Migration, abduction and children's rights: the relevance of children’s rights and the European supranational system to child abduction cases with immigration components

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10 The Impact of the European Supranational Architecture on Primary Carer Abductions with Immigration Components

10.1 Introduction

This dissertation has argued that context is important in adjudicating child abduction applications. Human rights violations stemming from other branches of law may and should play a role in the decision. Similarly, obstacles to return affecting a taking parent can be important when adopting a child rights-based approach to the return mechanism. In practice, the cross border element inherent in child abduction applications renders difficult the assessment of context by domestic courts. This is because such an assessment should be carried out by reference to the laws in a different legal system, and not in relation to the laws in that country. Moreover, whenever it comes to migration matters, potential conflicts exist between different branches of law, *in casu*: between family and immigration laws. The best interests of the child and other rights of children are evaluated differently in family and immigration laws and the lack of coordination impacts on the rights of children. Notwithstanding these difficulties, it was argued in the preliminary conclusions that such an assessment is necessary whenever there is a demonstrated relationship of care between the child and the taking parent, and there are arguable allegations that the child's return will result in the separation of the child from their primary carer.

Against this background, in the preliminary conclusions it was further argued that the Child Abduction Convention can only function optimally where there is a minimum level of fundamental rights protection in the country of habitual residence.

This Chapter considers the role of the European supranational Courts in creating the optimal context for the functioning of the Child Abduction Convention. As outlined in Sections 7.2 and 8.2 respectively, both Courts are competent to lay down (minimum) standards of human rights protection. They are competent to decide child abduction cases as well as immigration-related cases. Therefore, through their case law they can arguably offset the power imbalances created by immigration laws and consequently contribute to the fairness of the proceedings for children and parents with an immigration background. Section 10.2 of this dissertation assesses whether the case law of the Strasbourg and Luxembourg Courts has indeed contributed to offsetting the power imbalances mentioned above. The cases analysed concerned the separation of parents where at least one of them had a precarious immigration status. In practice, such cases could arguably arise

before a child abduction court.[1] The question here is: How have the two European supranational Courts addressed the best interests of the child and the right to maintain contact with both parents in cases involving precarious immigration status of separated primary carers?

This sub-research question exclusively addresses the case law of the European supranational Courts in the migration sphere. It does not deal with (academic) discussions around the suitability of this case law from a migration perspective, or with other policy objectives. The aim is to determine the minimum standards within the European Union as distilled from the two Courts case law and in areas which are of direct relevance for child abduction courts. For this reason, the analysis is based extensively on the case law and, where available, on documents submitted to the Courts for adjudication. Academic writings in this field have been assessed only to the extent strictly necessary for the subject matter.

Section 10.3 addresses the concerns raised by refugee considerations brought within child abduction proceedings, from the perspective of refugee law. Such considerations have equally exposed the issue of parent child separation and the capacity of the country of habitual residence to protect the child. The question of the capacity of the system to protect the child is even stronger in these cases in light of the definition of the term refugee in the Geneva Convention as a person who is unable or unwilling due to a legitimate fear of persecution to avail himself of the protection of the country of habitual residence. These cases expose a potential conflict in assessments between immigration and family courts within the same jurisdiction. This conflict may equally result in the separation of the child from their primary carer. The case law of the two supranational Courts in refugee matters is relevant for domestic courts deciding child abduction cases. This is because of these Courts' constitutional function within Europe. In other words, national family courts within the European Union/Council of Europe are bound to follow all the case law, including the case law concerning refugee matters, of the two European supranational Courts. Hence, Section 10.3 answers the following question: How should child abduction cases with refugee components be considered in the light of the case law of the CJEU and ECtHR?

Similarly to Section 10.2, given its factual nature, the answer to this sub-research question is provided by relying mainly on primary sources of law, namely the relevant EU laws and the case law of the CJEU and of the ECtHR. Whenever EU laws allow for the discretion of Member States, some examples of how they have legislated within the discretionary sphere are provided.

It should be further noted that the case law of the CJEU and ECtHR is analysed from the perspective of minimum standards of protection.

1 Cases with immigration components where an immigration-based defence was brought post-abduction were discussed in Section 5.6 of this dissertation. The cases analysed in Section 10.2 reveal the same pattern, albeit pre-abduction.

Children's rights could inform the principle of non-refoulement itself and indeed the CRC Committee has shown its willingness to contribute to such an interpretation.[2]

10.2 The European supranational Courts and the best interests of children from separated parents in immigration proceedings

Within the European Union, both the CJEU and the ECtHR have dealt with the child's right to have contact with both parents and best interests in separated mixed-status families. The sections below address their approaches first from the perspective of the CJEU and subsequently from the perspective of the ECtHR.

10.2.1 Children of separated parents in the case law of the CJEU

Over time, the CJEU has developed an extensive body of case law on the relationship between children and parents and the impact of such a relationship on residence rights within the Union. This case law has been primarily driven (i) by the principle of the freedom of movement and (ii) by the developing notion of EU citizenship.[3] Against this background, and as it shall be elaborated upon herein, it is important to note that the extent of residence rights of a parent depends largely on whether the child is an EU national.

The CJEU's analysis of EU citizen children's rights started from their status as right- holders whose rights of residence should not be deprived of a useful effect.[4] This approach has enabled the CJEU to rule that denying residence rights to parents who are the primary carers of EU citizen children would deprive the child's right of residence of any useful effect.[5] In other words, if the parent who takes care of the child cannot legally remain in the Union, their departure would result in the EU citizen child also having to leave due to their dependence. Consequently, the CJEU has ruled that EU states must allow third country national (TCN) parents to derive residence rights from their EU citizen children.[6] This obligation has been conditioned on the requirement that the child (through the parents) has sufficient resources not to become a burden on the social security system of the host

2 CRC Committee 4 February 2021, no. 83.2019 (R.H.M. on behalf of Y.A.M. v. Denmark).

3 Lonardo 2022, p.603; Dal Pozzo 2013.

4 CJEU 19 October 2004, C-20/02 ECLI:EU:C:2004:639 (Kunqian Catherine Zhu and Man Lavette Chen v. Secretary of State for the Home Department), para 45. In the same case (para 20) the CJEU has expressly positioned children as holders of rights guaranteed by the Treaties "which cannot be made conditional on the attainment […] of the age prescribed for the acquisition of legal capacity to exercise those rights.

5 CJEU 19 October 2004, C-20/02 ECLI:EU:C:2004:639 (Kunqian Catherine Zhu and Man Lavette Chen v. Secretary of State for the Home Department), para 45.

6 CJEU 19 October 2004, C-20/02 ECLI:EU:C:2004:639 (Kunqian Catherine Zhu and Man Lavette Chen v. Secretary of State for the Home Department), para 45.

Member State.[7] However, Member States are under a duty to grant TCN parents the right to work so as to enable the children to genuinely enjoy the substance of their rights conferred by the status as citizens of the Union.[8] This flows from the fact that a residence right without a right to work, will inevitably lead to the parent(s) not having sufficient resources necessary under the relevant EU law.

The assessment of dependency in the parent-child relations has proven of particular importance. The CJEU's case law indicates that even where only the child is an EU citizen, primary carer parents who prove the child's dependence on them should be able in certain conditions to derive residence rights from their child.[9]

However, until 2017 Member States interpreted narrowly the notion of dependency. This impacted significantly on separated mixed-status families. For example, in the Netherlands, official guidelines of the Secretary of State for Security and Justice required that except when the EU national parent was in detention or could not be awarded custody, the immigration authorities were to assume that the child could remain in The Netherlands.[10] In other words, separated third country national parents who were their children's primary carers could not derive residence rights on the basis of their children.

Against this background, the Higher Administrative Court of the Netherlands submitted a preliminary reference, registered as the *Chavez-Vilchez* case.[11] Domestically the case concerned the eligibility for child benefits and income support of eight separated mothers whose claims for residence rights had been rejected by the national immigration authorities.[12] All mothers exercised primary physical custody and shared parental responsibilities with the fathers who were either absent or minimally involved in the children's lives. For the Dutch government, the presence of another parent in the territory of the Union was a justification for enabling the

7 CJEU 19 October 2004, C-20/02 ECLI:EU:C:2004:639 (Kunqian Catherine Zhu and Man Lavette Chen v. Secretary of State for the Home Department). See also Article 21 TFEU in conjunction with Article 7 Citizens Directive.

8 CJEU 8 March 2011, C-34/09 ECLI:EU:C:2011:124 (Gerardo Ruiz Zambrano/Office national de l'emploi), para 42.

9 CJEU 15 November 2011, C-256/11, ECLI:EU:C:2011:734 (Murat Dereci and Others/Bundesministerium für Inneres), paras 65 to 67; CJEU 6 December 2012, C-356/11, ECLI:EU:C:2012:776 (O and S v. Maahanmuuttovirasto and Maahanmuuttovirasto /L), para 56; CJEU 8 November 2012, C-40/11, ECLI:EU:C:2012:691 (Yoshikazu Iida/Stadt Ulm), para 71 (obligation of the child to leave the territory of the EU).

10 CJEU 10 May 2017, C-133/15, ECLI:EU:C:2017:354 (H.C. Chavez-Vilchez and Others v. Raad van bestuur van de Sociale verzekeringsbank and Others), para 10.

11 CJEU 10 May 2017, C-133/15, ECLI:EU:C:2017:354 (H.C. Chavez-Vilchez and Others v. Raad van bestuur van de Sociale verzekeringsbank and Others).

