
Article:
Collinson, J. orcid.org/0000-0001-7049-2192 (2022) Beyond decisions about a child and decisions affecting a child in deportation cases. The International Journal of Children's Rights, 30 (3). pp. 703-728. ISSN 0927-5568

https://doi.org/10.1163/15718182-30020015

Beyond Decisions About a Child and Decisions Affecting a Child in Deportation Cases

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Acknowledgements

I am grateful to the Journal editors and reviewers for their comments on this article. I am indebted to Professor John Eekelaar for kindly providing detailed comments on a draft version of this article. All errors remain my own.

Abstract

Who should be central to the determination of deportation decisions: parent or child? The state claims an interest in enforcing immigration control by removing the adult. The child, on the other hand, has an interest in maintaining their relationships with both of their parents, as well as the practical and cultural benefits of growing up in the country of their nationality or habitual residence. How to decide between these competing claims is of practical and theoretical importance in human rights determinations under Article 8 ECHR and Article 3 UNCRC. This article investigates the theoretical distinction which is drawn between decisions *about* a child and decisions *affecting* a child, and argues that this approach is problematic. First, Article 8 ECHR is an incomplete vehicle for determining the best interests of the child. Secondly, it reinforces the 'problematic logical inversion' found in the European Court of Human Right's migration jurisprudence.

Keywords

deportation – best interests – Article 8 ECHR – Article 3 UNCRC – Convention on the Rights of the Child – proportionality

1. Introduction

Who should be central to the determination of deportation decisions: parent or child? The state claims an interest in enforcing immigration control by removing the adult. The child, on the other hand, has an interest in maintaining their relationships with both of their parents, as well as the practical and cultural benefits of growing up in the country of their nationality or habitual residence. How to decide between these competing claims is of practical and theoretical importance to deportation decisions.

This problem is of considerable theoretical complexity. In UK law, Article 8 of the European Convention on Human Rights (ECHR) operates as the benchmark against which the lawfulness of deportation decisions are judged. This requires a balance to be struck between the right to family life enjoyed by children and the legitimate aims of the state. How, though, ought the best interests of the child as a primary consideration under Article 3 of the UN Convention on the Rights of the Child (UNCRC) be recognised in that balance?

In addressing this problem, a distinction has been drawn between decisions *about* a child and decisions *affecting* a child as a means to determine the role that the best interests of the child ought to play in Article 8 ECHR immigration decisions. Lady Hale, in her judicial role, relied on this distinction in the seminal UK Supreme Court judgment of *ZH (Tanzania) v. Secretary of State for the Home Department* [2011] UKSC 4 (henceforth, *ZH (Tanzania)*). In academic writing, Professor John Eekelaar in this Journal (Eekelaar, 2015) and elsewhere (Eekelaar, 2016),[1] developed this distinction further as a means of categorising case law which otherwise appears to treat the best interests of the child considerably differently from context to context. This article argues that this approach is problematic in deportation cases. First, Article 8 ECHR is an incomplete vehicle for determining the best interests of the child. Family and private life is not entirely the same as the best interests of the child, and it is doctrinally difficult to consolidate them effectively in the same decision-making process. Secondly, it reinforces the 'problematic logical inversion' (Dembour, 2015: 4) which is found in the European Court of Human Right's jurisprudence with respect to migration. This logical inversion, 'conceives of the rights guaranteed in the Convention as exceptions which temper the general principle of state sovereignty regarding migration control' (Dembour, 2015: 4). This inverts the underlying promise of human rights instruments: that state interests are only

[1] The 2016 version of John Eekelaar's argument is in substance the same and deals more briefly with deportation decisions than his 2015 article. This article therefore refers almost solely to his 2015 article for the sake of simplicity.

permitted to limit the human rights that all human beings are inherently presumed to hold in circumstances where there is a legitimate aim in the public interest and where it is proportionate to do so.

For the sake of definitional clarity, this article is concerned with decisions taken by a state to expel a foreign national from its territory and does not address immigration decisions taken about the entry of a foreign national into the state's territory. The legal grounds for expulsions varies from jurisdiction to jurisdiction. UK law has two legally distinct means of immigration expulsions, labelled "removal" and "deportation". Removal applies, 'if the person requires leave to enter or remain in the United Kingdom but does not have it' (Immigration Act 2014, s. 1). Deportation occurs if the Secretary of State for the Home Department (SSHD) determines that the deportation of a person, other than a British citizen, is 'conducive to the public good' (Immigration Act 1971, s. 3(5)(a)), which is a power particularly aimed at foreign national offenders (UK Border Act 2007, s. 32(2)). Additionally, extradition of foreign nationals to be tried abroad occurs under a network of statutory and prerogative (executive) powers (CPS, 2015).

This article is intended to have relevance to jurisdictions beyond the author's UK context. The term "deportation" is therefore used generically in this article to describe removal and deportation, although they may be labelled differently in other jurisdictions. UK case law is used in order to explicate the issues raised and to give examples of how they have been addressed. However, the underlying issue – that of the interrelationship of Article 8 ECHR and Article 3 UNCRC – is derived from the international legal framework which is shared by many other jurisdictions.

2. Article 3 UNCRC, Article 8 ECHR, and Deportation Decisions

Article 3 UNCRC requires that, 'In all actions concerning children … the best interests of the child shall be a primary consideration.' In contrast, Article 8 ECHR protects the private and family life of those in the territory of the state. The fundamental differences between the two human rights provisions, and the legal and institutional contexts of their implementation, leads to what is best described as an attempt to mix oil and water.

At the supra-national level, the best interests of the child principle has been embraced by the European Court of Human Rights (ECtHR) as one of the criteria for determining Article 8 ECHR claims in deportation cases (*Üner v. Netherlands* App no 46410/99, (Grand Chamber, 18 October 2006), para. 57-8). However, the best interests of the child does not

appear in the text of the ECHR, nor is the ECtHR a party to the UNCRC. The application of the best interests of the child to Article 8 ECHR decisions by the Court has been problematic. Academic commentary has highlighted the inconsistent application of the principle in deportation cases (Klaasen, 2019; Jacobsen, 2016; Smyth, 2015) in which a case-by-case 'lottery' (Leloup, 2019: 62) has developed. This is not unique to deportation cases: in a wide range of human rights questions the ECtHR's application of the best interests of the child has been described as 'unpredictable' (Kilkelly, 2010: 260). In response, Leloup (2019) and Sormunen (2020) have argued for a procedural approach to the best interests of the child at the ECtHR level in deportation decisions, whereby the Court should be concerned solely with the quality of domestic decision-making. They argue that a procedural approach would bring more consistency to ECtHR decision-making and limit the definitional expansion of Article 8 ECHR.

