The threefold concept of the best interests of the child in the immigration case law of the ECtHR

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ABSTRACT

The ‘best interests of the child’ is a unique and broad principle of the United Nations Convention on the Rights of the Child and is frequently referred to by international courts. The European Court of Human Rights is no exception. This article examines which aspect(s) of the ‘best interests’ concept appears in the immigration case law of the Court and how it can provide protection for migrant children in precarious situations.

KEYWORDS

best interests of the child, children in migration, immigration detention, right to family life, European Court of Human Rights

1. INTRODUCTION

The best interests of the child is one of the four general principles\(^1\) of the United Nations (hereafter: UN) Convention on the Rights of the Child\(^2\) (hereafter: CRC or ‘Convention’). This

\(^1\)Article 2 (Non-discrimination), Article 3 (Best interests of the child), Article 6 (Right to life, survival and development), as well as Article 12 (Right to be heard/Respect for the views of the child). Designated as general principles by the CRC Committee at its first meeting in 1991 in CRC/Ce/5, para 13.

principle, embodied in Article 3 CRC, has the most interesting threefold nature, which is described in detail by the Committee on the Rights of the Child (hereafter: CRC Committee) in its General Comment No. 14 (2013)\(^3\) (hereafter: CRC GC no 14). According to this description, the child’s best interests is not only an interpretative legal principle, but also a substantive right and a rule of procedure at the same time. Regarding the enforcement of the CRC, the individual complaint mechanism has been in force only since 2014.\(^4\) As a result, the CRC Committee has not had the opportunity to elaborate on its meaning and content in cases concerning individual petitions. Thus, the Convention does not yet have a comprehensive, powerful system of enforcement. Stemming from this deficiency, it means a supplementary contribution in upholding the rights therein when regional human rights protection mechanisms, such as the European Court of Human Rights (hereafter: ECtHR or ‘Strasbourg Court’), involves the CRC in order to interpret the provisions of the European Convention on Human Rights\(^5\) (hereafter: ECHR) in cases concerning children in the immigration context. In this regard, it is worth examining how the ECtHR conceptualizes the best interests of the child principle in immigration cases, namely which dimension of the threefold concept prevails in its case law. To this end, this article first aims to describe the origins and legal nature of the concept of the best interests of the child in international law (Section 2). Secondly, it gives an overview of the legal basis of the ECtHR’s reliance on external sources (sources other than the ECHR) in its judgments (Subsection 3.1). Thirdly, it scrutinizes the case law of the ECtHR regarding Article 5 (right to liberty) and Article 8 (right to family life) of the ECHR in order to identify which of the three approaches is frequently referred to by the Strasbourg Court (Subsection 3.2). Furthermore, this study also seeks to establish whether or not and to what degree the three dimensions of the best interests of the child are connected and built upon each other (Section 4). Last, this article ends with a short concluding section (Section 5).

2. UNPACKING THE ‘BEST INTERESTS OF THE CHILD’ CONCEPT

2.1. The origins of the concept

The ‘best interests of the child’ can be identified as the overarching and foundational principle of the CRC. Its origins in international law appear as Principle 2 of the UN Declaration of the Rights of the Child of 20 November 1959. The Declaration states that: ‘[t]he child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration’.\(^6\) Introducing this

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\(^3\)Committee on the Rights of the Child, General Comment no 14: on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (art. 3, para. 1) 29 May 2013, para 6.


essential principle was a prominent step in international law-making, however due to the non-binding legal nature of the UN Declaration as a General Assembly Resolution, it was not enforceable. Thus, being a *soft law* instrument, upholding the principle depended only upon the States’ willingness. At the same time, it is noteworthy that in this document, the child still appeared as an object, which needed to be provided with assistance. Only during the drafting of the CRC was the result of the paradigm shift unfolding. As a result, the child became a self-standing right holder herself/himself.

As it appears from the *travaux préparatoires* of the CRC, numerous debates surrounded the *wording of the principle* during the drafting rounds. Namely, to make the best interests of the child ‘a’ or ‘the’ primary consideration or, as in the 1959 Declaration; ‘the paramount’ one. Eventually, the decision was to apply ‘a’ primary consideration, leaving space for the balancing of conflicting interests in different situations. It also means that it is *not an absolute* right and it can be overridden by other interests, such as the protection of public order or the interests of another child or, in the minority of cases, the interests of the parents. However, it still has special importance, since, compared to other considerations, it must have high priority, particularly when an action unarguably affects the child concerned. To this end, in cases where the competing interests have equal importance, a larger weight must be added to what is in the child’s ‘best interests’. According to the CRC Committee, there could be three reasons behind the aforementioned approach. First, there is no other human rights treaty that would assign a higher level of consideration to the interests of the protected group. The second one is a moral reason, since children can be considered a vulnerable group of individuals and at this stage of life any decision which negatively affects their situation can give rise to significant issues, which would affect their whole lives. Thirdly, they have – compared to adults – less influential power on the formation of policies and laws regarding their situations.

There is only one scenario in which an even higher level of consideration needs to be accorded to the child’s best interests. In adoption cases that remain the determining factor, i.e. the paramount consideration.

