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THE EXCEPTIONAL UNFAIRNESS OF THE "EXCEPTIONAL AND EXTREMELY UNUSUAL HARDSHIP" TEST

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Momin bin Mohsin*

Abstract

Legislators often face criticism for introducing ambiguous terms into law. The "exceptional and extremely unusual hardship" (EEUH) standard in U.S. immigration law is one such prominent example. Delving into a historical analysis, the article tracks the evolution of the EEUH standard from its incorporation in the Immigration and Nationality Act of 1952 to its current applications. Through a comprehensive survey across different jurisdictions such as the UK, Canada, and Australia, the paper exposes the inadequacies of the EEUH standard, emphasizing its obsolescence. Advocating for a paradigmatic reassessment, it proposes the replacement of the EEUH standard with the "best interest of the child" standard. Central to this proposal is a firm conviction in broadening judicial considerations to encompass not only immediate removal scenarios but also the critical impacts on the mental and physical well-being of citizen children. Highlighting the importance of the child's citizenship status in removal deliberations, this perspective emphasizes the increasing recognition of the inherent rights vested in citizen children. Fundamentally advocating for a transformative shift in removal cases, it proposes a more inclusive and child-centric approach grounded in the best interest of the child standard.

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Introduction

The aim of this paper is to examine how the United States applies the "exceptional and extremely unusual hardship" (EEUH) standard in cases of removal, specifically focusing on situations where the individual facing removal has a child who is a U.S. national. First, Part II begins by discussing the EEUH standard under the 1952 Immigration and Nationality Act.[1] Subsequently, it delves into the evolution of the EEUH standard post-1952, transitioning to an "extreme hardship" test, and discusses the reintroduction of the EEUH in 1996.[2] This section also scrutinizes how courts have interpreted and applied the EEUH standard, with a specific focus on situations involving U.S. national children.

Shifting to Part III, the analysis broadens to encompass international perspectives on cancellation of removal cases, proposing that the "best interest of the child" standard might offer a more suitable alternative to the EEUH test. Support for this proposition involves an exploration of international obligations outlined in the United Nations Convention on the Rights of the Child.[3] Furthermore, this part will examine how the United Kingdom applied the "best interest of the child" standard in relief for removal cases through its *ZH (Tanzania) v. SSHD* decision.[4] It will also look at the Australian High Court's decision in *MIEA v. Teoh*, and succeeding judgments in *Vaitaki v. MIEA*, and *Wan v. MIMA*.[5] In addition, it will also analyze the Canadian judgment in *Baker v. Canada* and *Denis v. Canada*, to assess how Canadian courts have adopted and implemented "the best interest of the child" standard.[6] Finally, Part IV offers solutions to reform the EEUH test in light of the comparative international jurisprudence provided.

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[1] Act of June 27, 1952, Pub. L. No. 82-414, § 244(a), 66 Stat. 163, 214.
[2] 8 U.S.C. § 1254(a)(1) (1982); Omnibus Consolidated Appropriations Act § 309(c)(5)(A), Pub. L. No. 104-208, 110 Stat. 3009 (1997).
[3] Declaration of the Rights of the Child, G.A. Res. 1386 (XIV), princ. 2, 14 U.N. GAOR Supp. No. 16, U.N. Doc. A/4354 (Nov. 20, 1959).
[4] ZH (Tanzania) (FC) (Appellant) v. Sec'y of State for the Home Dep't (Respondent), [2011] UKSC 4, judgment, (on appeal from [2009] EWCA Civ. 691).
[5] Minister of State for Immigr. and Ethnic Affs. v. Teoh (1995), 183 CLR 273 (Austl.); Vaitaki v. Minister for Immigr. and Ethnic Affairs (1998) 150 ALR 608 (Austl.); Wan v. Minister for Immigr. & Multicultural Affairs, (2001) 107 FCR 133(Austl.).
[6] Baker v. Canada (Minister of Citizenship and Immigr.), [1999] 2 S.C.R. 817 (Can.); Denis v. Canada (MCI), 2015 FC 65 (Can.).

I. The EEUH Standard in the United States

A. Pre 1952 Regime

Prior to 1940, the immigration laws of the United States adhered to stringent standards mandating the deportation of any immigrant found to be residing in the country illegally.[7] This is because the Immigration Act of 1917 (hereafter Act 1917) required the Secretary of Labor to deport any individual who entered or remained in the United States unlawfully.[8] The only means available for a deportable person to legally remain in the United States was to have their status altered through a private bill enacted by Congress, and presented to the President in accordance with procedures set in Article 1, § 7 of the Constitution.[9]

In 1940, Congress included a provision in the Alien Registration Act of 1940, which allowed the Attorney General to suspend deportation of illegal immigrants who met certain conditions.[10] These conditions stipulated that an illegal immigrants residence in the United States could be legalized or their deportation could be suspended if they proved: 1) five years of good moral character while living in the United States; and 2) deportation would result in "serious economic detriment" to a parent, minor child, or a spouse who was a United States citizen or a lawful permanent resident.[11] In the 1948 amendment, Congress asked the Attorney General to suspend deportation of illegal immigrants who did not possess family ties, but could establish seven years of residence in the United States.[12]

In the 1950's, there was widespread criticism that illegal immigrants were abusing the suspension of deportation proceedings and were being favored excessively.[13] Responding to the criticism, Congress passed the Internal Security Act of 1950, which considerably broadened the deportation powers of the Attorney General.[14] The Act gave the Attorney General the power to detain illegal immigrants, and supervise their activities pending the execution of deportation orders.[15] It also narrowed the power of the Attorney General to suspend deportations.[16] Finally, all immigration and nationality laws were codified by the Immigration and Nationality Act of 1952.[17]

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[7] William C.B. Underwood, *Unreviewable Discretionary Justice: The New Extreme Hardship in Cancellation of Deportation Cases*, 72 Ind L. J. 885, 888 (1997).
[8] *See* Immigration Act of 1917, Pub. L. No. 64-301, 39 Stat. 874.
[9] *See* INS v. Chadha, 462 U.S. 919, 933 (1983).
[10] Ch. 439, tit. II, 54 Stat. 670; Susan L. Kamlet, *Judicial Review of "Extreme Hardship' in Suspension of Deportation Cases*, 34 Am. U. L. Rev. 175, 184 (1984).
[11] Ch. 439, tit. II, § 19(c)(2), 54 Stat. 672.
[12] *See* Act of July 1, 1948, 62 Stat. 1206; Underwood, *supra* note 1, at 889.
[13] Underwood, supra *note* 7, at 889.
[14] Act of Sept. 23, 1950, c. 1024, § 22, 62 STAT. 1006.
[15] *Id*. at 1010-12.
[16] *Id.* (The Act denied the Attorney General the authority to deport any illegal immigrant who would be subject to persecution in his or her homeland).
[17] Will Maslow, *Recasting our Deportation Law: Proposal For Reform*, 56 Colum. L. Rev. 309, 314 (1956).

B. Post 1952

The Immigration and Nationality Act of 1952 changed the standard for suspension of deportation.[18] Under section 244(a), the Attorney General could suspend the deportation of an alien if:

> (1) the alien had remained in the United States for a certain time period (this depended on the seriousness of the deportation grounds), (2) the alien had in all his time in the United States maintained good moral character, and (3) that removal of the alien would result in exceptional and extremely unusual hardship to the alien or to his spouse, parent or child — who is a United States citizen or a lawful permanent resident.[19]

There were several differences between the Alien Registration Act of 1940 and the Immigration and Nationality Act of 1952. First, the "serious economic detriment" standard was changed to the "exceptional and extremely unusual hardship" standard.[20] Second, while the 1940 regime only allowed an illegal immigrant to show serious economic detriment to a parent, minor child, or a spouse who was a United States citizen or a lawful permanent resident, the 1952 regime allowed an illegal immigrant to show they would *personally* suffer exceptional and extremely unusual hardship upon removal.[21] The reason behind the use of the "exceptional and extremely unusual hardship standard" was congressional determination that suspension should only be granted in cases where such deportation is unconscionable.[22] While an average of 4,021 suspension cases per year were approved under the 1940 regime, this number fell down dramatically to an average of 207 per year under the 1952 regime.[23] Consequently, the higher threshold imposed by Congress had its desired effect.

