

Family Reunification Claims of Refugee Children in the UK: Exploring the Potential of Article 8 ECHR Interpreted in line with the Best Interests of the Child

Abstract

This article examines family reunification claims of refugee children in the UK. It argues that international law, specifically Article 8 of the European Convention of Human Rights (ECHR), requires the articulation of a distinctive child-centred approach to family reunification and a presumption against family separation of refugee children. This interpretation of Article 8 of the ECHR is guided by the best interests of the child principle, which should be a ‘paramount’ consideration when assessing the proportionality of interference with the right to family life of children seeking asylum, thereby allowing entry of the child’s family members into the territory of a state. This paper asserts that Article 8 may serve as a vehicle for change in facilitating the reunion of these children with their families in the UK.

Introduction

Family reunification¹ is a crucial aspect of the refugee journey, particularly for children who have been forcibly separated from their families due to conflict, persecution, or other humanitarian crises. The separation from family members during forced displacement and flight can lead to devastating consequences for the well-being of refugees and their ability to integrate into the new host community.² It is not surprising that when asked about their first priority upon reaching safety, refugees almost invariably express their primary concern as being reunited with the family members they were forced to leave behind.³

¹ For this article, family reunification refers to addressing the separation of a child and their family members during migration by granting the right of entry to a family member. It may also encompass preserving family life, such as renewing residence permits, readmitting family members who temporarily left, or preventing removals. However, the focus here is on the entry of a family member to join a refugee child or *vice versa*.

² Ruth Marsden, ‘Voices of Strength and Pain: Impacts of Separation, Loss and Trauma on the Health and Wellbeing of Reuniting Refugee Families’ (British Red Cross 2016) <available at www.redcross.org.uk/-/media/documents/about-us/research-publications> accessed 19 May 2024.

³ Cathryn Costello, Kees Groenendijk, and Louise H Storgaard, ‘Realising the Right to Family Reunification of Refugees in Europe’ (Council Europe 2017) 12.

The importance of family as a fundamental social group is highlighted in most, if not all,⁴ international human rights instruments. For example, United Nations Convention on the Rights of the Child (CRC) emphasises 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’.⁵

The UK is the party to international treaties such as the CRC and the European Convention on Human Rights (ECHR).⁶ The CRC protects a child’s right to know and be cared for by their parents, to an identity, and to maintain family relations under Articles 7 and 8, as well as their right to privacy and family under Article 16.⁷ Additionally, Articles 9 and 10 of the Convention safeguard a child’s right to avoid separation from their parents (unless necessary, in their best interests) and to maintain contact in the event of separation.⁸ Although the ECHR does not explicitly guarantee rights to children, Article 8 of the ECHR protects the right to respect for private and family life of anyone. While the UK’s obligations under the CRC have not been directly incorporated into UK law, the ECHR is incorporated into domestic British law through the Human Rights Act 1998.⁹ Therefore, this paper focuses on the ECHR and its Article 8, and examines how it should integrate more specific provisions for children from the CRC in accordance with the rules of treaty interpretation set out by the Vienna Convention on the Law of Treaties (VCLT),¹⁰ which also reflect customary law.¹¹

As a general rule, the existing laws on refugee family reunification in the UK prohibit unaccompanied child refugees from being reunited with their families, unless in very

⁴ The Refugee Convention does not explicitly address family unity or family life, and the term "family" is mentioned only indirectly in Article 12(2). Family unity was discussed in the non-binding Final Act of the Refugee Convention. Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention); United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, ‘Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons’, UN doc A/CONF.2/108/Rev.1 (26 November 1952).

⁵ Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC), preamble. See also Recommendation N° R (99) 23 of the Committee of Ministers to Member States on Family Reunion for Refugees and Other Persons in Need of International Protection, Council of Europe, preamble.

⁶ Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 222 (European Convention on Human Rights, ECHR).

⁷ John Tobin and Sarah M Field, ‘Art. 16 The Right to Protection of Privacy, Family Home, Correspondence, Honour, and Reputation’, in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (OUP 2019) 553.

⁸ Yulia Ioffe, ‘The Right to Family Reunification of Children Seeking International Protection under the Convention on the Rights of the Child: Misplaced Reliance on *Travaux*?’ 34(2) (2022) IJRL 215.

⁹ Human Rights Act, 1998, c. 42.

¹⁰ Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT) arts 31–33.

¹¹ On the customary nature of the rules of interpretation, see: *Oil Platforms (Preliminary Objections) (Islamic Republic of Iran v United States of America)*, Judgment, ICJ Reports 1996 [23], and others.

exceptional circumstances or for compelling compassionate reasons. Unaccompanied refugee children do not have the right to sponsor their parents or siblings to join them under the refugee family reunion (RFR) rules.¹² Parents who are refugees or beneficiaries of humanitarian protection can apply for family reunification but must meet the strict criteria and requirements imposed by the UK immigration rules. As discussed in Part 3 of this paper, there are two remaining routes that child refugees can pursue to be reunified with their parents: based on Article 8 of the ECHR in exceptional circumstances due to the unjustifiably harsh consequences,¹³ or based on compelling compassionate factors warranting a grant of leave ‘outside the Rules’ (LOTR).¹⁴ In my view, practitioners representing refugee children in family reunification proceedings should argue that the best interests of the child should be a ‘paramount’ rather than just a ‘primary’ consideration in family reunification cases under these latter two routes. This is required by a proper interpretation of Article 8 of the ECHR, which incorporates the standard of the child’s best interest (‘paramount’) in Article 9 of the CRC in line with Article 31(3)(c) of the VCLT.¹⁵ Practitioners should also continue advocating for the government to grant unaccompanied refugee children in the UK the right to sponsor their parents to join them under the RFR rules, which currently only allow sponsorship of partners and children. At the very least, a child-centred approach to interpreting Article 8 of the ECHR demands relaxing the prohibitive evidential thresholds and reducing uncertain and lengthy waits for decisions. Part 2 examines Article 8 of the ECHR and its application to family reunification in the migration context, particularly its ‘elsewhere’ approach in assessing proportionality. It argues that if Article 8 of the ECHR is interpreted according to the VCLT rules and properly integrates the correct standard of the best interest of the child principle set out in Article 9 of the CRC, it mandates a distinctive child-centred approach to family reunification and a presumption against the separation of refugee children from their families. Part 3 discusses various legal channels through which family reunification for refugee children in the UK can be pursued and analyses their compatibility with Article 8 of the ECHR. Part 4 concludes by recommending to practitioners the use of Article 8 of the ECHR as a vehicle for change in facilitating the reunion of refugee children with their families in the UK.

¹² Appendix Family Reunion (Protection) 4.1, 5.1, 6.1.

¹³ Ibid, 7.1. Immigration Rules Appendix Family Members GEN. 3.2.

¹⁴ Home Office, ‘Leave Outside the Immigration Rules: Version 3.0’ (LOTR Guidance) (29 August 2023).

¹⁵ ‘There shall be taken into account, together with the context... (c) any relevant rules of international law applicable in the relations between the parties’. VCLT, art 31 (3) (c).

