Reconstructing the European Court of Human Rights' Article 8 Jurisprudence in Deportation Cases: The Family's Right and the Public Interest

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ABSTRACT

This article rationalises the case law of the European Court of Human Rights (ECtHR) under Article 8 of the European Convention on Human Rights in deportation cases involving children. The European Court of Human Rights engages in a balancing exercise between the right to family life of the deportee's family on the one side, and the public interest in deportation on the other. This article expands on existing case law analysis by suggesting that in deportation case the Court considers Article 8 as a form of commonly held right, rather than an individual right held by one member of the family. Furthermore, the balance is argued to be constructed as a relationship between two factors on both sides, rather than of a sole factor on either side as being determinative. This article concludes that the best interests of the child (one of the '*Üner* criteria') is not adequately reflected in the Court's deportation decision-making practice.

KEYWORDS: human rights, deportation, children, family life, Article 8 European Convention on Human Rights, *Üner v Switzerland*

1. INTRODUCTION

In this article I seek a rationalisation of the deportation case law of the European Court of Human Rights (ECtHR or 'the Court'), under Article 8 of the European Convention on Human Rights (ECHR),[1] in deportation cases involving children. The ECtHR engages in a balance between the right to family life of the foreign national offender's family on one side, and the public interest in deportation on the other.

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[1] 1950, ETS 005.

This article proceeds with four substantive Sections. The first introduces the ECtHR's statement of doctrine, the so-called '*Üner* criteria',[2] which it claims guides its decision-making in deportation cases. I examine critiques of the *Üner* criteria from within the Court and from academic commentary, and describe how academic comment has sought and failed to find a rational, non-arbitrary, jurisprudence within the ECtHR's Article 8 of the ECHR deportation case law.

Secondly, I argue that the ECtHR's approach to Article 8 is best understood as the Court viewing family life as a commonly held right: a right that examines the family of foreign national offenders as a whole, rather than as a right that is held by individual persons within the family. This characteristic of being commonly held provides the super-structure of the decision-making model of balancing presented by the ECtHR.

Thirdly, I examine how the ECtHR constructs the balance between the different considerations inherent in family life. I suggest a model of the ECtHR's balancing exercise which is constructed from four core concerns; the *value* of family life and the *gravity* of the interference with family life on the one side, and the pre-existing *importance* of deportation and the *severity* of offending on the other. I argue that this relationship between factors in the balancing exercise accounts more fully for the ECtHR's case law than previous academic investigations. Finally, I consider the political dimension to these cases and whether the controversial nature of deportation might also help account for why the best interests of the child appear marginalised in ECtHR judgments concerning deportation, in contrast to its apparent approach in other areas of law affecting children.

The aim of this article is to attempt to find the pattern within the ECtHR's Article 8 deportation case law. The purpose is not to defend the ECtHR against the claims of arbitrary decision-making which have built up around its Article 8 case law, but instead to open up that

[2] *Üner v Netherlands* Application No 46410/99, Merits, 18 October 2006.

jurisprudence to the possibility of more sustained critique of where its case law may fail to uphold the rights of the individual. This article takes up one particular critique with respect to how the ECtHR addresses the best interests of the child, and I argue that despite its claim to take into account the best interests of the child as a separate *Üner* criterion, the mode of the ECtHR's decision-making does not permit it to do so.

The analysis in this article is based on a close reading of the ECtHR's Article 8 ECHR deportation case law. I have selected for inclusion in my analysis only those cases identified through the HUDOC online database as those: (a) engaging Article 8 ECHR, (b) about an adult individual who is not a national of the States Party, and who is liable for deportation from the state because of a prison sentence served pursuant to conviction of a criminal offence, and (c) where the foreign national offender has a biological child, or parental relationship with a non-biological child, in the deporting state. The reason for these criteria is that the foreign national offender in the ECtHR case would in the UK law be likely deemed a 'foreign criminal'[3] who is liable for deportation. These criteria therefore exclude cases which the ECtHR would refer to as 'deportation', but which in the UK would be labelled as 'removal'. Removal from the UK applies simply 'if the person requires leave to enter or remain in the United Kingdom but does not have it'[4] and requires no element of criminality.

I am interested in deportation cases affecting children because they engage more of the *Üner* criteria, and because the larger number of individuals affected by the deportation of the

[3] Section 117D(2) Nationality, Immigration and Asylum Act 2002, provides:

> "foreign criminal" means a person—
> (a) who is not a British citizen,
> (b) who has been convicted in the United Kingdom of an offence, and
> (c) who—
> (i) has been sentenced to a period of imprisonment of at least 12 months,
> (ii) has been convicted of an offence that has caused serious harm, or
> (iii) is a persistent offender.

[4] Section 3(1) Immigration Act 1971 (UK).

foreign national offender makes the decision-making process more complex for the reviewing court.

2. THE EUROPEAN COURT OF HUMAN RIGHT'S STATEMENT OF DOCTRINE IN ARTICLE 8 DEPORTATION CASES: THE *ÜNER* CRITERIA

The focus of the ECtHR's analysis in deportation decisions is on the balancing exercise between the right to family life of Article 8(1) OF THE ECHR on the one hand and the legitimate aims for interference included in Article 8(2).[5] In the 2001 judgment of *Boultif*, the ECtHR felt 'called upon to establish guiding principles'[6] in deciding deportation cases which engage Article 8 ECHR. These were expanded by the Grand Chamber in *Üner*[7] as being:

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

[5] Pirker, *Proportionality Analysis and Models of Judicial Review: A Theoretical and Comparative Study* (2013) at 188.

[6] *Boultif v Switzerland* Application No 54273/00, Merits and Just Satisfication, 2 November 2001 at para 42.

[7] supra n 2.

- whether there are children of the marriage, and if so, their age;
- the seriousness of the difficulties which the spouse is likely to encounter in the country to which the applicant is to be expelled
- the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled; and
- the solidity of social, cultural and family ties with the host[8] country and with the country of destination.[9]

This article attempts to make rational sense of how the ECtHR applies the numerous *Üner* criteria. Adoption of the *Üner* criteria was in part a response to a charge of arbitrariness; indeed, one of the ECtHR's own judges described its deportation case law as being 'tainted with arbitrariness.'[10] Academic analysis has generally agreed with this assessment. Dembour's review of the deportation case law in 2003 concluded that the facts of individual cases provided 'little help in explaining the variation' in decision-making outcome.[11] Warbrick likewise

[8] The literature tends to depreciate the use of 'host state' as it perpetuates the notion of migrant guest-hood. For example, see Gibney, 'Deportation, Crime, and the Changing Character of Membership in the United Kingdom' in Franko Aas and Bosworth (eds), *The Borders of Punishment: Migration, Citizenship, and Social Exclusion* (2013) at 232. This article uses the term 'deporting state' or 'deporting country', apart from in quotations in which 'host' is used in the original. Similarly, 'country of origin' is used only where quoting a source as 'country of origin' contains within it an implicit judgement as to the place to which the person belongs, as well as failing to reflect the fact that a person may be removed or deported even if they were born in the deporting state. 'Receiving state' is therefore preferred throughout this article.

[9] *Üner v The Netherlands,* supra n 2 at paras 57-58.

[10] *Boughanemi v France* Application No 16/1995/522/608, Merits and Just Satisfaction, 27 March 1996, Dissenting Opinion of Judge Martens.

[11] Dembour, 'Human Rights Law and National Sovereignty in Collusion: The Plight of Quasi-Nationals at Strasbourg' (2003) 21 *Netherlands Quarterly of Human Rights* 63 at 82.

concluded that it was 'undeniable' that 'there is a degree of unpredictability about the outcome of cases under Article 8'[12] and Spijkerboer argued that the ECtHR's case law is 'inconsistent'.[13]

Others have sought an empirically sound and definitive doctrinal statement in response to the content of Article 8 ECHR, such as that deportation will be disproportionate when the foreign national offender is a second-generation migrant[14] or where the child is not adaptable.[15] However each have been faced with decisions which appear to contradict such definitive statements. Summarising the case law, Janis *et al* conclude that: 'Close individualized examination of the applicant's family life in the deporting and destination countries, and of the applicant's record of criminal behaviour, has resulted in a jurisprudence about which few generalizations are possible.'[16]

The *Üner* criteria themselves, however, are problematic. Judges dissenting in *Üner* observed that the criteria are predominantly factors that point towards finding in favour of the deportee and their family. Only one criterion – the nature and seriousness of the offence committed by the applicant – belongs on the public interest side of the balance.[17] The multitude of criteria therefore also causes problems of weight and priority which the ECtHR does not address directly either in the *Üner* judgment,[18] or in its subsequent case law.

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[12] Warbrick, 'The Structure of Article 8' (1998) 1 *European Human Rights Law Review* 32 at 33.

[13] Spijkerboer, 'Structural Instability: Strasbourg Case Law on Children's Family Reunion' (2009) 11 *European Journal of Migration and Law* 271 at 279-80.

