

THE BEST INTERESTS OF THE CHILD PRINCIPLE AS AN INDEPENDENT SOURCE OF INTERNATIONAL PROTECTION

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Abstract The Convention on the Rights of the Child, and the best interests principle codified in Article 3 in particular, is playing an increasingly significant role in decisions involving the admission or removal of a child from a host State. This article examines the extent to which the best interest principle may provide an independent source of international protection. That protection may, for instance, proscribe the removal of a child from a host State notwithstanding that the child is ineligible for protection as a refugee or protection under the more traditional *non-refoulement* obligations in international human rights law.

Keywords: best interests, children, complementary protection, Convention on the Rights of the Child, human rights, Refugee Convention, refugee law.

I. INTRODUCTION

More than 15 years ago Professor Guy Goodwin-Gill demonstrated characteristic foresight in contemplating that the Convention on the Rights of the Child ('CRC')¹ called for a 'total realignment of protection' for child refugee applicants.² In a subsequent submission to the UK House of Lords Select Committee on the European Union, Goodwin-Gill, writing with Agnès Hurwitz, criticized the draft European Union Qualification Directive for its failure to sufficiently engage with the CRC and, in particular, the best interests principle codified in Article 3.³ They submitted that '[i]n every

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¹ Opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

² GS Goodwin-Gill, 'Who to Protect, How ... and the Future?' (1997) 9 IJRL 1, 7.

³ Article 3 provides: '(1) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration; (2) States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures; (3) States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by

decision affecting the child, the best interests of the child shall be a primary consideration, and where children are concerned (particularly the unaccompanied), a duty to protect may arise, absent any well-founded fear of persecution or possibility of serious harm'.⁴ A similar argument has been advanced by Professor Jane McAdam, who has argued that Article 3 of the CRC adds an additional layer of consideration to the interpretation and application of the Refugee Convention,⁵ in addition to 'constitut[ing] a complementary ground of protection in its own right'.⁶

Although we remain some way from a total realignment, there are signs that we are moving in that direction, with the CRC, and Article 3 in particular, playing an increasingly significant role in decisions involving the admission or removal of a child from a host State. This article examines the role of Article 3 in adjudicating the status of a child seeking international protection, and the extent to which the best interests principle may provide an independent source of protection. That protection may, for instance, proscribe the removal of a child notwithstanding the fact that the child is not eligible for protection as a refugee or protection under the *non-refoulement* obligations in international human rights law.⁷ Part I provides a brief exposition of the

competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.'

⁴ GS Goodwin-Gill and A Hurwitz, 'Memorandum' reprinted in Minutes of Evidence Taken before the European Union Committee (Sub-Committee E) (10 April 2002) in House of Lords Select Committee on the European Union, 'Defining Refugee Status and Those in Need of International Protection', House of Lords Paper No 156, Session 2001–02 (2002) Appendix 2, [10].

⁵ Convention relating to the Status of Refugees, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) and the attendant Protocol relating to the Status of Refugees, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967) (hereafter referred to individually as the '1951 Convention' and the '1967 Protocol' and collectively as the 'Refugee Convention').

⁶ J McAdam, *Complementary Protection in International Refugee Law* (Oxford University Press 2006) 173–4. See also J McAdam, 'Seeking Asylum under the Convention on the Rights of the Child: A Case for Complementary Protection' (2006) 14 International Journal of Children's Rights 251. For further endorsement see J Pobjoy, 'A Child Rights Framework for Assessing the Status of Refugee Children' in S Juss and C Harvey (eds), *Contemporary Issues in Refugee Law* (Edward Elgar Publishing 2013) 91; S Bolton, 'Promoting the Best Interests of the Child in UK Asylum Law and Procedures' (2012) 26(3) Journal of Immigration, Asylum and Nationality Law 232; S Bolton, "'Best Interests": Safeguarding and Promoting the Welfare of Children in Immigration Law and Practice' in Immigration Law Practitioners' Association, *Working with Refugee Children: Current Issues in Best Practice* (Immigration Law Practitioners' Association 2012) 1; N Dicker and J Mansfield, 'Filling the Protection Gap: Current Trends in Complementary Protection in Canada, Mexico and Australia' (New Issues in Refugee Research: Research Paper No 238, UNHCR, May 2012) 19–22; A Lundberg, 'The Best Interests of the Child Principle in Swedish Asylum Cases: The Marginalization of Children's Rights' (2011) 3(1) Journal of Human Rights Practice 49; B Carr, 'Incorporating a "Best Interests of the Child" Approach into Immigration Law and Procedure' (2009) 12 Yale Human Rights and Development Law Journal 120; JK Dalrymple, 'Seeking Asylum Alone: Using the Best Interests of the Child Principle to Protect Unaccompanied Minors' (2006) 26 Boston College Third World Law Journal 131.

⁷ This includes both the express norm of *non-refoulement* under art 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987), and the implicit norm contained within arts 6–7 of the International Covenant on Civil and Political Rights, opened for signature 16

argument and an overview of academic, institutional and judicial support for the use of Article 3 as an independent and complementary source of protection.⁸ Part II outlines a two-stage framework for assessing what is in the best interests of a child and the circumstances in which those circumstances will preclude the removal of a child from a host State.

There are at least three reasons why it is important to examine the extent to which Article 3 may provide an independent source of international protection. First, participation in the CRC is greater than participation in the Refugee Convention.⁹ For host States that have not yet become a party to the Refugee Convention, the CRC may provide the strongest—indeed, in some cases the only—treaty-based entitlement capable of preventing the removal of a child from a host State. Secondly, there will be children who do not satisfy the Article 1 refugee definition, because either they do not satisfy the inclusion criterion¹⁰ or are found to be no longer needing or otherwise undeserving of protection,¹¹ but are nonetheless at risk of some form of harm. In these cases the CRC has the capacity to provide a critical additional layer of protection.¹² Thirdly and finally, there is a greater level of international oversight of State compliance with the CRC, predominately through the Committee on the Rights of the Child. This level of oversight is generally lacking in the context of the Refugee Convention, which has no interstate supervisory body to hold

December 1966, 999 UNTS 171 (entered into force 23 March 1976) and arts 6 and 37 of the CRC. At the European level, it also includes art 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) ('European Convention on Human Rights').

⁸ The term 'complementary protection' is generally used to refer to international protection for persons falling outside the scope of the protection provided under the Refugee Convention but who otherwise have a claim for protection based on obligations under international human rights law. The term is arguably inappropriate in the context of art 3 of the CRC. There is a compelling argument, given the scope and legal standing of the best interests principle, that, where a State is party to both the CRC and the Refugee Convention, art 3 should provide the *principal* basis for international protection in claims involving children, and should therefore not be understood as providing protection that is *complementary* to the Refugee Convention: see eg G S Goodwin-Gill, 'The United Nations Convention on the Rights of the Child and its Application to Child Refugee Status Determination and Asylum Processes: Introduction' (2012) 26(3) *Journal of Immigration Asylum and Nationality Law* 226, 228–9. For this reason, the term 'independent protection' has been adopted in this article.

⁹ As at January 2015 there are 148 parties to either the 1951 Convention or the 1967 Protocol, as against 194 parties to the CRC. The US and Somalia are the only two States that have failed to ratify the CRC.

¹⁰ Refugee Convention art 1(A)(2).

¹¹ Refugee Convention arts 1(C)–1(F).

¹² The Committee on the Rights of the Child ('UNCRC') has emphasized the need to consider complementary forms of protection in claims involving children. In UNCRC, General Comment No 6: Treatment of Unaccompanied and Separated Children outside Their Country of Origin, 39th sess, UN Doc CRC/GC/2005/6 (2005) ('General Comment No 6') [77], the Committee stated that in cases where 'the requirements for granting refugee status under the 1951 Refugee Convention are not met, unaccompanied and separated children shall benefit from available forms of complementary protection to the extent determined by their protection needs'. See also General Comment No 6, [66].

States accountable for non-compliance with the treaty.¹³ This oversight is reinforced by the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure,¹⁴ which provides children with a direct mechanism to bring complaints against a State for a failure to meet the protection obligations under the CRC.

II. ARTICLE 3 AS AN INDEPENDENT SOURCE OF INTERNATIONAL PROTECTION

Article 3 provides that the best interests of the child shall be a primary consideration in all actions concerning children.¹⁵ This includes actions undertaken by ‘public or private social welfare institutions, courts of law, administrative authorities or legislative bodies’.¹⁶ Article 3 requires ‘[e]very legislative, administrative and judicial body or institution ... to apply the best interests principle by systematically considering how children’s rights and interests are or will be affected by their decisions or actions’.¹⁷ The express language of the provision, which captures all actions *concerning* children, makes clear that the best interests principle is engaged not only where a decision directly affects a child, for example where a child independently claims international protection, but also when a child is indirectly affected by a decision, for example where a child’s parent is at risk of being removed.

The UNCRC has in its recent General Comment No 14 underlined that the best interests principle operates as both a substantive right and an interpretative device.¹⁸ As regards the former, the Committee observed that the Article 3(1) obligation incorporates:

¹³ See JC Hathaway, AM North and J Pobjoy, ‘Supervising the *Refugee Convention*: Introduction’ (2013) 26 *Journal of Refugee Studies* 323.

¹⁴ Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, GA Res 66/138, UN GAOR, 66th sess, 89th plen mtg, UN Doc A/RES/66/138 (2011), adopted 19 December 2011 and opened for signature 28 February 2012 (entered into force 14 April 2014).

¹⁵ CRC art 3(1). The ‘best interests’ language appears on several occasions in the CRC (arts 9, 18, 20, 21, 37, 40), though art 3 is the core provision. That provision is based on principle 2 of the Declaration of the Rights of the Child, GA Res 1386 (XIV). It is also reflected in the Convention on the Elimination of All Forms of Discrimination against Women, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) (arts 5(b) and 16(1)(d)), the African Charter on the Rights and Welfare of the Child, OAU Doc CAB/LEG/24.9/49 (entered into force 29 November 1999) (art IV), and the Charter of Fundamental Rights of the European Union [2000] OJ C 364/1 (art 24(2)).

¹⁶ CRC art 3(1).

¹⁷ UNCRC, General Comment No 5: General Measures of Implementation of the Convention on the Rights of the Child (arts 4, 42 and 44(6)), 34th sess, UN Doc CRC/GC/2003/5 (2003) [12]. In the context of administrative authorities, the UNCRC has emphasized that the scope of art 3(1) is very broad, ‘covering decisions concerning ... protection, asylum, [and] immigration’: UNCRC, General Comment No 14 on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (art 3, para 1), 62nd sess, UN Doc CRC/C/GC/14 (2013) (‘General Comment No 14’) [30].

¹⁸ *ibid* [6]. In addition, the Committee noted that art 3 incorporates a rule of procedure, designed to ensure that any decision-making process that involves a child incorporates an evaluation of the possible impact that that decision may have on the child. It is not clear, however, how this third concept differs from the operation of art 3 as a substantive right.

The right of the child to have his or her best interests assessed and taken as a primary consideration when different interests are being considered ... and the guarantee that this right will be implemented whenever a decision is to be made concerning a child ...¹⁹

According to the Committee, Article 3(1) 'creates an intrinsic obligation for States, is directly applicable (self-executing) and can be invoked before a Court'.²⁰ The Committee also acknowledged the role of Article 3 as an interpretative legal principle, observing that '[i]f a legal provision is open to more than one interpretation, the interpretation which most effectively serves the child's best interests should be chosen'.²¹

The obligation under Article 3(1) attaches to all children within a State's jurisdiction.²² A State cannot limit the application of the provision on the basis of a child's citizenship or immigration status. This is made clear by the non-discrimination guarantee in Article 2(1) of the CRC, as well as Article 22 which provides that unaccompanied or accompanied children seeking refugee status are entitled to enjoy all applicable rights in the CRC on a non-discriminatory basis. Although it is now generally accepted that Article 3 is relevant to children seeking international protection, such recognition has tended to focus on procedural guarantees and the treatment that children receive during and subsequent to any status determination process.²³ But while Article 3 is plainly relevant to the procedures and treatment applicable to children seeking international protection, the best interests principle may also be relevant to the substantive determination as to whether a child is in fact eligible for international protection. This aspect of the obligation is often overlooked by States,²⁴ despite the fact that the best interests principle applies to 'all actions concerning children'²⁵ and must therefore 'be respected during all stages of the displacement cycle'.²⁶

¹⁹ *ibid.*

²⁰ *ibid.* The suggestion that art 3(1) is 'self-executing' is problematic, given that the question as to whether a treaty or a treaty provision is 'self-executing' is determined by the municipal system in question, not *ex cathedra* by a treaty-supervising body.

²¹ *ibid.*

²² CRC art 2(1).

²³ See eg UNHCR, UNHCR Guidelines on Determining the Best Interests of the Child (2008). At a domestic level, see eg Immigration and Refugee Board, Guidelines Issued by the Chairperson Pursuant to Section 65(3) of the Immigration Act: Guideline 3: Child Refugee Claimants: Procedural and Evidentiary Issues (30 September 1996) 2 ('[i]n determining the procedure to be followed when considering the refugee claim of a child, the CRDD should give primary consideration to the "best interests of the child"'); Memorandum from Jeff Weiss, Acting Director, Office of International Affairs, United States Department of Justice Immigration and Naturalization Service, 'Guidelines for Children's Asylum Claims' (File No 120/11.26, 10 December 1998) 3 ('INS Guidelines').

²⁴ UNCRC, '2012 Day of Discussion: The Rights of All Children in the Context of International Migration: Background Paper' (August 2012) 20.

²⁵ CRC art 3(1) (emphasis added).

²⁶ General Comment No 6 (n 12) [19]. As recent guidelines published by the UK Home Office have acknowledged, the best interests principle requires 'a continuous assessment that starts from the moment the child is encountered and continues until such time as a durable solution has been

Article 3 may be relevant in adjudicating the status of a child seeking international protection in two distinct ways. First, the best interests principle may inform the interpretation of a State's protection obligations under the Refugee Convention (or, indeed, the wider *non-refoulement* obligations under international human rights law). In particular, the best interests principle demands an age-sensitive and inclusive interpretation of these respective obligations.²⁷ This is consistent with the UNCRC's recent affirmation that where a legal provision is open to more than one interpretation the decision-maker should favour the interpretation that best serves the child's best interests.²⁸ This is not to suggest that the best interests principle amends or displaces the definitional criterion set out in the Refugee Convention (or, indeed, the broader *non-refoulement* obligations under international human rights law). In this respect, States are correct to caution that the 'best interests principle ... does not replace or change the refugee definition in determining substantive eligibility'.²⁹ But accepting that circumscription does not render the best interests principle otiose to the interpretation of the Refugee Convention definition.³⁰ In the context of interpreting the constituent elements of the refugee definition the principle must simply be understood as norm-shaping rather than norm-producing.³¹

reached': UK Border Agency ('UKBA'), Asylum Process Guidance: Processing an Asylum Application from a Child (ver 5, 11 August 2010) [1.3] ('Asylum Process Guidance'). In the UK this is now reflected in section 55 of the Borders, Citizenship and Immigration Act 2009 (UK).

