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PROTECTING AND PROMOTING THE HUMAN RIGHT TO RESPECT FOR FAMILY LIFE: TREATY-BASED REFORM AND DOMESTIC ADVOCACY

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I. INTRODUCTION

This article examines the right to respect for family life in international law, focusing on its underlying principles and explicit protections. The article identifies these legal norms so that drafters of international treaties, specifically the International Migrants Bill of Rights, and United States legal practitioners representing immigrant children can incorporate the right to respect for family life into their drafting and advocacy, thereby protecting and promoting this critical human right.

To encourage both high-level, international treaty-based reform and the grassroots domestic advocacy necessary to comprehensively protect and promote this right, this article provides specific ideas for incorporating the right to respect for family life into (1) the International Migrants Bill of Rights and (2) the United States immigration advocacy process.

Section II identifies the principles that underlie the right to respect for family life, especially as it relates to children: (1) that family is the natural and fundamental unit of society and (2) that maintaining the family unit is in the best interests of the child. It also discusses the individuals to whom the right to respect for family life typically attaches. Section III discusses examples of how courts and U.N. expert bodies, including the European Court of Human Rights and the United Nations Human Rights Committee, apply the right to respect for family life in child and family immigration contexts. Section IV analyzes the themes and reasoning in this case law.

Section V discusses specific ideas for further integrating the right to respect for family life into the current version of the International Migrants Bill of Rights. Section VI identifies ways in which United States-based advocates can incorporate the right to respect for family life into their

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advocacy efforts. Section VII provides a brief conclusion.

II. UNDERLYING PRINCIPLES AND APPLICABILITY

There are two main principles underlying the right to respect for family life as it relates to children: (1) the family is the natural and fundamental unit of society, and (2) maintaining the family unit is in the best interests of the child.

The first—family is the natural and fundamental unit of society—appears explicitly in several international conventions.¹ The second—maintaining the family unit is in the best interests of the child—is inferred from the Convention on the Rights of the Child (“CRC”) and explicitly stated in the African Charter on the Rights and Welfare of the Child (“ACRWC”).²

A. *Family is the Natural and Fundamental Unit of Society*

There are numerous treaty provisions that explicitly recognize the family as the natural and fundamental unit of society. These provisions, however, do not stop there, but also obligate states to afford the family unit broad protection. For example:

- “The family is the natural and fundamental group unit of society and is entitled to protection by society and the state.”³
- “The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society”⁴
- “[T]he family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community.”⁵
- “The family shall be the natural unit and basis of society. It shall be

1. See, e.g., Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 16(3), U.N. Doc. A/RES/217(III) (Dec. 12, 1948) [hereinafter Universal Declaration of Human Rights].

2. Sonja Starr & Lee Brilmayer, *Family Separation as Violation of International Law*, 21 BERKELEY J. INT’L L. 213, 222 (2003) (citing Convention on the Rights of the Child, Preamble & arts. 7(1), 8(1), and 9(1), Nov. 20, 1989, 1577 U.N.T.S. 3); African Charter on the Rights and Welfare of the Child, arts. 4(1), 19(1), July 11, 1990, OAU Doc. CAB/LEG/24.9/49).

3. Universal Declaration of Human Rights, *supra* note 1; International Covenant on Civil and Political Rights, art. 23(1), Dec. 16, 1966, 999 U.N.T.S. 171; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 44(1), Dec. 18, 1990, 2220 U.N.T.S. 93; American Convention on Human Rights, art. 17(1), Nov. 22, 1969, 1144 U.N.T.S. 146.

4. International Covenant on Economic, Social, and Cultural Rights, art. 10(1), Dec. 16, 1966, 993 U.N.T.S. 3.

5. Convention on the Rights of the Child, *supra* note 2, Preamble.

protected by the State which shall take care of its physical health and moral.”⁶

- “The family shall be the natural unit and basis of society. It shall enjoy the protection and support of the State for its establishment and development.”⁷
- “The family as a fundamental unit of society has the right to appropriate social, legal and economic protection to ensure its full development.”⁸

Despite the differences in wording, there seems to be broad international agreement, including ratification by the United States of the International Covenant on Civil and Political Rights (“ICCPR”), regarding the principle that the family is the natural and fundamental unit of society and regarding states’ obligation to provide this unit some level of protection and support.

B. *Maintaining the Family Unit is in the Best Interests of the Child*

As stated in the CRC, which is the primary international treaty addressing the rights of children around the world, and the ACRWC, the “best interests of the child” standard is the standard by which states must shape their policies relating to children.⁹ The “best interests of the child” standard is also the prevailing legal standard governing court-ordered separation of children from their families in the United States.¹⁰

While determining the “best interest” of any individual child is necessarily a fact-based, imprecise process, there is legal support for the principle that maintaining the family unit is in the best interests of a child. The CRC provisions supporting the inference that the maintenance of the family unit is in the best interests of the child are:

- Family is “the natural environment for the growth and well-being of all its members and particularly children,” and that “the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love, and understanding”;¹¹
- Each child has “the right to know and be cared for by his or her parents”;¹²

6. African Charter on Peoples’ and Human Rights, art. 18(1), June 27, 1981, 1520 U.N.T.S. 217.

7. African Charter on the Rights and Welfare of the Child, *supra* note 2, art. 18(1).

8. European Social Charter, pt I, art. 16, Oct. 18, 1961, 529 U.N.T.S. 89.

9. Convention on the Rights of the Child, *supra* note 2, art. 3(1); African Charter on the Rights and Welfare of the Child, *supra* note 2, art. 4(1).

10. See LeAnn Larson LaFave, *Origins and Evolution of the “Best Interests of the Child Standard,”* 34 S.D. L. REV. 459 (1989).

11. Convention on the Rights of the Child, *supra* note 2, Preamble.

12. *Id.* art. 7(1).

- Each child has “the right . . . to preserve his or her identity including . . . family relations . . . without interference”;¹³ and
- A ban on the separation of a child from his or her parents, except by competent authorities subject to judicial review.¹⁴

Although the connection between best interests of the child and maintenance of the family unit is not explicit, it is easy to infer that the CRC links the two concepts.¹⁵

The link between the maintenance of the family unit and the best interests of the child also exists, more explicitly than in the CRC, in the ACRWC. In Article 4(1), the ACRWC identifies the “best interests of the child” standard as the “primary consideration” for any action involving children.¹⁶ It then continues by providing in Article 19(1) that: “Every child shall be entitled to the enjoyment of parental care and protection and shall, whenever possible, have the right to reside with his or her parents.”¹⁷ These provisions suggest that maintaining the family unit is an important component under the generally and internationally recognized principle of “best interests of the child.”

C. *Protected Individuals*

Because one’s family can include parents, siblings, grandparents, adult children, and others, establishing the existence or non-existence of a family life involves a fact-based, flexible, and substantive evaluation of situations where the right to respect for family life might attach.

This inquiry focuses on the strength of the emotional ties between the people in the situation.¹⁸ In some situations, other ties, such as economic dependence, can also be important.¹⁹ Despite this flexible standard, there is still a hierarchy to the types of relationships that can constitute family life; certain relationships are more likely to indicate family life than others.

1. *Close Family*

At its clearest, “family life” exists between a married husband and wife and between parents and their children.²⁰ The strongest example of family

13. *Id.* art. 8(1).

14. *Id.* art. 9(1).

15. Starr & Brilmayer, *supra* note 2, at 222-23.

16. African Charter on the Rights and Welfare of the Child, *supra* note 2, art. 4(1).

17. *Id.* art. 19(1).

18. Starr & Brilmayer, *supra* note 2, at 256 (citing *Khan v. United Kingdom*, App. Nos. 2991/66, 2292/66, 10 Y.B. Eur. Conv. on H.R. 478 (1967) (Euro. Comm’n on H.R.)); *Singh v. Entry Clearance Officer, New Delhi*, [2004] EWCA (Civ) 1075 (Eng.), available at <http://www.ipsofactoj.com/international/2005A/Part02/int2005A%2802%29-004.htm> [hereinafter *Singh*].

19. *Kugathas v. Sec’y of State for the Home Dep’t*, [2003] EWCA (Civ) 31 (Eng.), available at <http://www.bailii.org/ew/cases/EWCA/Civ/2003/31.html> [hereinafter *Kugathas*].

20. *X v. Germany*, App. No. 6357/73 (1974).

life, particularly as it relates to children, is that of a child born in wedlock, who benefits from a strong presumption, which cannot be overturned save extraordinary circumstances, that he or she has a right to respect for family life with his or her parents.²¹ Such a child has a “life bond” with his or her parents that survives despite contrary occurrences like divorce, separation, or lack of cohabitation.²²

Perhaps most notably, the category of children under the “close family” rubric also includes illegitimate²³ and foster and adopted children.²⁴ Like children born in wedlock, these children enjoy a similarly strong presumption in favor of family life with their respective parents.

2. *Broader Types of Family*

Ties between other blood relatives—such as between grandparents and grandchildren—are likely sufficient, as long as the relatives play a significant role in the family life.²⁵ This logic might also extend to more distant blood relatives, such as aunts and uncles, although that particular type of relationship has not yet been explicitly recognized as constituting family life.²⁶

In examining these broader types of family relationships, other types of ties, such as economic dependence, might come into play.²⁷ For example, in the case of adult children trying to establish a right to respect for family life with their surviving parents, something more than emotional ties must exist.²⁸ The person seeking to establish family life must show that the ties that bind are more than those of “close relations of whom we are extremely fond and whom we visit”²⁹ In such a case, where the emotional closeness of a “broader family” member is disputed, a demonstration of economic or other dependence might help establish sufficient ties.