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

[15] Buquicchio-De Boer, 'Children and the European Convention on Human Rights' in Matscher and Petzold (eds), *Protecting Human Rights: The European Dimension,* 2nd edn (1990) at 81.

[16] Janis, Kay and Bradley, *European Human Rights Law: Text and Materials,* 3rd edn (2010) at 410.

[17] *Üner v Netherlands* supra n 2, Joint Dissenting Opinion of Judges Costa, Zupančič, and Türmen, at para 81.

[18] ibid at para 82.

I argue that the ECtHR's use of the *Üner* criteria in its subsequent case law can be described in rational terms. However, previous case analysis seeking only one definitive doctrinal statement or variable factor on each side found examples where apparently similar cases lead to disparate outcomes. I argue that there exists a more complex relationship between factors in the balancing exercise than has previously been presupposed by the scholarship; a relationship outlined in sections 3 and 4.

3. ARTICLE 8 ECHR IN THE EUROPEAN COURT'S JURISPRUDENCE: INDIVIDUAL RIGHT OR COMMONLY-HELD RIGHT?

The first claim this article makes is that the ECtHR approaches the family life aspect of Article 8 ECHR as a commonly-held right. By this I mean that rather than assessing whether the actions of the state in deporting a foreign national offender have violated the family life right of one individual, or a series of individuals, the ECtHR assesses whether the right of the family as a common group has been violated. In this article I describe the ECtHR's approach to family life as a commonly-held right. In coining this slightly ham-fisted term, I refrain from using the term collective right to describe this conception of family life. It may be that my description of a commonly-held right is contiguous with what is understood by the pre-existing term of art as collective rights (such as the rights of minorities, rights of indigenous communities, the right to self-determination etc).[19] In the alternative, this characteristic of being commonly-held (or collective) may be a characteristic shared with other ECHR rights which are relational in nature, such as the right to marry (Article 12 ECHR) or the right to congregational worship

[19] On collective rights generally, see inter alia: Graham, 'Reconciling Collective and Individual Rights: Indigenous Education and International Human Rights Law' (2010) 15 *UCLA Journal of International Law and Foreign Affairs* 83; Juviler, 'Are Collective Rights Anti-Human? Theories on Self-Determination and Practice in Soviet Successor States' (1993) 11 *Netherlands Quarterly of Human Rights* 267; Sanders, 'Collective Rights' (1991) 13 *Human Rights Quarterly* 368; Dinstein, 'Collective Human Rights of Peoples and Minorities' (1976) 25 *International and Comparative Law Quarterly* 102.

(under the right to religion, Article 9 ECHR). However, for the purpose of this article, nothing turns on whether Article 8 ECHR being commonly-held is the same as, or different from, collective or other relational rights, and so this is not a question that I explore here.

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

A. An Individual Right

Approaching the right to family life as an individual right would place the emphasis on the relationship between the foreign national offender, their child/ren, and their spouse/partner. From this view, the interference is with the relationship that one person has with another. This makes sense because the interest being protected by the right to family life is one's ability to establish and maintain family relationships. If Article 8 ECHR is approached as an individual's right to relationship with family, then the question of who is the individual rights-holder is of fundamental importance; the shifting lens through which the enquiry is conducted has significant potential to alter the assessment as to whether the interference with family life is proportionate. Even the same factual matrix, viewed through a lens which focuses on the foreign national offender, or their partner, or the child, is liable to point to different outcomes of proportionality.

If the right to family relationship is the foreign national offender's individual right, then it affects how the facts of that relationship are presented, processed and understood. An

example of this is the case of *Antwi v Norway*,[20] where viewing the relationship through the lens of the foreign national offender or through the child alters the presentation of the factual issues at stake. Mr Antwi was a Ghanaian national with no leave to remain in Norway and who had committed immigration offences in order to enter the country. He had lived and grown up in Ghana until he was 23 years old, when he committed his offences to enter Europe. As an adult he was personally responsible for his offending. There were no issues raised suggesting that Mr Antwi was forced to leave Ghana, nor that he was unable to return there and reintegrate into Ghanaian society. Indeed, he had returned to marry there before entering Norway again on false papers. Although Mr Antwi actively engaged with his daughter's upbringing, she presented no special care needs to make her dependent on his care or to suggest that she could not be cared for by her mother.

In contrast, the same factual circumstances considered through the lens of the child's perspective appear considerably different. The child (unnamed in the ECtHR judgment) was eleven years old and a Norwegian national from birth, having been born there. She was described as being well integrated into Norwegian society and spoke Norwegian at home. It was her father who she spent most time with, and he supported her education through help with homework and being the parental contact for school. He facilitated her participation in extra-curricular sports activities. She had only visited Ghana three times (re-entering Norway legally as a citizen) and had little knowledge of the languages of Ghana. Her mother, with whom she lived in a nuclear family unit with Mr Antwi, was a naturalised Norwegian national, and her maternal grandparents and uncles/aunts were resident in Norway. Because the child was a Norwegian national, it could not be said that there was any public interest in her removal; the

[20] Application No 26940/10, Merits and Just Satisfaction, 14 February 2012.

child did not offend, posed no risk to the public, and could not be said to represent a conflict with the immigration law of the state.

The factual matrix is identical and shared with the foreign national offender, but the lens through which those facts are viewed – the family life relationship of the child or the adult – fundamentally alters the dimensions of the balancing exercise.[21]

Pursuing a lens that is exclusively and individually focussed on either the foreign national offender, or their spouse/partner, or on the child, presents theoretical problems. If one pursues a balancing exercise analysis through the lens of the foreign national offender's relationship right, then the child's interests (let alone their *best* interests) are excluded from the ECtHR's consideration. This is because the best interests of the child are not exhausted by consideration of the relationship a child has with one family member; they encompass considerations of, for example, the child's views, their identity, care, protection and safety, their vulnerability, and socio-economic rights such as to health and education.[22]

Alternatively, instead of interpreting family life as the right of one individual, it is possible to view the relationship to be the right held individually by more than one individual simultaneously. Consequently, a violation could properly be found of the child's family life

[21] This is an insight similar to that presented by Dembour and Yeo in different forms. Both argue that the way the lens through which the facts of a cases are viewed fundamentally affects how one approaches that case. Dembour further argues that the presentation of facts is never a neutral exercise, and poses the rhetorical question as to whether the foreign national offender in *El Boujaïdi* was a persistent and dangerous drugs offender, or a heroin addict who turned to dealing to fund his addiction? (Dembour, 'Human Rights Law and National Sovereignty in Collusion: The Plight of Quasi-Nationals at Strasbourg' (2003) 21 *Netherlands Quarterly of Human Rights* 63 at 72-3; Yeo, 'Protecting the Rights of Family Members' (2008) 22 *Journal of Immigration, Asylum and Nationality Law* 147 at 147 & 152).

[22] For example, see the 'welfare checklist' in section 1(2) of the Children Act 1989. Other versions of what are considered to be contained in the best interests of the child can be found from the UN Committee on the Rights of the Child (Committee on the Rights of the Children, *General Comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art.3, Para.1),* available at: docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsqIkirKQZLK2M58RF%2f5F0vEAXPu5AtSWvliDPBvwUDNUfn%2fyTqF7YxZy%2bkauw11KCpZ8VGFd%2fxi%2f1%2bqnSUbLGoXotjGq0RxAO4qsYpqHWlu7 [last accessed 23 March 2018]. And in academic literature (Kalverboer et al., 'The Best Interests of the Child in Cases of Migration: Assessing and Determining the Best Interests of the Child in Migration Procedures' (2017) 25 *International Journal of Children's Rights* 114 at 135-7).

rights where no violation is found in the foreign national offender's case. Although the foreign national offender could not him/herself thereby claim a right to remain in the deporting state because of their own family life, it is clear that to remove them would be a violation of the child's right. Leave to remain should therefore be granted in such cases to the foreign national offender parent in order to vindicate the right of the child, not the right of the parent.

However, this is not the analysis undertaken by the European Court of Human Rights. Eekelaar suggests that the ECtHR does not 'clearly separate the interests of the children from the applicant's own Article 8 rights.'[23] Either this means that the best interests of the child are a relevant aspect of the Article 8 ECHR right of the adult foreign national offender, or that the Court does not analyse Article 8 ECHR as an *individual* right, but rather a form of *commonly-held* right vested in a group of people. The next sub-section argues that an objective explanation of the ECtHR's case law is that it approaches the right to family life as a commonly-held right, rather than an individual right. This has consequences for the shape of the balancing methodology pursued by the ECtHR.

B. A Commonly-Held Right

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

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

because family life is necessarily relational; it cannot be conducted by an individual in isolation.

