

The Rights of Minor EU Member State Nationals Wishing to Enjoy Family Life with a Non-EU Parent in their Country of Nationality

A Study in the Light of the UN Convention on the Rights of
the Child

Ellen Nissen



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E. Nissen

ISBN 978-90-5850-953-6

Published by:
Wolf Legal Publishers (WLP)
PO Box 313
5060 AH Oisterwijk
The Netherlands
E-Mail: info@wolfpublishers.nl
www.wolfpublishers.com

Lay-out: Hannie van de Put

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Contents

PREFACE	ix
INTRODUCTION	1
1. Increased Attention for the Perspective of the Child in the Interpretation of Article 8 ECHR	2
2. Increased Relevance of EU Citizenship and EU Fundamental Rights Protection for Citizen Children	3
3. Increased Significance of the Convention on the Rights of the Child	6
4. Research Questions	7
5. Methodology	8
6. Overview of Chapters	8
CHAPTER 1 – THE CONVENTION ON THE RIGHTS OF THE CHILD	9
1.1 Introduction	9
1.2 The Convention on the Rights of the Child – An Overview	9
1.2.1 Why Rights for Children?	9
1.2.2 The CRC – A Comprehensive Document	10
1.3 The Convention on the Rights of the Child – Normative Value	11
1.3.1 The CRC and the Committee on the Rights of the Child	11
1.3.2 General Principles: Articles 3 & 12 CRC	12
1.3.3 General Principles: Articles 3 & 12 CRC – Illustrative Case Law	15
1.3.4 Cross-Border Families and Family Life – Articles 9 & 10 CRC	17
1.3.5 Nationality, Identity and the Right to Know Your Parents – Articles 7 & 8 CRC	19
1.3.6 An Holistic Approach – Illustrative Case Law	21
1.3.7 The Best Interests Principle and Nationality	21
1.4 A Comprehensive and Systematic Approach towards Child Rights	22
1.5 Conclusion	24
CHAPTER 2 – THE EUROPEAN CONVENTION ON HUMAN RIGHTS	29
2.1 Introduction	29
2.2 The ECHR and the Child as Rights-Bearer	29
2.3 The ECHR and the Best Interests Principle	31
2.4 The Significance of Nationality	32
2.4.1 The Right of Residence under Articles 2 and 3 Fourth Protocol of the ECHR	33
2.4.2 Nationality and the Right to Respect for Family Life	34
2.5 The Right to Respect for Family Life	36
2.5.1 Margin of Appreciation & Positive vs. Negative Obligations	36

2.5.2	Minor State Party Nationals with (a) non-EU parent(s) – Appendages of the Parents	39
2.5.2.1	Early Case Law	39
2.5.2.2	A Shift towards the Incorporation of the Best Interests Principle?	41
2.5.3	Minor State Party Nationals with (a) non-EU parent(s) – A Paradigm Shift	43
2.5.3.1	<i>Osman v. Denmark</i>	44
2.5.3.2	<i>Osman v. Denmark</i> – Analysis	45
2.5.3.3	<i>Nunez v. Norway</i>	46
2.5.3.4	<i>Nunez v. Norway</i> – Analysis	48
2.5.3.5	<i>Antwi and Others v. Norway</i>	49
2.5.3.6	<i>Antwi and Others v. Norway</i> – Analysis	51
2.6	Conclusion	52
CHAPTER 3 – THE LAW OF THE EUROPEAN UNION		55
3.1	Introduction	55
3.2	Citizenship of the European Union	55
3.3	Children’s Rights in the European Union	56
3.3	Fundamental Rights as General Principles of European Union Law	59
3.3.1	The Impact of the Right to Respect for Family Life on the Interpretation of Free Movement Provisions	59
3.2.2	The Impact of the CRC and Article 24 of the Charter on Decisions by the European Court of Justice	61
3.4	The ‘Mobile’ Minor EU Citizen	63
3.5	The ‘Static’ Minor EU Citizen – The <i>Zambrano</i> Case	66
3.5.1	<i>Zambrano</i> – Facts & Decision	66
3.5.2	<i>Zambrano</i> in the light of European Union Citizenship	67
3.5.2.1	Opinions AG Sharpston & AG Mengozzi	67
3.5.2.2	The European Court of Justice’s Decision in <i>Dereci</i>	70
3.5.2.3	Analysis	70
3.5.3	<i>Zambrano</i> in light of the Charter of Fundamental Rights of the EU	72
3.5.3.1	Opinions of AG Sharpston & AG Mengozzi	72
3.5.3.2	The European Court of Justice’s Decision in <i>Dereci</i>	73
3.5.3.3	Analysis	74
3.5.4	Opinion AG Trstenjak in <i>Lida v. Stadt Ulm</i>	74
3.5.5	When is a Child Forced to Leave the Territory of the Union?	76
3.5.5.1	A Glance at Dutch Case Law	77
3.5.5.2	When does a situation cease to be merely ‘desirable’?	77
3.6	Conclusion	79
CHAPTER 4 – CONCLUSION		81
4.1	Ancillary Question A	81
4.2	Ancillary Question B	82
4.3	Ancillary Question C	83

CONTENTS

4.4	Ancillary Question D	85
4.5	Implications of the Diverging Approaches	86
BIBLIOGRAPHY		89
	European Case Law	89
	National Case Law	91
	Articles and Books	91
APPENDIX		
	Convention on the Rights of the Child	95

Preface

On Thursday 29 November 2012 Ellen Nissen was awarded the Hanneke Steenbergen Scriptieprijs. This prize is awarded each year by the Stichting Hanneke Steenbergen Fonds (see for more information www.steenbergenscriptieprijs.nl) for the best thesis on migration law. During her life, Hanneke Steenbergen taught migration law at the University of Leiden and was highly dedicated to the promotion of education on migration law. After she passed away in June 2001 her family, friends and colleagues decided to establish a foundation, the primary purpose of which is to award a yearly prize stimulating research and interest in migration law issues.

Ellen Nissen, under the supervision of Tineke Strik, sets out the central question in the introduction to her master thesis as follows:

‘While recent developments in the jurisprudence by the Courts seem to be highly significant in the application of the right to respect for family life under the ECHR, and the way Union citizenship should be interpreted, they have caused a lot of confusion amongst scholars and practitioners with regard to the exact consequences and scope of application. What these developments in the case law of the European Courts have in common is the fact that both the ECJ and ECtHR put children at the forefront of their considerations. Therefore, gaining insight in the rights of children might provide at the same time more insight into the approaches adopted by the Courts. With particular focus on the legal position of EU citizen children with third-country national parents, these considerations lead to the following main research question: In what way do the European Court of Human Rights and European Court of Justice incorporate the values and principles of the CRC in their interpretation of a child’s right of residence and a child’s individual right to respect for family life in cases that concern minor citizens of an EU Member State who are residing in their country of nationality and wish to enjoy family life with (a) non-EU parent(s)?

We proudly present this book and we hope that it may be of use in practice and for further research.

Elsbeth Guild (chair),
Karin Zwaan (coordinator) and
Tineke Strik

Introduction

On the 30th of March 2010 the highest Dutch administrative court ruled in favour of the State in the case of a Surinam mother of four Dutch minor citizens.¹ The mother had sent her Dutch children to the Netherlands, with their Dutch father, in order for them to get proper education. After their father was arrested and sentenced to imprisonment, the children were left in the care of their grandmother and aunt. The mother filed a request for a residence permit on the basis that she enjoyed family life with her Dutch children. This request was denied. The decision considered the mother's arguments that the children, as Dutch citizens, have a right to residence in the Netherlands, and a right to education and care. However, the decision did not give decisive weight to these rights. The Court instead ruled that the sovereign right of the State to control its own borders and establish its own immigration policies outweighed, in this case, the interests of the mother and children.

This case considered by the Dutch administrative court is just one example of a situation where a child's nationality and right of residence do not correspond with the nationality and residency status of the parent. In such situations, a child might then be forced to choose between enjoying residency in the country of citizenship and enjoying the company and care of a parent. There are many more situations that have led to court cases in which children are placed in a similar position. Such situations can occur when parents of different nationalities file for divorce, though one parent's residency status is dependent upon the marriage. There have been many cases of asylum seekers forming a family with a citizen of the nation where, and while, the asylum claim was being assessed. Once the asylum claim is denied it is not always possible to acquire legal residency through a procedure based on family life. These cases show that citizen children do not always have an enforceable right that enables them to uphold family unity in their home country.

It is a general principle of international law that countries have exclusive competence in the areas of nationality law and immigration, to the extent that a state's conduct does not infringe upon its obligations under international and European Law.² In this area of international and European obligations, there have been significant developments since the ruling in the aforementioned case that impact, and have potential consequences for, the legal position of children of non-EU citizen parents.

All Member States of the European Union (EU) are parties to the European Convention of Human Rights and Fundamental Freedoms³ (ECHR) and all nationals of a Member State are citizens of the Union.⁴ All individuals within the territory and jurisdiction of a Member State are bearers of human rights under the international

1 ABRvS 30 March 2010, No. 200809182/1/V2.

2 Pieter Boeles, Maarten den Heijer, Gerrie Lodder & Kees Wouters, *European Migration Law* (Intersentia, 2009), p. 24.

3 Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5.

4 Consolidated Version of the Treaty on the Functioning of the European Union (TFEU) [2008] OJ C 115/13, Art. 20.

human rights treaties which the particular Member State signed up to and ratified.⁵ All the Member States of the EU are parties to the United Nations Convention on the Rights of the Child 1989 (CRC).⁶ The European Court of Justice (ECJ) and the European Court of Human Rights (ECtHR) have the competences to scrutinize national decisions for compatibility with respectively EU law and the ECHR and to issue binding judgments in individual cases. The EU and the Council of Europe have shown a keen interest in the development of children's rights and both the ECJ and ECtHR use the CRC as an interpretative instrument.⁷

In her commentary on the above-mentioned case, Sarah van Walsum questioned whether the ruling was in line with international and European law.⁸ She concluded the ruling is not in breach of rules of international and European law. Quite a few significant developments have taken place since that commentary, however, and it remains to be seen whether van Walsum would draw the same conclusions now. What, then, has changed since the ruling in the case of the Dutch children who wish to be united with their mother within the territory of the Netherlands? There are three developments that can be discerned which have had a great impact on the legal status of children, and have the potential to augment their legal status in the future. I will examine these three developments.

1. Increased Attention for the Perspective of the Child in the Interpretation of Article 8 ECHR

The right to respect for family and private life under Article 8 of the European Convention on Human Rights has since 1985, when the Court took a revolutionary step in the application of this Article, become an increasingly important ground that facilitates legal residency and family reunification for immigrants.⁹ Historically, the Article aimed to prevent arbitrary interference by the State in family life. Gradually, the ECtHR expanded the scope of Article 8, by making States accountable for allowing family life to develop on their territory, and at a later stage by, in specific circumstances, allowing family reunification with settled migrants who established strong ties with their host country.¹⁰ Article 8 ECHR has therefore become of vital importance in safeguarding an individual's right to family life, even though children's rights and interests have been rather invisible in cases that concern both family life and immigration. During the development of the application of Article 8, the main

5 Boeles, Den Heijer, Lodder & Wouters, *European Migration Law*, p. 27.

6 Convention on the Rights of the Child, GA Resolution 44/25, 20 November 1989, in force 2 September 1990, UN Doc. A/44/49 (1989).

7 Commission, 'An EU Agenda for the Rights of the child' (Communication) COM(2011) 60 final; Geraldine van Bueren, *Child Rights in Europe – Convergence and Divergence in Judicial Protection* (Council of Europe Publishing, 2007) p. 13.

8 Sarah van Walsum, Case note, ABRvS 30 March 2010, 200809182/1/V2, *JV* 2010/214, ve10000515.

9 *Abdulaziz, Cabales and Balkandali v. The United Kingdom* (9214/80) (9473/81) (9474/81) (1985) 7 EHRR 471.

10 *Sen v. The Netherlands* (31465/95) (2001) 36 EHRR 81.

INTRODUCTION

question in proceedings was not only whether a State's conduct constituted interference with family life, but also whether a state was obliged to enable family ties to develop by taking a positive measure. In a recent case, *Nunez v Norway*,¹¹ concerning a mother of two young children who was threatened with expulsion, this distinction was stripped of its relevance. The Court in that case did, however, refer to the importance of the best interests of the child principle with explicit reference to Article 3 of the CRC, and concluded that it was:

(...) not convinced in the concrete and exceptional circumstances of the case that sufficient weight was attached to the best interests of the children for the purposes of Article 8 of the Convention.¹²

This reasoning constitutes a paradigm shift in the approach of the Court towards the balancing of interests within the meaning of Article 8 ECHR. In this thesis I will take a closer look at this evolution of the application of Article 8 ECHR in the context of citizen children with third-country national parents, attempt to assess the implications of this shift in the light of the CRC and consider to what extent the ECtHR follows the line set out by the Convention.

2. Increased Relevance of EU Citizenship and EU Fundamental Rights Protection for Citizen Children

The notion of citizenship exists without a clear definition. It is a complex, ever changing political concept which never ceases to be questioned and contested. The concept finds its origins in the history of the nation-state and is closely linked, yet not interchangeable, with rights and often confused to be a synonym of nationality, although this latter concept is only an element of citizenship. Nationality is usually described as the legal bond which defines the relationship between the individual and the state. The International Court of Justice (ICJ) defined the concept of nationality in the *Nottebohm case*¹³ as follows:

According to the practice of States, to arbitral and judicial decisions and to the opinions of writers, nationality is a legal bond having as its basis a social factor of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as a result of an act of authorities, it is in fact more closely connected with the population of the State conferring nationality than with any other state.¹⁴

The nation-state's significance within global systems is defined by its relationship to territory and population. With the rise of international human rights law it seems that

11 *Nunez v. Norway* (55597/09) [2011] ECHR 1047.

12 *Ibid.*, para. 84.

13 *Nottebohm Case (Liechtenstein v. Guatemala)*; *Second Phase*, ICJ Reports 4 (ICJ, 6 April 1955).

14 *Ibid.*, 23.

states have an increased responsibility for the people residing within their territory and, consequently, an increased interest in immigration control. Paul Hirst and Grahame Thompson describes the significance of the nation-state in a globalizing world as follows: 'States remain "sovereign", not in the sense that they are all-powerful or omniscient within their territories, but because they police the borders of a territory and, to the degree that they are credibly democratic, they are representative of the citizens within those borders.'¹⁵ EU citizenship provides the individual with a whole new status that comes with rights and responsibilities, and which aims to complement national citizenship as opposed to altering or to replacing it.¹⁶ A Member State's own law on nationality determines who can acquire that Member State's nationality.¹⁷ What all European laws on nationality have in common is that nationality contains the right to enter and reside in one's own country.¹⁸ This is also codified at European level in Article 3 of the Fourth Protocol to the ECHR, which states:

- 1) No one shall be expelled, by means either of an individual or of a collective measure, from the territory of the State of which he is a national.
- 2) No one shall be deprived of the right to enter the territory of the State of which he is a national.

For minors, this right of residence attached to their nationality can be rendered meaningless when their dependency on their parents is not taken into account. This particular issue has been subject of much scholarly debate.¹⁹ The perspective of the child is often absent in immigration cases, and decision-makers and judges often fail to assess how substance and meaning can be given to the child's rights attached to his or her citizenship.²⁰ Jacqueline Bhabha, who has been one of the main critics of the approach adopted in the United States of America, writes that it is not just the right of residence that is at stake in these types of cases:

'In short, the fact of belonging to a country fundamentally affects the manner of exercise of a child's family and private life, during childhood and well beyond. Yet chil-

15 Paul Hirst and Grahame Thompson, *Globalization in Question – The international Economy and the possibilities of Governance* (Cambridge Polity Press, 1996), p. 275.

16 TFEU Art 20.

17 The Convention on Certain Questions relating the Conflict of Nationality Laws (The Hague 12 April 1930) states in Article 1: 'It is for Each State to determine under its own law who are its nationals.' This provision is restated in Article 3 of the 1997 European Convention on Nationality.

18 Article 10 of the CRC and Article 12 of the International Covenant on Civil and Political Rights also codify the right of an individual to enter its own country.

19 Caroline Sawyer, 'Not Every Child Matters; the UK's Expulsion of British Citizens' (2006) 14 *The International Journal of Children's Rights*, p. 157; Jacqueline Bhabha, 'The "Mere Fortuity of Birth"? Children, Mothers, Borders and the Meaning of Citizenship', in Seyla Benhabib and Judith Resnik (eds), *Migrations and Mobilities: Citizenship, Borders and Gender* (New York University Press, 2009), p. 187, 192: 'And yet, for all intents and purposes, some of the American children described above were de facto - or constructively - deported; if a young child's parents are forced to leave a country, so in effect is the child. Why does a citizen child's non-deportability not impinge more effectively on the family's residency rights?'

20 Marcelle Reneman, 'Het Kinderrechtenverdrag krijgt tanden' (2011) 8 *Asiel & Migratierecht*, p. 349.

INTRODUCTION

dren, particularly young children, are often considered parcels that are easily movable across borders with their parents and without particular cost to the children.²¹

As EU citizenship is contingent on nation-based citizenship, and because the concept is constantly evolving, the extent to which EU citizenship can address these issues or impact the application of these rights is not a straightforward matter. It is clear, however, that the ECJ relatively recently took a significant step in the promotion of independent citizenship status of children, which directly affects minor nationals of all Member States. An EU citizen has the right to move and reside freely within the territory of the Member States, in accordance with the conditions laid down in primary and secondary EU legislation. This citizenship right can only be relied upon when the particular situation comes within the scope of EU law, which is the case when there is a link to freedom of movement provisions. It is, generally speaking, the movement that triggers the enjoyment of rights attached to EU citizenship. In its ruling of the 9th of March 2011 in the case of *Zambrano v. Office National de l'Emploi* the ECJ interpreted the EU Citizenship status of minors as,

(...) meaning that it precludes a Member State from refusing a third country national upon whom his minor children, who are European Union citizens, are dependent, a right of residence in the Member State of residence and nationality of those children.²²

With this decision the ECJ has brought minors of all Member States with a third-country national parent potentially within the scope of EU law, notwithstanding that they have not exercised their freedom of movement. This not only holds potential significance in the area of EU citizenship rights, but also in the area of fundamental rights protection in the EU. After the entry into force of the Lisbon Treaty the Charter of Fundamental right of the European Union (the Charter) has become a binding legal document.²³ The Charter is significantly more child-centred than the ECHR and therefore has the potential to offer more protection to minors. In this thesis I will examine the impact of the *Zambrano* case and its potential implications for citizen children of non-EU citizen parents. I will assess the judgment in the light of the CRC, which can be seen as the touchstone against which all decisions affecting children should be measured, and I will examine to what extent the line of reasoning adopted by the Court reflects the principles enshrined in the CRC.

21 J. Bhabha, "The "Mere Fortuity of Birth"? Children, Mothers, Borders and the Meaning of Citizenship"; (2004) *differences: A Journal of Feminist Cultural Studies*, Vol. 15, No. 2, p. 193.

22 Case C-34/09 *Ruiz Zambrano* [2011] ECR I-0000, 8 March 2011, para. 46.

23 Xavier Groussot and Laurent Pech, Fundamental Rights Protection in the European Union post Lisbon treaty, *Fondation Robert Schuman Policy Paper n° 17* available at: http://www.robertschuman.eu/doc/questions_europe/qe-173-en.pdf.

3. Increased Significance of the Convention on the Rights of the Child

After a drafting process that took over ten years, the Convention on the Rights of the Child was finally adopted in 1989. It is the first binding, comprehensive human rights document which addresses children as subjects instead of objects. It explicitly recognizes children as rights-bearers. Other agreements aiming to increase the protection of children traditionally employed the method of providing their parents with rights. The CRC is almost universally ratified. The only countries that failed to ratify the CRC are Somalia and the United States of America, making it one of the most widely-ratified human rights treaties. It has been a highly influential document over the past two decades. Especially during the first decade after its adoption, the CRC generated a lot of activity from child rights advocates and NGO's, and influenced law and policy on international, regional and national levels. Policy makers, the judiciary and state structures are slowly moving towards the incorporation of the rights based approach in all matters involving children.

The CRC offers a fundamentally new vision on the child, as an autonomous human being, a family member and a member of society. The Committee on the Rights of the Child (the Committee)²⁴ has repeatedly stressed the importance of a holistic approach towards the rights under the CRC, their interdependence and indivisibility, and the significance of the 'best interests' principle enshrined in Article 3.²⁵ The Committee requires states to take,

(...) active measures throughout Government, parliament and the judiciary. Every legislative, administrative and judicial body or institution is required to apply the *best interests principle by systematically considering how children's rights and interests are or will be affected by their decisions and actions* – by, for example, a proposed or existing law or policy or administrative action or court decision, including those which are not directly concerned with children, but indirectly affect children.²⁶ (emphasis added)

Notions such as 'best interests', 'holistic approach' and 'systematically considering' are as difficult to apply in practice as they are easy to write down or use rhetorically. There is no clear-cut answer to the question of what these notions exactly mean. The rights in the CRC appear sometimes to be more of an idealistic nature, articulating moral aspirations, instead of setting concrete and clear norms. Translating these 'rights' into domestic law, therefore, is not an easy task, and is often neglected. The lack of implementation of the Convention into domestic law, and the open-ended nature of the norms, has undermined the direct application of the CRC in national courts, and thereby also undermined the development of child rights as a coherent body of law.²⁷ The absence of an individual complaints procedure and enforcement

24 The Committee is the body that monitors the implementation of the CRC as established by Article 43 CRC.

25 Committee on the Rights of the Child, *General Measures of Implementation of the Convention on the Rights of the Child (arts 4, 42 and 44, para 6)*, General Comment No. 5, (2003) CRC/GC/2003/5, para. 18.

26 *Ibid.*, para. 12.

27 Jane Fortin, *Children's rights and the Developing Law* (Cambridge University Press, 2009), p. 46.

mechanism is regarded as a serious lacuna in the Convention as the interpretations by the Committee have remained fragmented and without real authoritative force.²⁸

A progressive attitude of the European Courts towards the application of the CRC can function as a catalyst in the advancement of child rights and the application of the CRC. Such an attitude not only increases the level of protection required by the European Courts, it will also provide the CRC with much needed authoritative force. Because of this recognition at the European level, the CRC is bound to extend its influence. For this reason, this study views the legal position of children with third-country national parents from the perspective of the CRC. It aims to assess what this development potentially means for the application of children's rights in cases concerning citizen children with foreign parents who seek legal residency in the country of their children's nationality, and to provide clarification on how the relevant children's rights should be applied in accordance with the CRC.

4. Research Questions

While recent developments in the jurisprudence by the Courts seem to be highly significant in the application of the right to respect for family life under the ECHR, and the way Union citizenship should be interpreted, they have caused a lot of confusion amongst scholars and practitioners with regard to the exact consequences and scope of application. What these developments in the case law of the European Courts have in common is the fact that both the ECJ and ECtHR put children at the forefront of their considerations. Therefore, gaining insight in the rights of children might provide at the same time more insight into the approaches adopted by the Courts. With particular focus on the legal position of EU citizen children with third-country national parents, these considerations lead to the following main research question:

In what way do the European Court of Human Rights and European Court of Justice incorporate the values and principles of the CRC in their interpretation of a child's right of residence and a child's individual right to respect for family life in cases that concern minor citizens of an EU Member State who are residing in their country of nationality and wish to enjoy family life with (a) non-EU parent(s)?

And consideration of this question yields the following ancillary queries:

- a. What approach towards the rights of children does the UN Convention on the Rights of the Child promote?
- b. How does the CRC evaluate the right of residence attached to nationality, how does the ECtHR evaluate the right of residence attached to nationality when applying and interpreting Articles 2 and 3 of the Fourth Protocol of the ECHR, and how does the ECJ evaluate the right of residence attached to nationality when applying and interpreting EU Citizenship?

28 *Ibid.*

- c. How does the CRC evaluate the right to respect for family life, how does the ECtHR evaluate the right to respect for family life when applying and interpreting Article 8 of the ECHR, and how does the ECJ evaluate the right to respect for family life when applying and interpreting EU Citizenship?
- d. What are the similarities and differences between the approaches of the ECtHR and the ECJ towards applying the values and principles of the CRC?

5. Methodology

To establish to what extent the CRC influenced other legal regimes one first needs to identify what rights and approach the CRC promotes. In order to do this, I will make use of the Convention, the draft history, the interpretations by the Committee and analyses of the application of the CRC by scholars. I will make use of primary and secondary EU legislation and the interpretation by the ECJ of this legislation. The same applies to the ECHR and the interpretation of these rights by the ECtHR. I will heavily rely on and draw from the judgments of these Courts. I will also examine the literature that notes the increased significance of the CRC and children's rights at European level, by applying the so-called 'snowball' method. The sources of these articles will be of relevance to my research and therefore will be consulted and scrutinized on their relevance to answering the research questions.

6. Overview of Chapters

In Chapter 1, I will conduct a thorough discussion of the CRC. I will explore the ideas of the CRC about children and rights, as well as the general distinctive features of the CRC. I will then explore the content of provisions, relevant for children who wish to enjoy family life with a third-country national parent. I will mainly rely on guidance from the Committee on the Right of the Child and academic literature to determine the scope and normative value of the rights under the CRC. In Chapter 2, I will examine how the interpretation of the ECHR by the ECtHR has been influenced by the rights set out in the CRC, and to what extent the approach towards children's rights promoted by the CRC is adopted. I will also examine what the implications are of the Court's recognition of the importance of the best interests principle for the legal position of minor State Party nationals. Chapter 3 will first examine the status of the CRC at European Union level. This will be followed by a discussion of the possible impact of EU citizenship status and the Charter in cases that concern 'static' minor Member State nationals and the residence rights of third-country nationals. The new paradigm in citizenship cases and the inclusion of a child-specific provision have the potential to significantly influence the level of protection for children. Chapter 4 aims to answer the questions as formulated in the introduction, and clarify the legal position of EU citizen children with a third-country national parent.

Chapter 1

The Convention on the Rights of the Child

1.1 Introduction

By virtue of their humanity children are beneficiaries of all rights under international human rights treaties. However the CRC was specifically designed to safeguard and promote the rights of children and is now regarded as a touchstone against which the treatment of children is measured. In this chapter I provide a short overview of the general features of the CRC, after which I take a closer look at the Articles that are specifically relevant for citizen children who wish to enjoy family life with a third-country national parent.

1.2 The Convention on the Rights of the Child – An Overview

1.2.1 *Why Rights for Children?*

Immediately when employing the concept of children's rights, a paradox reveals itself. The notion of 'rights' seems to presuppose autonomous subjects capable of acting rationally and exercising choices whether and how to administer their entitlements. Children, however, typically lack the capacity to make such choices. Children, especially at a very young age, cannot act as their own agents. Children's dependency is a striking feature that always surrounds the notion of children's rights and can be regarded as one of the root causes of disputes. The most developed and least contested human rights are civil rights, which in general impose negative duties on the state, and provide the individual with freedom from government interference. While this is a very suitable approach for adults, leaving children to their autonomy would not be beneficial to them. Therefore there seems to be something forced and unsettling about trying to fit the child into the adult-centric world of rights. At first sight it raises the question whether it is the most suitable approach to achieve the welfare of a child. This is one of the reasons why the concept of children as rights-bearers is as much contested as it is supported, and also a reason why it causes ideological and cultural division across the globe. Further, it is often suggested that children's rights undermine the rights of the parents.²⁹

The question arises; what exactly are the benefits of speaking about rights for children? Proponents of rights for children generally acknowledge the fact that children do not have the same capacities as adults and therefore should not be treated in the same way. Yet, they argue, children are born with human dignity and have interests of their own. Is the lack of 'will' and 'choice' and children's dependency enough reason to deny them rights? Proponents of children's rights would argue this is not

29 Martin Guggenheim, *What's wrong with children's rights* (Harvard University Press, 2005), p. 131.

the case and challenge the automatic dismissal of children's entitlements and voices because children do not have the same capacities as adults. They also feel there are times in which children are actually capable of acting as active agents and kept in prolonged dependence by adults. The differential treatment between adults and children should be based on real differences that have to be assessed on a case-by-case basis. Children, from such a perspective, do not differ from adults to the extent that it would be justifiable to deny them rights. Yet, to the extent that children are different from adults they should be entitled to rights adults do not have because of their vulnerability. Therefore, children's rights are argued on the basis of both *differences* and *similarities*.

The 'rights' language has other positive features. For example, 'rights' provide a child with entitlements instead of making them reliant on charity or goodwill. The rights language also provides a widely supported line of reasoning and auditing tools to assess whether policies meet certain standards. It also helps to remove boundaries between different disciplines by providing a framework that can accommodate the different facets of childhood thereby increasing coherence. Lastly, the acceptance of children as rights-bearers calls for an active approach by judges and policy makers in identifying these rights and interests. This decreases the risk that the rights and interests of the child are simply overlooked.

