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Bettering the Best Interests of the Child Determination:

Of Checklists and Balancing Exercises

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‘In making the proportionality assessment under art 8, the best interests of the child must be a primary consideration. This means that they must be considered first.’

Lady Hale, *ZH (Tanzania) v Secretary of State for the Home Department* [2011]

UKSC 4, [2011] 2 AC 166, (para. 33).

‘There is no talk about best interests in our situations. I mean “best” seems to indicate choosing between several choices. Someone like me has no other choice. No choices were ever discussed with me. So it seems strange this idea of best interests of children.’

Zyan, a young person who has gained British citizenship by a discretionary citizenship application.

ABSTRACT

The paper compares European Court of Human Rights (ECtHR) and UK court judgments on cross-border nationality cases concerning children and wholly domestic family law cases regarding children (without the cross-border element). It identifies different legal standards that apply to the well-being of children such as the best interests principle and the welfare principle and maps how successful these standards are in bringing in the views of children. It appears that cross-border nationality cases are unable to consider the interests of children as seriously as the wholly domestic family law cases. The domestic court approach of welfare brings in children's views more effectively than nationality cases in domestic courts or at the ECtHR. It would benefit children if a rigorous best interests determination is carried out in nationality proceedings and a welfare approach is adopted consistent with family law cases.

Introduction

This paper is based on part-serendipitous findings from research on an Economic and Social Research Council (ESRC)-funded project on British citizenship and nationality law practice.¹ While the focus of the ESRC project is on British citizenship, a number of practitioners who were interviewed for their citizenship and nationality-related practice had engaged in representing children in the acquisition of British nationality or in acquiring indefinite leave to remain. The paper identifies a lack of consistent application of legal standards on the well-

being of children when there are competing interests to be considered. Haugli and Shinkareva (2012) write that children clearly have an identifiable interest in being part of a stable and permanent community of citizens as well as being part of a stable family. Our research on nationality applications of foreign-born children who are long-term British residents demonstrates however that family and/or community and identity and/or nationality may be competing interests for some children. Due to uncertain family migration status, or lack of individual full citizenship status, foreign-born children may soon be unable to enjoy uninterrupted stay within the country, access to higher education, or free movement within the European Economic Area, in a manner that other British children are normally accustomed to enjoy. Lack of coherent legal reasoning on children's rights in nationality legal practice obfuscates priorities for the well-being of children, especially for those children from migrant families. It increases the uncertainty, and corresponding sense of insecurity, experienced by such children.

Data

We have gathered in-depth qualitative data on the situation of children's rights in nationality laws from interview data with nine legal practitioners, observational data at two law centres, and contributions made by 19 stakeholders in a workshop on children's citizenship in London.² Our project data consistently highlights the precarious condition of children who are long-term residents but not yet citizens. Such children generally acquire full British social identity but fail to obtain the corresponding secure legal status in the UK. In some instances, despite acquiring a secure legal status, they are unable to fully enjoy their legal rights.

In interviews carried out by us, practitioners mentioned experiencing different approaches to the well-being of children in domestic family law cases (such as in custody

cases where both parents live in the UK), rather than in cases in which there is a trans-national element. Practitioners observed that when nationality becomes an important issue then the migration history of the family and immigration policies of the country are considered in greater detail than any other factor. They seldom come across any mention of the welfare of children in nationality proceedings. These observations led us to enquire further about distinctions in how courts approach cases where a cross border element places nationality in focus as compared to ones in which the domestic family law issues predominate. Analysis of leading cases in the ECtHR and in the UK domestic courts reveals a number of different approaches towards children's rights despite the presence of comparable legal provisions in both kinds of cases. Further, even in nationality proceedings where children apply for British citizenship through processes of registration it appears their best interests are overlooked.

This paper analyses why there are discrepancies in legal conceptualizations of rights of children and seeks the common threads in the assessment of the well-being of children that run through various laws. After laying out the various standards relating to well-being, the paper looks at European Court and UK domestic court judgments involving children in family law cases and in nationality cases in order to evaluate the standards applied and to look for points of symmetry and asymmetry on children's rights. The paper suggests that as children are excluded from most representative political processes, there is little scrutiny of their private world unless there is serious cause for concern for their safety or conduct. In these circumstances the onus is on law to play a strong normative and adjudicatory role for children and to speak with clarity of their rights at every possible opportunity. To this end, a harmonised approach would enable children to always be kept central in decision-making in due recognition of their special position in society, in all fields of life and not just in family

law. Recent significant debates in the field of family law have particular relevance for nationality cases when children are involved.

Standards of Varying Intensity for Well-being

In international law the well-being of children is not articulated in the same manner as it is in the domestic legal framework (Eekelaar, 1986). The UN Convention on the Rights of the Child (UNCRC) 1989 is the best-known standard on the best interests of the child at the international level. The UNCRC places a duty on all national institutions to consider the best interests of the child. However, the UNCRC is not directly incorporated into domestic law in the United Kingdom. Instead domestic law is a variety of legislation and rules that deal with different aspects of best interests. Within domestic UK laws, the broader human rights approach is different from the specific legal ones that permeate trans-border nationality and domestic family law proceedings.

The logic of the European Convention on Human Rights (ECHR) is brought home to the UK through the Human Rights Act 1998 (HRA). The case law on Article 8 ECHR right to private and family life, presents a confluence of the various standards in domestic cases that are not always harmoniously synthesised. The right to respect for family life imposes positive obligations on the state including the duty to provide a framework for adjudication and enforcement for disputes between individuals. The state can only interfere with the private and family life to the extent permitted by Article 8 (2). Proportionality, a balancing exercise of various relevant aspects in a case, is the mainstay of Article 8 ECHR cases. Evaluation of the extent of the permissible interference is the tension that permeates many legal disputes involving children. An example of how this exercise operates with respect to children is

succinctly summarised by Lord Dyson MR in a privacy case, *Weller and others v Associated Newspapers Ltd* [2015] All ER (D) 194 (Nov),

The balancing exercise must always be undertaken in children's cases as in adult cases [...], although a child's right is not a trump card in the balancing exercise, the primacy of the best interests of a child means that, where a child's interests would be adversely affected, they must be given considerable weight. It might require very powerful article 10 rights (for example, exceptional reasons in the public interest) to outweigh a child's article 8 rights.

