

# Putting children first? Children's interests as a primary consideration in public law

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*The interests of children have often been neglected in public decision-making. In response to this neglect the United Nations Convention on the Rights of the Child 1989 requires children's interests to be made a 'primary consideration' in decisions concerning them. Recent developments in case-law and legislation have ensured that this duty is now an established requirement in a wide range of policy areas. Nonetheless, as the breadth of the duty has expanded, so uncertainty about its precise basis and flexibility about its requirements have threatened to undermine its utility. The duty has the potential to improve decision-making for children but only if focus is maintained on the importance of making children's interests visible in a system designed for adults.*

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## Children and public decision-making

Children are citizens<sup>1</sup> and an integral part of the community. Their interests may be deeply affected by state action or inaction just as those of adults may be. Indeed the inability of many children to take action to change their circumstances and avoid disadvantage puts children in a particularly vulnerable position if their interests are at risk of being adversely affected. It is in recognition of this dependent position that the welfare of children is widely recognised as the paramount consideration in court decisions that concern their upbringing. But other actions of the state may well have a more serious and coercive impact on a child than a court order determining their upbringing. The decision of an immigration official to deport the child's parents;<sup>2</sup> the adoption of a welfare policy that puts the family into significant poverty;<sup>3</sup> or the refusal of planning permission for the family home,<sup>4</sup> all have the potential fundamentally to harm the interests of the child. The ability of children to affect these decisions or to be represented within the decision-making process is extremely limited. Children's lack of enfranchisement and their limited opportunity for participation in the political process leaves their voices and interests in a precarious position in the public sphere.<sup>5</sup> It is no surprise that it is children who have suffered much of the burden of recent austerity cuts.<sup>6</sup>

In recognition of the weakness of children's voices, the United Nations Convention on the Rights of the Child 1989 (UNCRC) imposes a positive duty on states to ensure that 'in all

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1 A Nolan, 'The Child as "Democratic Citizen": Challenging the "Participation Gap"' [2010] PL 767; and A Invernizi and J Williams, *Children and Citizenship* (Sage, 2008).

2 *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, [2011] 2 AC 166.

3 *R (SG) v Secretary of State for Work and Pensions* [2015] UKSC 16, [2015] 1 WLR 1449.

4 *Stevens v Secretary of State for Communities and Local Government* [2013] EWHC 792 (Admin).

5 A Nolan, *Children's Socio-Economic Rights, Democracy and the Courts* (Hart Publishing, 2011), chapter 2.

6 Joint Committee on Human Rights, *The UK's Compliance with the UN Convention on the Rights of the Child*, HC 1016 (2015), pp 28–31. Report of the UK Children's Commissioners (1 July 2015), especially at para [1.4].

actions concerning children . . . the best interests of the child shall be a primary consideration'.<sup>7</sup> Whilst the UK overall has been criticised for failure to meet the demands of this obligation,<sup>8</sup> it has been taken increasingly seriously at least in some parts of the UK. The devolved administrations in Wales and, to a lesser extent, Scotland have imposed legislative obligations on ministers to require consideration of the rights and interests of children across all departments. The Westminster government, often lagging behind in matters of children's rights, has responded more cautiously, with limited statutory duties, and a non-binding commitment. These differing responses to children's interests within the devolution settlement has, as the Joint Committee of Human Rights noted, created a patchwork of responsibilities for children's interests with the risk of gaps developing within differing responsibilities.<sup>9</sup>

In the absence of a uniform legislative response, the judiciary has made innovative use of the UNCRC to require that children's interests are taken seriously across a wide range of policy areas. This has had a transformative impact in many fields but is by no means a complete answer to the invisibility of children's interests. The current limitations are vividly illustrated by the recent Supreme Court decision *R (SG)* concerning the imposition of the 'benefit cap'.<sup>10</sup> In a finely balanced decision, a majority of the court found that the cap had been imposed without sufficient consideration of affected children's interests, so violating Article 3 of the UNCRC but, by a different majority, that this did not render the regulations unlawful. This decision demonstrated deep conflict of opinion as to the precise means by which the UNCRC obligation is relevant within domestic law, with three different alternative bases given in that case. The lack of clarity on the basis and limits of the obligation is a significant obstacle for the judicial protection of children's interests in public law.

In those cases to which the duty does apply, there remain important questions as to its precise application. There is a concern that judicial imposition of an indeterminate 'best interests' standard could undermine well-established regulatory frameworks in areas of policy such as planning and immigration. As the reach of the best interests approach has increased, so this concern is heightened given the difficulty of articulating a sufficiently precise meaning for an obligation that applies across wide-ranging policy areas. Whilst these are valid concerns, the response in some of the cases has diminished children's interests to a point that fails to require substantial engagement with them. There is a related risk that the characterisation of children's interests by decision-makers or parents can be paternalistic, self-serving and may fail to take seriously the individual children affected or their legal and human rights.<sup>11</sup>

Despite these weaknesses, an obligation on public decision-makers to consider the interests of children can, if applied in the right way, have a significant positive impact on outcomes for affected children and can do so in a way that not only respects but also improves administrative discretion. The uncertainty as to the proper basis and interpretation of that obligation is problematic for both children and decision-makers. Ultimately, the best outcomes for children are only likely to be secured if careful consideration of their best interests and their voices is embedded throughout the political process.

### Article 3 UNCRC: application in international law

The requirement that children's best interests should be given special consideration in decisions concerning them is a foundational concept within the law relating to children throughout

7 UNCRC, Art 3(1).

8 Committee on the Rights of the Child, *Concluding Observations* (2008) CRC/C/GBR/CO/4, at paras [26] and [27].

9 Joint Committee on Human Rights, *The UK's Compliance with the UN Convention on the Rights of the Child*, HC 1016 (2015).

10 *R (SG) v Secretary of State for Work and Pensions* [2015] UKSC 16, [2015] 1 WLR 1449.

11 J Fortin, 'Are Children's Interests Really Best? *ZH (Tanzania) v Secretary of State for the Home Department*' (2011) 74 MLR 932.

national and international law.<sup>12</sup> It is, however, the obligation found in UNCRC Article 3(1) that has been particularly significant in the developing domestic jurisprudence. Article 3(1) states:

‘In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.’

The UN Committee on the Rights of the Child (the UN Committee) has given extensive guidance on its interpretation, which whilst not directly binding, carries significant weight.<sup>13</sup> This identifies Article 3(1) as one of the four Articles that embody general principles of the Convention and are to be used in implementing and interpreting all of the rights within the Convention.<sup>14</sup> As such, Article 3(1) is not merely one provision of the UNCRC; it is, as Michael Freeman suggests, pivotal to the UNCRC as a whole.<sup>15</sup>

One of the difficulties with giving coherent meaning to Article 3(1) is the wide-ranging nature of the right and the diverse situations in which it applies. Fundamentally, the UN Committee defines the best interests of the child as a threefold concept: a substantive right of children to have their best interests assessed and treated as a primary consideration; an interpretive tool to resolve ambiguity in legal provisions; and a procedural rule to ensure that children's interests are fully considered in decisions that concerning them.<sup>16</sup> Further, the Article applies to all forms of public decision-making, from judicial and administrative decisions concerning an individual child to the creation of generally applicable legislation or policy that will affect disparate groups of children.<sup>17</sup> Article 3(1) is also deliberately framed broadly to include all actions<sup>18</sup> concerning children; this covers not only actions that directly affect children but also those that indirectly do so. As such the principle has force beyond decisions that focus on children and extends to wider policies, for example on housing, the environment and transport.<sup>19</sup> This means that, for the UN Committee, Article 3(1) applies in principle to all actions and omissions that directly or indirectly affect individual children, groups of children or children in general. On this understanding, almost any administrative or legislative act could be read as falling under Article 3(1).

To an extent the breadth of Article 3(1) is a key strength: it is easy for the interests of children to be overlooked in a political system run by and largely for adults. The breadth of application both in terms of the actions and the institutions to which it applies has, perhaps necessarily, resulted in a flexible, context-dependent duty. This creates the risk that the Article may become meaningless with too little minimum content to provide an effective standard. This concern has not gone unnoticed by the UN Committee, which notes that not every action by the state need incorporate a full and formal process of determining the best interests of the child, but there is limited guidance as to when such a process is required. The UN Committee draws a contrast between decisions that have a major impact on children, which will require a greater level of

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12 For example, The African Charter on the Rights and Welfare of the Child, Art 4(1) and Charter of Fundamental Rights of the European Union, Art 24(2). M Freeman, *Article 3: The Best Interests of the Child* (Martinus Nijhoff, 2007), chapter 2.

13 Committee on the Rights of the Child, *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), CRC/C/GC/14 (General Comment No 14).

14 Committee on the Rights of the Child, *General Comment No 5 (2003) General Measures of Implementation of the Convention on the Rights of the Child*, CRC/GC/2003/5, para [12].

15 M Freeman, *Article 3: The Best Interests of the Child* (Martinus Nijhoff, 2007), pp 2–5.

16 *General Comment No 14*, para [6].

17 *Ibid*, para [14](b).

