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THE BEST INTERESTS OF THE CHILD IN EU FREE MOVEMENT LAW

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1. The Genesis of the Best Interests Principle

1.1 While this session of the seminar has, superficially, a somewhat narrow focus, I consider it instructive to broaden the horizons. This exercise involves some reflection, beyond the EU framework, on the setting of the best interests principle in international law and in the common law jurisdiction of the United Kingdom. The first of these two dimensions is unavoidable, having regard to the aetiology of the principle. The second dimension, which is of course more introspective, will hopefully be of some interest to those of our colleagues who hail from other EU Member States.

1.2 The best interests principle is rooted in a provision of international law, namely Article 3(1) of the UN Convention on the Rights of the Child (1989) ("UNCRC"):

> "*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.*"

As its 30th anniversary nears, Article has gradually acquired a progressive, and deservedly, elevated profile globally. Given that international treaties are not self-executing in the dualist legal system of the United Kingdom, Article 3(1) of UNCRC was marooned on the plane of international law for some 20 years, until Parliamentary legislative activity eventuated.[1]

1.3 Bearing in mind the agonies and atrocities suffered across the world throughout the 20th Century, what prior provision, if any, in international law existed for the protection of children? Children did not feature specifically in the most important landmark in the history of international human rights protection, the UN Universal Declaration of Human Rights in 1948. They were, however, recognised implicitly in the opening words of the Preamble –

> *"Whereas 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."*[2]

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[1] Via Section 55 of the Borders, Citizenship and Immigration Act 2009.
[2] My emphasis.

Moreover, the Declaration established a series of fundamental rights and freedoms to be enjoyed by all persons, without distinction "*of any kind*". Notably, the rights of those intending to marry, parents and the family were specifically recognised and, in Article 16(3) the Universal Declaration proclaimed:

> *"The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."*

Children were, therefore, clearly in the frame.

1.4 Special recognition of the rights of children at international level, however, was already in existence. On 26th September 1924, the Geneva Declaration of the Rights of the Child was promulgated. This was the work of the League of Nations. It is a short, but remarkable, document, which proclaimed, *inter alia:*

> *"By the present Declaration …… men and women of all nations, recognizing that mankind owes to the Child the best that it has to give, declare and accept it as their duty that, beyond and above all considerations of race, nationality or creed ……"*

There followed a short menu, consisting of just five paragraphs. I draw attention to the second of these:

> *"The child that is hungry must be fed; the child that is sick must be nursed; the child that is backward must be helped; the delinquent child must be reclaimed; and the orphan and the waif must be sheltered and succoured."*

It is no irreverence to describe this as an international law Sermon on the Mount. Its flavour is unsurprising, given the influence of the Judeo- Christian traditions in the development of international law - and also the common law.

1.5 The 1926 Declaration is of note for another reason. In the present era there is, understandably, a heavy emphasis on the notions of duty and balance. The asserted rights and freedoms of the individual are frequently debated and calibrated against this background. Intriguingly, this concept was expressly articulated in paragraph 5 of the 1924 Geneva Declaration:

> *"The child must be brought up in the consciousness that its talents must be devoted to the service of fellow men."*

The vision and enlightenment which precipitated the Geneva Declaration should serve as a continuing source of inspiration. I suggest that, almost one century later, one can learn much from this compact, but fascinating, instrument.

1.6 Another UN measure, the Declaration of the Rights of the Child followed, in 1959. At the heart of this instrument lay the following acknowledgement:

> *"Whereas 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."*

The 1959 Declaration reiterated that:

> *"**Mankind owes to the child the best it has to give.**"*

This was an exact replica of the Geneva Declaration. These simple words established an obligation of undeniable gravity. The purpose of this Declaration was framed in unequivocal language:

> *"…… to the end that [the child] may have a happy childhood and enjoy for his own good and for the good of society the rights and freedoms herein set forth ……."*

Herein, one can readily identify a notable evolution in the international regime for the protection of children. Furthermore, the concept of reciprocal responsibility, expressed in paragraph 5 of the 1924 Declaration, is repeated. There followed a comparatively modest list of rights – in particular the right to a name, a nationality and free elementary education.

1.7 Fully 30 years were to pass until a comprehensive international charter of childrens' rights made its appearance, in the form of the UN Convention on the Rights of the Child (1989). This has achieved a remarkably high rate of ratification. There are 189 subscribing states of the world. This number does not include (remarkably it seems to many) one of the most powerful nations in the universe, the US and (less remarkably perhaps) one of the weakest, Somalia.

1.8 As this resume demonstrates, advances in the protection of children, the largest of the most vulnerable groups in every society, have been painstaking.

2. EU Legislation: Main Sources

2.1 While, in retrospect, the development of the best interests principle at a global level seems to have been notably laboured, EU legislative intervention. It must be recognised, of course, that the legislative competence of the EU was limited during the first decades of its existence. Indeed, it is the gradual expansion of this competence which has given rise to such controversy in certain Member States. These developments were linked with the enlargement of the Community which, by 1995, had grown from 6 to 15 Member States and were contained in a series of new intra-state treaties executed by the members – at Maastricht (1993), Amsterdam (1999), Nice (2001) and, ultimately, Lisbon (2004), by which stage membership had swollen to 27 states.

