

A Hostile Environment for Children? The Rights and Best Interests of the Refugee Child in UK Asylum Law

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ABSTRACT

Children fleeing persecution, torture, ill-treatment, exploitation and violence, cross international borders to seek protection in another state because they have lost the protection of their home state. When a child seeks international protection, the framework of rights under the Convention on the Rights of the Child (CRC) and the best interests principle should guide a state to determine the child's status and protection needs. However, a child's rights and protection needs clash with a state's interest in immigration control, which determines who can enter and remain in the state. The UK government's 'hostile environment' policy applies to all adults and children who enter the UK irregularly, and have no right to remain. I argue that the UK's approach violates its international obligations under the CRC. This article analyses how the children's rights framework, in particular the 'best interests' principle, challenges the UK's 'hostile environment' policy.

KEYWORDS: children's rights, Convention on the Rights of the Child, Convention Relating to the Status of Refugees 1951, international protection, hostile environment.

1. INTRODUCTION

States such as the United Kingdom (UK) claim a prevailing public interest in maintaining strong border control and implementing policies to deter 'illegal immigrants' (including children), from arriving at the border or making life so uncomfortable for them that they are left with no option but to return home. Since 2012, the UK government has adopted a 'hostile environment' policy¹ as a way of tackling irregular migration, in order to force the return of people without leave to remain and to discourage people from making dangerous journeys to reach the UK. The policy and its implementation affects child refugees and asylum seekers, who have rights, in both international and domestic law, but lack the means, the voice and the power to realise their rights.

This article argues that the UK's narrow version of international protection and the hostile environment can be challenged through the children's rights framework and best interests principle, formalised in the Convention on the Rights of the Child (CRC).² In international law a refugee child is anyone under the age of 18³ who fulfils the criteria for refugee status as defined in Article 1A(2) of the Convention Relating to the Status of Refugees

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¹ See Yeo, *Briefing: What is the Hostile Environment, where does it come from and who does it affect?* (Free Movement Blog, WordPress 2018) (1 May 2018), available at: <https://www.freemovement.org.uk/briefing-what-is-the-hostile-environment-where-does-it-come-from-who-does-it-affect/> [last accessed 30 January 2019].

² Convention on the Rights of the Child 1989, 1577 UNTS 3 (CRC).

³ Article 1 CRC (unless under national laws the age of majority is attained earlier). The CRC and its treaty monitoring body, the Committee on the Rights of the Child (CRC Committee) consider a refugee child to be any child seeking international protection, whether they are able to claim refugee status or not: Article 22 CRC and General Comment No. 6: Treatment of unaccompanied and separated children outside their country of origin, 1 September 2005. Any reference to 'refugee child' in this article covers all situations in which a child has crossed an international border and requires international protection.

1951 (Refugee Convention),⁴ The UK has ratified both the CRC⁵ and the Refugee Convention,⁶ which ought to provide a rights-based framework for the protection of children and their rights in the context of international migration. However, there is limited protection of children's rights in the UK, especially in the immigration and asylum context. The CRC has not been incorporated into UK law and the options for bringing a claim in order to remedy the impact of the hostile environment on the child, are limited. I argue that because the best interests principle has been implemented in UK asylum and immigration law, it is a potential conduit to challenge the hostile environment policy and potentially is 'a means of increasing the reach of children's rights into domestic law'.⁷ This article examines the best interests principle within the framework of children's rights and the obstacles refugee and asylum seeking children face securing protection and access to their rights in the face of the government's approach to controlling migration.⁸

The article begins with an overview of the hostile environment policy, its origins and current incarnation. In section three, the article examines the international legal framework for children's rights and an interpretation of the Refugee Convention from the perspective of a refugee and asylum-seeking child. Next, the article discusses the UK's hostile environment policy's impact on the rights of children seeking international protection in the UK. Third, the article examines how a refugee child's rights are protected in UK law with an analysis of the development of the best interests principle in UK asylum and immigration law. Finally, I argue that the operationalisation of the best interests principle from a rights-based perspective has the potential to challenge the hostile environment.

2. WHAT IS THE 'HOSTILE ENVIRONMENT'?

The phrase 'hostile environment' was first used by Theresa May (in her capacity as Home Secretary) in an interview in 2012 with the Daily Telegraph.⁹ She declared that she wanted to create a 'hostile environment' for people who had no right to be here or with no leave to remain. In her words: '[t]he aim is to create here in Britain a really hostile environment for illegal migration.'¹⁰ The hostile environment is characterised by ordinary citizens, such as landlords, health workers, bankers and Driver and Vehicle Licensing Agency (DVLA) staff carrying out border and immigration checks as part of everyday life. The creation of this hostile environment agenda is implemented through legislation¹¹ and manifested in policy output¹² and political discourse. The devastating and cruel impact of the hostile environment was brought to public

⁴ Convention Relating to the Status of Refugees 1951, 189 UNTS 137 and the Protocol Relating to the Status of Refugees (1967) 606 UNTS 276 (the Refugee Convention).

⁵ UN Treaty Collection (Depositary), Status of Treaties: *Convention on the Rights of the Child* 1989, 1577 UNTS 3, Chapter IV, 11 (status as at 19 January 2019), the UK signed the CRC on 19 April 1990 and ratified it on 16 December 1991.

⁶ UN Treaty Collection (Depositary), Status of treaties: *Convention Relating to the Status of Refugees* 1951, 189 UNTS 137, Chapter V, 2 (status as at 19 January 2019). The UK signed the Refugee Convention on 28 July 1951 and it was ratified on 11 March 1954.

⁷ Kilkelly, 'The Best Interests of the Child: A Gateway to Children's Rights?' in Sutherland and Barnes MacFarlane (eds) *Implementing Article 3 of the United Nations Convention on the Rights of the Child: Best Interests, Welfare and Well-being* (2016) 51 at 62.

⁸ Yeo, *supra* n 1.

⁹ Kirkup and Winnett, Theresa May interview: 'We're going to give illegal migrants a really hostile reception, *The Daily Telegraph*, 25 May 2012 available at: www.telegraph.co.uk/news/uknews/immigration/9291483/Theresa-May-interview-Were-going-to-give-illegal-migrants-a-really-hostile-reception.html [last accessed 30 January 2019]. Theresa May was Home Secretary at the time.

¹⁰ *Ibid.* When she announced the policy, there was no suggestion that children would be exempted from the policy or that the best interests of the child will be taken into consideration when drafting measures implementing the policy.

¹¹ In particular, sections 20–28 and 38–47 Immigration Act 2014 and sections 34–35 and 39–45 Immigration Act 2016.

¹² For example, Home Office Annual Report 2015–2016 and 2016–2017 (Crown Copyright 2016 and 2017).

attention by the ‘Windrush’ scandal of April and May 2018, which revealed how hostile the UK had become under this policy, in particular for people who could not prove their status, even those who have resided in the UK for decades.¹³

A. The origins of the ‘hostile environment’

Although use of the phrase ‘hostile environment’ is a recent and explicit manifestation of the UK government’s immigration strategy, the seeds of this policy were planted in earlier immigration legislation, especially in the context of immigration detention, carrier sanctions and employment checks to tighten up on illegal working. These early manifestations of the hostile environment laid the foundations for the current policy.

(i) Immigration Detention

The UK government can detain people who enter the UK without leave in order to examine their immigration status, as well as detaining people awaiting removal and deportation.¹⁴ A person is also liable to detention if there are concerns about national security or if there has been a breach of conditions of stay.¹⁵ The decision to detain is taken by an immigration officer with limited scope for review of the decision. Practitioners and academics have expressed concerns that procedural guarantees are ignored and too much discretion is given to Home Office decision-makers.¹⁶ According to the official Home Office guidance, detention should be used sparingly and as a measure of last resort,¹⁷ but there is evidence that detention is used routinely and for long periods of time without a time limit.¹⁸ The UK is the only state in the EU which has no time limit for detention for immigration purposes. Rather than being exceptional, detention has become a standard component of the UK’s immigration and asylum enforcement policy.

(ii) Carrier Sanctions

The Immigration Act 1988, introduced measures requiring all airline and ferry companies to conduct pre-boarding checks. This was an early example of the UK outsourcing border and immigration checks to private companies which forms the basis of the current hostile environment policy. If airlines and ferry companies fail to check the immigration status of passengers before carrying them to the UK, and the passengers arrive without the correct paperwork or without proof of permission to enter the UK, the carriers are liable to a fine.¹⁹ This measure was unsuccessfully challenged by a carrier (Hoverspeed) on the grounds that the checks restricted its freedom to provide cross border services and the freedom of movement of its passengers under European Union (EU) law.²⁰ Since then, UK’s carrier sanctions and visa

¹³ See Gentleman, I can’t eat or sleep: the woman threatened with deportation after 50 years living in Britain, *The Guardian*, 28 November 2017, available at: <https://www.theguardian.com/uk-news/2017/nov/28/i-cant-eat-or-sleep-the-grandmother-threatened-with-deportation-after-50-years-in-britain> [last accessed 30 January 2019].

¹⁴ Schedule 2 of the Immigration Act 1971, paras 16-18.

¹⁵ *Ibid*; Section 62 of the Nationality, Immigration and Asylum Act 2002 introduced a free-standing power for the Secretary of State (i.e. an official acting on the Secretary of State’s behalf) to authorise detention.

¹⁶ See eg, Lindley, ‘Injustice in Immigration Detention: Perspectives from Legal Professionals’ (Bar Council 2017).

¹⁷ UK Home Office, Enforcement Instructions and Guidance, at para 55.1.3, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/470593/2015-10-23_Ch55_v19.pdf [last accessed 30 January 2019].

¹⁸ All Party Parliamentary Group on Refugees and All Party Parliamentary Group on Migration (March 2015), Inquiry into the Use of Immigration Detention in the United Kingdom <http://bit.ly/2xPuCtj> (last accessed 30 January 2019); Shaw, A report into the Welfare in Detention of Vulnerable Persons (January 2016), available at:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/490782/52_S32_Shaw_Review_Accessible.pdf [last accessed 30 January 2019].

¹⁹ Immigration (Carriers Liability) Act 1987. Currently the fine is £2,000 per passenger.

²⁰ *R v Secretary of State for the Home Department, ex parte Hoverspeed* [1999] INLR 591.

restrictions have been tightened further.²¹

In 2001, the EU introduced measures placing a burden on carriers to carry out checks on everyone entering the EU and to 'assume responsibility for the costs of the stay and return of the third-country national' who is refused entry to a Member State of the EU.²² All EU Member States impose carrier sanctions on companies which transport passengers by road, rail, air or sea. These measures have not stopped irregular migration, but instead force people who fear for their lives to find more costly and life-threatening routes to safety.²³ In 2008, the same year the UK withdrew its reservation to the CRC,²⁴ the Home Office announced that there would be '[t]ougher checks abroad [to] help keep Britain safe by stopping risks to our country coming close.'²⁵ These 'tougher' checks cover adults and children, making it much harder to travel safely to the UK to seek asylum, forcing many unaccompanied children into the hands of traffickers and the associated risks of making the crossing to the UK.²⁶

(iii) Employment Checks

A third example of the existence of a hostile environment before 2012, is in the context of employment checks. Since the mid-1990s, there has been an obligation on employers to carry out checks to ensure that their employees have the right to work in the UK.²⁷ If an employer cannot prove that he or she checked the employee's status, the employer faces a criminal prosecution and is liable to a fine or imprisonment²⁸ or a civil penalty.²⁹ These measures are targeted at people with no right to remain or work in the UK, and thus, in theory, should not affect recognised refugees and regular migrants. However, the tougher penalties on employers introduced by the Immigration Act 2016, are likely to result in greater reluctance to employ people whom the employer believes does not have the right to work in the UK.³⁰ This will have an impact on children if their parents cannot secure work and are forced into destitution.

B. The current hostile environment agenda: the Immigration Acts 2014 and 2016

The hostile environment agenda has the potential to impact, directly or indirectly, the rights of the child to enjoy the highest attainable standard of health,³¹ to benefit from social security,³² to an adequate standard of living³³ and to education.³⁴ The measures introduced in the Immigration Acts 2014 and 2016 to operationalise the hostile environment were mainly focused on the outsourcing of border and immigration checks to landlords, banks, the DVLA and the NHS. These measures extended the categories of people (including private individuals) required

²¹ See, for example, the Immigration and Asylum Act 1999, Nationality, Immigration and Asylum Act 2002, schedule 8 and the Carriers' Liability Regulations 2002, SI 2002/2817.