1.2.2 *The CRC – A Comprehensive Document*

The CRC is the first comprehensive international instrument that explicitly recognized children as rights-bearers. All children under the age of 18 are holders of rights under the Convention. Even very young children are entitled to the progressive exercise of their rights and must be respected in their own right. The Committee stresses that 'as holders of rights, even the youngest children are entitled to express their views, which should be "given due weight in accordance with the age and maturity of the child"(12)'.³⁰

The preamble of the CRC offers clear ideas about the child and its place within the family and society. It recognizes the family as 'the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children' and acknowledges that a child must be 'fully prepared to live an individual life in society and brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity'. The Convention contains a comprehensive set of rights: civil, political, economic and social rights are all included. Most human rights treaties do not cover these different types of rights in a single document. Attempts are often made to classify the rights of the CRC. It is impossible to avoid overlap when doing so. A well-known classification involves the 'three P's': Provision, Protection and Participation.³¹ Others like to emphasise the sense of community

30 Committee on the Rights of the Child, Implementing Child Rights in Early Childhood, *General Comment No. 7* (2005) CRC/C/GC/7/Rev.1, para. 14.

31 This classification was developed by Defence for Children International in cooperation with UNICEF, as discussed in Jim Lurie, 'The Tension Between Protection and Participation – General

and family that is entwined in the Convention by adding membership to that classification.³² In general it can be said that ‘Provision’ rights are in essence about the right to life and survival. They articulate how a child is to be provided with everything that is needed to fulfil the child’s basic needs and sustain his or her life. ‘Protection’ rights shield the child from abusive powers, both from individuals and the State. ‘Participation’ rights are designed to empower children. They call upon communities and families to respect the child as a member of the community, and encourage their capacity for autonomy.

1.3 The Convention on the Rights of the Child – Normative Value

1.3.1 *The CRC and the Committee on the Rights of the Child*

The Committee on the Rights of the Child (the Committee) was established by the CRC for the purpose of monitoring the implementation of the treaty by State Parties. It consists of 18 independent experts who come together three times a year for four weeks.³³ The Committee has relatively limited power compared to other treaty monitoring bodies and is not comparable to the highly influential European Courts. The Committee writes General Comments, Recommendations and holds days of General Discussion. The General Comments are an especially useful source that provides guidance as to how provisions should be interpreted. Yet, the primary function of the Committee is to periodically review the conduct of all State Parties to the Treaty. States are bound by the Convention to report every five years on the implementation of the Convention.³⁴ States are asked to report on the measures taken to give effect to the rights in the CRC and on the progress made with regard to the effective enjoyment of those rights.³⁵ During the examination of a State Party’s report the Committee engages in a dialogue with that particular state during a plenary session, after which the Committee drafts Concluding Observations and Recommendations. In General Comment No. 5 the Committee set out guidelines of what is expected from states in terms of implementation but also of reporting. In this General Comment can be found that the Committee expects a state to ‘consider the Convention not only Article by Article, but also holistically, recognizing the interdependence and indivisibility of human rights’.³⁶ The Committee particularizes this notion by elevating four Articles from the Convention to General Principles. States are asked to report on these Articles both on their own merits and in relation to the more specific rights of the Convention. The General Principles are Article 2 (non-discrimination), Article

Theory and Consequences as Related to Rights of Children, Including Working Children’ (2003) 7 *IUC Journal of Social Work*, at 7.7.1.

32 Lawrence LeBlanc, *The Convention on the Rights of the Child: United Nations Law making on Human Rights* (University of Nebraska Press, 1995), Part Two.

33 Trevor Buck, *International Child Law* (Cavendish Publishing, 2005), p. 50.

34 Article 44 of the CRC.

35 Buck, *International Child Law*, p. 50.

36 Committee on the Rights of the Child, General Measures of Implementation of the Convention on the Rights of the Child (arts 4, 42 and 44, para 6), *General Comment No. 5*, (2003) CRC/GC/2003/5, para. 18.

2 (best interests), Article 6 (right to life, survival and development) and Article 12 (participation and respect for a child's evolving capacities).

The CRC did not provide the Committee with the power to examine complaints from individuals or State Parties. Therefore there are no binding views or judgments that clearly and extensively articulate how the CRC should be interpreted. However, the Human Rights Council recently adopted an Optional Protocol to the CRC, which grants the Committee the power to receive complaints from individuals or groups of individuals.³⁷ State Parties are free to decide whether or not to adopt and ratify the Optional Protocol, which is yet to be opened for signature.

1.3.2 *General Principles: Articles 3 & 12 CRC*

This first paragraph of Article 3 states the following:

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.

While the provisions in the CRC are of equal importance, Article 3 has special relevance as it underpins all other Articles.³⁸ This Article does not only manifest itself within the law or the judiciary, but also shapes procedures and conduct within organisations. For example, the UNHCR has drawn up guidelines on how to determine the best interests of refugee children in which it specifically states that Article 3 applies to both individual cases and groups of children. Therefore there is a wide range of possible measures according to the UNHCR that can be undertaken in the light of this Article, such as 'consultation with children through participatory assessments that are systematic, age-appropriate and gender-sensitive; the collection of data by sex and age; giving primary consideration to the best interests of the child in resource allocation; the insertion of child-specific aspects in guidelines, policies, country operation plans, sub-project agreements and standard operating procedures; and many others'.³⁹

The question of what is in the best interests of a child is inherently subjective and indeterminate.⁴⁰ The CRC does not elaborate on the definition of 'best interests'. It also does not provide guidance as to the determination process that should be employed. Michael Freeman, in his commentary on Article 3, points out that it is interesting to note not only what the Convention says, but also what it does not say. It fails to provide a list of factors that are important in determining the best interests. For example, there is no reference to Article 12 as a tool for determining the best

37 For more information on this topic see: http://www.globalgovernancewatch.org/spotlight_on_sovereignty/un-hrc-approves-complaint-mechanism-for-children.

38 Michael Freeman, 'Article 3. The Best interests of the Child', in Andre Alen, Johan vande Lanotte, Eugene Verhellen, Fiona Ang, Eva Berghmans & Mieke Verheyde (eds), *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers, 2007), p. 1.

39 UN High Commissioner for Refugees, *UNHCR Guidelines on Determining the Best interests of the Child* (2008), p. 20

40 Freeman, 'Article 3. The Best interests of the Child', p. 2.

interests and what value should be attached to the child's own views.⁴¹ While there is extensive literature that explores the best interests principle, the Committee did not devote a General Comment to this very important General Principle to provide clarification. Therefore it is easier to decipher what the Committee think is not in the best interests of a child, as opposed to finding a positive definition of the best interests principle. For example, the Committee considers corporal punishment and female genital mutilation not compatible with the best interests principle.⁴²

The Article clearly states the best interests of the child must be a primary consideration. The wording was carefully chosen instead of *the* primary consideration or *the paramount* consideration. It means the best interests of the child do not take automatic precedence over other interests involved. Instead they need to be carefully balanced.⁴³ A 'paramount consideration' would be seen as very close to being the sole consideration, and would rarely be overridden by other considerations. The chosen wording leaves more room for flexibility for the decision maker, especially in extreme situations.

The question of how the interests of children relate to the competing interests of the State e.g. immigration control, is very difficult to answer. The Committee did not provide any guidance as to the weighing of public interest against the best interests of the child. There is no doubt however that these cases fall within the scope of Article 3. The decision to deny a parent residency is primarily directed at the parents and not the children. Still, the possible impact on their rights and interests must be a primary consideration of the decision maker and judge as this falls within the scope of 'concern' as meant by article 3 CRC. Article 3's scope includes decisions that both directly and indirectly affect children.⁴⁴

With regard to the determination of the best interests in cases that concern minor State Party nationals who wish to enjoy family life with a third-country national parent, it is interesting to mention that the Committee noted in General Comment Number 6 on unaccompanied and separated minor asylum seekers that:

A determination of what is in the best interests of the child requires a clear and comprehensive assessment of the child's identity, including her or his nationality, upbringing, ethnic, cultural and linguistic background, particular vulnerabilities and protection needs.⁴⁵

Even though these remarks are applicable to children outside their country of nationality and clearly were not made in the context of minor nationals residing in their home country and seeking family life with a parent, it could be argued that an analogous interpreta-

41 *Ibid.*, p. 31.

42 *Ibid.*, p. 51-52.

43 Michael Freeman, 'Why It Remains Important to Take Children's Rights Seriously' (2007) 15, *International Journal of Children's Rights*, p. 5-23 at p. 16.

44 Committee on the Rights of the Child, General Measures of Implementation of the Convention on the Rights of the Child (arts 4, 42 and 44, para 6), *General Comment No. 5*, (2003) CRC/GC/2003/5, para. 18.

45 Committee on the Rights of the Child, Treatment of Unaccompanied and Separated Children outside their Country of Origin, *General Comment No. 6*, (2005) CRC/GC/2005/6, para. 20.

tion is appropriate and the same factors are relevant in the best interests assessment of citizen children.

Another factor that could guide the best interests is the child's own voice. It had been attempted to include a reference to the views of the child during the drafting process of Article 3. However, concerns were raised with regard to the determination process when a child is not old enough to express its views.⁴⁶ Thus it was decided to draft a separate Article. Article 12 stipulates the following:

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

It is clear that the Committee attaches a lot of value to the views of the child given that Article 12 was elevated to the status of a General Principle and it is the only specific article of the Convention that been elaborated upon in a General Comment. In the General Comment on Article 12 the Committee describes the Article as one of the Convention's fundamental values and clarifies that the scope should be interpreted broadly.⁴⁷ Article 12 guides and shapes the implementation of the Articles of the Convention. In relation to the 'three Ps' the Committee notes;

Article 12 manifests that the child holds rights which have an influence on her or his life, and not only rights derived from her or his vulnerability (protection) or dependency on adults (provision).⁴⁸

The views of a child should be given due weight in accordance with the child's age, maturity and capacity to form his or her own view. In relation to Article 3 the Committee considers that these two general principles complement each other. The Committee recognizes that Article 12 provides a methodology for achieving the best interests. Furthermore, the Committee considers it imperative for the correct application of Article 3 to consider the components of Article 12.⁴⁹

As a last point of interest, what does the literature consider the correct approach towards determining the best interests and the relationship of this concept with Article 12? Both Tobin and Fortin stress the importance of adopting a rights-based approach in combination with the application of the best interests principle. When

46 Freeman, 'Article 3. The Best interests of the Child', p. 49-50.

47 Committee on the Rights of the Child, The Right of the Child to be Heard, *General Comment No. 12*, (2003) CRC/C/GC/12, para. 26.

48 *Ibid.*, para. 18.

49 Committee on the Rights of the Child, The Right of the Child to be Heard, *General Comment No. 12*, (2003) CRC/C/GC/12, para. 70.

there is tension between competing rights of different parties that cannot be resolved, the best interests principle can shift the balance to provide the child with the benefit of the doubt.⁵⁰ They also recognize that the rights articulated in the Convention are to be regarded as guiding the best interests.⁵¹ This means that conduct that is not in line with the rights under the Convention should be considered as contrary to the best interests of a child. An assessment of the best interests that leads to a subjective value judgement should be avoided. This will undermine the credibility of the Article and children's rights as a whole. The assessment is done by adults who could easily, resort to an interpretation that will serve their own idea of the best interests, or walk into the pitfall of resorting to a classic paternalistic interpretation. A correct application of the CRC and Article 12 requires that children be given an opportunity to be heard in legal proceedings affecting them. These views are not necessarily determinative and should be considered in accordance with a child's age and maturity level. Tobin stresses, especially in cases where a child is too young to be able to express its views, the importance of adopting a transparent reasoning process and an evidence-based approach.⁵² The particular circumstances of the child and any available empirical evidence should serve, as far as possible, as a means to avert both the risk of indeterminacy and a determination based on the subjective preference of a judge.

1.3.3 *General Principles: Articles 3 & 12 CRC - Illustrative Case Law*

Because of the broad character of Article 3, and its importance, I will briefly explore a number of key decisions from national Courts of different jurisdictions to give an idea of how the principle is and can be used directly in cases that concern citizen children. The cases that I will discuss are noteworthy because of the emphasis that is put in those cases' judgments on the best interests principle, and its impact on the outcome of the case. These cases do not provide an overview of the general practice as there are more cases to be found in which the best interests principle is not applied at all. The last case that I will discuss touched upon the role of Article 12 in this context. There was no mentioning of this Article in the other cases. This shows that there is still a long road ahead before the CRC can be considered to be fully implemented in national laws and procedures. Further, one may question the extent to which the child is recognized as a rights-bearer when reference to the views of the child is absent.

In the Canadian case of *Baker v. Canada (Minister of Citizenship and Immigration)*⁵³ the judges of the Supreme Court had to judge whether the decision to deport a mother of Canadian children was a reasonable one. The Court came to the conclusion that '...for the exercise of the discretion to fall within the standard of reasonableness, the decision-maker should consider children's best interests as an *important factor*,

50 Tobin, 'Judging the Judges: Are they adopting the rights approach in matters involving children?', p. 607; and Fortin, 'Accommodating Children's Rights in a Post Human Rights Act Era' (2006) 69 *Modern Law Review*, p. 299-326, at p. 311-312.

51 Tobin, 'Judging the Judges: Are they adopting the rights approach in matters involving children?', p. 590.

52 *Ibid.*, p. 592.

53 Supreme Court of Canada, *Baker v. Canada (Minister of Citizenship and Immigration)*, 9 July 1999, 1999 S.C.R. 817, File No. 25823.

give them *substantial weight, and be alert, alive and sensitive to them*⁵⁴ (emphases added). The Court reasoned that without this consideration the decision would fail to uphold the Canadian humanitarian and compassionate tradition as it would minimize the interests of the children. For this reason the initial decision was deemed unreasonable and an appeal was allowed.

In *Vaitaiki v. Minister for Immigration & Ethnic Affairs*⁵⁵ the Australian Federal Court criticised the manner in which the Administrative Appeals Tribunal applied the best interests principle. Burchett J asserted that the best interests of the children had not received adequate consideration in the foregone decisions.⁵⁶ The best interests had not been treated as a ‘*determining*’ factor in the decision to deport a father of three Australian minor citizens. It was not considered essential for the resolution of the issues before the Court, according to Burchett J, but was only assessed in the light of the pending deportation. He cited the following part of the Tribunal’s decision which reflects this: ‘The best interests of the 3 youngest children will clearly be served by remaining part of their nuclear family and by moving to Tonga as contemplated.’ Burchett J expressed a clear dissatisfaction with the Tribunal’s reasoning. He stated that ‘the deputy president treats the question, not as what the best interests of the children require *him* to decide with respect to the proposed deportation of the appellant, but what each set of children should do, given that their father would be deported.’ This judgment shows that even when Article 3 is included in the decision, this does not necessarily mean the standard set by Article 3 is immediately upheld and that the principle is applied in accordance with the Convention. It also shows there is a hazard of employing a conservative paternalistic approach towards the principle. Lastly, in the two cases we have seen now, one refers to the best interests as an ‘important’ factor, while the other one refers to it as a ‘determining’ factor, yet neither of the two refers to it as a primary consideration. The usage of loose language can lead to even more confusion as to the weight that should be accorded to the best interests, which will undermine its application.

In a recent judgement by the United Kingdom Supreme Court, Baroness Hale explored what methodology is appropriate in the assessment of the best interests of citizen children. In *ZH (Tanzania) v. Secretary of State for the Home Department*⁵⁷ the Supreme Court elaborated on the general principles that should be applied in cases concerning the removal or deportation of a parent (or both parents) of children who are citizens of the UK. Throughout the decision the underlying message was that children cannot be blamed for poor decisions made by their parents. Baroness Hale explicitly stated that the best interests assessment should not be coloured by bad parental choices.⁵⁸ To discover what the best interests exactly are in these cases Baroness Hale examined the role of Article 12 of the CRC. She distinguished and elabo-

54 *Baker v. Canada*, para. 75.

55 Federal Court of Australia, *Vaitaiki v. Minister for Immigration & Ethnic Affairs*, 15 January 1998, [1998] FCA 5.

56 *Vaitaiki v. Minister for Immigration & Ethnic Affairs*, at Reasons for Judgment by Burchett J.

57 United Kingdom Supreme Court, *ZH (Tanzania) (FC) (Appellant) v. Secretary of State for the Home Department (Respondent)*, 1 February 2011, [2011] UKSC.

58 *ZH (Tanzania) v. SSHD*, para. 44.

rated on two dimensions of this Article and how these dimensions should be employed. Firstly, she answered the question whether separate legal representation of the children in these types of cases is deemed essential. She considered it essential in situations where a child is separated from his or her parents for his or her own best interests, but not in immigration cases. In the latter the interest of the children and parents are usually not in conflict, therefore separate representation will ‘rarely be called for’. She considered it more relevant that ‘those conducting and deciding these cases’ are ‘alive to the point and prepared to ask the right questions’.⁵⁹ She did not provide an example of a situation where separate representation would be appropriate. Secondly, should a child’s view be heard in these cases? Baroness Hale answered this question rather ambiguously, stating that the immigration authorities ‘must be prepared at least to consider hearing directly from a child who wishes to express a view and is old enough to do so’.⁶⁰ Thus, hearing the child’s own views has to be a real possibility and should be kept in mind by the authorities but is not considered obligatory or essential for the determination process of the best interests.

1.3.4 *Cross-Border Families and Family Life – Articles 9 & 10 CRC*

One can discern expressions of the assumption that it is in the interest of the child to be with his or her parents throughout the entire Convention. Nevertheless, the CRC does not contain an absolute right to family life. Article 9 and 10 of the CRC should be read in conjunction and combined they form what can be considered a right to family unity.⁶¹ Article 9 and 10 provide guidance on how a State ought to deal with both the admission and deportation of parents. Article 9 deals with the separation of parents and children while Article 10 deals with situations of family reunification.

Article 9 states in paragraph one that parents and children should not be separated unless it is in the best interests of the child. Thus, Article 9 lifts the best interests principle in these cases from a primary to a paramount consideration, which means it is to be regarded as determinative. The wording of Article 9 seems to indicate that the first paragraph addresses cases that deal directly with the separation of parents and children.⁶² In immigration cases the separation is the result of a decision on residency or deportation, it is not a decision that directly concerns separation. Furthermore, deportation does not necessarily result in a permanent separation if the child follows the parent. The fourth paragraph specifically refers to deportation as an example of a situation where separation is the result of an action by a state. It states that in such situations family members of the deportee should receive essential information about the whereabouts of their relative upon request. It also states that that this request should not entail any adverse consequence for the person(s) concerned. At first sight, Article 9 does not seem to offer strong protection rights to children whose parents are faced with possible deportation. It does not provide abso-

59 *ZH (Tanzania) v. SSHD*, para. 36.

60 *Ibid.*, para. 37.

61 Eliahu Frank Abram, ‘The Child’s Right to Family Unity in International Law’ (1995) 17 *Law and Policy*, p. 397-439, at p. 415.

62 See appendix, Article 9 CRC.

lute or explicit rights to children who are threatened with separation from a parent due to deportation.

Article 10 provides a right to children and their parents to enter or leave a country for the purpose of family reunification. It does not give a right to also remain there but it must be possible for children and parents who reside in different states to maintain personal relations on a regular basis. Applications for family reunifications should be dealt with in a 'positive, humane and expeditious manner' according to Article 10. The word 'expeditious' is of particular significance in immigration cases, as family reunification procedures are often terribly time consuming. With this phrasing, the Convention recognises that a month in a child's life is not the same as a month in an adult's life. Because of a child's rapid development, a time-period in which, e.g., a parent is absent, has a much greater impact on a child, and is therefore regarded as lasting significantly 'longer'.⁶³

As we have seen, the normative value of Articles 9 and 10, and the way they interrelate in immigration cases, is not very straightforward. When looking at the drafting history and the statements of the Committee there is not a general agreement amongst the different parties on the application of these Articles. The chairman of the Working Group in charge of drafting the Convention declared that it was the understanding of the Working Group that:

'Article 6 (now 9) of this Convention is intended to apply to separations that arise in domestic situations, whereas Article 6 bis (now 10) is intended to apply to separations involving different countries and relating to cases of family reunification. Article 6 bis (now 10) is not intended to affect the general right of States to establish and regulate their respective immigration laws in accordance with their international obligations.'⁶⁴

In response to the declaration, three state representatives stressed the importance of those international obligations and that these obligations included the principles of Article 9. What the representatives exactly meant by that is rather difficult to discern. During Canada's first periodic review the Canadian representative and a member of the Committee, Mrs Santos Pais, displayed some public disagreement on the same topic. Mrs Santos Pais stated the following:

'It appeared from Canadian case law that a situation could arise where non-Canadian parents could be deported from the country and their children remain there. That situation was connected with Articles 9 and 10 of the Convention, especially in relation to separation. Under Article 9, States parties should ensure that there would be no separation unless it was in the best interests of the child concerned and determined by competent authorities subject to judicial review. Concern had been expressed as to how a child's best interests were taken into consideration when decisions to deport parents were made. Were family values taken into account by deci-

63 Rachel Hodgkin & Peter Newell, *Implementation Handbook for the Convention on the Rights of the Child: Fully Revised Third Edition* (UNICEF, 2007), p. 125.

64 Hodgkin & Newell, *Implementation Handbook for the Convention on the Rights of the Child*, p. 126.

sion-makers? Article 9 also referred to the need for judicial proceedings to give to all interested parties the right and opportunity to be heard.⁶⁵

In response, the Canadian representative cited the above-mentioned declaration of the chairman of the Working Group and also stressed that 'International law did not provide an express right to family reunification nor did the Convention recognize family reunification as a right.'⁶⁶ Mrs Santos Pais replied that this issue should,

'be seen in the context of the obligations of States parties under Article 9 of the Convention, which stated that children should not be separated from their parents unless that was in the best interests of the child. Was it the case in Canada that such decisions were always made, in accordance with Article 9, by competent authorities subject to judicial review?'⁶⁷

Lastly, noteworthy guidance for interpretation can also be found in the Committee's General Comment no. 6 on unaccompanied asylum seekers. The Committee explained in this comment that when there are obstacles preventing family reunification in the country of origin, Articles 9 and 10 of the Convention come into effect and should govern the host country's decisions at issue.⁶⁸ The Committee also mentioned that it does not matter whether these obstacles are of a legal nature or derived from a balancing exercise within the best interests principle. The Committee made this statement in the context of 'durable solutions'. This implies the Committee was not referring to temporary family reunification. It could be argued that with this statement the Committee acknowledged an express right to family reunification, on the basis of Article 3 in conjunction with Articles 9 and 10, in cases where there is such an obstacle preventing family reunification in the country of origin. Are children reduced to easy movable parcels in cases where no such obstacle exists? The best interests of the child principle and recognition of children as rights-bearers must be considered to impede such an approach.

1.3.5 *Nationality, Identity and the Right to Know Your Parents – Article 7 & 8 CRC*

Article 7 demands registration of all children immediately after birth and provides them with the right to a name and nationality. Further, it states a child has the right to know and be cared for by his or her parents as far as possible. Birth registration and nationality are means to ensure the visibility of the child. They make sure states are, or should be, aware of the existence of the child and are in theory capable of planning strategic policies to secure the best interests of the children within the state's territory. It also can be seen as a formal recognition of the legal personality of children. As pointed out above, the issue of nationality in international human rights law is a challenging one. Nationality laws are intrinsically bound to the sovereignty of the nation-

65 *Ibid.*

66 *Ibid.*

67 *Ibid.*, p. 126.

68 Committee on the Rights of the Child, *General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country Of Origin*, 1 September 2005, paras. 82-83.

state. Therefore this provision mainly aims to address situations in which children would otherwise become stateless. The CRC is not the only document in international law that aims to eradicate statelessness. The prohibition of statelessness is a generally recognized principle of human rights law as it is regarded as a threat to the enjoyment of rights.⁶⁹ In this light, one can conclude the provision on nationality was included for this reason rather than for the purpose of altering or influencing the concept of nationality as such or the rights attached to it.

The right to *know* your parents is of particular importance in the context of adoption and for example egg or sperm donation. The right *to be cared for* by one's parents should be read in the context of Article 5 which provides, alongside recognition of the primacy of the parents, recognition of the extended family (or community as provided for by local custom), Article 9 (as discussed above) and Article 18 which support the view that both parents have joint responsibility in the upbringing of the child, appropriately assisted by the State.⁷⁰ The words 'as far as possible' qualify both the right to know and be cared for by one's parents. The content of Article 7 substantiates, in line with the overall spirit of the CRC the idea that children are assumed, in ordinary circumstances, to be best off with their parents. The Committee failed to enhance the normative value of Article 7. During Periodic Reviews or in General Comments the right to be cared for by one's parents has not played any role of significance.

Article 8 provides a child with the right to preserve his or her identity with special regard to three facets of identity: nationality, name and family relations as recognized by law. By linking identity and nationality, Article 8 manages to shift the nationality issue slightly from the sovereign realm of the nation-state into the human rights sphere. For example, a state cannot deprive a child of his or her citizenship when a parent loses his or her citizenship, as this would amount to an assault on the identity of the child.⁷¹ Still, the nationality provisions are not considered strong provisions as the concept of nationality remains a sensitive issue for State Parties.⁷² It is rather unclear what is meant by the phrase 'family relations as recognised by law'. A look at the drafting history provides little clarification. The initial proposal distinguished three forms of identity, i.e., personal, legal and family identity. Several changes were proposed and accepted, resulting in to the adoption of the final text, which has almost the opposite meaning of the original version. It was intended to include other forms of identity that cannot be qualified as legal. It is clear however that this Article seeks to recognise the importance of family members other than the parents. It is also argued that this Article makes sure that not just biological and birth parents (i.e., the mother who gave birth and the acclaimed father on the basis of partnership with the mother) but also social parents are recognized.⁷³

69 Ineta Ziemele, *A Commentary on the United Nations Convention on the Rights of the Child – Article 7* (Martinus Nijhoff Publishers, 2007), p. 15.

70 Hodgkin and Newell, *Implementation Handbook for the Convention on the Rights of the Child*, p. 109.

71 *Ibid.*, p.114.

72 *Ibid.*

73 *Ibid.*, p. 106.

1.3.6 *An Holistic Approach – Illustrative Case Law*

There are not many cases that can serve as an example of a comprehensive and holistic approach towards the provisions of the CRC in situations that come within the remit of this thesis. National courts are still reluctant to apply the principles of the CRC directly and explicitly. Furthermore, especially in immigration law, the interests of children are often subsumed with those of their parents. I will again rely on the *ZH (Tanzania) v. SSHD* case by the Supreme Court of the United Kingdom in an attempt to provide some illustration. Baroness Hale identified Article 3 of the CRC as ‘the most relevant national and international obligation of the United Kingdom’.⁷⁴ In the light of this provision she also touched upon the Articles 7, 8, 9 and 12 in the judgement, Article 10 was left out of her assessment. Baroness Hale relied on Article 9 to find an answer to the question whether the best interests of the child should be the determining or a primary consideration. She concludes on the basis of Article 9 that a distinction should be made between decisions that ‘directly affect the child’s upbringing’ and decisions that ‘may affect a child more indirectly, such as decisions about where one or both parents are to live’.⁷⁵ She did not engage in a more thorough analysis of this Article. Other Articles she referred to were Articles 7 and 8. She considered that ‘although nationality is not a “trump card” it is of particular importance in assessing the best interests if the child’.⁷⁶ She then pointed towards Articles 7 and 8 in relation to nationality but, again, did not engage in an examination of the substantive value of the provisions.

1.3.7 *The Best Interests Principle and Nationality*

As was said above, the CRC does not clarify what rights children can, or should be able to, derive from their nationality status. The Committee does not comment on national practises in this area outside of the above-mentioned situations. I will show some excerpts of three cases, for illustrative purposes, which give an interesting view on how these principles, which are connected to both the CRC and nationality, are applied. More importantly, these excerpts will show that very different ideas exist on how these legal instruments and concepts relate to each other. I should note that the cases that will be discussed come from common law jurisdictions, where reference is usually made to the notion of citizenship rather than that of nationality.

Baroness Hale conceptualised the issue before the Court in *ZH (Tanzania) v. SSHD* very clearly in the very first sentence of the judgment. She stated that ‘the over-arching issue in this case is the weight to be given to the best interests of children who are affected by the decision to remove or deport one or both of their parents from this country’.⁷⁷ She made the conscious decision not to say ‘children who are citizens of this country’. However, she did consider the citizenship status of the children a very relevant factor as she immediately went on to state that ‘within this, however, is a much more specific question: in what circumstances is it permissible to

74 *ZH (Tanzania) v. SSHD*, para. 23.

75 *Ibid.*, para. 25.

76 *Ibid.*, para. 11.

77 *Ibid.*, para. 1.

remove or deport a non-citizen parent where the effect will be that a child who is a citizen of the United Kingdom will also have to leave?’ Baroness Hale expressly placed the value and rights attached to citizenship within the concept of the best interests of the child. She did not discuss citizenship as a factor that might contain relevance and rights outside the scope of Article 3. In the same judgment Lord Hope expressed his agreement with Baroness Hale’s analysis. He added however that he felt the significance of a child’s nationality should be considered in two respects. He considered it goes without saying that under normal circumstances it is not in the best interests of the child to ‘diminish a child’s right to assert his or her nationality’ and therefore it should be included in the best interests determination process.⁷⁸ He continued to explain that in his opinion it should also have an ‘independent value, free-standing of the debate in relation to the best interests.’ He did not elaborate on what this independent value would entail exactly.