However, the tension between Article 3 UNCRC and Article 8 ECHR does not just exist on the supra-national stage, but also on the domestic one. All Council of Europe members are also states parties to the UNCRC and so are obliged to give effect domestically to both sets of obligations.

The incorporation of the ECHR and UNCRC into UK domestic law, a dualist legal system, is complex. The ECHR has effect through the Human Rights Act 1998 (HRA). The decisions of public authorities – such as deportation decisions – are unlawful if they are incompatible with a Convention right (HRA, section 6). Article 3 UNCRC has not been directly incorporated into UK legislation. However, in the immigration sphere, the Home Secretary is required by section 55 of the Borders, Citizenship and Immigration Act 2009 to discharge her powers, 'having regard to the need to safeguard and promote the welfare of children'. Although worded differently, this been closely associated with Article 3 UNCRC, which 'is a binding obligation in international law, and the spirit, if not the precise language, has also been translated into our national law' (*ZH (Tanzania)*, para. 23). The Upper Tribunal (Immigration and Asylum Chamber) found that, 'While section 55 and Article 3(1) of the UNCRC are couched in different terms, there may not be any major difference between them in substance, as the decided cases have shown' (*JO and Others (section 55 duty) Nigeria* [2014] UKUT 517 (IAC), para. 6).

Treating the best interests of the child as a procedural obligation (as suggested by Leloup and Sormunen) might make some sense as an approach for the ECtHR as a supra-national body whose role is to provide 'European supervision' (*Handyside v. United Kingdom* App no 5493/72 (ECtHR, 7 December 1976), para. 49). However, an approach

based on procedural review has limitations on the domestic level: ultimately, someone has to make a first-instance decision. In the UK, the First-tier Tribunal (Immigration and Asylum Chamber):

> is not a secondary, reviewing, function dependent on establishing that the primary decision-maker misdirected himself or acted irrationally or was guilty of procedural impropriety. The appellate immigration authority must decide for itself whether the impugned decision is lawful and, if not, but only if not, reverse it (*Huang v. Secretary of State for the Home Department* [2007] UKHL 11, para. 11).

Other domestic systems may give appeals courts or tribunals only a supervisory function. But regardless of whether a substantive decision is to be made by executive or judicial bodies, some means of determining the substantive legal relationship between Article 3 UNCRC and Article 8 ECHR must be found. To that end, Pobjoy argues that the best interests of the child is an 'independent source of protection status' in decisions involving the removal of children (Pobjoy, 2015: 344). I have suggested that the best interests of the child ought to be treated as a substantive human right by applying the full human rights proportionality exercise to the best interests of the child (Collinson, 2020b) and I return to this idea in part 5 below. In contrast, Kilkelly is sceptical that Article 3 UNCRC contains within it a substantive right at all, but instead describes it as functioning as a 'gateway' to children's rights in politically contested areas, such as immigration (Kilkelly, 2016: 57). This article differs in content from these previous analyses by focussing solely on the *about/affecting* distinction drawn by Lady Hale and Professor Eekelaar.

Since the judgment in *ZH (Tanzania)*, UK deportation law has been dominated by the Immigration Act 2014. This set out statutory exceptions to deportation on the basis that the impact on a child would be 'unreasonable', 'unduly harsh', or entails 'very compelling circumstances', depending on the circumstances of the deportation of the parent (Immigration Act 2014, s. 19). I critiqued elsewhere how the statutory scheme does not comply with the best interests of the child as understood in UK immigration law (Collinson, 2019). As such, this article's interest in *ZH (Tanzania)* is not as an expression of UK deportation law as it stands presently, but in the way that the facts help illuminate the issue explored in this article and in its explication of a theoretical distinction between decisions *about* and *affecting* a child.

3. The Distinction Between Decisions *About* a Child and Decisions *Affecting* a Child

Deciding between whether the parent or child ought to be the central figure of concern in deportation decisions is of practical and theoretical importance. This section highlights the practical importance of a distinction between decisions *about* a child and decisions *affecting* a child by using a paradigmatic case – *ZH (Tanzania)* – to explain how these different decision-making lenses influence the way in which deportation cases are perceived and decided. A distinction between decisions *about* a child and decisions *affecting* a child has also been subject to analysis in different contexts by Professor Eekelaar and Lady Hale. However, it is argued that this theoretical distinction is problematic in the deportation context.

Eekelaar argues that the operation of 'concerning' in Article 3 UNCRC gives 'huge potential width' for the applicability of the best interests of the child and that the Committee on the Rights of the Child's General Comment No. 14 (2013) 'sought to make this manageable' (Eekelaar, 2015: 4) by distinguishing between the direct and indirect effects that an action might have on a child:

> Thus, the term 'concerning' refers first of all, to measures and decisions directly concerning a child, children as a group or children in general, and secondly, to other measures that have an effect on an individual child, children as a group or children in general, even if they are not the direct targets of the measure (Committee on the Rights of the Child, 2013: para. 19)

Eekelaar argues that the difficulties in reconciling the demands of Article 8 ECHR and Article 3 UNCRC can be helped by considering the purpose of the decision, which in turn affects the structure of the reasoning of the decision (Eekelaar, 2015: 4–5). He argues that the case law on issues related to children can be described as having been divided by the courts into two types of decisions.[2] The first are those which courts consider directly to concern the child. These are decisions *about* a child, and where the 'focus remains on finding what is best for the child' (Eekelaar, 2015: 5). The second are decisions which indirectly concern children: they *affect* a child. In decisions which *affect* a child the central focus in not on what is best for the child, but instead focusses on the best decision overall. Eekelaar argues that in

[2] He notes that the characterisation of these decisions is contestable: these are fundamentally *choices* that the courts have made to treat these kinds of decisions in a particular way.

order to maintain the coherence of Article 8 ECHR (Eekelaar, 2016: 101), this distinction should lead to a difference in 'the structure of the reasoning employed' depending on whether the decision is *about* a child or *affects* a child (Eekelaar, 2015: 5).