3. *Migrant Workers and Their Families*

Aside from the protections described above, migrant workers and their families have an explicit treaty-based reference to the types of individuals included in their families:

21. See, e.g., *Berrehab v. Netherlands*, 138 Eur. Ct. H.R. (ser. A), para. 22 (1988) [hereinafter *Berrehab*].

22. *Id.*

23. *Marckx v. Belgium*, App. No. 6833/74, 31 Eur. Ct. H.R. (ser. A) (1979) [hereinafter *Marckx*].

24. *Singh*, *supra* note 18; see generally Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally, G.A. Res. 41/85 (Dec. 3, 1986).

25. *Marckx*, *supra* note 23, at 4.

26. See *Nsona v. Netherlands*, App. No. 23366/94, 32 Eur. H.R. Rep. 9 (2001).

27. *Kugathas*, *supra* note 19.

28. See also *Khan v. The United Kingdom*, App. Nos. 2991/66, 2292/66, 10 Y.B. Eur. Conv. on H.R. 478 (1967) (Euro. Comm’n on H.R.).

29. *Id.*

“Persons married to migrant workers or having with them a relationship that, under the applicable law, produces effects equivalent to marriage, as well as their dependent children and other dependent persons who are recognized as members of the family by applicable legislation or applicable bilateral or multilateral agreements between the States concerned.”³⁰

This International Migrants Bill of Rights incorporates this definition in Article 18(2). This inclusion is one step toward ensuring that this document incorporates the right to respect for family life, but is insufficient to promote and protect this right to the fullest extent possible.

III. RIGHT TO RESPECT FOR FAMILY LIFE: CASES AND THEMES

Claims based upon the right to respect for family life usually arise in two separate venues pursuant to two different yet related convention provisions. In each, an individual challenges a state’s adverse immigration action as contrary to the right to respect for family life.

The first is the European Court of Human Rights (“European Court”) adjudicating a claim under Article 8 of the European Convention on Human Rights (“ECHR”).³¹ The European Court’s analysis of Article 8 is well-developed and extremely useful for thinking about the right to respect for family life, so much so that the second venue—the UN Human Rights Committee (“UNHRC”) adjudicating Article 17 of the ICCPR—looks to the European Court for guidance.³²

A. *Article 8 of the European Convention on Human Rights*

Article 8 of the European Convention on Human Rights states:

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.³³

30. International Convention on the Protection of the Rights of all Migrants Workers and Members of Their Families, *supra* note 3, art. 4.

31. *See, e.g.*, *Abdulaziz v. United Kingdom*, App. Nos. 9214/81, 9473/81, 9474/81, 7 Eur. H.R. Rep. 471 (1985) [hereinafter *Abdulaziz*].

32. *See, e.g.*, *Winata v. Australia*, U.N. Human Rights Comm., Commc’n No. 930/2000, P 7.3, U.N. Doc. CCPR/C/72/D/930/2000 (2001) [hereinafter *Winata*]; *see, e.g.*, *Madafferi v. Australia*, Commc’n No. 1011/2001, U.N. Doc. CCPR/C/81/D/1011/2001, para. 4.16 (2004) [hereinafter *Madafferi*].

33. Convention for the Protection of Human Rights and Fundamental Freedoms, art. 8(1) - (2), Sept. 3, 1953, 213 U.N.T.S. 222 [hereinafter *European Convention for Human Rights*].

Article 8 results in a multi-step analysis for the European Court that involves three different determinations: (1) whether family life exists, (2) whether the state's action constituted "interference" with the family life, and (3) whether despite the interference, the state's action was justified as in accordance with law and necessary in a democratic society in the interests of national security, public safety, or economic well-being; the prevention of disorder or crime; or the protection of health, morals, or the rights or freedoms of others.³⁴ In practice, the third step in this analysis consists of a balancing test that incorporates numerous relevant factors.

1. *Existence of Family Life*

First, the court must determine if a family life exists. This analysis follows the contours described above in Section II.C. Although the European Court does address this part of the analysis, it often easily finds the existence of a family life and then moves on to the rest of the analysis.³⁵

2. *"Interference" with Family Life*

The second aspect of the European Court's analysis examines whether the state's adverse immigration decision constitutes "interference" with the family life. The question of whether the adverse immigration decision constitutes interference manifests itself as both a negative and positive obligation.³⁶ The negative duty imposed upon the state—to refrain from interference in the family life that already exists in the country—has a positive corollary—the obligation of a state to admit to its territory certain family members—that accompanies it.³⁷

There is a difference between these two situations, but those differences do not usually emerge in this part of the analysis. Rather, the European Court typically finds an interference with family life, whether through removal or refusal of entry, and then folds the differences between the two situations into the fact-specific analysis that follows.³⁸ The type of case—entry or removal—thus becomes part of the European Court's balancing of the state's interest against the interests of an individual's right to respect for family life. States challenge characterization of an immigration decision as interference, but these challenges are unsuccessful.

More recently, a new type of positive obligation has emerged: the obligation of a state to care for an unaccompanied non-national child in its

34. *Gül v. Switzerland*, App. No. 23218/94, 22 Eur. H.R. Rep. 93, paras. 24-29 (1996) [hereinafter *Gül*].

35. See, e.g., *Abdulaziz*, *supra* note 31, ¶ 21.

36. *Id.* ¶ 67.

37. David Feldman, *The Developing Scope of Article 8 of the European Convention on Human Rights*, 3 EUR. HUM. RTS. L. REV. 265, 267 (1997).

38. *Gül*, *supra* note 34, ¶ 38.

territory.³⁹ In that type of situation, the state must also actively facilitate family reunification between the child and her non-national mother, even when the mother is living in a foreign country.⁴⁰ Currently, it is unclear exactly how far this type of positive obligation might reach but, at least where unaccompanied minors are concerned, the responsibilities of the custodial state may be quite significant.

3. *Whether the State's Interference was Justified*

Although Article 8 and, occasionally, the court, clearly delineate this third prong into three separate components (in accordance with law, necessary in a democratic society, and meeting one of the identified legitimate aims), the court's analysis is seldom as clear. Usually, the Court finds that an adverse immigration decision, as long as permissible under the country's immigration laws, was in accordance with law (the petitioner seldom challenges the legality of the adverse immigration decision). The Court then spends considerably more time balancing a number of factors to weigh the state's interest against those of the individual and her family.⁴¹

It is during this balancing that the obligation dichotomy discussed above—the positive obligation to allow entry versus the negative obligation to forego removal—emerges. Put simply: it is easier to stay in a country with one's family than it is to enter another country to be with one's family.⁴² That starting point is a result of well-established international law that gives states broad discretion in controlling the immigration of non-nationals into their territory and also provides the basic dividing line for each of the cases discussed below.⁴³

Recently, as mentioned above, a new type of positive obligation on states has emerged: the obligation to care for and seek reunification for unaccompanied, non-national minors in its custody.⁴⁴ This obligation does not fit in the traditional "entry versus removal" dichotomy and seems to represent a new, broader application of the Court's thinking on the reach of Article 8 protections.

Aside from these generalizations, the cases are fact-specific. A brief discussion of several examples is helpful before identifying their common general themes and specific arguments.

39. *Mayeka v. Belgium (Tabitha Case)*, App. No. 13178/03 (Sect. 1), Eur. Ct. H.R. (2006) [hereinafter *Mayeka*].

40. *Id.*

41. See, e.g., *Berrehab*, *supra* note 21, ¶ 25.

42. See Courtney R. Howell, *The Right to Respect for Family Life in the European Court of Human Rights*, 34 U. LOUISVILLE J. FAM. L. 693 (1996).

43. *Abdulaziz*, *supra* note 31, ¶ 67.

44. See *Mayeka*, *supra* note 39.

a. *Abdulaziz v. United Kingdom (1985)*

In *Abdulaziz*, Mmes. Abdulaziz, Cabales, and Balkandali were lawful and permanent residents of the United Kingdom (“UK”) who applied for entry for their respective husbands.⁴⁵ Pursuant to immigration law at the time, the UK denied entry to each of the husbands; the three wives then challenged this decision under Article 8’s right to respect for family life.⁴⁶

The women argued that Article 8 included the right to establish one’s family in a country of legal residence. Therefore, putting the women in the position of having to either be apart from their husbands or move out of the UK was contrary to Article 8.⁴⁷ The UK countered that the women had been granted lawful and permanent status when they were single, and because they had not shown any obstacles to establishing themselves in their or their husbands’ home countries, they were actually claiming a right to choose their residence, which is not protected.⁴⁸

The Court sided with the UK, finding that several factors weighed in favor of prohibiting entry: (1) the women had only married after they had achieved settled status in the UK and, at the time of their marriages, the women knew that their husbands could have been denied entry, (2) Article 8 does not protect the right to choose residency, especially where it involves compelling a state to accept non-nationals for settlement, and (3) there were no real obstacles to the women and their husbands settling in their home countries.⁴⁹

b. *Berrehab v. the Netherlands (1988)*

In *Berrehab*, a Moroccan citizen, Berrehab, lawfully resided in the Netherlands when he married a Dutch woman and had a child with her.⁵⁰ After the marriage, Berrehab applied for and was granted a residence permit based upon his marriage to a Dutch national.⁵¹ Berrehab and his wife divorced after two years, but he maintained close ties with his Dutch daughter.⁵² He applied for renewal of his residence permit but was denied because he was no longer married to a Dutch national and his relationship with his daughter could be continued from Morocco.⁵³ Berrehab challenged this decision pursuant to Article 8.⁵⁴

After finding the existence of a family life and interference in that family life through a decision to deport Berrehab, the European Court continued the

45. *Id.* ¶ 10.