12 Klaassen, The right of residence for non-EU parents of EU citizen children: the Chavez-Vilchez case, 12 May 2017, Leiden Law Blog.

expulsion of the primary carers from the Netherlands.[13] In other words, the right to have contact with both parents was not a factor to be considered in immigration proceedings. As evidenced in their observations to the CJEU, Denmark, Belgium and The United Kingdom- then still a Member State of the European Union-, equally supported the approach that an EU citizen child of separated EU national and non-EU national parents had no obstacle in remaining in the European Union. In their submissions this was the optimal solution whenever one parent, regardless of the actual relationship with the child, still resided within the European Union and could theoretically assume the care of that child.[14] They attached no relevance to the actual relationship between the child and the non-EU national parent who could be expelled simply because the child had another EU national parent. Quite on the contrary, as the Belgian Government contended, the existence of joint legal parental responsibilities required that domestic authorities pay no attention to the practical circumstances of the child, and of who cared for the respective child.[15] For the government of The United Kingdom, it was the responsibility of the EU citizen parent to take care of the child, and only if that parent had abused the child, or was incapable physically or mentally to assume care, would EU law become applicable in relation to the primary carer parent.[16] Of importance to the present dissertation, it should be stressed that any removal by these parents of their children outside the jurisdiction would have amounted to child abduction, given that in all cases, the parents exercised joint parental responsibilities. This is yet another illustration of the realities for children of mixed migration status discussed in Chapter 5 above.

In its judgement of 10 May 2017, the CJEU elaborated on the right of the child to have contact with both parents in the context of immigration law. The Court stressed that in the assessment of dependency the domestic authorities were to take into account the right to respect for family life and the child's best interests (Articles 7 and 24(2) respectively of the Charter). The Court refuted the Dutch Government's submission which was supported by the other governments mentioned above. For the CJEU, the existence of another parent willing and able to take care of the child was

13 CJEU 10 May 2017, C-133/15, ECLI:EU:C:2017:354 (H.C. Chavez-Vilchez and Others v. Raad van bestuur van de Sociale verzekeringsbank and Others), para 66.

14 As per their observations in the case CJEU 10 May 2017, C-133/15, ECLI:EU:C:2017:354 (H.C. Chavez-Vilchez and Others v. Raad van bestuur van de Sociale verzekeringsbank and Others), made available to this author by the European Commission following an application for access to documents. Commission Decision C(2017) 6671 of 29 September 2017.

15 CJEU 10 May 2017, C-133/15, ECLI:EU:C:2017:354 (H.C. Chavez-Vilchez and Others v. Raad van bestuur van de Sociale verzekeringsbank and Others), Observations of Belgium, paras 12 and 16.

16 CJEU 10 May 2017, C-133/15, ECLI:EU:C:2017:354 (H.C. Chavez-Vilchez and Others v. Raad van bestuur van de Sociale verzekeringsbank and Others), Observations of the United Kingdom, para 28.

not in itself sufficient to determine that dependency did not exist.[17] Member States were to take into account the child's best interests when deciding on granting residence rights to the third country national parent. Following this judgement, an assessment of the child's best interests must include "all the specific circumstances, including the age of the child, the child's physical and emotional development, the extent of his emotional ties both to the Union citizen parent and to the third country national parent, and the risks which separation from the latter might entail for that child's equilibrium."[18] The CJEU thus stressed that domestic authorities must assess the child's best interests in each individual case. The Court therefore considered that the burden to prove that the EU national parent is not capable or willing to undertake the day-to-day care of the child which was placed on the TCN parent, is not the sole relevant criterion in the determination.

This judgement is of particular importance to the present study as it is for the first time that the CJEU mandated states to consider the child's best interests when deciding on the derived residence rights for their TCN parents. The CJEU required national authorities to carry out a detailed assessment of the child's best interests. Such a requirement is consistent with the position of the CRC Committee in General Comment No 14.[19] Further, the CJEU ruling gives meaning to the right of the child to have contact with both parents in immigration law, by bringing it closer to the reasoning of family courts.

The importance of the child's best interests and family life were reiterated in the subsequent case of *K.A. and Others v. Belgian State* where the CJEU found that states were obliged to assess the relationship of dependency between the child and their TCN parent.[20] As with *Chavez Vilchez*, the CJEU stressed that the EU national parent's ability and willingness to assume sole responsibility for the primary day-to-day care of the child was a relevant but not sufficient factor to assess that dependency does not exist.[21] National courts had to evaluate the risks that separation may entail for the child's equilibrium.

In a different line of case law, the CJEU enabled primary carer parents to derive residence rights if their children were enrolled in educational programmes under Regulation No. 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community.[22] Here the CJEU has held that children have an independent right of residence in a

17 CJEU 10 May 2017, C-133/15, ECLI:EU:C:2017:354 (H.C. Chavez-Vilchez and Others v. Raad van bestuur van de Sociale verzekeringsbank and Others), para 71.

18 CJEU 10 May 2017, C-133/15, ECLI:EU:C:2017:354 (H.C. Chavez-Vilchez and Others v. Raad van bestuur van de Sociale verzekeringsbank and Others), para 71.

19 This is also discussed in Chapter 3 of this dissertation.

20 CJEU 8 May 2018, C-82/16, ECLI:EU:C:2018:308 (K.A. and Others v. Belgische Staat), para 52; CJEU 6 December 2012, C-356/11, ECLI:EU:C:2012:776 (O and S/Maahanmuuttovirasto and Maahanmuuttovirasto /L).

21 CJEU 8 May 2018, C-82/16, ECLI:EU:C:2018:308 (K.A. and Others/Belgische Staat).

22 OJ Official Journal L 257, 19/10/1968 P. 0002 – 0012.

host EU state if they are enrolled in educational programs as per Article 12 of Regulation No. 1612/68.[23] As in the other cases discussed herein, the CJEU attached importance to the primary carer status of the parent. For the Luxembourg Court it was immaterial that this parent was divorced, economically inactive or lacked resources.[24]

The case law above concerns EU citizen children with at least one TCN carer. It should be noted that EU law grants more significant rights to EU citizen children with EU citizen parents. These rights have mostly been codified in the Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (the "Citizens' Directive" or the "CD").[25] Union citizens have the right to work and reside in a Member State other than the state of nationality: their stay can only be restricted on the ground of sufficient resources and this in turn has been interpreted narrowly by the CJEU.[26]

Finally, it should be mentioned that no relevant case law has been identified where all family members were third country nationals. These situations fall primarily under the Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (the "Family Reunification Directive" or the "FRD"). Article 15(1) of the FRD sets a maximum residence period of 5 years after which the family member is entitled to receive an

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23 CJEU 7 September 2002, C-413/99, ECLI:EU:C:2002:493 (Baumbast and R/Secretary of State for the Home Department), para 63, C-480/08, CJEU 23 February 2010, C-480/08, ECLI:EU:C:2010:83, (Maria Teixeira/London Borough of Lambeth and Secretary of State for the Home Department), para 46.

24 CJEU 7 September 2002, C-413/99, ECLI:EU:C:2002:493 (Baumbast and R/Secretary of State for the Home Department), CJEU 23 February 2010, C-480/08, ECLI:EU:C:2010:83, (Maria Teixeira v. London Borough of Lambeth and Secretary of State for the Home Department) and CJEU 19 March 2019, Joined Cases C-297/17, C-318/17, C-319/17, C-438/17, ECLI:EU:C:2019:219 (Bashar Ibrahim and Others/Bundesrepublik Deutschland and Bundesrepublik Deutschland/Taus Magamadov). The same rights have been extended to TCN children with one TCN primary carer and one EU parent who were enrolled in educational establishments provided that (i) the children had a right to reside on the basis of EU law and (ii) they were dependent on a primary carer TCN parent. See: CJEU 8 May 2013, C-529/11, ECLI:EU:C:2013:290 (Olaitan Ajoke Alarape and Olukayode Azeez Tijani/Secretary of State for the Home Department).

25 Official Jounal L 158, 30.4.2004, p. 77–123.

26 For example, the CJEU has clarified that situations where women give up work temporarily due to the late stages of their pregnancies and resume their economic activity within a reasonable time after child birth are to be considered workers within the meaning of the relevant EU laws, and the income requirements referred to above are not applicable to them, see CJEU 2 October 2019, C-93/18, ECLI:EU:C:2019:809 (Ermira Bajratari v. Secretary of State for the Home Department), para 42. Further, even if the resources criteria is not met, Article 14 (3) CD provides that "An expulsion measure shall not be the automatic consequence of the Union citizen's or his or her family member's recourse to the social assistance system of the host Member State.

autonomous residence permit. Article 15(3) FRD further provides that "in the event of […] divorce, separation, […], an autonomous residence permit may be issued, upon application, if required, to persons who have entered by virtue of family reunification.

10.2.2 Children of separated parents in the case law of the ECtHR

Under the Strasbourg Court's settled case law, a state is entitled to control the entry and residence of aliens into its territory.[27] The ECtHR does not consider that the Convention guarantees the right of an alien to enter or to reside in a particular country.[28] Nevertheless, despite this seemingly deferential principle, over time the ECtHR has developed an extensive body of case law in the field of immigration and has been one key driver in changing Contracting States' policies in this area.[29]

This section analyses the situations where there is a risk to the relationship between one parent and the child(ren) due to parental separation and the potential expulsion of that respective parent.[30] The subject matter of analysis is the relationship between parents and children as framed by the ECtHR with a particular focus on the weight ascribed by the Court to the right of the child to maintain contact with both parents when immigration considerations appear. All of these situations have been analysed under Article 8 of the Convention: the right to family life.[31] Article 8 ECHR has been interpreted to impose on the one hand a *negative obligation* not to expel settled immigrants and, on the other hand a *positive obligation* to accept – in certain circumstances- the entry and residence of immigrants.[32] A negative obligation existed where the applicant held a valid residence permit for a while, thus the interference consisted in the state's withdrawal of the residence permit. Conversely, positive obligations were found where an applicant had never held a valid residence permit and argued that the

27 this principle was first laid down in the ECtHR 28 May 1985, nos. 9214/80 9473/81 9474/81 (*Abdulaziz, Cabales and Balkandali v. The United Kingdom*), and reiterated thereafter in virtually all cases concerning immigration questions.

28 For eg ECtHR 2 August 2001, no. 54273/00 (*Boultif v. Switzerland*), para 39.

29 Thym 2008, p. 89.

30 These cases could be qualified as expulsion cases, in that one parent risks deportation and there is a difference in legal status between the parent the other parent and the child. It should be noted though that this chapter is not only concerned with situations where the parent faces imminent expulsion, but also with those where the parent for example cannot regularise his status on the basis of the relationship with the child. Thus, from this perspective they can be seen as admission cases. Also, exceptionally first entry situations are considered when the question is that the parent has to choose between family life with one child in the host country or family life with a child from a different relationship in the country of origin. For a discussion on this classification, seecKlaassen 2015, p. 37.

