms* as a Compound Issue

The *polycentricity* and *plurality of decision-making norms* are inherent in deportation decisions in UK law because they arise from the simultaneous presence of Article 3 UNCRC and Article 8 ECHR. Because they arise simultaneously from the same source, *polycentricity* and *plurality of decision-making norms* are therefore two aspects, facets or layers of the requirement in UK law to give simultaneous effect to both Article 3 UNCRC and Article 8 ECHR; they present a compound issue.

The compound nature is clear when we observe theoretical solutions to the *plurality of decision-making norms* alone. The first is to consider only one set of human rights; to choose between Article 3 UNCRC or Article 8 ECHR. To make a deportation decision which gives effect to Article 8 ECHR only, or to Article 3 UNCRC only, is a coherent response to the *plurality of decision-making norms*; to take out of the equation one of the conflicting sets of

decision-making norms. To do so resolves the two theoretical problems attached to the *plurality of decision-making norms* by avoiding the existence of the conflict in the first place. We can revise the account of the relevant balancing exercise in our example family by greying out of consideration one or other of Article 3 UNCRC or Article 8 ECHR. To apply Article 8 ECHR only:

Article 8 ECHR	**Article 8 ECHR**	**Article 8 ECHR**	**UNCRC Article 3**
Marcus (FNO)	Samira (Partner)	Adam (Child)	Adam (Child)
		Bryony (Child)	Bryony (Child)
	Sharon (Ex-Partner)	Claude (Child)	Claude (Child)
Rights and Freedom of Others Prevention of Crime and Disorder Maintaining Immigration Control			Rights and Freedoms of Others

Or, to apply Article 3 UNCRC only:

Article 8 ECHR	**Article 8 ECHR**	**Article 8 ECHR**	**UNCRC Article 3**
Marcus (FNO)	Samira (Partner)	Adam (Child)	Adam (Child)
		Bryony (Child)	Bryony (Child)
	Sharon (Ex-Partner)	Claude (Child)	Claude (Child)
Rights and Freedom of Others Prevention of Crime and Disorder Maintaining Immigration Control			Rights and Freedoms of Others

The problem with these solutions is that whilst they resolve the *plurality of decision-making norms* they must offend the essential *polycentric* nature of deportation decisions. To exclude consideration of one of the rights means that the rights and interests that come under those areas are also excluded from the decision-maker's consideration. By excluding consideration of Article 3 UNCRC, the decision-maker must fail to consider the best interests of Adam, Bryony, and Claude (represented by them appearing in red text). To exclude consideration of Article 8 ECHR, the decision-maker must fail to consider the family life rights of Marcus, Samira, and Sharon, and the family life rights of the children (insofar as any aspect of their family life is not contained within consideration of their best interests). Excluding consideration of Article 8 ECHR also excludes consideration of those aspects of the public interest (crime and disorder and immigration control) which are non-rights-based considerations. Because *polycentricity* requires the consideration of <u>all</u> the relevant rights and interests, either solution to the *plurality of decision-making norms* is mutually exclusive of giving effect to the *polycentricity* of deportation decisions.

Polycentricity and the *plurality of decision-making norms* are not therefore, per se, separate issues which UK law permits independent resolution. Rather in practical terms they present themselves simultaneously and thus must be resolved simultaneously as they arise consequent to the requirement in UK law to apply both Article 8 ECHR and Article 3 UNCRC (or at least, their statutory domestications). However, separating out the two issues on the theoretical level in this way enables us to see why it is difficult in both theory and practice to give effect to the best interests of the child in UK deportation law; it enables us to make sense of what would otherwise be an impenetrable problem when viewed as a whole.

5. Conclusion

In this chapter, I have sought to unpick why applying Article 3 UNCRC and Article 8 ECHR may be difficult to achieve coherently in UK deportation decisions. I have labelled two strands of inter-twined issues as *polycentricity* and the *plurality of decision-making norms*. Presented by a knotted string, it helps to begin by determining whether the knot is made up of two strings tied together, or whether it is a knot in a single string. Identifying that there are two strings does not alter the nature of the knot, but does enable us to better identify strategies for undoing it. However, in undoing the knot, we must untangle both strings; we cannot untangle one string from the knot whist leaving the other in place. If we do, we fail in our overall goal of undoing the knot by simply replacing our two stringed knot with a one stringed one.

In deportation decisions which affect children, which this thesis is concerned with, the first string is that of *polycentricity*. I have argued that *polycentricity* is the requirement on deportation decision-makers to include effective consideration of all the human rights and interests which are engaged by the deportation of FNO with children. Furthermore, the decision-maker must afford the relevant human rights the presumption of priority so that they have the status of human rights, rather than of mere interests. The second string is that of the *plurality of decision-making norms*, whereby Article 8 EHCR requires a balance between the right to family life and the public interest in preventing crime and disorder. At the same time, Article 3 UNCRC requires the best interests of the child to be a primary consideration; it must be determined separately, first, and of no less inherent weight than other interests. Moreover, the best interests of the child under Article 3 UNCRC cannot be balanced against the public interest, only the human rights of others where there is a conflict between them.

Pulling at on one string by resolving one of the two problems of either *polycentricity* or the *plurality of decision-making norms* independently makes the problem more intractable because to resolve one appears incompatible with resolving the other. The problem that

deportation decision-makers face is that they are required by UK law to give effect to both the right to family life and the best interests of the child simultaneously.

In an alternative analogy it is like two pieces of a jigsaw puzzle which do not fit together, however the instruction is that they must be made to. One can ignore the instruction to make them fit together, or one may break one piece in order to get them to superficially mesh, but neither are solutions which achieve what is required.

In this chapter we have observed again the two themes which reassert themselves throughout this thesis. Firstly, Article 8 ECHR and Article 3 UNCRC present two competing aspects of public policy. Article 8 ECHR is focussed on the foreign national offender whose threat to the public interests in preventing crime and disorder and the maintenance of immigration control – the things which make the foreign national offender a "bad" migrant – may solely justify the interference of his human rights as a consequence of his offending. Article 3 UNCRC, on the other hand, reflects the vulnerable, innocent child who must be protected by the law. The child's best interests are a primary consideration because of their unique vulnerability, and their best interests may only be balanced against the human rights of others, rather than against an amorphous public interest.

Secondly, the *ad hoc* layering of legal obligations from different human rights regimes creates tensions between them. Article 8 ECHR and Article 3 UNCRC were developed separately, both in terms of institutional separation (the Council of Europe and the United Nations) and separated by time (1959 and 1989). However, they do not exist in a vacuum and Article 3 UNCRC has influenced the development of the ECtHR's understanding of what Article 8 ECHR requires.[282] When each of these are domesticated into UK law (as will be explored in the following chapters) the fact that they each impose apparently irreconcilable obligations on the decision-maker presents real problems. These are problems that I have

[282] *Üner v Netherlands* (n20) [58]

disentangled in theoretical perspective in this chapter as *polycentricity* and the *plurality of decision-making norms*.

The theoretical disentanglement engaged in by this chapter is important because in chapters 4-6 I use *polycentricity* and the *plurality of decision-making norms* as ways to effectively evaluate three approaches of deportation decision-making that are identifiable in UK law; a "simple balancing approach" based on the jurisprudence of the ECtHR, a "modified balancing approach" so as to attempt to treat the best interests of the child as being a primary consideration, and an "exception approach" which treats the best interests of the child as an exception to deportation because none of these succeed in resolving *polycentricity* and the *plurality of decision-making norms*, in chapter 7, I suggest a fourth possible approach to decision-making which treats the best interests of the child as the primary human right under consideration.

CHAPTER 4: A "SIMPLE BALANCE APPROACH" AFTER *HUANG*

1. Introduction

Chapter 3 explored the theoretical issues that arise as a consequence of the UK's obligations in the deportation law context to both Article 8 ECHR and Article 3 UNCRC. I labelled these as the *polycentricity* of deportation decisions and the *plurality of decision-making norms*. I argued that *polycentricity* arises because of the many different rights and interests that are engaged in deportation decisions. I argued that the *plurality of decision-making norms* is a consequence of Article 3 UNCRC's unique characteristics; that the best interests of the child must be a primary consideration, and that it may only be balanced against rights-based considerations. I argued that, in theoretical terms, accommodating both the *polycentricity* of deportation decisions and the *plurality of decision-making norms* appeared impossible within a single unified decision-making process. A decision could be *polycentric* but not give effect to the unique characteristics of Article 3 UNCRC, or give effect to the unique characteristics of Article 3 UNCRC but not be *polycentric*. I argued this to be the doctrinal cause of why UK law has found it difficult to give effect to the best interests of the child in deportation cases.

Chapters 4, 5 and 6 examine the ways in which UK law in different stages between 2007 to 2014 has formulated the decision-making process in deportation cases and explains how each attempt has been unable to coherently accommodate both the *polycentricity* of deportation decisions and the *plurality of decision-making norms* simultaneously. In this chapter, chapter 4, I examine a "simple balancing approach" to deportation cases and I associate this with the case of *Huang*.[283] Chapter 5 examines a "modified balancing approach" which I associate with *ZH (Tanzania)*.[284] Chapter 6 examines an "exception approach" which I identify as being found in s19, Immigration Act 2014. Each chapter reflects a chronological and conceptual development in UK deportation law from 2007 to 2014.

[283] *Huang* (n8)

[284] *ZH (Tanzania)* (n21)

This chapter is therefore concerned with a "simple balancing approach" to deportation decision-making, evident in UK deportation law from the 2007 House of Lords authority of *Huang*.[285] It is a decision-making approach which uses the familiar metaphor of the merchant's balance to weigh two competing principles; in the case of deportation, the right to family life against the public interest in deporting the FNO. As Barak observes, 'To speak of "balancing" is to speak metaphorically, but the mode of thought is normative.'[286]

This "simple balancing approach" arises in UK deportation law through analysis of Article 8 ECHR. As observed previously, the UK's 'domestication'[287] of the ECHR occurred through the Human Rights Act (HRA) 1998 and thus pre-dates, by almost a decade, the domestication of Article 3 UNCRC in s55 BCIA. This *ad hoc* layering of legal obligations is one of the central themes as to why UK law has found it difficult to give effect to the best interests of the child in deportation decisions. What the first part of this chapter will observe is that the House of Lords decision in *Huang* is part of a process of UK courts coming to terms with the fullness of the UK's obligations under the HRA to act in accordance with the ECHR in deportation cases. This observation will also be significant in the following chapter whereby the modification in the "modified balancing approach" is an attempt to bolt-on the unique characteristics of Article 3 UNCRC onto the pre-existing Article 8 ECHR balance.

The decision in *Huang* required for the first time UK decision-makers to undertake a fact-sensitive proportionality exercise in deportation cases,[288] guided by the jurisprudence of the European Court of Human Rights (ECtHR).[289] Such guidance is found in the ECtHR case

[285] *Huang* (n8)

[286] Barak (n11) 745

[287] Fordham (n40) 111

[288] *Huang* (n8) [20]

[289] ibid [18]

of *Üner*[290] in which the ECtHR states that it will consider a range of principles in deportation cases which come before it. One such principle is 'the best interests and well-being of the children',[291] which UK courts have determined to mean that the best interests of the child ought to be an integral part of the Article 8 ECHR balancing exercise.[292] This is a facet of the other theme running throughout this thesis; that the law, like public policy, pulls decision-makers in competing directions which approves the deportation of FNOs, but also requires the protection of children.

The second and third part of this chapter analyse the ECtHR Article 8 ECHR case law as to the structure of the balancing exercise and its ability to give effect to the best interests of the child in deportation decisions. This analysis identifies two structural requirements of this "simple balancing approach". The first argues that the ECtHR's approach to Article 8 ECHR is best understood as viewing family life as a *commonly-held right*; a right that examines the family of foreign national offenders as a whole, rather than as a right that is held and examined individually. This characteristic of being *commonly-held* provides the super-structure of the decision-making approach to balancing presented by the ECtHR. Secondly, that the weight assigned to the family life side of the balance is constructed with reference to a relationship between the ECtHR's assessment of the *value* of family life and the *gravity* of the interference with family life presented by deportation.

I argue in each part that these structural aspects of the "simple balancing approach" mean that as a decision-making process it is not *polycentric*, nor consistent with the *plurality of decision-making norms*.

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[290] *Üner v Netherlands* (n20)

[291] ibid [57-58]

[292] *DS (India) v Secretary of State for the Home Department* [2009] EWCA Civ 544, [2010] Imm AR 81; *LD (Zimbabwe)* (n20)

2. *Huang*: The Delayed Emergence of Proportionality in UK Article 8 ECHR Jurisprudence

The HRA requires UK public authorities to act compatibly with Convention Rights (s6 HRA) and requires courts to take into account the jurisprudence of the ECtHR (s2 HRA). The extent of the role assigned to courts to review decisions of public authorities on human rights grounds exercised UK courts for some time; the successful 'migration'[293] of proportionality principles to UK law was not assured. Before the HRA, the immigration rules:

> …had emphasised the discretionary nature of deportation of overstayers and offenders, requiring officials (and judges on appeal) to consider their situation in the round, taking into account "every relevant factor" – age, length of residence, family ties, character, employment record and so on.[294]

However, rather than pursue a consideration of all relevant factors in the round under a human rights analysis, as they had been accustomed to doing so before the HRA (albeit under the Secretary of State's residual discretion), early case law under the HRA in the deportation context was marked by judicial deference to executive decision making. In the 2003 case of *Edore*, the Court of Appeal articulated a role similar to a hands-off judicial review standard of Wednesbury unreasonableness, finding that the appellate court was to determine whether the Secretary of State's decision was 'properly one within the decision maker's discretion, i.e. was a decision which could reasonable be regarded as proportionate and as striking a fair balance between the competing interests in play.'[295] The appellate adjudicator was not to find a

[293] Pulido (n205)

[294] Frances Webber, *Borderline Justice: The Fight for Refugee and Migrant Rights* (Pluto Press 2012), 163

[295] *Edore v Secretary of State for the Home Department* [2003] EWCA Civ 716, [2003] 1 WLR 2979, [20]

violation of Article 8 ECHR 'if he personally would have preferred the balance to have been struck differently […] he cannot substitute his preference for the decision in fact taken.'[296] Where the Secretary of State made immigration decisions in line with her Immigration Rules, the courts found that Article 8 ECHR violations would only occur in cases which exhibited 'exceptional circumstances' not covered by those Rules.[297] This deference to the Immigration Rules is consistent with a critique of the use of proportionality-based decision-making by judges which argues that:

> Striking a balance between competing aims and values is a decision about what kind of society we want to live in. This is the task of the elected representatives, who are accountable to the members of this society, not a decision of courts.[298]

The use of an 'exceptional circumstances' test led to immigration appeals being refused, even when they exhibited strong factual circumstances.[299] Webber argues that, perversely, it was the introduction of the HRA itself that led to this restrictive regime. By seeking to defend the integrity of the HRA against its detractors, 'the executive and the courts clamped down on so-called "abuse" of human rights by the "undeserving", [so] the floor of human rights protection became an ever lower ceiling.'[300]

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[296] ibid

[297] *Shala v Secretary of State for the Home Department* [2003] EWCA Civ 233, [2003] All ER (D) 407; *M (Croatia) v Secretary of State for the Home Department* [2004] UKIAT 24, [2004] INLR 327; *M v Secretary of State for the Home Department (Croatia)* [2004] UKIAT 00029

[298] Niels Petersen, 'How to Compare the Length of Lines to the Weight of Stones: Balancing and the Resolution of Value Conflicts in Constitutional Law' (2013) 14 German Law Journal 1387, 1393

[299] Sarabjit Singh, 'Immigration and Article 8 Family Life' [2010] Judicial Review 377, 378

[300] Webber (n294) 164

Given this context, Lord Bingham gave mixed signals to adjudicators in *Razgar* as to whether Article 8 ECHR required a full, independent proportionality review or deference to the executive's immigration rules.[301] In one paragraph, Lord Bingham argued that the courts must engage in a full proportionality review of individual cases because:

> In considering whether a challenge to the Secretary of State's decision to remove a person must clearly fail, the reviewing court must, as it seems to me, consider how an appeal would be likely to fare before an adjudicator, as the tribunal responsible for deciding the appeal if there were an appeal. This means that the reviewing court must ask itself essentially the questions which would have to be answered by an adjudicator.[302]

But Lord Bingham also concluded by seemingly endorsing a test of exceptional circumstances finding that, 'Decisions taken pursuant to the lawful operation of immigration control will be proportionate in all save a small minority of exceptional cases, identifiable only on a case by case basis.'[303] *Razgar* clearly confused rather than evolved the law and the issue was returned to again in 2007 in the case of *Huang*.[304] In *Huang*, the House of Lords found that unless a case fell to be allowed within the Immigration Rules, the appellate authority was to undertake a fact-sensitive proportionality exercise.[305] 'Exceptional circumstances' was rejected as the relevant legal test:

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

[302] ibid [17]

[303] ibid [20]

[304] *Huang* (n8)

[305] ibid [20]

> He [Lord Bingham in *Razgar*] was there expressing an expectation, shared with the Immigration Appeal Tribunal, that the number of claimants not covered by the Rules and supplementary directions but entitled to succeed under article 8 would be a very small minority. That is still his expectation. But he was not purporting to lay down a legal test. [306]

Through *Huang* proportionality was adopted by UK courts as the appropriate decision-making tool in immigration cases argued on the basis of Article 8 ECHR[307] and the House of Lords 'received the principle of proportionality into domestic law'.[308] Where *Razgar* retains its influence[309] is in Lord Bingham's articulation of a structured approach to proportionality, comprising five questions:

> (1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?
> (2) If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8?

[306] ibid. Note that Lord Bingham was part of the panel of judges in *Huang* and that there was a single, joint decision of the House of Lords.

[307] Clayton (n28*)* 146; Brenda Hale, 'Families and the Law: The Forgotten International Dimension' (2009) 21 Child and Family Law Quarterly 413, 419

[308] Hickman (n212) 174

[309] It being used by UK courts in recent decisions to identify and structure Article 8 ECHR decision-making, for example, in: *Onwuje & Anor v Secretary of State for the Home Department* [2018] EWCA Civ 331; *SE (Mauritius) & Anor v Secretary of State for the Home Department* [2017] EWCA Civ 2145; *Ahsan v Secretary of State for the Home Department (Rev 1)* [2017] EWCA Civ 2009; *Secretary of State for the Home Department v SU* [2017] EWCA Civ 1069; *Singh (India) v Secretary of State for the Home Department* [2017] EWCA Civ 362

(3) If so, is such interference in accordance with the law?

(4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?

(5) If so, is such interference proportionate to the legitimate public end sought to be achieved?[310]

Although formally expressed in different terms, the *Razgar* questions substantively include the tests introduced in chapter 3 as being essential to the presumption of priority that human rights possess, and that mere interests do not. *Razgar* questions (1) and (2) concern the existence of a right which engages the ECHR. *Razgar* question (3) requires the interference 'to have some basis in domestic law and to be compatible with the rule of law'.[311] Question (4) requires there to be a legitimate aim to be pursued. It also requires the interference to be 'rational' and 'necessary' to achieving the legitimate aim. Finally, *Razgar* question (5) engages balancing. This fifth question requires the assessment of the balance between the weight of the family life on the one side, and the weight of the public interest on the other.

Razgar dictates a structure to proportionality as a whole, but does not suggest a structure for balancing the foreign national offenders' family life and the public interest in their deportation. For this, we must turn to the ECtHR. In the 2001 judgment of *Boultif*, the ECtHR felt 'called upon to establish guiding principles'[312] in deciding deportation cases which engage

[310] *R (Razgar)* (n301) [17]

[311] *Gillian v The United Kingdom* App no 4158/05 (ECtHR, 12 January 2010)

[312] *Boultif v Switzerland* App no 54273/00 (ECtHR, 2 November 2001), [42]

Article 8 ECHR. In *Boultif,* neither the applicant nor his wife had children.[313] Although the general principles established in *Boultif* included limited abstract reference to the situation of children,[314] *Üner* explicitly expanded the principles in *Boultif* to include reference to 'the best interests and well-being of the children'.[315]

Üner is itself typical of a deportation case of a *polycentric* character. Mr Ziya Üner was a Turkish national lawfully resident in the Netherlands. He had a Dutch partner and two Dutch children, none of whom spoke Turkish. Mr Üner was sentenced to seven years imprisonment for manslaughter (following earlier, minor assault convictions) and the Dutch authorities deported him consequent to his conviction.[316] In deportation decisions, including when they exhibit *polycentricity,* the principles that the ECtHR states that it will consider in each case are, in the order given in the *Üner* judgment:

- the nature and seriousness of the offence committed by the applicant;
- the length of the applicant's stay in the country from which he or she is to be expelled;
- the time elapsed since the offence was committed and the applicant's conduct during that period;
- the nationalities of the various persons concerned;
- the applicant's family situation, such as the length of the marriage, and other factors expressing the effectiveness of a couple's family life;

[313] ibid [37]

[314] ibid [48]

[315] *Üner v Netherlands* (n20) [57-58]

[316] *Üner v Netherlands* (n20) [12-29]

- whether the spouse knew about the offence at the time when he or she entered into a family relationship;
- whether there are children of the marriage, and if so, their age;
- the seriousness of the difficulties which the spouse is likely to encounter in the country to which the applicant is to be expelled
- 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[317] country and with the country of destination.[318]

UK courts in both *DS (India)*[319] and *LD (Zimbabwe)*[320] relied on the *Üner* principles as the 'leading Strasbourg authority'[321] as to the relevant considerations in assessing the proportionality of deportation decisions. More recently, *Üner* was identified by the Court of Appeal to be authority for the relevant factors to be considered in the Article 8 ECHR balancing

[317] The literature tends to depreciate the use of 'host state' as it perpetuates the notion of migrant guesthood (e.g. Gibney (n95) 232)

This thesis uses the term 'deporting state' or 'deporting country', apart from in quotations in which 'host' is used in the original.

Similarly, 'country of origin' is used only where quoting a source as 'country of origin' contains within it an implicit judgement as to the place to which the person belongs, as well as failing to reflect the fact that a person may be removed or deported even if they were born in the deporting state. 'Receiving state' is therefore preferred throughout this thesis.

[318] *Üner v Netherlands* (n20) [57-58]

[319] *DS (India)* (n292) [35]

[320] *LD (Zimbabwe)* (n20) [25]

[321] *DS (India)* (n292) [35]

exercise, finding that, 'There is an abundance of authorities in which the courts have applied the principles stated in […] *Üner* to the facts of individual cases.'[322]

The final *Razgar* question of balancing is a "simple balancing approach" in UK law because to determine whether the interference is 'proportionate to the legitimate public end'[323] requires the decision-maker to compare only two competing principles; the weight of the right to family life with the weight of the public interest in deportation. The balancing approach is also "simple" because, whereas a test of exceptional circumstances could be said to require the right to family life to weigh more heavily than the public interest before a court may intervene to prevent the deportation, a "simple balancing approach" requires only that the right be *as* weighty, (or only marginally more weighty) than the public interest in order to prevail.[324] The basic principles of proportionality require that the greater the interference with the right, the greater the public interest needs to be in order to justify that interference.[325]

The next two parts of this chapter seek to unpick the normative implications of this "simple balancing approach" and of the adoption of the *Üner* criteria in UK deportation law, and to assess their ability to give effect to the best interests of the child and to accommodate both the *polycentricity* of deportation decisions and the *plurality of decision-making norms* inherent in the UK's obligations under Article 8 ECHR and Article 3 UNCRC.

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[322] *DM (Zimbabwe) v The Secretary of State for the Home Department* [2015] EWCA Civ 1288, [28]. See also *KB (Trinidad and Tobago) v Secretary of State for the Home Department* [2010] EWCA Civ 11, [18]:

> 'The tribunal directed itself correctly by reference to *Üner v The Netherlands* (2007) 45 EHRR 14, where the relevant criteria in a deportation case are set out, and gave careful consideration to each of those criteria.'

[323] *R (Razgar)* (n301) [17]

[324] Matthias Jestaedt, 'The Doctrine of Balancing - Its Strengths and Weaknesses' in Matthias Klatt (ed), *Institutionalized Reason: The Jurisprudence of Robert Alexy* (Oxford University Press 2012), 156

[325] Robert Alexy, 'On Balancing and Subsumption. A Structural Comparison' (2003) 16 Ratio Juris 433, 436

3. Article 8 ECHR; Individual Right or Commonly-held Right?

The first normative implication of the "simple balancing approach" to deportation cases is that the family life aspect of Article 8 ECHR is treated as being a *commonly-held* right. By this I mean that rather than assessing whether the actions of the state in deporting a foreign national offender has violated the family life right of one individual, or of a series of individuals, the ECtHR assesses whether the right of the family as a common group has been violated.

Article 8 ECHR as a commonly-held right is significant because it ensures that the balancing exercise in deportation decisions conforms to the metaphor of the balancing scales which weigh two competing values within one decision. As a commonly-held right, the balancing scales must hold all the relevant rights and interests of the family unit in order to be a *polycentric* decision-making process. This includes the best interests of the child and the right to family life of each family member. However, as part 2(c) argues, by identifying the interests of the foreign national offender and their children as part of the same right means that the *best* interests of the child cannot be fully or properly considered and therefore the "simple balancing approach" cannot be truly *polycentric*. Secondly, if family life is a right commonly-held by the family unit how can the best interests of the child be a primary consideration; considered separately, and of no less inherent weight than other considerations? Part 2(d) argues that as a commonly-held right, the "simple balancing approach" also cannot uphold the *plurality* of decision-making norms between Article 8 ECHR and Article 3 UNCRC.

This part continues by describing how the shape of legal analysis of the right to family life would look if it were assessed as an individual right; either as an individual right viewed through the lens of the child as a rights holder, or the lens of the foreign national offender as the rights holder, or the lens of both as equal rights holders. This demonstrates the contrast with the ECtHR's approach to the right to family life as it being commonly-held.

3(a) An Individual Right

Approaching the right to family life as an individual right would place the emphasis on the individual's relationships. This presents the question as to whose rights are considered to be at stake, the FNO, their child/ren, and their spouse/partner? Whether the "bad" migrant FNO, or the innocent, vulnerable child is the centre of the enquiry affects what factors and moral judgments are relevant to the assessment of family life.

Perceiving Article 8 ECHR as an individual right means that the interference is with one person's relationships. If Article 8 ECHR is approached as an individual's right to relationship with family, then the question of who is the individual rights holder is of fundamental importance because the shifting lens through which the enquiry is conducted alters the assessment as to whether the interference with family life is proportionate. Even the same factual matrix, viewed through a lens which focuses on the foreign national offender, or on their partner, or the child, is liable to point to different outcomes of proportionality.

To work through an example, in the case of *Antwi v Norway*,[326] viewing the relationship through the lens of the FNO or through the child alters how the facts of that relationship are presented, processed and understood. Mr Antwi was a Ghanaian national with no leave to remain in Norway and who had committed immigration offences in order to enter the country. He had lived and grown up in Ghana until he was 23 years old and when he committed his offences to enter Europe. As an adult he was personally responsible for his offending. There was no issue raised suggesting that Mr Antwi was forced to leave Ghana, nor that he was unable to return there and reintegrate into Ghanaian society. Indeed, he had returned to marry there before entering Norway again on false papers. Although Mr Antwi actively engaged with his

[326] *Antwi and others v Norway* App np 26940/10 (ECtHR, 14 February 2012)

daughter's upbringing she presented no special care needs which made her dependent on his care, or to suggest that she could not be cared for by her mother.

In contrast, the same factual circumstances considered through the lens of the child's circumstances appear considerably different. The 11 year old child (unnamed in the ECtHR judgment) was a Norwegian national from birth, having been born there. She was described as being well integrated into Norwegian society and spoke Norwegian at home. It was her father who she spent most time with, and he supported her education by helping her with homework and being the parental contact for school. He facilitated her participation in extra-curricular sports activities. She had lived in Norway all her life, had only visited Ghana for two short visits, and had little knowledge of the languages of Ghana. Her mother, with whom she lived in a nuclear family unit with Mr Antwi, was a naturalised Norwegian national, and her maternal grandparents and uncles/aunts were resident in Norway. Because the child was a Norwegian national, it could not be said that there was any public interest in her constructive deportation; the child did not offend, posed no risk to the public, and cannot be said to represent a conflict with the immigration law of the state. The factual matrix is identical and shared with the foreign national offender, but the lens through which those facts are viewed – the family life relationship of the child or the adult – fundamentally alters the dimensions of the balancing exercise.[327]

Pursuing a lens that is exclusively and individually focussed on either the FNO, or their spouse/partner, or on the child, presents theoretical problems. If one pursues a balancing exercise analysis through the lens of the foreign national offender's relationship right, then

[327] This is an insight similar to that presented by Dembour and Yeo in different forms. Both argue that the way lens through which the facts of a cases are viewed fundamentally affects how one approaches that case. Dembour further argues that the presentation of facts is never a neutral exercise, and poses the rhetorical question as to whether the foreign national offender in *El Boujaïdi* was a persistent and dangerous drugs offender, or a heroin addict who turned to dealing to fund his addiction? (Marie-Bénédicte Dembour, 'Human Rights Law and National Sovereignty in Collusion: The Plight of Quasi-Nationals at Strasbourg' (2003) 21 Netherlands Quarterly of Human Rights 63, 72-73). See also: Yeo (n2) 147 & 152

much of what is in the child's interests are excluded from the ECtHR's consideration. This is because (as explained in chapter 2) the best interests of the child are not exhausted by consideration of the relationship a child has with one family member, but encompasses considerations of, for example, the child's views, their identity, care, protection and safety, their vulnerability, and their health and education.

However, it does not appear that the ECtHR approaches its analysis of family life as an individual human right. Eekelaar suggests that the ECtHR does not 'clearly separate the interests of the children from the applicant's own Article 8 rights.'[328] Either this means that the best interests of the child are a relevant *interest* for the determination of the Article 8 ECHR *right* of the adult foreign national offender, or that the Court does not analyse Article 8 ECHR as an *individual* right, but rather than a form of *commonly-held* right vested in a group of people. Part 3(b) is therefore dedicated to exploring these two suggestions and how they differ. It pursues the argument that an objective explanation of the ECtHR's case law is that it does approach the right to family life as a commonly-held right, rather than an individual right. This has consequences for the shape of the balancing methodology pursued by the ECtHR.

3(b) A Commonly-held Right

By a *commonly-held right* I mean that rather than assessing whether the actions of the state in deporting a foreign national offender has violated the family life right of one individual, or of a series of individuals, the ECtHR assesses whether the rights of the family as a common group have been violated. The right is held in common rather than individually because the analysis and assessment of the factual matrix of the family life is considered in the round by the ECtHR in a way that combines all the interests that can be said to be held by all the individuals. The

[328] John Eekelaar, 'The Role of the Best Interests Principle in Decisions Affecting Children and Decisions About Children' (2015) 23 International Journal of Children's Rights 3, 17

suggestion that the right to family life is a form of *commonly-held* right is an attractive one because family life is necessarily relational; it cannot be conducted by an individual in isolation.

As a commonly-held right, the interference of deportation is an interference with a relationship, and therefore the right to family life protects *relationships* rather than *individuals*. Because the protection is afforded to the relationship, interference with the relationship must affect both/all individuals in the family relationship. Because deportation is a binary institution (either the FNO is deported or they are not) either the relationship is broken by the deportation or it is not. It is therefore not possible to protect the family life of one individual in the family relationship without protecting the family life of the other. In the web of family relationships, breaking the strand between two individuals breaks that strand for both and therefore the right to family life must require the same outcome for both parties.

As a commonly-held right, the focus is on the relationship and the context for that relationship rather than on the individual. Observed as a commonly-held right, it is the child-parent relationship which is interfered with, rather than the child's relationship or the parent's relationship alone. If the example of *Antwi* (explored above) is viewed as an individual right, then the parent's right to family life would not have been disproportionately interfered with by his deportation because of his connection to Ghana. Thus where the choice is made to view the interference through the lens of *Antwi's* individual right alone, no Article 8 ECHR violation is found, despite the obvious negative consequences for the child. In contrast, as a commonly-held right, the negative consequence of deportation on the child's relationship becomes an integral aspect of the proportionality exercise which may alter the overall assessment.

Approaching Article 8 ECHR family life as a commonly-held right also makes sense of the ECtHR's failure (as Eekelaar sees it) to make 'no systematic distinction between […]

cases directly about children and decisions affecting children indirectly.'[329] Eekelaar maintains that there is a logical and relevant distinction between decisions which are 'about' a parent or 'about' a child, which he argues alters the nature of the human rights decision and the role of the best interests of the child. The failure to recognise the distinction between cases directly and indirectly affecting children is, in Eekelaar's analysis, a failing. Eekelaar uses the example of cases where the courts are called upon to make a decision about the extradition of a parent, and cases where the decision is whether to authorise the voluntarily relocation of a parent, with their child, to another country upon divorce thereby denying the estranged parent meaningful contact. Extradition, Eekalaar argues, is only indirectly about the child because it is a decision 'about' the parent; the consequence for the child is collateral to what the decision is about. In contrast, relocation is directly about the child, despite what Eekalaar describes as a 'superficial' similarity with extradition. Relocation is not 'about' the parent's ability to move to another country rather, Eekalaar argues, it is 'about' the child's best interests in maintaining contact with both parents.[330]

In contrast to Eekalaar's analysis, if family life is a commonly-held right then there is no relevant distinction to be drawn between the direct and indirect effects of an interference with human rights, because regardless of the type of decision which is being made – be it about relocation, contact, extradition or deportation – because the child is always a fundamental and indivisible part of the family commonality. In cases which may affect the relationship between the child and one or more parent, the assessment should be of the relationships between the family as a whole. When viewed as a commonly-held right it is irrelevant to the process of balancing, or to the outcome, whether deportation is interpreted as an action directly taken against the FNO and thus the child is only an indirect victim of the interference, or whether

[329] ibid 16

[330] ibid 9

deportation is interpreted as directly interfering with the child's relationship with the FNO. By ignoring the distinction between direct and indirect interference, the ECtHR avoids having to determine the case through the lens of only one individual rights-holder. However, by ignoring the difference between direct and indirect interference the only rationally remaining option open to it is to approach the right to family life as being commonly-held.

Support for the idea that the ECtHR approaches the Article 8 ECHR right as being commonly-held can also be found in the *Üner* criteria themselves. The *Üner* criteria are clearly not applicable for determining Article 8 ECHR as an *individual* right of the children of FNOs. For example, the length of marriage of the child's parents is irrelevant to an assessment of the child's family life, not least because the child's legitimacy is not a requirement for family life.[331] Nor are the *Üner* criteria concerned only with the family life of the FNO as the child's best interests may be harmed whereas the parent's family life is substantially unaffected. For example, where the child is constructively deported along with the parent, the child's best interests may be impaired by their dislocation from the UK, but the parent maintains their family relationship with the child because they remain resident with the child, albeit in a different country.

If the ECtHR were to analyse the right to family life as being an individual right, the *Üner* criteria throws up a number of these theoretical inconsistencies. Instead, by viewing family life as being commonly-held, the ECtHR is able to construct a list of relevant interests which encompass the relevant interests of the FNO, their partner/spouse, the best interests of children, and the public interest.

[331] *Marckx v Belgium* App no 6833/74 (ECtHR, 13 June 1979)

3(b)(i) A commonly-held right to family life in UK law

I argue that Article 8 ECHR as being a right that is commonly-held by the family unit as a whole is evident in UK case law. This stems in particular from the House of Lords judgment in *Beoku-Betts.*[332] In *Beoku-Betts*, the court was asked to determine:

> …should the immigration appellate authorities take account of the impact of his proposed removal upon all those sharing family life with him or only its impact upon him personally (taking account of the impact on other family members only indirectly ie. only insofar as this would in turn have an effect upon him)?[333]

The practical consequences for the conduct of appeals was central to the argument and decision in *Beoku-Betts*, and the normative implications of the questions for human rights were thereby somewhat side-lined. However, concluding the decision, the court suggested that 'if the impact of removal on other family members is relevant only in so far as it causes the appellant distress and anxiety, that puts a premium on the appellant exaggerating his feelings.'[334] More importantly, although not touched on by the court, is that if the impact of deportation on other family members is relevant only in so far as it causes the appellant distress and anxiety, then any consequence of deportation on other family members must be entirely ignored by the decision-maker. Any financial hardship, emotional distress, or negative practical consequence for the lives of other family members becomes irrelevant if they are not shared by the FNO. The best interests of the child would be rendered irrelevant because the FNO

[332] *Beoku-Betts* (n223)

[333] ibid [5]

[334] ibid [42]

parent does not feel the impact of deportation on the child's education, health, identity, or emotional wellbeing.

As a consequence of the desire to ensure that the interests of other family members were included in Article 8 ECHR decisions, the House of Lords adopted a commonly-held right approach to family life finding that:

> …"there is only one family life", and that, assuming the appellant's proposed removal would be disproportionate looking at the family unit as a whole, then each affected family member is to be regarded as a victim[335]

In this formulation, the interference is with what they share – family life – rather than with a right that any of them can meaningfully possess individually. This commonly-held approach also appears to be the basis of argument by counsel for Mr Betts:

> The appellant submits that the legislation allows, indeed requires, the appellate authorities, in determining whether the appellant's article 8 rights have been breached, to take into account the effect of his proposed removal upon all the members of his family unit. Together these members enjoy a single family life and whether or not the removal would interfere disproportionately with it has to be looked at by reference to the family unit as a whole and the impact of removal upon each member. If overall the removal would be disproportionate, all affected family members are to be regarded as victims. In making her initial decision on removal

[335] ibid [43]

> the Secretary of State must necessarily have regard to the article 8 rights of each and all of the family members.[336]

In a short concurring decision Baroness Hale reinforced that the focus is on a totality of family life enjoyed by the family unit as a whole:

> the whole is greater than the sum of its individual parts. The right to respect for the family life of one necessarily encompasses the right to respect for the family life of others, normally a spouse or minor children, with whom that family life is enjoyed.[337]

However, two reasons may be advanced for suggesting that *Beoku-Betts* did not envisage a commonly-held right to family life, and instead envisaged an independent and separate Article 8 ECHR decision made for each individual affected by an FNO's deportation. The first reason focusses on the central question in *Beoku-Betts*; are the Article 8 ECHR rights of the FNO's family to be excluded from consideration in a deportation appeal because the family members were not parties to the appeal (as no deportation order was made against the family members). The consequence of considering the family members as 'victims' could be said to elevate the family members to a *de facto* status of parties to the appeal, and thus with individually distinct legal personality.

The second reason relies on the language describing 'each' family member as a victim. 'Each' distinguishes the individuals as separate rather than conglomerated; linguistically we 'each' claim our individual rights, but 'all' claim rights that we share. The focus on 'each'

[336] ibid [20-21]

[337] ibid (n203) [4]

member of the family as victims of a human rights breach in *Beoku-Betts* might suggest Article 8 ECHR as individually, rather than commonly, held right.

There is some support for this in the cases which were determined in the immediate aftermath of the promulgation of the House of Lords judgment. In *R (Rainford)*, the language deployed is about the Article 8 ECHR claims of the family members being 'separate':

> The Secretary of State did not consider as a separate matter as she should have done the consequences for the members of the claimant's family sharing family life with him of his removal[338]

In *CO (Nigeria)*, the focus was placed on the individuals:

> in *Beoku-Betts* it was said that proportionality of the impact of removal must be considered by reference to each family member and that […] involves consideration of J's right to a family life with his father.[339]

In *R (Kaplan)*,[340] the Article 8 ECHR rights of the children involved appear to have been considered by the High Court independently and separately:

> Mr Collins [Kaplan's counsel] put the education of the children in a different way in the alternative, which was that they too had a private life and the private life involved their education in this country, and that by being deprived of that

[338] *R (Rainford) v Secretary of State for the Home Department* [2008] EWHC 2474 (Admin), [62]

[339] *CO (Nigeria) v Secretary of State for the Home Department* [2008] EWCA Civ 1174, [11]

[340] *R (Kaplan) v Secretary of State for the Home Department* [2009] EWHC 3807 (Admin)

> education, there was a realistic prospect that an IAT might take the view that, if they were to have to be deprived of that, there would be a breach of Article 8.[341]

However, *R (Kaplan)* can be distinguished on the basis that the Article 8 ECHR claim advanced by the children in this case is explicitly one which relied on the private life aspect of Article 8 ECHR as a separate and alternative argument to family life.

I argue that these examples are overwhelmed by cases which present a commonly-held basis to their understanding of how the right to family life works. Baroness Hale had a later opportunity to comment on *Beoku-Betts*, this time in the context of entry clearance. Her comments coincide with a commonly-held approach to the right to family life, describing the assessment of family life to be conducted 'in the round':

> In *Beoku-Betts v Secretary of State for the Home Department* [2008] UKHL 39, [2009] 1 AC 115, it was held that the interests of all family members have to be taken into account when assessing the article 8 claims of any of them. Thus the right to respect for the family life enjoyed by the sponsor and all three of these children should be looked at in the round. As I said in *Beoku-Betts*, at para 4, the totality of family life is greater than the sum of its individual parts.[342]

The idea of a commonly-held right can also be found in decisions of the High Court and Court of Appeal. A number of judgments refer to the family life rights of partners and children making up part of the overall balancing exercise after *Beoku-Betts*, whereas they had been excluded from consideration before. For example, in *AM (Jamaica)*:

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[341] ibid [32]

[342] *AS (Somalia) v Secretary of State for the Home Department* [2009] UKHL 32, [26]

> The Immigration Judge in this case clearly considered the Article 8 rights of the appellant. He did not know that he was supposed also to bring into the balance the Article 8 rights of the partner and of the children of the whole family. He did not ask himself, "What is going to be the effect on these children of not having their father?"[343]

Although the second question posed is about the effect on the children, it is framed within the context of *bringing into the balance* the Article 8 ECHR rights of the partner and child; the inference is that there is only one balancing decision to be made. The effect of *Beoku-Betts* appears to be that that the single balance should be populated not just by the family life rights of the FNO but also by the family life rights of his partner and child, considered as a unit. There is no indication that the issue is understood to be one of multiple balances which must be individually and separately considered.