2. Article 8 of the ECHR and Child-Centred Approach to Family Reunification

(a) Article 8 of the ECHR

Although the ECHR does not explicitly guarantee rights to family reunification to children, refugees, or anyone else beyond the general protection of the right to family life,¹⁶ some commentators argue optimistically that the ECtHR's Article 8 jurisprudence, when applied to refugees, effectively establishes a right to family reunification for recognised refugees.¹⁷ More broadly, in the migration context, Article 8 has been invoked regularly with varying success in cases where children were separated from their parents.¹⁸ Some scholars describe the ECtHR's case law on this matter as inconsistent and unsettled.¹⁹ Other authors assert that family reunification is not a right under the ECHR,²⁰ and that, with extremely rare exceptions, the court generally disregards the suffering of migrant families.²¹ In this article, I argue that in family reunification cases involving children, particularly the ones with refugee status, there is reason for some optimism due to the ECtHR's trend of integrating the best interests of the child principle.

¹⁶ The right to respect for family life is well-established in international human rights treaties, including the ECHR, but family reunification is not explicitly recognised as a separate right. Scholars like Rohan suggest it derives from the broader right to family life, which is not absolute. The prevailing view is that there is no explicit right to family reunification under international law or an obligation for states to allow it, with the possible exception of Article 9 of the CRC, as discussed further in this section. Mark Rohan, 'Family Reunification Rights: A Basis in the European Court of Human Rights' Family Reunification Jurisprudence' (2015) 15 *Chi J Int'l L* 347, 352. For the overview, see Ioffe (n 8) 218–24.

¹⁷ Rohan (n 16) 370; Cathryn Costello, Kees Groenendijk, and Louise H Storgaard, 'Realising the Right to Family Reunification of Refugees in Europe' (Council Europe 2017) 21–2. See also Daniel Thym, 'Respect for Private and Family Life under Article 8 ECHR in Immigration Cases: A Human Right to Regularize Illegal Stay?' 57(1) (2008) *ICLQ* 87, 103.

¹⁸ Cathryn Costello, *The Human Rights of Migrants and Refugees in European Law* (OUP 2015) 112; Ursula Kilkelly, *The Child and the European Convention on Human Rights* (Ashgate 1999) 214.

¹⁹ Ciara Smyth, *The Common European Asylum System and the Rights of the Child. An Exploration of Meaning and Compliance* (BOXPRESS 2013) 179; Thomas Spijkerboer, 'Structural Instability: Strasbourg Case Law on Children's Family Reunion' (2009) 11(3) *EJML* 271–93; Helena Wray, *Article 8 ECHR, Family Reunification and the UK's Supreme Court: Family Matters?* (Hart Publishing 2023) 44.

²⁰ See e.g. Kay Hailbronner and Daniel Thym, 'Case C-34/09, Gerardo Ruiz Zabran v. Office National de L'Emploi (ONEm), Judgment of the Court of Justice (Grand Chamber) of 8 March 2011' 48(4) (2011) *Common Market Law Review* 1253, 1261.

²¹ Marie-Bénédicte Dembour, *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint* (OUP 2015) 97, 122. See also Frances Nicholson, 'The Right to Family Life and Family Unity of Refugees and Others in Need of International Protection and the Family Definition Applied' 2018 UNHCR Legal and Protection Policy Research Series 15; Hélène Lambert, 'The European Court of Human Rights and the Right of Refugees and Other Persons in Need of Family Protection' (1999) 11 *IJRL* 427, 438–9; Marie-Bénédicte Dembour, 'The Migrant Case Law of the European Court of Human Rights: Critique and Way Forward', in Başak Çalı, Ledi Bianku, Iulia Motoc (eds), *Migration and the European Convention on Human Rights* (OUP 2021) 19.

The right to family life is not guaranteed in Article 8 of the ECHR in absolute terms. Article 8 includes a specific limitation clause, explicitly allowing restrictions on the right to family in the interest of public order or similar purposes.²² Central to the obligatory nature of Article 8 is the word ‘respect’, which encompasses both positive and negative dimensions.²³ The state must not only abstain from interfering with private and family life but also protect individuals from infringements of their right to private and family life by others.²⁴ Article 8(2) authorises interference with the rights to private and family life, but such interference must be ‘in accordance with the law’ and ‘necessary in a democratic society’ to achieve a legitimate purpose.

The goal of the third component of the analysis to determine whether the authorities have struck ‘a fair balance between the competing interests of the individual and of society as a whole’.²⁵ This is the most subjective aspect of applying Article 8, involving subtle distinctions about the proportionality of the measures taken by the state that limit or restrict human rights.²⁶ The court frequently begins its consideration of this element by questioning whether the interference responds to a ‘pressing social need’, i.e. establishing necessity. Additionally, the court insists that the measure in question be ‘relevant and sufficient’. When considering the positive dimension of the right, meaning the state's obligation to enforce the right, the court often has to balance this against the rights of others. If less severe measures could achieve the same objective, there is likely to be a proportionality issue.²⁷ However, in the cases that concern family migration, the ECtHR uses a multi-factor balancing test, so-called ‘elsewhere’ approach discussed below, instead of its usual proportionality assessment.²⁸ In this approach, state sovereignty and the public interest in immigration control are presumed to be constant and are not individually examined in each case.²⁹ The ECtHR does not consider the necessity of not admitting the migrants or explore less severe measures that could achieve a legitimate purpose. The presumption inherent in the ‘elsewhere’ approach is that the family life of migrants must be established ‘elsewhere’, unless there are ‘insurmountable’ circumstances

²² William A Schabas, *The European Convention on Human Rights: A Commentary* (OUP 2015) 402; Mark E. Villiger, *Handbook on the European Convention on Human Rights* (Brill 2022) 458; David Harris et al, *Harris, O’Boyle, and Warbrick: Law of the European Convention on Human Rights* (5th edn, OUP 2023)

²³ Schabas (n 22) 368.

²⁴ *Söderman v Sweden* (2014) 58 EHRR 36 [78]; *Tavlı v Turkey* [2006] ECHR 970 [28].

²⁵ *Keegan v Ireland* (1994) ECHR Series A no 291-A [49].

²⁶ Schabas (n 22) 406.

²⁷ *Ibid.*

²⁸ Harris et al (n 22) 559.

²⁹ Helena Wray, ‘Family Reunification and Article 8 ECHR: Three Steps towards a Fairer Balance’ EHRLR (forthcoming) 1, 17–18.

making it absolutely impossible for the applicants to do so.³⁰ The ‘elsewhere’ approach thus reflects the court’s default position of state sovereignty in migration cases, which grants states the power to exclude aliens save for limited exceptional circumstances (refugees and children).³¹ Scholars, particularly Dembour, have criticised this approach, arguing that it results in an inversion of the typical human rights stance, turning the protection of human rights into an exception to state sovereignty—a phenomenon termed the ‘Strasbourg reversal’.³² However, one possible explanation for the court’s approach is its reliance on the intentions of the state parties to the ECHR, which remain central to the interpretation of international conventions.³³ When the ECHR was drafted, the idea of including specific guarantees for migrants—such as rights to nationality, asylum, or protection against removal without due process—was explicitly rejected.³⁴ Therefore, the assumption was that the state has the primary responsibility to provide the protection of human rights enshrined in the ECHR to its own citizens, particularly where positive obligations are involved, which also justifies the margin of appreciation.³⁵ Additionally, since Article 8 explicitly allows restrictions on the right to family life in the public interest, it is difficult to argue against the significant burden on taxpayers that family reunification of non-citizens can bring, thus creating a strong presumption that immigration control is generally in the public interest. The ECtHR also does not necessarily deny the right to family life for migrants by utilising the ‘elsewhere’ approach, as the family life can still be maintained in the migrant’s country of citizenship. However, if the migrant is a refugee, the ECtHR considers this an exception and grants the right to family reunification in the country of asylum, as discussed below.