Since Congress never clearly defined the "exceptional and extremely unusual hardship" standard, the Board of Immigration Appeals (BIA) identified factors to guide its decision making process in the case of *In re S.*.[24] In this case, the respondent was a native of the British West Indies.[25] The respondent decided to remain in the United States, because she had relatives in the United States – and had no remaining relatives in her home country.[26] In determining whether her removal should be suspended, the BIA considered the following factors: (1) the length of residence in the United States, including the manner of entry; (2) the family ties in the United States; (3) the possibility of obtaining a visa abroad; (4) the financial burden on the illegal immigrant of having to go abroad to obtain a visa; and (5) the health and age of the illegal immigrant.[27]

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[18] While the term "alien" is a legal term of art used in this statute, alternative terms will be employed when referring to it outside of direct quotations; Act of June 27, 1952, Pub. L. No. 82-414, § 244(a), 66 Stat. 163, 214.
[19] *Id.* at 214.
[20] *Id*; *see also* Ch. 439, tit. II, § 19(c)(2), 54 Stat. 672.
[21] Ch. 439, tit. II, § 19(c)(2), 54 Stat. 672; § 244(a), 66 Stat. at 214.
[22] Kamlet, *supra* note 10, at 179.
[23] Maslow, *supra* note 17, at 344.
[24] The Board of Immigration Appeals is the highest administrative body for interpreting and applying immigration laws. *See* U.S. DEP'T OF JUSTICE BD. OF IMMIGR. APPEALS, S., 5 I&N Dec. 409, 410-411 (Bd. of Immigr. Appeals 1953), available at: https://www.justice.gov/eoir/board-of-immigration-appeals.
[25] In re S., 5 I&N Dec. at 409.
[26] *Id*.
[27] *Id.* at 411.

Furthermore, the BIA asserted that establishing "exceptional and unusual hardship" did not require the respondent to establish the presence of all these factors.[28] Instead, what was necessary was the presence of several of these factors.[29] In this case, the BIA found that the deportation of the respondent would constitute exceptional and extremely unusual hardship, because: (1) she had lived in the United States for some time, (2) it would take her time to obtain a United States visa from the British West Indies, and (3) she had limited assets.[30]

C. A Change in The EEUH Test

In 1962, Congress transitioned the standard for removal cases from EEUH to "extreme hardship."[31] Like the previous framework, Congress did not provide a specific definition for "extreme hardship", leaving the courts with the flexibility to formulate their own definition.[32] Recognizing the ambiguity of the term, the courts recognized that the term "extreme hardship" was not self-explanatory, allowing for reasonable disagreement on its meaning.[33] Despite this lack of precision, there was consensus that the new "extreme hardship" was a more lenient standard than the EEUH test.[34]

Even with this amendment, the BIA remained reluctant to formulate clear factors to define "extreme hardship."[35] In addition to the factors outlined in *In re S.*, the Senate Committee recommended that the BIA consider the economic and political situation in the illegal immigrant's home country, the illegal immigrant's occupation, and business amongst other things.[36] However, because of a lack of clear guidance from both Congress and the BIA, the extreme hardship standard remained controversial and ambiguous.[37]

Until 1981, the courts had a more flexible approach to the definition of "extreme hardship."[38] Courts were receptive to identifying hardship in cases where an individual faced the prospect of departing the United States.[39] However, the reading adopted by the Supreme Court in the case of *INS v. Jong Ha Wang* appeared to adopt a more restrictive reading.[40] In this case, the respondent husband and wife were citizens of Korea, and had entered the United States as nonimmigrant traders in 1970.[41] They were allowed to

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[28] *Id.* at 410.
[29] *Id.*
[30] In re S, *supra* note 25, at 411.
[31] 8 U.S.C. § 1254(a)(1) (1982).
[32] Kamlet, *supra* note 10, at 178.
[33] INS v. Wang, 450 U.S. 139, 144 (1981) (per curiam); *see also* Bueno-Carrillo v. Landon, 682 F.2d 143, 145 (7th Cir. 1982) (holding that term 'extreme hardship' is not self-explanatory); Banks v. INS, 594 F.2d 760, 762 (9th Cir. 1979) (*per curiam*) (finding that hard and fast rules do not bind determinations of extreme hardship. The BIA must use discretion to make decisions on a case by case basis).
[34] Wang v. INS, 622 F.2d 1341, 1345 (9th Cir. 1980) (en banc), *rev'd on other grounds per curiam*, 450 U.S. 139 (1981). The United States Ninth Circuit Court of Appeals held that courts generally agree that Congress intended to lower the degree of hardship required for suspension of deportation cases.
[35] Kamlet, *supra* note 10, at 179.
[36] H.R. Rep. No. 506, 94th Cong., 1st Sess. 17 (1975).
[37] Kamlet, *supra* note 10, at 179-80.
[38] Nat'l Immigr. Project of the Nat'l Law. Guild, 1 Immigr. L & Defense, § 8.24 (Mar. 2023), available at: https://1.next.westlaw.com/Document/Ie7fee67a6a4511d98805bd3a8e660ff4/View/FullText.html?ppcid=c6888c8170584f40be4835fc6e54983e&originationContext=documenttoc&transitionType=CategoryPageItem&contextData=%28sc.Category%29.
[39] *Id.*
[40] INS v. Jong Ha Wang, 450 U.S. 139 (1981).
[41] *Id.* at 141.

remain in the United States until 1972, but they remained beyond that date without lawful permission.[42]

In 1974, they were found to be deportable, and in 1975, they applied for adjustment of their status.[43] In determining whether an individual would suffer hardship, the Supreme Court held that the overall situation must show a more significant difficulty than the typical decrease in living standards experienced when moving from the United States to another country.[44] Furthermore, the Court held that:

> [t]he Attorney General and his delegates have the authority to construe 'extreme hardship' narrowly should they deem it wise to do so. Such a narrow interpretation is consistent with the 'extreme hardship' language, which itself indicates the exceptional nature of the suspension remedy.[45]

This highlights that, instead of providing explicit guidance, the Court empowered the Attorney General with broad discretion, enabling a tailored interpretation of what qualifies as extreme hardship in each case.

D. A Return to The EEUH Test

In 1996, Congress introduced the Immigration Reform and Immigrant Responsibility Act (IIRIRA).[46] The Act limited relief from removal in various ways.[47] The suspension of deportation provision of Immigration Nationality Act was replaced by a form of relief entitled "Cancellation of Removal and Adjustment of Status for Certain Nonpermanent Residents." [48] In order to qualify for cancellation of removal under this provision, an illegal immigrant: (1) must have been present in the United States for at least ten years, (2) should have good moral character, and (3) should establish that removal would result in "exceptional and extremely unusual hardship" to the illegal immigrant's spouse, parent or child – who is a United States citizen or a lawful permanent resident.[49]

The reforms in 1996 brought two major changes. First, the phrase "extreme hardship" was changed to "exceptional and extremely unusual hardship."[50] Second, under the new test, hardship resulting from removal was not considered.[51] Under the new test, only hardship to an illegal immigrant's United States citizen or lawful permanent resident spouse, parent or child would be considered.[52]

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[42] *Id.*
[43] *Id.*
[44] *Id*. at 142-5.
[45] Jong Ha Wang, *supra* note 40.
[46] Omnibus Consolidated Appropriations Act § 309(c)(5)(A), Pub. L. No. 104-208, 110 Stat. 3009 (1997).
[47] Allison Brownell Tirres*, Mercy In Immigration Law*, B.Y.U. L.Rev 1563, 1587 (2014).
[48] In re Monreal Aguinaga, 23 I. & N. Dec. 56, 58 (BIA 2001) (hereinafter, "Monreal"); *see also* 8 U.S.C. § 1229b.
[49] *See* 8 U.S.C. § 1229b(b)(1).
[50] *See* 8 U.S.C. § 1229b(b)(1); In re Monreal Aguinaga, 23 I. & N. Dec. at 58 (citing 8 U.S.C. § 1254(a)(1)).
[51] 8 U.S.C. § 1229b(b)(1).
[52] Monreal, *supra* note 48, at 57.

1. What Does Exceptional and Extremely Unusual Hardship Mean?

Still to this day, Congress has never defined what exceptional and extremely unusual hardship means. The following cases illustrate how the lack of clarity has led courts to different conclusions on similar fact patterns. In the case of *In re Monreal-Aguinaga*, the respondent was a thirty-four year old citizen of Mexico, who had been living in the United States since the age of fourteen.[53] The respondent's wife voluntarily left for Mexico before the respondent's cancellation of removal hearing, and took their infant United States citizen child with her.[54] The remaining two older children: a twelve year old, and an eight year old – both of whom were United States citizen's stayed with the respondent.[55] The respondent's seven siblings, and parents were all lawful United States residents.[56] The primary concern before the BIA revolved around determining whether the deportation of the respondent would result in exceptional and extremely unusual hardship for his United States citizen children and lawful permanent resident parents.[57]

The BIA wrestled with how to define EEUH, and deliberated on whether the EEUH standard under the 1996 amendment was the same as the extreme hardship standard under the1952 Act.[58] Ultimately, the BIA concluded the EEUH standard was higher than the extreme hardship standard, but EEUH did not require a finding of unconscionability as was required under the 1952 Act.[59] Although the BIA distinguished the new EEUH standard from the older standard, it considered similar factors used by previous courts to assess extreme hardship.[60] In this case, the BIA found that the respondent's removal would not result in any exceptional and extremely unusual hardship to his United States citizen children or his lawful permanent resident parents.[61]

While it was clear that the respondent's parents would not suffer EEUH (since they had seven other children in the United States), the BIA's decision on the impact of the respondent's removal on his children is puzzling. The majority disregarded the reality that if the children accompanied their father to Mexico, they would be leaving their school, friends, and family behind – to arrive in a new country, with fewer education opportunities and poorer economic prospects.[62]

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[53] Monreal, *supra* note 48, at 57.
[54] Monreal, *supra* note 48, at 57.
[55] Monreal, *supra* note 48, at 57.
[56] Monreal, *supra* note 48, at 57.
[57] Monreal, *supra* note 48, at 58.
[58] Monreal, *supra* note 48, at 58-9.
[59] Monreal, *supra* note 48, at 59-60.
[60] Monreal, *supra* note 48, at 63.
[61] Monreal, *supra* note 48, at 64.
[62] Lizzie Bird, *The Best Interests of the Child or the State? The Rights of the Child in Non-LPR Cancellation of Removal*, at 1 (Dec. 17, 2018) (Master's Theses, University of San Francisco).