As explained above, under the ECHR framework, a child's interests will figure prominently in the proportionality approach. However, it is one criterion amongst several in the assessment. In most UK domestic legislation and rules the applicable standard for children is the welfare principle. The welfare principle sets children's welfare as a 'primary consideration', thereby placing children in a supreme position. For example, the welfare principle is strongly attached to the paramountcy of the well-being of a child (S.1 of the Children Act 1989, which states that the child's welfare shall be the Court's paramount consideration). Under this principle a child's welfare would dominate over all other considerations. Equivalent paramountcy language is missing in the UNCRC, which defines the 'best interests of the child' as a primary consideration (Article 3 UNCRC). This means it is a basic and first order consideration but does not necessarily trump all other considerations. The UNCRC approach is closer to the proportionality one than the welfare principle. This does not mean that welfare in the domestic context is an 'all-inclusive' concept (McNamee et al, 2005). A checklist of key factors guide judges in the welfare principles. The 1989 Act does not define welfare but the checklist contained in Section 1(3) provides for the

ascertainable wishes and feelings of the child concerned to be considered in light of his age and understanding. It also provides for consideration of her/his physical and emotional and educational needs, the likely effect of any change in her/his circumstances, her/his age sex background and any characteristics of her/his which the Court considers relevant. The Court also examines any harm which s/he has suffered or is at risk of suffering, how capable each of her/his parents, and any other person in relation to whom the Court considers the question to be relevant, is of meeting her/his needs. The paramountcy of the welfare principle is not assured whenever children are involved. In the *ZH* case, *ZH (Tanzania) v SSHD* [2011] UKSC 4, Baroness Hale has distinguished the situations when the paramountcy principle will apply from other situations. She says if a decision is about the upbringing of a child the welfare principle is paramount, but if a decision merely affects a child (as many decisions will) it does not automatically trigger the paramountcy of the welfare principle.

Yet the duty to co-operate to promote the well-being of children in all circumstances is set out in S.10 of the Children Act 2004. According to S.10 (2) of the Children Act 2004, well-being is split into different aspects such as physical and mental health and emotional well-being; protection from harm and neglect; education, training and recreation; the contribution made by them to society; and social and economic well-being. The duty under S.55 Borders, Citizenship and Immigration Act 2009 replicates this in terms of UK Border Agency functions, which require that children be healthy; stay safe; enjoy and achieve; make a positive contribution to society; and achieve economic well-being. As already mentioned, the 1989 Children Act contains a checklist of principles about the welfare of the child, which is often utilised by family courts. While this provides a checklist of factors to be considered while assessing a child's welfare, it does not give us a precise definition of welfare. In nationality proceedings no such ready-reference checklist exists and the only means of

ascertaining the circumstances of children is through the balancing exercise of proportionality.

Mindful of these variations in legal standards and reasoning, in this paper we focus on two categories of cases where children are central and their well-being is of critical importance. These are trans-border cases involving children (which we term nationality cases), and domestic family law cases for studying approaches to the well-being of children. The nationality cases generally involve children and their right to reside, travel and education, while for family law the significant issues are adoption, custody and abduction cases. We find that cases wherein family law issues dominate are much better able to take account of children's views than cases where nationality is the focus. Nationality cases appear to take the interests of children for granted or to simply overlook these in the overall analysis. Further, nationality proceedings, even at the administrative level, do not engage fully with the well-being of children. In the following sections we will illustrate how we come to these conclusions.

Nationality, Children and Article 8, ECHR

In nationality and citizenship law, there are specific obligations placed on nation states with respect to the nationality of children (Kjørholt, 2008). Article 8 of the UNCRC says

1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality [...] as recognized by law without unlawful interference.
2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.

The UNCRC is not binding on the ECtHR but the court refers to it often in its decisions. Another authority given positive treatment by the ECtHR, is the International Court of Justice case of *Nottebohm*, (*Liechtenstein v Guatemala*) [1955] ICJ 1. This case first laid out the importance of effective connection in determining nationality and attached critical importance to identity as a part of nationality. In light of *Nottebohm* and Article 8 UNCRC, it is plausible that the ECtHR would require states to demonstrate the use of greater judgment while conferring or removing nationality from children than from adults (although there is no existing decision to this effect).

At first reading of relevant cases, this hypothesis appears to be borne out. The connection between nationality and identity has been deepened in several ECtHR cases subsequent to *Nottebohm*. For example, in *Genovese v Malta* (App. No. 53124/09) - [2011] ECHR 53124/09, the *Genovese* case in short, the court set out how nationality connects with the convention rights. It said that nationality falls within the scope of protection of the ECHR as part of a person's social identity, which in turn is part of that person's private life, 'even if art 8 of the Convention does not guarantee a right to acquire a particular nationality, it remains that nationality is an element of personal identity'. This case dealt with the acquisition of nationality of a Scottish-born man who was born out of wedlock to a British mother and a Maltese father. The father refused to acknowledge his son and maintain any relationship with him. The mother made a request for her son to be granted Maltese citizenship. Malta held that citizenship would only be granted if the father recognised his son. Eventually court proceedings led to his paternity being recognised on the birth certificate. Malta subsequently rejected her next application as the child was illegitimate and the mother was non-Maltese. This led to a claim of discrimination between legitimate and illegitimate children. The Court accepted that an arbitrary denial of citizenship might raise an issue under Art 8. For this line of reasoning the court followed an earlier case involving children. This