18 *Ibid*, paras [17]–[18] although the term is drafted positively, it is clear that that the UN Committee also uses the term to cover omissions.

19 *Ibid*, para [19], P Alston, ‘The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights’ (1994) 8 *IJLPF* 1, p 14.

protection, and those measures not directly aimed at children, in which the requirements would 'need to be clarified in the light of the circumstances of each case'.<sup>20</sup> This contrast may be unhelpful if it is taken to suggest that measures not directly aimed at children will not have a major impact upon them: it is often precisely because children are not the primary focus of the measure that their interests are overlooked.

Exactly what is required to implement Article 3 will also depend on the form of decision being made. In relation to general legislation and policy making, the primary means of implementation envisaged by the UN Committee is the child rights impact assessment (CRIA), embedded within all levels of government processes.<sup>21</sup> The CRIA approach requires a detailed and structured prior assessment of the impact of proposed policy or legislation on the rights and interests of children who are likely to be affected.<sup>22</sup> By way of contrast, for individual decisions, the decision maker will have to consider the meaning of 'best interests' and 'a primary consideration' in the particular case. The interpretation of these key terms in domestic law is considered further below. They are, however, not capable of precise, abstract definition but have been treated as adaptable and dependent on circumstance. To fashion these concepts into a meaningful legal duty it is necessary to interpret the principle within the specific contexts to which it applies; to do so effectively requires a clear understanding as to why children's interests are given this special protection.

The requirement to treat children's interests as a primary consideration does not necessarily entail treating those interests as of greater worth than the interests of all others affected: the interests of children are a primary consideration but are not paramount. Article 3(1) requires that children's interests are given special protection in decision-making but not that they are prioritised over all other considerations. In part, the obligation is remedial; it attempts to address the practical hurdles to receiving equal consideration in practice and the invisibility of children within political and legal processes. Whilst the interests of many children will be addressed through their parents' democratic rights, this is often insufficient. Not all parents will have the will or resources to represent their children's interests effectively and even when they do, the characterisation of those interests by the parent may be misguided, selfish or at odds with the child's own perception of their interests. Further, many of the most vulnerable children do not have stable adult care or have carers whose own position means that they are unable to engage in the democratic process. In still more cases the interests of children may be at risk precisely because of the decisions of their parents. For all of these reasons a democratic deficit remains for children.<sup>23</sup> Further, children's experience of a situation will often be different from that of the adults around them and may have more severe consequences; for example, deprivation of family life is harmful to both children and adults but is likely to have fundamental consequences for children's future development in a way not relevant to adults.<sup>24</sup> Similarly, poverty in childhood can have serious long-term consequences for children's development and future potential. Treating children as of equal moral worth in a system in which they are at risk of majoritarian neglect<sup>25</sup> may require enhanced procedural protection as a corrective to their disempowerment and it is this that is at the heart of Article 3(1).

### The UNCRC and statutory obligations

One method of ensuring that children's best interests are a primary consideration in decision-making is to impose legislative obligations on the administration to do precisely that. The

20 Ibid, para [20].

21 Ibid, paras [35] and [99].

22 See Welsh Government, *Children's Rights Scheme 2014*, Annex 2 for the CRIA template used in Wales.

23 A Nolan, *Children's Socio-Economic Rights, Democracy and the Courts* (Hart Publishing, 2011), chapter 2.

24 *HH v Deputy Prosecutor of the Italian Republic, Genoa* [2012] UKSC 25, [2013] 1 AC 338, at para [33].

25 J King, *Judging Social Rights* (Cambridge University Press, 2012), pp 181–185.

devolved administration in Wales has led the way in imposing explicit legislative duties to consider the rights and interests of children. A disparate set of more limited duties apply elsewhere in the UK, leading to a patchwork response to children's interests.

The Rights of Children and Young Persons (Wales) Measure 2011<sup>26</sup> states that 'Welsh Ministers must, when exercising any of their functions, have due regard to the requirements of' the UNCRC and its optional protocols. This obligation is notable for its general application to all ministers and its requirement that the minister pay due regard to the specific rights enumerated in the UNCRC and not merely to the minister's conception of the child's best interests. The requirement to have 'due regard' is familiar from its use in discrimination law,<sup>27</sup> and requires that the decision-maker approaches the duty 'in substance, with rigour and with an open mind' rather than merely adopting a 'tick box' approach.<sup>28</sup> The Welsh ministers, as required by the Measure, have published a detailed Children's Scheme, setting out the steps necessary to have 'due regard' to the rights of children. In particular, the Scheme gives detailed guidance on producing a CRIA in legislating or performing ministerial functions.<sup>29</sup> These detailed requirements, together with the further implementation requirements in the Measure, such as the obligation for ministers to report on their implementation of the duty, demonstrate a firm commitment to genuine engagement with children's rights throughout policy making and legislating in Wales. This duty on ministers has been supplemented by a specific duty on public authorities providing social services to have due regard to the UNCRC, but not on public authorities more widely.<sup>30</sup> Although there are some weaknesses in implementation,<sup>31</sup> this is the most significant legislative engagement with children's interests in the UK to date.

In 2014, Scotland rejected calls fully to incorporate the UNCRC, instead placing a somewhat weaker duty on Scottish Ministers than that imposed on their Welsh counterparts. Scottish Ministers are obliged to 'keep under consideration whether there are any steps which they could take which would or might secure better or further effect in Scotland of the UNCRC requirements, and if they consider it appropriate to do so, take any of the steps identified by that consideration'.<sup>32</sup> This duty, which gives ministers significant discretion, is primarily implemented through reporting requirements on Scottish Ministers and specified public authorities.<sup>33</sup>

Whilst the interests of children have been taken seriously in Wales and Scotland, the position in England<sup>34</sup> and in respect of non-devolved matters across the United Kingdom is much more equivocal. Rather than utilising a general obligation, the approach at Westminster is limited to specific statutory obligations. The Children Act 2004 imposes an obligation on specified bodies to 'make arrangements for ensuring that their functions are discharged having regard to the need to safeguard and promote the welfare of children'.<sup>35</sup> The Borders, Citizenship and Immigration Act 2009 puts the same obligation on the Secretary of State in relation to immigration, asylum and nationality.<sup>36</sup> These provisions were both intended to further the UK's

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26 J Williams (ed), *UNCRC in Wales* (University of Wales, 2013), especially chapter 4.

27 Equality Act 2010, s 149(1).

28 For example, *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin), [2009] PTSR 1506, at para [92].

29 Welsh Government, Children's Rights Scheme 2014.

30 Social Services and Well-being (Wales) Act 2014, s 7(2).

31 Report of the UK Children's Commissioners (1 July 2015), para [2.4]

32 Children and Young People (Scotland) Act 2014, ss 1.

33 *Ibid*, ss 1 and 2.

34 In Northern Ireland, the only relevant legislation is a recent requirement to make the best interests of children a primary consideration in relation to youth justice: Justice Act (Northern Ireland) 2015, s 98.

35 Children Act 2004, s 11(2) the duty is imposed on the bodies specified in s 11(1).

36 Borders, Citizenship and Immigration Act 2009, s 55.

obligations under Article 3(1), although the statutory wording falls far short of the requirements of that Article. First, the provisions only apply to specified agencies, not to the broad range of ‘administrative authorities and legislative bodies’ covered by Article 3(1); this significantly curtails the policy areas to which the obligations apply. Second, each obligation only requires the bodies in question to have ‘regard to’ children’s welfare, rather than to treat children’s interests as a ‘primary consideration’; this is also less onerous than the ‘due regard’ provisions in the Welsh Measure. Third, the requirement is merely to ‘make arrangements’, not actually to secure that welfare and safeguarding of the children in question. The duties under the 2004 and 2009 Acts are therefore worded in a way that appears to fall far short of the requirements in Article 3(1) UNCRC.<sup>37</sup> These duties also differ from those in the Welsh and Scottish legislative obligations as the focus is on the child’s welfare and not the broad range of rights protected by the UNCRC and its protocols. Further, unlike the provisions concerning the devolved administrations in Wales and Scotland, there is no obligation at a ministerial level, save in relation to immigration. Finally, the legislation itself does not lay down requirements for administrative implementation, for example the detailed reporting and CRIA approach used in the Welsh Measure. Whether or not these duties are able to be effective in improving children’s interests and securing compliance with Article 3(1) depends on judicial interpretation and administrative implementation.