²² Article 3 of Council Directive 2001/51/EC, supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985 [2001] OJ L 187/45.

²³ For example, Andersson, *Illegality, Inc.: Clandestine migration and the business of bordering Europe* (2014).

²⁴ See section 4 below.

²⁵ UK Home Office. *Making Change Stick: an introduction to the Immigration and Citizenship Bill* (2008) 6.

²⁶ UNICEF, *Neither Safe Nor Sound: Unaccompanied Children on the Coastline of the English Channel and the North Sea* (June 2016) at 77-84, available at: <https://www.unicef.org.uk/publications/neither-safe-nor-sound/> [last accessed 30 January 2019].

²⁷ Asylum and Immigration Act 1996, section 8.

²⁸ *Ibid.* Sections 8(1) and 8 (4). Section 8 has been amended by both s 21 of the Immigration, Asylum and Nationality Act 2006 and s 35 of the Immigration Act 2016. An employer will commit an offence where they employ a person knowingly, or where they have reasonable cause to believe, that the worker is disqualified from working by reason of their immigration status.

²⁹ Immigration, Asylum and Nationality Act 2006, section 15. The civil penalty is between £15,000 and £20,000 per employee depending on whether it is a repeat breach of the statutory obligation.

³⁰ Yeo, *supra* n 1.

³¹ Article 24 CRC.

³² Article 26 CRC.

³³ Article 27 CRC.

³⁴ Articles 28 and 29 CRC.

to carry out immigration checks, thus contributing to the government's aim to 'limit the factors that draw illegal migrants to the UK and to make it easier to remove those with no right to be in the UK.'³⁵ The implementation of the policies and their operationalisation by landlords, the NHS and schools, could result in homelessness and destitution and a risk that children and their families will be unable to access essential services, such as health or education, because they live in fear of being removed or deported.³⁶

Although the hostile environment policy is not explicitly directed at people who are entitled to international protection,³⁷ or at children directly, the effect of the policy is that it creates a hostile environment for *all* irregular migrants. The Home Office annual reports since 2014 reflect the policy, reporting on the measures which tighten internal border controls, enhancing border security and clamping down on illegal migration³⁸ and prioritising the returns of 'all nationals in the UK illegally (including foreign national offenders)'.³⁹ The policy's effectiveness (or success) appears only to be measured by the extent to which net migration to the UK is reduced without an assessment on the impact on children's rights (or their parents' rights).⁴⁰ Before examining the impact that the hostile environment has had on children's rights in the UK, there is a brief exposition of the international legal framework applicable to a child seeking international protection.

3. LEGAL FRAMEWORK FOR CHILDREN SEEKING INTERNATIONAL PROTECTION

UNICEF urges states to recognise that '[c]hildren's rights are not confined by national borders; where conflict or disaster, neglect, abuse or marginalisation drive children to move, their rights move with them'⁴¹ Children seeking international protection lose their identity as children and are treated according to their immigration status first, with their rights as children under the CRC considered second.⁴² A child, crossing an international border in search of safety and refuge, triggers the operation of international refugee law (IRL), but a child is also a rights holder under the CRC. The brief overview of both Conventions in the next two sections sets out the international legal framework governing refugee and asylum-seeking children.

A. Convention on the Rights of the Child

The CRC is the most ratified international human rights treaty in the history of the United Nations (UN). All UN Member States, except for the United States of America (USA),⁴³ have accepted the universality of children's rights, recognised that children are rights holders and have committed to respect, protect and fulfil the rights of children, without discrimination.⁴⁴

³⁵ See UK Home Office, *Annual Policy Report 2014 – 15* (Crown Copyright 2015) at 4.

³⁶ Liberty, *A Guide to the Hostile Environment: The Border Controls Dividing our Communities – and How We can Bring Them Down* (April 2018), at 5; available at:

<https://www.libertyhumanrights.org.uk/sites/default/files/HE%20web.pdf> [last accessed 30 January 2019].

³⁷ Refugee status is constitutive, not declaratory, thus a person is a refugee as soon as he or she fulfils the criteria in Article 1A(2) of the Refugee Convention, not when the state grants refugee status.

³⁸ Home Office, *Annual Report and Accounts 2016-17* (Crown Copyright 2017) at 18–19.

³⁹ *Ibid.* at 19.

⁴⁰ Yeo, *supra* n 1.

⁴¹ UNICEF, *A Child is a Child: Protecting Children on the Move from Violence, Abuse and Exploitation* (2017) at 7.

⁴² See eg: Finch, *CONNECT Country Report on the United Kingdom, 'Always Migrants, Sometimes Children: Mapping of the Reception and Protection of Unaccompanied Children in the United Kingdom'* (2014), available at: www.connectproject.eu/PDF/CONNECT-UK_Report.pdf [last accessed 16 November 2018]. The state imposes a status upon them - migrant, refugee, asylum seeker, unaccompanied child, illegal or irregular immigrant, undocumented migrant etc. See: Bhabha, 'Minors or Aliens? Inconsistent State Intervention and Separated Child Asylum-Seekers' (2001) 3 *European Journal of Migration and Law* 283 at 293–4.

⁴³ The USA signed the Convention on 16 February 1995, but never ratified it. See UN Treaty Collection (Depositary), *Status of Treaties Convention on the Rights of the Child*, *supra* n 5.

⁴⁴ 196 states have ratified the Convention on the Rights of the Child, see UN Treaty Collection (Depositary), *Status of Treaties Convention on the Rights of the Child*, *supra* n 5.

The CRC applies to all children, whatever their status or background.⁴⁵ In order to develop a children's rights perspective for effective implementation of the CRC, the Committee on the Rights of the Child (CRC Committee) identified four guiding principles: non-discrimination (article 2 CRC), the best interests of the child (Article 3(1)), the right to life, survival and development (article 6 CRC) and the right of the child to express his or her views freely and for those views to be given due weight according to the age and maturity of the child (article 12 CRC).⁴⁶ These guiding principles in addition to all the other rights in the CRC should operate as a potential 'game-changer' for children migrating across international borders.⁴⁷

The comprehensive framework of rights in the CRC is designed to ensure children reach their potential, but depends on states fulfilling their obligations and giving effect to children's rights, both in policy and law, which comes into sharp focus in the politicised arena of refugee and asylum law. There are six main reasons why the CRC should be the primary source of protection for refugee and asylum-seeking children. Firstly, all children within a state's jurisdiction are entitled to rights and protection whatever their status, nationality, gender, age, ethnicity, religion or race (Article 2 CRC). Secondly, the CRC makes specific provision for refugee and asylum-seeking children (Article 22 CRC). Thirdly, all states accept that the best interests of the child should be a primary consideration in all actions concerning children (Article 3(1) CRC),⁴⁸ which includes the children's right to care and protection to ensure their well-being (Article 3(2) CRC). Fourthly, children have rights to protection from violence, harm and exploitation (Articles 19, 32, 34, 36 and 39 CRC). Fifthly, children's rights cannot be derogated from in times of national emergency or to justify securitisation of a state's borders. Finally, children have a right to be heard, in terms of being allowed to express their views in all matters affecting them and to participate in any decision about their lives (Article 12 CRC), subject to the principle of evolving capacities (Article 5 CRC). If the CRC is fully implemented and applied to children seeking asylum and refugee children, these children have a right to protection and a durable solution in their best interests.

B. Convention Relating to the Status of Refugees 1951 and its 1967 Protocol

The mainstay of the international protection regime is the Refugee Convention,⁴⁹ which provides the definition of 'refugee' in Article 1A(2):

[O]wing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

Although, adults and children who fulfil the criteria are entitled to be granted refugee status and benefit from protection, the Convention is 'age neutral' and does not refer to children's rights specifically.⁵⁰ The only references to children are the parents' right to provide

⁴⁵ Article 2 CRC.

⁴⁶ Committee on the Rights of the Child, General Comment No 5: General Measures of Implementation of the Convention on the Rights of the Child (arts 4,42 and 44, para 6), 27 November 2003 at para 12.

⁴⁷ Crock, 'Justice for the Migrant Child: The Protective Force of the Convention on the Rights of the Child' in Mahmoudi, Leviner, Kaldal and Lainpelto (eds), *Child-Friendly Justice: A Quarter of a Century of the UN Convention on the Rights of the Child* (2015) 221 at 222.

⁴⁸ See discussion on the best interests principle in Section 3C(ii) below.

⁴⁹ UNHCR ExCom, Conclusion on the Provision of International Protection including through Complementary Forms of Protection No. 103 (LVI), 7 October 2005.

⁵⁰ Pobjoy, *The Child in International Refugee Law* (2017) at 3.

religious education for their children,⁵¹ the impact of having children who are nationals of the country of residence on a refugee's right to work,⁵² and the requirement to apply national standards on minimum age for employment.⁵³ Article 22 of the Refugee Convention, which concerns the right to elementary education, does not refer to childhood or age.

There is no treaty monitoring body for the Refugee Convention and it is left to states to decide whether and how to implement a system of refugee status determination. The adjudication of who is a refugee is determined by each State Party.⁵⁴ The office of the UN High Commissioner for Refugees (UNHCR) plays a limited role in terms of guidance and norm setting.⁵⁵ Most of the interpretation of the Convention and its application is carried out by states at a domestic level and provides 'an extraordinary example of international law in action, with treaty based norms enforced domestically in ways that lead to real rights for some of the most seriously disfranchised persons in the world.'⁵⁶ However, without a treaty body to monitor states' interpretation of the Convention, increasingly this protective system is being undermined and weakened by policies of *non-entrée* and deterrence designed to prevent refugees and asylum seekers from reaching a state's border.⁵⁷

The determination of refugee status presents obstacles for children who must demonstrate subjective fear, when they may not have the language to articulate fear and may not be able to understand how that fear links to one of the five grounds set out in Article 1A(2) of the Refugee Convention.⁵⁸ Furthermore, children may be invisible in the process because of the way in which refugee determination procedures are structured⁵⁹ or because they fall between child protection and immigration control concerns.⁶⁰ Children fleeing conflict, generalised violence or environmental degradation may struggle to prove that their claim for asylum falls into the, narrow and specific definition of 'refugee', based on a fear of persecution, viewed from an adult perspective and interpreted in the light of adult experiences.⁶¹ Children who fail to establish refugee status rely on a state's discretion to grant another form of protection.⁶² However, an alternative or complementary form of protection may not carry with it the full canon of rights set out in the Refugee Convention.⁶³

The right to *non-refoulement* in Article 33 of the Refugee Convention 'is not the foundation of the [Refugee] Convention, but its cornerstone'.⁶⁴ The principle is especially important for children who fail to satisfy the narrow criteria of Article 1A(2), as it ensures their

⁵¹ Article 4 of the Refugee Convention.

⁵² Article 17(2)(c) of the Refugee Convention.

⁵³ Article 24(1)(a) of the Refugee Convention.

⁵⁴ Alienikoff, 'State Centered Refugee Law: From Resettlement to Containment (1992) 14 *Michigan Journal of International Law* 120 at 124.

⁵⁵ UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, UN Doc. A/RES/428(V).

⁵⁶ See Hathaway, North and Pobjoy, 'Supervising the Refugee Convention: Introduction' (2013) 26 *Journal of Refugee Studies* 323.

⁵⁷ Gammeltoft-Hansen and Hathaway, *Non-refoulement in a World of Cooperative Deterrence* (2015) 53 *Columbia Journal of Transnational Law* 235.

⁵⁸ Pobjoy, *supra* n 50 at 79.

⁵⁹ Crock, *supra* n 47 at 229; Crock, 'Re-thinking the Paradigms of Protection: Children as Convention Refugees in Australia' in McAdam (ed), *Forced Migration, Human Rights and Security* (2008) 155 at 179; Pobjoy, *supra* n 50 at 3 and 46 - 52.

⁶⁰ Bhabha, *supra* n 42 at 284-5.

⁶¹ Crock, *Seeking Asylum Alone: Australia: A study of Australian law, policy and practice regarding unaccompanied and separated children* (2006) 244.

⁶² Such as humanitarian protection in UK law or subsidiary protection under Article 7 of Directive 2011/95/EU 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 [2011] OJ L 304/12 (Qualification Directive).

⁶³ McAdam, *Complementary Protection in International Refugee Law* (2006) at 17.

