

The best interests of the child in the case law of the Court of Justice of the European Union

Maastricht Journal of European and
Comparative Law
2022, Vol. 29(5) 596–614
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DOI: 10.1177/1023263X221144829
maastrichtjournal.sagepub.com



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Abstract

The principle that ‘in all actions relating to children (...) the child’s best interests must be a primary consideration’ (Article 24(2) EU Charter of Fundamental Rights) is widely applied by the Court of Justice of the European Union (CJEU). This article considers preliminary rulings in which the CJEU had recourse to the best interests of the child as the criterion for settling the dispute in the main proceeding. For analytical purposes, these cases may be grouped in two clusters: cases resembling child custody disputes, and other cases. It is argued that, in the light of the varied factual circumstances of the judicial disputes, the application of the criterion of best interests of the child as primary consideration warrants further scrutiny. To this end, this article identifies and assesses a practical and a conceptual challenge to the widespread application of the criterion. The former posits that the criterion is indeterminate, and this article considers whether drawing from Article 3 of the Convention on the Right of the Child may help in solving the uncertainty; the latter maintains that the test is unjust and self-defying, a critique that this article finds only partially founded, for cases resembling child custody disputes.

Keywords

Best interests of the child, EU law, EU Charter of Fundamental Rights, Court of Justice of the European Union, family law

I. Introduction

The primacy of the interests of the child is ‘one of the principles permeating the EU legal order’.¹ It is the most well-established principle in international and national legislation on

1. Opinion of the Advocate General Szpunar in Case C-335/17 *Valcheva*, EU:C:2018:359; Case C-133/15 *Chavez-Vilchez*, EU:C:2017:354, para. 42.

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childhood.² As noted with regard to child custody disputes, the idea that decisions ought to be settled exclusively or nearly exclusively according to what is in the child's best interests derives from the intuition, reminiscent of a Kantian imperative, of treating persons as ends in themselves, not merely as means for other people.³ Perhaps with similar optimism, the protection of children's interests may be explained by time preferences, in this case valuing the welfare of future generations more than the welfare of the present one.⁴ A more critical approach⁵ would instead emphasize the negative aspects in the fact that certain decisions are taken '*because children are children* – adults would decide such matters for themselves.'⁶ These explanations might be relevant as meta-criteria for evaluating the desirability of the principle.

The principle is codified in Article 24(2) of the EU Charter of Fundamental Rights (the 'Charter'), which states that 'in all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration'. All the Member States are bound by the United Nations Convention on the Rights of the Child (CRC), whose Article 3(1) has almost identical wording to Article 24(2) Charter.⁷ Moreover, the objectives of the EU in Article 3(3) TEU are to promote, *inter alia*, 'solidarity between generations and protection of the rights of the child'. From the principle, no right follows automatically. In EU secondary law, Article 23(2) of the Return directive⁸ and of the Reception directive⁹ give expression to the principle, stating that, in assessing the best interests of the child, national authorities shall take into account family reunification possibilities, the child's well-being and social development, safety and security, and the views of the child in accordance with his or her age and maturity. Article 6(1) Dublin III Regulation and Article 25(6) Procedures directive¹⁰ establish that the best interests of the child shall be a primary consideration for Member States when an unaccompanied child makes an application for international protection.¹¹ In addition, the European Court of Human

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2. Examples of the former are discussed in this article. For the latter, see for example 'Judicial Implementation of Article 3 of the Convention on the Rights of the Child in Europe: The Case of Migrant Children Including Unaccompanied Children', *UNICEF* (2012), p. 26 and T. Haugli et al. (eds.), *Children's Constitutional Rights in the Nordic Countries* (Brill, 2019).
 3. J. Elster, 'Solomonic Judgments: Against the Best Interest of the Child', 54 *Chicago Law Review* (1987), p. 5.
 4. For a survey of motivations for this principle, M. Freeman, *Article 3. The Best Interests of the Child* (Martinus Nijhoff Publishers, 2007), p. 40.
 5. Reference could be made to so-called 'childism', which denounces 'the automatic presumption of superiority of any adult over any child', see C. Pierce and G. Allen, 'Childism', 15 *Psychiatric Annals* (1975).
 6. A. Daly, *Children, Autonomy and the Courts. Beyond the Right to be Heard* (Brill, 2018), p. 72.
 7. The CRC specifies that the best interests of the child shall be a primary consideration in actions taken by 'public or private social welfare institutions, courts of law, administrative authorities or legislative bodies'. The European Court of Justice found that it is 'necessary, when interpreting [Article 24(2) Charter], to take due account of the provisions of that convention' C-112/20 *État belge (Return of the parent of a minor)*, EU:C:2021:197, para. 37.
 8. Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L 348/98.
 9. Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (Reception directive) [2013] OJ L 180/96.
 10. Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection [2013] OJ L180/60.
 11. See 'EASO Practical Guide on the Best Interests of the Child in Asylum Procedures', *European Asylum Support Office* (2019), https://euaa.europa.eu/sites/default/files/Practical_Guide_on_the_Best_Interests_of_the_Child_EN.pdf.

Rights has held that restrictions to the right to family life¹² must comply with the best interests of the child.¹³

Despite its wide application, there is still uncertainty as to what conception of the principle is to be preferred, that is, what the best interests of the child are.¹⁴ The legal issues this article explores arise precisely because there are different, conflicting conceptions of this principle (as they exist indeed of any principle operating at a level of abstraction).¹⁵ These different conceptions surface, for example, when custody is disputed between the parents: the interests of the two parents in conflict are at stake but the law forces them (and this is a conceptual problem on which this article returns) to articulate their claims by reference to other relevant considerations, which are phrased in neutral terms (such as the best interests of the child). For that reason their lawyers make cases for different constructions of the best interests of the child, for how such interests are to be actually construed.

The legal manifestation of these complex moral and psychological issues are, for example, the uncertainty over the relative force of the principle in respect to other criteria: quite how strong the meaning of ‘primary consideration’ is, pursuant to Article 24(2) Charter, that is, may it be offset by strong ‘secondary’ considerations, such as the right of the child to be heard?¹⁶ Considering the formulation of the scope of application of the principle in the Charter¹⁷ (‘in all actions relating to children’) there may be good grounds for varying such relative weight of the best interests of the child in different cases, depending on the subject matter of the dispute. The case law shows that the principle is sometimes used to guide interpretation of rules of EU secondary law. Occasionally, instead, secondary law limits the right provided for in Article 24(2) Charter. Sometimes that principle is the primary consideration determining a case, and sometimes it is one among the factors considered by the Court. A further point is that, bar few exceptions in the opinions of Advocate Generals¹⁸ and the articulation of the test for ascertaining the habitual residence of the child discussed below, there is no clear guidance in the case law of the Court as to how to ascertain the best interests of the child. Finally and crucially, aside from practical difficulties, it is possible to question the very desirability of using this criterion in all cases involving children.

To offer an overview of the application of the best interests of the child, this article explores selected cases in which the CJEU had recourse to it as criterion for settling the dispute in fields

12. Article 8 ECHR.

13. E.g. ECtHR, *Bronda v. Italy*, Judgment of 9 June 1998, para. 33, 81. Under Article 52(3) Charter, there is at least equivalent protection between rights guaranteed under the Charter and the same as protected by the ECHR.

14. M. Klaassen and P. Rodrigues, ‘The Best Interests of the Child in EU Family Reunification Law: A Plea for More Guidance on the Role of Article 24(2) Charter’, 19 *European Journal of Migration and Law* (2017), p. 191–218; T. Petrova, ‘The Twofold Approach to Children’s Freedom of Movement Rights Under European Law: Can “Children’s Equilibrium” Guide the Interpretation of the Post-Brexit Rights of UK Children Residing in the EU?’, 14 *CYELP* (2018), p. 99–133.