That there need not be a separate consideration of the situation as it applies to specifically to a child was forcefully applied in *MA (Turkey)* when permission to appeal to the Court of Appeal was refused:

> it is contended that the AIT did not have proper regard to the Article 8 rights of the son, contrary to the House of Lords decision in *Beoku-Betts* [2008] UKHL 39. Mr Yeo submits that no separate consideration is given to the impact on the son's Article 8 rights as is required by that decision. I am not persuaded that that is a properly arguable point which merits permission to appeal. It is important that one

[343] *AM (Jamaica) v Secretary of State for the Home Department* [2008] EWCA Civ 1408, [3-4]

> should not be too impressed by the particular form of a decision. In this particular case the Tribunal expressly reminded themselves at paragraph 12 that they had to pay due regard to the interests of the applicant's five year-old son and to the impact on his rights of the deportation of the applicant. That being so, their subsequent consideration of the continuation of the limited contact between the two people, the son and the applicant, if the applicant were deported, has in my view to be seen as reflecting the impact on the child as well as the impact on the applicant. It was not incumbent upon the Tribunal to go through the exercise again spelling out specifically the effects on the child as well as on the applicant; the relationship was a two-way relationship.[344]

In part 3(a) of this chapter, I argued that a separate and individual assessment of family life shifts the lens through which the enquiry is conducted and that this may fundamentally alter the assessment as to whether the interference with family life is proportionate. However, this approach is dismissed by the Court of Appeal here. Instead of a separate consideration of the son's Article 8 ECHR rights, *MA (Turkey)* endorsed a single consideration of the 'two-way relationship'.

In *Card*[345] the dispute was whether the Immigration Judge had considered the Article 8 ECHR family life right of the FNO's partner and child adequately after *Beoku-Betts*. Summarising *Beoku-Betts*, HHJ Waksman stated that: 'the appellate authorities were to take account of the impact of the relevant person's proposed removal upon "all those sharing family life with him".'[346] To do so in this case:

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[344] *MA (Turkey) v Secretary of State for the Home Department* [2009] EWCA Civ 1018, [8]

[345] *Card v Secretary of State for the Home Department* [2009] EWHC 2128 (Admin), [18]

[346] ibid [18]

> in considering Mr Card's Article 8 rights, inevitably a view would need to be formed about whether Ms Knighton and her daughter could go to Jamaica to join him. It would be difficult to see how that could not form part of the tribunal's general considerations in a case of this kind. That in my judgment is not the same as considering directly the impact on their Article 8 rights of the removal of Mr Card in the context of the overall proportionality balancing exercise. So I do not accept that a Beoku-Betts-compliant exercise was undertaken in the second tribunal decision.[347]

Beoku-Betts required the expansion of the enquiry from simply a question of whether the FNO's partner and daughter *could* go to Jamaica to carry on their family life with the FNO, and thereby render the FNO's Article 8 ECHR claim null for lack of interference. Instead, *Beoku-Betts* required that consideration be given to whether the partner's ties to the UK and the daughter's medical needs means that they *should be required* to leave the UK.[348] This would clearly ensure that there was recognised an Article 8 ECHR interference in the family and that this interference weighed more heavily in the balancing exercise, but the context is still explicitly of a single 'overall proportionality balancing exercise.'

In *AF (Jamaica)*, the language used is again that of the 'family unit as a whole'[349] and 'the overall balance of proportionality.'[350] The language of a 'whole family' is repeated in *SA*

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[347] ibid [32]

[348] ibid [35-36]

[349] *AF (Jamaica) v Secretary of State for the Home Department* [2009] EWCA Civ 240, [22]

See also the same phrase deployed at *Etti-Adegbola v Secretary of State for the Home Department* [2009] EWCA Civ 1319, [13]

[350] *AF (Jamaica)* (n349) [33]

(Somalia); 'the impact of a decision on the whole family has to be looked at rather than focussing on the impact indirectly on other members onto the particular applicant.'[351] In *DS (India),*[352] the description of what was required focussed on 'all members of the family unit' and the effect of the deportation on them contributing to the 'overall' issue of Article 8 ECHR proportionality.[353] A single balancing exercise reappears in *BM (India),* and in this judgment the idea of a commonly held Article 8 ECHR right is described as being whether their rights 'together' made the deportation order disproportionate:

> whether in the light of Article 8 he ought to be deported or whether this was a case where his Article 8 rights and those of his partner and his children, together with his Article 8 rights, should result in the deportation order not being confirmed. The Tribunal in terms reminded itself that the first instance determination was legally flawed because the interests of the children had not been properly weighed in the balance, and they sought then to balance these conflicting factors.[354]

Other judgments which grapple with *Beoku-Betts* seem to use both possible interpretations; that the Article 8 ECHR family life rights are both commonly- and individually-held. In *Sison,* the issue was whether *Beoku-Betts* could be 'read across'[355] onto a claim based on the private life element of Article 8 ECHR. The appellant's representative presented *Beoku-Betts* in terms of considering 'family as a unit':

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[351] *SA (Somalia) v Entry Clearance Officer* [2008] EWCA Civ 951, [8]

[352] *DS (India) v Secretary of State for the Home Department* [2009] EWCA Civ 544

[353] ibid [24]

[354] *BM (India) v Secretary of State for the Home Department* [2009] EWCA Civ 694, [4-5]

[355] *R (Sison) v Secretary of State for the Home Department (IJR)* [2016] UKUT 33 (IAC), [43]

> a Tribunal hearing an appeal by an individual who relies upon his or her Art 8 right to respect for their family life should consider the family as a unit and consider the impact upon the family life of the other members of that family unit.[356]

In deciding that there was a similarity between private and family life in this respect, UT Judge Grubb commented that 'I see no reason in principle why private life existing between two individuals cannot be seen in the same way as family life in an appropriate case.'[357] The similarity highlighted in this judgment seems to be that private life between individuals is relational and that it is the relationship between two individuals at stake, rather than the individual rights of either individual. However, in his conclusion, the judge talks in terms of a decision that was specifically about the rights of the third party and not the appellant Sison; the decision was taken about the 'interference with Mrs Jost's rights'.[358]

Similarly ambivalent between the two possible interpretations of *Beoku-Betts* is Mr Justice Coulson in *Tshiteya*. Here *Beoku-Betts* is described as requiring the Article 8 ECHR rights of an FNO's child to be considered 'separately'[359] and requiring a consideration of 'their individual Article 8 rights.'[360] However, his conclusion then talks in terms of the Tribunal (to whom the decision was remitted) having to consider whether proper consideration of the circumstances of the child would 'make a difference to the strength of the claimant's Article

[356] ibid [41]

[357] ibid [46]

[358] ibid [53]

[359] *R (Tshiteya) v Secretary of State for the Home Department* [2010] EWHC 238 (Admin), [29]

[360] ibid [43]

8.'[361] This reference to the child affecting the claimant FNO's rights, not the decision being taken on the basis of the child's independent Article 8 ECHR rights, rather undercuts the earlier reference to separate and individual rights held by the child.

Other decisions do not make it clear as to which possible interpretation of *Beoku-Betts* is preferred, such as in this paragraph from *R (Myckoo)*:

> It also seems to me that since *Beoku-Betts* there is a more explicit basis for submissions to be made than would have been possible in 2004, to the effect that Taliah's human rights must themselves be given consideration in addition to those of the claimant.[362]

In this paragraph, there is no indication as to how the FNO's daughter's human rights ought to be 'given consideration'. Nor is there clarity as to what it means to consider them 'in addition' to that of the claimant; a separate and independent human rights consideration that ought to be considered additionally to that of the FNO, or a human rights consideration which is additional to the FNO's claim within a single balancing exercise?

There is a lack of clarity to *Beoku-Betts*. It confirms that the human rights of other family members is integral to deportation appeals, and that the effect of deportation on family is to be directly considered. However, there is no direct instructions on *how* this ought to occur. Although the House of Lords could have intended that the rights of the FNO's family members ought to be considered separately and independently, it fails to make this clear. Instead the references to 'there only being one family life' and that family life is 'greater than the sum of its parts' have tended to trickle down to the decisions of the High Court and Court of Appeal,

[361] ibid [48]

[362] *R (Myckoo) v Secretary of State for the Home Department* [2008] EWHC 2778, [60]

particularly in the immediate period after the promulgation of the *Beoku-Betts* decision when many appeals and judicial reviews were being brought on the basis that *Beoku-Betts* represented a significant change in the law. The trend in these cases is to refer to a 'whole family' whose family life are relevant to the single Article 8 ECHR balancing exercise. The use of this language tends to support the idea of Article 8 ECHR family life as being commonly-held rather than individually. Indeed, when the argument was explicitly made that there should be separate sequential consideration of the human rights of family members, this was explicitly rejected by the Court of Appeal. This lack of clarity in the judgments of the UK's highest court is a phenomenon which is observable in chapter 6 with respect to the Supreme Court judgment in *ZH (Tanzania)*.

3(c) Polycentricity

To interpret Article 8 ECHR as a commonly-held right ensures that the balancing exercise conforms to, and works within, the confines and limitations of the metaphor of the two-sided balance; a "simple balance approach". Balancing scales are designed to compare the relative weights of two items and analysing family life as a commonly-held right simplifies the exercise into this familiar pattern. Unlike the analysis of family life as a series of individual rights, the balancing exercise required by a commonly-held right is one test which weighs two things; family life against the public interest. In order to be a *polycentric* decision-making process, the "simple balancing approach" must be able to ensure that all the relevant rights and interests of all the individuals affected by a deportation decision are considered. Under a commonly-held right, because there is only one family life, all the interests relevant to family life and the best interests of the child must be taken into account within the assessment of family life. However, by viewing family life as a commonly-held right, the "simple balancing approach" is unable to be truly *polycentric*.

To look at 'the family unit as a whole',[363] as required by *Beoku-Betts*, engages a specific version of a general critique of balancing as a decision-making tool in legal argument, namely that it cannot take into account all the relevant interests in the family life rights decision in deportation cases. Aleinikoff argues that balancing requires decision-makers to include consideration of a much wider range of relevant interests than the *Üner* criteria represent and that courts (including the ECtHR and UK courts) show willingness to engage with; 'Taking balancing seriously would seem to demand the kind of investigation of the world that courts are unable or unwilling to undertake.'[364]

Asking *which* holders of relevant interests should be counted within the family unit as a whole presents a significant question which a commonly-held right dynamic leave unanswered. First and foremost, when determining the value of family life, is the question considered through the perspective of the parent, the child, or a kind of amalgam of both? For example, in *Joseph Grant* the ECtHR felt unable to 'overlook the fact that the applicant has never co-habited with any of his children.'[365] In so finding, the ECtHR fails to consider the importance of a child's relationship with non-resident parents and instead views the value of relationship through an adult-centric lens which equates resident nuclear families with responsibility and commitment. The ECtHR's relies on an evidence-free assumption as to the value that the non-resident parent places on the relationship with the child and non-residence is cited as evidence of lack of value placed on the relationship by the adult foreign national offender.

However, even if the decision-maker were to assign the value of family life on the basis of an average achieved by combining the result of a child-centric lens and an adult-centric lens, then the decision-maker would fail to take into account the best interests of the child, as the

[363] *Beoku-Betts* (n223) [43]

[364] T Alexander Aleinikoff, 'Constitutional Law in the Age of Balancing' (1987) 96 Yale Law Journal 943, 978

[365] *Joseph Grant v The United Kingdom* App no 10606/07 (ECtHR, 9 January 2009), [40]

interests being taken into account fall short of what is *best* for the child. This is because the result of taking an average (either through a mean or a median) of two positions can never give a result equivalent to the highest value; the existence of a lower value will always result in the average being lower than the highest value in the range. Therefore, in the process of averaging out the value of family life in a commonly-held right between the adult-centric and child-centric perspectives the resulting value cannot be what is in the *best* interests of the child. Only by assessing the value of family life through a child-centric lens can the decision-maker take into account the *best* interests of the child because assigning lesser value is necessarily less than best. Therefore approaching Article 8 ECHR as a commonly-held right has the effect of undermining the child's best interests.

3(d) Plurality of Decision-Making Norms

The *plurality of decision-making norms* arise from the unique characteristics of Article 3 UNCRC described in chapter 3. The best interests of the child under Article 3 UNCRC ought to be a primary consideration; 'the child's best interests may not be considered on the same level as all other considerations.'[366] Secondly, only rights-based considerations ought to be balanced against the best interests of the child. The ECtHR itself is clearly not bound to the unique characteristics of Article 3 UNCRC; the Council of Europe is not (and may not be capable of being)[367] a signatory of to the UNCRC, nor is it clear that the ECtHR's introduction of the best interests of the child into the *Üner* criteria was intended by the Court to import a standard which it understood to be identical to the Article 3 UNCRC standard. However, this part argues that the "simple balancing approach" cannot address any of the issues thrown up

[366] General Comment No. 14 (2013) (n125) [37]

[367] The UNCRC being 'open for signature by all States' (Article 46 UNCRC) and the Council of Europe is not a State.

by the *plurality* of decision making norms and therefore the adoption of the "simple balancing approach" by UK courts would fail to give effect to the best interests of the child in deportation decisions.

The first unique characteristic of the best interests of the child under Article 3 UNCRC is that the best interests ought to be a primary consideration. However, because the "simple balancing approach" to family life treats the family life right as commonly-held means that the child's best interests are considered as part of an overall assessment of the family life right. To treat the best interests of the child as a primary consideration must require that they are considered as a distinct and separate concern. As the UN Committee on the Rights of the Child observe, 'If the interests of children are not highlighted, they tend to be overlooked.'[368] Instead of being treated separately, in the "simple balancing approach" the best interests of the child must be folded into the assessment of family life of the family unit as a whole, alongside and part of the assessment of the interests of the FNO, and their partners/spouses.

The second unique characteristic of Article 3 UNCRC is that non-rights based arguments, such as those relating to general migration control, cannot override the best interests of the child.[369] As argued in chapter 3, the public interest in crime and disorder are not, per se, rights based arguments because the public interest is not a right. However, the nature of the "simple balancing approach" clearly requires the balancing of the child's interests (aggregated as the commonly-held family life right) against the expansive public interest rather than only the rights of others.

Again, we can see deportation law pulling in two competing directions between the protection of the innocent, vulnerable child and the deportation of FNOs as a public policy good. Sociologically, Webber suggests that the necessity of the deportation of FNOs has

[368] General Comment No. 14 (2013) (n125) [37]

[369] General Comment No. 6 (2005) (n273) [86]

become 'axiomatic' in public and political discourse.[370] As de Noronha points out, foreign national criminals are the absolute opposites of the 'good citizen'; bad foreigners.[371] The FNO is therefore perceived as the architect of their own misfortune and Dembour argues that it is a pervasive feature of the ECtHR's migration case law that:

> …it is the migrants who have provoked the family separation of which they complain. *They* are responsible for the situation which has arisen from their own actions, decisions, and choices, adopted of their own free will. *They* are also the ones on which the onus falls for sorting it out. If family relationships are so important to them, *they* can return to their country of origin. Family dislocation has nothing to do with the government – nor, then, with human rights.[372]

This helps explain an emphasis in the case law (both at the ECtHR and in UK law) on deportation being a natural and automatic consequence of criminal offending by a foreign national. In UK law, there are 'three "parts" of the public interest – avoiding the risk of reoffending, deterrence and public revulsion.'[373] Although the ECtHR will engage in a forward

[370] Webber (n294) 169

[371] de Noronha (n12) 9

[372] Dembour (2015) (n164) 106 (emphasis original)

[373] Thomas Beaumont, 'The Public Interest in Deporting Criminals: A Triple Threat' (*Free Movement*, 3 May 2018) <www.freemovement.org.uk/public-interest-deporting-criminals-three-parts/> accessed 14 May 2018. Analysing *DW (Jamaica)* (n211). Authority for each of the "three parts" of the public interest (joint and severally) can be found at, *inter alia*: *OH (Serbia) v SSHD* [2008] EWCA Civ 694, [2009] INLR 109; *AM v Secretary of State for the Home Department* [2012] EWCA Civ 1634; *SS (Nigeria) v Secretary of State for the Home Department* [2013] EWCA Civ 550, [2014] WLR 998; *Hesham Ali v Secretary of State for the Home Department* [2016] UKSC, [2016] 1 WLR 4799

looking assessment of risk of reoffending,[374] it is not consistent in doing so.[375] Backward looking assessments based on such as the type of offence committed or the length of sentence imposed are as important to the ECtHR's assessment of the weight of public interest in deportation. Therefore, at the ECtHR 'The defendant state does not have to explain in detail how it understands its duty to act in its country's best interests as regard its policy and practice on the admission/rejection of aliens.'[376]

As a commonly-held right the emphasis for the court's assessment is on the family unit and their relationships. This results in the child, as part of the family unit and the relationship with the foreign national offender, being identified with their parent's offending. The focus becomes an adult one; is the offender's family relationship worth preserving? This permits the family life as a whole, including the best interests of the child, to be balanced against the offending of the foreign national offender parent.

The "simple balancing approach" therefore offends Article 3 UNCRC by balancing non-rights-based considerations against the best interests of the child. This is predominantly a problem of content rather than structure; it is a decision of the ECtHR and UK courts to include non-rights-based considerations such as public revulsion at offending in its assessment of the public interest. The structural problem that is revealed is the apparent inability to reconcile the decision-making norms of Article 8 ECHR and Article 3 UNCRC. To exclude non-rights-based considerations from the public interest would satisfy Article 3 UNCRC but would mean that some of the public interest considerations which Article 8 ECHR considers to be relevant to

[374] *Mbengeh v Finland* (Admissibility Decision) App no 43761/06 (ECtHR, 25 October 2006), (5); *Joseph Grant v The United Kingdom* (n365) [39]; *Onur v The United Kingdom* App no 27319/07 (ECtHR, 17 February 2009), [56]; *El-Habach v Germany* (Admissibility) App no 66837/11 (ECtHR, 26 October 2011), [32-33]; *Aponte v The Netherlands* (n244) [57]; *AH Khan v The United Kingdom* App no 622/10 (ECtHR, 20 December 2011), [36]; *Udeh v Switzerland* App no 12020/09 (ECtHR, 16 April 2013), [49]; *Sarközi and Mahran v Austria* App no 27945/10 (ECtHR, 2 April 2015), [68]

[375] *Antwi and Others v Norway* (n326); *Paposhvili v Belgium* App no 41738/10 (ECtHR, 17 April 2014)

[376] Dembour (2015) (n164) 106

deportation decisions would be ignored. This would offend the *polycentricity* of deportation decisions by excluding relevant interests from consideration in the decision. This structural problem in the "simple balancing approach" presents an impenetrable impasse. Because the "simple balancing approach" folds the best interests of the child assessment into the Article 8 ECHR balancing exercise, it appears unable to give effect to the specific decision-making norms of both sets of human rights in deportation decisions.

4. The Weight of Family Life: The *Value* of Family Life and the *Gravity* of Interference

The second argument pursued in this chapter is that the ECtHR determines the overall weight of the family life side of the simple balance by reference to a relationship between the *value* of family life and the *gravity* of the interference with family life. Whereas the previous part of this chapter explored the nature of family life under Article 8 ECHR as being *commonly-held* addressed the framework for the balancing exercise, this part drills down to explore how the weight to family life is said by the ECtHR to be determined in practice. This is important because the process for assigning weight to family life within the balancing assessment engages both the *polycentricity* of deportation decisions and the *plurality* of decision-making norms.

I argue that consideration of the *value* of family life and the *gravity* of the interference with family life derives from the ECtHR's attempt to make rational use of the *Üner* criteria which it set out for itself. The adoption of the *Üner* criteria was in part driven by the charge of arbitrariness, and indeed one of the ECtHR's own judges described its deportation case law as being 'tainted with arbitrariness.'[377] Academic analysis has generally agreed with this assessment. Dembour's review of the deportation case law caused her to conclude that an analysis of the factual matrixes of the cases provided 'little help in explaining the variation' in

[377] *Boughanemi v France* App no 16/1995/522/608 (ECtHR, 27 March 1996), Dissenting Opinion of Judge Martens

decision-making outcome.[378] Warbrick likewise concluded that it was 'undeniable' that 'there is a degree of unpredictability about the outcome of cases under Article 8'[379] and Spijkerboer argued that the ECtHR's case law is 'inconsistent'.[380]

Others have sought an empirically sound, definitive doctrinal statement as to the content of Article 8 ECHR, such as that deportation will be disproportionate when the foreign national offender is a second-generation migrant[381] or where the child is not 'adaptable'.[382] However each have been faced with decisions which appear to contradict such definitive statements. Summarising the case law, Janis *et al* conclude that:

> Close individualized examination of the applicant's family life in the deporting and destination countries, and of the applicant's record of criminal behaviour, has resulted in a jurisprudence about which few generalizations are possible.[383]

The *Üner* criteria might be seen as an appropriate response to the absence of generalisable principles. The *Üner* criteria seek to impose a checklist of relevant factors to guide decision-makers as to the content of Article 8 ECHR family life. However, the articulation of the *Üner* criteria as a linear checklist is problematic. As the dissent to the *Üner* judgment observed:

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[378] Dembour (2003) (n327) 82

[379] Colin Warbrick, 'The Structure of Article 8' (1998) 1 European Human Rights Law Review 32, 33

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

[381] Ryszard Cholewinski, 'Strasbourg's "Hidden Agenda"?: The Protection of Second-Generation Migrants from Expulsion under Article 8 of the European Convention on Human Rights' (1994) 12 Netherlands Quarterly of Human Rights 287

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

[383] Mark W Janis, Richard S Kay & Anthony W Bradley, *European Human Rights Law: Text and Materials* (3rd edition, OUP 2010), 410

> …apart from the seriousness of the offence, all the "[*Üner*] criteria" seem to us to point to a violation of Article 8. […] Hence, the only way in which the finding of a non-violation can possibly be justified, when the "[*Üner*] criteria" […] are applied, is by lending added weight to the nature and seriousness of the crime.[384]

The multitude of criteria therefore causes problems of weight and priority which the ECtHR does not address directly in the *Üner* judgment or its subsequent case law. The joint dissent in *Üner* asks rhetorically:

> …how do we assign relative weight to the various factors on the basis of some ten guiding principles – are we not seeing here the implicit emergence of a method which gives priority to one criterion, relating to the offence, and treats the others as secondary or marginal?[385]

The challenge is laid down for the ECtHR to explain whether the *Üner* criteria do indeed require that the factors which make up the family life are secondary or marginal to the offence committed. The Spartan use of language in ECtHR judgments can make it difficult to assess, as an external observer, how the ECtHR has weighed individual factors in specific cases. As Dembour observes in this context, 'Facts are vulnerable to contrasting interpretations and different people, including judges, dress them differently'.[386] What follows is a post-facto analysis of the ECtHR's case law, the aim of which is to determine some pattern in the ECtHR's

[384] *Üner v Netherlands* (n20), Joint Dissenting Opinion of Judges Costa, Zupančič, and Türmen, [81]

[385] *Üner v Netherlands* (n20), Joint Dissenting Opinion of Judges Costa, Zupančič, and Türmen, [82]

[386] Dembour (2003) (n327) 82

case law as to the balancing exercise in deportation cases. I do not suggest that any one judge, or the court collectively, consciously engages with Article 8 ECHR cases in the way outlined by this analysis. However, I do argue that it reflects the pattern of decision-making which emerges from the body of the ECtHR's jurisprudence in deportation cases.

Instead of a list of ten guiding principles addressed in a linear checklist, I argue that the ECtHR determines the weight of family life by reference to a relationship between the *value* of the family life and the *gravity* of the interference. However, despite the *Üner* criteria's explicit reference to the best interests of the child, the reduction of family life to the *value* of the family life and the *gravity* of the interference means that much of what is otherwise considered to be part of the best interests of the child is excluded from consideration; for example, considerations of the health and physical wellbeing of the child, the safety of their physical environment, or aspects of the child's emotional welfare, including the continuity and stability of their life circumstances. Instead, the *value* of family life and *gravity* of interference are reduced to simple markers of cohabitation, and of belonging or integration in the deporting state. By eschewing a rich understanding of the best interests of the child, the ECtHR case law fails the test of *polycentricity*. Furthermore, by considering the child's best interests across two different metrics rather than as a single, separate factor in its own right, the ECtHR is unable to give effect to the requirement under Article 3 UNCRC that the best interests of the child be a primary consideration. Each of these critiques is addressed in depth in parts 3(b) and 3(c). Part 3(a) begins by analysing the ECtHR Article 8 ECHR case law and its reduction of the *Üner* criteria into a pattern of *value* of the family life and the *gravity* of the interference.

4(a) The Value of Family Life and Gravity of the Interference with Family Life

Instead of using the *Üner* criteria as a linear checklist, I argue that the ECtHR determines the weight of family life as a relationship between the *value* of the family life and the *gravity* of

the interference. It is important to note here the definitional distinction between *value* and *weight*. The metaphor of a balance, as in the "simple balancing approach" to Article 8 ECHR, suggests that what is placed on either side of the balance has *weight* and that the relative weight of one side over the other determines the outcome of the balancing exercise. I argue that the *value* of family life and the *gravity* of interference are the two ultimate factors relevant to determining the overall *weight* assigned to the applicant's side of the balance. *Value* and *gravity* are two organising principles under which the ECtHR corrals the multiple *Üner* criteria relevant to the weight of family life. By organising the *Üner* criteria into two simpler concerns the ECtHR is able to rationally assign relative weight to the multiple factors which would otherwise overwhelmingly point towards a violation of Article 8 ECHR in all cases (as identified by the dissenting judges in *Üner*).

The assessment of the relative *value* of family life is only one aspect of the overall *weight* of the family life, and as such the *value* of family life is not singularly determinative of its *weight* in the balancing exercise. I argue that this relationship between the *value* of family life and the *gravity* of interference thereby comprises the way in which the overall weight of family life is measured in order to place it in the balancing exercise against the public interest in deportation. The interests which are taken into account in an assessment of the *value* of family life are magnified by those interests expressing the *gravity* of interference.

There is also a difference in the ECtHR's enquiry as to the *existence* of family life and its *value*. This part delineates the difference between these enquiries (part 3(a)(i)) before examining the way in which the ECtHR determines the *value* of family life (part 3(a)(ii)) and the *gravity* of the interference (part 3(a)(iii)). The relationship between the two concerns is described in part 3(a)(iv).

4(a)(i) The Difference Between the Existence *of Family Life and its* Value

The *value* of family life is a different enquiry from whether there is family life that engages Article 8 ECHR in the first place; a logically prior enquiry because if there is no family life which exists to engage the substantive Convention right, then there is no right to protect. Indeed, the first two questions of the *Razgar* enquiry in UK law are concerned precisely with this issue; is there an interference which engages with a right?[387] Therefore the ECtHR's first enquiry is as to the *existence* of family life, which it determines on the basis of *de jure* and *de facto* family life. The Court will presume that family life exists on the basis of blood or marriage and conducts a short enquiry as to whether there are sufficient *de facto* ties to amount to family life in other relationships.[388]

However, whilst the ECtHR will readily find family life to exist, this does not mean that it considers all family lives to have equal claims to protection. The ECtHR finds that some family relationships are closer, more committed – of more *value* – than others. This distinction between the existence of family life and its value is illustrated in *Joseph Grant*. In this case, the ECtHR found that there existed a family life that engaged Article 8 ECHR between Grant and his daughter because children born to a married couple are 'ipso jure part of that family from the moment of birth'.[389] However, the family life established by Grant and his daughter was found to have a low relative *value* because the ECtHR 'cannot overlook the fact that the applicant has never co-habited with any of his children.'[390] Lack of cohabitation between Grant and his daughter did not invalidate the existence of family life between them so as to engage

[387] *R (Razgar)* (n301) [17]

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

[389] *Joseph Grant v The United Kingdom* (n365) [30]

[390] ibid [40]

Article 8 ECHR – after all, 'cohabitation is not a sine qua non of "family life" for the purposes of Article 8'[391] – but cohabitation was clearly relevant to the Court's assessment as to some other metric in the balancing exercise. This other metric is what I describe as being the *value* that the family life held.

4(a)(ii) Defining the Value *of Family Life*

Van Walsum argues that 'Decisions concerning the admission of family members inevitably touch on fundamental questions regarding the definition and value of family bonds.'[392] In the balancing exercise, the ECtHR concerns itself with the *value* of the family life of the applicant. The *value* of family life is therefore the ECtHR's assessment of the relative quality of family life and thus how much protection from interference it might deserve.

The value of the family life is an obvious place to look for evidence of the ECtHR's consideration of the 'the best interests and well-being of the children', as per its commitment in the *Üner* criteria. However, the lapse of time involved in the development of legal obligations to the best interests of the child means that it is difficult to disentangle precisely when the ECtHR considered the best interests of the child to be an essential component of the Article 8 ECHR right to family life. The addition of the best interests of the child into the list of criteria was described by the ECtHR in the 2006 Grand Chamber decision in *Üner* as a 'wish to make explicit two criteria which may already be implicit[393] As authority the Court cited two of its earlier decisions; *Tuquabo-Tekle*[394] and *Şen*.[395] Both these earlier cases were related to

[391] *Berrehab* (n215) [16]

[392] van Walsum (n388) 511

[393] *Üner v Netherlands* (n20) [58]

[394] *Tuquabo-Tekle and others v Netherlands* App no 60666/00 (ECtHR, 1 March 2006)

[395] *Şen v Netherlands* App no 31465/96 (ECtHR, 21 December 2001)

challenges against the state refusal to allow the entry of a foreign national child into its territory for the purpose of family reunion. The factual background of these cases was therefore substantially different from cases involving the deportation of a FNO, and the ECtHR found in both *Tuquabo-Tekle* and *Şen* that the positive obligations of the state were engaged[396] (in contrast to deportation cases where the ECtHR collapses the distinction).[397] Neither *Tuquabo-Tekle* nor *Şen* use the language of the best interests of the child. Instead, the ECtHR states it 'will have regard to the age of the children concerned, their situation in their country of origin and the extent to which they are dependent on their parents.'[398]

Moreover, it is not clear whether in *Üner* the ECtHR had in mind a definition of the best interests of the child which was commensurate with Article 3 UNCRC as only much later is the ECtHR's explicitly finds that the principles of Article 3 UNCRC are relevant for the proper interpretation of Article 8 ECHR. In the 2010 Grand Chamber case of *Neulinger and Shuruk*, the ECtHR found 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'.[399] In 2011, the ECtHR further developed its jurisprudence and placed reliance on both Article 3 UNCRC and its own judgment in *Neulinger and Shuruk* to ground its finding of a violation of Article 8 ECHR in a removal case, *Nunez.*[400] It is not then obvious at what

[396] *Tuquabo-Tekle and others v Netherlands* (n394) [42]; *Şen v Netherlands* (n395) [31]

[397] For example, *Aponte v The Netherlands* (n374) [53]:

> '…the boundaries between the State's positive and negative obligations under this provision do not lend themselves to precise definition. The applicable principles are, nonetheless, similar. In the context of both positive and negative obligations the State must strike a fair balance between the competing interests of the individual and of the community as a whole.'

[398] *Tuquabo-Tekle and others v Netherlands* (n394) [44]; *Şen v Netherlands* (n395) [37]

[399] *Neulinger and Shuruk v Switzerland* (n251) [135]

[400] *Nunez v Norway* (n255) [84]

stage the ECtHR sought to set out a principle of the child's best interests of equal content or status as to that in the UNCRC.

I argue that consequently the ECtHR's case law on deportation has adopted a very narrow view of what considerations are relevant to the best interests of the child and this narrow understanding has made it difficult for UK courts, following the ECtHR's jurisprudence, to give effect to the best interests of the child to its fullest extent. In chapter 2, although it was clear that there was some disagreement as to the precise content of the best interests of the child, there was general agreement that it encompassed the child's emotional and physical welfare and development. This includes considerations of the child's education, health and social networks beyond the nuclear family. However, when it comes to assessing the *value* of family life between foreign national offender applicant and their child, the ECtHR appears to use cohabitation with the foreign national offender parent as the only relevant consideration. For example, in *Üner* itself, the Court found that:

> …it cannot overlook the fact that the applicant lived with his partner and first-born son for a relatively short period only, that he saw fit to put an end to the cohabitation, and that he never lived together with his second son.[401]

The Court engages in an evidence-free judgment of the value of family life based on parent-child cohabitation in other cases such as *Onur*, where again, the ECtHR finds without reference to any evidence in support of its assertion that deportation 'is unlikely to have had the same impact as it would if the applicant and his daughter had been living together'.[402] The ECtHR takes no account of the benefit to children with non-resident parents. Such benefits may

[401] *Üner v Netherlands* (n20) [62]

[402] *Onur v The United Kingdom* (n374) [58]

include intangible emotional support, as well as practical assistance with homework, extra-curricular activities, etc. These were precisely the aspects of parent-child relationships which the ECtHR cited in *Antwi*[403] when finding a high value of family life between cohabiting parent and child, and yet the ECtHR ignores it where the parent and child do not live together.

However, the ECtHR's assessment of the value of family life between applicant and their children cannot by itself account for its decision making. Even in cases where the Court assesses the value of family life to be similar, the outcome is not always the same. In *Udeh*, the applicant did not live with his children and custody was 'awarded to the mother but the first applicant was granted access right'[404] but ultimately the ECtHR found that Article 8 ECHR was violated. In *Onur*, the applicant also did not live with his child but had a contact arrangement, 'spending on average two to three days a week with him.'[405] Notwithstanding the similar nature of the family life to that in *Udeh*, no violation of Article 8 ECHR was found in *Onur*. On the other hand, cases with evidence of different value to family life will not necessarily result in correspondingly different outcomes; although Joseph Grant did not cohabit with his daughter and no violation of Article 8 ECHR was found by the ECtHR, there was also no violation found in *El-Habach* where 'the applicant lived together with his younger daughter N. from her birth'.[406]

To account for the different outcomes of these cases I argue that the *value* of family life cannot be the only consideration relevant to the overall weight to given to the ECtHR to the family life. I argue that the ECtHR engages in a more complex analysis of the weight of family life by placing the *value* of family life in relationship with factors which express the *gravity* of

[403] *Antwi and others v Norway* (n336)

[404] *Udeh v Switzerland* (n374) [50]

[405] *Onur v The United Kingdom* (n374) [58]

[406] *El-Habach v Germany* (Admissibility) (n374) [35]

the interference. Therefore where two family lives share the same *value*, greater *weight* in the balancing exercise will be given where the *gravity* of interfering with that family life is greater.

4(a)(iii) The Gravity *of the Interference with Family Life*

If family life can be of variable *value* then the interference with family life can also be experienced with greater or lesser intensity. The value of family life is not determinative of how interference with it is felt. Even if a family life is of great value, interference may be felt less keenly than in situations where family life is of low value. Where the interference is felt with more intensity the *gravity* of the interference is greater. The overall *weight* given to family life in the balancing exercise is therefore a combination of both the factors expressing the *value* of family life and *gravity* of the interference. The *gravity* of interference can be expressed with reference to the *Üner* criteria:

- the length of the applicant's stay in the country from which he or she is to be expelled;
- the nationalities of the various persons concerned;
- whether there are children of the marriage, and if so, their age;
- the seriousness of the difficulties which the spouse is likely to encounter in the country to which the applicant is to be expelled
- …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.[407]

[407] *Üner v The Netherlands* (n20) [57-58]

Each of these reflects aspects of the family members' membership, belonging, or integration in the receiving and deporting country. The overriding concern is whether the circumstance of the family's integration in the deporting state and continuing relationship, if any, with the receiving state means that the interference is believed by the ECtHR to be felt more or less keenly. These factors are, I argue, used by the ECtHR to determine whether the interference with family life is of more or less *gravity* in the case before it.

Two of the *Üner* criteria are concerned with whether the family can follow the foreign national offender to the receiving state. The only reasonable underlying rationale, albeit one that is absent from explicit exposition in the ECtHR's case law, is that where family unity can be maintained in the receiving state (normally the state of nationality of the foreign national offender) the primary objection to deportation – family separation – is overcome. The primary interference in such circumstances is with other interests which make up the family life right; what the ECtHR calls 'social and family ties', but which I argue are also interpreted by the Court as being markers of integration or belonging.

These other interests also reintroduce previously typical aspects of private life as relevant **interests** in the assessment of the family life **right**. Although Article 8 ECHR protects both private *and* family life, the ECtHR treats the private life or family life of an applicant as being two separate area of protection and will choose to focus its rights analysis to exclusively one or the other.[408] After *Slivenko*[409] the ECtHR restricted:

[408] Steinorth (n222) 191

[409] *Slivenko v Latvia* App no 48321/99 (Grand Chamber, 9 October 2003)

> …its formerly wide understanding [of family life] with a new focus on the 'nuclear family' of spouses and minor children, while at the same time broadening the protective reach of Article 8 ECHR to the network of personal, social and economic relations that make up the private life of every human being[410]

Thus in *Sarközi and Mahran*[411], the applicants had family life with each other (as mother and son) and this family life would be interfered with by Sarközi's deportation to Hungary because Mahran was an Austrian national who would be able to remain there with his Austrian father, thereby splitting up mother and son.[412] In addition, Sarközi had relationships with 'her [adult] daughter from a first marriage, her daughter's husband and child, her brother and her parents.'[413] However, the human right to family life under Article 8 ECHR was restricted by the ECtHR to consideration of the nuclear family relationship between Sarközi and Mahran as mother and son. Only this parent-child relationship was protected by the presumption of priority afforded to Article 8 ECHR as a human right, and not the family relationship between Sarközi and her extended family. Because the ECtHR will focus on either family or private life, the ECtHR examined the case as one of family life between Sarközi and Mahran only.[414] Despite this focus on family life as the sole **right** engaged, the ECtHR considered Sarközi's 'close family and social ties in Austria'[415] with her extended family as a relevant **interest** to be

[410] Thym (n388) 88

[411] *Sarközi and Mahran v Austria* (n374)

[412] ibid [6-9]

[413] ibid [8]

[414] ibid [61]

[415] ibid [71]

considered in determining the proportionality of the interference with her right to family life under Article 8 ECHR. These private life considerations were clearly relevant as an interest protected by family life equal in status to other interests such as the severity of offending, the length of exclusion from Austria, and the length of Sarközi's residence in Austria.[416]

Similarly in *Paposhvili* the ECtHR took into account 'the fact that the applicant's wife and children […] have developed social ties there [Belgium]'.[417] Again, rather than protect these as a *right* to private life, the social ties of the Paposhvili family were taken into account as *interests* relevant to their family life. Where an interference with Article 8 ECHR is found to be disproportionate because of the interference with the family's social ties with the deporting state,[418] the violation is of the right to family life, not with the individual right to private life of the foreign national's wife and children. This is also further evidence that Article 8 ECHR is considered to be commonly-held.

Although whether the nuclear family can follow the foreign national offender to the receiving state is a relevant factor in the ECtHR's decision making[419] that the family cannot go does not guarantee that a violation of Article 8 ECHR will be found. In *Mbengeh* the ECtHR found that because the foreign national offender's wife and son were Finnish nationals who had never lived in Gambia, did not speak the language and had no other ties there, they could not 'be expected to follow the applicant'.[420] Nevertheless, not only was this not a barrier to the deportation of the applicant, the whole case was found to be manifestly ill-founded.[421]

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[416] ibid [68-70]

[417] *Paposhvili v Belgium* (n375) [152]

[418] Two cases that can be characterised in this way are: *Omojudi v The United Kingdom* App no 1820/08 (ECtHR, 24 November 2009), and; *Keles v Germany* (n10)

[419] Buquicchio-De Boer (n382) 81

[420] *Mbengeh v Finland* (n374) 5

[421] ibid 6

Whether the child can be expected to go to the receiving state with the deported foreign national offender is a question which the ECtHR uses to conflate three of the *Üner* criteria; age, nationality, and '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'. The ECtHR reduces these to a question of the 'adaptability' of the child to a change of environment.[422] Where the children 'are young and able to adapt to a new environment' no infringement of Article 8 ECHR will be generally be found.[423] This operates on the level of presumption, with little consideration made of the other subjective factors which may make it more or less likely that an individual child would actually be able to adapt.[424] The ECtHR also presupposes that young children are adaptable, yet it does not also maintain a presumption that older children are not adaptable.[425] But more fundamentally, the focus on the child's adaptability is clearly problematic because of the fact that the best interests of the child is concerned above all with what is in the *best* interests of the child. A child may adapt to conditions which are sub-optimal, but the capacity of the child to adapt does not transform a condition from being sub-optimal to being in the child's best interests.

The nationality of the child is used by the ECtHR as a criterion but on its face, its use is inconsistent in the extreme. In *Udeh*, the applicant's daughter's Swiss nationality seemed influential in the ECtHR's finding that they 'could hardly be obliged to follow the first

Although struck out for being 'manifestly ill-founded', one would be hard pressed to distinguish the form of written decision taken in *Mbengeh* from decisions taken in 'well-founded' cases by a full Chamber. In *Mbengeh* the Court recited and applied the *Üner* criteria and the case essentially failed on the basis that the Finnish domestic decision was a proportionate one.