46. *Id.* ¶ 59.

47. *Id.* ¶ 66.

48. *Id.* ¶ 61.

49. *Id.* ¶ 68.

50. *Berrehab*, *supra* note 21, ¶ 7-8.

51. *Id.* ¶ 8.

52. *Id.* ¶ 9.

53. *Id.* ¶ 10.

54. *Id.* ¶ 11.

balancing under Article 8(2) and found that the action here was in accordance with law and that it met a legitimate aim (protection of the labor market), but that the deportation was not necessary in a democratic society.⁵⁵

In making its determination, the European Court noted that (1) this was not a case of an alien seeking first entry, but of a long-time resident who had lawfully lived, had a home, and worked there; (2) the government had no additional complaint against Berrehab; and (3) he had a family and, most importantly, a young child who needed to retain her close ties with her father.⁵⁶ Ultimately, the Court sided with Berrehab, holding that the Netherlands violated Article 8 because the measures taken were disproportionate to the need to protect the state's interest.⁵⁷

c. *Moustaquim v. Belgium (1991)*

In *Moustaquim*, a Moroccan national, Moustaquim, emigrated to Belgium when he was two years old to join his father.⁵⁸ He lived there for 19 years and was then deported.⁵⁹ While a youth, Moustaquim had engaged in various criminal activities that eventually served as the basis for his deportation.⁶⁰ After five years living outside of Belgium, Moustaquim's deportation order was temporarily suspended and he was allowed to return because (1) he came to Belgium at the age of two, (2) all his family was in Belgium, and (3) he would be given a chance for rehabilitation.⁶¹ Despite this temporary permit, Moustaquim challenged his deportation under Article 8.⁶²

The Court easily found the existence of family life because Moustaquim had lived in Belgium with his parents and siblings and had kept in contact with them during his deportation.⁶³ The court also found that the deportation constituted an interference with that family life.⁶⁴

In its balancing, the Court found that the deportation was in accordance with law and pursued a legitimate aim (protection of public order), but that the factors weighed against it being necessary in a democratic society because: (1) all criminal offenses were committed when Moustaquim was a minor, (2) all of his close relatives lived in Belgium, (3) he was less than two when he arrived, (4) he lived there for 20 years, (5) he only visited Morocco twice, and (5) he had received all of his schooling in Belgium.⁶⁵ The

55. *Id.* ¶ 22-29.

56. *Id.* ¶ 29.

57. *Id.*

58. *Moustaquim v. Belgium*, App. No. 12313/86, 13 Eur. H.R. Rep. 802, ¶ 9 (1991) [hereinafter *Moustaquim*].

59. *Id.*

60. *Id.* ¶ 18.

61. *Id.* ¶ 25.

62. *Id.* ¶ 36.

63. *Id.*

64. *Id.*

65. *Id.* ¶ 45.

deportation thus impermissibly disrupted his family life.⁶⁶

d. Gül v. Switzerland (1996)

In *Gül*, a Turkish national, Gül, lived in Switzerland with his wife.⁶⁷ Gül had lived in Turkey for most of his life, but in 1983, he traveled to Switzerland and applied for political asylum; he left his wife and two sons in Turkey.⁶⁸ Gül was denied asylum, but was able to remain in Switzerland after he was injured at his place of work.⁶⁹ In 1987, Gül's wife joined her husband in Switzerland to seek medical attention and the couple remained there afterward pursuant to a humanitarian permit based upon Mrs. Gül's medical condition.⁷⁰

After receiving this residence permit, Mr. Gül started proceedings to bring his son, Ersin, to Switzerland from Turkey.⁷¹ After his initial request was denied, he challenged the denial under Article 8.⁷² The Court recognized that Mr. Gül had a family life with his son and that the state's refusal to allow Ersin to enter constituted interference with that life.⁷³

In its balancing, the Court found in favor of Switzerland's right to exclude Ersin from its territory. In doing so, the Court considered that: (1) Mr. Gül caused the separation from his son; (2) Mr. and Mrs. Gül had made recent visits to his son; (3) although Mr. and Mrs. Gül lawfully resided in Switzerland, they did not have a permanent right of abode; (4) there were no obstacles to the development of a family life in Turkey; and (5) Ersin had always lived in Turkey and possessed the cultural and linguistic environment of that country.⁷⁴

e. Ahmut v. the Netherlands (1996)

In *Ahmut*, a Moroccan citizen, Ahmut, had resided in the Netherlands since 1986 and had attained joint citizenship (Morocco and the Netherlands) by 1990.⁷⁵ When he emigrated to the Netherlands, he left his ex-wife and five children in Morocco.⁷⁶ Subsequent to his emigration, his ex-wife died and her mother then cared for the children.⁷⁷ In 1990, Mr. Ahmut's ten-year old son, Souffiane, arrived in the Netherlands to stay with his father, but he was

66. *Id.* ¶ 46.

67. *Gül*, *supra* note 34, ¶ 6.

68. *Id.* ¶ 7.

69. *Id.* ¶ 8.

70. *Id.* ¶ 8, 11.

71. *Id.* ¶ 13.

72. *Id.* ¶ 24.

73. *Id.* ¶ 37.

74. *Id.* ¶ 41-42.

75. *Ahmut v. the Netherlands*, App. No. 21702/93, 24 Eur. H.R. Rep. 62, ¶ 7 (1996) [hereinafter *Ahmut*].

76. *Id.* ¶ 9.

77. *Id.* ¶ 11-12.

soon denied a residency permit.⁷⁸ Ahmut challenged the denial under Article 8.

After confirming that a denial of entry can interfere in family life, the Court balanced the state's need for immigration control of Souffiane with his right to respect for family life.⁷⁹ The Court ultimately upheld the Netherlands' decision, finding that Souffiane could be denied entry because (1) Souffiane had lived in Morocco his entire life, had strong linguistic and cultural ties with Morocco, and had family there; (2) Mr. Ahmut had voluntarily decided to live in the Netherlands; (3) Mr. Ahmut could still maintain the degree of family life which he himself had opted for; and (4) there was no obstacle against Mr. Ahmut returning to Morocco, especially as he had maintained his Moroccan citizenship despite becoming a national of the Netherlands as well.⁸⁰

f. Sen v. the Netherlands (2001)

In *Sen*, two Turkish nationals, Mr. and Mrs. Sen, emigrated to the Netherlands in 1986, leaving their daughter, Sinem, in Turkey in her aunt's custody.⁸¹ While living in the Netherlands, the Sens had two more children that they raised in the Netherlands.⁸² In 1992, the Sens applied for a residence permit for Sinem, which was rejected.⁸³ In 1993, an application for review was also rejected.⁸⁴ Mr. Sen then filed a complaint under Article 8 alleging that, by refusing to allow Sinem to enter the Netherlands, the state had violated his family's right to respect for family life.

Before the European Court, the Netherlands argued that (1) Sinem had become more of a part of her aunt's family in Turkey than of her parents' family in the Netherlands; (2) the Sens' decision to voluntarily move to the Netherlands had weakened their family bond with Sinem; and (3) the Netherlands had no positive obligation to grant Sinem a residence permit as long as it was not revoking a permit that already allowed the family to reside in the Netherlands.⁸⁵

The Court first acknowledged the factual similarities between this case and those of *Gül* and *Ahmut*: (1) the family's separation was a result of a voluntary parental decision to voluntarily leave their country and (2) all of Sinem's cultural and linguistic ties were with her home country of Turkey.⁸⁶

78. *Id.* ¶ 23.

79. *Id.* ¶ 60-63, 67.

80. *Id.* ¶ 69-70.

81. Family and Children: Refusal of Grant of Residence Permit for Daughter of Turkish Nationals Resident in the Netherlands (Case Comment), E.H.R.L.R. 2002, 4, 537 (2002) [hereinafter Family and Children].

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 538.

The Court found that this case differed, however, because of the difficulty of the Sens' return to Turkey.⁸⁷ The Sens had been long settled in the Netherlands and had two additional children who had spent their entire lives in the Netherlands.⁸⁸ Using those two factors as their decision points, the Court held that the Netherlands had violated Article 8.

g. Mayeka v. Belgium (Tabitha Case) (2007)

In 2000, Ms. Mayeka arrived in Canada from the Democratic Republic of Congo (DRC), was granted refugee status, and received indefinite leave to remain.⁸⁹ She then sought to have her five-year old daughter, Tabitha, join her.⁹⁰ Ms. Mayeka asked her brother, a Dutch national, to collect Tabitha from the DRC and look after her until she was able to come to Canada.⁹¹

In August 2002, Tabitha arrived with her uncle at the Brussels airport; her uncle did not have travel or immigration documentation for Tabitha, and she was refused entry and preparations were made for her removal.⁹² Tabitha was detained in Belgium pending removal and separated from her uncle, who returned to the Netherlands.⁹³ An appointed lawyer unsuccessfully applied for Tabitha to be granted refugee status.⁹⁴ During this two-month process, despite attempts to have her placed in foster care, Belgian authorities held Tabitha in an adult detention center.⁹⁵

On October 17, 2002, Tabitha was deported to the DRC.⁹⁶ A social worker accompanied her to the airport where she was placed in police custody.⁹⁷ During her flight, a specially assigned flight attendant looked after Tabitha.⁹⁸ Upon arrival in the DRC, however, none of Tabitha's family members were waiting for her, and Ms. Mayeka did not learn of the deportation until after it had taken place.⁹⁹ Eventually, following the intervention of the Belgian and Canadian prime ministers, Ms. Mayeka and Tabitha were reunited in Canada on October 23rd.¹⁰⁰

Following the incident, Ms. Mayeka alleged that the Belgian authorities'

87. *Id.*

88. *Id.* The case comment suggests that *Sen* was, in part, an attempt to rein in previous deference to states in cases such as *Gül* and *Ahmut*. *Id.* at 539. Others, however, suggest that *Sen* is merely a natural extension of previous cases. See Nicola Rogers, *Immigration and the European Convention on Human Rights: Are New Principles Emerging*, E.H.R.L.R. 2003, 1, 53-63. As discussed later, *Sen* seems to put a different spin on the Court's previous cases. For that reason, it seems reasonable that *Sen* may have purposefully expanded or altered previous Court holdings.