²⁷ 'The best interests principle is ... relevant to such substantive questions as defining the behavior that counts as persecution of a child, the circumstances that give rise to a well-founded fear in a child, and the threshold that a child must meet to discharge their burden of proof ... [The] principle operates as an interpretative aid, broadening and deepening the scope of protection, both in terms of substantive law and procedural mechanisms': J Bhabha and W Young, 'Not Adults in Miniature: Unaccompanied Child Asylum Seekers and the New US Guidelines' (1999) 11(1) *IJRL* 84, 97–8.

²⁸ General Comment No 14 (n 17) [6].

²⁹ INS Guidelines (n 23) 18 (although this must be read taking into account the fact that the US has not ratified the CRC) ('While the Authority is conscious of article 3(1) of the [CRC] ... the requirement to consider the best interests of the child, whom it is accepted is more vulnerable than an adult, cannot somehow elevate the child ... to refugee status where there is no real chance of that child ... suffering persecution if returned to their country of origin. Whether or not these people are refugees depends on the application of the definition of refugee in the Refugee Convention to each of them and not on the application of article 3(1) of the [CRC]'); Refugee Appeal No 70695/97 (Refugee Status Appeals Authority, New Zealand, 30 April 1998) 23.

³⁰ *Contra* INS Guidelines (n 23) 3, which provides that the best interests principle 'does not play a role in determining substantive eligibility under the ... refugee definition'. Bhabha and Young have identified that this statement was a last-minute addition, with an earlier version of the guidelines emphasizing that '[t]he need for sensitive treatment of child asylum-seekers extends not only to interviewing techniques but also to the legal analysis of the child's claims': Bhabha and Young (n 27) 97 (emphasis added). *Contra* also the position taken by the Federal Court of Canada in *Kim v Canada* [2011] 2 FC 448, 454 [6]: 'It is clear that the best interests of the child cannot substantively influence the answer with regard to whether a child is a refugee, but the best interests of the child are central to the procedure by which to reach a decision.' For a more principled treatment of the best interests principle by the Federal Court of Canada, see *Patel v Canada (Minister of Citizenship and Immigration)* [2005] FCJ No 1305, [61]–[63]. See also the approach taken in the recent guidance issued by the UKBA: Asylum Process Guidance (n 26) [1.3].

³¹ The author thanks James Hathaway for this characterization.

By way of illustration, in the context of the ‘being persecuted’ definition, UNHCR has recognized that ‘[t]he best interests of the child requires that the harm be assessed from the child’s perspective’ and that ‘[t]his may include an analysis as to how the child’s rights or interests are, or will be, affected by the harm’.³² National decision-makers have similarly drawn upon the best interests principle in assessing the suitability of an internal protection alternative,³³ the appropriateness of removing a child to a ‘safe third-country’ for processing,³⁴ and the scope of the Refugee Convention’s exclusion provisions.³⁵ In each of these examples the best interests principle has been drawn upon to inform the interpretation of a particular element of the Refugee Convention definition rather than being invoked as an alternative or replacement to that definition.

The second context in which Article 3 may be engaged is as an independent basis for protection outside the traditional refugee protection regime. In particular, an assessment of the best interests of the child may preclude the return of a child to her home country notwithstanding the fact that the child is not eligible for protection under the Refugee Convention or the more traditional *non-refoulement* obligations noted above. Article 3 thus creates a new category of protected persons whose claims need to be assessed and evaluated by domestic decision-makers.³⁶ The relevant inquiry in these cases is whether the removal of the child is in the child’s best interests. If removal is contrary to those interests, there will be a strong presumption against removing the child, subject only to a tightly circumscribed range of considerations that may in certain circumstances override the child’s best interests.

The argument that Article 3 provides an independent basis for international protection has both academic and institutional support. As noted above, Goodwin-Gill has for some time emphasized the relevance of the best

³² UNHCR, Guidelines on International Protection: Child Asylum Claims under art 1A(2) and 1 (F) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees (2009) [10].

³³ See eg *RA (AP) v Secretary of State for the Home Department* [2011] CSOH 68, [25]. See also para 27 of the EU Qualification Directive (Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted [2011] OJ L 337/9).

³⁴ See eg *R (TS) v Secretary of State for the Home Department* [2010] EWHC 2614 (Admin); *R (BT) v Secretary of State for the Home Department* [2011] EWCA Civ 1446; *ALJ and A, B and C’s Application for Judicial Review* [2013] NIQB 88. See, more generally, ‘Dublin II’ art 6 (Council Regulation (EC) No 343/2003 of 18 February 2003 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining and Asylum Application Lodged in One of the Member States by a Third-Country National [2003] OJ L 50/1), and the decision in *R (MA) v Secretary of State for the Home Department* (Court of Justice of the European Union, C-648/11, 6 June 2013).

³⁵ See eg *R (ABC) (a minor) (Afghanistan) v Secretary of State for the Home Department* [2011] EWHC 2937 (Admin).

³⁶ N Blake, ‘Current Problems in Asylum and Protection Law: The UK Judicial Perspective’ (Paper presented at Ninth World Conference of the International Association of Refugee Law Judges, Slovenia, 7 September 2011) 10.

interests principle in determining whether or not a State owes a child international protection.³⁷ The argument has since been taken up and developed by McAdam:

the best interests of the child, reflecting an absolute principle of international law, are highly relevant in determining whether or not a child needs international protection. The principle applies to any protection claim concerning children, irrespective of whether they are unaccompanied, accompanied by family members (even where the child is not the primary applicant), or seeking family reunion ... [B]est interests are also relevant to removal cases which will personally affect a child, such as where the State seeks to deport a parent.³⁸

McAdam argues that the best interests principle adds an additional layer of consideration to the interpretation and application of the Refugee Convention, in addition to ‘constitut[ing] a complementary ground of protection in its own right’.³⁹

Both the UNCRC and UNHCR have also endorsed the argument that Article 3 creates a new category of protected persons. The clearest affirmation is found in the UNCRC’s General Comment No 6, which provides that ‘[r]eturn to the country of origin shall in principle only be arranged if such return is in the best interests of the child’.⁴⁰ According to the Committee, this determination should take into account the views of the child; the safety, security and socio-economic conditions awaiting the child upon return; the availability of care arrangements for the child; the child’s level of integration in the host country; the child’s right to preserve her identity, including her nationality, name and family relationship; and the desirability of continuity in a child’s upbringing.⁴¹ The Committee suggests that in exceptional circumstances other considerations may override the best interests of the child; it stresses, however, that such considerations must be rights-based and that ‘[n]on-rights-based arguments such as those relating to general migration control, cannot override best interests considerations’.⁴²

In recent years, the UNCRC has underlined the need for States to ‘conduct individual assessments and evaluations of the best interests of the child at all stages of ... any migration process affecting children’.⁴³ In particular, the Committee has explained that ‘primary consideration should be given to the best interests of the child in any proceeding resulting in the child’s or their

³⁷ Goodwin-Gill (n 2) 7; Goodwin-Gill (n 8); GS Goodwin-Gill, ‘Unaccompanied Refugee Minors: The Role and Place of International Law in the Pursuit of Durable Solutions’ (1995) 3 *International Journal of Child Rights* 405.

³⁸ McAdam, *Complementary Protection* (n 6) 173.

³⁹ *ibid* 173–4.

⁴⁰ General Comment No 6 (n 12) [84].

⁴¹ *ibid*.

⁴² *ibid* [86]; see also at [20]. See discussion on rights-based considerations at text (n 184).

⁴³ UNCRC, Report of the 2012 Day of General Discussion: The Rights of all Children in the Context of International Migration (2013) [72].

parents' detention, return or deportation'.⁴⁴ In its most recent observations on Australia, for instance, the Committee counselled Australia to ensure that 'its migration and asylum legislation and procedures have the best interests of the child as the primary consideration in all immigration and asylum processes' and that 'determinations of the best interests are consistently conducted by professionals who have been adequately trained in best interests determination procedures'.⁴⁵ Further support for the approach taken by the Committee can be found in the reports of the Special Rapporteur on the Human Rights of Migrants, who has stressed that 'children should be repatriated only if it is in their best interests, namely, for the purpose of family reunification and after due process of law'.⁴⁶ This view also finds support in the work of the Office of the United Nations High Commissioner for Human Rights which has acknowledged that 'the ability of States to return children in the context of migration is constrained by a number of factors' and that '[t]he principle of the best interests of the child ... should be a primary consideration in any decision to return, and in decisions on the deportation of their parents'.⁴⁷

UNHCR has similarly acknowledged the importance of Article 3 in determining the eligibility of a child for international protection. In its Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum, the organization states that where a child is found not to qualify for refugee status 'an assessment of the solution that is in the best interests of the child should follow as soon as practicable after the negative result'.⁴⁸ The UNHCR Executive Committee has also recognized that '[t]he principle of the best interests of the child shall be a primary consideration in regard to all actions concerning children'⁴⁹ and recommended that States adopt 'appropriate procedures for the determination of the child's best interests which facilitate adequate child participation without discrimination'.⁵⁰ To assist

⁴⁴ *ibid.*

⁴⁵ UNCRC, Consideration of Reports Submitted by States Parties under Article 44 of the Convention—Concluding Observations: Australia, 60th sess, UN Doc CRC/C/AUS/CO/4 (2012) [80].

⁴⁶ Jorge Bustamante, Report of the Special Rapporteur on the Human Rights of Migrants, UN Doc A/64/213 (3 August 2009) [85], [97]. See also Human Rights Council, Report of the Special Rapporteur on the Human Rights of Migrants, Jorge Bustamante, UN Doc A/HRC/11/7 (14 May 2009) [57], [123].

⁴⁷ Human Rights Council, Study of the Office of the United Nations High Commissioner for Human Rights on Challenges and Best Practices in the Implementation of the International Framework for the Protection of the Rights of the Child in the Context of Migration, UN Doc A/HRC/15/29 (5 July 2010) [46]–[47].

⁴⁸ UNHCR, Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum (1997) [9.2].

⁴⁹ Executive Committee of the High Commissioner's Programme, Report of the Fifth-Eighth Session of the Executive Committee of the High Commissioner's Programme—Note by the High Commissioner, 58th sess, UN Doc A/AC.96/1048 (2007) [14(b)(v)] ('Conclusion on Children at Risk').

⁵⁰ *ibid* [14(g)]. See also Executive Committee of the High Commissioner's Programme, Report of the Fifth-Sixth Session of the Executive Committee of the High Commissioner's Programme,

decision-makers in that determination process, UNHCR has published a set of guidelines outlining a formal mechanism for determining the best interests of children, which primarily serve UNHCR field agents working in developing countries.⁵¹

At a domestic level, Article 3 is beginning to play an increasingly important role. Although the role of the best interests principle is well established as a matter of international obligation, at the municipal level there has traditionally been a general lack of enthusiasm with the idea that the best interests principle may provide an independent basis for international protection. There are, however, signs that this is beginning to change. By way of illustration, following the UK's withdrawal of its reservation to the CRC—which limited the entitlement of non-citizen children to claim rights under the CRC, including under Article 3—the government enacted legislation requiring the State to 'make arrangements for ensuring that [the Secretary of State's] functions are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom'.⁵² The withdrawal of the reservation and the subsequent passage of domestic legislation provided the impetus for a series of decisions considering the application of Article 3 to migration-related decisions concerning children and, in particular, cases raising issues under Article 8 of the European Convention on Human Rights.⁵³ As Bolton explains, 'it was this withdrawal ... that began to level the playing field ... to create conditions for more substantive progress to be made in the arena of immigration and asylum law and policy, nearly two decades after the [CRC] was ratified by the UK'.⁵⁴

56th sess, UN Doc A/AC.96/1021 (2005) [21(n)] ('Conclusion on the Provision on International Protection Including Through Complementary Forms of Protection').

⁵¹ UNHCR, UNHCR Guidelines (n 23). UNHCR uses the acronym 'BID' to describe the formal process designed to ascertain the child's best interests. The Guidelines are complemented by UNHCR, Field Handbook for the Implementation of UNHCR BID Guidelines (2011).

⁵² Borders, Citizenship and Immigration Act 2009 (UK) section 55. This duty is explicated in statutory guidance which provides that the 'the best interests of the child will be a primary consideration (although not necessarily the only consideration) when making decisions affecting children': UKBA, Every Child Matters: Statutory Guidance to the UK Border Agency on Making Arrangements to Safeguard and Promote the Welfare of Children (November 2009) [2.7].

⁵³ For example, in *In Üner v The Netherlands* (2007) 45 EHRR 14, a case involving the expulsion of a father of three children following his conviction for manslaughter, the ECtHR explicitly identified 'the best interests and well-being of the children' as a criterion to assess whether deportation was necessary in a democratic society and proportionate to the legitimate public aim sought to be achieved (at [58]). This was subsequently elaborated on in the case of *Neulinger and Shukri v Switzerland* (2012) 54 EHRR 31, where the Court underlined the fact that 'the decisive issue is whether a fair balance between the competing interests at stake—those of the child, of the two parents, and of public order—has been struck ... bearing in mind, however, that the child's best interests must be the primary consideration ... The child's best interests, from a personal development perspective, will depend on a variety of individual circumstances, in particular his age and level of maturity, the presence or absence of his parents and his environment and experiences ... For that reason, those best interests must be assessed in an individual case' (at [134], [138]).

⁵⁴ Bolton, 'Promoting the Best Interests of the Child' (n 6) 235.