The shortcomings of the statutory obligations were addressed to a limited extent by the previous Coalition Government’s undertaking to:

‘... give due consideration to the UNCRC Articles when making new policy and legislation. In doing so, we will always consider the UN Committee on the Rights of the Child’s recommendations but recognise that, like other state signatories, the UK Government and the UN committee may at times disagree on what compliance with certain Articles entails.’<sup>38</sup>

At the time of writing, this commitment has not been reissued by the incoming Conservative Government. A renewed commitment to the undertaking may assist in the realisation of the obligations in Article 3 but it is limited in its scope and ambition. The commitment was not translated into a legally binding form, nor did it specify a monitoring and reporting requirement. These weaknesses are evident from the Joint Committee on Human Rights’ (JCHR) review of the implementation of the undertaking. Whilst the JCHR found notable areas of significant impact, this impact was largely a function of the political will within the responsible department in question, with implementation of the commitment varying considerably between departments.<sup>39</sup> This variable approach is facilitated by an advisory but not mandatory approach to the consideration of children’s interests within the legislative and policy-making process. For example, the Cabinet Office’s ‘Guide to Making Legislation’ references the undertaking but merely states that:

*‘It would be helpful to Parliament and the Joint Committee on Human Rights (JCHR) if explanatory notes included a summary of the anticipated effects of legislation on children and on the compatibility of draft legislation with the UNCRC.’*<sup>40</sup>

This suggests that considering the UNCRC is a useful courtesy to Parliament rather than a clear commitment to children, and no guidance is given as to the means by which these anticipated effects are to be assessed, in contrast to the very detailed guidance on identifying regulatory

37 Joint Committee on Human Rights, Children Bill, 19th Report of Session 2003–04 (HC 537).

38 *Hansard*, HC Deb, col 7WS (6 December 2010).

39 Joint Committee on Human Rights, *The UK’s Compliance with the UN Convention on the Rights of the Child*, HC 1016 (TSO, 2015) especially at para 24.

40 Cabinet Office, ‘Guide to Making Legislation’, July 2014, para [11.123] (emphasis added).

impact. The effect of this is seen in the significant differences in how far the UNCRC is considered within the material accompanying Bills affecting the lives of children. Some Bills, such as the Children and Families Bill 2013, have received detailed assessment against the UNCRC. For many, however, no governmental assessment of the impact on children's rights and interests is carried out. Notably the JCHR was deeply critical of the Department of Work and Pensions' failure to carry out any detailed rights-based analysis of the impact of the Welfare Reform Bill 2011,<sup>41</sup> despite its serious implications for child poverty. Whilst the (newly strengthened)<sup>42</sup> Office of the Children's Commissioner has produced helpful CRIA of legislation, including the Welfare Reform Bill, this is no substitute for a detailed consideration of that impact by the Government Department formulating the policy and legislation in question.

There has then been some progress on embedding children's interests within political process in policy-making and legislating. That progress has, however, been patchy, with implementation depending on the location of responsibility within the devolution arrangements and the degree of political will within the department in question to a thorough commitment to children's interests and the UNCRC. A more rigorous general duty upon Ministers in the Westminster Government to have due regard to the UNCRC, backed by clear implementation measures, is required firmly to embed children's rights and interest within the legislative and policy-making processes. Given the lack of political impetus towards such legislation at the present time, the role of judicial interpretation has become particularly important. Whilst there has been considerable case-law on Article 3, the exact basis of the obligation is not clear and it is to that issue that we now turn.

### **Children's best interests in domestic law: the basis of the obligation**

The UNCRC is an international treaty that has not been incorporated into domestic law and so, as the UK is a dualist system, it is well-established orthodoxy that an unincorporated treaty is not directly applicable in domestic law. It may, however, be relevant as a basis for interpreting any ambiguous legislative provisions,<sup>43</sup> exercising judicial discretion<sup>44</sup> and developing the common law. From these basic principles it may seem that the scope of Article 3(1) to found domestic administrative obligations would be somewhat limited. Nonetheless, Article 3(1) has been the subject of creative interpretation that has seen significant progress in giving children's interest increased prominence within domestic public law. Much of this interpretation has come, not from specific statutory obligations mentioned above, but through the Human Rights Act 1998. The precise legal foundation for Article 3(1)'s role in domestic law is, however, deeply contentious, particularly in situations in which the interests of the child are raised indirectly.

### **Interpreting the 2004 and 2009 statutory obligations**

The role of children's interests is least contentious in those cases concerning the explicit statutory obligations to have 'regard to the need to safeguard and promote the welfare of children'. As with Article 3, the statutory obligations under the Children Act 2004 and the Borders, Citizenship and Immigration Act 2009 apply in relation to individual decision-making as well as to the formulation of general policy.<sup>45</sup> Any failure to consider children's welfare in

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41 JCHR, *21st Report Legislative Scrutiny – Welfare Reform Bill*, especially at para [1.35].

42 Children Act 2004, ss 2–2C as amended by Children and Families Act 2014.

43 *Smith v Secretary of State for Work and Pensions and Another* [2006] UKHL 35, [2006] 1 WLR 2024, at para [78].

44 *Mabon v Mabon* [2005] EWCA Civ 634, [2005] Fam 366, at paras [26] and [28]. J Williams, 'England and Wales', chapter 4 in T Liefadd and J Doek (eds), *Litigating the Rights of the Child* (Springer, 2015).

45 *R (Castle) v Commissioner of Police of the Metropolis* [2011] EWHC 2317 (Admin), [2012] 1 All ER 953.

discretionary decisions covered by these obligations will be open to judicial review on the straightforward basis of failure to have regard to a mandatory relevant consideration.<sup>46</sup>

A more difficult question is whether these statutory obligations require affected public authorities to comply with the standards set out in Article 3(1), despite the much weaker wording used in the statutes themselves. In particular, is it enough for a decision-maker to have regard to the need to safeguard and promote children's welfare or will that welfare have to be treated as the primary consideration to fulfil the statutory duties? There is no clear answer to this question in the case-law as those cases that have used Article 3(1) as an interpretive aid in dealing with the statutory obligations have turned upon the application of the Human Rights Act 1998 (HRA). This leaves open the question of whether the statutory obligations should be interpreted in the light of Article 3(1) regardless of whether there is also a claim under the HRA. The Supreme Court regarded this point as arguable but undecided in *Nzolameso*.<sup>47</sup> Certainly there is a good argument that the statutory obligations were intended to further the UK's obligations under the UNCRC.<sup>48</sup> This is particularly clear in relation to the 2009 Act as the obligation was created as a direct consequence of the withdrawal of the UK's immigration reservation to the UNCRC.<sup>49</sup> The importance of the UNCRC in implementing these duties is also clear from the accompanying statutory guidance.<sup>50</sup> For these reasons it is arguable that the somewhat weak statutory wording should be given a more demanding meaning consistent with the UK's international obligations under Article 3.<sup>51</sup>

### ***Children's interests and the European Convention on Human Rights***

The primary route for the use of Article 3 in domestic law has not been the explicit statutory obligations, but the interpretation of rights under the HRA.

The European Court of Human Rights has increasingly looked to international obligations in its interpretation and application of a wide range of rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (the European Convention). This approach is captured in the Grand Chamber decision of *Neulinger and Shuruk v Switzerland* in which the court observed that:

‘The Convention cannot be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law. Account should be taken, as indicated in Article 31(3)(c) of the Vienna Convention on the Law of Treaties of 1969, of “any relevant rules of international law applicable in the relations between the parties”, and in particular the rules concerning the international protection of human rights.’<sup>52</sup>

The use of international law is not merely limited to resolving uncertainty; the court takes into account evolving norms of international law to ensure that the European Convention remains

46 *Collins v Secretary of State for Communities and Local Government* [2012] EWHC 2760 (Admin), [2012] 1 All ER 953. *Nzolameso v Westminster City Council* [2015] UKSC 22, [2015] 2 All ER 942, at para [37]. The obligations do not operate to distort the exercise in question and so do not apply to factual questions. *Huzrat v Hounslow London Borough Council* [2013] EWCA Civ 1865, [2014] HLR 201, at para [26].

47 *Nzolameso v Westminster City Council* [2015] UKSC 22, [2015] 2 All ER 942, at paras [28]–[29].

48 *Re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27, [2012] 1 AC 144, at para [12]. Also *ZH (Tanzania)* above n 2, at para [23].

49 Joint Committee on Human Rights, *Legislative Scrutiny: Borders, Citizenship and Immigration Bill, 9th Report of Session 2008–09* (HC 375), 1.10–1.16.

50 Home Office, UK Border Agency, Department for Children, Schools and Families, *Every Child Matters: Change for Children* (Home Office, 2009), para [2.7].

51 *Smith v Secretary of State for Work and Pensions and Another* [2006] UKHL 35, [2006] 1 WLR 2024, especially at para [78].

52 *Neulinger and Shuruk v Switzerland* (Application No 41615/07) [2011] 1 FLR 122, at para [131].

practical, effective and harmonious.<sup>53</sup> This is particularly important in relation to children; the European Convention was drafted with little consideration for the interests of children and at a time when the notion of children as rights holders was not widely accepted.<sup>54</sup> In the intervening 65 years the interests of children have been better understood and the UNCRC has been pivotal in recognising and defining children's rights and interests. To ensure that the European Convention remains practical and effective in relation to children, consideration of the specialist law relating to the UNCRC is essential.

