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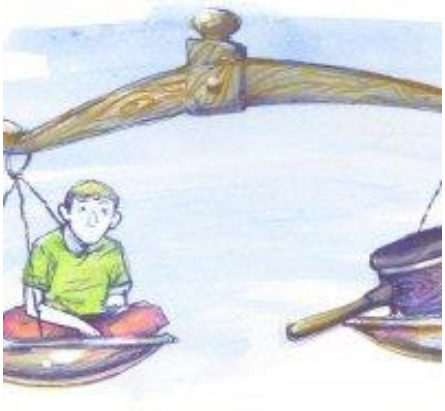
THE BEST INTERESTS OF THE CHILD: DEFINITION, STAKES AND PROSPECTS



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The notion of « best interests of the child » constitutes a very common, widely accepted legal standard in family law used by many jurisdictions, including the European Court of Justice ('the ECJ') and the European Court of Human Rights ('the ECtHR') to resolve disputes involving children. However, the best interests of the child, although highly valued and appreciated by jurists, are certainly more of a notion, as guiding as it may be, than a proper legal concept. That being said, the issue of adequate terminology is not in itself relevant; it is to be brought closer to the most essential question of the definition[1]. At this time, it is sufficient to say that it is undefinable in the abstract, and only makes sense in relation to a specific situation[2].

When looking back in history, we can find early traces of the concept of best interests of the child. As an example, preparatory papers of Napoleon's civil code already referred to the notion. It also appeared in some case law in common law countries at the beginning of the 20th century, e.g. in a ruling from Canada's Supreme Court stating that the interests of the child prevailed over the father's authority. It became progressively more visible in the second half of the 19th century and in the early 20th century, when the child had become a subject in its own right. Some masterpieces in literature, such as Oliver Twist in 1837 or the Jungle Book in 1894, attest to this growing interest for the child. A next step was the signature of the Declaration of the Rights of the Child in 1924 by the League of Nations. During that period, one figure, Janusz Korczak, was a particularly strong advocate of children's rights. He argued notably in favour of respect towards children, considering them not as human beings in the making but as persons with rights. His 1929 publication «The Child's Right to Respect» was a major source of influence for the adoption by the United Nations of the 1959 Declaration of the Rights of the Child, an extended version of the 1924 document.

However, the United Nations Convention on the Rights of the Child ('the CRC') of 1990 is the first legally binding instrument that specifically aimed to protect children. Whereas the 1959 Declaration considered the child more as an object of the law, the CRC sees the child as a subject of the law. The CRC promotes core principles, among which are and the consideration of the best interests of the child (Art. 3) and the promotion of family reunification (Art. 10).

Europe has developed its own legal framework to strengthen children's rights. Since 1989, the Council of Europe has included the child's best interests in many of its legal instruments, such as the European Convention on the Exercise of Children's Rights, the European Convention on the Adoption of Children and the Lanzarote Convention on Protection of Children against Sexual Exploitation and Sexual Abuse. Moreover, the concept has become particularly strong within

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1 Jacqueline Pousson-Petit (dir.), *Qu'en est-il de la simplification du droit ?* L'intérêt supérieur de l'enfant : vecteur de simplification ou de déstructuration du droit de la famille en Europe ?, pp.193-209, Presses de l'Université Toulouse I Capitole, 2010

2 The best interests of the child: a dialogue between theory and practice by Council of Europe, ed.by M. Sormunen, Council of Europe, March 2016, p.37: *"it is part of what the theorists call notions with variable content (..) it has no foreordained substance. It is undefinable until one is faced with a specific situation".*

European bodies working on topics related to children's rights. For example, the Venice Commission examined the presence of children's rights in the Constitutions of the Council of Europe's Member States and recommended that States provide constitutional guarantees for the principle of best interests of the child. However, it must be noted that the ECHR does not expressly refer to the best interests of the child. Despite being used in the Court's jurisprudence, article 8.1, where the notion is attached by the Court, only states that « *Everyone has the right to respect for his private and family life, his home and his correspondence.* ». Lastly, the European Union also expressly refers to the notion of child's best interests in article 24 of the EU Charter of fundamental rights: "*In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration*". Henceforth, the notion seems to have become a staple in European law.

Indeed, regarding the number of cases brought before the European Court of Justice, the first one directly referring to the best interests of the child dates from 2006. It stays at around 2 cases per year until 2013, with the exception of 2010 and 6 cases. In 2014, we observe a rapid growth to 10 cases. Since then, there are between 6 and 10 cases a year. Only 2018 shows an abnormally high number (21).

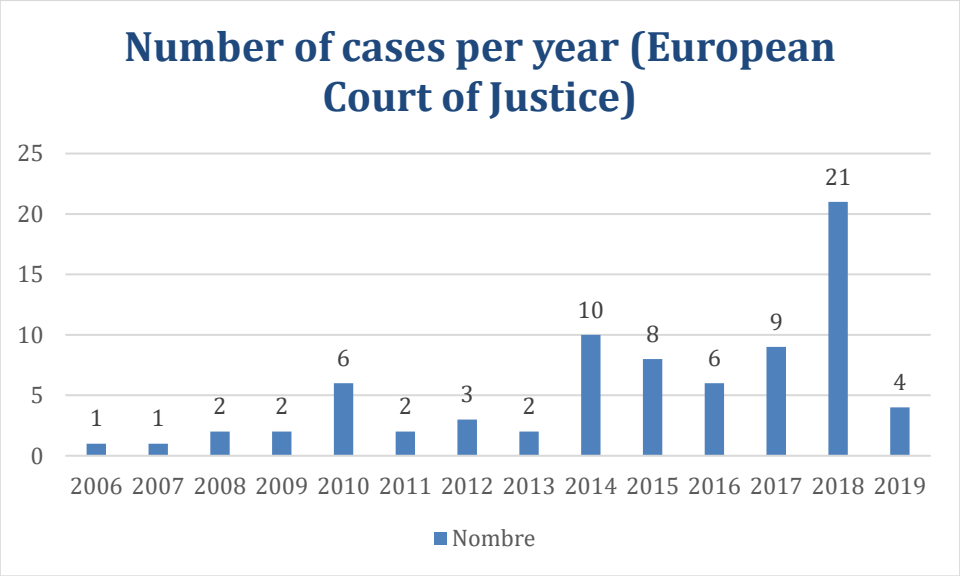

Figure 1: Number of cases per year brought before the European Court of Justice; data imported from the Curia database