⁶⁴ Durieux, *Three Asylum Paradigms*, (2013) 20 *Journal of Minority and Group Rights* 147, at 167; Wouters, *International Legal Standards for the Protection from Refoulement* (Doctoral Thesis), Leiden University (2009).

right to protection, not to be returned to a risk of irreparable harm and to counter a hostile environment which focuses on their illegality⁶⁵ and lack of status. The significance of this right in the context of children seeking international protection cannot be underestimated and is a direct challenge to a state's sovereignty over its borders.

C. Children's Rights in Refugee and Asylum law

The drafters of the CRC recognised that an article covering refugee and asylum seeking children should be included.⁶⁶ The specific provision for refugee and asylum seeking children is in Article 22(1) of the Convention:

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

Article 22 affirms the rights of child refugees in IRL, in international human rights law (IHRL) and international humanitarian law (IHL) rather than providing refugee children with additional rights, such as a right to asylum or a right to enter a state to claim asylum. The CRC does not define a refugee child, nor provide clarification of the refugee definition under Article 1A(2) of the Refugee Convention from a child's perspective. However, this provision, goes beyond the Refugee Convention by offering asylum seeking children the same rights as refugee children, regardless of their status. Furthermore, Article 22 CRC obliges states to 'take appropriate measures' to ensure the child receives 'appropriate protection and humanitarian assistance', thus imposing a positive obligation on the state to protect the child, whether the child is granted refugee status or not. However, Article 22 CRC does not overcome 'the out-dated definition of refugee... and the absence of a duty on states to provide asylum'⁶⁷ - two of the most fundamental weaknesses of the Refugee Convention.

Article 22(1) CRC also refers to the 'applicable rights' of refugee and asylum seeking children. Whilst this may imply that only certain rights are applicable to such children, it has been argued that this was to make a distinction between the various international instruments referred to in Article 22 (1) and not for the purpose of limiting the rights of refugee children.⁶⁸ Although humanitarian assistance is not defined in the CRC, both the UNHCR and the CRC Committee interpret this in the context of IRL and the rights under the CRC.⁶⁹ Article 22 (1) CRC confirms the centrality of the CRC for a refugee child's rights and underscores the importance a child rights-based interpretation of the Refugee Convention. The CRC Committee and the Committee on the Protection of the Rights of All Migrant Workers and Members of Their

⁶⁵ The term 'illegal migrant' is used by the UK government to refer to anyone without legal, settled or refugee status in the UK. The UNHCR suggests that such people should be referred to as 'irregular migrants'. See, for example, UNHCR *Asylum and Migration*, available at: <http://www.unhcr.org/uk/asylum-and-migration.html> [last accessed 19 November 2018].

⁶⁶ UN ECOSOC Report of the Working Group to the Commission on Human Rights 1981 (E/CN.4/L.1575), 20 – 21, para 125 (c).

⁶⁷ Van Bueren, *The International Law on the Rights of the Child* (1998) at 362.

⁶⁸ Price-Cohen, 'The United Nations Convention on the Rights of the Child: Implications for Change in the care and Protection of Refugee Children' (1991) 3 *International Journal of Refugee Law* 675 at 689.

⁶⁹ Committee on the Rights of the Child General Comment No. 6, supra n 3; UNHCR, Guidelines on International Protection: 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). See also Pobjoy, supra n 50 at 22.

Families (CMW) in their joint General Comment No 3 and 22⁷⁰ reminded states that they 'should ensure that children in the context of migration are treated first and foremost as children [and] ... have a duty...to respect, protect and fulfil the rights of children...regardless of their or their parents' or legal guardians' migration status.'⁷¹

The CRC provides a comprehensive framework for protecting refugee children and their rights and resolves the obstacles to protection which children face in IRL by supplementing the Refugee Convention with the child rights specific framework. Goodwin-Gill argues for a 'total realignment' of children's rights and asylum law:

[i]n a refugee and protection context, international human rights law can fill gaps and point out directions; it may even, as with the Convention on the Rights of the Child, call for a total re-alignment of protection, away from the formalities of 1951-style refugee status towards a complete welfare approach.⁷²

A decade later, Goodwin-Gill and McAdam affirmed that '[t]he welfare of the child and the special protection and assistance which are due in accordance with international standards, prevail over the narrow concerns of refugee status.'⁷³ Thus, '...if a line has to be drawn, a child is foremost a child before he or she is a refugee'⁷⁴ Children deserve protection because of their status as children, not because they fall within the refugee definition.⁷⁵

The scope of this article does not allow for an in-depth discussion of all the rights of a child in the context of international migration.⁷⁶ Although all children within the jurisdiction of a state are entitled to enjoy all the rights under the CRC, without discrimination, it is arguable that some rights are more important or more relevant at different stages of the journey and when the child is negotiating the asylum system of the host country. Before the CRC was adopted, the UNHCR published a '*Note on Refugee Children*' in 1987,⁷⁷ in which the High Commissioner emphasised that action on behalf of refugee children should be guided by two principles: the best interests principle and the principle of family unity.⁷⁸ These two principles along with the principle of *non-refoulement* in IRL are fundamental for the protection of children on the move and the rest of this section analyses these principles from the perspective of a refugee child.

⁷⁰ Joint General Comment No. 3 of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 of the Committee on the Rights of the Child: on the general principles regarding the human rights of children in the context of international migration (16 November 2017) (Joint General Comment No. 3 and 22).

⁷¹ Ibid. at para 11.

⁷² Goodwin-Gill, 'What to Protect, how ... the Future' (1997) 9 *International Journal of Refugee Law* 1 at 6.

⁷³ Goodwin-Gill and McAdam, *The Refugee in International Law*, 3rd Edn (2007) at 131.

⁷⁴ McAdam, 'Seeking Asylum under the Convention on the Rights of the Child: A case for Complementary Protection' (2006) 14 *The International Journal of Children's Rights* 251 at 269.

⁷⁵ Articles 2 and 3 CRC and Article 24 of the International Convention on Civil and Political Rights 1966, 999 UNTS 171 (ICCPR).

⁷⁶ The two Joint General Comments of the CRC Committee and the CMW Committee do this in some depth. See Joint General Comment No 3 and 22, supra n 70 and Joint General Comment No. 4 of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 of the Committee on the Rights of the Child: on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return (16 November 2017)(Joint General Comment No. 4 and 23).

⁷⁷ UNHCR, *Note on Refugee Children* (1987).

⁷⁸ Ibid, at para 11.

(i) *Principle of Family Unity and the Right to Family Life*

The right to family life is recognised by the CRC⁷⁹ and in a number of IHRL instruments.⁸⁰ The preamble to the CRC states that the family is ‘the fundamental group of society and the natural environment for the growth and well-being of all its members, particularly children.’⁸¹ The right is acknowledged in IRL, although it does not appear in the body of the Refugee Convention itself but in Recommendation B annexed to the Convention.⁸² Inherent in the right to family life is a right to family unity, which applies to everyone regardless of status. Family unity is particularly important for the protection of children in migration situations, because when they are on the move and unable to rely on the protection of a state, the family unit provides a support system, especially for younger members of the family.⁸³ The UNHCR in their Global Consultations on family unity stated, ‘[m]aintaining and facilitating family unity helps to ensure the physical care, protection, emotional well-being, and economic support of individual refugees and their communities.’⁸⁴

There are two key elements to this right – a right to family unity, which encompasses the child’s right to protection from ‘arbitrary or unlawful interference’ with his or her family,⁸⁵ and includes the right not to be separated from his or her parents⁸⁶ and a right to family reunification, if the family is separated at the start of, or during the journey.⁸⁷ Article 9 CRC obliges a state to guarantee the non-separation of a child from his or her parents or guardian, with the only exception being where separation is in the best interests of the child (Article 9(1) CRC). Article 9 CRC is more extensive than Article 17 of the International Covenant on Civil and Political Rights (ICCPR) and Article 16 CRC, which prohibit ‘arbitrary and unlawful’ interference with family life. Thus, if a state has a lawful and non-arbitrary reason for interfering with family life, the state will not violate Article 17 ICCPR or Article 16 CRC, but if such interference is not in the best interests of a child and results in separation of the child from his or her parents or guardian, then the interference is unlawful under Article 9 CRC. Family unity is about keeping a family together with the state ensuring that through its actions or omissions or those of others, it does not interfere with this right and takes positive measures to ensure realisation of this right.⁸⁸ Family unity has been described as a ‘meta-norm’ in the CRC, first, for ideological reasons emphasising the importance of family in society and, second, for practical reasons associated with responsibility for bringing up the child.⁸⁹

In the context of refugee and asylum seeking children, a state has a positive obligation to implement measures to ensure the family stays together, even though only one family member may have a valid refugee claim.⁹⁰ The absolute obligation in Article 9 CRC ‘provides a robust and

⁷⁹ CRC 5th Preambular paragraph and Articles 9, 10, 16 and 22(2) CRC.

⁸⁰ See Articles 12 and 16 of the Universal Declaration of Human Rights, GA Res. 217 A (III) 1948 (UDHR), Articles 17 and 23 of ICCPR and Article 10 International Convention on Economic and Social Rights (ICESCR), Article 16 CRC and Article 8 Convention for the Protection of Human Rights and Fundamental Freedoms 1950 ETS 5 (ECHR).

⁸¹ CRC 5th Preambular paragraph.

⁸² UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons *Final Act of the Conference of Plenipotentiaries, Recommendation B* (25 July 1951). The Recommendations are not legally binding.

⁸³ Jastram and Newland, Family Unity and Refugee Protection’ in Feller, Turk, and Nicholson (eds) *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (2003, reprinted 2005) 555 at 565.

⁸⁴ UNHCR, Global Consultation on International Protection, *Summary Conclusions – Family Unity*, Geneva Expert Roundtable, November 2001 at para 6.

⁸⁵ Article 16 CRC; see also Article 17 ICCPR and Article 8 ECHR.

⁸⁶ Article 9 CRC.

⁸⁷ Article 10 and Article 22(2) CRC.

⁸⁸ Abram, ‘The Child’s Right to Family Unity in International Immigration Law’ (1995) 17 *Law and Policy* 397 at 418.

⁸⁹ C. Smyth, *European Asylum Law and the Rights of the Child* (2014) at 141.

⁹⁰ Pobjoy, supra n 50 at 45.

principled safety net to prevent the separation of families.⁹¹ This is particularly relevant in a situation where a member of the family is facing deportation or has been detained for immigration purposes.⁹² Joint General Comment no 4 and 23 indicates that deporting a family member or refusing a family member a right to enter or remain in the territory of the state may amount to arbitrary or unlawful interference with family life.⁹³

For refugees and asylum seekers, there is an 'emerging consensus' that a right to family reunification should be realised in the country of asylum because the refugee cannot safely return to their country of origin to enjoy family life there.⁹⁴ It is a corollary of the right to family life, as a person cannot realise the right if he or she is not with the rest of the family and responsibility to uphold the right falls on the country of asylum.⁹⁵

States owe both negative and positive obligations in relation to the right to family reunification. The CRC recognises the importance of family reunification by obliging states to deal with applications to enter or leave the state by a child or his or her parents for family reunification 'in a positive, humane and expeditious manner'⁹⁶ and to protect and assist the child to trace the parents or other family members in order to effect reunification.⁹⁷ The CRC Committee has emphasised that 'the term 'family' must be interpreted in a broad sense to include biological, adoptive or foster parents or, where applicable, the members of the extended family or community as provided for by local custom'.⁹⁸ For instance, the CRC Committee have held in *YB and NS v Belgium*⁹⁹ that the term 'family' must be interpreted to comprise not only biological or adoptive parents but also those given responsibility to care for the child who have formed *de facto* family ties with the child.¹⁰⁰ Belgium's failure to consider the child's *de facto* family ties for the purposes of a family reunion application was held to be in breach of Article 10 and in particular the obligation to deal with family reunification in a positive, humane and expeditious manner'.¹⁰¹

An opportunity to reunite with his or her family in a safe country offers a refugee child safe routes to protection, whereas the lack of access to family reunion procedures forces children to make a choice between staying in a dangerous situation or making a perilous journey to join their families.¹⁰² Furthermore, family reunification should not take place in the country of origin where there is a 'reasonable risk' that a child's rights would be violated and would not be in the child's best interests.¹⁰³ Thus, if a state grants protection to a child or to a child's parents, the state must be proactive in ensuring reunification in accordance with the child's best interests, and develop effective and accessible family reunification procedures which allow children and/or their parents to migrate in a safe and regular manner.¹⁰⁴

⁹¹ Ibid. Although Article 9(1) only guarantees non-separation of the child from his or her parents or guardian not from other family members who he or she might be travelling with.