In *Neulinger* itself these principles were found in the Hague Convention on International Child Abduction<sup>55</sup> and the UNCRC. Here, as in other cases, the UNCRC was not simply used in order to better define the meaning of the European Convention's Article 8 right, but also to give primary weight to the interests of children within the proportionality exercise itself. The European Court considered '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'.<sup>56</sup> Whilst *Neulinger* concerned Article 8, there is nothing within this reasoning to restrict the relevance of the UNCRC, or any other provision of international law, to particular Articles; indeed the stated aim of creating a harmonious interpretation of the Convention and maintaining its practical relevance would rather suggest otherwise. The court has used provisions of the UNCRC in relation to a range of Articles, for example Article 3 UNCRC was recently used by the European Court in a claim concerning children's right to property under Article 1 of Protocol No 1 (A1P1) of the European Convention.<sup>57</sup> The court's use of Article 3 UNCRC is not contingent upon any particular Article or situation but is premised on a recognition that use of the widely recognised best interests principle is essential to maintain practical relevance of the European Convention for children.

It was these principles that formed the basis of the reasoning in *ZH (Tanzania)*,<sup>58</sup> the Supreme Court case that brought the importance of children's interests in public decision-making to prominence. In that case there was a failure to give proper consideration to the interests of two children who would have to accompany their mother if she were removed to Tanzania, as there were no suitable alternative arrangements for their care. The decision to remove the mother clearly concerned the children's Article 8 European Convention rights, as well as those of the mother, as it was well established that the right to respect for family life of one family member encompasses the rights of those with whom that right is enjoyed.<sup>59</sup> Applying the principles outlined above, the Article 8 proportionality exercise required the best interests of the children to be treated as a primary consideration in accordance with Article 3 UNCRC. Applying the balancing test, removal in this case was disproportionate, particularly given that the children were British citizens and would be deprived of their rights to be educated and brought up within their country if moved to another country of which they knew nothing. Although the 2009 Act obligation applied to the decision, it merely played an incidental role in the case as

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53 *Demir v Turkey* (Application No 34503/97) (2008) 48 EHRR 1272, especially at paras [66]–[68].

54 J Fortin, *Children's Rights and the Developing Law* (Cambridge University Press, 3rd edn, 2009), chapter 2; S Choudhry and J Herring, *European Human Rights and Family Law* (Hart Publishing, 2010), chapter 6.

55 Hague Convention on the Civil Aspects of International Child Abduction of 25 October 1980.

56 *Neulinger*, n 52 above, at para [135], the use of the word paramount is discussed further below.

57 *SL v Croatia* (Application No 13712/11) (2015) 39 BHRC 350 (Art 3 UNCRC used concerning Art 1 of Protocol No 1), see too *V v United Kingdom* (Application No 24888/94) (1999) 30 EHRR 121 (Art 3, European Convention); *Anatoliy and Vitaliy Ponomaryov v Bulgaria* (Application No 5335/05) [2011] ELR 491 (Art 14 with Art 2 of Protocol No 1 European Convention); *X v Austria* (Application No 19010/07) (2013) 57 EHRR 405 (Art 3 UNCRC used concerning Art 14 with Art 8).

58 *ZH (Tanzania)*, above n 2. Although the Upper Tribunal had frequently reinforced the importance of Art 3 in prior cases: J Fortin, 'Are Children's Interests Really Best? *ZH (Tanzania) v Secretary of State for the Home Department*' (2011) 74 MLR 932, at 951–952.

59 *Beoku-Betts v Secretary of State for the Home Department* [2008] UKHL 39, [2009] AC 115.

failure to comply with it rendered the decision not in ‘accordance with law’ for the purposes of Article 8(2) of the European Convention.<sup>60</sup> *ZH* has been followed in a wide variety of Article 8 cases in which the statutory obligations to have regard to children’s welfare are not present, including extradition,<sup>61</sup> planning<sup>62</sup> and prisoners’ leave.<sup>63</sup> In this way judicial interpretation has done much to fill the gaps in the application of the statutory obligations and to require a wide range of decision-makers properly to consider and assess the interests of affected children.

Whilst the importance of children’s interests to cases concerning their Article 8 rights is now well established, there has been much more uncertainty regarding their role in relation to other claims under the European Convention and a tendency to view the ‘best interests’ principle as founded on Article 8 rights alone.<sup>64</sup> As we have seen, this would be a misunderstanding of the approach of the European Court to the importance of international law. The reason that Article 8 has been particularly fruitful in relation to claims under the UNCRC is not because of any reasoning intrinsic to Article 8 itself but because, in a Convention primarily concerned with the civil and political rights of adults, it is often difficult for children to demonstrate that their rights are directly engaged. Article 8 is particularly important in that the Article 8 rights of children in a relationship with their parents are recognised as intrinsically bound up with the Article 8 rights of their parents. Cases brought by parents under Article 8, such as *ZH*, are therefore likely to engage the Article 8 rights of their children. The same intertwining of interests is not as easily recognised outside of this sphere of relationship rights, meaning that it is more difficult for children to assert their interest in, for example, the family’s financial situation, than it is in relation to the family’s relationships.

Any doubt on the relevance of the primary interests principle to European Convention claims outside Article 8 was dispelled in the recent Supreme Court case of *Mathieson*.<sup>65</sup> In that case a claim was brought on behalf of Cameron, a severely disabled young child, whose disability living allowance had been stopped owing to his extended stay in hospital, causing severe hardship to the family who continued to play a pivotal role in his care. Significantly, the allowance, whilst paid to and administered by his parents, was an entitlement due to Cameron himself. This meant that, somewhat unusually, it was the child’s right, rather than those of the parents, that founded the European Convention claim. The case was brought on the grounds of disability discrimination under Article 14, in conjunction with A1P1. In considering the justification for the discrimination in question, the Supreme Court drew upon the approach of the Strasbourg court outlined above, dismissing the Secretary of State’s contention that Article 3 UNCRC was irrelevant in this context.<sup>66</sup> The Supreme Court found that the Secretary of State’s failure to consider the interests of children in drawing up the rules was a procedural violation of Article 3 and had resulted in a substantive violation of Cameron’s best interests. Examining Article 14 of the European Convention through the prism of best interests resulted in a finding that Cameron’s rights had been violated. The language of the judgment was, however, much more cautious than that in the foundational Article 8 cases. Whilst Baroness Hale’s judgment in *ZH* spoke of Strasbourg expecting national authorities to apply Article 3, the judgment in

60 *ZH (Tanzania)* above n 2, at paras [24]–[33].

61 *HH*, above n 24, at para [33].

62 *Stevens v Secretary of State for Communities and Local Government* [2013] EWHC 792 (Admin).

63 *R (MP) v Secretary of State for Justice*; *R (P) v Governor of HMP Downview* [2012] EWHC 214 (Admin), [2012] 109 LS Gaz R 17, especially at para [170].

64 For example, *AZ v Secretary of State for Communities and Local Government* [2012] EWHC 3660 (Admin), [2013] LGR 444, at para [81].

65 *Mathieson v Secretary of State for Work and Pensions* [2015] UKSC 47, [2015] 1 WLR 3250.

66 The court also relied upon the similar provision in Art 7(2) of the UN Convention on the Rights of Persons with Disabilities.

*Mathieson* merely concludes that applying the best interests principle harmonised with the conclusion that had already been reached without reference to it.

Further uncertainty as to the precise reach of the best interests test can be seen in the deep disagreement that split the Supreme Court in *R (SG)*, another recent case concerning Article 14 taken with A1P1. *R (SG)* concerned the implementation of the benefit cap: an overall maximum amount payable in benefits to non-working households in any one year. The burden of the cap was predicted to fall heavily on single parent households for reasons directly related to the presence of children in those households. The basic needs of children resulted in increased child benefit and housing benefit meaning a household with children was more likely to hit the cap. At the same time, the difficulties faced by single parents in finding employment that fitted around the care needs of children made it much more difficult for the parents to obtain sufficient employment to escape the cap. These difficulties were amplified in cases of domestic violence. As 92% of single parent households were headed by a woman, the Secretary of State conceded that the consequences of these problems fell disproportionately on women. The question for the Supreme Court was whether such differential treatment could be justified under the usual principles of the *Stec* test in applying Article 14.<sup>67</sup> The applicants argued that it was necessary to treat the interests of the children as a primary consideration within that proportionality exercise.

Baroness Hale, Lord Kerr and Lord Carnwath found that there had been a failure to treat children's interests as a primary consideration. It could not possibly be in the best interests of the children concerned for their families to be deprived of the means to provide them with the core necessities of life. Whilst the Government was aware of the effect that the cap was likely to have on children and this had been debated in Parliament, at no point had children been treated as a primary consideration. Children's interests had been subordinated to other policy considerations without due assessment and weight being given to them.<sup>68</sup> For the majority on this point this was a clear violation of Article 3(1) UNCRC in international law. What split the court was whether this had any relevance in domestic law, and it was on this point that the majorities switched: Lord Carnwath, with considerable reluctance, agreed with Lords Reed and Hughes that it was not, having changed his mind after the conclusion of the argument. The application therefore came within a hair's breadth of succeeding and in doing so exposed significant differences between the justices in how children's interests should be treated when raised indirectly.