31 The ECtHR does distinguish between private life and family life although at times it does admit that the distinction is not always clear cut. For the purposes of the present analysis the author has looked solely at the limb 'family life' of Article 8. For a brief discussion on the distinction see also Klaassen 2015, page 40.

32 Klaassen 2015, p. 40.

state should have granted such permit considering the relationship with the child. Nevertheless, some cases did not lend themselves to examination under either positive and negative obligations and the Court has sometimes held that such a distinction is not always clear cut.[33]

In *Boultif v. Switzerland*, the ECtHR has developed for the first time assessment criteria for claims that the main obstacle to expulsion was the family life between spouses or spouses and children in the host country.[34] The best interests of children, in particular the seriousness of the difficulties which they were likely to encounter in the country of expulsion, has been added in the subsequent case of Üner v. The Netherlands.[35] Of the *Boultif* criteria which the Court looks at in expulsion cases, Klaassen identifies the 'family life elsewhere' criterion as the basis for the ECtHR's entire case law.[36] In other words, if family life is possible in another state, the Court will most likely rule that Article 8 ECHR has not been infringed.[37]

The situation of separated parents is fundamentally different from that of a united family in that whereas in a united family spouses may be assumed to take joint decisions and choose to exercise their family life in another country, this is manifestly not the case when parents are separated. When a parent from a separated family faces expulsion it cannot be automatically inferred that their former spouse and child will follow in the country of expulsion. Thus, the element of choice of residence disappears. In these cases the determining factor is not the family life with the former partner, but rather the impact of the expulsion on the relationship with the child.

To date, the right of the child to maintain contact with their non-national parent who had separated from the other parent, was directly addressed in 14 cases.[38] An overview of these cases indicates that the Court placed a significant emphasis on the quality of the relationship between the child and their parents as well as on the age of the child. The best interests of young children who had meaningful contact with their parents before the envisaged expulsion weighed heavily in the Court's finding of Article 8 infringements.[39] For older children, it accepted that remote contact via, for example, electronic means of communication satisfied the requirements

33 ECtHR 21 February 1990, no. 9310/81 *(Powell and Rayner v. The United Kingdom)*, para 41.
34 ECtHR 2 August 2001, no. 54273/00 (*Boultif v. Switzerland*), para 48.
35 ECtHR 18 October 2006, no. 46410/99 *(Üner v. The Netherlands)*, para 65.
36 Klaassen 2015, p. 43.
37 Klaassen 2015, p. 83.
38 The following key words were used in the Hudoc database: search 1: 'child' and 'divorce' and 'immigration' retrieved 33 results and search 2: 'child' and 'separation' and 'immigration' retrieved 71 results. All of the cases were checked for relevance to the subject matter and ultimately 13 cases were found to be pertinent.
39 See case law cited below: inter alia: ECtHR, 31 January 2006, no. 50435/99 *(Rodrigues da Silva and Hoogkamer v. The Netherlands)* ECtHR, 28 June 2011 no. 55597/09 (*Nunez v. Norway*). *Per a contrario* in a case where the case contact was sparse the Court declined to find an infringement of the ECHR: See ECtHR 7 October 2014, no. 15069/08 *(Loy v. Ger).*

for the child's right to have contact with both parents.[40] However, remote contact alone was not enough to conclude that the state has discharged its obligations to secure the right of the child to a relationship with the expelled parent; the Court also assessed whether the state had taken steps to enable direct contact as well.[41] It is noteworthy that the ECtHR did not draw a distinction between primary carer and non-primary carer parents. In *Udeh v. Switzerland,* it considered that the expulsion would seriously compromise the children's relationship with their father, who was visiting them once every two weeks. It found that "it is in the daughters' best interests to grow up with both parents and, as the latter are now divorced, the only way for regular contact to be maintained between the first applicant and his two children is to authorise him to remain in Switzerland, given that the mother could not be expected to follow him to Nigeria with their two children."[42] Yet, no contact at all over a prolonged period of time will most likely lead the Court to conclude that the best interests of the children are not adversely affected by deportation.[43]

Therefore, in the majority of cases where contact between the applicants and their children was seriously jeopardised by the expulsion measure, the Court appeared to place a significant, if not decisive, weight on the right of the child to have contact with both of their children. In these cases the applicants' fault for finding themselves in a 'deportable' situation appears to have been minimal. Rather, it was the authorities' conduct, in particular the lack of coordination between the family and immigration authorities which caused the loss of contact with their children. This lack of coordination and the ensuing impact on children and their parents have been evidenced in ECtHR case law since 1988.[44] The cases analysed in the paragraphs below illustrate the disconnection between family and immigration laws and the ensuing impact for the rights of children.

The first in this line of cases was *Berrehab v. The Netherlands* concerning the envisaged expulsion of a father whose residence permit had been with-

40 ECtHR 1 March 2018, no. 58681/12 (*T.C.E. v. Germany)* and ECtHR 23 October 2018, no. 25593/14 *(Assem Hassan Ali v. Denmark)*.

41 ECtHR 1 March 2018, no. 58681/12 (*T.C.E. v. Germany)*, where the state has enabled the applicant to travel to the host state for several periods of time a year so as to see his child (paras 28 and 30 taken together with para 57).

42 ECtHR 16 April 2013, no. 12020/09 (*Udeh v. Switzerland*), para 52.

43 ECtHR 20 December 2011, no. 6222/10 *(A.H. Khan v. The United Kingdom)*, para 40. It should be noted that ECtHR 23 October 2018, no. 25593/14 *(Assem Hassan Ali v. Denmark)*. appears to be an outlier in the Court's case law. Here the applicant had contact with his children and was separated from his former wives, yet the ECtHR did not carry out a detailed analysis of the impact of deportation on the children. It briefly mentioned that other than financial difficulties there was no obstacle for the children, the youngest of which was 7 years old at the time to visit the applicant in Jordan or to maintain contact with him in other ways (para 62).

44 ECtHR 21 June 1988, no. 10730/84 *(Berrehab v. The Netherlands)*.

drawn on the ground of divorce.[45] At the time of the events, he was seeing his daughter four times a week, however under national law this relationship could not form the basis for a residence permit. The Court did not refer to the best interests of the child, the judgement being adopted before the entry into force of the CRC. Yet, the main reason for finding a violation was that the envisaged expulsion threatened the close ties the very young child had developed with her father.[46]

In the following cases, the ECtHR placed a particular emphasis on the interplay between family law and immigration proceedings which -had it not been for the ECtHR's judgement – would have resulted in the children's separation from one of their parents. *Ciliz v. The Netherlands* is a variation of the situation in *Berrehab.*[47] Mr Ciliz' residence rights had ceased on the ground of his divorce. The family courts refused to set up a formal plan for contact with his son given that the applicant was facing immigration proceedings and possible expulsion. Access was left to be agreed upon between the applicant and his former spouse. At the same time, the immigration authorities found that there was no reason to renew his residence permit since, among others, he had no formal access arrangement in place with his son. Further, he was deported while the proceedings on access were pending and no visa was granted to him to attend such proceedings. Later, access was denied on the ground that he had not seen his son. From the facts, it is visible that the applicant's deportation was the result of the interplay between immigration decisions which underlined that there was no formal access arrangement in place and family law proceedings where no formal access was granted in light of the potential expulsion of the applicant. In practice therefore, the applicant had little contact with his child who was 5 years old when his father was expelled to Turkey. The Court highlighted that "the authorities, through their failure to coordinate the various proceedings touching on the applicant's family rights, have not, therefore acted in a manner which has enabled family ties to be developed".[48] This lack of coordination led the Court to find a violation of Article 8 ECHR. It is to be noted that in this case the Court did not directly mention the child or his right to contact, as the focus is more on the procedural side of Article 8. However, the finding of a violation was clearly based on the right to contact which had been affected through the interplay between the immigration and family law proceedings.

Two later cases decided in 2006 and 2011 respectively can be considered landmark cases in that the best interests of the child were at the core of the Court's judgments. Domestically they illustrate the interplay between family and immigration laws. They also show that the family courts modified custody rights to the detriment of the parent with a precarious immigra-

45 ECtHR 21 June 1988, no. 10730/84 *(Berrehab v. The Netherlands).*
46 ECtHR 21 June 1988, no. 10730/84 *(Berrehab v. The Netherlands)*, para 29.
47 ECtHR 11 July 2000, no 29192/95 *(Ciliz v. The Netherlands).*
48 ECtHR 11 July 2000, no 29192/95 *(Ciliz v. The Netherlands)*, para 71.

tion status solely to accommodate immigration considerations. They have been brought to the ECtHR as immigration cases, however similarly to the *Chavez-Vilcez* case of the CJEU, they are of particular importance for the present dissertation for at least two reasons. On the one hand they show how immigration laws modify the assessment of the best interests of the child by family courts. On the other hand they attest to the potential for harmonisation of substantive law by the European supranational Courts.

The applicants in the first case, *Rodrigues da Silva and Hoogkamer v. The Netherlands* were a mother -who did not hold a valid residence permit- and her daughter.[49] The mother had never been a legal resident in the Netherlands. She only attempted to regularise her status after separating from the child's father. She was denied a residence permit on the basis of the relationship with her daughter as she had never lawfully resided in The Netherlands. At the same time, in the family proceedings, the Dutch national parent was awarded parental responsibility on the ground that the mother was not a legal resident. The courts considered that if the mother had been granted custody she would leave for Brazil with her daughter, thus depriving the latter of the relationship with her Dutch father and grandparents. In practice, at the time of the proceedings in Strasbourg, the child was living with her Dutch grandparents four days a week and with her mother the other three days.

Before the Court, the applicants complained that the refusal to grant Ms Da Silva a residence permit constituted an unjustified interference with their right to family life in that the authorities did not sufficiently take account of the child's interests. Given that the parental responsibility had been vested with the father, the child could not legally leave for Brazil.