15. For the distinction between principles and rules in EU law see T. Tridimas, *General Principles of European Community Law* (OUP, 2006), drawing from R. Dworkin, *Taking Rights Seriously* (Harvard University Press, 1977).

16. Codified in Article 24(1) EU Charter of fundamental rights (‘Charter’).

17. The formulation is, one deduces from Article 51 Charter, to be interpreted restrictively: it applies to all actions concerning children, as long as the action fall within the scope of application of the Charter for some other reason (as confirmed in Case C-648/11 *MA, BT, DA*, EU:C:2013:367, para. 59). As Advocate General Szpunar summed up, ‘the scope of the Charter follows the scope of EU law and not vice versa’, Opinion of Advocate General Szpunar in Case C-18/18 *Eva Glawischnig-Piesczek v. Facebook*, EU:C:2019:458, para. 89.

18. E.g. Opinion of Advocate General Szpunar in Case C-335/17 *Valcheva* and Opinion of Advocate General Campos Sanchez Bordona in Case C-129/18 *SM*, EU:C:2019:140 who suggests distinguishing a procedural and substantive aspect in the assessment of the best interest of the child.

as disparate as family reunification, unaccompanied migrants, free movement of Union citizens, right of access and so on.¹⁹ This article submits that the test, as it results from the case law, may be expressed as follows: the best interests of the child is a principle which justifies a reading of other provisions of EU law, a reading aimed at giving a child the chance to *maintain a meaningful relationship with a parent-like figure, and it is assessed on an individual basis, taking into account the child's concrete needs*. This position is perfectly in line with Article 24(3) of the Charter.²⁰ More analytically, the case law, surveyed in part 1, points to the direction that the CJEU understand that whether something is in the best interests of the child is to be assessed with the help of the following three criteria (these are not cumulative criteria but simply a guidance as to how ascertain what constitutes the best interests of the child):

1. Stability. For example, the proximity of the child with the Member State where the decision is made;²¹ the requirement not to prolong more than is strictly necessary the procedure for determining the Member State responsible for asylum application in the case of unaccompanied children;²² or the requirement of taking into 'the existence of family, cultural and social ties with [the] country of origin' for the purposes of family reunification.²³
2. The (positive) relationship (emotional bond) between the child and the adult parent-like figure;²⁴ considering objective criteria such as the age of the child, and other criteria such as 'the extent of his emotional ties both to the Union citizen parent and to the third-country national parent, and the risks which separation from the latter might entail for that child's equilibrium'.²⁵
3. The ability of the parent to take full responsibility for the child.²⁶

Among the free movement of persons cases, the present article distinguishes between, on the one hand, cases resembling child custody disputes and, on the other hand, all the other situations. The key difference between the set of cases is that in cases resembling child custody disputes there are adults who had some form of affective relationship with the child, who disagree as to the child's

19. In addition, one might single out free movement of goods cases as well – on which this article does not dwell. In Case C-244/06 *Dynamic Medien*, EU:C:2008:85, the Court stated that the best interest of the child is a ground for restricting free movement of goods – provided that the restriction is proportionate. This is the only case in which there is no immediate relationship with an adult-like figure, so the test proposed in this article may not be of immediate application.

20. 'Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.'

21. Case C-512/17 *HR*, EU:C:2018:513, para. 40; Case C-523/07 *A*, EU:C:2009:225, para. 31, 34 and 35; Case C-497/10 *PPU Mercredi*, EU:C:2010:829, para. 44–46; Case C-376/14 *PPU C*, EU:C:2014:2268, para. 50; Opinion of Advocate General Saugmandsgaard Øe in Case C-393/18 *PPU UD*, EU:C:2018:749, para. 36, 65.

22. Case C-648/11 *MA*, BT, DA, para. 55.

23. Case C-380/17 *K and B*, EU:C:2018:877, para. 52.

24. Case C-129/18 *SM*: 'the closeness of the personal relationship which has developed between the child and its guardians'; Case C-380/17 *K and B* 'the nature and solidity of the person's family relationships'.

25. Case C-133/15 *Chavez-Vilchez*, para. 71.

26. Opinion of Advocate General Szpunar in Case C-133/15 *Chavez-Vilchez*, EU:C:2016:659, para. 101; Case C-221/17 *Tjebbes*, EU:C:2019:189, para. 46: 'retain genuine and regular links with members of his or her family'. The two latter factors are also expressed in the Court's criterion of 'the integration, on a continuous and long-term basis, into the home and family of a foster parent, of children who on account of their difficult family situation are particularly vulnerable', Case C-147/17 *Sindicatul Familia Constanța and Others*, EU:C:2018:926, para. 71. For the difficulty in how the UK interpreted this criterion in 'EU Settlement Scheme: Person with a Zambrano right to reside', Version 3.0, Home Office, 13 February 2020 see C. O'Brien, 'Between the Devil and the Deep Blue Sea: Vulnerable EU Citizens adrift in the UK Post-Brexit', 58 *Common Market Law Review* (2021), p. 431, 454.

destiny. This means that custody disputes involve relationships between people, so that a decision on one of them will necessarily affect the others.²⁷ The behaviour of individuals affected is, therefore, central to the determination of the child's best interests.

Such distinction does not appear to carry a weight in the Court's decisions, but it is important because most arguments *against* the use of the best interests of the child are convincing only in relation to the first set of cases. These arguments are surveyed in section 2, where this article presents two sets of critiques – practical and conceptual – that were originally moved to the use of the best interests of the child in custody cases. The practical critique was mounted already in the 70s by Mnookin, who argued that the principle 'is too indeterminate to be helpful in legal decisions'.²⁸ To evaluate this claim, this article considers (commentaries to) Article 3 CRC as a possible source of inspiration for the standards to be followed in order to ascertain the best interests of the child.²⁹ The critique by Mnookin was extended by Elster when writing about child custody cases,³⁰ and his ideas feature as part of the conceptual critique: the principle is unjust and occasionally self-defeating – unjust because one may contend that other public policies may be worthier of protection than children's interests, and self-defeating because the way it is ascertained encourages strategic behaviour (lies) by a parent to persuade the decision-maker to assign them custody of the child – but a decision in that sense would arguably be *against* the best interests of the child. This article evaluates a generalized application of the critique that was originally formulated in the context of child custody cases, by testing the desirability of the application of the test to a set of cases in which the factual disputes vary significantly. It ought to be stressed that the criticisms tested in this article are directed against Article 24(2) Charter, and not against the reasoning of the Court (which is, of course, bound to apply the Charter pursuant to Article 51 thereof). This article therefore does not argue for or evaluate different criteria, and this is chiefly because the Court could not adopt them without Treaty change.

2. The widespread application of the 'best interests of the child' in the case law

A. Parental responsibility matters

Cases on parental responsibility matters, namely child custody and right of access, including child abduction cases, arrive before EU courts through preliminary rulings, often on jurisdictional

27. R. Mnookin, 'Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy', 39 *Law & Contemporary Problems* (1975), p. 226, 252, and thus require 'person oriented' not 'act oriented' determinations.

28. See R. Mnookin, 'Foster Care-in Whose Best Interest?' 43 *Harvard Education Review* (1973), p. 599; and R. Mnookin, 39 *Law & Contemporary Problems* (1975).