was the case of *Karashev v Finland* (App. No 31414/96) (12 January 1999, unreported) in which two children born in the former USSR, arrived in Finland in 1991 requesting asylum. It was rejected and no reason was found to grant them a permit. Finland tried to deport them. Karashev (one of the children) claimed that although he and his brother were citizens of the USSR, they weren't citizens of the Russian Federation. Finland refused citizenship without providing reasons so Karashev claimed he had been arbitrarily denied a nationality and rendered stateless. Although Karashev's claim did not succeed, the Court said that it did not, 'exclude that an arbitrary denial of a citizenship might in certain circumstances raise an issue under Article 8 of the ECHR, because of the impact of such a denial on the private life of the individual'. In the specific claim made by Karashev, the court found there was no serious breach as the denial was not arbitrary. However, Karashev opened the door for rights implications of denial of nationality. The *Genovese* case drew on *Karashev* to examine the extent of arbitrariness in the Maltese refusal. The *Genovese* applicant succeeded on the issue of discrimination on the basis of his illegitimacy.

The relevant principles of *Genovese* are now well established as these have been given positive treatment in a number of cases.³ One elaboration of the *Genovese* holding is worth setting out here in some detail. In *Riener v Bulgaria* (App. no 46343/99) - [2006] ECHR 46343/99 R a citizen of Bulgaria, obtained Austrian nationality and tried to renounce his Bulgarian citizenship for tax reasons. An important observation in the case is found in the partly dissenting opinion of Judge Maruste who said:

I see nationality (citizenship) as part of someone's identity. If art 8 covers the right to self-determination in respect of, for example, sexual orientation and so forth, it undoubtedly also covers the right to self-determination in respect of nationality and citizenship. It is true that the Convention does not guarantee the right to citizenship. But it follows from the general idea of freedom, freedom of choice and self-

determination that there should be a right to apply for citizenship and also a negative right to renounce it. This is part of the social, cultural and political self-determination of the individual, which, to my mind, also falls within the general scope of art 8.

As in *Genovese* and *Karassev*, a number of nationality cases are about children and family life. The leading case on best interests and family life in which nationality is of core importance is *Neulinger and another v Switzerland* (App. No. 41615/07) - [2010] ECHR 41615/07. In *Neulinger*, a Swiss National married an Israeli national. Their son was born in Israel with dual nationality. The father joined a radical religious movement. The mother, fearing that the child would be indoctrinated, fled to Switzerland with the child. Kidnapping proceedings were launched and the ruling was to send back the child. Both mother and child claimed that in ruling to send the child back, Swiss courts had breached their Article 9 rights. The court delved into the best interests of the child, accepting that a child's best interests are paramount (para. 135). The interests comprise two parts: the family and the wider environment. The child's ties to the family must be maintained unless the family is unfit. However, a parent cannot be allowed to take measures that would harm the child's health. The court laid out a number of factors to be considered while evaluating the best interests of a child. These include age, level of maturity, the presence or absence of his parents and his environment or experiences. As these are variables they need to be assessed on a case-by-case basis. The direct link with nationality is that there could be a risk to the child regarding psychological harm if he were returned (para. 143). In order to assess the proportionality of an expulsion measure concerning a child who has settled in the host country, it is necessary to take into account the child's best interests and well-being, and in particular the seriousness of the difficulties which he or she is likely to encounter in the country of destination and the solidity of social, cultural and family ties both with the host country and with the country of destination. The seriousness of any difficulties that may be encountered in the destination

country by the family members who would be accompanying the deportee must also be taken into account (para. 146).

Even closer to the general family law context is *R and another v United Kingdom* (App. No. 35348/06) - [2011] ECHR 35348/06 – a case about taking children into care and later adoption proceedings. The biological parents of the child had a long history of alcoholism but claimed breaches of their Article 8 rights. This case extends the *Neulinger* holdings on the best interests of children to find state action was proportionate on the merits of this case. This is despite the context of this case being different from the *Neulinger* subject matter (see also, in the context of adoption, *X and others v Austria* [2013] 1 FCR 387). Another case that looks at the best interests of children in nationality context is *Jeunesse v Netherlands* (App. No. 12738/10) - [2014] ECHR. Here, the applicant, of Surinamese nationality, had a relationship with another Surinamese national. Both were born in Surinam and had always lived in Surinam. They moved to the Netherlands and overstayed their visas. They then married and had two children, both of whom had Dutch nationality. The Netherlands tried to expel them. They made an Article 8 claim regarding the refusal to grant Netherlands residence. Part of their claim was based on their children’s best interests. In para. 84 the court found that, ‘the general interests of Netherlands government did not outweigh the rights of the applicant and her family ... insufficient weight given to the best interests of her children’. It was found that insufficient weight was given to the best interests of the applicant’s children by the immigration authorities. In para. 23 the court examined the fact that the children are Netherlands nationals and paid particular attention to the children’s bonds with the Netherlands and their best interests in uninterrupted education.