One of the earliest UK cases to afford greater prominence to the best interests principle in the migration context was *LD v Secretary of State for the Home Department*,⁵⁵ an appeal against a decision to remove a Zimbabwean man with three young children who were lawfully resident in the UK. Drawing heavily on the Strasbourg jurisprudence on the right to respect for private and family life under Article 8 of the European Convention on Human Rights, Blake J determined that ‘there can be little reason to doubt that the interests of the child should be a primary consideration in immigration cases’ and that ‘[a] failure to treat them as such will violate Article 8 [of the European Convention on Human Rights] as incorporated directly into domestic law’.⁵⁶ In the context of a removal decision, Blake J took the view that ‘[v]ery weighty reasons are needed to justify separating a parent from a minor child or a child from a community in which he or she had grown up and lived for most of her life’.⁵⁷ He considered that both principles were engaged in the case and that, given the absence of any strong reasons to support the removal of the children’s father, the appellant’s removal would constitute a violation of the Article 8 right to family life.⁵⁸

The issue was revisited the following year in the now oft-cited decision of the Supreme Court in *ZH (Tanzania) v Secretary of State for the Home Department* (‘*ZH*’).⁵⁹ This case involved an appeal against a decision to remove a Tanzanian woman who had two children born in the UK, a daughter aged 12 and a son aged 9. Before the case was heard the Secretary of State conceded that on the particular facts removing the appellant would be a disproportionate interference with the Article 8 rights of the children; however, the case proceeded to allow the Supreme Court to deliver guidance on the general principles which should apply in future cases.⁶⁰ In the majority opinion, Lady Hale drew on the Strasbourg jurisprudence and underlined that the best

⁵⁵ [2010] UKUT 278 (IAC). Although earlier decisions in the UK acknowledged the relevance of the interests of a child when applying art 8, this was never explicitly done by reference to art 3 of the CRC. For example, in *EB (Kosovo) v Secretary of State for the Home Department* [2009] 1 AC 1159, [12], Lord Bingham held that ‘it will rarely be proportionate to uphold an order for removal of the spouse if there is a close and genuine bond with the other spouse and that spouse cannot reasonably be expected to follow the removal spouse to the country of removal, or if the effect of the order is to sever a genuine and subsisting relationship between parent and child’.

⁵⁶ *LD* [2010] UKUT 278 (IAC), [28].

⁵⁷ *ibid* [26].

⁵⁸ *ibid* [29]. The following month Blake J issued his decision in *R (MXL) v Secretary of State for the Home Department* [2010] EWHC 2397 (Admin), which outlined a similar set of principles: ‘Once Article 8 is engaged, the exercise of judgment in a case falling within its ambit must comply with the principles identified by Strasbourg. In a case where the interests of children are affected this means that other principles of international law binding on contracting states should be complied with. In the case of children those principles are reflected in Article 3(1) of the [CRC] to which the UK is now a party without any derogation in respect of immigration decision making’ (at [83]).

⁵⁹ [2011] 2 AC 166. For an excellent discussion on the decision in *ZH* and its background see J Fortin, ‘Are Children’s Best Interests Really Best? *ZH (Tanzania) (FC) v Secretary of State for the Home Department*’ (2011) 74(6) MLR 947.

⁶⁰ *ZH* [2011] 2 AC 166, [13].

interests principle is relevant 'not only to how children are looked after in this country while decisions about immigration, deportation or removal are being made, but also to the decisions themselves'.⁶¹ Accordingly, '[i]n making the proportionality assessment under article 8, the best interests of the child must be a primary consideration. This means that they must be considered first'.⁶² Lady Hale acknowledged that the child's best interests might be outweighed by 'the cumulative effect of other considerations'⁶³ but stressed that a decision-maker must not 'treat any other consideration as inherently more significant than the best interests of the children'.⁶⁴

Both the decisions of the Supreme Court in *ZH* and the Upper Tribunal in *LD* arose in the context of an appeal against the removal of a child's parent where the parent had no right to be or remain in the country.⁶⁵ Courts have, however, sensibly taken the view that the general principles set out in these cases apply wherever an Article 8 right is engaged. As Lord Kerr stated in *HH v Deputy Prosecutor of the Italian Republic, Genoa*, 'the intrinsic value of the [Article 8] right cannot alter according to context'.⁶⁶ Accordingly, although the interests that a State invokes to justify the interference will differ depending on the context, the approach to the evaluation of Article 8 remains the same.⁶⁷ A review of decisions in the UK over the past five years reveals that the best interests principle has been incorporated into the Article 8 proportionality assessment in a wide range of contexts, including cases involving the extradition of a parent,⁶⁸ the removal of a children as part of a family unit,⁶⁹ the

⁶¹ *ibid* [24] (Lady Hale). The Upper Tribunal has since re-emphasized that the best interests obligation is both procedural and substantive: 'it is not helpful to attempt to analyse the duty ... as being either procedural or substantive in effect. It applies to the procedures involved in the decision-making process; but it will also apply to those aspects of the substantive decision to which it is relevant': *AA (unattended children) (Afghanistan) CG* [2012] UKUT 00016 (IAC), [33].

⁶² *ZH* [2011] 2 AC 166, [33].

⁶³ *ibid*.

⁶⁴ *ibid* [26].

⁶⁵ For additional art 8 removal cases incorporating the best interests principle see *Secretary of State for the Home Department v MK* [2011] UKUT 00475 (IAC); *AJ (India) v Secretary of State for the Home Department* [2011] EWCA Civ 1191; *E-A v Secretary of State for the Home Department* [2011] UKUT 00315 (IAC); *SA v Secretary of State for the Home Department* [2011] UKUT 00254 (IAC).

⁶⁶ [2013] 1 AC 338, [141].

⁶⁷ *ibid*.

⁶⁸ See eg *HH v Deputy Prosecutor of the Italian Republic, Genoa* [2013] 1 AC 338 ('*HH*'); *H v Lord Advocate (Scotland)* [2013] 1 AC 413. In *HH* [2013] 1 AC 338, [148], Lord Kerr held that '[i]n the field of extradition, as in every other context ... the importance of the rights of the particular child affected falls to be considered first. This does not impair or reduce the weight that will be accorded to the need to preserve and uphold a comprehensive charter for extradition. That will always be a factor of considerable importance, although ... the weight to be attached to it will vary according to the nature and seriousness of the crime or controls involved'.

⁶⁹ See eg *Zoumbas v Secretary of State for the Home Department* [2013] 1 WLR 3690; *IE v Secretary of State for the Home Department* [2013] CSOH 142; *JW (China) and MW (China) v SSHD* [2013] EWCA Civ 1526; *AAN v Secretary of State for the Home Department* [2012] CSOH 141; *R (Meaza Asefa) v Secretary of State for the Home Department* [2012] EWHC 56 (Admin).

return of a child pursuant to the Hague Convention,⁷⁰ the deportation of a parent following a criminal conviction,⁷¹ the removal of an unaccompanied child,⁷² the admission of a child applying from outside the UK,⁷³ the detention of a parent,⁷⁴ and the denial of permanent residence to a parent and her children.⁷⁵

Although the UK is at the forefront of recent developments, a number of jurisdictions have, for some time, engaged with the best interests principle in determining whether a child is entitled to an international protection status.

Senior courts in Canada, Australia and New Zealand have long recognized that a decision involving the deportation or extradition of a child's parent must necessarily entail a consideration of the best interests of the child.⁷⁶ One of the first decisions to discuss the role of the best interests principle in this context was the decision of the High Court of Australia in *Minister for Immigration and Ethnic Affairs v Teoh*.⁷⁷ The case involved a Malaysian citizen with an Australian-citizen wife, three Australian-born children and four Australian-born stepchildren. Mr Teoh's application for residency status was rejected on character grounds because he had been convicted of drug offences. He sought judicial review of that decision. The High Court held the primary decision-maker had committed an error of law by failing to treat the best interests of Mr Teoh's children as a primary consideration. The majority of the High Court considered that Australia's ratification of the CRC generated a legitimate expectation that decision-makers would act in

⁷⁰ See eg *Re E (children) (FC)* [2012] 1 AC 144, and the decision below in *Eliassen v Eliassen* [2011] EWCA Civ 361.

⁷¹ See eg *CW (Jamaica) v SSHD* [2013] EWCA Civ 915; *AJ (Bangladesh) v Secretary of State for the Home Department* [2013] EWCA Civ 493; *SS (Nigeria) v Secretary of State for the Home Department* [2014] 1 WLR 998; *Ogundimu v Secretary of State for the Home Department* [2013] UKUT 00060; *Sanade v Secretary of State for the Home Department* [2012] UKUT 00048 (IAC); *Lee v Secretary of State for the Home Department* [2011] EWCA Civ 348; *Omotunde v Secretary of State for the Home Department* [2011] UKUT 00247 (IAC); *T v Secretary of State for the Home Department* (Special Immigration Appeals Commission, Appeal No SC/31/2005, 22 March 2010).

⁷² See eg *R (AA) v Upper Tribunal and Secretary of State for the Home Department* [2012] EWHC 1784 (Admin); *FM (Afghanistan) v Secretary of State for the Home Department* (Upper Tribunal (IAC), Appeal No AA/01079/2010, 10 March 2011) [159]–[161].

⁷³ See eg *Mundeba v Entry Clearance Officer—Nairobi* [2013] UKUT 00088 (IAC); *Muse v Entry Clearance Officer* [2012] EWCA Civ 10; *Entry Clearance Officer – Kingston v T* [2011] UKUT 00483 (IAC). See also *R (Sheikh) v Secretary of State for the Home Department* [2011] EWHC 3390 (applying the best interests principle in assessing whether the refusal to waive an unaccompanied minor's fee for entry clearance constituted a violation of art 8).

⁷⁴ See eg *R (MXL) v Secretary of State for the Home Department* [2010] EWHC 2397 (Admin).

⁷⁵ See eg *R (Tinizaray) v Secretary of State for the Home Department* [2011] EWHC 1850 (Admin). Although the denial of permanent residence did not automatically give rise to removal or deportation, the Court considered that that did 'not reduce or minimise the [Secretary of State's] duty to take account of the best interests of any child directly affected by that applicant and its possible refusal': at [12]. See more generally *R (SM) v Secretary of State for the Home Department* [2013] EWHC 1144.

⁷⁶ In the US, the best interest principle has played a more limited although not inconsequential role in decisions involving the removal of a parent. See eg *Beharry v Reno* 183 F Supp 2d 584 (ED NY, 2002); *Cabrera-Alvarez v Gonzales* 423 F 3d 1006 (9th Cir, 2005).

⁷⁷ (1995) 183 CLR 273.

conformity with it, including Article 3.⁷⁸ The High Court considered that in refusing to grant Mr Teoh residency status the primary decision-maker had treated the government's character policy, rather than the best interests of Mr Teoh's children, as the primary consideration. According to Mason CJ and Deane J, '[a] decision-maker with an eye to the principle enshrined in the [CRC] would be looking to the best interests of the children as a primary consideration, asking whether the force of any other consideration outweighed it'.⁷⁹ Subsequent decisions have confirmed that the reasoning in *Teoh* applies both to the situation where the removal of a parent will force the separation of the child and parent, as was the scenario in *Teoh*, and to the situation where the child is constructively deported because she will voluntarily accompany the parent upon departure.⁸⁰

In Canada the leading decision is *Baker v Canada (Minister of Immigration and Citizenship)*,⁸¹ which involved a Jamaican national who had been served with a deportation order after it was established that she had worked illegally in Canada and overstayed her visitor's visa. Ms Baker applied for humanitarian protection under what was then section 114(2) of the Immigration Act,⁸² principally on the basis that her deportation would be contrary to the best interests of her children. The certified question for the Supreme Court was whether, in the absence of express reference to the CRC in domestic immigration legislation, decision-makers were required to treat the best interests of children as a primary consideration in assessing an

⁷⁸ *ibid* 291 (Mason CJ and Deane J). Gaudron J, at 304, went further, and suggested that there may, in fact, be a foundation for a legitimate expectation even absent the CRC or its ratification: 'any reasonable person who considered the matter would ... assume that the best interests of the child would be a primary consideration in all administrative decisions which directly affect children as individuals and which have consequences for their future welfare'.

⁷⁹ *ibid* 292.

⁸⁰ See in particular *Vaitaiki v Minister for Immigration and Multicultural Affairs* (1998) 150 ALR 608; *Wan v Minister for Immigration and Multicultural Affairs* (2001) 107 FCR 133. The decision of the High Court in *Teoh* (1995) 183 CLR 273, and its subsequent application in *Vaitaiki* (1998) 150 ALR 608 and *Wan* (2001) 107 FCR 133, has been endorsed widely both within Australia and internationally. In Australia, the jurisprudence has been supplemented with the publication of a series of ministerial directions that stipulate that the best interests of any child must be a primary consideration in deciding whether to refuse or cancel a parent's visa. The most recent ministerial direction (Minister of Immigration and Citizenship (Australia), Direction No 55—Visa Refusal and Cancellation under s 501 (25 July 2012), [9.3(1)], [11.2](1)) ('Direction No 55'), directs that '[d]ecision-makers must make a determination about whether [cancellation/removal] is, or is not, in the best interests of the child'. The Direction, at [9.3(4)] and [11.2(4)], lists a number of factors which must be considered in assessing the best interests of the child: '(a) The nature and duration of the relationship between the child and the person ... ; (b) The extent to which the person is likely to play a positive parental role in the future...; (c) The impact of the person's prior conduct, and any likely future conduct, ... on the child; (d) The likely effect [of] separation ... ; (e) Whether there are other persons who already fulfill a parental role in relation to the child; (f) Any known views of the child ... ; (g) Evidence that the person has abused or neglected the child ... ; and (h) Evidence that the child has suffered or experienced any physical or emotional trauma arising from the person's conduct.'

⁸¹ [1999] 2 SCR 817.

⁸² RSC 1985, c 1-2.

application for humanitarian protection. The majority of the Supreme Court answered in the affirmative and determined that in assessing an application for humanitarian protection ‘the decision-maker should consider children’s best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them’.⁸³ The Court emphasized that the best interests will not always be determinative, but considered that ‘where the interests of children are minimized, in a manner inconsistent with Canada’s humanitarian and compassionate tradition and the Minister’s guidelines, the decision will be unreasonable’.⁸⁴ The requirement specified in *Baker* has since been codified in section 25(1) of the Immigration and Refugee Protection Act⁸⁵ which mandates that in exercising the discretion to grant humanitarian protection the Minister must ‘tak[e] into account the best interests of a child directly affected’.⁸⁶ The provision has been supplemented by departmental guidelines, which provide guidance on the matters which decision-makers ought to consider in assessing a child’s best interests.⁸⁷

In New Zealand recourse to the best interests principle is mediated via the Immigration Act 2009, which allows a parent to appeal against deportation on humanitarian grounds where ‘[t]here are exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for the appellant to be deported from New Zealand’ and ‘[i]t would not in all the circumstances be contrary to the public interest to allow the appellant to remain in New Zealand’.⁸⁸ In *Ye v Minister of Immigration*⁸⁹—a case involving two families, each containing New Zealand-born children and Chinese national parents at risk of removal—the New Zealand Supreme Court held that New Zealand’s immigration legislation must be interpreted in a way that is consistent with New Zealand’s obligation to observe the

⁸³ *Baker v Canada* [1999] 2 SCR 817, [75].

⁸⁴ *ibid.*

⁸⁵ SC 2001, c 27.