The exact opposite approach can be found in *Minister of State for Immigration and Ethnic Affairs v. Ab Hin Teob*.⁷⁹ In a case that concerned the pending deportation of a father of three Australian children, Gaudron J considered it ‘arguable that citizenship carries with it a common law right on the part of children and their parents to have a child’s best interests taken into account (...) particularly decisions which affect children as dramatically and as fundamentally as those involved in this case’.⁸⁰ According to the learned judge, the status of the CRC under Australian law was of subsidiary importance as the rights attached to the children’s citizenship arguably already contain all the rights of the CRC. He explained that citizenship does not only revolve around obligations of the citizen, but also of obligations on the part of the State, especially when the individual finds himself in a vulnerable position.

In *Vaitaiki v. Minister for Immigration & Ethnic Affairs* it was considered by Burchett J that when the citizenship status of a child is not mentioned in the reasoning, this should not lead to the automatic conclusion that the courts did not treat the child’s best interests as a primary consideration.⁸¹ Accordingly, in his view, it is possible to engage in a thorough assessment of the competing interest in compliance with the CRC without taking the citizenship rights and status of the children into account.

1.4 A Comprehensive and Systematic Approach towards Child Rights

The extent to, and manner in, which judges adopt children’s rights defines the normative value of such rights, thereby contributing to a greater recognition and application of the rights of children. We have seen that children’s rights are at a risk of being undermined by incoherent application and that the application of the best interests principle holds the inherent risk of a subjective value judgment. In order to tackle these issues, and in line with the Committee’s requirement to consider children’s

78 *Ibid.*, para. 44.

79 High Court of Australia 7 April 1995, *Minister of State for Immigration and Ethnic Affairs v. Ab Hin Teob*, (1995) HCA 20.

80 *Ab Hin Teob*, para. 375.

81 *Ibid.*, at Reasons for Judgment by Burchett J.

rights systematically, Tobin reviewed many judicial cases in both common law and civil law jurisdictions involving children. He developed a model that can guide the systematic application of children's rights. He distinguishes six different approaches towards the rights of children that judges adopt; the invisible, incidental, selective, rhetorical and superficial child rights approach.⁸² I will briefly summarize these approaches:

Invisible: A failure to conceptualize the issue before the Court in terms of children's rights and to identify the relevant rights. The interests of children are not articulated in terms of their rights and the children are seen as an extension of their parents. No steps are taken to examine the content of rights and how to accommodate their application in a child-sensitive manner.

Incidental: Children's rights are not absent, yet not considered essential to determine the central issue. They are mentioned, but not developed.

Selective: When the court selects a certain right from the CRC and refers to it in a significant manner but chooses to ignore other aspects of the CRC. The particular right then seems to be drawn upon out of convenience in order to confirm the judge's view.

Rhetorical: When a case can be argued in different ways on the basis of the CRC, a process of reasoning must take place with regard to the underlying principles. This process should be clearly communicated and made transparent, which will contribute to the substance of the invoked rights.

Superficial: When there is a strong engagement from judges with children's rights but when they fail to undertake a thorough assessment of the competing rights involved. Children's rights are then used as a trump card to avoid balancing the interest and rights of different parties involved.

Substantive: According to Tobin this is the only approach that does not 'overlook, marginalize or misuse' the rights formulated by the CRC. A meaningful use of children's rights can be facilitated within four different dimensions. Judges have the possibility to engage with children's rights in the area of:

- The conceptualization of the issues before the court.
When the court structures matters in terms of the possible impact on children's rights. A famous example can be found in the United Kingdom's *Williamson* case on corporal punishment where Baroness Hale declared the following: 'My lords, this is, and has always been a case about children, their rights and the rights of their parents and teachers.'⁸³
- The procedures to be adopted for the determination of these issues.
There are several ways in which procedures can accommodate a child's age and maturity level and offer protection from harm. This can range from media restrictions to appointing a special representative for the child. Tobin again uses the *Williamson* case for illustration: '(...) there has been no one here or in the courts below to speak on behalf for the children. No litigation friend has been appointed to consider the rights of the pupils involved separately from those of

82 Tobin, 'Judging the Judges: Are they adopting the rights approach in matters involving children?', p. 593.

83 *R (on the application of Williamson and others) v Secretary of State for Education and Employment and others* (2005) 2 AC 246, para. 271.

the adults. No non-governmental organization (...) has intervened to argue a case on behalf of children as a whole. The battle has been fought on ground selected by the adults.⁷⁸⁴

- The meaning to be given to the content of the rights in question. This requires judges to interpret rights through a child-centric lens and assess what is needed to give substance to a right in the specific situation of children. This interpretation should accommodate the specific features and vulnerabilities of children. Tobin finds an example of this approach in a case of the European Court of Human Rights, again on corporal punishment: ‘Steps should be taken to enable effective protection to be provided (against inhuman and degrading treatment), particularly to children and other vulnerable groups in society, and should include reasonable measures to prevent ill treatment of which the authorities have or ought to have knowledge.’⁷⁸⁵
- The substantive reasoning by which to resolve the issue and balance the competing interests. Again Tobin relies on the *Williamson* case to illustrate this approach in cases between the State, children and their parents. He states that not only did Baroness Hale carefully conceptualize the issue before the court; she continued to examine the rights involved for the purpose of striking a suitable balance.

The substantive rights approach does not require that substantive effect is given to children’s rights in all dimensions but at in least some of them. The models outlined by Tobin shows the different dimensions in which children’s rights manifest themselves, which will be useful when examining the case law by the European Courts in the next chapters.

1.5 Conclusion

There are six underlying values and principles that are specifically relevant for the right to family life of citizen child that can be distinguished from the foregoing considerations.

Firstly, of great importance in respecting the Convention is acknowledgment of the child as a rights-holder. This means that a child-sensitive approach towards rights is required. Children often need other measures than adults in order to give substance to their rights. To ensure the effective enjoyment of the rights of children States have a duty to take positive action when needed. Judges must ask themselves what it means for children to have rights, what the relevant rights are and what is needed to ensure their fulfillment.

Secondly, the right to be heard under Article 12 is seen as an indicator of the degree to which children are respected as rights-bearers. Children have a right to be

84 *Williamson*, para. 271.

85 Tobin, ‘Judging the Judges: Are they adopting the rights approach in matters involving children?’, p. 611.

heard in judicial cases that affect them and due weight much be attached to their views in accordance with their age and maturity. The effective enjoyment of this right requires procedural measures to be taken to enable children to express their views.

Thirdly, the best interests of the child must always be a primary consideration. There is no derogation allowed from this Article. Neither the Convention nor the Committee has provided substantial guidance or a list of factors in order to clarify how the best interests are to be determined. The principle is therefore flexible but also inherently subjective. The Committee did expressly recognize that respect for Article 12 is required for the correct application of the best interests principle.

Fourthly, the Convention explicitly recognized the importance of a family for children. A family environment is imperative for children to grow up in an atmosphere that provides them with love, understanding and happiness. The Convention also recognizes the role of parents in ensuring the rights under the Convention. The Convention offers a strong right for children not to be separated from their parents under Article 9, which provides that there can be no other reason to separate a child from his or her parents than that child's best interests. There is rather strong disagreement on whether this Article was meant to affect immigration control. While the Committee insists that cases that concern family life and immigration must not only comply with the requirements of Article 3 but should also be seen in the light of Article 9 (1), states generally remain adamant that the working group intended for such situation to only be covered by Article 10. Article 10 does not offer an express right to family reunification but requires States to take as little time as possible to evaluate family reunification applications. The first sentence of Article 10 refers to Article 9, which makes the position that deportation and family reunification cases are solely covered by Article 10, and that immigration control was not meant to be affected, hard to maintain. The fourth paragraph of Article 9 refers to deportation orders and the importance to keep family members informed of the whereabouts of their loved one(s) which can be seen as a conformation that these cases are covered by Article 9 in its entirety but also as a paragraph articulating the exceptions to the general rule. Surely, deportations and refusals of family reunification applications that result in the separation of a child from a parent and that are considered not in the best interests of the child are hard for States to justify?

Fifthly, nationality is recognized as an essential legal status in order to ensure the effective fulfillment of children's rights. Article 7 aims to combat statelessness, which holds a great risk of children becoming entirely invisible. There is no express right of residence attached to nationality that is recognized by the Convention. It remains silent on the substance of this status thereby respecting the State's sovereignty in this area. One might argue however that the value of an unconditional right of abode is implied in the importance that is attached to nationality as a status.

Lastly, these principles and the Articles of the Convention should not be viewed in isolation. Ensuring the best interests of the child is possible only by respecting the child as a rights-bearer. The best interests of the child and the right to be heard not only reinforce each other but also the rest of the Convention's provisions. The application of Articles 9 and 10 must be done in accordance with Article 3 and 12. The other way around, the application of Article 3 is guided by the Articles of the Convention, hence separation of a child from its parents is presumed to not be in the child's best interests.

When focusing on these principles and the situation of the minor national seeking family life with both parents in his or her country of nationality, some difficulties we should be mindful of during the course of this study emerge. The exact scope of the Articles remains unclear. Arguably this is due to factors such as the vague wording of the provisions, the disagreement on their interpretation and the fact that the Committee does not have the competence to assess individual cases. It is therefore not possible to present these rights as straightforward and easy to implement and apply. It is not clear what factors determine the best interests and as a consequence it remains unclear how these factors and interests should be weighed against other interests. The Committee also does not clarify under what circumstances a child can be expected to follow his or her parents, thereby avoiding separation. Of course, a child can only be expected to follow its parents when it is consistent with Article 3, however, how do we know if this is the case? When does the right not to be separated become an obligation for the State to grant residency to a parent? Consequently, the question of when the rights under the CRC can override factors of immigration control is rather difficult to answer.

The case law referred to above illustrates that there are specific pitfalls for the judiciary, and thus the European Courts, when applying the above mentioned principles. Firstly, there is often a failure on the part of the judiciary to acknowledge children as rights holders, and articulate the interests of children in terms of their rights. An approach that includes both rights and interest would allow judges to adopt a more systematic approach, and would allow decisions to be based on a surer factual foundation. Secondly, judges generally have very little regard for the voice of the child in immigration cases. While this is understandable to a certain extent, listening to views of the child is the linchpin of recognition of the child as active subject of rights. It would therefore be appropriate to at least examine what role the views of the child ought to play in immigration cases. It might also prove to be a useful tool in assessing whether separation will occur. It is not hard to imagine that a child might not follow a parent because it would be in the best interests of the child to stay in his or her home country. Thirdly, the application of the best interests principle is often accompanied by loose language. The language that is used is an indication of what weight should be accorded to the best interests. The chosen words vary from 'an important' consideration to 'the paramount' consideration, and this creates confusion. When applying Article 3, it is also important that in separating the interests, and rights of parents and children, the evaluation of conduct is separated as well. The rights of children should not be coloured by their parents' behavior. Fourthly, despite the unclear and therefore rather weak normative value of the specific articles (that are not General Principles) which have been examined, they do hold value in that they explicitly recognize a child's individual right not to be separated from a parent and that a child must be able to assert his or her nationality. The last principle mentioned above holds that these provisions must be respected in accordance with Articles 3 and 12 of the Convention. Judges are often bound to apply rights from other legal sources, which might even offer stronger protection to children. It will then be important for judges to remember to also approach these rights as individual rights for children and to still apply them in accordance with Articles 3 and 12 of the CRC.

CHAPTER 1

It is important that judges adopt transparent reasoning and a comprehensive approach in order to address these pitfalls and to avoid value judgments or so-called ‘cherry picking’. Transparent reasoning also helps to clarify in what way differential treatment of children compared to adults is required and justifiable.

Chapter 2 – The European Convention on Human Rights

2.1 Introduction

The European Convention on Human Rights and Fundamental Freedoms (ECHR) is seen as one of the most influential human rights treaties in the world. The right to respect for family life enshrined in Article 8 of the Convention has been of great significance in cases that concern both immigration and family life. This chapter does not aim to provide a detailed overview or discussion of the entire legal framework under the ECHR that is applicable in all situations concerning citizen children who seek family life with a third-country national parent. Given the broad variety of factual circumstances, this would go beyond the remit of this thesis. This chapter seeks to examine the Court's approach towards the rights attached to these children's nationality and their individual right to respect for family. The Court's approach has evolved in recent years and it will be particularly interesting to see how this development affects the scope of application of these rights and the outcome of the cases. After briefly discussing the legal position of the child under the ECHR, I will move on to examine what value the relevant rights hold for children. The case law discussed in this chapter is divided into three time periods for the purpose of identifying shifts in the approach adopted by the Court. The first time period covers the earliest case law and displays the most traditional approaches adopted by the Court.⁸⁶ The second time period examines the case law after the first mentioning of the best interests principle.⁸⁷ At the end of this chapter, the most recent time period will be discussed in detail in order to clarify what the new path chosen by the Court means for the future application of rights for children and the best interests principle.⁸⁸

2.2 The ECHR and the Child as Rights-Bearer

The European Convention on Human Rights was created in the aftermath of the Second World War. It contains rights that were of foremost concern at that time, and which can be qualified mainly as civil and political rights. Unlike the CRC it does not recognize social and economic rights. While the CRC recognizes the importance of the family as a fundamental group in society in its preamble, the ECHR contains no such acknowledgement. It also does not recognize the vulnerable position of children and their special needs, the best interests principle was not included in the Convention and no express reference is made to the child as a bearer of rights. Ironically, the first time the child is mentioned the Convention provides powers to the state vis-à-vis the child; it grants permission to detain a child for educational purposes.⁸⁹ The

86 1988-2000.

87 2005-2008.

88 2010-present.

89 ECHR, Article 5 (1)

Convention also gives explicit rights to parents in the area of education, specifically the freedom to educate their children in line with their religious views and convictions.⁹⁰ Despite the absence of specific reference to children, it must be assumed that children do not hold an exempted position and in fact are bearers of all the rights under the Convention. According to Article 1 of the Convention, everyone within the jurisdiction of a Member State is subject of the rights in the Convention. It does not make any reference to an age requirement.

While the ECHR is not a child-centered document, the way the rights have been interpreted by the Court, especially with regard to Article 8 ECHR, has made a considerable contribution to the protection of children.⁹¹ The European Court of Human Rights is tasked with scrutinizing national decisions for their compatibility with the ECHR. Unlike the CRC it does hold the competence to examine individual complaints and children are entitled to bring claims before the Court. The relationship between relevant sources of international (human rights) law and the ECHR has been clearly established by the Court. It has long been recognized by the Court that the Convention should not be interpreted in a vacuum but in harmony with general principles of international law, and that all relevant and applicable rules should be taken into account.⁹² The ECHR is to be interpreted as a living instrument. Therefore, the Court is able seek legal guidance from other human rights documents such as the CRC as long as the outcome is compatible with the object and purpose of the ECHR.⁹³ Dynamic interpretation should not lead to the creation of new rights, therefore the Court does not except claims on grounds that are derived mainly from the CRC, despite the fact that all countries that have signed up to the ECHR also signed and ratified the CRC. The Court does not follow the line set out by the CRC if this means stretching the rights of the ECHR to the extent that states would start to question the legitimacy of the Court and the entire legal framework.⁹⁴ In *Sabin v. Germany* the Court clarified how it feels the CRC should be regarded:

The human rights of children and the standards to which all governments must aspire in realizing these rights for all children are set out in the Convention on the Rights of the Child.⁹⁵

A closer look at the case law of the ECtHR and the guidance offered by the Committee on the Rights of the Child shows that they do not always approach rights in the same manner and consequently do not always reach the same conclusions either. For example, the Committee strongly condemns all forms of corporal punishment, while

90 ECHR, Article 2, First Protocol.

91 Ursula Kilkelly, *The Child and the European Convention on Human Rights* (Ashgate Publishing, 1999), p. 187.

92 *Golder v the United Kingdom* App No 4451/70 (Commission Decision, 21 February 1975) para. 35.

93 Kilkelly, *The Child and the European Convention on Human Rights*, p.16.

94 *Ibid.*

95 *Sabin v. Germany* (30943/96) (2003) 36 EHRR 43, para. 39.

the ECtHR did find certain conduct that qualifies as corporal punishment compatible with the provisions of the ECHR.⁹⁶

2.3 The ECHR and the Best Interests Principle

As previously noted, the European Convention does not contain a provision similar to Article 3 of the CRC. While the incorporation of the best interests principle in applying Article 8 of the ECHR is common practice in family law cases, the principle has been notably absent in immigration cases. The Court usually does not refer to the CRC in its application of the best interests principle and it is unclear what requirements the Court attaches to the application of the best interests principle in family law cases. It does attach importance to the views of the child but what weight is to be given to these views is not easy to discern.⁹⁷ Van Bueren states that it is difficult to determine what weight is attached to the many building blocks of ‘best interests’, and when the principle has overriding force.⁹⁸ She recommends a comprehensive study to be undertaken to ‘analyze the constituent elements of the best interests principle relevant to the range of rights protected in the ECHR’.⁹⁹ It is clearly beyond the purpose of this thesis to undertake such a comprehensive study. However, I would like to draw attention to a recent case that concerns cross-border family life that might be able to form a bridge between the diverging approaches by the Court in immigration cases and family law cases.

In *Neulinger and Shuruk v. Switzerland*¹⁰⁰ the Court was required to determine if a child, who was unlawfully taken by its mother to Switzerland, should be returned to the child’s father in Israel. The Court articulated the over-arching issue of the case to be the fair balance between the interests of parents, the child and public order, within the margin of appreciation. Extensive reference was made to the CRC.¹⁰¹ It was noted by the Court that neither during the drafting process nor after the coming into force of the Convention, had criteria for the assessment of the best interests of the child been given by either the working group or the Committee, but that all values and principles of the Convention should be applied and that the Convention must be considered as a whole. The Court explicitly acknowledged that the child’s best interests must be the primary consideration and could possibly override the interests of the parents. The Court found that the ‘paramountcy’ of the best interests of the child is broadly supported by both international law and European law, in particular in the CRC and the EU’s Charter of Fundamental Rights.¹⁰² The Court conceded that while it is recognized in the Charter that maintaining family ties is of great importance, the return of a child after abduction may be found to be against the best interests of the child if he or she is now settled in a new environment, and a parent does not have the

96 Geraldine Van Bueren, *Child Rights in Europe* (Council of Europe Publishing, 2007), p. 20.

97 *Hokkanen v. Finland* (19823/92) (1995) 19 EHRR 139, para. 61.

98 Van Bueren, *Child Rights in Europe*, p. 37.

99 *Ibid.*

100 *Neulinger and Shuruk v. Switzerland* (41615/07) (2012) 54 EHRR 3.

101 The Court specifically mentioned the Preamble, and Articles 7, 9, 14 & 18 of the CRC when outlining the relevant international law.

102 *Neulinger and Shuruk v. Switzerland*, para. 135.

right to harm the child's health or development. The Court sought, *mutatis mutandis*, guidance in expulsion cases and found that factors to be taken into account are:¹⁰³

the seriousness of the difficulties which he or she is likely to encounter in the country of destination and the solidity of social, cultural and family ties both with the host country and with the country of destination. The seriousness of any difficulties which may be encountered in the destination country by the family members who would be accompanying the deportee must also be taken into account.¹⁰⁴

The Court took note of the fact that the child in this particular case held Swiss nationality and had resided in Switzerland for five years from the age of two. While he was still considered to be of an adaptable age, the Court held that removal from Switzerland would cause him to face radical upheaval in his personal life. The Court also took into account how the difficulties that the mother would face upon return would affect the child. Interestingly enough, with regard to the child, the Court was not convinced that a return would be in his best interests and concluded that not enabling him to stay in Switzerland would amount to a violation of Article 8 ECHR. Yet, in the case of the mother, the Court held her right to respect for her family life would be disproportionately interfered with if she were forced to return to Israel. This case is particularly significant because it provides a rather thorough examination of the CRC and how the best interests are to be assessed. It was also recognized that the wellbeing of other family members affects the child's best interests. Furthermore, the fact that a connection was made between the best interests assessment and expulsion cases might lead to a greater recognition of the best interests principle in cases that concern family life and immigration. The principles of the Court's assessment are directly applicable in cases that concern minor nationals of State Parties and third-country nationals. In answering the question whether these children can be expected to follow their parents, these principles are of equal relevance. Notably, the Court mentioned that the nationality of the child was a relevant factor.

2.4 The Significance of Nationality

In cases that concern minor State Party nationals wishing to enjoy family life with a third-country national parent, nationality can play a role within three different legal constructs. Firstly, nationality has rights attached to it. The right that all nationals of all countries have in common and is considered undisputed is the right to reside in your country of nationality. This right is also recognized in the ECHR and could be of relevance in determining whether a right of residence should be granted to a parent of a minor national. Secondly, within the right to respect for family life under Article 8 ECHR, nationality has been mentioned as a factor of relevance in assessing whether Article 8 has been violated. Thirdly, as we have seen in Chapter 1, nationality

¹⁰³ *Maslov v. Austria* (1638/03) [2008] ECHR 546.

¹⁰⁴ *Neulinger and Shuruk v. Switzerland*, para.146.

may be of relevance in determining the best interests of the child. The first two notions will be discussed below. The inclusion of the best interests principle in cases that concern both immigration and family life is a rather recent development, and therefore this aspect of the significance of nationality will be discussed later on in this chapter.

2.4.1 *The Right of Residence under Articles 2 and 3 Fourth Protocol of the ECHR*

In *Schober v. Australia*¹⁰⁵ the Court was faced with the question whether the expulsion of the spouse of an Austrian national was a violation of Mr Schober's rights under Article 3 of Protocol No. 4, which prohibits the expulsion of a State's own national.¹⁰⁶ Mr Schober claimed that he was effectively forced to choose between residing in his country of nationality and breaking up his marriage. The Court stated that this situation did not 'disclose any appearance of a violation of Article 3' without adding any further explanation. Interestingly, the Court's reply to the claim that Mr Schober was not able to exercise his rights under Article 2 of Protocol No. 4 was less dismissive. The relevant paragraphs of Article 2 read as follows;

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence. (...)
3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of ordre public, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The Court did not say the situation of Mr Schober did not fall within the scope of Article 2, but held that assuming his rights under this Article were restricted, the measure was in accordance with the law and necessary in a democratic society. Given that Mr Schober's wife had been convicted and sentenced to three years imprisonment, the Court left room for a very different outcome in situations where there are no weighty reasons relating to public order. Unfortunately the argument and reasoning that a refusal to allow a close family member to reside, especially in cases concerning children, might violate these rights has not been litigated any further. In some cases concerning citizen children this argument has been put forward, however the home State of these children had not ratified the Protocol in these cases.¹⁰⁷ The question must be raised whether the child is fully recognized as a rights-bearer when rights that are arguably very relevant for the assessment of immigration cases involving minor nationals are not taken into account.

105 *Schober v. Austria* App No 34891/97 (ECtHR, 9 November 1999) (declared inadmissible).

106 See 'Introduction' of this thesis.

107 *O. and OL. v. the United Kingdom* Appl. No. 11970/86 (Commission Decision, 13 July 1987) (declared inadmissible); *Sorabjee v. the United Kingdom* App No 23938/94 (Commission Decision, 23 October 1995) (declared inadmissible); *Jaramillo v. the United Kingdom* App No 24865/94 (Commission Decision, 23 October 1995) (declared inadmissible); *Poku v. the United Kingdom* App No 26985/95 (Commission Decision, 15 May 1996) (declared inadmissible).

2.4.2 Nationality and the Right to Respect for Family Life

While nationality does play a role in the assessment of whether family members should be allowed on a state's territory, it is unclear what exactly the impact of nationality is on the right to family life. Commentators have drawn attention to the ambiguity the Court displays with regard to the relationship between nationality and family life. Boeles deems two cases particularly interesting in this regard: *Boultif v. Switzerland* and *Ahmut v. the Netherlands*.¹⁰⁸ In *Boultif*¹⁰⁹ the Court found that the expulsion of the husband of a Swiss national would amount to a violation of Article 8 ECHR. The Court not only listed 'nationality' as one of the criteria that must be examined to determine whether an expulsion is justified, but it appears that it was the Swiss nationality of the wife that made the scale tip in favour of the applicant, Mr Boultif. In an examination of the case, De Hart asks whether Mrs Boultif's ties to her home country, Switzerland, are implied in her nationality as the Court does not go into them.¹¹⁰ This question is not answered in the judgment.

A big discussion between the judges arose in *Ahmut*¹¹¹ on the question of what extent nationality holds a right for parents to have their children present with them in their country of nationality. When Mr Ahmut, a Moroccan national, came to the Netherlands he left behind his (ex-)wife and five children, Hamid, Fouad, Chaouki, Souad and Souffiane. Soon after his arrival he married a Dutchwoman and after four years of legal residence in the Netherlands he obtained Dutch citizenship while retaining his Moroccan nationality. One year after Mr Ahmut had left for the Netherlands the mother of his children died, leaving the children in the care of their grandmother. While Hamid stayed in Morocco, Fouad and Chaouki came to the Netherlands to pursue their studies. At a later stage, Souad and Souffiane travelled to the Netherlands together without the required visas. Souad returned to Morocco but Souffiane stayed in the care of Mr Ahmut. The Netherlands authorities rejected the application for a residence permit thereby making it impossible for Souffiane, who was twelve at the time, to enjoy family life with his father. The Court held that there was no positive obligation on the State to enable family life between Souffiane and Mr Ahmut. The decision was anything but unanimous and given the thoughtful and elaborate dissenting opinions, the case seemingly led to fierce debate between the judges. In the decision of the Court no specific meaning was attached to Mr Ahmut's nationality. The dissenting judges however felt the role and meaning of his nationality should be regarded differently. Judge Valticos for example wrote:

The father had acquired Netherlands nationality, and in any country, a national is entitled to have his son join him, even if the son does not have the same nationality.¹¹²

108 Boeles, Den Heijer, Lodder & Wouters, *European Migration Law*, p. 168.

109 *Boultif v. Switzerland* (54273/00) (2001) 33 EHRR 50.

110 Betty de Hart, 'Love Thy Neighbour: Family Reunification and the Rights of insiders' (2009) 11 *European Journal of Migration and Law*, p. 235-252 at p. 247.

111 *Ahmut v. the Netherlands* (21702/93) (1996) 24 EHRR 62.

112 Dissenting Opinion judge Valticos, *Ahmut v. the Netherlands* (21702/93) (1996) 24 EHRR 62.

Judge Martens and judge Lohmus also strongly disagreed with the approach that was adopted by the Court with regard to the issue of nationality. They argued it was dealt with in a wrongful manner:

If a father who is a Netherlands national wants to live with and care for his nine year-old child in the Netherlands both father and child are, in principle, entitled to have that decision respected.¹¹³

The Commission was faced with the question of how the nationality of children should be evaluated within the right to family life.¹¹⁴ Unfortunately, because these cases concerned United Kingdom nationals the scope of Articles 2 and 3 of the Fourth Protocol was not tested as the UK did not ratify the Fourth Protocol. The cases *O. and O.L. v. United Kingdom*, *Sorabjee v. United Kingdom* and *Jaramillo v. United Kingdom* all concerned young children of parents without legal residence. Not allowing these parents residency would in all likelihood result in the children following the parents. Without going into all the details of these cases it is particularly noteworthy what the Commission noted with regard to the value of the children's citizenship. In *O. and O.L.* the Court remarked that:

The applicants' British nationality is exclusively based on the fact that they were born in the United Kingdom. However, this fact alone cannot confer rights of abode in that country upon the parents, particularly when, as in the case of the second applicant, the birth occurred whilst the parents had no right to reside in the United Kingdom.¹¹⁵

In assessing the value of nationality the Commission considers it relevant under what circumstances the nationality was obtained, thereby effectively creating second-class citizens. Furthermore, the Commission left no misunderstanding that there is no human right to family life attached to nationality, but left room for a different outcome of the case in a situation where nationality was not obtained by virtue of being born in a certain country. However, in *Sorabjee* the Commission held there was no material distinction between nationalities obtained through *ius soli* and *ius sanguinis*. Both in *Sorabjee* and *Jaramillo* the Commission fell back on its decision in *O. and O.L.* by stating that the Commission had not considered citizenship a factor of particular significance in previous cases and that it was compatible with the right to respect for family life to 'expect children of unlawful overstayers to follow their parents even if

113 Dissenting Opinion judge Martens joined by judge Lohmus, *Abmut v. the Netherlands* (21702/93) (1996) 24 EHRR 62 para. 7.

114 'The European Convention on Human Rights originally envisaged two judicial bodies: a court and a commission. Article 19 of the Convention set up the European Commission of Human Rights alongside the European Court of Human Rights. From 1953 until 1999, the Commission had an intermediary role -- that of shielding the Court from frivolous suits. The Commission would hear cases, then refer its reports to the Court -- the only body with the power to issue a binding legal decision. The Commission also had the discretion to refer its reports to the Committee of Ministers, a political body, which could decide whether the Convention had been violated.'