⁹² Article 9(4) CRC.

⁹³ Joint General Comment No. 4 and 23, supra n 76 at para 28.

⁹⁴ Jastram and Newland supra n 83 at 556-7.

⁹⁵ Turk and Nicholson, 'Refugee Protection in International Law: an overall perspective' in Feller, Turk, and Nicholson (eds) supra n 83, 3 at 34.

⁹⁶ Article 10(1) CRC.

⁹⁷ Article 22(2) CRC.

⁹⁸ Committee on the Rights of the Child, General Comment No.14: The right of the child to have his or her best interests taken as a primary consideration (art 3, para 1), 29 May 2013 at para 59 and Article 5 CRC.

⁹⁹ Committee on the Rights of the Child, *YB and NS v Belgium* (12/2017), Views, CRC/C/79/D/12/2017 (27 September 2018).

¹⁰⁰ Ibid. para 8.11.

¹⁰¹ Ibid. para 8.12.

¹⁰² Joint Agency Briefing Note, *Together Again: Reuniting Families in Safety-What the UK Can Do* (Oxfam, Refugee Council, Amnesty International and British Red Cross, February 2017) at 2.

¹⁰³ Joint General Comment No 4 and 23, supra n 76 at para 35.

¹⁰⁴ Ibid. at paras 27 and 32-38.

(ii) *The Best Interests principle*

The best interests principle was first established in international law in the 1959 Declaration on the Rights of the Child,¹⁰⁵ but in that instrument the principle was aligned with child welfare and protection and was limited to legislative action by states.¹⁰⁶ Its inclusion in the CRC meant that the principle was applicable in a broader range of situations and it was accorded a new status as a principle of interpretation in international law in the context of children's rights.¹⁰⁷

The best interests principle existed in domestic jurisdictions before the CRC was adopted and primarily applied in family law cases where the court was required to find a solution in relation to competing interests, usually between two parents or between the parents and the state.¹⁰⁸ Prior to the CRC, the principle was aimed at ensuring a child's welfare, in the context of family conflict, neglect, abuse and domestic violence, rather than ensuring children's rights. At the core of the best interests principle is the notion that children require protection and guidance because of their lack of maturity, experience or understanding.¹⁰⁹

The principle is set out in Article 3(1) CRC, but also appears in articles on specific rights, such as Article 9 CRC on the non-separation of children from their parents and Article 21CRC on adoption. Article 3(1) states:

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

The best interests principle is one of the four guiding principles in children's rights,¹¹⁰ and should 'be brought into the mainstream of all policies affecting children in international migration'.¹¹¹ The drafters of the CRC shied away from inserting a best interests principle into Article 22 CRC¹¹² because states wanted to avoid agreeing to an obligation which may have had the effect of overriding state sovereignty in immigration and nationality law.¹¹³

The best interests principle is an interpretative principle and procedural guarantee, as well as a substantive right.¹¹⁴ It is a right insofar as states have an obligation to make the best interests of the child a matter of primary concern. But it is not an absolute right; it is 'a primary consideration' and thus is qualified by, and maybe balanced against, other considerations.¹¹⁵ Although there is no definition of best interests, the CRC Committee has fleshed out the approach to be taken in assessing and applying best interests in relation to any action

¹⁰⁵ UN Declaration on the Rights of the Child, GA Res 1386 (XIV), 20 November 1959.

¹⁰⁶ Ibid. Principle 2.

¹⁰⁷ Van Bueren, supra n 67 at 45.

¹⁰⁸ Alston and Gilmour Walsh, *The Best Interests of the Child: Towards a Synthesis of Children's Rights and Cultural Values* (1996) at 1. Alston and Gilmour-Walsh give examples of countries such as Canada, France, India, the UK, USA and Zimbabwe where the principle is familiar in the context of family law principles.

¹⁰⁹ Woolf, 'Coming of Age? The Principle of 'the Best Interests of the Child' (2003) 2 *European Human Rights Law Review* 205 at 208-9.

¹¹⁰ See section 3A above.

¹¹¹ Joint General Comment No. 3 and 22, supra n 70 at para 19.

¹¹² UN ECOSOC, Report of the Informal Open-Ended Working Group on the Rights of the Child, UN Doc. E/1982/12/Add.1 and E/CN.4/1982/30/Add.1 (15 March 1982) at paras 96 and 98. The original wording for Article 22 stated that the best interests of the child had to be *the guiding principle* in every decision about refugee children and children seeking refugee status, a stronger formulation than *a primary consideration* in Article 3(1) CRC.

¹¹³ This is evidenced by the number of states that entered reservations or made declarations seeking to limit the rights of non-citizen/national children under the CRC. The states were UK, Germany, Japan, Switzerland, Singapore and New Zealand; UN Treaty Collection (Depositary), *Status of Treaties Convention on the Rights of the Child*, supra n 5.

¹¹⁴ Committee on the Rights of the Child, General Comment No.14, supra n 98 at para 6.

¹¹⁵ Crock, supra n 47 at 225.

concerning children.¹¹⁶ The policy objective behind the principle is ‘to promote a real change in attitudes leading to the full respect of children as rights holders.’¹¹⁷ If implemented in a rights-based system, the principle should ensure the ‘full and effective enjoyment of the rights recognised in the Convention’, as well as of the ‘holistic development of the child’.¹¹⁸ A child’s best interests must be given high priority and assessments or determinations of best interests must give appropriate weight to fulfilling the rights of the child.¹¹⁹

As discussed below, the best interests principle is firmly established in UK family and childcare law¹²⁰ and more has been extended to immigration and asylum law.¹²¹ Its visibility and recognition in domestic and international law reveals the principle’s potential to be a ‘gateway’ for other rights.¹²² The fact that best interests has been incorporated into national legislation and regarded as ‘the thin end of the human rights wedge for children’,¹²³ it does not mean that a child rights-based approach to best interests is automatic in practice.¹²⁴ The principle is sometimes implemented to satisfy state interests rather than being used to ensure that the state does what is best for the child’s protection needs.¹²⁵

Both the CRC Committee and CMW have reminded states that the best interests of a child must be ‘taken fully into consideration in immigration law, planning, implementation and assessment of migration policies and decision-making on individual cases’.¹²⁶ The best interests principle should have broad rights-based application throughout the asylum process as well as in relation to the design and implementation of policies which impact on asylum seeking or refugee children and should not be outweighed by non-rights based considerations such as migration control.¹²⁷

The UNHCR described ‘best interests’ as the principle which ‘requires that the child’s welfare precedes all other considerations’ and demands that ‘the child’s physical, psychological and social development needs be met’.¹²⁸ What is best for the refugee child must take precedence over any political, social or ‘other consideration’ and an individual assessment of needs with the child’s participation should take place with the objective of enabling him or her to develop ‘physically, mentally, morally, spiritually and socially in a healthy and normal manner.’¹²⁹ This approach resonates with the CRC Committee and the four guiding principles of the CRC.

The best interests principle, directly challenges a state-centric approach to refugee law and obliges states to consider solutions in line with the best interests of the child, as opposed to prioritising policy considerations, such as creating a hostile environment for any child attempting to enter a state irregularly or for children living in a state whose status has not been

¹¹⁶ Committee on the Rights of the Child, General Comment No 14, supra n 98.

¹¹⁷ Ibid. at para 12.

¹¹⁸ Ibid. at para 82.

¹¹⁹ Ibid. at para 32 (a) and (c).

¹²⁰ For example, the Children Acts of 1989 and 2004.

¹²¹ Section 55 Borders, Citizenship and Immigration Act 2009.

¹²² Kilkelly supra n 7 at 51.

¹²³ Ibid at 63.

¹²⁴ Lundy, Kilkelly and Byrne, Incorporation of the United National Convention on the Rights of the Child in law: A Comparative Review’ (2013) 3 *International Journal of Children’s Rights* 442.

¹²⁵ Committee on the Rights of the Child, General Comment No 14, supra n 98 at para 34.

¹²⁶ Joint General Comment No. 3 and 22, supra n 70 at para 29.

¹²⁷ Committee on the Rights of the Child, General Comment No. 6, supra n 3 at para 86; Joint General Comment No. 3 and 22, supra n 70 at para 33.

¹²⁸ UNHCR *Note on Refugee Children*, supra n 77 at para 11. However, this ‘definition’ of best interests was not reproduced in the UNHCR *Guidelines on Refugee Children* (Geneva, 1988), which was published by the UNHCR a year later. Both predated the adoption of the CRC.

¹²⁹ Ibid.

settled.

(iii) *The Principle of Non-Refoulement and the Rights of the Child*

Non-Refoulement is the right not to be returned to a country where there is a risk of persecution, torture or death and is a right under the Refugee Convention, as well as under IHRL.¹³⁰ It also provides a safety net for those who may not satisfy the definition of refugee under the Refugee Convention, but who cannot return to that country because of a 'risk of irreparable harm.'¹³¹

Although *non-refoulement* is considered to be at the heart of the refugee protection regime,¹³² the discourse of human rights has overtaken it 'via a process of appropriation'¹³³ and the duty of *non-refoulement* has emerged as an overlapping ground of protection common to both IHRL and IRL.¹³⁴ *Non-refoulement* confronts a state's sovereign right of control over its territory and the development of the principle reflects an insecure compromise between a state's right to control access to its territory and the protection of refugees whose lives are at risk.¹³⁵

The CRC Committee asserts that a state must not return a child to his or her country of origin where there are 'substantial grounds for believing that there is a real risk of irreparable harm to the child.'¹³⁶ The CRC Committee does not provide a definition of 'irreparable harm' but confirms that it includes harms under Article 6 CRC (life, survival and development) and Article 37 CRC (right to liberty and freedom from torture and cruel, inhuman or degrading treatment).¹³⁷ Any assessment of risk must be conducted in an age and gender-sensitive manner and should take into account the consequences of insufficient food provision or lack of health services.¹³⁸ The CRC Committee's conceptualisation of *non-refoulement* is much broader than Article 33 of the Refugee Convention and the general duty of *non-refoulement* under IHRL. Articles 6 and 37 CRC are broader than the equivalent articles in the ICCPR and the CRC Committee contemplates a lack of access to economic and social rights as well as the risk of torture, inhuman or degrading treatment or punishment which warrants separate consideration in claims involving children.'¹³⁹

Non-refoulement has been interpreted as 'an implicit guarantee flowing from the obligations to respect, protect and fulfil human rights'.¹⁴⁰ It is significant that both the CMW and CRC Committees urge states not to adopt a narrow interpretation of *non-refoulement*¹⁴¹ and that the obligations of the States Parties apply to 'each child within their jurisdiction',¹⁴² which is defined as including 'jurisdiction arising from a State exercising effective control outside its

¹³⁰ Article 33 of the Refugee Convention; Article 3 of Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, 1465 UNTS 85 (CAT); Article 3 ECHR.

¹³¹ Articles 2, 6 and 7 ICCPR and Human Rights Committee (HRC), General Comment No. 31 [80]: The nature of the general legal obligation imposed on States Parties to the Covenant, 26 May 2004 at para 12; Committee on the Rights of the Child, General Comment No. 6, supra n 3 at para 27. This is the basis of what has become known as 'complementary', 'subsidiary' or humanitarian protection, see: McAdam, supra n 63 and n 74.

¹³² Chetail, 'Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law.' In Rubio-Marin (ed) *Human Rights and Immigration* (2014) 19 at 28.

¹³³ Ibid.

¹³⁴ Ibid.

¹³⁵ Ibid. at 33.

¹³⁶ Committee on the Rights of the Child, General Comment No. 6 supra n 3 at para 27; Joint General Comment No. 3 and 22, supra n 70 at para 46; The EU Qualification Directive, supra n 62, article 15 has a 'serious harm' threshold, which covers death penalty and execution, torture, inhuman or degrading treatment or punishment and a serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

¹³⁷ Ibid.

¹³⁸ Ibid.

¹³⁹ Pobjoy supra n 50 at 192.

¹⁴⁰ Joint General Comment No. 3 and 22, supra n 70 at para 45.

¹⁴¹ Ibid. at para 46.