As regards the nature of the principle, the CRC Committee stated in GC no. 14 that, as a substantive right, the principle of the best interests of the child, has a *self-executing character*, which it identified as directly applicable and which can be directly invoked before a court. This nature makes the substantive right a particularly powerful tool, since it means that in order to be

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7Since the ‘best interests’ principle was first introduced in custody and parentage determination cases in the domestic law of the United States in the 1990’s.

8On the history of the ‘best interest principle’ and its origins in the common law system and the reasons behind the paradigm shift, see further: Dolgin (1996).

9In the original and the Revised Polish draft, in line with the 1959. Declaration, the phrase ‘the paramount’ consideration was initiated (see: Report of the Commission on Human Rights, Thirty-fourth Session, E/CN.4/1292, pp.124, Commission on Human Rights, Thirty-sixth Session, E/CN.4/1349, p.3). Later it was agreed that it was going to be phrased as ‘primary’ consideration. However, still in 1989, considerations were given whether to continue it as ‘a’ or ‘the’ primary consideration (see: Commission on Human Rights, Forty-fifth Session, E/CN.4/1989/48, pp. 22–23, paras 119, 121–124, 125).

10CRC GC no 14, paras 39–40.


12CRC GC no 14 para 6 (a).
invoked before a national court it does not require an act of transformation into domestic law, neither in the case when a State operates a dualistic system concerning the relationship of international and municipal law. On the other hand, the self-executing character does not have special importance with regard to a convention that has the highest number of ratifications amongst human rights treaties. Nonetheless, there are notably diverse opinions on this type of norm itself, i.e. how it is decided that it actually has a self-executing nature.

A common critique of the ‘best interests’ concept raises its indeterminate and fluid nature and content, that it is not particularly specified, it thus has a broad understanding and can be very different in each case. Neither the CRC, nor GC no. 14 gives a precise description regarding what is contained exactly in the best interests of the child in different situations. However, one cannot even expect it to give a general description since the social and economic situations of each State differ reasonably: furthermore, the individual circumstances of each child always need to be assessed.

In response to the aforementioned critique, the CRC Committee observed, that the principle is ‘dynamic’ and ‘flexible’ and that every case requires an individualised assessment. However, at the same time it gave some guidance on what elements are to be taken into account throughout the procedure. According to this guidance, ‘best interests assessment consists in evaluating and balancing all the elements necessary to make a decision in a specific situation, while best interests determination describes the formal process with strict procedural safeguards designed to determine the child’s best interests on the basis of the best interests assessment.’ Against this explanation, best interests assessment means an examination whether immediate actions are in the best interests of the child and draws on in-depth information about her/him, accumulated in the course of the process. Best interests determination as a formalized process involves interviews and consultations by qualified professionals. The Committee identifies seven elements to be taken into account when assessing the best interests of the child. In the context of this article, the relevant components are the following: the preservation of the family environment and maintaining relations, which is interesting in cases of detention of families, deciding on

13Only the United States had not ratified the Convention. Link 1.


15One aspect of its flexible interpretation can be seen from Para 84 of CRC General Comment no 6, which prohibits returning a migrant child to her/his country of origin if it is not in the best interests of the child. Drawing on this provision, the best interests principle might be understood as an independent source for protection outside the country of origin. On this topic, see further: Pobjoy (2015) 327–63. As for the procedure which leads to the establishment whether or not return is in the best interests of the child, a best interests assessment and determination need to be carried out. It means a thorough analysis of the individual circumstances of the child in a holistic manner. Furthermore, general human rights obligations such as the prohibition of refoulement need to be observed as well. In case a decision reflects that the child’s best interests is to stay on the territory, then the State, under which jurisdiction she/he is going to remain is responsible for taking care of them and arranging their status in a legal way. E.g. under EU law, to grant a residence permit or a right to stay. With regard to unaccompanied children, long-term residence solutions are encouraged by prominent actors in the field such as UNICEF or the European Commission. See European Union Agency for Fundamental Rights (2019) 7–21.

16CRC GC no 14 para 47.

17These are (a) the child’s views, (b) the child’s identity, (c) preservation of the family environment and maintaining relations (d) care, protection and safety of the child (e) situation of vulnerability (f) the child’s right to health (g) the child’s right to education. CRC GC no 14, 52–78.
whether or not to separate them. The care, protection and safety of the child is especially relevant in expulsion and return cases, since as the UN Special Rapporteur on the human rights of migrants, Felipe González Morales forcefully stated ‘[t]he right of every child to safety and protection does not cease when they migrate’. In addition, considering their situation of vulnerability is crucial given the fact that they first and foremost need to be treated as children and only at the second place as migrants.

2.2. The content of the concept

As mentioned in the introduction, according to the interpretation given by the CRC Committee, the ‘principle of the best interests of the child’ is a *threefold concept*. On the one hand, it is a *substantive right*, which requires ‘the ’best interests’ of the child to be assessed and taken as a primary consideration’. The Committee added that as a substantive right, the best interests of the child is a self-executing norm. Therefore, it constitutes a particularly powerful tool and has a wide impact, concerning the fact, that it creates an enforceable obligation on States even without transformation into the domestic legal systems – be it monist or even dualist vis-à-vis international law – thus can be invoked before a court in any proceeding, concerning children. Altogether, stemming from the substantive nature of the best interests, children have the right for it to be ‘assessed, appropriately integrated and consistently applied.’