The Court agreed that there was no possibility for the applicants to exercise family life elsewhere. Moreover, the Court stressed that this impossibility had been caused by the family courts who granted the father sole parental responsibility on the ground of her mother's immigration status. The Court also took into account that the child had been only three years old at the time of the final domestic decisions and that she had extensive contact with her mother (living with her 3 days a week). Thus, the relationship between the applicants and the right of the child to maintain contact with her mother outweighed the state's interests in preserving the economic well-being of the country.[50] Here, it had been the Dutch family courts, acting on the advice of the Dutch child welfare authorities which had determined the applicant's impossibility to leave the country.

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49 ECtHR, 31 January 2006, no. 50435/99 *(Rodrigues da Silva and Hoogkamer v. The Netherlands).*

50 Other mitigating factors for the first applicant were that she did not have a criminal record and that –even if she had never done so- at some point in time she could have regularised her status. Thus, other than the fact that she had not have a valid residence permit, Ms Rodriguez could not be held liable for the situation she found herself in.

The other case where the child's best interests came to the fore is *Nunez v. Norway*, decided in 2011.[51] As in *Rodrigues da Silva v. The Netherlands*, the applicant in *Nunez* was a mother with two small children who was facing expulsion and an entry ban to Norway. In the domestic proceedings, she had been found guilty of providing false or manifestly misleading information concerning her immigration status. She had two small children born in 2002 and 2003 respectively, and she had separated from her husband when the children were three and two years old respectively. Also, in the ensuing family litigation for custody, the Oslo City Court had granted her former spouse sole parental responsibilities on the main ground that it was unlikely that she would succeed in reversing the expulsion decision. Further, in the immigration proceedings, the Supreme Court by a small majority found that the seriousness of the offences she had committed outweighed the best interests of the children. They also considered that there was nothing in the case file from which it could be inferred that the children could not be well taken care of by their father.

The applicant's complaint to the European Court was that the expulsion decision was contrary to Article 8 ECHR as her breaches of immigration laws could not justify her separation from the two children. As opposed to *Rodrigues da Silva* where the Court analysed the case from the perspective of positive obligations, the ECtHR did not find relevant to determine whether this case was one involving positive or negative obligations. Further, in this case the Court highlighted that had it not been for the best interests of the children, the balance would have weighed in favour of the state, given that the applicant had indeed committed serious immigration offences and had knowingly misled the authorities. However, the children's best interests pointed in a different direction. The relevant factors were that similar to the case of *Rodrigues da Silva*, the applicant had been the children's primary carer and her precarious immigration status was the only reason custody was granted to the father. The Court stressed that it found this factor 'significant'.[52] Also, the Court dismissed as speculative the arguments of the Government that the father undertook before the domestic courts to facilitate contact between the children and their mother. All these factors amounted to exceptional circumstances for the ECtHR which concluded that the Norwegian authorities did not attach sufficient weight to the best interests of the children.

This case is significant as it clarifies that the interests of the children to have a relationship with their primary carer are the driver behind the Court finding a violation of Article 8 ECHR. The Court again acknowledged the problematic aspect of the family courts awarding custody to the other parent on the ground of the applicant's precarious immigration status. The Court stressed on several occasions that the confluence between immigration and family proceedings resulted in the Article 8 violation of the pres-

51 ECtHR, 28 June 2011 no. 55597/09 (*Nunez v. Norway*).

52 ECtHR 28 June 2011 no. 55597/09 (*Nunez v. Norway*), paras 79 and 80.

ent case. It is noteworthy that the Court refused to rely on undertakings given by a private person on contact between children and their mother and placed importance on the role of the state in shaping the relationship between the children and their parents.

Finally, it should also be noted that in its case law the ECtHR has equally dealt with concerns put forth by states that parents may instrumentalise their children to obtain immigration advantages.[53] Of particular relevance here is *Priya v. Denmark,* where the facts indicated that the parents had only formally separated so as to increase the chance of a spouse to remain in Denmark. In dismissing the case as ill-founded the Court reasoned that the couple and children appeared to still live together at the time of the domestic decision, that they had not divorced or indicated that they wished to divorce. The Court therefore analysed this situation from the perspective of the 'family life elsewhere' doctrine and found that there were no obstacles to the family settling in India.

10.2.3 Minimum standards in family migration cases: European supranational Courts' case law analysis

Sections 10.2.1 and 10.2.2 above have outlined the contribution of the CJEU and of the ECtHR respectively to setting down (minimum) standards in family migration cases. The question was whether and to what extent the best interests of the child and the right of the child to have contact with both parents should be relevant in migration cases where the primary carer parent would otherwise risk expulsion from that state. As explained throughout this dissertation, when this possibility is absent or allowed only in exceptional situations, (i) it creates power imbalances within the family which may enhance the risk of domestic violence, (ii) may be indicative on its own of domestic violence or, even when there are no other indications of domestic violence (iii) it may amount to a separation of the child from the primary carer.

Moreover, as evidenced by the case law brought to the CJEU and the ECtHR, children of mixed-status families are at a heightened risk of being separated from one of their parents. The case law indicated that domestic authorities used the legal residence status of one parent as an argument in support for depriving the other, non-citizen parent of residence rights.[54] In their observations in the *Chavez-Vilchez* case, the Dutch, Belgian, Danish and British governments did not place any weight on the right of the

53 ECtHR 6 July 2006, no. 13594/03 (*Priya v. Denmark (dec)*); ECtHR 25 March 2003, no. 41226/98 (*I.M. v. The Netherlands (dec.)*); ECtHR 31 October 2002, no. 37295/97 *(Yildiz v. Austria),* para 44.

54 See the states' reasoning in the CJEU 10 May 2017, C-133/15, ECLI:EU:C:2017:354 *(*H.C. Chavez-Vilchez and Others v. Raad van bestuur van de Sociale verzekeringsbank and Others), discussed in Section 10.2.1 above.

child to have contact with both parents. Following their reasoning, parents could be deported as the children had an EU citizen parent. Further, the cases before the ECtHR showed that this has indeed happened as the family courts favoured the child's ties to the country of residence and deprived the immigrant parent of custody rights on the basis of their immigration status. This tendency has been noted in countries outside the European Union and the Council of Europe, specifically in the United States which deals with the highest number of abduction applications (incoming and outgoing worldwide).[55]

Across the European Union, EU national parents and their children are allowed to move, reside and work freely. They are the beneficiaries of the most extensive rights under EU law. Further, the case law of the CJEU is now affirming the right of EU citizen children to extend residence rights to their parents. Under this line of case law, the CJEU requires Member States to allow third country national parents of EU citizen children to reside and work in their territory to enable the children to genuinely enjoy the substance of their rights. In these cases, states are to assess holistically the relationship between the child and the parent and should the dependency test be met, grant the parent the right to reside in their territory on the basis of the relationship with the child. It should be added that, on the basis of the *Bosphorus* doctrine, discussed in Chapter 9 above, failure of a Member State to comply with this line of case law may give rise to a violation of Article 8 of the ECHR. No such case has yet been brought to the ECtHR. However, it has been shown that ECtHR has been willing to incorporate EU law into the human rights guarantees in other areas of law.[56] Moreover, failure to consider the best interests of the child and the child's relationship with the immigrant parent have already been found to be in breach of Article 8 ECHR.[57]

Further, it is important to note that only EU citizen children are beneficiaries of these rights. Non-EU citizen children are not able to extend residence rights to their non-EU parents. In such cases, pursuant to the Family Reunification Directive, an autonomous residence permit only arises after a legal residence period of 5 years.

Nevertheless, all EU Member States are parties to the ECHR, and hence the ECtHR case law is equally applicable. Section 10.2.2 has shown that the ECtHR attaches importance to the parent child relationship even when the parent is not the child's primary carer. The ECtHR has focused specifically on children of divorced parents, and it has recognized the difficulties

55 Concerning the number of child abduction applications see the latest statistical analysis of Lowe/Stevens Global Report 2023; on the relationship between family law and immigration law and the instrumentalization of immigration laws by family courts see Thronson 2010, pp. 253-255; Thronson 2013, p. 660.

56 For a discussion on the Bosphorus doctrine see section 9.2.2 above; on the complementarity between the CJEU and ECtHR see also Sections 9.3 and 9.4 above.

57 See discussion in Section 10.2.2 above.

these children have in maintaining contact with their parents whenever family and immigration laws intersect. Under this case law, states are to consider the child's best interests and the right to have contact with both parents which has a separate dimension in immigration law. Importantly, the ECtHR has also addressed the dissonance between family and migration courts, which would not have been possible outside a supranational adjudication structure.

10.3 The European supranational Courts' relevance for the intersection between child abduction and refugee law

Section 5.6.3 of this dissertation has shown that a growing number of child abduction applications are brought concurrently with or after the taking parent and/or the child have been granted refugee status or another form of international protection.[58] Child abduction courts diverge on relevance of the Geneva Convention and the prohibition of refoulement to the Hague Convention proceedings. Differences have equally been noted regarding the necessity to suspend the child abduction proceedings to await the outcome in the parallel asylum cases, or on the outcome of the Hague Convention application, when there is a difference between the taking parent and child(ren) in the form of international protection received. For example, some courts considered that concurrent refugee applications gave rise to a rebuttable presumption against returning the child,[59] other courts ruled that the grant of refugee status resulted in an absolute bar to return,[60] whereas yet others found asylum applications irrelevant for child abduction proceedings.[61] In one instance, a family court assessed a pending asylum claim as evidence for the precarious status of the taking parent in the state of abduction, which in turn became a reason in support of ordering the return of the child.[62] In this case, the concurrent asylum proceedings supported the child's return.

Furthermore, available case law and states' responses to HCCH questionnaires on this topic revealed several points of tension between the two legal frameworks, such as the need for expediency or the burden of proof.

58 It has been highlighted that in the 2023 Hague Conference Questionnaire, 14 out of 21 respondent countries confirmed that they had dealt with parallel refugee applications, see < https://www.hcch.net/en/publications-and-studies/details4/?pid=8519&dtid=33>>, last accessed on 5 May 2023.

59 A.M.R.I. v. K.E.R., 2011 ONCA 417.

60 G v. G [2021] UKSC 9, para 129.

61 As per the response to the 2023 HCCH Questionnaire, available at <https://assets.hcch.net/docs/e8143069-376a-4e5c-a7e2-353a4e080e28.pdf>, last accessed on 5 May 2023.