2.2 The EU legislative measures sounding on the best interests of the child do not exist in isolation, as the evolution sketched above demonstrates. Rather, I suggest, they are to be considered in the context of UNCRC, in particular Articles 3, 9, 18, 20, 21, 37 and 40. These assorted provisions are concerned with child protection and care, the maintenance of family unity, shared parental responsibilities in the upbringing of children, protection against physical or mental violence, injury or abuse (*et al*), special protection and assistance for children removed from their family environment, the prohibitions against torture or other cruel, inhuman or degrading treatment or punishment and unlawful or arbitrary deprivation of liberty, coupled with associated rights, and the treatment of every child defendant under the criminal law in a manner consistent with the child's sense of dignity and worth and the promotion of rehabilitation.

2.3 The main EU legislative measures in this context are the following:

- **Council Directive 2003/86/EC** of 22 September 2003 on the right to family reunification, Article 5 especially.
  http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:251:0012:0018:en:PDF

- **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, Article 28 particularly.
  http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:158:0077:0123:en:PDF

- **The EU Charter of Fundamental Rights of the European Union**, Article 24 especially:

"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."
http://www.europarl.europa.eu/charter/pdf/text_en.pdf

- **Directive 2008/115/EC** of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, Article 5 especially.
http://eurlex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:32008L0115&from=en

- **Directive 2013/33/EU** of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), Article 23
http://eurlex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:32013L0033&from=en

- **Council Directive 2005/85/EC** of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, Article 17 particularly.
http://eurlex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:32005L0085&from=EN

- **Council Directive 2003/9/EC** of 27 January 2003 laying down minimum standards for the reception of asylum seekers, Article 18 especially.
http://eurlex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:32003L0009&from=en

2.4 The more detailed outworkings of the Geneva Convention Relating to the Status of Refugees are the subject of Community law regulation in the "Qualification" Directive [No 2004/83/EC] which

also (per Article 15) establishes a separate, or secondary, regime of "subsidiary" protection, designed to protect all persons against "serious harm", as defined. Notably, in the recitals, it is stated:

> *"(12) The 'best interests of the child' should be **a** primary consideration of Member States when implementing this Directive ….*
>
> *(20) It is necessary, when assessing applications from minors for international protection, that Member States should have regard to child-specific forms of persecution."*[3]

[My emphasis]

2.5 The "Reception" Directive [No 2003/9/EC] establishes "*minimum standards for the reception of asylum seekers*". It is specifically provided in Article 18(1) of this measure:

> *"The best interests of the child shall be **a** primary consideration for Member States when implementing the provisions of this Directive that involve minors."*

[My emphasis]

2.6 As the short menu above demonstrates, EU law is progressively influential in the field of the protection of children's' rights. Furthermore, the importance of the Strasbourg case law under Article 8 ECHR must be recognised. Under present arrangements, both domestic and international, these remain potent sources. Bearing in mind recent and current political debates, who could plausibly disagree with the proposition that any dilution of their impact would undoubtedly be a retrograde step?

3. Some European Leading Cases

I have intentionally gathered together an eclectic mix of decisions of both the Luxembourg and Strasbourg national courts. It may be said that, as of today, these two venerable judicial institutions are looking in each other's directions more attentively than ever before.

3.1 ***Schneider v Germany*** (Application no. 17080/07), 15 September 2011

[3] In domestic law, the "subsidiary protection" regime established by the Qualification Directive is given effect by paragraph 339C of the Immigration Rules.

Where a complainant maintained that he was the biological father of a child, there would be a violation of the European Convention on Human Rights 1950 art.8 if the domestic courts refused to grant him access to and information about the child without examining whether either would be in the child's best interests.

3.2 ***Ruiz Zambrano (European citizenship)*** (Case C-34/09) CJEU, 08 March 2011

TFEU art.20 was to be interpreted as precluding a Member State from refusing a third-country national a right of residence and a work permit in circumstances where his minor, dependent children were nationals of, and were resident in, that Member State. Refusals would, in such circumstances, deprive the children of the genuine enjoyment of the substance of their rights as EU citizens.

3.3 ***Rodrigues da Silva and Hoogkamer v the Netherlands*** (Application no. 50435/99), 31 January 2006

Held, upholding the complaint, that Art.8 did not impose a general obligation upon states to respect an immigrant's choice of country of residence and to authorise family reunions in their territories. In a case that involved family life as well as immigration, the extent of a state's obligations varied according to the particular circumstances of the persons involved and the general interest. Relevant factors included the extent to which family life was ruptured, the extent of ties in the contracting state, whether there were insurmountable obstacles in the way of the family living in the country of origin of one or more of them, factors of immigration control or public order and whether the family life had been created at a time when the persons involved had been aware of its precarious nature given the immigration status of one of them, Ahmut v Netherlands (21702/93) (1997) 24 E.H.R.R. 62 and Gul v Switzerland (23218/94) (1996) 22 E.H.R.R. 93 applied. In view of the consequences that an expulsion would have upon D's responsibilities as a mother, and upon her family life with R, and taking into account that it was in the father's best interests to remain in the Netherlands, the economic wellbeing of the country did not outweigh D's Art.8 rights. That was so despite the fact that S had been residing illegally in the Netherlands at the time of R's birth. By attaching paramount importance to that factor, the authorities had indulged in excessive formalism. A fair balance had not been struck, and there had been a violation of Art.8.

3.4 ***Sophia Gudrun Hansen v Turkey*** (Application no. 36141/97), 23 September 2003

Under Art.8 European Convention of Human Rights national authorities were obliged to take necessary measures to reunite parents with their children. The adequacy of the measures taken depended on the swiftness of the implementation. Obliging children to re-unite with a parent ought not to be ruled out in the event of unlawful behaviour by the parent with whom the children lived.