On the other hand, the best interests of the child functions as a *rule of procedure*, which requires authorities during the decision-making process to carry out an exhaustive impact assessment. The justification of a decision that the child’s best interests were indeed considered is one of the crucial elements of the prevalence of the procedural right. To this end, the decision must contain a part on how the right has been respected, what was identified to be in the child’s best interests, based on what criteria, how other considerations were weighed against the child’s best interests.

The third face of the best interests of the child appears as a fundamental, *interpretative legal principle*, which works as a tool in cases where more than one possible interpretation of a legal provision exist, and taking into account the child’s best interests, that one needs to prevail which serves the child’s interests more accurately.

Best interests is an umbrella provision, its aim is to ensure the well-being of the child. All of the CRC’s provisions are required to be interpreted in light of the best interests principle and the CRC Committee often uses it as a tool of interpretation of certain Convention rights as well. For example in order to specify the case of detention in the migration context.

At the same time, the best interests of the child acts as a magnet which attracts all the rights of the child thereby conveying them into areas where they are originally not present. For example, the ECHR does not contain specific provisions on children. However, in the event that the Strasbourg Court considers the best interests of the child it results in the prevalence of other rights of the child as well.

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18 UNGA ‘Note by the Secretary General transmitting the Report of the Special Rapporteur on the Human Rights of Migrants’ A/75/183, (20 July 2020) 16.
20 CRC GC no 14, para 6 (c).
3. THE ECTHR AND ITS CASE LAW ON CHILDREN IN MIGRATION

3.1. The ECtHR and the UN convention on the rights of the child: systemic interpretation?

The ECHR does not in itself contain specific provisions concerning children; however, it enshrines human rights protecting every human being. From very early on, the ECtHR followed a consistent and evolving approach in invoking specific provisions of the CRC in its rulings.23 Various provisions of the ECHR and a segment of its case law serve as a basis for taking this path. This engagement with the CRC also flows from the general rules of treaty interpretation as codified in the 1969 Vienna Convention on the Law of the Treaties (hereafter: VCLT).24 Certain provisions of the ECHR are strengthening the extensive prevalence of the rights enshrined in the CRC. First, under Article 1 ECHR, the obligation of States arises not only to provide the rights contained in the European Convention in theory, but in practice as well25 stemming from the obligation to ‘secure to everyone within their jurisdiction’. Furthermore, Article 53 ECHR is also of relevance, since it requires States not to offer less satisfactory human rights protection in their domestic systems – based on the interpretation of the ECHR – than it is being prescribed in other relevant human rights instruments that the States are parties to.

Nonetheless, as regards the Court’s interpretation of the ECHR; the Convention as a ‘living instrument’ establishes that it needs to be interpreted in light of current circumstances.26 It can be seen from the Court’s case law that it gradually extended the range of instruments – other than the Convention – that it relies on, as tools of interpretation. First, it found satisfactory the considerable development of the human rights protection level in Member States’ domestic practice.27 Later in the Marckx case, the ECtHR also drew attention to the fact that the domestic laws of Council of Europe (hereafter: CoE) member States are constantly evolving in line with relevant international instruments. As part of the Strasbourg Court’s interpretation, it is going to take account of this pattern when interpreting the Convention as a ‘living instrument’ in line with present day conditions.28 Later, it reiterated the ‘living instrument’ nature of the ECHR in Demir and Baykara v. Turkey29 by devoting a separate section30 in the judgment to explain the basis of interpreting ECHR provisions in the light of other international instruments. It drew special attention to the Court’s task to interpret the Convention not only theoretically, but also in a practical and effective manner.31 On the one hand, it relies on Article 31 (3) (c) of the VCLT, which supports consistency in the international legal system by including amongst the general methods of

23For an overview on the topic see e.g. Kilkelly (2001) 308–26.
27Tyrer v UK para 31.
28Marckx v. Belgium App no 6833/74 (ECtHR, 13 June 1979) para 41.
29Demir and Baykara v Turkey App no 34503/97 (ECtHR, 12 November 2008).
30Demir and Baykara paras 65–68.
31Demir and Baykara para 66.
treaty interpretation the consideration of ‘any relevant rules of international law applicable in the relations between the parties’. By relying on this provision and carrying out a *dynamic interpretation* of the Convention with the help of universally or regionally adopted legal instruments, the ECtHR reflects on *common developments* and recognises the natural and *continuous evolution* of protected rights. Complementing the VCLT provision with its own case law with regards to the fact that it is obliged to consider relevant rules and principles of international law which are applicable between the Contracting States. On the other hand, it recalls its own case law, by which it demonstrates that as part of the ‘living nature’ of the Convention it always took into account the ‘evolving norms of national and international law’. Moreover, the Court makes a distinction between the various kinds of interpretative tools, such as general international law, CoE instruments and considerations by the Court. In other words, the latter means that the ECtHR might take into account various kinds of international legal instruments, even customary international law, relevant to the subject matter. It does not make a distinction between these sources based on whether or not they are signed or ratified by the respondent State. It is of the view that the existence of these treaties reflects the development of human rights protection and can be regarded as a reflection of common values. With regard to general international law, it refers to relevant international treaties, ‘general principles of law recognised by civilized nations’, as well as peremptory norms of international law (*jus cogens*). Another aspect which justifies the reliance on other international instruments is that they support the *objective interpretation* of the Convention rights. Furthermore, Member States are the ‘masters of the treaty’ and thereby they can influence the interpretation of the ECHR. On the other hand, however, evolutive interpretation could also lead to a lower level of protection. The Court’s scrutiny might establish that there are such widely accepted international instruments which do not provide a higher protection of human rights – as in the strict interpretation of the ECHR – neither offer an equal level of it. Therefore, in order to eradicate a judgment, inconsistent with ECHR standards, the Court needs to carefully exclude such international instruments from its consideration.