(b) The ECtHR’s Interpretation of Family Reunification under Article 8

As a general stance on immigration and expulsion, the ECtHR has confirmed that a state is entitled, as a matter of international law and subject to its treaty obligations, to control the entry and residence of aliens within its territory.³⁶ A state’s right to control the entry and residence of aliens applies regardless of whether an alien entered the host country as an adult or at a

³⁰ See Dembour, ‘When Humans Become Migrants’ (n 21) 127.

³¹ Ibid 128.

³² Dembour, ‘When Humans Become Migrants’ (n 21) 118–9; Dembour, ‘The Migrant Case Law’ (n 21) 29.

³³ VCLT, art 31.

³⁴ Dembour, ‘The Migrant Case Law’ (n 21) 29.

³⁵ Thym (n 17) 104; Wray, ‘Family Reunification’ (n 29) 9.

³⁶ *Abdulaziz, Cabales, and Balkandali v UK* (1985) 7 EHRR 471 [67]; *Jeunesse v the Netherlands* (2014) 60 EHRR 789 [100]; *M.A. v Denmark* (2021) ECHR 628 [131]; *B.F. and Others v Switzerland* App no 13258/18 (ECtHR, 4 October 2023) [88]; *Dabo v Sweden* App no 12510/18 (ECtHR, 18 January 2024) [88].

young age.³⁷ According to the court, the ECHR does not guarantee a foreign national the right to enter or reside in a particular country. Therefore, domestic authorities are not obligated to allow an alien to settle in their country.³⁸ Article 8 alone does not impose a general obligation on a state to respect a married couple's choice of country for their matrimonial residence or to authorise family reunification within its territory.³⁹ Thus, the ECtHR typically finds that refusing admission is the state's permitted default position. Refusal to admit, especially spouses, is considered an interference with human rights only in exceptional cases where families cannot relocate together to enjoy family life elsewhere.⁴⁰

(i) *Abdulaziz, Cabales, and Balkandali v UK*

This landmark case set the standard for assessing Article 8 violations in family reunification scenarios.⁴¹ While the case focused on the reunification of spouses of lawfully resident aliens, it established principles that have since been applied to cases involving children and refugees.⁴² The ECtHR recognised that Article 8 applies to migration situations and encompasses both negative obligations (non-interference) and positive obligations to ensure respect for family life. However, states retain a wide margin of appreciation to balance immigration control with individual rights.⁴³

The court introduced a two-pronged test for assessing positive obligations: (i) the existing or intended family life; and (ii) obstacles preventing the establishment of family life in another country.⁴⁴ This balancing test, known as the 'elsewhere' approach, weighs the state's migration interests against the applicant's difficulties in establishing family life elsewhere.⁴⁵ The court emphasised state sovereignty in migration control and declined to create exceptions for vulnerable groups such as refugees or children.⁴⁶ This approach is not necessarily

³⁷ *Üner v the Netherlands* (2007) 45 EHRR 14 [54]–[60].

³⁸ *Jeunesse* (n 36) [103]. See generally ECtHR, 'Guide on Article 8 of the European Convention on Human Rights' (31 August 2022).

³⁹ *Jeunesse* (n 36) [107]; *Biao v Denmark* (2017) 64 EHRR 1 [117].

⁴⁰ *Costello* (n 18) 113; *Dembour*, 'When Humans Become Migrants' (n 21) 3.

⁴¹ *Abdulaziz* (n 36). See also Ursula Kilkelly, *The Right to Respect for Private and Family Life: A Guide to the Implementation of Article 8 of the European Convention on Human Rights* (Council of Europe, Human Rights Handbooks Series 2003) 57.

⁴² *Gül v Switzerland* (1996) 22 EHRR 93; *Tuquabo-Tekle v the Netherlands* (2006) 1 FLR 798; *Sen v the Netherlands* (2003) 36 EHRR 7; *Ahmut v the Netherlands* (1996) 24 EHRR 62.

⁴³ *Abdulaziz* (n 36) [59], [67].

⁴⁴ *Ibid* [68]; *Rohan* (n 17) 360.

⁴⁵ *Lambert* (n 21) 427, 440–1.

⁴⁶ However, the court previously defined asylum seekers (and presumably also refugees) as members of 'a particularly underprivileged and vulnerable population group' deserving special protection. *M.S.S. v Belgium and Greece* (2011) 53 EHRR 2 [251]. See also Lourdes Peroni and Alexandra Timmer, 'Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law' (2013) 11 ICON 1056, 1057, 1068–9.

inconsistent with the CRC or the Refugee Convention, if these instruments are taken into account in each relevant case in accordance with Article 31(3)(c) of the VCLT.

(ii) *Gül v Switzerland*

The *Gül* case expanded the ‘elsewhere’ approach, imposing stringent requirements for proving obstacles to family life outside the host state.⁴⁷ The court also introduced the idea that separation caused by voluntary actions of the applicant may limit claims under Article 8.⁴⁸

The case involved a rejected asylum seeker and his wife, who had received residence permits in Switzerland, seeking to reunite with their child left behind in Turkey.⁴⁹ The ECtHR ruled that the obstacles to family life in Turkey were insufficient and found the separation largely self-inflicted, as the father had voluntarily left Turkey without proving persecution.⁵⁰ Despite the father’s alleged political persecution and the mother’s precarious health, the court concluded that family life could reasonably be pursued in Turkey, and no Article 8 violation occurred.⁵¹ The court did not assess the circumstances of the children or their best interests, assuming instead that the child left behind had strong cultural and linguistic ties to Turkey, making family life there feasible, if their parents relocated back to the country — something that the court considered reasonable.

(iii) *Tuquabo-Tekle v the Netherlands*

In contrast to *Gül*, the court found a violation of Article 8 in this case.⁵² A mother, a rejected asylum seeker from Eritrea, sought to reunite with her minor daughter left behind in Eritrea. The mother and her new family, all Dutch citizens, argued that family reunification was essential due to the daughter’s dependency and the family’s established life in the Netherlands.

The court applied the ‘elsewhere’ approach but considered the specific circumstances of the child, including her age, dependency, and precarious situation in Eritrea.⁵³ Although the ECtHR did not conduct a formal best interests assessment, it displayed greater sensitivity to the child’s needs and indicated a shift toward recognising the rights of both those inside the

⁴⁷ See e.g. Fatima Khan, ‘Reunification of the Refugee Family in South Africa: A Forgotten Human Right?’ (2011) 28 *Refuge* 77, 82; Costello (n 18) 124.

⁴⁸ See Hedi Viterbo and Yulia Ioffe, ‘No Refuge from Childhood: How Child Protection Harms Refugees’ (2024) *EJIL* 1, 25.