3.5 ***Jeunesse v Netherlands*** (Application no. 12738/10), 3 October 2014

(1) Article 8 did not impose a general obligation on a state to respect a married couple's choice of country for their family's residence but, where a case involved family life, the extent of the state's obligations varied according to the particular circumstances of the persons involved and the general interest. An important consideration being whether family life had been created at a time when the persons involved knew that their immigration status was precarious, then it would only be in exceptional circumstances that the removal of the non-national would constitute a violation of Art.8. The children's' best interests were a paramount consideration (see paras 101, 107-108 of judgment).

(2) The applicant had Netherlands nationality at birth but lost it when Suriname became independent. Her situation was not like that of other potential immigrants. The state's tolerance of the applicant's presence for such a long period of time enabled her to establish strong family ties in the Netherlands. There would be a degree of hardship if the applicant and her family returned to Suriname and the children's interests were best served by not disrupting them with the forced relocation of their mother. The state had given insufficient weight to the best interests of the applicant's children. A fair balance had not been struck between the competing interests of the applicant's rights and the state's immigration policy. There had been a failure by the Netherlands authorities to secure the applicant's right to respect for her family life under Art.8 (paras 115-123).

3.6 ***O and S v Maahanmuuttovirasto*** **(Case C-356/11)** CJEU, 6 December 2012

TFEU art.20 did not preclude a Member State from refusing to grant a third-country national a residence permit, on the basis of family reunification, to live with his spouse, a third-country national residing lawfully in that Member State who was the mother of a young EU citizen from a previous marriage, and who had a third-

country national child of their own marriage, provided that such a refusal did not deny the first child's genuine enjoyment of the substance of the rights of an EU citizen.

3.7 ***Nunez v Norway*** (Application no. 55597/09), 28 June 2011

Where an expulsion decision and a two-year prohibition on re-entry to Norway had been imposed on an applicant who had obtained work and residence permits in that country under a false identity, the national courts had been entitled to give weight to the aggravated character of her breaches of immigration law. However, a delay of four years between the discovery of her true identity and the making of the expulsion order resulted in the sanction being disproportionate with regard to the best interests of the applicant's children.

3.8 The principle of giving priority to safeguarding the best interests of the child is firmly embedded in the Strasbourg case law. It has been invoked in a series of contexts, gaining prominence initially in cases concerning the reunification of children assigned to social care with their parents.[4] More recently, one of the standout decisions of the ECTHR is that of the Grand Chamber in Neulinger and Shuruk v Switzerland.[5] Marital conflict and breakdown provided the context, which involved a bitter battle between two estranged parents for custody of their seven year old child.

3.9 It may be said that the passage of time emerged as the most salient factor in the Court's evaluation of the child's best interests. The high level of his integration in Switzerland and the fact that he had lived there with his mother during most of his short life, tipped the balance in favour of not requiring him to be returned to his father in Israel under the Hague Convention. To order otherwise would be a disproportionate interference with the rights of mother and child under Article 8(1) ECHR. The importance of individualised examination and the related standard of fully informed decision making were also emphasised.

3.10 The ECtHR stated that it -

> "*... must ascertain whether the domestic courts conducted an in-depth examination of the entire family situation and of a whole series of factors, in particular of a factual, emotional, psychological, material and medical nature, and made a balanced and reasonable assessment of the respective interests*

[4] Hokkanen – v – Finland (Application no. 19823/92), Series A number 299-A and Nuutinen – v – Finland (Application no. 32842/96), ECHR 2000 – VIII.
[5] (Application no. 41615/07).

of each person, with a constant concern for determining what the best solution would be for the abducted child in the context of an application for his return to his country of origin."[6]

This standard of judicial decision making will, of course, impose burdens in cases involving the possible return of an abducted child. However, children deserve nothing less. Moreover, any suggestion that in Neulinger the ECtHR has departed from its earlier approach, when it expressed itself entirely in agreement with the philosophy underpinning the Hague Convention, seems misplaced.[7]

3.11 The decision in Neulinger and kindred cases are a reflection also of the now internationally recognised standard of fair, transparent and thorough decision making processes in cases involving children.[8] It is no coincidence that in the jurisprudence of supranational courts some of the most frequently recurring themes are the diligence of the deciding authority, the depth of the enquiry, the opportunities given to those involved to be heard, the procedural fairness of the process and the sufficiency of the reasons given for the decision. The application of this prism explains why a merits based challenge rarely succeeds at the supranational judicial level.[9]

4. The CJEU: The Most Recent Learning

4.1 How to protect the rights and interests of children and, in particular, how to give effect to their status as citizens of the Union under Article 20 TFEU has been one of the recurring themes of both EU and domestic jurisprudence during the past decade. Easy answers to these juridical problems have been markedly in short supply.