¹⁴² Ibid. at para 12.

borders'.¹⁴³ Furthermore a state has obligations to children within its borders, 'including with respect to those children who come under its jurisdiction while attempting to enter its territory'.¹⁴⁴

Noll argues that the obligation in Article 22(1) CRC to ensure appropriate protection could extend to children outside the territory of asylum and may obligate a state to issue an entry visa to prevent the risk of harm and thus to avoid breaching *non-refoulement* obligations.¹⁴⁵ It is arguable that the best interests principle also adds a layer to this to require states to issue visas or safe passage to children where the state is aware of the risks the child faces, if he or she remains in a situation of risk or persecution, or is forced to take a potentially life-threatening journey to get to safety.¹⁴⁶ The CMW and CRC Committees have expressed their concern about the lack of regular and safe channels for children and how this contributes to children taking 'life-threatening and extremely dangerous migration journeys.'¹⁴⁷

If a state considers that a child should be returned to his or her country of origin, the state has an obligation to ensure that the process to return a child is based on evidentiary considerations and is considered pursuant to due process safeguards.¹⁴⁸ States should guarantee that the child will be safe and receive appropriate care and protection and enjoyment of rights when he or she returns to his or her country of origin.¹⁴⁹ General migration control considerations cannot override best interests, when deciding whether or not to return a child, reiterating the approach the CRC Committee first set out in 2005.¹⁵⁰ A child's best interests dictates that he or she must not be rejected at the border nor returned to his or her country of origin or habitual residence where there are substantial grounds for believing that he or she is at real risk of irreparable harm.¹⁵¹ For a child who fails to secure refugee protection, states will seek to return them, playing down the risks that the child faces. Some states have proposed setting up 'safe' reception centres in countries of origin for failed child asylum seekers, in order to avoid triggering their *non-refoulement* obligation.¹⁵² The state's *non-refoulement* duty has particular resonance in a situation where a child is refused asylum and is subject to a hostile environment and at risk of being 'voluntarily' repatriated in his or her best interests.

4. THE HOSTILE ENVIRONMENT AND CHILDREN'S RIGHTS

Until 2008, asylum seeking children¹⁵³ were excluded from full rights protection under the CRC.¹⁵⁴ The reservation entered by the UK when it ratified the CRC, ensured the primacy of UK immigration and nationality law over the CRC. Thus, children seeking asylum or children whose parents were seeking asylum or children who had not regularised their immigration status in

¹⁴³ Ibid. at para 12. For a discussion of recent developments on jurisdiction, see Gammeltoft-Hansen and Hathaway, *supra* n 57 at 257–72.

¹⁴⁴ Joint General Comment No. 3 and 22, *supra* n 70 at para 12.

¹⁴⁵ Noll, 'Seeking Asylum at Embassies: A Right to Entry Under International Law' (2005) 17 *International Journal of Refugee Law* 542 at 571.

¹⁴⁶ For example, it is argued that at the very least the UK government has an obligation to protect children who are sleeping rough in the makeshift camps in Calais or Paris who have family members in the UK, see: UNICEF, *Neither Safe Nor Sound*, *supra* n 26 at 89-90.

¹⁴⁷ Joint General Comment No 3 and 22, *supra* n 70 at para 41.

¹⁴⁸ Ibid. at para 33.

¹⁴⁹ Ibid.

¹⁵⁰ Ibid; Committee on the Rights of the Child, General Comment No. 6, *supra* n 3 at para 86.

¹⁵¹ Ibid. at para 46.

¹⁵² See, for example, the proposals of Denmark and Norway reported in <https://uk.reuters.com/article/uk-europe-migrants-nordics-afghanistan/denmark-norway-eye-kabul-centre-for-minors-denied-asylum-idUKKBN1JG2PQ> [last accessed 30 January 2019].

¹⁵³ Including children who were regarded by the Home Office as 'failed asylum seekers' and who had become 'appeal rights exhausted' (ARE).

¹⁵⁴ UN Treaty Collection (Depositary), *Status of Treaties Convention on the Rights of the Child*, *supra* n 5.

the UK were excluded from the CRC¹⁵⁵ and their best interests were not considered when decisions about their status were being made.¹⁵⁶

Following international¹⁵⁷ and national pressure,¹⁵⁸ the UK withdrew its reservation, thus providing an avenue for both non-citizen children and children seeking asylum in the UK to realise their rights and a guarantee that their best interests would be a primary consideration.¹⁵⁹ As a direct result of the lifting of the reservation, the UK Government introduced section 55 of the Borders, Citizenship and Immigration Act 2009 (s55 BCIA),¹⁶⁰ which enacted a version of the best interests principle applicable to non-national children *living in the UK*. Bolton suggests:

it was this withdrawal above all else that began to level the playing field from late 2008 to create conditions for more substantive progress to be made in the arena of immigration and asylum law and policy as it impacts on children, nearly two decades after the CRC was ratified by the UK.¹⁶¹

Despite the importance of s55 BCIA and the application of the best interests principle to children seeking international protection in the UK, the impact of the hostile environment agenda on children's ability to access and enjoy their rights is significant. Unfortunately, 'substantive progress'¹⁶² on developing a child rights-based approach in immigration and asylum law was short-lived. By handing border control over to private individuals, who do not have an obligation to consider the best interests of the child,¹⁶³ the UK government has circumvented a key protection for children whose status in the UK has not been regularised.

The hostile environment accentuates the precariousness of children's status,¹⁶⁴ which, as they get older, will impact on their ability to gain employment and access to college, university and secondary healthcare.¹⁶⁵ The CRC and CMW Committees raise concerns about policies or practices that deny or restrict basic rights, including labour and other social rights, to adult migrants which may directly or indirectly affect a child's right to life, survival and development.¹⁶⁶ States are reminded of their obligations under Article 18 CRC to ensure that children's development and their best interests are taken fully into account when 'it comes to policies and decisions aimed at regulating their parents' access to social rights, regardless of their migration status.'¹⁶⁷ Since the hostile environment policy was launched, there has been no

¹⁵⁵ See Blake and Drew, *Opinion In The Matter Of The United Kingdom Reservation To The UN Convention On The Rights Of The Child* (Matrix Chambers, 30 Nov 2001).

¹⁵⁶ Joint Committee on Human Rights, Tenth Report (session 2006-07), 22 March 2007 at paras 176–179; Blake and Drew, *supra* n 155.

¹⁵⁷ See eg Committee on the Rights of the Child, Concluding Observations regarding the United Kingdom of Great Britain and Northern Ireland, 9 October 2002, CRC/C/15/Add.188 at paras 6-7.

¹⁵⁸ Joint Committee on Human Rights, *supra* n 156 at paras 180–182.

¹⁵⁹ The best interests principle in immigration and asylum law is discussed in Section 5 below.

¹⁶⁰ Section 55 BCIA states: 'The Secretary of State must make arrangements for ensuring that— (a) the functions ... are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom, and (b) any services provided by another person pursuant to arrangements which are made by the Secretary of State and relate to the discharge of a function ... are provided having regard to that need'.

¹⁶¹ Bolton, Promoting the Best Interests of the Child in UK Asylum Law and Procedures' (2012) 26 *Journal of Immigration, Asylum and Nationality Law* 232 at 235.

¹⁶² *Ibid.*

¹⁶³ Under s55(2) BCIA, this duty is only imposed on the Secretary of State for the Home Department, immigration and customs officials. Although the Secretary of State is supposed to ensure that services carried out by any other persons on her/his behalf are discharged having regard to this obligation (s 55(1)(b) BCIA.

¹⁶⁴ For a discussion on precariousness in UK law, see Warren, 'Private Life in the Balance: Constructing the Precarious Migrant' (2016) 30 *Journal of Immigration, Asylum and Nationality Law* 124.

¹⁶⁵ The Children's Society and Coram Children's Legal Centre, *The impact of the 'hostile environment on children and young people today: Debate on people who entered the UK as minors between 1948 and 1971* (30 April 2018), available at: www.childrensociety.org.uk/what-we-do/resources-and-publications/the-impact-of-the-hostile-environment-on-children-and-young [last accessed 30 January 2019].

¹⁶⁶ Joint General Comment No 3 and 22, *supra* n 70 at para 44.

¹⁶⁷ *Ibid.*

children's rights impact assessment,¹⁶⁸ and no analysis on the impact of the hostile environment on children who are seeking asylum or children born in the UK, whose immigration status has not been regularised.¹⁶⁹

A hostile environment goes beyond the measures introduced by the Immigration Acts of 2014 and 2016 and, as discussed above, existed before the explicit creation of the hostile environment. The combination of this policy and other aspects of UK asylum and immigration law contribute to a hostile environment for non-national children living in the UK and as a consequence has a detrimental impact on their rights. The Home Secretary's duty to safeguard the welfare of children under s55 BCIA receives little attention in the operation of the policy, but as discussed further below, it is this duty which has caught the attention of the higher courts in the UK and provides an avenue for children to ensure protection of their rights and interests. The different aspects of UK asylum law that contribute to the hostile environment for children are outlined in the following analysis.

A. Unaccompanied Asylum Seeking Child (UASC) leave

Although not directly part of the hostile environment, one of the major hurdles children (especially unaccompanied children) have to face is what happens to them when they turn 18. Unaccompanied children under the age of 17½ who have been refused refugee status or humanitarian protection may be granted a form of limited leave, if there are no adequate reception arrangements in the country to which they would be returned.¹⁷⁰ This discretionary form of leave, known as Unaccompanied Asylum Seeking Child (UASC) leave was introduced in 2013¹⁷¹ and is granted for 30 months or until the child is 17½, whichever is shorter. The limited duration of UASC leave does not provide children with stability and hinders access to further education and the job market.¹⁷² A significant proportion of unaccompanied children are granted UASC leave rather than refugee status,¹⁷³ leaving such children in a state of precariousness and uncertainty at a critical period of their lives and transition into adulthood. The Children's Commissioner for England described UASC leave as 'much more like a stay of execution than anything else.'¹⁷⁴ Whereas the Home Office has argued that granting protection in the form of UASC leave is the most effective way of balancing the competing priorities of meeting the best interests of the child while maintaining effective immigration control.¹⁷⁵

The Home Office's approach to dealing with unaccompanied children, which on the surface seems to take account of the child's best interests and the principle of *non-refoulement*

¹⁶⁸ The CRC Committee recommends that states carry out a child's rights impact assessment on legislation, policy and budgetary allocation to predict the impact of the proposed law or policy on a child or group of children and the enjoyment of their rights: see Committee on the Rights of the Child, General Comment No 5, supra n 46 at paras 45-47; and Committee on the Rights of the Child, General Comment No 14, supra n 98 at para 35.

¹⁶⁹ The Children's Society and Coram Children's Legal Centre, supra n 165.

¹⁷⁰ Home Office, Immigration Rules, part 11: Asylum, at paras 352ZC-F, available at: <https://www.gov.uk/guidance/immigration-rules/immigration-rules-part-11-asylum> [last accessed 30 January 2019].

¹⁷¹ Although, strictly speaking, the child is no longer an unaccompanied asylum-seeking child (UASC) because their asylum claim has been refused.

¹⁷² House of Lords and House of Commons, Joint Committee on Human Rights, *Human Rights of unaccompanied migrant children and young people in the UK* (12 June 2013) at 4.

¹⁷³ In 2015, 809 unaccompanied children under 18 were granted UASC leave and 357 were granted refugee status. In 2016 828 were granted UASC leave with 502 granted refugee status. In 2016, for the first time in five years, refugee status was granted in more cases (817) than discretionary or UASC leave (388). See Refugee Council: Children in the Asylum System, November 2018, available at: https://www.refugeecouncil.org.uk/assets/0004/4610/Children_in_the_Asylum_System_Nov_2018.pdf [last accessed 19 January 2019].

¹⁷⁴ House of Lords and House of Commons, Joint Committee on Human Rights, supra n 172 at para 111.