He further notes that: 'The difficulty of finding the correct way to apply the best interests principle within Article 8 has caused much difficulty in deportation and extradition cases' (Eekelaar, 2015: 18). If anything, this undersells the complexity of the problem. Eekelaar uses *ZH (Tanzania)* as the basis of the application of an *affect/about* distinction in deportation decisions. He notes that Lady Hale, giving the leading judgment in that case, relies on a distinction between direct and indirect effect to ground her decision, 'But how exactly this works out is not explored' (Eekelaar, 2015: 5). This article explains the problems encountered in *ZH (Tanzania)* in trying to reconcile the competing structures of Article 3 UNCRC and Article 8 ECHR and identifies the problems inherent in its approach. It then turns to the distinction between decisions *about* a child and decisions *affecting* a child which Eekelaar finds more broadly in the case law and finds that this distinction is problematic in the deportation context.

3.1 The Practical Importance of the Distinction: ZH (Tanzania) *as a Paradigmatic Example*

The practical importance of determining whether the parent or child should be put at the centre of deportation decisions is evident if we consider two different lenses through which the same case – in this instance *ZH (Tanzania)* – may be viewed.

The first lens puts the adult at the centre of the decision and thereby the decision is considered to only *affect* the child indirectly. The adult (ZH) arrived in the UK in 1997 and was refused asylum in her own identity. She was not from 'an inherently dangerous place' (*ZH (Tanzania)*: para. 10) but instead of returning to her country of nationality, Tanzania, she made two false asylum claims by pretending to be a Somali national. She had two children, 'knowing that her immigration status was precarious. Having her second child was "demonstrably irresponsible"' (*ZH (Tanzania):* para. 8). Further applications for leave to remain were refused because of her false asylum claims. It was unclear how she supported herself and her family as any employment would be illegal (The Immigration Act 1971, s. 24B(1)). She might be entitled to local authority support for destitute children (Children Act 1989, s. 17), and therefore a financial burden on the state. Through this lens, the decision is one that is about the enforcement of immigration laws. The adult immigrant, of their own free will, has created the situation in which they find themselves and the decision to be made is

about that wilful breach of immigration law by the adult. The outcome might affect the children, but only as a corollary of the necessity of an immigration decision that the adult's actions have forced.

The second lens places the child at the centre. This makes the decision in *ZH (Tanzania)* into one directly *about* the child. The two children were both British citizens, aged twelve and nine years old. 'They have lived here with their mother all their lives, nearly all of the time at the same address. They attend local schools' (*ZH (Tanzania)*: para. 2). They had regular contact with their British father, but did not live with him because their parents were separated. Despite their loving and close relationship with their father, it would be unsuitable for the children to live with him due to his ill-health, limited means (his sole income was disability benefits), and he appeared to 'drink a great deal.' (*ZH (Tanzania)*: para. 2). The children had not visited their mother's country of nationality, let alone lived there: Tanzania was both legally and socially a foreign country to them. Through this lens the deportation decision is intimately and profoundly about the children and their lives. It determines what level of contact they might have with their mother and their father. A decision to remove their mother will result in them losing day-to-day physical contact with either their mother (if they remain in the UK with their father) or their father (if they leave the UK with their mother). This would be a separation more pronounced than in many divorce cases were contact is disputed but ultimately shared. A decision to remove the mother that results in the children leaving the UK means that they lose access to the tangible and intangible benefits of their British citizenship: their UK education being terminated, their access to NHS healthcare, and being able to grow up in 'their own culture and their own language' (*ZH (Tanzania)*: para. 32). Without the opportunity to identify meaningfully with the UK by living in and participating in its community life, the children's British citizenship will become only a legal formality rather than an internalised reality (Biesta, 2011). The deportation decision taken concerning their mother will therefore fundamentally alter the trajectory of the children's own identities, opportunities and development (Bhabha, 2004). And yet, as children, they had no agency in the matter: no choice as to where, when, or into what circumstances they were born.

The different lenses through which the facts of *ZH (Tanzania)* could be viewed is clearly of practical importance. It defines which facts are relevant for consideration by the decision-maker and through whose experiences is the situation to be judged. The difference between the two lenses is more than simply a practical one. Whether the decision is *about* the

children, or whether it is about their mother and merely *affects* them has the potential to alter the decision-making framework within which decisions about their lives are taken.

3.2 Theoretical distinctions between decisions about a child and decisions affecting a child: Lady Hale and John Eekelaar

A theoretical distinction between decisions *about* a child, and decisions *affecting* a child, is a central plank of the analysis conducted by Lady Hale (in her judicial role in *ZH (Tanzania)* and John Eekelaar (in his academic writing). However, this approach is problematic in the deportation context. First, Article 8 ECHR is an incomplete vehicle for determining the best interests of the child. Secondly, it reinforces the 'problematic logical inversion' (Dembour, 2015: 4) in the European Court of Human Right's jurisprudence with respect to migration.

3.2.1 Lady Hale in *ZH (Tanzania)*

For Lady Hale, the distinction between decisions *about* a child and decisions *affecting* a child appears to derive primarily from pragmatic considerations. In *ZH (Tanzania)*, counsel for ZH presented the UK Supreme Court with the argument that to remove the mother (ZH) was a decision 'with respect to the upbringing of a child' (*ZH (Tanzania)*, para. 25). The argument is an attractive one, and is forcefully made by Bhabha:

> The place of residence has pervasive impacts and lifelong consequences: it affects children's life expectancy, their physical and psychological development, their material prospects, their general standard of living. The fact of belonging to a particular country determines the type, quality, and extent of education the child receives, the expectations regarding familial obligations, employment opportunities, gender roles, consumption patterns that he or she imbues. It determines linguistic competence, social mores, vulnerability to discrimination, persecution, war. It affects exposure to disease, to potentially oppressive social and cultural practices, to life-enhancing kinship, social, occupational networks. In short, the fact of belonging to a country fundamentally affects the manner of exercise of a child's family and private life, during childhood and well beyond (Bhabha , 2004: 95).