⁴⁹ *Gül* (n 42) [11].

⁵⁰ *Ibid* [41].

⁵¹ *Ibid*.

⁵² *Tuquabo-Tekle* (n 42).

⁵³ *Ibid* [44].

state ('insiders' or 'sponsors') and those seeking entry.⁵⁴ This marked a step toward a more child-centred approach to family reunification, but the court clarified that this decision did not indicate a new legal standard.⁵⁵

(iv) *Mugenzi v France* and *Tanda-Muzinga v France*

These cases involved recognised refugees who sought to reunite with children left behind.⁵⁶ Despite recognising the vulnerabilities of refugees and children, the ECtHR applied the 'elsewhere' approach without carving out explicit exceptions for these groups. Both cases revolved around visa refusals due to authentication issues with birth certificates.

The court reaffirmed that Article 8 does not create a general obligation for states to authorize family reunification but acknowledged refugees' special procedural guarantees.⁵⁷ It found that France failed to fulfil its positive obligation to respect family life by processing visa applications negligently.⁵⁸ The court emphasised the importance of procedural guarantees and the child's best interests, stating that these must be integral to the proportionality analysis under Article 8.⁵⁹

The decisions marked significant progress by emphasising the best interests of the child as a critical factor in Article 8 cases involving refugee children. However, the 'elsewhere' approach continued to dominate, with the court balancing the applicants' circumstances against the state's immigration policies.

(v) *M.A. v Denmark*

The Grand Chamber of the ECtHR provided the most recent guidance on the 'elsewhere' approach in this 2021 case,⁶⁰ although the cases did not involve children. It concerned a Syrian

⁵⁴ For the further discussion on the concept of 'insider' or 'sponsor' and their 'insider privilege' to be joined by their family, see Costello (n 18) 106; Joseph H Carens, 'Who Should Get In? The Ethics of Immigration Admissions' (2003) 17(1) *Ethics and International Affairs* 95, 96; Betty de Hart, 'Love Thy Neighbour: Family Reunification and the Rights of Insiders' (2009) 11 *EJML* 235.

⁵⁵ *Tuquabo-Tekle* (n 42) [50]; Dembour, 'When Humans Become Migrants' (n 21) 121.

⁵⁶ *Mugenzi v France* (2014) ECHR 752 and *Tanda-Muzinga v France* (2014) ECHR 1047. The case *Longue and Others v France*, which addressed restrictions on family reunification procedures, involved a lawful resident of France rather than a recognized refugee. Consequently, it has not been analysed in this context. *Longue v France* (2014) ECHR 1047.

⁵⁷ *Mugenzi* (n 56) [54]; *Tanda-Muzinga* (n 56) [75]. See also Réka Friedery, 'Family Reunification in the Framework of the Council of Europe and in the Practice of the ECtHR' in Réka Friedery, Luigino Manca, and Ralf Roßkopf (eds), *Family Reunification: International, European and National Perspectives* (Berliner Wissenschafts-Verlag 2018) 43.

⁵⁸ *Mugenzi* (n 56) [52]; *Tanda-Muzinga* (n 56) [73].

⁵⁹ *Mugenzi* (n 56) [45]; *Tanda-Muzinga* (n 56) [67].

⁶⁰ The standard from *M.A. v Denmark* has been reiterated in the subsequent cases, including in *B.F. and Others v Switzerland* (n 36) and *Dabo v Sweden* (2024) ECHR 30.

national with temporary subsidiary protection in Denmark, who was subjected to a statutory three-year waiting period for family reunification. The court found that the waiting period violated Article 8 because the authorities failed to adequately balance the applicant's interest in family reunification against the state's interest in immigration control.⁶¹

In relation to the 'elsewhere' approach, the court outlined factors reducing the likelihood of an Article 8 violation:⁶² (i) Family life was established with the knowledge that the immigration status of one party would make family life within the state precarious from the beginning;⁶³ (ii) The sponsor or applicant has limited ties to the host country, often due to a short stay or illegal residence;⁶⁴ (iii) No insurmountable obstacles existed to living in another country;⁶⁵ (iv) The sponsor lacked sufficient resources to support the family. Conversely, factors increasing the likelihood of finding a violation included:⁶⁶ (i) The sponsor or applicant has a settled status in or strong ties to the host country; (ii) Family life was established when there was already a residential status; (iii) *Children are involved*; (iv) Significant or insurmountable obstacles to living in the country of origin.

The court emphasised the importance of the child's best interests,⁶⁷ referencing the CRC's principle that children's best interests must be a 'primary' consideration.⁶⁸ Although not decisive, these interests are afforded significant weight in the proportionality analysis.⁶⁹ The court's incorporation of the Article 3 CRC standard of the child's best interests into Article 8 has been the basis for most family reunification violation findings in recent years,⁷⁰ but child's interests have not always prevailed.

⁶¹ *M.A. v Denmark* (n 36) [194].

⁶² *Ibid* [134].

⁶³ Examples include: *Omorie v Norway* (2008) EHRR 761 [61]: A rejected asylum seeker, knowing his illegal status and lack of prospects for leave to remain, married a citizen of the host country; *Aponte v The Netherlands* (2011) ECHR1850 [59]: An applicant with an undisclosed criminal record, lacking a residence permit, married a citizen, started a family, and gave birth to a child, despite her precarious immigration situation. For more detail, see Wray, who describes this criterion—failure or inability to comply with immigration controls, making a claim unlikely to succeed—as the precariousness principle. Wray, 'Family Reunification' (n 29) 15.

⁶⁴ So far, the court has not found an obligation on the part of the state to grant family reunification to an alien who only had a short-term or temporary residence permit and whose family member had not entered the host country. *M.A. v Denmark* (n 36) [134 (ii)].

⁶⁵ The cases cited in support of this statement pertain to rejected asylum seekers, holders of residence permits on humanitarian grounds, and citizens, rather than refugees or holders of subsidiary (complementary) protection. For more on 'insurmountable obstacles', see Mark Klaassen, 'Between Facts and Norms: Testing Compliance with Article 8 ECHR in Immigration Cases,' 37(2) (2019) NQHR 157, 164–5.

⁶⁶ *M.A. v Denmark* (n 36) [135].

⁶⁷ *Ibid* [133] (emphasis added).

⁶⁸ *Jeunesse* (n 36) [109], referring to: *Tuquabo-Tekle* (n 42) [44]; *Popov v France* (2016) 63 EHRR 8 [139]–[140]; *Neulinger and Shuruk v Switzerland* (2012) 54 EHRR 31 [135]; and *X v Latvia* [GC] App no 27853/09 (ECtHR 2013) [96].

⁶⁹ Article 3 of the CRC mandates that the best interests of the child be a primary consideration in all actions affecting them. CRC, art 3.

⁷⁰ Wray (n 59) 21.

(c) ‘Elsewhere’ Approach Integrating the Best Interests of the Child

The ECtHR’s case law, as discussed above, indicates that the CRC and the child’s best interests principle are increasingly influencing the court’s interpretation of the right to family reunification for refugee children. The court’s interpretation of family reunification has gradually evolved to include an assessment of the best interests of the child, which was notably absent in earlier cases.