4.2 The most recent development in the jurisprudence of the CJEU is marked by its decision in Secretary of State for the Home Department v CS[10], promulgated as recently as 13 September 2016. In this case the young child concerned is a Union citizen possessing the nationality of a Member State (the United Kingdom) in which he has resided from birth, while his mother and sole carer is a third country national. The legislative framework was shaped by Article 20 TFEU and Directive 2004/38/EC.[11] The mother was convicted of the criminal offence of supplying a mobile phone to a

[6] At [139].
[7] In Maumousseau and Washington – v – France (Application no. 39388/05), ECHR 2007 – XIII.
[8] See 7.2 *infra*.
[9] Decisions such as Haase – v – Germany (Application no. 11057/02), ECHR 2004 – III are rare.
[10] Case C-304/14. And see also Rendón Marín (Case C-165/14), paragraph [4.10] *infra*.
[11] The "Citizens Directive".

somewhat notorious offender who was in prison and was sentenced to 12 months imprisonment in consequence. The Secretary of State decided that she must be deported pursuant to the relevant United Kingdom legislation.[12]

4.3 The Upper Tribunal of the United Kingdom made a reference to the CJEU under Article 267 TFEU. The substance of the questions referred was whether Article 20 TFEU precludes domestic legislation requiring a third country national who has been convicted of a criminal offence of a certain gravity to be expelled from the territory of the Member State concerned notwithstanding that such person is the primary carer of a young child who is a national of that Member State and has resided there from birth, in circumstances where the envisaged expulsion would require the child to leave the territory of the EU, thereby depriving it of the genuine enjoyment of the substance of its rights as a Union citizen. In the paragraphs which follow I shall endeavour to outline the headlines in the Court's reasoning.

4.4 At the outset, the Court reiterated that citizenship of the Union confers on every Union citizen a primary and individual right to move and reside freely within the territory of the Member States, subject to the limitations and restrictions prescribed by the Treaty and the associated implementing measures.[13] Next, the Court recalled that the Treaty provisions on citizenship of the Union do not confer any autonomous rights on third country nationals.[14] Rather, while third country nationals may acquire rights, these are derivative in nature, that is to say derived from the rights enjoyed by the Union citizen concerned.[15] Moreover, the rationale of derived rights is to avoid interference with the Union citizen's freedom of movement. The crucial passage in the Court's reasoning is the following:[16]

> "*The above situations*[17] *have the common feature that, although they are governed by legislation which falls, a priori, within the competence of the Member States, namely legislation on the right of entry and residence of third country nationals outside the scope of provisions of secondary legislation which provide for the grant of such a right under certain conditions, they nonetheless have an intrinsic connection with the freedom of movement and residence of a Union citizen, which prevents the right of entry and residence*

[12] Sections 32 and 33 of the UK Borders Act 2007.
[13] See [25].
[14] At [27].
[15] See [28].
[16] See [30].
[17] In the Zambrano, Dereci and associated cases.

being refused to those nationals in the Member State of residence of that citizen, in order not to interfere with that freedom ….”

4.5 Next, the Court, while acknowledging that derogation from the right of residence of Union citizens or members of their families on the basis of public policy and public security is possible, emphasised that these concepts must be interpreted strictly and that their scope must be subject to control by the EU institutions.[18] In this passage and others, one can detect the presence of the principle of proportionality, albeit not articulated expressly.

4.6 The Court, developing its reasoning, considered that the scope of public policy –

> *"…. presupposes, in any event, the existence, in addition to the disturbance of the social order which any infringement of the law involves, of a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society."* [19]

The Court then recalled its jurisprudence to the effect that public security entails –

> *"… a threat to the functioning of institutions and essential public services and the survival of the population, as well as the risk of a serious disturbance to foreign relations or to peaceful coexistence of nations, or a risk to military interests ….”* [20]

The next step in the Court's reasoning was the following:

> *"In this context, it must be held that, where the expulsion decision is founded on the existence of a genuine, present and sufficiently serious threat to the requirement of public policy or of public security, in view of the criminal offences committed by a third-country national who is the sole carer of children who are Union citizens, that decision* ***could be*** *consistent with EU law."* [21]

[My emphasis]

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[18] See [37].
[19] At [38].
[20] At [39]. There is a nexus to be made between this passage and Article 25 of the Schengen Regulation of 09/03/16.
[21] At [40].

4.7 However, said the Court, there can be no inflexible, bright line legal rules. Rather, there is required, in every case –

> *"…. a specific assessment by the national court of all the current and relevant circumstances of the case, in the light of the principle of proportionality,* ***of the child's best interests*** *and of the fundamental rights whose observance the Court ensures …*
>
> *That assessment must therefore take account in particular of the personal conduct of the individual concerned, the length and legality of his residence on the territory of the Member State concerned, the nature and gravity of the offence committed, the extent to which the person concerned is currently a danger to society, the age of the child at issue and his state of health, as well as his economic and family situation."*[22]

Thus, the Court reasoned, it is incumbent on the national Court to examine –

> *".. what, in [the offender's] conduct or the offence that she committed, constitutes a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society or of the host Member State, which may justify, on the ground of protecting the requirements of public policy or public security, an order deporting her from the United Kingdom."*[23]

4.8 The Court's reasoning continued:

(i) In conducting the necessary balancing exercise, the national Court must take account of the fundamental rights the observance whereof is ensured by the CJEU, in particular the right to respect for private and family life protected by Article 7 of the Lisbon Charter.[24]

(ii) Furthermore, account must be taken of the child's best interests when weighing the several interests concerned and –

> *"Particular attention must be paid to his age, his situation in the Member State concerned and the extent to which he is dependent on the parent."*[25]

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[22] At [41] – [42]. My emphasis.
[23] At [46].
[24] At [48].
[25] At [49], citing Jeunesse – v – The Netherlands (Application no. 12738/10).