62 Cour d'Appel Versailles, 2e chambre, 1re section, 24 November 2016, no 16/05302.

The interplay between child abduction and asylum proceedings has yet to receive meaningful attention in academic studies.[63] Existing commentaries focus on the approaches of child abduction courts in Canada and the United States and one commentary covers the recent judgement of the UK Supreme Court.[64]

This section is dedicated to the interplay between the Child Abduction and the Refugee Convention from the perspective of the European supranational Courts. The topics covered reflect the concerns which have emerged from the overview of the national case law in this area.[65] The jurisdiction of both Courts extends to the field of international protection and non-refoulement which could in turn enhance their potential for harmonising divergent approaches of domestic courts across Europe for the benefit of human rights.[66]

10.3.1 The status of the principle of non-refoulement

The prohibition against non-refoulement has received widespread recognition across all legislative levels of the EU: it is mentioned in the founding Treaties and the EU Charter; it has been considered a general principle of law and it is equally enshrined in various pieces of secondary laws. [67]

Article 78(1) TFEU provides that the EU shall develop a common asylum policy with a view to ensure protection against non-refoulement in accordance with the Refugee Convention. Article 18 of the EU Charter equally guarantees the right to asylum in accordance with the Refugee Convention. Article 19(2) of the EU Charter embodies the prohibition against non-refoulement. On the basis of the CJEU's case law, it has been argued

63 So far, several scholars have considered this intersection: Bossin/Demirdache 2012; Estin 2015; Loo 2016; Garbolino 2019; Walsh/Atkins 2022.

64 Walsh/Atkins 2022.

65 Section 5.6.3 of this dissertation.

66 The Common European Asylum System is binding for all Member States, with the exception of Denmark and Ireland. Iceland, Liechtenstein, Norway and Switzerland, are members to the European Economic Area (the EEA agreement 1992), hence they all participate in the part of the CEAS regarding the determination of the State responsible for examining applications for asylum lodged in one of the member states, Blöndal 2020, p. 99.

67 As per Article 288 of the TFEU. Within the EU's hierarchy of norms, the first place is occupied by the founding treaties (the Treaty on the European Union and the Treaty on the Functioning of the European Union). Under Article 6(1) of the TEU, the Charter of Fundamental Rights has the same value as the Treaties. After the Treaties and EU Charter, the next place within the EU is occupied by the general principles of law. The general principles of law are not defined within the Treaties and have been largely developed by Union courts on the basis of common traditions of EU Member States. It is agreed that fundamental rights are general principles of EU law. General principles of law are highly relevant in that the EU, through its institutions, must comply with general principles of law when adopting any EU internal act. See Tridimas 2006, p. 50. Next in the hierarchy of norms are the legislative acts adopted following the ordinary legislative procedure: the regulations, directives and decisions (Article 288 TFEU). Legislative acts are followed by delegated acts (Article 290 TFEU) and then by implementing acts (Article 291) TFEU.

that the principle of non-refoulement has acquired the status of general principle of law within the EU legal order.[68] Furthermore, this principle has found its way in EU's secondary legislation.[69]

Within the CoE, the Strasbourg Court has consistently held that the ECHR does not guarantee the right to political asylum or to a residence permit.[70] Nevertheless, already since the 1989 *Soering* judgment, the ECtHR ruled that it is competent to examine if "substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country. The establishment of such responsibility inevitably involves an assessment of conditions in the requesting country against the standards of Article 3 of the Convention."[71] Even though the Soering judgement did not concern an asylum seeker, the ECtHR as of 1991 has applied the same reasoning to asylum seekers.[72] It has thus been argued that the ECtHR has developed an implicit non-refoulement obligation.[73] Under the ECtHR's settled case law, states have the obligation not to deport, extradite or expel individuals to countries where they would face a real risk of treatment contrary to Article 3 ECHR (right to freedom from torture, inhuman or degrading treatment) or Article 2 ECHR (right to life).

10.3.2 Child abduction proceedings after the receipt of refugee status

Once it has been established that non-refoulement occupies an important place in the European human rights architecture, the next step is to determine the impact of the refugee status for child abduction proceedings, from the perspective of the European supranational Courts. From the perspective of national law, it has been shown that child abduction courts are faced with situations where a parent or a child has received protection from immigration authorities in the same country. The child abduction courts

68 Mungianu 2016, p. 115, citing CJEU 21 December 2011 Joined Cases C-411, 493/10, ECLI:EU:C:2011:865 (N.S. and Others/Secretary of State for the Home Department para 109.

69 see among others Recital 3 and 48 of Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted; recital 3 and Article 35 of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection; Recital 3 of REGULATION (EU) No 604/2013 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast).

70 ECtHR 18 October 2011, no. 24147/11 *(I. v. the Netherlands* (dec.)), para 43.

71 ECtHR 7 July 1989, no. 14038/88 *(Soering v. The United Kingdom*), para 91.

72 ECtHR 20 March 1991, no. 15576/89 *(Cruz Varas and Others* v. *Sweden).*

73 Hamdan 2016, p. 21.

need to evaluate whether the child can nevertheless return to the country of habitual residence in light of the Child Abduction Convention. *Stricto sensu*, for the purposes of abduction proceedings, family courts evaluate the weight to be given to a decision that a parent/child faces a well-founded fear of persecution or otherwise a risk of ill treatment. It is argued herein that such evaluation should be carried out as a minimum, in light of the case-law of the CJEU and the ECtHR.

At international level, it has been noted that non-refoulement is the expression of the idea that a person should not be sent back to a country where they may face persecution or a serious human rights violation.[74] Commentators have focused extensively on the approach of the European supranational Courts to non-refoulement touching upon aspects such as the grounds for protection, the expansiveness or the limits of their case law, and (in)consistencies with the Refugee Convention.[75]

This literature has only a limited impact here as the intersection between Hague Convention and refugee law is indicative of a different factual scenario. The situations envisaged are those where an immigration authority in a Member State accepts that the parent (and child) are refugees (or beneficiaries of subsidiary protection) and a child abduction application is lodged subsequent to this finding.

The excerpt below, from a contribution criticising the restrictive interpretation of immigration authorities, is illustrative of the issue.

"[…] the daughter told a psychologist that she strictly refused any contact with her father. The court eventually pronounced the divorce, granting a visiting right to the father. He, who had an extensive criminal record, could meet his daughter every week (for 24 hours) and during holidays, without third-party supervision. He used this right to carry out an attempted abduction of his daughter in 2018. This happened while her mother was abroad, directly after the police had advised her to go and see her father and comply with the visiting right. This visit created the direct opportunity for the abduction, after which the father said he would take his daughter to his native village and marry her off at the age of 13. After the mother and daughter fled Albania and the mother applied for asylum in Belgium, the daughter asked her not to go into details about her father's violence towards her. […]"[76]

After their arrival in Belgium, the father filed a complaint […] for international child abduction against his ex-wife."[77] The Belgian family courts had to determine this child abduction application.

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74 Çalı/Costello/Cunningham 2020, p. 356; Within the EU The prohibition of non-refoulement entails an obligation to grant individuals who meet the legal requirements refugee status or subsidiary protection.

75 Costello 2016; Garlick 2015; Ciliberto 2019.

76 Roels 2023, p. 4.

77 Roels 2023.

What is the impact of a positive outcome of the refugee proceedings on the child abduction courts? It should be recalled that some national courts have reasoned that the return obligation under the Hague Convention is different in nature than the non-refoulement obligation under the Geneva Convention and hence they have not considered the refugee proceedings when determining the Hague Convention application.[78]

To date, the CJEU had one recent opportunity to address the intersection between child abduction and refugee proceedings in the case of *A. and B.*[79]

In absence of further relevant case law on the relationship between child abduction and successful refugee applications, insight is drawn from European supranational Courts' case law concerning the intersection between non-refoulement and extradition proceedings. It should be recalled that both child abduction and extradition proceedings are distinct from the refugee determination, and they concern summary proceedings. Both the Luxembourg and the Strasbourg Courts have grappled with these issues in their case law and their approach could be relevant, *mutatis mutandis,* to child abduction cases.

The case of *A. and B.* concerned a mother and child who had been transferred from Sweden to Finland pursuant to a decision adopted in the application of the Dublin III Regulation. After their transfer, the father who remained in Sweden filed a child abduction application. The CJEU was asked to determine, *inter alia* whether the child's removal to Finland was wrongful within the meaning of the Brussels II *bis* Regulation. The CJEU found that compliance with a binding transfer decision by a parent and child is not wrongful removal.[80] It considered that the child's retention was "a mere consequence of the child's administrative status, as determined by enforceable decisions taken by the Member State where the child was habitually resident".[81] This reasoning prompts the conclusion that the CJEU prioritised the provisions of the Dublin Regulation over those of the Brussels II *bis* Regulation. However, albeit not discussed in the judgement, the Advocate General's Opinion in this case clarifies that the Swedish authorities had withdrawn the father's custody rights after the child's departure, which could have rendered moot the Court's judgement.[82] Nevertheless, the Court's omission in attaching any weight to this aspect implies that in similar proceedings, and irrespective of the custody arrangements in force, Dublin transfers do not amount to wrongful removals within the sense of parental child abduction.

78 See Section 5.6.3 of this dissertation.
79 CJEU 2 August 2021, C-262/21 PPU, ECLI:EU:C:2021:64 (A/B).
80 CJEU 2 August 2021, C-262/21 PPU, ECLI:EU:C:2021:64 (A/B), para 49.
81 CJEU 2 August 2021, C-262/21 PPU, ECLI:EU:C:2021:64 (A/B), para 51.
82 CJEU 14 July 2021, C-262/21 PPU, ECLI:EU:C:2021:592 (*A/B),* Opinion of Advocate General, para 20.