Moreover, from the metadata collected on Curia, we can observe that the child's best interests' concept is almost exclusively raised in procedures of preliminary ruling. We can draw a few conclusions from this finding. Firstly, the notion raises difficulties for national judges, who are in need of interpretative rulings to use it properly. Secondly, the notion will require dynamic

exchanges between judges, both at national and European level. Lastly, through EU regulations and ECJ case law, the child's best interests can have powerful transformative effects on national legislation.

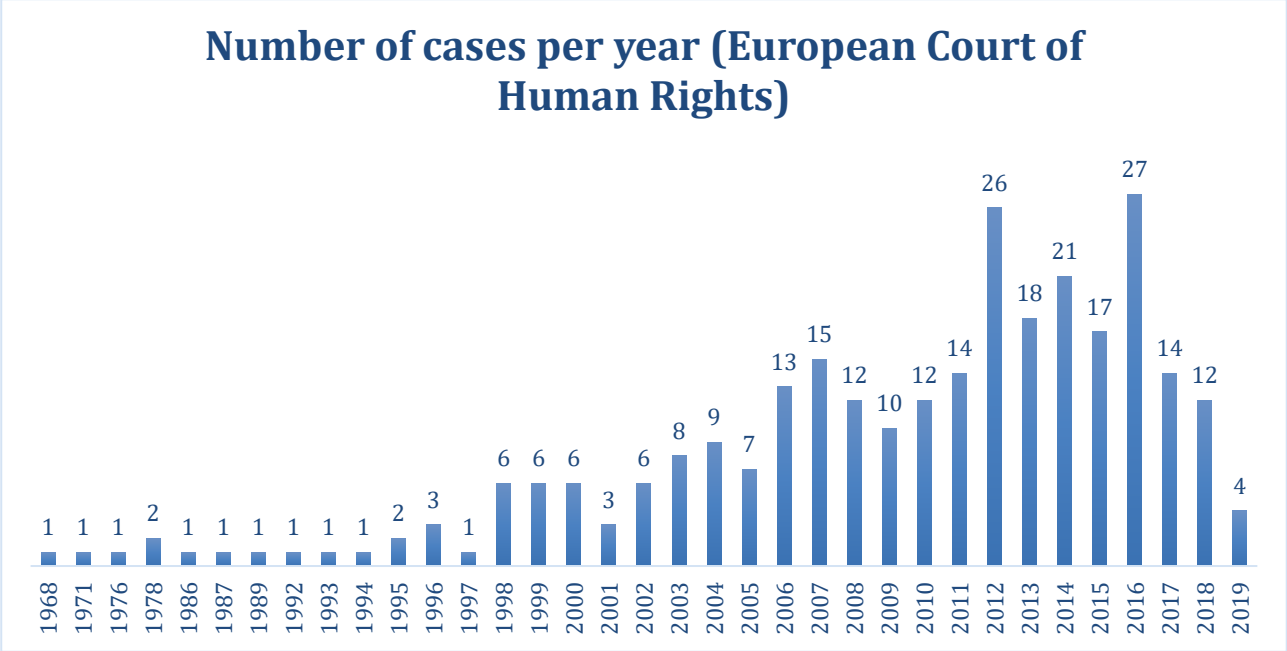

Figure 2: Number of cases per year brought before the European Court of Human Rights; data imported from the HUDOC database

Regarding the ECtHR, while it was concerned with barely one case per year during the 1990s, we can track it in six cases in 1998. This number rises to 26 in 2012 and even 27 in 2016. Although the European Convention on Human Rights does not expressly refer to the child's best interests, the adoption of the Convention on the Rights of the Child helped give legitimacy to its use under article 8 of the ECHR. What is striking is the huge disparity between countries in the number of cases in which they are involved. Indeed, based on 238 cases where the notion "child's best interests" does appear, Italy is a party in 38 of them, France in 36, followed by Turkey and Romania (21). Moreover, with regards the former two, the number of cases is still growing, while other countries, like Germany, the UK or the Czech Republic, which were regularly party to the Court in the 2000s, have been less involved in child's best interests' cases over the last ten years. From our graphs, we can also note a recent decline in the use of the notion in the jurisprudence of the ECtHR, without any proper explanation.

Therefore, the best interests of the child undoubtedly constitute a rising notion at European level, and especially within the jurisprudence of the European Court of Justice. It is a flexible and living notion that reflects social consensus at a given time, but it is not a self-executing principle. That being said, because of its omnipresence, the principle of best interests remains difficult to

comprehend for those who have to put it into practice. Its indefinite and undetermined character gives rise to a variety of interpretations and methods of application; its application in a given situation does not necessarily lead to a particular and immutable result[3]. It forces us once more to consider how essential the dialogue between judges is. Created as a judicial tool to protect children, it is now time to identify what is concretely considered as the "best interests of the child".