The omnibus holding of the CJEU is in the following terms:[26]

> *"In the light of all the foregoing considerations, the answer to the questions referred is that Article 20 TFEU must be interpreted as precluding legislation of a Member State which requires a third-country national who has been convicted of a criminal offence to be expelled from the territory of that Member State to a third country notwithstanding the fact that that national is the primary carer of a young child who is a national of that Member State, in which he has been residing since birth without having exercised his right of freedom of movement, when the expulsion of the person concerned would require the child to leave the territory of the European Union, thereby depriving him of the genuine enjoyment of the substance of his rights as a Union citizen. However, in exceptional circumstances a Member State may adopt an expulsion measure provided that it is founded on the personal conduct of that third-country national, which must constitute a genuine, present and sufficiently serious threat adversely affecting one of the fundamental interests of the society of that Member State, and that it is based on consideration of the various interests involved, matters which are for the national court to determine."*

4.9 This welcome decision of the CJEU codifies and clarifies the governing principles in cases involving the expulsion of a convicted parent and the EU citizenship rights and best interests of a directly affected child.

4.10 Hot on the heels of CS followed Rendón Marín[27] where the CJEU reached the same conclusion on weaker facts, the EU citizen child being a (mere) dependant of Sr Marin, the third-country national and her father. The keenest of observers may find it of interest to examine two questions in particular. The first is whether, having regard to its factual matrix, the decision in Rendón Marín goes further than that in CS. The second is whether the answer provided by the CJEU to the omnibus question considered in CS differs in substance from that proposed by the Advocate General[28] - and if so, in what respects. As regards the first of these questions, my own tentative view is that Rendón Marín was somewhat weaker on its facts than CS and is, therefore, arguably

[26] At [50].
[27] See [4.2] *supra*, published on the same day as CS, 13/09/16.
[28] See Opinion of Advocate General Szpunar in Rendón Marín v Administración del Estado and Secretary of State for the Home Department v CS (Cases C-165/14 and C-304/14) at [179].

the more important of the two decisions. As regards the second question, the avoidance of the twin evils of excessive semantics and over-analysis points to the conclusion that, ultimately, the CJEU and the Advocate General were *ad idem*.

5. The Lisbon Charter

5.1 My intermediate point of reference is the Charter of Fundamental Rights of the European Union [2007/C303/01], the *soi-disant* "Lisbon Charter". Its provisions are directly applicable to all EU institutions and agencies and all agencies and organs of Member States **when they are implementing Union law:** per Article 51(1).

5.2 In the present context, I draw attention to three of its provisions. First, Article 24, under the rubric "The Rights of the Child", recognises specific rights quite distinct from and additional to those belonging to the sphere of Article 8 ECHR. It states:

> "*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."*

Second, children are eligible to claim the protection provided by Article 33 which, under the rubric "*Family and Professional Life*", provides:

> "*1. The family shall enjoy legal, economic and social protection.*
>
> *2. To reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child.*"

Third is the intriguing "Right to Good Administration", enshrined in Article 41. This provides:

> "*1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union."*

The text continues:

> *"2. This right includes …….*
>
> *(a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken."*

5.3 The Lisbon Charter jurisprudence of the CJEU is developing apace. Its absorption, if not muscular and relentless, has been nonetheless progressive and seamless. One of its notable facets is the developing bilateral interaction with the Strasbourg jurisprudence.

5.4 This landmark EU instrument of protection of human rights, now of over three years' vintage, possesses a challenging architecture of rights, freedoms, principles and "Explanations". Notably, it recognises rights, directly effective in national law, which are <u>not</u> a mirror image of ECHR or, indeed, UNCRC rights. It is more than simply a codifying instrument. Those practicing in the field of children's rights have a duty to be familiar with its provisions. Such awareness is of increasingly critical importance in this jurisdiction, given the reality that while the Charter is positively flourishing in other Member States, including the Republic of Ireland, it appears to be relatively dormant in the UK.

5.5 The cocktail of rights, freedoms, principles and explanations which the Charter brings together constitutes one of the challenges for the national Court. Notably, there is no mention of the "Explanations" in the Preamble. In contrast rights, freedoms and principles are considered in a single sentence:

> "*The Union therefore recognises the rights, freedoms and principles set out hereafter.*"

Arguably, the most important statement in the Preamble is the unequivocal proclamation:

> "*To this end, it is necessary to **strengthen** the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible in a Charter.*"[29]

One finds an important insight into the distinction between rights and principles in Article 51(1).

[29] My emphasis.

"*The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore* ***respect the rights, observe the principles*** *and promote the application thereof in accordance with their respective powers…*".[30]

Accordingly, rights are to be respected while principles are to be observed. I suggest that there is nothing casual or inadvertent in the different verbs employed by the legislator in this context.

5.6 The explanations, as revised, where published in the Official Journal of the European Union on 14 December 2007.[31] They contain the following self-proclamation:

"*Although they do not as such have the status of law, they are a valuable tool of interpretation intended to clarify the provisions of the Charter.*"

Notably, the justification and rationale of the Explanations is stated to be the drafting adjustments made to Articles 51 and 52. The Explanation relating to Article 24 consists of two sentences. The first contains the self-evident statement that:

"*This Article is based on the New York Convention on the Rights of the Child … particularly Articles 3, 9, 12 and 13 thereof.*"

One immediately observes that recourse to the provisions of UNCRC other than Article 3, mentioned in this statement, will be legitimate in the interpretation and application of Article 24 in appropriate cases. The second part of the Explanation states:

"*Paragraph 3 takes account of the fact that, as part of the establishment of an area of freedom, security and justice, the legislation of the Union on civil matters having cross-border implications, for which Article 81 of the Treaty on the Functioning of the European Union confers powers, may include notably visiting rights ensuring that children can maintain on a regular basis a personal and direct contact with both of their parents.*"

[30] My emphasis.
[31] 2007/C 303/02.