The ECtHR stated that a teleological interpretation of the Convention must always be given in ‘present day conditions’, since the ECHR is a ‘living instrument’. These principles are said to constitute the ‘evolutive and dynamic’ basis of interpretation of the Convention. The Court’s approach to investigate and give significant consideration to the continuous evolution and common developments of Member States’ legislation can also act as a counter-balance of an excessive use of the *living instrument approach*. When the Court observes

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33 Demir and Baykara para 67.
34 As for the CoE instruments, these do not only cover the Conventions adopted under the umbrella of the CoE but include the non-binding instruments emanating from the CoE organs (Committee of Ministers and the Parliamentary Assembly). Not only those ones representing States Parties but others such as the Venice Commission or the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (hereafter: CPT). European Court of Human Rights, Registry (2020).
35 Demir and Baykara paras 74–84.
36 This approach can also be regarded as one which promotes the universal nature of human rights e.g. the congruent practice of regional human rights courts may amount to a series of minimum standards in the field. Cf. Kovács (2020) 153.
37 Ulfstein (2018) 94.
fragmentation with regard to Member States’ legislations and policies, it takes a conservative stance and interprets the right in a rather strict sense.\textsuperscript{38} Lastly, the term ‘European Consensus’\textsuperscript{39} or ‘emerging tend’ must be mentioned. The Court constantly examines how domestic legal systems of the CoE member States are handling human rights issues and how the protection standards rise in certain areas of human rights protection.\textsuperscript{40} After finding a common ground and a common trend in several Member States’ policies, it may rely on such similarity when interpreting the convention notions to be accurate in present-day conditions.\textsuperscript{41} Notwithstanding, it needs to make distinction between States’ domestic practices and obligations undertaken by them on an international level, since these might show certain discrepancies. Therefore, the ECtHR is required to accord greater weight to international instruments, since they express the view of ECHR State Parties on certain international obligations.

3.2. The ECtHR’s engagement with the best interests of the child principle: one- or multi-dimensional?

The right to family life in Article 8 ECHR and the right to liberty and security in Article 5 ECHR became focal points of this paper’s scrutiny, since the ECtHR has the richest case law on the best interests of the child with regards to Article 8. As a next step, the Court extended its scope to Article 5 cases.\textsuperscript{42} Another reason which supports the examination of the latter right in this context is that detention of migrant children still continues to stand as a pressing issue.\textsuperscript{43} This

\textsuperscript{38}Gerards (2008) 9–12.

\textsuperscript{39}Remarkable cases where the Court applied this concept e.g.: Vo v. France App no 53924/00 (ECtHR, 8 July 2004), Glor v. Switzerland App no 3444/04 (ECtHR, 30 April 2009), Lee v. UK 25289/94, (ECtHR, 18 January 2001), Evans v UK 6339/05 (ECtHR, 10 April 2007).

\textsuperscript{40}When considering these practices, one might have to be really careful not to regard them as regional customary law, since these are only similar practices of States which do not bear a binding nature. Ziemele (2013) 250–51.

\textsuperscript{41}European Court of Human Rights, Registry (2020) 3.

\textsuperscript{42}Smyth (2013) 21.

\textsuperscript{43}Despite, the emergence of several soft law instruments on the topic, the general prohibition of child migration detention has still not been given effect by a binding international document. For instance, according to the CRC at the 2012 Days of General Discussions, children should not be criminalized or be subjected to punitive measures because of their or their parents’ migration status. Such detention of a child always contravenes the best interest principle. In the Recommendations it was also expressed, that States should expeditiously and completely cease the detention of children based on their migration status. States should adopt alternatives to detention that fulfil the best interests of the child, along with their rights to liberty and family life. In 2017, the CRC Committee and the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families stated in their Joint General Comment nos 4–23 that any kind of immigration detention based on a child or their parents’ migration status, should be ceased from all national laws (para 5). In the Global Compact for Migration, a separate Objective (no.13) dedicated to the minimalization of the use of immigration detention with a paragraph – namely, h) – focusing on child detention. Also, the Global Study on Children Deprived of Liberty, states that the precise extent to which the principle of measure of last resort allows deprivation of liberty depends on the type of detention. In the migration context, the report says that whether children are on the move unaccompanied, separated or with their families, migration-related detention never meets the high standards of a measure of last resort in article 37 (b) of the Convention or of the best interests of the child in article 3 of the Convention, as there are always non-custodial solutions available, which need to be applied.
subsection examines, through selected cases, which dimension(s) of the best interests concept is being addressed by the ECtHR.