The dissent pointed out the perceived inconsistency of the majority decision in the following words:

> [The children] face a loss of their home, their childhood roots, their friends, and their customary family circle. They face separation from their grandparents. They face a completely different school system and classes taught in a completely different language. Are the hardships resulting from these involuntary changes 'truly exceptional'? [63]

Monreal was followed by a similar BIA decision in the case of *In re Andazola Rivas*.[64] Like *Monreal*, this case centered around whether the removal of the respondent would result in "exceptional and extremely unusual hardship" to her two United States citizen children.[65] In this case, the respondent was a thirty year old citizen of Mexico, who had been employed by a company that provided her with health insurance and a savings plan.[66] The respondent was able to buy a house, had savings, and owned a vehicle.[67] As per the respondent's admission, she had no relatives in Mexico, and the respondent's mother took care of the children.[68] Furthermore, the respondent testified that although her partner lived with her, he did not have a stable source of income.[69] One of the respondent's concerns was that if she were removed, the standard of education that her children would receive in Mexico would not be at par with the standard of education in the United States.[70]

The BIA found that removal of the respondent would not subject her children to exceptional and extremely unusual hardship.[71] The BIA provided a weak rebuttal to the respondent's contentions. It failed to take into account the respondent's point about the disparity of the standard in education between Mexico and the United States, and stated that, "[the] respondent has not shown that her children would be deprived of all schooling or of an opportunity to obtain any education."[72] In both *Monreal* and *Andazola*, the courts disregarded four key factors: (1) familial separation; (2) economic loss; (3) adverse psychological and social outcomes; and (4) length of residence considerations.[73] These decisions demonstrate the immense difficulty respondents had in seeking cancellation of removal under the 1996 amendment.[74]

In both these cases, the BIA did not incorporate any literature addressing the impact that relocating to a new place or school can have on children. Numerous studies have found that switching schools for reasons other than grade promotion increases the

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[63] Monreal, *supra* note 48, at 71.
[64] In re Andazola, 23 I. & N. Dec. 319, 319 (BIA 2002).
[65] *Id.* at 319.
[66] *Id.* at 320.
[67] *Id*.
[68] *Id*.
[69] *Id*.
[70] In re Andazola, *supra* note 64, at 320.
[71] In re Andazola, *supra* note 64, at 324.
[72] In re Andazola, *supra* note 64, at 323.
[73] Lucy Y. Twimasi, *Hardship Reconstructed: Developing Comprehensive Legal Interpretation and Policy Congruence in INA § 240A(b)'s Exceptional and Extremely Unusual Hardship Standard*, 34 Chicanah/O-Latina/O L. Rev. 35, 48 (2016).
[74] *Id.*

likelihood of dropping out.[75] Children, accompanying their deported parents often begin to lose their aspirations and dreams, and have lower vocational and educational readiness.[76] Furthermore, research has also shown that such children feel like exiles, and experience issues with communication due to a language barrier.[77]

Although the dissents in *Andazola* did not quote on any literature, the dissenting judges recognized the impediments that the children of the respondent would face upon their return to Mexico. The dissent stated:

> [T]he removal of the United States citizen children in this case is not merely a return to a country with a lower standard of living and a poor educational system. It is, in essence, a method of depriving the citizen children of the valued education that they currently enjoy in the United States.[78]

The dissent also recognized the respondent's daughter "would suffer academically [because] she [had] limited knowledge of 'academic' Spanish."[79] This shows that the majority judgment overlooked psychosocial considerations and encountered difficulties in appropriately applying the law to the facts, particularly in assessing the potential effects of the educational system.

2. A Change of Heart?

In re Gonzalez Recinas, the BIA finally found a set of facts that could constitute EEUH.[80] In this case, the respondent was a thirty-nine year old Mexican national, who was the mother of four U.S. citizen children and two non-citizen children.[81] The respondent's parents were lawful permanent residents, while her siblings were citizens of the United States.[82] The respondent's four youngest children who had never been to Mexico, did not speak Spanish and were dependent upon her.[83] The respondent had no relatives in Mexico who could assist her with her return.[84] Moreover, the respondent's former husband was not actively involved with the family and provided no support to the family.[85]

The BIA found the facts of this case were distinguishable from *Monreal* and *Andazola*.[86] The BIA held that unlike the children in those two cases, the respondent's children were entirely dependent on their single mother for support.[87] Another aspect that distinguished the respondent's case from *Andazola* was the lack of presence of the

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[75] Nan Marie Astone & Sara S. McLanahan, *Family Structure, Residential Mobility, and School Dropout: A Research Note*, 31 DEMOGRAPHY (4) 575, 576 (1994).
[76] Kalina Brabeck et al., *The Psychosocial Impact Of Detention And Deportation On U.S. Migrant Children And Families*, 84:5 AM. J. ORTHOPSYCHIATRY 496, 501 (2014).
[77] *Id.*
[78] In re Andazola, *supra* note 64, at 328-29.
[79] In re Andazola, *supra* note 64, at 335.
[80] In re Gonzalez-Recinas, 23 I.&N. Dec. 467 (BIA 2002).
[81] *Id.* at 467.
[82] *Id*.
[83] *Id*. at. 470.
[84] *Id*.
[85] In re Gonzalez, *supra* note 80, at 470.
[86] In re Gonzalez, *supra* note 80, at 470.
[87] In re Gonzalez, *supra* note 80, at 471.

father of the children.[88] Finally, the BIA found that this case fell into the "outer limit of the narrow spectrum of cases in which the exceptional and extremely unusual hardship standard will be met."[89]

The BIA's attempt to distinguish *Gonzalez* from *Monreal* and *Andazola* does not make sense. Like *Gonzalez*, the children in *Andazola* were largely financially dependent on their mother.[90] The father of the children in *Andazola* did not have a stable source of income and "sometimes" contributed to the support of the family.[91] Furthermore, in *Gonzalez*, the BIA focused on the hardship that the respondent would face if she were separated from her extended family in the United States.[92] However, the respondent in *Monreal* had United States permanent resident or citizen family members as well – yet the impact of deportation of the respondent was not fully explored.[93] These inconsistencies in case law have led to a failure to establish clear criteria for what qualifies as exceptional and extremely unusual hardship.

3. More Recent Case Law

The high bar set in *Monreal* and *Andazola* continues to guide the court's analysis of exceptional and extremely unusual hardship in cancellation of removal cases.[94] A few cases illustrate this assertion. In *Lojano v. Holder*, the Court of Appeals affirmed a BIA determination that the removal of the respondent would not hurt the education, obesity, and illness of his son Jonathan.[95] In *Ayeni v. Holder*, the Court of Appeals rejected the petitioner's contention that the BIA had neglected to weigh the seriousness of his child's asthma in ordering his removal.[96]

In addition, in *Mendez-Moranchel v. Ashcroft*, Mr. Mendez, who was subject to deportation, argued that his removal would cause exceptional and extremely unusual hardship to his son.[97] Mr. Mendez argued that his son had a disability that required him to receive special language instruction.[98] Due to this disability, his son could not speak English or Spanish.[99] As a result, Mr. Mendez argued that if he took his son to Mexico, he would be denied a proper education.[100] Despite this, the BIA found that Mr. Mendez's removal would not constitute exceptional and extremely unusual hardship to his son.[101]

In a more recent case, *In re J-J-G,*[102] the respondent was a Guatemalan citizen, who was present in the United States without being admitted or paroled.[103] The respondent applied for relief from removal, and argued his removal would cause exceptional and extremely unusual hardship to his five United States children, and his

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[88] In re Gonzalez, *supra* note 80, at 471.
[89] In re Gonzalez, *supra* note 80, at 471.
[90] *See* In re Andazola, *supra* note 64, at 320.
[91] *See* In re Andazola, *supra* note 64, at 320.
[92] In re Gonzalez, *supra* note 80, at 472.
[93] Monreal, *supra* note 48, at 65.
[94] *See* Lojano v. Holder, 594 Fed. App'x. 13, 15 (2d Cir. 2014); Ayeni v. Holder, 617 F.3d 67, 71 (1st Cir. 2010).
[95] Lojano v. Holder, 594 Fed. App'x. 13, 15 (2d Cir. 2014).
[96] Ayeni v. Holder, 617 F.3d 67, 71 (1st Cir. 2010).
[97] Mendez- Moranchel v. Ashcroft, 338 F.3d 176, 177 (3d Cir. 2003).
[98] *Id.*
[99] *Id*.
[100] *Id.*
[101] *Id.*
[102] In re J-J-G, 27 I.&N. Dec. 808 (BIA 2020).
[103] *Id.* at 809.