Source: http://library.law.columbia.edu/guides/European_Human_Rights_System.

115 *O. and O.L. v. United Kingdom*, at section 'The Law'.

they had acquired theoretical rights of abode in the deporting country'. By including the words 'unlawful overstayers' and 'theoretical rights' it seems that the Commission felt the conduct of the parents devalued the rights of the children.

2.5 The Right to Respect for Family Life

The right to respect for family life under Article 8 of the ECHR has been litigated extensively in cases that concern immigration and family life. As discussed in the introduction of this thesis the application of this Article has developed over the years and has offered strong protection rights to the individual against measures taken by the State that affect family life. I will first discuss two instruments used by the Court to determine what is required from states in order to fulfill their obligations under Article 8 ECHR. I will then turn to examine the Court's approach to the rights and interests of children in cases that predate the court's recent rulings in which a more child sensitive approach is displayed, and where the legality of pending deportations of parents of minor nationals is assessed. Finally, there will be an in-depth discussion of the cases *Osman*, *Nunez* and *Antwi*.

2.5.1 Margin of Appreciation & Positive vs. Negative Obligations

The 'margin of appreciation' is essential in establishing the scope of specific rights under the ECHR and is especially important in determining the scope of the right to respect for family life in immigration cases. There are several elements that can be distinguished within this doctrine.¹¹⁶ To begin with, the margin of appreciation is closely linked to rights that permit measures that constitute an infringement, but are necessary in a democratic society and proportionate to the legitimate aim pursued.¹¹⁷ Article 8 of the ECHR reads as follows:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

In the *Handyside* case in 1976 the Court explained this relationship in more detail for the first time.¹¹⁸ It held that the conceptions of morals vary between time and place and that no uniform European codification of requirements can be distinguished in the national laws of the State Parties.

116 Kilkelly, *The Child and the European Convention on Human Rights*, p. 16.

117 Articles 8-11 ECHR.

118 *Handyside v. The United Kingdom* (5493/724) (1976) 1 EHRR 737.

By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the ‘necessity’ of a ‘restriction’ or ‘penalty’ intended to meet them.(...) it is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of ‘necessity’ in this context.¹¹⁹

Therefore, due to the phrasing and nature of these rights there is a certain margin of appreciation granted to a state in applying them. The Court held that its role is of a supervisory nature as a state does not have an unlimited power of appreciation. What can be implicitly found in the *Handyside* case was more explicitly recognized by the Court in *Rasmussen v. Denmark*, i.e., that the national traditions of the State Parties can influence the degree of discretion that is allowed by the Court. The Court held that:

The scope of the margin of appreciation will vary according to the circumstances, the subject-matter and its background; in this respect, one of the relevant factors may be the existence or non-existence of common ground between the laws of the Contracting States.¹²⁰

Therefore, the margin of appreciation might become narrower when a common practice is detectable and, of course, wider when there is not.

In *Abdulaziz, Cabales and Balkandali v. The United Kingdom*¹²¹ the applicants, long term UK residents, argued that Article 8 of the European Convention of Human Rights ‘encompassed the right to establish one's home in the State of one's nationality or lawful residence’.¹²² In response to the applicant's position, the ECtHR described the fundamental features of the relationship between the sovereign nation, that nation's right to control its own borders, and the fundamental human rights of the individual. The Court reaffirmed the strong position of the state and the wide margin of appreciation when it comes to regulating the right of entry of non-nationals:

Accordingly, this is an area in which the Contracting Parties enjoy a *wide margin of appreciation* in determining the steps to be taken to ensure compliance with the Convention with due regard to the needs and resources of the community and of individuals. (...) Moreover, the Court cannot ignore that the present case is concerned not only with *family life* but also with *immigration* and that, as a matter of well-established international law and subject to its treaty obligations, a State has the right to control the entry of non-nationals into its territory.¹²³ (emphases added)

119 *Ibid.*, para. 48.

120 *Rasmussen v. Denmark* (8777/79) (1984) ECHR Series A no 87, para. 40.

121 *Abdulaziz, Cabales and Balkandali v. The United Kingdom* (9214/80) (9473/81) (9474/81) (1985) 7 EHRR 471.

122 *Ibid.*, para. 66.

123 *Ibid.*, para. 67.

This has become the basis and point of departure of all cases concerning family life and immigration. In this case the Court did not find a breach of Article 8 but stressed that the particular circumstances should be assessed on a case-by-case basis, thereby explicitly recognising that there could be circumstances where the rights of the individuals involved override the State's right to immigration control. In *Abdulaziz* the Court accepted that the rights of all individuals concerned are of importance given the fact that the applicants in this case were not the spouses who wished to enter the country, but the spouses already settled in the country.

To be able to rely on Article 8 there of course has to be a relationship between the persons involved that qualifies as 'family life'. It is long-established case law that a child born from a marital union is considered to automatically enjoy a relationship with his or her parents that amounts to family life, which can only be considered to be broken in very exceptional circumstances.¹²⁴ There has not been a case yet where such exceptional circumstances occurred. In a case where the child was not born from a marriage and where the father recognized the child after ten months, rarely saw the child, and did not contribute financially to its upbringing the Court still found that the relationship between the father and child amounted to family life and fell within the scope of Article 8 ECHR.¹²⁵ Even when children reach adulthood, this does not necessarily affect the bond with their parents according to the Court.¹²⁶

While Article 8 ECHR seeks to protect the individual from arbitrary interference by the State, it does not merely require the State to abstain from so doing. Due to the phrasing of the first paragraph, i.e., that 'everyone is entitled to respect for his private and family life', positive obligations can be read into Article 8 ECHR. This means that the State may have to take measures in order to allow and enable family life to develop. The Court considered how these different features of Article 8 should be dealt with in *Gül v. Switzerland*:

The Court reiterates that the essential object of Article 8 (art. 8) is to protect the individual against arbitrary action by the public authorities. There may in addition be positive obligations inherent in effective 'respect' for family life. However, the boundaries between the State's positive and negative obligations under this provision (art. 8) do not lend themselves to precise definition. The applicable principles are, nonetheless, similar.¹²⁷

The effect of the division of positive and negative obligations is that the margin of appreciation is generally narrower when the State is considered to have interfered with family life than when the State has possibly neglected to take positive action. The factors to be taken into account when examining whether Article 8 has been breached have been developed by the Court in its jurisprudence. Important is to what extent family life is effectively ruptured, the ties of the applicant with the State he or she wishes to enter, whether there are insurmountable obstacles in the way of the

124 *Ahmut v. the Netherlands*, para. 60.

125 *Boughanemi v. France* (22070/93) (1996) 22 EHRR 228.

126 *Osman v. Denmark* (38058/09) [2011] ECHR 926.

127 *Gül v. Switzerland* (23218/94) [1996] ECHR 5, para. 38.

family living in the country of origin of the applicant, and whether there are factors such as breaches of immigration law or considerations of public order that justify the expulsion or refusal of admittance of a third-country national.¹²⁸ A factor that is of major significance, and which heavily influences the considerations of the Court and possible outcome of the case, is whether the persons involved knew that the immigration status of one of them was precarious but made the decision to develop family life regardless.¹²⁹ In such situations, only in exceptional circumstances will the State be obliged to enable family life to develop on its territory.

In the light of the CRC these instruments arguably become less useful. If the best interests of the child are to be regarded as a primary consideration, the margin of appreciation will invariably be affected and in most cases significantly reduced, especially when the Court chooses to conduct its own assessment. The distinction between positive and negative obligations will also become artificial as under the CRC the State has a responsibility to ensure the rights of children and uphold the best interests principle, regardless of whether this calls for positive action to do so. Lastly, children cannot decide whether or not to be born when a parent's residence status is precarious.

2.5.2 *Minor State Party Nationals with (a) non-EU parent(s) -- Appendages of the Parents*

2.5.2.1 *Early Case Law*

The first case that concerned a citizen child with a third-country national parent in which a violation of Article 8 was found by the Court concerned a termination of lawful residence. In *Berrehab v. The Netherlands*¹³⁰ the Dutch authorities refused to renew Mr Berrehab's residence permit after his marriage to a Dutch national had broken down. Mr Berrehab's wife, Ms Koster, filed for divorce after two years of marriage and after a daughter, Rebecca, was born from this marriage. After the marriage was dissolved Mr Berrehab and Ms Koster agreed to an arrangement that enabled Mr Berrehab to have frequent and regular contact with his daughter: he saw his daughter four times a week for several hours. The Court held that his expulsion prevented him from having regular access to his daughter, reducing it to a somewhat theoretical possibility. Therefore, the measure constituted an interference with his right to respect for family life, leaving to be answered whether the decision to refuse a renewal of his residence permit was necessary in a democratic society, and proportionate to the legitimate aim pursued. The Court concluded that the measure was disproportionate given that the State did not have any complaint against Mr Berrehab. He had lived lawfully in the country for several years, did not have a criminal record and was fully self-sufficient. The interference with his family life was rather severe, according to the Court, as there were close ties between father and daughter. Furthermore, the Court considered that a young child, like Rebecca, needs to remain in contact with her father. The Court concluded that a proper balance between the interests involved was not achieved and that the expulsion of Mr Berrehab would be disproportionate to the aim pursued, thus violating Article 8. The dissenting opinion

128 *Solomon v. the Netherlands* App No 44328/98 (ECtHR, 5 September 2000) (declared inadmissible).

129 *Rodrigues da Silva and Hoogkamer v. the Netherlands* (50435/99) (2006) 44 EHRR 34.

130 *Berrehab v. the Netherlands* (10730/84) (1989) 11 EHRR 322.

of Judge Thor Vilhjalmsón is, for the purpose of this study, a rather interesting one. He stated the following with regard to the position of Rebecca, who was also an applicant in this case:

I take the view that the Court must assess the *competing rights and interests independently*. It should be noted that the second applicant was a young girl when her father had to leave the Netherlands. The family life she had enjoyed with him was limited to what he had agreed with the mother. The child *had hardly any voice* on the scope of her contacts with her father and the respondent State *could not alter that situation by any positive action on its part*. Thus, her situation was very precarious. In my opinion, this is an argument in favour of the respondent State's position in this case. Taking into account the family situation already described, I have come to the conclusion that neither the rights of the second applicant, taken alone, or the combined rights of the two applicants can lead to a finding of a breach of Article 8 (art. 8). (emphases added)

While Judge Vilhjalmsón argues Rebecca's rights and interests should be considered separately from the rights and interests of her father, this doesn't lead, according to the judge, to extra protection. While the CRC is based on an idea that visibility of children, and separate attention for their rights, interests and vulnerability will often lead to increased protection, this is not the case in Judge Vilhjalmsón's reasoning. Also, he feels it is the sole responsibility of the parents to decide how much a child should be involved in the decision what the contact between father and child should look like.

Notwithstanding that in *Poku v. The United Kingdom*¹³¹ the children concerned were applicants, and the claim was mainly founded on grounds concerning their rights, the Commission only considered their interests in the light of their parents' conduct. Ama Poku, a Ghanaian national, was threatened with expulsion after she overstayed her visa. While being illegal in the country she first had a relationship with Mr Fybrace, with whom she had a son, Michael. The relationship broke down and Ms Poku entered into a relationship with Mr Adjei, who would later become her husband and with whom she had two more children, Jason and Jermaine. Meanwhile she was notified of the decision to deport, which she appealed. Mr Adjei also had a daughter, Sarah, from a previous marriage. All of the persons involved had British citizenship except for Ms Poku. In assessing the position of the children the Commission again stated that citizenship was not of particular significance. Jermaine and Jason were of an adaptable age, as Jermaine was three years old and Jason was not even born at the time that the decision became final, and, according to the Commissioner, could be expected to follow their mother to Ghana. The situations of Sarah and Michael proved a bit more difficult as they were in danger of being separated from a parent. Given that Mr Adjei was expected to follow his wife and enjoy family life with their two children in Ghana, Sarah, who lived with her mother, would no longer be able to enjoy her father's company. The Commission considered that her father must have

131 *Poku v. the United Kingdom* App No 26985/95 (Commission Decision, 15 May 1996) (declared inadmissible).

been aware of Ms Poku's precarious residence status and consequently held that Sarah's situation 'flows from the choice exercised by her father from any interference by the State with her family relationships'.¹³² Michael, who was eight years old when the decision to deport his mother became final, was considered to be able to adapt in Ghana despite the fact that the Commission acknowledged that he was integrated into the United Kingdom school system. The effect on his existing family life was considered to be minimal according to the Commission, as his father and he were mainly in touch through phone conversations. The complaint was found ill-founded and declared inadmissible.

In *Solomon v. The Netherlands*¹³³ the father of a Dutch child was refused legal residence because he came to the Netherlands to request asylum, and developed family life after his claim had been denied. The Court found that while his residence status was already precarious, especially after his request was denied and a request for a stay of expulsion was denied by the Regional Court, he could not reasonably expect to be able to remain in the Netherlands. Family life with his wife and child was developed after these events. The Court unanimously found the complaint to be ill-founded and declared it inadmissible without looking at the case from the child's perspective.

In these cases children were seen as the appendages to their parents. In the words of the Court, their legal position flows from the choice exercised by their parents. The State was exempted from taking any responsibility to ensure children's rights and interests when the children's own parents failed to act in their best interests.

2.5.2.2 *A Shift towards the Incorporation of the Best Interests Principle?*

The *Da Silva & Hoogkamer v. The Netherlands*¹³⁴ case revolved around the Brazilian mother of a Dutch child who, despite the fact that she was in a genuine relationship with a Dutchman, never applied for a residence permit and therefore had never enjoyed legal residency in the Netherlands. After the separation of Ms Da Silva and Mr Hoogkamer, Ms Da Silva applied for a residence permit in order to stay with her daughter or at the least have access to her. During the separation, Mr Hoogkamer was given custody over the child. The decision to award the father custody was heavily influenced by the possibility that Ms Da Silva would not be granted a residence permit and would take the child back to Brazil with her. It was considered by the Court that Ms Da Silva did not at any point have legal residence and that therefore only in exceptional circumstances would the State be bound to provide legal residence to Ms Da Silva. The Court unanimously concluded that the expulsion of Ms Da Silva would constitute a violation of Article 8. This raises the question: what were the exceptional circumstances in the present case? The Court mentioned a number of factors that are relevant in addressing this question. The fact that there would have been a real chance of legal residency had Ms Da Silva applied for a permit seemed to have been an important circumstance for the Court. The Court did not seem to accept the possibility of Rachel following her mother to Brazil as a real option given the circumstance that Mr Hoogkamer was awarded full custody of Rachel. Especially notable about this case is the fact that the Court made reference to the best interests

132 *Ibid.*, part 3.

133 *Solomon v. the Netherlands* App No 44328/98 (ECtHR, 5 September 2000) (declared inadmissible).

134 *Rodrigues da Silva and Hoogkamer v. the Netherlands* (50435/99) (2006) 44 EHRR 34.

of Rachel. Even though no reference was made to the CRC, it appears that the Court drew inspiration from the Convention. Specifically relevant in the Court's assessment of the best interests was the close relationship of Rachel with her mother and Rachel's young age (she was three when the final decision was taken). Rachel was an applicant in this case which may have led the Court to be more inclined to explore her specific interests, although we have seen in the above mentioned cases this does not necessarily make a difference in how the position of a child is assessed.

The case *Useinov v. The Netherlands*¹³⁵ revolved around an asylum seeker from Macedonia who engaged in a relationship with a Dutch national while his asylum application was under consideration. The couple had a child together and when Mr Useinov's asylum application was rejected he applied for a residence permit on grounds of family life. However, soon after filing the application, Mr Useinov's girlfriend, Ms Van B, informed the authorities that their relationship had ended. The authorities decided there was no positive obligation on the State to provide Mr Useinov with a residence permit, and rejected the application. Soon after, a second child was born. While Ms Van B worked, Mr Useinov looked after the children. The Court considered Mr Useinov's assertion that his right to family life had been violated to be ill-founded and declared the case inadmissible. The Court agreed with the Dutch authorities that the question under consideration was whether the State had failed to take a positive measure that enabled Mr Useinov to develop family life. As there had not been a withdrawal of a residence permit, and Mr Useinov's stay had never been lawful, only in exceptional circumstances would a State be bound under Article 8 to allow residence to the applicant. The children were not applicants in the case, and the Court did not consider their interests and rights to be of any relevance. The Court considered that even though there might be some social hardship, nothing prevented Ms Van B from moving to Macedonia with the children. We learn nothing about their ties to the Netherlands and there is no reference to their nationality. There is no examination of factors that might be relevant in the assessment of what obstacles Ms Van B, and the children would encounter if they followed Mr Useinov.

The case *Üner v. The Netherlands* concerned a long-term resident of Turkish origin. Mr Üner had come to the Netherlands at age 12 with his mother and brothers in order to reunite with their father. He married a Dutch national and together they had two children. He was convicted for both minor offences and serious crimes, which led to the withdrawal of his residence permit by the Dutch authorities. The Court used the *Boutif* criteria in order to determine whether expulsion would be justified in this case.¹³⁶ The Court added two extra criteria, one of which concerned the interests of the children involved; 'the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled'.¹³⁷ However, in applying these criteria the Court appeared to be selective in its application. The children were deemed to be of an 'adaptable age' when the final decision was taken, re-

135 *Useinov v. the Netherlands* App No 61292/00 (ECtHR, 11 April 2006) (declared inadmissible).

136 *Boutif v. Switzerland* (54273/00) (2001) 33 EHRR 50.

137 *Üner v. the Netherlands* (46410/99) (2006) 45 EHRR 14.

spectively six and one and a half years. While the Court noted that the nationalities of all family members involved were relevant there was no reference to the children's Dutch nationality. By noting that the children were of an adaptable age the Court apparently concluded that they would not encounter any serious difficulties in Turkey. It is at least questionable whether this approach by the Court qualifies as a thorough and careful consideration of the children's best interests.

In *Omorogie and others v. Norway*¹³⁸ the Court was faced with legal issues that were similar to the *Useinov* case. In this case family life was also created while an asylum seeker was awaiting the outcome of his application. Mr Omorogie, a Nigerian national, came to Norway to seek asylum and soon thereafter he met Ms Darren with whom he developed a relationship. After his application was rejected and an unsuccessful appeal the couple got married. After the decision became final, a daughter, Selma, was born. Despite the fact that the child was an applicant in this case, her rights and interests were neither assessed nor spoken of. The only reference to her by the Court was in the context of her 'adaptable age'. There was no examination of what the impact would be of either a separation from her father or of her leaving her country of nationality. The Court did not consider a five-year re-entry ban to be disproportionate to the legitimate aim pursued.

While a slow emergence of the best interests principle can be detected in these cases, its application seems to be merely rhetorical. The Court did not display a genuine commitment to the best interests as a primary consideration. It is mentioned as a factor but not given adequate consideration. The Court did not conduct any impact assessment. Despite the fact that the interests of children very slowly seemed to make their way to the forefront of the considerations, consideration of the rights of these children remained absent.

2.5.3 *Minor State Party Nationals with (a) non-EU parent(s) – A Paradigm Shift*

In this final section three cases, which were decided in a relatively short and recent time period, and which seem to mark a departure from the Court's traditional doctrines and reasoning, will be discussed. The rights and interests of children are much more at the forefront of the Court's decision-making process than they had been in the cases discussed above. Not all three cases concern minor nationals of a State Party who wish to enjoy family life in their home country. The first case concerns an adolescent who wished to obtain legal residency in Denmark in order to be with her parents and settle in the country she lived in for a lengthy period of her childhood. The second case concerns the pending deportation of a mother of two children who reside with their father in Norway who is a settled migrant. The children do not seem to have obtained a residence permit of their own, let alone hold Norwegian nationality. The last case does concern Norwegian minor nationals whose father is threatened with deportation.

138 *Omorogie and Others v. Norway* (265/07) [2008] ECHR 76.

2.5.3.1 *Osman v. Denmark*

The *Osman v. Denmark*¹³⁹ case concerned a 17-year-old Somali national who lived in Denmark from age seven onwards, together with her parents and three siblings. At age fifteen Sahro's father sent her against her will, supposedly for disciplinary reasons, to Kenya in order to take care of her ill grandmother who stayed in a refugee camp. Her mother, who had divorced her father a couple of years before, reluctantly agreed. A couple of months before she turned eighteen, the girl applied for family reunification as her residence permit had lapsed because of her stay abroad, which was longer than the allowed twelve months. The national law in Denmark grants a right to family reunification to children younger than fifteen years old. The Danish immigration authority found there were no circumstances that obliged them to grant the girl a residence permit.

Surprisingly, the Court immediately stated it did not consider it necessary to determine whether the situation touched upon the State's positive or negative obligations under the Treaty:

The Court does not find it necessary to determine whether in the present case the impugned decision, to refuse to reinstate the applicant's residence permit, constitutes an interference with her exercise of the right to respect for her private and family life, or is to be seen as one involving an allegation of failure on the part of the respondent State to comply with a positive obligation. In the context of both positive and negative obligations the State must strike a fair balance between the competing interests of the individual and of the community as a whole.¹⁴⁰

Seeing as Sahro had turned eighteen after filing the application, the Court elaborated on the scope of Article 8 ECHR and what rights the measure had interfered with. The Court noted that the relationship between parents and young adults who have not yet formed a family of their own has been found to amount to 'family life' in previous case law. The Court continued to specify that not only the right to respect for family life but also the right to respect for private life had been interfered with as 'the totality of social ties between settled migrants and the community in which they are living constitutes part of the concept of "private life" within the meaning of Article 8'.¹⁴¹ However, not only Sahro's private life was taken into account by the Court as it drew on previous case law in order to acknowledge the importance of the interests of the parents. It stated that:

it may be unreasonable to force the parent to choose between giving up the position which she has acquired in the country of settlement or to renounce the mutual enjoyment by parent and child of each other's company, which constitutes a fundamental element of family life. (...) The issue must therefore be examined not only from

¹³⁹ *Osman v. Denmark* (38058/09) [2011] ECHR 926.

¹⁴⁰ *Ibid.*, para. 53.

¹⁴¹ *Ibid.*, para. 55.

the point of view of immigration and residence, but also with regard to the mutual interests of the applicants.¹⁴²

The Court also showed due respect for parental rights by acknowledging that the exercise of these rights constitutes a fundamental element of family life and that imposing limitation on children's liberty is part of the parental duty. It then recalled settled case law that very serious reasons are required to justify expulsion of a settled migrant.¹⁴³ Despite the fact that the case at hand did not concern an expulsion, it held that the same reasoning applied, considering the fact that the girl spent her 'formative years' in Denmark.

The Court examined the rationale behind the nation's legislation and it found that while discouraging parents from sending their children abroad to be re-educated is a legitimate aim, 'the authorities cannot ignore *the child's interest* including its *own right* to respect for private and family life.'¹⁴⁴ (emphases added) The fact that the girl's own views had been disregarded contributed to the Court's finding that her interests had not sufficiently been taken into account and that Article 8 ECHR had been violated.

2.5.3.2 *Osman v. Denmark – Analysis*

The first signal of a more child-specific approach by the ECtHR comes from the fact the Court did not consider it necessary to determine whether this case concerned a negative or positive obligation of the State. In light of the CRC this is a rather artificial distinction as it is a State's duty to ensure the rights under the CRC, whether this calls for an active approach or not. A second clear factor that reflects an approach that the CRC asks judges to adopt is a clear reference to the child's own rights and interests. These rights were isolated, but not entirely separated, from those of the parents, as the Court stressed that parental rights must be respected. The girl's own rights under Article 8 were clearly articulated. A third reflection of an approach that is sensitive towards the vulnerabilities of children is the fact that the Court emphasized the fact that her 'formative years' were spent in Denmark, thus recognizing that, especially, these years have a great impact on the lives of children. The Court also criticized the authorities' failure to take into account Ms Osman's own view, which is, as we have seen, a fundamental part of the requirements of the CRC.

The Court did not allow for a State to be blindsided by the aim of its own policy, and to overlook the interests and rights of children when implementing it. The parents did not respect Sahro's own views and arguably did not act in her best interests when they sent her to Kenya. This conduct of the parents did not provide justification for the State to have equal disregard for the child's rights and interests. Of course, it should be noted that Sahro turned eighteen soon after she filed the application, which makes it difficult to assess the extent of the enhancement of the protection of children's rights. However, the sensitive manner with which the Court dealt with the rights and interests of all parties concerned, the parents, daughter and State, suggests a greater commitment to the advancement of child rights by the Court than had previously been the case. Van Walsum supports this view in her commentary, in

142 *Ibid.*, para. 68.

143 *Maslov v. Austria* (1638/03) [2008] ECHR 546 .

144 *Osman v. Denmark*, para. 73.

which she compares the *Osman* case to a similar earlier case to which the Court referred.^{145 146} Both cases have similar facts, yet the Court did not find a violation of Article 8 in the earlier case. Van Walsum suggests that the different outcomes can be ascribed to the changing attitude of the Court towards the position of children, as the Court failed to acknowledge the child's own rights, separate from those of the parents under Article 8 ECHR in the earlier case. It will be interesting to see whether the Court continues this path in the following cases.

2.5.3.3 *Nunez v. Norway*¹⁴⁷

In 1996 Ms Nunez, a Dominican Republic national, entered Norway in 1996 as a tourist and was soon thereafter caught shoplifting. She was deported and received a two-year re-entry ban. Four months later she returned to Norway using a passport, which stated a different name and identity number. After she married a Norwegian national she was granted a residence permit. In her application she stated she had never travelled to Norway before and that she had never been convicted of a criminal offence. In 2001 her husband filed for divorce. In the same year she started a relationship with Mr O., who also originates from the Dominican Republic and who enjoyed legal residency in Norway. In 2002 and 2003 their daughters were born. In 2001 the police started an investigation into the history of Ms Nunez because the truth about her identity and first stay in Norway was brought to their attention. Ms Nunez acknowledged her previous stay in Norway and admitted she had used a different passport deliberately to circumvent the re-entry ban of two years. In 2002 her work permit was revoked and in 2005 the decision was taken to expel Ms Nunez. In 2005 Ms Nunez and the father of her children separated. Ms Nunez became the main care-giver to the children, and arrangements for regular visiting hours with their father were made. This arrangement changed in 2007 when the father was rewarded custody of the children, partially because of the pending expulsion of Ms Nunez. The Court found that the father was best suited to assume daily care of the children as there was little chance the decision on expulsion would be reversed by the higher courts.

After affirming that the relationship between Ms Nunez and her daughters indeed amounts to family life as meant by Article 8 ECHR, the Court repeated the well-established framework that has been developed in the jurisprudence with regard to situations that involve immigration and family life. In line with *Osman*, the Court did not consider it necessary to determine whether the situation touched upon the State's positive or negative obligations under the Treaty.

The Court extensively elaborated upon the interests at stake. It acknowledged the State's reliance on, and the importance of, respect for immigration laws and how impunity undermines this respect. The re-entry ban was imposed in the present case constitutes an important means for the State to discourage and prevent disobedience and violations of immigration laws. Ms Nunez repeatedly breached the rules govern-

145 *Ebrahim v. the Netherlands* Appl No 59186/00 (ECtHR, 18 March 2003) (declared inadmissible).

146 *Osman v. Denmark* (38058/09) [2011] ECHR 926, Case note Sarah van Walsum, I 2011/331, ve11001345.

147 *Nunez v. Norway* (55597/09) [2011] ECHR 1047.

ing immigration, which the Court qualified as offences of ‘aggravated character’.¹⁴⁸ Therefore the Court concluded that the public interest argument of the State weighed heavily in the assessment of the fair balance that must be struck between the competing interests. Furthermore, as Ms Nunez had obtained residence permits on the basis of false documents, her stay in Norway had not at any time been lawful. Therefore, only in exceptional circumstances would her removal violate Article 8 ECHR.

While the interests of Ms Nunez alone were regarded as unable to outweigh the interests of the State, the Court continued to examine ‘whether particular regard to the children’s best interests would nonetheless upset the fair balance under Article 8’.¹⁴⁹

The Court considered that the children had been living with their mother since their birth until custody was granted to their father. They had experienced stress because of the separation of their parents, the changed living circumstances, and their mother’s pending expulsion. While the deceit and false statements during the immigration procedure had come to light in 2001, the decision to expel Ms Nunez was not taken until 2005. Furthermore, the Court considered a two-year separation of mother and children to be a long time, especially considering the ages of the children, who were eight and nine when the decision on expulsion became final. The Court did not examine the possibility of the father and children following the mother, apparently not finding this a feasible scenario.