Our contribution will show the difficulty in defining this legal notion and applying it concretely. On the one hand, we will base our assessment on the exploration of the use of the standard in the context of family unification cases, and address the balance operated by the ECJ and the ECtHR when other legitimate interests are part of the judicial decision-making process. On the other hand, the need to keep the notion fairly broad in order to fulfil its ambition to respect every individual situation will be examined.

I - The best interests of the child, from vagueness to inconsistency

Even though the notion of best interests of the child appeared in the 19th century, it is only recently that it gained momentum within national legislation, European regulations and international laws. It has also become a powerful tool in the hands of judges. Nevertheless, when applied, a lack of consistency may be observed, as we will see in the context of family reunification cases.

A - The child's best interests: vague definition and blurred content

Despite a growing number of texts referring to the best interests of the child, the notion remains vague and, even though some attempts to provide a more concrete definition have been made, they do not clarify the notion.

First, there is a multiplicity of texts and sources referring to the best interests of the child. In article 1 of the CRC, the child is defined as « *any human being under the age of eighteen, unless the age of majority is attained earlier under national legislation* ». However, the principle qualified as a magical notion by French legal scholar Jean Carbonnier[4] is not defined. The truth is that it is difficult, if not impossible to define these "best interests" objectively. Therefore, while it is to date a key concept of contemporary family law, it is paradoxically one of the most discussed and has been the subject of many studies. Many instruments mention the best interests of the child, but none has tried to define them precisely. Perhaps this is to give more scope to the notion without constricting

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3 P.Alston and B. Gilmour-Walsh, *The Best Interests of the Child. Towards a Synthesis of Children's Rights and Cultural Values*, études Innocenti, UNICEF, 1996, p. 2

4 J Carbonnier, *Note on Paris Court of Appeal*, 10 April, 1959 (1960)

it too tightly.

Although most authors criticise this blurred notion, few have taken the risk of proposing a definition[5].

The expression "best interests of the child" can be found in several European and legal instruments. This standard has been enshrined in article 24 (1) and (2) of the Charter of Fundamental Rights of the EU, which draws on the CRC *("in all acts relating to children, whether by public authorities or private institutions, the best interests of the child must be a primary consideration"*), as well as many legislative provisions at domestic level, as recommended by the Committee on the Rights of the Child. It is considered by the courts to be paramount and as prevailing over the other interests and arguments at stake.

In article 7, the Charter recognises the right to respect for private or family life. This provision must be read *"in conjunction with the obligation to have regard to the child's best interests, which are recognised in article 24(2) of the Charter, and take into account the need, expressed in article 24 (3), for a child to maintain a personal relationship with both his or her parents on a regular basis"*[6]. These different instruments stress the importance of family life for a child and recommend that States have regard to the child's best interests. However, they do not create an individual right for members of a family to be allowed to enter the territory of a State and cannot be interpreted as denying Member States a certain margin of appreciation when they examine applications for family reunification.

The best interests of the child lead to a certain interpretation and application of EU family law. The intensity of the principle is best highlighted in this area, as the notion pervades family law in a very binding way: Article 24(2) of the Charter codifies the best interests of the child principle in a general provision *'in all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.'* In particular, a fundamental right of the child is the right, as enshrined in Article 24(3) of the Charter, to maintain a personal relationship and direct contact with both parents on a regular basis, "*respect for that right undeniably merging into the best interests of any child*[7].

The formulation of this provision is very similar to that of Article 3 of the CRC. However, independently of the application of article 24(2) of the Charter or any relevant provision of EU law, Member States remain in any event bound by the CRC when implementing EU law[8].

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5 C.Neirinck, "A propos de l'intérêt de l'enfant", in *Le droit au respect de la vie familiale au sens de la CEDH*, p.25-29

6 Parliament v Council, C-540/03, ECR I-5769 27 June 2006, para 2

7 Detiček, C-403/09 PPU, 23 December 2009, para 54

8 CJEU, Rendón Marin and C.S., C-165/14 and C-304/14, ECLI:EU:C:2016:75, para 174 opinion of the Advocate-General Szpunar

As stated by the Explanation relating to the Charter, Articles 3 (best interests), 9 (unity of family), 12 (participation) and 13 (expression) of the CRC form the basis for Article 24. Besides the Charter, the protection of children's rights is stated as one of the objectives of the EU in Article 3 TEU.

The struggle to define the child's best interests is even stronger when passing from one language to another. In French, the translation of the best interests of the child would be "l'intérêt supérieur de l'enfant". "Supérieur" does not solely echo what is best for the child, but also something that is superior, an interest above others and specific to the child. On the other hand, in international law, article 3.1 of the CRC states that the best interests of child "shall be a primary consideration", hence it is not "the primary consideration"; the idea of superiority that we find in French seems to lessen. Moreover, while in English the best interests of the child must be taken into account "in all actions", this translates into French as *"dans toutes les décisions concernant l'enfant",* i.e in every decision.

Depending on the interpretation made by the authority, the scope of the article may be broadened or reduced.

A question such as "what are the child's best interests" cannot be answered in absolute terms and must necessarily be embedded in a context. Nevertheless, one can also expect that some criteria, conditions or standards are used in order to unify its application by public authorities, notably judges. As pointed out by many authors, the vagueness of its content, and the blur surrounding what should be considered as desirable for the child is what makes the concept of child's best interests so useful and powerful. It is plastic, flexible and versatile and can help find a good solution to many situations. That is why attempts to strengthen the definition have been undertaken by authors, not only legal scholars, but also psychologists and other experts working with children. Starting from a mere legal notion, the best interests of the child have gained in content.