[422] Ciara Smyth, 'The Best Interests of the Child in the Expulsion and First-Entry Jurisprudence of the European Court of Human Rights: How Principled Is the Court's Use of the Principle' (2015) 17 European Journal of Migration and Law 70, 75; Kilkelly (n214) 47

[423] Buquicchio-De Boer (n382) 81

[424] Kilkelly (n214) 110

[425] Smyth (n422) 76-77

applicant to Nigeria.'[426] In *Shala*, although the children were Kosovar nationals, they had been born and brought up in Germany and 'could not be expected to move to Kosovo'.[427] But the ECtHR does not apply a general principle that the constructive deportation of national or 'quasi-national'[428] children should be avoided. Indeed, being nationals of the deporting state was actively disadvantageous in the cases of *Üner* and *Onur* as in both cases the ECtHR found that the child's citizenship of the deporting state meant that the gravity of the interference with the child's family life was lessened because they could regularly visit other family members being left behind.[429] The only sensible way of distinguishing the way in which the ECtHR treated the issue of nationality in these cases is to point to the ages of the children involved. In *Shala* the children were (at the time of decision) aged between 11 to 21 years old[430] and in *Udeh* they were ten years old.[431] In contrast, the children were much younger in *Onur* (just under two years old)[432] and *Üner* (six years old).[433] The *Üner* criteria of nationality appears thus to be entirely redundant in the ECtHR's analysis as no greater protection is given to national children from constructive deportation. The ECtHR therefore appears to assess the belonging of the family not on the basis of *de jure* ties of nationality, but on *de facto* connections. This has the unfortunate side-effect of the ECtHR making a decision that although a child may be a national of the state, they do not truly belong. Assessment of the gravity of

[426] *Udeh v Switzerland* (n374) [52]

[427] *Shala v Germany* (Admissibility Decision) App no 15620/09 (ECtHR, 22 January 2013), [26]

[428] Extending a prohibition on the constructive deportation to quasi-national children would be analogous to what Cholewinski argued was 'the premise that second-generation migrants who have been resident in the territories of states parties for a considerable period of time should effectively be treated as *de facto* citizens, with the result that expulsion from their country of residence can hardly ever be justified.' (Cholewinski (n381) 298)

[429] *Üner v Netherlands* (n20) [64]; *Onur v The United Kingdom* (n374) [60]

[430] *Shala v Germany* (Admissibility Decision) (n427) [4]

[431] *Udeh v Switzerland* (n374) [8]

[432] *Onur v The United Kingdom* (n374) [60]

[433] *Üner v Netherlands* (n20) [64]

interference on the basis of their *de jure* nationality ties to the state would have demanded equal outcomes in all four cases. The differences in treatment of the deporting state's nationals can therefore only be accounted for by reference to the *de facto* connections that the children were able to show to the state; connections that older children (as in *Shala* and *Udeh*) are more likely to have established.

If nationality is not a marker of belonging in the ECtHR, then what factors are considered as marking a foreign national offender and their family as belonging to the deporting state? That belonging or integration is an increasingly important dimension of the Article 8 ECHR jurisprudence, particularly in relation to the *Üner* criteria has been recognised by scholars.[434] The factual circumstances found to be relevant to the Court's decision about the belonging related criteria are those things which touch on, 'the acquisition of nationality; links to the country of nationality; language; and labour market integration'.[435] Other scholars have attempted to decode a 'hidden agenda' behind the introduction of a standard of belonging or integration. Cholewinski argued that this agenda was designed to uphold the right of residence of second-generation migrants by strengthening their hand in the balancing exercise.[436] Such a development would be consistent with wishes of the Parliamentary Assembly who have declared that second-generation migrants should be afforded the same protection against deportation as citizens.[437] On the other hand, others have identified the integration standard as

[434] Clíodhna Murphy, 'The Concept of Integration in the Jurisprudence of the European Court of Human Rights' (2010) 12 European Journal of Migration and Law 23, 27

[435] ibid 30. A similar list can be found at Thym (n388) 93

[436] Cholewinski (n381) 298. The claim that 'quasi-nationals' receive any form of enhanced protection is rejected by Dembour on the basis that the vast majority of claims by foreign nationals are rejected at the admissibility stage, and because the balancing exercise is rigged in favour of the right of states to deport (Dembour (2003) (n327))

[437] Parliamentary Assembly of the Council of Europe, 'Recommendation 1504 (2001): Non-Expulsion of Long-Term Immigrants' <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=16881&lang=en> accessed 26 May 2016

a malleable device which is used to reject claims for protection; 'that relatively tenuous links have been seen to establish significant ties to the country of origin'.[438] Whether a person can be assumed to be able to integrate into the receiving state has also been recently explored in UK law. In *Kamara*, the Court of Appeal found that:

> The idea of "integration" calls for a broad evaluative judgment to be made as to whether the individual will be enough of an insider in terms of understanding how life in the society of that other country is carried on and a capacity to participate in it, so that as to have a reasonable opportunity to be accepted there, to be able to operate on a day-to-day basis in that society and to build up within a reasonable time a variety of human relationships to give substance to the individual's private or family life.[439]

The tensions created by the adoption of an integration standard are vividly described by de Hart in her description of the *Omeregie*[440] case. Whereas the applicants sought to portray Nigeria as a dangerous 'other',[441] the ECtHR described Nigeria as being similar to the deporting state; a commonly spoken language in both countries was English and the applicant's Norwegian wife had previously lived in South Africa ('as if Africa was one country, and everything was the same.')[442]

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[438] Murphy (n434) 31

[439] *Secretary of State for the Home Department v Kamara* [2016] EWCA Civ 813, [14]

[440] *Darren Omoregie and Others v Norway* App no 265/07 (ECtHR, 31 October 2008)

[441] In her article, de Hart describes the applicant's legal tactic as '"orientalising" Nigeria as a culturally strange and dangerous foreign country, where a western/white woman could not live and western children were kidnapped.' (Betty de Hart, 'Love Thy Neighbour: Family Reunification and the Rights of Insiders' (2009) 11 European Journal of Migration and law 235, 241)

[442] ibid 241

It is not however only the applicant FNO's belonging and integration which are assessed as part of the *gravity* of the interference with their family life, but also the presumed belonging and integration of their family. In particular, the ECtHR will consider the possibility of the family of the FNO relocating elsewhere.[443] This is a common thread in the ECtHR case law comprising two strands; how well they are integrated into the deporting state and what links they have with the receiving state. For example, in *Omojudi* the ECtHR examined on the one hand the fact that the FNOs wife had lived in the UK for 26 years and had 'strong' ties to the UK, and the children were born in the UK and had spent their whole lives there. On the other hand, the wife had left Nigeria as an adult and so it was determined to be 'likely that she would be able to re-adjust to life there', although the children would 'likely encounter significant difficulties' in relocating.[444] In *Antwi*, a similar direct comparison of the child's belonging between the deporting and receiving state was conducted. On the one hand, the child was a Norwegian national who had spent her whole life there, 'is fully integrated into Norwegian society' and spoke Norwegian. In comparison, her links to Ghana were 'very limited' as she had only visited three times and had 'little knowledge' of the local language.[445]

The dual concern with whether the applicant's family can be said to belong in either the deporting or receiving state places trans-national and diaspora families at a considerable disadvantage in having their situation recognised as a violation of human rights. If indicators

[443] Emmet Whelan, 'The Right to Family Life v Immigration Control: The Application of Article 8 of the European Convention on Human Rights in Ireland' (2006) 6 Hibernian Law Journal 93, 110

Villiger observed the same in the Commission's case law, but Villiger suggested that it played the role of a determinative factor, as the Commission would not find an interference with family life where the family members could be expected to follow the person being deported. The expectation that family members would follow the foreign national offender was established is 'they are nationals of, or have established ties with, the *country of destination,* even if salary or educational prospects are worse.' (emphasis original) (Mark E Villiger, 'Expulsion and the Right to Respect for Private and Family Life (Article 8 of the Convention) – An Introduction to the Commission's Case-Law' in Franz Matscher and Herbert Petzold (eds), *Protecting Human Rights: The European Dimension* (2nd edn, Carl Helmanns Verlag JG 1990), 659)

[444] *Omojudi v The United Kingdom* (n418) [46]

[445] *Antwi and Others v Norway* (n326) [94]

of belonging to the receiving state cancel out those indicators which indicate belonging to the deporting state then, as Murphy observes, 'This approach would seem to require migrants to relinquish the identity of their country of origin in order to secure their place in the deporting society.'[446] Article 3 UNCRC includes considerations of the child's identity explicitly according to the UN Committee on the Rights of the Child,[447] and implicitly under the welfare checklist in s1(3) Children Act 1989.[448] Moreover, Article 8 UNCRC grants children a right to identity; a right with potential application to issues of cultural identity.[449] The right to private life aspect of Article 8 ECHR also includes protection for one's identity.[450] This means that the ECtHR overlooks this important identity aspect of the child's rights under the European Convention as well as an essential aspect of their best interests under Article 3 UNCRC.

The *gravity* of interference is therefore an assessment by the ECtHR as to how intensively the FNO and their family are assumed to feel any interference with their family life. The ECtHR assumes that any interference with family life will be of less gravity where the foreign national offender and their family cannot be said to properly "belong" to the deporting state. Likewise, the ECtHR assumes that interference with family life will be of lesser gravity if the family "belong" in the eyes of the ECtHR in the receiving state.

4(a)(iv) The Relationship Between Value of Family Life and the Gravity of Interference

I have argued in this chapter that both the *value* of family life and the *gravity* of interference with the family life right are important independent factors in the ECtHR's Article 8 ECHR

[446] Murphy (n434) 34

[447] General Comment No. 14 (2013) (n125) 7

[448] See part 3(c) of chapter 2

[449] Stewart GA, 'Interpreting the Child's Right to Identity in the UN Convention on the Rights of the Child' (1992) 26 Family Law Quarterly 221

[450] *Goodwin v The United Kingdom* (2002) 35 EHRR 18

balancing exercise, but that individually they do not account for the outcome of decisions. That *value* and *gravity* are independent concerns is evident; the factors of belonging cannot be said to go to the *value* of the family life of the applicant because a foreign national offender's relationship with their children or partner may be strong, close and dedicated, even if they lack any of the significant markers of integration with the deporting state. Visa versa, the foreign national offender may have a relatively weak relationship with their family, but have no connection with the receiving state other than *de jure* nationality. The overall weight given to the family life in the ECtHR's balancing exercise is, I argue, therefore determined by a relationship between the *value* of family life and the *gravity* of interference with that family life.

This relationship between two factors better accounts for the ECtHR's decisions than scholarly accounts to date which have focused on one factor alone to explain the ECtHR's case law. For example, Spijkerboer observes that:

> …the Court both interprets the (in)voluntary nature of the separation between parents and children, *and* considers it not to be decisive. […] The Court addresses whether the family can move to the country of origin, *and* considers it not to be decisive.[451]

Where the weight of family life is comprised of a relationship between two independent factors – the *value* of family life and the *gravity* of interference – neither can be independently decisive or determinative. A high level of *value* may be offset by a low level of *gravity* (or visa versa) and thus the overall weight of family life is not determined independently by either one

[451] Spijkerboer (n380) 279-280 (emphasis original)

or the other. Hence in a decision such as *Omojudi* an Article 8 ECHR violation was found despite the unexceptional circumstances of the value of the family life in question, comprising in that case a relationship with his wife and children.[452] Key to that decision appeared to be the 'considerable weight' that the ECtHR placed on the length of residence and strength of ties that the applicant's wife and children (including citizenship in the latter cases) had with the UK.[453] Likewise, a violation was found in *AW Khan*, despite his heroin importation offence attracting a seven year custodial sentence.[454] In this case, the applicant had a significantly limited family life comprising of a recently born British citizen child, and a recent girlfriend whom the court found could relocate to Pakistan.[455] In contrast, the applicant's markers of belonging to the UK – the 'strength of ties with the UK', lack of ties with Pakistan, the length of his residence in the UK, and the young age at which he entered the UK[456] – all magnified the gravity of the interference to the extent to which his deportation was found disproportionate to the public interest.[457]

The markers of belonging clearly affect the outcome of cases. For example, in both *Aponte*[458] and *El-Habach*[459] the *value* of family life was substantially similar to that in *Omojudi*; in all cases comprising a relationship with a spouse or partner, and children.[460]

[452] *Omojudi v The United Kingdom* (n418) [6]

[453] ibid [45]

[454] *AW Khan v The United Kingdom* App no 47486/06 (ECtHR, 12 January 2010), [7]

[455] ibid [15 & 44]

[456] ibid [43]

[457] ibid [50-51]

[458] *Aponte v Netherlands* (n374)

[459] *El-Habach v Germany* (Admissibility) (n330)

[460] *Aponte v Netherlands* (n374) [10 & 17]; *El-Habach v Germany* (Admissibility) (n374) [4-5]

However, the applicants in *Aponte*[461] and *El-Habach*[462] had considerable ties to their countries of nationality and *El-Habach*[463] had low labour market integration in the deporting state. In both cases no violation of Article 8 ECHR was found[464] whereas a violation of Article 8 ECHR was found in *Omojudi* where his integration in the deporting state was greater and therefore could be expected to feel the *gravity* of the interference more keenly.

I argue that this relationship between the value of family life and the gravity of interference thereby comprises the way in which family life is measured in order to place it in the balancing exercise against the public interest in deportation. The interests which are taken into account in an assessment of the *value* of family life are magnified by those interests expressing the *gravity* of interference. Thus in the overall evaluation of family life the weight is a combination of the two. Where both the value of family life and the gravity of interference is high, the overall weight given to family life will be greater than situations where the value is low and gravity high, or value is high and gravity low. Correspondingly, the weight given to family life will be least where both the value of family life and the gravity of interfering with it are low. The weight of family life, assessed on this basis, is then placed on one side of the Article 8 ECHR balancing exercise and weighed against the public interest on the other.

4(b) Polycentricity

Although the *Üner* criteria require consideration of the 'best interests and well-being of the children', it is an unavoidable conclusion that the ECtHR's case law discloses inadequate engagement with the best interests of the child, either substantively or procedurally. This is an

[461] *Aponte v Netherlands* (n374) [60]

[462] *El-Habach v Germany* (Admissibility) (n374) [37]

[463] ibid [36]

[464] *Aponte v Netherlands* (n374) [62]; *El-Habach v Germany* (n374) [40]

inevitable consequence of the ECtHR's case law which boils down the *Üner* criteria to a consideration of the *value* of family life and the *gravity* of the interference, to the exclusion of many of the other factors which make up the best interests of the child.

This is reinforced as the ECtHR's engages only with the dimensions of the child's best interests which reflect their family bond, age and country ties. This only reflects a partial picture of what Article 3 UNCRC envisions as being encompassed by the 'best interests' of the child (as is clear from chapter 2). As Ciara Smyth observes, 'it is unclear why the Court fastens onto these particular factors. Approaching the best interests of the child from a rights-based perspective, there are, arguably, more obvious factors to consider.'[465] For example, a focus on the dimension of belonging as between the deporting and receiving state places 'greater weight to the strength of past connections than to the significance of future potentialities, including the potential for a child to realise and enjoy her Convention rights.'[466] Furthermore, both the assessment of *value* of family life and the question of belonging are also determined abstractly by the ECtHR without reference to the child's own views. In contrast, the child's age-appropriate view is both a component of Article 3 UNCRC,[467] and a free-standing right under Article 4 UNCRC.[468]

Socio-economic rights are directly relevant to the child, such as health and education.[469] An example of how the ECtHR could take into account the right to education is to be found in its own deportation case law. In *Keles,* the Court found that:

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[465] Smyth (n422) 90

[466] Siobhan Mullally, 'Citizen Children, "Impossible Subjects" and the Limits of Migrant Family Rights in Ireland' [2011] European Human Rights law Review 43, 44

[467] Smyth (n422) 90

[468] ibid 91

[469] ibid 92

> …the applicant's four sons […] entered Germany at a very young age where they received all their school education. Even if the children should have knowledge of the Turkish language, they would necessarily have to face major difficulties with regard to the different language of instruction and the different *curriculum* in Turkish schools.[470]

Clearly the overriding concern here was with the children's education as an aspect of their best interests. The ability or otherwise to engage in the curriculum because of its different content, or language of instruction, are clearly relevant to the child's effective access to the educational content. Compare the attitude in *Keles* to that in *Palanci* where assessment of the child's interests in education is exhausted by an observation by the ECtHR that 'they were to return to Ankara, a city with a well-established education system.'[471] The differences the children would experience in terms of the language of instruction and curriculum would be the same as between the dislocation to Turkey in *Keles* and in *Palanci*, but the decision to consider education as a relevant aspect of the best interests of the child in *Keles* is a conscious decision by the Court. It is clear then that, other than the exception in *Keles*, the ECtHR's interpretation of the *Üner* criteria of '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' is exhausted by considerations of the children's adaptability rather than being coincident with a full understanding of the best interests of the child.

[470] *Keles v Germany* (n10) [64]

[471] *Palanci v Switzerland* (n231) [61]. The applicants contended that the children could only understand spoken Turkish, and not its written form [42].

The first clear problem with the ECtHR's case law is therefore that it excludes consideration of a great deal of what is otherwise an aspect of the best interests of the child. When it comes to assessing the *value* of family life between FNO and their child, the ECtHR appears to use cohabitation with the foreign national offender parent as the only relevant consideration. As for the *gravity* of the interference, the ECtHR's balance only measures the membership, belonging, or integration of the family members in the receiving and deporting country. These reflect only a partial picture of what Article 3 UNCRC envisions as being encompassed by the 'best interests' of the child. It excludes, for example, considerations of the health and physical wellbeing of the child, the safety of their physical environment, or aspects of the child's emotional welfare, including the continuity and stability of life circumstances.[472] This may be partly as a function of the narrow scope of the ECHR as against the broader scope of the UNCRC. Whereas the ECHR only explicitly includes civil and political rights,[473] the UNCRC 'covers not only civil and political rights but also social, economic, cultural and humanitarian rights.'[474] The UNCRC clearly presents a richer concept of the best interests of the child than the ECHR. A narrow understanding of the best interests of the child means that the "simple balancing approach" to Article 8 ECHR is not effectively *polycentric* because it cannot accommodate all the relevant aspects of the best interests of the child.

4(c) The Plurality of Decision-Making Norms

The "simple balancing approach" also fails to give effect to the unique characteristic of the best interests of the child under Article 3 UNCRC, that the best interests ought to be a primary

[472] Aspects of the best interests of the child set out in chapter 2 and derived from s1(2) of the Children Act 1989, the General Comment No. 14 (n125), and Kalverboer (n143)

[473] Kilkelly (n214) 3

[474] Dominic McGoldrick, 'The United Nations Convention on the Rights of the Child' (1991) 5 International Journal of Law and the Family 132, 133

consideration. To treat the best interests of the child as a primary consideration must require that they are considered as a distinct and separate concern. However, instead of being treated separately, in the "simple balancing approach" the best interests of the child are folded into the factors of *importance* of family life and *gravity* of interference, alongside and part of the assessment of the interests of the FNO, and their partners/spouses. By dividing the relevant factual matrix in this manner, the ECtHR cannot make an assessment as to what is in the best interests of the child as a separate and independent consideration.

Instead, different aspects of what make up the best interests of the child are subject to consideration which is paradoxically both isolated and indivisible. In the "simple balancing approach", the different aspects of the child's interests are given isolated assessment because they are split between the *importance* of family life and *gravity* of interference, rather than considered holistically as a view taken as to what is in the best interests of the child. At the same time, the best interests of the child are made part of an assessment which is indivisible as between the interests of the child and the interests of others. If we take again the example in *Joseph Grant* where the ECtHR assessed the value of family life on the basis that the foreign national offender had never cohabited with their child,[475] it is impossible to divide the assessment made as to the best interests of the child and the family life assessment of the foreign national offender. Rather than a separate consideration of the best interests of the child, the "simple balancing approach" looks more like a meringue. One cannot pick apart the egg-whites and sugar, and one cannot pick apart the best interests of the child from the interests of the foreign national offender when the decision-maker assesses the *value* of family life in this way.

[475] *Joseph Grant v The United Kingdom* (n365) [40]

Despite the best interests of the child being one of the explicit *Üner* criteria, the "simple balancing approach" does not therefore actually permit an assessment of the best interests of the child as a separate consideration. It is therefore also not possible for the decision-maker to elevate the best interests to a primary consideration if the decision-maker does not actually know what the child's best interests are because there is no means of disaggregating them from the interests of other individuals.

5. Conclusion

The "simple balancing approach" has, I have shown, two central aspects to its decision-making process. The first is that the right to family life is one that is considered to be commonly-held by the family unit, rather than being a right that is held by one individual or a series of isolated individuals. The second is that in practice the linear *Üner* criteria are rearranged so that the weight given to family life is determined by a relationship between what the ECtHR considers to be the *value* of family life and the *gravity* of the interference.

The primary advantage of the "simple balancing approach" is that it formulates the Article 8 ECHR balancing exercise so as to fit within the confines of the metaphorical balancing scales with which courts are familiar with. It also recognises that family life is necessarily relational; one cannot have a family life by oneself.

However, the "simple balance approach" runs into significant theoretical problems in the context of reconciling Article 8 ECHR and Article 3 UNCRC, which is what UK decision-makers are required to do. The "simple balancing approach" cannot be fully *polycentric* because it requires the exclusion of the best interests of the child. As a commonly-held right, the best interests of the child must give way to an assessment of the weight to family life which is necessarily tempered by the weight of any rights or interest of other family members which are lower than the best interests of the child. This is heightened by the use of *value* and *gravity*

as the defining features of the weight to family life because they exclude much of what is unique to the best interests of the child.

The "simple balancing approach" is also unable to accommodate the *plurality* of decision-making norms introduced by the best interests of the child under Article 3 UNCRC. The best interests of the child cannot be a primary consideration because the nature of the "simple balancing approach" as being commonly-held and split between *value* and *gravity* mean that the best interests of the child cannot be considered separately or first. Instead, the best interests of the child are folded into the common family life along with the separate rights of the other family members, and split between the different metrics of *value* and *gravity*. The commonly-held aspect of the "simple balancing approach" also means that the child's best interests (to the extent to which they are considered at all) must be directly weighed against the general public interest in deportation of the foreign national offender.

These obvious failings in the "simple balancing approach" underscore the difficulties in accommodating both Article 3 UNCRC and Article 8 ECHR. The ECtHR is clearly torn between a focus on the "bad" foreign national offender on whom the negative consequences of deportation naturally and reasonably fall,[476] and the protection of 'the best interests and well-being of the children'.[477] As Dembour argues, the ECtHR begins with a foundational assumption in favour of state control over immigration which may be tempered by recognition of the 'poignancy of their personal circumstances'.[478] The decision in *Üner* was an attempt by the ECtHR to formalise the factors relevant to the balancing exercise so, in theory, decisions would be guided by principles more consistent than reliance on the sympathy engendered in individual cases. However, the best interests of the child has been layered onto the right to

[476] Dembour (2015) (n164) 106

[477] *Üner v Netherlands* (n20) [57-58]

[478] Dembour (2015) (n164) 96-98

family life many years after the general principles of Article 8 ECHR have been otherwise determined; in particular that family life is a commonly-held right, placed in to a simple balance against the public interest. This *ad hoc* development has resulted, I have argued, in the "simple balancing approach" being ill-suited to reflect adequately both the best interests of the child and the pre-existing structures of Article 8 ECHR. In the next chapter, UK courts can be seen to develop the case law in a way which emphasises the need to maintain the primary status of the best interests of the child. However, this modification of the balancing exercise merely emphasises the essential difficulty in a unified decision-making process for both the family life of the FNO, and the best interests of the child.

CHAPTER 5: A "MODIFIED BALANCING APPROACH" AFTER *ZH (TANZANIA)*

1. Introduction

In the previous chapter, I described how and why UK law first viewed the best interests of the child in deportation decisions through the prism of Article 8 ECHR. Under that "simple balance approach" of decision-making, the best interests of the child were treated as an interest which was folded into the right to family life enjoyed by the family unit. This chapter is about the next stage of development in UK deportation law when it first began to articulate the best interests of the child as being a separate statutory obligation inherent to s55 of the Borders, Citizenship and Immigration Act (BCIA) 2009, that the SSHD must 'safeguard and promote the welfare of children'.

I argue in this chapter that in the seminal 2011 case of *ZH (Tanzania),*[479] the Supreme Court articulated s55 BCIA as having characteristics which make it similar to Article 3 UNCRC, and different to the approach of the ECtHR and UK courts after *Huang*[480] to the right to family life under Article 8 ECHR. These characteristics are that the best interests of the child have a primary status, meaning that they must be treated first, separately and of no less inherent weight than other interests, and that only rights-based considerations may be balanced against the best interests of the child. I outlined in chapter 3 of this thesis how each of these characteristics have been identified in Article 3 UNCRC. The theoretical problems of operating simultaneously the right to family life and the best interests of the child in the forms that they take under Article 8 ECHR and Article 3 UNCRC were also described in chapter 3. I argued that *polycentricity* describes the existence of multiple rights and interests which belong to multiple individuals within any family where a child (or children) are affected by the deportation of a parent. The *plurality of decision-making norms* relates to the different formal legal requirements of Article 8 ECHR and Article 3 UNCRC. I demonstrated that it appeared

[479] *ZH (Tanzania)* (n21)

[480] *Huang* (n8)

impossible to create a decision-making process which both respected the *plurality of decision-making norms* and yet remained *polycentric* by taking into account all the relevant rights and interests at stake in deportation decisions.

Explaining and analysing this "modified balancing approach" pursued by the Supreme Court in *ZH (Tanzania)* is therefore significant for this thesis because it represents one of the first and clearest attempts by the UK courts to grapple with the best interests of the child as a statutory duty in deportation decisions separate from, but simultaneous to, the right to family life. This required the court to engage with the theoretical issues that this thesis has argued are inherent to approaches which attempt to give simultaneous effect to Article 3 UNCRC and Article 8 ECHR. On a theoretical level the decision-maker is, I suggested, presented with three choices for resolving these issues; first, to pursue a balancing approach by emphasising the difference in language between s55 BCIA and Article 3 UNCRC; second, to adopt a principle of paramountcy, akin to that found in UK family law, or; third, to try to resolve the tensions of trying to give effect to both family life and the best interest of the child.

In the previous chapter, I argued that following the House of Lords case of *Huang*[481] UK courts treated the best interests of the child as an interest which was folded into the human right to family life enjoyed by the family unit under Article 8 ECHR. This can be described as a practical expression of the first possible choice; to give effect to Article 8 ECHR through a "simple balancing approach", but to ignore the unique characteristics of Article 3 UNCRC. I argued this did not respect the *plurality of decision-making norms,* and additionally, the nature of the way that the European Court of Human Rights (ECtHR) constructed the balance means that the best interests of the child is sidelined, and so this "simple balancing approach" is not *polycentric* either.

[481] ibid

In this chapter I argue that from 2011-2014, UK courts (starting with *ZH (Tanzania)*) attempted to resolve the tension and so create a decision-making approach which gave effect to the unique characteristics of Article 3 UNCRC, but also the Article 8 ECHR balancing exercise, whilst also maintaining *polycentricity*. It is a "modified balancing approach" because it seeks to modify the Article 8 ECHR balancing exercise to accommodate the best interests of the child, rather than adopt an entirely new form of decision-making process. In chapter 3 I suggested that to effectively reconcile the right to family life and the best interests of the child in this manner requires the decision-maker to be able to also answer two questions which arise under the *plurality of decision-making norms*; (a) what is the proper relationship between the best interests of the child (when they are considered separately, as a human right, and of no less weight than other considerations) and the family life rights of both the children and of others in the family; and, (b) if only rights-based considerations are permitted to be balanced against the best interests of the child, but Article 8 ECHR permits non-rights-based considerations to be balanced against the best interests of the child, how can the decision-maker do both simultaneously? I conclude in this chapter that UK courts provide no answer to these questions. Ultimately, these problems were introduced into UK deportation law by *ZH (Tanzania)* and not resolved, and that subsequent case law ultimately resort to restating the problem rather than articulating solutions.

Throughout this thesis I have identified s55 BCIA as the site of domestication of Article 3 UNCRC. The s55 duty states that that the Secretary of State must ensure that her immigration powers (including over deportation) are 'discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom'. There is therefore an undeniable divergence of language between s55 BCIA and Article 3 UNCRC. This divergence of language opened up to UK courts choices as to how the s55 duty could have been interpreted.

Part 2 of this chapter therefore explains the background to s55 BCIA and to the *ZH (Tanzania)* case and analyses the interpretive choices that were open to, but ultimately rejected by, UK courts; (a) to ignore the unique characteristics of Article 3 UNCRC, follow the ECtHR jurisprudence and continue the "simple balancing approach" described in the previous chapter, or (b) to adopt a position of paramountcy for the best interests of the child. Understanding these helps contextualise the interpretive decisions made by the Court as a compromise position, but also that it was not an inevitable compromise. Part 2(c) outlines the decision in *ZH (Tanzania)* and the effective domestication of Article 3 UNCRC. Part 3 is therefore concerned with an evaluation of this "modified balancing approach", using *polycentricity* and the *plurality of decision-making norms* as the basis for this analysis. The conclusion to this chapter is that the compromise position of merging Article 8 ECHR and Article 3 UNCRC does not work.

2. Section 55 BCIA and Choices: Balancing, Paramountcy, or Another Way?

From the UK's ratification of the United Nations Convention on the Rights of the Child (UNCRC) on 16 December 1991, the UK had a treaty reservation to the effect that the Convention was not to apply to immigration.[482] However, the reservation was withdrawn in November 2008 and as a direct result,[483] Parliament enacted s55 BCIA which came into force on 2 November 2009.[484] Even though s55 BCIA was a direct consequence of the withdrawal of its reservation, the wording of the s55 statutory duty and Article 3 UNCRC is different. S55

[482] The reservation stated that, 'The United Kingdom reserves the right to apply such legislation, in so far as it relates to the entry into, stay in and departure from the UK of those who do not have the right under the law of the UK to enter and remain in the UK, and to the acquisition and possession of citizenship, as it may deem necessary from time to time.' (House of Commons Foreign Affairs Committee, 'First Report: Foreign Policy and Human Rights' (21 December 1998, HC 100-I – HC 100-III), Annex A <https://publications.parliament.uk/pa/cm199899/cmselect/cmfaff/100/100ap32.htm> accessed 3 December 2018)

[483] Christie, (n181) 16; Fortin (2014) (n175) 55; *ZH (Tanzania)* (n21) [23]

[484] The Borders, Citizenship and Immigration Act 2009 (Commencement No. 1) Order 2009, s2

BCIA requires that the Secretary of State must ensure that her immigration powers (including over deportation) are 'discharged having regard to the need **to safeguard and promote the welfare** of children who are in the United Kingdom'.[485] Article 3 UNCRC, in contrast, states:

> 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**.[486]

Although there may be little difference in practice between the 'welfare' of the child and the child's 'best interests',[487] s55 BCIA does not (on its face) require the best interests of the child to be a **primary** consideration. The act of judicial decision-making is one of making choices, and the wording of s55 BCIA presented the Supreme Court in *ZH (Tanzania)*[488] with choices as to how to interpret s55 BCIA. The facts of *ZH (Tanzania)* are not concerned with deportation, but the principles of law arising from it are equally applicable. The relevant facts of *ZH (Tanzania)* cannot be described any more succinctly than they are in the Supreme Court judgment itself:

> [ZH] is a national of Tanzania who arrived here in December 1995 at the age of 20. She made three unsuccessful claims for asylum, one in her own identity and two in false identities. In 1997 she met and formed a relationship with a British citizen. They have two children, a daughter, T, born in 1998 (who is now 12 years old) and

[485] Borders, Citizenship and Immigration Act 2009, s55 (emphasis added)

[486] UNCRC, Article 3 (emphasis added)

[487] *R (MXL)* (n20) [84-85]

[488] *ZH (Tanzania)* (n21)

> a son, J, born in 2001 (who is now nine). The children are both British citizens, having been born here to parents, one of whom is a British citizen. They have lived here with their mother all their lives, nearly all of the time at the same address. They attend local schools. Their parents separated in 2005 but their father continues to see them regularly, visiting approximately twice a month for 4 to 5 days at a time.[489]

The Supreme Court had three discrete choices open to it as to how to interpret s55 BCIA in the context of its relationship with the UK's international law obligations under Article 3 UNCRC and Article 8 ECHR. The first possible choice was to adopt a balancing approach to the best interests of the child. This choice would have placed emphasis on the language of s55 BCIA and rejected the domestication of the unique characteristics of Article 3 UNCRC. This would have committed UK courts to the "simple balancing approach" of decision-making that I outlined in chapter 4 as representative of the ECtHR's jurisprudence, and the UK's decision-making in deportation decisions after *Huang*. The second choice open to the Supreme Court was to adopt a principle of paramountcy. Under a paramountcy principle the best interests of the child would be the sole determinative factor in deportation decisions, as it is in some family law contexts. Indeed, the children's representatives in *ZH (Tanzania)* floated precisely this argument.[490] The third option was to attempt some kind of melding or fusion of the incompatible structural requirements of Article 8 ECHR's "simple balancing approach" and the unique characteristics of Article 3 UNCRC. I argue in part 2(c) of this chapter that this is the option that the Supreme Court ultimately took. This part explores each in turn.

[489] ibid [2-3]

[490] ibid [25]

2(a) Balancing

The first option open to the Supreme Court in *ZH (Tanzania)* would have been to interpret s55 BCIA narrowly so as to maintain the pre-2009 status quo of the "simple balancing approach" to deportation decision-making. Under this approach, no special status is attached to the child's best interests and they are just one of many interests to be considered. As already observed, the wording of s55 BCIA is different from that of Article 3 UNCRC. S55 BICA requires only that the Secretary of State 'have regard' for the welfare of children. Interpreted narrowly, this duty only requires the Secretary of State to take into account the welfare of the child in her decisions as a mandatory consideration. The welfare or best interests of the child must then be included for consideration in the "simple balance", but has no special, primary status. Failure by the decision-maker to take into account mandatory considerations is an error of law[491] and thus s55 BCIA would simply render any decision which did not have regard to the welfare of the child unlawful. This would be an additional obligation upon which the child could rely to ensure that their interests were at least included in the balancing exercise of Article 8 ECHR. However, it changes nothing about how the "simple balancing approach" should be undertaken.

Such a narrow reading of s55 BCIA was well within the range of possible decisions open to the Supreme Court in *ZH (Tanzania)*. Although UK courts will presume that Parliament does not intend to legislate contrary to international law,[492] this principle does not transubstantiate the 'spirit' of the UNCRC (as Lady Hale describes it in *ZH (Tanzania)*)[493] into the incorporation of the specific language of that treaty where Parliament has used different words. The UK's international obligations include those to the ECHR (via s6 of the Human

[491] *Re Findlay* [1985] AC 318, 333

[492] Ian Loveland, *Constitutional Law, Administrative Law, and Human Rights: A Critical Introduction* (6th edition, 2012, OUP) 367

[493] *ZH (Tanzania)* (n21) [23]

Rights Act 1998) and chapter 3 demonstrated that the unique characteristics of Article 3 UNCRC appear incompatible with the requirements of the ECtHR's Article 8 ECHR jurisprudence, thus creating the *plurality of decision-making norms* with which this thesis is concerned. In order to avoid these theoretical problems the Supreme Court could have placed emphasis on the plain language of s55 BCIA which appears entirely compatible with the "simple balancing approach" of the ECtHR jurisprudence. Under this first interpretive route s55 BCIA would impose only a narrow obligation that the decision-maker must pay genuine regard for the welfare interests of the child in their determination of the right to family life. To this extent, s55 BCIA may be seen as only being a statutory reinforcement of the requirement that already existed in the *Üner* criteria for determining Article 8 ECHR (and relied on in *Huang*) regarding 'the best interests and well-being of the children'.[494] This requirement was already obliquely present in UK law via the requirement to take into account the jurisprudence of the ECtHR,[495] but elevating it to a separate statutory requirement would have ensured child litigants a way to directly enforce this in all cases, whilst avoiding the apparent theoretical conflict created by the *plurality of decision-making norms* between Article 8 ECHR and Article 3 UNCRC. To follow this route would have allowed the Supreme Court to sidestep the problems inherent in the *plurality of decision-making norms*, but without giving any prominence to the best interests of the child as envisioned in Article 3 UNCRC.

This may well have been the then government's intention when it placed the s55 duty before Parliament. It would be consistent with policy development leading up the Children Act 2004 – a family law measure – in which reference to the UNCRC were purposefully dropped in order to avoid extending children's human rights.[496] The language of s55 BCIA of

[494] *Üner v Netherlands* (n20) [57-58]

[495] Human Rights Act 1998, s2(a)

[496] Jane Williams, 'Incorporating Children's Rights: The Divergence in Law and Policy' (2007) 27 Legal Studies, 261, 263

discharging immigration functions 'having regard' for the welfare of children also mirrors the language of the public sector quality duty which requires public authorities to 'have due regard' to eliminate discrimination and promote equality.[497] A narrow interpretation of s55 BCIA would also be consistent with the views of ministers who suggested 'that withdrawal of the [UNCRC] reservation is unlikely to have much practical effect.'[498] A narrow mandatory relevant consideration, rather than a substantive change in the structure of deportation decision-making, would have been consistent with this prediction. This narrow obligation may also be what the then President of the Upper Tribunal (Immigration and Asylum Chamber) sought to describe as the general effect of s55 BCIA:

> …twofold, inter-related duties […] (i) to have regard to the need to safeguard and promote the welfare of any children involved in the factual matrix in question and (ii) to have regard to the Secretary of State's guidance.[499]

President McCloskey derived these duties from the administrative law principle that the decision-maker must 'have regard to all material considerations.'[500] To meet her s55 duty, the SSHD 'must be properly informed' and 'conduct a careful examination of all relevant information and factors.'[501] In a later case, developing the natural consequence of finding that s55 is a discrete statutory duty, McCloskey found that failure by the SSHD to fulfil her s55

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[497] Equality Act 2006, s149

[498] Drew and Nastic (n18) 123

[499] *JO and Others* (n46) [10]

[500] ibid [10]. Citing as authority: *Secretary of State for Education and Science v Metropolitan Borough Council of Tameside* [1977] AC 1014; and, *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997

[501] *JO and Others* (n46) [11]

duty would render the SSHD's deportation decision 'not in accordance with the law'.[502] A similar finding was also made in *DS (Afghanistan)*.[503] Being an independent statutory duty means that children affected by deportation decisions can rely on s55 BCIA to require the Secretary of State to have regard for their welfare and factual circumstances. Failure by the Secretary of State to do so would render deportation decisions unlawful, independently of other substantive or procedural aspects of the decision-making.

However, a narrow reading of s55 BCIA to require the SSHD to simply 'have regard' for the best interests of the child says nothing about the priority that the best interests of the child ought to have in decision-making. This mirrors Fredman's critique of the public sector equality duty in which she argues that it reflects 'a fundamental ambivalence as to the importance of equality, deferring to public authorities' view as to what priority equality deserves.'[504] In contrast, Article 3 UNCRC clearly says something about the priority that the best interests of the child should have in decisions; it ought to be a primary consideration.

The obvious consequence of interpreting s55 BCIA as imposing only a mandatory relevant consideration within the established "simple balancing approach" to deportation decision-making is that the unique characteristics of Article 3 UNCRC must be effectively ignored by the court. This narrow reading of s55 BCIA would fall considerably short of a substantive human right which must determine the structure of the decision-making process. Furthermore, a narrow reading of s55 BCIA only requires that the SSHD must have regard to the welfare of the child but is silent as to the primacy or otherwise of the child's welfare interests. Because of this language, s55 BCIA also does not preclude the child's welfare interests being outweighed by non-rights-based considerations. This might be consistent with

[502] *MK (section 55 - Tribunal options) Sierra Leone* [2015] UKUT 00223 (IAC), [24]

[503] *DS (Afghanistan) v Secretary of State for the Home Department* [2011] EWCA Civ 305; Yeo (n59) 191

[504] Sandra Fredman, 'The Public Sector Equality Duty' (2011) 40 Industrial Law Journal 405, 418

the wording of s55 BCIA, but not with the underlying international law obligations to Article 3 UNCRC. I also argue in part 2(c) below that this is also inconsistent with what *ZH (Tanzania)* itself otherwise requires.

2(b) Paramountcy

The second option available to the Supreme Court in *ZH (Tanzania)* was to rely on a principle of paramountcy. Instead of a narrow reading of s55 BCIA, paramountcy would be an expansive one. The paramountcy of the best interests of the child is familiar to UK courts. In family law, s1(1) Children Act 1989 requires that in any question related to the upbringing of the child, 'the child's welfare shall be the court's paramount consideration'. Paramountcy means that 'children's welfare trumps and outweighs all other considerations; no other interests or values may affect the decision; children's interests are the only ones that count.'[505]

The UK's family courts have found that any decision taken in support of the best interests of the child will be consistent with Article 8 ECHR, even where the family life rights of the parent and child, or between parents, are in conflict.[506] Thus adopting a principle of paramountcy would resolve both *polycentricity* and the *plurality of decision-making norms* between Article 8 ECHR and Article 3 UNCRC in the deportation context by assuming that to treat the best interests of the child as paramount also encompasses all the requirements of Article 8 ECHR. Furthermore, as Eekelaar argues, the chief benefit of the paramountcy principle is that 'it requires a decision made with respect to a child to be justified from the point of view of a judgment about the child's interests.'[507] This alters the position of children from being 'instruments for the promotion of the interests of others […] to one where children's

[505] Reece (n173) 267

[506] Choudhry and Fenwick (n149) 465; Fortin (2006) (n154) 303-4; Choudhry and Herring (n119) 108

[507] John Eekelaar, 'Beyond the Welfare Principle' (2002) 14 Child and Family Law Quarterly 237, 240

carers were expected to use their position to further the children's interests.'[508] The state is explicitly required to use its position to 'safeguard and promote the welfare of children' in its immigration functions by s55 BCIA 2009 and in the family law context by s1(1) Children Act 1989. Just as disputing parents cannot reasonably complain that their children's interests are put first by the courts in determining their dispute, the UK state cannot complain that its interests in deportation are placed secondary to the best interests of children when itself has committed to do so through primary legislation.

In *ZH (Tanzania)* the children's representatives (the children had separate representation) argued that s1(1) Children Act 1989, and thereby the principle of paramountcy, should apply.[509] But Lady Hale dismissed the argument that either s1(1) Children Act 1989 itself should apply, or that s55 BCIA imports an equivalent paramountcy principle in deportation cases. She stressed that 'questions with respect to the upbringing of a child must be distinguished from other decisions which may affect them.'[510] Deportation is, according to Lady Hale, of the latter type of decision. Lady Hale relied on the UNCRC for this distinction, finding that the UNCRC only requires that the best interests of the child must be paramount only in some cases, 'notably adoption (Article 21) and separation of a child from parents against their will (Article 9)'.[511] Other decisions 'affecting'[512] the child are only a primary rather than a paramount consideration.