¹⁷⁵ Home Office, *Response to the Independent Chief Inspector of Borders and Immigration's Report: An Inspection of how the Home Office considers the 'Best Interests' of Unaccompanied Asylum Seeking Children* (2018) at paras 2.28-2.29; Immigration Rules, supra n 170 at para 352ZE.

by not returning him or her to a place where his or her safety cannot be guaranteed, is fundamentally flawed. It leaves children in a state of limbo and uncertainty and local authorities and NGOs are concerned that UASC leave is damaging for children because of the uncertainty of their future after the age of 18, which causes unnecessary distress and is not in their best interests.¹⁷⁶ As well as having an impact on their right to education and access to the labour market, it also impacts their right to life, survival and development under Article 6 CRC, a fundamental and guiding principle of the CRC.¹⁷⁷

B. Immigration detention of children

The detention of children with their families for immigration purposes has been part of immigration policy in the UK since the early 1990s. Official policy in the 1990s was that detention of children should take place only when removal from the UK was imminent and limited to a few days.¹⁷⁸ However, in October 2001 the government announced that detention of families would be brought in line with the criteria for individuals without children, with the added caveat that detention should only occur if deemed necessary and in compliance with the right to family life under Article 8 of the European Convention on Human Rights (ECHR).¹⁷⁹ The consequence of this policy change was that families could be detained with no time limit and the number of families being detained in immigration removal centres increased year on year. The indefinite detention of families ended in 2010, but the government maintained a power to detain for 'exceptional cases and border cases',¹⁸⁰ which in effect allowed immigration officers to continue to detain families in so called 'family friendly' centres such as the Cedars pre-departure accommodation centre near Gatwick.¹⁸¹ Detention of families continued after this policy announcement, although the number of children detained dropped.¹⁸²

Under Article 37(b) CRC, the detention of children must not be unlawful or arbitrary and is circumscribed by the *ultima ratio* principle, meaning a child should only be detained as a last resort and for the shortest period possible. Previously, the CRC Committee confirmed that this provision includes the detention of children for immigration purposes,¹⁸³ but by applying the best interests principle, an unaccompanied or separated child should not be detained, *as a general rule* and such detention cannot be justified solely on the basis of their migratory or residence status or lack thereof.¹⁸⁴ More recently the CMW and CRC Committees confirmed that detention for immigration purposes is never in a child's best interests¹⁸⁵ and '[s]tates should expeditiously and completely cease or eradicate the immigration detention of children'.¹⁸⁶ Joint General Comment No 4 and 23 indicates that the correct interpretation of Article 37(b) confines detention to children subject to juvenile justice. Detaining children as a last resort is not applicable to immigration proceedings because it would conflict with the principle of best interests of the child and the child's right to development.¹⁸⁷ States must instead pursue solutions which fulfil the child's best interests and his or her right to liberty and family life, such

¹⁷⁶ Bolt, *An inspection of how the Home Office considers the 'Best Interests' of Unaccompanied Asylum Seeking Children: August – December 2017* (Crown Copyright 2018) at 8; House of Lords and House of Commons, Joint Committee on Human Rights, *supra* n 172 at 111 and 112.

¹⁷⁷ Committee on the Rights of the Child, General Comment No. 5, *supra* n 46 at para 12.

¹⁷⁸ Home Office (Cm 4018), *Fairer, Faster and Firmer: A Modern Approach to Immigration and Asylum* (1998) at para 12.5.

¹⁷⁹ Home Office (Cm 5387) *Secure Borders, Safe Haven: Integration with Diversity in Modern Britain* (2002) at para 4.77.

¹⁸⁰ Clegg and Nalumu, 'We are proud of having ended child detention', *The Guardian* 29 October 2012.

¹⁸¹ Silverman and Griffiths, 'Immigration Detention in the UK.' (COMPAS 2018) *Migration Observatory Briefing*.

¹⁸² *Ibid.*

¹⁸³ Committee on the Rights of the Child, General Comment No. 6, *supra* n 3 at para 61.

¹⁸⁴ *Ibid.*

¹⁸⁵ Joint General Comment No 4 and 23, *supra* n 76 at paras 5 and 9.

¹⁸⁶ *Ibid.* at para 5.

¹⁸⁷ *Ibid.* at para 10.

as staying in non-custodial community based centres, while their immigration status is being determined or before they are removed from the state.¹⁸⁸ Consistent with the principle of family unity,¹⁸⁹ a child's best interests determine that the family should be kept together and thus the entire family should be placed in a non-custodial setting.¹⁹⁰

The UK continues to adopt the *ultima ratio* principle for unaccompanied children and Home Office guidance confirms that as a general principle, unaccompanied children must not be detained other than in very exceptional circumstances and for the shortest possible time.¹⁹¹ However, until recently, children, both unaccompanied and with their families were routinely detained for immigration purposes and with no time limit. The Immigration Act 2014, introduced the rule that an unaccompanied child can be detained in a 'short-term holding facility' but for no more than 24 hours.¹⁹² The immigration officer making the decision must have regard to safeguarding the welfare of the child in accordance with s55 BCIA.¹⁹³ Children can be detained with their families, in particular where a family is liable for removal because the family has no right to remain in the UK. In these cases families can be held for up to 72 hours in an immigration removal centre, but in certain circumstances (and subject to ministerial authority) this can be extended to a maximum of seven days.¹⁹⁴ Although the UK is detaining fewer children and there are now safeguards in the form of time limits for detaining children, the fact that families are now detained at Tinsley House Immigration Removal Centre run by G4S (who also provide the welfare support) is more evidence of a hostile environment for children. Children involved in age dispute proceedings have always been liable to be detained and can be detained with adults, whilst their age is being determined, which does not comply with the benefit of the doubt principle.¹⁹⁵

The effect of detention on children is well documented and it has been demonstrated that even short periods of detention can have a negative and profound impact on children's health and well-being.¹⁹⁶ Dudley et al record that immigration detention has 'undeniable immediate and long-term mental health impacts on asylum-seeking children and families.'¹⁹⁷ The effects on children include heightened rates of suicide, suicide attempts and self-harm, mental disorder, and developmental problems, including severe attachment disorder.¹⁹⁸ The UN Special Rapporteur on Torture, and other Cruel, Inhuman or Degrading Treatment or Punishment, Juan Mendez, has said that not only is the detention of children for immigration purposes never in the best interests of children but it might also amount to torture or ill-treatment, because it 'exceeds the requirement of necessity, becomes grossly disproportionate and may constitute cruel, inhuman and degrading treatment of migrant children'.¹⁹⁹ Thus the UK's continued use of detention of children for immigration purposes contravenes the most recent interpretation of Article 37(b) CRC by the CRC Committee and the CMW Committee.²⁰⁰

¹⁸⁸ Ibid. at para 11.

¹⁸⁹ See section 3C(i) supra.

¹⁹⁰ Ibid.

¹⁹¹ UK Home Office, Enforcement Instructions and Guidance, supra n 17 at para 55.9.3.

¹⁹² Schedule 2 Immigration Act 1971, paragraph 16(2); Ibid.

¹⁹³ Ibid.

¹⁹⁴ Ibid. at para 55.9.4; Schedule 2 Immigration Act 1971.

¹⁹⁵ Joint General Comment No. 4 and 23, supra n 76 at para 4.

¹⁹⁶ See for example, Corlett, Mitchell, Van Hove, Bowring, and Wright, *Captured Childhood* (International Detention Coalition, 2012) at 48; Dudley, Steel, Mares and Newman, 'Children and young people in immigration detention.' (2012) 25 *Current Opinion in Psychiatry* 285.

¹⁹⁷ Ibid.

¹⁹⁸ Ibid.

¹⁹⁹ UN General Assembly Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, A/HRC/22/53, 5 March 2013 at para 80.

²⁰⁰ Unfortunately, the UK is not alone in this practice. The Trump Administration's zero tolerance policy, which led to the separation of children from their parents at the US-Mexican border and who were contained in prison-like conditions, is the most extreme example of this. The UN's Human Rights Council suggested it could

C. The right to an adequate standard of living

Article 27(1) CRC obliges states to provide children with a 'standard of living adequate for their physical, mental and spiritual and moral development'. As well as having an adequate standard of housing, this also means not living in fear of eviction because of the child or the child's parent's migration status.²⁰¹ To protect a child's right to an adequate standard of living, states should develop standards and procedures to establish firewalls between public and private service and housing providers and immigration enforcement authorities.²⁰² Contrary to these obligations, the Immigration Act 2016 introduced an accelerated eviction process for tenants who are disqualified from renting by reason of their immigration status,²⁰³ which leaves individuals including children 'entirely at the whim of the Home Office and the accuracy of the information held on its databases.'²⁰⁴

The new criminal offence of renting to persons disqualified²⁰⁵ and the penalties imposed could result in landlords refusing to rent to anyone where there is a doubt about their immigration status and may have the unfortunate consequence of inadvertent or blatant racial profiling in the rented sector, contrary to Article 2 CRC. There is no obligation on the landlord to consider the best interests of a child of the family when deciding whether to rent to a family. The Joint Council for the Welfare of Immigrants (JCWI) carried out research on the government's pilot 'Right to Rent' scheme in the West Midlands to reveal the discriminatory impact of the policy.²⁰⁶ More revealing, the JCWI concluded that there is no evidence to show that the policy has achieved or will achieve its stated aim to deter illegal migration or prevent irregular migrants from settling in the UK.²⁰⁷ The Home Office is not interested in whether or not the policy works or is an effective policy because, according to Home Office civil servants, 'it is the right thing to do' and the public would not find it acceptable to allow 'illegal migrants' the same access to benefits and services as British citizens and legal migrants.²⁰⁸

D. Data-sharing

An additional feature of the hostile environment is the sharing of data and information on people who may be liable for removal between certain government departments, in particular the Department of Education and the Department of Health, and the Home Office. In September 2016, the Department for Education asked all state schools for data on nationality, country of birth and English language proficiency of children as part of the data collection by schools in the annual school census.²⁰⁹ Although, the Department for Education's official aim was to ensure that schools received the correct funding,²¹⁰ the Memorandum of Understanding between the Home Office and the Department for Education revealed that it is in fact part of the hostile environment agenda and allowed the sharing of information with the Home Office for

amount to torture, see: <https://www.independent.co.uk/news/world/americas/us-politics/un-trump-children-family-torture-separation-border-mexico-border-ice-detention-a8411676.html> [last accessed 30 January 2019].

²⁰¹ Joint General Comment No. 4 and 23 supra n 76 at para 51.

²⁰² Ibid. at para 52.

²⁰³ Immigration Act 2016, section 40 which inserted section 33D into the Immigration Act 2014.

²⁰⁴ Yeo, supra n 1.

²⁰⁵ Immigration Act 2016, supra n 201.

²⁰⁶ Joint Council for the Welfare of Immigrants (JCWI), "No passport equals no home": An Independent Evaluation of the Right to Rent Scheme' (3 September 2015), available at: <https://www.jcwi.org.uk/no-passport-no-home> [last accessed 30 January 2019].

²⁰⁷ Ibid. at 15.

²⁰⁸ Yeo supra n 1.

²⁰⁹ Education (Pupil Information) (England) (Miscellaneous Amendments) Regulations 2016 (SI 2016 No 808).

²¹⁰ Department for Education blog *Education in the Media: Information about the school census and the national pupil database* (31 October 2016), available at: <https://dfemedia.blog.gov.uk/2016/10/31/information-about-the-school-census-and-the-national-pupil-database/> [last accessed 30 January 2019].

immigration purposes.²¹¹ The NHS have been under an obligation to share data about patients who maybe ‘immigration offenders’ and liable for deportation.²¹² Thus registering with a doctor could result in information being passed to the Home Office for immigration enforcement purposes.²¹³

The CRC and CMW Committees specifically address the issue of data sharing for the purposes of immigration control in relation to birth registration²¹⁴ and urge states to have ‘effective firewalls’ between child protection and immigration enforcement,²¹⁵ and between a child migrant’s labour rights and immigration enforcement.²¹⁶ With regard to a child’s right to health, states should prohibit the sharing of patients’ data between health institutions and immigration authorities²¹⁷ and the prohibition on data sharing and the establishment of firewalls also applies in relation to a child’s right to education.²¹⁸

In the wake of the ‘Windrush’ controversy, the government changed its approach to data sharing, announcing in April 2018 that it will no longer collect the nationality and country of birth data from schools²¹⁹ and in May 2018, the Home Office confirmed it will not ask for patient data from the NHS unless it is in connection with a serious criminal offence.²²⁰ However, while re-establishing ‘firewalls’ between the Home Office and other government departments, the government passed an amendment to the Data Protection Bill allowing information to be shared with the Home Office for the purposes of ‘effective immigration control’ and removing the right of the data subject to know that this data is being shared.²²¹ This indicates that the two announcements in April and May 2018 were merely symbolic to deflect public attention in the aftermath of the ‘Windrush’ controversy, while the underlying ideology of the hostile environment remained intact.