In that sense, General Comment 14, written by the committee of the UNCRC, was a major step towards a clearer definition. It underlines that the best interests of the child may be understood as a threefold concept. Firstly, a substantive right that is in the best interests of the child is the right for children to see their best interests taken into primary consideration. This right is "self-executing" and creates an intrinsic obligation for States: they must ensure that children's interests are truly considered. Secondly, it is an interpretative legal principle. In other words, when interpreting a law or any other regulation affecting children, this interpretation must serve the best interests of the child. It must be used as a compass to guide one's decision and to understand any legal measure. Thirdly and lastly, the best interests of the child constitute a rule of procedure, enshrining three other obligations: States must provide procedural guarantees in order to assess and determine what is in the best interests of the child ; an evaluation of the impact of the decision must

be established to assess what its potential consequences may be ; and States must provide the rationale behind their decisions, notably how the assessment of the best interests of the child has been made and which criteria were considered.

Furthermore, general comment 14 has been great progress for defining not **what** the best interests of the child are per se, but **how** to define the best interests of the child. Indeed, building too precise a framework would actually undermine the strength of the notion, which is its flexibility and versatility. Nonetheless, by taking a first glance at what could be common criteria that should be used, it grants a concrete basis to the best interests of the child and begins to answer the critics who see it as a nebulous concept. This position is also held by Jorge Cardona Llorens, who explains that even though the definition still has weaknesses, "the best interests of the child are not what I consider best for a child but what objectively secures for the child, both the full and effective realisation of all the rights secured in the convention and his or her overall development." However, another issue not addressed by the committee is when, among the criteria listed, some may collide or diverge. While the decision maker, including the judge, must carefully balance them, nothing has been done yet to weigh up and rank the identified criteria.

This effort to define the notion has also been pursued by the ECtHR and ECJ in their rulings. Such an extensive notion might imply an increased number of cases. The best interests of the child have been created to be included in every decision concerning children, and, consequently, can be raised in many cases. In turn, this creates the need for judges to determine what the best interests of the child truly are, and what are not, regarding the special circumstances of each case.

B - The "best interests of the child" as applied in European family reunification cases: an illustration of a lack of consistency in the use of the standard?

We have shown that this principle, that first appears to be self-evident, self-explanatory and therefore an obvious point of departure for judges when examining cases involving children, is in fact intrinsically problematic. That being said, is there consistency in the way the ECtHR and the ECJ interpret and apply the best interests of the child? We will base our assessment on family reunification cases per se (2003 Directive), but we will also incorporate immigration and asylum-related cases in which family reunification is a crucial element at stake.

The Parliament initiated an action[9] for annulment of the 2003 Directive on the right to family reunification[10] contesting two provisions that concerned children, namely Article 4(1) that allowed integration requirements for children older than twelve and Article 4(6) that allowed a maximum

9 Parliament v Council, Case C-540/03 27 June 2006

10 Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification

age of fifteen for the family unification of children. The ECJ's approach was practical as it verified whether a balance was found between the best interests of the child and the margin of appreciation allowed to Member States. It ruled that the possibility to impose an integration requirement could not be interpreted as allowing Member States to adopt implementing provisions that would be contrary to the right to respect for family life. With regard to the maximum age of fifteen, the ECJ held that even though Member States may impose such an age restriction, they must still have due regard for the best interests of the child concept and the right to respect for family life. However, the ECJ refrained from further concretising what the best interests of the child concept means in this context.

Article 5(5) of the Family Reunification Directive requires that *« when examining an application, the Member States shall have due regard to the best interests of minor children. ».* Article 6 (1) however gives them a margin of appreciation: " *The Member States may reject an application for entry and residence of family members on grounds of public policy, public security or public health.*"

In the seminal Ruiz Zambrano case[11] and the previous decision in Chen[12] about the right of residence of a child's third-country national parent, the Court does not explicitly refer to the best interests of the child. However, it held that if the parents of the children who had a right of residence under EU law were refused residence, the children might be deprived of their right of residence. In fact, O., S. v Maahanmuuttovirasto & Maahanmuuttovirasto v L[13] is the first internal situation family reunification case that referred to the obligation for the national authorities to take into consideration the child's best interests when applying Directive 2003/86 and examining applications for family reunification. The Court invoked Article 7 of the Charter, affirming that it not only *"contains rights corresponding to those guaranteed by Article 8(1)*[14] but adding that *"that provision of the Charter must also be read in conjunction with the obligation to have regard to the child's best interests, recognised in Article 24(2) of the Charter, and with account being taken of the need, expressed in Article 24(3), for a child to maintain on a regular basis a personal relationship with both parents"*.

The Court notably states in the Alfredo Rendón Marín case[15] that the implementation of article 20 TFEU has to take into account the child's best interests, recognised in Article 24(2) of the Charter. That being said, the Court wishes to make it clear that when *"the refusal (...) is founded on the existence of a genuine, present and sufficiently serious threat to the requirements of public policy or*