29. The case law of the ECtHR has received extensive attention elsewhere (in addition to those mentioned through the article, see e.g. G. Van Bueren, *Child Rights in Europe: Convergence and Divergence in Judicial Protection* (Council of Europe Publishing, 2007); V. Lazic, 'Family Private International Law Issues before the European Court of Human Rights: Lessons to be Learned from Povse v. Austria in Revising the Brussels IIa Regulation and its Relevance for Future Abolition of Exequatur in the European Union', in Paulussen et al. (eds), *Fundamental Rights in International and European Law: Public and Private Perspectives* (Springer, 2015). In the light of the fact that the Strasbourg court leaves a margin of discretion to member states for ascertaining the best interests of the child, it is submitted that the case law is not sufficiently determinate to offer helpful guidance for the interpretation of the test under EU law and it is therefore not used as a source of inspiration in this article.

30. J. Elster, 54 *Chicago Law Review* (1987).

issues.³¹ It is key to stress that in these procedural matters, the criterion of the best interests of the child is not used to solve the custody issue itself – this is a matter for the national court, in which the CJEU is never, not even indirectly, involved.³² In these cases, the principle of the best interests guides the interpretation of other provisions of EU law.

Regulation 2019/1111 ('Brussels IIa recast'), much like its predecessor (the Brussels II Regulation)³³ establishes that jurisdiction belongs to the courts where a child is 'habitually resident',³⁴ to ensure proximity between the decision and the child, in the latter's best interest. The formulation is remindful of the Child Abduction Convention, which is applicable to children habitual resident in a contracting party (Article 4), and pursuant to Article 3 of which the removal or retention of a child is illegal if in breach of the law 'of the State in which the child was habitually resident'.³⁵ However, neither that Convention³⁶ nor the Brussels IIa Regulation define the concept of habitual residence:³⁷ this is when the best interests of the child become relevant as an interpretative tool.³⁸

In these cases, where national courts invest EU courts of preliminary questions on the interpretation of the concept of habitual residence, the principle of the best interests of the child as an interpretative criterion never results in a *contra legem* interpretation. By way of example, in the case of *UD*,³⁹ the referring court asked whether a child who had never been to the UK could be considered a habitual resident of that Member State for the purposes of establishing jurisdiction under the Brussels II Regulation. The Advocate General took the view that the rule on jurisdiction of the Brussels II Regulation reflects 'the criterion of proximity, whereby the legislature intended to translate the objective of protecting the best interests of the child'.⁴⁰ The best interests of the child are served, according to the AG, when decisions are made in the Member State where there is proximity between the child and a social and familial environment (the child's centre of interests), independently from 'the mere geographical proximity between the child and a given place'.⁴¹ The Court agreed that the rule on jurisdiction favoured the criterion of proximity with the view of meeting

31. In addition to those discussed in more detail in this section, see Joined Cases C-325/18 PPU and C-375/18 PPU *C.E. and N.E.*, EU:C:2018:739 in which the custody dispute was not between parents, but between parents and welfare institution.

The difference in the parties involved does not change the conceptual difficulties that this article mentions in the section below.

32. It goes without saying that the national court is, however, bound by the Charter whenever it applies EU law.

33. Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, [2003] OJ L 338/1.

34. Article 7 of Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction, [2019] OJ L 178. Herein, reference shall be had to Regulation 2201/2003 because it was the law applicable to the decisions discussed in this section, but the substantive analysis does not change.

35. Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.

36. E. Pérez-Vera, *Explanatory Report on the 1980 Hague Child Abduction Convention* (HCCH, 1982), p. 445 the notion of habitual residence is 'a well-established concept in the Hague Conference, which regards it as a question of pure fact'.

37. Case C-111/17 PPU *OL*, EU:C:2017:436, para. 39.

38. There is a vast literature on the best interests of the child in the context of the Hague Convention, on which see P. McEleavy, 'The European Court of Human Rights and the Hague Child Abduction Convention: Prioritising Return or Reflection?', 62 *NILR* (2015), p. 365–405.

39. Case C-393/18 PPU *UD*, EU:C:2018:835; similarly, Case C-428/15 *D*, EU:C:2016:819; Case C-565/16 *Saponaro*, EU:C:2018:265; Case C-499/15 *W and V v. X*, EU:C:2017:118; Case C-455/15 PPU *P v. Q*, EU:C:2015:763; Case C-404/14 *Matouskova*, EU:C:2015:653.

40. Opinion of Advocate General Saugmandsgaard Øe in Case C-393/18 PPU *UD*, para. 36.

41. *Ibid.*, para. 65.

the best interests of the child,⁴² but clarified that the test of habitual residence consists of two subsequent steps. First, the child has to be physically present in the place in which he/she is allegedly integrated.⁴³ The criterion of habitual residence derives from settled case law, and, as the Court had clarified in *A*, under EU law it has a distinctive meaning in parental responsibility matters.⁴⁴ Second, the child's presence has to be stable, which means that the child must have 'some degree of integration of the child into a social and family environment'.⁴⁵ Further, with regard to the stability of the presence of the child, the CJEU has singled out several factors for identifying the national court geographically close to the child which should enjoy jurisdiction. Those factors include: the duration, conditions and reasons for the stay (*A*⁴⁶, *OL*,⁴⁷ *HR*⁴⁸), the place and conditions of the child's attendance at school (*Mercredi*),⁴⁹ linguistic knowledge and the child's family and social relations in the Member State concerned (*A*)⁵⁰, the parental intention so long as such intention is manifested throughout tangible steps such as purchasing or renting accommodation in the Member State in question (*A*,⁵¹ *Mercredi*,⁵² *C*⁵³). The relevant factors vary according to the age of the child concerned, so that the Court found that 'the environment of a young child is essentially a family environment' (*OL*,⁵⁴ *Mercredi*⁵⁵).

The same conclusion can also be derived from the derogations contained in Articles 9–15 of the Brussels IIa recast Regulation (and its predecessor), which arguably also give expression to the principle of the best interests of the child. Article 9 of that Regulation provides, where a child moves and subject to certain conditions, for the courts of the Member State of the child's former habitual residence to retain jurisdiction, while Article 12(1) provides, subject to certain conditions and where the holders of parental responsibility are in agreement, for the prorogation of the jurisdiction of the court which has jurisdiction to decide on an application for divorce, legal separation or marriage annulment, which is not the court of the Member State where the child is habitually resident. The Brussels IIa recast Regulation also establishes, by way of exception, that the courts of a Member State having jurisdiction as to the substance of the matter may ask the court of another Member State to assume jurisdiction, if they consider that the court of another Member State, with which the child has a particular connection, would be better placed to hear the case if this is in the best interests of the child. With reference to the Brussels IIa Regulation, in *EP* the Court considered that the French nationality of a child living in Romania could be a sufficient criterion to establish a connection with France,⁵⁶ but that this connection is not necessarily in the best interests of the child.⁵⁷ There are, however, no guidelines as to what standard the national court

42. Case C-393/18 PPU UD, para. 48.

43. Similarly, Case C-499/15 W, V and X, para. 61.

44. Case C-523/07 *A*, EU:C:2009:225, para. 35–36.

45. See also Case C-512/17 HR, para. 41.

46. *Ibid.*, para. 39.

47. *Ibid.*, para. 44.

48. *Ibid.*, para. 45.

49. C-497/10 PPU *Mercredi*, para. 52.

50. *Ibid.*, para. 39.

51. *Ibid.*, para. 40.

52. *Ibid.*, para. 50.

53. C-376/14 PPU *C*, para. 52.

54. *Ibid.*, para. 45.

55. *Ibid.*, para. 54–56.