lawful permanent resident mother.[104] The respondent testified that his eight year old daughter had been diagnosed with hyperthyroidism, and required consistent medical treatment.[105] Without treatment, her metabolic functions would be impaired.[106] Since state benefits covered the medical cost of treatment in the United States, the father claimed he would be unable to cover the cost of treatment in Guatemala.[107] In support of this contention, the respondent's partner testified that the cost of treatment in Guatemala was $1,100. This was information that she had acquired from the internet.[108] To the contrary, the respondent's mother claimed that she had previously received medical care for free in Guatemala, and believed that medical care was still provided for free.[109] Ultimately, the BIA concluded there was no evidence the respondent's daughter would have to discontinue her treatment if she moved to Guatemala.[110]

In addition, the respondent testified his elder son received counseling, and had been diagnosed with "Anxiety Disorder, unspecified" and "Attention-deficit hyperactivity disorder, unspecified."[111] The BIA affirmed the immigration judge's finding that because the child had received coping strategies and had demonstrated no requirement for additional treatment for attention deficit disorders, he did not suffer from any on-going medical condition.[112] As a result, the BIA concluded that the respondent's removal would not result in exceptional and extremely unusual hardship to his children.[113]

It could be argued that there was not enough evidence concerning the impact deportation of a parent has on the mental health of a child, when *Monreal* and *Andazola* were decided. However, this argument does not extend to the 2020 case of *In re J-J-G*. There is evidence that children, who are United States citizens, tend to have a higher risk of suffering from negative psychological effects when their parents are vulnerable to deportation.[114] Furthermore, the constant dread of deportation and detention hinders the development trajectories of such children.[115] For example, children of undocumented parents demonstrate lower enrollment rates in preschool and public school programs.[116] Furthermore, the actual arrest, detention, and deportation of the parents contributes to the trauma, exacerbating the detrimental impact on the mental health of the children.[117]

The legal vulnerability of parents and their encounters with detention and deportation were notably linked to various adverse effects on children, including depression, anxiety, separation fears, social isolation, self-stigma, aggression, and withdrawal.[118] In the case of *In re J-J-G,* the BIA assumed that because the respondent's son had been provided with anxiety managing techniques, which included *watching a*

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[104] *Id.*
[105] *Id.*
[106] *Id.*
[107] *Id.*
[108] In re J-J-G, *supra* note 102, at 809.
[109] In re J-J-G, *supra* note 102, at 809.
[110] In re J-J-G, *supra* note 102, at 810.
[111] In re J-J-G, *supra* note 102, at 809.
[112] In re J-J-G, *supra* note 102, at 813.
[113] In re J-J-G, *supra* note 102, at 817.
[114] Zayas, Aguilar-Gaxiola & Yoon, *The Distress of Citizen-Children with Detained and Deported Parents*, 24 (11) J Child Fam Stud. 24 3213, 3213 (2015), available at: https://doi.org/10.1007%2Fs10826-015-0124-8.
[115] *Id.*
[116] *Id.* at 3214.
[117] *Id.* at 3213.
[118] *Id.* at 3215.

few scary movies, he had no on-going medical condition.[119] The psychological evidence and research shows that the court's opinion cannot be right.

II. A Comparative Analysis of Different Legal Regimes

The EEUH standard is a relic of the past. The subsequent section shows as compared to various other common-law nations, the United States continues to adopt a very stringent and narrow approach to the EEUH standard.

A. International Law

In the international context, the idea of the best interest of the child being most important grew from the United Nations Declaration on the Rights of the Child.[120] Subsequently, the standard was incorporated in the United Nations Convention on the Rights of Child (CRC).[121] The best interest of the child standard found in Article 3 of the CRC states the following:

> 1. 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.[122]
>
> 2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.[123]

This standard has been termed as the "umbrella provision" and is often used in the interpretation for other rights and articles enshrined in the CRC.[124] The United States became a signatory to the CRC in 1995.[125] However, since the United States has not ratified the CRC, the best interest of the child approach is not applied in the immigration system.[126]

An argument can be made that even if the United States has not ratified the CRC, the best interest of the child standard should still apply via enforcement of customary

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[119] In re J-J-G, *supra* note 102, at 809-13.
[120] Declaration of the Rights of the Child, G.A. Res. 1386 (XIV), princ. 2, 14 U.N. GAOR Supp. No. 16, U.N. Doc. A/4354 (Nov. 20, 1959).
[121] Convention on the Rights of the Child (CRC), G.A. Res. 44/25, U.N. Doc. A/RES/44/25 (Nov. 20, 1989).
[122] *Id.* at art. 3(1) (Nov. 20, 1989).
[123] *Id.* at art. 3(2) (Nov. 20, 1989).
[124] *See* Jonathan Todres, *Emerging Limitations on the Rights of the Child: The U.N. Convention on the Rights of the Child and Its Early Case Law*, 30 Colum. Hum. Rts. L. Rev. 159, 171 (1998).
[125] Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2006, at 328, U.N. Doc. ST/LEG/SER.E/25 (Vol. I) (2007), available at http:/ / treaties.un.org/doc/source/ publications/MTDSG/ English-l.pdf; *See* Luisa Blanchfield, Cong. Research Serv., R40484, The United Nations Convention On the Rights Of the Child 1 (2013).
[126] *See* Luisa Blanchfield, Cong. Research Serv., R40484, The United Nations Convention On the Rights Of the Child 1 (2013)

international law.[127] A body of rules is classified as customary international law: (1) if there is a general and consistent state practice on the given issue, and (2) to the extent that such a practice exists, states have engaged in it out of a sense of international legal obligation.[128] The CRC is an internationally recognized treaty that has been ratified by the representative group of nations.[129] Thus, the CRC is acknowledged to be part of customary international law.[130] Consequently, despite the absence of ratification by the United States, the rights delineated in the CRC may be deemed binding.[131]

B. The United Kingdom

The decision of the Supreme Court in *ZH (Tanzania) v. SSHD* shows how the best interest of the child standard is used in relief of removal cases in the United Kingdom.[132] This case involved a Tanzanian national (mother) who arrived in the United Kingdom in 1995.[133] In 1997, she met a British national (father) and had two children – a daughter T aged twelve, and a son aged nine called J.[134]

Both children were British citizens, and had lived their entire lives in the United Kingdom.[135] The couple eventually separated, and the father was diagnosed with HIV — forcing him to live on disability benefits.[136] The mother unsuccessfully applied for asylum thrice, with her immigration history described by the court as "appalling."[137] After her former husband's HIV diagnosis, she made fresh representations to obtain relief from removal.[138] The mother argued that removing her would constitute disproportionate interference with her "right to respect for private and family life," guaranteed by Article 8 of the European Convention on Human Rights (ECHR).[139]

The first–tier immigration tribunal held that the British children could reasonably be expected to follow their mother to Tanzania.[140] The rationale of the tribunal was that Tanzania was not an uncivilized place, and their "mother must have told them about it."[141] The tribunal also found that the father could visit the children in Tanzania, and that his HIV status or his financial circumstances were not an obstacle to such visits.[142] As a result, the immigration tribunal rejected the mother's application.[143]

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[127] *See* Chelsea Padilla-Frankel, *Contemporary Theory on Customary International Law and Human Rights Violations in the United States: Languishing Behind Bars - Juveniles Sentenced to Life Without Parole*, 33 Ariz. J. Int'l & Comp. L. 803 (2016).
[128] Ryan M. Scoville, *Finding Customary International Law*, 101 Iowa L. Rev. 1893, 1895 (2016).
[129] Padilla-Frankel, *supra* note 127, at 806.
[130] *See* Erica Stief, *Impractical Relief and the Innocent Victims: How United States Immigration Law Ignores the Rights of Citizen Children*, 79 UMKC L. Rev. 477 (2010).
[131] Bird, *supra* note 62, at p. 17.
[132] *See generally* ZH, UKSC 4 *supra* note 4.
[133] ZH, UKSC 4 *supra* note 4, at ¶ 2.
[134] ZH, UKSC 4 *supra* note 4, at ¶ 2.
[135] ZH, UKSC 4 *supra* note 4, at ¶ 2.
[136] ZH, UKSC 4 *supra* note 4, at ¶ 2.
[137] ZH, UKSC 4 *supra* note 4, at ¶ 2.
[138] ZH, UKSC 4, *supra* note 4, at ¶ 3.
[139] ZH, UKSC 4, *supra* note 4, at ¶ 5.
[140] ZH (Tanzania) v. Sec'y of State for the Home Dep't, [2009] EWCA Civ 691, ¶ 27.
[141] ZH, UKSC 4, *supra* note 4, at ¶ 3.
[142] ZH, UKSC 4, *supra* note 4, at ¶ 4.
[143] ZH, UKSC 4, *supra* note 4, at ¶ 4.