E. Right to family reunification

The rules on family reunification are a further manifestation of the hostile environment for children in the UK.²²² There is no statutory right to family reunification in the UK²²³ and entry to the UK for family reunification purposes is governed by discretionary Immigration Rules. While adults who are recognised as refugees or have humanitarian protection are able to sponsor members of their immediate family²²⁴ to come to the UK, a child recognised as a refugee is not

²¹¹ Home Office, *Memorandum of Understanding between the Home Office and the Department for Education in respect of the Exchange of Information Assets*, para 15.1.2; available at: http://defenddigitalme.com/wp-content/uploads/2016/12/20161016_DfE-HO-MoU-redacted-copy.pdf [last accessed 30 January 2019].

²¹² Data sharing between the departments was formalised in a Memorandum of Understanding between the NHS and the Home Office in January 2017, available at: <https://www.gov.uk/government/publications> [last accessed 30 January 2019]. Section 261 of the Health and Social Care Act 2012 allows disclosure of patient information as part of an investigation of a criminal offence.

²¹³ See Liberty (April 2018), *supra* n 36 at 5.

²¹⁴ Joint General Comment No. 4 and 23, *supra* n 76 at para 21.

²¹⁵ *Ibid.* at para 42.

²¹⁶ *Ibid.* at para 46.

²¹⁷ *Ibid.* at para 56.

²¹⁸ *Ibid.* at para 60.

²¹⁹ See Whittaker, ‘DfE ends divisive pupil nationality data collection’ *Schools Week* 9 April 2018, available at: <https://schoolsweek.co.uk/dfe-ends-divisive-pupil-nationality-data-collection/> [last accessed 30 January 2019].

²²⁰ Campbell, ‘U-Turn on forcing NHS to hand patients’ data to Home Office’ *The Guardian* 10 May 2018, available at: <https://www.theguardian.com/society/2018/may/09/government-to-stop-forcing-nhs-to-share-patients-data-with-home-office> [last accessed 30 January 2019].

²²¹ Jarrett, ‘The Tories want you to think their new Data Protection Bill is empowering – but its ‘immigration exemption’ will make life hell for people like me’, *The Independent* 8 May 2018, available at: <https://www.independent.co.uk/voices/data-protection-bill-immigration-home-office-privacy-intrusion-a8340826.html> [last accessed 30 January 2019].

²²² A child’s right to family life (including family unity and family reunification) are explored in section 3C(i) above.

²²³ Clayton, *Textbook on Asylum and Immigration Law*, 6th edn (2014) at 254.

²²⁴ Immediate family is defined as a spouse or partner or children under the age of 18, who formed part of the family unit before their refugee sponsor fled their country of origin or former habitual residence to claim asylum

able to do so.²²⁵ The policy objective behind this measure is to prevent children being used as a pull factor for asylum seekers to travel to the UK, which the UK government argues puts children at a higher risk of trafficking.²²⁶ However, the basis of this is unfounded as children are not more likely than their family members to be granted asylum.²²⁷ Thus, the government prioritises its deterrence and immigration control policy above the right of the child to family life and does not justify this approach on the basis of the best interests of the children who are already in the UK or the best interests of the child yet to arrive.²²⁸ The UK (along with Denmark and Ireland) opted out of the EU's Family Reunification Directive, which does allow for a child to sponsor family reunification with members of their family.²²⁹

The UK's denial of a refugee child's right to apply for family reunification violates the child's right to non-separation under Article 9 CRC and family reunification under Article 10(1) and Article 22(2) CRC, as discussed in section 3C(i) above. Joint General Comment No 4 and 23 reminds states of their positive obligations to maintain the family unit and ensure the best interests of the child are a primary consideration. If it is not safe to return the child to their country of origin because of a 'reasonable risk that such return would lead to the violation of the human rights of the child'²³⁰ then reunification should take place in the UK.

5. HOW ARE A REFUGEE CHILD'S RIGHTS PROTECTED IN UK LAW?

The CRC has not been incorporated into UK law, although some elements of the CRC can be found in policy and legal frameworks. Rather than full incorporation, the UK has adopted a sectoral approach to incorporation in addition to implementing non-legal measures to fulfil its international obligations.²³¹ Specific pieces of UK legislation confirm certain rights for children such as the right to education²³² and labour rights.²³³ Landmark cases such as *Gillick v West Norfolk and Wisbech Health Authority*,²³⁴ have recognised the competence of a child to consent to medical treatment, but not specifically the right to the highest attainable health under Article 24 CRC. The Human Rights Act 1998 (which incorporated the ECHR) provides children with a further platform to claim their rights and for UK courts to recognise children as rights holders.²³⁵ UK courts recognise that the CRC 'is reflected in the interpretation and application by the European Court of Human Rights of the rights guaranteed by the European Convention'.²³⁶

This fragmented approach to children's rights has given rise to criticism of the UK by the CRC Committee for failure to incorporate the CRC fully,²³⁷ not using the CRC as its framework for the

in the UK: Home Office, Immigration Rules, supra n 170 at paras 352A – FJ; Home Office Guidance: Family Reunion for Refugees and those with Humanitarian Protection (Version 2.0, 29 July 2016) at 5, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/541818/Family_reunion_guidance_v2.pdf [last accessed 30 January 2019].

²²⁵ Joint Agency Briefing, supra n 102 at 5.

²²⁶ UK House of Commons Library Briefing Paper: UK Family Reunion Rules: Striking the Right Balance? (1 March 2018) at 3.

²²⁷ Joint Agency Briefing note, supra n 102 at 5.

²²⁸ Ibid; For a discussion on the approach of governments to protect 'putative children' by harming embodied children see: Crock, 'Of Relative Rights and Putative Children: Rethinking the Critical Framework for the Protection of Refugee Children and Youth' [2013] 20 *Australian International Law Journal* 33 at 35.

²²⁹ Directive 2003/86/EU on the right to family reunification [2003] OJL 251, Article 10(3).

²³⁰ Joint General Comment No.4 and 23, supra n 76 at para 35.

²³¹ Lundy, Kilkelly, Byrne and Kang, *The UN Convention on the Rights of the Child: A Study of Legal Implementation in 12 Countries* (2012) at 3, 117 and 119.

²³² Human Rights Act 1998, schedule 1, First Protocol, article 2; Education Act 1996, section 7.

²³³ See, for example, Children and Young Persons Act 1933.

²³⁴ [1986] AC 112.

²³⁵ Fortin, 'Accommodating Children's Rights in a Post Human Rights Act Era (2006) 69 *Modern Law Review* 299.

²³⁶ *R (R) v Durham Constabulary* [2005] 1 WLR 1184, Baroness Hale of Richmond at para 26.

²³⁷ Committee on the Rights of the Child, Concluding Observations regarding the United Kingdom of Great Britain and Northern Ireland, 20 October 2008, CRC/C/GBR/CO/4 at para 11.

development of children's policy,²³⁸ failure to implement strategies and action plans for recognising children's rights²³⁹ and not ensuring that the provisions of the Convention are directly enforceable and justiciable in domestic law.²⁴⁰

The child rights framework should provide the primary platform for challenging the hostile environment, but without incorporation of the CRC into UK law, there are few avenues for children to directly challenge the government's policy. If a child suffered treatment amounting to inhuman and degrading treatment or punishment as a result of the hostile environment policy, a claim could be brought under Article 3 ECHR.²⁴¹ A second avenue would be to bring a claim under Article 8 ECHR, on the grounds that the hostile environment (or aspects of the policy) interferes with the child's right to private or family life.²⁴² However, the outsourcing of operational elements of the hostile environment policy to private individuals such as landlords creates another hurdle under the Human Rights Act 1998, and the child would need to show that the private individual was performing a 'public function'.²⁴³

In asylum and immigration cases, the best interests principle has become an important mechanism through which children can exercise their rights to access asylum procedures or to challenge deportation or removal. The importance of the best interests principle to ensure that children have access to their CRC rights has been championed by Baroness Hale.²⁴⁴ In the next section, I analyse the role of the best interests principle in protecting children's rights in UK law and increasing the visibility of children's rights in the asylum process.

A. The role of best interests in UK asylum law

The best interests principle has been part of family and childcare law, in the UK, since 1989²⁴⁵ and in immigration and asylum law since 2009.²⁴⁶ Section 55 BCIA, mirrors the safeguarding principle in the Children Acts of 1989 and 2004, however, this only applies to children already in the UK, narrowing the jurisdiction provision in Article 2 CRC. Section 55 BCIA does not use the precise wording of Article 3(1) CRC, instead it speaks of the need to 'safeguard and promote the welfare' of the child. Baroness Hale, in *ZH (Tanzania) v Secretary of State for the Home Department*,²⁴⁷ confirmed that 'the spirit, if not the precise language [of article 3(1)], has been translated into our national law'.²⁴⁸

The effect of section 55 BCIA is that any immigration or asylum decision, which is made without having regard to the need to safeguard and promote the welfare of any children

²³⁸ Ibid. at para 15.

²³⁹ Committee on the Rights of the Child, Concluding Observations regarding the United Kingdom of Great Britain and Northern Ireland, 12 July 2016, CRC/C/GBR/CO/5 at paras 8 and 9.

²⁴⁰ Ibid. at para 7.

²⁴¹ The severity threshold for Article 3 ECHR cases is high and applies in exceptional cases, see: *N (FC) v Secretary of State for the Home Department* [2005] UKHL 31 at paras 48 – 50 and *N v the United Kingdom* Application No 26565/05, 27 May 2008. The House of Lords held that the risk of destitution due to the withdrawal of financial and housing support for asylum seekers amounted to inhuman and degrading treatment in *R (Adam, Limbuela and Tesema) v Secretary of State for the Home Department* [2005] UKHL 66 at paras 8 and 63.

²⁴² Article 8 ECHR cases are based on the Court deciding whether the interference with private and family life is necessary and proportionate balanced against the legitimate interests of the state. In the UK courts, consideration of the child's best interests has become a key element of the balancing assessment. See section 5B below.

²⁴³ S 6 Human Rights Act 1998.

²⁴⁴ *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4 at para 23; 2 AC 166; Fortin, Children's Rights: Flattering to Deceive? (2014) 26 *Family and Children Law Quarterly* 51 at 54.

²⁴⁵ S 1(3) Children Act 1989 and s 11 Children Act 2004.

²⁴⁶ S. 55 Borders, Citizenship and Immigration Act 2009.

²⁴⁷ *ZH (Tanzania)*, supra n 244.

²⁴⁸ Ibid. para 23.

involved, will be unlawful.²⁴⁹ After this new ‘safeguarding’ duty was introduced, the UK government produced detailed statutory guidance, *Every Child Matters: Change for Children*, on how the best interests principle should be applied in asylum decisions.²⁵⁰ This guidance (which has not been updated since 2009) alongside the Home Office publication *Children’s Asylum Claims*,²⁵¹ focuses on how to process asylum claims from children, but not how the safeguarding duty applies to the treatment of children whilst they are waiting for the decision or on how their rights are protected throughout the process.

Since section 55 BCIA came into force, the higher courts in the UK readily engage with the best interests principle in Article 8 ECHR cases and recognise that the principle gives effect to the child’s protection needs in an immigration or asylum context. Mobilising the best interests principle as a ‘gateway’ right²⁵² may provide children with a means to challenge the hostile environment in the UK and to protect their rights.

B. UK Case Law on Best Interests

It is not possible within the scope of this article to carry out a detailed exposition of UK case law on s 55 BCIA. Instead I examine a line of UK jurisprudence establishing the legal principle that a failure to assess the best interests of the child as ‘a primary consideration’ will render the decision unlawful. Most of the cases discussed below, are immigration cases under Article 8 ECHR, where an adult is facing deportation or removal and their child is facing constructive removal as a result, whether or not the child is a British citizen. The best interests of the child become more prominent when all other avenues, available to an adult to resist removal or deportation have been exhausted. Although the cases were not brought by the children to protect their rights directly and predate the implementation of the hostile environment policy, the cases reveal the development of UK jurisprudence on best interests in an asylum and immigration context and the significance of the best interests principle under s 55 BCIA where children are involved, either directly or indirectly. With notable exceptions,²⁵³ there is, nevertheless, a reluctance by the senior UK courts to refer to children as rights holders²⁵⁴ or to engage in rights language, despite the courts’ willingness to consider a child’s best interests.