3.2.1. Cases regarding the right to family and private life (Article 8 ECHR). The right to family life (Article 8) belongs to those provisions of the ECHR, that suggest a two-stage test in order to justify any measure of a public authority, which would interfere with this right. At the first stage, the ECtHR needs to establish whether there is an interference with a right protected by the Convention and in case this condition is met, it focuses on whether justification can be provided for such an interference. The justification test implies the necessity test and it identifies whether the conduct complained of, served a legitimate aim and was prescribed by law. The meaning of this specific necessity test (necessary in a democratic society) was further clarified by the Strasbourg Court in its Sunday Times judgment. In the case at hand, it stated, that ‘necessary in a democratic society’ implies the existence of a ‘pressing social need’. Over time, the ECtHR extended the scope of the necessity test by including the parallel examination of the proportionality and added the criteria of the proportionality of the measure in question. Despite setting up this detailed examination procedure, the Court seemed to simplify it and merged the two stages into the ‘fair balance test’. Under the latter, it establishes whether the State has struck a fair balance between the interfering rights; the conflicting general and individual interests. It does so by mentioning different aspects which support the importance and weight of the interests at stake and then it decides which one tips the scale.

The aforementioned scrutiny can be seen at the following cases, where the Court preferred the application of the fair balance test in migration cases.

The matter of safeguarding the right to family life occurs in immigration detention cases, where the most pressing issues are whether or not the family should be divided when applying the detention order or whether they should be placed in a centre established primarily for adults.

From this perspective, it is worth analysing the detention of an unaccompanied migrant child in the Mayeka & Mitunga case. Here, a minor child was detained at the Brussels Airport because she did not have the necessary documents to enter the State’s territory. She applied for asylum but her claim was rejected as inadmissible. Her deportation was ordered to the Democratic Republic of Congo where there were no family members she could have joined. Eventually she reunited with her mother – who obtained refugee status in Canada – following the intervention of the Belgian and Canadian Prime Ministers. The possible limitation of Article 8 ECHR requires a necessity test, namely the measure taken, which interferes with this right, should be necessary in a democratic society and should pursue a legitimate aim. In the case at hand, the Court concluded that the placement of the child in a closed detention centre with adults – taken into account the lack of risk of her absconding from underneath the authorization of the Belgian authorities – was completely unnecessary. Despite of the government’s defence, that it had to reconcile its interest in migration control with the applicant’s right to private and family life, the Court concluded that the authorities should have considered alternatives to detention which

44Sunday Times v The United Kingdom App no 6538/74 (ECtHR, 26 April 1979).
46Mubilanzila Mayeka and Kaniki Mitunga v. Belgium App no 13178/03 (ECtHR, 12 October 2006).
would have aligned more with the best interests of the child.\textsuperscript{47} Thus, the Strasbourg Court emphasized the State’s sovereign right to control the entry and stay of aliens in order to pursue the duty to maintain public order, as it is imposed by international law, but by doing so, they need to pay attention to the fact that they are still bound by other obligations under international law such as the ECHR and the CRC. As a result of its scrutiny of the preceding aspect, the ECtHR found the violation of Article 8. It can be seen in the case at hand that the Court applied the \textit{procedural approach}, since it found that no attention was given to the best interests of the child. An even more thorough analysis of the possible alternative measure and their effect on the child’s well-being could have been carried out by which it could have been said that the procedural right was thoroughly taken into account. The Court also emphasized, that States have the right to control immigration and an obligation to protect public order, but these need to be reconciled with its obligations under human rights law, such as the ECtHR or the CRC.

It can be observed in this case that the best interests of the child as a procedural and a substantive right are not necessarily connected nor incorporated in each other. It might happen that the procedural right prevails, i.e. national authorities consider the best interests of the child and reason their decision accordingly. Thus the procedural approach prevails. At the same time it can be noticed that despite the consideration of the best interests, it was not given a primary consideration to.

In \textit{Popov},\textsuperscript{48} the Court examined whether the detention of a family and their two minor children in a closed detention facility was compatible with the Convention. The examination of the necessity requirement was a major component of its scrutiny. The ECtHR emphasized that it is crucial that international conventions are being taken into account when national authorities are striking a fair balance between competing interests.\textsuperscript{49} Regarding limitations of Article 8 of the ECHR, a necessity test must be carried out. Stemming from this obligation, the aim of the confinement of persons must be proportionate with the reason behind the confinement order. In order to reach proportionality, the ECtHR pointed out that in case of families the child’s best interests must be taken into account, since there is a broad consensus in international law that the best interests of the child must be paramount.\textsuperscript{50}

The use of the phrase ‘paramount’ is interesting in the detention context, since according to the CRC, the best interests of the child is ‘a primary consideration’ and only in adoption cases must it be accorded as ‘the paramount’ consideration. However, it can be observed from the Strasbourg Court’s case law that it consistently uses and refers to the best interests of the child as ‘paramount’. This approach originates in the phrasing of the \textit{1980 Hague Convention on the Civil Aspects of International Child Abduction} (hereafter: Hague Convention).\textsuperscript{51} It is stated in the preamble, that ‘the interests of children are of paramount importance in matters relating to their custody’. This terminology and the reference to the 1980 Hague Convention appears in the Court’s judgments and it became frequently used, not only in child abduction cases, but in the

\textsuperscript{47} Mubilanzila Mayeka and Kaniki Mitunga v. Belgium para 83.

\textsuperscript{48} Popov v France App no 39472/07 and 39474/07 (ECtHR, 19 January 2012).