The Supreme Court reversed, and held for the mother.[144] Writing for an unanimous Supreme Court, Baroness Hale emphasized that the best interest of the child standard was not solely confined to the care of children within the United Kingdom but also extended to considerations of immigration, deportation, and removal, emphasizing its relevance to the decision-making process itself.[145] Therefore, in making proportionality assessments under Article 8 of the ECHR, the best interest of the child must be a primary consideration.[146]

1. What Does the "Best Interest of the Child" Standard Mean?

Baroness Hale *in ZH (Tanzania) v. SSHD* provided a roadmap of factors to determine the best interests of a child.[147] The Court recognized "best interest" broadly referred to the well-being of a child and involved assessing whether it was reasonable to expect the child to live in another country.[148] Other factors that would require consideration were: (1) the child's level of integration in the United Kingdom, and the length of absence from the other country, (2) where and with whom the child is to live and the arrangements for looking after the child in the other country, and (3) the strength of the child's relationship with parents or other family members which will be severed if the child moves away.[149] Furthermore, the Court recognized that although nationality of the child was not a "trump card," nationality was important in assessing the best interests of the child.[150]

Applying these principles, the Supreme Court held that the children were British, and had an unqualified right of abode in the United Kingdom.[151] They had always lived in the United Kingdom where they were educated and had social connections within the community.[152] Thus, it was not enough to say that the young children could readily adapt to life in another country.[153] In addition, the Court noted the intrinsic value of citizenship should not be downplayed.[154] As British nationals, the children had rights they would be unable to exercise if they moved to another country.[155] Such a move would make them lose the advantage of growing up and being educated in their own country (the United Kingdom), and in their own language.[156]

If the best interest standard as developed by the United Kingdom Supreme Court was applied to the cases of *Monreal* and *Andazola*, the decision in those cases would be different. Like *In re Andazola*, the issue of educational standards arose in *ZH (Tanzania)*.[157] In *Andazola*, the BIA overlooked this issue and stated "[the] respondent has not shown that her children would be deprived of all schooling or of an opportunity

[144] ZH, UKSC 4, *supra* note 4, at¶ 18.
[145] ZH, UKSC 4, *supra* note 4, at ¶ 12.
[146] ZH, UKSC 4, *supra* note 4, at ¶ 16.
[147] ZH, UKSC 4, *supra* note 4, at ¶ 15.
[148] ZH, UKSC 4, *supra* note 4, at ¶ 15.
[149] ZH, UKSC 4, *supra* note 4, at ¶ 29.
[150] ZH, UKSC 4, *supra* note 4, at ¶ 15.
[151] ZH, UKSC 4, *supra* note 4, at ¶ 31.
[152] ZH, UKSC 4, *supra* note 4, at ¶ 31.
[153] ZH, UKSC 4, *supra* note 4, at ¶ 31.
[154] ZH, UKSC 4, *supra* note 4, at ¶ 31.
[155] ZH, UKSC 4, *supra* note 4, at ¶ 31.
[156] ZH, UKSC 4, *supra* note 4, at ¶ 31.
[157] In re Andazola, *supra* note 64, at 324; ZH, UKSC 4, *supra* note 4, at ¶ 16.

to obtain any education."[158] The Supreme Court of the United Kingdom, however, recognized that being educated in the United Kingdom was an advantage conferred on the children by virtue of their British citizenship.[159] Thus, by moving to another country, these children would not be able to exercise their rights.[160]

Furthermore, in *Montreal*, the BIA disregarded the fact that by accompanying their father to Mexico, the children would leave their school, friends, and family behind.[161] However, the Supreme Court in *ZH* held that in evaluating the best interest of the child, consideration had to be paid to the social links the children formed in the community and in their school.[162]

The foregoing discussion establishes that the divergence in results for similar sets of facts in these two jurisdictions is not indicative of a lack of compassion among immigration judges in either jurisdiction. Rather, it can be attributed to the utilization of a highly ambiguous and contentious EEUH standard.

2. The Best Interest Test v. Public Interest

The decision in *ZH (Tanzania)* does not mean that courts will find that the best interest of a child precludes the deportation of an individual in every case. In *ZH* Baroness Hale stated that the child's best interest must be identified first, and then the court must assess whether any other considerations outweigh those best interests.[163]

The case of *E-A (Article 8 – best interests of child) Nigeria* is an example of the balancing test described above. This case involved a family of four.[164] The first appellant (father) entered the United Kingdom as a student from Nigeria, and the second (daughter) and fourth appellant (wife) gained possession of a valid entry clearance as dependents of their student husband/father.[165] The third appellant (daughter) however was born in the United Kingdom.[166] The appellants applied for an extension for leave to remain in the United Kingdom, which was denied. [167]

The first-tier immigration judge found that the first and fourth appellants were well educated, and there was no reason why they would not be able to find work if they were removed to Nigeria.[168] The judge also found that most of the family of the appellants remained in Nigeria.[169] With regards to the second appellant, the judge found that she was in primary school, while the third appellant was still at nursery.[170] Thus, even if the appellants were removed, they would return to Nigeria as a family.[171] Moreover, because of the young age of the second and third appellants, they would be

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[158] In re Andazola, *supra* note 64.
[159] ZH, UKSC 4, *supra* note 4, at ¶ 32.
[160] ZH, UKSC 4, *supra* note 4, at ¶ 32.
[161] Bird, *supra* note 62, at 1.
[162] ZH, UKSC 4, *supra* note 4, at ¶ 31.
[163] Jane Fortin, *Are Children's Best Interests Really Best? ZH (Tanzania)(FC) v. Secretary of State for the Home Department*, 74 The Modern L. Rev. 932, 950 (2011).
[164] E-A (Article 8 – best interests of child) Nigeria, [2011] UKUT 00315 (IAC).
[165] *Id.* at ¶¶ 2-3.
[166] *Id.* at ¶ 11.
[167] *Id.* at ¶ 6.
[168] *Id.* at ¶ 9.
[169] *Id*.
[170] E-A, *supra* note 164, at ¶ 9.
[171] E-A, *supra* note 164, at ¶ 11.

able to re-adapt to life in Nigeria.[172] The court also noted that there were English speaking schools in Nigeria, which the appellants could attend, hence overcoming any difficulty in understanding accents.[173] Based on these determinations, the judge concluded that removal of the appellants would not breach their right to family and private life.[174]

The Upper Tribunal upheld the tribunal judge's determination. Following the decision in *ZH*, the Upper Tribunal assessed the best interests of the second and third appellant as the first and primary consideration.[175] The Upper Tribunal found that the third appellant had been a resident of the United Kingdom for five years, while the second appellant had been a resident for four years.[176] Considering their age, and the time they had spent in the United Kingdom, the tribunal found that the second and third appellants had just begun to take tentative steps towards socialization towards the world.[177] The Upper Tribunal found that there was no evidence the second and third appellants formed strong friendships outside the family.[178] As a result, the best interest of the children would be to remain with the family unit.[179]

The tribunal further assessed whether deporting the appellants to Nigeria would strike a necessary, proportionate, and fair balance between respecting the appellants' right to private life and addressing the particular public interest in question.[180] The tribunal justified the necessity for the appellants to leave the United Kingdom based on the public interest, specifically citing the imperative of maintaining firm and equitable immigration control.[181]

The decision in *E-A* signifies a few important things. First, it shows how lower tribunals have interpreted the best interest standard laid out in *ZH*. Second, it shows that the best interest standard has its limits. Thus, the best interest of the child will be weighed against any policy considerations that warrant removal. Third, it demonstrates that the tribunal's decision in *E-A* was in part prompted by the fact that the first appellant had arrived in the United Kingdom on a student visa.[182] By referring to the firm and fair immigration control as the public interest implicated in this case, the tribunal made it clear that it did not want to open a pathway to incentivize foreign students to ask for relief from removal.[183]

The tribunal's decision in this case seems to be wrong. In discussing the best interest of the children, the tribunal looked over the intrinsic importance of the third appellant's British citizenship.[184] The intrinsic importance of a child's British citizenship was one of the factors identified by the Supreme Court in *ZH*. The tribunal disregarded that the British child had rights by virtue of his citizenship, and those rights could not be exercised if he had to move to Nigeria with his parents. It is plausible that because of his young-age, the third appellant might have easily adjusted to life in Nigeria. However,