After these considerations, the Court was not satisfied the best interests of the children had been duly taken into account by the immigration authorities. The Court identified the long lasting bond between mother and children, the fact that it took a very long time before the decision was taken, and the previous disruptions in the children’s lives as exceptional circumstances that led to the conclusion that the State had not acted within its margin of appreciation. The importance of the best interests of the child principle was stressed by the inclusion of a reference to Article 3 of the CRC and to *Neulinger and Shuruk v. Switzerland*, which is a clear acknowledgement of the best interests as a primary consideration. The Court was not satisfied a fair balance was struck between the State’s interests and Ms Nunez’s ‘need to be able to remain in Norway in order to maintain her contact with her children in their best interests, thus reaching the conclusions that expulsion would constitute a violation of Article 8.’¹⁵⁰

The dissenting and concurring, opinions are particularly interesting in this case. Judge Jebens wrote a concurring opinion in which he expressed that he felt the reasoning of the judgment should have explained more clearly how the interests of the children defined the outcome of the case, separately from the interests of Ms Nunez. Furthermore, he stated that the young ages of the children should have been expressly mentioned as one of the exceptional circumstances of the case. In reaching this conclusion, he drew upon the Committee’s General Comment No.7 on the rights of young children, as they are ‘especially vulnerable to adverse consequences of separation.’ He also pointed out that an approach which ‘emphasizes the priority to be given to the interests of the child’ inevitably reduces the margin of appreciation of the

148 *Ibid.*, para. 72.

149 *Ibid.*, para. 78.

150 *Ibid.*, paras. 84-85.

State, but that the reliance of the Court on Article 3 of the CRC constitutes an important step forward which should be welcomed by a Human Rights Court in the twenty-first century.

Judges Mijovic and De Gaetano wrote a joint dissenting opinion in which they criticized both the approach adopted by the Court and the outcome of the case. The dissenting judges considered a two-year re-entry ban proportionate in light of the serious breaches of immigration law by Ms Nunez. The expulsion would be temporary and contact between Ms Nunez and her children could be facilitated during these two years, they reasoned. Therefore the measure did not impose an ‘extraordinary burden’ on the children which, they felt, is a requirement in order to establish a violation of Article 8 ECHR. The judges also criticized the Norwegian law, which requires a two-fold proportionality assessment within Article 8, both with regard to the person who the expulsion order is issued against, and with regard to this person’s closest family members. The judges held that ‘this dichotomy is artificial in the light of what must necessarily be a unitary concept of family life in Article 8’. They seem to explicitly distance themselves from the concept of family, as a set of individuals with separate rights and interests but who thrive within a family environment, which the CRC promotes. The judges clearly disagreed with the new path chosen by the ECtHR even though they did concede that the best interests principle carries significant weight and is of primary importance. At the same time they argued the Court should have adopted the more traditional approach and should have accorded a large margin of appreciation to the State because the children were born at a time when the parents knew, or should have known, that the residency status of Ms Nunez was precarious. These two statements seem difficult to reconcile.

2.5.3.4 *Nunez v. Norway – Analysis*

This judgement is significant for a number of reasons. The incorporation of the best interests principle and the explicit reference to Article 3 of the CRC is a novelty in cases that concern family life and immigration. The views of the dissenting judges, and the concurring judge, differ fundamentally from one another and seem to represent two ends of a rather broad spectrum. This shows the Court is still finding its way in applying this new balancing test.

Again the Court did not consider it necessary to apply the doctrine of the positive and negative obligation. While on the one hand the Court seems to be very careful in balancing the different interests involved, on the other hand it does allow for the application of the best interests to be coloured by the parents’ breach of immigration laws. The Court examined in great detail what the State interest in maintaining immigration control precisely is and whether the interest is greater when severe breaches of immigration laws have taken place. The Court found this is indeed the case as ‘punishment’ is an important instrument to dissuade people from disrespecting these laws. Therefore, a lot of weight is accorded to the State’s interest. By doing so the Court upholds the values and principles under the CRC. Having said that, because the mother’s residency had never been legal, it is considered that a violation of Article 8 can only be found if there are ‘special circumstances’. The Court proceeded to examine the best interests of the children and then discerned ‘special circumstances’. Consequently, when the deportation of a parent goes against the best

interests principle, the question that is to be answered is not whether this outweighs the State's interest, but whether there are 'special circumstances'. An application of the best interests principle that incorporates the 'special circumstances' doctrine allows for this principle to be coloured by the parents' behaviour as that is where the principle finds its origin.

Furthermore, there is very little recognition of the child as rights-bearer that can be discovered in the judgment. There is no reference to the views of the children and there is no mention of the children's individual right to family life. The children do not seem to have legal residency but this was not touched upon by the Court. As we have seen in Chapter 1, it is imperative for judges for the sake of coherency (and a requirement of the Committee as mentioned in General Comment No. 5) to consider children's rights and interests systematically backed by comprehensive, transparent reasoning. While the judgment might be falling short in this regard, the fact that the children were not applicants in the case did not stop the judges from attaching much value to their interests. This displays a sensitive approach towards ensuring a child's best interests.

2.5.3.5 *Antwi and Others v. Norway*¹⁵¹

Mr Antwi, a Ghanaian national, came to Norway in 1999. He obtained legal residency there under EU free movement provisions using a forged Portuguese passport. In Norway he joined his Ghanaian girlfriend, whom he had met in Germany and who had lived in Norway from the age of seventeen onwards. His girlfriend obtained Norwegian citizenship in 2000 and in 2001 the couple had a daughter, Nadia, who is also a Norwegian national. The couple got married in 2005 in Ghana. At this moment Mr Antwi's wife learned of her husband's fraud. In 2005 the Dutch authorities discovered Mr Antwi was using a forged passport while traveling to Canada and handed him over to the Norwegian authorities. The Norwegian authorities ordered him to leave in 2006 with a re-entry ban of five years.

The Court, traditionally, started off by affirming that the relationship between Mr Antwi, his wife, and child amounted to family life under Article 8 of the Convention. In line with the *Nunez* judgment the Court did not consider it relevant to determine whether this case concerned a decision that interfered with family life, or whether the State might have failed to take a positive measure in order to facilitate family life. The Court did not question whether the five-year re-entry ban was a proportionate measure in relation to Mr Antwi's conduct and personal circumstances. Therefore the Court was to examine whether, similar to *Nunez*, the interests and circumstances of the other family members could outweigh the interest of the State in controlling its borders. While the interests of the spouse are dismissed in one short paragraph,¹⁵² the Court examined the circumstances of Nadia more thoroughly. The Court established that an execution of the expulsion order would not be 'beneficial' to Nadia because of her strong ties with Norway, limited connection to Ghana, and her strong attachment to her father.¹⁵³ Her father made a significant contribution to her daily care and upbringing and Nadia was considered to be of an age, ten years, when such support is

151 *Antwi and Others v. Norway* (26940/10) [2012] ECHR 259.

152 *Ibid.*, para. 93.

153 *Ibid.*, para. 97.

of particular importance. It was also considered she would have difficulties adapting to a Ghanaian life and readapting in Norway at a later stage in her life if she were to return after accompanying her father. Yet, the Court found that there were circumstances that were decisive in *Nunez* that were significantly different from Nadia's situation. The children in *Nunez* had already suffered from a disrupted family life because of the separation of their parents and the removal from their mother's care into their father's care. The stress that emerged from the threat of their mother's deportation was also taken into account by the Court, together with the long period of time it took before the decision on expulsion was taken. Nadia did not experience a previous disruption of family life nor did it take a long time before the decision to expel her father was taken. The Court did not consider there to be any other circumstances that would qualify as 'special' and therefore considered that sufficient weight was attached to the best interests of the child in taking this decision. Furthermore, there were no insurmountable obstacles that prevented the family from enjoying family life together in Ghana, as both parents grew up there and the entire family had gone on visits there. The Court did not find a violation of Article 8.

Interestingly enough, the judges again were not in agreement, especially when it came to the application of the best interests principle. The two dissenting judges, judge Sicilianos and judge Lazarova Trajkovska, wrote an elaborate opinion on their interpretation of the best interests principle and how they felt it should have been applied in the *Antwi* case. In their opinion the Court did not apply the best interests principle in a coherent fashion. In a quest to find a widely accepted approach toward the best interests principle the judges explored the interpretation and guidance offered by well-known commentators, the Committee on the Rights of the Child, other European legal instruments and of course previous jurisprudence by the ECtHR.¹⁵⁴ In applying their findings and evaluating how the Court dealt with the best interests principle in the present case, the judges considered that to 'admit that the impugned measure was "clearly not" in – i.e. against – the best interests of the applicant, while at the same time affirming that such interest have been duly taken into account seems to only pay lip service to a guiding human rights principle',¹⁵⁵ especially considering that, the girl, who is now eleven, would be eighteen before family life could be enjoyed again in Norway (given the processing time of family reunification applications) which would impact her greatly in very important years in her life. The dissenting

154 Including the Court's own findings in *Neulinger and Shuruk*: 'The Court notes 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' (*Neulinger and Shuruk v. Switzerland*, cited above, § 135). (...) It is also important to note that, although the landmark case of *Neulinger and Shuruk* concerned the abduction of a child, the Grand Chamber took the view that guidance on this point may be found *mutatis mutandis* in the case-law of the Court on the expulsion of aliens (see also, for instance, *Emre v. Switzerland*, no. 42034/04, § 68, 22 May 2008), 'according to which, in order to assess the proportionality of an expulsion measure concerning a child who has settled in the host country, it is necessary to take into account the child's best interests and well-being' (*Neulinger and Shuruk*, cited above, § 146. See also *Üner v. the Netherlands* [GC], no. 46410/99, § 57, ECHR 2006-XII).

155 Dissenting Opinion of judge Sicilianos, joined by judge Lazarova Trajkovska, *Antwi and Others v. Norway* (26940/10) [2012] ECHR 259, para. 8.

judges were of the opinion that the outcome of the case was not consistent with the *Nunez* judgment as the bond between parent and child in *Nunez* was less strong and the immigration offences more aggravated compared to the *Antwi* case. The re-entry ban of five years is also significantly longer than the two year re-entry band imposed on Ms Nunez. Therefore the dissenting judges concluded that the Court should have found a violation of Article 8 ECHR.

2.5.3.6 *Antwi and Others v. Norway – Analysis*

Again we see that the Court does not place the measure in the realm of the positive or negative obligation, affirming that this was not an incidental approach. However, the Court seems to display less sophistication in balancing the interests than it did in *Nunez*, though arguably this case calls for a more comprehensive and sophisticated reasoning because of its complexity. In *Nunez*, because of the fact custody was awarded to the father of the children, who was a settled migrant, the Court did not consider it a realistic option that the children (and the father) could follow the mother. It therefore did not have to clarify how the best interests relate to the ‘insurmountable obstacle’ test or how the choice between home and family life is to be evaluated in relation to the specific circumstances of children. In *Antwi*, the Court did have to examine whether it was acceptable to expect the children to follow the father because the parents were still together.

The Court established clearly that the deportation of the father would not be ‘beneficial’ to the daughter. The Court does not actually speak of the ‘best interests’ in this paragraph let alone refer to it as a primary consideration.¹⁵⁶ The Court also does not mention the CRC or *Neulinger and Shuruk v. Switzerland* like it did in *Nunez*. The Court does not proceed to carefully balance the interests of the child against the interests of the State. Yet it falls back on traditional doctrines, developed when children’s rights and interests were notably absent, to establish that deportation and a five-year re-entry ban do not entail a violation of Article 8 ECHR. Clearly, according to the Court, the fact that it is not in the best interests of the child does not amount to an insurmountable obstacle preventing the family members from settling together in Ghana. The Court also easily assumes that even if Nadia and her mother decide not to follow Mr Antwi, they would be able to keep regular contact with Mr Antwi and that the mother would be able to care for her daughter by herself. How realistic this scenario is in practise is not actually examined or elaborated upon, nor does the Court carefully assess how this scenario impacts the life and rights of the child and how it sits with the best interests principle.

In consonance with *Nunez*, the Court did not depart from the ‘exceptional circumstances’ doctrine, which applies when an immigrant with precarious residence status nonetheless chooses to form a family, thereby allowing parental behaviour to colour the application of the best interests principle. The Court in *Antwi* specifically focused on these special circumstances, which it felt were not present in this case. The Court of course must have realized that a significant difference between the situation in *Nunez* and the situation in *Antwi* was the fact that a two-year re-entry ban had been imposed on the mother in *Nunez* and that the father in *Antwi* faced a five-

¹⁵⁶ *Ibid.*, para. 97.

year re-entry ban. It fell back on *Omorogie* to establish that a five-year re-entry ban was not considered a violation of Article 8 ECHR in a case that was similar to the facts of *Antwi* and concerned a breach of immigration laws that was of a less aggravated character. As we have seen, the perspective of the child was completely absent in *Omorogie*, which makes it quite surprising that the Court draws on this case. In *Nunez* a new direction was seemingly chosen that is a lot more sensitive to the position of the child. Why did the Court choose to assess the re-entry ban in the light of *Omorogie* and not in the light of *Nunez*? In *Nunez* reference was made to the fact that the re-entry ban would cause serious upheaval in the children's lives and the uncertainty surrounding the question when the mother would be allowed to enter Norway again. No reference to this uncertainty was made in *Antwi* and the impact of a five-year (at least) re-entry ban on the daughter was not examined.

Similar to *Nunez*, the Court does not articulate the legal position of the daughter in terms of rights. The factors that were mentioned with regard to the assessment of what would be 'beneficial' to her are similar to the factors that were explicitly connected to the right to both private and family life under Article 8. While the expulsion would either cause her right to respect for private life (if she and her mother would follow) or her right to respect for family life (if she and her mother would chose to stay) or both (if only the daughter would follow the father) to be severely infringed, the impact on these rights was not assessed. All these factors and scenarios were absorbed by the application of the best interests principle. The daughter's nationality and the unconditional right of residence that is attached to it were not deemed to be of any relevance. In *Osman* the Court considered it might be unreasonable to force a parent to choose between the status he or she has acquired in a country and the enjoyment of a parent-child relationship. A similar reasoning is not applied to the family members of Mr Antwi. In relation to the children especially this is a missed opportunity by the Court to clarify how this choice is to be evaluated.

2.6 Conclusion

While Article 8 ECHR articulates a strong right to respect to family life, which also benefits children, the perspective of children has been notably absent until recent jurisprudence. Their interests and rights were, until recently, completely subsumed with those of their parents. Their position could be characterized as invisible and confined to the private realm, which gave parents unlimited power in deciding their children's fate. Decisions on admittance of parents of children were coloured by, and decided on the basis of, the parents' conduct rather than on considerations that focus on the best interests of the child or the child's individual rights. There is a rather clear trend to be signaled in which the Court makes efforts to separate the right and interests of children from the rights and interests of their parents. Having said this, there is not yet agreement between all judges that the incorporation of the best interests principle is the appropriate approach to be adopted towards the application of Article 8.

Article 3 of the CRC has been of great influence in recent case law, contributing to the protection of both citizen and non-citizen children. It is clear the Court is

searching for, and developing, an appropriate approach towards this principle within the application of Article 8 ECHR. There are many different ideas among the judges about the interpretation, determination and what weight should be accorded to the best interests of children in cases that concern both family life and immigration. The Court does not follow the CRC in terms of the explicit recognition of the child as autonomous subject and bearer of rights. It does not determine the best interests of the child by involving the child's own voice or assessing what rights the children exactly hold (and how these right might provide guidance in determining their best interests).

As the Court does not adopt this approach, it also does not answer the question what it means for children to be citizens of a State, and what it means for them to give up all the benefits and rights attached to their nationality status in order to enjoy family life with parents in another country. The Court has yet to consider how the individual rights of the child under Article 8 ECHR, and the rights attached to nationality, weigh against the interest of the State.

In the three dimensions in which nationality can play a role, only in one does it incidentally occur. It is mentioned as a factor that is relevant in balancing the different interests when applying Article 8 ECHR. However, in none of the cases it is clarified how this factor is to be evaluated or what ties to the home country nationality implies. References to the rights under Articles 2 and 3 Fourth Protocol and references to nationality within the examination of the best interests are yet to be found in the case law concerning minor State Party nationals and the residence rights of third-country nationals.

Chapter 3 – The Law of the European Union

3.1 Introduction

In the previous chapter we saw how the ECHR is interpreted by the ECtHR in the light of the CRC. In particular, the best interests principle was found to have an impact on the balancing of interests within the application of Article 8 ECHR. At European Union level there is also a trend that can be detected towards a greater respect for, and inclusion of, children's rights and interests. Until recently, this development was of no concern to the citizen child who did not move between Member States, as citizenship rights are mainly applicable to citizens who engaged in cross border movement. In *Zambrano*¹⁵⁷ the Court stretched the application of rights attached to EU citizenship, in very exceptional situations, to include static citizens. In this chapter, first I will briefly outline the position of the (static) citizen child within the general framework of Union law. I will then turn to examine the application and interpretation of principles of fundamental rights, especially relevant for children, in a number of different cases. While these cases do not touch upon the specific situation of citizen children who wish to enjoy family life in their home state with a third-country national parent, they provide insights on how fundamental rights are used by the Court, and help to determine whether and how fundamental rights can influence the scope of application of Union law. It will also be interesting to see how the Charter and CRC are used by the Court, especially now that the Charter has become a binding document. I will then explore the relevance of Union citizenship for children before moving on to discuss the recent case law on this topic. In the last section of this chapter I will endeavor to gain insight into the implications of the *Zambrano* judgment. It will be of particular interest to see if, and how, the Court interpreted rights attached to citizenship and fundamental rights simultaneously, and how these interpretations can be explained in the light of the CRC.

3.2 Citizenship of the European Union

EU Citizenship was introduced by the Maastricht Treaty in 1992 and is now codified in Article 20 of the Treaty on the Functioning of the European Union (TFEU).¹⁵⁸

1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.

157 Case C-34/09 *Ruiz Zambrano* [2011] ECR I-0000, 8 March 2011.

158 The Treaty of Lisbon amends the EU's two core treaties, the Treaty on European Union and the Treaty establishing the European Community. The latter is renamed the Treaty on the Functioning of the European Union. In addition, several Protocols and Declarations are attached to the Treaty.

The wording of Article 20 makes clear that one obtains EU citizenship automatically when one obtains the nationality of a Member State. The ECJ has repeatedly held that EU citizenship is destined to be the fundamental status of nationals of the Member States.¹⁵⁹ The second paragraph of Article 20 contains a set of rights attached to EU citizenship, most importantly the rights to move and reside freely within the territory of the Member States, and, additionally, civil rights such as voting rights and the right to consular protection. These rights are further specified in the Articles 21-25 TFEU. It is interesting to note that Article 10 (3) Treaty on European Union (TEU)¹⁶⁰ provides that every citizen has the right to participate in the democratic life of the Union. While the Treaty thus confers rights upon all citizens of the Union, EU citizenship rights are generally triggered when one exercises the right to freedom of movement. The most important right attached to EU Citizenship is the right to move and reside within the Union. The residence rights of family members of EU citizens who have moved between Member States can be found in Directive 2004/38/EC, which is also referred to as the Citizens' Directive.¹⁶¹ This directive regulates the exercise of freedom of movement rights and largely codifies jurisprudence by the ECJ. Citizen children, who have not moved across borders, fall outside the scope of this directive and therefore cannot enjoy the rights to family life that are granted by the directive to the mobile EU citizen. The legislation that regulates the freedom of movement is consequently viewed and interpreted by the ECJ in the light of its original purpose: the establishment of a single market. There have been very few cases where, notwithstanding the absence of cross border movement, the Court did not regard these situations as a 'purely internal' matter and applied rights that are associated with EU mobility rights. These cases, despite the fact there was no cross border movement, had a linking factor to EU law as the measures under scrutiny were found to be impeding the future exercise of the right to move and reside.¹⁶² Only in two recent cases, *Rottmann*¹⁶³ and *Zambrano* has the Court applied a reasoning that was not based on cross-border logic, but on the status of citizenship as such. I will return to these cases later on in this chapter.

3.3 Children's Rights in the European Union

In the early years of the European Union there was little regard for the rights of children. In light of the fact that its early incarnation was founded upon the desire to establish a single economic market throughout Europe, the disregard for the position

159 Case C-184/99 *Grzelczyk* [2001] ECR I-6193, para. 31.

160 Treaty on European Union (EU), 7 February 1992, 1992 O.J. (C 191) 1, 31 I.L.M. 253.

161 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC Directive 2004/38, Article 2 para. 2.

162 Case C-353/06 *Grunkin and Paul* [2008] ECR I-7639; Case C-148/02 *Garcia Avello* [2003] ECR I-11613.

163 Case C-135/08 *Rottmann* [2010] ECR I-0000, 2 March 2010.

of children is unsurprising. The focus on the European citizen as mobile worker has largely excluded children. When included, children were addressed as passive objects rather than active subjects of rights.¹⁶⁴ The first mention of children can be traced back to the Treaty of Amsterdam.¹⁶⁵ By amending the existing EC and EU treaties it incorporated a prohibition on age discrimination and a provision that protects children from crime.¹⁶⁶ The Charter of Fundamental Rights of the European Union (the Charter) is the first constitutional EU document that addresses children as subjects. While the Charter was adopted as a Solemn Proclamation it has now become a legally binding document.¹⁶⁷ It binds all bodies of the EU and all Member States when implementing EU law. While it does not contain an explicit reference to the CRC, it does contain a child-focused provision which clearly echoes some of the rights and principles of the CRC. The explanation of the Charter also reveals that Article 24 is based on the CRC, particularly Articles 3, 9, 12 and 13 CRC.¹⁶⁸ Article 24 of the Charter reads as follows;

1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.
2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.
3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.

It is rather unclear why these elements of the Articles of the CRC were chosen. The Articles that have been elevated by the Committee to General Principles have only partially been included in Article 24. The wording of Article 24 does at points depart from the wording of the Articles in the CRC. While the CRC speaks of all actions 'concerning' children in Article 3, Article 24 of the Charter rephrases this to refer to all actions 'relating' to children. It is unclear whether this narrows or widens the scope of the best interests principle. With regard to the participation rights granted in Article 24 of the Charter and Article 12 of the CRC, it is arguable that the Charter provides a broader right than the CRC. While the CRC grants a child the right to express his or her views when the child is 'capable of forming his or her own views', the Charter automatically provides all children with this right. The right to maintain a personal relationship with both parents seems less strong than the right not to be

164 Sandy Ruxton, *What about us? Children's Rights in the European Union – Next Steps* (EURONET, 2005) p. 19.

165 Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, as signed in Amsterdam on 2 October 1997.

166 Ruxton, *What about us? Children's Rights in the European Union – Next Step*, p. 20-21.

167 Charter of Fundamental Rights of the European Union, C 364/01, as declared on 18 December 2000.

168 Explanations Relating to the Charter of Fundamental Rights (2007/C 303/02); The Charter provides in the preamble and Article 52 paragraph 7 that the Court is to have due regard for this explanation.

separated from a parent as codified in Article 9 CRC. It will be interesting to see how the Court deals with these alterations of the wording of the provisions of the CRC.

While the preamble claims to merely reaffirm rights that result from existing principles, it does provide new significance and moral authority, most specifically with regard to the rights of the child.¹⁶⁹ Article 20 declares that everyone is equal before the law and Article 21 prohibits age discrimination. These Articles can be interpreted as ensuring that all rights in the Charter are applicable to children, especially seeing as an earlier draft of the Charter, which referred to equality between ‘all men and women’, was revised.¹⁷⁰ The right to respect for family life is codified in Article 7 of the Charter. It follows the exact wording of Article 8 ECHR and the Charter provides it must at least offer equal, but allows for more extensive, protection.¹⁷¹ The ECJ follows the ECtHR in its application and interpretation of Article 7 of the Charter. There are no provisions that provide a right to acquire a nationality similar to Article 7 of the CRC.

The Treaty of Lisbon,¹⁷² which entered into force in 2009, not only gave legally binding force to the Charter, it enhanced the legal position of children in the EU in more ways. Article 3 TEU now specifically expresses the EU’s commitment to the protection of children’s rights. This provision has led to the adoption of an EU Agenda for the Rights of the Child.¹⁷³ In this communication the European Commission embraces the CRC as an authoritative legal instrument. The Commission concedes that because all Member States of the EU ratified the CRC, it should guide ‘EU policies and actions that have an impact on the rights of the child.’¹⁷⁴ The aim of the agenda is to ensure that all EU policies that directly or indirectly affect the child are to be designed and implemented in accordance with the Charter and CRC. The Agenda on the rights of the Child aspires to use community law, the Charter and the CRC in order to ensure that a coherent approach is adopted in all EU actions. Departments are required to conduct a children’s rights impact assessment of initiatives, which is in line with recommendations of the Committee on the Rights of the Child.¹⁷⁵ The Commission has said it will ‘continue to follow attentively the work of the UN Committee on the Rights of the Child and its interpretation of the provisions of the UNCRC.’¹⁷⁶ The Charter is thus not the only instrument EU actions need to comply with and are scrutinized against. The CRC is considered an important instrument as well.

169 Clare McGlynn, ‘Rights for Children?: The Potential Impact of the European Union Charter of Fundamental Right (2002) 8 *European Public Law*, p. 387-400 at p. 391.

170 McGlynn, *Rights for Children?*, p. 393.

171 Article 52 para. 3 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:FULL:EN:PDF>.

172 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007.

173 Commission, ‘An EU Agenda for the Rights of the child’ (Communication) COM(2011) 60 final.

174 *Ibid.*, p. 1.

175 *Ibid.*, p. 5.

176 *Ibid.*

3.3 Fundamental Rights as General Principles of European Union Law

The European Court of Justice holds the competence to interpret European Union law. EU institutions can bring cases before the Court and national judges can refer cases to the Court for the purpose of scrutinizing the validity of acts adopted by the institutions or on order to seek clarification on the interpretation of EU law.¹⁷⁷ General principles of fundamental rights form an integral part of the legal order of the European Union. When interpreting the law of the Union, the Court draws inspiration from the constitutional traditions of the Member States and human instruments that all Member States have signed up to, particularly the European Convention on Human Rights.¹⁷⁸ The general framework of fundamental rights recognized by the Court is now laid down in the Charter, as discussed above. The relationship between the Charter and the CRC can be found in Article 53 of the Charter:

Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.

In this section I will examine some of the early case law of the Court in which it interpreted rights concerning the freedom of movement in the light to the right to respect for family life. I will then proceed to discuss how the Charter and CRC have been interpreted and used by the Court in applying community law.

3.3.1 *The Impact of the Right to Respect for Family Life on the Interpretation of Free Movement Provisions*

In the case of *Carpenter*¹⁷⁹ the Court made extensive use of the fundamental right to family life enshrined in Article 8 ECHR in its interpretation of EU law. The case concerned the Philippine wife of a UK worker who was threatened with removal from the UK. Mrs Carpenter claimed a derivative right of residence from her husband's status as a service provider across the EU. She argued her deportation would either force Mr Carpenter to follow her to the Philippines or to allow the family unit to be broken. In either case, Mr Carpenter's ability to provide services across the EU would be negatively affected. The Court stated:

It is clear that the separation of Mr and Mrs Carpenter would be detrimental to their family life and, therefore, to the conditions under which Mr Carpenter exercises a fundamental freedom. That freedom could not be fully effective if Mr Carpenter

¹⁷⁷ Article 19 TEU.

¹⁷⁸ Article 6 (3) TEU and Article 52 and 53 of the Charter.

¹⁷⁹ Case C-60/00 *Carpenter* [2002] ECR I-6279.

were to be deterred from exercising it by obstacles raised in his country of origin to the entry and residence of his spouse.¹⁸⁰

The Court continued to state that a Member State may justify measures which hamper the exercise of fundamental freedoms for reasons of public interest, as long as these measures are in accordance with fundamental rights protected by the EU. After weighing the different interests involved, the Court concluded that the removal of Mrs Carpenter was not compatible with the right to freedom to provide services ‘read in the light of the fundamental right to respect for family life.’¹⁸¹ According to the Court the decision to deport Mrs Carpenter failed to strike a fair balance between the competing interests involved because there was no reason to believe Mrs Carpenter might become a danger to public order or public safety. Even though it was not explicitly stated by the Court it seemed that because this case concerned both citizenship rights and family life rights, it demanded weighty reasons in order to justify deportation. Arguably, the ECJ narrowed the margin of appreciation granted to the State because of the applicable citizenship rights. By applying Article 8, the Court tried to reconcile ‘the family’ as an instrument in order to facilitate free movement and ‘the family’ as a unit that is protected under Article 8 ECHR.

In *Metock*¹⁸² the Court held that Union citizens are severely obstructed in the exercise of the freedoms under the Treaty if they are unable to lead a ‘normal family life’¹⁸³ in the host Member State. Furthermore it considered that:

The refusal of the host Member State to grant rights of entry and residence to the family members of a Union citizen is such as to discourage that citizen from moving to or residing in that Member State, even if his family members are not already lawfully resident in the territory of another Member State.¹⁸⁴

The Court interpreted the provisions on free movement very broadly in order to remove all possible obstacles to freedom of movement, however this time without a reference to Article 8 ECHR. It held that variable conditions upon the entry of family members between Member States are incompatible with the objective of the internal market.