\textsuperscript{49} Popov para 139.

\textsuperscript{50} Popov para 140.

migration context as well, extending it to all decisions, concerning children.\textsuperscript{52} Despite referring to the best interests as ‘the paramount’ consideration,\textsuperscript{53} the Court is still in favour of the balancing of the conflicting interests and it does not accord an absolute nature to the best interests of the child.

Attention also needs to be given to family reunification cases. Here, the Court has the difficult task of conclusively assessing how the best interests determination was carried out, since that often remains formally undocumented.

In \textit{Saleck Bardi v Spain},\textsuperscript{54} the ECtHR found a violation of Article 8 in respect of a biological mother’s right to family life.\textsuperscript{55} The judgment condemned the procedure of Spain, in which it awarded guardianship to a foster family in an unfair procedure, despite the mother’s clear intent on re-establishing contact with her daughter. Since the child was also affected by the decisions, the Court examined how her best interests were considered. In this regard it accorded weight to the best interests as a \textit{substantive right}. It seems that it found satisfactory the procedural approach of the Spanish authorities of considering the best interests thoroughly. It was also satisfied with the prevalence of the \textit{substantive} right, since when the Spanish authorities awarded custody to the foster family, they accorded decisive importance to the child’s best interests. They recognised that she established strong ties with that family throughout the years of her stay and she expressed her wish not wanting to stay with her biological mother.

The ECtHR accorded high importance to the best interests of the child in the case of \textit{Rodrigues da Silva v the Netherlands},\textsuperscript{56} when finding a violation of a mother’s right to family life by establishing that the Spanish State could not strike a fair balance between the competing interests, namely the mother’s right to family life and staying in the Netherlands with access to her daughter as opposed to the state’s economic interest. As an essential element of reaching its conclusion, the ECtHR stated that the child’s best interests were not considered as a primary factor during the authorities’ deliberation on the mother’s expulsion. Instead the utmost importance was given to the economic well-being of the country which in this context meant the excessive formalism on the side of the authorities. In the present case, the Court found a violation with regard to the best interests as a \textit{substantive right}.

\textsuperscript{52} Neulinger and Shuruk v Switzerland App no 41615/07 (ECtHR, 6 July 2010) para 135.
\textsuperscript{53} Rahimi v Greece App no 8687/08 (ECtHR, 5 April 2011) para 108.
\textsuperscript{54} Berisha v Switzerland App no 948/12 (ECtHR, 30 July 2013) para 51.
\textsuperscript{55} Referring to the best interests as paramount is neither unfamiliar to the CRC Committee which used this term several times in its Concluding Observations to different States. Smyth (2013) 43.
\textsuperscript{56} Saleck Bardi v Spain App no 66167/09 (ECtHR, 24 May 2011).
\textsuperscript{55} The ECtHR found a violation of the applicant’s right to family life, since the delay of the Spanish procedure added up to the fact that her daughter felt abandoned by her and even more integrated in Spain. It can be concluded, that if the inertia and the lack of communication of the Spanish authorities did not happen, the mother’s right to family life would not be violated. Saleck Bardi 64. Despite of the fact, that Article 8 does not contain explicit procedural obligations, the ECtHR established in its case law that it is inherent in this section, especially in cases when the length of proceedings has a clear impact on the applicant’s family life, as it does so in the present case. CoE: ECtHR (2020) 281.
\textsuperscript{56} Rodrigues da Silva v the Netherlands App no 50435/99 (ECtHR, 31 January 2006).
In *Assem Hassan Ali v Denmark*, the ECtHR reiterated the relevant criteria set out in its previous case law under which it can be determined whether or not the interference was necessary in a democratic society in case of an expulsion order of the parent. Amongst these criteria the best interests of the child appears in such a way that it needs to be examined with regard to the seriousness of difficulties the children are likely to encounter in the country to which the applicant is to be expelled. In the context of an expulsion based on amongst others a crime, committed by the parent, the child’s best interests still needs to be a primary consideration, needs to be accorded effective protection but cannot alone be decisive. In the case at hand, the Court stated consequently that the nature and seriousness of a crime may outweigh the aforementioned criteria. Therefore, the ECtHR found in the present case that the Danish authorities did not violate the applicant’s right to family life, since his children’s best interests were not adversely affected by his expulsion that is why these interests did not outweigh the State’s in upholding public order. In the present case, the procedural right prevailed, since it was taken into account adequately. The substantive right also prevailed in the domestic procedure and the Strasbourg Court found it satisfying, that the Danish authorities have seen that the best interests were not violated by making the decision on the father’s expulsion.

In *Mugenzi v France*, the ECtHR decided in a family reunification case where it reiterated what it stated in *Popov* that in such cases when the balancing of interests is carried out and children are concerned, their best interests must be a primary consideration when considering proportionality. The Court declared that despite of the fact that there are no explicit procedural guarantees in Article 8, the decision-making process, leading to a result of a right being limited, nonetheless needs to respect the interests, safeguarded by Article 8. The Court concluded that a fair balance was not struck between the different interests at stake, accordingly, there has been a violation of Article 8 of the Convention.