[172] E-A, *supra* note 164, at ¶ 11.
[173] E-A, *supra* note 164, at ¶ 9.
[174] E-A, *supra* note 164, at ¶ 12.
[175] E-A, *supra* note 164, at ¶ 47.
[176] E-A, *supra* note 164, at ¶ 37.
[177] E-A, *supra* note 164, at ¶ 40.
[178] E-A, *supra* note 164, at ¶ 41.
[179] E-A, *supra* note 164, at ¶ 47.
[180] E-A, *supra* note 164, at ¶ 47.
[181] E-A, *supra* note 164, at ¶ ¶ 48-49.
[182] E-A, *supra* note 164, at ¶ ¶ 2-3
[183] E-A, *supra* note 164, at ¶ ¶ 48-49.
[184] E-A, *supra* note 164, at ¶ 11.

moving to another country would still mean losing the advantages of growing up and being educated in his home country, the UK.[185]

C. Australia

1. MIEA v. Teoh

Apart from the United Kingdom, the best interest of the child standard is also applied in Australia. An example is the decision of the High Court of Australia in the case of *MIEA v. Teoh*.[186] In this case, Mr. Teoh, a Malaysian citizen came to Australia, and obtained a temporary resident entry permit.[187] He married an Australian-citizen wife, and they had three Australian-born children.[188] Furthermore, he assumed the role of a step-father to four Australian-born step-children (children of his wife from a previous marriage).[189]

Mr. Teoh's application for resident status was rejected because he had prior drug convictions, and did not meet the good character criteria set out by the Migration Act 1958.[190] The Immigrant Review Panel acknowledged Mr. Teoh's assertions, recognizing that his removal would cause significant financial and emotional hardship on his wife and children.[191] However, the panel stated that the "compassionate claims [were] not considered to be compelling enough for waiver of policy in view of [Mr. Teoh's] criminal record."[192] Subsequently, Mr. Teoh sought judicial review of this decision.[193]

On appeal, Mr. Teoh argued that the court had erred in fact and in law in finding that the hardship to his wife and children had been taken into relevant consideration.[194] The High Court held the lower court made an error of law by failing to uphold the best interest of Mr. Teoh's children as the primary consideration.[195] The court held that Australia's ratification of the CRC generated a legitimate expectation that decision makers would act in accordance with Article 3 of the CRC.[196] Thus, the High Court concluded that in denying Mr. Teoh's residency status, the lower court had treated the government's character policy, rather than the best interests of Mr. Teoh's children as the primary consideration.[197]

In his judgment, Gaudron J. found in favor of Mr. Teoh but for reasons different than those discussed by Chief Justice Mason.[198] In a perhaps novel and unique approach, the judge found that it was not necessary to rely upon the CRC to establish that the best interest of children should be a primary consideration.[199] The judge emphasized the

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[185] ZH, UKSC 4 *supra* note 4, at ¶ 16.
[186] Minister of State for Immigr. and Ethnic Affs. v. Teoh (1995), 183 CLR 273 (AUSTL.).
[187] *Id.* at ¶ 2.
[188] *Id.*
[189] *Id.*
[190] *Id. at ¶¶ 3-4.* (Mason CJ & Deane, JJ.).
[191] *Id*. at ¶ 7 (Mason CJ & Deane, JJ.).
[192] Minister of State for Immigr. and Ethnic Affs. v. Teoh, *supra* note 186, at ¶ 7.
[193] Minister of State for Immigr. and Ethnic Affs. v. Teoh, *supra* note 186, at ¶ 8 (Mason CJ & Deane, JJ.).
[194] Teoh, *supra* note 186, at ¶ 11 (Mason CJ & Deane, JJ.).
[195] Teoh, *supra* note 186, at ¶ 13 (Mason CJ & Deane, JJ.).
[196] Minister of State for Immigr. and Ethnic Affs. v. Teoh, *supra* note 186, at ¶ 32 (Mason CJ & Deane, JJ.).
[197] Minister of State for Immigr. and Ethnic Affs. v. Teoh, *supra* note 186, at ¶¶ 39-41(Mason CJ & Deane, JJ.).
[198] Minister of State for Immigr. and Ethnic Affs. v. Teoh, *supra* note 186, at ¶¶ 1-8 (Gaudron, J.).
[199] Minister of State for Immigr. and Ethnic Affs. v. Teoh, *supra* note 186, at ¶ 2 (Gaudron, J.).

importance of the children's Australian nationality, deeming it sufficient to merit the consideration of their best interests.[200] The judge stated:

> [I]t is arguable that *citizenship carries with it a common law right on the part of children and their parents to have a child's best interests taken into account,* at least as a primary consideration, in all discretionary decisions by governments and government agencies which directly affect that child's individual welfare.[201] (emphasis added).

By prioritizing the well-being of children in discretionary determinations, the decision in *Teoh* makes an important contribution to the ongoing global discussion about the essential role of the "best interest of the child standard" in shaping immigration policies and legal frameworks.

2. The Continued Application of MIEA v. Teoh

The approach adopted by the High Court of Australia in *Teoh* has been confirmed in subsequent cases.[202] While *Teoh* highlighted a scenario in which the parent's removal would result in the separation from their child, the Court's reasoning was also extended to scenarios in which the child faces constructive deportation by choosing to accompany the parent upon their departure.[203]

The case of *Vaitaki v. MIEA* involved a non-citizen appellant (Mr. Vaitaiki) who appealed his deportation order because he had been convicted of alcohol related offenses.[204] Mr. Vaitaiki had married an Australian national (first wife), with whom he had three Australian national children.[205] He subsequently separated from his first wife, and later began seeing an Australian national named Janette Katoa (born in Tonga).[206] Mr. Vaitaki had three Australian national children from his partnership with Ms. Katoa.[207] The record indicated that while Mr. Vaitaiki had been imprisoned for his offenses, he had maintained contact with children, and had a good relationship with all of them.[208] With regards to his children from Ms. Katoa, the lower tribunal found that if the deportation order was carried, Ms. Katao had expressed her intention to return to Tonga with her three children, seeking proximity to Mr. Vaitaiki.[209] Ms. Katao testified that although employment, and educational opportunities in Tonga were not as good as they were in Australia—the need of the children to be near their father outweighed these factors.[210] Despite these representations, the lower tribunal found that the serious nature of Mr. Vaitaiki's crimes outweighed the hardships that his family would face.[211]

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[200] Minister of State for Immigr. and Ethnic Affs. v. Teoh, *supra* note 186, at ¶ 2-3 (Gaudron, J.).
[201] Minister of State for Immigr. and Ethnic Affs. v. Teoh, *supra* note 186, at ¶ 4 (Gaudron, J.).
[202] Vaitaki v Minister for Immigr. and Ethnic Affairs (1998) 150 ALR 608 (AUSTL.).
[203] Jason M. Pobjoy, The Child In International Refugee Law 13 (Cambridge Univ. Press, 2017).
[204] *See also* Vaitaki v Minister for Immigr. and Ethnic Affairs (1998) 150 ALR 608 (Burchett, J.) (AUSTL.)
[205] *Id.* at 2.
[206] *Id.*
[207] *Id.*
[208] *Id.* at 1-2.
[209] *Id.* at 2-3.
[210] Vaitaki v Minister for Immigr. and Ethnic Affairs, *supra* note 202, at 3.
[211] Vaitaki v Minister for Immigr. and Ethnic Affairs, *supra* note 202, at 3.

The federal court reversed the tribunal's decision because it went against the established principles set in *Teoh*.[212] The federal court found that the lower tribunal made an error by not considering the impact that accompanying their father to Tonga would have on the children, as they would have to leave the community, start a new life, and lose the benefits available to them as Australian citizens.[213] In essence, the federal court held the lower court failed to give primary consideration to the children's best interest.[214] The court found that the tribunal's use of the term "return" in reference to the children's move to Tonga suggested that it overlooked that their homeland was Australia.[215] Despite the fact that both *Teoh* and *Vaitaiki* involved convicted offenders,[216] courts in Australia have emphasized the continued importance of the best interest of the child standard in relief from removal cases.[217]

Following the decision in *Vaitaiki*, the Full Federal Court in *Wan v. Minister for Immigration and Multicultural Affairs*, provided a list of factors to evaluate cases in which it was likely that a child will accompany their parents back to the parents' home country.[218] The factors include:

> (a) the fact that the children, as citizens of Australia, would be deprived of the country of their own and their mother's citizenship, 'and of its protection and support, socially, culturally and medically, and in the many other ways evoked by, but not confined to, the broad concept of lifestyle';
> (b) the resultant social and linguistic disruption of their childhood as well as the loss of their homeland;
> (c) the loss of educational opportunities available to the children in Australia; and
> (d) their resultant isolation from the normal contacts of children with their mother and their mother's family.[219]

The Australian approach in relief from removal cases has been recognized and applied in other jurisdictions. Both *MIEA v. Teoh* and *Wan v. MIMA* were cited in *ZH* by the United Kingdom's Supreme Court.[220] This shows that there is a degree of consensus among certain common law jurisdictions regarding the appropriateness of assessing the best interest of the child in such cases.