56. Order of the Court in Case C-530/18 *EP*, EU:C:2019:583, para. 32.

57. *Ibid.*, para. 34.

should apply to ascertain the best interests of the child.⁵⁸ The rationale of the derogations contained in the Brussels IIa recast Regulation is essentially the same as the Child Abduction Convention and the law applicable to the protection of children:⁵⁹ namely, to ensure that decisions concerning the child are taken as closely as possible to the child. Indeed, consideration of the best interests of the child also comes into play in decisions on child abduction cases.⁶⁰ In that context, the Court has considered, for example, that the right of a child to be heard cannot constitute an obligation but must be assessed having regard to what is required in the best interests of the child in each individual case.⁶¹

Further, part of the preliminary rulings on parental responsibility matters is constituted by jurisdictional disputes on the right of access. In these cases, the underlying dispute has something in common with child custody cases, because there are some disagreements between adults as to who gets to have a close bond with the children. The best interests of the child was used, in these cases, as main interpretative criterion.⁶² For Advocate General Szpunar, the principle ‘must guide any teleological interpretation of the provisions of Regulation No 2201/2003’,⁶³ on the right of access, and the Court followed his opinion.⁶⁴

B. Free movement of persons cases

In these cases, the principle is used both to guide interpretation of other provisions of EU law and to confer a right. The cases are grouped in two sets, depending on the conflicts arising. First there will be cases related to family reunification and migration (of unaccompanied minors), in which there is not necessarily a disagreement between parents, but there may be a disagreement between parents on the one hand and a public institution on the other as to what constitutes the best interests of the child. Second, this part discusses cases resembling child custody disputes, and in which there are therefore disagreements between parents.

1. Family reunification, migration and citizenship. The cases discussed below involve both EU and non-EU citizens. Yet, even though their situation is regulated by different legal regimes under EU law, the Court appears to have a similar approach toward the best interests of the child – and this is the right approach, as the best interests is a guiding principle of general application regardless

58. The General Court explicitly excluded that rules of procedure of another Member State may be a relevant factor in determining the court that should assume jurisdiction in light of best interest of the child (*ibid.*, para. 42).

59. Hague Convention of 5 October 1961 concerning the powers of authorities and the law applicable to the protection of minors.

60. On which see P. McEleavy, ‘The New Child Abduction Regime in the European Union: Symbiotic Relationship or Forced Partnership?’, 1 *Journal of Private International Law* (2005); L. Walker and P. Beaumont, ‘Shifting the Balance Achieved by the Abduction Convention: The Contrasting Approaches of the European Court of Human Rights and the European Court of Justice’, 7 *Journal of Private International Law* (2011), p. 231; P. Beaumont, L. Walker and J. Holliday, ‘Parental Responsibility and International Child Abduction in the Proposed Recast Brussels IIa Regulation and the Effect of Brexit on Future Child Abduction Proceedings’, 16 *International Family Law Journal* (2016), p. 307; S. Bartolini, ‘In the Name of the Best Interests of the Child: The Principle of Mutual Trust in Child Abduction Cases’, 56 *Common Market Law Review* (2019), p. 91.

61. Case C-400/10 PPU *McB*, EU:C:2010:582, para. 64 and Case C-491/10 PPU *Aguirre Zagarra*, EU:C:2010:828, para. 64.

62. Case C-4/14 *Bohez v. Wiertz*, EU:C:2015:563.

63. Opinion of Advocate General Szpunar in Case C-335/17 *Valcheva*, para. 38.

64. See Case C-335/17 *Valcheva*, EU:C:2018:359, para. 36, where the Court referred to the AG’s opinion.

of the citizenship of the child. This is also borne by secondary legislation, as recalled in the introduction.

In some family reunification cases,⁶⁵ the dispute shares an element in common to child custody disputes, because the public authority may have to decide whether the child has sufficient bonds with an adult. In *SM*,⁶⁶ for example, the Court considered whether a child ‘adopted’ under the Algerian Kafala system could be considered a direct descendant of EU citizens for the purposes of the Citizen Rights Directive.⁶⁷ In order to ascertain what was in the best interests of the child, Advocate General Sanchez-Bordona proposed to follow a procedural and a substantive assessment. For the substantive assessment, the Advocate General proposed to have recourse to the criterion used by the Court in *Sindicatul Familia Constanța*: ‘The integration, on a continuous and long-term basis, into the home and family of a foster parent, of children who on account of their difficult family situation are particularly vulnerable, constitutes an appropriate measure to safeguard the best interests of the child’.⁶⁸ The procedural assessment consists, on the basis of international and EU law, of a dual assessment by the authorities of the states concerned by an international adoption. The Court was not as systematic in its judgment, but provided nonetheless helpful guidance: the assessment of the best interests of the child

must take into consideration, inter alia, the age at which the child was placed under the Algerian *Kafala* system, whether the child has lived with its guardians since its placement under that system, the closeness of the personal relationship which has developed between the child and its guardians and the extent to which the child is dependent on its guardians, inasmuch as they assume parental responsibility and legal and financial responsibility for the child.⁶⁹

In *K and B*, the Court recalled, in an *obiter*, that a Member State may examine the merits of a family reunification with due regard to ‘to the best interests of minor children, the nature and solidity of the person’s family relationships, the duration of his residence in the Member State and of the existence of family, cultural and social ties with his country of origin’.⁷⁰ The last three limbs may be read as specifications of the best interests of the child.

In other cases involving migrant children there is no evidence of any disagreement between parents.⁷¹ These are cases, for example, of unaccompanied minors who apply for international protection. In that context, in *MA, BT, DA*, the transfer of unaccompanied children was deemed incompatible with the best interests of the child, even though no particular articulation was given as to

65. On family reunification and best interest of child M. Klaassen and P. Rodrigues, 19 *European Journal of Migration and Law* (2017).

66. Case C-129/18 *SM*.

67. Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ L 158/77).

68. Case C-147/17 *Sindicatul Familia Constanța and Others*, para. 71.

69. Case C-129/18 *SM*, para. 69.

70. Case C-380/17 *K and B*, para. 52.

71. Advocate General opinion in Case C-490/16 *A.S.* EU:C:2017:443, para. 24. Joined Cases C-643/15 and C-647/15 *Slovakia and Hungary v. Council*, EU:C:2017:631 recalls the duty to interpret Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece in the light of the best interests of the child. Among others, Case C-550/16 *A and S*, EU:C:2018:248 interpreting Directive 2003/86/EC in the light of the best interest of the child.

why it is the case, the Court merely arguing that ‘since unaccompanied minors form a category of particularly vulnerable persons, it is important not to prolong more than is strictly necessary the procedure for determining the Member State responsible, which means that, as a rule, unaccompanied minors should not be transferred to another Member State.’⁷² In *MA and others*, the Court seemed not impose on Member States an obligation of taking into account the best interests of the child as primary consideration when deciding whether to examine asylum application, excluding that the principle may result in interpreting EU secondary legislation *contra legem*.⁷³ In *H and R*, the question referred for a preliminary ruling was whether a Member State could issue a request to another Member State to ‘take back’ an applicant who had lodged application in the latter Member State first. The Court found that this request could not be made, *inter alia* because the criteria for determining responsibility are ‘intended to promote the best interests of the child’.⁷⁴ The case law on accompanied minors shows that the principle may be used to interpret secondary legislation (provided that this does not result in an interpretation *contra legem*), and that provisions giving expression to the principle may trump other provisions of secondary legislation. The Court has also found that EU secondary law may limit the application of Article 24(2) Charter. In *Commissaire général aux réfugiés et aux apatrides* the question before the Court was if Belgium could declare inadmissible the application of a third-country national who had been granted refugee status in Austria, when that person was the father of a minor who was beneficiary of international protection in Belgium. As a rule, Member States shall ensure family unity: protection should be extended to family members of a beneficiary of international protection, if possible. By way of exception, an application may be declared inadmissible for the reason provided for in Article 33(2)(a) Procedures Directive, namely if another Member State has already granted international protection. The Court found that that exception gave ‘expression to’ the principle of mutual trust, so that it could lawfully restrict Article 24(2) Charter.⁷⁵