89. *Mayeka*, *supra* note 39, ¶ 9.

90. *Id.* ¶ 10.

91. *Id.*

92. *Id.* ¶ 11.

93. *Id.* ¶ 13.

94. *Id.* ¶ 13, 19.

95. *Id.* ¶ 23.

96. *Id.* ¶ 31.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* ¶ 34.

detention of Tabitha, their failure to reunite Tabitha with her in Canada, and Tabitha's deportation violated her right to respect for family life.¹⁰¹ Belgium argued that several factors absolved them of liability: (1) Tabitha's uncle had fraudulently tried to pass her off as his daughter, (2) Tabitha had no family in Belgium, (3) Belgian authorities were unaware of the mother's attempt to bring Tabitha to Canada, and (4) Tabitha's family had been notified of her arrival in Kinshasa.¹⁰²

In its decision, the Court took a sympathetic attitude toward Tabitha, focusing especially on her status as an unaccompanied minor. In balancing the state's need to control immigration against Tabitha's right to respect for her family life, the Court found that Tabitha's separation from her caretaker uncle and detention in Belgium were disproportionate to the state's interest.¹⁰³ Additionally, the Court held that Belgian authorities had a positive obligation to make detailed inquiries to their Canadian counterparts to bring about the family's reunification.¹⁰⁴ Finally, the Court also held that, since Tabitha's deportation delayed her reunification with her mother and left her without supervision in the DRC, the deportation also violated her Article 8 rights.¹⁰⁵

B. *Article 17 of the International Covenant on Civil and Political Rights*

The second category of cases interpreting the right to respect for family life come from the UNHRC interpreting Article 17 of the ICCPR. Article 17 provides that: "1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence 2. Everyone has the right to the protection of the law against such interference" ¹⁰⁶ Under this framework, the UNHRC follows an analysis similar to that of the European Court for interpreting Article 8. After establishing the existence of family life and a state interference in that family life, the UNHRC must then determine whether such interference was "arbitrary." That inquiry involves a fact-specific, multi-factor balancing test akin to the test of the Court.

The following cases demonstrate the similarities between the two approaches. In each case, Australia refused to concede that its immigration decisions constituted interference in family life even though the arguments are akin to those made under the European Court's third-stage balancing inquiry.¹⁰⁷ Due to that similarity, the discussion below examines Australia's arguments as part of the balancing inquiry, not as a challenge to the existence

101. *Id.* ¶ 73.

102. *Id.* ¶ 74.

103. *Id.* ¶ 82.

104. *Id.*

105. *Id.* ¶ 90.

106. International Covenant on Civil and Political Rights, *supra* note 3, art. 17.

107. *See* Winata, *supra* note 32, ¶ 4.11.

of interference in family life.

1. *Winata v. Australia (2001)*

In *Winata*, Mr. Winata and Ms. Li arrived in Australia in 1985 from Indonesia on temporary visas.¹⁰⁸ After their visas expired, they commenced a *de facto* marriage and had a son, Barry, who by virtue of his birth and having lived in Australia for 10 years was an Australian citizen by 1995.¹⁰⁹ In 1998, when Barry was 13, Mr. Winata and Ms. Li then attempted to obtain a more permanent and legal status in Australia, but were unable to do so.¹¹⁰

Mr. Winata and Ms. Li appealed to the UNHRC under Article 17, claiming that any removal from their dependent son would constitute an arbitrary interference with their family life.¹¹¹ They recognized that although their deportation would indeed be lawful, in this case, the age of their son, his attachment to Australia, his dependence on them as his parents, and their existence as a family in Australia all weighed in favor of respecting their right to respect for family life over any immigration decision of the Australian government.¹¹²

The Australian government countered that (1) Barry could leave Australia and the only disruption to his life would be in his education; his family life would continue because he would be with his parents; (2) the parents' failure to leave Australia when their visas expired and return to Indonesia, where they had close ties, weighed heavily against them expecting to be able to remain in Australia; and (3) unlawful establishment of a family in a state's territory weighs heavily against invoking the right to respect for family life in that territory.¹¹³

The UNHRC held in favor of Mr. Winata, finding that, although Australia did have broad discretion in implementing its immigration policy, the balancing of factors in this case required more than a showing of lawfulness before they could expel the parents. The determinative factors included that (1) the parents had been in Australia for 14 years and had a well-settled life; (2) Barry had been born in Australia, lived there for 13 years, and was a citizen; and (3) Barry had completed all of his schooling in Australia and had no real cultural ties to Indonesia.¹¹⁴

2. *Madafferi v. Australia (2004)*

In *Madafferi*, Mr. Madafferi arrived in Australia on a tourist visa in 1989.

108. *Id.* ¶ 2.1.

109. *Id.* ¶ 2.1

110. *Id.* ¶ 2.3-2.6.

111. *Id.* ¶ 3.3.

112. *Id.* ¶ 3.4-3.5.

113. *Id.* ¶ 4.10-4.16

114. *Id.* ¶ 7.3.

After this visa expired, he became an unlawful resident.¹¹⁵ In 1990, he married an Australian citizen, with whom he had four children, all of whom were born in Australia.¹¹⁶ In 1996, Mr. Madafferi applied for a spousal visa and disclosed past convictions in his home country of Italy; his application was denied based upon his “bad character.”¹¹⁷ Mr. Madafferi appealed to the UNHRC based, in part, upon an Article 17 violation.¹¹⁸

Mr. Madafferi argued that his removal would split up his family, resulting in a violation of their right to respect for family life.¹¹⁹ Australia countered that (1) any decision about whether the family would stay in Australia or go to Italy was for the family alone to make (essentially a choice of residence) and (2) the children were young and could integrate into Italian society.¹²⁰

After finding the existence of a family life and an interference in that family life, the UNHRC determined that Australia’s attempt to remove Mr. Madafferi was arbitrary and therefore violated Article 17. Here, the factors weighing against removal of Mr. Madafferi included (1) the weakness of the state’s interest, which was based upon 20-year old convictions in another country; (2) the 14 years the family had spent together in Australia; and (3) the lack of linguistic or cultural connection of the children to Italy.¹²¹

IV. RIGHT TO RESPECT FOR FAMILY LIFE: THEMES AND REASONING

A. *General Themes*

In addition to the entry versus removal distinction discussed above, the case law exhibits several general themes, including (1) the overarching importance of the child’s cultural and linguistic ties, (2) a sympathetic attitude toward children, and (3) a high bar faced when showing obstacles to settlement in one’s home country. These three themes appear in almost all decisions.

1. *Importance of the Child’s Cultural and Linguistic Ties*

The importance of the child’s cultural and linguistic ties is pervasive in the case law:

- In *Berrehab*, a non-national father’s long-time residence, constant employment, and personal relationships with nationals in the Nether-

115. Madafferi, *supra* note 32, ¶ 2.1-2.2.

116. *Id.* ¶ 2.2.

117. *Id.* ¶ 2.7.

118. *Id.* ¶ 2.8, 3.1.

119. *Id.* ¶ 3.1.

120. *Id.* ¶ 4.17

121. *Id.* ¶ 9.8.

lands, coupled with his daughter's ties to the Netherlands, allowed him to avoid removal.¹²²

- In *Mostaquim*, a non-national adult was allowed re-entry following deportation because, in part, he had grown up and gone to school in Belgium.¹²³
- In *Gül*, a non-national's son was denied entry to Switzerland in part because the son had spent his entire life in Turkey and had strong cultural and linguistic ties to that country and not to Switzerland.¹²⁴
- In *Ahmut*, a father's son was denied entry into the Netherlands in part because the son had spent his entire life in Morocco, and had strong linguistic and cultural ties to Morocco, but not to the Netherlands.¹²⁵
- In *Winata*, parents who had lived in Australia for 14 years and had a well-settled life there were able to remain, in part because their child had been born in Australia, had lived there for 13 years, was an Australian citizen, and had gone to school only in Australia.¹²⁶
- In *Madafferi*, a father who had lived in Australia for 14 years was allowed to remain in the country, in part because his children, who were born and raised in Australia, had no cultural or linguistic ties to Italy, the country to which he was to be deported.¹²⁷

It is important to note that cultural and linguistic ties can cut in both directions: either in favor of entry/prevention of removal or against entry/in favor of removal. Regardless, if this factor works in favor of a particular individual, it is an important, if not the most important, argument in helping that family member achieve her objective.

It also seems important to note the analysis in *Sen* where the court overlooked the cultural and linguistic ties of the child seeking entry, which were entirely to the country of Turkey, in favor of preserving the cultural and linguistic ties of her two younger siblings, which were to the Netherlands. Although the court's motivation is unclear, it seems that sheer numbers (one child with ties to the Turkey, two with ties to the Netherlands) played at least some role in its decision.