In *ZH (Tanzania)*, it was generally recognised that the children would go with their mother to Tanzania were she to be deported, but their upbringing would also fundamentally change if their mother were removed and they were to remain in the UK with their father. Any decision would have profound implications for their upbringing, for all the reasons that Bhabha highlights. However, finding that the decision was 'with respect to the upbringing of a child' would have had a central legal consequence in the context of UK law, one which was clearly politically untenable. Under s. 1(1) of the Children Act 1989, 'When a court determines any question with respect to – (a) the upbringing of a child … the child's welfare shall be the court's paramount consideration.' The paramountcy principle means that 'the child's welfare automatically prevails' (Choudhry and Fenwick, 2005: 455) and is 'determinative' (Harris-Short *et al*, 2011: 540) of whatever question is at issue. If the deportation decision in *ZH (Tanzania)* was 'with respect to the upbringing of a child', then the best interests of the child must determine the outcome of ZH's immigration claim, regardless of any countervailing political or public interest imperatives in favour of deportation.

In this context, distinguishing between decisions which are directly *about* the child and those which only indirectly *affect* the child precluded the need to declare the best interests of the child to be paramount in an area of such political sensitivity as immigration law. Instead of paramountcy, Lady Hale found that the best interests of the child indirectly *affects* a child, and therefore is only supposed to be 'a primary consideration' (*ZH (Tanzania)*: para. 26) within 'the assessment of proportionality under article 8(2) [ECHR]' (*ZH (Tanzania)*: para. 29).

However, the formulation of the best interests of the child as 'a primary consideration' is problematic in the context of Article 8 ECHR for two reasons: (1) the concept of the best interests of the child contains more than is covered by the umbrella of private and family life under Article 8 ECHR; (2) the requirement in *ZH (Tanzania)* that the best interests of the child should be 'a primary consideration' within the Article 8 ECHR determination fails to articulate what the relationship is between the best interests of the child and family life. Each is addressed in turn.

First, the best interests of the child is a much broader concept than that covered by private and family life under Article 8 ECHR. Aspects of the best interests of the child, including the consideration of the child's individual characteristics and their views, and the provision of a safe physical environment (Committee on the Rights of the Child, 2013), sit uncomfortably within even the broadest account of the Article 8 EHCR right to private life,

'to ensure the development, without outside interference, of the personality of each individual with other human beings' (*Von Hannover v. Germany* App no 59320/00 (ECtHR, 24 June 2004): para. 50).

Pobjoy argues, in agreement with the UNHCR, that the full range of UNCRC rights are relevant to making a full best interests assessment. These far exceed the content of protections afforded by private and family life under Article 8 ECHR. For Pobjoy, these include the rights to development, education and health, protection from discrimination, registration and acquisition of national, and an adequate standard of living (Pobjoy, 2015: 352-3). Elsewhere the best interests of the child in immigration cases is said also to encompass issues related to the child's nationality, health, and education (Kalverboer *et al.*, 2016: 120). A Netherlands' Ombudsman for Children report adds the right to development and identity (deKinderombudsman, 2012). The Committee on the Rights of the Child has emphasised the 'interrelationships' (UNICEF, 2007: 37) between Article 3 UNCRC and other substantive UNCRC rights, and consistency 'with the spirit of the entire Convention' (UNICEF, 2007: 38).

Placing all these considerations within the right to private life risks turning Article 8 ECHR into a catch-all with no apparent definitional limits. This problem of making Article 8 ECHR a definitional catch-all to accommodate the expansive notion of the best interests of the child is even more acute with respect to the provision of education and health, which are considered by the UN Committee on the Rights of the Child to be inherently part of the best interests of the child (Committee on the Rights of the Child, 2013), as well as being listed human rights in Articles 28 and 24 CRC. However, these rights are either absent from the ECHR (health) or explicitly listed elsewhere in the ECHR (the right to education in Article 2 of the First Protocol).

Taking full account of the content of the best interests of the child under the ECHR therefore presents a doctrinal conundrum. The European Court of Human Right's (ECtHR) doctrine is that it will not create new rights which do not appear in the text of the Convention. In *Johnston* (*Johnston and others v. Ireland* App no 9697/82 (ECtHR, 18 December 1986)) the ECtHR refused to find a right to divorce as existing implicitly within the Article 12 right to marry, finding instead that if the signatory states had intended to create such a specific right then they would have explicitly done so in the ECHR text. Similarly, the ECtHR will not give effect to a substantive right through the application of another. In *Maaouia* (*Maaouia v. France* App no 39652/98 (Grand Chamber, 5 October 2000)), the ECtHR determined that deportation hearings are not covered by the Article 6 ECHR fair hearing

guarantees because the provision of specific guarantees in Article 1, Protocol 7 'clearly intimated [the] intention not to include such proceedings within the scope of Article 6(1) of the Convention' (*Maaouia*: para. 37). To maintain consistency in the ECtHR doctrine on these points, it cannot fully reflect the right to health (a new right) or the right to education (a Protocol right) within its Article 8 ECHR determinations. However, both health and education are integral aspects of the UN Committee's conception of the best interests of the child.

Furthermore, although Article 8 ECHR protects both private *and* family life, the European Court of Human Rights will focus on either the private life or family life of an applicant as being two separate areas for protection (Steinorth, 2008). Where a migrant's deportation interferes with both their nuclear and extended families, considerations related to the private life with the extended family tend to be ignored in favour of focussing on the family life of the nuclear family. However, the child's relationships with their extended family members is as integral to the assessment of the best interests of the child as is their relationship with immediate family (Kalverboer *et al*., 2017). This issue is not as doctrinally complex as the one described above, as it can be resolved more simply by merely going back to the position once held by the Commission. But it is a reminder that we should not take for granted that Article 8 ECHR automatically encompasses all the facets relevant to a complete best interests assessment.

If Article 3 UNCRC is definitionally broader than Article 8 ECHR, then attempting to give effect to the best interests of the child within the auspices of the right to private and family life either causes aspects of the best interests of the child to be ignored, or else stretches Article 8 ECHR beyond the limits of its text and current interpretation by the ECtHR.