The court has historically taken into account international treaties, particularly the CRC, when examining the issue of the best interests of the child.⁷¹ I argue that in family migration cases the child’s best interests formulation should be taken from Article 9 of the CRC that deals specifically with the question of family separation,⁷² and not Article 3 of the CRC that includes a general iteration of best interests.

While the most comprehensive definition of the child’s best interests is contained in Article 3 of the CRC,⁷³ other formulations of the child’s best interests are also used in specific articles of the CRC,⁷⁴ including indeed in Article 9. Article 9 of the CRC imposes a higher standard of ‘paramountcy’ of the best interests of the child as opposed to Article 3 of the CRC, which prescribes a lower standard of ‘primacy’.⁷⁵ Article 9 of the CRC is more precise than Article 3 in its content and purpose.⁷⁶

I explore all textual ambiguities of Articles 9 (and 10) of the CRC elsewhere,⁷⁷ but for this article, I will briefly address the main issues. The phrase ‘shall ensure’ in Article 9(1) of the CRC imposes an ‘obligation of result’, on states, requiring them to take proactive measures to safeguard children's enjoyment of their rights. This includes positive duties to maintain and facilitate family unity, even when family separation is not caused by the state (e.g. in migration scenarios). This obligation is mandatory, leaving no room for discretion or exceptions, and

⁷¹ *Popov* (n 68) [116].

⁷² This position is confirmed by the CRC Committee. See CRC Committee, ‘General Comment No 6: Treatment of Unaccompanied and Separated Children Outside Their Country of Origin’, UN Doc CRC/GC/2005/6 (2005) [81]–[82]; CRC Committee, ‘General Comment No 14: On the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (art 3, para 1)’, UN doc CRC/C/GC/14 (29 May 2013) [3].

⁷³ CRC art 3 (1). See also Smyth (n 19) 176; Ciara Smyth, ‘Towards a Complete Prohibition on the Immigration Detention of Children’ (2019) 19 HRL Rev 1, 30.

⁷⁴ Philip Alston, ‘The Best Interests Principle: Towards A Reconciliation of Culture and Human Rights’ (1994) 8 IJLF 1, 13.

⁷⁵ John Tobin and Judy Cashmore, ‘Article 9: The Right Not To Be Separated from Parents’ in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (OUP 2019) 319; Eliahu F Abram, ‘The Child’s Right to Family Unity in International Immigration Law’ (1995) 17 Law and Policy 397, 418–9.

⁷⁶ Ursula Kilkelly, ‘The CRC in Litigation under the ECHR’ in Ton Liefaard and Jaap Doek (eds), *Litigating the Rights of the Child: The UN Convention on the Rights of the Child in Domestic and International Jurisprudence* (Dordrecht 2015) 197.

⁷⁷ Ioffe (n 8) 224–39.

requires states to take necessary measures to prevent, remedy, and reverse separation. The CRC Committee, a body monitoring the implementation of the CRC, confirms this interpretation of Article 9(1), emphasising that states must take actions to ensure and facilitate family unity, including reuniting children with their parents when separated, even when separation results from immigration enforcement.⁷⁸

Article 9 is based on the presumption that family separation is against the best interests of the child (using the imperative formula: ‘shall not be separated’). Therefore, the second sentence of Article 9(1) of the CRC (‘except when ... such separation is necessary for the best interests of the child’) allows for the separation of a child from their parents only when it is in the child’s best interests, such as cases of abuse or neglect by the family towards the child.⁷⁹ This standard equally applies to refugee children due to the CRC’s non-discrimination provision (Article 2), with no indication in the text of Article 9 that excludes refugee children from its personal scope.⁸⁰ This means that separation must be justified solely by the child’s best interests and cannot be based on state interests, such as migration control. Thus, according to Article 9, no public interest can justify the denial of family unity; only the private interest of a refugee child can do so.⁸¹ This interpretation is endorsed by the CRC Committee.⁸²

The rules of treaty interpretation also require that Article 9 be read in the context of the CRC as a whole, including Article 7(1), which provides that the child has the right to know and be cared for by their parents as far as possible, and Article 8(1), which establishes the child’s right to preserve their identity without unlawful interference, including family relations. This holistic reading of the CRC supports the view that Article 9 sets a high threshold for applying the best interests principle in cases of family separation by emphasising that family separation must be ‘necessary’ and that preserving family unity is generally in the child’s best interests. As such, the interests of the child are given ‘paramount’ consideration, meaning they carry the

⁷⁸ See e.g. CRC Committee, ‘General Comment No 6: Treatment of Unaccompanied and Separated Children Outside Their Country of Origin’, UN doc CRC/GC/2005/6 (1 September 2005) [81], [83].

⁷⁹ See Sharon Detrick, *A Commentary on the United Nations Convention on the Rights of the Child* (Brill 1999) 168; Wouter Vandenhoe, Gamze Erdem Türkelli, and Sara Lembrechts (eds), *Children’s Rights: A Commentary on the Convention on the Rights of the Child and Its Protocols* (Elgar 2019) 117. See UK Secretary of State, Guidance on ‘Children’s Asylum Claims’ (4th version, 31 December 2020) 70–1.

⁸⁰ However, it is important to note that some scholars contest the personal scope of Article 9 of the CRC, arguing that it applies only to the domestic separation of children from their parents, while Article 10 addresses separation across different states. Detrick (n 79) 170, 184; Jason Pobjoy, *The Child in International Refugee Law* (CUP 2017) 70, 73; John Tobin and Judy Cashmore, ‘Article 9: The Right Not to Be Separated from Parents’ John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (OUP 2019) 310. Cf. Ioffe (n 8) 234–9, offering three criticisms of the views held by the aforementioned scholars concerning the personal scope of Article 9 and its relations with Article 10 of the CRC.

⁸¹ Abram (n 75) 418.

⁸² UNCRC, ‘General Comment No 6: Treatment of Unaccompanied and Separated Children Outside Their Country of Origin’ (2005) UN Doc CRC/GC/2005/6 [84], [85].

most considerable weight⁸³ and cannot be overridden by other factors.⁸⁴ According to this standard, limitations on the right to family life can only be justified if the separation of refugee children from their parents is genuinely in their best interests. This contrasts with Strasbourg's 'elsewhere' approach, where the best interests of the child are not decisive but are treated according to Article 3's 'primary' consideration standard. I argue that this is an incorrect standard for this context and is incompatible with Article 9(1) of the CRC.⁸⁵

As mentioned above, the ECtHR case law has been evolving to integrate the child's best interests in the context of family migration. While the ECtHR has not explicitly established a new legal standard where children refugees are concerned as the exception to the 'elsewhere' approach, it has incorporated best interests of the child as a factor 'afforded significant weight', which may allow family reunification in certain circumstances. When considering the best interests of the child, the ECtHR although sometimes using the wording of the 'paramount' importance, which aligns with the higher standard set by Article 9 of the CRC, in practice it applied a lower standard of a 'primary' consideration as per Article 3 of the CRC. By consistently referring to the CRC and the international law standards more generally, the ECtHR has integrated the assessment of the best interests of the child into the analysis of proportionality under Article 8, which is in line with Article 31(3)(c) of the VCLT.