2. Sympathetic Attitude toward Children

The courts regularly display a sympathetic attitude toward children, particularly where a parent of the child might be deported and thus removed from the child's life. In *Berrehab*, the Court allowed a non-national father to

122. *Berrehab*, *supra* note 21, ¶ 29.

123. *Mostaquim*, *supra* note 58, ¶ 45.

124. *Gül*, *supra* note 34, ¶ 42.

125. *Ahmut*, *supra* note 75, ¶ 70.

126. *Winata*, *supra* note 32, ¶ 7.3.

127. *Madafferi*, *supra* note 32, ¶ 9.8.

remain, partly because of his young daughter's need for close contact with her father.¹²⁸ In *Mostaquim*, the court relied on an adult's youthful ties to Belgium and youthful indiscretions as part of its justification for allowing his re-entry.¹²⁹

This sympathy, however, does not generally extend to situations where a parent has voluntarily chosen to leave her family for another country and then later wants to bring those children into their new country of residence. In *Gül*, a non-national father could not bring his adolescent son from Turkey into Switzerland, in part because he had chosen to leave and could also go back.¹³⁰ In *Ahmut*, a father voluntarily chose to leave his children in Morocco, and as a result, his son was not allowed to join him in the Netherlands.¹³¹

Again, a slight variance to this general theme comes from the *Sen* case. In *Sen*, the parents voluntarily left their first child behind in Turkey, but then were able to have her admitted to join them six years later in the Netherlands.¹³² In *Sen*, the court focused heavily on the Sens' two children who had been born and raised in the Netherlands; the interests of those two children outweighed the parents' voluntary decision to leave their first daughter in Turkey.

The sympathetic attitude toward children also seems closely tied to the first overarching theme of the importance of cultural and linguistic ties. In each of the five cases discussed above, the court, while manifesting a sympathetic attitude toward children, was also able to rely on the cultural and linguistic of the children as a justification for its ultimate decision.¹³³

Courts' sympathetic attitude toward children reached a new pinnacle in *Tabitha* when the Court found that Belgium had violated Article 8 because of the way it treated an unaccompanied minor in its custody.¹³⁴ The child had no cultural or linguistic ties to Belgium, did not have any family in Belgium, and was in Belgium only because her uncle had lied to get her admitted. The Court held, however, that Belgium's detention of the child, lack of coordination with Canadian officials to effectuate family reunification, and deportation of the child had violated Article 8.

3. *High Bar for Adult Applicants Seeking to Establish Obstacles to Return*

Finally, courts generally have set a high bar for an adult applicant seeking

128. Berrehab, *supra* note 21, ¶ 29.

129. Mostaquim, *supra* note 58, ¶ 44.

130. Gül, *supra* note 34, ¶ 41-42.

131. Ahmut, *supra* note 75, ¶ 69-70.

132. Family and Children, *supra* note 81, at 537.

133. As noted above, *Sen* put a slight spin on the cultural and linguistic ties theme. Regardless, the cultural and linguistic ties of children (even if not those seeking entry) played a large role.

134. Immigration and Asylum: Refusal of Asylum Application on Behalf of a Five Year Old—Refusal of Leave to Enter Belgium (Case Comment), E.H.R.L.R. 2007, 1, 99 at 102.

to establish obstacles to her return. Courts will not settle for a showing that return to one's country of origin would be merely problematic for the adult, but rather must be convinced that severe obstacles block return to that country.¹³⁵

- In *Abdulaziz*, although the wives had lived in the U.K. for a number of years, would have to abandon their well-established careers, and faced being socially outcast, these obstacles did not prevent return.¹³⁶
- In *Ahmut*, it was reasonable to expect an adult to abandon his business and settled life to return to his home country to be with his son.¹³⁷
- In *Gül*, despite a difficult medical condition and a well-settled life in Switzerland, the parents could return home to be with their son.¹³⁸

However, one set of factors that did meet this standard emerged in *Sen*, where the cultural and linguistic ties of two young children, combined with the well-settled life of the parents, established enough of an obstacle to return to allow the family to have another one of their children join them.¹³⁹ This high bar, then, is not applied in an absolute fashion, but rather takes into account other significant factors.

B. *Tests, Reasoning, and Arguments*

Aside from the general themes that characterize most of the judicial decisions interpreting the right to respect for family life, there are specific tests, arguments, and reasoning that have emerged. Some of these arguments and reasoning can be found in almost every case (balancing individual against state interests) while others have only been mentioned in the dissents of isolated cases (choosing between settlement and a child is *per se* unreasonable).

1. *Weighing Individual versus State Interests is the Essential Balancing Test*

In the cases above, once the court finds the existence of family life and interference in that family life, it then proceeds to balance the interests of the individual in her family life against the interests of the state in controlling immigration. Courts also frame this balancing test as whether the state's actions are disproportionate to the stated need for immigration control.

Under this balancing test, the three general themes described above—

135. Gül, *supra* note 34, ¶ 41 (suggesting that a showing of persecution leading to asylum might be sufficient to establish the level of obstacle necessary to prevent return).

136. Abdulaziz, *supra* note 31, ¶ 68.

137. Ahmut, *supra* note 75, ¶ 70.

138. Gül, *supra* note 34.

139. Once again, it is important to note that other motivations—the purposeful reigning in of decades of deference to individual state immigration authorities—may have been at play in *Sen*.

importance of cultural and linguistic ties of the children, a sympathetic attitude towards children, and a high bar to establishing significant obstacles to return—frame the inquiry under which additional factors can also play an important role. None of these factors, however, will be dispositive, especially where the court focuses instead on one of the three general themes described above.

There are numerous additional factors on each side of the equation. On the individual side, the courts will consider (1) a parent's decision to leave his home country; (2) the legal status of an individual's residence in a country; (3) an individual's criminal background; (4) an individual's extent of contact with her home country; and (5) an individual's knowledge and/or awareness of the immigration laws governing his situation.

As a preliminary matter on the state side, there is a strong international legal presumption in favor of the state's ability to control entry to its territory and its immigration framework. Aside from this basic interest, the court will also consider the need for a state to (1) regulate its economy; (2) protect its national security; (3) provide public safety; (4) prevent disorder or crime; and (5) protect the health, morals, or rights or freedoms of others.

2. *Adverse Immigration Actions of all Types Interfere with Family Life*

In their decisions, courts have reasoned that all types of immigration decisions—from denial of entry to forced removal to separation from a caretaker to detention—interfere with the right to respect for family life. State arguments against this threshold finding have been unsuccessful, as the courts have easily found interference and instead focused most of their opinions on balancing individual against community interests. Through their decisions, the courts seem to imply that debate over whether a state action is interference is unimportant; the more important inquiry is whether or not that interference is justified as proportionate to the individual's interest.

3. *Additional Arguments and Reasoning*

Aside from the essential balancing test between individual and state interests and the seeming presumption in favor of finding interference with family life, there are other arguments that emerge in some of the cases. Most of these additional arguments and reasoning have only recently emerged as part of the *Sen* and *Tabitha* cases.

- Forcing a parent to choose between remaining settled in one country and being with their child who lives in another country is *per se* unreasonable and/or inhumane.¹⁴⁰

140. Immigration: Minor Son of Turkish National Refused Entry—Family Life—Article 8 (Case Comment), E.H.R.L.R. 1996, 4, 445, 448 (discussing the *Gül* dissent) [hereinafter *Minor Son of Turkish National Refused Entry*].

- When examining cultural and linguistic ties and the extent to which a family is well-settled in a particular country, the court can consider either those of the child seeking entry or of her siblings and family living in another country.¹⁴¹
- Children are not responsible for their parents' or relatives' fraudulent actions.¹⁴²
- Unaccompanied minors should be reunited with their families and, until they are, the custodian state is responsible for their care.¹⁴³

These arguments and lines of reasoning are more recent than the well-entrenched general themes discussed above, but the courts' movement to adopt them suggests that the right to respect for family life may be broader than previous cases had identified.

V. FURTHER INTEGRATING THE RIGHT TO RESPECT FOR FAMILY LIFE INTO THE INTERNATIONAL MIGRANTS BILL OF RIGHTS

In addition to domestic advocacy in the United States, discussed below, further development of the International Migrants Bill of Rights can help ensure the protection and promotion of the human right to respect for family life. As it currently exists, the draft treaty incorporates many references to the right to respect for family life and has taken excellent first steps to ensuring recognition of this right for some of the most vulnerable members of our world. In particular, the IMBR properly recognizes the importance of family life during the removal and detention process, and highlights the primacy of this right by designating Article 18 to explicitly address only family rights. These existing provisions provide a good basis for expansion. Specifically, we propose the following five revisions to the International Migrants Bill of Rights.

A. *Family is the Natural and Fundamental Unit of Society*

Several international conventions already recognize that the family is the natural and fundamental unit of society, and we recommend that the Bill incorporate this standard explicitly. Of these existing conventions, almost all recognize this right within an article dedicated to family life, and we recommend doing the same by incorporating the following language into the existing Article 18 of the International Migrants' Bill of Rights:

Article 18(1) The family is the natural and fundamental group unit of society and is entitled to the widest possible protection and assistance

141. Family and Children, *supra* note 81.

142. Mayeka, *supra* note 39, at 84, 89.

143. *Id.* at 82, 90.

by the state. Migrant families, irrespective of the citizenship status of any member of the family, are entitled to the same family protections as citizens of the state.