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

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

Approaching Article 8 ECHR family life as a commonly-held right also makes sense of the ECtHR's failure (as Eekelaar sees it) to make 'no systematic distinction between […] cases directly about children and decisions affecting children indirectly.'[24] Eekelaar maintains

[24] ibid at 16.

that there is a logical and relevant distinction between decisions which are 'about' a parent or 'about' a child, which he argues alters the nature of the human rights decision and the role of the best interests of the child. The failure to recognise the distinction between cases directly and indirectly affecting children is, in Eekelaar's analysis, a failing. Eekelaar uses the example of cases where the courts are called upon to make a decision about the extradition of a parent, and cases where the decision is whether to authorise the voluntary relocation of a parent, with their child, to another country upon divorce, thereby denying the estranged parent meaningful contact. Extradition, Eekelaar argues, is only indirectly about the child because it is a decision 'about' the parent; the consequence for the child is collateral to what the decision is about. In contrast, relocation is directly about the child, despite what Eekelaar describes as a 'superficial' similarity with extradition. Relocation is not 'about' the parent's ability to move to another country rather, Eekelaar argues, it is 'about' the child's best interests in remaining in their own country.[25]

In contrast to Eekelaar's analysis, if family life is a commonly-held right then there is no relevant distinction to be drawn between the direct and indirect effects of an interference with human rights, because regardless of the type of decision which is being made – be it about relocation, contact, extradition or deportation – the child is always a fundamental and indivisible part of the family commonality. When viewed as a commonly-held right it is irrelevant to the process of analysis, or to the outcome, whether deportation is interpreted as an action directly taken against the foreign national offender (and thus the child is only an indirect victim of the interference), or whether deportation is interpreted as directly interfering with the child's relationship with the foreign national offender. By ignoring the distinction between direct and indirect interference, the ECtHR avoids having to determine the case through the

[25] ibid at 9.

lens of only one individual rights-holder. However, by ignoring the difference between direct and indirect interference, the only rationally remaining option open to it is to approach the right to family life as one which is commonly-held.

The ECtHR's commonly-held approach to Article 8 ECHR in the area of deportation is not attributable to the cases arriving before it as a consequence of an application by foreign national offenders alone. If the foreign national offender alone was the applicant then the ECtHR might be constrained from considering the individually held family life rights of the foreign national's family. Without them being individual applicants, the ECtHR might only be able to consider the Article 8 ECHR rights of family members in a more indirect way, leading to a commonly-held approach to the family life as a whole. However, although the majority of cases surveyed in this article were brought exclusively by the foreign national offender, four list the family of the foreign national offender as applicants,[26] and there is no discernible difference in the ECtHR's approach depending on whether the applicants are the foreign national alone, or include their family members.

Support for the idea that the ECtHR approaches Article 8 ECHR as being commonly-held can also be found in the *Üner* criteria. The *Üner* criteria are clearly not applicable to Article 8 ECHR as an individual right of the children of foreign national offenders. For example, the length of marriage of the child's parents is irrelevant to an assessment of the child's family life, not least because the child's legitimacy is not a requirement for family life.[27] Nor are the *Üner* criteria concerned only with the family life of the foreign national offender parent, as circumstances may harm the child's best interests but leave the the parent's family life substantially unaffected. For example, where the child is constructively deported along

[26] *Antwi and others v Norway* supra n 20; *Udeh v Switzerland* Application No 12020/09, Merits and Just Satisfaction, 16 April 2013; *Paposhvili v Belgium* Application No 41738/10, Merits and Just Satisfaction, 17 April 2014; *Sarközi and Mahran v Austria* Application No 27945/10, Merits and Just Satisfaction, 2 April 2015.

[27] *Marckx v Belgium* Application No 6833/74, Merits and Just Satisfaction, 13 June 1979.

with the parent, the child's best interests may be impaired by their dislocation from the UK, but the parent maintains their family relationship with the child because they remain resident with the child, albeit in a different country. Furthermore, only the child directly feels the effects of loss to their education, access to healthcare, disrupted contact with peers, etc. If the ECtHR were to analyse the right to family life as being an individual right, the *Üner* criteria throw up a number of these theoretical inconsistencies. Instead, by viewing family life as being commonly-held, the ECtHR is able to construct a list of relevant interests which encompass the relevant interests of the foreign national offender, their partner/spouse, the best interests of children, and the public interest.

To interpret Article 8 ECHR as a commonly-held right permits the balancing exercise to conform to, and work within, the confines and limitations of the metaphor of the balance. Balancing scales are designed to compare the relative weights of two items. The consequence of analysing family life as a commonly-held right is that it simplifies the exercise into this familiar pattern. Unlike the analysis of family life as a series of individual rights, the balancing exercise required by a commonly-held right is one test which weighs two things; family life against the public interest. Thus the analysis of Article 8 ECHR as a commonly-held right means that any account of how the ECtHR weighs the various aspects of an individual case must conform to two principal structural rules. Firstly, that all the interests relevant to family life and the best interests of the child must be taken into account within the assessment of family life. Secondly, that there are only two sides to the balance; the family life and the public interest.

4. THE FOUR CONCERNS OF THE ARTICLE 8 EUROPEAN CONVENTION ON HUMAN RIGHTS BALANCING EXERCISE IN THE EUROPEAN COURT OF

HUMAN RIGHTS JURISPRUDENCE: VALUE, GRAVITY, IMPORTANCE, AND SEVERITY

The second argument pursued in this article is that the ECtHR places four central concerns – the value of family life, the gravity of the interference with family life, the importance of deportation, and the severity of offending – into a complex relationship with each other in the Article 8 ECHR balancing exercise.

I argue that the ECtHR's reliance on four central concerns derives from its attempt to make rational use of the criteria of principles that it has laid out for itself in the *Üner* judgment. ECtHR decisions are compound majority decisions based upon a compromise between the judges, thus obscuring the jurisprudential approaches of any one individual judge. In addition, the Spartan use of language in ECtHR judgments can make it difficult to assess, as an external observer, how the ECtHR has weighted individual factors in specific cases. As Dembour observes in this context, 'Facts are vulnerable to contrasting interpretations and different people, including judges, dress them differently'.[28] What follows is a post-facto analysis of the ECtHR's case law, with the aim of determining some pattern in it. I do not suggest that any one judge, or the court collectively, engages consciously with Article 8 ECHR cases in the way outlined by this analysis; however, I do argue that it reflects the pattern of decision-making which emerges from the body of the ECtHR's jurisprudence in deportation cases.

A. Core Concern 1: The *Value* of Family Life

The first of the four core concerns considered by the ECtHR in making Article 8 ECHR deportation decisions is that of the value of family life. Van Walsum argues that 'Decisions concerning the admission of family members inevitably touch on fundamental questions

[28] Dembour supra n 11 at 82.

regarding the definition and value of family bonds.'[29] In the balancing exercise, the ECtHR concerns itself with the *value* of the family life of the applicant. To talk in terms of the 'value' of family life is ethically problematic as it requires an assessment of family relationships. Such assessments are inherently subjective and often based on assumptions which have racial, cultural and gendered foundations.

It is important to note here the definitional distinction between value and weight. The metaphor of a balancing scale suggests that what is placed on either side of the balance has weight and that the relative weight of one side over the other determines the outcome of the balancing exercise. I argue that the value of family life is one of the factors relevant to determining the overall weight assigned to the applicant's side of the balance (the other being the gravity of interference, outlined in section 3(b) of this article). The assessment of the relative value of family life is therefore only one aspect of the overall weight of the family life, and as such the value of family life is not singularly determinative of its weight in the balancing exercise. There is also a difference in the ECtHR's enquiry as to the existence of family life and its value. This section delineates the difference between these enquiries before examining the way in which the ECtHR determines the value of family life.

(i) The difference between the existence *of family life and its value*

The *value* of family life is a different enquiry from whether there is family life that engages Article 8 ECHR in the first place; a logically prior enquiry because if there is no family life which engages the substantive Convention right, then there is nothing to protect. Therefore the ECtHR's first enquiry is as to the existence of family life, which it determines on the basis of de jure and de facto family life. The Court will presume that family life exists on the basis of

[29] van Walsum, 'Comment on the Sen Case. How Wide Is the Margin of Appreciation Regarding the Admission of Children for Purposes of Family Reunion' (2003) 4 *European Journal of Migration and Law* 511 at 511.

blood or marriage and conducts a short enquiry as to whether there are sufficient de facto ties to amount to family life in other relationships.[30]

Whilst the ECtHR will readily find family life to exist, this does not mean that it considers all family lives to have equally weighty claims to protection. The ECtHR finds that some family relationships are closer, more committed – of more value – than others. This distinction between the existence of family life and its value is illustrated in *Joseph Grant*.[31] In this case, the ECtHR found that there existed a family life that engaged Article 8 ECHR between Grant and his daughter because children born to a married couple are 'ipso jure part of that family from the moment of birth'.[32] However, the family life established by Grant and his daughter was found to have a low relative value because the ECtHR 'cannot overlook the fact that the applicant has never co-habited with any of his children.'[33] Lack of cohabitation between Grant and his daughter did not invalidate the existence of family life between them so as to engage Article 8 ECHR – after all, 'cohabitation is not a sine qua non of "family life" for the purposes of Article 8'[34] – but cohabitation was clearly relevant to the Court's assessment as to some other metric in the balancing exercise. This other metric is what I describe as being the core concern of the value that the family life held.