Most importantly, to this category belong cases on free movement of Union citizens à la *Zambrano*. These involve decisions such as *Zambrano*,⁷⁶ but also *O, L and Others*⁷⁷ and similar cases involving children where there is no evidence of disagreements between the parents. In *Zambrano*, the Court did not explicitly mention the best interests of the child to establish when a third-country nationals derives a right of residence in the EU. The Court did have recourse to the notion of dependency of children, in para. 45, so as to justify why the expulsion of the parent would deprive children of the genuine enjoyment of the substance of rights conferred by EU citizenship. One may also take the view that the notion of dependency expresses that it is in the child’s best interests to confer to a parent a derived residence right, but the Court does not use this language. That it is not only a parent, but also a parent-like figure who may remain in the territory of the Union was made clear by *O, S and Others*, where the *Zambrano* right of derived residency was claimed in

72. Case C-648/11 *MA, BT, DA*, para. 55.

73. Case C-661/17 *M.A., S.A., A.Z.*, EU:C:2019:53, para. 72.

74. Joined Cases C-582/17 and C-583/17 *H.*, EU:C:2019:280, para. 83.

75. Case C-483/20 *Commissaire général aux réfugiés et aux apatrides*, EU:C:2022:103, para. 35–37. On the problems of this reasoning see L. Lonardo, ‘Case C-483/20 *Commissaire général aux réfugiés et aux apatrides*: the intricate relationship between the Charter and secondary legislation in the Common European Asylum System’ (*EU Law Live*, 21 March 2022); and in other context M. van den Brink, ‘When can religious employers discriminate? The scope of the religious ethos exemption in EU law’ 1(1) *European Law Open* (2022), p. 103.

76. Case C-34/09 *Zambrano*, EU:C:2011:124.

77. Joined cases C-356/11 and C-357/11 *O and Others*, EU:C:2012: 776, para. 76 to 78.

favour of the step-fathers of children who are EU citizens.⁷⁸ The Court proceeded to consider what criteria are relevant for establishing when the EU child is deprived of the genuine enjoyment of the substance of rights: it listed legal, financial or emotional dependence.⁷⁹ In *Chavez-Vilchez* (discussed in the next section) the Court linked that an assessment of the right to respect for family life (Article 7 Charter) with that of the best interests of the child.⁸⁰

In conjunction to Article 7 Charter, Article 24(2) Charter was found to militate in favour of a right to non-discrimination on the grounds of sex in the *Pancharevo* case (see also *GC*, below, on non-discrimination on the grounds of nationality).⁸¹ The question was whether a Member States could refuse to issue a birth certificate recognizing two women as mothers, when such certificate had been issued in another Member State. On the basis of the Explanations relating to the Charter, the Court found that Article 24(2) represents the integration into EU law of the principal rights of the child referred to in the CRC.⁸² Article 2 CRC, which enshrines a right to non-discrimination, meant that the right of the child to be registered after birth (derived from Article 7 Charter) implies prohibits discrimination for the child on the basis of the sexual orientation of the child's parents.⁸³ It was ultimately the right to free movement – as interpreted teleologically through the combination of Article 7 and 24(2) Charter – to be breached by the Member State's refusal to issue the birth certificate.

Another case involving the best interests of the child in the context of citizenship is *Tjebbes*.⁸⁴ The Court considered whether Dutch law conducing to automatic loss of Dutch citizenship was contrary to EU law, where such loss was foreseen for adults who held dual citizenship and who had principal residence outside the Netherlands for an uninterrupted period of 10 years. The Court judged that EU law did not preclude such measure, provided that the Dutch law respected fundamental rights, and in particular the best interests of children. National courts ought therefore to ensure that an adult who automatically loses the nationality of a Member State can 'retain genuine and regular links with members of his or her family'.⁸⁵

Finally, it is perhaps significant that in some of the most controversial cases on EU citizenship, *Dano*⁸⁶ and *Alimanovic*,⁸⁷ the criterion is absent in the Court's reasoning, even though children were involved. Even more: arguably, recourse to the criterion might have compelled a different conclusion than the one reached by the Court, since the Court might have found that it was in the best interests of a dependent child that the mother should be entitled to the benefits she claimed.⁸⁸ In fact, by contrast, in *GC*, the Court found that the best interests of the child, read in conjunction with the right the right to respect for private and family life (as in *Chavez-Vilchez*, but this time in the context of EU citizens), means that a Member State may refuse an application for social assistance only after ascertaining that that refusal does not expose the citizen concerned and the children for which he or she is responsible to an actual and current risk of violation of their fundamental rights.⁸⁹

78. *Ibid.*, para. 55.

79. *Ibid.*, para. 56.

80. *Ibid.*, para. 70.

81. Case C-490/20 *Pancharevo*, EU:C:2021:1008.

82. *Ibid.*, para. 63.

83. *Ibid.*, para. 64.

84. Case C-221/17 *Tjebbes*.

85. *Ibid.*, para. 46.

86. Case C-333/13 *Dano*, EU:C:2014:2358.

87. Case C-67/14 *Alimanovic*, EU:C:2015:597.

88. Section 2.B.2 advances a conjecture to explain such absence.

89. Case C-709/20 *GC*, EU:C:2021:602, para. 92.

2. *Cases resembling child custody disputes.* Together with the right to family life (Article 7 Charter), the best interests of the child was used as paramount interpretative criterion for deriving a *Zambrano* rights of residence in case a child EU citizen has not exercised free movement and has a parent who is an EU national who may be a caregiver. That case law restated in essence the finding that Article 20 and 21 TFEU confer a right to residence and free movement to a child EU citizen – and a derivative right to a parent-like figure. To be sure, the CJEU does not always spell out the relationship between the right guaranteed by virtue of EU citizenship and those guaranteed by the best interests of the child. It appears that the latter strengthens and shapes the former: in the best interests of the child is the enjoyment of EU citizenship, and this may necessitate residence of the child on the Union's territory.

There may or may not be, in these cases, a disagreement between the parents. There is nothing to suggest that in cases classified in the section above there was disagreement between the parents (*Zambrano, O, L and Others*), whereas disagreement may have existed in other factual circumstances, such as the varied circumstances of the many families in the joined cases *Dereci*,⁹⁰ the joined cases *Chavez-Vilchez*⁹¹ or the joined cases *Rendon Marin*.⁹² *Chavez-Vilchez, Dereci* and *KA*⁹³ in particular resemble a child custody dispute because the national authority – albeit not the European Court of Justice – is entrusted with the task of establishing whether the children will live with one parent or the other.⁹⁴

As mention, disagreement between parents did not seem to matter for the Court's reasoning. In *Dereci*, the Court was not concerned with the principle of the best interests of the child, but rather based its reasoning on the notion of genuine enjoyment of rights, derived from *Zambrano*. *Rendon Marin* and *Chavez-Vilchez*, instead, were both based explicitly on the principle of the best interests of the child.⁹⁵ While in *Rendon Marin* the Court did not offer particular guidance as to how concretely ascertain the criterion,⁹⁶ *Chavez-Vilchez* constitutes the most comprehensive list of criteria to be taken into account for such determination: 'the age of the child, the child's physical and emotional development, the extent of his emotional ties both to the Union citizen parent and to the third-country national parent, and the risks which separation from the latter might entail for that child's equilibrium'.⁹⁷ The same criterion is repeated in *KA*.⁹⁸

3. Two critiques

A. The practical challenge: the criterion is indeterminate

The position under EU law is not different, in substance, from that under the Convention on the Rights of the Child, which is, however, slightly more articulate⁹⁹ and may be a useful source of

90. Opinion of Advocate General Mengozzi in Case 256/11 *Dereci*, EU:C:2011:626 opinion, para. 5.

91. See the factual recapitulation in Opinion of Advocate General Mengozzi in Case C-256/11 *Dereci*, para. 51.

92. Advocate General Opinion in Case C-165/14 *Rendon Marin*, EU:C:2016:75. In the first of these joined cases, nothing is known about one parent; in the other, nothing is mentioned.