Further, the Luxembourg Court has so far decided on one preliminary reference concerning an envisaged extradition from Croatia of a Russian Icelandic national who had been granted refugee status in Iceland.[83] Another preliminary reference is now pending before the CJEU, in a case concerning the expulsion from Germany of a Turkish national who had received refugee status in Italy.[84] In absence of a judgement, the Opinion of the Advocate General Richard de la Tour can offer useful insights.[85]

In the case of *A*, the CJEU set out important principles for the intersection between non-refoulement with extradition proceedings. Here, an Icelandic Russian national had been granted asylum status in Iceland. Subsequently, Russia filed an extradition request with the Croatian authorities where he was present. Importantly, in Iceland the grant of asylum was based precisely on the criminal proceedings which the person concerned was subject to in Russia and which formed the object of the extradition request.[86] The CJEU applied Article 19(2) of the EU Charter and found that Croatia needed to assess whether the extradition posed a real risk to inhuman and degrading treatment for the Icelandic national.[87] On the relevance of the asylum status, the CJEU ruled that it should be treated as a particularly substantial piece of evidence which was all the more relevant considering that both the asylum grant and the extradition requests were based on the same criminal proceedings.[88] The CJEU refrained from holding that the asylum grant in Iceland was binding on Croatia. However, it stressed in particularly strong terms that Croatia must refuse extradition "unless substantial and reliable information demonstrate that the person whose extradition is requested obtained asylum by concealing the fact that he or she was subject to criminal proceedings in his or her country of origin."[89]

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83 CJEU 2 April 2020, C-897/19, ECLI:EU:C:2020:262 (Ruska Federacija/I.N.).

84 CJEU 19 October 2023, C-352/22, ECLI:EU:C:2023:794 (Generalstaatsanwaltschaft Hamm (Demande d'extradition d'un réfugié vers la Turquie), Opinion of the Advocate General Richard de la Tour.

85 CJEU 19 October 2023, C-352/22, ECLI:EU:C:2023:794 (Generalstaatsanwaltschaft Hamm (Demande d'extradition d'un réfugié vers la Turquie), Opinion of the Advocate General Richard de la Tour.

86 CJEU 19 October 2023, C-352/22, ECLI:EU:C:2023:794 (Generalstaatsanwaltschaft Hamm (Demande d'extradition d'un réfugié vers la Turquie), Opinion of the Advocate General Richard de la Tour, para 67.

87 CJEU 19 October 2023, C-352/22, ECLI:EU:C:2023:794 (Generalstaatsanwaltschaft Hamm (Demande d'extradition d'un réfugié vers la Turquie), Opinion of the Advocate General Richard de la Tour, para 64.

88 CJEU 19 October 2023, C-352/22, ECLI:EU:C:2023:794 (Generalstaatsanwaltschaft Hamm (Demande d'extradition d'un réfugié vers la Turquie), Opinion of the Advocate General Richard de la Tour, paras 66, 67.

89 CJEU 19 October 2023, C-352/22, ECLI:EU:C:2023:794 (Generalstaatsanwaltschaft Hamm (Demande d'extradition d'un réfugié vers la Turquie), Opinion of the Advocate General Richard de la Tour, para 68.

A similar case is currently pending before the CJEU. The Advocate General Richard de la Tour in his Opinion favours an interpretation to the effect that asylum status granted in one Member State is not binding on another Member State. Instead, when considering extradition to a third country, the asylum obtained in another Member State must play an important role.[90] The Member State deciding on the extradition request should determine on a case-by-case basis the human rights of the persons concerned, and in particular the rights enshrined under Articles 18 and 19(2) of the EU Charter.[91]

The ECtHR has approached in a similar fashion cases where a successful asylum application was followed by an extradition request.[92] The ECtHR has imposed an obligation on States Parties to take into account the asylum status obtained in another Contracting State to the Geneva Convention.[93] However, this is only a starting point and courts are to examine afresh whether the person may be exposed to an infringement of Article 3 ECHR, if expelled.[94] When assessing that the grant of a refugee status did not amount to an obstacle to execute a European Arrest Warrant, the ECtHR considered the long period (of 10 years) which had elapsed between the successful asylum application and the extradition request as well as the fact that the extradition request concerned a non-political offence.[95]

In addition, both the CJEU and the ECtHR have stressed that assurances of the requesting state, to the effect that the person shall not be subject to inhuman and degrading treatment, are not sufficient.[96] Instead, authorities are to rely on information which is objective, reliable and properly updated.[97]

The case law outlined above sets important guidelines for determining the relevance of refugee status to child abduction applications. To-date, neither

90 CJEU 19 October 2023, C-352/22, ECLI:EU:C:2023:794 (Generalstaatsanwaltschaft Hamm (Demande d'extradition d'un réfugié vers la Turquie), Opinion of the Advocate General Richard de la Tour, para 41.

91 CJEU 19 October 2023, C-352/22, ECLI:EU:C:2023:794 (Generalstaatsanwaltschaft Hamm (Demande d'extradition d'un réfugié vers la Turquie), Opinion of the Advocate General Richard de la Tour, para 43.

92 ECtHR 25 June 2021 nos. 40324/16 and 12623/17, (*Bivolaru and Moldovan v. France)*; ECtHR 25 March 2014, no. 59297/12 *(M.G. v. Bulgaria)*; *Abdolkhani et Karimnia v. Turkey*, no 30471/08, 22 septembre 2009, paras 8, 9 and 82.

93 ECtHR 25 March 2014, no. 59297/12 *(M.G. v. Bulgaria)*, para 88.

94 ECtHR 25 March 2014, no. 59297/12 *(M.G. v. Bulgaria),* para 88.

95 ECtHR 25 June 2016, nos. 40324/16 and 12623/17 (*Bivolaru and Moldovan v. France*), para 139.

96 ECtHR 25 March 2014, no. 59297/12 *(M.G. v. Bulgaria)*, para 93; CJEU 19 October 2023, C-352/22, ECLI:EU:C:2023:794 (Generalstaatsanwaltschaft Hamm (Demande d'extradition d'un réfugié vers la Turquie), Opinion of the Advocate General Richard de la Tour, para 65.

97 CJEU 19 October 2023, C-352/22, ECLI:EU:C:2023:794 (Generalstaatsanwaltschaft Hamm (Demande d'extradition d'un réfugié vers la Turquie), Opinion of the Advocate General Richard de la Tour, para 65.

Court has considered that a successful asylum application in one State is binding on the authorities of another State. However, the refugee status weighs heavily in determining the scope of non-refoulement. In the case of child abduction, child abduction courts are to give substantial weight to a favourable decision for international protection. This weight increases where there is an overlap in scope between the two proceedings.[98] If for example the refugee status has been granted on account of domestic violence and domestic violence is equally raised as an exception to return, child abduction courts must follow the refugee authorities.[99] As an exception, it is not necessary to follow the refugee authorities where asylum has been obtained through concealment[100] or if a long period of time between the two proceedings has elapsed.[101]

Notwithstanding the above, it should be highlighted that all the aforementioned case law analysed the relevance of refugee status granted in one state for the purposes of proceedings taking place in another state. Such situations have not (yet) been identified in child abduction cases. The case law review carried out in Section 5.6.3 indicated that the conflict was between family and immigration authorities within the same country. It follows that the grant of refugee status by the authorities in the same country should weigh even heavier absent the cross border element. Last, and also supporting the argument in favour of attaching significant weight to a determination of refugee status, it should be noted that child abduction and extradition proceedings have different policy goals. Whereas abduction focuses on the best interests of the child, prevention of forum shopping and comity, extradition cases have as primary objective the prevention of impunity for persons who have committed a criminal offence.[102] Thus, the refugee status should weigh even heavier in child abduction cases where, as has been argued in this dissertation comity should not outweigh individual children's rights.

Finally, it should be noted that the analysis above focused on the impact of the grant of refugee status or subsidiary protection to pending abduction proceedings. The analysis did not evaluate the value of the principle of non-refoulement for child abduction courts which has been briefly addressed

98 As it appears from CJEU 19 October 2023, C-352/22, ECLI:EU:C:2023:794 (Generalstaatsanwaltschaft Hamm (Demande d'extradition d'un réfugié vers la Turquie), Opinion of the Advocate General Richard de la Tour, para 67.

99 As it appears from CJEU 19 October 2023, C-352/22, ECLI:EU:C:2023:794 (Generalstaatsanwaltschaft Hamm (Demande d'extradition d'un réfugié vers la Turquie), Opinion of the Advocate General Richard de la Tour, para 68.

100 As it appears from CJEU 19 October 2023, C-352/22, ECLI:EU:C:2023:794 (Generalstaatsanwaltschaft Hamm (Demande d'extradition d'un réfugié vers la Turquie), Opinion of the Advocate General Richard de la Tour, para 68.

101 As it appears from ECtHR 25 June 2016, nos. 40324/16 and 12623/17 (*Bivolaru and Moldovan v. France*), para 138.

102 CJEU 19 October 2023, C-352/22, ECLI:EU:C:2023:794 (Generalstaatsanwaltschaft Hamm (Demande d'extradition d'un réfugié vers la Turquie), Opinion of the Advocate General Richard de la Tour, para 69.

in Section 4.3.3. in the context of the exceptions to return under the Child Abduction Convention. Indeed, the right to non-refoulement can be seen from a child-rights lens and this right is equally applicable to child abduction proceedings, irrespective of concurrent asylum claims.[103] Furthermore, as mentioned in Section 10.3.1. child abduction courts should equally follow the EU Charter provisions and Article 3 of the ECtHR. In the specific context of child abduction, it has been argued that the ECtHR should reframe the grave risk of harm in child abduction cases under Article 3, rather than Article 8 ECHR.[104] These considerations are important in their own right and have been addressed in this dissertation; they are nevertheless distinct to the issue analysed herein.

10.3.3 The recipient of protection

In some cases, domestic courts refused to consider an asylum claim on the ground that the beneficiary of protection was the parent rather than the child who had only been named as a dependant in the application for international protection.[105] First, it should be noted that when the parent has already been granted status, that parent is in an objective impossibility to return and therefore the return of the child will result in the separation from the parent. In such cases, family courts should adopt a child rights-based approach to the question of parent child separation.