General Observations about Nationality, Children and the ECtHR

Some general trends can be observed in the ECtHR nationality cases. First, it is significant that the ECtHR cases have deepened the link between nationality and personal identity in Article 8 and, on some occasions, Article 9 cases. Second, despite this deepened link, these cases fail to develop upon the special effects of arbitrary denial of nationality on children. For instance, both *Genovese* and *Karashev*, while dealing with children and childhood, do not give any special importance to the rights and well-being of children. Third, we find some indication that when family law issues, such as that of the family staying together, become central to the disposition of the case there is discussion of the best interests of the children. We shall explore this aspect further when we examine more cases before the ECtHR where the family law issues are the leading ones. Fourth, as far as can be ascertained from the judgments, there is very little procedure in place for determining the best interests of children in nationality cases before the ECtHR. In dealing with issues of refugee law, the UNHCR has a systemic process in place to determine the best interests of children but no such formal process is followed in the decision-making processes adopted by the ECtHR in nationality law cases (Dalrymple, 2006). Finally, the nationality case law where children's best interests are sometimes discussed, focuses on preventing negative effects on children rather than promoting positive benefits of a particular European nationality for the development of children. For example, judges analyse the impact on the children of the breaking up of the family unit because of immigration problems faced by the family. The closest the court has come to looking at benefits of citizenship for children is in the *Jeunesse* case discussed above, where the benefit of uninterrupted education has been considered. Even this discussion is superficial and unsystematic. The many macro-associations made by children during their childhood, which extend beyond their immediate family to other relatives, friends, schoolteachers, and others who come within their sphere, are largely ignored in ECtHR case law. It appears that most ECtHR cases fail to give effect to the spirit of the

UNCRC even when the language of ‘best interests’ seeps into the judgments. It now remains to be seen how UK courts address issues of nationality and the well-being of children.

Nationality and Well-being of Children in UK courts

For a long period in UK domestic nationality law cases, the UNCRC had little relevance because the United Kingdom had entered a specific reservation to exclude immigration, asylum and nationality cases. However, the reservation was finally lifted in 2008, and Section 55 of the Borders, Citizenship and Immigration Act 2009 was inserted in domestic law. Section 55 places a duty on the Secretary of State, immigration officers and customs officials to have due regard for the need to safeguard and promote the welfare of children while performing any function in relation to immigration, asylum or nationality. The duty has been further elaborated upon in statutory guidance to include ‘preventing impairment to a child’s development which in turn includes “social development and enabling children to have optimum life chances and enter adulthood successfully”’ (Borders, Citizenship and Immigration Act, 2009: 1(4)).

In July 2012, the government introduced significant changes to the Immigration Rules. The announcement stated that the changes incorporate into the Rules, amongst other things, the requirements that must be satisfied for a child’s case to succeed and an assertion that the changes will protect children’s best interests (for example, Rule of EX1 of Appendix FM – Family Members). More recently, the Immigration Act 2014 in Section 71 clarifies that it would not limit, in any way, duties regarding the welfare of children imposed on the Secretary of State or any other person by Section 55 of the Borders, Citizenship and Immigration Act 2009. Reference to a children’s champion is now included in the Section 55 statutory guidance: there shall be a senior member of staff (the children’s champion) who is

responsible to the Chief Executive of the UK border agency for promoting the duty to safeguard and promote the welfare of children throughout the UK border agency, for offering advice and support to UK border agency staff in issues related to children, and identifying and escalating areas of concern.

The practitioners who work with children on nationality proceedings herald these positive changes. A Bristol-based immigration lawyer in the UK told us, ‘Recent focus on welfare of migrant children, particularly unaccompanied minors, has brought about some good changes for children in my immigration and nationality cases.’ Best interests analysis involving children has, however, been mired in legal disagreements in the domestic legal scene. Legal advisers and lawyers report an artificial distinction made between the best interests of children and their welfare. For example, Lambeth Law Centre submitted a freedom of information application (FOIA) seeking to understand how S.55 would operate and what the duties of the children’s champion would be under the new legal regime. The response to this FOIA request was that the children’s champion under the UKBA does not determine best interests of children but provides advice on the implications of the welfare of children. This artificial distinction made between welfare and best interests is also mirrored in the case law we examine in this article.

As in the ECtHR, nationality case law in the UK has developed mainly in terms of Article 8 ECHR (the right to respect for private and family life) rather than any other provision. A leading example is *ZH (Tanzania) v SSHD* [2011] UKSC 4, a Supreme Court case from 2011, which deals with children’s rights and nationality issues under the aegis of Article 8. *ZH* has been hailed as the first domestic case to fully consider the role of the best interests of children in balancing the various rights of a family and its members under the right to respect for private and family life through proportionality analysis. In *ZH*, the UK Supreme Court looked into whether the removal from the UK of the mother of British citizen

children would interfere disproportionately with the right for respect to family life of the children. The children, in addition to being British citizens, had also spent all their lives in the UK. They did not have any attachment to any other nationality. The court was thus perplexed about how to consider their best interests while also examining their mother's complex immigration case.

ZH came at a critical juncture in legal reasoning on children's rights when the UK changed course on the UNCRC and immigration proceedings. It is proximate to the introduction of the new S.55 duty to consider the best interests of children in domestic immigration legislation. Situated at this transitional time, this judgment simmers with discontent about divergences in legal standards applicable to children. Judges grapple in it with the lack of clarity in the scope and extent of best interests of children while undertaking the balancing exercise of proportionality (Glen, 2012). Lady Baroness Hale says: 'in making the proportionality assessment under Article 8, the best interests of the child must be a primary consideration. This means they must be considered first. They can, of course be outweighed by the cumulative effect of other considerations' (para. 33). While Baroness Hale called 'best interests' a primary consideration, her analysis presents it only as one of several factors to be balanced. Lord Kerr however is more emphatic when he says that best interests of children:

must rank higher than any other. It is not merely one consideration that weighs in the balance alongside other competing factors. Where the best interests of the child clearly favour a certain course, that course should be followed unless countervailing reasons of considerable force displace them. It is not necessary to express this in terms of a presumption but the primacy of this consideration needs to be made clear in emphatic terms. What is determined to be in a child's best interests should

customarily dictate the outcome of cases such as the present, therefore, and it will require considerations of substantial moment to permit a different result (para. 46).

Lord Kerr's approach elevates the status of the best interests of the child beyond it being just another consideration (however important) in the balancing exercise.