This standard should not be controversial as it merely reflects broad international agreement as embodied in the U.N. Declaration on Human Rights, the ICCPR, the American Convention on Human Rights, the ICESCR, the CRC, the African Charter on Peoples' and Human Rights, the African Charter on the Right and Welfare of the Child, and the European Social Charter.¹⁴⁴

In addition, drafters of the bill might consider elevating some reference to the right to respect for family life into the Preamble of the document. Such a reference would fit well within the existing framework through only a minor revision:

RECOGNIZING that migrants and migrant families have special needs that may require special accommodations in certain regards;

Although this adds only three words into the preamble, we believe it can speak volumes about the importance and relevance of the family-based considerations in the context of migrant rights.

B. *Expand the Best Interest of the Child Standard*

In Article 9, the Bill states that the “best interests of the child” shall be a primary consideration in all actions affecting the child migrant. This inclusion appropriately references the existing internationally-accepted standard for evaluating state actions affecting children, but revisions could help transform this principle into a better guide for such actions. We propose:

144. At the April 9, 2010 Symposium on the Draft International Migrants' Bill of Rights held at Georgetown Law, the drafters raised a concern about whether the definitions of “family” and “natural” might exclude non-traditional families. The research did not reveal any example of a state that has explicitly interpreted these terms in such a discriminatory manner. Human Rights Watch and Immigration Equality specifically interpret the UDHR and ICCPR language of “natural and fundamental group unit” as inclusive of LGBT families because there is no express definition of marriage as between a man and woman. Human Rights Watch & Immigration Equality, *Family, Unvalued: Discrimination, Denial, and the Fate of Binational Same-Sex Couples under U.S. Law* 138 (2006).

Furthermore, according to the South African Constitutional Court: “The statement in Article 16(3) of the UDHR that the family is the natural and fundamental group unit in society, entitled to protection by the state, has in itself no inherently definitional implications. Thus, it certainly does not confine itself to the nuclear monogamous family as contemplated by our common law. Nor need it by its nature be restricted intrinsically, inexorably and forever to heterosexual family units. There is nothing in the international law instruments to suggest that the family, which is the fundamental unit of society, must be constituted according to any particular model. Indeed, even if the purpose of the instruments was expressly to accord protection to a certain type of family formation, this would not have implied that all other modes of establishing families should for all time lack legal protection.” *Minister of Home Affairs v. Fourie; Lesbian and Gay Equality Project v. Minister of Home Affairs*, 2005 (CC) at 64 (S. Afr.).

Article 9(2) The best interests of a child migrant shall be a primary consideration in all actions affecting the child migrant. Maintaining the family group unit, the natural and fundamental unit of society, should be the guiding factor in such considerations, and shall account for the child's rights to grow up and live in a family environment, to be raised by and cared for by his or her parents, and not to be separated from his or her parents except pursuant to judicial review. The views of the child migrant, him or herself, must be given due weight in accordance with the child's maturity and age.

While a lengthy revision, we believe this text would provide the more detailed guidance necessary for adjudicators to properly apply the best interests of the child standard.

C. *Incorporate the Fact-Based Inquiries underlying the Existence of Family Life*

International courts have already developed an extensive framework for considering the existence of a family life and what factors adjudicative bodies should consider when determining how the right protects families from state decisions that would interfere with their family life. We propose the following changes to better incorporate this extensive set of guidelines:

Article 18(2)(a) As with any family, the strength of the emotional or economic ties between or among people will indicate the existence of a family life. Among close family members—husbands and wives and parents and children—family life exists. Among other blood relatives—grandparents and grandchildren—family life exists where the ties between or among individuals are significant. This inquiry is fact-specific and must account for the circumstances of each case.

This incorporation will provide guidance for adjudicative bodies to account for the different types of family structures and units courts will encounter when dealing with migrants that come from different cultural and familial backgrounds than those of the country in which the court sits.

D. *Incorporate the “Interference with Family Life” Standard and Relevant Factors*

Currently, Article 5(6) of the Bill discusses the removal process and makes some limited references to factors courts should consider when granting a migrant relief from removal from a country to which the migrant has substantial ties. We would expand this section as follows:

Article 5(6) States shall establish opportunities for relief from removal for migrants who have a substantial individual connection to the host

country, for whom removal would interfere with the existence of the family life of the migrant, or where a condition in the State to which he or she would be removed prevents removal. These opportunities should incorporate consideration of the following key factors: (a) the cultural and linguistic ties of the individual seeking relief, particularly if the individual is a child; (b) the length of time an individual has spent in a particular country; and (c) the individual's personal and economic connections to the State and citizens of the State.

Making these factors explicit within the Bill incorporates by reference existing case law and also ensures that the “interference with family life” standard—the key standard that prompts courts to engage in the fact-specific balancing inquiry necessary to ensure proper protection of the right to respect for family life—is explicitly mentioned in the Bill. In the event that drafters determine that such a lengthy provision is inappropriate in the text of the Bill, the list of factors to consider could be effective if appearing in the commentary instead. We note that commentary should be developed for Article 5(6).

We also recommend incorporating a specific commentary reference to support Article 18(4), which states that “Dependent family members of migrants have a right to derivative immigration status and timely admission to the country in which a migrant is lawfully settled.” This reference would note that, under international law, forcing a parent to choose between remaining settled in one country or being with his or her child who lives in another country is *per se* unreasonable or inhumane.¹⁴⁵

E. *Incorporate the Right to Respect for Family Life throughout the Bill*

In addition to these changes, we recommend the explicit incorporation of the right to respect for family life in all relevant provisions of the Bill, including within:

- Article 10 as a civil and political right;
- Article 11 as an economic and social right; and
- Article 12 as a cultural right.

These small additions would merely incorporate existing international legal provisions into respective sections within the Bill to ensure consistent emphasis of the right to respect for family life throughout the treaty document.

145. See *Minor Son of Turkish National Refused Entry supra* note 140.

VI. INCORPORATING THE RIGHT TO RESPECT FOR FAMILY LIFE INTO DOMESTIC
ADVOCACY IN THE UNITED STATES

There are at least two ways that United States-based advocates might begin to integrate the themes and arguments identified above into their domestic advocacy efforts. The first is through challenges—direct and indirect—to the “exceptional and extremely unusual hardship” standard applicable to cancellations of removal under 8 U.S.C. § 1229(b)(b). The second is through challenges—direct and indirect—requesting inclusion of discretion into waiver determinations under Section 212 of the 1996 Immigration and Naturalization Act (INA).

A. *Direct and Indirect Challenges to the “Exceptional and Extremely Unusual Hardship” Standard For Cancellation of Removal Under 8 U.S.C. § 1229(b)(b).*

Pursuant to 8 U.S.C. § 1229(b)(b)(1)(D), cancellation of removal is allowed only for those individuals who can demonstrate that:

removal would result in exceptional and extremely unusual hardship to the alien’s spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

Direct and indirect challenges to the “exceptional and extremely unusual hardship” standard are part of the same argument package. The argument’s basic structure is:

1. Pursuant to the *Charming Betsy* canon of statutory construction, Congress is presumed to have legislated in a manner consistent with international law.
2. The United States has signed and ratified the ICCPR, which includes the right to respect for family life in Article 17.
3. The “exceptional and extremely unusual hardship” standard conflicts with the United States’ obligations pursuant to ICCPR Article 17.
4. Direct Challenge: the conflict between the “exceptional and extremely unusual hardship” standard and ICCPR Article 17 cannot be reconciled without distorting Congress’ statute; therefore, 8 U.S.C. §1229(b) is illegal under international law.
5. Indirect Challenge: In the alternative, the conflict between the “exceptional and extremely unusual hardship” standard can be reconciled by bringing the standard into line with United States’ obligations under Article 17.

The direct challenge highlights the conflict between the two standards and asks the court to declare the “exceptional and extremely unusual hardship”

standard illegal under international law. The indirect challenge presents an alternative to that more drastic measure and suggests instead that, with some changes, the court could easily bring the standard into compliance with the United States' obligations under ICCPR Article 17.

1. *Pursuant to the Charming Betsy Canon of Statutory Construction, Congress is Presumed to have Legislated Consistent with International Law*

The *Charming Betsy* canon of statutory construction is the starting point of arguments challenging a domestic statute under international law. The canon states that, when examining Congressional legislation's compliance with international law, there is a presumption that Congress intends to legislate in a manner consistent with international law.¹⁴⁶ The canon thus requires that courts construe a statute as not conflicting with international law where it is possible to do so without distorting the statute. Given this starting point, advocates posing a direct challenge to the "exceptional and extremely unusual hardship" standard face a high threshold. They must not only show that the statute conflicts with international law, but also that there is no way for the court to construe the statute to comply with international law.

2. *The United States has Signed and Ratified the ICCPR, which Includes the Right to Respect for Family Life in Article 17*

Article 17 of the International Covenant on Civil and Political Rights provides that: "1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence "2. Everyone has the right to the protection of the law against such interference" ¹⁴⁷ The United States has signed and ratified the ICCPR and is bound by its provisions.¹⁴⁸

3. *The "Exceptional and Extremely Unusual Hardship" Standard Conflicts with the United States' Obligations Pursuant to ICCPR Article 17*

Pursuant to 8 U.S.C. § 1229(b)(1)(D), cancellation of removal is

146. *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 117-18 (1804).