Second, it is important to highlight that existing studies show that children cannot always apply for independent protection status.[106] Pursuant to article 7 (3) of the Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (the "Procedures Directive" or "PD"),[107] Member States are bound to ensure that children have the right to lodge an asylum application in their own name only if they have the *legal capacity* to do so under national law. For children who do not possess such legal capacity, Member States are bound to guarantee a child's right to make an asylum application through their legal representative. It is further left to Member States to determine the cases when a child can make an application on their

103 On the principle of non-refoulement from the perspective of the CRC Committee, see also Klaassen/Rodriguez, The Committee on the Rights of the Child on female genital mutilation and non-refoulement, 2018, available at <<leidenlawblog.nl>>, last accessed on 14 June 2024.

104 Robinson 2023, see also Section 8.4. discussing the case law of the ECtHR in relation to the child's rigfht to be protected from violence.

105 This was the practice of the UK Supreme Court before the judgement in the case of *G v. G* [2021] UKSC 9, which removed this requirement. (see discussion in Section 5.6.3).

106 Following the latest report of EASO, in AT, DE, ES, FR, HU, LV, SE and SK the application for international protection has to be filed by a child's parent, whereas in FI, EE, IT, LT, NO, the application can be lodged by the child. (see EASO Report on Asylum Procedures for Children, 2019, p. 26.

107 OJ L 180, 29.6.2013, p. 60–95.

own behalf.[108] Consequently, EU law does not require that Member States provide for an independent right of asylum for accompanied children.

The issue of asylum applications by family members within the Member States formed the subject of a query circulated by the European Commission on 29 May 2017.[109] Among the 22 responding Member States it was apparent that the rule was to have accompanied children included in their parents' application.[110] In terms of the decisions, some Member States issue separate decisions for each family member,[111] where others issue joint decisions where the child is included in the parent's application.[112] In some cases it was expressly mentioned that in exceptional circumstances, children could put forward separate reasons than their parents and in these cases a separate decision will be issued for the child.[113] The responses also revealed that Member States tend to grant the same status to all members of the family applying for asylum on the basis of the principle of family unity. This approach in the EU Member States appears to be consistent with that mentioned by Pobjoy in his description of accompanied children's cases in countries such as the United Kingdom, Canada and the United States.[114] He stresses that in these jurisdictions the child's right to an independent refugee claim tends to be overlooked when such child is accompanied by a family member.[115] Authorities prefer to grant the child the same status as the parent by invoking the principle of family unity. He further records that even though a child might have an independent right to asylum, given that these jurisdictions do not provide for the possibility of a parent to obtain derivative status from that of the child, parents are the principal asylum seekers while their children are included in the application as dependants.[116] Such approach is apparently taken so as to avoid situations where a child is granted refugee status but the parent is not granted such status to the effect that the child would either choose to stay without the parent or the child would have to leave with the parent to a country where he has a legitimate fear of persecution.[117] In the same vein the UNHCR in its guidelines for international protection highlights that accompanied children may be perceived as part of the family unit rather than as individuals with

108 Article 7(5)(a) Procedures Directive.

109 EMN Ad-Hoc Query on immediate family members applying for asylum at the same time, Requested by SK EMN NCP on 29th May 2017, available at https://www.emnitalyncp.it/wp-content/uploads/2018/02/053_sk_on_immediate_family_members_applying_for_asylum_at_the_same_time.pdf accessed on 23 December 2023.

110 This was so in Belgium, Croatia, Cyprus, Hungary, Italy, Lithuania, Latvia, Luxemburg, Malta, the Netherlands, Poland, Slovakia, Slovenia.

111 Austria, Cyprus, Netherlands, Poland, Slovenia, Estonia, France, Germany, Malta.

112 Belgium, Croatia, Hungary, Italy, Latvia, Lithuania, Luxemburg.

113 Estonia, Finland, France, Germany, Malta, United Kingdom.

114 Pobjoy 2017, p. 49 et following.

115 Pobjoy 2017, p. 49.

116 Pobjoy 2017, p. 51.

117 Pobjoy 2017, p.51.

their own interests. [118] Their claims are assessed individually, mainly when they are unaccompanied rather than when accompanied by their families.[119]

In light of the above, it appears that courts' distinction in outcomes in child abduction proceedings depending on the beneficiary of protection is suitable only if national law allows accompanied children to file an independent asylum application and provided that there is evidence of such a practice in the respective jurisdiction.

10.3.4 The effect of an asylum application

Other than the recent case of the British Supreme Court, it appears that none of the family courts deciding on the Hague Convention petitions considered necessary to suspend abduction proceedings pending the determination of refugee status.[120] This Section shall assess whether this approach is consistent with EU law and the case law of the ECtHR.

Under EU law, procedural matters related to the asylum application, such as access to the procedure, rights of the applicants to interpretation, guarantees, obligations for the applicants, remedies, timelines, etc are regulated by the Procedures Directive. The CJEU has assessed the legal effects of a return decision and the necessity of an appeal with suspensive effect in preliminary references under 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.[121]

Pursuant to Article 9(1) of the Procedures Directive, applicants are entitled to remain in the Member State until a determination is made at first instance. The right to stay pending the asylum procedure does not apply in two cases. The first is when an applicant has lodged a subsequent application merely in order to delay or frustrate the enforcement of a decision which would result in their imminent removal.[122] Member States may by virtue of Article 40(4) PD introduce a provision in their national law to the effect that authorities are only required to examine such new application if the applicant was "through no fault of his or her own, incapable of assert-

118 UNHCR Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, 22 December 2009, HCR/GIP/09/08, para. 2.

119 UNHCR Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, 22 December 2009, HCR/GIP/09/08, para. 2.

120 See Section 5.6.3.2 of this Dissertation.

121 *OJ L 348, 24.12.2008, p. 98–107*, see CJEU 18 December 2014, C-562/13, ECLI:EU:C:2014:2453 (Centre public d'action sociale d'Ottignies-Louvain-La-Neuve/Moussa Abdida); CJEU 19 June 2018, C-181/16, ECLI:EU:C:2018:465 (Sadikou Gnandi/État belge); CJEU 30 September 2020, C-402/19, ECLI:EU:C:2020:759 (LM/Centre public d'action sociale de Seraing).

122 Article 41 (a) PD.

ing" the new elements required by such a new application. Within the same exception, the right to remain pending the examination of the asylum claim at first instance does not apply where the applicant has lodged another application after the initial application has been declared inadmissible.[123] The other exception mentioned under Article 9(2) of the Procedures Directive allows Member States to surrender an applicant to another Member State pursuant to its obligations under the European Arrest Warrant or otherwise to a third country or to international criminal courts or tribunals. To the extent the envisaged extradition may breach the principle of non-refoulement it is submitted here that the principles discussed in Section 10.3.1 apply mutatis mutandis.

As for the appeal procedure, pursuant to Article 46(5) PD, the general rule is that applicants are entitled to remain in the territory of the Member States until the time-limit for their exercise of the right to an effective remedy has expired, and if such right has been exercised they are entitled to remain pending the outcome of the remedy. Article 46(6) includes several exceptions to this rule, to be decided upon in court. Exceptions to the right to remain pending appeal proceedings include situations where applications were manifestly unfounded, vexatious, discontinued or inadmissible.

The CJEU has interpreted the suspensive effects of a return decision in light of Articles 19(2) and 47 of the EU Charter.[124] It has established that the notion of an effective remedy under the EU Charter affords applicants the right of a remedy with automatic suspensive effect before at least one judicial body.[125] From the perspective of the CJEU it was important that persons exercising their right to an effective remedy were allowed to remain within the jurisdiction during the determination of their appeal.[126] The CJEU has also assessed the dependence of children on their parents in removal cases.[127] In a case concerning the envisaged removal of a parent, the ECtHR mandated that national authorities assess the relationship of dependency between that parent and their (adult) child. The dependency of a child on their parent could thus result in a breach of non-refoulement for the child in case of the parent's removal.[128] Consequently, the right to non-refoulement set out under Article 19(2) of the EU Charter should guarantee to the parent a right to appeal with suspensive effect against the removal decision.[129]

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123 Article 41 (b) PD.

124 CJEU 19 June 2018, C-181/16, ECLI:EU:C:2018:465 (Sadikou Gnandi/État belge); CJEU 30 September 2020, C-402/19, ECLI:EU:C:2020:759 (LM/Centre public d'action sociale de Seraing).

125 CJEU 19 June 2018, C-181/16, ECLI:EU:C:2018:465 (Sadikou Gnandi/État belge), para 58.

126 C-239/14, Tall, 17 December 2015, para 56.

127 CJEU 30 September 2020, C-402/19, ECLI:EU:C:2020:759 (LM/Centre public d'action sociale de Seraing).

128 CJEU 30 September 2020, C-402/19, ECLI:EU:C:2020:759 (LM/Centre public d'action sociale de Seraing), paras 37, 42, 50.

129 CJEU 30 September 2020, C-402/19, ECLI:EU:C:2020:759 (LM/Centre public d'action sociale de Seraing), para 43.

Under the ECHR, the same issues have been analysed under Articles 2 or 3 alone or in conjunction with Article 13 ECHR (the right to an effective remedy).[130] The ECtHR has held that the notion of an effective remedy for the purposes of non-refoulement obligations requires an "independent and rigorous scrutiny" of any complaint made by a person in such a situation, and, secondly, "the possibility of *suspending [emphasis added]* the implementation of the measure impugned."[131]

Consequently, under the ECtHR's case law a remedy for applicants at risk of expulsion is effective if it has an automatic suspensive effect of the deportation.[132] The Court has not dealt with the question of whether applicants for international protection have the right to stay in the country where they request protection during the first instance process. Yet, as stated above, the Court has affirmed that applicants should be entitled to challenge the deportation and such a challenge -in order to qualify as an effective remedy – should have an automatic suspensive effect. All the more thus should an applicant have the right to stay while their initial claim for protection is being dealt with. Furthermore, when it comes to the effectiveness of the remedy, the Court held that discretionary remedies, or other possibilities for the authorities to grant suspensive effect, do not meet the condition of effectiveness under the Convention due to their uncertainty for the applicants.[133]

10.3.5 Length of the proceedings

Family courts vested with Child Abduction proceedings are concerned that the duration of the asylum claims will negatively influence the decision-making in child abduction cases. Indeed, as per the Child Abduction Convention, the case is to be resolved within 6 weeks. A similar timeline is set under Brussels II *ter* Regulation. The rationale behind the Child Abduction Convention is that the abductor uses the passage of time in their favour to create an irreversible situation where the child cannot return to the state of habitual residence.