Both cases recognize the effect that family life, or the absence thereof, has on the exercise of citizenship rights. While it seems that family rights are used as an instrument to facilitate the ultimate goal of the internal market, it is also argued by scholars that the integration argument is employed to protect family rights.¹⁸⁵ While in *Carpenter* there is a clear balancing by the Court of different relevant rights, in *Metock* the

180 *Ibid.*, para. 39.

181 *Ibid.*, para. 46.

182 Case C-127/08 *Metock and Others* [2008] ECR I-6241.

183 *Ibid.*, para. 62.

184 *Ibid.*, para. 64.

185 Norbert Reich & Solvita Harbacevica, ‘Citizenship and family on trial: A Fairly optimistic overview of recent court practice with regard to free movement of persons’ (2003) 40 *Common Market Law Review*, p. 615-638.

Court relies solely on the internal market argument. In both cases it is clear, however, that the Court has manifested itself as the guardian of the effective assertion of the fundamental freedoms under the Treaty as opposed to holding itself out as the guardian of human rights, or the rights attached to the status EU citizenship, without a cross-border reference.

3.2.2 *The Impact of the CRC and Article 24 of the Charter on Decisions by the European Court of Justice*

In *Parliament v. Council*¹⁸⁶ the European Court of Justice acknowledged explicitly what is also recognized in the Charter, that the CRC binds all Member States and is thus taken into account by the Court ‘in applying the general principles of Community law’. At the time of the decision the Charter was not yet legally binding, but the Court still established its relevance by stating that the directive under scrutiny referred to the Charter in its preamble. Furthermore, it conceded that the principle aim of the Charter is to reaffirm existing principles of fundamental rights. The European Parliament argued before the Court that a number of provisions of the Family Reunification Directive were incompatible with fundamental rights.¹⁸⁷ The Court found, after examining the preamble together with Articles 9 and Article 10 of the CRC, and Article 7 in conjunction with Article 24 (second and third paragraph) of the Charter, that while these instruments stress the importance of family life to a child, they do not create a right of entry for family members. It held that these Articles cannot be interpreted as denying a certain margin of appreciation to State Parties. The best interests principle was interpreted as a ‘recommendation’ that states ‘have regard to the child’s interests’. The ECJ did not engage in a more thorough discussion or examination of the content of the rights laid down in the CRC. Yet, the Court relied on EU immigration law and Article 8 of the ECHR to determine whether the contested provisions should be upheld or not. It is surprising to see how little regard the Court displayed for the best interests principle, while it was already expressly codified in the (although not binding) Charter in no uncertain terms.

In *Dynamic Medien*¹⁸⁸ the question arose whether Germany was breaching EU law by prohibiting the sale of DVDs and videos that were not accompanied by the appropriate ‘suitable for young persons’ label. The ECJ ruled that Germany was allowed to prohibit the sale in order to protect young people. The Court reached its decision after considering in particular Article 17 of the CRC, which encourages State Parties to develop guidelines on how best to protect children from information that could harm their well-being. The Charter was also touched upon, in particular Article 24, second paragraph, under which children have the right to the protection that is necessary for their well-being. Several commentators recognized the vulnerability of child rights ‘to being diluted or overlooked in the face of competing political and economic

186 Case C540/03 *Parliament v Council* [2006] ECR I-5769.

187 Council Directive 2003/86/EC of 22 September 2003 on the Right to Family Reunification.

188 Case C-244/06 *Dynamic Medien* [2008] ECR I-505.

objectives.¹⁸⁹ This case is therefore particularly noteworthy as the rights of children led the Court to permit derogation from the fundamental free movement of goods provisions.¹⁹⁰

The case *Delicèk*¹⁹¹ concerned a family consisting of an Italian father, Slovenian mother and their daughter. The case concerned an EU regulation that regulates the enforcement of judgments in matrimonial matters.¹⁹² The Italian courts had awarded custody to the Italian father. The child was temporarily placed in the care of child services, which provided an opportunity for the mother to travel with her daughter to Slovenia and file for custody there. The Court stressed the importance of the best interests principle and the right of the child to remain in contact with both parents as recognized by Article 24 of the Charter. It also held that ‘an exception may be made to the child’s fundamental right to maintain on a regular basis a personal relationship and direct contact with both parents if that interest proves to be contrary to another interest of the child’. The ECJ found, however, that the determination of the best interests is a matter for the national courts. It is worth noting that the Court made no reference to the first paragraph of Article 24 in which the right of the child to express its views is codified, notwithstanding that the 13-year-old daughter had clearly expressed the desire to remain with her mother.

In *J. McB v L.E.*¹⁹³ the Court decided that a measure that made the acquisition of a father’s custody rights dependent on a Court ruling, because the parents were not married, was permitted under Union law. The Court reiterated that the Charter does not extend or alter the competence of the Union. Therefore the ECJ considered itself ‘called upon to interpret, in the light of the Charter, the law of the EU within the limits of the powers conferred on it’.¹⁹⁴ According to the Court, provisions that regulate such a situation cannot be interpreted in a way that disrespects the fundamental rights of the child under Article 24, which ‘undeniably merges into the best interests of the child’. Furthermore, Article 7 must be read in a way that takes into account the rights under Article 24 and respects the obligation to consider the best interests of a child.¹⁹⁵ The law under scrutiny was considered to enable a judge to examine all the relevant facts in determining the best interests, which is in accordance with the Charter. In the Court’s decision the best interests of the child appeared to be a primary consideration and it was recognized that all the elements of Article 24 guide those best interests. The Court showed a clear recognition of the child as rights-bearer and acknowledged that the best interests are guided by these rights, and furthermore, that these rights must be read in a way that respects the best interests. This approach is in line with the approach promoted by the CRC and the Committee.

189 Helen Stalford & Eleanor Drywood, ‘Using the CRC to inform EU Law and Policy Making’, in Antonella Invernizzi & Jane Williams (eds), *The Human Rights of Children* (Ashgate Publishing 2011), p. 199.

190 Stalford & Drywood, ‘Using the CRC to inform EU Law and Policy Making’, p. 213.

191 Case C-403/09 *PPU Delicèk* [2009] ECR I-12193.

192 Council Regulation No. 2201/2003, 27 November 2003.

193 Case C-400/10 *PPU J. McB v L.E.* ECR 2010, ECR I-0000, 5 October 2010.

194 *Ibid.*, para. 51.

195 *Ibid.*, para. 60.

In *Zarraga v. Pelz*¹⁹⁶ the Court provided guidance on what Article 24 requires from judges, with regard to hearing the views of the child, in cases that concern cross-border custody cases. It held that while it is a child's right to be heard, it is not an obligation to hear a child. The application of this right must be guided by the question whether it is in the best interests of the child.¹⁹⁷ However, when the Court finds that hearing the child is not contrary to its best interests, it must ensure the effectiveness of the right to be heard and offer the child a genuine opportunity to express his or her views.¹⁹⁸ This means that legal procedures and conditions that facilitate this right are made available and that all appropriate measures are taken. We again see here that the different rights under Article 24 reinforce each other. The Court also displays a commitment to the effective enjoyment of these rights.

Stalford and Drywood describe the Court's relationship with the CRC as 'unsteady'.¹⁹⁹ They feel there are conflicted messages about the status of the CRC at EU level and that its application is fragmented and selective. It seems that the CRC's direct influence has decreased since the coming into force of the Lisbon Treaty, which gave binding effect to the Charter. The Court's focus in cases that concern children is now mainly on the Charter. Consequently, the CRC's indirect influence has increased because of Article 24 of the Charter especially after the Charter became a binding instrument. While the Court appears to follow the line set out by the CRC and the Committee, it is yet to refer to guidance provided by the Committee or to the CRC in determining the scope of application of Article 24. The Court is now faced with the challenging task of applying children's rights in a coherent fashion.

3.4 The 'Mobile' Minor EU Citizen

The position of the child within the concept of EU citizenship has historically been one of dependency: dependency on movement and dependency on a family member. The majority of EU citizen children has not moved between Member States and has therefore very little possibility to benefit from their citizenship status. The children who did move between member states are generally dependent on a family member. Adult citizens who work in other Member States are allowed to be accompanied by their partner and dependent children under the age of 21.²⁰⁰ This construct has led to difficulties in situations where the family unit was disrupted, for example in the event of a divorce. It was also evident that the treatment of children as chattels of their parents would possibly undermine the protection of their rights, especially in situa-

196 Case C-491/10 *Zarraga v. Pelz* [2010] ECR I-14247.

197 *Ibid.*, para. 63.

198 *Ibid.*, para. 66.

199 Stalford & Drywood, 'Using the CRC to inform EU Law and Policy Making', p. 213.

200 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC Directive 2004/38 at Article 2 para. 2.

tions where a parent loses his or her status as a worker, after having resided in the host Member State for some time.²⁰¹

The ECJ has made a significant contribution to the recognition of the status of the child independent from both the movement between states and the status of the parents. In *Baumbast and R v Secretary of State for the Home Department*²⁰² the ECJ interpreted the construct of EU citizenship rather broadly, which effectively augmented the protection of children. Yet, the Court did so only to a certain extent by recognizing individual rights of the child. The Court had to answer the question whether the two children of a Colombian and German national could remain in the United Kingdom for the purpose of continuing their studies. One of the children had Columbian nationality, while the other had dual nationality, both German and Columbian. The children's residence permits were dependent upon their German father's status as a worker. Their father lost his job and could not find other work within the territory of the United Kingdom, but instead gained employment with a German company. The Court reasoned that secondary legislation requires that children of workers have access to education, for the purpose of creating the best possible conditions for integration of family members, to reach the objective of freedom of movement for workers.²⁰³ Following from this reasoning the Court held that:

In circumstances such as those in the *Baumbast* case, to prevent a child of a citizen of the Union from continuing his education in the host Member State by refusing him permission to remain might dissuade that citizen from exercising the rights to freedom of movement laid down in Article 39 EC and would therefore create an obstacle to the effective exercise of the freedom thus guaranteed by the EC Treaty.²⁰⁴

From the foregoing the Court came to conclude that the children were entitled to reside there in order to pursue their education. The fact that the parents of the children had been divorced and the children did not live permanently with the (former) migrant worker did not change the outcome of the case. The Court also explicitly stated it did not matter whether the children were citizens of the Union themselves. The children were referred to as 'children of a citizen of the Union', despite the fact that one of the children was indeed a citizen of the Union herself.²⁰⁵ Therefore, we can safely say, the right to education and residence did not derive from the independent citizenship status of the daughter with dual nationality. What is particularly noteworthy is that consequently the mother became dependent upon the right of residence of the children. The Court had granted the children a free-standing right of residence, notwithstanding the available resources, and conceded that this right 'must be interpreted as entitling the parent who is the primary carer of those children (...) to

201 Helen Stalford, 'The relevance of EU citizenship to children', in Antonella Invernizzi & Jane Williams (eds), *Children and Citizenship* (SAGE publications 2008), p. 163.

202 Case C-413/99 *Baumbast* [2002] ECR I-07091.

203 *Ibid.*, para. 50, and Regulation No 1612/68, Article 12.

204 *Baumbast*, para. 52.

205 *Ibid.*, para. 97.

reside with them in order to facilitate the exercise of that right'.²⁰⁶ The children had hence gone from exercising a dependent right to being an 'anchor' for their mother.

In *Chen and Zhu v. Secretary of State for the Home Department*²⁰⁷ the Court recognized for the first time that children can derive an independent right to move and reside from their citizenship status. The case concerned a Chinese national, Mrs Chen, who deliberately traveled via England to Northern Ireland to give birth to her child on the island of Ireland. At the time, the law in Ireland stated that anyone born on the island of Ireland (including Northern Ireland) would automatically receive Irish nationality. Baby Catherine was born in Belfast on the 16th of September 2000 and obtained her Irish passport in the same month. Mrs Chen and Catherine then moved to Wales and applied for a residence permit on grounds of Community free movement rights. The Court was to examine whether Mrs Chen and Catherine indeed had a right of residence in the United Kingdom under European law. The ECJ established that primary and secondary Community law confer the right upon all citizens of the Union, who are covered by comprehensive health insurance, and who have sufficient resources, to move and reside freely in all Members States. Catherine was able to fulfill these requirements by means of her mother's resources. Even though Catherine did not move between different Member States, she held the nationality of one Member State while residing in another, which, according to the Court, amounted to a factor that linked this case to situations governed by Union law. Further, the ECJ did not consider the fact that Mrs Chen consciously used Irish nationality law, for the purpose of enabling her and Catherine to rely on the advantages of Union law, as a factor that would justify a devaluation of the rights attached to the nationality of a Member State. As the loss and acquisition of a nationality is purely a matter for each Member State (while having due regard for Union law), if it wishes to prevent abuse, a Member State is free to change the requirements and conditions in its national laws.²⁰⁸ The refusal to accept Catherine as a resident of the United Kingdom for this reason would constitute an additional condition for recognition of nationality, which is contrary to Union law. The Court conceded that Catherine had a right to reside in the United Kingdom. Additionally, to give 'useful effect' to this right it 'implies that the child is entitled to be accompanied by the person who is his or her primary carer'. Therefore Catherine's mother was additionally granted a right of residence.

It is particularly interesting to take a closer look at how the Court dealt with Catherine's legal status as a minor. The Court took a clear stance by stating that EU law 'cannot be made conditional upon the attainment by the person concerned of the age prescribed for the acquisition of legal capacity to exercise those rights personally'. The Court also referred to the extensive considerations on this topic by Advocate General Tizzano in his Opinion in the *Chen and Zhu* case. The Advocate General reasoned that a clear distinction should be made between 'legal personality' and 'legal capacity'.²⁰⁹ Minors do not have the capacity to take action that produces legal effect, yet they undoubtedly possess legal personality. According to the legal systems of the Members States legal personality is acquired at birth, therefore, a minor is considered

206 *Ibid.*, para. 75.

207 Case C-200/02 *Zhu and Chen* [2004] ECR I-09925.

208 *Ibid.*, para. 37.

209 Opinion of Advocate General Tizzano, Case C-200/02 *Zhu and Chen* [2004] ECR I-09925, para. 42.

a subject of rights. The fact that children cannot independently exercise rights does not devalue rights conferred upon them by the law. To give effect to these rights, parents or guardians act on behalf of the minor, not in their own capacity as rights holders.²¹⁰

This way of reasoning about children and their rights clearly reflects an approach the CRC promotes. Children are not deprived of their rights or considered not to have any, just because they cannot act as their own agents. The fact Catherine was able to rely on her mother's resources, despite the fact that this was not clearly laid down in the law as a possibility, also displays a child-sensitive reading of the law.

3.5 The 'Static' Minor EU Citizen – The *Zambrano* Case

The Court stirred the legal world tremendously with its decision in *Zambrano*. For a moment it was unclear whether the Court changed the nature of EU law by not accepting 'purely internal' situations anymore and conceding that all nationals of Member States are citizens of the Union and thus fall within the scope of Union law. Soon thereafter, in its ruling in the *McCarthy*²¹¹ case, the Court (Second Chamber) clarified it did not intend to do so. A joint case was brought before the Court in order to clarify the principles, as they were established in *Zambrano* and later also in *McCarthy*.²¹² The common factor between these cases was that the EU citizen was not considered dependent upon the income of the third-country national. I will mainly rely on the case brought by Murat Dereci in order to clarify the scope and application of the *Zambrano* doctrine, in order to disentangle the citizenship puzzle.²¹³ I will first focus on principles relating to EU citizenship, after which I will try to discern what role can be attributed to principles of fundamental rights protection, in particular the scope and application of the Charter. While this distinction is somewhat artificial, I believe it will prove helpful to separate these rights of different natures before linking them again at a later stage. It should be noted for reasons of clarity that the Opinion by Advocate General Sharpston was delivered before the Court's decision in *Zambrano*, while the Opinion of Advocate General Mengozzi in the *Dereci* case was delivered after the Court ruled in the cases *Zambrano* and *McCarthy*.

3.5.1 *Zambrano* – Facts & Decision

In *Zambrano v. Office national de l'emploi*²¹⁴ the question arose whether two Colombian nationals had the right to reside in Belgium with their two Belgian children. Mr and Mrs Ruiz Zambrano both applied for asylum in Belgium respectively in April 1999 and February 2000. Mr and Mrs Ruiz Zambrano, at this point, had one child who

210 *Ibid.*, paras. 42-44.

211 Case C-434/09 *McCarthy* [2011] ECR I-0000, 5 May 2011.

212 Case C-256/11 *Dereci* [2011] ECR I-0000, 15 November 2011.

213 Anja Wiesbrock, 'Disentangling the "Union citizenship puzzle"? The McCarthy case' (2011) 36 *European Law Review*, p. 861-873.

214 Case C-34/09 *Ruiz Zambrano* [2011] ECR I-0000.

held the Columbian nationality. Their application was refused on 11 September 2000 and they were ordered to leave the country, yet it was also decided they could not be sent back to Colombia as this would constitute a breach of the non-refoulement principle. The couple attempted several times to get their situation regularized, but failed. In the meantime two children, Diego and Jessica, were born, respectively in 2003 and 2005, and both of these children obtained Belgian citizenship. Colombian Law does not grant children who were born outside Colombian territory the Colombian nationality, while Belgian law does not allow children to be stateless, hence the children became Belgian citizens. From October 2000 until December 2006 Mr Ruiz Zambrano held employment with a Belgian company. When his contract was temporarily suspended in 2005, and also when it was terminated in 2006, he applied for unemployment benefits. These applications were rejected because he did not fulfill the conditions required by the law governing employment of foreign workers. Mr Ruiz Zambrano received a temporary residence permit in 2009 therefore proceedings brought before the Court in order to obtain legal residency retroactively. Before the Court it was argued by Mr Ruiz Zambrano that he enjoys a derivative right of residence by virtue of his and his wife's children's EU citizenship, plus, that, for this reason, he was exempted from the requirement to obtain a work permit and should therefore have received unemployment benefits.

In a remarkably short judgment the Court found it could not rely on Directive 2004/38/EC, as this Directive is applicable to EU citizens residing in a Member State of which they are not nationals, while the Zambrano children did not move to another Member State and are residing in the State of which they are a national.²¹⁵ Therefore the Court solely relied on Article 20 TFEU to come to its decision. The Court held that national measures that force the children to leave the territory of the Union in order to accompany their parents, deprive them of the 'genuine enjoyment of the substance of rights conferred by virtue of their status as citizens of the Union'.²¹⁶ The Court 'assumed' that the refusal to grant Mr Ruiz Zambrano both a right of residence and the right to work constituted such a measure, therefore entailing a breach of Article 20 TFEU, because the children were dependent upon the income of Mr Ruiz Zambrano and would have had to leave the territory of the Union in order to accompany their parents.²¹⁷ For this reason, the Court ruled, Mr Ruiz Zambrano should have been granted legal residency and a work permit.

3.5.2 *Zambrano in the light of European Union Citizenship*

3.5.2.1 *Opinions AG Sharpston*²¹⁸ & *AG Mengozzi*²¹⁹

In her elaborate assessment of the *Zambrano* case Advocate General Sharpston placed the particular situation of the Zambrano children within the broad framework of citizenship rights and the evolution of their application by the Court. I will touch upon only a few elements of her reasoning. For the purpose of determining whether

215 *Ibid.*, para. 39.

216 *Ibid.*, para. 42.

217 *Ibid.*, para. 44.

218 Opinion of Advocate General Sharpston, Case C-34/09 *Ruiz Zambrano* [2011] ECR I-0000.

219 Opinion of Advocate General Mengozzi, Case C-256/11 *Dereci* [2011] ECR I-0000.

the situation of the Zambrano children should be qualified as a purely internal situation, she explored a number of cases in which citizenship rights were applied by the Court in situations where there had not been any cross-border movement.²²⁰ She also touched upon case law in which the Court allowed rights to be invoked against a citizen's own Member States, after having exercised the right to freedom of movement.²²¹ In a last remark she pointed out that the EU Treaty confers rights upon citizens that can be invoked by all citizens of the Union, regardless of whether they exercised the right to free movement.²²² In order to finally answer the question of whether there is a linking factor to EU law in the *Zambrano* case and whether Mr Zambrano ought to be granted a derivative right of residence, AG Sharpston draws in particular on the Court's considerations in the cases of *Rottman* and *Zhu and Chen*.

The *Rottman*²²³ case concerned an Austrian citizen who gained German citizenship after a naturalization procedure. Subsequently, he lost his Austrian citizenship. When the German authorities discovered Mr Rottman had provided them with incorrect information in his application for German nationality, procedures were instigated to withdraw his acquired nationality. The Court did not dwell on the question whether this constituted a purely internal situation but chose to look at the future consequences of this withdrawal by stating that 'the situation of a citizen of the Union who (...) is faced with a decision withdrawing his naturalization (...) and placing him (...) in a position capable of causing him to lose his status conferred by Article 20 TFEU and the rights attaching thereto falls, by reason of its nature and its consequences, within the ambit of EU law'²²⁴ (emphases added by AG Sharpston). These considerations led AG Sharpston to conclude that while Member States possess exclusive competence in the area of acquisition of nationality, they do not have unlimited power with regard to consequences of this acquisition.

Read in conjunction with the *Chen and Zhu* case, the considerations from *Rottman*, can be readily applied to the *Zambrano* case, according to AG Sharpston. Without the company and care of their parents, the children are unable to exercise their rights as Union citizens.²²⁵ Given the age and dependency of the children (and their mother) on their father, the entire family will have to leave the territory of the Union when Mr Zambrano does not enjoy a derivative right of residence and has to leave the Member State. The children have to be physically present to be able to exercise their right to move and reside. As this reasoning effectively results in a right of residence, she considers it artificial not to explicitly recognize a free-standing right of residence separate from the right to move. She therefore calls upon the Court to do so.²²⁶ AG Sharpston concludes that potential interference by Member States with citizenship rights 'is acceptable in principle'²²⁷ but that this interference should be made condi-

220 The cases *Chen and Zu*, *Garcia Avello* and *Rottman* at paragraph 78.

221 The cases *D'Hoop*, *Grunkin & Paul* at paragraph 76.

222 Opinion AG Sharpston, para.79.

223 Case C-135/08 *Rottmann* [2010] ECR I-0000, 2 March 2010.

224 Opinion AG Sharpston, para. 94.

225 *Ibid.*, para.95.

226 *Ibid.*, para.101.

227 *Ibid.*, para.108.

tional upon the proportionality principle. AG Sharpston finds the measure by the Belgian authorities in the *Zambrano* case to be disproportionate because Mr Zambrano did not pose a threat to society while an expulsion would have tremendous impact on the children's lives, but considers this decision to be ultimately 'one for the national court, and the national court alone'.²²⁸

AG Mengozzi articulated his interpretation of the doctrine as formulated by the Court in its decisions in *Zambrano* and *McCarthy*²²⁹ as follows:

(...) a risk of deprivation of the genuine enjoyment of the substance of the rights attaching to citizenship of the Union or an impediment to the exercise of the right of the Union citizens concerned to move and reside freely within the territory of the Member States.²³⁰

When applying this doctrine to situations such as those in the *Dereci* case, where Member State nationals seek family reunification with a family member from outside the Union, the crucial factor is whether these EU citizens are dependent upon the non-EU national to the extent that they will have to leave the territory of the entire union when legal residency is refused to the respective third-country national, according to AG Mengozzi. Mr Dereci, a Turkish national, entered Austria illegally in November 2001 and married an Austrian citizen in July 2003. Between 2006 and 2008 three children were born who all hold Austrian nationality. Mr Dereci's application for a residence permit was refused in January 2006 because Mr Dereci should have applied for the permit before entering Austria. The Austrian authorities also doubted that Mr Dereci had sufficient financial resources to qualify for family reunification and held that neither EU law, nor Article 8 of the ECHR demanded residency to be granted to Mr Dereci. AG Mengozzi considered that, given the fact that Mrs Dereci and the three children are not dependent on Mr Dereci for their means of subsistence, there is no risk of them having to leave the territory when Mr Dereci is refused a residence permit. AG Mengozzi admitted that this situation is rather paradoxical seeing as the children not only become dependent on whether or not their mother

228 *Ibid.*, para.121.

229 The *McCarthy* Case concerned a UK national, who also held the Irish nationality. She had never exercised her right to freedom of movement and was reliant on State benefits for her means of subsistence. She argued her Jamaican spouse should be granted a right of residence on the basis of her EU citizenship rights. The question was whether she fell within the scope of the EU law which regulates the right to move and reside within the Union. The Court held that:

'no element of the situation of Mrs McCarthy, as described by the national court, indicates that the national measure at issue in the main proceedings has the effect of depriving her of the genuine enjoyment of the substance of the rights associated with her status as a Union citizen, or of impeding the exercise of her right to move and reside freely within the territory of the Member States, in accordance with Article 21 TFEU.'

Interesting enough the Court referred to Article 3 of the ECHR to support the views that she was not forced to leave the territory of the Union.

(...) In that regard, by contrast with the case of Ruiz Zambrano, the national measure at issue in the main proceedings in the present case does not have the effect of obliging Mrs McCarthy to leave the territory of the European Union. Indeed, as is clear from paragraph 29 of the present judgment, Mrs McCarthy enjoys, under a principle of international law, an unconditional right of residence in the United Kingdom since she is a national of the United Kingdom.

230 Opinion AG Mengozzi, para. 33.

exercised her right to freedom of movement, but the mother's citizenship status becomes a factor that impedes family reunification. The AG did not consider the possibility of an interpretation of the *Zambrano* criteria that is not merely economical but also embraces emotional dependency. While he mentioned that an impediment to the exercise of freedom of movement could bring a situation within the scope of Union law, he did not examine whether the refusal of a residence permit to the father might constitute such an impediment of the children's right to move and reside.

3.5.2.2 *The European Court of Justice's Decision in Dereci*

The Court was to determine whether Article 20 TFEU indeed does not require residency to be granted to Mr Dereci. The ECJ considered that in the *Zambrano* case the children were forced not just to leave the country of their nationality, but the territory of the Union as a whole.²³¹ This would consequently make the exercise of EU citizenship rights impossible. In the *Zambrano* case, the Court considered the right of residence of the third-country national to be vital for the effective exercise of the children's EU citizenship rights and specified that the circumstances in the *Zambrano* case were to be regarded as exceptional.²³² The Court held that:

Consequently, the mere fact that it might appear desirable to a national of a Member State, for economic reasons or in order to keep his family together in the territory of the Union, for the members of his family who do not have the nationality of a Member State to be able to reside with him in the territory of the Union, is not sufficient in itself to support the view that the Union citizen will be forced to leave Union territory if such a right is not granted.²³³

The Court implied that in the *Dereci* case it did not consider the children dependent on Mr Dereci to such an extent they were forced to leave the territory of the Union as a whole, which was assumed to be the case in *Zambrano*. Yet, it did not explicitly say so as the Court left it up to the national judges to verify whether a refusal would lead to a situation in which the children could be considered deprived of the enjoyment of the substance of rights attached to their EU citizenship.

3.5.2.3 *Analysis*

There was a lot of speculation after the *Zambrano* case whether a paradigm shift had occurred in the application of EU citizenship rights. It has become clear after *Dereci* that, while situations that concern Union citizens who have not moved across borders should not readily be qualified as purely internal situations, there still is a 'residual core' of 'wholly internal' situations that remains outside the scope of EU law.²³⁴ The decisions in *Zambrano* and *Dereci* show that, while specific cases can and will push the boundaries of Union citizenship and the effects it has on national citizenship and

²³¹ *Dereci*, paras. 66 and 67.

²³² *Dereci*, para. 67.

²³³ *Ibid.*, para.68.

²³⁴ Jo Shaw, 'Concluding thoughts: *Rottmann* in context', in *Has the European Court of Justice Challenged Member State Sovereignty in Nationality Law?*, EUI Working Paper RSCI 62 (2011), p. 39.

national immigration laws, the goal of Union citizenship becoming the fundamental status of Union citizens has not yet been achieved.²³⁵ The *Zambrano* judgment raised a lot of questions and issues that called for clarification. Of course the main difficulties that arose from the case concern the division of competences between the Union and the Member States. For the purpose of this thesis however it is particularly relevant to look at what rights are attached to EU citizenship and how these rights are interpreted in the light of the special position of children.

The Court, in *Zambrano*, did not follow AG Sharpston's advice to recognize a free-standing right of residence under Article 20 TFEU. The Court did not even explicitly refer to the right to move and reside as the core right attached to the status of citizen of the Union. It did not do so in *Dereci* either. In *McCarthy* the Court separately assessed a possible impediment of the right to move and reside under Article 21, not Article 20 TFEU. Perhaps the Court chose to do so in order to support its own assertion that the 'genuine enjoyment' test can only be met in very exceptional circumstances in which EU citizenship status is rendered virtually meaningless. This view is supported by the fact that the Court did not follow AG Sharpston in her assessment that a proportionality test should be conducted in order to determine what degree of infringement of citizenship rights is acceptable.