⁸⁶ A child may also apply directly for humanitarian protection under section 25(1) of the Act: see text (n 92). Section 25(1) is bolstered by section 3(3)(f), which provides that the Act is to be construed and applied in a manner that ‘complies with international human rights instruments to which Canada is signatory’. In *De Guzman v Canada (MCI)* [2005] FCJ No 2119, [82]–[83], the Federal Court of Appeal confirmed that section 3(3)(f) ‘attaches more than mere ambiguity-resolving, contextual significance’ to international human rights instruments, requiring the Act to be ‘interpreted and applied consistently with an instrument to which paragraph 3(3)(f) applies, unless, on the modern approach to statutory interpretation, this is impossible’.

⁸⁷ Citizenship and Immigration Canada, IP 5: Immigrant Applications in Canada Made on Humanitarian or Compassionate Grounds (1 April 2011), [5.12]. For example, these guidelines provide that ‘[t]he relationship between the applicant and “any child directly affected” need not necessarily be that of parent and child, but could be another relationship that is affected by the decision. For example, a grandparent could be the primary caregiver who is affected by an immigration decision and the decision may thus affect the child’.

⁸⁸ Immigration Act 2009 (NZ) section 207. An equivalent provision was found in section 47 of the Immigration Act 1987 (NZ). A child may also apply directly for protection under section 207 of the Immigration Act 2009 (NZ): see text (n 93).

⁸⁹ [2009] NZSC 76. See also *Huang v Minister of Immigration* [2009] NZSC 77, handed down concurrently.

requirements of the CRC and, in particular, the requirement that ‘in all actions concerning children, by public and administrative authorities, the best interests of the child shall be a “primary consideration”’.⁹⁰ This means that in considering a parent’s humanitarian appeal it is necessary to consider ‘who will care for the child, and the nature and extent of the difficulties the child may face in remaining in New Zealand without parents’ or, if the child is to leave New Zealand, ‘the nature and extent of any problems the child may face if returned to the parent’s home country’.⁹¹

An increasing number of jurisdictions, including Canada, Australia, New Zealand and several European States, have also implemented discretionary humanitarian protection schemes that require decision-makers to take into account the best interests of any children affected by a decision to remove a child and/or the child’s parent. Critically, this includes cases where the child is the principal applicant. By way of illustration, and as already touched upon above in the context of the removal of a child’s parents, Canadian legislation mandates that in exercising the discretion to grant humanitarian protection the Minister must ‘tak[e] into account the best interests of a child directly affected’.⁹² The comparable New Zealand statutory humanitarian protection scheme has been interpreted to require the decision-maker to treat the best interests of the child as a primary consideration.⁹³ In Australia the process is less transparent, with the Minister retaining a non-compellable and

⁹⁰ *Ye v Minister of Immigration* [2009] NZSC 76, [24]; see also at [25]: ‘It is appropriate, in the light of New Zealand’s obligations under art 3(1), to interpret the relevant provisions of the Immigration Act so that the interests of New Zealand citizen children are always regarded as an important consideration in the decision-making processes’. The Supreme Court thus affirmed the decision of the High Court (*Ding v Minister of Immigration* (2006) 25 FRNZ 568) and Court of Appeal (*Ye v Minister of Immigration* [2008] NZCA 291). The Supreme Court’s finding that the best interests of any children are to be taken into account in any immigration decision affecting their parents accords with the approach taken in earlier New Zealand authority: see eg *A v Chief Executive, Department of Labour* [2001] NZAR 981; *Puli’uvea v Removal Review Authority* (1996) 14 FRNZ 322 (leave to appeal to the Privy Council refused in *Puli’uvea v Removal Review Authority* [1996] 3 NZLR 538); *Elika v Minister of Immigration* [1996] 1 NZLR 741; *Tavita v Minister of Immigration* [1994] 2 NZLR 257.

⁹¹ *Ye v Minister of Immigration* [2009] NZSC 76, [42].

⁹² Immigration and Refugee Protection Act, SC 2001, c 27, section 25(1). See text (nn 81–7).

⁹³ See generally text (nn 88–91). For examples see, *AD (Nigeria)* [2012] NZIPT 500451, [52] (allowing the humanitarian appeal of Nigerian mother and three Nigerian children on the basis that it would be contrary to their best interests to ‘face an entirely uncertain future in Nigeria with [their mother], a person with limited intellectual and emotional skills’); *BP (Iran)* [2012] NZIPT 500965 (allowing the humanitarian appeal of a 10-year-old Iranian girl, where her parents had been recognized as refugees and it was in her best interests to remain with them); *BL (Iran)* [2012] NZIPT 500963 (allowing the humanitarian appeal of a five-year-old Iranian boy, where his parents had been recognized as refugees and it was in his best interests to remain with them); *AD (Czech Republic)* [2012] NZIPT 500876 (allowing the humanitarian appeal of a seven-year-old girl from the Czech Republic, where her parents and brother had been recognized as refugees and it was in her best interests to remain with them); *AH (South Africa)* [2011] NZIPT 500228 (allowing the humanitarian appeal of a South African mother and her five-month-old son in circumstances where they were both at risk of harm from an ex-boyfriend and his gang associates); *AH (Iran)* [2011] NZIPT 500395 (allowing the humanitarian appeal of a 10-year-old Iranian boy, where his parents had been recognized as refugees and it was in his best interests to remain with them).

non-reviewable discretion to grant protection '[i]f the Minister thinks it is in the public interest to do so'.⁹⁴ Published guidelines provide that, in exercising the discretion, the Minister should take into account circumstances that may enliven Australia's obligations under the CRC, including Article 3.⁹⁵ Several European States have legislated to mandate that the best interests of the child be considered in assessing whether a child should be granted a humanitarian protection status, including Sweden,⁹⁶ Finland,⁹⁷ and Norway.⁹⁸

Finally, in response to the distinct challenges presented by the increase in the arrival of unaccompanied children a number of jurisdictions have introduced special protection measures specifically targeted at unaccompanied children which expressly incorporate a best interests assessment. By way of illustration, in the US an unaccompanied child may apply for a bespoke form of protection: special immigrant juvenile status ('SIJS').⁹⁹ In order to be eligible for SIJS a child (less than twenty-one years of age) must first be declared the dependent of a juvenile court or placed in the care of a child welfare agency. A State court must then decide that the child cannot be reunited with one or both parents because of abuse, abandonment, neglect or a similar reason, and that it is not otherwise in the

⁹⁴ Migration Act 1958 (Cth) sections 351, 417, 501J. For a discussion on this 'public interest' power, see M Foster and J Pobjoy, Submission No 9 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Inquiry into the Migration Amendment (Complementary Protection) Bill 2009 (28 September 2009).

⁹⁵ Minister of Immigration and Citizenship, Minister's Guidelines on Ministerial Power (sections 345, 351, 391, 417, 454 and 501J) (P A098, 24 March 2012), [12]. See also Minister of Immigration and Citizenship, Administration of Ministerial Powers (P A124, 24 March 2012), [15.3], which sets out further detail on factors to be considered in assessing the best interests of a child. As a matter of practice, the Refugee Review Tribunal may, where a child is ineligible for refugee protection, refer cases to the Minister for consideration: see eg *1206440* [2013] RRTA 102 (6 February 2013), [45]–[50]; *1113067* [2012] RRTA 982 (30 October 2012), [95]–[96]; *1201414* [2012] RRTA 410 (5 June 2012); *1103115* [2011] RRTA 434 (2 June 2011), [32]–[33]; *1102118* [2011] RRTA 415 (30 May 2011), [63]; *1100862* [2011] RRTA 291 (18 April 2011), [50]–[51].

⁹⁶ Ch 1, section 10 of the Swedish Aliens Act (2005:716) provides that, '[i]n cases involving a child, particular attention must be given to what is required with regard to the child's health and development and the best interests of the child in general'. This provision was introduced in 1997 following Sweden's ratification of the CRC. See generally Lundberg (n 6); M Eastmond and H Ascher, 'In the Best Interest of the Child? The Politics of Vulnerability and Negotiations for Asylum in Sweden' (2011) 37(8) *Journal of Ethnic and Migration Studies* 1185.

⁹⁷ Section 6 of the Finnish Aliens Act (301/2004) provides that in any decision concerning children 'special attention shall be paid to the best interests of the child and to circumstances related to the child's development and health'. This direction applies to applications for residence on humanitarian grounds. See generally A Parsons, *The Best Interests of the Child in Asylum and Refugee Procedures in Finland* (Vähemmistövaltuutettu 2010).

⁹⁸ Section 38 of the Act of 15 May 2008 on the Entry of Foreign Nationals into the Kingdom of Norway and Their Stay in the Realm (Immigration Act) provides that '[i]n cases concerning children, the best interests of the child shall be a fundamental consideration' and that '[c]hildren may be granted a residence permit [on humanitarian grounds] even if the situation is not so serious that a residence permit would have been granted to an adult'.

⁹⁹ See 8 USC section 1101(a)(27)(J). SIJS is the only form of protection in US immigration law that expressly incorporates the best interests principle as an eligibility requirement.

child's best interests to return to her home country. In the UK an unaccompanied child will not be removed unless the Secretary of State is satisfied that there are 'adequate reception arrangements'¹⁰⁰ in place in the child's home country.¹⁰¹ These children are granted a form of limited leave until they are 17-and-a-half years of age, at which point in time the leave to remain lapses. In assessing whether discretionary leave ought to be granted, decision-makers are instructed that 'the best interests of the child must be taken into account as a primary consideration in the decision'.¹⁰²

The preceding (brief) overview of State practice demonstrates the capacity of Article 3 to limit a State's ability to remove a child and/or a child's parent from its jurisdiction. Although States may have initially resisted the idea that Article 3 may give rise to an independent source of protection status, the above discussion makes clear that the best interests principle is playing an increasingly central role in decisions involving the removal of children. The application of the best interests principle in a range of migration contexts and across multiple jurisdictions illustrates that the argument advanced in this article—that the best interests principle may give rise to an independent protection status—is not merely a theoretical aspiration, but finds support in a fast-evolving body of regional and domestic jurisprudence that engages with Article 3 to provide effective protection to children and their parents. That jurisprudence provides an important source of guidance for decision-makers tasked with considering the application of Article 3 as an independent source of protection and with identifying the circumstances in which the provision may preclude the removal of a child from a host State.

III. THE APPLICATION OF ARTICLE 3 AS AN INDEPENDENT SOURCE OF INTERNATIONAL PROTECTION

How, then, should a decision-maker determine what is in the best interests of the child and whether those interests preclude the removal of the child from a host State? Although there is clear value in providing a general framework for the application of the best interests principle as an independent source of protection, it is important to emphasize that the best interests principle is by design a flexible and dynamic concept; it is not possible to prescribe how a child's interests will be best served in any given situation at any given point in time.¹⁰³ A best interests

¹⁰⁰ UKBA, Asylum Process Guidance (n 26) [17.7], now incorporated into the Immigration Rules, r 352ZC.

¹⁰¹ An unaccompanied child will only be eligible for limited leave to remain if they have applied for and been refused refugee and subsidiary protection: Immigration Rules, r 352ZC(b).

¹⁰² UKBA, Asylum Process Guidance (n 26) [17.8].

¹⁰³ General Comment No 14 (n 17) [11]. As noted by Madame Justice McLachlin of the Supreme Court of Canada, '[t]he multitude of factors that may impinge on the child's best interests make a

assessment must take place on a case-by-case basis, taking into account the specific circumstances of the individual child.¹⁰⁴ There are, however, a number of signposts that are capable of guiding decision-makers in the application of Article 3 of the CRC to situations where a child is at risk of removal. These general principles derive principally from jurisprudence developed in the various migration-related contexts in which States have engaged with the best interests principle.

Article 3 will be engaged wherever a child may be affected by an immigration decision.¹⁰⁵ In certain circumstances, Article 3 will require a decision-maker to look beyond the claim and/or evidence formally put forward by the applicant. As Justice Gaudron of the High Court of Australia has observed, any reasonable person 'would assume or expect that the interests of the child would be taken into account ... *as a matter of course* and without any need for the issue to be raised with the decision-maker'.¹⁰⁶ Decision-makers are thus under an obligation to 'be *proactive* in identifying [the child's best interests] so that they can be properly taken into account'.¹⁰⁷

measure of indeterminacy inevitable. A more precise test would risk sacrificing the child's best interests to expediency and certainty': *Gordon v Goertz* [1996] 2 SCR 27, [20].

¹⁰⁴ 'These circumstances relate to the individual characteristics of the child or children concerned, such as, *inter alia*, age, sex, level of maturity, experience, belonging to a minority group, having a physical, sensory or intellectual disability, as well as the social and cultural context in which the child or children find themselves, such as the presence or absence of parents, whether the child lives with them, quality of the relationships between the child and his or her family or caregivers, the environment in relation to safety, the existence of quality alternative means available to the family, extended family or caregivers, etc.': General Comment No 14 (n 17) [48].

¹⁰⁵ Although not without controversy, this may also require a decision-maker to take into account the prospective best interests of an unborn child. Although it is generally accepted that, subject to domestic law providing otherwise, the CRC does not apply to unborn children (P Alston, 'The Unborn Child and Abortion Under the Draft Convention on the Rights of the Child' (1990) 12 HRQ 156), there is a compelling argument that in the case of a pregnant mother the refugee decision-maker ought to consider the best interests of the unborn child, on the basis that if the child is born she will have rights under the CRC: see eg *CA v Secretary of State for the Home Department* [2004] EWCA Civ 1165; *Griffiths v Minister for Immigration* [2003] FMCA 249. *Contra SZRLY v Minister for Immigration and Citizenship* [2012] FCA 1459.

¹⁰⁶ *Teoh* (1995) 183 CLR 273, 304 (emphasis added). This insightful assumption is made 'because of the special vulnerability of children, particularly where the break-up of the family unity is, or may be, involved, and because of their expectation that a civilised society would be alert to its responsibilities to children who are, or may be, in need of protection': *ibid*. In *Garasova v Canada (Minister of Citizenship and Immigration)* (Unreported, Federal Court of Canada, Lemieux J, 2 November 1999) [41], Lemieux J similarly stated that art 3 requires 'close attention to the interests and needs of children because children's rights and attention to those interests are central humanitarian and compassionate values in Canadian society'.