However, if deportation is perceived through the lens of the child's experience, the deportation of an FNO parent intimately concerns their upbringing. The deportation of an FNO

[508] ibid

[509] *ZH (Tanzania)* (n21) [25]

[510] Ibid

[511] ibid

[512] ibid

parent will leave different families different options, but boil down to one of two possible outcomes:

1. the child leaves the UK with their FNO parent, despite the child's own right of abode or leave to remain in the UK being otherwise unaffected by the parent's deportation; or,
2. the child remains in the UK, either with the non-offender parent, other relative, private fostering arrangement, or in the care of social services. The child's ability to have direct physical contact with the FNO parent is significantly impaired, the child is (as per Article 9 UNCRC) separated from a parent against their will.

Both options define who the child lives with, where, and what contact they have with the deported parent. It appears that 'the decision is in fact about where the child should live and how the child is to maintain contact with both parents.'[513] To this extent, the practical outcome of deportation decisions for children is identical to other decisions by the family courts as to contact arrangements between a child and their parents and to which the paramountcy principle applies. Only if deportation is viewed through a state-control or adult-centric lens is deportation not about the child but about the proper disposal of a foreign national offender. Through an adult-centric lens the impact on the child is side-lined as being an unfortunate collateral consequence and thus deportation is not a decision 'with respect to' their upbringing, but one merely 'affecting' them in a secondary way.

Approaching *ZH (Tanzania)* from a paramountcy perspective would resolved the issues of *polycentricity* and the *plurality of decision-making norms* from a child-centric perspective.

[513] Eekelaar (2015) (n328) 9

Paramountcy of the child's best interests in deportation would require them to be the overriding interest, to the exclusion of other interests (and particularly the public interest in deportation). A *polycentric* rights problem would be reduced to a *mono-centric* decision.

As for the *plurality of decision-making norms*, paramountcy would require the UK courts to effectively ignore the "simple balancing approach" of the ECtHR in favour of the unique characteristics of Article 3 UNCRC. As in family law, the UK courts could maintain an assumption that pursuing the best interests of the child as a paramount consideration in deportation decisions is consistent with the requirements of Article 8 ECHR.[514] This would be well founded. An outcome of a deportation decision which positions the best interests of the child as the only relevant factor in the decision-making exercise would always be Article 8 ECHR compliant where the opposing interest is that of the public interest rather than the rights of another individual. The public interest is an optimisation *permission*; the state is merely permitted to pursue the public interest to the full degree compatible with the human rights of the individual, but is not obliged to do so.[515] In contrast, the individual right is an optimisation *requirement*; the state is always obliged to maximise the individual human right.[516] Thus only where the conflict is between the rights of two individuals can the state be critiqued for giving too much weight to one right and too little to another. This is not the situation in deportation decisions as the state cannot be found in breach of the ECHR by giving too much weight to the individual right at stake and/or for giving too little weight to the public interest. Thus the paramountcy of the best interests (as a facet of the individual right at stake) over the public interest in deportation would be Article 8 ECHR compliant.

[514] Choudhry and Fenwick (n149) 465; Fortin (2006) (n154) 303-4; Choudhry and Herring (n119) 108

[515] Julian Rivers, 'Proportionality, Discretion and the Second Law of Balancing' in George Pavlakos (ed), *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy* (Hart Publishing 2007), 168

[516] ibid

2(c) A "Modified Balancing Approach": The s55 Duty as Incorporating Article 3 UNCRC into UK Law

The alternative path forged by the Supreme Court in *ZH (Tanzania)* was to try to give effect to the unique characteristics of Article 3 UNCRC as well as the balancing exercise of Article 8 ECHR. *ZH (Tanzania)* can therefore be described as pursing a "modified balancing approach". This could be described alternatively as an attempt to merge the two rights regimes, or to bolt-on the best interests of the child to the existing balancing framework. Jane Fortin interprets *ZH (Tanzania)* as imposing 'the need to fulfil the requirements of Article 3 [UNCRC] […] in the context of carrying out the balancing exercise required by Article 8 [ECHR]'.[517] So did the Court of Appeal in *AJ (India)*, finding that *ZH (Tanzania)* 'has incorporated the section 55 [BCIA] test within the proportionality assessment under Article 8 [ECHR].'[518] Regardless of how one describes the relationship, it is clear – as I argue below – that UK courts have used s55 BCIA as a means by which to domesticate those aspects of Article 3 UNCRC which give rise to the *plurality of decision-making norms*; (i) that the best interests of the child has a primary status, and (ii) that only rights-based arguments may outweigh the best interests of the child.

Although the language of s55 BCIA is different to that of Article 3 UNCRC, UK courts have drawn a general equivalence between the two. Lady Hale in *ZH (Tanzania)* relied on the 'spirit' of the UK's international obligations, finding that Article 3 UNCRC, 'is a binding obligation in international law, and the spirit, if not the precise language, has also been translated into our national law.'[519] In *R (TS)*,[520] Mr Justice Wyn Williams found that the

[517] Fortin (2014) (n175) 56

[518] *AJ (India) v Secretary of State for the Home Department* [2011] EWCA Civ 1191, [28]

[519] *ZH (Tanzania)* (n21) [23]

[520] *R (TS)* (n20)

statutory guidance[521] required the use of the UNCRC as an interpretive tool for correctly understanding the s55 duty[522] and, moreover, that 'the statutory guidance intends that when a decision maker is having regard to the need to safeguard and promote the welfare of a child he is for all practical purposes also having regard to the best interests of the child.'[523] In *JO (Nigeria)*, the Upper Tribunal relied on the similarity of substance and outcome:

> In the field of immigration, therefore, the enactment of section 55 discharges an international law obligation of the UK Government. While section 55 and Article 3(1) of the UNCRC are couched in different terms, there may not be any major difference between them in substance, as the decided cases have shown.[524]

The Supreme Court have also found that there is something special to this relationship of translated 'spirit' between Article 3 UNCRC and s55 BCIA. In *R(SG)*, the Supreme Court distinguished the immigration law context (to which the 'spirit' of Article 3 UNCRC applies through the s55 duty) from the context of welfare benefits law which lacks this domesticated 'spirit' and which therefore lacks substantive obligations to the best interests of the child.[525]

I argue that *ZH(Tanzania)* also makes some specific findings which gives flesh to the spirit of Article 3 UNCRC, findings that must be interpreted as the domestication into the UK's deportation case law of the unique characteristics of Article 3 UNCRC; that the best interests of the child are a primary consideration and that only rights-based considerations ought to be

[521] 'Every Child Matters' (n140)

[522] *R (TS)* (n20) [31-32]

[523] ibid [35]. See also: Fortin (2011) (n46) 952

[524] *JO and Others* (n46) [6]

[525] *R (SG and others) v Secretary of State for Work and Pensions* [2015] UKSC 16, [82]

balanced against the best interests of the child. In part 2(c)(i) and (ii), below, I describe how the decision in *ZH (Tanzania)* emphasised each of these. The adoption of these unique characteristics by UK courts resulted in an increasing tension in UK deportation law along the lines of the larger themes addressed in this thesis. Firstly, the decision in *ZH (Tanzania)* describes the children as being 'innocent victims'[526] who are contrasted with the "bad" migrant parent who has an 'appalling' immigration history.[527] Secondly, the introduction of the best interests of the child is treated as an *ad hoc* development in the law rather than as an integrated part of it. This characteristic of it being bolted-on to the "simple balancing approach", giving rise to a "modified balancing approach", reflects what I critique below[528] as an internal incoherence in *ZH (Tanzania)* as to the relationship between the best interests of the child and the right to family life.

2(c)(i) The best interests of the child have a primary status

ZH (Tanzania) is authority in UK law for the principle that the best interests of the child have primary status.[529] The primary status of the best interests of the child means two things according to Lady Hale; firstly, 'this means that they must be considered first'[530] and second, that the decision-maker must 'not treat any other consideration as inherently more significant than the best interests of the children'.[531]

[526] *ZH (Tanzania)* (n21) [21]

[527] ibid [33]

[528] This chapter, part 3

[529] *ZH (Tanzania)* (n21) [33]

[530] ibid

[531] ibid [26]. See also, *Zoumbas* (n268) [10]

The primacy of the best interests of the child, according to *ZH (Tanzania)*, means that the best interests of the child be put first 'temporally'[532] in the decision-making process. Bolton argues that the principal importance of *ZH (Tanzania)* is in the establishment of the temporal primacy of the best interests of the child as a procedural rule, rather than in establishing any additional substantive understanding to what the best interests of the child requires.[533] However, the temporal primacy of the best interests of the child does more than simply require that as a mandatory relevant consideration it be the consideration looked at first by the decision-maker. Instead, considering the best interests of the child first temporally is designed to support the substantive dimension of the primacy of the best interests of the child. As Lord Kerr observes, accounting for the best interests of the child first ensures that those interests receive adequate attention, so that considering the best interests of the child first:

> …is not merely a mechanistic or slavishly technical approach to the order in which the various considerations require to be evaluated. It accords proper prominence to the matter of the child's interests. […] where a child's interests are involved, it seems to me that there is much to be said for considering those interests first, so that the risk that they may be undervalued in a more open-ended inquiry can be avoided.[534]

[532] *AJ (India)* (n518) [28]. See also, McKee (n59) 239

[533] Syd Bolton, 'Promoting the Best Interests of the Child in UK Asylum Law and Procedures' (2012) 26 Journal of Immigration, Asylum and Nationality Law 232, 237

[534] *HH v Deputy Prosecutor of the Italian Republic, Genoa* [2012] UKSC 25, [2013] 1 AC 338, [144]

Considering the best interest of the child first ensures that they are considered separately. As the UN Committee on the Rights of the Child have observed, 'If the interests of children are not highlighted, they tend to be overlooked.'[535]

An additional rationale for considering the best interests of the child first arises from the other unique characteristic of Article 3 UNCRC,[536] that the child must not be blamed for matters for which they are not responsible. As the Upper Tribunal observed, the best interests of the child:

> …is a matter which has to be addressed first and as a distinct stage of the inquiry. […] The underlying rationale must be that unless, when children are concerned, the Article 8 proportionality assessment is conducted in this way there is a risk of the best interests of the child consideration wrongly taking into account extraneous factors such as the parents' poor immigration history.[537]

The strict necessity to address the best interests of the child first in the temporal sense is not a view universally shared in the UK's case law after *ZH (Tanzania)*. Both Lord Judge and Lord Wilson in *HH* argued that judges ought to decide for themselves the order in which they consider the relevant factors in decision-making.[538] President McCloskey thus found that it was not an error of law if a First-tier Tribunal judge did not determine the child's best interests first as there is no direct statutory requirement to do so.[539] However, these cases confirm that if the

[535] General Comment No. 14 (2013) (n125) [37]

[536] Discussed in depth in chapter 5, part 2(c)(ii)

[537] *MK (best interests of child) India* [2011] UKUT 00475 (IAC), [19]

[538] *HH v Deputy Prosecutor of the Italian Republic, Genoa* (n534) [125] & [153]

[539] *PD and Others (Article 8 - conjoined family claims) Sri Lanka* [2016] UKUT 00108 (IAC), [20]

best interests of the child are not considered temporally first, they must still be substantially considered separately, and as a primary consideration. Considering the best interests of the child temporally first will make it easier for the decision-maker to demonstrate that they have given the best interests of the child substantive primary status.[540]

Substantively, the primacy of the best interests of the child requires the decision-maker 'not treat any other consideration as inherently more significant than the best interests of the children'. [541] The weight given to the child's best interests must be no less than any other consideration, but it may be given the same weight as other considerations. As Lord Hodge describes the position in *Zoumbas*:

> …the best interests of a child must be **a** primary consideration, although not always **the only** primary consideration […] Although the best interests of a child can be outweighed by the cumulative effect of other considerations, no other consideration can be treated as inherently more significant[542]

By itself, this says very little. It requires that the decision maker assign only equal weight between the best interest of the child and other considerations such as the public interest in deportation. In other words, the public interest in deportation may be held to be as important as the best interests of the child. However, taken together with the first aspect of the primary status of the best interests of the child – that it ought to be considered first temporally – the inherent significance of the best interests of the child reinforces that the best interests of the child must be considered as a factual matter which is separate from the commonly-held family

[540] Fortin (2014) (n175) 58

[541] *ZH (Tanzania)* (n21) [26]. See also, *Zoumbas* (n268) [10]

[542] *Zoumbas* (n268) [10] (emphasis added)

life. In chapter 4, I argued that when Article 8 ECHR family life is engaged alone in a "simple balancing approach" to deportation decision-making, the best interests of the child are integrated into the assessment of the family life as a right commonly-held between all the family members. Therefore, treating the best interests of the child as having its own inherent, primary weight and to be temporally considered first requires the decision-maker to set apart the assessment of best interests from the commonly-held Article 8 ECHR right. To consider the best interests of the child as part of an assessment of the commonly-held right would fail to consider the best interests first. It would also treat the best interests as subsumed within the family life and thus as not having its own inherent significance.

Considering the best interests of the child as a primary consideration thus requires the structure of decision-making to make a separate consideration of the best interests of the child. If the best interests of the child are included as part of the right to family life, as in the "simple balancing approach" in chapter 4, then the best interests of the child do not receive the prescribed status of inherent primary significance. Whilst considering the best interests of the child as the temporally first consideration is not strictly required, to do so ensures that the best interests are given sufficient inherent significance and insulates the consideration of best interests from being infected by proscribed considerations such as the offending of the parent. The "modified balancing approach" of decision-making reflects these procedural aspects of treating the best interests of the child as a primary consideration.

2(c)(ii) 'A child must not be blamed for matters for which he or she is not responsible, such as the offending of a parent'[543]

In *ZH (Tanzania)* Lady Hale stated that the children of foreign nationals must not be 'blamed' for their parent's immigration wrongdoing. The eponymous ZH was a Tanzanian national who had two British citizen children.[544] The mother had an 'appalling' immigration history arising from multiple failed asylum applications, some of which were fraudulent.[545] Although *ZH (Tanzania)* was a removal case, the principles established apply equally to deportation cases. In *ZH (Tanzania)* the best interests of the children were balanced against the public interest 'to maintain firm and fair immigration control, coupled with the mother's appalling immigration history and the precariousness of her position when family life was created.'[546] However, Lady Hale qualified the nature of the balance between the best interests of the child and the public interest finding that, as for the mother's 'appalling' immigration history, 'as the Tribunal rightly pointed out, the children were not to be blamed for that.'[547] This idea, that children are not to be 'blamed' for the immigration misdeeds of their parents, is not unique to *ZH (Tanzania)*. In *EM (Lebanon)*,[548] Lady Hale stated that the 'child is not to be held responsible for the moral failures of either of his parents.'[549] Later, in *Zoumbas*, the Supreme Court restated

[543] ibid

[544] *ZH (Tanzania)* (n21) [2]

[545] ibid [5]:

> 'She made a claim for asylum on arrival in her own name which was refused in 1997 and her appeal was dismissed in 1998, shortly after the birth of her daughter. She then made two further asylum applications, pretending to be a Somali, both of which were refused.'

[546] ibid [33]

[547] Ibid

[548] *EM (Lebanon)* (n226)

[549] ibid [49]

what it considered the established principles of the s55 duty, and stated that, 'A child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent'.[550]

I argue that the logical meaning of a requirement not to blame children for the actions of their parents in deportation cases is that only rights-based considerations may outweigh the best interests of the child. This would bring the meaning of s55 BCIA closer to what I argued in chapter 3 is the international obligation under Article 3 UNCRC. I argue this because it is the only interpretation of the idea that a child should not be blamed for the offending of their parent which navigates a line between two unlikely absolutes; that the best interests of the child must always prevail regardless of the public interest, or that there is no substantive content to the idea.

Let us start with what it means to 'blame' someone. To blame someone is to say that they are responsible for some wrong. Blame is therefore a necessary precondition of punishment because blame requires the moral competence to be able to act in a way which avoids the blameworthy behaviour. Where someone is unable to prevent or avoid the action, they cannot be reasonably blamed for that action and therefore cannot reasonably be punished for it.[551] Thus the child of a criminal offender cannot be said to be blameworthy of the criminal act that the offending parent has committed because they cannot have prevented their parent's offending and could not have avoided it taking place because it was not the child's own actions. Rosalind English argues that the logical consequence of *ZH (Tanzania)* is that therefore there can be no public interest consideration against which the best interests of the child can be weighed against, and therefore no balancing exercise under Article 8 ECHR possible:

[550] *Zoumbas* (n268) [10]

[551] JER Squires, 'Blame' (1968) 18 The Philosophical Quarterly 54; Edward Sankowski, 'Blame and Autonomy' (1992) 29 American Philosophical Quarterly 291; Garrath Williams, 'Blame and Responsibility' (2003) 6 Ethical Theory and Moral Practice 427; Matthew Talbert, 'Moral Competence, Moral Blame, and Protest' (2012) 16 The Journal of Ethics 89

> So in other words a determination that takes into account the usual principles of Article 8 jurisprudence amounts to a verdict on the children which "blames" them for their parents bad behaviour. The objection to this line of reasoning is that it evacuates the balancing act of any content by first taking away the usual factors by which we measure whether one case is deserving and the other not and then substituting for these measures a mechanical test – the question: "is this in the child's best interests"?

However, this runs contrary to how Lady Hale in *ZH (Tanzania)* explicitly sets out the idea that the child should not be blamed. Lady Hale does not set out an absolute test, as English supposes, that the best interests of the child will always prevail. Instead, the best interests of the child are still explicitly made subject to a balance:

> …the best interests of the child must be a primary consideration. This means that they must be considered first. They can, of course, be outweighed by the cumulative effect of other considerations.[552]

On the other hand, Laws LJ appears to go too far in the opposite direction to English's argument. In reviewing the statement that the child should not be blamed for the moral failure of their parent he exclaimed, 'Of course not; but that is not to say, as sometimes it is perhaps taken to say, that in a child case the importance of immigration control is in any way lessened.'[553] However, if the public interest is entirely unaltered, then to say that the child is

[552] *ZH (Tanzania)* (n21) [33]

[553] *In the matter of LB, CB (a child) and JB (a child)* [2014] EWCA Civ 1693, [15]. This part of Lord Justice Laws' judgment appeared entirely in bold type in the original.

not being blamed for the parent's actions becomes a mere platitude with no legal substance or consequence. This cannot be correct either. It is a principle which has been endorsed by the Supreme Court in both *ZH (Tanzania)* and in *Zoumbas*, which assume that it has some substantive meaning.

I argue that the principle established by the Committee on the Rights of the Child – that the best interests of the child can only be outweighed by rights-based considerations[554] – is the most coherent understanding of what it means not to blame the child. Where deportation arises solely because of the offence that has been committed, it is because the FNO is blameworthy (i.e. they had the moral competence to affect their behaviour so that they did not offend). The child should not be blamed because they lack the moral competence to affect their parent's offending behaviour and therefore they should not experience the negative consequences of that offending (i.e. the deportation of a parent). However, deportation in order to protect the human rights of others is of a different character to deportation as a consequence of past offending. To balance the rights of the child against the rights of others does not entail the blaming of the child.

This is therefore a question as to whose rights are at stake in deportation decisions; the innocent, vulnerable child or the "bad" migrant FNO. Viewed as an assessment purely about the rights of the adult FNO, then their deportation clearly arises as a consequence of the blame that is attached to their offending. The deportation of FNOs is justified by UK courts on the basis that it should 'deter foreign nationals from committing serious crimes by leading them to understand that, whatever the other circumstances, one consequence of them may well be deportation'.[555] Deportation also communicates society's 'revulsion at serious crimes'[556] and

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[554] General Comment No. 6 (2005) (n273) [86]

[555] *OH (Serbia)* (n273) [15]

[556] ibid

the condemnation of 'serious wrongdoers.'[557] Both of these justifications for deportation attach because the FNO is blameworthy; they had the moral capacity to have avoided the blameworthy activity of criminal offending. It is therefore logically coherent[558] to balance the rights of the FNO against public interest considerations – deterrence and communication – which are based solely upon the fact that they have offended.

However, if the assessment is of the rights of the child, then it is morally incoherent to balance their rights against a public interest in deterring offending or communicating social revulsion. This is because blame for the offending does not attach to the child; the child did not have the moral competence to avoid the blameworthy behaviour because the offending was not theirs. Human rights-based considerations, however, can be balanced against the rights of the child because doing so implies no blame. If the best interests of the child conflicts with another individual's human rights then this does not imply that either individual is blameworthy, only that they have valid rights which cannot be simultaneously pursued to their full realisation. Such is, for example, the rights conflict where a divorced parent seeks permission to take a child out of the UK in order for that parent to pursue career or other family interests, such as with a new partner or spouse (which are protected by the parent's right to family and private life under Article 8 ECHR).[559] The best interests of the child to maintain their own private life connections to the UK and their family life with the other parent are balanced against the rights

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[557] *SS (Nigeria)* (n273) [53]

[558] Albeit objectionable on other grounds, such as the inherently discriminatory nature of making only foreign nationals liable for deportation for criminal offences. See *inter alia*, Navasky (n1)

[559] See *inter alia*; Sydney Mitchell Solicitors, 'Legal Implications of Taking Children Abroad If You Are Separated' (17 July 2017) <www.sydneymitchell.co.uk/news/legal-implications-taking-children-abroad-if-you-are-separated> accessed 14 December 2017; Cartwright King Solicitors, 'How Do I Stop My Ex From Taking My Child Out Of The County' (15 December 2015) <http://cartwrightking.co.uk/news/how-do-i-stop-my-ex-from-taking-my-child-out-of-the-country/> accessed 14 December 2017; Rights of Women, 'Children and the Law: Relocation, Holidays and Abduction' <http://rightsofwomen.org.uk/get-information/family-law/children-law-relocation-holidays-abduction> accessed 14 December 2017

of their divorced parent to pursue their Article 8 ECHR protected family and private life. However, no blame attaches to either the parent for their desire to expand their individual private or family life, nor to the child for having their own rights which may point to the court refusing to authorise the child being taken out of the UK. In such cases the role of the courts is to determine whether the proposed interference is disproportionate to the rights held.

In deportation cases, Article 3 UNCRC allows that the best interests of the child may be balanced against the rights of other individuals, because to do so does not require the child to be blamed. For example, where to not deport the FNO would interfere with the rights of others because they are likely to reoffend. Furthermore, the likely reoffending must be of a character which engages the *rights* of another individual. This would include the *rights* of individuals to bodily integrity, to property etc, but not the mere *interests* of general deterrence or communication.

Lady Hale seems to reject any distinction between rights-based and non-rights-based considerations in *ZH (Tanzania)*. Finding it 'difficult to understand the distinction', Lady Hale argues that 'the prevention of disorder or crime is seen as protecting the rights of other individuals' as well as a general public interest.[560] However, if there is no distinction between rights-based and non-rights-based considerations then the requirement that the child should not be 'blamed' for the conduct of their parents become a substance free platitude in the way that Laws LJ implied.[561] For it to mean something substantive for the child not to be blamed for their parent's offending then the distinction between human rights and mere interests (as discussed in detail in chapter 3) becomes of vital importance. There is a distinction between limitations to human rights grounded in the public interest to prevent crime and disorder through deterrence and communication simply because the foreign national has offended, and

[560] *ZH (Tanzania)* (n21) [28]

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

the public interest in protecting the rights of others. To balance the general public *interest* against the rights of the child would entail blaming the child for their parent's offending, whereas where the child's rights are limited in order to protect the *rights* of other individuals no blame entails.

As we can see, unpacking the logical consequences of what *ZH (Tanzania)* means when it states that the child should not be 'blamed' for the offending of their parent has expended a great deal of intellectual energy in the courts and academic comment. If there is no distinction between rights-based and non-rights based considerations which may be balanced against the rights of the child in deportation decisions, then to say that the child should not be 'blamed' for the offending of their parent either it means that the best interests of the child are paramount, despite the explicit rejection of this elsewhere in *ZH (Tanzania)*, or it means nothing. As both these seem absurd conclusions, the only other logical conclusion is that there is in fact a relevant and important distinction between rights-based and non-rights-based considerations which Lady Hale should not have dismissed. Reliance on this distinction, on the other hand, aligns s55 BCIA with the unique characteristic of Article 3 UNCRC that only the rights of others may be balanced against the best interests of the child.

3. A "Modified Balancing Approach"

What *ZH (Tanzania)* provides us with is an alternative approach to deportation decision-making, one that claims to put the best interests of the child first. The "modified balancing approach" begins from the position that the best interests of the child are an independent and separate consideration, one that must be considered separately and (ideally) first. The best interests of the child is a child-centred assessment in that the child should not be blamed for the offending of their parent. I argue that this means that the best interests of the child cannot

be outweighed by non-rights-based considerations but can be outweighed by the rights of other individuals.

At the same time as introducing into UK deportation law these principles which align with the unique characteristics of Article 3 UNCRC, the "modified balancing approach" remains attached to a balancing of family life and the public interest in deportation under Article 8 ECHR. Although the best interests of the child must be considered separately, it is also said to be an 'integral part of the proportionality assessment under article 8 ECHR'.[562] The legal propositions inherent to this "modified balancing approach" are:

- That the best interests of the child should normally be identified at the beginning of the balancing exercise (i.e. separately);[563]
- No consideration may be treated as being inherently more significant than the best interests of the child;[564]
- That the best interests decision should not be devalued by the immigration record or criminal conduct of their parents and so should be taken in isolation from and without reference to those factors;[565]
- That the best interests assessment is to be placed in the balance with other factors relevant to the Article 8 ECHR balancing exercise.[566]

[562] *Zoumbas* (n268) [10]

[563] *Kaur (children's best interests / public interest interface)* [2017] UKUT 14 (IAC), [40]

[564] *Zoumbas* (n268) [10]

[565] *Kaur* (n563) [37]

[566] ibid [19]

This "modified balancing approach" is consistent with UK courts attempting to navigate a new legal obligation – s55 BCIA – alongside existing human rights obligations under Article 8 ECHR. However, this also incorporates the tensions between Article 8 ECHR and Article 3 UNCRC which in chapter 3 I analysed as creating the problems of the *polycentricity* of deportation decisions and the *plurality of decision-making norms*.

4. Evaluating the "Modified Balancing Approach"

If the "modified balancing approach" replicates in UK law the theoretical problems described in chapter 3 by the need to give effect to both Article 8 ECHR and Article 3 UNCRC simultaneously, then we can use the issues identified as a means by which to explain why the "modified balancing approach" fails to resolve the problems. This part therefore uses the ideas of *polycentricity* and the *plurality of decision-making norms* as analytical devices.

4(a) Polycentricity

The "modified balancing approach" is clear that the best interests of the child are a facet of the Article 8 ECHR balancing exercise. As Jane Fortin asserts, Lady Hale means that 'the need to fulfil the requirements of Article 3 of the CRC were made very much in the context of carrying out the balancing exercise required by Article 8 [ECHR]'[567] The "simple balancing approach" required the best interest of the child to be folded into consideration of family life. The "modified balancing approach" appears to require the best interests of the child to be part of the Article 8 ECHR assessment, and seeks to treat the best interest of the child separately so as to ensure that it is not excluded from consideration either by accident or design. In the "simple balancing approach" the treatment of the right to family life as a commonly-held right resulted

[567] Fortin (2014) (n175) 58

in, I argued, only a partial consideration as to what the best interests of the child actually includes. The "modified balancing approach" seeks to ameliorate this by requiring the best interests of the child to be considered separately and first. The "modified balancing approach" is therefore more *polycentric* than the "simple balancing approach" because it requires more of the decision-maker in terms of considering the best interests of the child. By considering the best interests of the child separately and first it seeks to ensure that the best interests of the child are considered at all; something that the "simple balancing approach" struggled to evidence. This is reinforced by the Upper Tribunal authority finding that s55 BCIA is a discrete statutory duty which, if the SSHD or courts fails to discharge, would be an error of law.[568]

However, even as an independent statutory duty, s55 BCIA falls short of being established as a human right in UK law. Any subsuming of the best interests of the child into the Article 8 ECHR balancing exercise robs the best interests of the child of their status as a *right* and instead treats it as a mere *interest*. The folding of the best interests of the child into the Article 8 ECHR balancing exercise means that the presumption of priority holds only for the right to family life. The "modified balancing approach" does not anticipate a separate inquiry as to the tests of legitimate aim, suitability, and necessity with respect to the best interests of the child. The best interests of the child is still being treated as a mere interest rather than as a separate human right.

The "modified balancing approach" therefore is *poly*centric because it more effectively takes into account all the relevant interests in deportation decisions. However, it is not poly*centric* because it still places the rights of the adult foreign national offender at the centre of the enquiry. The "modified balancing approach" remains a question as to the disposal of a

[568] *MK (section 55 - Tribunal options) Sierra Leone* (n502)

foreign national offender – albeit a disposal which takes more notice of the child – rather than a question about the best interests of the child.

4(b) Plurality of Decision-Making Norms

4(b)(i) The relationship between family life and the best interests of the child

The "modified balancing approach" is more *polycentric* than the "simple balancing approach" because of the fact that it requires the best interests of the child to be considered separately and to be given no less inherent weight than any other considerations. However, in making deportation decisions more *polycentric*, the "modified balancing approach" fails to address the *plurality of decision-making norms* which are a logical consequence of the principles that UK courts established in *ZH (Tanzania)*. In particular, *ZH (Tanzania)* provides no guidance as to the proper relationship between the best interests of the child and the right to family life. *ZH (Tanzania)* demands that the best interests of the child be considered first, to have an inherent significance, and to be determined without reference to the offending of the parent. But having determined what the best interest of the child requires, *ZH (Tanzania)* provides no indication as to what to do with it or what relationship, if any, it has with the rest of the interests which make up family life. In chapter 3 I referenced this problem in the abstract by drawing a box around the best interests rights of the children involved in a deportation decision:

Article 8 ECHR	**Article 8 ECHR**	**Article 8 ECHR**	**UNCRC Article 3**
Marcus (FNO)	Samira (Partner)	Adam (Child)	Adam (Child)
		Bryony (Child)	Bryony (Child)
	Sharon (Ex-Partner)	Claude (Child)	Claude (Child)

How does the separate factor of the best interests of the child fit into the balancing exercise of Article 8 ECHR? The metaphor of the balance works as a means of decision-making because it permits the weighing of two arguments; claimant versus defendant, deportation versus leave to remain. Determining the weight of what goes into each side of the balance may be more complex than weighing one thing on each side, and I argued that the "simple balancing approach" of Article 8 ECHR jurisprudence in deportation cases is one such example, whereby weight may be determined by a relationship between two factors (the *value* of family life magnified by the *gravity* of the interference). But this does not upset the general idea of a two-sided balance.

The scales of justice are presented visually (for example on the Lady Justice statue on the Old Bailey) as a merchant's scale with two balancing pans. Visually, we can imagine a form of scales with three pans dangling from a suspended tripod. This would allow the balancing of three separate weights; whichever pan hangs lowest is the weightiest of the three. But this extension of balancing does not accurately reflect what is meant by the "modified balancing approach" because although it is being treated as a separate consideration with its own inherent weight, the best interests of the child is not envisaged by this approach as being an entirely independent factor; it is not being balanced *against* the right to family life, it is supposed to be an integral component of it.

However, if the best interests of the child are an integral aspect of the family life then there is a conflict between the individual nature of the best interests of the child and the commonly-held right to family life. In the construction of the "simple balancing approach", outlined in chapter 4, I described the right to family life as being commonly-held between all the family members. This made considerable logical sense as family life is necessarily relational; the right to family life under Article 8 ECHR protects relationships between individuals rather than things that can be experienced by an individual in isolation. The same

is not true of the best interests of the child. These are experienced individually and uniquely by each child within a family. Some aspects of the child's best interests are connected to the relationships that they have with others, especially within the family. However, this is not the case with many other aspects, in particular those concerning their health, education etc, or those benefits which Lady Hale argues flows from the right to abode as a British citizen, 'the advantages of growing up and being educated in their own country, their own culture and their own language.'[569] These are not commonly-held by the family as a whole but instead are held and experienced by the children as individuals.

However, to simply *add* the weight of the best interests of each additional child individually to the balancing exercise on the side of the family life would result in it weighing more heavily the more children there are. Hypothetically, a family of ten children could result in the weight of family life always being greater than the public interest or rights of others, even if the best interests of each individual child is of limited weight. The outweighing of the public interest or rights of others occurs simply by virtue of the existence of multiple children to add to the scales. It appears odd that the rights of ten children, each with modest weight to their best interests, could outweigh the public interest whereas a single child with very weighty best interests may not, simply because they are only one individual. This kind of utilitarian assessment of the happiness of the most people is anathema to human rights discourse.

The alternative is to treat the best interests of all the children in the family as coming under the one facet of family life and labelled 'the best interests of the child'; a kind of average of the best interests of all the children involved. This seems to be the approach in *ZH (Tanzania)* in which the best interests of two children were at stake where it described the relevant facts (in so far as the best interests of the child were concerned) as being the same as between the

[569] *ZH (Tanzania)* (n21) [32]

children, noting that they shared their status as British citizens, both attended school, and were of similar age. Thus to, adopt the ECtHR framework and assess their best interests along the basis of the *value* of the best interests in the specific case, magnified by the *gravity* with which an interference with the best interests are felt, would produce a materially similar outcome for both children. In *ZH (Tanzania)*, Lord Hope could thus talk in terms of 'their' best interests, as though whether there were one, two or more children had no relevance to the outcome of the decision or the weight assigned to the best interests as a facet of the family life right.[570]

But within each family, the best interests of multiple children will often differ. This is evident if for example, as in *PD (Sri Lanka)*, the best interests of the child was measured with reference to factors which will be often influenced most by age; the length of residence of the child, the imminence of educational milestones, and the child's extensive engagement with extra-curricular activities.[571] The assessment of best interests of two children in a family may also differ because one lives with a disability whereas the other does not. Children within a family may even differ on lines of nationality, and 'Although nationality is not a "trump card" it is of particular importance in assessing the best interests of any child.'[572] For example, one child of non-British parents may have acquired ten years residence in the UK since birth and been registered as a British citizen under s(4) of the British Nationality Act 1981 simply because they are ten years old, whereas a younger sibling may be non-British. The examples of potential difference are multifarious.

Where the differences in factual circumstances are material to the assessment of best interests *ZH (Tanzania)* itself provides no guidance. One option would be that the decision-maker determines the weight of the principle of the best interests of the child by reference the

[570] ibid [43]

[571] *PD and Others* (n539) [29]

[572] *ZH (Tanzania)* (n21) [30]

child most negatively affected by the deportation, but this has the effect of completely ignoring the other children in the family as holding individual rights or interests; the very issue that the *polycentricity* of deportation decisions requires the court to grapple with. The other option is to take some kind of average of the best interest effects of deportation on all of the children, but doing so devalues the best interests of any child who would be particularly negatively affected by the deportation of an FNO parent by ignoring their specific circumstances which result in their best interests being particularly weighty. Both solutions offend the *polycentricity* of deportation decisions because they require the decision-maker to either ignore or devalue the relevant best interests of one or more children in the family.

The "modified balancing approach" therefore must offend either the *polycentricity* of deportation decisions or the *plurality of decision-making norms*. It does not adequately address the *polycentricity* of the rights and interests in deportation decisions because in introducing some of the *plurality of decision-making norms* there is no adequate account of the relationship between the best interests of the child and the right to family life to be found in the UK case law. Although it is stated that the best interests of the child are 'integral'[573] to the Article 8 ECHR family life balancing exercise, this by itself does not resolve the relationship satisfactorily; 'integral' is nowhere defined. Regardless of whether the best interests of the child is considered as to be added onto the other interests which make up family life, or treated as an average of the best interests of multiple children, the essential *polycentricity* of deportation decisions cannot be upheld.

[573] *Zoumbas* (n268) [10]

4(b)(ii) Not blaming the child for the offending of their parent

The other aspect of the *plurality of decision-making norms* is the difference between what Article 8 ECHR and Article 3 UNCRC permits to be balanced against the best interests of the child. I argued in chapter 3 that Article 3 UNCRC permits only rights-based considerations to be balanced against the best interests of the child, and that this requirement was the most logical way of understanding the principle in UK law that 'A child must not be blamed for matters for which he or she is not responsible, such as the offending of a parent'.[574] In *ZH (Tanzania),* Lady Hale found that:

> In this case, the countervailing considerations were the need to maintain firm and fair immigration control, coupled with the mother's appalling immigration history and the precariousness of her position when family life was created. But, as the Tribunal rightly pointed out, the children were not to be blamed for that.[575]

Lord Hope highlighted this too in his judgment, finding that 'It would be wrong in principle to devalue what was in their best interests by something for which they could in no way be held to be responsible.'[576] If in treating the best interests of the child as a separate consideration which is determined first, it is clear that the inherent weight that the best interests of the child has should not be 'devalued' by the immigration or criminal wrongdoing of their parents. The children 'are innocent victims of their parents' choices.'[577] Therefore what is in the

[574] ibid

[575] *ZH (Tanzania)* (n21) [33]

[576] ibid [44]

[577] ibid [21]

best interests of the child is not affected by their parent's wrongdoing; what is best for the child is always best.

However, the problem caused by the *plurality of decision-making norms* is when the best interests of the child is made part of the Article 8 ECHR balancing exercise. If the family life (including the best interests of the child) is then balanced against the parent's offending or poor immigration background, the child's best interests are still being made subject to an assessment of the weight assigned to the public interest in deporting their parent. The assessment is shifted later in the decision-making process, but the effect is the same; whether the best interests of the child are more likely to be upheld is entirely dependent on the weight assigned to the offending of the parent. Where two children have equally weighted best interests, where the parent's offence is weighted more in the balancing exercise (because, for example, the prison sentence received was greater) the child's best interests are less likely to prevail in the outcome of the deportation decision. The child is still effectively being blamed for the offending of their parent because whether they suffer the negative consequence of deportation is dependent on the severity of the actions of their FNO parent.

I argue that this lends weight to the idea that to not blame the children for the wrongdoings of their parents is best understood as to prevent the best interests of the child from being balanced against non-rights-based considerations, such as the simple fact that the foreign national offender parent has offended. If to not blame the child means less, then it effectively means nothing because it simply delays the point in the deportation decision-making process at which the child is blamed.

However, only balancing rights-based considerations against the family life (including the best interests of the child) in the "modified balancing approach" must offend the *polycentricity* of deportation decisions because it excludes from the decision those aspects of the public interest which Article 8 ECHR explicitly permits to outweigh the right to family life;

as in *ZH (Tanzania),* 'the need to maintain firm and fair immigration control, coupled with the mother's appalling immigration history and the precariousness of her position when family life was created.'[578] If *polycentricity* requires all the relevant interests to be taken into account in deportation decisions, to exclude aspects of the public interest from an Article 8 ECHR balancing exercise must be problematic.

This is the bind that the UK courts are clearly in following *ZH (Tanzania)*. Not to blame the child for the offending of their parent is a natural consequence of the general public policy context, outlined in chapter 2, that the child is a person in their own right, and moreover, a vulnerable person who requires protection. However, there is clear tension between this public policy view of the child and the view of FNOs as individuals against whom deportation ought to be the automatic consequence of their offending. Both these have been translated into legal principles for decision-making in deportation cases – that the child should not be blamed for the offending of the parent and that the FNO may be deported because of their offending alone – but they remain principles in tension with each other. I have labelled the resulting tension as the *polycentricity* and *plurality of decision-making norms* inherent in deportation decisions. Regardless of the label, it is a tension that the "modified balancing approach" fails to adequately address in theory or practice.

5. Conclusion

This chapter has been propelled by the Supreme Court decision in *ZH (Tanzania)*. It was the first decision to identify s55 BCIA as imposing on the deportation decision-maker legal principles beyond that already identified by previous courts in the Article 8 ECHR derived "simple balancing approach". Previous to *ZH (Tanzania)* the best interests of the child were

[578] ibid [33]

recognised as being a part of the right to family life under Article 8 ECHR (domesticated through the Human Rights Act 1998) and s55 BCIA merely reinforced the necessity that the child's best interests be identified as a factor within that "simple balancing approach". *ZH (Tanzania)*, however, reimagined the s55 duty to have incorporated the 'spirit' of Article 3 UNCRC. According to the Supreme Court, the best interests of the child were to be considered separately, first and to be given an inherent weight of its own within the balancing exercise. Moreover, the child should not be 'blamed' for the actions of their parents which resulted in the deportation proceedings.

This chapter established that these aspects of the *ZH (Tanzania)* decision were a conscious choice made by the court in interpreting the s55 duty. The wording of s55 BCIA is sufficiently vague to be interpreted by the courts in either a narrow or expansive fashion; to support either a "simple balancing approach", or one of paramountcy. Instead, *ZH (Tanzania)* sought a middle ground between interpretive extremes. However, in doing so, *ZH (Tanzania)* introduced into UK law those theoretical problems which in chapter 3 I identified as inherent in any deportation decision-making process which seeks to give effect to Article 3 UNCRC and Article 8 ECHR simultaneously. Neither *ZH (Tanzania)*, nor the case law which followed it, have resolved these. There is no articulation of the proper relationship between the best interests of the child and family life, other than that the best interests of the child is simultaneously of separate, primary inherent weight, and also 'integral' to family life. The child is not to be 'blamed' for the offending of their parent, but the family life which encompasses their best interests may be balanced against that offending.

This is problematic because the failure to articulate a decision-making process which satisfies the *polycentricity* of deportation decisions and the *plurality of decision-making norms* means that the "modified balancing approach" is essentially incoherent. Whilst its central claim is to put the best interests of the child first – temporally and substantively – the reality is that it

undermines that by continuing to treat the child as a collateral consequence of an adult-centric focus on the foreign national offender.

CHAPTER 6: AN "EXCEPTION APPROACH AFTER THE IMMIGRATION ACT 2014

1. Introduction

This thesis is about the different approaches in UK deportation law to the obligation to give effect to the best interests of the child. This legal obligation to the best interests of the child has been introduced into UK law by s55 Borders, Citizenship and Immigration Act (BCIA) 2009. I have argued that approaches based on a "simple balance" (after *Huang*)[579] and a "modified balance" (after *ZH (Tanzania)*)[580] failed to give effect to the best interests of the child in a coherent or theoretically consistent manner. I have argued, that this is because deportation cases pull decision-makers in two competing directions; to deport the "bad" FNO, but also to protect the vulnerable, innocent child from the effects of that deportation. Furthermore, the legal obligation to the best interests of the child have appeared as *ad hoc* developments which decision-makers have approached, thus far, as requirements to be integrated into existing standards and frameworks (in particular that of the right to family life under Article 8 ECHR). In this chapter, I explore the "exception approach" to deportation cases that arose from the Immigration Act 2014.