The approach adopted by the Court seems to echo both principles of international law concerning the expulsion of a state's own citizens and the unconditional right of residence attached to that status, and principles from the CRC. While the unconditional right of residence attached to nationality was used in *McCarthy* as a reason to consider Ms McCarthy as not being forced to leave the territory of the Union, in *Zambrano* this argument was not used. This implies that the Court interpreted this unconditional right differently in the light of the children's special circumstances. Even though the children *Zambrano* were not expelled, *de facto* their status was meaningless without legal residency of their parents because of their dependency. The Court interpreted the status of citizen of the Union in such a way that secures its useful effect and recognizes children as citizens and subjects of rights. One might argue that, technically, children still possess the rights attached to their Union citizenship, such as the right to move and reside in the Union and the right to take part in the democratic life of the Union, the Court chose not to adopt such an adult-centric interpretation of these rights. It is regrettable that both AG Mengozzi and the Court did not examine in *Dereci* whether the refusal of a residence permit to a third-country national parent entails and impediment on a child's right to move and reside under Article 21 like it, however briefly, did in *McCarthy*. Given that the Court does not specify which rights exactly are attached to citizenship under Article 20, which allows for unenumerated rights, and it has yet to examine the relationship between a minor EU citizen's right to freedom of movement and the need for parental support in order to exercise this right, it is not only difficult but next to impossible to discern the exact scope of these recently introduced doctrines and in what way they accommodate children's rights. A question that calls for further examination is when exactly an EU citizen, and particularly a minor EU citizen, is considered forced to leave the

235 *Ibid.*, p. 40.

territory of the Union. I will elaborate further on this question at the end of this chapter.

One of the main implications of the approach adopted by the Court is that, even after two opportunities to provide clarification, it still causes legal uncertainty because of all the remaining grey areas. It has also raised objections because of its harsh implications in respect of differential treatment of similar situations.²³⁶ Lansbergen and Miller seem to be correct in stating that the *Zambrano* case ‘is so ambiguous that it may reasonably be questioned whether the Court in this instance has prioritized individual justice over legal certainty and the consistent application of settled principle’.²³⁷

3.5.3 *Zambrano in light of the Charter of Fundamental Rights of the EU*

3.5.3.1 *Opinions of AG Sharpston & AG Mengozzi*

While the ECJ in *Zambrano* did not make any use of the Charter, in her elaborate Opinion in the same case, AG Sharpston devoted a generous portion of her reasoning to the question whether an individual can rely on the EU fundamental right to family life independently of any other provision of EU law.²³⁸ AG Sharpston showed herself mindful of the hazardous consequences of the growing importance of fundamental rights at EU level, namely the overlapping levels of protection offered by different legal systems on both the European and a national level. She feels it is imperative for legal certainty and clarity that one is able to identify the scope of EU law, as this is decisive for the application of fundamental rights. She describes this as follows:

(...) it is necessary to avoid the temptation of ‘stretching’ Article 21 TFEU so as to extend protection to those who ‘just’ fail to qualify. There must be a boundary to every rule granting an entitlement. If there is no such limit, the rule becomes undecipherable and no one can tell with certainty who will, and who will not, enjoy the benefit it confers. That is not in the interests of the Member States or the citizen; and it undermines the authority of the Court.²³⁹

Her proposal is that the applicability of the Charter is not made dependent upon whether the EU has exercised the competences conferred upon it ‘but rather on the existence and scope of a material EU competence’.²⁴⁰ Therefore, with this approach, even if the EU did not enact legislation in a particular field, but it has the competence to do so, that field falls within the scope of EU law, which would mean the Charter

236 Adam Stanislas & Peter van Elsuwege, ‘Citizenship Rights and the Federal Balance between the European Union and its Member State: Comment on *Dereci*’ (2012) 37 *European Law Review*, p. 176-190 at p. 180.

237 Anja Lansbergen & Nina Miller, ‘Court of Justice of the European Union European Citizenship Rights in Internal Situations: An Ambiguous Revolution? Decision of 8 March 2011, Case C-34/09 *Gerardo Ruiz Zambrano v. Office national de l’emploi (ONEM)*’, (2011), *European Constitutional Law Review* 7, p. 287-307 at p. 306.

238 Opinion AG Sharpston, paras 151-171.

239 *Ibid.*, para. 143.

240 *Ibid.*, para. 163.

could be relied upon. In the *Zambrano* case, the second child was born on the 1st of September 2003, when the Charter was still a non-binding instrument and the Lisbon Treaty had not even been drafted. Therefore she concludes that in this case, the fundamental right to family life as codified in the Charter could not be invoked as a free-standing right.²⁴¹ Furthermore, the approach to fundamental rights she proposes would have such a federalizing effect that the Court would need an ‘unequivocal political statement’ in order to proceed in this direction.

Advocate General Mengozzi focused in his Opinion in the *Dereci* case more on his interpretation of the current status of fundamental rights within the European legal order, rather than contemplating what the status ought to be or in what direction it should evolve. From the reasoning by the Court in *Zambrano* and *McCarthy* AG Mengozzi draws the conclusion in his Opinion that the phrase ‘the substance of the rights attaching to the status of European Union citizen’ does not include the right to respect for family life under Article 7 of the Charter or Article 8 of the ECHR.²⁴² These rights do not hold enough power in their own right, to bring a situation within the scope of EU law. In his view this follows from the desire to prevent the different legal orders from encroaching on each other’s powers and institutions.²⁴³ The Charter, therefore, does not confer free-standing rights upon citizens of the Union. Only when the Court establishes that a citizen, who has not moved between Member States, is deprived of the genuine enjoyment of rights attaching to EU citizenship can the situation of that citizen be considered as falling within the scope of Union law. When this, however, is not the case, competence to examine a violation of the right to family life lies with the ECtHR.

3.5.3.2 *The European Court of Justice’s Decision in Dereci*

Seeing as these cases brought before the ECJ sought to reduce the legal uncertainty that was created by the *Zambrano* ruling, the ECJ touched upon the scope of the fundamental rights of the Charter to provide some clarification. Firstly, the Court observed that, to the extent that Article 7 of the Charter contains rights that correspond with the principles laid down in Article 8 ECHR, the meaning that is to be given to these rights in the Charter can be drawn from, and found in, the case law of the ECtHR.²⁴⁴ Secondly, the Court noted that, in accordance with Article 51 paragraph 1 of the Charter ‘the Charter does not extend the field of application of European Union law beyond the powers of the Union, and it does not establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties’.²⁴⁵ Following from these considerations, the ECJ in a final remark explained that the national courts ought to decide whether the particular circumstances of the case bring a case within the scope of EU law. If this is the case, the national court must examine whether there is a breach of the rights under the Charter. If the case at hand falls outside the scope of EU law, the national Court must undertake this examination within the legal framework of the ECHR.

241 *Ibid.*, para. 176.

242 Opinion AG Mengozzi, para. 37.

243 *Ibid.*, para. 39.

244 *Dereci.*, para. 70.

245 *Ibid.*, para. 71.

3.5.3.3 *Analysis*

Both Groenendijk and Shaw conclude the Court sends a confusing message by suggesting that after the national court has determined whether a situation, similar to the circumstances in *Zambrano* and *Dereci*, falls within the scope of EU law (by applying the ‘genuine enjoyment’ test) there is still room for a fundamental rights assessment.²⁴⁶ When the ‘genuine enjoyment’ test is applied in such situations, and it is established a citizen is deprived of the genuine enjoyment of rights under Article 20, a residence permit ought to be granted to the third-country national on the basis of that same Article. In *Zambrano* no reference was made to a proportionality test. As Shaw put it, ‘it seems to be a yes/no issue’.²⁴⁷ This instruction to the national courts is ambiguous to say the least, but also leaves room for a more flexible approach by the national courts. It is also interesting to note that the Court’s reasoning in *Zambrano* and *Dereci* is in sharp contrast with its much less cautious interpretation of citizenship rights in a cross-border context, as we have seen in *Carpenter*.

3.5.4 *Opinion AG Trstenjak in Lida v. Stadt Ulm*²⁴⁸

The Opinion of AG Trstenjak was delivered on the 15th of May 2012. While at the time of writing, the decision of the ECJ is still pending, it is interesting to take a look at the AG’s interpretation of the standing principles of citizenship rights after the cases mentioned above. Even though this case does not concern a static citizen child, the applicable principles are to a large extent the same. The interpretation of these principles is therefore relevant for the purpose of this thesis.

The case concerns a German minor citizen who lives in Austria with her mother. Her father, who is a Japanese national, lives and works in Germany and visits her and her mother on a regular basis. The parents are married and share custody of the child. The father first enjoyed a right of residence on grounds of his marriage to a German national, but after his wife moved to Austria his right of residence was based on his employment. He sought to receive residence rights on ground of his daughter’s citizenship, as a right of residence based on employment is of a more precarious nature. The questions referred to the Court seek to clarify the impact of the Charter on the interpretation of Directive 2004/38/EC and the application of Articles 20 and 21 TFEU.

With regard to the applicability of the Directive in the present case, the AG concludes that the Directive clearly articulated that it governs rights of residence outside the Member State of origin, in this case Germany. Therefore, the situation must be considered to fall outside the scope of the Directive. An assessment of the Directive in the light of fundamental rights is therefore not necessary as the question of interpretation and application of these rights ‘cannot be raised outside the scope of the legal act’.²⁴⁹

246 Shaw, ‘Concluding thoughts: *Rottmann* in context’; Kees Groenendijk, Case note, Case C-256/11 *Dereci* [2011] ECR I-0000.

247 Shaw, ‘Concluding thoughts: *Rottmann* in context’, p. 39.

248 Opinion of Advocate General Trstenjak, Case C-40/11 *Lida*, delivered on 15 May 2012.

249 *Ibid.*, para. 54.

With regard to the applicability of citizenship rights and the Charter in the present case, the situation is a lot less straightforward. In interpreting the scope of the daughter's citizenship rights, the AG held that the situation is only covered by Article 20 if 'the core' and 'very essence' of this legal position is affected when her father is not granted a right of residence.²⁵⁰ Given that she already made use of her freedom of movement by moving to Austria, the AG does not find it arguable that this is the case. She does find it conceivable that, when the father was to lose his residence rights, the daughter and mother might be inclined to move back to Germany. However, this situation is both hypothetical and difficult to link to the essence of the legal position of the daughter.

In applying the principles of fundamental rights, the AG discusses the criterion as formulated by the Court in *Dereci*. The AG concludes that a restriction of freedom of movement under Article 21 TFEU is a connecting factor that triggers the applicability of the Charter. The AG held that:

(...) it would appear plausible that the Union citizen – on the assumption that the relationship between the father and the daughter is trouble-free, as the case-file suggests – could be deterred all the more from exercising her right to freedom of movement if, as a result of a possible denial of a right of residence in Germany under Union law, there were a danger that her father, as a third-country national, would have to take up residence far away from her.²⁵¹

However, these circumstances are to be examined by the national court, as they are able to gather and assess all the relevant facts. The question whether interpretation of the right to freedom of movement in the light of Articles 7 and 24 of the Charter can lead to a right of residence for the father depends on the circumstances of each individual case. In this assessment it is particularly relevant, according to AG Trstenjak, to establish whether the loss of the right of residency of the third-country national parent would impact on the possibility of parent and child to maintain regular contact.²⁵²

250 *Ibid.*, paras 64, 67.

251 *Ibid.*, para.78.

252 At the time of preparing this text for publication, the ECJ handed down its judgment in the *Lida* case ([2012] EUECJ C-40/11). The Court did not follow the reasoning of the AG. It held that, '(...) it is common ground that that the claimant has always resided in that Member State in accordance with national law, without the absence of a right of residence under European Union law having discouraged his daughter or his spouse from exercising their right of freedom of movement by moving to Austria.' The Court continued to state that, '(...) it cannot validly be argued that the decision at issue in the main proceedings is liable to deny Mr Lida's spouse or daughter the genuine enjoyment of the substance of the rights associated with their status of Union citizen or to impede the exercise of their right to move and reside freely within the territory of the Member States (see McCarthy, paragraph 49). It must be recalled that the purely hypothetical prospect of exercising the right of freedom of movement does not establish a sufficient connection with European Union law to justify the application of that law's provisions (see Case C-299/95 *Kremzow* [1997] ECR I-2629, paragraph 16). The same applies to purely hypothetical prospects of that right being obstructed.' (paras. 74-77)

3.5.5 *When is a Child Forced to Leave the Territory of the Union?*

As stated above, the newly introduced ‘genuine enjoyment’ test has created quite a few grey areas that require clarification. For one, what rights exactly are attached to Union citizenship? The Court seems to consciously mystify the answer to that question as it refuses to articulate more clearly the exact rights that are at stake. Instead it focuses on the requirement of ‘being forced to leave the territory of the Union’ to determine whether a person falls within the scope of Union law. What do we know so far about the Court’s interpretation of this deceptively simple phrase?

In *Zambrano* the Court assumed the children would have to leave the territory of the Union because they were dependent on the income of the father. Ms McCarthy on the other hand was not considered forced to leave, even though she wished to enjoy family life with her husband while her home country refused to allow this on their territory. She would have to leave her country to be with her husband, but the Court did not consider such a departure ‘forced’. In the *Dereci* case the Court left it up to the national courts to apply these principles and added that, even though granting residency to a third-country national might be desirable for economic reasons, and for the purpose of enjoying family life, ‘desirability’ is not enough for a situation to meet the standard of the ‘genuine enjoyment’ test.

What situations other than the one in *Zambrano* might meet this standard? As an example, AG Mengozzi, in his Opinion in the *Dereci* case, described two other situations that he feels would meet the standard required by the Court. Firstly, he argued that if Mrs Dereci had been unable to work, she would not have been able to provide for the needs of the children and unable to settle in another Member State of the Union. This situation, in his view, would deprive the children of the genuine enjoyment of their EU citizenship rights. His second example concerns situations where a parent, who is a Union citizen, is ‘economically and/or legally, administratively and emotionally dependent’²⁵³ on a third-country national child. He immediately added:

These are the different specific situations which will be referred to the Court in references for preliminary rulings which will determine the precise scope of Ruiz Zambrano. This situation is, I confess, not very satisfactory from the point of view of legal certainty.²⁵⁴

AG Mengozzi is quite right in stating this, as the above painted picture raises more questions than it actually answers. How is the level of dependency and the line between ‘desirable’ and ‘a forced departure’ to be established? Should national Courts make use of fundamental rights in order to establish this? The Court delivered a very ambiguous answer to this question by stating that the scope of Union law determines whether the Charter or the ECHR is applicable to a situation. Of course, the CRC and the ECHR binds Member States regardless of the scope of Union law. Does this mean the difference between ‘desirable’ and ‘forced departure’ is to be established in

²⁵³ Opinion AG Mengozzi, para. 48.

²⁵⁴ *Ibid.*, para. 49.

the light of these fundamental rights? First, I will briefly touch upon a number of cases from the highest Dutch administrative Court in order to get a better understanding, and to serve as an example, of how the ‘genuine enjoyment’ test is applied on a national level. Second, I will use academic literature in an attempt to answer the above posed question how the line that marks the scope of Union law should be drawn.

3.5.5.1 *A Glance at Dutch Case Law*

On March 7 2012 the highest Dutch administrative Court ruled in a number of cases on the applicability of Article 20 TFEU.²⁵⁵ I will discuss two cases in which the Court found in favour of the third-country national applicant and two in which it found in favour of the State. To start off with the latter, the common factor in both cases was that a third-country national wished to enter the Netherlands in order to enjoy family life with their Dutch spouse and child/children. In both cases it was argued that the Dutch spouse was unable to provide all the care the children needed because of either physical or mental health problems, due to which, according to the applicants, the children were forced to leave the territory of the Union in order to receive all the care they need. The Court held that there are social institutions to support the parents where they need help. The reasoning by the ECJ requires, according to the Dutch Court, that parents make use of this offered help if this prevents the children from having to leave the territory. The same reasoning is applied with regard to financial resources. Where needed, the Dutch parent must call on social security in order to avert the risk of a forced departure.

Both cases that were decided in favour of the third-country national, concerned single parents who were their children’s sole caregivers. The Court, on the basis of the reasoning in *Zambrano*, did not accept that these children could be separated from their parents in order to enjoy the substance of rights attached to their Union citizenship. In one case the State argued the children could stay with an uncle in Spain. The Court decided that, in line with *Zambrano* and *Dereci*, it must be assumed that the children would follow their parent, in this case, their mother.

These cases display a very narrow interpretation of the criteria set out in the case law by the ECJ. The Court does not make any use of human rights instruments to establish whether a departure is to be considered forced. The applicants in the cases that were decided in favour of the State argued before the Court that, because of the ambiguities in the *Dereci* judgment, a preliminary reference to the ECJ would be in order. It is questionable whether the Court made the right decision by not doing so.

3.5.5.2 *When does a situation cease to be merely ‘desirable’?*

In *Zambrano* the Court concluded the children would be forced to leave the territory of the Union if their father was not granted a residence permit. In *Dereci* the Court implied this was not the case. The Court’s reasoning in *Zambrano*, which mainly referred to the economic factor that would compel the children to leave, in combination with AG Mengozzi’s mainly economic reading of the doctrine, seems to support

255 Afdeling bestuursrechtspraak Raad van State, 7 March 2012, Nos 201011743/1/V1; 201108763/1/V2; 201105723/1/V1; 201102780/1/V1.

the view that dependency on the income of third-country national parents must be seen as a decisive factor. In *Dereci* the Court did not send out a message aiming to prevent a narrow reading of the ‘genuine enjoyment’ test by national courts. We have seen that the Dutch national court applies such a narrow interpretation.

However, the *Dereci* case was referred back to the national judges, while in *Zambrano* the Court provided an assessment of the facts and a ruling. The Court did not conduct the factual assessment needed to find out whether the children were deprived of the genuine enjoyment of the rights attached to their Union citizenship. It also did not investigate whether the Charter was applicable in this specific case. Perhaps with this strategy the Court avoided declaring the Charter inapplicable while at the same time making sure it does not overstep its competence.

The national Courts and judges are not hampered by the same competence restrictions. Furthermore, they are always bound to act in accordance with the ECHR and the CRC. Can, and should, these human rights be reconciled with rights attached to EU citizenship? And if so, how should they be applied together? It is beyond the purpose of this thesis to address these questions comprehensively. I will instead give a short overview of the argument made by Gareth Davies who argues a strong case in favour of applying these rights side by side and the inclusion of a proportionality test in order to determine the acceptable degree of interference with these rights. This proportionality test was also suggested by AG Sharpston in her Opinion in the *Zambrano* case.

Davies points out that dependency on the income of a third-country national is not in itself enough reason to assume a child will be forced to leave, or that a child who is not dependent for its means of subsistence on a parent will not be.²⁵⁶ However sad, it is possible for parents to decide it would be in the best interests of the child to remain with family members or in the care of the State. It is also not unthinkable that a deportation of a parent has such a devastating effect on a child that not following the parent is not a feasible alternative. Given that dependency might be emotional, practical and can differ in degree, Davies does not consider it tenable to use this notion as a determinative evidential principle, rather than as an instrument.²⁵⁷

The solution proposed by Davies follows the line set out by AG Sharpston in two regards. He feels the notion of ‘forced departure’ should be replaced with an assessment of the proportionality of the interference with the right to reside. He does not consider the fact that the Court did not expressly recognize such a right very relevant. Perhaps because the right of residence attached to nationality is undisputed or because he agrees with AG Sharpston that not recognizing such a right is rather artificial. In his essay he sets out three clear reasons for proposing this approach.

Firstly, there is a vast number of cases that can be drawn from that concern interference with citizenship rights. According to Davies, all of these cases conclude that ‘such interference is prohibited unless justified by some over-riding need and proportionate’.²⁵⁸ *Rottman* and *Baumbast* serve as examples of cases in which the Court ap-

256 Gareth Davies, ‘The Family Rights of European Children: Expulsion of Non-European Parents’ (2012) *EUI Working Paper* RSCAS, p. 9.

257 *Ibid.*, p. 10.

258 *Ibid.*, p. 11.

plied this reasoning. Secondly, case law that specifically relates to the residence rights of third-country nationals also supports this view. Davies relies especially on *Carpenter* to argue that when the exercise of a citizenship right is harder, but not impossible, the expulsion must be proportionate and reflect a fair balance of interest.²⁵⁹ Thirdly, Davies considers proportionality the only conceptually coherent test. A reasoning that focuses exclusively on ‘forced departure’ marginalizes the importance of Union citizenship in cases where a citizenship right is not deprived but diminished in quality. He calls it ‘naïve and implausible’ to treat it as a right that does not know degrees of interference.²⁶⁰ At the same time, a measure that concerns the deportation of a parent is never just about citizenship rights. An approach towards these types of cases that does not include a reference to the right to respect for family life is ‘willfully obscure and will produce incomplete and unsatisfying jurisprudence.’²⁶¹ At the heart of his argument in favour of proportionality lies the fact that it is fuzzy edged and variable as opposed to having the hard and fast lines displayed by the Court’s current approach, which Davies claims is about legal convenience instead of substantive interests.²⁶²

3.6 Conclusion

Just like the CRC, the ECJ and the concept of EU citizenship acknowledge and respect that nationality is intrinsically bound to the State and therefore that the laws on nationality are guided by the concept of State sovereignty. However, EU citizenship is only conferred upon nationals of a Member State, and is therefore fundamentally linked to the concept of nationality. EU Citizenship cannot be seen separately from a Member State’s nationality and vice versa. Therefore, if the consequences of national measures and laws on nationality also affect the rights attached to EU citizenship, it becomes a matter of EU law. In *Zambrano* the Court recognized that it is imperative for the effective enjoyment of citizenship rights to be physically present in the territory of the Union, thereby implicitly recognizing a right of residence attached to EU citizenship. The Court has introduced two tests to determine whether a situation that involves a static citizen falls within the scope of Union law. The first is based on EU citizenship status as such, and is determined by the ‘genuine enjoyment’ test. The second is based on cross-border logic; there must be an impediment to the exercise of free movement. It is unclear under what circumstances one is deprived of the genuine enjoyment of the substance of the rights attached to EU citizenship and what exact rights are attached to EU citizenship. In *Zambrano* the Court established that one is deprived of the genuine enjoyment of the substance of the rights attached to EU citizenship when forced to leave the territory of the Union. It will be easier for children to meet this requirement than for adults to do so as children generally have no choice in the matter. The Court clarified in *Dereci* that there is no free-standing right to family life attached to citizenship of the Union. Furthermore, the refusal to

259 *Ibid.*, p. 12.

260 *Ibid.*, p. 13.

261 *Ibid.*

262 *Ibid.*

grant a right of residence to a parent was not interpreted to deprive the children of the genuine enjoyment of the substance of rights attached to their citizenship status when the other parent can provide their basic needs. The Court did not provide useful guidance on whether and how Articles 24 and Article 7 of the Charter can, or should, be used to assess whether a child is forced to leave. It also did not mention that national Courts are to make sure the rights under the CRC, in particular Article 3, are upheld. It is likely the Court was concerned about acting beyond its competence, but it adopted a restrictive approach at the expense of children. The question remains whether the rights in the Charter or the CRC can potentially stretch the interpretation of the 'genuine enjoyment' test and the right to move and reside as the national judges are bound to uphold the standard of these Conventions. There seems to be a hidden assumption of family life in the *Zambrano* judgment which could potentially impact the way in which *Zambrano* should be applied. The Court did not find it acceptable to expect parents to leave their children in the care of the State, thereby recognizing the importance of children and parents not to be separated.

It is also arguable that a child is hampered in exercising the right to move and reside under Article 21 TFEU without the presence of both parents when the line of reasoning and approach to citizenship rights from the *Carpenter* case is applied. This reasoning is yet to be recognized by the Court in cases that concern static citizens. Only time and more jurisprudence on this topic will be able to provide more clarity with regard to the possible influential power of the Charter on citizenship rights.

The general approach of the Court towards the rights of children, when it is not hampered by competence restrictions generally reflects the approach that the CRC promotes. The Court displays a clear recognition of the child as rights-bearer and examines what is needed to give content to the rights of children. The Court generally finds that the presence of parents is imperative for the effective enjoyment of rights. However, as we have seen, this does not necessarily mean the Court considers the presence of both parents imperative in order to ensure the effective enjoyment of rights. In its application of the Charter the Court stressed the interrelatedness of the rights under Article 7 and Article 24, which is in line with the requirement of the Committee to view the Convention as a whole. The Court also recognized that the rights within Article 24 reinforce each other and should not be viewed separately. The Court has yet to consider how the best interests principle and the right of the child to be heard, as enshrined in Article 24, should be applied and ensured in immigration cases.

Chapter 4 – Conclusion

At the start of this thesis, the research question that was posed followed from the recent developments at European level: In what way do the European Court of Human Rights and European Court of Justice incorporate the values and principles of the CRC in their interpretation of a child's right of residence and a child's individual right to respect for family life in cases that concern minor citizens of an EU Member State who are residing in their country of nationality and wish to enjoy family life with (a) non-EU parent(s)?

I will proceed to answer the ancillary that will, taken as a whole, provide an answer to the main question.

4.1 Ancillary Question A

What approach towards the rights of children does the UN Conventions on the Rights of the Child Promote?

The CRC promotes a child-specific approach to children and their rights that aims to strengthen their legal position. The individual rights under the CRC seem to be of a rather weak normative value. Together with the fact that there is no enforcement mechanism in place and the Committee on the Rights of the Child does not have the competence to examine individual complaints, it seems doubtful the rights enshrined in the CRC are able to offer a high level of protection in individual cases concerning citizen children and their parents. As a whole, however, the CRC does promote an approach towards the legal position of children, which can greatly affect the way their rights are interpreted and applied. When these approaches permeate other legal frameworks, which provide stronger rights and enforcement mechanisms, children will be put at the forefront of decision making and receive the best of both worlds. First and foremost, the CRC recognizes the child as a rights-bearer. While this might seem self-evident, the position of children is often viewed in terms of the rights of their parents, or a paternalistic approach is adopted towards ensuring their wellbeing. From respecting children as active subjects of rights, there follows a respect for their evolving capacities and the progressive exercise of their rights, but also recognition that special protection measures may be needed to ensure vindication of their rights. Secondly, from this same principle flows that due respect should be given to a child's own voice and that effective participation in all matters affecting them should be ensured. Weight should be attached to their views and opinions in accordance with their age and level of maturity. Thirdly, while the CRC does not provide parents with unbridled power over their children, there is a strong recognition of the importance of family life in the CRC. The family is seen as the most natural environment in which children can thrive and in which their rights can be most effectively ensured. Parents and children should not be separated unless this is in the child's best interests. Fourthly, the best interests of the child should be a primary consideration in all decisions that concern them. Decision

makers and judges must demonstrate that they have assessed how decisions impact children and their rights. This assessment has to form a primary consideration. Lastly, the CRC must be regarded and applied as a holistic document. The rights of the CRC cannot and should not be viewed in isolation. The rights and principles interrelate and cannot be effectively upheld when other rights under the CRC are breached and neglected.

4.2 Ancillary Question B

How does the CRC evaluate the right of residence attached to nationality, and how does the ECtHR evaluate the right of residence attached to nationality when applying and interpreting Article 2 and 3 of the Fourth Protocol of the ECHR, and how does the ECJ evaluate the right of residence attached to nationality when applying and interpreting EU Citizenship?

The CRC is silent on what rights ought to be attached to the status of nationality. The CRC does provide every child with a right to acquire a nationality, as this is imperative to reach the general goal of visibility for children and in order to uphold the rights of the CRC. This might be a reflection of ‘the right to have rights’ in accordance with the work of Hannah Arendt.²⁶³ The CRC does not know any provisions such as Articles 2 and 3 Fourth Protocol ECHR which prohibit the expulsion of own citizens and provide individuals with a right of residence throughout the country of nationality. There is very little case law on what the prohibition on expulsion and the right to move and reside everywhere in the territory of one’s own country mean for the residence rights of third-country national family members. There is no case law that views this right in the light of child rights or the specific situation of citizen children. The Court has not closed the door however to the possibility that the refusal to enable the enjoyment of family life on the territory of an individual’s home state might infringe these rights. This raises the question whether the scope of this Article has been sufficiently tested and whether the right of residence under this Article holds the potential to contribute to cases that concern citizen children in a more meaningful way.

While citizens of the Union have been able to enjoy EU citizenship rights for a long time, most of these rights could only be invoked in 26 of the 27 Member States.²⁶⁴ While this division of powers is still intact, the ECJ is exploring the edges of its competence and has acknowledged that citizenship rights can be invoked against the home Member State in certain (although rare) situations. The situation of the *Zambrano* children constitutes such a situation. Cases in which citizenship rights can be invoked against the home Member State are regarded as encroaching upon the State’s sovereignty and are therefore of a sensitive nature. The ECJ has not explicitly recognized that there is a right of residence that can be invoked against the home Member State attached to EU citizenship. With the introduction of the ‘genuine enjoyment’ test as established in *Zambrano* the ECJ has introduced a doctrine that *de facto* results in a right of

263 Jacqueline Bhabha, ‘Arendt’s Children: Do Today’s Migrant Children Have a Right to Have Rights?’ (2009) 31 *Human Rights Quarterly* 410-451.