11 CJEU, Ruiz Zambrano, 8 March 2011, C-34/09

12 CJEU, Chen and others, 19 October 2004, C-200/02, para 45

13 O., S. v Maahanmuuttovirasto & Maahanmuuttovirasto v L, 2 December 2012, C-356/11 and C-357/11, paras 8 and 81

14 Ibid, para 76

15 Alfredo Rendón Marín and C.S 13 September 2016 C-165/14, para 81

of public security (…) (it) is compatible with EU law even if its effect is that the Union citizen who is a family member of that third-country national is compelled to leave the territory of the European Union"[16]. In the Chavez-Vilchez case[17], the Court's reasoning includes an assessment of the primary carer of the child and whether there is in fact a relationship of dependency between the child and the third-country national parent. The Court reminds the national authorities that they must take account of the right to respect for family life, as codified in Article 7 of the Charter, *"that article requiring to be read in conjunction with the obligation to take into consideration the best interests of the child"*. It sets a much lower threshold for the fulfilment of the criterion of dependency because of its articulation with the principle of the child's best interests. The Court specifically indicates that the examination must take into consideration, *"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 the child's equilibrium"*[18]. Therefore, on multiple occasions, the ECJ confirmed that the best interests of the child must be granted significant weight. For its part, the ECtHR held that national decision-making bodies should, in principle, assess evidence in respect of the « practicality, feasibility and proportionality »[19] of any removal of a non-national parent. It is in K.A and Others[20] that the scope of the application of article 20 TFEU in family reunification was further clarified: its application is based on the criterion of dependency. In other words, a minor EU citizen would have to leave the EU territory in order to remain with the parent. The examination of the existence of such a relation of dependency and the assessment of the entry ban affecting the third-country national on public policy grounds must take place on a case-by-case basis. The Court also states *"the fact that the other parent, where that parent is a Union citizen, is actually able (…) to assume sole responsibility for the (…) care of the child (…) is not in itself a sufficient ground for a conclusion that there is not, between the third-country national parent and the child, such a relationship of dependency".* An entry ban may constitute a reason for refusing to grant a derived right of residence under article 20 TFEU "*only if it is apparent (...) in the light of the principle of proportionality, the best interests of any child or children concerned and fundamental rights, that the person concerned represents a genuine, present, and sufficiently serious threat to public policy"*. The intensity of the principle and the Court's commitment to singling out the fate of children in family unification cases

16 Ibid, para 84

17 Chavez-Vilchez and Others, 10 May 2017, CJUE C-133/15, para 70

18 Ibid, para 72.

19 Jeunesse v The Netherlands, Application no. 12738/10, 3 October 2014 para 109

20 K.A and Others v Belgium., Case C-82/16 8 May 2018, para 72

are, as I. Goldner Lang points out[21], illustrated by the fact that this *"criterion of dependency gets a different reading in the context of adult EU citizens, as it no longer matters what is in their best interests.*

In light of this examination, it would not be correct to simply state that the weight accorded to the standard by the ECJ varies without any objective justification but rather on a case-by-case basis. However, the application of the principle certainly appears to be malleable, as the Court's interpretation of the notion seems rather contingent and somewhat unpredictable.

The ECtHR has held that the best interests of the child are a primary consideration in all actions which affect them[22]. The notion is not mentioned as such in the Convention but it is widely referred to, mainly in cases concerning the right for respect of private and family life, protected by Article 8 of the Convention. The fact that a State has not sufficiently taken it into consideration may constitute on its own a ground for the violation of Article 8. The Court takes account of the age of the child concerned, the circumstances in the country of origin and the extent to which he is dependent on relatives[23]. Therefore, the Court does not trouble itself; it defines the best interests of the child in concreto and merely considers whether or not the best interests of the child have been sufficiently taken into account in a given case. It can also resort to formulas of the type: *"the best interests of the child, understood as (...)"*[24] in a given case. In Neulinger and Shuruk v. Switzerland[25], it is stated that what is required to give effect to the principle in a given circumstance must be ascertained on a case-by-case basis. In Nunez[26], the child's best interests, described as the *"well-being, which is determined by a variety of individual circumstances, such as among others the absence of parents"* were considered. The Court urged the authorities to balance fairly the legitimate interest of the State in ensuring migration control with the need to ensure that the child's best interests to maintain contact are preserved. In that case, the best interests of the child played a crucial role that trumped the alarming immigration history of the applicant. In Mugenzi[27] and Tanda-Muzinga[28] the Court once more urged the national authorities to prioritise the best interests of the child when deciding whether to grant reunification. The Court observed in particular that the

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21 I. Goldner Lang, Extending the scope of EU law to internal situations: "in the child's best interests we swear, but not a step further" online source: eumigrationlawblog.eu

22 See for example Sen v. the Netherlands, Application no. 31465/96, 21 December 2001

23 Rodrigues da Silva and Hoogkamer v. the Netherlands, No 50435/99, § 39, 31 January 2006

24 For example, in the 2007 case of Maumousseau and Washington, para 75, the Court speaks of Charlotte's best interests understood as her immediate reintegration into her usual environment; Rodrigues da Silva and Hoogkamer v. Netherlands No 50435/99, 31 January 2006, para 39

25 Neulinger and Shuruk v. Switzerland No. 41615/07, 6 October 2010

26 Nunez v. Norway, Application no. 55597/09, 28 September 2011

27 Mugenzi v. France, Application no. 52701/09 10 July 2014

28 Tanda-Muzinga v. France, Application no.2260/10 10 July 2014, see also Senigo Longue v France, Application no. 19113/09 10 July 2014

national authorities had not, on the one hand, given due consideration to the applicants' refugee status that require "flexibility, promptness and effectiveness"[29] and to the best interests of the children on the other. In the two cases, the Court found that there had been a violation of Article 8 of the Convention whereas in I.A.A. and Others v. the United Kingdom[30] the Court held that the national courts had struck a fair balance between the applicants' interest in developing a family life in the UK and the State's interest in controlling immigration. Immigration is a domain left to the Member States that hold the sovereign right to control the entry and residence of foreign nationals in their territory. Nonetheless, the best interests of the child must be placed at the heart of these considerations and the Court looks at the proceedings as a whole to decide whether the domestic authorities have overstepped the margin of appreciation afforded to them[31] in violation of Article 8 of the Convention.