The *ZH* approach was adopted in *Collins v Secretary of State for Communities and Local Government and another* [2013] EWCA Civ 1193; a case regarding many travellers (half of whom were children) who had an enforcement notice made out against them by the local council. Article 8 was raised in relation to the eviction. In *F-K (FC) v Polish Judicial Authority* [2012] UKSC 25, an extradition case, the issue was whether extradition of a parent would breach Article 8 in relation to the children. The court discussed the effect of extradition upon the children and decided that the effect of extraditing their mother alone would not be too severe and would be outweighed by the public interest in returning her to Italy, but if both parents are extradited the effect would be too harsh. Baroness Hale writes in the leading judgment that the age of the children was decisive in allowing the appeal.

The *ZH* case is equally authoritative for its focus on a pressing need to listen to the voices of children. In most nationality cases, children are not consulted or their views sought on their best interests. In the empirical data we have gathered as well, children who have had contact with lawyers find it baffling as to what real choices are placed before them by the law. In nationality cases, Zyan's sentiments, quoted in the epigraph, are echoed by many others caught between secure nationality and life experience. They report not being consulted about their own priorities or expectations in life through any legal procedures. Their lawyers, while preparing applications, seek to emphasise their Britishness. However, the special obligation towards them as children, irrespective of their nationality, is not the mainstay of most legal proceedings. Lawyers identify the source of complications as competing needs.

Children's voices are lost, or even silenced, when adult needs compete and, particularly, when national interests such as immigration control enter the picture.

In this context it is a welcome change that in *ZH* the Court clarified that it is important to ascertain the wishes of the child. Representatives of children should listen to children and it is best practice for public bodies to always ensure that they try and ascertain the best interests of the child. This is in accordance with Article 12 UNCRC, which introduces the need for the decision-maker to endeavour to ascertain the views of the child. The *ZH* court said that when considering the mother's poor immigration history, a child should not be held responsible for the acts or omissions of her or his parents. Right after *ZH*, the judgment in *R (Tinizaray) v SSHD* [2011] EWHC 1850 also confirmed the role of the 'best interests' principle. *Tinizaray* concerned an Ecuadorian woman who had entered the UK illegally and later had a child. Her application to the UK Border Agency for indefinite leave to remain, including her mother and child as dependants, was refused. HH Judge Anthony Sultan QC set out some guidance on how to take into account a child's best interests while undertaking the balancing exercise. In this guidance, nationality is of particular importance, since deportation would deprive that child of her country of origin and the protection and support that she has acquired socially, culturally and medically from growing up in a British lifestyle, and would also lead to a social and linguistic disruption and a loss of educational opportunities. Regarding the voice of the child the judge says,

the views of a child who is capable of forming her own views in all matters affecting her must be heard and due weight must be given to them in accordance with her age and maturity. Procedures should be adopted that ensure that those views are fully and freely obtained (para. 13).

In addition, *Tinizaray* refers to the Children Act (1989) and sets out what the decision-maker within the family law context must take account of when seeking to protect the welfare of an individual child. The judge held that these same considerations are relevant to the proper exercise of the S.55 duty in immigration cases involving children. Therefore, together *ZH* (Tanzania) and *Tinizaray* are categorical in their emphasis on the importance of children's rights in the context of immigration law in the UK and provide ample precedence for bringing into nationality proceedings the provisions that are already popular in family law to facilitate the incorporation of the views of children.

Thus, the march of case law as well as changes to the immigration rules in July 2012, which incorporated into the rules the requirements of best interests, have changed the domestic legal landscape. With these new insertions, it seems clear that the welfare of the child is to be given primary consideration in all cases relating to nationality and immigration. It appears that at least law on the books fully supports the welfare of children in all instances where they are impacted. However, the law in actual practice is a different story. A London-based leading practitioner on children's nationality cases informed us that generally,

refusal letters do not make reference to s55 or best interest consideration. At pre-action or judicial review stages, the Secretary of State sometimes argues that just because it has not been referred to, it does not mean that this has not been considered. Some judges choose to believe that s55 duty have been considered in spite of this not [having] been referred to in the initial decision or in the review letters. In some cases, the Secretary of State agrees to re-review and comes back with a refusal letter which refers to s55! I often ask for Home Office's records held about clients. In a few cases, I have found a 1 line reference to s55.

Further, the Home Office fails to recognise the welfare benefits to children of full British citizenship over subsidiary forms of immigration status. In *FI, R (on the application of) v Secretary of State for the Home Department* [2014] EWHC 2287 (Admin), a child (a 16 year old who had lived in the UK since the age of seven) had already been granted Indefinite Leave to Remain (which allows people to settle in the UK without time restriction), so the Home Office argued that registration as British would not enhance his right to live or study in the UK, nor would it contribute further to his everyday life (para. 14). For this reason, argued the Home Secretary, the boy's best interests had already been taken into account, and the decision to refuse registration was based on the fact that his best interests would 'lie with his family but not to the detriment of current nationality legislation'. The court held that, 'it is wrong to treat the decision as having no impact on his best interests' (para. 22). The court made reference to the 'undoubted benefits of British Citizenship' but did not expand on these. Thus the courts have interpreted the 'best interest' standard as requiring the Home Secretary to consider more than just simply whether the child can continue to live with his or her family. The positive benefits of citizenship also need to be considered although the court has not specified what these positive benefits are.

As we have seen, in UK domestic cases, as well as in the ECtHR, family law and nationality are integrally connected but the cases where the child's well-being are given consideration are mostly the ones in which the family law issue is the most important one. Other than in a few cases like *ZH* and *FI*, the well-being of children rarely permeates nationality law cases. In other cases, 'best interests' language or welfare as a concept has very little influence. We submit that this distinction is a cause for concern as it undermines the robustness of the legal framework for children's protection and participation. Further, from our analysis we submit that the confluence of legal standards in Article 8 case law has rendered such distinctions redundant. Although the *ZH* court restated the fundamental

principle that children are not responsible for the actions of their parents, children often bear the burden of unfortunate or ill-considered decisions of adults in the immigration context.