(ii) Defining the value of family life

The *value* of family life is therefore the ECtHR's assessment of the relative quality of family life. Different factual matrices reveal that differences in the value of family life can result in

[30] ibid; Thym, 'Respect for Private and Family Life Under Article 8 ECHR in Immigration Cases: A Human Right to Regularize Illegal Stay?' (2008) 57 *International and Comparative Law Quarterly* 87 at 89-90.

[31] *Joseph Grant v The United Kingdom* Application No 10606/07, Merits, 8 January 2009.

[32] ibid at para 30.

[33] ibid at para 40.

[34] *Berrehab v The Netherlands* Application No 10730/84, Merits and Just Satisfaction, 21 June 1988 at para 16.

different outcomes in the balancing exercise. For example, in *Omojudi* the applicant had a wife to whom he had been married some twenty years and he lived with his three children and one grandchild as a family unit.[35] Great value was given by the ECtHR to his family life, and a violation of Article 8 ECHR was found arising from his deportation.[36] A violation of Article 8 ECHR was found in *Keles* where the marriage had lasted fifteen years, even though the first five years of marriage were spent apart.[37] A violation was also found in *Udeh* where the family life consisted of a non-residential relationship with children from his ex-wife.[38] In contrast, in *Shala* no violation of Article 8 ECHR was found despite the marriage of the applicant having persisted for 'some seventeen years';[39] a similar length of time to the marriage in *Omojudi* and longer than that in *Keles*.

The difference in outcome between these cases cannot be accounted for by a simple bifurcated balance between the value of family life and the nature or seriousness of the foreign national's offences. An Article 8 ECHR violation was found in the case of *Omojudi* in which the applicant was sentenced to fifteen months imprisonment for a sexual offence (as the ECtHR observed, on the lower end of the sentencing scale for such offences)[40] and in *Keles* the applicant committed a series of minor driving and alcohol related offences attracting no more than 6 months imprisonment.[41] In contrast, in *Shala*, where no Article 8 ECHR violation was found, the applicant was sentenced for over five years for trafficking in heroin;[42] a type of

[35] *Omojudi v The United Kingdom* Application no 1820/08, Merits and Just Satisfaction, 24 November 2009 at para 6 & 45.

[36] ibid at para 49.

[37] *Keles v Germany* Application No 32231/02, Merits, 27 October 2005 at para 61.

[38] *Udeh v Switzerland* supra n 26 at para 50.

[39] *Shala v Germany* Application No 15620/09, Admissibility, 22 January 2013 at para 17.

[40] *Omojudi v The United Kingdom* supra n35 at para 12 & 44.

[41] *Keles v Germany* supra n 37 at paras 6-16.

[42] *Shala v Germany* supra n 39 at paras 5 & 28.

offence which the ECtHR weighs particularly heavily against any applicant.[43] However, in *Udeh* where a violation of Article 8 ECHR was also found, the applicant was also convicted of drug trafficking.[44]

There is clearly no determinative factor here to explain the apparent divergence in outcome between these four cases. The difference of outcome in *Shala* (where no violation was found) and *Omojudi* and *Keles* (where a violation was found), could be argued to come down to the severity of the offending in *Shala* because the length of marriages in each case was similar at 15-20 years duration, and all lived with their children. However, this does not in itself account for the difference in outcome in *Udeh* where the offence was comparable to that in *Shala*, but the family circumstances were considerably different; in *Udeh* the foreign national offender was divorced and had a non-residential relationship with his children. Clearly factors other than simply the value of family life and the severity of the offences must be relevant to the ECtHR's decision making if it is to be explained as anything other than arbitrary.

I argue that instead of a single determinative factor, or a simple balance between the *value* of family life and the *severity* of offending, there is a more complex relationship between factors at work in the ECtHR's reasoning.

(iii) The value of family life and the child

The value of the family life is an obvious place to look for evidence of the ECtHR's consideration of the 'the best interests and well-being of the children', as per its commitment in the *Üner* criteria. The addition of the best interests of the child to those first articulated in *Boultif* was described by the ECtHR in *Üner* as a 'wish to make explicit two criteria which

[43] *Dalia v France* Application No 154/1996/773/974, Merits and Just Satisfaction, 19 February 1998 at para 54; *Amrollahi v Denmark* Application No 56811/00, Merits and Just Satisfaction, 11 July 2002 at para 36-37.

[44] *Udeh v Switzerland* supra n 26 at para 9.

may already be implicit in those identified in the *Boultif* judgment'.[45] As authority the Court cited two of its earlier decisions; *Tuquabo-Tekle v Netherlands*[46] and *Şen v Netherlands*.[47] Both these earlier cases were related to challenges against the state refusal to allow the entry of a foreign national child into its territory for the purpose of family reunion. The factual background of these cases was therefore substantially different from cases involving the deportation of a foreign national offender, and the ECtHR found in both *Tuquabo-Tekle* and *Şen* that the positive obligations of the state were engaged[48] (in contrast to deportation cases where the ECtHR collapses the distinction).[49] Neither *Tuquabo-Tekle* nor *Şen* use the language of the best interests of the child. Instead, the ECtHR states it 'will have regard to the age of the children concerned, their situation in their country of origin and the extent to which they are dependent on their parents.'[50]

Only much later than the 2006 *Üner* decision did the ECtHR's develop its jurisprudence to find that the principles of Article 3 UN Convention on the Rights of the Child (UNCRC) – that the best interest of the child ought to be a primary consideration in all decisions affecting children – are relevant for the proper interpretation of Article 8 ECHR. In the 2010 Grand Chamber case of *Neulinger and Shuruk*, the ECtHR found that 'there is currently a broad consensus – including in international law – in support of the idea that in all decisions

[45] *Üner v Netherlands* supra n 2 at para 58.

[46] Application No 60666/00, Merits and Just Satisfaction, 1 March 2006.

[47] Application No 31465/96, Merits, 21 December 2001.

[48] *Tuquabo-Tekle and others v Netherlands* supra n 46 at para 42; ibid at para 31.

[49] *Aponte v The Netherlands* Application No 28770/05, Merits and Just Satisfaction, 3 November 2011 at para 53:

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

[50] *Tuquabo-Tekle and others v Netherlands* supra n 46 at para 44; *Şen v Netherlands* supra n 47 at para 37.

concerning children, their best interests must be paramount'.[51] In 2011 the ECtHR further developed its jurisprudence and placed reliance on both Article 3 UNCRC and its own judgment in *Neulinger and Shuruk* to ground its finding of a violation of Article 8 ECHR in a removal case, *Nunez v Norway*.[52]

I argue that the ECtHR's case law suggests a very narrow view of what considerations are relevant to the best interests of the child. Although there remains some disagreement as to the precise content of the best interests of the child,[53] there is general agreement that it encompasses the child's emotional and physical welfare and development. This includes considerations of the child's education, health, and social networks beyond the nuclear family.[54] However, when it comes to assessing the *value* of family life between foreign national offender applicant and their child, the ECtHR appears to use cohabitation with the foreign national offender parent as the only relevant consideration. For example, in *Üner* itself, the Court found that:

> …it cannot overlook the fact that the applicant lived with his partner and first-born son for a relatively short period only, that he saw fit to put an end to the cohabitation, and that he never lived together with his second son.[55]

[51] *Neulinger and Shuruk v Switzerland* Application No 41615/07, Merits and Just Satisfaction, 6 July 2010 at para 135.

[52] Application No 55597/09, Merits and Just Satisfaction, 28 June 2011 at para 84.

[53] Mnookin, 'Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy' (1975) 39 *Law and Contemporary Problems* 226.

[54] Kalverboer et al. supra n 26 at 135-7; Committee on the Rights of the Children supra n 26.

[55] *Üner v Netherlands* supra n 2 at para 62.

The Court engages in an evidence-free judgment of the value of family life based on parent-child cohabitation in other cases such as *Onur*, where again, the ECtHR finds without reference to any supporting evidence that deportation 'is unlikely to have had the same impact as it would if the applicant and his daughter had been living together'.[56] The ECtHR takes no account of the benefit to children with non-resident parents.

As with family life between an applicant and their spouse/partner, the ECtHR's assessment of the value of family life between an applicant and their children cannot by itself account for its decision making. Even in cases where the Court assesses the value of family life to be similar, the outcome is not always the same. In *Udeh*, the applicant did not live with his children and custody was 'awarded to the mother but the first applicant was granted access right'[57] but ultimately the ECtHR found that Article 8 ECHR was violated. In *Onur*, the applicant also did not live with his child but had a contact arrangement, 'spending on average two to three days a week with him.'[58] Notwithstanding the similar nature of the family life to that in *Udeh*, no violation of Article 8 ECHR was found in *Onur*. However, cases with evidence of different value of family life will not necessarily result in correspondingly different outcomes; although Joseph Grant did not cohabit with his daughter and no violation of Article 8 ECHR was found by the ECtHR, there was also no violation found in *El-Habach* where 'the applicant lived together with his younger daughter N. from her birth'.[59]

To account for the different outcomes of these cases I argue that the value of family life is placed in relationship with factors which express the gravity of the interference. Therefore

[56] *Onur v The United Kingdom* Application No 27319/07, Merits, 17 February 2009 at para 58.