147. International Covenant on Civil and Political Rights, *supra* note 3, art. 17.

148. How courts should apply ICCPR provisions is a contested issue. Many federal courts do not apply its provisions once they identify the ICCPR as non-self-executing. In contrast, at least one court has applied ICCPR provisions as interpretive guidance. *Beharry v. Reno*, 183 F.Supp.2d 584, 595 (E.D.N.Y. 2002) (citing *Beazley*, 242 F.3d at 263-68), *rev'd on other grounds*, 329 F.3d 51 (2d Cir. 2003). Despite the predominant view for the moment, there is a worthwhile argument for the direct applicability of the ICCPR. In its Executive Transmittal Package for the ICCPR, the Executive Branch and the Senate adopted a shared understanding about the ICCPR's status as non-self-executing. In that view, the ICCPR is non-self-executing not for the usual reason that Congress would need to take additional actions to implement it, but because existing federal and state law and regulatory authorities generally met the ICCPR's obligations so no further implementation was needed. That prompts the argument that laws that "implement" the ICCPR should be read to coincide with the United States' ICCPR obligations. For a full discussion of this important issues, see the Georgetown memo on the U.S. implementation of the ICCPR.

allowed only for those individuals who can demonstrate that “removal would result in exceptional and extremely unusual hardship to the alien’s spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.” As currently interpreted by U.S. courts, the “exceptional and extremely unusual hardship” standard sets an extremely high threshold for individuals seeking cancellation of removal under the standard. The contours of the standard are most fully explicated in *In re Recinas*, the Board of Immigration Appeals precedent decision where the applicant met the standard’s requirements.

In *In re Recinas*, a 39-year old native and citizen of Mexico applied for cancellation of her removal pursuant to 8 U.S.C. § 1229(b)(b). She claimed that her removal would result in “exceptional and extremely unusual hardship” to her four United States citizen children.¹⁴⁹ In examining her claim, the Board reiterated that the “exceptional and extremely unusual hardship” standard requires a threshold showing that the hardship suffered is “substantially beyond that which would ordinarily be expected to result from the person’s departure.”¹⁵⁰ The Board noted it would consider factors such as the age, health, and circumstances of qualifying family members, and any impact that a move to another country would have on them.¹⁵¹

To reach that threshold, the mother showed that (1) the four United States citizen children had been raised in the United States and had known no other way of life; (2) the children did not read or speak Spanish; (3) the children were entirely dependent on their mother; (4) the applicant, as a single mother, did not have any other relatives in Mexico who would be able to assist her with child care; (5) the children would have lost any economic stake that their mother had gained in the United States; and (6) all of the applicant’s family (children and parents) resided lawfully in the United States.¹⁵² Only with all of these factors working in her favor was the mother able to succeed where previous applicants had failed.

The *In re Recinas* analysis suggests two reasons why the “exceptional and extremely unusual hardship” standard conflicts with ICCPR Article 17. First, Article 17 requires a judicial inquiry into the “arbitrary” nature of any immigration action; 8 U.S.C. § 1229(b) does not incorporate that inquiry. Second, to the extent that 8 U.S.C. § 1229(b) does allow an inquiry into the arbitrariness of an immigration decision, the level of inquiry permissible under *In re Recinas* is insufficient to satisfy the legal requirements of ICCPR Article 17.

149. *In re Recinas*, 23 I & N Dec. 467 (BIA 2002).

150. *Id.* at 468 (citing *Matter of Monreal*, 23 I. & N. Dec. 56 (BIA 2001)).

151. *Id.*

152. *Id.* at 471-72.

a. *ICCPR Article 17 requires an additional judicial discretionary inquiry into the “arbitrary” nature of any immigration action; 8 U.S.C. § 1229(b) does not provide a similar allowance.*

The UNHRC’s use of a balancing test stems from the use of the word “arbitrary” in Article 17 of the ICCPR. The use of the word “arbitrary,” in addition to the requirement of “lawfulness,” establishes the need for a state to show not only that its removal action was in accordance with its own immigration laws, but also that the state interest in removal outweighed the individual’s interest in remaining. The word “arbitrary” creates an additional protection for individuals: even where a state has the domestic legal ability to remove an individual, the state must then, pursuant to Article 17’s “arbitrary” standard, balance its interests against those of the individual.

There is no corresponding analysis pursuant to the “exceptional and extremely unusual hardship” standard. United States courts do not meaningfully examine the arbitrariness of state’s decision to remove, but only measure the decision against the statutory standard. That restriction on judicial analysis results in the checklist-type analysis in *In re Recinas*, leaving courts without the ability to incorporate the principle of “arbitrariness” into their decisions.

b. *To the extent that 8 U.S.C. § 1229(b) does allow for a determination of whether or not removal is “arbitrary,” the “exceptional and extremely unusual hardship” standard does not allow sufficient inquiry to satisfy international legal requirements.*

In re Recinas may give U.S. judges some measure of discretion to inquire into the arbitrary nature of an immigration decision, but it falls short of the level required under ICCPR Article 17. In *In re Recinas*, the Board seemed to require that every factor weigh in favor of the applicant before it was willing to grant cancellation of removal. It, in effect, created a checklist under which an applicant could not receive cancellation of removal. If any factor weighed against the applicant, it seems unlikely that the applicant would have been eligible for cancellation of removal.

Although the factors examined in *In re Recinas* and pursuant to Article 17’s right to respect for family life are similar, the means of weighing those factors stand in sharp contrast. *Recinas*’ cumulative analysis is not really a balancing test at all: it only seems to allow for a cancellation of removal after the applicant demonstrates that every factor leans in her favor. In contrast, the UNHRC will find a violation of Article 17 with a simple determination that the state action was “arbitrary”: that the individual’s interest outweighed that of the state.

For example, in *Winata*, the UNHRC found a violation of Article 17 where the parents had been settled in Australia for 14 years and the child was a citizen of Australia, had lived there for 13 years, and had completed all of his

schooling in Australia. The UNHRC determined that these factors simply outweighed the state's arguments that both parents were in Australia illegally and that the family still had close ties to their home country and held that, pursuant to ICCPR Article 17, both parents were entitled to remain in Australia with their son.

Under the *In re Recinas* standard, however, the parents would have failed on two points of the cumulative checklist: (1) having all members of the family in the country legally and (2) having no ties to their home country. Consequently, their situation would presumably not have been "exceptional and extremely" unusual and they would have been denied cancellation of removal. This conflict between the decision of the HRC pursuant to ICCPR Article 17 and the likely decision of the BIA on the same facts pursuant to the "exceptional and extremely unusual hardship" standard exemplifies the domestic standard's inconsistency with international law.

c. Analogy: European Court cases interpreting ECHR Article 8, their accordance with the UNHRC cases, and their conflict with In re Recinas.

As discussed above, the UNHRC has looked to the European Court's interpretation of ECHR Article 8's right to respect for family life for guidance in interpreting Article 17. United States-based advocates can argue that there is a similar conflict between the "exceptional and extremely unusual hardship" standard and the European Court's case law interpreting Article 8.

The European Court, like the UNHRC, also has the ability to exercise discretion pursuant to the phrase "necessary in a democratic society" in ECHR Article 8, a term that plays the same analytical role that the word "arbitrary" plays in the Article 17 analysis. Pursuant to the Article 8 "necessary in a democratic society" phraseology, the Court, aside from any determination that a particular immigration decision is in accordance with a country's domestic law, can conduct a discretionary balancing test of the state's interests against the interests of the individual. The additional protection provided under the word "arbitrary" in the UNHRC jurisprudence is also provided in the European Court.

Additionally, in the cases above, the Court's balancing test considers numerous factors similar to those in *In re Recinas*, but without *In re Recinas*' cumulative requirement. For example, in *Sen*, a family in the Netherlands had their right to respect for family life violated when their child was denied entry to join them. The European Court noted that the family's long-settled nature and the presence of other children who had been born in the Netherlands outweighed the state's interest in excluding a child, even though that child had been born in another country, had spent her entire life in that country, and had extended relatives who cared for her in her home country.

Although an entry case, *Sen*'s balancing and its contrast with the checklist-style analysis of *In re Recinas* is stark. The family who was allowed to have

their child join them in the Netherlands only met two of the *In re Recinas* factors—(1) the family’s long-settled nature in the Netherlands and (2) the presence of other children who had cultural and linguistic ties to the Netherlands—yet their child was allowed to enter pursuant to the family’s Article 8 right. Furthermore, Article 8 required this entry despite the presence of caretaking relatives in another country and the child’s lack of cultural and linguistic ties to the Netherlands. Under *In re Recinas*, the family never would have been permitted to have their child join them in the Netherlands.

Aside from any other value in the case, *Sen* also seems to stand most strongly for the proposition that, under the right to respect for family life, no factor is determinative. In allowing the child’s entry, the Court set aside arguably the most important factor—the cultural and linguistic ties of the child—to allow the child to join her family. Pursuant to *In re Recinas*, it is inconceivable that a court could allow a child without any ties to the United States to enter.

4. *Direct Challenge: the Conflict between the “Exceptional and Extremely Unusual Hardship” Standard and ICCPR Article 17 cannot be Reconciled without Distorting Congress’ Statute; therefore, 8 U.S.C. § 1229(b) is Illegal*

A direct challenge to the “exceptional and extremely unusual hardship” standard would argue that the conflicts between ICCPR Article 17 and 8 U.S.C. § 1229(b) cannot be reconciled. That is, either due to the lack of a requirement for an “arbitrary” inquiry or due to the inability of allowing for the leniency of the international balancing test under the strict cumulative analysis of *In re Recinas*, it is impossible to bring 8 U.S.C. § 1229(b) into compliance with international law. Therefore, the “exceptional and extremely unusual hardship” standard is illegal. Under the *Charming Betsy* canon of statutory construction, a court is likely to try to avoid this conclusion and attempt, instead, to construe the statute consistent with international law.