In *El Ghatet v. Switzerland*, the applicants’ claim for family reunification was dismissed by the Swiss authorities, based on its conclusion, that the child had closer family ties in his country of origin, Egypt. Here, the Court, repeatedly took the procedural approach and reiterated its findings from *Berisha* and *I.A.A*. It stated that the best interests cannot be a ‘trump card’, which enables children to get accepted into a country where her/his family member is residing. Therefore, it pointed out the importance of carrying out a best interests assessment in each and every individual case. As an essential part of that decision, the authorities shall give a detailed reasoning how the best interests were taken into account, through the deliberation process. In the present case, it concluded that the Swiss authorities’ examination was insufficient in that sense that it did not enable them to strike a fair balance between the competing interests, namely the State’s interest in immigration control and the child’s interests, therefore the Court concluded that there was a violation of Article 8.

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57 *Assem Hassan Ali v Denmark*, App no 25593/14 (ECtHR, 23 October 2018).
59 *Mugenzi v France*, App no 52701/09 (ECtHR, 10 July 2014).
60 *El Ghatet v Switzerland*, App no 56971/10 (ECtHR, 8 February 2017).
61 *I.A.A and Others v the United Kingdom*, App no 25960/13 (ECtHR, 8 March 2016). (Decision).
62 *El Ghatet* paras 46–47.
63 *El Ghatet* paras 53–54.
In *Tuquabo-Tekle*, the ECtHR emphasized three elements that need to be taken into account when in a family reunification case it is to be established whether national authorities could strike a fair balance between the competing interests. The three elements are: the age of the children concerned, their situation in their country of origin and the extent to which they are dependent on their parents. It explicitly connected it with the paramountcy requirement of the best interests principle in *I.A.A and others v the United Kingdom*. It can be considered as a clear *substantive approach*, which establishes different aspects of examination as handholds for domestic authorities to always consider them in such cases.

### 3.2.2. Cases regarding the right to liberty (Article 5 ECHR)

As regards the limitation of human rights, several States require carrying out the *necessity and proportionality test* in their domestic legislation, to justify a restrictive measure in a particular case. However, the foregoing is not common in every legal regime, neither is crucial under Article 5 (1) (f) ECHR which intends to prevent an unauthorized entry into a country. In *Saadi* and *Chahal*, the Court concluded that the necessity and proportionality test, with regard to Article 5 (1) (f) is not essential, save in the case where domestic legislation requires it. At the same time, however, it can be observed in its case law that during the examination, whether detention of children was arbitrary or not, it assigns decisive importance to such safeguards, which, under EU law are being scrutinized in the course of the necessity and proportionality test. There are four requirements therein, which serve the prevalence of the best interests of the child: detention is a measure of last resort, it is for the shortest appropriate period of time, it respects the right to family life and that detention facilities are equipped for children. Furthermore, another aspect to which the Court assigns greater weight is whether less intrusive measures could have been taken. The latter has particular importance in cases concerning children, since searching for alternatives to detention is obligatory in order to eradicate the arbitrariness of the detention of children. In 2017, the CRC Committee and the Committee on Migrant Workers published their Joint General Comment No.23 and No.4, emphasizing, that despite Article 37 (b) CRC, according to which the detention of children is allowed as a measure of last resort, it is not similarly applicable in
the immigration context, since it would contravene the best interests principle.\(^{71}\) As it can be concluded from the case law of the ECtHR, it is mostly in line with the aforementioned international instruments; however, it might be of interest to examine which one out of the three dimensions of the concept can be identified in the Court’s case law.

In 2011, the Rahimi case\(^{72}\) resulted in a landmark judgment concerning the detention of an unaccompanied migrant child in a closed centre for adults with poor hygiene and infrastructure conditions. When examining the alleged violation of Article 5 (1) ECHR, the Court found out that when national authorities ordered the detention of the applicant, they did not, at any stage, give consideration to the best interests of the child.\(^{73}\) It can be seen from the Court’s assessment that neither the procedural nor the substantive form of the best interests of the child was taken into account, since there was a lack of best interests assessment and determination. Therefore, authorities failed to strike a fair balance between the competing interests – namely the State’s interest in migration control versus the best interests of the child – accordingly, the best interests could not appear as a primary consideration. Here, the ECtHR reiterated its finding from Neulinger and Shuruk, that ‘there is currently a broad consensus – including in international law – in support of the idea that in all decisions concerning children, their best interests must be paramount’. This case can be considered as a milestone in the course of child migration cases, since the Court attached decisive importance to the consideration of the best interests of the child when assessing a violation of the right to liberty. It invoked Article 37 CRC which deals with the protection of the same right as Article 5 ECHR and it interpreted the latter in light of that child-friendly provision.

The year after, in Popov v. France the Court referred to previous case-law when pointing out that the best interests must be paramount. Concerning the detention of the children, the Court found a violation of Article 5 (1) (f), drawing heavily on the fact, that national authorities did not separately examined the situation of the children, hence did not consider alternative measures which could have been applied to them.\(^{74}\) From this assessment, a procedural approach might be seen, since the Court assigned decisive importance to the fact that the consideration of the children’s situation was omitted altogether. Hence, the steps of best interests assessment and determination were bypassed as well and the right could not have been taken into account.