93. Case C-82/16 *KA and Others*, EU:C:2018:308.

94. Case C-133/15 *Chavez-Vilchez*, para. 70.

95. *Ibid.*; Case C-165/14 *Rendon Marin*, para. 66.

96. Case C-165/14 *Rendon Marin*, EU:C:2016:675, para. 85 mandates 'a specific assessment by the referring court of all the current and relevant circumstances of the case, in the light of the principle of proportionality, of the child's best interests and of the fundamental rights whose observance the Court ensures,' with reference to the child's age, situation and dependency.

97. Case C-133/15 *Chavez-Vilchez*, para. 71.

98. Case C-82/16 *KA*, para. 72.

99. With the exception perhaps of the principles established in Article 23(2) Return directive.

inspiration for EU lawyers.¹⁰⁰ In its comment to Article 3 of the Convention on the Right of the Child, the Committee on the Rights of Children offers a non-exhaustive and non-hierarchical list of elements to guide a best-interests assessment: the child's views (which, under the Charter, appears to be an autonomous criterion), the child's identity, the preservation of family environment and relations, care protection and safety of the child, situation of vulnerability and the child's rights to health and education.¹⁰¹

The criterion of proximity in the CJEU's case law bears resemblance with a rule stated by the Committee on the Rights of Children: when separation does occur, the decision-makers ought to ensure that the child maintains linkages with parents, family and siblings.¹⁰² To be sure, proximity in the context of the case law of the Court has a different purpose than that of solving cross-jurisdictional custody disputes: proximity in the context Brussels IIa regards rather the issue of the forum with which the child has the closest connection, in order to identify where proceedings should be brought. Other criteria present in the CJEU's case law could benefit from the articulation given by the General Comment to Article 3 of the Convention on the Rights of the Child. The CJEU looks at the emotional bond between the child and the adult, as well as the ability of the adult to take care of the child, and the Comment to the CRC specifies that the care of a child ought to be understood in relation 'to the comprehensive ideal of ensuring the child's 'well-being' and development. Children's well-being, in a broad sense includes their basic material, physical, educational and emotional needs, as well as needs for affection and safety'.¹⁰³

Furthermore, the Comment to the CRC provides for additional criteria that have not been explicitly mentioned in the case law of the CJEU', such as the child's safety,¹⁰⁴ such as protection from peer pressure, bullying and other forms of exploitations.¹⁰⁵

EU courts may thus in the future lay down a more precise test, involving three sets of factors: those concerning the child, those concerning the adults, those concerning the relationship child-adult and those concerning the relationship between the adults.¹⁰⁶ To the first (child) may pertain objective data such as age, school record, amount of time spent with digital technology and recreational activities; to the second (adults), factors such as finance, history of illegal conducts, physical and mental health; to the third (child-adult relationship) necessarily pertain factors that are hardly amenable to quantification, such as emotional bonds, the capacity to provide the child with stability and continuity, and the disposition to protect the child from ongoing litigation and other

100. In addition to the developments outlined below, regard may also be had – for the idea more than for the substance – to the American Bar Association, *A Judge's Guide, Making Child-Centered Decisions in Custody Cases* (2nd ed., 2008), which lists questions to consider for the ascertainment of the best interest of the child depending on the group of age.

101. Committee on the Rights of the Children, 'General comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)' (2013) 12. See also M. Freeman, *Article 3. The Best Interests of the Child* for other attempts at specifying the meaning of the test.

102. Committee on the Rights of the Children, 'General comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)' (2013) 15.

103. Committee on the Rights of the Children, 'General comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)' (2013) 16.

104. See also General comment No. 13 (2011) on the right of the child to freedom from all forms of violence.

105. Committee on the Rights of the Children, 'General comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)' (2013) 16.

106. Conceivably, one may take into account a fourth set of factors, namely the relationship between the adults involved. As explained below in the section on conceptual issues, however, the notion of best interest of the child is self-defeating if ascertained exclusively through the behaviour of the adults in the proceedings. This factor, therefore, ought to be limited.

forms of abuse.¹⁰⁷ This could guide not only the application of the principle, but also the interpretation of provisions meant to give concrete expression to it.

Notwithstanding these lists and specifications, the notion of the best interests of the child is still amenable to criticism, for its practical application is far from univocal. The high indeterminacy of the criterion has been criticized by scholars in the US¹⁰⁸ and, more recently, in the EU.¹⁰⁹ As one author has stated it, '[t]he best interests standard necessarily invites the judge to rely on his or her own values and biases to decide the case in whatever way the judge thinks best. Even the most basic factors are left for the judge to figure out',¹¹⁰ or that when a judge decides about custody under the best-interests principle 'is exercising administrative discretion which by its nature cannot be rule-bound'.¹¹¹ This fierce criticism is not entirely convincing, as it only holds true for certain factors. It is true in any case that semantic openness and vagueness is a feature of language which cannot be eliminated from a legal text.¹¹²

More radically, the criticism one may move to such lists is that they do not contribute meaningfully to solving the uncertainty, and in fact the test of best interests is ambivalent toward the child's autonomy.¹¹³ The indeterminacy lies in the fact that it is not possible to use the criterion of best interests in order to know the outcomes of the options, their relative likelihood or in order to rank them in order of desirability.¹¹⁴ This critique is in theory applicable to all the cases outlined above, yet it becomes much less cogent when cases other than those resembling child custody are considered (that is, in the context of procedural private international legal issues).¹¹⁵ Granted, it is not necessary to know all the possible outcomes of the options (the outcome of what may happen if the child is found to be cared for by the EU parent or by the third-country parent, for example), but only the plausible ones. It is, however, not possible to determine the likelihood of each plausible outcome, but, if anything, only its value, thus leaving the decision-maker under uncertainty.¹¹⁶ It is also objectionable that either the child or an adult third party may be able to attach the correct value to the outcome of options: the child's own choice may not be meaningful, since (s)he is asked to choose between two projects of life; similarly, letting a third party choose amounts to having them guess the child's choice or, even worse, what would be the future

107. J. Elster, 54 *Chicago Law Review* (1987), p. 38 draws attention to the need of including 'only activities that are done with the child [rather than for the child] and hence either give rise to a special need of the child for the primary caretaker or a special need of the primary caretaker for the child'.

108. Mnookin, 39 *Law & Contemporary Problems* (1975), p. 230; R. Lidman and B. Hollingsworth, 'The Guardian Ad Litem in Child Custody Cases: The Contours of Our Judicial System Stretched Beyond Recognition', 6 *George Mason Law Review* (1998), p. 289–290. The US, however, is not party to the CRC.