5. *Indirect Challenge: The Conflict between the “Exceptional and Extremely Unusual Hardship” Standard can be Reconciled by Bringing the Standard into Line with the United States’ Obligations under Article 17*

An indirect challenge would argue that, by either construing the statute to allow for an additional “arbitrary” inquiry or, alternatively, to better reflect an equitable balancing rather than the *In re Recinas* cumulative analysis, the conflict between the “exceptional and extremely unusual hardship” standard and the requirements of ICCPR Article 17 can be reconciled.

This argument does not focus on the determinacy or indeterminacy of any given factor in any given case, but rather on the need for the court to conduct a case-specific balancing that equitably weighs the state’s interest against those of the individual. *In re Recinas* requires that all factors weigh in favor of the applicant; the UNHRC and European Court cases allow for harmful

factors—criminal history, illegal residence, lack of cultural and linguistic ties—to be outweighed by a stronger showing of an individual interest in remaining in the country. Each case should be evaluated on its own facts, not measured against an extremely high statutory standard.

6. *Cabrera-Alvarez: Case Study of a Direct Challenge*

A version of a direct challenge to the “exceptional and extremely unusual hardship” standard emerged in the Ninth Circuit in *Cabrera-Alvarez v. Gonzales*. In this case, an applicant father challenged an immigration judge’s denial of cancellation of removal under the standard as contrary to the “best interest of the child” provisions included in the Convention on the Rights of the Child.¹⁵³ The father argued that, to comply with international law, the impact of his removal on his children had to be the primary consideration in the cancellation determination.

The Court disagreed with the applicant and determined that the immigration judge had accounted for the best interests of the child even though he had ultimately determined that the children’s father was ineligible for cancellation of removal.¹⁵⁴ The Court stated that the IJ’s analysis under the “exceptional and extremely unusual hardship” standard already incorporated an examination of the impact of the father’s removal on the children.¹⁵⁵

a. Distinguishing Cabrera-Alvarez from the Proposed Challenge

A direct challenge to the “exceptional and extremely unusual hardship” standard pursuant to ICCPR Article 17’s right to respect for family life would mimic the applicant’s position in *Cabrera-Alvarez*, but with notable differences. First, advocates would argue from the basis of Article 17 of the ICCPR, to which the United States is a party. In *Cabrera-Alvarez*, the Court had to assume that the Convention on the Rights of the Child was customary international law for it to apply.¹⁵⁶ This assumption likely made the Court reluctant to grant any additional rights based upon that assumption and put that applicant at a disadvantage from the outset of his case.

Second, advocates arguing from ICCPR Article 17 have the *Winata* and *Madafferi* cases to demonstrate that the right to respect for family life applies in the deportation proceedings of parents. The Court in *Cabrera-Alvarez* was unconvinced that the applicant’s invocation of the CRC was even appropriate in a cancellation of removal proceeding.¹⁵⁷

Finally, as demonstrated above, there are strong, existing indications of the differences between the current iteration of the “exceptional and extremely

153. *Cabrera-Alvarez v. Gonzales*, 423 F.3d 1006 (9th Cir. 2005).

154. *Id.*

155. *Id.*

156. *Id.* at 1010.

157. *See id.* at 1010-11.

unusual hardship” standard as seen in *In re Recinas* and the current interpretation of ICCPR Article 17 (and ECHR Article 8). United States-based advocates have textual and judicial support for their direct challenge, and perhaps more importantly, the alternative of an indirect challenge that offers the court an easier option for bringing U.S. law into accordance with international law.

B. *Inclusion of Discretion in Waiver Determinations*

A second means of incorporating the right to respect for family life into United States domestic immigration decisions is an ICCPR Article 17-based argument for the inclusion of agency discretion into waiver determinations under INA § 212.

Under INA § 212, Congress provided several waivers of inadmissibility, including those for health-related grounds (212(g)), criminal conduct (212(h)), fraud or misrepresentation (212(i)), and unlawful presence (212(a)(9)(B)(v)). Some of these waivers already include processes for the exercise of agency discretion, but others, like the waivers for criminal conduct, provide for summary deportation of individuals who facially meet the statutory criteria.

The basic structure of an argument for including a discretion-based hearing into the § 212 waiver of inadmissibility process is:

1. Pursuant to the *Charming Betsy* canon of statutory construction, Congress is presumed to have legislated in a manner consistent with international law.
2. The United States has signed and ratified the International Covenant on Civil and Political Rights, which includes the right to respect for family life in Article 17.
3. The United States’ obligations pursuant to ICCPR Article 17 conflict with § 212 waiver determinations that do not allow for a manner of discretion.
4. Direct Challenge: the conflict between the lack of discretion in the § 212 waiver process cannot be reconciled without distorting Congress’ statute; therefore, non-discretion-based § 212 waiver determinations are illegal under international law
5. Indirect Challenge: In the alternative, the conflict between the lack of discretion in the § 212 waiver process can be reconciled by mandating a discretion-based hearing within the § 212 waiver process, even where the statute does not require it.

The direct challenge highlights the conflict between the lack of discretion allowed under some § 212 waiver determinations and emphasizes the impossibility of bringing that process into line with the United States’ obligations under ICCPR Article 17. The indirect challenge suggests that, by simply reading a requirement of a discretion-based hearing (or other element) into the § 212 waiver process, it is possible to avoid a conflict with

international law.

The first two parts of this argument are the same as discussed in the corresponding parts in the previous section regarding the “exceptional and extremely unusual hardship” standard. Now, this memo continues with the third part of the challenge to the § 212 waiver process.

1. *The United States’ Obligations Pursuant to ICCPR Article 17 Conflict with § 212 Waiver Determinations that do not Allow for a Manner of Discretion*

As part of the right to respect for family life, ICCPR Article 17 prohibits “arbitrary” interferences into one’s family life. The inclusion of the word “arbitrary” suggests a need for a measure of discretion in state decisions that affect an individual’s right to respect for family life. Under the “exceptional and extremely unusual hardship” standard discussed above, the word “arbitrary” in ICCPR Article 17 acts as either an additional protection for individuals or as an influence on the relative weighing of interests at issue in a particular case.

The word “arbitrary” should have the same impact on the § 212 waiver process: Where an individual is facially ineligible for a waiver of inadmissibility and is summarily rejected because of that facial ineligibility, the United States has breached its obligations under ICCPR Article 17. This breach stems from the same type of “checklist” process seen in *In re Recinas*: Individuals are measured only against a set cumulative standard, with no real allowance for the fact-specific, case-by-case balancing determinations conducted under ICCPR Article 17.

2. *Direct Challenge: The Conflict between the Lack of Discretion in the § 212 Waiver Process cannot be Reconciled without Distorting Congress’ Statute; therefore, Non-discretion-based § 212 Waiver Determinations are Illegal*

Under § 212, some of the waivers, such as the § 212(g) health-related waiver for HIV-infected individuals, already provide a discretion-based hearing. Others, such as the § 212(h) waiver for criminal conduct, only require that an individual be measured against the set statutory criteria, and then have the applicant summarily rejected when he fails to meet that criteria.

Those § 212 waivers that do not provide a discretion-based inquiry on a fact-specific, case-by-case basis violate ICCPR Article 17 by not allowing for a determination of arbitrariness before an individual is denied a waiver. Therefore, those particular § 212 waiver processes are illegal under international law.

3. *Indirect Challenge: In the Alternative, the Conflict between the Lack of Discretion in the § 212 Waiver Process can be Reconciled by Requiring a Discretion-based Hearing within the § 212 Waiver Process*

In situations where an individual is facially ineligible for a § 212 waiver

and thus eligible for summary removal, advocates can argue that the word “arbitrary” in ICCPR Article 17 requires that an individual to be deported is entitled to a discretion-based hearing, even if not provided for in Congress’ statute. This indirect challenge seems the most likely to succeed.

In *Beharry v. Reno*, the Eastern District of New York, facing a challenge to the § 212 waiver process in part pursuant to ICCPR Article 17, read a discretion-based hearing requirement in § 212(h) to avoid conflict with international law. To reach that ultimate conclusion, the Court first found that that INA § 212(h) was inconsistent with ICCPR Article 17, because an applicant’s inability to present reasons why he should not be deported violated the ICCPR’s protection “against arbitrary interference with one’s family.”¹⁵⁸

Despite this broad finding, the *Beharry* court limited its decision to a narrow set of cases: those where an alien had lived in the U.S. for the required seven years and had demonstrated “extreme hardship,” but whose crime was defined as an aggravated felony only after he had committed it. Aside from that limitation, however, *Beharry* can still stand for two points of argument for advocates working pursuant to ICCPR Article 17’s right to respect for family life: (1) that ICCPR Article 17’s use of the word “arbitrary” requires some level of discretion in immigration proceedings and (2) that courts can use that requirement to read a discretion-based element into immigration decision-making processes to avoid conflicts with international law.

IV. CONCLUSION

Through the principles and arguments identified and discussed above, international human rights law on the right to respect for family life provides a host of possible ideas for the drafters of international treaties and arguments for child immigration advocates. The underlying principles, broad conception of the family units, factors that weigh in favor of the family, general themes, and specific tests, arguments, and reasoning can be developed by advocates, serve as worthwhile guidance for policymakers, and aid the drafters of the IMBR in reflecting the current understanding of how the right to family life applies to international migrants. By promoting this right in these ways, all these actors can help ensure that its protections will reach immigrant children around the world.

158. *Beharry v. Reno*, 183 F.Supp.2d 584, 604 (E.D.N.Y. 2002) (citing *Beazley*, 242 F.3d at 263-68), *rev’d on other grounds*, 329 F.3d 51 (2d Cir. 2003).