The flexibility of this inherently subjective notion is not a problem per se. It allows judges to operate a balance between competing legitimate interests. However, even in a specific area of law, the application and invocation of the principle is difficult to read. This has resulted in a mix of approaches that could prove difficult to rationalise for national authorities. In that respect, we agree with the "plea" made by M. Klaassen and P. Rodrigues[32] for more *"clarity"* and *"guidance"* for Member States, since it results from their rigorous analysis that the best interests of the child are not systematically applied in the various types of family reunification cases. M Klassen pleads for the ECtHR to *"streamline the reasoning in order to create consistency and coherence in the case law and to do justice to the best interests of the child concept"*[33]. This clarity, which would be most welcome, will only be possible if the definition of the notion is further refined.

II - The balance in the definition of the best interests of the child

Even if the attempts to sharpen the definition of the best interests of the child came to fruition to some extent, weaknesses would still exist. They find their mainspring in the difficulties a more specific definition raises (A). This explains why above all definitions, criteria must be developed to assess what the best interests of the child really are and strike a balance in their practical implementation (B).

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29 The expression is found in the press release issued by the Registrar of the Court.

30 I.A.A. and Others v. the United Kingdom, Application no. 25960/13, 31 March 2016

31 ECtHR Ejimson v. Germany, Application no.58681/12, 1st March 2018

32 Mark Klaassen and Peter Rodrigues, The Best Interests of the Child in EU Family Reunification Law: A Plea for More Guidance on the Role of Article 24(2) Charter, in European Journal of Migration and Law Online Publication Date: 16 June 2017

33 M. Klassen, The right to family unification: between migration control and human rights, Meijers Institute and Graduate School of Leiden Law School, 2015, chapter 4.

A - The challenges behind a clearer picture of the Child's Best Interests

When looking for a more precise definition of the best interests of the child, finding a balance between the different factors that are at the core of the concept is a real difficulty.

Even if the concept must remain fairly vague to be valid for a case-by-case approach, it must also be precise enough to avoid all kinds of conflicts of interest. In this respect, the diversity in national European legislation regarding the notion of the child's best interests is a stake that must be taken into account.

Jorge Cardona Llorens explains[34] that the main challenge in the definition of the best interests of the child is to strike three main balances. The first is to select the relevant circumstances, elements and safeguards for the interests of the child; secondly to arbitrate between the necessary protection of the child and his or her need for empowerment; and lastly by finding the correct measure between the stability a child needs and his or her unavoidable development that will bring many changes in the way his or her interests are taken into account. Indeed, the major objective of the concept is to build a decision in order to anticipate and accompany the transition from childhood to adulthood. It renders possible an application of the concept that considers the evolving knowledge about physical and psychological development in a child. The definition of the concept has to remain fairly vague since it offers flexibility[35], but this vagueness can also leave room for multiple conflicts of interest and manipulation. The jurisprudence of the European Court of Human Rights is filled with examples of such conflicts and allows us to understand how its judges were able to settle the conflicts born on this occasion. As regards filiation cases, the concept of the child's best interests has been used to decline the establishment of a filiation link. In the 2013 case, "Krisztian Barnabas Toth v. Hungary", the judges of the European Court of Human Rights ruled that the establishment of the applicant's paternity would deprive the child of an "existing loving family and social environment" since the child had been living, since his birth, with a man he considered as his father. Here, if in theory the interest of the child is to get to know his or her origins and biological link and the interest of the applicant is to see his filiation relationship, the situation showed a conflict of interest. The balance was found in fostering the best interests of the child instead of the claims of the biological father.

Conflicts of interest can also be found in placement into care cases. For example, in "Levin v.

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34 Jorge Cardona Llorens, *Presentation of general comment n°14: strengths and limitations, points of consensus and dissent emerging in its drafting*. In The best interests of the child: a dialogue between theory and practice. Council of Europe, March 2016. pp. 9-11

35 Olga Khazova, *Interpreting and applying the best interests of the child. In The best interests of the child: a dialogue between theory and practice*. Council of Europe, March 2016. pp. 18-27

Sweden" in 2012, the applicant complained about poor contact with her three children who were later placed in public care. The local courts found that the applicant's lawful rights to keep a relationship with her children had to be limited in order to protect the children from further harm to their development. The European Court of Human Rights approves the legal reasoning of the Swedish courts and allows the best interests of the children to prevail over the interests of the mother. However, in "BB and FB v. Germany" (2013), the European judges ruled that the German authorities failed to give enough reasons to their decision of parental authority withdrawal. In this matter, the children were removed right after allegations of mistreatment that later proved to be false. In the wake of the removal, parental authority was withdrawn from the father and the Court considered that after the placement of the children, further investigations should have been made by all available means to establish the veracity of the facts. The best interests of the child also suggest that a decision to withdraw parental authority must be taken after a wide range of further investigations to assess the situation.

As regards adoption cases, the Court ruled in "Pini v. Romania" that the concept of the best interests of the child means that the objective of adoption is "providing a child with a family and not a family with a child".

The last example of a conflict of interests between children and adults can be related to child abduction. As a basic principle, parents should not be deprived of maintaining relations with their children even if they are divorced and live in different countries. Despite this principle, the European Court of Human Rights stated in "Neulinger v. Switzerland" (2010) that the national courts had led a sufficient examination of the family situation. In this matter, a mother refused to return her son to his father in Israel. Finally, it was decided that the young boy would stay with his mother in Switzerland due to the "*significant disturbance that his forced return to Israel would be likely to cause*".

As a whole, these decisions solving conflicts of interest reveal that there is still a fairly large margin of appreciation granted to the competent national authorities even if they can vary depending on the facts of the case. One of the difficulties behind a definition of the best interests of the child is also the complexity of finding a common definition between the European countries which consider the notion very differently.