Concerning asylum proceedings, Article 31(3) of the Procedures Directive provides that Member States are to conclude the examination of the case at first instance within six months from the date of lodging of the application. There are several possibilities to extend this period with a further 9 months (article 3 (3)(a) to (c) and 31(4)PD), but in any case the period should not last longer than 21 months from the date of lodging the application (Article 31(4) PD). Also, it should be noted that children, regardless of whether they are accompanied or not, are to be considered vulnerable

130 It should be noted that Article 6 ECHR does not apply to the expulsion of aliens (ECtHR 5 October 2000, no. 39652/98 *(Maaouia v. France (GC))*, para 41).
131 ECtHR, 4 November 2014, no. 29217/12 (*Tarakhel v. Switzerland)*, para 126.
132 For example, ECtHR 5 February 2002, no. 51564/99 (*Conka v. Belgium*), paras 79, 81.
133 Spijkerboer 2009.

within the meaning of Article 21 of the Reception Conditions Directive. Therefore, applications including children may be prioritised in accordance with Article 31(7) of the PD. Prioritisation under Article 31(7) PD should be distinguished from acceleration of the examination procedure within the meaning of Article 31(7), the latter applying to several distinct circumstances where there is a high likelihood of rejection.[134] As shown above, it should further be noted that the applicants have the right to appeal first instance decisions and such a right to appeal has suspensive effect. The Procedures Directive nevertheless does not provide a timeline for the resolution of the case on appeal. Under Article 46(10) PD this is for the Member States to lay down in their national legislation. Following a report published by the European Council on Refugees and Exiles (the "ECRE"), not all Member States have introduced maximum deadlines for examining appeals.[135] Of those countries having introduced such deadlines, they vary from one month in Poland to 15 months in Austria.[136] Further, the same report points out that in practice proceedings on appeal can last up to two years in some countries.[137] In addition, in the context of asylum it has been pointed out that speediness of the proceedings can sometimes negatively impact on the applicants' rights to access the procedure and to have an effective remedy, therefore authorities should carefully balance these rights so as to achieve an optimum length of proceedings.[138]

Similar to the question of suspensive effect, given the lack of applicability of Article 6 ECHR to expulsions, the ECtHR has dealt with the question of length of proceedings under Article 13 of the Convention. However, in asylum cases the complaint was not that the proceedings leading to the determination of protection status had been excessively long, but rather that the right to an effective remedy had been violated on account of excessively short proceedings. *De Souza Ribeiro v. France* is a case in point. The decision in that case had been taken within less than 24 hours and he had been already deported within that time frame. The Court held:

> "the haste with which the removal order was executed had the effect of rendering the available remedies ineffective in practice and therefore inaccessible. While the Court is aware of the importance of swift access to a remedy, speed should not go so far as to constitute an obstacle or unjustified hindrance to making use of it, or take priority over its practical effectiveness."

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134 cases where the examination procedure may be accelerated are those where for example the applicant is from a safe country of origin, the applicant has misled the authorities, the applicant has destroyed or withheld facts, etc. Article 31 (8) (a) to (j).

135 ECRE report: The length of asylum procedures in Europe, October 2016, available at https://www.ecre.org/wp-content/uploads/2016/10/AIDA-Brief-DurationProcedures.pdf, accessed on 19 June 2018.

136 ECRE report 2016, p. 9.

137 ECRE report 2016, referring to countries such as Italy, Spain and Cyprus, p. 10.

138 ECRE report 2016, p. 1.

In the same vein, the Court has condemned priority procedures where applicants had to file their complete asylum application within 5 days and where the timeline for preparation of the appeal was of 48 hours. Conversely, the Court has accepted that the effectiveness of a remedy may be impaired by long delays in the procedure.[139]

Consequently, it does appear that in order to discharge with the requirements of the ECtHR, domestic authorities should determine asylum claims taking into account both the time needed for the applicants to prepare their cases as well as that the overall length of the procedure should not be excessive. However, there have not been enough cases on these points so as to assess with more certainty what would constitute an excessive delay or a too short time for preparation of the case and appeal.

10.3.6 Burden of proof and evidence necessary of a real risk of harm

The case law of both the CJEU and the ECtHR has addressed the question of the type of evidence on which states may rely when assessing whether the state of return is capable of offering adequate protection upon return. In addition, the ECtHR has also developed an extensive body of case law on the burden of proof in asylum cases. This line of case law can equally be instructive for child abduction applications which have to deal with similar questions, albeit in a different context.

First, concerning the burden of proof, the ECtHR considers that a state's responsibility is engaged "where substantial grounds have been shown for believing that the person concerned, if deported, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country."[140] While it is for an applicant to show that such a real risk exists, in order to accept or refute this proposition, in addition to the evidence submitted before the national authorities, the ECtHR will also look into reliable reports of international organisations on the situation in the country of origin, or reports issued by national authorities of other contracting states.[141] A frequent feature in expulsion cases is the issue of credibility since applicants for international protection have few if any documents to prove their case.[142] For this reason the Court gives the applicants "the benefit of the doubt when it comes to assessing the credibility of their statements and the documents submitted in support thereof."[143] Once an applicant has established that a serious risk of treatment contrary to Article 3 existed, it is for the government to prove that the application is nevertheless ill-founded.[144]

139 ECtHR 2 February 2012, no. 9152/09 *(I.M. v. France).*
140 ECtHR 4 November 2014, no. 29217/12 (*Tarakhel v. Switzerland), para* 93.
141 See for eg. ECtHR 10 September 2015, no. 4601/14 *(R.H. v. Sweden).*
142 ECtHR 5 September 2013, no 886/11 (*K.A.B. v. Sweden)*, para 70.
143 ECtHR 10 September 2015, no. 4601/14 *(R.H. v. Sweden)*, para 58.
144 Spijkerboer 2009, p. 62.

While the ECtHR has so far not dealt with the issue of burden of proof in cases of child applicants, it should be highlighted that cases involving children raise particular issues in relation to the burden of proof in that children may find it more difficult to prove that they are at risk of persecution. In these cases, it has been recommended that children should be dealt with greater care and the benefit of the doubt rule and concessions regarding the burden of proof, should be particularly applicable to them.[145]

Similarly, the CJEU has considered that state declarations and the accession of the state where the person is to be returned to international treaties guaranteeing respect for fundamental rights are not in themselves sufficient for assessing that adequate protection against ill-treatment exists in that state.[146] The CJEU has imposed an obligation on Member States to rely on evidence which is "objective, reliable, specific and properly updated".[147] In addition, it has expressly outlined that such information may be obtained from "judgments of international courts, such as judgments of the European Court of Human Rights, judgments of courts of the requesting third State, and also decisions, reports and other documents produced by bodies of the Council of Europe or under the aegis of the United Nations."[148]

10.4 Conclusions

This chapter had a different nature: it focused on public law matters. Section 10.2 addressed the contribution of the CJEU and the ECtHR to providing minimum standards of protection across states within their jurisdiction. The inquiry covered the minimum standards of protection for children with parents having an immigration background. This Section has shown that state authorities use children's rights to serve immigration goals. It was also shown that, until the rulings of the two Courts, the weight of the right of the child to have contact with both parents differed depending on the authority deciding the matter. Such an asymmetry had the result that children of immigrant parents were denied the right to contact with those parents solely on the ground of the immigration status of their parents. These discussions evidence the instrumentalisation of children's rights for other policy goals. They also echo the existing debates at the drafting time of the CRC, when states were willing to accept the rights of children only if they did not affect their immigration policies.[149] One question remains: why are

145 Pobjoy 2017, p. 99.

146 CJEU 6 September 2016, C-182/15, ECLI:EU:C:2016:630 (Aleksei Petruhhin/Latvijas Republikas Ģenerālprokuratūra), para 57; CJEU 2 April 2020, C-897/19, ECLI:EU:C:2020:262 (Ruska Federacija/I.N.), para 65.

147 CJEU 2 April 2020, C-897/19, ECLI:EU:C:2020:262 (Ruska Federacija/I.N.), para 65.

148 CJEU 6 September 2016, C-182/15, ECLI:EU:C:2016:630 (Aleksei Petruhhin/Latvijas Republikas Ģenerālprokuratūra), paras 55-59; CJEU 2 April 2020, C-897/19, ECLI:EU:C:2020:262 (Ruska Federacija/I.N.), para 65.

149 See Section 3.3.1 above.

minimum standards of protection in immigration law important for child abduction cases? The answer in short is: in absence of such standards the Convention's goal of returning the child for a fair custody determination remains devoid of substance. If the Convention's aim is to serve children's rights, children's rights cannot be used against the children the Convention is supposed to serve. Moreover, return decisions to a country where a parent does not have a minimum level of immigration protection are decisions *about* the child because they will separate the child from the taking parent. They are not decisions *about the best place* to adjudicate the custody dispute as suggested by Eekelaar.[150] Therefore a closer examination of the parent child relationship is necessary, as discussed in the Preliminary Conclusions (Chapter 6).

Second Section 10.3 addressed the relevance of the European supranational Courts at the intersection between child abduction and refugee law. It was shown that given their constitutional nature, the CJEU and ECtHR are capable of offering a unified response to such cases across states within their jurisdiction. The answers to the relevant questions analysed in this section are the following. Return orders under the Child Abduction Convention can amount to a breach of the non-refoulement principle if the parent and/ or the child have received asylum status or are beneficiaries of subsidiary protection. The same applies if the return is ordered while the child and/ or the parent have appealed the asylum decision. If the taking parent is the only recipient of protection, child abduction courts are to treat such protection as an *objective impossibility* to return to the country of habitual residence. Overall, it is the responsibility of the authorities (child abduction and administrative/ immigration) to devise protocols to work together in these cases. Such protocols should be guided by the rights of children. However, simply stating that the Child Abduction Convention serves the best interests of the child is not sufficient and it falls short of a child rights-based approach.

150 Eekelaar 2015.