For the majority, the children's interests were not relevant to the questions before the court. The case did not concern children's own Convention rights as the children were not being deprived of their own property, nor did they constitute a protected class under Article 14 of the European Convention. The fact that children would be affected by the cap was not capable of bearing on the question of whether the differential impact on women could be justified, particularly as children would be affected in the same way whether that parent were male or female.<sup>69</sup> Further, Article 3 of the UNCRC could provide no illumination of the meaning of the mother's right not to be discriminated against in the protection of her property.<sup>70</sup> In addition there was concern that Article 3 would displace the *Stec* 'manifestly without reasonable foundation' test.

For Baroness Hale and Lord Kerr in the minority, it was impossible to dissociate the interests of children from those of their mothers. The women suffered the discriminatory impact by reason

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<sup>67</sup> *Stec v United Kingdom* (Application Nos 6573/01 and 65900/01) (2006) 43 EHRR 1017, para [51].

<sup>68</sup> *R (SG) v Secretary of State for Work and Pensions Child Poverty Action Group Intervening* [2015] UKSC 16, [2015] 1 WLR 1449, at paras [122]–[128] (Lord Carnwath).

<sup>69</sup> *Ibid*, at para [89] (Lord Reed).

<sup>70</sup> *Ibid*, at para [146] (Lord Hughes).

of their position as lone mothers and their financial position would inevitably impact upon their dependent children.<sup>71</sup> Article 3 did not displace the usual tests but was relevant to the application of those tests. The impact on the parents could only be understood by considering the impact on the children as the interests of the children were intrinsically bound up with the rights of the mothers in question. When viewed in this way the effect on the children was such that the cap could not possibly be a proportionate means of achieving a legitimate aim.<sup>72</sup> The fact that the children of single fathers would suffer in the same way as those of single mothers was not an answer to a claim based on indirect rather than direct discrimination. Lord Kerr also suggested that a policy reached in breach of Article 3(1) was ‘without reasonable foundation’.<sup>73</sup>

As is clear from the subsequent case of *Mathieson*, the difference in *R (SG)* did not arise because the case concerned Article 14 but because the interests of children were only indirectly affected.<sup>74</sup> This does not mean that the rights of children must be engaged before their best interests are relevant. In many of the Article 8 cases, such as *ZH*, children’s rights have not been directly before the court and yet have been treated as an integral part of the proportionality assessment. Such a technical approach would be undesirable in that it would have no bearing on the actual interests of those affected: the interests of Cameron Mathieson and his family, for example, would be affected in precisely the same way whether the payment was technically due to his parents or to him directly. Instead the difference in *R (SG)* concerned whether the interests of children had a bearing when applying the ordinarily applicable tests, and this will be an easier hurdle to pass in cases in which the children’s rights are directly before the court. The judgment of the majority in *R (SG)* shows a considerable reluctance to recognise the inevitable intertwining of interests between parents and children outside Article 8. This is likely to limit the utility of the best interests approach. The structure of the European Convention often makes it difficult for children to frame issues that deeply affect them as engaging their Convention rights in administrative cases. The fact that adults tend to be the owners of property, recipients of payments and subjects of decisions means that children’s interests are often invisible to the Convention beyond Article 8. It is this invisibility that Article 3 UNCRF is designed to address.

### ***A freestanding obligation?***

Brief mention should also be made of an alternative basis put by Lord Kerr in *R (SG)* for the applicability of Article 3. His argument was based on the controversial Australian case of *Teoh*<sup>75</sup> that the ratification of a treaty, in this case the UNCRF, could in itself generate a legitimate expectation that that treaty would be followed unless notice had been given to the contrary. *Teoh* has received significant criticism both in Australia and the UK<sup>76</sup> and has been heavily constrained by subsequent case-law in Australia.<sup>77</sup> This criticism is unsurprising particularly given the tension between the decision in *Teoh* and the traditional dualist principle that treaties do not have direct effect within domestic law. Whilst Lord Kerr acknowledges these formidable obstacles, his argument is that they do not apply with the same force in

71 Ibid, at paras [220]–[224] (Baroness Hale) and [263]–[269] (Lord Kerr).

72 Ibid, at paras [226]–[229].

73 Ibid, at para [268].

74 *Mathieson*, above n 65, at [43].

75 *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 128 ALR 353.

76 M Groves, ‘Treaties and Legitimate Expectations – the Rise and Fall of *Teoh* in Australia’ (2010) 15 *Judicial Review* 323; S Patel, ‘Founding Legitimate Expectations on Unincorporated Treaties’ (2010) 15 *Judicial Review* 74.

77 *Minister for Immigration and Ethnic Affairs ex parte Lam* [2003] HCA 6, (2003) 214 CLR 1; *Al-Kateb v Goodwin* (2004) 219 CLR 562.

relation to human rights treaties. Drawing on Lord Steyn's speech in *Re McKerr*,<sup>78</sup> he argues that the rationale for the dualist theory is to protect the citizen from abuse by the executive without democratic scrutiny. For Lord Kerr, this rationale does not apply in the same way to human rights treaties, which instead confer further protection on the citizen. On this basis Lord Kerr considered that Article 3(1) UNCRC is directly enforceable in domestic law. Whilst this is an interesting argument, as Lord Kerr himself recognises, it is unlikely to find favour in the courts of this country, at least at present.<sup>79</sup>

## Applying the 'best interests' approach in domestic law

The case-law that has developed since *ZH* has exposed significant differences of opinion about exactly what is required by the best interests approach. These differences are in part due to the very flexibility of the principle and the increasingly diverse contexts in which it may be applied. This lack of clear meaning is a problem in itself but also raises the concern that such a wide-ranging and imprecise principle has the potential to cut across well-established practice and significant policy objectives in diverse and complex areas. To be practically effective, the application of the test will vary in different policy areas, with particular reference to the applicable statutory framework, the presence of statutory guidance and the role of international agreements. Nonetheless, there is the potential for the term to become meaningless and robbed of its minimum content if it is seen as entirely context-dependent.

## Which children?

The preliminary step is to identify which children are entitled to have their best interests treated as a primary consideration. For decisions concerning a specific child or children the answer will be straightforward and those affected should be treated as individuals. The question is more complex in relation to policy decisions, as groups of children, each with potentially different interests, may be affected at some level. Indeed ultimately all children may be regarded as being affected by a policy that will change the nature of the country in which they will grow up. The UN Committee offers very little guidance on this point, commenting that: '[F]or collective decisions – such as by the legislator –, the best interests of children in general must be assessed and determined in light of the circumstances of the particular group and/or children in general'.<sup>80</sup> These comments could be used in a way that undermines the purpose of Article 3. In *R (SG)*, they were used to argue that, whilst the benefit cap might put directly affected children into greater poverty, children as a class would benefit from 'the long-term shift in welfare culture' or 'reversing the impact of benefit culture'.<sup>81</sup> This approach essentially encompasses the executive's vision of a better future society within the definition of children's best interests. Whilst the executive has a legitimate and weighty interest in pursuing policies that it considers will produce an improved future for all, those policies are best understood as competing considerations within the proportionality test rather than distorting the meaning of 'best interests' for those who are directly and identifiably affected. To do otherwise is to obscure the distinctive interests of the children most directly affected by the policy and to conflate the interests of children with the policy advanced by the decision-maker.

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78 [2004] UKHL 12, [2004] 1 WLR 807.

79 *R (SG)*, above n 68, at para [253].

80 *General Comment No 14*, para [32].

81 *R (SG)*, above n 68: contrast Baroness Hale at para [226] who describes the government's argument as a misunderstanding of Art 3(1) with Lord Hughes at para [153].

### Determining 'best interests'?

The meaning of 'best interests' has perhaps given greatest concern to commentators on the case-law concerning children's interests and administrative law.<sup>82</sup> Criticism that the welfare test is heavily subjective<sup>83</sup> and largely indeterminate<sup>84</sup> will be familiar to family lawyers.<sup>85</sup> The UN Committee's guidance does little to assuage these concerns: the concept 'is complex and its content must be determined on a case-by-case basis' and 'is flexible and adaptable'.<sup>86</sup> There is a risk that so vague a term may be applied in ways that actually undermine children's well-being. To ensure that children's interests are applied in a way likely to benefit them in practice, three points are significant. First, 'best interests' must be viewed in the light of the wider rights contained in the UNCRC: 'an adult's judgment of a child's best interests cannot override the obligation to respect all the child's rights under the Convention'.<sup>87</sup> Second, interests must be assessed on an individualised basis with sufficient evidence and information on which a determination of the child's individual interests can be made.<sup>88</sup> Third, the child's right to be heard under Article 12 UNCRC is regarded by the UN Committee as inextricably linked to a determination of her best interests.<sup>89</sup>

Jane Fortin warns that a focus on a paternalistic assessment of children's best interests can obscure their status as holders of legal and human rights under domestic and EU law as well as the UNCRC itself. She contrasts the European Court of Justice's decision in *Zambrano*,<sup>90</sup> which starts from children's rights as EU citizens, and *ZH*, which considers citizenship as a mere aspect of their interests.<sup>91</sup> This is an important point: the specific rights of children give a more certain basis than the vague definition of 'best interests' and require that children's rights are recognised as protected entitlements rather than merely as an important consideration. There is no reason in principle why a best interests approach should neglect or displace children's rights. The UN Committee's guidance specifically states that adults' perception of children's best interests should not be permitted to override their enumerated Convention rights. It can hardly be in the best interests of children to deprive them of rights that they are entitled to as a matter of law. Children are rarely the subject of decisions or the applicants in legal challenges, meaning that their rights are often not raised directly. For these reasons it is particularly important that children's rights are properly identified before consideration of their interests.