[57] *Udeh v Switzerland* supra n 26 at para 50.

[58] *Onur v The United Kingdom* supra n 56 at para 58.

[59] *El-Habach v Germany* Application No 66837/11, Admissibility, 26 October 2011 at para 35.

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

B. Core Concern 2: The Gravity of the Interference With Family Life

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

- the length of the applicant's stay in the country from which he or she is to be expelled;
- the nationalities of the various persons concerned;
- whether there are children of the marriage, and if so, their age;
- the seriousness of the difficulties which the spouse is likely to encounter in the country to which the applicant is to be expelled
- the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled; and
- the solidity of social, cultural and family ties with the host country and with the country of destination.[60]

[60] *Üner v Netherlands* supra n 2 at para 57-58.

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

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

Even when the ECtHR's decision making takes into account the inability of the nuclear family to follow the foreign national offender to the receiving state,[61] there is no guarantee that an Article 8 ECHR violation will be found. In *Mbengeh* the ECtHR found that because the foreign national offender's wife and son were Finnish nationals who had never lived in Gambia, did not speak the language and had no other ties there, they could not 'be expected to follow the applicant'.[62] Nevertheless, not only was this not a barrier to the deportation of the applicant, the whole case was found to be manifestly ill-founded.[63] Although struck out for being

[61] Buquicchio-De Boer supra n 15 at 81.

[62] *Mbengeh v Finland* Application No 43761/06, Admissibility, 25 October 2006 at 5.

[63] ibid at 6.

'manifestly ill-founded', one would be hard pressed to distinguish the written decision in *Mbengeh* from decisions taken in 'well-founded' cases by a full Chamber. In *Mbengeh* the Court recited and applied the *Üner* criteria[64] and the case essentially failed on the basis that the Finnish domestic decision was a proportionate one.

Whether the child can be expected to go to the receiving state with the deported foreign national offender is a question which the ECtHR uses to conflate three of the *Üner* criteria; age, nationality, and 'the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled'. The ECtHR reduces these to a question of the 'adaptability' of the child to a change of environment.[65] Where the children 'are young and able to adapt to a new environment' no infringement of Article 8 ECHR will be generally be found.[66] This operates on the level of presumption, with little consideration made of the other subjective factors which may make it more or less likely that an individual child would actually be able to adapt.[67] Although the ECtHR presupposes that young children are adaptable, it does not also presume that older children are not adaptable.[68] But more fundamentally, the focus on the child's adaptability is clearly problematic because of the fact that the best interests of the child is concerned above all with what is in the *best* interests of the child. A child may adapt to conditions which are sub-optimal, but the capacity of the child to adapt does not transform a condition from being sub-optimal to being in the child's best interests.

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[64] ibid at 4.

[65] Smyth, 'The Best Interests of the Child in the Expulsion and First-Entry Jurisprudence of the European Court of Human Rights: How Principled Is the Court's Use of the Principle' (2015) *17 European Journal of Migration and Law* 70 at 75; Kilkelly, *The Child and the European Convention on Human Rights* (1999) at 47.

[66] Buquicchio-De Boer supra n 15 at 81.

[67] Kilkelly supra n 65 at 110.

[68] Smyth supra n 65 at 76-7.

The nationality of the child is used by the ECtHR as a criterion but on its face, its use is inconsistent in the extreme. In *Udeh*, the applicant's daughter's Swiss nationality seemed influential in the ECtHR's finding that they 'could hardly be obliged to follow the first applicant to Nigeria.'[69] In *Shala*, although the children were Kosovar nationals, they had been born and brought up in Germany and 'could not be expected to move to Kosovo'.[70] But the ECtHR does not apply a general principle that the constructive deportation of national or 'quasi-national'[71] children should be avoided. Indeed, being nationals of the deporting state was actively disadvantageous in the cases of *Üner* and *Onur* as in both cases the ECtHR found that the child's citizenship of the deporting state meant that the gravity of the interference with the child's family life was lessened because they could regularly visit other family members being left behind.[72] The only sensible way of distinguishing how the ECtHR treated the issue of nationality in these cases is to point to the ages of the children involved. In *Shala* the children were (at the time of decision) aged between 11 to 21 years old[73] and in *Udeh* they were ten years old.[74] In contrast, the children were much younger in *Onur* (just under two years old)[75] and *Üner* (six years old).[76] The *Üner* criterion of nationality thus appears to be entirely redundant in the ECtHR's analysis as no greater protection is given to national children from

[69] *Udeh v Switzerland* supra n 26 at para 52.

[70] *Shala v Germany* supra n 36 at para 26.

[71] Extending a prohibition on the constructive deportation to quasi-national children would be analogous to what Cholewinski argued was 'the premise that second-generation migrants who have been resident in the territories of states parties for a considerable period of time should effectively be treated as *de facto* citizens, with the result that expulsion from their country of residence can hardly ever be justified.' (Cholewinski supra n 14 at 298).

[72] *Üner v Netherlands* supra n 2 at para 64; *Onur v The United Kingdom* supra n 56 at para 60.

[73] *Shala v Germany* supra n 36 at para 4.

[74] *Udeh v Switzerland* supra n 26 at para 8.

[75] *Onur v The United Kingdom* supra n 56 at para 60.

[76] *Üner v Netherlands* supra n 2 at para 64.

constructive deportation. The ECtHR appears to assess the belonging of the family not on the basis of *de jure* ties of nationality, but on *de facto* connections. This has the unfortunate side-effect of the ECtHR making a decision that although a child may be a national of the state, they do not truly belong. In *Shala* and *Udeh*, the children were sufficiently old to have developed signifiers of belonging to the deporting state, whereas in *Onur* and *Üner* the children were too young to have independent signifiers of social belonging. Assessment of the gravity of interference on the basis of their *de jure* nationality ties to the state would have demanded equal outcomes in all four cases. The differences in treatment of the deporting state's nationals can therefore only be accounted for by reference to the *de facto* connections that the children were able to show to the state; connections that older children are more likely to have established.

The ECtHR jurisprudence is therefore concerned with the degree to which the foreign national offender or their family belong in the deporting state, and their level of belonging to the receiving state to which they face deportation. The ECtHR presumes that the more that the foreign national offender or their family appear to belong to the deporting state and the less that they appear to belong to the receiving state, the greater is the intensity with which they will experience the interference with their right to family life. The more intense the interference is, the more gravity the interference has and the greater must be the state's justification for its interference with the human right.

C. The Value of Family Life and the *Gravity* of Interference, and the Best Interests of the Child

Before moving onto the relationship between the value of family life and the gravity of interference, it is worth evaluating the above findings against the standard of upholding the best interests of the child. In this respect, it is an unavoidable conclusion that the ECtHR's case

law demonstrates inadequate engagement with the best interests of the child, either substantively or procedurally.

Earlier I suggested that the nature of the ECtHR's introduction of the 'best interests and well-being of the children' in *Üner* – as a consequence of the Court's previous judgments and before its substantive engagement with the UNCRC – did not necessarily suggest that its use of the phrase 'best interests' was used by the ECtHR in the same sense as implied by Article 3 UNCRC. This observation is reinforced by the Court's engagement with only the dimensions of the child's interests which reflect their family bond, age and country ties. However, this only reflects a partial picture of what Article 3 UNCRC envisions as being encompassed by the 'best interests' of the child. As Ciara Smyth observes, 'it is unclear why the Court fastens onto these particular factors. Approaching the best interests of the child from a rights-based perspective, there are, arguably, more obvious factors to consider.'[77] A focus on the dimension of belonging to either the deporting and receiving state places 'greater weight to the strength of past connections than to the significance of future potentialities, including the potential for a child to realise and enjoy her Convention rights.'[78] Furthermore, both the assessment of *value* of family life and the question of belonging are determined abstractly by the ECtHR without reference to the child's own views. In contrast, the child's age-appropriate view is both a component of Article 3 UNCRC,[79] and a free-standing right under Article 12 UNCRC.[80]

Ciara Smyth argues that the Committee on the Rights of the Child has 'drawn attention to the correlation between fulfilment of parents' right to an adequate standard of living and

[77] Smyth supra n 65 at 90.

[78] Mullally, 'Citizen Children, "Impossible Subjects" and the Limits of Migrant Family Rights in Ireland' [2011] *European Human Rights law Review* 43 at 44.

[79] Committee on the Rights of the Children supra n 22.