The Immigration Act 2014 has had a complicated history. It was an attempt by the government to place on a statutory footing the Immigration Rules that it had introduced in July 2012. Those rules were themselves 'an attempt to respond to judicial decisions which the Government disapproved of by weighting the proportionality balance conducted by immigration judges firmly on the side of removal and deportation.'[581] Of the competing public policy strands, the government clearly believed that deportation law had erred too far in protecting children (and by extension, their "bad" migrant parents) and not given enough

[579] *Huang* (n8)

[580] *ZH (Tanzania)* (n21)

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

attention to the public interest in deporting FNOs. This was a central plank of Theresa May's Conservative Party conference speech in 2011 when she was Home Secretary, promising that:

> …I will write it into our immigration rules that when foreign nationals are convicted of a criminal offence or breach our immigration laws: when they should be removed, they will be removed.[582]

When Theresa May believed that the 2012 changes to the Immigration Rules were being 'ignored'[583] by the courts she resorted to statute, the Immigration Act 2014, in order that primary legislation 'will specify that foreign nationals who commit serious crimes shall, except in extraordinary circumstances, be deported.'[584] Part 2 of this chapter explains the political and legislative development of the Immigration Rule changes in July 2012 and how the government came to adopt primary legislation as its preferred alternative to changing the landscape of UK deportation law.

The Immigration Act 2014 has also had a complicated history because it has been at the centre of conflicting authority as to its interpretation. This conflicting Upper Tribunal and Court of Appeal authority was finally resolved in October 2018. In the Supreme Court judgment of *KO (Nigeria)*,[585] Lord Carnwath (with whom the rest of the Justices agreed) determined that the Immigration Act 2014 creates closely defined statutory exceptions to deportation. This chapter therefore deals with UK deportation law as it stands in January 2019. Before the

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[582] politics.co.uk (n99)

[583] Simon Walters and Glen Owen, "Judges "sabotaged' MPs' bid to deport rapists and thugs… but Theresa May vows to crush judges' revolt by rushing through tough new laws' (*Daily Mail,* 17 February 2013) <www.dailymail.co.uk/news/article-2279842/Theresa-May-Home-Secretary-vows-crush-judges-revolt-rushing-tough-new-laws.html> accessed 27 July 2018

[584] ibid

[585] *KO (Nigeria)* (n24)

Supreme Court decision in *KO (Nigeria)*, s19 of the Immigration Act 2014 existed in a liminal space. This is because the courts had interpreted the Act as merely introducing three new statutory directions as to the weight that foreign national offending had in the Article 8 ECHR balancing exercise,[586] but otherwise 'in substance the approach envisaged … is not materially different to that which a court will adopt in any other Article 8 exercise.'[587] The deportation provisions of the Immigration Act 2014 were therefore not interpreted by the courts to be substantively different from that which preceded it (and which I labelled and discussed in the previous chapter as the "modified balancing approach"), only that Parliament had put its thumb on the balancing scales in favour of deportation. This thesis therefore does not address it as being an approach distinct from what went previously in its task of drawing out the recent chronology of UK deportation law. This chapter is therefore concerned with s19, Immigration Act 2014 as creating a different "exception approach" to deportation. Whether this different approach was actually UK deportation law from the Act coming into force, or only after the judgment in *KO (Nigeria)* in October 2018, is not an argument that is relevant to this thesis. Determining when the "exception approach" became effective in UK law and when the liminality of the Immigration Act 2014 began and ended does not take further the investigation as to the best interests of the child in UK deportation law.

This chapter therefore proceeds in part 3 with an explanation of the Immigration Act 2014 as requiring an "exception approach" to deportation cases. At the same time, the Immigration Act 2014 did not displace the HRA nor s55 BCIA which I have identified throughout as the site of domestication of the right to family life (Article 8 ECHR) and the best interests of the child (Article 3 UNCRC). Nor did the Immigration Act 2014 displace the case law that preceded it, such as *ZH (Tanzania)*. The "exception approach" therefore can be

[586] Collinson (2017) (n106) 250-251

[587] SSHD submission in *MA (Pakistan) v Upper Tribunal (Immigration and Asylum Chamber) & Anor* [2016] [2016] EWCA Civ 705, [2016] 1 WLR 5093, [28]

assessed with reference to the problems of *polycentricity* and the *plurality of decision-making norms*.

In part 4, I undertake this analysis and conclude that the "exception approach" does not take into account the best interests of the child, and instead substitutes a heightened standard of 'unduly harsh' (or higher) which a child must meet. The exceptions in the Immigration Act also excludes from consideration the best interests of many children by relying on a restrictive definition of a 'qualifying child' who may rely on the exception to deportation. The exception also excludes consideration of the family life rights of other family members affected by deportation, particularly the rights of women – ex-partners, grandparents, and other female relatives – upon whom the care of children frequently falls after the deportation of a parent. The "exception approach" is therefore, I argue, not *polycentric*. Furthermore, the exception approach also fails to resolve the *plurality of decision-making norms* by giving greater inherent weight to the public interest in deportation than the best interest of the child. This is notwithstanding that the primary status of the best interests of the child includes that the best interests of the child should have no less inherent weight than other factors. Finally, the weight given to the public interest is defined by the Immigration Act purely with reference only to the past behaviour of the FNO, rather than by reference to future risk of reoffending, the best interests of the child are balanced against non-rights-based considerations. The effect is to blame the child for the offending of their parent.

Although this new "exception approach" steps outside the layering of the obligations to the best interests of the child onto Article 8 ECHR, which was observed in previous chapters, it still places the foreign national offender at the centre of the enquiry. The "exception approach" starts with a presumption in favour of deportation, against which only the strongest of claims by children can act as an effective exception.

If the Immigration Act 2014 did not displace the s55 BCIA duty, nor the interpretive case law, then if the Immigration Act 2014 does not resolve the problems of *polycentricity* or the *plurality of decision-making norms* which I have argued are created by the concurrent domestication of Article 8 ECHR and Article 3 UNCRC in the forms in which they have been domesticated, then the "exception approach" is deficient in giving effect to the best interests of the child in UK deportation law. Whether or not one believes that the Immigration Act 2014 ought to be repealed and/or replaced as a consequence of its inability to resolve the problems of *polycentricity* or the *plurality of decision-making norms* is contingent upon one's belief that it is both desirable and possible to devise a decision-making process which does resolve these problems. In chapter 7, I suggest an approach to deportation law which proves the possibility of doing so. The desirability of such an approach is a matter of personal political preference.

2. Legislative changes to UK deportation law; the Immigration Rule changes in July 2012 and the Immigration Act 2014

In chapters 4 and 5, it is clear that the courts had driven a great deal of change to the substantive law on deportation. This was perhaps inevitable after *Huang*[588] required decision-makers, appeal tribunals and courts to make individualised decisions about the proportionality of deportation under Article 8 ECHR.[589] This was a state of affairs which the post-2010 Conservative government suggested had occurred with the tacit approval of past administrations:

> …previous Secretaries of State have asserted that if the Courts think that the rules produce disproportionate results in a particular case, the Courts should themselves

[588] *Huang* (n8)

[589] Chapter 2, Part 2

> decide the proportionate outcome on the facts before them rather than hold that the rule itself is incompatible with Article 8. The Courts have accepted this invitation to determine proportionality on a case-by-case basis and do not – indeed cannot – give due weight systematically to the Government's and Parliament's view of where the balance should be struck, because they do not know what that view is.[590]

This was perceived by the government as a 'public policy vacuum'.[591] The claim of a public policy vacuum did not exist in a political one. The government clearly believed that deportation law had not given enough attention to the public interest in deporting foreign national offenders. As SSHD, Theresa May stated that:

> We all know the stories about the Human Rights Act. The violent drug dealer who cannot be sent home because his daughter – for whom he pays no maintenance – lives here. The robber who cannot be removed because he has a girlfriend. […] we will change the immigration rules to ensure that the misinterpretation of Article Eight of the ECHR – the right to a family life – no longer prevents the deportation of people who shouldn't be here. […] The meaning of Article Eight [ECHR] should no longer be perverted. So I will write it into our immigration rules that when foreign nationals are convicted of a criminal offence or breach our immigration laws: when they should be removed, they will be removed.[592]

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

[591] ibid [38]

[592] politics.co.uk (n99)

Thus as a means of pursuing its political agenda, the government introduced new immigration rules in July 2012 to 'embed within the rules the Secretary of State's interpretation of Article 8 ECHR.'[593]

> The new Immigration Rules are intended to fill this public policy vacuum by setting out the Secretary of State's position on proportionality and to meet the democratic deficit by seeking Parliament's agreement to her policy. The rules will state how the balance should be struck between the public interest and individual rights, taking into account relevant case law, and thereby provide for a consistent and fair decision-making process. Therefore, if the rules are proportionate, a decision taken in accordance with the Rules will, other than in exceptional cases, be compatible with Article 8.[594]

The Secretary of State's interpretation of Article 8 ECHR weighted the proportionality balance 'firmly on the side of removal and deportation.'[595] As to the relationship between the courts and Article 8 ECHR, Thomas described the intended impact of the July 2012 Immigration Rules as being:

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

[593] Clayton (n28) 146

[594] Home Office, 'Statement of Intent: Family Migration' (n590) [38]

[595] Southerden (n581) 256

to "shift" the judicial role from reviewing the proportionality of individual administrative decisions to reviewing the proportionality of the Rules[596]

The post-July 2012 Immigration Rules require that once a foreign national offender is determined liable for deportation, that:

> the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A.[597]

Paragraph 399(a) of the Immigration Rules exclusively concerns children (and thus is of exclusive concern to this thesis):

> (a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and
>
> (i) the child is a British Citizen; or
>
> (ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case
>
> (a) it would be unduly harsh for the child to live in the country to which the person is to be deported; and
>
> (b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported

[596] Thomas (n48) 147

[597] Immigration Rules, paragraph 398C

However, family life is complex and the complexity of the post-*Huang* case law is a result of the courts grappling with individual proportionality decisions; what does the right to family life require when the individual complexity of family life is coupled with the complexity of the circumstances of offending which led the foreign national offender to this particular juncture, in the individual complex circumstances that they arise? As Mr Justice Munby in the Court of Appeal observed:

> such is the diversity of forms that the family takes in contemporary society that it is impossible to define, or even to describe at anything less than almost encyclopaedic length, what is meant by "family life" for the purposes of Article 8.[598]

It was apparent that 'strong factual cases which would previously have been allowed under the application Article 8 ECHR would fall outside what was provided for by the Immigration Rules.'[599] This was not least because there was no obvious immediate reference in the Immigration Rules to the best interests of the child and surely, it was argued, that there must be circumstances related to the interests of children which were not reflected adequately in the Immigration Rules.[600] Addressing this in *MF (Nigeria)*, the Court of Appeal benefited from the SSHD's own submission that 'the new rules do not herald a restoration of the exceptionality test.'[601] Therefore the Court of Appeal, apparently with the SSHD's support,

[598] *Singh* (n17) [72]

[599] Collinson (2017) (n106) 244, 248

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

[601] *MF (Nigeria)* (n108) [39]

was able to find space within the Immigration Rules formulation that 'the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances'[602] for authority to continue to conduct 'a proportionality test as required by the Strasbourg jurisprudence.'[603] This Article 8 ECHR proportionality test would operate to capture those cases where the Immigration Rules did not adequately reflect the case law on Article 8 family life. Thus:

> The word "exceptional" is often used to denote a departure from a general rule. The general rule in the present context is that, in the case of a foreign prisoner to whom paras 399 and 399A do not apply, very compelling reasons will be required to outweigh the public interest in deportation. These compelling reasons are the "exceptional circumstances". We would, therefore, hold that the new rules are a complete code and that the exceptional circumstances to be considered in the balancing exercise involve the application of a proportionality test as required by the Strasbourg jurisprudence.[604]

However, despite the SSHD's position in litigation in which '[counsel for the SSHD] has made it clear on behalf of the Secretary of State that the new rules do not herald a restoration of the exceptionality test',[605] in the political sphere the SSHD chose to interpret the decision in

[602] Immigration Rules, paragraph 398C

[603] *MF (Nigeria)* (n108) [44]

[604] ibid[43-44]

[605] ibid [39]

MF (Nigeria) as the judges ignoring Parliament[606] and instead pursued her agenda through primary legislation; in the form of s19 of the Immigration Act 2014.

3. Section 19 of the Immigration Act 2014

Section 19, Immigration Act 2014 is textually dense and, as a piece of amending legislation, is a plethora of sub-sections. Part 2(a) below sets out the relevant portions of the text before describing how it creates a child-centred exception to deportation. However, part 2(b) observes that the Immigration Act 2014 does not displace either the HRA nor the s55 duty, or the deportation case law that preceded it.

3(a) Section 19 Immigration Act 2014 as an "exception approach"

Section 19, Immigration Act 2014 itself introduces a new Part 5A to the Nationality, Immigration and Asylum Act (NIAA) 2002. This thesis will therefore use the section numbers within the context of the NIAA for consistency and clarity, although it will continue to identify the whole as the approach adopted by the Immigration Act 2014. Part 5A NIAA requires courts and tribunals to '(in particular) have regard'[607] to a list of public interest considerations when determining any Article 8 ECHR based appeal against removal or deportation.[608] S117B NIAA lists considerations which apply 'in all cases',[609] and s117C NIAA lists those which apply 'in cases concerning the deportation of foreign national criminals'.[610] The public interest considerations which apply to FNOs states that:

[606] Walters and Owen (n583)

[607] Nationality, Immigration and Asylum Act 2002, s117A(2)

[608] Nationality, Immigration and Asylum Act 2002, s117A(1)

[609] Nationality, Immigration and Asylum Act 2002, s117A(2)(a)

[610] Nationality, Immigration and Asylum Act 2002, s117A(2)(b)

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

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

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

(4) Exception 1 applies where—

(a) C has been lawfully resident in the United Kingdom for most of C's life,

(b) C is socially and culturally integrated in the United Kingdom, and

(c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.

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

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

there are very compelling circumstances, over and above those described in Exceptions 1 and 2[611]

"Exception 1" clearly applies regardless of whether or not the foreign national offender has children and is concerned with what would be considered to be private life under Article 8 ECHR. It is disjunctive to "Exception 2" and thereby applies separately to it as deportation must occur unless either (not both) Exceptions apply. Because this thesis is concerned with foreign national offenders who have children, this chapter is concerned only with "Exception 2".

These sub-sections introduce a new set of legal nomenclature which itself defines. A 'foreign criminal' is a person who is not a British citizen, who has been convicted of an offence, and who has been sentenced to a period of imprisonment of at least 12 months, or 'has been convicted of an offence that has caused serious harm', or 'is a persistent offender'.[612] What

[611] What, though of the textual difference between the exception in s117C of the Immigration Act 2014 and paragraph 399(a) of the Immigration Rules, both concerning deportation? In the simplest account of the relationship between the Immigration Rules and the Immigration Act 2014, the Rules are addressed to the SSHD as the administrative decision-maker of first instance, whereas the Immigration Act 2014 are addressed to courts and tribunals on appeal. This is supported by the text of the Rules and Act:

> 'the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies' (Immigration Rules, paragraph 398(c))
>
> 'This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts'(Immigration Act 2014, s117A(1))

A certain pragmatism prevails to recognise that the provisions must mean substantively the same, not least because 'it would be bizarre for her [the SSHD] to depart from Parliament's view of the public interest as reflected in the legislation, and if she were to do so in a manner prejudicial to the individual, it would simply invite appeals.' (*MA (Pakistan)* (587) [15]).

Furthermore, it has been found by the courts that, 'There is no tension in the fact that there is an area of overlap between [NIAA 2002] s117C(4)&(5) and para 399 of the rules. When s117 was brought into effect by the Commencement Order, the vocabulary of para 399 was different, speaking not of undue harshness but of reasonableness. The rule was amended to reflect the vocabulary of the statute and so the assessment now carried out under the rules is compliant with the requirements of the statutory provision.' (*KMO (section 117 - unduly harsh) Nigeria* [2015] UKUT 00543 (IAC), [12]).

[612] Nationality, Immigration and Asylum Act 2002, 117D(3), inserted by the Immigration Act 2014, s19

these latter two actually mean is irrelevant to this thesis because this thesis had defined FNOs as those who are liable for deportation, and coming under either definition will mean that they are liable for deportation under s3(5) Immigration Act 1971.[613] A 'qualifying child' is 'a person who is under the age of 18 and who is a British citizen, or has lived in the United Kingdom for a continuous period of seven years or more'.[614] A non-British citizen child born in the UK can therefore only become a 'qualifying child' when they reach the age of seven, and any non-British citizen child under the age of seven years cannot be a 'qualified child'. The qualifying period of residence in the UK must be continuous and so any breaks in residence will reset the clock on the qualifying residence period, although what counts as a sufficient break has not yet been the subject of case law.

The statutory exceptions require an 'evaluative exercise'[615] rather than an exercise of balance. The most obvious difference between the two is that balancing requires a comparison between variables, whereas an evaluation is a comparison of a variable against a constant. Therefore I evaluate whether my dinner is healthy by reference to how I define 'healthy' (calorific content, vitamins present, levels of sugar, fat etc), but balance when I consider which dinner is healthier (the dinner with low fat, low sugar, but few vitamins, balanced against the high fat, high sugar dinner fortified with additional vitamins). Thus to evaluate whether a deportation is 'unduly harsh' requires the decision-maker to evaluate whether or not the effects of the deportation meets a definition of 'unduly harsh' which is unchanging and determined externally to the individual case. In contrast, a balancing exercise would require an assessment of the weight of the best interests of the child as against the offending of the FNO; the greater

[613] *Yussuf (meaning of "liable to deportation")* [2018] UKUT 00117 (IAC). See also: *OLO and Others (para 398 - 'foreign criminal')* [2016] UKUT 56 (IAC); *Chege ('is a persistent offender') Kenya* [2016] UKUT 187 (IAC), [2016] Imm AR 833

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

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

the severity of offending the worse must be the consequences for the child before it can be considered 'unduly harsh'.

In *KO (Nigeria)*, Lord Carnwath found nothing in the use of the terms 'the effect of C's deportation on the partner or child would be unduly harsh'[616] that 'import[s] a reference to the conduct of the parent' which is to be balanced against the situation of the children or partner.[617] Because it is an evaluative exercise, the meaning of 'unduly harsh' or 'very compelling circumstances' applies uniformly across the category of foreign national offender, defined with reference to the length of their imprisonment that it covers. Therefore any FNO sentenced to imprisonment for less than four years must demonstrate that the effect of their deportation is unduly harsh on a qualifying child, regardless of whether their sentence is for one year or three-and-a-half years, and whether certain types of offence are considered to be more severe than others. Likewise, the child of an FNO sentenced to twenty years imprisonment must meet only the same level of 'very compelling circumstances' as where the FNO parent was sentenced to only four years. The seriousness of the offence committed is irrelevant to the judicial task, because this is defined by the statutory categories of exception, so that decision-makers would not be 'asked to decide whether consequences which are deemed unduly harsh for the son of an insurance fraudster may be acceptably harsh for the son of a drug-dealer.'[618]

In comparison with the decision-making approaches described in the preceding two chapters, an exception to deportation marks two significant departures. The first, as already noted, is that under the exception approach to the Immigration Act 2014 the weight assigned to the public interest side of the Article 8 ECHR balancing scale is pre-determined by statute and of unalterable weight within the two categories of 'unduly harsh' and of exhibiting 'very

[616] Nationality, Immigration, and Asylum Act 2002, s117C(5)

[617] *KO (Nigeria)* (n24) [17] & [22]

[618] ibid [32]

compelling circumstances'. In contrast, the "simple balancing approach" and "modified balancing approach" both envisage the weight of the public interest in deportation to be of (potentially) infinite variability based upon the severity of the offending. The second is that on the other side of the balancing scales stands only the interests of the child.[619] Previously, the best interests of the child would either be folded in its entirety into the family life right of other family members, including the FNO parent, (the "simple balancing approach") or determined separately but then integral to the family life right (the "modified balancing approach").

3(b) The best interests of the child and the right to family life after the Immigration Act 2014

It has been a central claim of this thesis that the best interests of the child (Article 3 UNCRC) and the right to family life (Article 8 ECHR) have been domesticated into UK law by s55 BCIA and the HRA respectively. Because the Immigration Act 2014 does not displace either of these statutory provisions, either by express or implied repeal, both must equally continue to apply. This means that the "exception approach" must be considered in the context of the requirement in UK law to apply both human rights regimes and to grapple with the issues of *polycentricity* and the *plurality of decision-making norms* which are inherent in this legal framework of multiple human rights regimes. If the "exception approach" cannot resolve these problems, then as a decision-making process it cannot give effect to the best interests of the child, as this thesis has argued they are defined in law. If the current statutory regime governing deportation of FNOs with children is deficient in this regard, it strongly suggests that it must be repealed and replaced.

The Immigration Act 2014 operates in the context of the s6 HRA duty that UK courts must act compatibly with Convention rights. This is stated explicitly in s19 Immigration Act 2014 itself:

[619] In this chapter, part 4(a) I make the argument that this falls short of being the *best* interests of the child

117A(1)This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts—

(a) breaches a person's right to respect for private and family life under Article 8, and

(b) as a result would be unlawful under section 6 of the Human Rights Act 1998.

The Home Office ECHR memorandum confirms this intention, stating that, 'New section 117A of the [NIAA] 2002 Act requires a court or tribunal considering Article 8 [ECHR] in an immigration case to have particular regard to the public interest as defined in this Part.'[620]

The Exceptions themselves were justified by the government as comprising a codification of the existing principles of law, both from the ECtHR and domestic courts. These are the principles that, presumably, Theresa May believed had been 'perverted' by erroneous interpretation or application by UK judges.[621] Therefore according to the Home Office ECHR memorandum:

> Exception 2 in new section 117C(5) is designed to capture the circumstances where the Article 8 [ECHR] case law would be likely to prevent deportation of a foreign criminal on family life grounds. […] In applying an "unduly harsh" […] test, particularly in respect of foreign criminals who are also illegal migrants it reflects the principles in the current [Immigration] Rules and the domestic jurisprudence in

[620] 'Immigration Bill: European Convention on Human Rights' (n47) [67]

[621] politics.co.uk (n99)

this area such as ZH (Tanzania) that states the best interests of a child are a primary consideration, particularly where they are British.[622]

The ECHR memorandum does not mention the s55 duty, nor the best interests of the child. However, the Immigration Act 2014 does, and at s71 states unequivocally that:

> For the avoidance of doubt, this Act does not limit any duty imposed on the Secretary of State or any other person by section 55 of the Borders, Citizenship and Immigration Act 2009 (duty regarding the welfare of children).

Furthermore, the courts have found consistently that s55 BCIA and the case law (particularly *ZH (Tanzania)*[623] and *Zoumbas*[624]) 'survived'[625] as applicable principles of law after the Immigration Act 2014. In *MK* it was said that:

> …in all cases where section 55 of the 2009 Act applies, the requirement to perform the twofold statutory duties is unaffected by the statutory reforms made by the Immigration Act 2014 and, in particular, the insertion of the new Part 5A into the Nationality, Immigration and Asylum Act 2002. There has been no amendment of section 55 of the 2009 Act. It continues to apply with full vigour. It has not been modified in any way by the most recent flurry of statutory activity. […] Both

[622] 'Immigration Bill: European Convention on Human Rights' (n47) [85]

[623] *ZH (Tanzania)* (n27)

[624] *Zoumbas* (n268)

[625] *Kaur* (n563) [30]

> regimes will have to be given full effect by the Secretary of State in appropriate cases.[626]

This was also the finding of the Supreme Court in *KO (Nigeria)*:

> …the presumption, in the absence of clear language to the contrary, that the provisions are intended to be consistent with the general principles relating to the "best interests" of children, including the principle that "a child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent"[627]

Therefore, those aspects of the best interests of the child which I have argued in this thesis arise from the domestication of Article 3 UNCRC into UK law also survive; that the best interests of the child is a primary consideration (to be considered separately, first, and of no less inherent weight than other considerations) and that the best interests of the child should not be balanced against non-rights-based considerations. This also means, inevitably, that the theoretical challenges inherent to giving effect to the best interests of the child in UK law also survive. The "exception approach" in the Immigration Act 2014 to deportation cases must demonstrate that it resolves the problems of *polycentricity* and the *plurality of decision-making norms* in order to give effective consideration to the best interests of the child in deportation decisions. In part 3 of this chapter, I argue that it does not.

[626] *MK* (n502) [22] (emphasis original)

[627] *KO (Nigeria)* (n24) [15]

4. Evaluation of the "Exception Approach"

4(a) Polycentricity

Polycentricity in deportation decisions requires that all the rights and interests affected by deportation are taken into account. However, to describe the Immigration Act 2014 as a "child-centred" exception flatters to deceive. The principal problem with the statutory exception as it stands is that although it is concerned exclusively with the interests of the child, it is not consistent with the *best* interests of the child. This is the case both in the criteria which act as a necessary gateway for the exception, and the standard of harm required before the exception takes effect.

A 'qualifying child', is one who is 'a person who is under the age of 18 and who is a British citizen, or has lived in the United Kingdom for a continuous period of seven years or more'.[628] The inclusion of an automatic qualification of a British citizen child, regardless of age, is not in itself objectionable because it helps move the 'right to abode' from a simple liberty to enter without let or hinderance[629] to a more protective status for children, albeit one that remains short of granting an inviolable positive right to remain.. The Supreme Court in *ZH (Tanzania)* also recognised an intrinsic significance of British citizenship for a child's best interests:

> Nor should the intrinsic importance of citizenship be played down. As citizens these children have rights which they will not be able to exercise if they move to another country. They will lose the advantages of growing up and being educated in their own country, their own culture and their own language.[630]

[628] Nationality, Immigration and Asylum Act 2002, s117D(1)

[629] Caroline Sawyer, 'Not Every Child Matters: The UK's Expulsion of British Citizens' (2006) 14 The International Journal of Children's Rights 157, 160

[630] *ZH (Tanzania)* (n21) [32]

Identity is a core aspect of the best interests of the child under the UK family law 'welfare checklist'[631] (s1(2) Children Act 1989) and the Committee on the Rights of the Child General Comment 14 on the right of the child to have his or her best interests taken as a primary consideration.[632] Living in one's country of citizenship is important to a child's identity, Bhabha argues, because the:

> Ability to enjoy the attributes of the apprenticeship [to adult citizenship rights, such as voting] is a prerequisite for the assumption of the obligations of citizenship on majority; citizenship, to be meaningful, then, is a civic practice that has to be lived and experienced, that requires participatory presence and engagement[633]

For the British state to ignore the importance of British citizenship as establishing a moral right of presence in the UK is, Bhabha argues, to ignore the moral obligations of the state to its citizens. In deportation cases, 'Attention to the claims of the citizen child is displaced by a focus on the noncitizen parent.'[634] But this represents selective blindness to the 'fact [that] all non-naturalized citizens acquire their privileged insider status and their associated claims on the state through the accident of birth'.[635]

However, this argument does not also commit one to also argue that the best interests of the child requires non-British children to be constructively deported to their country of

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[631] Herring (n141) 535

[632] General Comment No. 14 (2013) (n125)

[633] Bhabha (2004) (n15) 113

[634] Bhabha (2014) (n42) 77

[635] ibid

nationality. A British identity – whatever that is – may be developed by a child who is not a British citizen, and maintaining that identity should be an integral part of the assessment of their best interests. Secondly, the moral obligation on the British state extending to its citizens an unconditional right of abode does not extinguish its moral or legal obligations to the best interests of all children; citizen and non-citizen alike. Recognising a right to abode of one's own citizens does not require a state to force all children to live in the state of their nationality, either by preventing the freely chosen emigration of British citizen children from the UK or deporting non-British citizen children. The automatic inclusion of British citizen children to 'qualifying' status under the Immigration Act 2014 also does not preclude non-British citizen children from also qualifying. Indeed, the Immigration Act 2014 defines children who qualify for the exceptions as including non-British citizen children who have been resident in the UK for seven years or more.[636]

However, the problem with this rule-based qualification is that where the outcome of deportation of a foreign national offender parent is unduly harsh on a non-British child, that child is not protected from the harm to their best interests unless they meet an arbitrary threshold of seven years residence; 'Rule-based systems can also lead to unjust outcomes.'[637] This is clearly a probable consequence of hard and fast qualifying criteria, such as that the exceptions to deportation apply only to British citizens and children who have been resident in the UK for seven years or more. A 'seven year policy'[638] has particular resonance for UK immigration lawyers. Between 1996 and 2008, a Home Office policy (referred to as DP 5/96) applied to the effect that where a child had been resident in the UK for seven years, neither

[636] Nationality, Immigration and Asylum Act 2002, s117D(1)

[637] Otto (n111) 445

[638] Alex Cooray, 'Private Life Applications for Children Following the Withdrawal of DP5/96' (*Duncan Lewis Solicitors*, 11 October 2010) <www.duncanlewis.co.uk/immigration_news/Private_Life_applications_for_children_following_the_withdrawal_of_DP596_%2811_October_2010%29.html> accessed 26 May 2016

deportation nor removal action would normally be taken against a child, and leave to remain would be granted to their family.[639] Even after the official withdrawal of the policy the courts found seven years to be an appropriate rule of thumb as to how long a child's residency in the UK would have to be in order to weigh heavily in the Article 8 ECHR balancing exercise.[640] The difference between a general principle and an inviolable rule is self-evident, but also of legal importance. The Secretary of State acts unlawfully if she treats a policy as having the character of a rule,[641] so to have refused leave to remain solely on the basis that a child had not reached the milestone of seven years residence under DP 5/96 would have been unlawful. Were DP 5/96 still in operation as a policy, the best interests of the child would be of relevance as to whether seven years residence was a reliable rule of thumb to apply in the individual case. Lots of factors associated with the best interests of the child may suggest that a specific child ought to be granted leave to remain, along with their family, before they had accumulated seven years residence. In contrast, the 'qualifying child' criteria of s117D(1) NIAA is impervious to arguments to the effect that the *best* interests of the child require that they be granted access to the statutory exception, regardless of their length of residence. The qualifying child criteria ensure that the interests of some children of foreign national offenders are considered under the statutory exception to deportation, but not the *best* interests of all children of foreign national offenders. The "exception approach" therefore cannot be *polycentric* because it fails to take into account all of the relevant rights and interests in deportation decisions, particularly the best interests of children who do not qualify for the statutory exception.

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[639] Immigration Law Practitioners' Association (ILPA), 'Withdrawal of Seven Year Child Concession - DP5/96' <www.ilpa.org.uk/data/resources/4640/09.01.1098.pdf> accessed 27 May 2016

[640] *EM and Others (Returnees) Zimbabwe CG* [2011] UKUT 98 (IAC), [308]

[641] *R (Alvi) v Secretary of State for the Home Department* [2012] UKSC 33. See also: *Secretary of State for the Home Department v Pankina* [2010] EWCA Civ 719

The second stage of the exception is whether the effect is 'unduly harsh' or exhibiting 'very compelling circumstances', depending on whether the foreign national offender was sentenced to a period of more or less than four years imprisonment. Even the lower standard of 'unduly harsh' presents considerable issues for the claim that the exception to deportation under the Immigration Act 2014 actually takes into account the best interests of the child. A standard of 'unduly harsh' effects on the child is defined in the case law by reference to synonyms rather than substantive content:

> …*"unduly harsh"* does not equate with uncomfortable, inconvenient, undesirable or merely difficult. Rather, it poses a considerably more elevated threshold. "Harsh" in this context, denotes something severe, or bleak. It is the antitheses of pleasant or comfortable. Furthermore, the addition of the adverb *"unduly"* raises an already elevated standard still higher.[642]

This is not to say that a court will never find that the consequences of deportation are very severe or very bleak. In *MK (Sierra Leone)*, from which the above definition of 'unduly harsh' is taken, the Upper Tribunal found that:

> …we have no hesitation in concluding that it would be unduly harsh for either of the two seven year old British citizen children concerned to be abruptly uprooted from their United Kingdom life setting and lifestyle and exiled to this struggling, impoverished and plague stricken west African state. No reasonable or right thinking person would consider this anything less than cruel.[643]

[642] *MK (section 55 – Tribunal options)* (n502) [46] (emphasis original)

[643] ibid

However, other judges have taken the view that the loss of contact with an FNO parent from a child's life in the UK is not 'unduly harsh':

> There is undoubtedly a close relationship between this father and his children, as one would expect in any family living together as does this one. The preserved finding of fact is that, although it would not be unduly harsh for the four younger children to move to Nigeria, the reality of the situation is that they will remain here and, as the family relationships cannot be maintained by modern means of communication, there will be a complete fracture of these family relationships. The claimant is not authorised to work and so has been unable to provide financial support for his family but his role within the household has meant that his wife has been able to work, which she would find hard or impossible if she had to care on a daily basis for the children without her husband's assistance. Thus it is said that if the claimant is removed, the main household income will be lost and the children would be subject to economic disadvantage. But, again, that is not an experience that can, in my judgment, be categorised as severe or bleak or excessively harsh as, like any other person lawfully settled in the United Kingdom, the claimant's wife and family will have access to welfare benefits should they be needed.[644]

In neither case is the assessment made as to what is in the child's best interests. An assessment of the best interests of the child, whatever list of factors are used to determine it, requires only that one situation be better than another, whereas 'unduly harsh' clearly requires

[644] *KMO (section 117 - unduly harsh)* (n611) [43]

the post-deportation situation to be severely bleak. For example, if the 'plague stricken' state of the country (Sierra Leone was at the time experiencing an Ebola outbreak)[645] tipped it into the status of unduly harsh, it would unlikely to be in the best interests of the British children in *MK* to suffer constructive deportation to Sierra Leone if it was only 'struggling' and 'impoverished'. However, the 'unduly harsh' exception will act to protect the child's best interests in only the heightened set of negative circumstances. In the other example from case law, it will usually be in the best interests of the child to be in a household with a working parent rather than one reliant on benefits, not least because benefit income is capped at £20,000pa[646] whereas income from employment is not. In contrast, only abject destitution appears to be considered in the case law to be an 'unduly harsh' effect of deportation.

This is not to say that the best interests of the child must be a paramount consideration – both Article 3 UNCRC and the Supreme Court in *ZH (Tanzania)* permits the best interests of the child to be overridden by the rights of others – but that to take into account the best interests of the child in a *polycentric* deportation decision requires that what is in the *best* interests of the child must be determined. Because the statutory exception under the Immigration Act 2014 does not address the *best* interests of the child, it cannot be *polycentric* in the way required by Article 3 UNCRC or s55 BCIA.

Despite this, it is worth observing that the Immigration Act 2014 exception does at least address one of the problems of *polycentricity* thrown up by the "modified balancing approach" explored in the preceding chapter. That approach was critiqued as having no way to cope effectively with situations whereby the best interests of one child in a family weighed more heavily against deportation than that of their siblings. The question posed was whether the "modified balancing approach" would average out the weight of best interests as between the

[645] *MK (section 55 – Tribunal options) Sierra Leone* (n502) [45]

[646] Gov.uk, 'Benefit Cap' <www.gov.uk/benefit-cap/benefit-cap-amounts> accessed 7 June 2018

multiple children; such an average would more adequately reflect the effect of the deportation on the children (as a plural group), but not give sufficient weight to the best interests of a child with weightier interests. The exception at least seems to answer this aspect of the problem of *polycentricity* by making the focus of the investigation about each individual child's circumstances, and weighing each individually against a standard test of 'unduly harsh' or 'very compelling circumstances'. This is a test that can be failed when applied to one child but passed when applied to a second, yet the "fail" by one child has no bearing on whether the second child will pass, nor on the legal consequences for the foreign national offender parent's deportation as a result of that "pass".

Although it presents an effective answer to the existence of the rights and interests of multiple children, the exceptions under the Immigration Act 2014 still leads to problematic theoretical and practical consequences with respect to how it treats the *polycentric* rights of other adults which are also at stake. S117C NIAA does permit deportation to be outweighed by the effect of deportation on the 'the partner **or** child'.[647] However, this is a disjunctive exception which only includes current partners who are British Citizens or those with indefinite leave to remain.[648] The focus solely on the interests of the individual child results in the exclusion of interests of other family members, which in deportation appeals affecting children will frequently be the interests of women; ex-partners, mothers, grandmothers, and other female family members upon whom the care of children frequently falls. Any decision-making process which is apt to exclude the interests of women is vulnerable to a forceful feminist critique on this ground alone.[649] As in the example from *KMO*,[650] above, the loss of employment/career

[647] Nationality, Immigration and Asylum Act 2002, s117C(5) (emphasis added)

[648] Nationality, Immigration and Asylum Act 2002, s117D(1)

[649] See for example, de Hart (n441)

[650] *KMO (section 117 - unduly harsh)* (n5611) [43]

and associated material disadvantage will be most immediately experienced as a negative effect on the private life of the carer who remains in the UK. But if this is an unduly harsh effect of the deportation of the foreign national offender, then only if they are currently partners will s117C NIAA intervene and an exception to prevent the deportation; ex-partners, grandparents or others must suffer the consequences of the deportation, regardless of its harshness.

The final set of interests to account for in a *polycentric* deportation decision is that of the public interest. The exception approach in the Immigration Act 2014 does take into account the public interest by starting with a presumption of deportation; 'The deportation of foreign criminals is in the public interest.'[651] The public interest thereafter weighs more heavily depending on the length of sentence served because the interests of the child will only outweigh the assumption of deportation if it is 'unduly harsh' on the child, rising to 'exceptional circumstances' where the sentence is greater than four years imprisonment. The structural device of an exception rather than a balancing exercise does not diminish the fact that the public interest is taken into account in the exception approach to the Immigration Act 2014. The specific situation of children as vulnerable and dependent on adult care, as discussed in chapter 2, means that, as Elias LJ observed in *MA (Pakistan)*, there are 'powerful reasons why, [a qualifying child should be permitted to remain in the UK] even though the effect is that their possibly undeserving families can remain with them.'[652]

However, the presumption in favour of deportation means that even where the interests of individuals are taken into account by the exceptions to deportation in the Immigration Act 2014, they are given the status of mere interests rather than as *rights*. As argued in chapter 3, the core distinction between rights and interests is that rights are subject to the presumption of priority; the requirement that interference is only lawful if it is for a legitimate aim, is rational,

[651] Nationality, Immigration and Asylum Act 2002, s117C(1)

[652] *MA* (*Pakistan*) (587) [37]

necessary, and proportionate. The presumption in favour of deportation means that it may be conducted even if it is neither rational nor necessary; the only relevant test is that of its unduly harsh or exceptional effects on the child.

The exception approach to the Immigration Act 2014 is therefore only weakly *polycentric*. It takes into account the interests of some children (i.e. 'qualifying' children) and adults (i.e. 'qualifying' partners), and well as the public interest in deportation. However, it falls considerably short of taking into account the interests of all children or adults affected by deportation decisions because of the restrictive qualifying criteria. Furthermore the exceedingly high barriers of 'unduly harsh' or 'exceptional circumstances' means that the *best* interests of qualifying children are not taken into account, only a version of their interest where the consequences of deportation are the most abject. Finally, the presumption in favour of deportation means that the interests of children are taken into account as mere interests, rather than as a human right.

4(b) Plurality of Decision-Making Norms

The *plurality of decision-making norms*, identified in chapter 3, is encountered because deportation decisions are governed by two separate, substantive legal regimes – Article 3 UNCRC and Article 8 ECHR (or their domestic equivalents) – which have within them specific rules governing their fulfilment. It is in trying to give effect to both sets of rules effectively in one decision-making process which is challenging. Chapters 4 and 5 have shown how UK courts have attempted to reconcile these two regimes in decision-making processes which I have described as the "simple balancing approach" and the "modified balancing approach", but I have argued that neither has effectively given effect to the *plurality of decision-making norms* because both have required one or more of the decision-making norms contained within the best interests of the child to be ignored. In this part I argue that the "exception approach" in the

Immigration Act 2014 at least fulfils the requirement that the interests of the child[653] ought to be a primary consideration. However, it does not also adequately require that the best interests of the child be balanced only against rights-based considerations. The ultimate conclusion is that the Immigration Act 2014's "exception approach" also fails to resolve this problem.

First, then, does an "exception approach" to the Immigration Act 2014 treat the interests of the child as *a* primary consideration? In one sense, the interests of the child are *the* primary consideration because the only evaluation that the decision-maker is required to make is with respect to the child; is the deportation of their FNO parent unduly harsh or exhibits very compelling circumstances above unduly harsh? The primary status of the interests of the child arises from the intrinsically child-centred frame of thought that the decision-maker is required to adopt. Because the weight of the public interest is pre-determined by statute based on the length of sentence served, the decision-maker should not be distracted from a focus solely on the child's interests by considerations based on the specific context of the offending of the FNO. However, it may also be said that the interests of the child are not treated as *a* primary interest as the public interest is considered to be (contrary to the instructions in *Zoumbas*) 'inherently more significant than the best interests of the children'.[654] This is because there is a presumption in favour of deportation which automatically makes is more significant, and because the exception to deportation are not framed in terms of the *best* interests of the child, rather they are framed as the greater hurdles of 'unduly harsh' or 'exceptional circumstances'.

A decision-making framework which focuses on the child's interests goes some way to satisfy the requirement to treat the best interests of the child as a primary consideration. However, Article 3 UNCRC does not impose simply a requirement to treat the best interests of

[653] In the previous part I argued that the *best* interests of the child are not being taken into account, only some aspects of their interests.