However, the ECtHR has not fully engaged with the interpretation of CRC provisions by the CRC Committee, which is the body established specifically to oversee the application of the CRC whose interpretations carry significant persuasive authority.⁸⁶ As explained above, the CRC Committee confirms the high standard of 'paramountcy' for the child's best interests in cases of family separation. While the Human Rights Act 1998 mandates UK courts consider jurisprudence of the ECtHR when determining the issues related to the ECHR rights,⁸⁷ UK courts have the freedom to develop their own human rights jurisprudence that could potentially provide greater protection for child refugees and align more closely with the UK's international obligations under the CRC. UK domestic legislation already requires prioritising the best

⁸³ See Nicholson, 'The Right to Family Life' (n 21) 36.

⁸⁴ Jason Pobjoy, *The Child in International Refugee Law* (CUP 2017) 70, 74; Abram (n 75) 397, 418. See also CRC Committee, 'General Comment No 6' (n 63) [85].

⁸⁵ Ioffe (n 8) 230.

⁸⁶ The *Diallo* case reasoning by the International Court of Justice (ICJ) emphasizes that significant weight should be given to interpretations provided by the independent body specifically established to oversee the treaty's application. *Ahmadou Sadio Diallo (Republic of Guinea v DRC) (Merits)* [2010] ICJ Rep 639 [66], reiterated in *Application of the CERD (Qatar v United Arab Emirates) (Preliminary Objections)* [2021] ICJ General List No 172 [77], [101]. Cf. *R (on the application of AB) v Secretary of State for Justice* [2021] UKSC 28 [61]–[65].

⁸⁷ Human Rights Act 1998, s 2. See also *R v Lyons* [2002] UKHL 44, [2003] 1 AC 976 [105].

interests of the child in family reunion cases.⁸⁸ In the next section, I will explain how the UK can fully incorporate the CRC obligations and the correct standard for the child's best interests within the existing family reunion routes.

3. UK Right to Family Reunification for Refugee Children

As previously mentioned, the Refugee Convention does not incorporate family unity, nor is it an obligation for the UK under the Convention. However, the UK, like most other states parties, includes provisions for family reunion in its practices—since refugee family reunion has been incorporated into the Immigration Rules.⁸⁹

(a) Family Reunion Route (RFR)

Family reunification for refugees in the UK can be pursued through various legal channels.⁹⁰ The most direct avenue is the Family Reunion route (RFR) outlined in Immigration Rules Appendix Family Reunion (Protection), which is accessible to close family members of an individual holding a protection status in the UK, including the refugee status, but have not yet obtained British citizenship.⁹¹ The eligibility for applying for RFR depends on whether both the refugee in the UK (the sponsor) and their family member abroad (the applicant) meet the strict criteria and requirements. This scheme only works in the scenarios involving children where the applicant is the child, as children are not eligible to be sponsors.⁹² The policy rationale for excluding unaccompanied children from this scheme is reportedly to promote the best interests of children by discouraging families from sending their children alone on dangerous journeys to the UK as 'anchors' to facilitate future family reunification claims. This approach is intended to prevent hazardous journeys, reduce the risk of exploitation by criminal

⁸⁸ Section 55 of the Borders, Citizenship and Immigration Act 2009. See also Home Office, 'Asylum Decision Making Guidance (Asylum Instructions): Family Reunion: For Individuals with Protection Status in the UK: Version 10.0' (API Family Reunion) (17 July 2023) 8 <https://assets.publishing.service.gov.uk/media/64b5438061adff001301b153/Family_reunion.pdf> accessed 3 August 2024; UK Visas and Immigration, 'Every Child Matters: Statutory Guidance to the UK Border Agency on Making Arrangements to Safeguard and Promote the Welfare of Children Issued under Section 55 of the Borders, Citizenship and Immigration Act 2009' (November 2009) <<https://assets.publishing.service.gov.uk/media/5a7b9db0e5274a7318b8fd0b/change-for-children.pdf>> accessed 27 July 2024.

⁸⁹ See Stephanie Harrison, Ronan Toal, Sadat Sayeed, David Neale (eds), *Macdonald's Immigration Law & Practice* (10th edn, LexisNexis Butterworths 2021) 1146–7.

⁹⁰ Silvia Borelli, Fiona Cameron, Elena Gualco and Claudia Zugno, 'Refugee Family Reunification in the UK: Challenges and Prospects' (University of Bedfordshire 2021) 21.

⁹¹ Immigration Rules Appendix Family Reunion (Protection) (updated 16 May 2024) <<https://www.gov.uk/guidance/immigration-rules/immigration-rules-appendix-family-reunion-protection>> accessed 19 May 2024. See also API Family Reunion (n 88) 18.

⁹² Immigration Rules Appendix Family Reunion (Protection) 5.1, 6.1.

gangs, and encourage individuals in need of international protection to seek asylum in the first safe country they reach.⁹³

The failure to provide a route under the immigration rules for child refugees to reunite with their parents, as well as the rationale for creating and maintaining the discrepancy that allows qualified routes of entry for adult refugees on the basis of family reunification but not for the families of child refugees, was examined in *R (DM) v Secretary of State for the Home Department*.⁹⁴ Advocacy efforts to include parents among the eligible family members of a refugee through the RFR route could be beneficial, as the court proceedings demonstrated a lack of direct evidence supporting the policy aims and justification for excluding the parents of unaccompanied children from family reunion.⁹⁵ However, it should be noted that in this case, despite the lack of concrete evidence, the court stated that it is not unreasonable for the UK Secretary of State to anticipate that allowing family reunification for child refugees could create incentives for children to leave their families and undertake dangerous journeys to the UK. It also acknowledged that such incentives could pose significant risks, including exploitation by criminal gangs, which may outweigh other considerations.

The Family Reunion route is the most favourable procedure for family reunification under UK law. Unlike other routes available for family reunification, RFR does not impose any financial or accommodation requirements on the sponsor.⁹⁶ The requirements for sponsoring RFR are relatively straightforward: any individual who holds refugee status or humanitarian protection in the UK and is over 18 years old is eligible to sponsor RFR. This status may have been acquired through either applying for international protection in the UK or entering the UK as a beneficiary of a resettlement programme. The Immigration Rules impose notable restrictions on the family members of a refugee who are entitled to apply via the RFR route. RFR is only available to the spouse, civil partner, or unmarried or same-sex partner of a refugee,⁹⁷ and their minor dependent children (under certain exceptional circumstances children over the age of 18).⁹⁸ In both instances, the family member must have

⁹³ UK Home Office Response to the Chief Inspector's Report (8 October 2020) 4.3, 4.4.

⁹⁴ *R (DM) v Secretary of State for the Home Department (UNHCR intervening)* [2023] EWHC 740 (Admin), *R (DM) v Secretary of State for the Home Department* [2024] EWHC 967 (Admin). The High Court dismissed a challenge to the rules barring child refugees from bringing their families to the UK, but permission to appeal the decision has been granted to the Court of Appeal.

⁹⁵ [2024] EWHC 967 (Admin) [52]–[53].

⁹⁶ API Family Reunion (n 88) 11.

⁹⁷ Immigration Rules Appendix Family Reunion (Protection) 4.1.