Immigration practitioners who work with children struggle daily to understand why law treats their clients differently from other children while assessing their well-being. Sandra, a lawyer who has worked with young people who arrived in the UK as little children says,

Protection of children is a priority. But when it comes to positive aspects of development, it is usually more convincing for the authorities and courts to think concretely of the needs of immigration control. This is more real to them in many ways than abstract notions of nurturing the potential of children. These children are part of families with immigration problems and that makes it difficult to remember they are children first. The focus of the cases becomes the behaviour of the children and, worse, their families.

Another says, ‘the good conduct principles in nationality law are just borrowed from adult provisions for children. Surely there is something wrong with that’. In case law, there are several examples of how good conduct undercuts best interests determination by the Home Office. One such instance is *R (on the application of SA) v Secretary of State for the Home Department* [2015] EWHC 1611 (Admin), a case about the refusal of registration as a British citizen of a child. The child, who came to the UK aged nine, was later refused citizenship for a recorded incident of cannabis possession. However, the High Court disagreed and found the refusal to be arbitrary and unjustified because the child had effectively demonstrated a strong connection with the UK. The judge found that there was no real evaluative exercise carried out by the Home Office to determine the best interests of the child.

We submit that while the domestic nationality case law demonstrates a gradual recognition, through legislation and case law, of the relevance of the well-being of children, there persists a reluctance to engage with best interests determination in practice. In domestic nationality cases the emphasis should be on rights, but courts tend to place more emphasis on the likelihood of the family to remain in the UK or the conduct of family members and the child, rather than assessing the best interests of the child. Consistent with an individualistic rights approach, the other societal connections of the child are largely ignored while considering the best interests of the child (see also a similar analysis in the American immigration law context by Carr (2009) and Abrams (2006)). We also find family law welfare language is mostly precluded from cases where the nationality of the child is the primary point of contention in a case. Further, nationality is often viewed as an area of absolute executive discretion, which generally overcomes any connected rights considerations (Giner, 2007). A contrasting view can be obtained from family law cases where children's welfare is central to court determinations.

ECtHR, Family Law and Children's Best Interests

The ECtHR's approach to children's rights in the general family law context is also connected to Article 8 ECHR cases, but unlike the nationality cases, the cross-border issues are missing in these cases. In the family law context, there is a series of cases in which the ECtHR has said that the best interests of the child would override the interests of any other parties. For example, as far back as in 1982, the court said in *Hendricks v Netherlands* (1982 5 EHRR 223) that if there was a serious conflict between the interests of the child and one of his or her parents, which could only result in the disadvantage of one of them, it was the child's interests that had to prevail under Article 8 (2). In *Johansen v Norway* (1996 23 EHRR 33), the ECtHR said that the parent cannot be entitled under Article 8 of the

Convention to a measure that would harm the child's health and development. Again, in *Hoppe v Germany* (App. no 28422/95) - [2002] ECHR 28422/95, the Court observed that a child's welfare is paramount and this is also enshrined in Article 3 (1) of the UNCRC. These cases trace a clear trajectory of jurisprudence in this area towards greater protection of children's best interests.

A notable difference between the family law-dominant cases and the nationality-dominant cases is that in family law cases, children appear to be consulted at length about their welfare as part of the investigation around their circumstances. For example, in the context of child abuse, the case of *Jovanovic v Sweden* [2015] ECHR 10592/12 is one in which the child's views are considered at great length, with the court asserting that the best interests of the child may override those of the parents (para. 77). Also, in the context of suspected child abuse in *Dolhamre v Sweden* (App. No. 67/04) - [2010] ECHR 67/04, we see the views of children are taken seriously. In this case, a couple had three children who alleged that their father was sexually and physically abusing them. Authorities took them into care due to the children's allegations. The children became worse when they were allowed telephone contact, so care was prolonged. The court said that while mutual enjoyment of parent and children's company is key to Article 8, here the best interests of the children were correctly prioritised, based on the fact that there was no violation due to the state acting in what it thought was their best interests by prolonging contact. The court held that the children had a right to be involved in the process, and so the state was right to accept their accusations.

Another case where children were taken into care is of *Levin v Sweden* (App. No. 35141/06) - [2012] ECHR 35141/06. In this case the children did not want to see their mother more than twice a year, especially not alone as they were scared of her. The court held that the child's best interests should be placed at the forefront. The *Levin* case is typical of the proportionality approach when the child's interests are to be concerned for their protection.

The court first lays out the scope of Article 8 and says: the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life, and domestic measures hindering such enjoyment amount to an interference with the right protected by Art 8 of the Convention. But then the court says that it has to 'balance the interest of the applicant to have increased contact with her children against the interests of the children to have a secure and stable environment in which to develop.' In doing so, the Court attaches particular importance to the best interests of the children which, depending on their nature and seriousness, might override those of the applicant (paras. 57–69). An entire paragraph (para. 67) is devoted to how the children 'expressly stated that they did not want to see their mother more than twice a year'. The Court said that 'This cannot ... be ignored or trivialised'. Thus the *Levin* case approach demonstrates that the most significant difference between ECtHR family law cases and the nationality law cases in the ECtHR is that children are consulted more in the family law cases. However, it should be noted that the consultations are generally in the context of negative effects on their well-being. We will return to this point when we discuss the positive dimensions of gaining secure nationality status.