Treating children as individuals requires evidence about their specific interests. This has caused some significant practical difficulties. Children's interests will often align with those of their carers, who will often be well placed to raise any evidence of impact on the children;<sup>92</sup> there is, however, a risk in relying on this assumption. As the UN Committee notes, the flexibility of children's interests leaves considerable room for manipulation by parents advancing their own

82 R English, 'Analysis: Children's "best interests" and the problem of balance' *UK Human Rights Blog* 2 February 2011, at: <http://ukhumanrightsblog.com/2011/02/02/analysis-childrens-best-interests-prevail-in-immigration-decisions/> (last visited 30 July 2015); J Fortin, 'Children's Rights – Flattering to Deceive' [2014] CFLQ 51, at p 59.

83 J Eekelaar, 'Beyond the Welfare Principle' [2002] CFLQ 237.

84 R Mnookin, 'Child Custody Adjudication: Judicial Functions in the face of Indeterminacy' (1975) 39 *Law and Contemporary Problems* 226.

85 For the purposes of this article it is assumed that 'welfare' and 'best interests' have the same meaning, for example *Re A (Male Sterilisation)* [2000] 1 FLR 549, 560 (Thorpe LJ).

86 *General Comment No 14*, para [32].

87 *Ibid*, para [4].

88 *HH*, above n 24, at paras [82]–[83], *Jeunesse v Netherlands* (Application No 12738/10) (2015) 60 EHRR 789, at para [120].

89 *General Comment No 14* at paras [43]–[45] and Committee on the Rights of the Child, *General Comment No 12 (2009) The Right of the Child to be Heard*, CRC/C/GC/12, [70]–[74].

90 *Gerardo Ruiz Zambrano v Office National de L'Emploi* (Case C-34/09) Grand Chamber judgment of 8 March 2011.

91 J Fortin, 'Are Children's Interests Really Best? *ZH (Tanzania) v Secretary of State for the Home Department*' (2011) 74 MLR 932.

92 *Stevens v Secretary of State for Communities and Local Government* [2013] EWHC 792 (Admin), at para [58].

interests,<sup>93</sup> which may clash with those of the children. For example, it would usually be reasonable to assume that children will be adversely affected by the extradition of their parents, but relying on that assumption without further investigation could be dangerous. In *BH v Lord Advocate*,<sup>94</sup> the father whose extradition was sought had a history of child sexual abuse, his victims including another of his daughters. His argument that his children's best interests would be harmed by his extradition was rather generously described by the Supreme Court as 'at best, very weak'. In *BH v Lord Advocate*, once the facts were before the court, the clash was clear, but in other cases the relationship between the interests of the parents and children may be more difficult to discern. In *B, M v Secretary of State for the Home Department*,<sup>95</sup> the father and his 10-year-old daughter sought to resist their return to France to process their asylum claim. The father claimed that return would harm his daughter's interests as she frequently wore the burka and legal restrictions in France would prevent her from accessing education whilst wearing dress acceptable to her. The child's views and personal maturity were not known, as her father had not followed invitations to bring her to meetings with the Border Agency. His own evidence that he believed it to be his duty as a Muslim to 'demand' that she wear the burka clearly raised concerns as to whether the decision was, or would in the future, be freely made by the child in question.<sup>96</sup> Although the claim failed in any event, the complexity of determining the child's interests in this case highlights the danger of assuming that the interests of children align with those of their parents without further evidence.

Distortion of the child's interests is less likely if the decision-maker recognises the importance of ascertaining the child's views to ensure that the interests are those of the individual child rather than assumptions made about her.<sup>97</sup> The UN Committee describes meaningful participation as a 'vital element' in determining best interests,<sup>98</sup> and this is reinforced by Article 12 UNCRC. The views of the child will not necessarily determine her best interests but will be an important component in doing so. Failure to consider the views of the child has been a significant factor in a number of domestic cases on children's interests. For example, in *AZ* significant weight was put on the failure of the planning inspector to ascertain the (then) 10-year-old's views about the options for his care should his father not gain planning permission for his home.<sup>99</sup> Despite the emphatic terms in which the UN Committee has connected the child's right to be heard and her best interests, in reality the child may have limited opportunity to do so in many situations. This has been a particular difficulty in extradition cases in which the focus of the procedural requirements is upon the person to be extradited, with no procedural means of discovering the views of the child save for making the child a party to the case. The Supreme Court has upheld the view that this will rarely be necessary or desirable given that it will be rare for the child's interests to be of sufficient strength to outweigh the public interest in extradition.<sup>100</sup> It may then be difficult in practice for children to be heard in the way envisaged by the UN Committee. In these cases it is particularly important that the interests of the children are properly identified.

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93 *General Comment No 14*, at para [34].

94 *BH v Lord Advocate* [2012] UKSC 24, [2013] 1 AC 413.

95 *B, M v Secretary of State for the Home Department* [2013] EWHC 2281 (Admin).

96 See Baroness Hale's observations concerning the decision of a nearly 14-year-old to wear the jilbab, *R (SB) v Headteacher and Governors of Denbigh High School* [2006] UKHL 15, [2007] 1 AC 100.

97 *ZH (Tanzania)* above n 2, at paras [34]–[37]; *HH*, above n 24, at para [82].

98 *General Comment No 14* [89]–[91].

99 *AZ v Secretary of State for Communities and Local Government* [2012] EWHC 3660 (Admin), [2013] LGR 444. In *R (MP)*, above, n 63, the children were separately represented at the hearing to give separate consideration to their interests: at paras [172]–[174].

100 *H v Lord Advocate*, above n 94, at para [36]; *HH*, above n 24, at paras [85]–[86].

### **Best interests and the procedural obligation**

For the UN Committee the procedural aspect of Article 3(1) is crucial: decision-makers must give explicit consideration to the best interests of the child and a reasoned explanation as to how those interests have been taken into account in the decision in question.<sup>101</sup> This is important because of the remedial role that Article 3(1) plays in addressing the invisibility of children's interests in adult-focused decision-making. Further, failure to identify and evaluate the interests of children will leave decisions vulnerable to the judgment that those interests were not given proper weight in the relevant balancing process.

The procedural aspect of the best interests approach has been important in domestic cases. Cases in which there has been a failure to consider children's interests,<sup>102</sup> or to evaluate those interests correctly,<sup>103</sup> have proved more successful than those in which the decision-maker has properly assessed the interests in question but is challenged on the relative weight assigned to them. It is clearly a matter of good practice for a reasoned assessment of the child's best interests and their role in the decision to be produced. Whether failure to do so is itself a breach of domestic law is less clear. In *Collins*, Pelling J held that it was not, as the issue was one of substance and not procedure.<sup>104</sup> This is probably correct and is in accordance with the general approach to human rights in which the courts have been concerned with the substance of the decision and not the means by which it was reached.<sup>105</sup> This should not undermine the importance of proper procedure in identifying children's interests; the court will be much more willing to set aside the decision on substantive grounds if there is no evidence that the decision-maker has evaluated those interests as a primary consideration.

A good example of this approach is the Grand Chamber in *Jeunesse*. In that case the Dutch authorities had considered the interests of the citizen children in general terms in making the decision to deport their mother, but the Grand Chamber found that they had not considered and assessed any actual evidence on the detailed implications of removal for the children. The failure to consider the children's interests properly led directly to the substantive breach of Article 8. The court found that '[a]ccordingly, it must conclude that insufficient weight was given to the best interests of the applicant's children'.<sup>106</sup> Similarly emphatic language on the connection between procedure and substance can be seen in the Supreme Court decision in *Mathieson*. In that case the Secretary of State had failed to show any evidence of an evaluation of the interests of in-patient children in hospital. The Supreme Court found that '[u]nsurprisingly – one might say inevitably? – breach of the procedural rule has generated a violation of the substantive [Article 3 UNCRC] right of disabled children to have their best interests assessed as a primary consideration'.<sup>107</sup> This conclusion supported the finding of a breach of Article 14 of the European Convention.

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101 *General Comment No 14*, para [6](c) but see at [20] the more significant the impact on the child, the more likely that a full and formal process will be required.

102 *Mathieson*, above n 65, at para [41]; *R (MP)*, above n 63, especially at [143], [175] and [188]; *AZ v Secretary of State for Communities and Local Government* [2012] EWHC 3660 (Admin), [2013] LGR 444, especially at paras [132]–[133] and [139]–[140].