⁹⁸ Ibid 5.1, 6.1. The child must not be leading an independent life. They cannot be married or in a civil partnership, and must not have formed an independent family unit (6.1 (c)). If the child is aged 18 or over, the application for family reunion can only be satisfied in exceptional circumstances as set out in 6.2. See also

been part of the sponsor's family unit before the sponsor fled their country of habitual residence (so-called 'pre-flight family members'),⁹⁹ a position that is more restrictive than the one under both ECHR and EU law. Importantly, according to the Immigration Rules, the RFR bars unaccompanied refugee children from sponsoring their parents, siblings, or other responsible adults.¹⁰⁰ Historically, there was a brief exception to this prohibition for the parents of unaccompanied children who had fled Kosovo and secured asylum in the UK. This concession was limited to the period from July to September 1999. As of 2 October 2000, the family reunification regime established in the Immigration Rules included the aforementioned blanket prohibition.¹⁰¹

I argue that this prohibition disregards the UK's international obligations, particularly under the ECHR and the CRC. Children granted refugee status in the UK being deprived of the opportunity to reunite with their close family members in the same manner as adults is incompatible with Article 9 of the CRC and Article 8 of the ECHR. Although, as mentioned earlier, the UK's obligations under the CRC have not been directly incorporated into UK law, Section 55 of the Borders, Citizenship, and Immigration Act 2009 mandates decision-makers in immigration matters to consider 'the need to safeguard and promote the welfare of children who are in the UK'. Furthermore, the principle of the best interests of the child is explicitly outlined as the 'primary' consideration in immigration decisions concerning children, as stated in the Immigration Rules and the relevant statutory guidance.¹⁰²

(b) Exceptional Circumstances under Article 8 ECHR

If the applicant does not meet the RFR eligibility requirements, such as the parent of an unaccompanied refugee child, family reunion based on Article 8 may be possible in exceptional circumstances.¹⁰³ The sponsor must prove that refusing permission to stay or entry clearance would violate Article 8 of the ECHR due to the unjustifiably harsh consequences for the

British Red Cross, 'Applying for Refugee Family Reunion: A Guide to the Family Reunion Process' (updated March 2024) 12, 19.

⁹⁹ Immigration Rules Appendix Family Reunion (Protection) 4.1 (b), 6.1 (b). See also Immigration Rules Appendix Children, CHI 1A.1.

¹⁰⁰ Paragraphs 4.1 to 6.2 of Immigration Rules Appendix Family Reunion (Protection) specify the relationship requirements for a partner, child, or child over 18 to qualify for refugee family reunion. Other family members, including relatives of children with protection status, are ineligible under these rules.

¹⁰¹ *AT and Another v Secretary of State for the Home Department* [2016] UKUT 227 (IAC) [11].

¹⁰² *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4 [33].

¹⁰³ *Ibid*, 7.1. Immigration Rules Appendix Family Members GEN. 3.2.

sponsor or their relevant family member.¹⁰⁴ However, the Home Office guidance clearly states that family reunion is not a protection route and asylum cannot be claimed from outside the UK, so individuals should apply for asylum in the first safe country they reach.¹⁰⁵ It also endorses the ‘elsewhere approach’, meaning that family reunion will not be granted if family life can be enjoyed outside the UK.¹⁰⁶

The Home Office guidance defines ‘exceptional circumstances’ as situations where refusing entry clearance or limited leave to remain would breach Article 8 of the ECHR, causing unjustifiably harsh consequences for the relevant child or another affected family member. ‘Exceptional’, however, does not mean merely unusual or unique but rather involves unjustifiably harsh consequences for the individual or their family such that refusal would not be proportionate under Article 8. ‘Unjustifiably harsh consequences’ are outcomes that are not justified by public interests like immigration control, taxpayer burdens, integration, and public protection. This includes the assessment of the best interests of any relevant child as a ‘primary’ consideration, the standard so far endorsed by the ECtHR case law, but, as argued above incompatible, with Article 9 of the CRC. Similar to the ECtHR, the UK Home Office guidance incorporates the precariousness principle (e.g. the applicant with limited leave), where very compelling reasons are needed to override public interest. Similarly, forming family life with someone outside the UK generally does not require entry unless exceptional circumstances exist.¹⁰⁷

Similar to the relevant factors outlined in *M.A. v Denmark*, the UK Home Office guidance provides several relevant factors to be evaluated when considering whether there are exceptional circumstances that could lead to unjustifiably harsh consequences if an application for entry clearance or limited leave to remain is refused. Among the factors: the best interests of a relevant child, ability to lawfully remain in or enter another country, nature and extent of the family relationships, circumstances leading to separation, impact on each family member, serious cultural barriers to relocation, impact of mental or physical disability or serious illness, absence of governance or security, immigration status, and cumulative factors.¹⁰⁸ In contrast, the factors such as lack of knowledge of a language spoken in the country in which the family would be required to continue or resume living, being separated from extended family

¹⁰⁴ Ibid. See also API Family Reunion (n 88) 23. See also Home Office, ‘Family Policy: Family Life (as a Partner or Parent) and Exceptional Circumstances: Version 21.0’ (Exceptional Circumstances Guidance) (17 May 2024).

¹⁰⁵ API Family Reunion (n 88) 24.

¹⁰⁶ Ibid.

¹⁰⁷ Exceptional Circumstances Guidance (n 112) 62.

¹⁰⁸ Ibid 64–7.

members, material change in the quality of life for the family in the country in which they would be required to continue or resume living are circumstances in which ‘unjustifiably harsh consequences’ are not likely to arise.¹⁰⁹

In *ZH (Tanzania)*, the court established that the child's best interests in maintaining family life in the UK must be given ‘primary consideration’, therefore assessed prior to any other factors are evaluated.¹¹⁰ In another case, *Zoumbas*, the court further emphasised the importance of the best interests of the child principle in Article 8 ECHR claims. It emphasised that although, as acknowledged in *ZH (Tanzania)*, the best interests of a child can theoretically be outweighed by the cumulative effect of other considerations, no other factor can inherently be deemed more significant: ‘...The best interests of a child are an integral part of the proportionality assessment under Article 8 of the Convention; in making that assessment, the best interests of a child must be a primary consideration, although not always the only primary consideration; and the child’s best interests *do not of themselves have the status of paramount consideration...*’¹¹¹ These cases focused on the removal of family members, but the application of the best interests of the child should remain consistent in various family migration scenarios.

In *AT and Another*, the Immigration and Asylum Chamber of the Upper Tribunal decided that refusing to allow the reunification of family members with a child who has been granted asylum in the UK may amount to a disproportionate violation of the right to respect for family life, as guaranteed by Article 8 of the ECHR, even though the Immigration Rules, as mentioned above, do not specifically allow for family reunification in such cases.¹¹² In this case, a 17-year-old from Eritrea attempted to reunite with a mother and a sibling, which was rejected on the basis that the UK Immigration Rules do not cover family reunion for parents and siblings. The Upper Tribunal, drawing from ECtHR case law, concluded that, given the need to ensure adequate protection for a child refugee, the principle of best interests heavily favoured allowing family reunification in the UK.¹¹³

Some of the views expressed in *AT and Another* were subsequently criticised by the same Chamber in the later decision in *KF and Others*.¹¹⁴ Despite reaching a similar conclusion in favour of permitting family reunion in the UK in this case, the Upper Tribunal emphasised the

¹⁰⁹ Ibid 68.