Family Law Cases and Well-being of Children in UK Courts

Given our observations on family law and nationality cases in the ECtHR, we now look for points of symmetry and asymmetry in family law-linked domestic cases such as those related to adoption and custody of children, to see if similar patterns emerge in the domestic scene. Here, as already mentioned, the most relevant standard is of the welfare principle. This principle is part of the legal reasoning in family law cases both in England and in Scotland (Arthur, 2010). Language used in both jurisdictions is of paramountcy to the interests of children. For example, the Children (Scotland) Act 1995 sets out that the welfare of the child is the paramount consideration. In England, the Children Act 1989 states that children's

welfare should be the paramount concern of the courts. This Act has a pragmatic approach to welfare, listing the following factors as important considerations: educational need, age, sex, background circumstances, the likely effect of change on the child, and the likelihood of harm to the child. Courts should take into account the child's wishes; the physical and emotional needs; whether the child has or is likely to suffer; the parents' ability to meet the child's needs; and the powers available to the court. The origins of the welfare principle in England can be traced to the practice of the Chancery court in wardship and guardianship cases in the late eighteenth and nineteenth centuries (Kohm, 2007). Bromley's Family Law book records that the first statute to mention the child's welfare as a relevant consideration is the Guardianship of Infants Act 1886.

In family law there has been debate in the recent past about how to include children and their views in legal proceedings (e.g. Freeman, 1997; James, 2007). The aspiration is to include them without compelling them to take sides in the disputes of adults and rendering them vulnerable to potential manipulation by adults (Masson, 2000). There has also been concern about how much children understand; their capacity is always queried (Kelly, 1997). It is to resolve these quandaries that measures such as expert evidence and well trained questioning of children have become routine aspects of family law evidence gathering.

England and Scotland differ in how the UNCRC operates in the domestic framework. England does not give direct effect to the UNCRC but Scotland has recently given direct effect to the UNCRC from 27 March, 2014 through the Children & Young People (Scotland) Act 2014. The Act introduces a duty on Scottish Government Ministers to *'keep under consideration whether there are any steps which they could take which would or might secure better or further effect in Scotland of the UNCRC requirements'*. This means that the Scottish Government should always consider whether or not what they're doing will help promote the

rights of children and young people in Scotland. Instead of looking towards the UNCRC, the English Family Division of the High Court in England has concentrated on the welfare principle. A further distinction between Scottish and English domestic family law approaches is that English judges look for expert evidence in the assessments of CAFCASS officers (the Children and Family Court Advisory and Support Service which represents children in family court cases) and expert witnesses who prepare a welfare report (Fernando, 2014). In England, seldom do judges speak directly to children. In Scotland judges do not generally have access to expert reports and often speak to children directly. Family law cases go to some effort to ascertain the views of the child, whether through the expert evidence or through direct interaction. It is this element that is missing in equivalent cases involving children and nationality laws.

The understanding of the content of child well-being and welfare can be greatly assisted through much of the High Court Family Division's own case law and child-focused procedures. For example, *In re K (A Child) (Reunite International Child Abduction Centre intervening)* [2014] UKSC 29, a child born in Lithuania in 2005 lived with his grandparents. His parents had separated and his father played no part in his life. The mother gave his grandmother power of attorney and moved away. She continued to pay some maintenance and had contact with the child occasionally. The grandmother obtained a care order. In 2012, the mother wanted to take the child back, terminating the care order. The mother took the child away to Northern Ireland with her. Having lost her case in the lower courts, the grandmother appealed to the UK Supreme Court, which determined that the grandmother had obtained the care order as it was in the child's best interests and therefore she had lawful custody of the child. Another case of child custody is *In re L (A Child) (Custody: Habitual Residence) (Reunite International Child Abduction Centre intervening)* [2013] UKSC 75, where the Supreme Court asserted 'that each case will receive the individualised treatment

necessary for appropriate consideration of the child's best interests'. A Supreme Court case that demonstrates the child's views are given weight via the welfare principle is *In re LC (Children) (Reunite International Child Abduction Centre intervening)* [2014] UKSC 1 in which a Spanish mother and British father separated. The mother took the children as per an agreement with the father but when the children visited England for a holiday they did not return to Spain. The children wanted to remain in England and apparently hid their passports. They did not return to Spain so the mother issued child abduction proceedings. The Supreme Court took into careful consideration the views of the children, particularly the eldest child. This is because a relevant factor was the state of mind of a child who was adolescent or had the maturity of an adolescent. Here, it is not just the protection of children but also the positive aspects of their personal development and wishes that are important in the case.

Threading Through Various Conceptions of Well-being

As we have seen in family law cases the welfare of children is discussed frequently and copiously. While it is noteworthy that the language is seldom about the rights of children, the courts have adopted a welfare approach, which goes much further than general well-being and looks at both safeguarding the child and enhancing their development. Conversely, in nationality-related cases, discussions of children and rights do not always include a best interests analysis or determination of well-being (see also, Eekelaar, 2015). A striking example of this is the recent *Tigere* case [2015] UKSC 57, which has emphasised the right to education for all children without discrimination, but without an analysis of the best interests of children. Tigere is a 20-year-old Zambian national, who came to the UK in 2001, aged six. Her mother overstayed her visa, which meant Tigere was, at one point, unlawfully present in

the country. Later she obtained discretionary leave to remain in the UK and in 2018 will be able to apply for indefinite leave to remain. Tigere was offered several university places but was unable to accept the places as she was not eligible for a student loan because of her immigration status. The Supreme Court allowed Tigere's appeal by a majority of 3:2. Baroness Hale writes the lead judgment and finds the settlement requirement for loans violates Tigere's right to access education. Writing about the impact on the lives of young people she says:

One does not need to have been a university teacher to appreciate that it is important to keep up the momentum of one's studies, to maintain the habits and skills learned at A level, and in many cases (particularly the sciences) to retain the knowledge gained there. A voluntary gap year is one thing, but an enforced gap of several years is quite different. These young people will also find it hard to understand why they are allowed access to all the public services, including cash welfare benefits, but are denied access to this one benefit, which is a repayable loan (para. 40).

Yet, despite this analysis, not once does the judgment use the best interests principle or welfare principle in terms of right to education of children.