The second problem of making the best interests of the child 'a primary consideration' under Article 8 ECHR determinations is that *ZH (Tanzania)* fails to articulate what the relationship is between the best interests of the child and family life, especially that portion of the family life that is held by people other than the child. *ZH (Tanzania)* and subsequent case law have suggested that the best interests of the child is simultaneously of inherent weight (a weight that is both separate and primary) (*ZH (Tanzania)*, para. 26), but also 'integral' (*Zoumbas v Secretary of State for the Home Department* [2013] UKSC 74 , para. 20) to family life. But how can a consideration be determined separately and yet simultaneously be integral? Is the weight of the best interests of the child *added* to the weight of the family life of their adult parent and then balanced against the public interest in immigration control, or

are they to be *weighed separately* against the public interest in immigration control and the weightiest of the three prevail? The failure to address how the principles articulated in *ZH (Tanzania)* should operate in practice undermines its promised protections. Because it does not provide any answer to these essential and fundamental questions, *ZH (Tanzania)* is theoretically and doctrinally incomplete.

3.2.2 John Eekelaar's Analysis

Eekelaar fleshes out the theoretical distinction between decisions *about* a child and decisions *affecting* a child (Eekelaar, 2015 and 2016). He argues that this distinction is the key to understanding the differences between different kinds of court decisions related to children. Eekelaar argues that to make sense of Article 3 UNCRC in the context of Article 8 ECHR, it is necessary to go further than the UK Supreme Court in *ZH (Tanzania)* because 'the distinction should not simply affect the relative weight given to the child's interests and those competing with it, but the structure of the reasoning employed' (Eekelaar, 2015: 5).

When the decision is *about* a child, Eekelaar argues that in the structure of legal reasoning the 'focus of the decision-maker should be on discovering a solution that has the best outcome for the child'. Eekelaar cites decisions about a child's medical care, public- and private-law adoption, and whether the child can be taken out of the UK by a relocating parent as paradigmatic (Eekelaar, 2015: 5). As for decisions *affecting* a child (including deportation decisions (Eekelaar, 2015: 18–23)), he provides a clearer roadmap for the structure of reasoning than is present in *ZH (Tanzania)*. Eekelaar argues that 'the focus of the decision-maker should be on reaching the "best" solution *to the issue to be decided*' (Eekelaar, 2015: 5). As part of deciding the "best" solution to the issue, the best interests of the child 'are indeed part of the agenda' (Eekelaar, 2015: 5). However, 'if the "best" solution to the issue in question is considered to have a sufficiently detrimental effect on the child's interests, it may be modified or abandoned' (Eekelaar, 2015: 5).

Eekelaar expands on this approach in his discussion of deportation decisions. He argues that in deportation cases involving children, courts 'have tended towards' formulating the essential question as being 'whether adhering to the policy of deportation was outweighed by the children's interests'? This is the 'first formulation', which the courts have favoured over the second possible formulation: 'whether the children's interests were outweighed by adhering to the policy of deportation?' (Eekelaar, 2015: 20–1):

> Since in both extradition and immigration cases the decisions are not about children, but only affect them indirectly, the argument made here requires that a decision process closer to the first formulation. The structure of Article 8 need not affect the way the principle is applied. All it requires is that a further step be taken to ascertain whether the resulting interference in the child's private life can be justified as being in accordance with the law and is necessary in a democratic society in the interests of [the legitimate aims of Article 8(2) ECHR] (Eekelaar, 2015: 21).

Eekelaar is seeking to rationalise the differences in the ways that the courts have approached deportation decisions, rather than to set down a legal test for how these cases ought to be approached. This two-step formulation of the operative legal question in deportation cases leaves fundamental questions as to the process of decision-making unanswered. It does not address the question (asked above of the *ZH (Tanzania)* formulation) as to what relationship is envisaged between the best interests of the child and the family life rights of their parents when they are weighed in the first step. Is the weight of the best interests of the child *added* to the weight of the family life of their adult parent and then balanced against the public interest in immigration control? In which case the interests of multiple children would seem to stack up in a utilitarian manner against the public interest, in a way that would give an inherent, unjustified advantage in deportation cases to families with many children. Alternatively, are the best interests of the children to be *weighed separately* to the family life of their parents, each separately pitted against the public interest in immigration control, and the weightiest of the three prevail? But this does not square with a process of weighing all the family life interests (including the best interests of the child) in a single side of the balance.

The proposed sequence of two steps also creates a new question which undermines it. If the best interests of the child were weighed properly in the first place so as to be a primary consideration, in what circumstances could the best interests of the child be outweighed by the public interest in deportation when weighed alongside other family life considerations, yet singularly outweigh the public interest in deportation when balanced against it alone in the second step? In what circumstances could the best interests of the child *plus* the family life interests of their parent(s) be of less weight than the best interests or private life of the child alone? It seems a logical improbability that the second step could ever produce an answer in favour of the children's rights (and against deportation) when the first step did not.

The two-step process seems to require only that the same question is asked twice, albeit in two differently worded ways.

Two further objections thus arise. The only circumstances in which this two-step process might logically produce different results is where at the first step the parent(s) private life rights lie in the deporting state so strongly that they overwhelm the child's best interests in residing in the receiving state. In the second step, there would then be no conflict between the best interests of the child and the state interest in immigration control of the parents, pointing towards an outcome of the deportation of the whole family. However, when would this likely arise in practice? To secure such a strong claim to remain in the deporting state on the basis of their private life alone, the parent(s) would have to have been resident in the deporting state for much of their lives, be overwhelmingly socially, culturally and economically integrated into the deporting state, and have so few ties to the receiving state so that they would find it difficult to navigate its social bureaucracy (renting, obtaining jobs etc.). It seems inconceivable that in such circumstances, a child of such parent(s) would have independent family connections with the receiving state that their parent(s) do not have, but also not have countervailing social connections to the deporting state (education, language, life experience etc) inherited from their parent's own integration in the deporting state. Even if the child were a babe-in-arms with nationality of the receiving state, and a reasonable case could be made that the primary best interest of such a child is in growing up in their country of nationality, it would still be in the context of being cared for by parents who face substantial practical barriers in the receiving state such as language and a restricted ability to access the necessities of social thriving (income, housing, healthcare etc). The best interests of the child are unlikely to be found in a situation where they have access to an abstract good (being brought up in the state of their nationality) but where the practical arrangements for their care are substantially impaired.