¹⁰⁷ *Ye v Minister of Immigration* [2009] NZSC 76, [50] (emphasis added). For a recent decision applying the principles set out in *Ye*, see *O'Brien v Immigration and Protection Tribunal* [2012] NZHC 2599 (finding that the Tribunal had failed to sufficiently consider the child's best interests and, in particular, the evidence of a psychologist detailing the impact that deportation would have on the child). In *SS (Sri Lanka) v Secretary of State for the Home Department* [2012] EWCA Civ 945 the Court of Appeal of England and Wales similarly held that the Tribunal had committed a 'serious error of law' by failing to consider the best interests of the children, notwithstanding the fact that this issue was not originally raised by the applicant family. The Court accepted that 'the

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. The two stages are clearly set out by the Australian Federal Court in *Wan*:

[The decision-maker is] required to identify what the best interests of Mr Wan's children required ... *and then* to assess whether the strength of any other consideration, or the cumulative effect of other considerations, outweighed the consideration of the best interests of the children understood as a primary consideration.¹⁰⁸

The two stages are distinct and should not be conflated. In *ZH*, the Supreme Court stressed the importance of considering the child's best interests *first*.¹⁰⁹ The reason for this is straightforward: a failure first to determine what is in the best interests of the child makes it impossible to assess whether any countervailing considerations outweigh those interests. As the Australian Federal Court has explained:

Given this balancing exercise, where the children's best interests were left at the level of mere hypothesis, it is hardly surprising that the positive finding of a risk of harm to the Australian community from even the small risk of the applicant re-offending outweighed the hypothesis of possible harm to the best interests of the applicant's children should his visa be cancelled.¹¹⁰

In this case the Federal Court quashed the Minister's decision on the basis that the Minister had never addressed the 'central question of what the best interests of the children required' and was thereby unable to 'assess whether any other consideration outweighed the best interests of the children understood as a primary consideration'.¹¹¹

A. Stage 1: Determining the Best Interests of the Child

As noted above, it is imperative that a decision-maker determines what is in the best interests of the child as a first and separate stage. This is made clear by the express language of Article 3(1): the use of the word 'shall' reflects the

duty is now so well established as to give rise to a question that obviously requires consideration, whether or not raised by the appellant ... and ... a failure to do so amounts to an error of law': at [17].

¹⁰⁸ *Wan v Minister for Immigration and Multicultural Affairs* (2001) 107 FCR 133, [32] (emphasis added). This passage was approved by Lady Hale in *ZH* [2011] 2 AC 166, [159]–[160].

¹⁰⁹ *ZH* [2011] 2 AC 166, [160]. See also *Secretary of State for the Home Department v MK* [2011] UKUT 00475 (IAC), [19] ('it is a matter which has to be addressed first and as a distinct stage of the inquiry'); *ALJ and A, B and C's Application for Judicial Review* [2013] NIQB 88, [96].

¹¹⁰ *Nweke v Minister for Immigration and Citizenship* [2012] FCA 266, [20].

¹¹¹ *ibid* [21]. See also *Spruill v Minister for Immigration and Citizenship* [2012] FCA 1401, [12]–[19]; *Lesianawai v Minister for Immigration and Citizenship* [2012] FCA 897, [37]–[51]; *Tauariki v Minister for Immigration and Citizenship* [2012] FCA 1408, [33]–[44]. In Canada see eg *Williams v Canada (Minister of Citizenship and Immigration)* [2012] FCJ No 184, [63]; *Ferrer v Canada (Minister of Citizenship and Immigration)* [2009] FC 356, [6].

mandatory nature of the obligation, while the term ‘consideration’ makes clear that the child’s interests must actually be taken into account.¹¹² Alston has underlined that the ‘consideration’ mandated by Article 3 must be ‘genuine rather than token or merely formal’ and must ‘ensure that all aspects of the child’s best interests are factored into the equation’.¹¹³ This point has been recognized in the case law, with the Canadian Supreme Court emphasizing that a decision-maker must be ‘alert, alive and sensitive’ to the best interests of an affected child.¹¹⁴ It is insufficient for a decision-maker simply to state that they have taken into account the interests of the child without identifying with adequate particularity what those interests are.¹¹⁵ The best interests of the child must be ‘well identified and defined’¹¹⁶ and the decision-maker must undertake ‘a careful and sympathetic assessment of the children’s interests’.¹¹⁷

A best interests assessment requires decision-makers to consider the long-term effects that a decision or action may have on a child’s welfare and development, including those effects that will be felt after a child has reached her eighteenth birthday.¹¹⁸ The need for a forward-looking examination is difficult to reconcile with the approach adopted by some States of granting children temporary protection status solely for the duration of childhood. For instance, unaccompanied children arriving in the UK are granted a form of limited leave until they are 17-and-a-half years of age, at which point in time the leave to remain lapses and the child may be removed. This approach gives rise to an enforced state of limbo, with children being required to live

¹¹² ‘The words “shall be” place a strong legal obligation on States and mean that States may not exercise discretion as to whether children’s best interests are to be assessed and ascribed the proper weight as a primary consideration in any action undertaken’: General Comment No 14 (n 17) [36].

¹¹³ P Alston, ‘The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights’ in P Alston (ed), *The Best Interests of the Child: Reconciling Culture and Human Rights* (Oxford University Press 1994) 1, 13.

¹¹⁴ *Baker v Canada* [1999] 2 SCR 817, [75]. For a detailed discussion on the substantive content of the ‘alert, alive and sensitive’ phrase, see *Kolosovs v Canada (Minister of Citizenship and Immigration)* [2008] FCJ No 211, and its application in *PGS v Canada (Minister of Citizenship and Immigration)* [2012] FCJ No 10, [60]–[66].

¹¹⁵ *Hawthorne v Canada (Minister of Citizenship and Immigration)* [2003] 2 FC 555, [32]; *AA (AP) v Secretary of State for the Home Department* [2014] CSIH 35, [16].

¹¹⁶ *Legault v Canada (Minister of Citizenship and Immigration)* [2002] 4 FC 358, 369.

¹¹⁷ *Ahmad v Canada (Minister of Citizenship and Immigration)* [2008] FCJ No 814, [30]. Hence, as the Federal Court of Australia has determined, it is insufficient for a decision-maker simply to speculate as to what may be in the best interests of a child: *Lesianawai v Minister for Immigration* [2012] FCA 897, [50].

¹¹⁸ This argument has been eloquently made by Goodwin-Gill, who argues that ‘what is in the best interests of the child must necessarily be understood also as including those decisions and actions, the effects of which will continue or be felt after the age of eighteen’: Goodwin-Gill (n 8) 227. See also *R (AA) v Upper Tribunal and Secretary of State for the Home Department* [2012] EWHC 1784 (Admin), [44] (“‘Best interests’ for a 17-year-old are not confined to looking no further ahead than the child’s eighteenth birthday. If one were advising a 17-year-old about (say) what educational courses to study, be it to A level or to a technical qualification or otherwise, one would take into account what would happen after the age of 18 in advising on the choices s/he had to make”).

with the constant fear that they will be removed as soon as they reach adulthood.¹¹⁹ As the High Court of England and Wales has observed:¹²⁰

I am unable to see how the welfare of a 16 year old youth is best promoted by forcing him to anxiously face the prospect or spectre of removal from the UK ... The stress of this constant re-appraisal of his life is hardly conducive to the promotion of his best interests ... The claimant has been forced into a form of limbo by the decision of the SSHD. I fail to see how this can be suggested to advance best interests of a 16 year old youth. He is entitled—is he not—to have some notion of what his future holds?

A mechanistic approach such as that adopted in the UK—which mortgages off a permanent solution to some future point in time (or, more cynically, serves only to postpone removal)—is incompatible with the object and purpose of the CRC which, at its core, is concerned with *developing* a child to their fullest potential and *preparing* a child for a responsible life in a free society.¹²¹ A child cannot be expected to postpone her growth and development.¹²² The best interests principle requires a decision-maker to consider a child's future protection and development needs. In certain circumstances this may require the implementation of an *immediate* and *permanent* solution, such as the grant of an indefinite form of protection.

There are three factors that must be taken into account in making an assessment as to what is in the best interests of a child.¹²³ The first factor is the views of the child. Article 12(1) of the CRC imposes a positive obligation on States to give due weight to the views of the child in accordance with their age and level of maturity. Article 12(2) stipulates that children have a right to be heard in 'any judicial and administrative proceedings affecting the child'. Although a child's views may not be determinative, they represent a critical ingredient in undertaking the best interests assessment.¹²⁴ This has been

¹¹⁹ As noted by one commentator, a grant of limited leave to remain 'serves only to postpone removal' and 'keep[s] children in a state of limbo with a heightened sense of anxiety and constant fear of the risk of eventual removal as they become young adults': Bolton, 'Promoting the Best Interests of the Child' (n 6).

¹²⁰ *R (ABC) (a minor) (Afghanistan) v Secretary of State for the Home Department* [2011] EWHC 2937 (Admin) [58].

¹²¹ See CRC, Preamble, arts 6(2), 23(3), 27(1), 29(1)(a), 29(1)(d). See further Goodwin-Gill (n 8) 227.

¹²² 'Solutions for children in flight cannot be mortgaged to some future time and place; on the contrary, as the child will not postpone his or her growth or development, so the need to implement elements of a durable solution is immediate': Goodwin-Gill (n 8) 227.

¹²³ In preparing this Part the author has benefited from discussion and debate with John Tobin. The factors discussed here derive in part from the framework set out in J Tobin, 'Judging the Judges: Are They Adopting the Rights Approach in Matters Involving Children?' (2009) 33 *MULR* 579; and J Tobin, 'Justifying Children's Rights' (2013) 21 *International Journal of Children's Rights* 395.

¹²⁴ *ibid*; Tobin, 'Judging the Judges' (n 123) 579. See also D Archard and M Skivenes, 'Balancing a Child's Best Interests and a Child's Views' (2009) 17 *International Journal of Children's Rights* 1. The point is cogently made by the former UNHCR Assistant High Commissioner, Erika Feller: 'What is clear is that, in deciding on the best interests of the child, attention has to be paid to the need to involve children in the making of decisions that affect them

affirmed by the UNCRC, which considers that ‘there can be no correct application of article 3 if the components of article 12 are not respected’.¹²⁵ The recast EU Qualification Directive also expressly notes that, in assessing the best interests of the child, Member States should in particular take into account ‘the views of the minor in accordance with his or her age and maturity’.¹²⁶

Senior appellate courts have recognized the importance of seeking a child’s views when determining the best interests of a child in the immigration context. The UK Supreme Court has drawn upon Article 12 of the CRC and affirmed that an important part of determining a child’s best interests is ‘discovering the child’s own views’.¹²⁷ This is regarded as important because a child’s views and interests will not always coincide with their parents’ and, in some cases, a parent may not be able properly to put the child’s views before the court.¹²⁸ According to Lady Hale, ‘[t]he important thing is that everyone, the parties and their representatives, but also the courts, is alive to the need to obtain the information necessary in order to have regard to the best interests of the children as a primary consideration, and to take steps accordingly’.¹²⁹ The New Zealand Supreme Court¹³⁰ and the Canadian Federal Court of Appeal¹³¹ have similarly acknowledged the right of children to express their views in the context of an Article 3 best interests assessment.

... Put another way, the “best interest of the child” should be properly understood to accommodate an opportunity for the child to determine what those best interests are, even where this, in the final analysis, is not held to be determinative of what is in the best interests in the individual case’: UNHCR, Statement by Ms Erika Feller, Director, Department of International Protection, UNHCR: The Right to Be Heard for Separated Children Seeking Asylum in Europe, Working Group 1—Asylum and Migration, Norrköping, Sweden (1 March 2001) <<http://www.unhcr.org/42b970b22.html>>.

¹²⁵ UNCRC, General Comment No 12: The Right of the Child to Be Heard, 51st sess, UN Doc CRC/C/GC/12 (2009) [74]. See also General Comment No 14 (n 17) [43], [53]–[54]. The relationship between art 3 and art 12 received considerable attention during the drafting of the CRC. Indeed, art 12(2) initially formed a subpara of art 3, on the basis that ‘it followed logically from paragraph 1 of article 3 as a means by which judicial or administrative authorities could ascertain a child’s best interests in a given case’: UN Doc E/CN.4/L.1575, [28].

¹²⁶ EU Qualification Directive [2011] OJ L 337/9, para 18: ‘In assessing the best interests of the child, Member States should in particular take due account of ... the views of the minor in accordance with his or her age and maturity.’

¹²⁷ *ZH* [2011] 2 AC 166, [34].

¹²⁸ *HH* [2013] 1 AC 338, [85], citing largely from the *amicus curiae* submissions of the CORAM Children’s Legal Centre.

¹²⁹ *ibid* [86].

¹³⁰ *Ye v Minister of Immigration* [2009] NZSC 76, [53]; see also *Ye v Minister of Immigration* [2008] NZCA 291, [134]–[146] (Glazebrook J).

¹³¹ *Hawthorne v Canada (Minister of Citizenship and Immigration)* [2003] 2 FC 555, [33] (‘[i]n order to ensure that the child’s wishes are properly considered, Article 12 provides that the child must be given an opportunity to be heard, either directly or indirectly, in administrative proceedings affecting her rights or interests’). See also *Vasquez v Canada (Minister of Citizenship and Immigration)* [2002] FCT 413, [14] (‘[i]n my opinion, implicit in the minor Applicants’ appearance was that they had a view on the subject of their eventual fate. Whether it was the fault of the principal Applicant in not specifically asking that they should be allowed to speak or the fault of the Immigration Officer in not asking if they wished to speak, the end result

The second factor that must be taken into account is the specific situation and circumstances of the child, including the child's age, level of maturity and any particular vulnerabilities or needs that that child may have.¹³² For example, has the child been the subject of physical or psychological abuse? Does the child suffer from a disability or other medical condition? What, if any, language does the child speak? Is the child unaccompanied or accompanied by a family member? The best interests of a child in a specific situation of vulnerability will not be the same as a child who is not in the same vulnerable situation. As the UNCRC has apprised, decision-makers must thus 'take into account the different kinds and degrees of vulnerability of each child' in order to accommodate the reality that 'each child is unique and each situation must be assessed according to the child's uniqueness'.¹³³

The third factor is the extensive catalogue of rights protected under the CRC. The best interests principle is self-evidently indeterminate. It has been suggested that such imprecision gives rise to a risk that the best interests principle will be used as 'an alibi for individual arbitrariness'.¹³⁴ This criticism, however, is premised on an interpretation of Article 3 that fails to take into account the balance of the CRC. The rules of treaty interpretation are clear, however, that Article 3 must be read within the context of the CRC as a whole, including the substantive rights protected under it.¹³⁵ The latter construction injects substantive content into Article 3 and thus provides a critical bulwark against the risk of subjective arbitrariness. As Alston explains,

the Convention as a whole goes at least some of the way towards providing the broad ethical or value framework that is often claimed to be the missing ingredient which would give a greater degree of certainty to the content of the best interests principle. It provides a carefully formulated and balanced statement of values to which some [now, 194] State Parties have formally subscribed.¹³⁶

The argument is developed further by Tobin:

is that their views were not expressed. In my opinion their views should be known'); *Khader v Canada (MCI)* [2013] FCJ No 359, [33]–[34].