The nexus thus forged between children/parental contact (on the one hand) and the grander aim of establishing within the EU an area of freedom, security and justice (on the other) is striking.

5.7 As regards Article 33 of the Charter, it suffices to note the clear statement in the Explanation that this is based on Article 16 of the European Social Charter. Generally, from the judicial perspective, the mechanism of the Explanations serves the important function of illuminating – though not necessarily comprehensively – the context in which questions relating to the interpretation and application of individual provisions of the Charter are to be determined.

5.8 Article 24(3) of the Charter was considered by the Upper Tribunal in the case of Abdul.[32] This case concerned a national of Nigeria, aged 41 who had two daughters aged 13 and 11 respectively, both British citizens and whose offending gave rise to a deportation decision under the Immigration (European Economic Area) Regulations 2006.[33]

5.9 In its consideration of Article 24(3), the Tribunal took into account the decision of the CJEU in Detiček v Sgueglia[34] which held that a measure preventing the maintenance on a regular basis of a personal relationship and direct contact between a child and both parents is justifiable only where trumped by another interest of the child of greater potency.[35] The decision in McB v - LE[36] was also considered. The Tribunal construed this latter decision as a recognition by the CJEU that Article 24(3) adds something of substance to Article 24(2). It held that Article 24(3) creates a free standing right. It stated:

> *"I am of the opinion that Article 24(3) creates a free standing right. It may, of course, be viewed as the unequivocal articulation of a concrete "best interests" right and, on this analysis, is a development, or elaboration, of Article 24(2). Furthermore, given the exception formulated in the final clause of Article 24(3), the nexus with Article 24(2) is unmistakable. However, I consider it clear that Article 24(3) was designed to create a discrete right, an analysis which is harmonious with general principles of EU law. These include the well known principle that every part of a measure of EU law is presumed to have a separate and individual effect and impact. Article 24(3)*

[32] Abdul (section 55- Article 24(3) Charter) [2016] UKUT 106 (IAC).
[33] The "EEA Regulations".
[34] [2009] EUECJ C-403/09.
[35] At [59].
[36] [2010] EUECJ C-400/10.

may also be viewed through the prism of the principle that where one has an amalgam of specific and general provisions, the former should normally be considered in advance of the latter. This construction is further fortified by the Commentary of the Charter of Fundamental Rights of the European Union (published by the EU Network of Independent Experts on Fundamental Rights), at p207:

> *"….. Children are no longer considered as mere recipients of services or beneficiaries of protective measures but rather as rights holders and participants in actions affecting them.""*[37]

5.10 Article 24(2) was considered by the CJEU in Case C-648/11[38]. This was a Dublin Regulation[39] case concerning, in the first of the three conjoined cases, the identification of the Member State responsible for examining the asylum application of a child, an Eritrean national aged 15 years, who first made an asylum application in Italy and repeated this in the United Kingdom. The circumstances of the two applicants in the conjoined cases were essentially the same.

5.11 The critical feature common to all three was that each was an unaccompanied minor. The impugned decision of the Secretary of State in all three cases was to certify that each applicant could be returned to Italy and the Netherlands respectively as these were safe countries. None of the applicants had a family member present in any of the three countries concerned. The CJEU, in construing Article 5(2) of the Regulation, emphasised its settled case law that this exercise involved consideration not only of the wording, but also the context and the objectives pursued.[40] Next, referring to the particular focus on unaccompanied minors contained in Article 6, coupled with recitals 3 and 4, the Court continued:[41]

> "*Since unaccompanied minors form a category of particularly vulnerable persons, it is important not to prolong more than is strictly necessary the procedure for determining the Member State responsible, which means that, as a rule, unaccompanied minors should not be transferred to another Member State.*"

5.12 Developing its reasoning, the Court then turned to Article 24 of the Charter, noting that the Dublin Regulation expressly observed "*the*

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[37] At [30].
[38] A reference under Article 267 TFEU by the English Court of Appeal in R (MA and Others) – v – Secretary of State for the Home Department [2011] EWCA Civ 1446.
[39] Regulation (EC) Number 343/2003.
[40] At [50] – see Migrationsverket v Petrosiam (Case C-19/08), [2009] ECR I-495 at [34].
[41] At [55].

fundamental rights and principles which are acknowledged in particular in the Charter".[42] The judgment continues:

> "*Those fundamental rights include, in particular, that set out in Article 24(2) of the Charter, whereby in all actions relating to children, whether taken by public authorities or private institutions, the child's best interests are to be a primary consideration.*
>
> *Thus, the second paragraph of Article 6 of Regulation No 343/2003 cannot be interpreted in such a way that it disregards* ***that fundamental right*** *….."*[43]

5.13 In these passages the Court unambiguously describes and categorises a child's best interests as a fundamental right. However, these paragraphs must not be considered in isolation. In the immediately succeeding passages I suggest that the Court, in substance, employs the language of principle. In [59], it describes the child's best interest as "*a primary consideration*" and in [60] the Court speaks of "*taking into account of the child's best interests*". This is not the language of rights or, by extension, the recognition and vindication of rights.