[654] *Zoumbas* (n268) [10]

the child first in the temporal sense. As Lord Kerr argued, there must be a substantive effect on the decision-making in order for the treating the best interests of the child as being temporally first to actually comply with the primacy of the best interests.[655] Therefore the presumption in favour of deportation results in a substantive undercutting of the procedural child-centric focus of the Immigration Act 2014 exception. Although it is a child-centric exception, it is one that is drawn so narrowly that the best interests of the child cannot be treated as being of the same inherent significance as the public interest in deportation. This is by design; 'The Government aims to remove as many foreign national offenders as quickly as possible'.[656]

The second aspect of the *plurality of decision-making norms* is that the best interests of the child should not be overridden by non-rights-based considerations. The "exception approach" to deportation in the Immigration Act 2014 fails to comply with this in a more direct way than the previous approaches explored. In the "simple balancing approach" and the "modified balancing approach" the weight assigned to the public interest in deportation is variable based on the severity of the offending of the FNO, whereas in the "exceptionapproach" the weight of the public interest is static. This means that it cannot be adjusted by the decision-maker in order to reflect a greater public interest in deportation arising from a rights-based reason for deportation, or lowered where the public interest in deportation is only in consequence of a generalised public interest.

For example, both FNO1 and FNO2 are sentenced to two years imprisonment. Where FNO1 presents a high risk of (re)offending against an individual this is clearly a rights-based consideration which General Comment 6[657] permits to override the best interests of the child;[658]

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[655] *HH v Deputy Prosecutor of the Italian Republic, Genoa* (n534) [144]

[656] House of Commons Committee of Public Affairs, 'Managing and Removing Foreign National Offenders' <https://publications.parliament.uk/pa/cm201415/cmselect/cmpubacc/708/708.pdf> accessed 2 August 2017, 5

[657] General Comment No. 6 (2005) (n373) [86]

[658] See discussion in chapter 3, part 3(b)

the individual who is at high risk of being offended against has a right to physical integrity, property etc, which would be interfered with by the offending (which in Article 8(2) ECHR terms is 'the rights or freedoms of others'). In contrast, where FNO2 presents no risk of reoffending, the rationale for their deportation can lie only in the communicative and deterrent functions of deportation;[659] considerations which are not based in the rights of individuals but rest instead in a general public interest (in Article 8 EHCR terms, the public interest in the prevention of crime and disorder). In these contrasting examples between FNO1 and FNO2, the "simple balancing approach" and "modified balancing approach" both permit the decision-maker to weigh the public interest in deportation more heavily against FNO1. The general public interest in deportation may still under both approaches be sufficient to make the deportation of FNO2 proportionate to the interference with the best interests and/or right to family life of the child, and therefore contrary to the requirements of Article 3 UNCRC, but these balance-based approaches at least allow for recognition that the public interest is less weighty in such cases.

Under the "exception approach" of decision making arising from the Immigration Act 2014, the weight assigned to the public interest in the cases of both FNO1 and FNO2 is defined by statute to be the same – that the effect of their deportation must be 'unduly harsh' on the qualifying child – and cannot be adjusted by the decision-maker. Therefore not only may the best interests of the child be overridden by non-rights based considerations, the best interests of the child are as likely to be overridden by non-rights based considerations as by rights-based considerations because the statutory regime makes no distinction between the two.

This conclusion as to the failure of the "exception approach" to adequately address the unique characteristic of Article 3 UNCRC that only rights-based considerations can override

[659] *OH (Serbia)* (n273) [15]; *AM v SSHD* (n273) [24]; *SS (Nigeria)* (n273) [53]

the best interests of the child also therefore feeds into its failure of the "exception approach" to preclude the blaming of the child for the offending of their parent. Although the "exception approach" directly eschews any suggestion (as had been made by the Secretary of State) that the Immigration Act 2014 requires a consideration of whether 'the consequences were or were not "due"'[660] to the child, the relative weight of the public interest is altered by statute with reference only to the prison sentence served by elevating the test of 'unduly harsh' under s117C(5) to that of 'exceptional circumstances' in s117C(6) NIAA. This is inherently looking back only at what past prison sentence was served, rather than being a forward-looking assessment as to the risk that the FNO presents in the future for the rights of others. The child is therefore required to suffer greater negative consequences the longer the prison sentence of the parent. The only determinative factor is how long the FNO spent in prison and it is irrelevant to the exceptions as to whether or not they are likely to reoffend in a way as to interfere with the rights of others. There can be no clearer example of deportation effectively blaming the child for the offending of their parent.

For these reasons, the "exception approach" fails to give adequate attention to the unique characteristics of Article 3 UNCRC and thereby fails to adequately address *plurality of decision-making norms*. The exception does not treat the best interests of the child as a primary consideration in a substantive sense, despite the procedural frame of thought presents a superficial child-centeredness. Instead, the public interest in deportation is treated as having more inherent weight than the best interests of the child because the exception begins with a presumption in favour of deportation. Because the "exception approach" alters the weight of the public interest based solely on the length of prison sentence received, the best interests of

[660] *MAB (para 399; "unduly harsh") USA* (n615) [50]

the child may be overridden by non-rights-based considerations. In the exception approach, this also results in the child being directly blamed for the offending of the parent.

5. Conclusion

Immigration Act 2014, confirmed by the Supreme Court in *KO (Nigeria),* introduced an "exception approach" deportation. The statutory exceptions are not based on a human right balancing framework, but on a child-centric evaluation of the impact of deportation of an FNO on children. However, under scrutiny the notion of a "child-centric" exception to deportation flatters to deceive. Whilst the "exception approach" does centre on the child, it does not adequately take into account the *best* interests of all children affected by deportation. Instead, any child who falls outside of the qualifying criteria will not have their best interests considered as an exception. Even if a child is a 'qualifying child' then the requirement that the effects on the child ought to be 'unduly harsh' or evidence 'exceptional circumstances' mean that the exception is not based on what is in the *best* interests of the child, but on a heightened standard which the Upper Tribunal have described as amounting to very severe or very bleak. The exception also does not take into account the rights of all adults affected by deportation, particularly the rights of ex-partners, grandparents, and other female relatives upon whom the care of children often falls after the deportation of a parent. The "exception approach" to the Immigration Act 2014 is therefore not *polycentric*.

The "exception approach" also fails to resolve the *plurality of decision-making norms.* Because the exception begins with an assumption in favour of deportation, the best interests of the child are not given a primary status through which they possess an inherent weight no less than the public interest in deportation. Finally, because the weight assigned to the public interest is pre-determined by statute and based entirely on the pass behaviour of the FNO (indexed by the length of the prison sentence received) the interests of the child are caused to

be outweighed by non-rights-based considerations. The effect is to blame the child for the offending of their parent because the length of sentence determines whether the child can be required to face a very bleak future, or worse.

CHAPTER 7: TAKING THE HUMAN RIGHTS OF CHILDREN SERIOUSLY AND LITERALLY: A "HUMAN RIGHTS APPROACH" TO DEPORTATION DECISION-MAKING

1. Introduction

This thesis has been concerned up to this point with identifying the reasons for the difficulties that UK deportation law has found in giving effect to the best interests of the child. In this final substantive chapter, I demonstrate the existence of an alternative decision-making approach which is capable of giving effect to the best interests of the child in deportation decisions, whilst avoiding the theoretical pitfalls that I identified each previous decision-making approach as having fallen into. In demonstrating this alternative decision-making approach – which I call the "human rights approach" – it supports the conclusion that the problems of *polycentricity* and the *plurality of decision-making norms* is a consequence of the *ad hoc* layering of legal obligations in deportation decisions. This chapter supports that conclusion by demonstrating that an approach to decision-making which is not based on the *ad hoc* layering conducted to date is more capable of giving effect to the best interests of the child in deportation decisions.

In chapter 3 I argued that UK law has domesticated Article 8 ECHR (the right to family life) through the Human Rights Act (HRA) 1998 and Article 3 UNCRC (the best interests of the child) through s55 Borders, Citizenship and Immigration Act (BCIA) 2009, and through subsequent case law. These two domestic legal requirements mean that deportation decisions ought to be *polycentric* in that they must give effect to all the relevant rights and interests engaged in deportation decisions, and also ought to respect the *plurality* of decision-making norms inherent in Article 3 UNCRC and Article 8 ECHR. These issues arise because UK decision-makers are required to remain faithful to both legal regimes. However, the application of a deportation decision which gives simultaneous effect to both appears theoretically impossible because they require fundamentally different things of decision-makers.

Because the suggested "human rights approach" is not based on the *ad hoc* layering of legal obligations, it will require new legislation. As well as the repeal of s19 Immigration Act 2014, amendment to the UK Borders Act 2007 will be required. The UK Borders Act 2007 sets

out the requirements for 'automatic deportation' and when deportation orders may be revoked. The suggested amendment is in bold:

> Section 32(6) The Secretary of State may not revoke a deportation order […] unless
>
> (a) he thinks that an exception under section 33 applies
>
> Section 33(2) Exception 1 is where removal of the foreign criminal in pursuance of the deportation order would breach—
>
> (a) a person's [European] Convention rights, or
>
> (b) the United Kingdom's obligations under the Refugee Convention, or
>
> **(c) the best interests of the child under Article 3 of the UN Convention on the Rights of the Child.**

The "human rights approach" would therefore not build on top of developments in UK deportation law in which different approaches to decision-making have been adopted in order to accommodate both Article 8 ECHR and Article 3 UNCRC. I outlined these approaches in chapters 4-6. In the first, the "simple balancing approach", the best interests of the child was woven directly into the fabric of Article 8 ECHR as one of the principles which the European Court of Human Rights adopted in its *Üner* judgment[661] as relevant for determining the proportionality of an interference with the right to family life under Article 8 ECHR. In the "modified balancing approach" the status of the best interests of the child as a primary consideration was asserted, including through the statutory duty of s55 BCIA, and the attempt by the court in *ZH (Tanzania)* to bolt this duty onto the Article 8 ECHR proportionality

[661] *Üner v Netherlands* (n20)

exercise. The final development has been the "exception approach" found in the Immigration Act 2014 which allowed for the best interests of the child to override the public interest in the deportation of FNOs, but only where the deportation was 'unduly harsh' on the child or exhibited 'exceptional circumstances'. Each of these separate approaches have failed to be *polycentric* or to give effect to the *plurality* of decision-making norms. The layering of the legal obligations to the best interests of the child onto the right to family life has thereby failed to produce a coherent means of deportation decision-making which gives effect to the best interests of the child.

The "human rights approach" takes the idea of the best interests of the child as a human right both literally and seriously. The starting point of the "human rights approach" is that the best interests of the child is an independent, free-standing human right. This means that it is to be applied separately to the right to family life rather than as an element of it. This arises from the UK's international law obligation under Article 3 UNCRC. The Committee on the Rights of the Child have already given their view that the best interests of the child is 'A substantive right […which] creates an intrinsic obligation for States, is directly applicable (self-executing) and can be invoked before a court.'[662] The difficulties of the "simple balancing approach", "modified balancing approach", and "exception approach" have all apparently arisen as a result of UK deportation law not domesticating Article 3 UNCRC as an independent, free-standing human right, and instead attempting to give effect to the best interests of the child only as a part of a single deportation decision with the right to family life, either subsumed within it (as in the "simple balancing approach"), or bolted-on to it (the "modified balancing approach"), or as an Article 8 ECHR based exception to deportation (the "exception approach"). The central contention in this chapter then is that if treating the best interests of the child as a human right

[662] General Comment No. 14 (2013) (n104)

can result in a deportation decision-making process which is *polycentric* and respects the *plurality* of decision-making norms of Article 8 ECHR and Article 3 UNCRC then approaches which are based on the *ad hoc* layering together of these obligations make it difficult for UK law to give effect to the best interests of the child in deportation decisions.

This chapter progresses by examining what it would mean for the best interests of the child to be a human right in the UK's deportation law. In part 2, I outline the "human rights approach" to the best interests of the child as a commitment to the application of the tests of proportionality which I argued in chapter 3 as inherent to the presumption of priority that human rights have over other interests;[663] the tests of rationality, necessity, and balancing. In part 3 I take each of the questions inherent to the presumption of priority in turn and explain their proposed meaning and content. Because this approach focuses on the importance of the tests preceding that of balancing, I label this approach as being the "human rights approach", in contrast to the approaches previously discussed which have either placed emphasis on the balancing exercise (the "simple balancing approach" and the "modified balancing approach") or on a framework of exceptions (the "exception approach"). I argue (in part 4 of this chapter) that this "human rights approach" does successfully achieve a decision-making process which is both *polycentric* and reflects the *plurality* of decision-making norms. It does this by recognising that Article 3 UNCRC and Article 8 ECHR are different human rights which must be determined separately of each other. Both are relevant to situations of deportation, but this does not require them to be determined together as part of a single decision-making process.

[663] Donnelly (n171) 5

2. Outline of the "Human Rights Approach"

In this first part I outline what I mean by a "human rights approach" to the best interests of the child. Part 2(a) establishes what is required of deportation decision-makers under the best interests of the child as a human right. I outline proportionality and its sub-tests of rationality, necessity, and balancing as essential elements of human rights decisions recognised widely in the academic literature. I identify these as prevailing in UK human rights law, particularly in the House of Lords case of *Razgar*[664] and therefore use this as the starting point for developing a decision-making framework relevant to the best interests of the child as a human right.

Once part 2 of this chapter identifies the outline of the "human rights approach", part 3 of this chapter describes in detail the operation of each of the separate elements inherent to it. Part 4 analyses this "human rights approach" as a means by which UK deportation law is able to rationally construct a decision-making process which gives effect to the best interests of the child and reconcile Article 3 UNCRC and Article 8 ECHR.

2(a) A "human rights approach" to the best interests of the child

The Committee of the Rights of the Child have stated that Article 3 UNCRC – the best interests of the child – is itself a freestanding human right than can be directly engaged.[665] This is supported by academic acceptance of this assertion[666] and of academic and practitioner acceptance of the authoritative nature of General Comments of the Committee.[667]

Because it starts from the position that the best interests of the child is a human right, the "human rights approach" requires the application of human rights methodology in a

[664] *R (Razgar)* (n284) [17]

[665] General Comment No. 14 (2013) (n104)

[666] Alston (n217) 15; Werner and Goeman (n217) 6

[667] Livingstone, Lansdown and Third (n242)

disciplined manner. In chapter 3 I argued the importance of a distinction between human rights and mere interests. Human rights are interests that are considered to be particularly important by political choice and societal agreement.[668] When an interest is considered to be of sufficient importance to be considered a human right, the importance of human rights is established and maintained by the presumption of priority that human rights have.[669] The presumption of priority is that to lawfully interfere with a human right, the state must satisfy all of a sequence of tests. These tests together are frequently labelled the tests of 'proportionality',[670] but each plays a distinct role, and only the last requires a balancing between two things (the right of the individual against the state interference with the right) which resembles the metaphor merchant's balancing scales. The tests in sequence are:

(1) Where specified by the human rights measure in question, the interference must be in pursuit of a permitted restriction. Some human rights are written with specific legitimate aims which may be pursued by the state as a permitted restriction on a right, such as with the Article 8 ECHR right to family life and the legitimate aims of '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.' Other human rights may only be interfered with in order to further another human right, and in chapter 3 I argued that Article 3 UNCRC is of this type so

[668] What Dembour labels a 'deliberative' view of human rights: Dembour (2006) (n196) 11

[669] Donnelly (n171) 5

[670] Madhav Khosla, 'Proportionality: An Assault on Human Rights?: A Reply' (2010) 8 International Journal of Constitutional Law 298, 300

that only rights-based considerations may be balanced against the best interests of the child.[671]

(2) The second test, that of suitability or rationality, 'requires that the limitation contribute to the achievement of a legitimate end.'[672]

(3) The test of necessity requires that the action be the 'least restrictive means to further that end'.[673]

(4) The final test of proportionality is that of 'balancing',[674] also referred to in the literature as 'proportionality *sricto sensu*'[675] or 'proportionality in the narrow sense',[676] enquires as to whether the benefits of the permitted government action under the legitimate aim are proportionate to the interference with the human right.[677] Thus the balancing test 'requires that the limitation achieve the pursued end to a degree that justifies the extent of the constraint on the […] right'.[678]

The discrete application of each test of the presumption of priority – rationality, necessity, and balancing – is a widely used theoretical description of what is required in making

[671] General Comment No. 6 (2005) (n252) [86]

[672] Pulido (n184) 484. See also: Cohen-Eliya and Porat (n184) 464

[673] Cohen-Eliya and Porat (n184) 464; Pulido (n184) 484

[674] Pulido (n184) 483

[675] Barak (n187) 6

[676] Pulido (n184) 484

[677] Cohen-Eliya and Porat (n184) 464

[678] Pulido (n184) 484

proportionality decisions.[679] In the House of Lords decision in *Razgar*, Lord Bingham set out the 'likely'[680] questions for identifying the proportionality of an interference with Article 8 ECHR:

> (1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?
>
> (2) If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8?
>
> (3) If so, is such interference in accordance with the law?
>
> (4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?
>
> (5) If so, is such interference proportionate to the legitimate public end sought to be achieved? [681]

This structured five question approach continues to be used by UK courts to structure Article 8 ECHR decision-making.[682] We can see here that the test of necessity (*Razgar* question 4) is distinct from balancing (*Razgar* question 5). This distinction between the two tests exists

[679] ibid 483

[680] *R (Razgar)* (n284) [17]

[681] ibid

[682] *Onwuje & Anor v Secretary of State for the Home Department* [2018] EWCA Civ 331; *SE (Mauritius) & Anor v Secretary of State for the Home Department* [2017] EWCA Civ 2145; *Ahsan v Secretary of State for the Home Department (Rev 1)* [2017] EWCA Civ 2009; *Secretary of State for the Home Department v SU* [2017] EWCA Civ 1069; *Singh (India) v Secretary of State for the Home Department* [2017] EWCA Civ 362

notwithstanding Hickman's citation of *Huang*[683] as evidence that the test of necessity is 'subservient to the more general, less structured, question of whether the overall measure has struck a 'fair balance' between competing interests.'[684]

The "human rights approach" to the best interests of the child is a logical development of the *Razgar* questions, albeit applied to a different human right; that of the best interests of the child. The framework of the "human rights approach" presents the decision-maker in deportation decisions with a series of questions, with the tests of rationality, necessity, and balancing at their heart:

1. Are the best interests of the child engaged?
2. What are the best interests of the child?
3. Would the deportation of the FNO secure the rights and freedoms of an identifiable individual or secure the rights and freedoms of the general public?
4. Would the deportation of the FNO *rationally* contribute to securing the rights and freedoms of others?
5. Is the deportation of the FNO *necessary* to secure the rights and freedoms of others?
6. Is the interference with the best interests of the child *strictly proportionate* to the interference with the rights and freedoms of others?

Questions 1-3 are important to determining the outline of the best interests of the child and the rights of others as the permitted restriction against which it may be balanced. For the practical purposes of a decision-maker applying proportionality to the best interests of the child as a substantive human right, it is essential that the decision-maker is satisfied that the best

[683] *Huang* (n8)

[684] Hickman (n191) 189

interests of the child are engaged and what those best interests are, and what the outlines of the permitted restriction on that right are that the state pleads in aid of deportation. This is the same work that *Razgar* questions 1-3 do with respect to outlining the existence and scope of an engaged family life and its permitted limitations.

I have argued consistently that the permitted restrictions on the best interests of the child as a human right under Article 3 UNCRC are the rights of others. In contrast, Article 8 ECHR permits a wider series of legitimate aims based in the public interest to be balanced against the right to family life. It should be uncontroversial that different human rights may have different permitted restrictions. For example, Article 9 ECHR permits proportionate interference with the right to thought, conscience and religion for 'the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.' These are a different list of legitimate aims to those under Article 8 ECHR and the decision-maker could not seek to lawfully interfere with Article 9 ECHR on the basis of a legitimate aim that appears under Article 8 ECHR but excluded from Article 9 ECHR (such as the 'economic well-being of the country').

An addition to *Razgar* is the test of *rationality*[685] which is inexplicably absent from *Razgar* but is otherwise a generally accepted aspect of proportionality.[686] The "human rights approach" to the best interests of the child requires its application, although its importance in individual cases vis-à-vis the other questions will be fact specific; some cases may turn more on the tests of rationality, some on necessity, and some on balancing. What does not alter is

[685] The test of 'rationality' is sometimes referred to as the test of 'suitability'. However, the difference of label points to the same thing. See; Alexy (n308) 135; Robert Alexy, 'Balancing, Constitutional Review, and Representation' (2005) 3 International Journal of Constitutional Law 572, 572; Greer (2006) (n204) 205; Pulido (n205) 483; Stone Sweet and Mathews (n222) 75

[686] For example: Cohen-Eliya and Porat (n184) 464; Hickman (n191) 179; Luc B Tremblay, 'An Egalitarian Defense of Proportionality-Based Balancing' (2014) 12 International Journal of Constitutional Law 864, 865

that a failure to pass only one of these tests is necessary and sufficient to render deportation an unlawful interference with the human right of the best interests of the child.

Part 3 of this chapter engage each of the questions inherent to the best interests of the child as a human right. Part 4 engages in analysis of this new "human rights approach" as resolving the *polycentricity* and *plurality of decision-making norms* thrown up by deportation decisions.

3. The Questions Inherent to the "Human Rights Approach"

In the previous part, I established that there are six questions which are inherent to the "human rights approach" to the best interests of the child. Each are individually important, although their importance in specific cases will be fact dependent. Not all cases will require a detailed evaluation of each test, but the decision-maker must turn their mind to each test. This part addresses each of these tests in turn as to their proposed content and meaning, in the order to which they arise:

1. Are the best interests of the child engaged?
2. What are the best interests of the child?
3. Would the deportation of the FNO secure the rights and freedoms of an identifiable individual or secure the rights and freedoms of the general public?
4. Would the deportation of the FNO *rationally* contribute to securing the rights and freedoms others?
5. Is the deportation of the FNO *necessary* to secure the rights and freedoms of others?
6. Is the interference with the best interests of the child *strictly proportionate* to the interference with the rights and freedoms of others?

3(a) Are the best interests of the child engaged?

The first relevant question to the "human rights approach" is to establish that the best interests of the child are engaged in a deportation decision, and that they are engaged as a human right. The "human rights approach" puts the best interest of the child temporally first; one of the conditions of Article 3 UNCRC inherent in the best interests of the child being a primary consideration. However, by itself, putting the question as to whether the best interests of the child are engaged first does not make the best interests of the child a human right; to do so requires a commitment to the other questions – of necessity, rationality, and proportionality – inherent to the presumption of priority for human rights. It is a commitment to the presumption of priority which distinguishes the creation of a human right as opposed to a mere interest.

That a deportation decision impacts upon a child ('a person who is under the age of 18')[687] is determined in individual cases. However, because all children have the right to have their best interests considered as a primary consideration, then unlike with the "exception approach" of decision-making arising from the Immigration Act 2014, the consideration of best interests under a "human rights approach" is not restricted to what the Act refers to as 'qualifying children'; a British citizen child or a child who has been resident for a period of seven years or more.[688] Therefore under a "human rights approach" the best interests of all children will be considered regardless of citizenship, age, or length of residency, so long as their interests are affected by the deportation of a FNO.

Under the "human rights approach", whether a person affected by a deportation is actually a child is 'an issue of objective fact'[689] and the means by which age assessments are

[687] *R (AA) v Secretary of State for the Home Department and Wolverhampton City Council* [2016] EWHC 1543 (Admin), [8]

[688] Nationality, Immigration and Asylum Act 2002, s117D(1)

[689] *R (AA)* (n623) [67]

conducted[690] is beyond the scope of this thesis. Additionally, whether a child will actually be affected by a deportation decision is open to a range of analysis, but there appears little reason to depart from the ECtHR norm in family cases which assumes that family life exists on the basis of blood and conducts a short enquiry as to whether there are sufficient *de facto* ties to amount to family life in other relationships.[691] Such *de facto* ties between a foreign national offender and a child could be emotional or financial. However, the necessity of ties between the child to the FNO parent in order to engage the child's human right to their best interests suggests that children would not have a relevant best interests right which is engaged in all circumstances. Absence of ties would likely occur where contact between the child and FNO is prohibited with no prospect of being permitted in the future, as may be ordered by a family court.[692]

More relevant for the purposes of this thesis are issues arising where there are more than one child affected by a deportation decision, because taking into account the rights of multiple rights holders is central to the *polycentricity* of deportation decisions. I explain how the "human rights approach" would deal with there being more than one child whose individual human rights are engaged by a deportation decision; either where there is more than one child whose best interests appear to conflict (part 3(a)(i)), and where there are more than one child where their best interests coincide (part 3(a)(ii)).

[690] Coram Children's Legal Centre, 'Migrant Children's Project FACT SHEET: The Age Assessment Process' (March 2017) <www.childrenslegalcentre.com/wp-content/uploads/2017/03/Age-assessment-process.march_.2017.pdf> accessed 13 August 2018

[691] van Walsum (n344) 511; Thym (n344) 89-90

[692] Family Law, 'Practice Direction 12J - Child Arrangements and Contact Order: Domestic Violence and Harm' [2017] Fam Law 1230

3(a)(i) Whose best interests in situations of conflict?

The "human rights approach" gives greater recognition than previously explored approaches to the possibility of conflict between the rights of a child and the rights of others, including that of other children. Where a deportation decision is not in the best interests of one child, but is in the best interests of another child, or would imperil the human rights of an adult (such as the other parent in situations involving domestic violence), those human rights would be identified in the third question of the "human rights approach"; would the deportation of the foreign national offender secure the rights and freedoms of an identifiable individual or secure the rights and freedoms of the general public? The question then becomes whether the deportation of the foreign national offender is rational or necessary in order to secure the right of another child to their best interests, or an adult to their human rights. If these questions are answered in the affirmative, the "human rights approach" permits a balancing between the best interests of the child and the rights of others, including the best interests of other children. The best interests of the child are therefore not an absolute human right, a trump card or overriding exception. Instead, it may give way to the rights of others.

If it is in the best interests of the child to not have contact with a foreign national offender parent, then this is a family law matter and cannot be reasonably resolved by deportation proceedings. There is an existing legal obligation on social services to protect children from harm arising from parental contact and measures available for them to safeguard children. These obligations apply at the point at which the child is at risk and so social services cannot, lawfully, delay action behind deportation proceedings in the hope or expectation that deportation will discharge their safeguarding duties for them.[693] If the child is already

[693] Family Lives, 'Social Services and Your Family' <www.familylives.org.uk/advice/your-family/social-services-and-your-family/social-services-and-your-family/> accessed 13 August 2018; Social Care Institute for Excellence, 'Child Protection Procedures' <www.scie.org.uk/publications/introductionto/childrenssocialcare/childprotection.asp> accessed 13 August 2018

prevented from contact with the foreign national offender parent in order to safeguard the child's best interests, then it is unlikely that the best interests of the child as a human right is engaged in the first place.[694] This is because if there is no contact permitted between parent and child then the child's best interests are unlikely to be affected by the parent's deportation.[695]

If on the other hand there is a conflict whereby the deportation of the foreign national offender's deportation would negatively affect the best interests of one child but at the same time be beneficial to the best interests of another child, then the deportation decision-maker would approach this conflict in the same way as they would a conflict between any other human rights. The "human rights approach" resolves, through a structured approach, any conflict between human rights. Is the deportation of the parent rationally capable of protecting the second child, is it strictly necessary to protect the second child, and finally, is it proportionate in the narrow sense?

However, what the state cannot reasonably claim is that the deportation of the FNO is in the best interests of a child where contact is permitted by the family courts. There exists in family law a presumption that children should be brought up by their parent(s) and that 'maintaining current arrangements (the status quo) and contact with the non-residential parent are each in children's best interests.'[696] There is no reason to depart from these assumptions. Where contact between the FNO parent and a child is restricted by the family courts and/or social services then it must be assumed that the contact restrictions in place are sufficient to

[694] Whether the right to family life is engaged is a question of fact (*Singh v The Secretary of State for the Home Department* [2015] EWCA Civ 630). The existence of family life between parent and child, for the purposes of the ECHR, may be broken by circumstance (*Berrehab v The Netherlands* (n194))

[695] Principles as to how deportation decision-makers should approach applications for future contact between parent and child are established in *RS (immigration and family court proceedings) India* [2012] UKUT 00218 (IAC)

[696] Masson, Bailey-Harris and Probert (n132) 654. Citing as authority: *Re L, Re V, Re M, and Re H (Contact: Domestic Violence)* [2000] 2 FLR 334, 365; *Re D (Care: Natural Parent Presumption)* [1999] 1 FLR 135, CA; *Re O (Contact: Imposition of Conditions)* [1995] 2 FLR 124, 128

protect the best interests of the child. Social Services and the family courts, as emanations of the state, can be assumed to provide for the most intensive limitation on parental contact necessary for the protection of the child. The only exception to this are extreme circumstances whereby the FNO parent has shown intent to harm a child, notwithstanding the measures put in place to prevent the child from having any contact.

The answer in these sort of situations is to focus on the question as to whose rights are at stake. In most human rights conflicts we are concerned with how the rights of an individual protect themselves from a certain negative outcome. Such example is when a FNO argues that their own rights to be free from torture (Article 3 ECHR) or to carry on family life (Article 8 ECHR) are at stake. The FNO uses their own human rights as a shield against an undesirable action. In contrast, deportation decisions are of another kind when a child argues that a human rights interference is caused by an action on a third person (the FNO parent). The child is not seeking to protect the human rights of the FNO, nor seeking to prevent deportation for the sake of the FNO; the child is at all times seeking only the protection of their own human rights from disproportionate interference. Confusion only arises when one forgets that the child seeks to engage their human rights to protect themselves from a human rights interference (loss of effective contact with their parent or their own constructive deportation), rather the best interests of the child being used by the foreign national offender to protect them against deportation. As Lady Hale recently noted:

> …it is quite correct to say that children must be recognised as rights-holders in their own right and not just as adjuncts to other people's rights. But that does not mean that their rights are inevitably a passport to another person's rights.[697]

[697] *Makhlouf v Secretary of State for the Home Department (Northern Ireland)* [2016] UKSC 59, [2017] 3 All ER 1, [47]

The best interests of the child are a human right that belongs to the child. Under the "human rights approach", as now, the deportation of a foreign national offender will have been already determined to be *a priori* conducive to the public good because of the offence that they have committed.[698] The deportation order will be made unless it is a violation of someone's human rights to carry it out.[699] If a child is in a situation where their best interests are improved by the deportation of a foreign national offender (e.g. because the foreign national offender is intent on harming them notwithstanding a no contact order) then a deportation order will be made unless someone else's human rights are more weighty in the proportionality assessment. Under the "human rights approach" this may be the human rights of another child of the FNO (e.g. their Article 3 UNCRC right to their best interests).

Conflicts of this type therefore do not present an existential problem for the "human rights approach" to the best interests of the child. Instead the "human rights approach" is specifically designed as a means of resolving such questions through the proportionality exercise. In contrast, an approach based on the paramountcy of the best interests of the child would end up in an unresolvable conflict whereby the best interests of two children point to two different outcomes, but both claim to be the paramount consideration upon which a decision ought to be taken. The principle of paramountcy would result in an unstoppable force meeting an immovable object. In contrast, proportionality under the "human rights approach" permits of an answer in every case as to whether deportation is a proportionate interference.

[698] Immigration Act 1971, s3(5)

[699] UK Borders Act 2007, s33(2); Macdonald and Toal (n79) 1279

3(a)(ii) Whose best interests when there is more than one child?

This preliminary question as to whose rights are at stake also raises an issue first canvassed with respect to the "modified balancing approach" in chapter 5; how should the decision-maker weigh the best interests of multiple children? Immediately above,[700] I addressed how the decision-maker ought to address where different children have divergent best interests; where one child's best interests are negatively affected by the deportation of a FNO, but another child's best interests are enhanced by deportation. In those cases, the "human rights approach" permits of a proportionality assessment between these conflicting rights. However, more challenging is when there are multiple children whose best interests are negatively affected by the deportation of a foreign national offender, but to differing degrees. In chapter 5 I suggested that the best interests of children affected by the deportation of a parent may vary along the lines of the length of their residency in the UK, the imminence of educational milestones, and the child's engagement with extra-curricular activities.[701] The assessment of best interests of two children in a family may also differ because one lives with a disability whereas the other does not. Children within a family may even differ on lines of nationality, and 'Although nationality is not a "trump card" it is of particular importance in assessing the best interests of any child.'[702] The examples of potential difference are multifarious.

Where there are multiple children, I suggested that in the "modified balancing approach" the weight of the best interests of the child might be treated as being either cumulative or averaged out. The first option would seem to artificially advantage families with more children by adding extra weight to the family life side of the balance for each extra child in the family, whereas the second would fail to give sufficient weight to the best interests of a

[700] This chapter, part 3(a)(i)

[701] Factors considered relevant to a child's best interests in *PD and Others* (n495) [29]

[702] *ZH (Tanzania)* (n21) [30]

child whose interests where substantially weightier than that of their siblings. In contrast, the "exception approach" treated each child separately, presenting a pass/fail model whereby the effect on each child was assessed against the standard of 'unduly harsh' or 'exceptional' effects on the individual child. The FNO need not show that their deportation is 'unduly harsh' on all the children affected by their deportation because where the effect of deportation on any one child meets the exception, then the foreign national offender cannot be deported.

Furthermore, unlike the right to family life in the "simple balancing approach" which I argued was conceived as being a commonly-held right, the "human rights approach" also requires each child to be treated separately as the best interests of the child are a right that is held individually and uniquely by each child in a family. Like the "exception approach", the "human rights approach" is a pass/fail whereby the deportation of the foreign national offender is unlawful if it is contrary to the right to the best interests of only one child.

Unlike under the "exception approach", however, this does not mean that the rights or interests of others are irrelevant. I above stated that in situation of conflict between the human rights of different individuals this would be addressed by the tests of rationality, necessity, and balancing as between the two competing rights. Where rights do not conflict, for example where a partner or spouse has a family life with the foreign national offender, that right can also be pressed as a separate right under Article 8 ECHR. Demanding a separation of the family life right of an adult partner and the best interests rights of the child may be critiqued as a way of sidestepping the problem of *polycentricity*. However, I argue that it is instead ensuring that each right is protected and respected to their fullest extent. In contrast, the "simple balancing approach" in particular results in the best interests of the child being subsumed under the family life rights of others (and therefore not realising the best interests of the child fully), and the "exception approach" results in the family life rights of others being subsumed under the best interests of the child. Whereas in *Beoku-Betts* it was rightly said that 'there is only one family

life',[703] the "human rights approach" recognises that the best interests of the child are a human right which is not exhausted by consideration only of the family life of the child and therefore should be considered separately as a distinct human right.

That is not to say that the family life enjoyed by the child, nor the situation of other carers, are not relevant to the best interests of the child. However, their relevance is either with respect to how deportation of the FNO may result in the remaining carer being unable to meet the interests of the child, or because there is a conflict between the rights and interests of the carer and the best interests of the child. In the first instance, these issues make up part of question two, what are the best interests of the child, and in the second instance they go to the third question with respect to securing the rights and freedoms of others. Where the interests of the carer are not relevant to the best interests of the child they remain relevant, and can be pursued as the carers' right to family and/or private life under Article 8 ECHR and should be treated as such.

Only because the ECHR was not designed with an independent, free-standing child's rights component has the ECtHR been required to read in a best interests standard into its Article 8 ECHR jurisprudence, and only because the UK had a reservation to the UNCRC and no domestic incorporation in the immigration sphere has the best interests of the child had to be considered as part of Article 8 ECHR. This *ad hoc* layering of obligations mean that the "simple balancing approach" and "modified balancing approach" arose from need rather than because they present the most sensible means by which to achieve the desired outcome to secure the best interests of the child. The UK's withdrawal of its UNCRC reservation presents an opportunity to recognise a proper free-standing human right to the best interests of the child.

[703] *Beoku-Betts* (n202) [43]

3(b) What are the best interests of the child?

In chapter 2, I outlined the lack of agreement as to what is included, substantively, within the best interests of the child. I briefly examined three checklists as to the content of the best interests of the child; the UK family law 'welfare checklist'[704] (s1(2) Children Act 1989), the Committee on the Rights of the Child General Comment 14,[705] and in the BIC-Model, created by academic Margrite Kalverboer and colleagues.[706] I argued that although each checklist includes and excludes different individual factors, they each contain an identifiable, shared nucleus of concern for the child's physical, emotional, and material needs, and support for the child's development.

Taking the best interests of the child seriously and literally as a human right in the deportation context will require UK courts to engage with detailed consideration of what is in the child's best interests. The Committee on the Rights of the Child argue that the best interests of the child is context specific and a 'dynamic'[707] principle and the "human rights approach" may require UK courts to determine a new checklist specific to deportation law. In chapter 2, I made the point that this thesis is not concerned with defining and defending a particular checklist for determining the best interests of the child because, although it is an important enquiry, it is one which is logically separate from how the best interests of the child ought to be treated within the wider decision-making process in deportation cases.

What is significant for this thesis is that the question as to the best interests of the child is being asked as the central motivating determination of the "human rights approach". In contrast, under the "simple balancing approach" the ECtHR determines the weight of the

[704] Herring (n120) 535

[705] General Comment No. 14 (2013) (n104)

[706] Kalverboer (n122) 135-137

[707] General Comment No. 14 (2013) (n104) [1]

family life as being split between the *value* of family life and the *gravity* if the interference which means that the best interests of the child is never determined as an independent, separate consideration. The "modified balancing approach" does require the best interests of the child to be determined separately but does not address how then the decision-maker should use that determination.

The "human rights approach" requires the decision-maker to make the best interests of the child the primary consideration, both in terms of it being a separate enquiry and being put temporally first. This ensures that the "human rights approach" engages the requirements of Article 3 UNCRC to treat the best interests of the child as a primary consideration.

3(c) Would the deportation of the FNO secure the rights and freedoms of another?

Just as the decision-maker must establish that the best interests of a child are engaged by a deportation, they must also establish that there is a permitted restriction. Only if the interference with a human right is to pursue a permitted restriction can the interference be lawful. I argued in chapter 3 that Article 3 UNCRC only permits human rights-based considerations to be balanced against the best interests of the child, an argument I re-establish in part 3(c)(i). In part 3(c)(ii) I further establish that this means that the reasons supporting deportation of a foreign national offender must be a forward looking assessment as to whether or not the FNO is likely to commit an offence in the future, rather than deportation being invoked solely as a consequence of past offending. In part 3(c)(iii) I argue that there is therefore an important distinction between a risk of future offending which affects the rights of an individual and a general public interest in preventing crime and disorder. The first is a permitted rights-based consideration, and the latter is not under the "human rights approach".

3(c)(i) The rights and freedoms of others

I argued in chapter 3 that Article 3 UNCRC only permits human rights-based considerations to be balanced against the best interests of the child.[708] In contrast, the legitimate aim of preventing crime and disorder under Article 8 ECHR – which may justify an interference with family life – contains non-rights-based aspects. These non-rights-based aspects are a generalised public interest of general deterrence of criminal behaviour and the communication of social revulsion at foreign national offending.[709] I argued that because only a human-rights based consideration may be balanced against the best interest of the child, this requires that the risk of reoffending be linked directly to an interference with the rights or freedoms of another person.

This need not necessarily be an identifiable individual. The "human rights approach" would still permit the best interests of the child to be interfered with where the deportation would secure the rights and freedoms of others, but the government is unable to point to a specific individual who is at risk. This goes some way towards the generalised public interest under Article 8 ECHR to prevent crime and disorder. However, it stops short of reintroducing a balance against the generalised public interest by maintaining a necessary link with a forward-looking assessment of the risk of the FNO interfering with the human rights of others. That there may be uncertainty as to where the line lies between the rights and freedoms of others and the general public interest in preventing crime and disorder is one of the issues which can only be determined with reference to individual cases rather than to an abstract principle. Greer makes a similar point:

[708] Chapter 3, part 3(b)(ii)

[709] *DW (Jamaica)* (n211)

> There is a fine line separating legitimate interference with [European] Convention rights in pursuit of specific collective goals, which is consistent with the Convention's *raison d'etre,* from trampling minority rights in order to secure the common good, which is not.[710]

The fine line that separates the rights and freedoms of others and the general public interest in preventing crime and disorder is easier to identify the further one gets from it. However, one of the primary reasons for the difference between the rights and freedoms of an identifiable individual and of an unknown, theoretical member of the public is that it is a relevant distinction for question 5 (necessity) and question 6 (balancing) of the "human rights approach". Where the FNO poses a risk to a specific individual, there may be no necessity to the deportation because other specific orders may be balancing, the weight that would be given to a risk of offending against an unknown, hypothetical victim would be less than in the case of an interference with the rights and freedoms of a known individual. I explain these assertions fully below in part 6 and part 7. For the questions of necessity and balancing it is an important precursor step to identify whether the best interests of the child is being balanced against the human rights of an identifiable individual, against certain groups or types of people in the abstract, or any possible random individual.

Connected to the question as to whose human rights are balanced against the best interests of the child is identifying that the imputed future activity of the FNO actually engages with the human rights of those individuals. The human rights of others would include where the FNO represented a risk to human rights to bodily integrity and thus (e.g.) offences against the person, sexual offences, etc. It would also include property rights and thus to offences like

[710] Greer (2004) (n212) 431

theft, robbery, fraud etc, and to human rights related to the security of minorities (covered by offences such as inciting religious or racial hatred). Other offences may also engage other human rights of the individual, but this must be assessed on a case by case basis rather than it be presumed that all crimes engage the human rights of some individual. The need to engage substantively with the question as to whether the reoffending risk engages the human rights of others distinguishes the "human rights approach" from the approach adopted in *ZH (Tanzania)* in which Lady Hale appeared to presuppose that any justification based on the prevention of crime and disorder will engage the human rights of others.[711]

Contra the implication of *ZH (Tanzania)*, there is not a general human right to live in a society free from crime, and not all crimes directly interfere with the human rights of individuals. This is not an exercise is identifying victimless crimes, only a recognition that not all acts which are criminal interfere with the human rights of others, and not all interferences with human rights are crimes. Therefore the "human rights approach" to deportation decision-making would not permit the best interests of the child to be balanced against a risk of reoffending by a foreign national offending where the likely offending cannot be shown to directly affect the human rights of others. For example, in the case of the simple possession of drugs,[712] there is no human right that a victim could point to as being interfered with by someone else's drugs possession. Therefore the best interests of the child could not lawfully be interfered with in order to deport a foreign national offender because of their risk of committing such an offence.