¹³² 'A determination of what is in the best interests of the child requires a clear and comprehensive assessment of the child's identity, including her or his nationality, upbringing, cultural and linguistic background, particular vulnerabilities and protection needs': General Comment No 6 (n 12) [20]. See also General Comment No 14 (n 17) [48]; Advisory Opinion OC-21/14, Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection (19 August 2014) [71].

¹³³ General Comment No 14 (n 17) [76].

¹³⁴ Théry, "'The Interest of the child" and the Regulation of the post - Divorce Family' in C smart and S sevenhuijsen (eds), *child custody and the politics of Gender* (1989) 78, 82. See P Alston and B Gilmour-Walsh, *The Best Interests of the Child: Towards a Synthesis of Children's Rights and Cultural Values* (UNICEF 1996) 2, for a summary of the key criticisms of the indeterminacy of the provision.

¹³⁵ Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 31(1)-(2).

¹³⁶ Alston (n 113) 19.

While the best interests principle remains a fluid and flexible concept it is not unfettered or entirely subject to the personal whims of a decision-maker. Rather it remains informed and constrained by the rights and principles provided for under the Convention ... Put simply, a proposed outcome for a child cannot be said to be in his or her best interests where it conflicts with the provisions of the Convention.¹³⁷

In other words, it is in a child's best interests to enjoy the rights and freedoms provided for in the CRC. This integrative construction of Article 3 is endorsed by the UNCRC, which affirms that '[t]he concept of the child's best interests is aimed at ensuring both the full and effective enjoyment of all the rights recognized in the Convention and the holistic development of the child'.¹³⁸

Critically, there is no principled basis for importing any additional hardship threshold into the best interests analysis. As explained by the Canadian Federal Court, '[t]here is no basic needs minimum which if "met" satisfies the best interest test' and there is no 'hardship threshold, such that if the circumstances of the child reach a certain point on the hardship scale only then will a child's best interests be so significantly "negatively impacted" as to warrant positive consideration'.¹³⁹ As the Federal Court recognizes, '[t]he question is *not*: "is the child suffering enough that his 'best interests' are not being 'met'?"' The question at the initial stage of the assessment is: "what is in the child's best interests?"¹⁴⁰ The Canadian Federal Court of Appeal has similarly noted that a hardship threshold is ill-suited when assessing the claims of children, given that '[c]hildren will rarely, if ever, be deserving of any hardship'.¹⁴¹

¹³⁷ J Tobin, 'Beyond the Supermarket Shelf: Using a Rights Based Approach to Address Children's Health Needs' (2006) 14 *International Journal of Children's Rights* 275, 287. See also M Freeman, *A Commentary on the United Nations Convention on the Rights of the Child: Article 3: The Best Interests of the Child* (Martinus Nijhoff 2007) 9; Alston and Gilmour-Walsh (n 134) 39.

¹³⁸ General Comment No 14 (n 17) [4]. The approach has also been approved by UNHCR (UNHCR, UNHCR Guidelines (n 23): 'While determining the best interests of the child, it is important to consider all the rights of the child' (at 15); '[t]he result of the [best interests determination] must take account of the full range of the child's rights, and hence consider a variety of factors ... Determining the best interests of a child thus requires taking account of all relevant circumstances, while keeping in mind the indivisible nature of the CRC and the interdependency of its articles' (at 67)) and UNICEF (UNICEF, *Implementation Handbook for the Convention on the Rights of the Child* (2007) 38: 'Any interpretation of best interests must be consistent with the spirit of the entire Convention ... States cannot interpret best interests in an overly culturally relativist way and cannot use their own interpretation of "best interests" to deny rights now guaranteed to children by the Convention'). It was also affirmed in *Secretary of State for the Home Department v MK* [2011] UKUT 00475 (IAC).

¹³⁹ *Williams v Canada (Minister of Citizenship and Immigration)* [2012] FCJ No 184, [64]

¹⁴⁰ *ibid* (emphasis in original).

¹⁴¹ *Hawthorne v Canada (Minister of Citizenship and Immigration)* [2003] 2 FC 555, [9]. See also *Santhirajah v Attorney-General* [2012] FCA 940, [320]; *Alcocer v Canada (Minister of Citizenship and Immigration)* [2013] FCJ No 2, [13]; *Judnarine v Canada (Minister of Citizenship and Immigration)* [2013] FCJ No 61, [45]–[47]; *Mbikayi v Canada (Minister of Citizenship and Immigration)* [2012] FCJ No 1314, [4]–[7]; *Sebbe v Canada (Minister of Citizenship and Immigration)* [2012] FCJ No 842, [15]–[16]; *Sun v Canada (Minister of Citizenship and Immigration)* [2012] FCJ No 218, [43]–[48].

A principled construction of Article 3 thus requires a decision-maker to consider the extent to which a child seeking international protection will enjoy each of the rights protected under the CRC, having regard to both the personal circumstances of the child and the conditions prevailing in the home country. That assessment should be based on empirical evidence that relates to both the specific child and the human rights conditions in the destination country. This is because the best interests assessment ‘requires a judgment to be made on a rational basis taking into account all relevant factors’ and not just ‘on the basis of how these matters are perceived by the child and/or parent(s)’.¹⁴² By anchoring the best interests assessment in both a principled (rights-based) and objective (evidence-based) framework the risk of subjective and/or speculative arbitrariness in the application of the best interests principle is considerably reduced.¹⁴³

A broad range of CRC rights may be relevant to the best interests assessment.¹⁴⁴ As acknowledged by UNHCR, ‘the best interests of the child determination must take account of the full range of the child’s rights, and ... is rarely determined by a single, overriding factor’.¹⁴⁵ Although by no means an exhaustive list, decision-makers have considered the following substantive rights in determining whether removal is in a child’s best interests: the right to an education (Articles 28, 29);¹⁴⁶ the right to protection against

¹⁴² *Secretary of State for the Home Department v MK* [2011] UKUT 00475 (IAC), [20]

¹⁴³ Tobin, ‘Judging the Judges’ (n 123) 589–92.

¹⁴⁴ There have been suggestions that decision-makers assessing claims involving the removal of a child may benefit from the provision of a checklist, similar to that which is sometimes provided to decision-makers in the family law arena (see eg *Children Act 1989* (UK) s 1(3)); see *Secretary of State for the Home Department v MK* [2011] UKUT 00475 (IAC), [21]; *R (Tinizaray) v Secretary of State for the Home Department* [2011] EWHC 1850 (Admin) [19]–[20]. Although the UNCRC (see eg General Comment No 6 (n 12) [84]), UNHCR (see eg UNHCR, UNHCR Guidelines (n 23) 67–76) and a number of States (see eg Minister for Immigration and Citizenship (Australia), Direction No 55 (n 80) [9.3], [11.2]; UKBA, Asylum Process Guidance (n 26) [17.8]) have made efforts to identify those factors that a decision-maker ought to take into account, the CRC itself ultimately provides the most principled ‘interpretation tool’ to give meaning to the content of the best interests principle: *FM (Afghanistan) v Secretary of State for the Home Department* (Upper Tribunal (IAC), Appeal No AA/01079/2010, 10 March 2011) [152].

¹⁴⁵ UNHCR, UNHCR Guidelines (n 23) 67 [3], approved in *Secretary of State for the Home Department v MK* [2011] UKUT 00475 (IAC), [21]; *R (Meaza Asefa) v Secretary of State for the Home Department* [2012] EWHC 56 (Admin), [47].

¹⁴⁶ See eg *Wan v Minister for Immigration and Multicultural Affairs* (2001) 107 FCR 133, [30], approved in *ZH* [2011] 2 AC 166, [30]; *Cebrosos v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] AATA 213, [119]–[121]; *Secretary of State for the Home Department v MK* [2011] UKUT 00475 (IAC), [41]–[51]; *R (TS) v Secretary of State for the Home Department* [2010] EWHC 2614 (Admin) [75]; *LD v Secretary of State for the Home Department* [2010] UKUT 278 (IAC), [30]; *Ye v Minister of Immigration* [2008] NZCA 291, [253]–[269] (Glazebrook J), affd *Ye v Minister of Immigration* [2009] NZSC 76; *Diakité v Canada (Minister of Citizenship and Immigration)* [2009] FCJ No 217, [87]–[92]. In assessing a child’s ability to access education in the destination country, decision-makers have underlined the need to ‘ascertain[] the child’s mother tongue and other languages spoken and written (and degree of fluency)’ and to consider ‘[h]ow this would affect [the child’s] integration in the community and their participation in the education system in the destination country’: *Ye v Minister of Immigration* [2008] NZCA 291,

discrimination (Article 2);¹⁴⁷ the right to the highest attainable standard of health, including access to medical care and treatment (Articles 24, 25);¹⁴⁸ the right to life, survival and development (Article 6);¹⁴⁹ the right to protection from all forms of physical or mental violence (Articles 19, 34, 35, 36, 37, 38);¹⁵⁰ the right to be registered and acquire a nationality, and to preserve an identity, including a nationality (Articles 7, 8);¹⁵¹ the right to privacy and home life, based on the child's level of integration in the host country (Article 16);¹⁵² and the right to an adequate standard of living, based,

[181], [249]–[255] (Glazebrook J). For similar reasoning, see *Kim v Canada* [2007] FCJ No 1399, [18]–[22]. See generally General Comment No 14 (n 17) [79].

¹⁴⁷ See eg *Ye v Minister of Immigration* [2008] NZCA 291, [256]–[269] (Glazebrook J) (discussing the impact of China's one-child policy on *hei heizi* or 'black children'), aff'd *Ye v Minister of Immigration* [2009] NZSC 76; *FM (Afghanistan) v Secretary of State for the Home Department* (Upper Tribunal (IAC), Appeal No AA/01079/2010, 10 March 2011) [108].

¹⁴⁸ *R (TS) v Secretary of State for the Home Department* [2010] EWHC 2614 (Admin) [31]–[32]; *Kolosovs v Canada (Minister of Citizenship and Immigration)* [2008] FCJ No 211, [14]; *Williams v Canada (Minister of Citizenship and Immigration)* [2012] FCJ No 184; *Patel v Canada (Minister of Citizenship and Immigration)* [2005] FCJ No 1305. See generally General Comment No 14 (n 17) [77]–[78].

¹⁴⁹ See eg *FM (Afghanistan) v Secretary of State for the Home Department* (Upper Tribunal (IAC), Appeal No AA/01079/2010, 10 March 2011) [108], [132].

¹⁵⁰ See eg *Diakité v Canada (Minister of Citizenship and Immigration)* [2009] FCJ No 217 (risk of forced marriage); *AA (unattended children) (Afghanistan) CG* [2012] UKUT 00016 (IAC), [89]–[93] (risk of indiscriminate violence, forced recruitment, sexual violence, trafficking and a lack of adequate arrangements for child protection); *Awolope v Canada (Minister of Citizenship and Immigration)* [2010] FCJ No 645 (risk of female genital cutting, and tribal facial scarring). See generally General Comment No 14 (n 17) [71]–[74].

¹⁵¹ See eg *ZH* [2011] 2 AC 166, [30] ('[a]lthough nationality is not a "trump card" it is of particular importance in assessing the best interests of any child. The [CRC] recognizes the right of every child to be registered and acquire a nationality (Article 7) and to preserve her identity, including her nationality (Article 8)'), affirmed in *HH* [2013] 1 AC 338; *H v Lord Advocate (Scotland)* [2013] 1 AC 413, [12]. See also *Sanade v Secretary of State for the Home Department* [2012] UKUT 00048 (IAC), [65]; *Omotunde v Secretary of State for the Home Department* [2011] UKUT 00257 (IAC), [38]; *Wan v Minister for Immigration and Multicultural Affairs* (2001) 107 FCR 133, [30]; *Vaitaiki v Minister for Immigration and Multicultural Affairs* (1998) 150 ALR 608, 614 (Burchett J); *Ye v Minister of Immigration* [2008] NZCA 291, [110]–[115] (Glazebrook J); and, for a European perspective, *Zambrano v Office national de l'emploi* (Court of Justice of the European Union, C-34/09, 8 March 2011). Significantly, each of these cases involved children that had been born in the host State. Arts 7 and 8 of the CRC may give rise to distinct considerations where the affected child is a national of another country. As the Upper Tribunal sensibly recognized in *Secretary of State for the Home Department v MK* [2011] UKUT 00475 (IAC), [25], 'factors such as citizenship and immigration status can sometimes strengthen, sometimes weaken the argument that the best interests of the child lie in remaining in the [host country]'. In that case, the Tribunal noted 'the fact that [the claimant] and the children are Indian citizens demonstrates that they have another country to go to and one in which, absent special circumstances, they can legitimately expect to enjoy the benefits of that country's citizenship'. See generally General Comment No 6 (n 12) [20], [84]; General Comment No 14 (n 17) [56]; UNHCR, UNHCR Guidelines (n 23) 67 [3].

¹⁵² See eg *ZH* [2011] 2 AC 166, [29] (noting the relevance of 'the level of the child's integration in [the host country] and the length of absence from the other country'); *LD v Secretary of State for the Home Department* [2010] UKUT 278 (IAC), [27] ('substantial residence as a child is a strong indication ... of what the best interests of the child requires'); *FM (Afghanistan) v Secretary of State for the Home Department* (Upper Tribunal (IAC), Appeal No AA/01079/2010, 10 March 2011) [108]. See also CRC art 20 (recognizing the 'desirability of continuity in a child's upbringing

among other things, on the availability of care arrangements for the child in the country of origin (Articles 20, 27).¹⁵³

An additional right critical to the best interests assessment in the immigration context is the child's right to be with her family.¹⁵⁴ In the majority of cases involving unaccompanied children, if the child's family can be located, the best interests of the child will generally be best served by reuniting the child with her family.¹⁵⁵ This is consistent with the protection against arbitrary interference with the family (Article 16), the obligation to respect the responsibilities, rights and duties of parents (Article 5) and the duty of non-separation (Article 9). Yet the principle of family unity is not absolute, and it is critical that family reunification is not invoked as an automatic trump card to justify a child's removal where that removal will be contrary to the child's best interests.¹⁵⁶ This is inherent in the structure of Article 9(1), which

and to the child's ethnic, religious, cultural and linguistic background'); General Comment No 6 (n 12) [84].

¹⁵³ *ZH* [2011] 2 AC 166, [29] (noting the need to consider 'where and with whom the child is to live and the arrangements for looking after the child in the other country'); *AJ (India) v Secretary of State for the Home Department* [2011] EWCA Civ 1191, [31] ('[w]hen considering the child's best interests, it must be in the context of the particular circumstances of the child's family'); *R (TS) v Secretary of State for the Home Department* [2010] EWHC 2614 (Admin), [31]–[32]; *ALJ and A, B and C's Application for Judicial Review* [2013] NIQB 88, [102]. See also General Comment No 6 (n 12) [85], recognizing that '[i]n the absence of the availability of care provided by parents or members of the extended family, return to the country of origin should, in principle, not take place without advance secure and concrete arrangements of care and custodial responsibilities upon return to the country of origin'. This is reflected, for instance, in the UK's policy on unaccompanied minors: see UKBA, Asylum Process Guidance (n 26) [17.7].