5.14 Notably, very soon afterwards, in Joined Cases C-356/11 and C-357/11[44], the Court, in its consideration of the child's best interests and in the specific context of Article 24(3), namely a child's need to maintain a regular personal relationship with both parents, did not employ the language of rights. Rather, the central theme of these passages is that of taking into account the child's best interests.[45]

5.15 The contention that the best interests of the child ranks as a principle, a primary consideration to be taken into account, rather than a right is fortified by the contrasting approach of the CJEU to one of its sister provisions, Article 24(3). The court has held unequivocally that Article 24(3) creates a fundamental right in Detiček v Sgueglia[46]. Notably, the Court's reasoning also makes clear that this right may, in principle, yield to the best interests of the child in circumstances where its vindication and enforcement would damage those interests.

5.16 A brief reflection on some figures is instructive. The Fundamental Rights Agency of the European Union has reported that in 2015

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[42] At [56].
[43] At [57] – [58]. My emphasis.
[44] O and S v Maahanmuuttovirasto and Maahanmuuttovirasto v L (Cases C-356/11 and C-357/11).
[45] See [75] – [81].
[46] [2009] EUECJ C-403/09, at [54] – [58].

there was a total of 68 Article 267 TFEU references by national Courts to the CJEU involving Charter issues. Article 47 (effective remedy and fair trial) and Article 7 (private and family life) constituted the majority [31]. Interestingly, France and the United Kingdom made a total of 41 preliminary ruling references in which only two raised Charter issues. A short breakdown illuminates:

(a) During the past five years, there has been no reference to the Charter in the preliminary ruling requests made by Croatia, Cyprus, the Czech Republic, Demark, Lithuania, Malta and Sweden.

(b) In contrast, the references made by Austria, Belgium, Italy, Slovakia and Spain raise Charter issues in a high proportion of cases.

5.17 I draw attention to one pending Article 267 reference of particular interest, made in 2015. The Administrative Court of Luxembourg has raised the interesting question of the definition of "child". The question referred asks whether in the provisions of the free movement *acquis* the term "child" is confined to biologically proven children or extends to a person for whom the frontier worker concerned assumes parental responsibility, specifically in the matter of economic support for education. Interestingly, the questions arising have been raised in the context of one of the Charter's more self-effacing provisions, namely Article 33 which concerns "*family and professional life*".

6. The Dublin Regulation

6.1 In the EU context, a brief word on Dublin III [Regulation (EU) 604 2013], which has been in operation since 19 January 2014 and is very topical as of now, is unavoidable.

6.2 One of its striking features is the ever increasing, and highly welcome, emphasis on the protection of children and respect for family life: see Recitals [13] – [17] and Article 6. Thus the best interests of the child shall be "***a*** *primary consideration of Member States*" [my emphasis] when applying the Regulation: recital [13]; the best interests assessment should in particular take due account of the child's well-being, social development, safety and security, together with the child's views and background: *ditto*; respect for family life shall be a primary consideration: recital [13]; applications for international protection by several family members should be processed together: recital [15]; full respect for the principle of family unity is required: recital [16]; where an unaccompanied minor has a family member or relative in another Member State who can take care of him, this is a "*binding*

responsibility criterion": *ditto*; a personal interview of each applicant is obligatory: Article 5; and there is a right to specified information: Article 4.

6.3 Dublin III gathers together, in a single provisions – Article 6 – a plethora of protections for children under the banner "Guarantees for Minors": the best interests principle; the right to have a suitably qualified and expert representative at all stages; the obligation, where appropriate, to take action to identify the family members, siblings or relatives of an unaccompanied child on the territory of another Member State; the duty to ensure that each Member State's "*competent authority*" is adequately resourced and staffed with properly trained personnel; and the exhortation to engage with international or other relevant organisations in family tracing exercises.

6.4 Dublin III was heralded by some as a paradigm illustration of the world growing wiser as it grows older: would that that were so! I pose but one question: how efficacious in practice and in the real world are these superficially impressive protections?

7. The United Kingdom: A Snapshot

7.1 In the field of immigration and asylum decisions, Article 3 UNCRC was eventually given effect in domestic law by section 55 of the Borders, Citizenship and Immigration Act 2009. However, almost 25 years later, it might be said that, in the domestic legal system of the United Kingdom, this measure has not attained its full potential. Before 2009 it belonged to the domain of international law and was, therefore, embraced by the longstanding principle that international treaties and conventions are not self-executing. Notwithstanding, during this period, the impact and importance of the Convention were judicially recognised. This is best illustrated in the words of one senior English judge who said, in 2002, that the UNCRC (and the Lisbon Charter) -

> *"can, in my judgment, properly be consulted insofar as they proclaim, reaffirm or elucidate the content of those human rights that are generally recognised throughout the European family of nations……"*[47]

7.2 In its jurisprudence, the Upper Tribunal has laid emphasis on the twin duties imposed by section 55. First, all decisions within the scope of the section must be made "*… having regard to the need*

[47] Per Munby J in *R (on the application of The Howard League for Penal Reform) – v – Secretary of State for the Home Department* [2002] EWHC 2497 Admin, paragraph 51.

to safeguard and promote the welfare of children who are in the United Kingdom". Second, the decision maker must "*… have regard to*" the statutory guidance published by the Secretary of State.[48] Second, the Upper Tribunal jurisprudence has highlighted the importance of the decision making process (to be contrasted with its outcome), emphasising the need for decision makers to be properly informed. See JO and Others (section 55 duty) Nigeria[49] and MK (section 55 – Tribunal options) Sierra Leone.[50]

7.3 In United Kingdom law, where a minor is unaccompanied, there is a specific statutory family tracing obligation imposed on the Government (the Home Secretary), per regulation 6 of the domestic transposing measure, the Asylum Seekers (Reception Conditions) Regulations 2005.