[711] *ZH (Tanzania)* (n21) [28]

[712] The maximum sentence for drugs possession is 7 years (class A drugs), 5 years (class B drugs), or 2 years (class C drugs) (Gov.uk, 'Drugs Penalties' <www.gov.uk/penalties-drug-possession-dealing> accessed 13 July 2018)

3(c)(ii) Forward looking focus

The other aspect of the protection of the rights and interests of others as the only permissible limitation on Article 3 UNCRC is that it requires a forward-looking focus of investigation. This means that the deportation of an individual foreign national offender could not be justified on the basis solely of their having committed an offence in the past, only in order to prevent further offences in the future. After all, deportation is not supposed to be part of the process of sentencing for past offending.[713] Deportation cannot protect against a human rights interference by the foreign national offender which occurred in the past because it has already happened. Deportation can, however, contribute to the prevention of a human rights breach in the future. There must therefore be a risk of such an occurrence for there to be a legitimate rights-based justification for interfering with the best interests of the child.

This is a departure from the current assessment of the public interest with respect to non-EAA national FNO, as their deportation is currently justified on the basis of 'avoiding the risk of reoffending, deterrence and public revulsion.'[714] Deterrence and public are not forward looking factors as they are based solely on the fact that offending has occurred in the past, and apply regardless of whether or not the foreign national offender presents a risk of interfering with the human rights of another person in the future.

A purely forward-looking focus on the foreign national offender's conduct would, however, be similar to UK deportation law as it applies to EEA-nationals. The Immigration (European Economic Area) Regulations 2016 explicitly prevents deportation being justified solely on the basis that a crime has been committed in the past. Instead, only if the foreign national offender presents an ongoing threat of reoffending can their deportation be justified.[715]

[713] *Maaouia v France* App no 39652/98 (Grand Chamber, 5 October 2000) [2000] ECHR 455, [39]

[714] *DW (Jamaica)* (n211) [23]

[715] The Immigration (European Economic Area) Regulations 2016, Regulation 27:

The difference of treatment between EEA and non-EAA national offenders has been recognised by UK courts:

> …a decision to remove an EEA national has to be based exclusively on the personal conduct of the person concerned and requires an individualised assessment of his case. […] The approach required in an EEA case is fundamentally inconsistent with the application of a statutory duty to deport on the basis of a generalised assumption that deportation is conducive to the public good.[716]

Furthermore, general deterrence and public revulsion cannot justify the deportation of an EAA-national FNO. Instead, the decision to deport an EAA-national FNO:

> (5) Where a relevant decision is taken on grounds of public policy or public security it shall, in addition to complying with the preceding paragraphs of this regulation, be taken in accordance with the following principles—
>
> (a) the decision must comply with the principle of proportionality;
>
> (b) the decision must be based exclusively on the personal conduct of the person concerned;
>
> (c) the personal conduct of the person must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, taking into account past conduct of the person and that the threat does not need to be imminent;
>
> (d) matters isolated from the particulars of the case or which relate to considerations of general prevention do not justify the decision;
>
> (e) a person's previous criminal convictions do not in themselves justify the decision;
>
> (f) the decision may be taken on preventative grounds, even in the absence of a previous criminal conviction, provided the grounds are specific to the person.

[716] *R (Connell) v Secretary of State for the Home Department* [2018] EWCA Civ 1329, [34]

> …must be based exclusively on the personal conduct of the person concerned and that matters that do not directly relate to the particular case or which relate to considerations of general prevention do not justify a decision to remove him. On the face of it, therefore, deterrence, in the sense of measures designed to deter others from committing similar offences, has of itself no part to play in a decision to remove the individual offender. Similarly, it is difficult to see how a desire to reflect public revulsion at the particular offence can properly have any part to play[717]

Applying an identical requirement within a "human rights approach" to the best interests of the child is therefore not a radical development to deportation law, but rather an extension of part of the law that already applies to EEA-national FNOs.

3(d) Would the deportation of the FNO rationally contribute to the rights and freedoms of others?

Deportation results in the incapacitation of the FNO from offending further in the UK (because they are no longer present here) and so in the majority of cases, their incapacitation through deportation will rationally contribute to securing the human rights of others. However, there is a minority of cases where a deportation order may not rationally contribute, for example where a deportation order cannot be executed because the FNO is *de jure* or *de facto* stateless.

As well as the practical aspect of rationality discussed above there is also a normative one. One aspect of non-rights-based considerations against which the best interests of the child are balanced in the "simple balancing approach", "modified balancing approach", and "exception approach" is that deportation orders serve a communicative function. Applying a

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

deportation order even if it cannot be practically carried out can still be *rationally* applied if the deportation order itself is considered to serve its communicative function by labelling the foreign national offenders as 'serious wrongdoers'[718] or 'public revulsion'[719] at their crimes. However, a communicative function of deportation orders cannot be used to justify a deportation which interferes with the human right to the best interests of the child under the "human rights approach" because communication about the offence or offender does not protect the human rights of others. Labelling an offender or their offence by imposing an inexecutable deportation order therefore does not prevent the FNO from reoffending and thereby interfering with the rights of others. Indeed, the focus on the control of FNOs through deportation, and deportation alone, may serve to direct attention away from other means of post-sentence control of offenders which are explored under the heading of *necessity* in part 6, below.

However, if a core purpose of deportation orders is given effect to, such as communicating revulsion, then the order is automatically both *rational* and *necessary*, and no other alternatives to deportation need be considered in order to protect the rights of others. If, on the other hand, a deportation order is not *rational* because it cannot effectively incapacitate the foreign national offender from interfering with the rights of others by reoffending, the onus is placed on the state to consider alternative means by which to prevent or reduce the risk of reoffending.

[718] *SS (Nigeria) v SSHD* (n239) [53]

[719] *DW (Jamaica)* (n211) [23]

3(e) Is the deportation of the FNO necessary to secure the rights and freedoms of others?

The question of necessity seeks the 'least restrictive means'[720] of securing the legitimate aim and thus requires the state to show that there was not a less invasive action that would have achieved the same goals, but without interfering with individual human rights to the same extent. Where a less restrictive means exists, the proposed interference will be inconsistent with human rights protections as being unnecessary.[721] Taking seriously the best interests of the child as a human right requires that the deportation of FNOs be necessary, and therefore that there is no less restrictive means of achieving that aim. The test of necessity would therefore require the decision-maker to give careful consideration to the range of devices that are present in UK law and which are currently used with British Citizen offenders after the end of their sentences. Examples include post-sentence supervision, Sexual Harm Prevention Orders, Criminal Behaviour Orders, and Terrorism Prevention and Investigative Measures, a list which I expand on further below. If any of these other measures are likely to be effective in protecting the rights of others, then deportation is not *necessary* and therefore a violation of the child's best interests as a human right.

There is nothing about foreign national offenders that marks them out as being different from UK national offenders so that deportation can be the only necessary means of post-sentence prevention of reoffending. Indeed, the threat to society posed by foreign national offending has been greatly exaggerated. During the 2006 'crisis' surrounding the release of 1023 FNOs from prison without being considered for deportation,[722] only three had been in fact imprisoned for murder and nine for rape, yet 'the ceaseless discussion of rape and murder

[720] Brems and Lavrysen (n191), 1

[721] Barak (n11) 744; Brems and Lavrysen, (n191) 3

[722] BBC News (n78)

had the effect of inflating the significance of these offenders within the population.'[723] Albeit from dated figures,[724] FNOs may be less likely to be imprisoned for violent or sexual offences:

> …the December 2006 figures suggest that rates of violent and sexual offences for sentenced foreign and British nationals are either comparable or less prevalent amongst foreign nationals. For example, 10 per cent of sentenced foreign nationals were imprisoned for sexual offences against 11 per cent of British nationals, and 18 per cent of foreign nationals were imprisoned for 'violence against the person' compared to 28 per cent of British nationals.[725]

There is clearly a disconnect between the public imagination of FNO and the reality of the general risk they pose. Deportation clearly cannot be necessary to incapacitate all FNOs sentenced to more than a year in prison, and yet the binary nature of deportation – a FNO is either deported or they are not – coupled with the statutory direction that 'The deportation of foreign criminals is in the public interest'[726] tends towards this outcome. However, and in contrast to the treatment of FNOs, UK law does not require the permanent incapacitation of UK national offenders beyond the length of their prison sentence. Indeed, the indeterminate prison sentence was abolished in 2012.[727] Instead some level of risk of reoffending is accepted

[723] de Noronha (n12)

[724] Comparable statistical information which breaks down types of offences based on nationality is no longer available. (Gov.uk, 'Offender management statistics quarterly' (26 October 2017) <www.gov.uk/government/collections/offender-management-statistics-quarterly> accessed 14 August 2018)

[725] Hindpal Singh Bhui, 'Alien Experience: Foreign National Prisoners After the Deportation Crisis' (2007) 54 Probation Journal 368, 370

[726] Immigration Act 2014, s117C(1)

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

as a consequence of an offender being released back into the community. That risk is managed by the use of other measures which are at the disposal of the criminal and civil justice systems to help mitigate the risk of reoffending, and also to protect the rights of individuals at specific risk of interference with their rights arising from that reoffending. It is these measures which should be assessed by the courts in deportation cases as possible less restrictive measures which may render deportation unnecessary in individual cases. The range of possible post-sentence measures available for the control of offenders is staggeringly large and the following list may present only a snapshot.

For those sentenced to less than two years imprisonment a mandatory period of post-sentence supervision now applies[728] so that all offenders must spend twelve months under the care of the probation service, either on licence or under supervision.[729] The stated rationale for post-sentence supervision is the effective rehabilitation of offenders.[730] Other post-conviction measures are attached after conviction of specific offences or type of offending. Conviction of a football-related offence may be followed by a Football Banning Order of two to five years duration.[731] Sexual Risk Orders (imposed post-conviction)[732] and Sexual Harm Prevention Orders (which do not require conviction of an offence to be applied)[733] apply to sex offenders

[728] Criminal Justice Act 2003, s256AA. See also; Nicola Padfield, 'The Magnitude of the Offender Rehabilitation and "Through the Gate" Resettlement Revolution' [2016] Criminal Law Review 99, 103

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

[730] ibid

[731] Football Spectators Act 1989, s14A & 14B. See also; Mark James and Geoff Pearson, '30 Years of Hurt: the Evolution of Civil Preventive Orders, Hybrid Law, and the Emergence of the Super-Football Banning Order' [2018] Public Law 44; Mark Roberts, 'The Case for Football Banning Orders' (2017) 73 Magistrate 2

[732] Sexual Offences Act 2003, s122A-s122K

[733] Sexual Offences Act 2003, s103A-s103K

and those deemed to be future potential sex offenders.[734] Criminal Behaviour Orders[735] may be imposed after conviction of an offence if 'the offender has engaged in behaviour that caused or was likely to cause harassment, alarm or distress to any person'.[736] Mere suspicion of terrorism can result in the imposition of a Terrorism Prevention and Investigation Measures.[737] In the case of domestic violence, Non-Molestation Orders have been around in one form or another since 1976.[738]

The critique of many of these measures is based on their hybrid criminal-civil nature and thereby the rule of law implications of their application.[739] The purpose of this thesis is not to define what post-sentence measures should be used in order that the deportation of a FNO is rendered unnecessary, nor to provide empirical or theoretical justification of any particular measure(s). Instead, it is sufficient to observe that there are a range of post-sentence measures which are currently in use in the UK in order to prevent reoffending, and thereby protect the rights of others. After all, the government can hardly claim that these measures are entirely futile in preventing further offending or in protecting the public and thus are ineffective as a less restrictive measure than deportation for FNOs. There is also no reason to believe that these measures are uniquely effective for British Citizen offenders and uniquely ineffective for FNOs, just as there is no evidence that FNOs are any more 'dangerous' upon release from

[734] Terry Thomas and David Thompson, 'New Civil Orders to Contain Sexual Offending — A Matter of "Purposive Logic"?' (2013) 177 Criminal Law & Justice Weekly 703

[735] Anti-social Behaviour, Crime and Policing Act 2014, Part 2

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

[737] Terrorism Prevention and Investigation Measures Act 2011

[738] David Burrows, 'Protection From Molestation: Orders and Legal Aid' [2018] Family Law Journal 429

[739] See *inter alia*: Andrew Ashworth, 'Social control and "anti-social behaviour": the subversion of human rights?' (2004) 120 Law Quarterly Review 263; Andrew Ashworth, 'Four Threats to the Presumption of Innocence' (2006) 10 International Journal of Evidence and Proof 241; Andrew Ashworth and Lucia Zedner, 'Prevention Orders: A Problem of Undercriminalisation?' in RA Duff et al (eds) *The Boundaries of the Criminal Law* (Oxford University Press, 2010)

prison than British citizen offenders.[740] It would be up to the decision-maker in individual deportation cases to assess whether any particular post-sentence measure is an effective means for protecting the rights of others and thereby renders deportation unnecessary.

The effectiveness of any post-conviction measure of this kind, and therefore the necessity or otherwise of deportation, may rely on whether or not the risk of future offending by the FNO interferes with the human rights of an identifiable individual or the rights and freedom of the public in general. This is one of the reasons for the importance of the third question for determining whether the best interests of the child are violated by the deportation of a foreign national offender parent; would the deportation of the FNO secure the rights and freedoms of an identifiable individual or secure the rights and freedoms of the general public? For example, a Football Banning Order may be effective in protecting the public at large from football-related violence, but ineffective in the case of a concerted attempt to harm a specific player or official. On the other hand, a Non-Molestation Order may be effective in preventing a foreign national offender convicted of assaulting an ex-partner from repeating the offence against that individual, but ineffective if the offender presents a risk of violence against women as a group.

Assessment of the necessity of deportation and the exploration of less restrictive measures for achieving the protection of the rights of others is an important aspect of taking the best interests of the child seriously and literally as a human right. The best interests of the child are not an absolute right and there will remain some cases in which deportation is necessary in order to protect the rights of others. However, the plethora of post-sentence measures aimed at preventing reoffending in the UK national suggest that in many cases there will be a less restrictive means by which to achieve the aim of protecting the rights and freedoms of others.

[740] Bhui (n661) 370

3(f) Is the interference with the best interests of the child proportionate to the interference with the rights and freedoms of others?

The final question is that of balancing between the best interests of the child as a human right, as against the human rights of others that may be interfered with if the foreign national offender is not deported. When a human right is interfered with, that human right is not being satisfied to its maximum extent. The test of balancing (or proportionality *strictu sensu*) requires the decision-maker to determine whether the importance of what is being sought to be achieved through the interference is sufficient to justify that level of interference. 'The greater the degree of non-satisfaction of […] one principle, the greater must be the importance of satisfying the other.'[741] In the "human rights approach" the importance of the rights and freedoms of others must be sufficient to justify the interference with the best interests of the child by the deportation of a FNO parent. The greater the importance of the best interests of the child, the greater must be the importance of the rights and freedoms of others in order to justify deportation.

The means by which decision-makers might come to a decision as to the balance between a human right and an interference is by no means settled in the academic literature or judicial decisions.[742] After all, the idea of the merchant's balance is only a metaphor,[743] one which is capable to accommodating multiple formal decision-making processes. In this part, I use Alexy's delineation of three primary elements which must be considered when balancing human rights against a legitimate aim; (1) the abstract weight of the right being interfered with,

[741] Jestaedt (n307) 155

[742] Barak (n187)

[743] Iddo Porat, 'The Dual Model of Balancing: A Model for the Proper Scope of Balancing in Constitutional Law' (2006) 27 Cardozo Law Review 1393, 1398

(2) the intensity of interference with the right, and (3) the empirical certainty with which we know the right will be interfered with.[744] I adopt these because they help rationally tease out the different elements which might be reasonable to include in a balancing exercise. I address each of these in turn.

3(f)(i) Abstract Weight

The first ingredient of the balancing exercise in the "human rights approach" is what Alexy refers to as the abstract weight; the weight a human right has independent of the individual case.[745] For Alexy, human rights have a pre-existing conceptual weight. This means that one type of human right may have a greater abstract weight than others.[746] For example, society may choose to consider freedom of expression of the political press to be *a priori* more weighty than other forms of expression.[747] In any conflict between them the more important human right – the one with the most abstract weight – goes into the balancing exercise already with an advantage over the other. The best interests of the child is one human right among many and therefore the best interests of the child may be balanced against the rights of others. However, the best interests of the child are to be treated as being 'primary' so that the decision-maker must not 'treat any other consideration as inherently more significant than the best interests of the children'.[748] Therefore where the FNO presents a risk to the human rights of an identifiable individual the abstract weight of this competing human right can be no weightier than the weight given to the best interests of the child; of equal abstract weight but not inherently more

[744] Robert Alexy, 'Constitutional Rights and Proportionality' (2014) 22 Revus: Journal of Constitutional Theory & Philosophy of Law 51, 54

[745] Alexy (n308) 440

[746] ibid

[747] As the ECtHR could be argued to have found in *Castells v Spain* (n249) [43]

[748] *ZH (Tanzania)* (n21) [26]

significant. The abstract weight of the human right being balanced against the best interests of the child then becomes progressively lighter the further it is from being an identifiable human right held by an identifiable individual and the closer it is to the rights and freedoms of the general public. The abstract weight of the competing human right must therefore be determined in the light of the facts of the individual case, rather than independently of it in an *a priori* manner as Alexy suggests.

As the competing rights and freedoms of others become progressively lighter, eventually, the rights and freedoms of the general public becomes too far removed from an identifiable human right held by an identifiable individual. At this point instead of having any abstract weight in the balancing exercise it becomes simply a general public interest which is not based in a human rights consideration, and therefore cannot be balanced against the best interests of the child at all.

In the case of deportation under the "human rights approach", there is a fine line between a permitted balance between the best interests of the child and the human of abstract individuals, and the trampling of the rights of a vulnerable group (the children of foreign national offenders) in order to secure a general public policy goal of preventing crime and disorder. The importance of the third question in the "human rights approach" – would the deportation of the FNO secure the rights and freedoms of an identifiable individual or secure the rights and freedoms of the general public? – is thereby re-emphasised. The relevant question is whether the justification for deportation rests on the protection of the human rights of another person, even if that person is as yet unknown, or to protect the public as a whole from crime in the abstract. It is important at that earlier stage to identify whether there is a valid, rights-based consideration to be balanced against the best interests of the child at all. Where there is not, the interference must be found to be contrary to the best interests of the child as a human right at that earlier stage, rather than at the stage of balancing.

An example of where the rationale for deportation becomes under the "human rights approach" an impermissible resort to a general public interest is that of general deterrence. A general deterrent effect could be said to protect the rights and freedoms of other individuals if the effect of deportation means that other foreign national offenders do not go onto commit similar crimes in similar situations. This is the justification used for including deterrence as an essential part of the public interest under the UK's current deportation regime.[749] However, the causal link between the deterrent effects of deportation and the protection of the rights and freedoms of others is insufficient to be a rights-based justification for deportation. That is not to say that deportation will not have a general deterrent effect under the "human rights approach", only that it is not itself a rights-based consideration which can be balanced against the best interests of the child. General deterrence is an incidental effect of deportation under the "human rights approach", rather than a valid underlying justification for the deportation.

3(f)(ii) Intensity of Interference

In chapter 2, I argued that there are a range of different checklists available for determining what is in the best interests of the child. I do not intend to defend a particular checklist, but to indicate what it means to determine the intensity of interference in the context of the best interests of the child as a substantive human right.

The intensity of interference can be distinguished from the *gravity of interference* which I argued in chapter 4 was an essential element of the ECtHR's assessment of family life under Article 8 ECHR through the *Üner* criteria. I argued that the ECtHR's assessment of the *gravity of interference* reflects aspects of the family members' membership, belonging, or integration in the receiving and deporting country. The ECtHR's overriding concern is whether the

[749] *AM v SSHD* (n239) [24]; *OH (Serbia)* (n239) [15]

circumstance of the family's integration in the deporting state and continuing relationship, if any, with the receiving state means that the interference is believed by the ECtHR to be felt more or less keenly. This is to be contrasted with the intensity of interference in the Alexian balancing exercise which is a more holistic assessment. A good description of this kind of assessment can be found in the UK case of *EV (Philippines)*:

> In a sense the tribunal is concerned with how emphatic an answer falls to be given to the question: is it in the best interests of the child to remain? The longer the child has been here, the more advanced (or critical) the stage of his education, the looser his ties with the country in question, and the more deleterious the consequences of his return, the greater the weight that falls into one side of the scales. If it is overwhelmingly in the child's best interests that he should not return, the need to maintain immigration control may well not tip the balance. By contrast if it is in the child's best interests to remain, but only on balance (with some factors pointing the other way), the result may be the opposite.[750]

The BIC-model developed by Kalverboer *et al* envisages a similar exercise, but formalises it by using a binary numeric system. Kalverboer *et al* work through an example of a child, 'L', and her best interests between Afghanistan and the Netherlands.[751] In that example, return to Afghanistan fulfilled 5 of 14 components[752] to the best interests of the child, whereas

[750] *EV (Philippines) and others v Secretary of State for the Home Department* [2014] EWCA Civ 874, [36]

[751] Kalverboer (n122) 125-126

[752] Namely, adequate physical care; safe immediate physical environment; affective atmosphere; interest in the child, and; social network (Kalverboer (n122) 126)

the Netherlands fulfilled 7 of 14.[753] We can say that the return of 'L' to Afghanistan would interfere with her best interests, although not with overwhelming intensity. In contrast, the interference with 'Ls' best interests would clearly be very intensive if the Netherlands fulfilled all the components of 'Ls' best interests and Afghanistan none.

Again, I do not claim that Kalverboer's BIC-model is the correct checklist for assessing the best interests of the child, nor that a numeric system of the kind envisaged by Kalverboer *et al* is the most appropriate means of determining the intensity of interference. Instead, my argument is limited to suggesting that determining the intensity of interference is a necessary element to a rational balancing exercise, and that as a process it is not alien to decision-making with respect to the best interests of the child, either through formal strategies such as that developed by Kalverboer *et al*, or less structured strategies such as that adopted by the Court of Appeal in *EV (Philippines).*

3(f)(iii) Empirical Certainty

The final factor to determine the balance between competing human rights according to Alexy is the level of empirical certainty involved in the decision about human rights; how sound is the evidence base that justifies the interference?[754] This applies to both the best interests of the child as a human right and the protection of the human rights of others.

With respect to the protection of the human rights of others through deportation, how likely is it that the FNO will reoffend, and thereby interfere with the human rights of others? How strong is the empirical basis for that assessment? Is it based on an actuarial assessment of the kind of offender they are, or on the basis of an individualised assessment by a competent

[753] Namely, adequate physical care; safe immediate physical environment; supportive, flexible parenting structure; safe wider physical environment; education; contact with peers and friends, and; adequate examples set by the community (Kalverboer (n122) 126)

[754] Pirker (n191) 33

professional? Have they reoffended in the past, so as to give more empirical support the conclusion that they are more likely to do so again in the same circumstances? How convincing is the evidence that they have engaged effectively with rehabilitative exercises which may make criminal offending less likely?

With respect to the best interests of the child, how likely is it that their best interests will be interfered with to the level of intensity suggested? Is the assessment of the best interests supported by evidence or assertion? Is the assessment of the best interests of the child supported unanimously by the relevant professionals involved in the child's life and/or instructed for the purpose of deportation proceedings, or is there reasonable professional disagreement?

In assessing the empirical certainty of the best interests of the child and the risk of reoffending, the decision-maker must be alive to the inequality of arms between the state and the child of a FNO who seeks protection of their best interests. If the state seeks the deportation of the FNO on the basis of their risk of reoffending, they will be supported at minimum by an OASys report; a tool designed to assess the likelihood of reoffending and drawn up by the probation services as a matter of course for those convicted of offences.[755] In contrast, the child of a FNO may not be entitled to legal aid as deportation proceedings are generally excluded from legal aid.[756] This may present significant obstacles to presenting empirically reliable evidence of the interference that the child complains of. Not only may the child be unable to obtain or understand the importance of readily available evidence (such as school reports) for

[755] Robin Moore (ed), 'A compendium of research and analysis on the Offender Assessment System (OASys): 2009–2013' (July 2015, National Offender Management Service) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/449357/research-analysis-offender-assessment-system.pdf> accessed 11 July 2018, 3

[756] *R (Kiarie and Byndloss)* (n88) [60]

themselves, they or their parents may not be able to afford additional specialist reports such as those provided by independent social workers.[757]

Whilst *Ahmed* established that there is no general obligation on the Secretary of State or immigration tribunals under s55 BCIA to proactively secure evidence as to the best interests of the child,[758] that does not mean that such an obligation may never arise. The Court of Appeal has recognised that:

> …the Tribunal will expect the relevant interests of the child to be drawn to the attention of the decision maker by the individual concerned. The decision maker would then make such additional enquiries as might appear to him or her to be appropriate.[759]

However, in *SS (Nigeria)* the appropriate circumstances for the decision-maker to use this power was said to be 'limited'.[760] Furthermore, the House of Lords has recognised that in some situations, separate legal representation for the children involved in immigration cases may be required.[761] In *Ahmed*, the Upper Tribunal found that the existence of a duty on the decision-maker to proactively obtain evidence about the best interests of the child is contextual.[762] *Ahmed* can then be distinguished on the basis of context. In particular, in *Ahmed*

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[757] As recommended in, Mark Henderson, Rowena Moffatt, Alison Pickup, 'Best Practice Guide to Asylum and Human Rights Appeals' (31 March 2018, Electronic Immigration Network) <www.ein.org.uk/bpg/chapter/26> accessed 12 July 2018, [26.31A]

[758] *Ahmed and Others (deprivation of citizenship)* [2017] UKUT 00118 (IAC)

[759] *SS (Nigeria)* (n239) [62]

[760] ibid

[761] *EM (Lebanon)* (n205) [43]

[762] *Ahmed and Others (deprivation of citizenship)* (n694) [24-25]

the primary decision-maker (the Secretary of State) had been unaware until a relatively late stage that s55 BCIA was engaged and that the best interests of the child had therefore not 'arisen forcefully'[763] before that point in the legal proceedings. In *Ahmed*, the proceedings centred around deprivation of citizenship.[764] However, firstly, where the legal question at issue is whether the best interests of the child are violated under the "human rights approach" to deportation, the best interests of the child can only arise forcefully from the earliest stages as they are the basis for the case in the first place. Secondly, the deprivation of citizenship was found in *Ahmed* did not itself affect the best interests of the child directly.[765] In this respect, the Upper Tribunal specifically drew comparison with cases of deportation[766] in which the best interests of the child will presumably arise more forcefully as being a decision affecting the child and thus engage more readily the decision-makers obligations to seek empirical evidence of the child's best interests.

The positive duty on the decision-maker to obtain empirically reliable evidence about the best interests of the child will therefore arise much more frequently in cases where deportation appeals are determined under the "human rights approach". In order to secure the best interests of the child as a human right, provision for independent assessment of those best interests for the benefit of the deportation decision-maker will have to be improved from the current situation. In *RS*, the Upper Tribunal observed that it was ill-equipped to make such assessments and that there is currently no means of accessing specialist input to guide its decisions:

[763] ibid [32]

[764] ibid [2]

[765] ibid [32]

[766] ibid

> …there is no local authority or children's guardian, no access to the service provided by CAFCAS [sic], and no independent means of ascertaining the wishes, concerns and interests of the child.[767]

This may be achieved in practice by expanding the role of the Children and Family Court Advisory and Support Service (Cafcass) which currently only works in the family law context.[768] However, even if Cafcass or other body were to provide an empirically reliable report in all deportation cases, this would not mean that the best interests of the child would automatically obtain a high level of empirical certainty for the purposes of the balancing exercise. Cafcass' investigations may be inconclusive or inconsistent with evidence from other sources, for example, or evidence about the situation the child would face in the receiving country may be limited.

4. Operationalising the "Human Rights Approach" in UK Statute law

Operationalising the "human rights approach" in UK law may be possible by taking the principles established in *ZH (Tanzania)* to their logical conclusion. However, an amendment to primary legislation may prove the more durable solution which does not require the Supreme Court to grapple with whether it is permissible for it to interpret s55 BCIA 2009 as creating a new substantive human right in UK law.

The suggested amendment is in bold as an amendment to the automatic deportation provisions of the UK Borders Act 2007:

[767] *RS (immigration and family court proceedings) India* (n631) [37]

[768] Cafcass, 'About Cafcass' <www.cafcass.gov.uk/about-cafcass/> accessed 11 July 2018

Section 32(6) The Secretary of State may not revoke a deportation order […] unless

(a) he thinks that an exception under section 33 applies

Section 33(2) Exception 1 is where removal of the foreign criminal in pursuance of the deportation order would breach—

(a) a person's [European] Convention rights, or

(b) the United Kingdom's obligations under the Refugee Convention, or

(c) the best interests of the child under Article 3 of the UN Convention on the Rights of the Child.

In one sense, this is all that should be required by any amendment to legislation. Section 33 of the UK Borders Act already refers out to two external sources of law; the European Convention rights in schedule 1 of the HRA 1998, and the Refugee Convention. The "human rights approach" expanded on above is, I have argued, a logical application of the text of Article 3 UNCRC and of established descriptions of proportionality contained in both human rights and common law in authority such as *Bank Mellat (No 2)*[769] and *Quila*.[770] On the other hand, the introduction of a new statutory intervention into the existing political milieu of immigration

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

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

[770] Quila & Anor, R (on the application of) v Secretary of State for the Home Department [2011] UKSC 45, [45]:

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

law is fraught with difficulties, as evidenced by the introduction of the attempts to define Article 8 ECHR in the immigration rules in July 2012,[771] and the Immigration Act 2014.[772]

An addition to the 'interpretation' section of the UK Borders Act 2007 (s38) would be appropriate, and be the fifth interpretation clause, and therefore a new s38(5), UK Borders Act 2007. This would state:

> Section 38(5) In section 33(2)(c), the best interests of the child under Article 3 of the UN Convention on the Rights of the Child comprises five questions which shall be consecutively determined by the Secretary of State and the courts—
>
> (a) does the decision to make a deportation order against an individual interfere with the best interests of the child? If so,
>
> (b) does the decision to make a deportation order against an individual promote the Convention Rights (schedule 1 of the Human Rights Act 1998) of others? If so,
>
> (c) does the decision to make a deportation order against an individual rationally contribute to promoting the Convention Rights (schedule 1 of the Human Rights Act 1998) of others? If so,
>
> (d) is the decision to make a deportation order against an individual the least restrictive means by which to promote the Convention Rights (schedule 1 of the Human Rights Act 1998) of others? If so,

[771] Gemma Manning, 'The Immigration Rules and Article 8 - A Complete Code for Deportation Cases?' (2014) 71 Student Law Review 34; Sadat Sayeed and David Neale, 'Immigration and Asylum Case Law since 2016 – A Complex Picture: Part 1' (2017) 22 Judicial Review 277; Sheona York, 'Deportation of Foreign Offenders - A Critical Look at the Consequences of Maaouia and Whether Recourse to Common-Law Principles Might Offer a Solution' (2017) 31 Journal of Immigration, Asylum and Nationality Law 8.

[772] Collinson (2017) (n106); Jonathan Collinson, 'Disciplining the Troublesome Offspring of Section 19 of the Immigration Act 2014: The Supreme Court Decision in KO (Nigeria)' (2019) 33 Journal of Immigration, Asylum and Nationality Law 8

(e) is the interference with the best interests of the child proportionate to the interference with the Convention Rights (schedule 1 of the Human Rights Act 1998) of others?

Exception 1 to deportation in section 33(2)(c), is met where—

question (a) is answered in the positive, and question (b) in the negative; or,

question (a) is answered in the positive, and question (c) in the negative; or,

question (a) is answered in the positive, and question (d) in the negative; or,

question (a) is answered in the positive, and question (e) in the negative; and

regardless of the answer to any other question.

Exception 1 to deportation in section 33(2)(c), is not met where—

question (a) is answered in the negative; or,

question (a), question (b), question (c), question (d), and question (c) are all answered in the positive.

Although this appears convoluted, it provides the clearest roadmap for operationalising the "human rights approach" by leaving as little as possible to structural vandalism, as had arguably been the fate of the "exceptions approach" in the Immigration Act 2014.[773]

5. Analysis

Throughout this thesis I have argued that the best interests of the child (under the domestication of Article 3 UNCRC through s55 BCIA) and the right to family life (under the domestication of Article 8 ECHR through the HRA) present significant theoretical problems when the obligations inherent to each appear simultaneously. Thus when decision-makers are asked to make a single decision about deportation which gives effect to the best interests of the child

[773] Collinson (2017) (n106)

and the right to family life they may make a decision which is *polycentric* but which does not give effect to the *plurality of decision-making norms*, or visa versa. In contrast, the "human rights approach" began from the premise that the best interests of the child is a free-standing, independent human right which must be determined separately. I argue that analysis of the "human rights approach" supports the assertion that the problems of *polycentricity* and *plurality of decision-making norms* are resolvable when the decision-maker takes the best interests of the child as a human right seriously and literally, rather than engage in the *ad hoc* layering of obligations which gave rise to the "simple balancing approach", "modified balancing approach", and "exception approach".

5(a) Polycentricity

The "human rights approach" starts from the premise that the best interests of the child ought to be treated as an independent, separate human right in its own respect. The "simple balance approach", "modified balance approach", and "exception approach" all attempt to construct a single deportation decision which gives effect to both Article 3 UNCRC (the best interests of the child) and Article 8 ECHR (the right to family life). I have suggested that this is in part because of the history of domestication of both provisions.

The ECHR does not include a discrete human right that protects the best interests of the child. Instead, the best interests of the child were adopted by the ECtHR in 2006 in *Üner*[774] as a facet of the right to family life under Article 8 ECHR. UK law also did not recognise the best interests of the child as a relevant principle to apply to immigration law until the withdrawal of a reservation in 2009 to the UNCRC to the effect that it would not apply to immigration matters.[775] However, the ECHR had been domesticated by the Human Rights Act 1998 and so

[774] *Üner v Netherlands* (n20) [57-58]

[775] Drew and Nastic (n18)

the best interests of the child was recognised as being relevant to deportation decisions in UK law as a facet of Article 8 ECHR, before the best interests of the child under Article 3 UNCRC was domesticated as a separate provision through s55 BCIA. It could be argued that UK courts have been locked into a desire to produce a single deportation decision-making process that gives effect to both Article 3 UNCRC and Article 8 ECHR by accident, rather than rational design; an *ad hoc* layering of obligations into one deportation decision-making process.

Absent thus far has been discussion of the right to family life under Article 8 ECHR. Throughout this thesis I have made the point that deportation decisions must be *polycentric*, that is, that deportation decisions engage multiple rights and interests that must be taken into account. In chapter 3, I used a fictional but representative example family to illustrate the range of human rights and interests engaged by a decision to deport a foreign national offender. The fictional family comprised a foreign national offender (Marcus), their current partner (Samira), a child (Adam) and step-child (Bryony) with their current partner, an ex-partner (Sharon), and a child with that ex-partner (Claude). All of these are then balanced against the public interest in deportation. The multiple human rights and interests engaged in this situation could be set out as follows:

Article 8 ECHR	**Article 8 ECHR**	**Article 8 ECHR**	**UNCRC Article 3**
Marcus (FNO)	Samira (Partner)	Adam (Child)	Adam (Child)
		Bryony (Child)	Bryony (Child)
	Sharon (Ex-Partner)	Claude (Child)	Claude (Child)

Public Interest

The "human rights approach", which starts from the premise that the relevant right engaged in deportation decisions is that of the best interests of the child, clearly only takes into account the rights of the children under Article 3 UNCRC (in the example above), and part of the public interest, but only insofar as it engages the rights and freedoms of others. How can the "human rights approach" then claim to be *polycentric*? I argue that taking seriously and literally the claim that the best interests of the child is a human right does not extinguish the Article 8 ECHR family life claims of any other person; human rights is not a zero-sum game. Instead, the right to family life must also be determined, but as a separate and independent human right. After determining whether or not deportation is a disproportionate interference with the best interests of the child, the decision-maker would then turn to whether or not deportation is a disproportionate interference with the right to family life. Considering Article 3 UNCRC and Article 8 ECHR as independent human rights sequentially may result in one of the following outcomes:

1. Violation of Article 3 UNCRC and Article 8 ECHR
2. Violation of Article 3 UNCRC, but not Article 8 ECHR
3. No violation of Article 3 UNCRC, but a violation of Article 8 ECHR[776]
4. No violation of either Article 3 UNCRC or Article 8 ECHR

Outcomes 1, 2, and 3 would result in the deportation of the foreign national offender being prohibited on human rights grounds; deportation would result in a human rights breach

[776] Such an outcome could occur, for example, in situations where the foreign national offender has minimal contact with a non-resident child, but has a strong family life relationship with a spouse. In such circumstances, the Article 8 ECHR family life with the spouse may prevail over the public interest in deportation even when the best interests of the child may be outweighed.

of an individual and therefore should not take place. It irrelevant which substantive human right is engaged, or who the rights-holder is, for the purpose of this end result.

The application of multiple human rights to the same factual situation, and their sequential consideration as equally important but separate human rights, is an everyday aspect of human rights adjudication. Deportation is an example of a case where a single act (that of deportation) can engage more than one human right. Two cases emphasise this point.

In *Paposhvili*, the applicant was a Georgian national resident in Belgium and who had been convicted of a number of criminal offences. He argued before the ECtHR that his deportation to Georgia would be a violation of Article 3 ECHR because of the lack of appropriate treatment there for his leukaemia and, consequently, his life expectancy would be considerably reduced by his deportation.[777] Furthermore, he argued that his deportation would be a breach of his Article 8 ECHR family life rights as it would entail his separation form his family who had Belgian residency papers.[778] In the second case, of *Mubilanzila Mayeka & Kaniki Mitunga*, a child (Kaniki) arrived in Belgium where she was sent to stay with an uncle and grandmother after her mother (Mubilanzila) had obtained refugee status in Canada.[779] Not realising that Kaniki had not automatically also been given refugee status by the Canadian authorities,[780] Kaniki arrived in Belgium without the necessary immigration documentation.[781] The Belgian authorities removed Kaniki to the DRC, her country of nationality, unaccompanied and where there was no reception arrangements in place to ensure Kaniki's safe arrival and future care.[782] The removal itself was considered to be a violation of the Article

[777] *Paposhvili v Belgium* App no 41738/10 (Grand Chamber, 13 December 2016), [195]

[778] ibid [208]

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

[780] ibid [14]

[781] ibid [11]

[782] ibid [31]

3 ECHR and Article 8 ECHR rights of Kaniki because of the lack of care in the manner of her unaccompanied deportation (Article 3 ECHR) and because the deportation interfered with Kaniki's family life (Article 8 ECHR).[783]

In both cases, a violation of Article 3 ECHR and Article 8 ECHR was found by the ECtHR. The findings were not of a violation of Article 3 in conjunction with Article 8, but of two separate human rights arising from the single action by the state. Successfully showing a violation of either right would have been sufficient to prevent the deportation or removal.[784] In neither case was there any question that a finding of non-violation of either right could possibly result in the deportation being found to be permitted. Once an action of the state is shown to be a violation of a human right then the action is unlawful, no matter how many human rights are engaged and how many are actually found to be violated.

A case where a violation of Article 3 UNCRC is shown and Article 8 ECHR is not (or visa versa) is not a conflict of rights situation. Not showing a violation of one right is not the same as saying that that human right requires the deportation of the FNO. The human rights are engaged as a shield to prevent deportation, not a sword to demand it. Where an individual's human rights are determined to be at stake in deportation proceedings, these are addressed through the process of proportionality and therefore balanced against the Article 8 ECHR or Article 3 UNCRC rights of those negatively affected by the deportation. It is at this stage where there is a conflict of rights and the question is whether the protection of one person's rights are a disproportionate interference with the rights of others. If it is determined that the FNOs deportation is a disproportionate interference with the rights of the other then the conflict of

[783] Violations were also found of Article 3 ECHR and Article 8 ECHR rights of the mother, Mubilanzila, because of the distress and separation caused by Kaniki's removal. Kaniki's Article 5(1) and 5(4) ECHR rights and Article 8 ECHR right to family life were also found to have been violated by her detention prior to her removal (ibid)

[784] In *Mubilanzila Mayeka & Kaniki Mitunga* the ECtHR application was brought after deportation had taken place. In *Paposhvili* the applicant died before his deportation could be carried out and the case was pursued by his relatives (ibid [31]; *Paposhvili v Belgium* (n708) [126])

rights is resolved in favour of preventing the deportation. If it is determined that the deportation is not a disproportionate interference with an individual's Article 3 UNCRC or Article 8 ECHR rights then the conflict of rights is resolved in favour of deportation.

Under the "human rights approach", once an assessment of the best interests of the child as a human right has been conducted, the decision-maker must make an independent assessment of Article 8 ECHR. At this stage, the decision-maker may balance the general public interest in deportation against the family life of the FNO and of their children, and the general public interests may even prevail. However, by considering the best interests of the child as an independent human right means that it is not cross-contaminated, unlike under the "simple balancing approach", "modified balancing approach", and "exception approach" where the general public interest is balanced against the best interests of the child because there is no distinction made between what is permitted under Article 3 UNCRC and Article 8 ECHR. However, a finding of violation of only one of Article 3 UNCRC and Article 8 ECHR is required in order to prevent the deportation of a FNO.

Considering the best interests of the child as a human right and the right to family life sequentially ensures that the deportation decision is *polycentric* because all the relevant rights and interests are taken into account. The best interests of the child are considered (under Article 3 UNCRC), the family life of the FNO, their partner, and their children are considered (under Article 8 ECHR), the general public interest in deportation is considered (under Article 8 ECHR), and the rights and freedoms of others are also considered (under Article 3 UNCRC and Article 8 ECHR). The best interests of the child are considered as a human right, as is family life, and the public interest in deportation is kept at the status of an interest because it is relevant only to the determination of Article 8 ECHR, rather than being allowed to claim the status of a human right that is permissibly balanced against the best interests of the child.

The "human rights approach" therefore presents a considerable improvement on the "simple balance approach", the "modified balance approach", and the "exception approach" by being truly *polycentric* by taking into account all the relevant rights and interests in deportation decisions.