264 See Chapter 3 of this thesis.

residence which is in fact guided by EU law and guarded by the ECJ. To meet the standard of the test as formulated in *Zambrano* a Union citizen must be deprived of the genuine enjoyment of the substance of the rights conferred by the status as citizen of the Union. The subsequent case law, most specifically the *Dereci* case, has clarified that this is not an easy standard to meet. There has to be a situation in which the citizen in fact has no other choice but to leave the territory of the Union. The existence of family life with a third-country national is not in itself considered a factor that obliges someone to leave the Union and therefore deprive a citizen of the effective enjoyment of citizenship rights. The situation must impact the core and essence of citizenship as to make the enjoyment of the rights attached to it near to impossible. Only in very exceptional circumstances will this standard be met.

4.3 Ancillary Question C

How does the CRC evaluate the right to respect for family life, and how does the ECtHR evaluate the right to respect for family life when applying and interpreting Article 8 of the ECHR and how does the ECJ evaluate the right to respect for family life when applying and interpreting EU Citizenship?

While the CRC grants children the right not to be separated from their parents, unless this is in their best interests, cases that involve both family life and immigration seem to have been singled out as exceptions to this rule. Even though the best interests of the child ought to be paramount in cases involving a possible separation of parents and child, in immigration cases there are valid reasons of immigration control that must be taken into account. Cases that concern family reunification must be dealt with positively, expeditiously and humanly according to the CRC. The Convention is silent on what the right not be separated from one's parents means in immigration cases. Having said that, as that the Convention must be interpreted holistically, this right is still of value. Given the open-ended nature of these provisions and the absence of decisions in individual cases by the Committee the best interests principle becomes of special importance. It has been explicitly recognized by the Committee that there is no derogation from this principle in immigration cases.

The ECHR has now expressly acknowledged the importance of the best interests principle. When applying the right to family life enshrined in Article 8 ECHR the Court now attaches primary importance to the best interests of the child in balancing the interests involved. It was also recognized by the Court that the best principle, as the Court applies it, derives directly from the CRC. While Article 8 ECHR already offered a rather strong right (and the incorporation of the best interests principle does not alter the substance of that right) that protects an individual's right to respect for family life, and prohibits arbitrary interference by the state, it is a new development that the interests of children are put to the forefront. Given that in most of the Court's recent case law and in both *Nunez* and *Antwi* the best interests principle played a decisive role in the outcome of the case, the new approach adopted by the Court should not be regarded as an incidental one. In the determination process of the best interests of the child the Court does not make use of the child's own views nor of the other rights enshrined in the CRC or the ECHR and therefore does not follow the line set out by the Committee on the Rights of the Child. The Court seems to be searching for criteria that determine

the best interests but also, more importantly, how to establish what weight should be accorded to the best interests. When does the best interests of children outweigh the interests of the State with regard to immigration control? Given the novelty of the application of the best interests principle, it is hardly surprising that the Court is still finding its way. It seems however that there are still judges who disagree with the application of the best interests principle as a primary consideration in general. This view must be regarded as unhelpful and not constructive because of the broad (arguably universal) recognition of the best interests principle. The best interests principle has become, and will stay, an integral part of the Court's case law. Therefore a discussion on how to apply this principle is much more in order than a discussion on whether to apply it.

In the application of Article 8 ECHR it seems to matter very little whether one possesses the nationality of a State Party or not. It does not seem to play a role in the best interests assessment and very little outside this assessment. Notably, the Court disregarded the value of nationality completely in *Antwi* and did not make reference to the fact that the children in *Nunez* did not possess legal residency.

While the Charter codifies a right to respect for family life at least equal to Article 8 ECHR and a child-specific provision that enshrines multiple principles of the CRC, most notably the best interests principle, these rights have been notably absent in the ECJ's recent decisions in *Zambrano* and *Dereci*. In *Zambrano* this can to a certain extent be explained by the fact that a right of residence was granted on the basis of citizenship rights which took away the need to assess the measure's compatibility with fundamental rights. In *Dereci*, however, the Court instructed the national Court to establish whether Mrs Dereci and the children were deprived of the genuine enjoyment of the substance of rights attached to their citizenship *and* to assess whether the situation fell within the scope of EU law in order to determine whether the Charter or the ECHR was applicable. These statements seem to contradict each other as such a situation seems to be brought within the scope of EU law when the EU citizen is indeed considered to be deprived of the genuine enjoyment of his or her rights. Was the Court implying that the 'genuine enjoyment' test should be conducted in light of the Charter, thus saying that the Charter can be used by judges as an instrument to bring a situation within the scope of EU law? The fact that the ECJ stressed that the Charter was not meant to create rights beyond the existing powers of the Union seems to contradict this. It remains a grey area what exactly the Court implied.

A second legal formula was constructed by the Court in *McCarthy*, with regard to the application of the right to move and reside under Article 21 TFEU, which is also especially relevant for the application of the Charter. When a national measure impedes the right to move and reside, this constitutes a connecting factor to EU law and in which case the Charter can be invoked against the home member State. It has not been recognized yet by the Court that a denial of a residence permit to third-country nationals can impede a citizen's exercise of the right to move and reside. In *Dereci* the Court remained silent on the issue. The Court therefore interprets this right a lot more narrowly than it interprets the classic economic free movement rights. It will be very interesting to see how the Court will decide and reason in the *Lida* case. In this case a minor Member State national moved between Member States, which may have triggered the applicability of EU law and thus the Charter. If the right to move and reside is read in light of the Charter, the Court may conclude that a refusal of a residence permit to the

child's father may impede the exercise of this right.²⁶⁵ This reasoning could be analogously applied to static citizen children with one EU national parent. After *Zambrano*, *McCarthy* and *Dereci*, how tenable would it be for the Court to conclude such situations fall outside the scope of Union law?

4.4 Ancillary Question D

What are the similarities and differences between the approaches of the ECtHR and the ECJ towards applying the values and principles of the CRC?

The Courts display radically different approaches towards children and their rights. While the ECJ clearly recognizes the child as rights-bearer, the ECtHR has only recently done so in the *Osman* case. After *Chen* and *Zambrano* the ECJ has proven to be able to adopt a child-specific approach towards the interpretation of rights. The ECJ attempts to find answers to the questions what rights children possess and what is needed to give substance and meaning to these rights. The ECtHR tends to look at cases from the perspective and rights of the parents and in light of the parents' conduct. While the incorporation of the best interests principle in balancing the interests involved is a clear step forward with regard to increasing the visibility of children, the Court has not departed from its traditional doctrines and paternalistic approach just yet. While the Court's decision in *Nunez* clearly aimed to offer protection to the children, the Court's phrasing was illustrative:

The Court is therefore not satisfied that the authorities of the respondent State acted within their margin of appreciation when seeking to strike a fair balance between its public interest in ensuring effective immigration control, on the one hand, and the *applicant's need to be able to remain in Norway in order to maintain her contact with her children in their best interests*, on the other hand.²⁶⁶ (emphases added)

While the interests of the children were decisive for the case, the ECtHR in the end speaks of the applicant's needs instead of the children's needs. By doing so it creates confusion about how the different interests of the children and of the mother impact the case. Their interests become blurred and difficult to distinguish from one another hence making it difficult to determine what weight is attached to them and how to apply Article 8 ECHR in a coherent fashion. The excerpt above seems to indicate that the interests of the children were incorporated in the mother's rights under Article 8 ECHR. The ECtHR generally chooses not to articulate a child's interests in terms of rights. Children have a right to family life separate from the right of their parents. This was clearly recognized in *Osman* yet the Court failed to articulate this in *Antwi* and *Nunez*. It should be noted that the *Osman* case concerned a 17-year-old girl who was the main focus of proceedings as her application to enter the country was under scrutiny. Her age and the fact her right of residence was at stake perhaps made it impossible for

²⁶⁵ See footnote 252.

²⁶⁶ *Nunez v. Norway* (55597/09) [2011] ECHR 1047, para. 84.

the Court not to recognize her separate interests and rights. This case cannot be said to clarify the Court's position on the rights of younger children. In *Nunez* and *Antwi* the ECtHR did not answer the question whether the children's right to respect for private and family life was (disproportionately) infringed upon and whether a child is even able to exercise these rights without the support of his or her parents.

In applying the best interests principle the ECtHR also does not display any recognition of the child as an active subject of rights. A child's own views are never included as a relevant factor. Unlike the ECJ, the ECtHR does not ask the question what it means for children to hold a right to respect for private and family life and how this right can be effectively ensured. This explains why the ECtHR has not attached any meaning to the citizenship status of children. The Court does not assess what the rights attached to this status mean for children. The rights under Articles 2 and 3 Fourth Protocol have never been deemed relevant because in the strict legal sense children are not expelled when their parents are being expelled. They still possess their residence rights and are allowed to return whenever they want. They can also remain in the care of the State if necessary. The doctrine that the ECJ formulated in *Zambrano* seems to be analogously applicable to Articles 2 and 3 of the Fourth protocol. However, in *Zambrano*, the Court did not find it acceptable to require that children are separated from their parents in order for them to enjoy rights attached to their citizenship.

The ECJ however falls terribly short to date in applying Article 24 of the Charter, combined with the right to family life, in situations similar to the *Dereci* case. While Article 3 of the CRC and Article 24 of the Charter both recognize that the best interests of the child should be a primary consideration in all actions that concern, or relate to, them, the Court only provides minimal, and rather incomprehensible, guidance to the national Courts on how the Charter should be applied together with citizenship rights. Moreover, in *Dereci*, the Court referred the entire case back to the national Court without conducting its own assessment of the cases at hand, thereby missing an excellent opportunity to show how citizenship rights should be reconciled with the best interests principle. The Court implied in *Dereci* that the 'mere fact' that it is in the best interests of the child to enjoy family life in the territory of the Union, does not support the view that the child is obliged to leave when a residence permit is not granted to a parent. This displays neither a logical, sophisticated nor comprehensive approach to the legal position of these citizen children. It is insufficient and unconstructive guidance to the national courts on how the best interests principle, which the national Courts are obliged to apply under the CRC, should be interpreted in conjunction with citizenship rights, especially when these citizenship rights are not impossible but very difficult to exercise. It is not only a terribly narrow reading of citizenship rights, but also one that renders them meaningless the moment it cannot be established that a child is in fact obliged to leave the territory.

4.5 Implications of the Diverging Approaches

There are two rather clear and immediately visible issues that arise from both Courts' recent case law and adopted approaches.

Firstly, both the ECtHR and the ECJ have been repeatedly criticized for the unpredictability of the recently applied and developed legal formulas. Even before the ECtHR applied the best interests principle in immigration cases scholars have addressed the issue of legal uncertainty in the ECtHR's application of the best interests principle in family law cases.²⁶⁷ Even though the flexibility and application of the principle on a case-by-case basis, and the way it offers a flexible tool in order to protect the interests of children in numerous situations, can be considered the principle's main strength, it must also be considered a pitfall that judges should be mindful of; there is an inherent risk of indeterminacy, incoherent application and subjective value judgments. Therefore the judges have been called upon to clarify what the relevant factors are in determining the best interests and what weight should be attached to these different factors. The Court's application of the best interests principle in *Nunez* and *Antwi* will likely reinvigorate this call. In both cases the children were about the same age, they had a strong connection with the parent faced with deportation, and in both cases it was established that deportation would not be in the children's best interests. Yet in *Nunez* a two-year re-entry ban was deemed unacceptable and in *Antwi* a five-year re-entry ban was allowed. This raises suspicion of arbitrariness, which is exactly what the Court aims to protect individuals from.

The ECJ has also been subjected to rather severe criticism from scholars and practitioners with regard to the most recent jurisprudence on EU citizenship. The fact that the Court has largely ignored fundamental rights issues when applying citizenship rights has been heavily criticized. Furthermore, the ECJ's judgments in *Zambrano* and *McCarthy* are rather fact-driven, which is perceived as problematic. According to Niamh Nic Shuibhne 'the Court is trying to be both local immigration adjudicator and supranational standard-setter in these cases: but this is not proving to be an effective or appropriate blend of functions and the performance of both is now suffering.'²⁶⁸ She continues to conclude that 'the case law has become so individualistic, so fact specific, as to raise accusations of arbitrariness'.²⁶⁹

Secondly, a very hard line has been drawn between the legal position of children who do and children who do not fall within the scope of EU law. The Court's departure from the cross-border test as the sole test to determine the division of competences with regard to citizenship right is laudable and shows that the phrase 'EU Citizenship is destined to be the fundamental status of nationals of the Member States' is starting to move beyond rhetorical use. The new additional test, which is based purely on the status as citizen of the Union without any reference to future or hypothetical use of the freedom of movement, brings this status a lot closer to the static citizen. However, the current narrow reading of the new doctrine and the Court's focus on 'having to leave to territory' reinforces the problem of reverse discrimination rather than addressing it. Reverse discrimination has been a long standing legal issue and refers to the inequality that arises when 'mobile' EU citizens (or in this case, citizens that fall within

267 Geraldine Van Bueren, *Child Rights in Europe – Convergence and Divergence in Judicial Protection* (Council of Europe Publishing, 2007), p. 37.

268 Niamh Nic Shuibhne. '(Some of) The Kids Are Alright', (2012) 49 *Common Market Law Review*, p. 349-380 at p. 377.

269 *Ibid.*, p. 378.

the scope of Union law) receive a more lenient treatment with regard to family reunification in a Member State in comparison to that State's own nationals (or citizens that fall outside the scope of Union law). This division has arguably farther-reaching consequences for citizen children than it does for adults. Rather unpredictable, and perhaps even random, circumstances will decide whether citizen children seeking family life with a parent fall within the scope of EU law, and thus will be treated as citizens with rights that they derive from that status, or fall outside the scope, which will reduce the value of their nationality to virtually no value at all. The Courts seem to be driven by a desire to provide equality and protection to children, yet somehow this is not what is being achieved in practice. Both Courts have a responsibility in softening the edges of this division.

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Appendix

Convention on the Rights of the Child

Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989

Entry into force 2 September 1990, in accordance with article 49

Preamble

The States Parties to the present Convention,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Bearing in mind that the peoples of the United Nations have, in the Charter, reaffirmed their faith in fundamental human rights and in the dignity and worth of the human person, and have determined to promote social progress and better standards of life in larger freedom,

Recognizing that the United Nations has, in the Universal Declaration of Human Rights and in the International Covenants on Human Rights, proclaimed and agreed that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,

Recalling that, in the Universal Declaration of Human Rights, the United Nations has proclaimed that childhood is entitled to special care and assistance,

Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community,

Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding,

Considering that the child should be fully prepared to live an individual life in society, and brought up in the spirit of the ideals proclaimed in the Charter of the United Na-

tions, and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity,

Bearing in mind that the need to extend particular care to the child has been stated in the Geneva Declaration of the Rights of the Child of 1924 and in the Declaration of the Rights of the Child adopted by the General Assembly on 20 November 1959 and recognized in the Universal Declaration of Human Rights, in the International Covenant on Civil and Political Rights (in particular in articles 23 and 24), in the International Covenant on Economic, Social and Cultural Rights (in particular in article 10) and in the statutes and relevant instruments of specialized agencies and international organizations concerned with the welfare of children,

Bearing in mind that, as indicated in the Declaration of the Rights of the Child, "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth",

Recalling the provisions of the Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally; the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules); and the Declaration on the Protection of Women and Children in Emergency and Armed Conflict, Recognizing that, in all countries in the world, there are children living in exceptionally difficult conditions, and that such children need special consideration,

Taking due account of the importance of the traditions and cultural values of each people for the protection and harmonious development of the child, Recognizing the importance of international co-operation for improving the living conditions of children in every country, in particular in the developing countries,

Have agreed as follows:

PART I

Article 1

For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.

Article 2

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

Article 3

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

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

Article 4

States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

Article 5

States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

Article 6

1. States Parties recognize that every child has the inherent right to life.

2. States Parties shall ensure to the maximum extent possible the survival and development of the child.

Article 7

1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.

2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

Article 8

1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.

2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.

Article 9

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.

3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure

that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.

Article 10

1. In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.

2. A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances personal relations and direct contacts with both parents. Towards that end and in accordance with the obligation of States Parties under article 9, paragraph 1, States Parties shall respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country. The right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary to protect the national security, public order (ordre public), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention.

Article 11

1. States Parties shall take measures to combat the illicit transfer and non-return of children abroad.

2. To this end, States Parties shall promote the conclusion of bilateral or multilateral agreements or accession to existing agreements.

Article 12

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Article 13

1. The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of fron-

APPENDIX

tiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.

2. The exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others; or

(b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

Article 14

1. States Parties shall respect the right of the child to freedom of thought, conscience and religion.

2. States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.

Article 15

1. States Parties recognize the rights of the child to freedom of association and to freedom of peaceful assembly.

2. No restrictions may be placed on the exercise of these rights other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.

Article 16

1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, or correspondence, nor to unlawful attacks on his or her honour and reputation.

2. The child has the right to the protection of the law against such interference or attacks.

Article 17

States Parties recognize the important function performed by the mass media and shall ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health.

To this end, States Parties shall:

- (a) Encourage the mass media to disseminate information and material of social and cultural benefit to the child and in accordance with the spirit of article 29;
- (b) Encourage international co-operation in the production, exchange and dissemination of such information and material from a diversity of cultural, national and international sources;
- (c) Encourage the production and dissemination of children's books;
- (d) Encourage the mass media to have particular regard to the linguistic needs of the child who belongs to a minority group or who is indigenous;
- (e) Encourage the development of appropriate guidelines for the protection of the child from information and material injurious to his or her well-being, bearing in mind the provisions of articles 13 and 18.

Article 18

1. States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.
2. For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.
3. States Parties shall take all appropriate measures to ensure that children of working parents have the right to benefit from child-care services and facilities for which they are eligible.

Article 19

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, in-

APPENDIX

jury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

Article 20

1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.

2. States Parties shall in accordance with their national laws ensure alternative care for such a child.

3. Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

Article 21

States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:

(a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary;

(b) Recognize that inter-country adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin;

(c) Ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;

(d) Take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it;

(e) Promote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.

Article 22

1. States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

2. For this purpose, States Parties shall provide, as they consider appropriate, co-operation in any efforts by the United Nations and other competent intergovernmental organizations or non-governmental organizations co-operating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family. In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason, as set forth in the present Convention.

Article 23

1. States Parties recognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community.

2. States Parties recognize the right of the disabled child to special care and shall encourage and ensure the extension, subject to available resources, to the eligible child and those responsible for his or her care, of assistance for which application is made and which is appropriate to the child's condition and to the circumstances of the parents or others caring for the child.

3. Recognizing the special needs of a disabled child, assistance extended in accordance with paragraph 2 of the present article shall be provided free of charge, whenever possible, taking into account the financial resources of the parents or others caring for the child, and shall be designed to ensure that the disabled child has effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child's achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development

4. States Parties shall promote, in the spirit of international cooperation, the exchange of appropriate information in the field of preventive health care and of medical, psychological and functional treatment of disabled children, including dissemination of and access to information concerning methods of rehabilitation, education and vocational services, with the aim of enabling States Parties to improve their capabilities and skills and to widen their experience in these areas. In this regard, particular account shall be taken of the needs of developing countries.

Article 24

1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.

2. States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures:

(a) To diminish infant and child mortality;

(b) To ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care;

(c) To combat disease and malnutrition, including within the framework of primary health care, through, *inter alia*, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution;

(d) To ensure appropriate pre-natal and post-natal health care for mothers;

(e) To ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of accidents;

(f) To develop preventive health care, guidance for parents and family planning education and services.

3. States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.

4. States Parties undertake to promote and encourage international co-operation with a view to achieving progressively the full realization of the right recognized in the present article. In this regard, particular account shall be taken of the needs of developing countries.

Article 25

States Parties recognize the right of a child who has been placed by the competent authorities for the purposes of care, protection or treatment of his or her physical or mental health, to a periodic review of the treatment provided to the child and all other circumstances relevant to his or her placement.

Article 26

1. States Parties shall recognize for every child the right to benefit from social security, including social insurance, and shall take the necessary measures to achieve the full realization of this right in accordance with their national law.

2. The benefits should, where appropriate, be granted, taking into account the resources and the circumstances of the child and persons having responsibility for the maintenance of the child, as well as any other consideration relevant to an application for benefits made by or on behalf of the child.

Article 27

1. States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.

2. The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development.

3. States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.

4. States Parties shall take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the State Party and from abroad. In particular, where the person having financial responsibility for the child lives in a State different from that of the child, States Parties shall promote the accession to international agreements or the conclusion of such agreements, as well as the making of other appropriate arrangements.

Article 28

1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:

APPENDIX

- (a) Make primary education compulsory and available free to all;
 - (b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;
 - (c) Make higher education accessible to all on the basis of capacity by every appropriate means;
 - (d) Make educational and vocational information and guidance available and accessible to all children;
 - (e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.
2. States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention.
3. States Parties shall promote and encourage international cooperation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries.

Article 29

1. States Parties agree that the education of the child shall be directed to:
- (a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;
 - (b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;
 - (c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;
 - (d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;
 - (e) The development of respect for the natural environment.

2. No part of the present article or article 28 shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principle set forth in paragraph 1 of the present article and to the requirements that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

Article 30

In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.

Article 31

1. States Parties recognize the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts.

2. States Parties shall respect and promote the right of the child to participate fully in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity.

Article 32

1. States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.

2. States Parties shall take legislative, administrative, social and educational measures to ensure the implementation of the present article. To this end, and having regard to the relevant provisions of other international instruments, States Parties shall in particular:

- (a) Provide for a minimum age or minimum ages for admission to employment;
- (b) Provide for appropriate regulation of the hours and conditions of employment;
- (c) Provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present article.

Article 33

States Parties shall take all appropriate measures, including legislative, administrative, social and educational measures, to protect children from the illicit use of narcotic

drugs and psychotropic substances as defined in the relevant international treaties, and to prevent the use of children in the illicit production and trafficking of such substances.

Article 34

States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

- (a) The inducement or coercion of a child to engage in any unlawful sexual activity;
- (b) The exploitative use of children in prostitution or other unlawful sexual practices;
- (c) The exploitative use of children in pornographic performances and materials.

Article 35

States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.

Article 36

States Parties shall protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare.

Article 37

States Parties shall ensure that:

- (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;
- (b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;
- (c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interests not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

Article 38

1. States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.
2. States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.
3. States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest.
4. In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict.

Article 39

States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.

Article 40

1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.
2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:
 - (a) No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed;

APPENDIX

(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:

- (i) To be presumed innocent until proven guilty according to law;
- (ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;
- (iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interests of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;
- (iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;
- (v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;
- (vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used;
- (vii) To have his or her privacy fully respected at all stages of the proceedings.

3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:

- (a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;
- (b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected. 4. A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

Article 41

Nothing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of the child and which may be contained in:

- (a) The law of a State party; or
- (b) International law in force for that State.

PART II**Article 42**

States Parties undertake to make the principles and provisions of the Convention widely known, by appropriate and active means, to adults and children alike.

Article 43

1. For the purpose of examining the progress made by States Parties in achieving the realization of the obligations undertaken in the present Convention, there shall be established a Committee on the Rights of the Child, which shall carry out the functions hereinafter provided.
2. The Committee shall consist of eighteen experts of high moral standing and recognized competence in the field covered by this Convention.^{1/} The members of the Committee shall be elected by States Parties from among their nationals and shall serve in their personal capacity, consideration being given to equitable geographical distribution, as well as to the principal legal systems
3. The members of the Committee shall be elected by secret ballot from a list of persons nominated by States Parties. Each State Party may nominate one person from among its own nationals.
4. The initial election to the Committee shall be held no later than six months after the date of the entry into force of the present Convention and thereafter every second year. At least four months before the date of each election, the Secretary-General of the United Nations shall address a letter to States Parties inviting them to submit their nominations within two months. The Secretary-General shall subsequently prepare a list in alphabetical order of all persons thus nominated, indicating States Parties which have nominated them, and shall submit it to the States Parties to the present Convention.
5. The elections shall be held at meetings of States Parties convened by the Secretary-General at United Nations Headquarters. At those meetings, for which two thirds of States Parties shall constitute a quorum, the persons elected to the Committee shall be

APPENDIX

those who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

6. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if renominated. The term of five of the members elected at the first election shall expire at the end of two years; immediately after the first election, the names of these five members shall be chosen by lot by the Chairman of the meeting.

7. If a member of the Committee dies or resigns or declares that for any other cause he or she can no longer perform the duties of the Committee, the State Party which nominated the member shall appoint another expert from among its nationals to serve for the remainder of the term, subject to the approval of the Committee.

8. The Committee shall establish its own rules of procedure.

9. The Committee shall elect its officers for a period of two years.

10. The meetings of the Committee shall normally be held at United Nations Headquarters or at any other convenient place as determined by the Committee. The Committee shall normally meet annually. The duration of the meetings of the Committee shall be determined, and reviewed, if necessary, by a meeting of the States Parties to the present Convention, subject to the approval of the General Assembly.

11. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Convention.

12. With the approval of the General Assembly, the members of the Committee established under the present Convention shall receive emoluments from United Nations resources on such terms and conditions as the Assembly may decide.

Article 44

1. States Parties undertake to submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made on the enjoyment of those rights

(a) Within two years of the entry into force of the Convention for the State Party concerned;

(b) Thereafter every five years.

2. Reports made under the present article shall indicate factors and difficulties, if any, affecting the degree of fulfilment of the obligations under the present Convention. Reports shall also contain sufficient information to provide the Committee with a

comprehensive understanding of the implementation of the Convention in the country concerned.

3. A State Party which has submitted a comprehensive initial report to the Committee need not, in its subsequent reports submitted in accordance with paragraph 1 (b) of the present article, repeat basic information previously provided.

4. The Committee may request from States Parties further information relevant to the implementation of the Convention.

5. The Committee shall submit to the General Assembly, through the Economic and Social Council, every two years, reports on its activities.

6. States Parties shall make their reports widely available to the public in their own countries.

Article 45

In order to foster the effective implementation of the Convention and to encourage international co-operation in the field covered by the Convention:

(a) The specialized agencies, the United Nations Children's Fund, and other United Nations organs shall be entitled to be represented at the consideration of the implementation of such provisions of the present Convention as fall within the scope of their mandate. The Committee may invite the specialized agencies, the United Nations Children's Fund and other competent bodies as it may consider appropriate to provide expert advice on the implementation of the Convention in areas falling within the scope of their respective mandates. The Committee may invite the specialized agencies, the United Nations Children's Fund, and other United Nations organs to submit reports on the implementation of the Convention in areas falling within the scope of their activities;

(b) The Committee shall transmit, as it may consider appropriate, to the specialized agencies, the United Nations Children's Fund and other competent bodies, any reports from States Parties that contain a request, or indicate a need, for technical advice or assistance, along with the Committee's observations and suggestions, if any, on these requests or indications;

(c) The Committee may recommend to the General Assembly to request the Secretary-General to undertake on its behalf studies on specific issues relating to the rights of the child;

(d) The Committee may make suggestions and general recommendations based on information received pursuant to articles 44 and 45 of the present Convention. Such suggestions and general recommendations shall be transmitted to any State Party con-

cerned and reported to the General Assembly, together with comments, if any, from States Parties.

PART III

Article 46

The present Convention shall be open for signature by all States.

Article 47

The present Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article 48

The present Convention shall remain open for accession by any State. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 49

1. The present Convention shall enter into force on the thirtieth day following the date of deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.

2. For each State ratifying or acceding to the Convention after the deposit of the twentieth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after the deposit by such State of its instrument of ratification or accession.

Article 50

1. Any State Party may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to States Parties, with a request that they indicate whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that, within four months from the date of such communication, at least one third of the States Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of States Parties present and voting at the conference shall be submitted to the General Assembly for approval.

2. An amendment adopted in accordance with paragraph 1 of the present article shall enter into force when it has been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of States Parties.

3. When an amendment enters into force, it shall be binding on those States Parties which have accepted it, other States Parties still being bound by the provisions of the present Convention and any earlier amendments which they have accepted.

Article 51

1. The Secretary-General of the United Nations shall receive and circulate to all States the text of reservations made by States at the time of ratification or accession.

2. A reservation incompatible with the object and purpose of the present Convention shall not be permitted.

3. Reservations may be withdrawn at any time by notification to that effect addressed to the Secretary-General of the United Nations, who shall then inform all States. Such notification shall take effect on the date on which it is received by the Secretary-General

Article 52

A State Party may denounce the present Convention by written notification to the Secretary-General of the United Nations. Denunciation becomes effective one year after the date of receipt of the notification by the Secretary-General.

Article 53

The Secretary-General of the United Nations is designated as the depositary of the present Convention.

Article 54

The original of the present Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations. In witness thereof the undersigned plenipotentiaries, being duly authorized thereto by their respective Governments, have signed the present Convention.

1/ The General Assembly, in its resolution 50/155 of 21 December 1995 , approved the amendment to article 43, paragraph 2, of the Convention on the Rights of the Child, replacing the word “ten” with the word “eighteen”. The amendment entered into force on 18 November 2002 when it had been accepted by a two-thirds majority of the States parties (128 out of 191).