7.4 The UK Supreme Court has had occasion to consider the meaning and scope of section 55 in two landmark decisions, ZH (Tanzania) v Secretary of State for the Home Department[51] and Zoumbas v Secretary of State for the Home Department[52]. In both decisions the Supreme Court readily assimilated the concepts of welfare and best interests. Baroness Hale opined that the duty involved is to consider the best interests of the child first[53], while the formula developed by Lord Kerr was:

> "*…a primacy of importance must be accorded to his or her best interests. This is not, it is agreed, a factor of limitless importance in the sense that it will prevail over all other considerations. It is a factor, however, that must rank higher than any other. It is not merely one consideration that weighs in the balance alongside other competing factors. Where the best interests of the child clearly favour a certain course, that course should be followed unless countervailing reasons of considerable force displace them.*"[54]

7.5 The decision in Zoumbas is notable for the code of seven principles devised by Lord Hodge:

> "*(1) The best interests of a child are an integral part of the proportionality assessment under article 8 ECHR;*

[48] Per section 55(3).
[49] [2014] UKUT 517 (IAC).
[50] [2015] UKUT 223 (IAC).
[51] [2011] UKSC 4.
[52] [2013] 1 WLR 3690.
[53] At [26].
[54] At [46].

(2) 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 the paramount consideration;

(3) Although the best interests of a child can be outweighed by the cumulative effect of other considerations, no other consideration can be treated as inherently more significant;

(4) While different judges might approach the question of the best interests of a child in different ways, it is important to ask oneself the right questions in an orderly manner in order to avoid the risk that the best interests of a child might be undervalued when other important considerations were in play;

(5) It is important to have a clear idea of a child's circumstances and of what is in a child's best interests before one asks oneself whether those interests are outweighed by the force of other considerations;

(6) To that end there is no substitute for a careful examination of all relevant factors when the interests of a child are involved in an article 8 assessment; and

(7) A child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent." [55]

The need for decision makers to be properly informed, emphasised in the Upper Tribunal's jurisprudence, is stated unambiguously in the following passage:

> *"There is no substitute for a careful examination of all relevant factors when the interests of a child are involved in an Article 8 assessment."*[56]

8. Some Concluding Thoughts

8.1 The concept of a child's best interests challenges every decision maker and Judge to discharge their respective functions in an open minded, panoramic and flexible manner. The best interests concept is unavoidably fact sensitive. It is not susceptible of any

[55] At [10].
[56] At [10].

broad, all embracing definition. In this sense, it is a striking reflection of the reality of the human condition. The potency of the best interest's principle must not be underestimated. In every case where this factor arises, it is capable in principle of displacing and outweighing all countervailing factors. In cases where this occurs, the best interests of the child or children concerned ascend to the level of the dominant and determinative factor.

8.2 This principle continues to operate as a reflection of the concern which every developed, humane and responsible society has for one of its weakest and most vulnerable cohorts. It also reflects society's acknowledgement of the vital truism that today's children are tomorrow's adults. It may be said that strong judicial oversight, duly imbued with responsible legislation and courageous political leadership worldwide, lie at the heart of the best interests principle in its current state of evolution and its further development.

8.3 There is a school of thought that legislators, both international and domestic, and courts, as of now, may have gone about as far as one can realistically and feasibly go in the various measures devised to recognise and protect a child's best interests. There is no obvious sign of any material extension of this protection. Notwithstanding, the development of the best interests principle is such that, in some cases, it is capable of providing a free standing, independent source of international protection. The effect of this protection is to preclude, in appropriate cases, the removal of a child or parent (or parental figure) from a host state notwithstanding that the child is not eligible for the protections provided by refugee status or those available under the *non-refoulement* obligations of States in international human rights law.

8.4 That is not to say that there has been, by judicial decision making, impermissible legislating by stealth, tantamount to a realignment of Article 3 UNCRC with the Refugee Convention. However, it may be said that the increasing influence of Article 3 has fortified and invigorated the protection afforded by the Refugee Convention and, by extension, the Qualification Directive.

8.5 Finally, in this context, I draw attention to two considerations in particular. First, UNCRC has more States parties than the Refugee Convention (194 versus 148).[57] Second, the arrangements for international oversight of State compliance with UNCRC, which involve the UN Committee on the Rights of the Child, have no direct counterpart in the Refugee Convention machinery. Notably, if unsurprisingly, the UN Committee has advocated that the best

[57] The US and Somalia are the only two States which have failed to ratify the UNCRC.

interests principle operates as both a substantive right and an interpretive device.[58]

8.6 It is generally held that in international law UNCRC makes the most extensive provision for the minimum obligations owed by States to children, in both the immigration context and generally. UNHCR has argued that UNCRC prescribes the most exacting standards for protection and assistance to children under any international instrument. While the Refugee Convention remains the cornerstone of the international law arrangements for the protection of refugees, the full potential of UNCRC to provide a valuable additional layer of protection, a potent adjunct, has probably not yet been fulfilled.

[58] See General Comment No 14.