5(b) The Plurality of Decision-Making Norms

The *plurality of decision-making norms* was identified in chapter 3 as arising from the different things which Article 8 ECHR and Article 3 UNCRC demand of decision-makers, even in their domestic law guises. By this I mean that those aspects of decision-making process which are set out on the international level have been adopted by UK courts as aspects of the right to family life under the Human Rights Act 1998, and the best interests of the child under s55 BCIA. These aspects are:

1. That the right to family life may be balanced against the public interest in preventing crime and disorder;
2. That the best interests of the child may be balanced against the human rights of others, but not non-rights-based considerations;
3. That the best interests of the child must be a primary consideration. This means that it must be considered separately and be of no less inherent weight than other considerations. Considering the best interests of the child temporally first is optional but doing so assists the decision-maker in ensuring that they give adequate application of the other aspects of the primacy of the best interests of the child.

In chapter 3, I demonstrated that it was theoretically impossible to give effect to all three aspects of the decision-making norms of Article 8 ECHR and Article 3 UNCRC in the same

deportation decision, or at least impossible to do so whilst also making a decision which is effectively *polycentric* as well. Exploring the ways in which UK law has attempted to structure deportation decision-making in chapters 4-6 has borne this out. Each of the "simple balancing approach", "modified balancing approach", and "exception approach" have struggled to accommodate the decision-making norms of both Article 8 ECHR and Article 3 UNCRC in the same decision whilst giving effect to all the relevant rights and interests at stake in deportation decisions.

However, the "human rights approach" to deportation decisions begins with the insight that each of the right to family life and the best interests of the child are two separate human rights. Examining deportation decisions as separately engaging two separate human rights – just as deportation decisions are already assessed as engaging separate human rights when deportation interferes with the freedom from torture, right to a fair trial, and right to family life – ensures that deportation decisions are able to be consistent with the *plurality of decision-making norms*.

The best interests of the child are considered separately because it is recognised as being, under the "human rights approach" a separate human right. This contrasts most with the "simple balancing approach" and "modified balancing approach" which seek to subsume the best interests of the child as an interest relevant to the right to family life. In so doing, these approaches also fail to give the best interests of the child no less inherent weight than other interests. The "human rights approach" is given no less inherent weight than other considerations if in the balancing stage of enquiry it has no less abstract weight than other considerations.

When presented by a deportation appeal which engages the best interests of the child and the right to family life, the decision-maker may decide the two claims in any order under the "human rights approach" and yet maintain the separateness between the two which is the

practical reason for considering the best interests of the child temporally first. Therefore, under the "human rights approach" not putting the best interests of the child first temporally does not endanger the primacy of the best interests of the child, which is the case under the "simple balancing approach" and "modified balancing approach".

Finally, the "human rights approach" ensures the application of different considerations as being legitimate limitations on the right to family life and the best interests of the child. The decision-maker will undertake a balancing exercise between the best interests of the child against the human rights of others, and then of the right to family life against the general public interest. The existence of limitation clauses applicable to one human right engaged by a case does not mean that those limitation clauses are to be employed by the decision-maker in relation to the other human rights engaged by the case. For example, in *Paposhvilli* and *Mubilanzila Mayeka & Kaniki Mitunga*,[785] the decision as to whether Article 3 ECHR was violated was determined on the basis of the permitted restrictions on that right (i.e. none, as Article 3 ECHR is an absolute right) and the decision as to whether Article 8 ECHR was violated was determined on the basis of the permitted restrictions on that right (i.e. the limitation clauses in Article 8(2) ECHR). However, there can be no case in which the limitation clause in Article 8(2) ECHR can be applied to a decision about a violation of Article 3 ECHR. Likewise, the more expansive public interest limitation clauses under Article 8 ECHR do not transpose, under the "human rights approach", to the application of Article 3 UNCRC.

This has been one of the primary errors in each of the "simple balancing approach", "modified balancing approach", and "exception approach". By attempting to give effect to both the right to family life and the best interests of the child in one integrated deportation decision, the best interests of the child have been made subject to the public interest limitation clauses

[785] *Paposhvili v Belgium* (n708) [208]; *Mubilanzila Mayeka & Kaniki Mitunga v Belgium* (n710) [10]

inherent to Article 8 ECHR. This has resulted in the balancing of the public interest (a non-rights-based consideration) against the best interests of the child.

The "human rights approach" is therefore able to give effect to the *plurality of decision-making norms* by recognising and giving effect to the plurality of human rights regimes present in deportation decisions. To date, UK law has approached deportation law from the point of view of a decision as to the disposal of an FNO. This means that the best interests of the child has been considered to be an aspect of the rights claim of the FNO, rather than a human right in and of itself. The s55 duty has been considered as an additional duty to be incorporated into the assessment of the rights claim of the FNO, rather than a unique human rights claim that is held by the individual child. The "human rights approach" instead understands deportation decisions to affect a range of different individuals, each with different rights claims that must be determined separately and individually.

6. Conclusion

In this final chapter, I argued that the key to giving effect to the best interests of the child in UK deportation law is to recognise that the right to family life and the best interests of the child are separate, different human rights. That the best interests of the child is a freestanding, independent human rights is the view of the UN Committee on the Rights of the Child,[786] and gives deportation decision-makers the only way to actually give effect to both the right to family life and the best interests of the child in a coherent manner. The best interests of the child as a human right puts the child at the centre of the deportation enquiry. It is worth noting what Bhabha says about child-centred approaches to immigration law:

[786] General Comment No. 14 (2013) (n104)

> …a child-centered perspective is equivalent to neither a call for open borders nor the deregulation of immigration control. Instead, the child-centered perspective postulates that the failure to acknowledge the fundamental differences between children and adults in the immigration context perversely skews decision-making.[787]

Taking the best interests of the child literally and seriously as a human right identifies the best interests of the child to be different, and that previous approaches have skewed deportation decision-making by attempting to get the best interests of the child to fit within existing adult-centred paradigms of deportation decision-making. The best interests of the child as a human rights does not require the deregulation of immigration control, but instead a refocus on the questions that matter:

1. Are the best interests of the child engaged?
2. What are the best interests of the child?
3. Would the deportation of the FNO secure the rights and freedoms others?
4. Would the deportation of the FNO *rationally* contribute to securing the rights and freedoms of others?
5. Is the deportation of the FNO *necessary* to secure the rights and freedoms of others?
6. Is the interference with the best interests of the child *strictly proportionate* to the interference with the rights and freedoms of others?

[787] Jacqueline Bhabha, '"Not a Sack of Potatoes": Moving and Removing Children Across Borders' (2006) 15 Public Interest Law Journal 197, 212

I have labelled this the "human rights approach" to deportation. Under this approach, deportation decisions would be *polycentric* because considering the best interests of the child as a human right does not preclude the consideration of other human rights (such as the right to family life) which are also engaged by deportation decisions. What it precluded is a trade-off or balancing of the multiple human rights engaged by deportation decisions. This approach also gives effect to the *plurality of decision-making norms* because the best interests of the child are considered separately and have no less inherent weight than other considerations. The best interests of the child cannot be weighed against non-rights-based considerations but may give way to the rights of others where it is necessary and proportionate for them to do so.

Taking seriously and literally the best interests of the child as a human right means that they may be given effect to in UK deportation law without encountering the theoretical and practical difficulties that UK law has thus far encountered in its "simple balancing approach", "modified balancing approach", and "exception approach" to deportation.

CHAPTER 8: CONCLUSION

1. The decision to deport foreign national offenders

In chapter 3, I introduced a fictional, but representative family to help investigate the best interests of the child in deportation decisions in UK law. In this fictional family, 'Marcus' is a national of Freedonia. In the UK he committed a criminal offence and the Home Office seeks his deportation. Marcus is in a relationship with 'Samira', also a Freedonian national and lawfully resident in the UK. Together they have a child (Adam) who is a Freedonian national. Marcus is therefore the biological, social, and resident parent of Adam. Samira has a second child (Bryony) from a previous relationship with a British national. Because of the British nationality of Bryony's father (but with whom Bryony has no contact), Bryony is British. Marcus is the social and resident parent of Bryony, although he is not the biological parent. Finally, Marcus also had a previous relationship with a British national, 'Sharon'. Marcus and Sharon had a child (Claude) who is a British national by virtue of Sharon's nationality. Marcus is the social, biological, but not resident father of Claude.

This family is fictional, but representative of the complex ties that encompass what 'family life' means. Not only are the ties of relationship between different individuals complex, there is an inherent complexity to other aspects of the factual circumstances behind each individual. This is particularly so with respect to the children, and it is the best interests of children that this thesis has been concerned. The children – Adam, Bryony, and Claude – have different nationalities, different mothers, and different relationships (social and biological, resident and non-resident) with Marcus. They are presumably of different ages, which might correspond to different educational milestones, and different capacities and needs for maintaining a social world beyond the immediate family. The children might have disabilities or learning difficulties which impact on their daily lives. The children have different maternal grandparents, and might have different relationships with Freedonia; they may have visited there and speak Freedonian, they may not.

In this thesis, I have highlighted how the deportation of foreign national offenders (FNOs) – like Marcus – is determined by statute to be 'conducive to the public good'[788] and the public identify their continued presence in the UK to be undesirable.[789] Marcus is considered to be individually responsible for his offending and his deportation is individually deserved and required as a direct consequence. However, Marcus is not just an individual; he is part of a family. He has a partner and three children. Each of them is individual and unique, each having their own constellation of connections with each other, with other individuals, and with society as a whole. The desire to protect family life and best interests of children caught up in the deportation of Marcus is also reflected in both public policy and deportation law, but this is in clear tension with the impetus to deport.

In this thesis, I have identified that this central tension – deportation versus protection of human rights – has been reflected in the provisions of the UK's deportation law. The Immigration Act 1971 begins with the assumption that Marcus's deportation is 'conducive to the public good'.[790] The legal protection of human rights has been added to this legal foundation as and when they arose in the wider legal environment. First, the protection of the human right to respect to family life (Article 8 ECHR), was domesticated in the Human Rights Act (HRA) 1998. Second, that the best interests of the child ought to be a primary consideration (Article 3 UNCRC), domesticated in s55 Borders, Citizenship and Immigration Act (BCIA) 2009. This *ad hoc* development of legal principles has resulted in, I have argued, UK deportation law binding itself to a series of increasingly irreconcilable legal principles; a *plurality of decision-making norms*:

[788] Immigration Act 1971, s3(5)(a); UK Borders Act 2007, s33(2)

[789] de Noronha (n12) 1

[790] Immigration Act 1971, s3(5)(a); UK Borders Act 2007, s33(2)

- That the best interests of the child are an 'integral' part of the right to family life under Article 8 ECHR;
- That the best interests of the child ought to be a primary consideration; that it ought to be considered separately and of no less inherent weight than other considerations (and preferably temporally first in the decision-making process);
- That the child should not be 'blamed' for the moral failings of their parent, including that they have offended; therefore only rights-based considerations ought to be balanced against the best interests of the child;
- That the legitimate aims for interfering with the right to family life include the maintenance of immigration control and preventing crime and disorder, including by the deportation of foreign national offenders in order to incapacitate, deter, and to communicate society's opprobrium for criminal offending.

Furthermore, deportation decisions are *polycentric*. Deportation decisions may be about an isolated individual, with no existing social or family ties to the UK who is arrested on arrival at the airport. However, many deportation decisions, like that of Marcus, affect multiple individuals connected by family ties. Marcus has a family life with his partner, Samira, but that family life is inherently not just Marcus'; it is Samira's family life as well. Marcus has children and therefore has a family life with them, but that family life is not just Marcus'; it is the family life of his children as well. Marcus' children also have best interests which stretch beyond the simple maintenance of family but also encompasses their safety, education, health, environment, and identity, amongst other things.[791]

[791] Outlined in chapter 2

2. The Simple Balancing Approach

The "simple balancing approach"[792] is based on this paradigm which views the deportation of Marcus through the metaphor of a balance between two competing values; the weight of family life on one side, and the weight of the public interest in deportation on the other. In the "simple balancing approach", 'there is only one family life'.[793] This one family life is a commonly-held human right to family whereby the weight of family life held by Marcus' family can be assessed as a whole and placed onto one side of the balancing scales.

The decision-maker, following the European Court of Human Rights (ECtHR) jurisprudence, is able to assess the overall weight of family life by considering the *value* the family life, magnified by the *gravity* with which any interference with family life will be felt. The decision-maker will consider the *value* of Marcus' family life by looking at whether Marcus is married[794] and whether he lives with his children.[795] The *gravity* of interference is dependent on the level of belonging that Marcus, Samira and their children have to the UK or whether they are considered to really 'belong' in Freedonia. Although two of Marcus' children are legally British citizens, the decision-maker will have to assess whether they are old enough for that citizenship to mean something more to them than a liberty to enter the UK without let or hinderance.[796] To what extent will they actually miss living in the UK, to what extent do they actually belong? On the other side of the balance, the public interest in preventing crime and disorder weighs heavily. Criminal offending by an FNO engages all 'three "parts" of the public interest – avoiding the risk of reoffending, deterrence and public revulsion.'[797]

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[792] Chapter 4

[793] *Beoku-Betts* (n203) [43]

[794] *Üner v Netherlands* (n20) [57-58]

[795] *Joseph Grant v The United Kingdom* (n321) [40]

[796] Caroline Sawyer (n565) 160

[797] Beaumont (n329)

The "simple balancing approach" requires deportation decision-makers to weigh these two sides of the balance and undertake a fact-sensitive proportionality exercise between them.[798] When the weight of the two competing values – family life and public interest – are placed in the balance, which value weighs most heavily? Which value must be given effect to; the deportation of the foreign national offender, or the protection of family life?

To the extent that the best interests of the child impinges on this fact-sensitive proportionality exercise, it is as one of the relevant factors relevant to deportation decision-making. It must find a place alongside all the other factors relevant to the family life of Marcus, his partner, and his children, and the fact that Marcus has committed a serious criminal offence.

In chapter 4 I argued that, in reality, the best interests of the child is split between consideration of the *value* of family life and the *gravity* of the interference. Some aspects of the child's best interests (such as their relationship with resident and non-resident parents) are considered as part of the *value* of family life, and some aspects of their best interests (such as their *de jure* and *de facto* ties to the UK) are considered as part of the *gravity* of interference. However, this means that the best interests of the child are effectively side-lined because they are subsumed into the wider question of what weight ought to be given to the family life of the foreign national offender. The best interests of the child, as the best interests of the child, goes missing.

This is problematic for two reasons. The first is that it means that the "simple balancing approach" to deportation decisions is not *polycentric*. The *polycentricity* of deportation decisions arises because they involve multiple individuals – Marcus, Samira, Adam, Bryony, Claude, and Sharon – but also because each of those individuals have different human rights which are engaged by deportation decisions. Marcus has a right to family life, Samira has a

[798] *Huang* (n8) [20]

right to family life, Sharon has a family life with Claude, and Adam, Bryony and Claude have both a right to family life *and* to have their best interests taken as a primary consideration. Whenever a decision-making process means that the best interests of the child goes missing – as it does under the "simple balancing approach" to deportation decisions – the decision-making process is no longer *polycentric.*

The second problem is that there is a *plurality of decision-making norms*. The *polycentricity* of deportation decisions arises from the fact that deportation decisions engage both the right to family life and the best interests of the child. The *plurality of decision-making norms* arises because each of these rights engage require something different of the decision-maker. The right to family life under Article 8 ECHR (and domesticated into UK law by the Human Rights Act 1998) requires a balance between family life and the public interest in deportation as a means to prevent crime and disorder. The best interests of the child under Article 3 UNCRC (and domesticated into UK law by s55 BCIA) requires that the best interests of the child be a primary consideration; it must be considered separately and have no less inherent weight than other considerations. The best interests of the child may also not be balanced against considerations which are not grounded in the human rights of others.

The "simple balancing approach" is unable to accommodate this *plurality of decision-making norms*. Rather than treat the best interests of the child as a separate consideration, the best interests of the child is subsumed into the consideration of family life. Therefore, rather than being assessed separately as one thing – the best interests of the child – it is broken into those aspects which speak to the *value* of family life and the *gravity* of interference. Because it is subsumed in this way, it cannot have no less inherent weight than other considerations. Finally, the "simple balancing approach" has only two sides so that the best interests of the child must be balanced against non-rights-based considerations because non-rights-based

considerations are integral parts of the public interest in the Article 8 ECHR legitimate aim of preventing crime and disorder.

The "simple balancing approach" reflects two of the themes of UK deportation law. The first is the dichotomous conflict between the desire to deport FNOs (notionally for the 'prevention of crime and disorder') and the protection of the rights of individuals, particularly children who have a family life with the FNO. The "simple balancing approach" reflects this by having two sides to a metaphorical balancing scale and into which any relevant aspect of the case must be fit in order to be visible to the decision-maker. The second is that the best interests of the child are an *ad hoc* development to existing patterns of deportation decision-making. The "simple balancing approach" was initially formulated without reference to the best interests of the child. Only in the 2006 European Court of Human Rights (ECtHR) case of *Üner*[799] was the best interests of the child first articulated as an aspect of the right to family life to be incorporated into the "simple balancing approach" of Article 8 ECHR.

3. The Modified Balancing Approach

The modification of the "simple balancing approach" – articulated by the Supreme Court in *ZH (Tanzania)*[800] – was the second major development of UK deportation law examined by this thesis.[801] This development seeks to give greater concentration to the best interests of the child through s55 BCIA by requiring some specific, child-centric principles must be given effect to alongside the right to family life; a "modified balancing approach". These are that the best interests of the child be a primary consideration; it must be considered separately and have no less inherent weight than other considerations. The best interests of the child may also not

[799] *Üner v Netherlands* (n20)

[800] *ZH (Tanzania)* (n21) [33]

[801] Chapter 5

be balanced against considerations which are not grounded in the human rights of others, or in the preferred language of *ZH (Tanzania)*, children should not be 'blamed' for the conduct of their parents.[802]

The articulation of these principles mean that the "modified balancing approach" is more *polycentric* because it requires decision-makers to take into account the best interests of the child as a consideration in and of itself, rather than one subsumed into consideration of family life (although it stops short of being fully *polycentric* because the best interests of the child do not obtain the status of a human right). However, the "modified balancing approach" presents a confused response to the *plurality of decision-making norms* by stating principles as to the best interests of the child but not explaining how they are to operate in practice. It does not define the relationship between family life and the newly separate consideration of the best interests of the child. How can the best interests be both separate to family life but at the same time 'integral' to it? The "modified balancing approach" includes the instruction that children should not be blamed for the conduct of their parents yet continues to allow that the vindication of their rights claim is contingent upon how severe the FNOs past offending was. How can a child be shielded from the blame for their parent's deportation if their best interests are more likely to be impaired the more blameworthy the parent is considered to be?

Ultimately, the "modified balancing approach" remains committed to a vision of deportation which balances the FNOs family life against the impetus to deport as a consequence of offending. The "modified balancing approach" recognises that the best interests of the child may 'sabotage'[803] the Secretary of State's intention to deportation but does not set out a coherent way in which it should do so. It develops statements of principle without developing a coherent structure in which those principles can be given effect to.

[802] *ZH (Tanzania)* (n21) [33]

[803] Fortin (2011) (n46) 947

4. The Exception Approach

The development of a statutory "exception approach"[804] to deportation cases may have been a response to the lack of consistent decision-making arising from the "modified balancing approach" with Theresa May as SSHD decrying the way in which the right to family life had been 'perverted'.[805] The Immigration Act 2014 dictates exceptions to the deportation of foreign national offenders when the effect of deportation on 'qualifying children' is 'unduly harsh' or exhibits 'exceptional circumstances'.[806]

As an evaluative exercise concerned with whether the effect of deportation on the child amounts to 'unduly harsh' treatment or 'exceptional circumstances' appears, at first blush, a child-centred focus on the vulnerable child. However, although this may be the decision-maker's centre of attention it masks that it is the public imperative to deport that is reinforced by statute, not the protection of the child. The Immigration Act 2014 begins with the focus on the position of the FNO whose deportation is in the public interest. This acts as an underlying presumption which a qualifying child must overcome. Moreover, the child must demonstrate more than that their *best interests* are impaired by the deportation of the foreign national offender parent; the negative effects that they suffer must be greater than that so as to be 'unduly harsh' or of 'exceptional circumstances'. The child's best interests are not the primary statutory consideration, rather it is the imperative to deport the FNO which is primary and that only reluctantly will the Immigration Act 2014 permit the interests of children to be an effective exception to deportation.

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[804] Chapter 6

[805] politics.co.uk (n87)

[806] Nationality, Immigration and Asylum Act 2002, s117C (inserted by The Immigration Act 2014, s19). See also: *KO (Nigeria)* (n24)

5. Why has UK law found it difficult to give effect to the best interests of the child in the decision to deport foreign national offenders?

UK deportation law is the site of a tension between two different public policy impulses. The first is that FNOs are "bad" migrants, whose continued presence is the UK is considered to be manifestly not in the public interest. On the other hand, foreign national offenders may have children who are considered to be inherently vulnerable, innocent, and in need of the law's protection. To deport an FNO may result in the vulnerable, innocent child having their best interests impaired for reasons beyond their control; after all it is not their fault that their FNO is an offender and they should not be blamed for what they are not responsible for. On the other hand, to protect the child means that the FNO escapes deportation. UK deportation law has found it difficult to give effect to the best interests of the child in deportation decisions precisely because to do so cuts against the imperative to deport the FNO. In claiming that their best interests should be given effect to, the child gets in the way of the state's attempt to deport FNOs.

UK deportation law has sought to manage this public policy tension by conceptualising deportation decisions within the framework of a human rights balance. The family life of FNOs and their children are balanced against the public interest in deportation and this allowed decision-makers to make case specific proportionality decisions so that the public policy tension is resolved in individual cases.

However, prevailing understandings of human rights has not stood still, and neither have the substantive human rights provisions relevant to deportation. The best interests of the child has impinged slowly on deportation decision-makers; first as an aspect of the right to family life,[807] then as unincorporated treaty obligation,[808] and finally as a statutory duty to take

[807] *Üner v Netherlands* (n20)

[808] The 2008 withdrawal of the immigration reservation to Article 3 UNCRC (Christie (n160) 16; Fortin (2006) (n154) 55)

into account the welfare of children.[809] The courts have expanded the understandings of these obligations so that the s55 duty has been interpreted so as to include some of the important features of Article 3 UNCRC; that the best interests of the child ought to be a separate, primary consideration which is given no less inherent weight than other considerations, and which cannot be balanced against non-rights based considerations. This thesis has described the outlines of both jigsaw pieces (the best interests of the child and the right to family life) and explained why they do not appear to be able to fit together. Their not fitting together is because, I have argued, of the *polycentricity* of deportation decisions, and the *plurality of decision-making norms*. Giving effect to either is possible, but this must come at the cost of the other; yet they are problems which must be resolved simultaneously because they arise simultaneously from the legal obligation to apply both the best interests of the child and the right to family life.

The development of the obligation to the best interests of the child has been *ad hoc*, first within the "simple balancing approach" first devised with reference solely to determine the right to family life, second as a modification to that approach – a "modified balancing approach" – and lastly through a statutory intervention which created an "exception approach". None of these approaches have been able to resolve the problem inherent to the legal obligation to give effect to the right to family life and the best interests of the child, as both have been come to be understood. This inherent problem is that the *ad hoc* development of the best interests of the child has resulted in the creation of two different parts of the law – the right to family life and the best interests of the child – which do not operate together seamlessly or effectively. They are like two jigsaw pieces which do not fit together but which the instruction is that they must be made to. The result is likely to be messy, incomprehensible, unusable, and

[809] Borders, Citizenship and Immigration Act 2009, s55

to require the exclusion of some of the aspects of the pieces; appropriate adjectives to apply to the "simple balancing approach", "modified balancing approach", and "exception approach". In each approach, it is the best interests of the child which is the aspect frequently excluded (or at least side-lined).

UK deportation law has therefore found it difficult to give effect to the best interests of the child in deportation decisions because it has remained committed to giving effect to the best interests of the child in a single deportation decision alongside the right to family life. However, because both require different things of the decision-maker, UK deportation law requires decision-makers to reconcile the irreconcilable.

6. … And what to do about it

In the final chapter, I argued for a change to s33 UK Borders Act 2007, which sets when and 'automatic' deportation order may be revoked. This effect of this amendment would be to make the best interests of the child a freestanding, independent human right in deportation cases. Whereas the "simple balancing approach", "modified balancing approach", and "exception approach" all view the best interests of the child as an aspect of, or addition to, the UK's domestic and/or international obligations under Article 8 ECHR, this final approach – which I have called the "human rights approach" – starts from the perspective that the best interests of the child is itself a human right which is directly engaged by the deportation of an FNO parent.

The rationale for its inclusion in this thesis is twofold. Firstly, it helps illustrate why UK law as found it difficult to take into account the best interests of the child in deportation decisions. The central argument has been that the *ad hoc* layering of legal obligations to the right to family life and the best interests of the child in deportation law has resulted in two theoretical problems; *polycentricity* and the *plurality of decision-making norms*. These arise because the content of these legal norms appear to require different, and irreconcilable, things

of deportation decision-makers when the right to family life and the best interests of the child are applied simultaneously. However, when the domestication of Article 3 UNCRC is separated from the domestication of Article 8 ECHR so as to recognise the best interests of the child as being a separate, independent human right, rather than as an aspect of the right to family life that must be subsumed within or bolted-onto it, the problems of *polycentricity* and the *plurality of decision-making norms* fall away. By demonstrating that it is possible to envisage a decision-making approach that does not have these contradictions at its heart, further supports the argument that it is because of the way in which Article 8 ECHR and Article 3 UNCRC have been domesticated in the HRA and s55 BCIA that UK law has found it difficult to give effect to the best interests of the child in deportation law.

The second rationale for chapter 7 is to present a solution to the problem presented in this thesis. In chapter 5 I highlighted the choices that the UK Supreme Court had for the interpretation of s55 BCIA in the context of Article 3 UNCRC, and in chapter 7, the choices that Parliament made in creating an "exception approach" in the Immigration Act 2014. Each of these choices has resulted in an entrenchment of the problems of *polycentricity* and the *plurality of decision-making norms* by the *ad hoc* layering of developing legal obligations to the best interests of the child onto the right to family life in UK law. This provides a second answer to the thesis question; that UK law has found it difficult to give effect to the best interests of the child in deportation law, not because these are fundamentally irreconcilable legal obligations, because of the legislative choices made in UK deportation law. By making a different set of legislative choices, such as the one proposed here, UK law is capable of giving full effect to the best interests of the child in the decision to deport foreign national offenders.

7. Implications for Future Research

The "human rights approach" to deportation decision-making presented in chapter 7 has two clear implication for future research. Firstly, to what extent is it possible or desirable to modify the existing approaches to Article 8 ECHR (presented in this thesis as the "simple balancing approach" at chapter 4) so that the proposed "human rights approach" is given effect through interpretation of Article 8 ECHR, rather than through legislative change? Secondly, what are the implications of the "human rights approach" to the legal regulation of removal?

7(a) Modifying Article 8 ECHR

A central weakness of the proposed "human rights approach" to the best interests of the child in UK deportation law is that it requires the creation (or recognition) of a new, separate human rights obligation in UK law. In chapter 7 I suggested a wording as to how this might be achieved as an amendment to UK statute law. Article 8 ECHR, on the other hand, already has a concrete place in UK deportation law through the Human Rights Act 1998. UK authorities (including the Home Office, immigration tribunals and higher courts) must act in a manner which is compatible with Article 8 ECHR.[810] Furthermore, a modification to the ECtHR's conception of Article 8 ECHR would apply more broadly to affect the deportation practices of other states. There is clearly a practical advantage to working within an existing legal framework in order to create positive, child-centred law reform. Considering how this might be achieved would be potentially fruitful area for future research.

[810] Human Rights Act 1998, s6

Furthermore, the existing framework of Article 8 ECHR appears – on its face – to accommodate the best interests of the child. Both UK case law[811] and ECtHR jurisprudence[812] have recognised the best interests of the child as being an integral element to what private and family life mean in the context of the Article 8 ECHR right. To what extent is the critique of the "simple balancing approach" in chapter 4 based on failings in the practical use of Article 8 ECHR, rather than on specific doctrinal barriers? Can the same results as the "human rights approach" be obtained by using Article 8 ECHR? Future research would consider these questions. Below I sketch a departure point for this research, by highlighting differences between the "human rights approach" to the best interests of the child and Article 8 ECHR. These would have to be surmounted to achieve a doctrinally coherent and/or politically desirable modification of Article 8 ECHR.

Article 8 ECHR protects the right to family life and private life. Family relationships are core to what in chapter 2 were identified as aspects of the best interests of the child in the law and literature; relationships of mutual affection with parents or care-givers; supportive, flexible parenting structure; to have an example (behavioural, cultural etc) set by the child's parent(s); interest in the child shown by parent(s); continuity in upbringing and care; capability of the child's parent(s) to meet the child's needs.

Private life under Article 8 ECHR is an expanding concept, including, for instance; the right to choose one's name;[813] the right to private sexual expression;[814] the right to information

[811] *LD (Article 8 – best interests of child) Zimbabwe* [2010] UKUT 278 (IAC), [2011] Imm AR 99; *R (on the application of MXL) & Ors v Secretary of State for the Home Department* [2010] EWHC 2397 (Admin); *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4; *Zoumbas v Secretary of State for the Home Department* [2013] UKSC 74,; *Kaur (children's best interests / public interest interface)* [2017] UKUT 14 (IAC).

[812] *Üner v Netherlands* (n20)

[813] *Burghartz v Switzerland* App no 16213/90 (ECtHR, 22 February 1994)

[814] *Dugeon v The United Kingdom* App no 7525/76 (ECtHR, 22 October 1981)

about toxic fumes;[815] freedom from compulsory medical intervention;[816] freedom from sexual assault;[817] and, freedom from having a photograph of oneself being taken and disseminated.[818] The private life aspect of Article 8 ECHR may therefore reasonably include aspects of the best interests of the child such as the child's identity, their health and physical wellbeing, and a social network with friends and peers, again, all aspects of the best interests of the child identified in chapter 2.

However, there are also aspects of the best interests of the child which do not fit neatly within conceptions of family life, private life, or other ECHR rights. The wishes, feelings, or views of children, consideration of individual characteristics, and safe physical environment, sit uncomfortably within (although not entirely outside the possible ambit) the central proposition of the Article 8 EHCR right to private life 'to ensure the development, without outside interference, of the personality of each individual with other human beings'.[819]

This limitation of the ECHR protections of human rights in the context of children has been noted, not least by Kilkelly:

> the European Convention does not reiterate its standards of social and economic rights. Thus the Convention does not recognize the right to social security, the right to an adequate standard of living, or cultural rights of any kind. Specific reference to the important needs of childhood is absent too.[820]

[815] *Guerra v Italy* App no 14967/89 (Grand Chamber, 19 February 1998)

[816] *X and Y v Netherlands* App no 8978/80 (ECtHR, 26 March 1985)

[817] *MC v Bulgaria* App no 39272/98 (ECtHR, 4 December 2003)

[818] *Von Hannover v Germany* App no 59320/00 (ECtHR, 24 June 2004); *Sciacca v Italy* App no 50774/99 (ECtHR, 50774/99); *Khuzin and others v Russia* App no 13470/02 (ECtHR, 23 October 2008)

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

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

More problematic for the prospect of protecting all of what is implied by the best interests of the child under the umbrella of Article 8 ECHR are those aspects of the child's best interests which are protected by other human rights, such as the right to education (Article 2 of Protocol 1). Could the right to privacy be stretched to include rights protected by other substantive Articles? The case law of the ECtHR suggests not. The exclusion of immigration removal and deportation from the protections of Article 6 ECHR were in part justified by the ECtHR on the basis that:

> by adopting Article 1 of Protocol No. 7 containing guarantees specifically concerning proceedings for the expulsion of aliens the States clearly intimated their intention not to include such proceedings within the scope of Article 6 § 1 of the Convention.[821]

Protecting the child's best interests in education through Article 8 ECHR rather than separately through Article 2 of Protocol 1 would be doctrinally impermissible for the same reasons. Notwithstanding this, in chapter 4 I gave as example the case of *Keles* in which the ECtHR successfully included the education opportunities of the children of foreign national offenders within the context of Article 8 ECHR in a deportation case. Clearly the doctrinal evidence here as to the ECtHR's practice is mixed and future research would have to grapple with the doctrinal coherency of an approach which seeks to protect some rights through the application of another right.

[821] *Maaouia v France* (n713) [37]

A second consideration for future research is that the best interests of the child does not directly correspond to the right to family life or the right to private life under Article 8 ECHR. Setting aside the separate problem of issues to do with the right to education, to effectively achieve an outcome similar to the "human rights approach" solely through Article 8 ECHR its interpretation must be developed to undo the conceptual separation of private and family life which I described in chapter 4 as occurring in the ECtHR case law. The ECtHR currently chooses to focus its analysis of protection exclusively on either the family or private life of the applicants[822] and restricts:

> its formerly wide understanding [of family life] with a new focus on the 'nuclear family' of spouses and minor children, while at the same time broadening the protective reach of Article 8 ECHR to the network of personal, social and economic relations that make up the private life of every human being[823]

However, this does not point to Article 8 EHCR being doctrinally unsuitable for use so as to achieve the same result as the "human rights approach" to the best interests of the child, only that current trends in the ECtHR's interpretation of Article 8 ECHR preclude it.

Further research would have to consider that, even if it is possible to modify the definition of Article 8 ECHR family and private life so as to capture the individual components of the best interests of the child, whether this would be desirable. Would it adequately reflect what the best interests of the child is? "More than the sum of its parts" is cliché, but apt. Restricting consideration to private and family life reduces the scope of enquiry about the child, when the aim of a specific human right to the best interests of the child in the UNCRC is

[822] Steinorth (n201) 191

[823] Thym (n344) 88

designed to increase the range of the enquiry. For the Committee on the Rights of the Child, 'In giving full effect to the child's best interests, the following … should be borne in mind: … The universal, indivisible, interdependent and interrelated nature of children's rights'.[824] For McGoldrick, commenting on the UNCRC, it is a 'range of personal, social, economic and other factors that determine the perception of what is in the 'best interests' of the child.'[825] Restricting consideration of the child's best interests to their family and private life (as centrally important to the lives of children as these might be) appears undesirable if it is incapable of fully expressing what the best interests of the child means.

7(b) Removal

This thesis has consciously limited its analysis to the subject of deportation and has drawn a hard distinction between deportation on the one hand and removal on the other. A deportation order is attached to those whose presence in the UK is 'not conducive to the public good'[826] and removal applies to those in the UK who require leave to remain or enter and do not have it.[827] However, this distinction obscures overlap between the two legal categories.

Deportation is legally and morally distinct from removal because only deportation, deception, and the loss of refugee status through the actions of the individual refugee, may result in extant indefinite leave to remain (ILR) being curtailed.[828] However, not all foreign national offenders are in the morally significant position of having ILR and many will also be removable because they require leave to enter or remain and do not have it. Furthermore, illegal

[824] General Comment No. 14 (2013) (n104)

[825] Dominic McGoldrick, 'The United Nations Convention on the Rights of the Child' (1991) 5 International Journal of Law and the Family 132, 136

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

[827] Immigration Act 1971, s10

[828] Nationality, Immigration and Asylum Act 2002, s76

entry or visa overstaying (i.e. not possessing leave to enter or remain when one requires it) are in fact themselves criminal offences;[829] albeit ones where the maximum sentence falls short of the automatic deportation threshold of 12-months imprisonment.[830] Finally, the distinction drawn in this thesis obscures the fact that much of the case law relevant to removal also applies to deportation cases, and indeed this thesis makes much use of these cases to establish the law as applied to deportation. This shared case law includes the seminal cases of *ZH (Tanzania)*, *Zoumbas*, *Beoku-Betts,* and *Huang,* all referred to in depth in this thesis.

The "human rights approach" clearly has implications for removal decisions. If, as I assert, the human right encapsulated by the best interests of the child must be treated as a separate, primary consideration and that only rights-based considerations may outweigh the best interests of the child, then this human right must apply equally to removal. The right to the best interests of the child cannot logically apply exclusively to deportation. This presents a significant challenge to the concept of immigration removal which warrants further research.

This challenge arises because, on its face, the "human rights approach" could prohibit immigration removals entirely where children are involved. This is because the reasons for removal are said to be because an individual does not possess leave to enter or remain, and so removal pursues the legitimate aim of controlling immigration.[831] These do not appear to be human rights-based considerations as I have drawn them in this thesis because a failure to have an administrative immigration status does not obviously interfere with a human right possessed by an individual or group. Immigration control appears to affect only a general public

[829] Immigration Act 1971, s24(1)(a)-(b)

[830] Entering the UK without leave, remaining beyond the time limited by the leave, or failing to observe a condition of the leave are punishable by imprisonment for up to six months, or a fine, or both (Immigration Act 1971, s24(1))

[831] Immigration Act 2014, s117B(1)

interest,[832] rather than the rights and freedoms of other individuals. If so, then removal as a function of immigration control alone cannot outweigh the best interests of the child. If immigration removal does not provide a legitimate aim for the state's interference with the best interests of the child, then the removal of a foreign national with a child will rarely be permitted. Further research into the application of the Immigration Act 2014 'exceptions'[833] regime to removal cases involving children, and how the "human rights approach" differs from the current legal regime, is clearly required.

A departure point for this research would be to note that Home Office guidance on removal states that 'The starting point is that we would not normally expect a qualifying child to leave the UK.'[834] To what extent would the "human rights approach" be different from the above guidance, taken at face value?

Firstly, the "human rights approach" clearly extends to apply beyond the rigidity of the Immigration Act 2014's 'qualifying child'; British citizen children or children resident in the UK for more than seven years. But application of the "human rights approach" beyond 'qualifying children' does not mean that the removal of all parents of children would automatically be prohibited.

Many removals occur in the context where a non-British child had leave to enter and/or remain as a dependent of their parent, and so both parent and child are removable simultaneously. In such cases, the best interests of the child may not be interfered with at all because the child's interests are as adequately met in their country of nationality as they are in the UK. This would most obviously (but by no means exclusively) be the case in of a child

[832] Such as the 'maintenance of effective immigration control' or 'the interests of the economic well-being of the United Kingdom'; Nationality, Immigration and Asylum Act 2002, s117B(1)&(2)

[833] Chapter 6 of this thesis. See also, Collinson (2017) (n106) 251; Collinson (2019) (n772) 14

[834] Home Office 'Family Migration: Appendix FM Section 1.0bFamily Life (as a Partner or Parent) and Private Life: 10-Year Routes' (11 April 2019, Version 4.0) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/795223/10-year-routes-guidance-v4.0ext.pdf> accessed 8 May 2019, 68

removed as part of a family unit, after a period of temporary migration, to an economically developed, English speaking country such as Canada, the US, New Zealand, or Australia. The primary difference in the "human rights approach" is that the assessment must be of the child's best interests, rather than of an arbitrary period of residence for the purpose of qualification and a consideration of the 'reasonableness'[835] of removal.

As suggested previously,[836] the period of seven years residence arose as a rule-of-thumb adopted by UK courts to help determine when the best interests of a child remaining in the UK begin to outweigh the public interest in removal.[837] The removal provisions of the Immigration Act 2014 raise seven years residence to the status of inviolable rule. There are strong arguments that the 'qualifying child' provisions are therefore a breach of s55 BCIA, Article 3 UNCRC, and Article 8 ECHR because they do not take into account the best interests or family life rights of children who have been resident for less than seven years. The "human rights approach" would require the seven year period of residence to be guidance, rather than a qualifying rule.

Furthermore, the "human rights approach" would not automatically prohibit all removals of parents of children where the best interests of the child are engaged by the removal of a parent. Some of the grounds of refusal of leave to remain (and would thus make that person removable for lack of immigration leave) clearly have the potential to engage human rights-based considerations in the way that the "human rights approach" envisages. Paragraph 322(5) of the Immigration Rules (contained within the general grounds for refusal of immigration leave) permit the refusal of immigration leave on the basis of:

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[835] Nationality, Immigration and Asylum Act 2002, s117B(6). For a discussion on the difference between 'reasonableness' and the best interests of the child, see Collinson (2019) (n772) 25

[836] Chapter 6, part 4(a)

[837] *EM and Others (Returnees) Zimbabwe CG* [2011] UKUT 98 (IAC)

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

The improper use of this provision by the Home Office aside,[838] refusals of further leave under this provision include circumstances which may engage human rights considerations which may legitimately be balanced against the best interests of the child under the "human rights approach". These include criminal offending or conduct (including terrorism related behaviours) which has not been prosecuted.[839]

The expectation that the SSHD would 'not normally expect a qualifying child to leave the UK' would not necessarily be upset by the "human rights approach" to the best interests of the child. Instead, the circumstances which sit outside the expectation that removal of a qualifying child is not reasonable would be given more certain legal content; firstly, where the best interests of the child are not interfered with by their removal or the removal of a parent; and, secondly where the reason for removal engages criminality, terrorism, or other activities which impact on the human rights of others. The "human rights approach" would also require the seven year period of residence for children to be 'qualifying' to be a rule of thumb rather than a hard and fast statutory rule. However, the practical effects of the "human rights approach" on the scope of removal decisions should not be underestimated depending on how the Home Office applies its policies in practice. Further research into the doctrinal and numerical impacts on removal of the "human rights approach" should be investigated further

[838] The rule had been applied in a blanket manner to individuals who had to make post-hoc alterations to their self-assessment tax returns but who had made genuine errors (or others had made the errors on their behalf) rather than have been engaged in dishonesty. See, *Balajigari and others v Secretary of State for the Home Department* [2019] EWCA Civ 673

[839] For a clear example of this see the removal case of, *Farquharson (removal – proof of conduct)* [2013] UKUT 00146 (IAC), [21] where the desirability of removal was premised on the basis that 'the appellant represents a source of future danger to vulnerable women.' The removal of Farquharson was clearly for reasons of protecting the human rights of others.

based on the reality of how such decisions are made under the current legislative and guidance framework.

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