The Children's Rights Knowledge Centre (KeKi) based in the Netherlands studied the relationship of the different European countries with the notion of the best interests of the child from 2004 to 2014. The report highlights the fact that among the European countries' legislation, the concept of the best interests of the child takes on a completely different dimension and importance. It is also

the conclusion drawn by the 2015 report of Kennan and Kilkelly[36]. The objective of this report was to collect data on how Member States promote the best interests of the child as a principle, a right and a rule of procedure. According to this study, the majority of jurisdictions across the European Union have reflected on the principle that the best interests of the child must be a guiding force in decision making in their constitution. This is the case for Belgium, Hungary, Slovenia and Spain. Some other States have included this principle in legislation, for example Austria, Bulgaria, the Czech Republic, Denmark, Greece, France, Sweden, the United Kingdom and Italy. However, in some States such as Belgium or Italy, even if the principle is taken into account in the texts, legislation only refers to the "need" to take the child's best interests into account and does not state that the principle must be a primary consideration. It is still important, but among other interests and principles.

As regards the implementation of the notion, criteria have been developed in legislation in some jurisdictions to help judges assess the child's best interests in specific types of proceedings (Austria, Finland, or the United Kingdom, for example). In other Member States looser parameters have been built through the case law of higher courts but also through legislation (Belgium, the Netherlands, Greece and Spain for example). In a few Member States such as Sweden, Croatia, France or Portugal, no such criteria or guidelines exist. Nonetheless, in Sweden, the absence of criteria is deliberate as the government has considered that the judicial courts need to have flexibility and discretion to decide what is in the best interests of the child and to choose the most appropriate decision on a case-by-case basis.

Hearing the child and giving weight to his or her views before making a decision, and considering whether he or she is mature enough, is a legal obligation in several jurisdictions (Bulgaria, Denmark, Greece, Finland, France, the Netherlands and Sweden). On the contrary, in at least three jurisdictions, Latvia, Portugal and Slovenia, a court is under no legal obligation to consider the views of the child in order to implement what is in his or her best interests.

It may be interesting to focus on the situation of Belgium to illustrate the fact that even if the principle of the best interests of the child may be taken into account, the Constitution of the State does not necessarily mean that the principle should prevail over all other principles before the courts[37]. In Belgium, the concept appears in article 22 bis al 4 of the Constitution. Nonetheless, the Belgian "Cour de Cassation" and "Conseil d'Etat", the highest courts in the judicial system for judicial and administrative cases, refuse to give any direct effect to article 3.1 of the United Nations Convention on the Rights of the Child and article 24.2 of the European Convention on Human Rights. In comparison, French courts have another view, since they have recognised the direct

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36 Kennan N. and Kilkelly U. *Children's involvement in criminal, civil and administrative judicial proceedings in the 28 member states of the EU*. Policy brief, Publications of the office of European Union, Luxembourg, 2015.

37 Rasson A-C, *L'intérêt de l'enfant, valeur fondamentale?* In L'intérêt de l'enfant. Larcier, 2019. pp. 336-353. ISBN. 194. 254.129. 28

applicability of the principle dedicated by article 3.1 of the United Nations Convention on the Rights of the Child in two decisions: the "Cour de Cassation" for the judicial cases in 2005 and the "Conseil d'Etat" for the administrative cases in a decision known as "Cinar" in 1997. Two main decisions of the Constitutional Court of Belgium illustrate how the principle is taken into account in this country. During the great reforms of filiation in Belgium in 1987 and 2006, the best interests of the child were mostly considered as a "value". The first example deals with the filiation deadline or "délai pivot". Before 2010 in Belgium, in the case of a request of recognition of a paternity or maternity link, if this action was requested after the first birthday of a child, the judge had the possibility to refuse to establish the link of filiation if it was considered against the child's best interests. Nonetheless, if the process was intended earlier than the first year of the child, the judge could not operate such control. In the decision of 16th December 2010, the court overruled this deadline and ruled that the judge had the possibility to consider the best interests of the child at all ages. Even if the best interests of the child were taken into consideration by the Constitutional Court of Belgium, the child's best interest is a primary but not absolute value in this country. In a decision of 7th March 2013, the Constitutional Court considered that the best interests of the child should be taken as a primary consideration yet not absolute when they interfere with other interests at stake. This example illustrates the main difficulty in finding a common definition for the child's best interests: the disparity of definition on a European scale.

B - The implementation of the best interests of the child through its definition

The professionals who have to deal with the concept of the best interests of the child in their everyday work, whether they are judges or medical professionals, psychosocial workers or educators, must have the necessary tools at their disposal to assess and determine the child's best interests. Moreover, they need to develop knowledge and good understanding of the notion. Indeed, the findings of the study led by the KeKi Centre between 2004 and 2014 tend to show that not only the background, but also knowledge of the individual who implements the concept may be more important than the tool that is used for assessment[38].