[80] Smyth supra n 65 at 91.

fulfilment of the child's right to an adequate standard of living'[81] given that the economic resources available to the child are almost inevitably defined by the economic resources available to their parents.[82] Other socio-economic rights are directly relevant to the child, such as health and education.[83] An example of how the ECtHR could take into account the right to education can be found in its own deportation case law. In *Keles*, the Court found that:

> …the applicant's four sons […] entered Germany at a very young age where they received all their school education. Even if the children should have knowledge of the Turkish language, they would necessarily have to face major difficulties with regard to the different language of instruction and the different *curriculum* in Turkish schools.[84]

Clearly the overriding concern here was with the children's education. Their ability or otherwise to engage in the curriculum because of its different content, or language of instruction, was relevant to their effective access to education as part of their best interests. Compare the attitude in *Keles* to that in *Palanci* where the assessment of the child's interests in education is exhausted by an observation by the ECtHR that 'they were to return to Ankara, a city with a well-established education system.'[85] The differences the children would experience in terms of the language of instruction and curriculum would be the same in *Keles*

[81] ibid at 92.

[82] ibid.

[83] Kalverboer et al. supra n 22.

[84] *Keles v Germany* supra n37 at para 64

[85] *Palanci v Switzerland* Application No 2607/08, Merits and Just Satisfaction, 25 March 2014 at para 61. The applicants contended that the children could only understand spoken Turkish, and not its written form (at para 42).

as in *Palanci*, but the decision to consider education as relevant to the best interests of the child in *Keles* was a conscious decision by the Court. Other than the exception in *Keles* the ECtHR's interpretation of the *Üner* criteria of 'the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled', is consistently exhausted by considerations of the children's adaptability rather than being coincident with the best interests of the child.

Furthermore, the best interests of the child are split between both dimensions: the best interests of the child to maintain relationships with both parents is an aspect of the value of family life, whilst their belonging and identity is an aspect of the gravity of interference. The child's family life interests are more likely to be protected if they can demonstrate a high gravity of interference by reference to high levels of belonging and integration in the deporting state. This is problematic because the level of protection afforded to the best interests of the child is, to an extent, then dictated by their ongoing cultural ties with the deporting state. In UK cases the more 'British' a child is, the more weight their interests will have. However, Article 14 ECHR requires the rights of the ECHR to be respected regardless of 'national or social origin, association with a national minority, property, birth or other status.' If Article 8 ECHR family life rights are more likely to be found to be violated in circumstances where the child is British, or identifies as being British, this seems to contravene the non-discrimination clause of Article 14 ECHR.

D. The Relationship Between the Value of Family Life and the Gravity of Interference

In the previous section I argued that belonging is an important factor in the ECtHR's balancing exercise, but does not account by itself for the outcome of decisions. That value and gravity are independent concerns is evident; the factors of belonging cannot be said to go to the *value*

of the family life of the applicant because a person's relationship with their children or partner may be strong, close and dedicated, even if they lack any of the significant markers of integration. Instead, the overall weight given to the family life in the ECtHR's balancing exercise is, I argue, determined by a relationship between the *value* of family life and the *gravity* of interference with that family life.

This relationship between two factors better accounts for the ECtHR's decisions than accounts which focus on one factor alone. Hence in a decision such as *Omojudi* an Article 8 ECHR violation was found despite the unexceptional circumstances of the value of the family life in question, comprising in that case of a wife and children.[86] Key to that decision appeared to be the 'considerable weight' that the ECtHR placed on the length of residence and strength of ties that the applicant's wife and children (including citizenship in the latter cases) had with the UK.[87] Likewise, a violation was found in *AW Khan*, despite his heroin importation offence attracting a seven year custodial sentence.[88] In this case, the applicant had a life of significantly limited value, comprising of a recently born British citizen child, and a recent girlfriend whom the court found could relocate to Pakistan.[89] In contrast, the applicant's markers of belonging to the UK – the 'strength of ties with the UK', lack of ties with Pakistan, the length of his residence in the UK, and the young age at which he entered the UK[90] – all magnified the gravity of the interference to the extent that his removal was found to be disproportionate to the public interest.[91]

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[86] *Omojudi v The United Kingdom* supra n 35 at para 6.

[87] ibid at para 45.

[88] *AW Khan v The United Kingdom* Application No 47486/06, Merits and Just Satisfaction, 12 January 2010 at para 7.

[89] ibid at para 15 & 44.

[90] ibid at para 43.

[91] ibid at para 50-51.

The markers of belonging clearly affect the outcome of cases. For example, in both *Aponte*[92] and *El-Habach*[93] the *value* of family life was substantially similar to that in *Omojudi*; in all cases comprising a relationship with a spouse or partner, and children.[94] However, the applicants in *Aponte*[95] and *El-Habach*[96] had considerable ties to their countries of nationality and *El-Habach*[97] had low labour market integration in the deporting state. In both cases no violation of Article 8 ECHR was found[98] whereas a violation of Article 8 ECHR was found in *Omojudi*.

I argue that this relationship between the value of family life and the gravity of interference thereby determines the way in which family life is measured in order to place it in the balancing exercise against the public interest in deportation. The interests which are taken into account in an assessment of the value of family life are magnified by those interests expressing the gravity of interference. Thus in the overall evaluation of family life the weight is a combination of the two. Where both the value of family life and the gravity of interference is high, the overall weight given to family life will be greater than situations where the value is low and gravity high, or value is high and gravity low. Correspondingly, the weight given to family life will be least where both the value of family life and the gravity of interfering with it are low. The weight of family life, assessed on this basis, is then placed on one side of the Article 8 ECHR balancing exercise and weighed against the public interest on the other.

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[92] supra n 49.

[93] supra n 59.

[94] supra n 49 at para 10 & 17; supra n 59 at para 4-5.

[95] supra n 49 at para 60

[96] supra n 59 at para 37.

[97] ibid at para 36.

[98] *Aponte v The Netherlands* supra n 49 at para 62; *El-Habach v Germany* supra n 59 at para 40.

E. Core Concern 3: The Importance of Deportation

Sections 3A–D of this article argued that the factors that the ECtHR considers to be relevant to the side of the balancing exercise occupied by the rights of the foreign national offender and their family, can be expressed in terms of those that relate to the value of the family life and the gravity of the interference. I demonstrated that neither concern was determinative of the overall weight given to the family life of the foreign national offender or their family, and instead the two concerns stand in relationship to each other. Sections 3E and F are related to the concerns that the ECtHR places on the other side of the balancing exercise that relate to the public interest; the importance of deportation and the severity of offending.

I argue that the importance of deportation is a static factor in the ECtHR's balancing exercise in that it is impervious to change by the circumstances of any one individual case. In this sense, the importance of deportation reflects the extrinsic importance of the public policy goal of deportation. It is extrinsic because the deportation of foreign national offenders is considered to be a 'good' because of factors that are not related to the individual. Factors such as the type of crime, the length and type of sentence imposed, the relative severity of the offence (such as whether there were aggravating or mitigating circumstances), and whether the offence was an aberration or pattern of offending behaviour, are all considered relevant to the *severity* of the need to deport and are factors intrinsic to the individual foreign national offender.

As with the relationship between the value of family life and the gravity of the interference, the importance of deportation and severity of the need to deport stand in relationship with each other to determine the overall weight given to the public interest side of the balance. However, unlike the value of family life, the importance of deportation does not vary depending on the circumstances in any individual case. The overall weight of the public

interest is therefore determined in an individual case only with reference to the severity of the need to deport as the only moveable factor of the public interest side of the balancing exercise.

The importance of deportation is a static factor that reflects the relative importance of the public policy of deporting foreign national offenders in comparison to the legitimate aims which may underpin the removal of a foreign national. In ascending order of the importance given to the legitimate aims of Article 8(2) by the ECtHR, removal may be legitimated by the public interest in the economic wellbeing of the state,[99] as an administrative sanction to deter dishonesty in immigration applications,[100] or to prevent crime and disorder by a foreign national offender.[101] Deporting foreign national offenders stands at the top of a hierarchy of importance. Importance is therefore not a repetition of the prior tests of whether a legitimate aim is present, or whether the individual's deportation rationally meets that aim; it is not a question of whether the legitimate aim exists, but what extrinsic weight it should be given.

That more importance is placed by the ECtHR on the deportation of foreign national offenders (pursuant to the legitimate aim of preventing crime and disorder) than on the administrative removal of foreign nationals (pursuant to the legitimate aim of the economic wellbeing of the nation) has been noted by Arai who comments that, 'Weaker justifications, including mere economic grounds, may not be sufficient to justify severing a close family tie in the deporting State.'[102] This is also identifiable in the case law. In *Berrehab*,[103] for example, the Court was keen to identify the case as one that engaged the legitimate aim of economic

[99] For example: *Rodrigues da Silva and Hoogkamer v The Netherlands* Application No 50435/99, Merits and Just Satisfaction, 31 January 2006) at para 44; *Berrehab v The Netherlands* supra n 36 at para 26.

[100] *Nunez v Norway* supra n 52 at para 71.

[101] Article 8(2) ECHR.