Smyth notes that 'the best interests principle has frequently been hijacked' by the state: 'insidiously, the best interests of the child is interpreted as coinciding with the state's interest in immigration control' (Smyth, 2015: 72). Bhabha questions whether there is ever –

> a bona fide argument, as is often alleged, that removal or deportation may be in the child's best interests because it will result in family reunification? This argument may be more clearly correct where a child has been kidnapped or forcibly trafficked in some other way' (Bhabha, 2006: 204).

The logical improbability that the second step could ever produce an answer in favour of the children's rights (and against removal) when the first step did not, appears to only serve the state a second bite of the cherry in making its arguments in favour of deportation.

The second objection that arises is with respect to the public interest. The second step question is 'to ascertain whether the resulting interference in the child's private life can be justified as being in accordance with the law and is necessary in a democratic society in the interests of [the legitimate aims of Article 8(2) ECHR]' (Eekelaar, 2015: 21). What legitimate aim might be weighed against the child's rights at this step?

At the first step question, the state's interests relate particularly to the parent's immigration status. Perhaps they are visa overstayers or even a foreign national offender. If these immigration control considerations are brought to bear against the family's rights claims when the rights of parent(s) and child are considered alongside each other, this seems to run counter to Lady Hale's claim in *ZH (Tanzania)* that:

> In this case, the countervailing considerations were the need to maintain firm and fair immigration control, coupled with the mother's appalling immigration history and the precariousness of her position when family life was created. But, as the Tribunal rightly pointed out, the children were not to be blamed for that (*ZH (Tanzania)*: para. 33).

Even if we accept the necessity of weighing the parent's immigration wrongs against the family's rights at the first step, at the second step question the decision-maker has two options. The first option is to ascertain whether the interference in the child's private life can be justified as necessary because of the immigration wrongs of their parent(s). This seems to be in direct contradiction to what Lady Hale had in mind when she states that children cannot be blamed for that.

Alternatively, at the second step, the necessity of the interference in the child's private life can be only be justified with the need to maintain immigration control, with all other aspects of the public interest which impose moral blame on the child for actions over which they have no agency – such as criminal offending by their parent(s), visa overstaying, illegal entry etc – are excised from consideration. In some cases, such as in *ZH (Tanzania)* itself, the children will even be citizens of the deporting state so there cannot be any question of the state having an interest in maintaining immigration control at all: the state cannot deport its own nationals. Even in cases where the child is not a national of the state and does not have

legal permission to be there, the second step question makes redundant the first by stripping away any of the factual background which are to do with the parent(s) rather than the child. The child, after all, had no agency or control over their visa status (Eekelaar and Collinson, 2021). In which case, there appears to be no functional difference between this two-step process for decisions *affecting* a child, and simply moving straight to the second question which is one exclusively *about* a child.

3.2.3 Problematic Logical Inversion of Human Rights Norms

A further problem with approaching deportation decisions as ones *affecting* a child is that it reinforces what Marie-Bénédicte Dembour has described as a 'problematic logical inversion' of human rights methodology at work in the European Court of Human Rights (ECtHR) decisions on immigration matters:

> … the Court conceives of the rights guaranteed in the Convention as exceptions which temper the general principle of state sovereignty regarding migration control, rather than the Court conceiving the state control prerogative as tempering human rights norms which would themselves be the foundational principle. … this is a problematic logical inversion from a human rights perspective (Dembour, 2015: 4).

The problematic logical inversion is most evident at the first step of the approach to deportation decisions as ones *affecting* children that Eekelaar identifies as being followed by the courts, rather than deportation decisions being *about* children. Eekelaar identifies that courts prefers a formulation of the first step question, which begins with the assumption in favour of adhering to immigration policy, and it is the children's interests which might dislodge that assumption. It asks 'whether adhering to the policy of deportation was outweighed by the children's interests' (Eekelaar, 2015: 22), rather than whether the policy of deportation is sufficiently strong so as to outweigh presumption in favour of the children's interests.

The second question – whether the resulting interference in the child's private life can be justified – is written in the obverse so that it is the interference of the child's private life which must be justified by state control. However, that it comes second in the enquiry means in practice that the best interests of the child is again relegated to the role of dislodging the presumption in favour of immigration control. Recall that at the first step, the

child's best interests have already been weighed against the public interest alongside the rights of their parents. If the second question is necessary, because the first step resolves in favour of deportation, then it again places the child's interests in a position where it must show something additional, exceptional, or extraordinary to outweigh the states' interests where it could not do so in concert with the rights of the parent(s). This is the case regardless of how the second question is rhetorically framed. The only way of getting around this issue is to exclude from the second step the public interest factors that apply only to the parent(s) (the "blame" factors). But, as argued above, this simply renders the first question obsolete and turns it into a question *about* the child.

One rebuttal to the claim of logical inversion of human rights methodology is that presented by Lord Kerr in the UK Supreme Court case of *HH* (*HH v. Deputy Prosecutor of the Italian Republic, Genoa* [2012] UKSC 25). In *HH*, the appellants argued against their extradition to Italy on the basis that it would not be in the best interests of their children, and therefore a breach of Article 8 ECHR rights. The court accepted at the outset that 'the impact upon the younger children of the removal of their primary carers and attachment figures will be devastating' (*HH*: para. 1).

In considering the Article 8 ECHR family life question, Lord Kerr examined the nature of the human rights balancing exercise and found that 'there is no great logic in suggesting that in answering the question, "does A outweigh B", attention must first be given to B rather than to A' (*HH*: para. 144). This has a certain common sense appeal. When examining a balancing scale, there is no advantage to reading off the weight of one side first before the other: one will (usually) be of greater weight than the other. Two kg is always heavier than 1kg, regardless of whether we read it as 1kg of gold versus 2kg of grain, or as 2kg of grain versus 1kg of gold.

However, this rebuttal focuses on the balancing question of human rights proportionality, and human rights methodology is more complex than a simple weighing of two goals of equal status. Focusing on balancing creates two harms inherent to the logical inversion of human rights norms.