¹¹⁰ API Family Reunion (n 88) [33].

¹¹¹ *Zoumbas v Secretary of State for the Home Department* [2013] UKSC 74 (27 November 2013) [10] (emphasis added).

¹¹² *AT and Another* (n 101) [39] and [43].

¹¹³ Ibid [39].

¹¹⁴ *KF and Others v Secretary of State for the Home Department* [2019] UKUT 413 (IAC).

necessity of a fact-sensitive analysis, which is in line with the ECtHR's orientation at the individual cases.

(c) Compelling Compassionate Factors

In cases where the requirements of the RFR are not met and there are no exceptional circumstances under Article 8 of the ECHR, the sponsor may raise in the application compelling compassionate factors (grounds that are not related to family and private life, medical or protection matters) warranting a grant of leave 'outside the Rules' (LOTR).¹¹⁵ LOTR on compelling compassionate grounds may be granted when the decision maker determines that the specific circumstances of the case include exceptional circumstances. The Home Office guidance indicates that not all LOTR is granted for the same reasons, as discretion is applied differently based on the specifics of each claim and the sponsor's circumstances. These circumstances imply that a refusal would lead to unjustifiably harsh consequences for the sponsor or their family but would not constitute a violation of Articles 3 and 8 of the ECHR, the Refugee Convention, or other international obligations.¹¹⁶ According to the guidance, granting LOTR should be rare, and discretion should be used sparingly.¹¹⁷ In line with the 'elsewhere approach', LOTR is not granted where it is reasonable to expect the sponsor to leave the UK despite such factors.¹¹⁸ When considering LOTR applications, however, decision-makers must prioritise the best interests of the child in line with Section 55 of the Borders, Citizenship and Immigration Act 2009. This is especially important where the decision may result in the child leaving the UK, where there are clear factors adversely affecting the child, or where a parent caring for the child requests that specific circumstances be taken into account. Although the guidance states that all decisions must demonstrate that the child's best interests have been considered as a primary concern, it acknowledges that this is not necessarily the only consideration.¹¹⁹ As I have argued above, this, in my opinion, is an incorrect standard for the best interests of the child in cases of family separation, which should be 'paramount'.

(d) Other Routes

¹¹⁵ See also Home Office, 'Leave Outside the Immigration Rules: Version 3.0' (LOTR Guidance) (29 August 2023).

¹¹⁶ Ibid 5. The guidance provides an example where an applicant or family member experiences a personal tragedy requiring their presence in the UK for a specific event or action. While this situation is significant, refusal would not automatically breach the ECHR.

¹¹⁷ Ibid 6.

¹¹⁸ Ibid 7.

¹¹⁹ Ibid.

For family members who do not meet the eligibility criteria for RFR, and where no exceptional circumstances under Article 8 of the ECHR or compelling compassionate factors exist to justify the grant of LOTR, family reunification may be sought through the ‘Family Member’ route, currently governed by Appendix FM to the Immigration Rules.¹²⁰ Additionally, refugees have access to other routes for reuniting with their families under resettlement programmes coordinated by the UNHCR, in which the UK participates.¹²¹

4. Conclusion

This article has explored the application of Article 8 of the ECHR to family reunification cases involving children and refugees. It has examined the evolving jurisprudence of the ECtHR in this area and the integration of the best interests of the child principle into the analysis of proportionality under Article 8. The article has also discussed the right to family reunification for refugee children in the UK and the limitations imposed by the Immigration Rules.

The ECtHR’s case law on family reunification, although inconsistent and unsettled, has shown a trend of integrating the best interests of the child principle in the interpretation of the right to family life. The best interests of the child should be a ‘paramount’ consideration in assessing the proportionality of interferences with the right to family life under Article 8, rather than merely a ‘primary’ consideration, as currently reflected in the ECtHR’s case law. The ECtHR’s approach in family reunification cases, known as the ‘elsewhere’ approach, reflects the default position of state sovereignty being the starting point in assessments in migration cases, granting states the power to exclude aliens. The ECtHR’s interpretation of the right to family life has been restrictive, but recent cases have shown a shift towards a more protective approach where children are involved. Although progress at the ECtHR has been gradual, Part 2 demonstrated it is real, and it may, in time, go even further,¹²² i.e. by establishing a new legal standard for refugee children as an exception to the ‘elsewhere’ approach. Progress in the ECtHR jurisprudence has historically occurred in areas where states have already committed to international law, such as children’s rights. These areas are likely to remain at the forefront of change.

¹²⁰ Immigration Rules Appendix FM: Family Members (updated 16 May 2024)

<<https://www.gov.uk/guidance/immigration-rules/immigration-rules-appendix-fm-family-members>> accessed 19 May 2024.

¹²¹ Home Office, ‘Policy Paper: Safe and Legal Routes’ (updated 20 July 2023)

<<https://www.gov.uk/government/publications/illegal-migration-bill-factsheets/safe-and-legal-routes>> accessed 27 July 2024. See also Afghan Relocation and Assistance Policy (ARAP) in LOTR Guidance 10.

¹²² Wray (n 19) 179.

By contrast, the UK's current immigration rules and policies fail to adequately protect the right to family reunification for refugee children. The RFR route, which is the most direct avenue for family reunification, does not allow unaccompanied child refugees to sponsor their parents or siblings. This prohibition is incompatible with the UK's international obligations and the best interests of the child principle. Practitioners should continue to advocate for the inclusion of unaccompanied refugee children in the UK to sponsor their parents under the current RFR rules. Regarding the exceptional circumstances in Article 8 of the ECHR and the compelling compassionate reasons routes, practitioners representing refugee children in family reunification proceedings should, in my opinion, argue that the best interests of the child ought to be given a 'paramount' consideration, rather than merely a 'primary' one. This high standard is established by Article 9 of the CRC and confirmed by the authoritative interpretation of the CRC Committee, the body specifically established to oversee the application of the CRC. If the best interests of the child are elevated to 'paramount' in the proportionality analysis for the exceptional circumstances in Article 8 of the ECHR route, it will outweigh other factors, rather than being just one of the considerations as described in the current guidance.

In conclusion, the ECtHR's jurisprudence on family reunification cases involving children and refugees is evolving towards a more child-sensitive approach, but still has some progress to make. The integration of the best interests of the child principle into the analysis of proportionality under Article 8 reflects the recognition of the importance of family unity and the well-being of refugee children. While the UK's Immigration Rules impose limitations on family reunification for refugee children, the best interests of the child principle should be taken into account in assessing the proportionality of such restrictions and should be of 'paramount' consideration. The UK should align its policies with its international obligations and the evolving ECtHR jurisprudence, as well as ensure that the rights of refugee children to family reunification are effectively protected in practice. By doing so, the UK can ensure that refugee children are not further traumatised by being forcibly separated from their families¹²³ and can have the opportunity to rebuild their lives in a safe and supportive environment with their loved ones.

¹²³ According to *Mayeka and Mitunga v Belgium*, arbitrarily enforced separation can constitute a violation of Article 3 of the ECHR. *Mayeka and Mitunga v Belgium* (2008) 46 EHRR 449 [51], [55].