[102] Arai, 'The Margin of Appreciation Doctrine in the Jurisprudence of Article 8 of the European Convention on Human Rights' (1998) 16 *Netherlands Quarterly of Human Rights* 41 at 49.

[103] supra n 36.

wellbeing and thereby disagreed with the Commission and the Dutch government assessment of the matter. The Commission had argued that:

> …the disputed decisions were consistent with Dutch immigration-control policy and could therefore be regarded as having been taken for legitimate purposes such as the prevention of disorder and the protection of the rights and freedoms of others.[104]

However the ECtHR disagreed, finding instead that:

> …the legitimate aim pursued was the preservation of the country's economic well-being […] rather than the prevention of disorder: the Government were in fact concerned, because of the population density, to regulate the labour market.[105]

It is only relevant for the Court to draw a distinction between the legitimate aims being pursued by the state in the assessment of the balancing of interests (as opposed to the prior tests of rationality or necessity), if different consequences flow from it. In the case of the distinction between the public interest of economic wellbeing and the prevention of crime and disorder, I suggest that the relevant difference is the importance that each public policy goal receives in the balancing exercise. Thus the importance of the act of expelling a foreign national is set categorically: the importance of the public interest is greater where the category is of 'deportation' rather than that of 'removal'. This is, in part, what sets the foreign national

[104] ibid at para 25.

[105] ibid at para 26.

offender at a significant disadvantage when seeking to secure the protection of their right to family life, when all the factual circumstances of the case are placed into the balancing exercise.

That a right or legitimate aim might have greater extrinsic importance in some categorical circumstances is a feature of the ECtHR's jurisprudence in other areas, and so the ECtHR setting the importance of deportation as a categorical rather than variable factor has precedent. For example, in *Castells v Spain*,[106] the ECtHR found that freedom of expression for the political press under Article 10 ECHR is categorically more important to satisfy, over and above the importance of other forms of expression, because of the 'pre-eminent role of the press'.[107]

The *importance* of deportation is therefore the first concern that the ECtHR places in the balancing exercise on the side of the public interest. I argue that the *importance* of deportation reflects the extrinsic importance that the ECtHR gives to the policy of the deportation of foreign national offenders. Therefore the core concern of the *importance* of deportation is a static factor which does not alter in individual deportation cases. In this sense, the importance of deportation reflects the underlying public policy goals which underpin and justify a policy of deportation. If the importance of deportation reflects this extrinsic aspect of the importance of deportation as a general policy, then the severity of offending reflects the intrinsic aspects of the case which make deportation more or less imperative.

F. Core Concern 4: *Severity* of Offending

[106] Application No 11798/85, Merits and Just Satisfaction, 23 April 1992.

[107] ibid at para 43.

If the importance of deportation is unyielding to individual factual circumstances in deportation decisions, it is the severity of offending which is fact specific. This encompasses two of the *Üner* criteria:

- the nature and seriousness of the offence committed by the applicant;
- the time elapsed since the offence was committed and the applicant's conduct during that period;

There has been little or no systematic academic commentary on the factors which lead the ECtHR to assign greater or lesser weight to the seriousness of certain offending behaviours or patterns. This is perhaps because this is the most transparent aspect of the ECtHR's jurisprudence, and because its decisions appear generally consistent with lay understandings of offending severity. Thus the ECtHR treats as more severe offences which result in longer[108] rather than shorter sentences.[109] It treats as more severe patterns of repeat,[110] or escalating[111] offending rather than one-off offences.[112] Offences committed when a juvenile are viewed as being less serious[113] than offences committed when an adult.[114] Offences against the person

[108] *AH Khan v The United Kingdom* Application No 6222/10, Merits and Just Satisfaction, 20 December 2011 at para 36; *Sarközi and Mahran v Austria* supra n 26 at para 68.

[109] *Joseph Grant v The United Kingdom* supra n 31 at para 38; *Omojudi v The United Kingdom* supra n 35 at para 44.

[110] *Joseph Grant v The United Kingdom* supra n 31 at para 38; *El-Habach v Germany* supra n 59 at para 30; *AH Khan v The United Kingdom* supra n 108 at para 36; *Paposhvili v Belgium* supra n 26 at para 145-147.

[111] *Sarközi and Mahran v Austria* supra n 26 at para 68.

[112] *Udeh v Switzerland* supra n 26 at para 47.

[113] *Moustaquim v Belgium* Application No 12313/86, Merits and Just Satisfaction, 18 February 1991 at para 44; *Maslov v Austria* Application No 1638/03, Merits and Just Satisfaction, 23 June 2008 at para 72.

[114] *Mbengeh v Finland* supra n 62 at 5; *Joseph Grant v The United Kingdom* supra n 31 at para 38; *Onur v The United Kingdom* supra n 56 at para 55; *El-Habach v Germany* supra n 59 at para 30.

will be viewed as being more severe[115] than property,[116] administrative,[117] or traffic offences.[118] Finally, the distribution of drugs will be treated as more severe[119] than their possession for personal use.[120] The ECtHR will also engage in a forward looking assessment of risk of reoffending,[121] although not consistently.[122]

G. The Relationship Between the *Importance* of Deportation and the *Severity* of Offending

The factors indicating severity of offending are significant because they suggest that although deportation has a static, extrinsic importance in the ECtHR's jurisprudence, as argued in section 3E of this article, it also has an intrinsic dimension that is related to the factual circumstances of the individual case. These two aspects of the public interest therefore stand in relationship to each other, just as the value of family life and the gravity of interference in family life stand in relationship with each other on the other side of the balance.

[115] *Omojudi v The United Kingdom* supra n35 at para 44; *El-Habach v Germany* supra n 59 at para 6; *AH Khan v The United Kingdom* supra n 108 at para 36; *Paposhvili v Belgium* supra n 26 at para 145-147.

[116] *Joseph Grant v The United Kingdom* supra n 31 at para 38; *Onur v The United Kingdom* supra n 56 at para 55.

[117] *Antwi and others v Norway* n 20 at para 90

[118] *Onur v The United Kingdom* supra n 56 at para 56

[119] *Mitchell v The United Kingdom* Application No 40447/98, Admissibility, 24 November 1998; *Mbengeh v Finland* supra n 62 at 5; *Aponte v The Netherlands* supra n 49 at para 57-58.

[120] *Joseph Grant v The United Kingdom* supra n 31 at para 38; *Udeh v Switzerland* supra n 26 at para 46.

[121] *Mbengeh v Finland* supra n 62 at 5; *Joseph Grant v The United Kingdom* supra n 31 at para 39; *Onur v The United* supra n 56 at para 56; *El-Habach v Germany* supra n 59 at para 32-33; *Aponte v The Netherlands* supra n 49 at para 57; *AH Khan v The United Kingdom* supra n 108 at para 36; *Udeh v* supra n 26 at para 49; *Sarközi and Mahran v Austria* supra n 26 at para 68.

[122] *Antwi and others v Norway* n 20; *Paposhvili v Belgium* supra n 26.

It may be objected that dividing the public interest in deportation into two – an intrinsic and an extrinsic element – is unnecessary. However, I do not believe that it is unwarranted. Firstly, the intrinsic severity of offending does not alter the extrinsic importance of deportation. Deportation in general may be pursued as a public policy good whilst still giving space for recognising that an individual's deportation may contribute more or less to that good. The ECtHR's separation of the extrinsic importance of deportation and the intrinsic severity of individual offending also reflects a political choice to determine that criminal offending may never be of such low severity so as to be only as bad as being injurious to the economic wellbeing of the state; they are categorically different and the importance of deportation that the ECtHR places on deportation reflects this. Secondly, that a foreign national offender is placed in a position where the public interest will weigh more heavily against them, because of the extrinsic fact of their status as an offender, matches empirical experience that only a small minority of applications to the ECtHR result in a finding of an Article 8 ECHR violation. That the scales of the balance are weighted against foreign national offenders, regardless of the intrinsic nature of their offending, accords with this experience.

H. Conclusion to the Four Concerns

I have argued in this section that the balancing exercise engaged in by the ECtHR, in Article 8 ECHR claims by foreign national offenders, comprises the determination of four core concerns: the value of family life, the gravity of the interference with family life, the importance of deportation, and the severity of offending. These four core concerns encompass the Court's own statement of the factual criteria that it claims (in its *Üner* criteria) to take into account in its decision-making.

I argue that the four core concerns suggest that the ECtHR has developed a more complex relationship between factors in the balancing exercise than is initially apparent from

the linear presentation of the *Üner* criteria. I argue that the gravity of interference acts as a force which magnifies the value of family life in any one case. It is the combination of the two which determines the overall weight assigned to the family life. Because the weight given to family life is a combination of factors, case analysis which focusses on just one of the factors will readily find examples where apparently similar cases lead to disparate outcomes. Case analysis which looks for a single determinative factor will likewise fail.[123]

On the other side of the balancing exercise, the severity of offending acts as a magnifying force on the importance of deportation. The public interest in deportation to prevent crime and disorder is considered to be especially important in comparison to other legitimate aims which may be invoked to justify removal. The importance of deportation in the abstract, however, does not solely account for the weight that the ECtHR will assign to the public interest. The individual factual circumstances related to the offending are also relevant. Again, to focus only on one factor of the two would lead analysis into error. To focus on the severity of offending as being determinative of the weight to the public interest would suggest that any case where the offending is less serious is more likely than not to succeed at Strasbourg; a result which is not empirically borne out. However, to suggest that criminal offending has only one weight ignores the fact specific analysis of offending that the ECtHR consistently engages in.