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[212] Vaitaki v Minister for Immigr. and Ethnic Affairs, *supra* note 202, at 12-13.
[213] Vaitaki v Minister for Immigr. and Ethnic Affairs, *supra* note 202, at 12-13.
[214] Vaitaki v Minister for Immigr. and Ethnic Affairs, *supra* note 202, at 12-13.
[215] Vaitaki v Minister for Immigr. and Ethnic Affairs, *supra* note 202, at 7.
[216] Vaitaki v Minister for Immigr. and Ethnic Affairs, *supra* note 204, at 1-2 (Burchett, J.); Minister of State for Immigr. and Ethnic Affs. v. Teoh, *supra* note 186, at ¶¶ 3-4 (Mason CJ & Deane, JJ.).
[217] Wan v Minister for Immigr. & Multicultural Affairs, (2001) 107 FCR 133(AUSTL.).
[218] Pobjoy, *supra* note 203, at 214; *Wan v Minister for Immigr. & Multicultural Affairs*, (2001) 107 FCR 133 (AUSTL.).
[219] Wan, 107 FCR at ¶ 30 (citations omitted).
[220] *See* ZH, UKSC 4 *supra* note 4, at ¶ 26.

D. Canada

1. Baker v. Canada

The Supreme Court's decision in *Baker v. Canada*, held the deportation of an individual would be contrary to the best interest of her child.[221] This case involved Mavis Baker, who was a citizen of Jamaica and entered Canada as a visitor.[222] Ms. Baker never received permanent resident status, but supported herself illegally by working as a domestic worker for eleven years.[223] While living in Canada, Ms. Baker had four children– who were Canadian nationals.[224] After the birth of her four children, Ms. Baker was diagnosed with paranoid schizophrenia.[225] Following her diagnosis, two of her children were placed with their natural father and the remaining two were placed in foster care.[226] Once she was in recovery, the two children placed in foster care were returned to her.[227] Ms. Baker was ordered to be deported.[228] In her submission to appeal this decision, Ms. Baker pointed out she was the sole caregiver for two of her children, and her other two children also depended on her for emotional support.[229] The Immigration Officer rejected Ms. Barker's submissions stating there were insufficient humanitarian and compassionate grounds to warrant Ms. Baker's application for permanent residence.[230]

Upon appeal to the Supreme Court of Canada, the question before the court was whether in absence of any express reference to the CRC in domestic law, Canadian courts were mandated to treat the best interest of the child as the primary consideration in an application for humanitarian protection.[231] The Supreme Court held that although the CRC had no direct application in Canadian law, the values reflected in international human rights law could play a role in shaping the contextual approach to statutory interpretation and judicial review adopted by the court.[232]

Furthermore, the Court held:

> The values and principles of the [*CRC*] recognize the importance of being attentive to the rights and best interests of children when decisions are made that relate to and affect their future … The principles of the [*CRC*] and other international instruments place special importance on protections for children and childhood, and on particular consideration of their interests, needs, and rights. They help show the values that are central in determining whether this decision was a reasonable exercise of the [humanitarian and compassionate] power.[233]

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[221] Baker v. Canada (Minister of Citizenship and Immigr.), [1999] 2 S.C.R. 817 (Can.).
[222] *Id.* at 825.
[223] *Id.*
[224] *Id.*
[225] *Id.*
[226] *Id.* at 826.
[227] Baker, *supra* note 6, at 826.
[228] Baker, *supra* note 6, at 826.
[229] Baker, *supra* note 6, at 826.
[230] Baker, *supra* note 6, at 826.
[231] Baker, *supra* note 6, at 826.
[232] Baker, *supra* note 6, at 861.
[233] Baker, *supra* note 6, at 861-2.

Following this reasoning, the Supreme Court held that when making a decision about an application for humanitarian protection, the "decision maker should consider children's best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them."[234]

However, the Court also cautioned that giving substantial weight to the interests of children does not mean such interests will always outweigh other considerations.[235] If the child's best interests were minimized in a manner inconsistent with Canada's humanitarian tradition, and the Minister's guideline, the decision made by the primary decision-maker would be unreasonable.[236] The decision in Baker was subsequently codified,[237] and case law has emerged holding that the best interest principle would also apply to cases involving the deportation of a child's parent.[238]

2. Subsequent Cases

In *Denis v. Canada* (MCI), the applicant was a thirty-two-year-old citizen of St. Lucia, who arrived in Canada at the age of twenty-two.[239] In 2013, she received a deportation order, and in 2014 the family's removal was ordered.[240] Upon an emergency filing for judicial review, the removal of the applicant, and her two children was stayed pending the outcome of the appeal.[241] The appellant had provided a statement that if she was returned to St. Lucia, she would have to live at her parent's house.[242] Due to the destruction of her parents' home, her only option was to reside with her grandmother. Her primary apprehension stemmed from the fact that her abusive uncle also resided in that household.[243]

While conducting the best interest of the child analysis, the immigration officer found that the applicant would likely have success in finding a job in St. Lucia, and therefore would be able to provide a stable home for her daughters.[244] With regards to the applicant's concern about her uncle, the officer held that the applicant could keep her children away from her uncle, and that redress was available in St. Lucia if her uncle caused any future difficulties.[245]

On appeal, the court held that the immigration officer failed to analyze the hardships the children would face with relocation to St. Lucia.[246] The court found that it could not be assumed that the daughters could easily readjust in St. Lucia.[247] This was

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[234] Baker, *supra* note 6, at 864.
[235] Baker, *supra* note 6, at 864.
[236] Baker, *supra* note 6, at 864.
[237] Pobjoy, *supra* note 218, at ¶ 215.
[238] *See also* Denis v. Canada (MCI), 2015 FC 65 (CAN.); Mangru v. Canada (MCI), [2011] FCJ No 978; Okoloubu v. Canada (MCI), [2008] FCJ No 1495 (CAN.); Kolosovs v. Canada (MCI), [2008] FCJ No 211 (CAN.); Raposo v. Canada (MCI), [2005] FCJ No 157 (CAN.); Cordeiro v. Canada (MCI), [2004] FCJ No 179 (CAN.); Hawthorne v. Canada (MCI), [2003] 2 FC 555 (CAN.); Legault v. Canada (MCI), [2002] 4 FC 358 (CAN.); Garasova v. Canada (MCI), (1999) 177 FTR 76 (CAN.).
[239] Denis, *supra* note 6, at ¶ 2.
[240] Denis, *supra* note 6, at ¶ 2.
[241] Denis, *supra* note 6, at ¶ 3.
[242] Denis, *supra* note 6, at ¶ 8.
[243] Denis, *supra* note 6,at ¶ 8.
[244] Denis, *supra* note 6, at ¶ 15.
[245] Denis, *supra* note 6, at ¶ 15.
[246] Denis, *supra* note 6, at ¶ 31.
[247] Denis, *supra* note 6, at ¶ 32.

because the applicant had testified that she had suffered sexual abuse in the past, and that she would have raise her daughters in the same house where her abuser lived.[248] As a result, the court allowed the application for judicial review, and held that the matter would be sent back for reconsideration.[249]

III. Moving Towards a Change in the EEUH Standard

The EEUH standard as applied today has an unconscionable effect on the children of those subject to deportation. By taking inspiration from the best interest of the child as applied in other jurisdictions, the United States should give away with the EEUH test. This paper proposes crucial amendments to the Immigration Reform and Immigrant Responsibility Act, urging Congress to prioritize children's welfare in removal proceedings. Proposed changes include mandating the best interest of the child as the primary consideration and introducing a comprehensive list of factors to guide this analysis. It emphasizes the necessity to assess the mental and medical health impact of removal on children, offering solutions for a more compassionate and child-centered framework. Emphasizing the inherent significance of a child's citizenship status, it highlights the increasing recognition of the intrinsic rights held by citizen children in the context of removal proceedings. Despite congressional inaction, it further urges U.S. courts to incorporate CRC considerations, given their status as customary international law.

A. Focusing On The Child's Best Interest

As a start, Congress should introduce an amendment in the Immigration Reform and Immigrant Responsibility Act that states that in all cases of removal, the best interest of the child should be the primary consideration. It is essential for Congress to clearly state that the fundamental priority is the identification of the child's paramount interests. Following this determination, decision-makers or judicial entities should methodically evaluate whether alternative considerations, either individually or collectively, outweigh the established paramount interests. As mentioned above, a problem seen under the EEUH test was that Congress had failed to define what exceptional and extremely unusual hardship meant. This led to courts adopting various definitions.

[248] Denis, *supra* note 6, at ¶ 32.
[249] Denis, *supra* note 6, at ¶¶ 54-7.

To prevent a recurrence of confusion encountered in the past, Congress should provide a list of factors to be considered while analyzing the best interest of the child. These factors can include:

> (1) the duration of a child's stay in the United States,
> (2) the level of integration of a child in the United States,
> (3) where and with whom the child will stay with if he leaves the United States,
> (4) the current socio-economic conditions in the country where the child is being removed to,
> (5) the state of educational and health facilities in the country to where the child is being removed to,
> (6) whether the child has family apart from his parents in the country where he is being removed to,
> (7) whether the child is able to speak the language of the country where he is being removed to,
> (8) the severity of the impact on the child's mental health,
> (9) whether the child suffers from any medical ailment, and whether the child's removal to another country might significantly disrupt the child's quality of life, and
> (10) the loss of intrinsic rights guaranteed by virtue of citizenship.