103 For example the failure to consider the citizenship of the children in *ZH (Tanzania)*.

104 *Collins v Secretary of State for Communities and Local Government* [2012] EWHC 2760 (Admin), especially at paras [29]–[30]. The Court of Appeal, whilst it approved Pelling J's decision, was clearly troubled by the assumption that the planning inspector had happened to adopt the right decision in substance despite not having identified the children's interests as a primary consideration in practice, *Collins v Secretary of State for Communities and Local Government* [2013] EWCA Civ 1193, [2013] PTSR 1594, at para [41].

105 *R (SB) v Headteacher and Governors of Denbigh High School* [2006] UKHL 15, [2007] 1 AC 100, at paras [28]–[31] and [68]. *Belfast City Council v Miss Behavin' Ltd Northern Ireland* [2007] UKHL 19, [2007] 1 WLR 1420, at paras [13]–[14], [31], [44], [88]–[89].

106 *Jeunesse v Netherlands* (Application No 12738/10) (2015) 60 EHRR 789, para [120], emphasis added.

107 *Mathieson*, above n 65, at para [41], see too *R (SG)* above n 68, at para [108].

How then is a court to decide whether the information available was sufficient to draw robust conclusions on the interests of the child, and what they are to do if it is insufficient? In *R (T)*<sup>108</sup> the court found the information available to the decision-maker to be woefully inadequate to assess the interests of an eight-year-old child in an application by her mother for indefinite leave to remain. The court found that to assess her interests in this case would require detailed information about her life since her birth in the UK, including on her education, relationships, home and social network. The decision was set aside, with any future decision to be determined with sufficient information as to the child's best interests. The Court of Appeal has, however, been reluctant to regard *R (T)* as creating a general principle.<sup>109</sup> In *R (T)* the interests of the child appeared strong and, as the family had initiated the application after nine years in the UK, the state interest in a quick decision was relatively low. In cases in which the child's interest has appeared less compelling and the state interest more urgent, the courts have been willing to proceed on more limited evidence. For example, *SS (Nigeria)* concerned an application to deport a foreign criminal convicted of serious offences relating to class A drugs and judged to be a real risk to the public. The claimant had not produced significant evidence as to the impact of the deportation on his four-year-old son, although there was evidence that he would stay in the UK with his mother who was his primary carer. The Court of Appeal accepted that the child's best interests required careful examination but found that exactly what was required would depend on the nature of the case. Parliament had placed great weight on the importance of deporting those who fell within the relevant legislation. Given this and the fact that he was not a primary carer, it was wholly unrealistic to suppose that any further inquiry into the child's interests could outweigh the interest in deportation and so no such investigation was required.<sup>110</sup> Further, the circumstances in which the tribunal should itself inquire into the facts beyond those raised before it would be extremely rare. This last point was reiterated in the very different case of *AN (Afghanistan)*<sup>111</sup> where the Court of Appeal found that there was no need to adduce further information concerning a 16-year-old who had only been in the UK briefly and had been represented, jointly with her parents, by solicitors and counsel at the hearing. Again no further information was likely to be able to outweigh the public interest in a robust immigration system.

The cases of *SS (Nigeria)* and *AN (Afghanistan)* demonstrate that the information required to make an assessment will be very much fact dependent and that the quest for full information cannot be allowed to displace the running of an efficient immigration system. These are certainly valid concerns, the European Court's treatment of children's interests in the different context of child abduction under the Hague Convention demonstrates the dangers of insisting on full investigation without regard to context. In these cases the European Court's insistence of an in-depth<sup>112</sup> or later an 'effective'<sup>113</sup> consideration of the interests of the child to be returned has risked undermining the summary return foundation of the Hague Convention,<sup>114</sup> a particular concern given the careful design of the Hague Convention to protect children at risk of abduction. Nonetheless the approach of the Court of Appeal in *SS (Nigeria)* comes very close to treating the state interests, and not those of the child, as the primary consideration. By starting from the point that the state interest is sufficiently strong that it is unlikely that any

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108 *R (T) v Secretary of State for the Home Department* [2011] EWHC 1850 (Admin).

109 *SS (Nigeria) v Secretary of State for the Home Department* [2013] EWCA Civ 550, [2014] 1 WLR 998, at para [55].

110 *Ibid*, paras [33]–[35], [55]–[58] and [62].

111 *AN (Afghanistan) v Secretary of State for the Home Department* [2013] EWCA Civ 1189, especially at para [23].

112 *Neulinger*, n 52 above.

113 *X v Latvia* (Application No 27853/09) [2014] 1 FLR 1135.

114 *Re S (A Child) (Abduction: Rights of Custody)* [2012] UKSC 10, [2012] 2 AC 257 and *Re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27, [2012] 1 AC 144; Beaumont et al, 'Child abduction: recent jurisprudence of the European Court of Human Rights' [2015] ICLQ 39.

evidence on the interests of the child could be sufficient to outweigh it, there is a danger that children's interests will be dismissed on the basis of generalised assumptions. If it is too easily assumed that children's interests are outweighed without sufficient evidence of the effect on the individual child, then the requirement to make children's interests a primary consideration will rapidly become a nullity.

### **'A primary consideration'**

The exact meaning of the term 'a primary consideration' has also been a source of considerable judicial disagreement. It is clear that the term does not equate to the domestic<sup>115</sup> paramountcy principle, which treats children's interests as the determining factor for the court in decisions concerning their upbringing. This is evident from the fact that the UNCRC treats children's interests as a determining factor in relation to decisions concerning their upbringing such as separation from their parents in Article 9(1).<sup>116</sup> Similarly, Article 21, the specific Article concerning adoption, requires that any system of adoption is to recognise the child's rights as paramount. There is therefore a clear contrast between the use of the child's best interests as a determining factor in those decisions that directly concern the child's upbringing and the lesser standard of 'a primary consideration' which applies to the more diffuse category of actions concerning children. It is well established that to treat children's interests as a primary consideration does not require those interests to displace all other considerations.

The use of the indefinite, rather than definite, article is also significant. As Michael Freeman notes, during the negotiations the drafting was altered from 'the' to 'a' primary consideration in response to the broadening out of the circumstances in which Article 3(1) applied.<sup>117</sup> This implies that there may be more than one primary consideration in relation to a particular decision. Lord Kerr has suggested that it is conceptually difficult to have multiple 'primary' considerations,<sup>118</sup> but this interpretation has not attracted wide support and does not fit with the drafting history. Most judgments have taken the view that there may be more than one 'primary' consideration, such that a further consideration, or considerations, can be treated as having equal, but not greater, intrinsic importance than children's interests.<sup>119</sup> This has been particularly evident in those areas in which there is clear legislative intent that other considerations should be given substantial weight, for example the need to protect the greenbelt<sup>120</sup> or the maintenance of firm immigration control.<sup>121</sup>

A further proposed meaning for 'a primary consideration' is that it requires the interests of children to be considered first, in that the decision-maker must identify the interests of the child before moving on to the question of whether that interference can be outweighed by other considerations. This approach was adopted by Baroness Hale in the foundational case of *ZH (Tanzania)*, a view which she again put forward, supported by Lord Kerr, in *HH v Deputy*

115 Children Act 1989, s 1; Adoption and Children Act 2002, s 1. European Court of Human Rights jurisprudence has been rather less careful in distinguishing between the terms primary and paramount. See for example *Neulinger*, n 52 above, paras [134]–[135] in which the terms appear to be used interchangeably.

116 See too Art 9(3), giving the right to parents and children who are separated from one another the right to regular, direct contact except if it is contrary to the child's best interests.

117 M Freeman, *Article 3: The Best Interests of the Child* (Martinus Nijhoff, 2007), p 45. Office of the UN High Commissioner for Human Rights, *The Legislative History of the Convention on the Rights of the Child, Vol 1* (United Nations, 2007), pp 345–348.

118 *HH*, above n 24, at paras [143] and [145].

119 *ZH (Tanzania)*, above n 2, at para [25], *HH*, above n 24, at paras [11] and [99], *Zoumbas v Secretary of State for the Home Department* [2013] UKSC 74, [2013] 1 WLR 3690, at para [13].

120 For example, *Dear v Secretary of State for Communities and Local Government* [2015] EWHC 29 (Admin), especially at paras [42]–[48].

121 For example, *Re LB, CB (A Child) and JB (A Child)* [2014] EWCA Civ 1693, at para [15].

*Prosecutor of the Italian Republic, Genoa*.<sup>122</sup> The primary reason in favour of this approach was that to do otherwise would be to risk losing sight of children's interests within a multi-faceted inquiry. There has, however, been little appetite for this structured approach elsewhere in the judiciary. There was considerable scepticism about the need for such an approach in the other judgments in *HH v Deputy Prosecutor of the Italian Republic, Genoa*, with Lords Mance, Judge and Wilson all expressing doubt as to whether there was any need to address children's interest in any particular order.<sup>123</sup> It is this view that appears to have prevailed in subsequent cases.<sup>124</sup>

It seems clear then what 'a primary interest' does not mean in domestic law: it does not mean that children's interests will necessarily determine the outcome; it does not mean that the interests of children are always intrinsically more important than all other factors; and it does not mean that children's interests must be considered first within the decision-making process. Instead the interests of the child must be treated as a factor of 'substantial importance'<sup>125</sup> with no other consideration to be treated as of greater intrinsic importance, even if, on the facts, the interests of children in question are outweighed.<sup>126</sup> Further, the interests must always be at the forefront of the decision-maker's mind.<sup>127</sup> Whether this is enough to maintain the distinctive importance of children's interests remains to be seen. The great value of the primary consideration approach is in giving children's interests a visibility that they often lack. If they are not to be treated as the first and most significant consideration, there is a risk that they will be lost amongst the competing 'primary' considerations.