The first harm is a rhetorical one. Reading off the weight of the state interest in deportation first is not a neutral act. Dembour notes that it 'relegates human rights as an exception which limits the principle of state sovereignty – instead of human rights being the overarching principle which is somewhat limited by state sovereignty' (Dembour, 2015: 187). When human rights are the exception to state sovereignty, it is the interests of state sovereignty in enforcing deportation that holds the position of an entrenched norm or the

natural state of affairs. The more pressing the political concern for immigration enforcement, the more dug-in it becomes. In turn, if human rights are the exception to the norm, then it is natural that only 'exceptional circumstances' (*Jeunesse v. The Netherlands* Application no 12738/10 (Grand Chamber, 3 October 2014): para. 114) should be sufficient to overcome the imperatives of state sovereignty. In contrast, the foundational idea of human rights is that only the exceptional needs of state sovereignty should overcome the presumption in favour of the enjoyment of human rights. The more cases that the decision-maker encounters exhibiting the inherent harm of deportation, the more normalised those harms become and the less exceptional cases they become. Thus, the human suffering created by deportation and removal becomes banal and taken for granted. As Sedley L.J. observed in one deportation case, 'this family, short-lived as it has been, will be broken up for ever because of the appellant's bad behaviour. That is what deportation does' (*AD Lee v. Secretary of State for the Home Department* [2011] EWCA Civ. 348: para. 27). The more banal the harms become to the decision-maker – the more that they are accepted simply as 'what deportation does'[3] – the more harm that needs to be demonstrated in order to achieve exceptionality.

Although there is undoubtedly harm caused by the rhetorical normalisation of deportation, and accompanying diminished space in which exceptionality to state imperatives of deportation is found, the principal doctrinal harm caused by the logical inversion is that the other tests of proportionality are ignored. These tests are:

(1) That the interference must be **in pursuit of a legitimate aim**.

(2) The test of **suitability or rationality** 'requires that the limitation contribute to the achievement of a legitimate end' (Pulido, 2013: 484).

(3) The test of **necessity** requires that the action be the 'least restrictive means to further that end' (Pulido, 2013: 484).

[3] Baillot *et al*. observed asylum decision-makers using 'detachment and denial of responsibility' as mechanisms for coping with the repeated exposure to the traumas narrated by female asylum applicants (Baillot *et al*. (2013): 511). Decision-makers in deportation cases may employ similar coping strategies in response to the distress experienced by those facing deportation and their families.

Only if these tests are met is the final test of proportionality pursued: that of 'balancing' (Pulido, 2013: 483). Only at this last stage is the inquiry 'whether the benefits of the governmental objective are proportionate to the violation of the … right' (Cohen-Eliya and Porat, 2011: 464).

Lord Kerr may be correct that there is no great difference in asking whether A outweighs B, or whether B outweighs A, but only at this final, balancing stage. The consequence of the logical inversion is that it jumps straight to the question of balancing, and the tests of legitimate aim, rationality, and necessity are ignored. This is despite their being integral to human rights decision-making. This is also a trend in the ECtHR's jurisprudence, noted in its approach to a number of substantive human rights articles (Pirker, 2013).

This is where the logical importance is of giving attention first to B rather than to A. If the question is whether the presumption in favour of immigration control is dislodged by the best interests of the child, then it is the interference with immigration control that must be justified:

> Question 1. Is the interference with immigration control for reasons of the best interests of the child **a legitimate aim** to pursue?
>
> *Answer:* yes, clearly the best interests of the child is a legitimate aim because of its intrinsic value and because of obligations arising from the UNCRC.
>
> Question 2. Is cancelling the removal order a **rational or suitable** way of achieving the aim of best interests?
>
> *Answer:* yes, cancelling the removal order ensures the child remains in the UK and thereby directly (and thereby rationally and suitably) secures their best interests.
>
> Question 3. Is there is a **less restrictive means** of achieving the best interests of the child than cancelling the removal order?
> *Answer:* no, the decision whether to remove the parent is an all-or-nothing outcome.

As these aspects of the proportionality test are evidently met in almost all cases, the only remaining legally relevant question is the balance between the best interests of the child and the policy imperative of immigration control. In contrast, when the question is *about* the child, the state must justify that its *immigration control* pursues a legitimate aim, is rational, and is the least restrictive means of achieving its aims. The state's justifications for its deportation decisions may less obviously meet these tests in individual cases.

4. Deportation Decisions as Binary Rights Conflicts

I suggest that the approach Eekelaar finds in the case law when courts approach cases as ones which *affect* children is problematic when applied to deportation. Deportation cases are normally presented as having a binary set of interests at stake: the private interests that the child and their families have in remaining in the UK on one side, and the public interest in maintaining immigration control on the other. This binary makes immigration decisions different to, in particular, relocation cases: cases in which one parent is *voluntarily* seeking to remove a child from the state of the child's nationality and thereby interfering with the future contact between the child and their other parent.

In contrast to the binary interests in deportation, in relocation cases there are three sets of wholly private interests which must be balanced: (1) the parent wishing to relocate abroad (for their own private or family life reasons) and who has a family life with the child; (2) the parent remaining in the UK (again for their own private or family life reasons) and who also has a family life with the child; and, (3) the child who has family life with both parents and their own family and private life interests in both places (such as extended family, citizenship, education and healthcare). In relocation cases, the state acts as neutral arbiter between the competing private interests. In contrast, in deportation decisions, the state claims a public interest in the expulsion and it is this interest which is placed in conflict with the rights of the parent and child to remain. In fact, if the state did not claim a public interest in deportation, there would be no legal conflict at all.

The two-step approach to decisions *affecting* the child works in relocation cases (even though, as Eekelaar points out, it is one that is treated as being *about* a child in UK law (Eekelaar, 2015: 9)) where it does not in deportation decisions. Utilitarian relocation decisions which maximise the rights enjoyment by determining in favour of one parent's decision to stay or leave (step one), may be rejected if that decision is nonetheless disproportionately detrimental to the best interests of the child (step two). However, when

applied to a conflict between private human rights interests on one side and the public interest on the other, this two-step approach breaks down. As demonstrated in section three, above, the two-step process either simply requires the decision-maker to ask the same question twice, but in two different ways, or result in a question which is *about* a child. In the deportation context, this does not provide the best interests of the child with any great deal of protection.