Furthermore, Congress should grant the Attorney General the discretionary authority to expand these factors to keep up with changing situations and circumstances. This would ensure that the list mentioned above is not exhaustive. Congress should also stipulate that once the Attorney General has exercised discretion and introduced another factor in the above-mentioned list, the Attorney General would lack the power to remove that factor from the list of considerations. The rationale behind this restriction of power lies in the fact that the Attorney General is a political appointee.

For example, suppose, an Attorney General (AG 1) appointed by an immigration friendly administration decides to expand the list of factors. A few years later, an administration that is strict on immigration comes into power and appoints its own Attorney General (AG 2). One of the foremost measures AG 2 would take is to revoke the immigration friendly determinations made by their predecessor. This decision would most likely be based on political considerations, rather than on facts, figures or any other policy rationale. Such a decision would create uncertainty in the law and could have an adverse impact on individuals who have or currently are in the process of applying for relief from removal. Limiting the Attorney General's power to remove the factors introduced by their predecessor would provide for more certainty in the law. This does not mean that factors introduced in the list can never be removed. Congress should provide that only it has the power to remove a new factor from the list.

B. Mental Health Impact

The literature cited above shows the adverse impact on a child's mental health in situations where a parent is subject to removal. [250] Thus, as part of analyzing the mental health impact on a child under the best interest analysis, a court must always ask the applicant to submit a social impact report from either a social worker, or a child psychologist.

These reports must speak about the emotional, practical, and psychological need of the child to remain in the United States and must speak about any adverse mental health effect that a child may suffer. There might be cases in which a party might not be able to pay for a social worker or a child psychologist for a social impact report. To deal with such cases, Congress must introduce a provision that empowers a court to appoint a social worker or a child psychologist. If a court can, on its own, appoint lawyers for individuals who cannot afford legal representation, a court appointed psychologist, whose purpose is to look at the mental health impact on United States citizen children is hardly novel.

C. Medical Health Impact

The case of *In re J-J-G* highlights the pressing need for reform in evaluating potential medical risks to a child due to removal and relocation.[251] Here, the involved parties asserted a treatment cost of $1,100 in Guatemala, a figure obtained from online sources.[252] It remains uncertain to what extent the Board of Immigration Appeals (BIA) independently verified this cost. What is clear is the BIA's reliance on this information without conducting its own investigation. This reliance resulted in the conclusion that there was insufficient evidence indicating the respondent's daughter would encounter treatment disruption upon moving to Mexico.[253]

Examining this decision from a policy standpoint reveals concerns, especially for individuals who have lived in the United States for an extended period and may be out of touch with the current situation in their home country. They might lack information about medical facilities, the cost, and the effectiveness of the health system. One way for them to acquire such information is the internet. But there are questions about whether the website they use or the information they use is credible at all. One possible solution to ensure a fair result could be to reverse the burden of proof in the medical health analysis. This means that the INS will have to prove to the BIA that a child's removal (a child who suffers from medical issues) to another country will not significantly disrupt the child's quality of life. The shifting of the burden of proof is fair, because the INS, a more sophisticated party with more resources, would be obligated to produce this information before the BIA.

D. Intrinsic Rights Theory

The duration of a child's stay is an important factor courts use to determine whether the child has a strong connection to the United States. However, just because a

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[250] Zayas, *supra* note 114, at 3213
[251] *See generally* In re J-J-G, *supra* note, 102.
[252] *See* In re J-J-G, *supra* note 102, at 809.
[253] *See* In re J-J-G, *supra* note 102, at 810.

child has been in the United States for a less amount of time does not automatically mean that the child lacks a strong connection. In fact, US courts should adopt the intrinsic rights perspective that courts in the United Kingdom, Canada, and Australia have adopted. As the Supreme Court of the United Kingdom in *ZH* stated, "the intrinsic importance of citizenship should not be downplayed."[254] This means that citizenship vests an individual with certain rights, such as the right to live and grow up in their own country, the right to be educated, the right to obtain the state's assistance for access to health amongst other things. Taking cue from other jurisdictions, courts in the United States should be mindful that when making a removal determination, their decision could deprive protections and guarantees afforded to a child by virtue of their citizenship.

Critics often ask one why one should care about the children of individuals who have violated and exploited our immigration laws. There are two reasons why we should care. First, it is crucial to recognize that these children, being United States citizens, inherently possess rights by virtue of their citizenship. This assertion aligns with established legal principles and jurisprudence. The constitutional framework, particularly the Fourteenth Amendment to the United States Constitution, explicitly ensures equal protection under the law.[255] By considering the best interest of these children, we not only uphold constitutional values but also affirm a commitment to fairness and equality within the broader legal framework.

Second, the notion of penalizing children for the transgressions of their parents has long been discredited as a mainstream approach in both legal contexts and broader societal perspectives.[256] For example, in the case *Weber v. Aetna Casualty & Surety Co.*, the Supreme Court ruled that it was both "illogical and unjust" to impose penalties on children based on the circumstances of their birth out of wedlock.[257] The court stated: "[o]bviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual – as well as an unjust – way of deterring parents."[258] U.S. immigration law continues to impose consequences for adult actions on children, despite the fact that these children have no authority over or control of their parents' decisions.[259] Refusing to consider the best interests of the child in removal cases would therefore amount to effectively punishing the child for the misdeeds of their parents.

In conclusion, prioritizing the well-being of the child in removal proceedings is not merely a question of fairness but a core principle in harmony with well-established legal norms. Failing to do so creates an unjust system that penalizes the innocent for circumstances beyond their control.

E. A Resort to Customary International Law

Even if Congress does not make changes to the EEUH test, courts in the United States should be bound to factor in CRC considerations by virtue of its designation as

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[254] ZH, *supra* note 4, at ¶ 16.
[255] U.S. Const. art. 14, § 1; *See* U.S. v. Wong Kim Ark, 169 U.S. 649 (1898).
[256] David B. Thronson, *Entering The Mainstream: Making Children Matter In Immigration Law*, 38 Fordham Urb. L.J. 393, 409 (2010); *See* Richard L. Brown, *Disinheriting the "Legal Orphan": Inheritance Rights of Children After Termination of Parental Rights*, 70 Mo. L.Rev. 125 150 (2005).
[257] Thronson, *supra* note at 256; Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972).
[258] Thronson, *supra* note at 256; Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972)
[259] Thronson, *supra* note at 256.

customary international law. Courts in the United States have recognized the binding nature of customary international law.[260]

The United States is not the only country where the CRC applies by its designation as customary international law. As the preceding section shows, similar to the United States, Canada has not ratified the CRC. Yet, the Canadian Supreme Court has upheld the binding nature of CRC.[261] Because the binding nature of customary international law has been recognized in the United States, and there is persuasive precedent from across the border, the CRC should be applied in removal determinations. This approach has been a subject of deliberation within the United States. In the case of *Beharry v. Reno*, the court held that the lack of best interest assessment in removal cases violated international law, and that the best interest must be considered when possible.[262] However, this approach has not been widely accepted as of yet.[263]

Conclusion

The above-mentioned discussion lays bare the inadequacies and deficiencies of the EEUH standard. A thorough jurisprudential survey across diverse jurisdictions unequivocally underscores the obsolescence of the EEUH standard, compelling a paradigmatic reevaluation. To achieve this goal, it is imperative to set aside the EEUH standard, opting instead for its replacement with the best interest of the child standard.

At the heart of this proposition is a firm stance on the necessity for judicial considerations to transcend the immediate removal scenario. This involves taking into account the nuanced impacts on the mental and physical well-being of citizen children. Additionally, the inherent importance of the child's citizenship status assumes utmost relevance in removal discussions. This strategic emphasis underscores the growing acknowledgment of the intrinsic rights held by children who are citizens within the realm of removal proceedings.

In essence, the identified shortcomings of the prevailing EEUH standard prompt a compelling call to action, urging a paradigm shift towards a more inclusive and child-centric approach in removal cases. The proposed reforms, grounded in the well-established best interest of the child standard and fortified by international consensus, represent a resolute plea for immediate and impactful change in U.S. immigration jurisprudence.

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[260] *See* The Paquete Habana*,* 175 U.S. 677 (1900) (holding that international law is part of U.S. law and must be ascertained and administered by the courts of justice appropriate jurisdiction)*; see also* Roper v. Simmons*,* 543 U.S. 551, 551-5 (2005) (drawing on customary international law and jurisprudence in a decision to abolish the death penalty).

[261] *See* Baker, *supra* note 221, at 864.

[262] *Beharry v. Reno*, 183 F.Supp. 2d 584 (E. D. N.Y. 2002), *rev'd by Beharry v. Ascroft*, 329 F.3d 51 (2003).

[263] *See Guaylupo–Moya v. Gonzales,* 423 F.3d 121, 135 (2d. 2005).