5. POLITICS OF DEPORTATION AND THE BEST INTERESTS OF THE CHILD

This article has presented a doctrinal legal analysis of judgments of the ECtHR which engage the Article 8 ECHR family life of foreign national offenders and their children. It has argued that the way in which the balancing exercise is structured – as a relationship between the value of family life, the gravity of the interference with family life, the importance of deportation,

[123] Summarising the case law, Janis et al conclude that: 'Close individualized examination of the applicant's family life in the deporting and destination countries, and of the applicant's record of criminal behaviour, has resulted in a jurisprudence about which few generalizations are possible.' (Janis et al. supra n 16 at 410).

and the severity of offending – has resulted in the best interests of the child being marginalised in the ECtHR's decision-making. The way in which the family life side of the balancing exercise is constructed seems to disaggregate the best interests of the child, so that it goes from being an independent factor in the *Üner* criteria, to being split between factors contained in the perceived value of family life and to the gravity of the interference with family life (section 4C). Within this, the value of family seems reduced to consideration of cohabitation and the gravity of interference reduced to issues of belonging and integration (section 4A(iii) and 4C).

As well as the doctrinal aspects of this, the marginalisation of the best interests of the child in deportation cases may also in part be due to the politically controversial nature of human rights assessments related to foreign nationals who commit criminal offences. This has already been alluded to; it is not politically neutral to determine that the public interest that is to be balanced against an individual's human rights should weigh more heavily in cases where a foreign national has committed a criminal offence than in cases where the foreign national is in breach of immigration law (section 4E).

The marginalisation of the best interests of the child in deportation cases also sets it apart from the rest of the ECtHR's jurisprudence which has otherwise 'been keen to see the ECHR interpreted and implemented in a manner that is consistent with the UNCRC.'[124] The ECtHR appears to foreground the rights of children in relation to corporal punishment,[125] the

[124] Scott, 'Conflict between Human Rights and Best Interests of Children: Myth or Reality?' in Sutherland and Barnes Macfarlane (eds), *Implementing Article 3 of the United Nations Convention on the Rights of the Child: Best Interests, Welfare and Well-being* (2016) at 68.

[125] *Campbell and Cosans v United Kingdom* Application No 7511/76 & 7743/76, Merits, 25 February 1982*; Costello-Roberts v United Kingdom* Application No 13134/87, Merits and Just Satisfaction, 25 March 1993. (Cited in Scott ibid at 68).

removal of children into care,[126] child abduction,[127] and the detention of minors.[128] Although it must be added, that even in these areas of law intimately concerned with the welfare of children, the ECtHR has been critiqued for being 'somewhat unpredictable to date'.[129] Even in non-deportation immigration cases, the best interests of the child appears to take a more central role in the ECtHR's judgments, for example the ECtHR in *Jeunesse* found 'that in all decisions concerning children, their best interests are of paramount importance'.[130]

Some differences in the way that the best interests of the child is applied to different areas is both doctrinally and rationally sound. The Committee on the Rights of the Child give authority for the principle that the best interests of the child is context specific and 'dynamic'.[131] What is centrally important to the best interests of the child will vary depending on the area of the child's life affected; for example, whereas liberty is central to the best interests of the child in immigration detention,[132] it is a factor of limited relevance to issues arising from contact on

[126] *Johansen v Norway* Application No 17383/90, Merits and Just Satisfaction, 7 August 1996*; K and T v Finland* App no 25702/94, Merits and Just Satisfaction, 12 July 2001*; P, C and S v United Kingdom* Application No 56547/00, Merits and Just Satisfaction, 16 July 2002. (Cited in Scott supra n 124 at 71).

[127] *Neulinger and Shuruk v Switzerland* supra n 51. (Cited in Beaumont et al., 'Child Abduction: Recent Jurisprudence of the European Court of Human Rights' (2015) 64 *International and Comparative Law Quarterly* 39 at 41).

[128] *Selçuk v Turkey* Application No 21768/02, Merits and Just Satisfaction, 10 January 2006. (Cited by Dohrn, 'Something's Happening Here: Children and Human Rights Jurisprudence in Two International Courts' (2006) 6 *Nevada Law Journal* 749 at 755).

[129] Kilkelly, 'Protecting Children's Rights Under the ECHR: The Role of Positive Obligations' (2010) 61 *Northern Ireland Legal Quarterly* 245 at 260.

[130] *Jeunesse v The Netherlands* Application No 12738/10, Merits and Just Satisfaction, 3 October 2014 at para 109. Although the 'genuinely exceptional' nature of the facts in that case suggest that it too may be an outlier in the ECtHR's engagement with the best interests of the child (Yeo, 'Strasbourg Decides Important Case on Respect for Family Life', *Free Movement,* 14 October 2014, available at: https://www.freemovement.org.uk/strasbourg-decides-important-case-on-respect-for-family-life/ [last accessed 6 November 2015]).

[131] Committee on the Rights of the Children supra n 22 at para 1.

[132] Smyth, 'Towards a Complete Prohibition on the Immigration Detention of Children' (2019) 19 *Human Rights Law Review* 1 at 1.

the breakdown of their parent's relationship.[133] The flexibility of the content of the best interests of the child is defended on the basis that 'it can be applied in the vast array of circumstances in which children find themselves [and] also allows for the accommodation of social and cultural factors that are relevant to the particular situation'.[134]

However, recognising the differences in context in which the best interests of the child needs to be assessed is not the same as saying that the best interests of the child, as a human rights standard, might vary depending on political context. Whilst it is legitimate to say that what is relevant to the best interests of the child might differ in cases about detention and contact, it cannot be legitimate to say that the best interests of the child should be a lesser standard where it might interfere with politically sensitive activities such as deportations. Allowing the best interests of the child to be malleable to marginalisation in politically sensitive areas, such as this article suggests has occurred in the ECtHR's deportation jurisprudence, degrades the best interests of the child as a human rights standard.

6. CONCLUSION

This article has centred on the task of untangling and rationalising the ECtHR's Article 8 ECHR deportation jurisprudence in deportation cases which involve children. It has argued that the ECtHR engages in a balancing exercise which is more complex than has hitherto been articulated in the academic literature. This complexity is contained in two interrelated claims. Firstly, the ECtHR approaches the right to family life in deportation cases as a kind of commonly-held right. Secondly, that the ECtHR places four central concerns – the value of

[133] Elrod, 'The Best Interests of the Child When There Is Conflict About Contact' in Sutherland and Barnes Macfarlane (eds), *Implementing Article 3 of the United Nations Convention on the Rights of the Child: Best Interests, Welfare and Well-being* (2016) at 265.

[134] Sutherland, 'Article 3 of the United Nations Convention on the Rights of the Child: The Challenges of Vagueness and Priorities' in Sutherland and Barnes Macfarlane (eds), *Implementing Article 3 of the United Nations Convention on the Rights of the Child: Best Interests, Welfare and Well-Being* (2016) at 36.

family life, the gravity of the interference with family life, the importance of deportation, and the severity of offending – in complex relationship with each other in the balancing exercise.

The critique of the ECtHR's approach to the best interests of the child in deportation cases is on three principal grounds. The first is that the ECtHR has a narrow view of what comprises the best interests of the child, often defaulting to an evidence free assessment of the value of the child's family life with their foreign national offender parent based on whether or not they live together under the same roof, effectively ignoring the value of relationship with non-resident parents. Second, because the gravity of interference is determined with reference to indicators of 'belonging' to the deporting state, the ECtHR will more readily protect the family life rights of children who are nationals of the state or are the children of integrated migrants. This goes against the grain of the best interests of the child, which ought to apply regardless of the nationality of the child, and also against the current understanding of the importance of trans-national and trans-cultural identity in migrant communities. The third is that the factors relevant to the best interests of the child are split between consideration of the *value* of family life and the *gravity* of the interference, rather than together to create an integrated assessment of what is in the best interests of the child.

In explaining these two arguments about the ECtHR's Article 8 jurisprudence, this article has sought to expose the decisions—often political, often controversial—that the ECtHR has made in developing its case law. Exposing these decisions opens the ECtHR to a more focussed critique of its jurisprudence than has been permitted to date because the academic literature has settled on an overarching indictment of arbitrary decision-making by the Court.

This critical work is not exhausted by this article, although this article has sought to highlight where the best interests of the child are necessarily side-lined or downplayed in the ECtHR's approach to the *Üner* criteria, notwithstanding that the best interests of the child are supposed to be one of the *Üner* criteria in its own right as a separate principle.

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