As regards the tools available, they rely on a simple definition of the notion. The best interests of the child correspond to the combined factors that contribute to the proper development of a child and help its transition from childhood to adulthood[39]. Thanks to this definition, Kalverboer and

38 Ibid

39 Heiner J. and Bartels A.A.J, *Jeugdstrafrecht en het belang van het kind : het belang van het kind nader omschreven, tijdschrift voor familie-en jeugdrecht*. pp. 59-67, 1989

Zijlstra developed the "best interests of the child" model in a joint project in 2006[40]. The model finds its concrete translation in the Bic Questionnaire (BIC-Q). It consists of 24 questions relating to 14 child-rearing conditions. These 24 questions are answered in relation to the child's current upbringing and living environment, the expected future situation if the child's upbringing and living environment are maintained and the expected future situation if an alternative child-rearing and living environment is chosen. A professional can use the questionnaire to anticipate the results of a decision and assess whether the results of this specific decision are in the best interests of the child. This questionnaire has been put into practice in the Netherlands in individual cases of children involved in asylum and immigration procedures[41]. Another tool to implement the child's best interests and find a definition could be to develop monitoring initiatives. For instance, the H.I.T foundation for migration aims at creating solutions to tackle challenges related to migration. It has developed a monitoring system to follow up on return decisions affecting minors. The advantages of this system are to build better decision-making and develop assistance for a particular system. It could also provide possibilities for appeal in a case where an individual decision is contested and in that way creates a better judicial system across Europe. The courts at European level can also set guidelines to implement the concept. For example, in "Schmidt v. France" (2007), the European Court of Human Rights set out some factors underlying the notion of the best interests of the child and highlighted the fact that the Member States must protect the child's psychological development, balance, well-being, health, rights and freedoms. Nonetheless, the courts are still not necessarily willing to define precisely what the best interests of the child are in order to assess more easily the best interests of the child on a case-by-case basis[42].

The efficient implementation of the best interests of the child is inherently linked with its definition. A common understanding of the child's best interests at European level may be a way to improve the common use of the concept across Europe at a time when family cases often imply a European dimension. In this way, the work of both legislation and courts is essential to build minimal standards. This movement has already started. For instance, as regards the hearing of a child, the Committee of Ministers of the Council of Europe has adopted a recommendation on the participation of children and young people under the age of 18. Brussels II regulation also gives reform and sets common minimum standards for hearing a child. As regards family law more specifically, Dublin III Regulation 604/2013 sets out some criteria to assess the best interests of the child such as family reunification possibilities, the child's well-being and development, and the

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40 Kalverboer, ME and Zijlstra, *AE, Kinderen uit asielzoekersgezinnen en het recht op ontwikkeling : Het belang van het kind in het Vreemdelingenrecht.* SWP Publishers. Amsterdam, 2006

41 Carla Von Os, *The best interest of the child assessment with recently arrived children. In The best interests of the child: a dialogue between theory and practice*. Council of Europe, March 2016. pp. 59-70

42 ECHR, "*Neulinger v. Switzerland*", 2010 and ECHR "*Mamousseau and Washington v. France*", 2007

views of the child in accordance with his or her age and level of maturity. The international courts of justice are also starting to develop common procedures to guide national judges and create common assessment of the best interests of the child in specific cases. The European Court of Human Rights has developed a procedural requirement corresponding to whether the parents have been involved in the decision-making process to a sufficient degree. This is the case in Sahin v. Germany (2003). The applicant was prevented from having contact with his daughters on the ground that the parents' separation had had a bad impact on the children's development. The court ruled that, when a parent is seeking to establish relationships with the child, accurate and complete information on the child's relationship with the applicant is an indispensable prerequisite for establishing a child's true wishes and thereby striking a fair balance between the interests at stake. The Court held that the involvement of the applicant in the access proceedings was insufficient.

In addition to all the tools presented, judges also need to develop common knowledge and assessment of the notion, since they have a difficult role to play in the definition and implementation of the best interests of the child. As was the case at the international conference in Brussels of 9th and 10th December 2014 on the occasion of the 25th anniversary of the United Nations Convention on the Rights of the Child, academic work and participation of different professionals is a way of creating and sharing common values and reaching the same conclusions. This work is not finished and may never be, but events such as the Themis competition also provide a good opportunity to create common knowledge amongst judges on a European scale.

To conclude, we have seen that the concept of the best interests of the child is vague and sometimes blurred, even if attempts have been made to make it clearer. Nonetheless, as Jacques Fierens wrote, even if the concept is difficult to understand and implement for the professionals involved, both the States and the judicial courts have to abide by the international conventions they ratified. In all matters, "*like the North Star, the best interests of the child are the brightest sight in the night and have to guide, always, the action of protagonists as a primary consideration*".

BIBLIOGRAPHY

The best interests of the child: a dialogue between theory and practice, Council of Europe, ed. by Mika Sormunen, March 2016

Jacqueline Pousson-Petit (dir.), *Qu'en est-il de la simplification du droit ?* L'intérêt supérieur de l'enfant : vecteur de simplification ou de déstructuration du droit de la famille en Europe? pp.193-209, Presses de l'Université Toulouse I Capitole, 2010

C. Neirinck, "A propos de l'intérêt de l'enfant", in *Le droit au respect de la vie familiale au sens de la CEDH*, pp. 25-29

I. Goldner Lang, Extending the scope of EU law to internal situations: "in the child's best interests we swear, but not a step further", online source: eumigrationlawblog.eu

Rasson A-C, *L'intérêt de l'enfant, valeur fondamentale?* . In L'intérêt de l'enfant. Larcier, 2019. pp. 336-353. ISBN. 194. 254.129. 28

Kennan N. and Kilkelly U. *Children's involvement in criminal, civil and administrative judicial proceedings in the 28 member states of the EU*. Policy brief, Publications of the office of European Union, Luxembourg, 2015.

Mark Klaassen and Peter Rodrigues, The Best Interests of the Child in EU Family Reunification Law: A Plea for More Guidance on the Role of Article 24(2) Charter, in European Journal of Migration and Law Online Publication Date: 16 June 2017

M. Klassen, The right to family unification: between migration control and human rights, Meijers Institute and Graduate School of Leiden Law School, 2015, chapter 4.

Willems G, *Legal parentage and best interest of the child in the case-law of European Courts of Rights. European journal of Human Rights*, pp.435-466, May 2018