Article 3(1) does not, of course, displace the usually applicable tests in domestic law; instead it requires that children's interests are made an integral part of the application of those tests. In relation to European Convention rights, this will mean that the interests of the child enter the usually applicable balancing test as a factor of substantial weight with no other consideration treated as of greater inherent significance.<sup>128</sup> On the particular facts of the case, the children's interests may be marginal or may be outweighed by strong countervailing considerations. The most difficult cases are those in which the interests of the child are strong but those interests arise in an area, such as immigration, in which the state is usually afforded significant discretion. This was the case in the European Court case of *Jeunesse*, in which the majority of the Grand Chamber found that the interests of the citizen children outweighed the state's immigration concerns on the facts of the case. In particular, the majority were of the view that 'it is questionable whether general immigration policy considerations of themselves can be regarded as sufficient justification for refusing the applicant residence in the Netherlands' despite the usually broad margin of appreciation granted to states on matters of immigration.<sup>129</sup> This demonstrates a surprisingly dismissive approach to the state's legitimate policy concerns, which will also vary according to the facts. A strongly worded joint dissent accused the majority of using the interests of the child to displace the margin of appreciation and put the European Court in the position of primary decision-maker. An analogous concern arises in domestic cases.

122 *ZH (Tanzania)*, above n 2, at paras [25]–[26] and [33]; *HH*, above n 24, at paras [12], [143].

123 *HH*, above n 24, at paras [98]–[100] (Mance); [125] (Judge); [153] (Wilson) a view echoed by Lord Hope in the sister case of *BH v Lord Advocate*, above n 94, at paras [49]–[51].

124 *Zoumbas*, above n 119, at para [19], judgment of the court (including Baroness Hale and Lord Kerr). See too *Stevens v Secretary of State for Communities and Local Government* [2013] EWHC 792 (Admin), para [60]; *Collins v Secretary of State for Communities and Local Government* [2012] EWHC 2760 (Admin), at para [28].

125 *SS (Nigeria) v Secretary of State for the Home Department* [2013] EWCA Civ 550, [2014] 1 WLR 998, at [44].

126 *ZH (Tanzania)*, above n 2, Hale at para [25]; *Zoumbas*, above n 119, at para [10].

127 *HH*, above n 24, at para [98].

128 See *Zoumbas*, above n 119, at para [10] for the application of these principles within the Art 8 test.

129 *Jeunesse v Netherlands* (Application No 12738/10) (2015) 60 EHRR 789, at para [121].

Much of the disquiet concerning children's interests is based around this legitimate concern that the vague and indeterminate consideration of 'best interests' could undermine carefully established frameworks for the determination of significant areas of policy. The reported cases to date have clustered around contexts such as planning, immigration, extradition, and welfare, each of which are characterised by complex legislative and regulatory frameworks. Further, these are all areas in which there are often compelling arguments in favour of judicial restraint on grounds of democratic legitimacy, the expertise of the primary decision maker and the polycentric nature of many of the legal issues in question. There is significant force in Laws LJ's concern that, if not properly understood, children's interests may be invested 'with a uniform prevailing force which yields no or little space to the context in hand'.<sup>130</sup> The concern that judicial protection of children's interests should not undermine the policy assessment of democratically accountable decision-makers, has featured particularly prominently in the judgments of Lord Reed<sup>131</sup> and Laws LJ.<sup>132</sup> These concerns are by no means limited to children's cases but are often acute in this area given the potentially indeterminate nature of children's interests, the mandatory significance granted to them and the complex policy context in which they often arise. Nonetheless, children are a group that is particularly vulnerable to majoritarian neglect in the usual democratic fora and the principles contained in Article 3(1) are an important safeguard against that neglect.<sup>133</sup> Where children's interests have not received proper assessment and consideration, the democratic argument in favour of a wide discretionary area of judgment is much less compelling. An examination of the reported cases to date is consistent with this approach. The cases in which the courts have intervened are usually those in which the decision-maker has not given substantial consideration to the interests of the children affected or has done so in a way that neglects significant aspects of those interests. There is, of course, room for significant disagreement as to what constitutes proper consideration in a particular case, as is evident in the sharp contrast between the judgments of the Supreme Court in *R (SG)*. Where interests have been properly evaluated and treated as a primary consideration, the courts have generally been reluctant to disturb the assessment of the decision-maker, although the court may intervene in cases in which that balance was disproportionate.<sup>134</sup>

### **Summary: interpreting Article 3(1) in domestic law**

As the application of the 'primary consideration' approach has spread, so its interpretation has, perhaps inevitably, become more flexible to deal with the diverse circumstances in which it applies. In many areas in which children are affected, the policy interests of the state are significant, as are the democratic arguments against extensive judicial intervention. These arguments have driven something of a watering down of the 'primary interests' approach from its high point in *ZH (Tanzania)*. If children's interests are not to be treated 'first' and other considerations are of equal intrinsic importance, then the interests of children risk being lost amongst adult concerns. This becomes an acute concern if the procedural aspect is also diminished. The strength of competing concerns at the balancing stage and the wide discretionary area of judgment granted to the decision-maker in many areas mean that the primary safeguard for children often comes in the procedural identification of their interests. A proper evaluation of the individual child's interests should not be displaced by an assumption that they

130 *SS (Nigeria) v Secretary of State for the Home Department* [2013] EWCA Civ 550, [2014] 1 WLR 998, at para [44].

131 *R (SG)* above n 68, paras [92]–[96].

132 *SS (Nigeria)*, above n 130.

133 J King, *Judging Social Rights* (Cambridge University Press, 2012), pp 176–185.

134 For example the Supreme Court decision in *F-K v Polish Judicial Authority* [2012] UKSC 25, [2013] 1 AC 338, heard with *HH*, in which the interests of the children had been considered but had not been properly treated as a primary consideration.

will not be strong enough to outweigh the interests of the state. Similarly, arguments that children in general will benefit from a particular policy should not obscure the interests of those directly affected.

## **Conclusions**

The role of children's interests in public decision-making has rapidly gained in importance, particularly within the last five years. There is much to be welcomed in these developments, which have raised awareness of children's interests in a wide range of areas. This is important both in remedying blindness to children's interests in decision-making and coming closer to complying with the UK's international obligations under the UNCRC. There are, however, significant weaknesses that have not yet been addressed within this rapid development. First, the duty to consider children's interests is geographically fragmented, with the devolved administrations taking very different approaches to one another and to Westminster. Second, consideration of children's interests in making primary legislation remains haphazard and appears to be largely a function of political will. Third, in the absence of a general duty, the importance given to children's interests has come through evolving judicial interpretation, but the boundaries of this obligation remain uncertain, with significant judicial disagreement at the margins. Fourth, there has been a tendency in some cases to downplay the importance of proceeding on the basis of explicit consideration of the specific interests of the children affected and to dismiss cases based on generalised assumptions. Fifth, the term 'primary consideration' risks paying mere lip-service to children's interests if state concerns, which are already accorded great weight in judicial decisions, are ranked alongside them as carrying equal intrinsic weight. Finally, there is a concern that a focus on best interests alone could neglect the legal and human rights of the children concerned in some cases.

The best safeguard for children is through a political and administrative culture that recognises and understands the importance of children's interests. Many of the identified weaknesses would be best resolved with the adoption and implementation of a general statutory duty on all ministers and public authorities to have due regard to children's interests in matters concerning them. The primary importance of Article 3(1) is in making children's interests visible and giving them force in decision-making processes that are usually focused on adults. The use of proper CRIA in policy-making and drafting legislation, together with detailed guidance as to how to integrate children's interests in diverse and complex administrative contexts, has greater potential to improve the quality of decision-making for children than judicial decisions after the event. Such developments would have benefits for public authorities too in that proper consideration of children's interests as a primary consideration at the outset will reduce the vulnerability of decisions to subsequent challenge.

At present it seems unlikely that there will be sufficient political will at Westminster for such a change, despite the greater enthusiasm with which children's interests have been embraced elsewhere in the UK. Protection of children's interests will then fall primarily to the judiciary and to those interpreting and implementing their decisions within administrative practice. The most significant tasks for the judiciary at present are delineating the precise limits of the principle and implementing the obligation in way that protects the interests of children whilst accommodating the diverse policy and legislative frameworks in which the issue arises. The experience to date demonstrates the importance of properly evaluating the individual interests of the affected children and giving proper weight to their interests in the initial decision-making stage. It is only by doing so that we make children's interests visible and recognise their moral worth.