\(^{71}\)UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, CMW/C/GC/4-CRC/C/GC/23, 16 November 2017, para 10. Although the majority of views share the standpoint of the Committees, one might observe different logical patterns which lead to this conclusion. E.g. according to Smyth’s teleological approach, there is no need to even examine the last resort requirement in case it is accepted that – pursuant to the first sentence of Article 37 (b) – immigration detention of children is fundamentally arbitrary and thus impermissible. Smyth (2019). Furthermore, the UN Global Study on Children Deprived of Liberty states that there is no need to move beyond the standards, set out in Article 37 (b) CRC since the last resort requirement is already providing such a protection level as the best interests principle. United Nations Global Study on Children Deprived of Liberty (Nowak 2019).

\(^{72}\)Rahimi.

\(^{73}\)Rahimi 109.

\(^{74}\)Popov para 119.
Sh.D. and Others considered the detention of three unaccompanied asylum seeking children. Two of them were placed in a so-called protective custody at a police station and they then spent a month living in the Idomeni camp in Greece. With regards to the Idomeni camp, it is true that it was only an informal one. However, in spite of it not being run under the supervision of the State, it is still at its territory. Given that, Greece is still bound by its human rights obligations, such as providing sufficient care for all children, deprived of her or his family environment under Article 20 of the CRC. The ECtHR assigned decisive importance to the best interests of the child when establishing a violation of Article (5) (1) of the ECHR. It reiterated its findings from H.A. and Others v Greece and stated that under Article 3 CRC, States have the obligation of taking the best interests of the child into account when making any decision concerning them. Here, a clear and strong procedural approach can be seen, since the ECtHR condemned the act of the Greek authorities of placing the children in detention at police stations instead of a temporary accommodation, said that it was unlawful whilst their best interests were not taken into account.

4. PATTERNS FROM STRASBOURG

The aim of this article has been to examine how the threefold nature of the best interests concept prevails in the migration case law of the ECtHR. To this end, it includes the analysis of the historical background and the legal nature of the concept. Then, the basis of the Strasbourg Court’s reliance on the concept was reviewed, with particular attention to the connection to the 1969 Vienna Convention and the consideration of the ‘European Consensus’. Afterwards, studies of selected cases connected to the most relevant articles of the ECHR became the centre of the paper’s scrutiny. Namely Article 5 and Article 8 cases, mostly migration detention and family reunification matters. Neither of the examined parts of the previous articles explicitly require a necessity and proportionality test when assessing the interference with the protected rights. Nevertheless, it can be seen that in cases concerning migrant children, the ECtHR examines such criteria which equals to the proportionality and necessity tests. It shines out of the consideration of alternative measures or the best interests of the child in Article 5 cases and in taking the fair balance test in Article 8 cases. As for a general conclusion from the Strasbourg Court’s judgments, it can be deduced that the majority is mostly in line with the relevant international legislative instruments on the best interests of the child. The best interests of the child was, in some aspect, addressed in each of the selected cases. Despite the ECtHR’s clear effort to examine it thoroughly, the evaluation of all the three dimensions of the concept was not carried out in any of the examined cases. That was not a result of the lack of an in-depth analysis of the matter, rather the exhaustion of the extent of the possible examination framework, since it is in the nature of the concept that its different dimensions are not necessarily connected nor incorporated in each other. The evaluation of the case law has shown that in the majority of cases the procedural and substantive dimensions were examined by the ECtHR and in neither of the selected cases prevailed the principled approach. The analysis of the Court started in each case by taking the procedural approach e.g. it examined whether or not the domestic authorities took into account the best interests of the child when

75 H. A. and Others v Greece App no 19951/16 (ECtHR, 28 February 2019).
76 Sh.D and Others Greece, Austria, Croatia, Hungary, North Macedonia, Serbia and Slovenia App no 14165/16 (ECtHR, 13 June 2019) para 69.
elaborating their decisions. Since the substantive approach inherently contains the prerequisite of the prevalence of the procedural approach, the ECtHR could only take the substantive approach after it thoroughly scrutinized the procedural aspect. Therefore, it can be concluded that the domestic authorities' activities determine the ECtHR's scope of deliberation. In the majority of cases it applied the procedural approach and in none of the cases was the principled approach addressed. Accordingly, it can be concluded that the three dimensions of the best interests concept in the examined context are not necessarily interdependent. However, it should be noted that the substantive dimension is built upon the procedural one and can only prevail when the best interests as a procedural right was adequately applied.

5. CONCLUDING REMARKS

This study shed light on the appearance of the best interests of the child concept in the ECtHR's case law from a scarcely scrutinized aspect. It examined three approaches to it. The ECtHR's case law reflects the comprehensive nature of the concept of the best interests of the child which is not only part of the scrutiny of domestic authorities but also of international institutions. With regard to the right to family life, the Strasbourg Court constantly takes this concept into account during the balancing of conflicting interests, even in cases where the child was not the applicant, but the decision concerned him/her. It is also of importance that the concept should not be abused and used as 'trump card', therefore a precise and detailed individualised assessment is always crucial.

As for detention, the ECtHR contributes to the evolving tendency of international instruments on eradicating the immigration detention of children. However, numerous cases continue to be brought before the Court, concerning this same subject matter, since most domestic practices are still falling behind to follow and to ensure the extensive prevalence of the three dimensions of the best interests of the child concept. However, had all the three dimensions been addressed it could have been clearly seen that immigration detention is not in the best interests of the child, neither from its different dimensions.

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