Given then that welfare and proportionality appear to work differently in family law and nationality cases is it possible to identify some underlying conceptual connections? First of all, our analysis reveals that, in all approaches, children are almost always the most important subjects of law on the book. In practice, however, other considerations crowd the picture. There is a perception that national interest in migration control is more significant than any individual rights. While migration and nation security are important considerations, there is also a strong public interest in the education and social development of children. National interest is also about preserving family lives and community connections so

arguably there is a national interest in exploring the possibility of a secure citizenship status for children. Thus, the conception of national or public interest is more complex in children's nationality proceedings than is considered in most cases. Thus in *In re B (A Minor)* - [1999] 2 A.C. 136 – HoL, the court looked at the benefits of adoption as against Home Office interest in controlling immigration. In this case, the child B, a Jamaican citizen, visited her mother's parents, having leave to be there for six months. During that period, B was schooled in England. B's mother returned to Jamaica but B stayed on in order to attend school. The Home Secretary refused to grant leave to remain. The living conditions for B if she were to return to Jamaica were very meagre; she would have no access to proper toilets or electricity at home. Her grandparents, both UK citizens, applied for an adoption order with permission from B's mother. The home office intervened, saying that the adoption process was only being used as a means to acquiring the right of abode in the UK. But, the grandparents' appeal was allowed on the basis that S.6 Adoption Act 1976 required courts to have regard to all the circumstances, treating the welfare of the child as the first consideration. Lord Hoffmann reasoned that the political motivations of the Home Office (to control immigration) do not offset the vast benefits that adoption would give to B.

Indeed, it is to accommodate multiple interests that various kinds of legal reasoning exist. Advocates for children's rights are often strongly opposed to balancing and weighing a child's interests against any other interests (Green and Dohrn, 1995). Yet, undeniably, there may be other considerations that need to be thought through while assessing the well-being of a child. The proportionality approach introduces the balancing of interests while the welfare approach takes a different tack on this by explicitly putting children's interests at the forefront and providing a checklist of considerations relating to the well-being of children. These may look like different standards but a common thread is that both systems are looking for the best possible outcome for children in difficult conditions.

Second, the voice of the child is a concept that links the various legal instruments. One checklist factor is the ascertainable wishes and feelings of the child concerned, considered in light of his age and understanding. This resonates with the UN Convention on the Rights of the Child Article 12 (1) (for analysis of Article 12 see Lundy, 2007). The first consideration in best interests assessments is to protect the child from harm, such as abuse or neglect. The safety of the child is an immediate concern (Littlechild, 2000). However the overall well-being of the child reaches far beyond their immediate safety. Procedurally, the determination of best interests focuses on the voice of the child with the child's understanding being central to gauging their situation. When the subject matter is primarily family law (custody, adoption, guardianship, etc.) there is a sense of the child being consulted, and their social connections and general welfare taken into account. Family courts gather more social and cultural evidence about children and their life situations than courts dealing with nationality cases.

Finally, it is apparent that welfare and best interests are conceptually closely linked and both form part of well-being. To borrow the words of Munby LJ in *In re G* [2012] EW CA Civ 1233 welfare is synonymous with well-being and interests; it extends to everything that relates to the child's development as a human. It seems unnecessary to delink welfare and best interests of children in different kinds of cases all closely connected to children. Professor Guy Goodwin-Gill notes about the field of refugee law: '[t]he welfare of the child, and the special protection and assistance which are due in accordance with international standards, "call for a total re-alignment of protection, away from the formalities of 1951-style refugee status towards a complete welfare approach."'¹

¹ Best Interests': safeguarding and promoting the welfare of children
www.unicef.org/crc/index_protocols.html

Conclusion

This article highlights the fact that while most people can readily agree about the need to prioritise the well-being of children there is considerable disagreement about the substance of what constitutes such well-being as well as the processes by which the well-being of a child is ascertained. This is most likely because children are seldom viewed only as children. They are also parts of family units, they may be migrants and asylum seekers, they are usually students, and sometimes they are workers. Potentially the many images of children and childhood in the eyes of the law mean there is scope for misalignment of well-being approaches and other legal policy needs.

We have demonstrated that best interests analysis is not generally at the heart of cases concerning the nationality and citizenship rights of children. This is consistent with the findings of our interviews with legal practitioners and young people and observations at law centres. Immigration concerns are given priority and the voice of the child is usually muted. For many children and their legal representatives, the words ‘best interests of the child’ or ‘welfare’ appear to be empty legal rhetoric as there is little or no attempt made to ascertain how children may be best served in most cases involving nationality and citizenship.

Given that in family law, challenges to incorporating the voice of the child have been faced and resolved in the recent past, it would benefit children to incorporate similar procedures such as expert evidence and direct evidence by children in nationality cases. As such, the language in most domestic law is expressed as child welfare and not child rights, but family courts, while primarily focusing on protecting the child, look at a wide range of societal connections of the child, which may impact on the development of the child. In family law, efforts are made to ascertain the views of children. This is not the case in

nationality proceedings. We submit that there is every reason for nationality proceedings to proactively carry out a best interests determination in all decisions affecting children. Using the welfare approach will better the consideration of the best interests of the child.

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² Prabhat, Hambly and Valdez published a research brief and a research report on Children's citizenship available at: <http://www.bris.ac.uk/media-library/sites/policybristol/documents/briefing-17-child-citizenship.pdf> (2015) and <http://bristol.ac.uk/media-library/sites/policybristol/documents/citizenship-policyreport-4.pdf> (2016).

³ For example, *R (on the application of Johnson) v Secretary of State for the Home Department* [2014] EWHC 2386, *AHK v Secretary of State for the Home Department* [2013] EWHC 1426 (Admin), and in *R (on the application of Kurmekaj) v Secretary of State for the Home Department* [2014] EWHC 1701.