109. M. Klaassen and P. Rodrigues, 19 *European Journal of Migration and Law* (2017).

110. M. Guggenheim, *What's Wrong with Children's Rights* (Harvard University Press, 2005), p. 40.

111. L.L. Fuller, 'Interaction between Law and its Social Context' (item 3 of unbound class material for Sociology of Law, UC Berkeley (Summer 1971)), p. 11.

112. G. Beck, *The Legal Reasoning of the European Court of Justice* (Hart, 2013), p. 52–75.

113. On the relationship between best interests of the child and child's autonomy, in theory and in practice, see A. Daly, *Children, Autonomy and the Courts. Beyond the Right to be Heard*, chapter 2 and chapter 5.

114. Mnookin, 39 *Law & Contemporary Problems* (1975), p. 257.

115. There may, of course, be child custody disputes in which there is sufficient evidence for the criterion to yield a determinate result (e.g. that one parent is obviously more fit than the other). Cases on free movement of goods may indeed be solved with more certainty by having recourse to a set list objective criteria (such as the age of the child) through which to assess whether it is in the child's best interest to be exposed to a good.

116. Uncertainty in the technical sense (lack of knowledge about future events), as distinguished from risk (the situation where one may win or lose something worthy).

child's choice.¹¹⁷ The fact that the child's voice has to be taken into account, but is in fact supervised by that of an adult,¹¹⁸ who assesses the child's maturity, speaks to the ambivalence of the test toward the child's autonomy.¹¹⁹ There are also other practical problems. Who should decide on the basis of this test?¹²⁰ Are courts or immigration authorities sufficiently equipped with qualified experts to make the determination? And at what time is the best interests to come to fruition? The child may be better off at a given point in the future even though the decision is not taken in his best interest now. Finally, is the best interests of the child to be understood with reference to the concrete child (or children in the dispute) or of all children as a category (on this point, see the conceptual objections mentioned in the next section)?

One cannot escape the impression that the lists of criteria may sometimes mask some wishful thinking, as an attempt to rationalize a choice between two options that simply cannot be rationalized.¹²¹ It must be very difficult for judges to come to terms with the fact that their decision has momentous implications for the parties involved and there is usually no clear-cut solution, especially if the solution is based on 'the behaviour of parents during an exceptionally stressful period'.¹²²

Despite these practical challenges, one may still assume, for the purposes of assessing conceptual critiques, that it is possible to determine even child custody disputes through the application of the best interests of the child.

B. The conceptual challenge: the criterion is unjust and self-defying

I. The criterion is unjust. In its most forceful expression, the critique to deciding in the best interests of the child as sole or main criterion in disputes involving children posits that there are situations in which other interests are worthier of protection. This argument can be presented in two subsets. First, one may suggest that there are other public policy considerations that, *ceteris paribus*, ought to guide judicial decisions. Second, one may consider that the interests of children should be subordinate to the interests of adults. This section presents these arguments in turn.

Other public policies may be worthier of protection than children's interests. For once, the decision of courts in the best interests of the child are, conceptually, an interference of the public power.¹²³ For example, one may prefer economic freedom to the best interests of children, and

117. J. Elster, 54 *Chicago Law Review* (1987), p. 14–15. This is what the Comment to the CRC instead suggests, that one 'should also consider the possible scenarios of the child's development, and analyse them in the short and long term' Committee on the Rights of the Children, 'General comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)' (2013) 18.

118. E.g. ECtHR, *Mandet v. France* (2016) where a judge 'overturned' the child's opinion as to what the latter's best interests was.

119. See B. Gornik, 'At the Crossroads of Power Relations: the Convention on the Rights of the Child and Unaccompanied Minor Migrants', in M. Sedmak, B. Sauer, B. Gornik (eds), *Unaccompanied Children in European Migration and Asylum Practices: In Whose Best Interests?* (Routledge, 2018), p. 25.

120. M. Klaassen and P. Rodrigues, 19 *European Journal of Migration and Law* (2017).

121. See generally J. Elster, 54 *Chicago Law Review* (1987). In the different context of the Hague convention, C Mol and T Kruger, 'International child abduction and the best interests of the child: an analysis of judicial reasoning in two jurisdictions' 14(3) *Journal of Private International Law* (2018), p. 421 conclude that 'the concept of the best interests of the child is often used without substance, and sometimes only to endorse conclusions that would have possibly been reached in any event'.

122. J. Elster, 54 *Chicago Law Review* (1987), p. 16.

123. As the US supreme court said in a decision prohibiting mandatory public education, '[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations' *Pierce v. Society of Sisters* 268 U.S. 510, 534–35 (1925).

may even advocate for a society that balances interests in that sense. It is also an interference with parental freedom: in case of child custody dispute or those resembling them, where the options are parents (say, with 'minority' values) and a third institution.¹²⁴

There are grounds for maintaining that the interests of the child ought not to trump the interests or the rights of parents (for example, in disputes concerning access rights). This argument acquires strength in virtue of the distinction between the welfare of a child and the welfare of children in general.¹²⁵ In a factual scenario of case resembling child custody disputes, for example, the best interests of the child (of that child) may yield a result which does not deter a behaviour that is against the welfare of children in general. For example, a child's best interests may be found to be, in a given circumstance, to live with a parent who has abandoned the other parent, who has used illegal tactics to bring about the *status quo* by virtue of which it is in the child best interests to be with him or her,¹²⁶ or with a parent who has illegally entered the territory of the Union. Possibly, the welfare of children is better served by a presumption against such behaviour, and the predictable loss of custody (rather than a decision in the best interests of the child) would serve such presumption. Moreover, there are welfarist arguments in the sense that it may be more efficient if the decision is taken so as to maximize the interests of the family, rather than only of the child.¹²⁷ Theoretical explanations (of the kind mentioned in the introduction) for the adoption of the principle may act as meta-criteria for the evaluation of the desirability of the principle itself. In other words, if making decisions in the best interests of the child means treating people as ends and not as means, the principle will be regarded positively. If instead it is considered a detriment to the child's autonomy, the principle will be criticized, and so on.

Against these principled challenges, in the context of judicial decisions one may move the powerful and decisive observation that EU primary law, in Article 24(2) of the Charter, mandates for the observance of such principle. It is, however, not as straightforward that, in case of conflict, the balancing between other principles and that provided in Article 24 Charter should be resolved in favour of the latter. Nothing contained in that instrument points decidedly to the direction that the principle of best interests of the child ought to prevail over other human rights, for example. While the principle of best interests of the child ought to guide the interpretation of provisions of secondary law, such as rules on jurisdiction or on family reunification, it is indeed questionable whether it always ought to take precedence on other values such as right to liberty or to effective judicial protection. It is, moreover, not convincing that the rights of children should prevail in light of the express provision of Article 3(3) TEU. It will be recalled that the article states that the Union 'shall promote (...) solidarity between generations and protection of the rights of the child' – but protection of a right does not mean primacy of the child's best interests over other considerations.

2. The criterion is self-defeating. Finally, a very forceful objection is that, in cases resembling child custody disputes, the principle is self-defeating if it is ascertained through the behaviour of adults. This section is only concerned with this kind of disputes, as the argument is not applicable to other sets of disputes (that ended up at the CJEU) because there are no conflicts between adults as to the 'allocation' of the child.

124. See the US cases cited in M. Freeman, *Article 3. The Best Interests of the Child*, p. 29.

125. The critique may therefore be void if Article 24(2) Charter is interpreted as meaning the best interest of children, of childhood, rather than of a given child in a given case.