That the two-step process for decisions *affecting* a child works flawlessly when applied to relocation decisions does not mean that we cannot prefer – and thereby actively choose – to apply the methodology of decisions *about* a child to such decisions. This reinforces that the designation of some decisions as being *about* a child, and others as *affecting* a child, is as much choice as legal requirement: a point emphasised by Eekelaar himself who argues that the characterisation of the issues can be a contested matter. If we can choose that relocation decisions will be dealt with so as to give a greater level of protection for the best interests of the child as decisions *about* a child, then we could also choose to apply the same legal processes to deportation decisions.

5. Moving Beyond Decisions A*bout* a Child and Decisions A*ffecting* a Child in Deportation Cases

This article has argued that any designation of deportation decisions by the courts as *affecting* a child is theoretically problematic when that designation leads to a two-step decision-making process which places the question of the state's interest in immigration control first, and the best interests of the child second. What of the possible alternatives? The highest-level alternative would be to recognise deportation decisions as ones 'with respect to the upbringing of a child' and thus the principle of paramountcy should apply. Bhabha's articulation of the myriad ways in which the deportation of a parent impacts the life of a child, quoted in detail in section 3.2.1, argues this powerfully.

Alternatively, courts may choose to approach deportation decisions as one *about* a child. Eekelaar's account of decisions *about* a child is that:

> the focus of the decision-maker should be on discovering a solution that has the best outcome for the child. This is done by *examining as wide a range of possible outcomes as is reasonably practicable*. …The focus remains on finding what is best for the child. That means that, while that solution may be modified in the

> light of other interests if they are sufficiently grave, it would be hard to contemplate any decision that would inflict harm on the child's interests (Eekelaar, 2015: 5).

A similar framework is articulated by Pobjoy:

> An assessment of a child's best interests involves a two-stage process. The first stage requires a decision-maker to determine what is in the best interests of the child. The second stage requires a decision-maker to assess whether those interests are outweighed by any countervailing factor (Pobjoy, 2015: 346).

Both focus on a first stage which considers the best interests of the child first, and a second which then asks whether other interests might outweigh the best interests of the child. As Eekelaar says, 'This does not of course mean that the court will necessarily follow the conclusion about the child's best interests discerned in this way. Other considerations might outweigh that' (Eekelaar, 2015: 7).

A final alternative would be to treat the best interests of the child as the central human right at stake in deportation decisions that have an impact on children (Collinson, 2020b). This goes beyond Article 8 ECHR, and beyond the *affect/about* distinction. Making the best interests of the child the human right at the centre of deportation decisions would require decision-makers to ask the following sequential questions:

1. Are the best interests of the child engaged?
2. Would the interference with the best interests of the child by the immigration decision secure a legitimate aim?
3. Would the interference with the best interests of the child *rationally* contribute to securing the legitimate aim?
4. Is the interference with the best interests of the child *necessary* to secure the legitimate aim?
5. Is the interference with the best interests of the child *strictly proportionate* to the pursuance of the legitimate aim?

Like decisions *about* a child, the interests of the child are put front and centre in the decision-making process. This approach remains preferable to the methodology of decisions

merely *affecting* a child because it both centres the child and requires the state to justify its interference with the child's best interests. This maintains the central promise of human rights protections, rather than succumbing to the ECtHR's logical inversion which privileges the state interest in deportation as the entrenched norm. By positioning the best interests of the child as the human right at stake, the textual limitations of Article 8 are also overcome. The best interests of the child no longer have to be squeezed into the right to private and family life, and instead has space to develop an autonomous meaning more consistent with the wider panoply of obligations which state signatories to the UNCRC have acceded to.

However, I argue that treating the best interests of the child as a human right in deportation decisions is also preferable to the two-stage processes described by Eekelaar and Pobjoy. Pobjoy briefly outlines tests of legitimate aim, rationality and necessity as part of the second stage balancing exercise (Pobjoy 2015: 360–2), but articulating them as independent, separate tests in human rights methodology is important because they are logically separate to the question of balancing. When deportation does not rationally secure the legitimate aim or is not necessary, it stops the enquiry in its tracks: no further balancing is required. Dembour highlights the importance of the state having to justify separately the rationality and necessity of its actions, rather than to have these assumed. She outlines how the subsumption of these tests into broader questions of balancing has led the ECtHR to take for granted the rationality and necessity of deportation, when in fact these matters are highly disputable. A clearly separate investigation of the legitimate aim, rationality, necessity and strict proportionality are important for ensuring that the state fully justifies its human rights interference (Dembour, 2015: 169).

6. Conclusion

Treating the best interests of the child as a much more holistic expression of the multiplicity of the rights of the child is not in itself a bad thing. States parties to the UNCRC have, after all, acceded to all the rights in that Convention and so cannot selectively chose which individual human rights of the child that they want to apply in the context of deportation (aside from reservations and derogations). Deportation impacts many different aspects of the life of a child, and therefore there seems little reason not to reflect this in the protections afforded to them.

Children generally do not have any control over their immigration status, or the immigration status of their parents, leading to deportation. Unlike natural phenomena which

cause negative welfare consequences – pandemics, earthquakes, etc – immigration status is a purely artificial construct (Bloch *et al*., 2014). Whereas negative welfare outcomes from pandemics or earthquakes are not because of the blameworthiness of the individual, negative outcomes arising from the state decision to enforce a deportation is intimately connected with the blame that is traditionally attached to being a visa overstayer or foreign national offender. The state's decision is a choice, one that exposes the child to negative consequences despite their lack of control over the circumstances which lead to their deportation or the deportation of their parent(s). To balance the best interests of the child against the state's interests in immigration control must result in blaming the child for wrongs that they did not commit.

In this sense, any decision-making methodology for deportation decisions which stops short of making the best interests of the child a *paramount* consideration may be morally indefensible. I do not shy away from this conclusion, although such an outcome is likely to be politically untenable, for the reasons that it was rejected when argued in *ZH (Tanzania)*. However, for the reasons explored in this article, the alternative of making deportation decisions ones which merely *affect* the child is inadequate. Treating the best interests of the child as a substantive human right at least puts the child firmly at the centre of decision-making and avoids the pitfall of the ECtHR's logical inversion of human rights methodology. Next best may, in this instance, be in the best interests of the child.

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