¹⁵⁴ See eg *ZH* [2011] 2 AC 166, [29] (noting the need to consider 'the strength of the child's relationships with parents or other family members which will be severed if the child has to move away'); *LD v Secretary of State for the Home Department* [2010] UKUT 278 (IAC), [26] ('[v]ery weighty reasons are needed to justify separating a parent from a minor child or a child from a community in which he or she has grown up and lived most of her life'); *Wan v Minister for Immigration and Multicultural Affairs* (2001) 107 FCR 133, [30].

¹⁵⁵ 'In order to pay full respect to the obligation of States under article 9 of the Convention to ensure that a child shall not be separated from his or her parents against their will, all efforts should be made to return an unaccompanied or separated child to his or her parents except where further separation is necessary for the best interests of the child, taking full account of the right of the child to express his or her views': General Comment No 6 (n 12) [81]. See also UNHCR, UNHCR Guidelines (n 23) 72 ('[r]esettlement is normally in the best interests of the child if it leads to family reunification'); European Commission, Communication from the Commission to the European Parliament and the Council—Action Plan on Unaccompanied Minors (2010–2014) [5.1] ('[i]t is likely that in many cases the best interest of the child is to be reunited with his/her family and to grow up in his/her own social and cultural environment').

¹⁵⁶ See eg *Ek v Canada (Minister of Citizenship and Immigration)* [2003] FCJ No 680, [33], where the Federal Court held that the immigration officer had erred in its conclusion that a child should be returned to Cambodia in order to be reunited with her parents and family. The Court considered that the officer had 'almost completely failed to analyse what hardship would be faced by [the child] if she were forced to leave Canada', giving only ' cursory mention to her establishment in Canada and her wishes' and '[n]o real consideration ... to her schooling or the bond she had with her aunt, uncle and cousins whom the evidence reveals are her current family'. See more generally General Comment No 6 (n 12) [81]–[83]; UNHCR, UNHCR Guidelines (n 23) 71–2; UNICEF (n 138) 316. For academic support, see McAdam, *Complementary Protection* (n 6) 181–2; J Bhabha,

specifies that a child may be separated from her parents where this is necessary for the best interests of the child. Although Article 9 expressly includes certain circumstances that may necessitate separation—most relevantly, cases involving abuse or neglect of the child by the parents’—the UNCRC has made clear that the list is not comprehensive and that other considerations may dictate that family reunion is not in the best interests of the child:

Family reunification in the country of origin is not in the best interests of the child and should therefore not be pursued where there is a ‘reasonable risk’ that such a return would lead to the violation of fundamental human rights of the child. Such risk is indisputably documented in the granting of refugee status or in a decision of the competent authorities on the applicability of *non-refoulement* obligations (including those deriving from article 3 of the CAT and articles 6 and 7 of the ICCPR). Accordingly, the granting of refugee status constitutes a legally binding obstacle to return to the country of origin and, consequently, to family reunification therein. Where the circumstances in the country of origin contain lower level risks and there is concern, for example, of the child being affected by the indiscriminate effects of generalized violence, such risks must be given full attention and balanced against other rights-based considerations, including the consequences of further separation. In this context, it must be recalled that the survival of the child is of paramount importance and a precondition for the enjoyment of any other rights.¹⁵⁷

In assessing whether family unification is appropriate, the decision-maker must take into account the views of the child and, consistent with Article 5 of the CRC, the views of the child’s parent or other interested party.

The best interests assessment is generally more complex in cases involving children that are accompanied by their parents. The more straightforward scenario is where the child’s parents are eligible to remain in the host State, for instance because the parents qualify for refugee status. In this situation it will almost always be in the best interests of the child to remain with their family. For instance, in *BP (Iran)* an Iranian girl, aged 10, was at risk of being removed to Iran alone after both her mother and father, also citizens of Iran, had been recognized as refugees in New Zealand.¹⁵⁸ The child was granted humanitarian protection on the basis that it was in her best interests ‘to be with both parents who are the people with responsibility for her

“‘Not a Sack of Potatoes’: Moving and Removing Children across Borders’ (2006) 15 Boston University Public Interest Law Journal 197, 204–5.

¹⁵⁷ General Comment No 6 (n 12) [82]. The Committee goes on to state (at [83]) that where family reunification is not possible in the destination country (for example, because of country conditions), a State’s obligations under art 10(1) of the CRC will be triggered; this art provides that ‘application by a child or his or her parents to enter or leave a State party for the purpose of family reunification shall be dealt with by State parties in a positive, human and expeditious manner’.

¹⁵⁸ *BP (Iran)* [2012] NZIPT 500965.

day-to-day care' and that '[g]iven that the parents will remain in New Zealand, it is in the ... child's best interests that she too be permitted to remain'.¹⁵⁹

The more difficult scenario is where neither the parents nor the child has any right to remain in the host State. In this situation there has been a tendency for decision-makers to start from an assumption that the parents will be removed and then assess the best interests of the child off the back of that assumption (generally resulting in a finding that it is in the best interests of the child to remain with their family and therefore be removed).¹⁶⁰ A more principled approach, consistent with Article 3 and the wider rights framework protected under the CRC, is to canvass the full range of options for the child, including the possibility of the entire family remaining in the host State, and then to assess which of those options is best suited to securing the realization of the child's rights.¹⁶¹ In the event that there are separate issues raised by a family member remaining in the host State—for example, where the child's parent has been convicted of a crime and is considered to be a risk to the safety of the host State—these concerns are addressed in the second stage of the best interests process.¹⁶²

A child's best interests are rarely determined by a single, overriding factor. The best interests assessment can thus not be approached as 'a simplistic or reductionist exercise'¹⁶³ but must entail consideration of a range of factors including any view held by the child, the child's individual circumstances and the extent to which the child will be able to enjoy her CRC rights in the country of destination. As the UNCRC has explained, the relevance and weight

¹⁵⁹ *ibid* [16]. For a similar result, see *AD (Czech Republic)* [2012] NZIPT 500876, [12]–[15]; *BL (Iran)* [2012] NZIPT 500963.

¹⁶⁰ See, by way of illustration, *IE v Secretary of State for the Home Department* [2013] CSOH 142, where the primary decision-maker's analysis of the best interests of the child was premised upon a factual assumption that the child's mother would be removed.

¹⁶¹ UNHCR, UNHCR Guidelines (n 23) 67. See eg *IE v Secretary of State for the Home Department* [2013] CSOH 142, [14] ('[I]t seems to me that as a matter of law, as well as logic, the respondent was not entitled to proceed upon a factual assumption that the [parent] would be removed when assessing what was in the best interests of the children'); *Kambo v Canada (Minister of Citizenship and Immigration)* [2012] FCJ No 936, [39]–[52]. This approach has also been endorsed in cases involving the removal of a parent where the child has a legal right to remain. For example, in *Ye v Minister of Immigration* [2008] NZCA 291, [407] (Hammond and Wilson JJ), the New Zealand Court of Appeal held that the immigration officer had asked the wrong question by focusing on whether it would be in the best interests of the Ye child to return to China with their mother. In the Court's view the critical question was in fact whether there was 'something about the circumstances of the children which meant that [their mother] really should be allowed to stay—perhaps for some defined period of time—in New Zealand'.

¹⁶² It may, however, be the case that where a family member is a criminal it will not be in the child's interests to remain with that family member. This will require an assessment of the specific situation and circumstances of the child: see text (n 132). The point is made by Lady Hale in *HH* [2013] 1 AC 338, [33]: '[T]here is ... a strong public interest in ensuring that children are properly brought up. This can of course cut both ways: sometimes a parent may do a child more harm than good and it is in the child's best interests to find an alternative home for her. But sometimes the parents' past criminality may say nothing at all about their capacity to bring up their children properly'.

¹⁶³ *Secretary of State for the Home Department v MK* [2011] UKUT 00475 (IAC), [21].

to be afforded to each element ‘will necessarily vary from child to child and from case to case, depending on the type of decision and the concrete circumstances’.¹⁶⁴ In cases where there is a tension or even a clear conflict between factors—for instance, where family reunification conflicts with the need to guarantee the child’s survival and development or indeed with the child’s or parent’s own individual view—the decision-maker must weigh up the various factors in order to reach a determination as to what is in the child’s best interests.¹⁶⁵

Where a decision-maker determines that removal is not in the best interests of the child it is important to keep in mind the cumulative strength of the factors that fed into that determination, as this will be relevant to the balancing exercise undertaken in the second stage of the best interests assessment.¹⁶⁶ For example, if all the factors relevant to the best interest of the child determination overwhelmingly support the child remaining in the host State, then strong countervailing factors will be required to justify an outcome that is inconsistent with the child’s best interests. On the other hand, in a borderline case—where there are good arguments that support a determination that it is in the child’s best interests to return to her home State—less will be required by way of countervailing factors.¹⁶⁷

B. Stage 2: The Balancing Exercise

Article 3 provides that in all actions ‘concerning children ... the best interests of the child shall be a *primary* consideration’.¹⁶⁸ The adoption of the indefinite article (‘a’ rather than ‘the’) indicates that the child’s best interests are ‘not to be considered as the single overriding factor’ and thus affords sufficient flexibility, ‘at least in certain extreme cases’, to enable decision-makers to take into account a broader range of interests.¹⁶⁹ Yet while this means that identifying a child’s best interests will not ‘lead inexorably to a decision in conformity with those interests’,¹⁷⁰ it does not mean that a decision that

¹⁶⁴ General Comment No 14 (n 17) [80].

¹⁶⁵ *ibid* [81]. See further UNHCR, Field Handbook (n 51) 67.

¹⁶⁶ ‘The need to keep in mind the “overall” factors making up the best interests of the child consideration must not be downplayed’: *Secretary of State for the Home Department v MK* [2011] UKUT 00475 (IAC), [24].

¹⁶⁷ *ibid*. See also *Zoumbas v Secretary of State for the Home Department* [2013] 1 WLR 3690, [13] (‘the decision-maker must evaluate the child’s best interests and in some cases they may point only marginally in one, rather than another, direction’); *Ye v Minister of Immigration* [2008] NZCA 291, [130]–[133].

¹⁶⁸ CRC art 3(1) (emphasis added). The author has benefited from conversations with Syd Bolton and Catriona Jarvis on the issues raised in this section.

¹⁶⁹ Alston (n 113) 13. For example, one of the drafters noted that ‘the interests of the child should be a primary consideration in actions concerning children but were not the overriding, paramount consideration in every case, since other parties might have equal or even superior legal interests in some cases (eg medical emergencies during childbirth)’: UN Doc E/CN.4/L.1575, [24].

¹⁷⁰ *ZH* [2011] 2 AC 166, [26] (Lady Hale).

conforms with a child's best interests can be easily displaced by reference to some other interest.¹⁷¹ As Alston explains, the formulation adopted by the drafters imposes a 'burden of proof on those seeking to achieve such a non-child-centered result to demonstrate that, under the circumstances, other feasible and acceptable alternatives do not exist'.¹⁷² Thus, in the context of a child seeking international protection, where removal of the child is contrary to the child's best interests, those interests must be afforded *substantial* weight¹⁷³ and the decision-maker must provide a compelling and evidence-based justification where they intend to reach a decision contrary to the child's best interests.¹⁷⁴

The weight to be given to the child's best interests has been the subject of considerable debate in national courts and tribunals.¹⁷⁵ In *ZH*, Lady Hale recognized that the child's best interests might be outweighed by 'the cumulative effect of other considerations'¹⁷⁶ but underlined that a decision-maker must not 'treat any other consideration as inherently more significant than the best interests of the children'.¹⁷⁷ In this particular case Lady Hale considered that the competing interests relied upon by the government—a need to maintain immigration control, the mother's immigration history, and the precariousness of her immigration status when the children were born—were insufficient to outweigh the fact that the children's best interests were plainly served by remaining in the UK with their mother.¹⁷⁸ In a separate

¹⁷¹ '[W]hilst the best interests of the child is a primary consideration, and not the only or the paramount consideration, it is much, much more than merely a consideration to which regard must be had': *R (Mansoor) v Secretary of State for the Home Department* [2011] EWHC 832 (Admin) [32]. In other words, '[w]hilst it has been judicially recognised that a primary consideration is not the same as a paramount or determinative consideration ... it must at least mean a consideration of the first importance': *R (MXL) v Secretary of State for the Home Department* [2010] EWHC 2397 (Admin) [84].

¹⁷² Alston, 'The Best Interests Principle' (n 113) 13. See also Alston and Gilmour-Walsh (n 134) 12; Tobin, 'Judging the Judges' (n 123) 588–9; McAdam, *Complementary Protection* (n 6) 180.

¹⁷³ *Baker v Canada* [1999] 2 SCR 817, [75]. *Contra* the approach taken by the Canadian Federal Court of Appeal in *Legault v Canada (Minister of Citizenship and Immigration)* [2002] 4 FC 346, [12], which determined that, once the decision-maker has made an assessment as to what is in the best interests of the child, 'it is up to her to determine what weight, in her view, it must be given in the circumstances'. This position is impossible to reconcile with the language of art 3.

¹⁷⁴ See generally CORAM Children's Legal Centre, 'Case for the CORAM Children's Legal Centre', Submission in *HH v Deputy Prosecutor of the Italian Republic, Genoa*, [45]–[46] (copy on file with author); CORAM Children's Legal Centre, 'Note for the CORAM Children's Legal Centre', Supplementary submission in *HH v Deputy Prosecutor of the Italian Republic, Genoa*, [9]–[10] (copy on file with author).

¹⁷⁵ See eg *HH* [2013] 1 AC 338, [11]–[15]; *R (Meaza Asefa) v Secretary of State for the Home Department* [2012] EWHC 56, [65]; *R (Mansoor) v Secretary of State for the Home Department* [2011] EWHC 832 (Admin), [32]–[35]; *ZH* [2011] 2 AC 166, [25]–[28] (Lady Hale), [46] (Lord Kerr); *Ye v Minister of Immigration* [2009] NZSC 76, [52]; *Ye v Minister of Immigration* [2008] NZCA 291, [59]–[79] (Glazebrook J); *Wan v Minister for Immigration and Multicultural Affairs* (2001) 107 FCR 133, [32].

¹⁷⁶ *ZH* [2011] 2 AC 166, [26].