126. Similar examples, and the necessary disclaimers, are in J. Elster, 54 *Chicago Law Review* (1987), p. 17 and following.

127. This incurs in the obvious problem of calculating the interests of the parties involved.

As Jon Elster explains, for situations similar to child custody cases ‘by making certain claims, or by acceding to certain proposals, one can reveal oneself to have a character that has a bearing on the resolution of the dispute’.¹²⁸ The behaviour of parties during the proceeding is indeed not only used by King Solomon in the Biblical episode,¹²⁹ but is also a factor to be considered by legislative provision (for example, in the United States, in Pennsylvania¹³⁰ or Alabama¹³¹). This may result a parent strategically adopt a behaviour so as to outguess the judge and to make it look like they are the party to be preferred: but then the criterion advocated by the Court in *Chavez-Vilchez* is not satisfying,¹³² because a parent may want to show the ability to take full responsibility for the child, and in order to do so the parent may have recourse to strategic behaviour (which might entail lying). Indeed, strategic behaviour might lead to a paradoxical situation in which ‘Solomon’s method – the use of behavior in custody proceedings to decide custody – can result in a Catch-22’, because cases may arise where ‘the more forcefully a parent presses a custody claim, the more he proves himself unfit for custody’¹³³ (this was the case in the extreme dispute decided by King Solomon).¹³⁴ Similarly, there are other reasons why a party may want to procrastinate: if it has more resources than the other or if it is in custody of the child and believes it is possible to get a favourable settlement the longer the legal proceedings take.¹³⁵ Even though the behaviour of parents is a question of fact, and thus for national authorities to consider, the CJEU suggests to take it into account.

Further, following the principle of best interests of the child may actually turn out to be detrimental to the child, because it may create incentive to litigation (for the parents or other parties involved) that, overall, are harmful to children in general.¹³⁶ In particular, the law thus construed creates an incentive of recurring to children (and children rights) for the purposes of claiming, for example, a right of residency.

Moreover, there is a case to be made that parents appeal to the impartial criterion of best interests of the child as a form of rationalization of their own self-interest¹³⁷ (admittedly, this incentive to ‘deception’ arises in any instance in which a party is required to show a criterion is met in order to gain something). While this is not, per se, a reason to abandon the criterion, it may have the effect of resulting in greater litigation.¹³⁸

128. J. Elster, 54 *Chicago Law Review* (1987), p. 5.

129. 1 Kings 3:13–19.

130. ‘The level of conflict between the parties and the willingness and ability of the parties to cooperate with one another.’

131. Alabama Code §30-3-153: ‘The agreement or lack of agreement of the parents on joint custody.’

132. Para. 71. Opinion of Advocate General Szpunar in Case C-133/15 *Chavez-Vilchez*, ‘[i]t seems to me relevant to ask whether it is consistent with EU law to restrict the right of a child who is a Union citizen to reside freely in the territory of the Union purely on the basis of considerations such as *the fact that it has not been established that the father would not be able to take full responsibility for care of the child*, where such a consideration is also equivalent to stating *that neither has it been established that he would be able to take responsibility for care of the child!* In that regard, it seems to me important to note that the referring court explained that it has not been established in the cases in question that a change in the custody arrangement is still a possibility.’

133. J. Elster, 54 *Chicago Law Review* (1987), p. 7.

134. 1 Kings 3:16–28.

135. J. Elster, 54 *Chicago Law Review* (1987), p. 24.

136. For the steps to reach this conclusion, J. Elster, 54 *Chicago Law Review* (1987), p. 25.

137. For an explanation of how people may rationalize self-interest as a form of deception, J. Elster, ‘Alchemies of the Mind: Transmutation and Misrepresentation’, 3 *Legal Theory* (1997), p. 133, 138.

138. *Ibid.*, p. 140: ‘In child-custody cases, both parents often convince themselves that he or she will be the better custodial parent – i.e., bring about the best outcome for the child whose welfare is supposed to be the impartial value promoted by

4. Conclusion

The notion of best interests of the child is applied to very different contexts and with different meanings, depending whether the context of parental responsibility matters (involving private international law rules on custody jurisdiction and the recognition and enforcement of custody judgments), or free movement of persons cases. In the first context, it is used as a determinant of the jurisdictional forum, and the criterion of proximity is stressed. In the second context, it is an objective that justified teleological interpretation of provisions of EU secondary law, especially in the Area of Freedom Security and Justice, but without resulting in an interpretation *contra legem*. The relationship between the Charter and secondary law, however, is more complex, as the latter also acts as limit to the right enshrined in the former. As a result, the case law provides no clear answer to the question of what ('secondary') considerations offset the best interests of the child (which is a 'primary consideration' in decisions concerning children).

The Court's case law is consistent in interpreting Article 20 and 21 TFEU to guarantee rights of free movement and residence to a child who has not exercised free movement and, derivatively, to a parent-like figure. In some (but not all) of these cases, the best interests of the child weighted in favour of that conclusion.

Deciding legal disputes on the basis of the best interests of the child may be objected to in principle, but the criticism is only convincing in child custody disputes or those resembling them: in other words, when there is disagreement between parents (or parent-like figures). An analytical distinction between the situations in which the best interests of the child is used as a determinant is warranted. When there is not a dispute between parents, the application of the best interests of the child is easier. Here, the principle is often used as guiding the interpretation of other rules of EU law. These are cases such as family reunification, cases in which the unaccompanied child is asylum seeker, certain free movement cases and so on. Here, the objection to the application of the best interests of the child as sole or primary determinant of the dispute can be made on practical grounds (it is difficult to ascertain the best interests) and on policy grounds (there are interests that are served best). This sort of policy argument, however, is unconvincing in the light of the Charter of fundamental rights. Albeit indeterminate, EU primary law mandates that the principle guide the case law of the Court, and be the primary – or even the sole – consideration to decide disputes.

If the dispute is or resembles one of child custody, the application of the criterion is more problematic because, as shown, the principle may be self-defeating, including in purely jurisdictional matters. In these cases, the principle is simply best not applied, and secondary law is best interpreted literally or with other teleological considerations. EU primary law, in Article 24(2) Charter, suggests that the Court ought to apply the principle widely. It could have done so in *Zambrano* and, one may venture to argue, in *Dano* – but it did not. If the criticism outlined in section 2 is convincing, the Court should have not applied the best interests of the child as sole determinant in *Chavez Vichez* – but it did.

What should the main criterion for deciding the case be, instead? Several proposals have been advanced – ranging from acting on incentive to litigation (for instance, by assuming a presumption

society: "I only want what is best for the child, and it just so happens that it will be best for the child to stay with me." It follows that each parent will tend to think, at least under the "best-interest" standard, that he or she is more likely to be granted custody by the court in case of litigation; hence, more litigation will be undertaken than if the parents had non-self-serving conceptions of what the interest of the child requires.'

in favour of either parent) to flipping a coin.¹³⁹ Given the current status of EU law, however, it is impossible to ignore the text of the Charter or to interpret it *contra legem*. The Charter, however, stands for the proposition that ‘the best interests of the child’ may be interpreted in the more robust sense of ‘best interests of children’ – a difference that may have significant repercussions both in individual cases and in the aggregate.

139. J. Goldstein, A. Freud and A. Solnit, *Beyond the Best Interests of the Child* (2d edition, Free Press, 1979), p. 153; J. Elster, 54 *Chicago Law Review* (1987), p. 45 concludes: ‘If the conjectural argument about the long-term educative effects is well-founded, randomization seems to be the best solution. If educative effects are minimal, a return to maternal presumption would seem to be called for.’