The Supreme Court’s first opportunity to review the safeguarding duty under s 55 BCIA was in *ZH (Tanzania) v SSHD*.²⁵⁵ This was a case relating to the status of a non-British parent of British children, who, according to the Court, had an ‘appalling immigration history’ and was threatened with removal. Baroness Hale gave the lead judgment and confirmed that any decision taken without consideration of the best interests of the child would not be ‘in accordance with the law’.²⁵⁶ It was acknowledged that the best interests of the child must be considered first, with Lord Kerr emphasising that ‘[w]hat is determined to be in a child’s best interests should customarily dictate the outcome...and it will require considerations of *substantial moment* to permit a different result’.²⁵⁷

²⁴⁹ Farbey, ‘A Legal Analysis of Child-sensitive Asylum Procedures’ (2014) 28 *Journal of Immigration, Asylum and Nationality Law*, 254 at 257; also *ZH (Tanzania)* supra n 244 at para 24.

²⁵⁰ UK Visas and Immigration (Home Office) and Department for Education, *Every Child Matters: Change for Children* (2 November 2009).

²⁵¹ UK Home Office, *Children’s Asylum Claims* (Version 2.0)(9 October 2017).

²⁵² Kilkelly, supra n 7.

²⁵³ For example Baroness Hale in *ZH (Tanzania)* supra n 244.

²⁵⁴ Fortin, ‘Are Children’s Best Interests Really Best? *ZH (Tanzania)(FC) v Secretary of State for the Home Department* (2011) 74 *Modern Law Review* 947 at 960.

²⁵⁵ *ZH (Tanzania)* supra n 244.

²⁵⁶ *Ibid.* para 24.

²⁵⁷ *Ibid.* para 46 (my emphasis).

In *Zoumbas v SSHD*,²⁵⁸ Lord Hodge set out the principles relevant to the operation of the best interests principle in Article 8 ECHR cases²⁵⁹ and acknowledged that the best interests principle had influenced the way the European Court of Human Rights had interpreted Article 8 of the ECHR.²⁶⁰ The proportionality assessment must consider the particular circumstances of the family, evaluate the child's best interests, which may point marginally in one direction or another, and consider factors which may tip the balance in favour of interfering with family life, even where it has severe consequences for the child.²⁶¹

This case was followed by *JO and others (section 55 duty) Nigeria*,²⁶² which provided detailed guidance about how the Secretary of State should carry out her duties under s55 BCIA.²⁶³ One of the issues in this case was the scope of the best interests assessment to be carried out. The President identified two principles underlying s55 BCIA; first, the decision maker owes a duty to be properly informed and second, the decision maker must conduct a careful examination and a 'scrupulous analysis' of all relevant information and factors.²⁶⁴ The guidance produced by the Secretary of State on best interests, together with the duties under s 55 BCIA and the principles set out by the Supreme Court in *Zoumbas* invokes a 'process of deliberation, assessment and final decision of some depth.'²⁶⁵ The failure of the Secretary of State to discharge her duties under s 55 BCIA, to properly assess the child's best interests and have regard to the statutory guidance amounted to a fundamental error of law.²⁶⁶

*EV (Philippines) v SSHD*²⁶⁷ confirmed that the best interests assessment is a separate process and must be 'determined by reference to the child alone without reference to the immigration history or status of either parent'.²⁶⁸ The Court of Appeal in *MA (Pakistan) and others v SSHD*²⁶⁹ confirmed that when making the best interests assessment 'it would be inappropriate to treat the child as having a precarious status merely because that was true of the parents'.²⁷⁰ In *Kaur v SSHD*,²⁷¹ the Upper Tribunal emphasised that the best interests assessment as a primary consideration should be carried out first, as this will avoid errors in the proportionality balancing exercise.²⁷²

This brief review of the case law reveals that whilst there is a focus on ensuring that a best interests assessment forms an integral part of an Article 8 ECHR proportionality assessment, there is little acknowledgement of the child's status as a rights holder under Article 8 ECHR. Nevertheless, there is acknowledgment in the courts and tribunals of the wider application of the best interests principle and the importance of assessing the child's best interests separately from that of the parents' immigration status. This could form the basis for challenging the hostile environment and may point towards a 'total realignment of protection',

²⁵⁸ [2013] UKSC 74.

²⁵⁹ The seven principles were derived from three previous Supreme Court cases: *ZH (Tanzania) v SSHD*, supra n 244, *H v Lord Advocate* [2012] UKSC 308 and *H(H) v Deputy Prosecutor of the Italian Republic* [2013] 1 AC 338.

²⁶⁰ *Zoumbas*, supra n 258 at para 10.

²⁶¹ *Ibid.* at para 13.

²⁶² [2014] UKUT 517 (IAC).

²⁶³ In this case, the applicant and her three children were not represented by a lawyer. In fact the President of the Upper Tribunal has provided important determinations in a few reported cases where the applicants are not represented, thus precluding full legal argument by one side.

²⁶⁴ *JO and others*, supra n 262 at para 11. This also reflects Lord Hodge's 4th principle in *Zoumbas*, supra n 258.

²⁶⁵ *Ibid.* at para 12.

²⁶⁶ *JO and others*, supra n 262 at para 17.

²⁶⁷ [2014] EWCA Civ. 874.

²⁶⁸ *Ibid.* at para 33.

²⁶⁹ [2016] EWCA Civ 705.

²⁷⁰ *Ibid.* at para 53.

²⁷¹ [2017] UKUT 14.

²⁷² *Ibid.*

which Goodwin-Gill advocated in 1997.²⁷³

5. A FRAMEWORK TO CHALLENGE THE 'HOSTILE ENVIRONMENT'?

The case law establishes that a best interests assessment requires a detailed scrutiny of all the considerations relevant to the child and that a failure to assess best interests is unlawful. Through the lens of best interests, it is possible to open the door to more rights-based arguments to challenge the hostile environment. This was evident in the case of *ZH (Tanzania)* in which Baroness Hale was willing to engage with other children's rights, such as the child's right to express views on all matters affecting him or her in Article 12 CRC.²⁷⁴ Children in need of international protection have a framework under the CRC to express a view on their protection needs, which secures a rights-based approach²⁷⁵ to protection.

The hostile environment's purpose runs contrary to the best interests of the child and the duty to ensure 'appropriate protection'²⁷⁶ for all refugee and asylum seeking children in the UK. Children seeking international protection in the UK do not have unhindered access to their rights and their access to protection derives from a complex set of immigration rules which embeds the 'hostile environment'.²⁷⁷

UK immigration law has been criticised for being 'obscure'²⁷⁸ and 'anything but accessible, intelligible, clear and predictable.'²⁷⁹ Article 3(1) CRC requires '[e]very legislative, administrative and judicial body or institution ... to apply the best interests principle by systematically considering how children's rights and interests will be affected by their decision and actions.'²⁸⁰ It cannot be in a child's best interests to have obscure, inaccessible, unintelligible and unpredictable rules to navigate.

The concept of the best interests of the child potentially provides a tool to challenge the hostile environment and provide access to a child's rights more broadly. Its recognition by the courts provides an opening to advocates to increase the visibility of children's rights in domestic law.²⁸¹ Using the best interests principle to provide effective protection for asylum-seeking and refugee children is not the only tool to advocate for children's rights in UK immigration and asylum law, but there is scope to implement a more rights-based approach built on the principles of family unity and *non-refoulement* too. A rights-based approach which embeds the best interests principle also ensures a creative alignment of both international refugee law and the CRC²⁸² responding to the distinct needs of a refugee child in the status determination process and providing the child with 'the full range of rights which follow[s] from recognition of the child's ... refugee status.'²⁸³

²⁷³ Goodwin-Gill, supra n 72.

²⁷⁴ *ZH (Tanzania)*, supra n 244 at paras 34 – 37..

²⁷⁵ For a definition of a rights based approach, see Committee on the Rights of the Child, General Comment No 13, The right of the child to freedom from all forms of violence, 18 April 2011 at para 59; Tobin, Understanding a Human Rights Based Approach to Matters involving Children: Conceptual Foundations and Strategic Considerations', in Invernizzi and Williams (eds), *The Human Rights of Children: From Visions to Implementation* (2013) 61.

²⁷⁶ Article 22(1) CRC.

²⁷⁷ Yeo, supra n 1.

²⁷⁸ Lord Justice Irwin 'Complexity and Obscurity in the Law and How We might Mitigate Them' *Peter Taylor Memorial Lecture, Professional Negligence Bar Association* 17 April 2017 at 8.

²⁷⁹ Yeo, supra n 1.

²⁸⁰ Committee on the Rights of the Child, General Comment No. 5, supra n 46 at para 12.

²⁸¹ Kilkelly, supra n 7.

²⁸² Pobjoy, supra n 50 at 5.

²⁸³ *Ibid.* at 15.

6. CONCLUSION

States, such as the UK, are adopting restrictive approaches to migration and border control²⁸⁴ which have resulted in a lack of regular and safe channels for children and their families to migrate. Together with 'arbitrary detention and deportation practices, [and] lack of timely family reunification opportunities these approaches to migration contribute to children taking life threatening and dangerous journeys.'²⁸⁵ Such approaches to migration control and a hostile environment policy are not reducing the numbers of children and their families attempting life-threatening journeys and the risks associated with trafficking, smuggling and exploitation. The UK's 'hostile environment' is unlikely to outweigh the violence and terror on the streets of Kabul or Baghdad or Damascus to which the UK government expects people to 'voluntarily' return.²⁸⁶

The withdrawal of the UK's reservation to the CRC and the introduction of the best interests principle under s 55 BCIA were welcome signs of a softening approach to child refugees and asylum-seekers. The UK courts have shown a willingness to use the best interests principle to ensure that children's best interests are a primary consideration, when decisions are made about their parents and/or them. However, the Home Office pays lip-service to the best interests principle²⁸⁷ and case law reveals a failure by the Home Office to refer to the principle or apply it in practice, in accordance with statutory guidance. The government has not carried out a child rights impact assessment on the hostile environment policy or any evaluation to assess whether it meets its objectives or is effective. It 'has the flavour more of a moral crusade than evidence-based policy'.²⁸⁸

The lack of available safe routes to the UK, the limiting of s55 BCIA to children in the UK, strict family reunification rules for unaccompanied children and the measures introduced to operationalise the hostile environment reveal a lack of commitment by the UK to fully implement the best interests principle in the context of asylum and immigration law. Whatever changes to the hostile environment²⁸⁹ are proposed, the policy was developed by the Home Office in an atmosphere in which children's rights were ignored or subsumed into the primary objective of immigration control to make the UK unwelcome for irregular or 'illegal' migrants. No aspect of the hostile environment policy speaks of the best interests of the child, the obligation to respect, protect and fulfil the rights of the child or of the requirement to ensure the care or the protection of the child necessary for his or her well-being.²⁹⁰

As a result of its ratification of the CRC, the UK is obliged to protect, respect and fulfil the rights of all children in its jurisdiction. This requires the UK to undertake 'appropriate measures' to ensure that refugee and asylum seeking children receive 'appropriate protection and humanitarian assistance'²⁹¹ and adopt a rights-based approach to protecting refugee and asylum seeking children in their best interests. An approach to international protection based on the CRC and operationalisation of the best interests principle challenges the UK's categorisation of children as 'illegal immigrants' in a hostile environment.

²⁸⁴ Gammeltoft-Hansen and Hathaway, *supra* n 57.

²⁸⁵ Joint General Comment No. 3 and No. 22, *supra* n 70 at para 41.

²⁸⁶ Warren, 'Even before Brexit, Theresa May's laws made Britain a Hostile Place for Migrants' *The Conversation* 19 July 2016, available at: theconversation.com/even-before-brexit-theresa-mays-laws-made-britain-a-hostile-place-for-migrants-62467 [last accessed 15 November 2018].

²⁸⁷ See, for example Bolt, *supra* n 176.

²⁸⁸ Yeo, *supra* n 1.

²⁸⁹ See, for example Lee, 'Javid ditching "hostile" was wise, but "compliance" won't humanise the Home Office' *The New Statesman* (1 May 2018), available at: www.newstatesman.com/politics/uk/2018/05/sajid-javid-home-secretary-office-compliant-hostile-environment [last accessed 15 November 2018].

²⁹⁰ Article 3(2) CRC.

²⁹¹ Article 22 CRC.

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