¹⁷⁷ *ibid.*

¹⁷⁸ *ibid* [33].

concurring opinion, Lord Kerr similarly acknowledged that the best interests principle ‘is not a factor of limitless importance in the sense that it will prevail over all other considerations’,¹⁷⁹ but took the view that ‘[i]t is a factor ... that must rank higher than any other’.¹⁸⁰ According to Lord Kerr, ‘[w]here the best interests of the child clearly favour a certain course, that course should be followed unless countervailing reasons of considerable force displace them.’¹⁸¹

There has been judicial debate as to whether the decision of Lord Kerr goes further than the decision of the majority as regards the weight to be afforded to the best interests of the child.¹⁸² It has been suggested that while Lady Hale left open the possibility that there may be more than one primary consideration, Lord Kerr adopted a more hardline view that the best interests of the child must rank higher than *any* other consideration. Lord Kerr has since clarified that he did intend to express the position more strongly than the majority, explaining that ‘[w]hat [he] was seeking to say was that ... no factor must be given greater weight than the interests of the child’.¹⁸³ The distinction may be semantic,¹⁸⁴ but to the extent that there is any difference between the two positions, Lady Hale’s construction is more neatly aligned with the language of Article 3.¹⁸⁵

Both the UNCRC and UNHCR suggest that only rights-based interests can outweigh the best interests of a child.¹⁸⁶ Although certainly positive from a

¹⁷⁹ *ibid* [46].

¹⁸⁰ *ibid*.

¹⁸¹ *ibid*. Lord Kerr went on to note that ‘[w]hat is determined to be in a child’s best interests should customarily dictate the outcome of cases such as the present [involving the removal of a child from a host State], therefore, and it will require considerations of substantial moment to permit a different result’.

¹⁸² See eg *R (BN) v Secretary of State for the Home Department* [2011] EWHC 2367 (Admin), [130]–[132]; *Lee v Secretary of State for the Home Department* [2011] EWCA Civ 348, [15].

¹⁸³ *HH* [2013] 1 AC 338, [145]. Lord Kerr notes that in suggesting that the child’s interests should be ‘given a primacy of importance’ he was not seeking to ‘stoke the debate about the distinction between “a factor of primary importance” and “the factor of primary importance”’. What [he] was seeking to say was that, in common with the opinion of the High Court of Australia [sic — Federal Court of Australia] in *Wan* [(2001) 107 FCR 133], no factor must be given greater weight than the interests of the child’.

¹⁸⁴ See *Zoumbas v Secretary of State for the Home Department* [2013] 1 WLR 3690, [12].

¹⁸⁵ Lady Hale’s construction has been preferred in subsequent UK decisions. See, in particular, *Zoumbas v Secretary of State for the Home Department* [2013] 1 WLR 3690, [10]–[13]. In *R (Meaza Asefa) v Secretary of State for the Home Department* [2012] EWHC 56, [65], Langstaff J noted that ‘the use of “a primary” consideration assumes, at least on a theoretical level, that other considerations may be sufficiently compelling to rank equally in weight, even if most will be secondary considerations and will not’. But *contra* the recent statements of the UNCRC in its General Comment No 14 (n 17), which states that ‘[t]he expression “primary consideration” means that the child’s best interests may not be considered on the same level as all other considerations’ (at [37]) and that ‘a larger weight must be attached to what serves the child best’ (at [39]). This ‘strong position’ is justified on the basis of the ‘special situation of the child: dependency, maturity, legal status and, often, voicelessness’ (at [37]).

¹⁸⁶ General Comment No 6 (n 12) [86]; UNHCR, UNHCR Guidelines (n 23) 76. See also *ZH* [2011] 2 AC 166, [27]–[28] (Lady Hale); *Sanade v Secretary of State for the Home Department*

protection standpoint, such a strict interpretation does not sit comfortably with the language of Article 3 which places no limitation on the range of interests that may be taken into account and balanced against the best interests of a child. In *ZH*, Lady Hale observed that the distinction between rights-based and non-rights-based arguments was difficult to understand, particularly given that wider interests, such as protecting the economic well-being of a host country, are also concerned with protecting the rights of individuals.¹⁸⁷ It may simply be the case, as Lady Hale suggests in *ZH*, that the approach adopted by the UNCRC and UNHCR reflects the reality that an argument that a child and/or her parents remaining in a host country poses a specific risk to the community will more easily outweigh the best interests of a child than an argument that the child and/or her parent's continued presence poses a more general threat to the economic well-being of the host country.¹⁸⁸ The question is one of weight rather than admissibility.

The two interests most commonly relied upon to militate against what is in a child's best interests are the maintenance of immigration control and the protection of members of host community as a result of criminal activity or other serious misconduct by the child or the child's family member. As regards the former, it is self-evident that '[i]mmigration control and child protection/making the best interests of a child a primary consideration do not always pull in the same direction'.¹⁸⁹ Although a legitimate consideration—given that maintaining the integrity of a system of immigration control is one of the means by which a State protects its economic well-being and national security¹⁹⁰—decision-makers have appropriately recognized that a general concern about maintaining immigration control will on its own generally be insufficient to justify an outcome inconsistent with the best interests of a child.¹⁹¹

Although not dispositive, evidence that the continued presence of a child and/or a child's parent in a host State poses a risk to members of the community may more easily outweigh the best interests of a child. This interest is most commonly raised where a family member of the child has engaged in

[2012] UKUT 00048 (IAC), [65]; *R (Mansoor) v Secretary of State for the Home Department* [2011] EWHC 832 (Admin), [32].

¹⁸⁷ *ZH* [2011] 2 AC 166, [28].

¹⁸⁸ *ibid*; *HH* [2013] 1 AC 338, [141] (Lord Kerr).

¹⁸⁹ *R (AN (a child) and FA (a child))* [2012] EWCA Civ 1636, [91].

¹⁹⁰ *R (Mansoor) v Secretary of State for the Home Department* [2011] EWHC 832 (Admin), [34].

¹⁹¹ *ZH* [2011] 2 AC 166, [28] (Lady Hale), [46] (Lord Kerr); *Ye v Minister of Immigration* [2009] NZSC 76, [31] ('[w]e do not, however, consider it can have been intended, consistently with relevant international obligations, that a general concern about the integrity of New Zealand's borders will be enough in itself to demonstrate that it would be contrary to the public interest to allow a person fulfilling the first criterion to remain in New Zealand'); *R (Mansoor) v Secretary of State for the Home Department* [2011] EWHC 832 (Admin), [35]. The UNCRC suggests that arguments relating to 'general migration control' are not rights-based and can therefore not override an outcome that is in the best interests of the child: UNCRC, General Comment No 6 (n 12) [86]. See also UNCRC, Report of the 2012 Day of General Discussion (n 43) [73], noting that 'States should make clear in their legislation, policy and practice that the principle of the child's best interest takes priority over migration and policy or other administrative considerations'.

criminal or other serious misconduct. Although a child must not be punished for the conduct of her parents,¹⁹² the criminal activity of a family member, and the attendant risk it may pose to the host community, may militate against a decision that is in the best interests of the child—for instance, keeping the family together in the host State—and necessitate the removal of that family member.¹⁹³ Critically, in this scenario it will not necessarily follow that the child will be removed from the host State. Rather, it is necessary to revisit the first stage of the best interests assessment and assess whether it would be in the child's best interests to join the family member overseas or to remain in the host State notwithstanding the parent's removal.

Other countervailing factors that have been relied upon by decision-makers in undertaking the balancing exercise include: the integrity of the international system of extradition;¹⁹⁴ deterrence of parents sending children to a host State as 'anchor children';¹⁹⁵ the integrity of the practical application of Dublin II,¹⁹⁶ and the deterrence of people smuggling networks.¹⁹⁷ Decision-makers have, however, recognized that the Article 3 balancing exercise should not be limited to a consideration of the interests that conflict with the child's best interests. Most critically, leading courts have accepted that there is an independent public interest in promoting the best interests of children. As the UK Supreme Court held in a case involving the extradition of a child's parent, '[i]t is not just a matter of balancing the private rights of children against the public interest in extradition, because there is also a wider public interest and benefit to society in promoting the best interests of

¹⁹² *ZH* [2011] 2 AC 166, [44] (Lord Hope).

¹⁹³ See eg *Lee v Secretary of State for the Home Department* [2011] EWCA Civ 348 (the conduct of drug offending father justified the father's deportation and separation from his young son, despite the fact that family unification in the UK was in the children's best interests); *Omotunde v Secretary of State for the Home Department* [2011] UKUT 00257 (father's conviction for two counts of conspiracy insufficient to outweigh the child's best interests in the family remaining together in the UK).

¹⁹⁴ Again, this generally arises where a family member of the child is the subject of an extradition request. See eg *HH* [2013] 1 AC 338. In that case Lady Hale made clear that '[i]t is not enough to dismiss these cases in a simple way—by accepting that the children's interests will always be harmed by separation from their sole or primary carer but also accepting that the public interest in extradition is almost always strong enough to outweigh it. There is no substitute for ... careful examination': at [34]. See also *Santhirajah v Attorney-General* [2012] FCA 940, [320].

¹⁹⁵ See eg *Children's Aid Society of Toronto v MM* [2010] OJ No 2550, [19], where the Ontario Court of Justice noted that '[t]here is no question of encouraging in any fashion or manner whatsoever the act of sending and abandoning foreign children in Canada'. States have tended to rely on anecdotal evidence of this practice: see McAdam, *Complementary Protection* (n 6) 182 fn 70.

¹⁹⁶ *ALJ and A, B and C's Application for Judicial Review* [2013] NIQB 88, [98]; *R (Mozaffar) v Secretary of State for the Home Department* [2014] EWCA Civ 854, [42].

¹⁹⁷ See eg recent policies in Australia: M Gordon, 'People Sent Offshore Will Include Children', *Sydney Morning Herald* (online), 22 August 2013. See generally M Foster and J Pobjoy, 'A Failed Case of Legal Exceptionalism? Refugee Status Determination in Australia's "Excised" Territories' (2011) 23(4) *IJRL* 583.

its children'.¹⁹⁸ Children are after all 'a country's most valuable asset for the future'¹⁹⁹ and there is thus a strong public interest 'in ensuring that children are properly brought up'.²⁰⁰ Decision-makers have also sensibly affirmed that there is an autonomous public interest in the preservation and protection of the family unit, underlining that 'the preservation and protection of the family is a matter of significant social importance'.²⁰¹

How a decision-maker ultimately balances the best interests of the child with other relevant interests will depend on the circumstances of the individual child. As noted above, it is important that the decision-maker keep in mind the overall factors that make up the substantive determination as to the child's best interests, as the cumulative strength of those factors is central to the balancing exercise.²⁰² As explained by the UK Upper Tribunal, if 'all the factors weighed in the best interests of the child consideration point overwhelmingly in favour of the child and/or relevant parent(s) remaining in the UK, that is very likely to mean that only very strong countervailing factors can outweigh it'.²⁰³ If the decision-maker ultimately determines that the child's best interests are outweighed by other interests, the decision-maker must demonstrate that no alternative outcome exists that is more compatible with the child's best interests.²⁰⁴

IV. CONCLUSIONS

The CRC provides the most comprehensive articulation of the minimum obligations that a State owes to a child, both generally and in the migration context. The CRC is widely regarded as a 'critical milestone for the

¹⁹⁸ *HH* [2013] 1 AC 338, [25] (Lady Hale). This argument is developed at length in the *amicus curiae* submissions of the CORAM Children's Legal Centre in that case: 'The special protection to be accorded to children and the obligation to implement the best interests principle are not merely matters of private individual rights to be balanced against a public interest in implementing extradition arrangements, they are as important as the maintenance of effective criminal justice systems and, it may justifiably be said, significantly more important than the public interest in the maintenance of effective immigration control system and the public interest in international comity': CORAM Children's Legal Centre, 'Case for the CORAM Children's Legal Centre', Submission in *HH v Deputy Prosecutor of the Italian Republic, Genoa*, [8] (copy on file with author).

¹⁹⁹ *Re X (a minor)* [1975] Fam 47, 52. As Freeman notes, 'giving greater weight to children's interests maximizes the welfare of society as a whole ... Putting children first is a way of building for the future': Freeman (n 137) 41.

²⁰⁰ *HH* [2013] 1 AC 338, [33] (Lady Hale).

²⁰¹ *Singh v Minister of Immigration* [2012] NZIPT 500067, [96]. In *Manase v Minister of Immigration* [2012] NZIPT 500522, [105], the New Zealand Tribunal similarly noted that '[i]t is beneficial to society to have stable, supportive families as the fundamental societal structure'. See also *Loumoli v Minister of Immigration* [2012] NZIPT 50042, [99]–[102]; *Vaitaiki v Minister of Immigration* [2012] NZIPT 500060, [109]–[111]; *AH (South Africa)* [2011] NZIPT 500228.

²⁰² *Secretary of State for the Home Department v MK* [2011] UKUT 00475 (IAC), [24]. See also *Ye v Minister of Immigration* [2008] NZCA 291, [130]–[133]. See text (n 165).

²⁰³ *Secretary of State for the Home Department v MK* [2011] UKUT 00475 (IAC), [24].

²⁰⁴ See text (n 171).

protection of children',²⁰⁵ promoting a construction of children as individual rights-bearers with distinct problems and distinct needs. As UNHCR has emphasized, 'the CRC requires perhaps the most exacting standards for protection and assistance to minors under any international instrument' and provides 'a valuable frame ... for any consideration of asylum issues as they affect children'.²⁰⁶ Although the Refugee Convention may well remain the cornerstone of the international refugee protection regime,²⁰⁷ it is becoming increasingly clear that the CRC provides a critical legal and moral benchmark for the treatment of children and that Article 3 may, in certain circumstances, provide a more appropriate and more child-friendly gateway for assessing the protection needs of a child seeking international protection.²⁰⁸ This article has attempted to demonstrate the capacity of Article 3 to provide an independent source of international protection outside the traditional refugee protection regime. As Part I identifies, the argument advanced here is neither an unfamiliar nor an entirely aspirational one, with both UNHCR and the UNCRC endorsing the argument that Article 3 provides an independent source of protection, and increased engagement with Article 3 by national decision-makers in a range of migration contexts. Part II of the article drew from this still reasonably nascent jurisprudence to outline a number of general principles to guide the application of Article 3 as an independent source of international protection. It is hoped that the framework outlined here will provide a platform for further discussion and debate, and may in the longer term strengthen the protection mechanisms available to children in need of international protection.

²⁰⁵ M Freeman, 'The Human Rights of Children' (2010) 63(1) *Current Legal Problems* 1, 20.

²⁰⁶ E Feller, Statement delivered to the EU Seminar on Children affected by Armed Conflict and Displacement (Sweden, 1 March 2001). See generally Pobjoy (n 6).

²⁰⁷ UNHCR ExCom, Conclusion on the Provision of International Protection including through Complementary Forms of Protection No 103 (LVI) (7 October 2005)

²⁰⁸ See (n 8).