

# Human Rights Brief

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Volume 25 | Issue 1

Article 3

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2021

## Examination of the Effects of Deportation as a Result of Revocation of Status Upon the Rights to Non-Discrimination, Family Unity, and the Best Interests of the Child: An Empirical Case from Norway

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### Recommended Citation

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Available at: <https://digitalcommons.wcl.american.edu/hrbrief/vol25/iss1/3>

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# EXAMINATION OF THE EFFECTS OF DEPORTATION AS A RESULT OF REVOCATION OF STATUS UPON THE RIGHTS TO NON-DISCRIMINATION, FAMILY UNITY, AND THE BEST INTERESTS OF THE CHILD: AN EMPIRICAL CASE FROM NORWAY

by Cecilia M. Bailliet\*

## INTRODUCTION

There is currently a European and Nordic trend emphasizing the return of non-European/Schengen nationals to their countries of origin or transit countries and implementing deportation as a principal mechanism of immigration control.<sup>1</sup> This article discusses the current framing of migration as a threat to the European region's security, which places pressure on the judiciary to serve as a resistant

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<sup>1</sup> See generally GRETE BROCHMANN & TOMAS HAMMAR, MECHANISMS OF IMMIGRATION CONTROL: A COMPARATIVE ANALYSIS OF EUROPEAN REGULATION POLICIES (2020); Ibrahim Soysüren & Mihaela Nedelcu, *European Instruments for the Deportation of Foreigners and Their Uses by France and Switzerland: The Application of the Dublin III Regulation and Eurodac*, J. ETHNIC & MIGRATION STUD. (2020); SERGIO CARRERA & MARCO STEFAN, FUNDAMENTAL RIGHTS CHALLENGES IN BORDER CONTROLS AND EXPULSION OF IRREGULAR IMMIGRANTS IN THE EUROPEAN UNION 1-21 (2020).

gatekeeper to fundamental international human rights.<sup>2</sup> Specifically, in the context of Norwegian domestic law and jurisprudence of the European Court of Human Rights (ECtHR), this article explores how deportation resulting from the revocation of a refugee's status affects human rights, and in particular, the human right of non-discrimination, the best interest of the child, and the right to family unity.

An empirical examination of a critical refugee revocation case brought before the Norwegian Supreme Court puts these findings into context, showing how a judiciary may engage in a restrictive contestation approach, and narrow the analysis of deportation to its effect on human rights.<sup>3</sup> This article further suggests that the Norwegian Supreme Court's approach fails to curb the current revocation and deportation practices and policies which target specific nationalities in violation of the principle of non-discrimination. Finally, this article calls for the adoption of a human rights-based framework in refugee revocation and deportation cases in the Nordic region.

## I. REVOCATION OF STATUS AND DEPORTATION AS REGIONAL AND NATIONAL POLICIES

The European Union (EU) and the Nordic region have recently pursued new "return" strategies in refugee and asylum policies, which emphasize improving the efficiency of the immigration system

<sup>2</sup> See e.g., Rafaella Kunz, *Judging International Judgments Anew? The Human Rights Courts before Domestic Courts*, 30 EUR. J. INT'L L. 1129, 1131 (2020) (discussing how judges act as gatekeepers).

<sup>3</sup> See HANS PETER SCHMITZ & KATHRYN SIKKINK, *International Human Rights*, in HANDBOOK OF INTERNATIONAL RELATIONS 827, 835 (2018) (on the perception of threats and the application of coercive measures by governments, as well as contestation techniques including: (1) claiming an exception based on imminent threat, (2) challenging the validity of human rights with a different set of norms, (3) or redefining behavior to fall outside the scope of a norm); Jessica Greenberg, *Counterpedagogy, Sovereignty, and Migration at the European Court of Human Rights*, 46 L. & SOC. INQUIRY 518-36 (2021).

through the use of restrictive practices and deportations.<sup>4</sup> Nikolas F. Tan, the senior researcher at the Danish Institute for Human Rights, recognized that the trend of returning refugees is a “paradigm shift” in Danish refugee policy.<sup>5</sup> Similarly, other researchers noted that the Nordic policy of revoking asylum based on particular nationalities has a negative signaling effect on maintaining restrictive immigration regimes throughout Europe.<sup>6</sup> The broader Nordic policy shift mandates an examination of specific cases to understand how the return turn policy functions in practice.

Revocation and deportation are closely tied to the practice of cancellation of asylum status. Cancellation is a judicial decision that invalidates the recognition of a person’s refugee status, and it overturns the

<sup>4</sup> Ramses A. Wessel, *Normative Transformations in EU External Relations: The Phenomenon of ‘Soft’ International Agreements*, 44 WEST EUR. POLITICS 72, 80-81 (2021); Madalina Moraru, *The New Design of the EU’s Return System under the Pact on Asylum and Migration*, EU IMMIGRATION & ASYLUM L. & POL. (Jan. 14, 2021), <https://eumigrationlawblog.eu/the-new-design-of-the-eus-return-system-under-the-pact-on-asylum-and-migration/> (describing the EU adoption of a perverse interpretation of a solidarity approach to facilitate the return of third country nationals supported by the Asylum and Migration Pact); Cathryn Costello & Itamar Mann, *Border Control: Migration and Accountability for Human Rights Violations*, 21 GERMAN L. J. 311, 312 (2020) (noting that the EU and States in the Global North “have long-standing modes of sharing restrictive policies and practices, many of which are custom built to evade accountability”).

<sup>5</sup> See Nikolas F. Tan, *The End of Protection: The Danish ‘Paradigm Shift’ and the Law of Cessation*, 90 NORDIC J. INT’L L. 60, 60-62 (2021) (noting that “[s]ince 2015, a self-described ‘paradigm shift’ enacted through legislative amendments to Denmark’s Aliens Act has shifted refugee policy away from permanent protection and integration towards temporary protection and return.”).

<sup>6</sup> Jan-Paul Brekke et al., *Temporary Asylum and Cessation of Refugee Status in Scandinavia: Policies, Practices, and Dilemmas*, EUR. MIGRATION NETWORK (2020), [https://www.udi.no/globalassets/global/european-migration-network\\_i/emn-norway-papers/emn-occasional-paper-temporary-asylum-and-cessation-of-refugee-status-in-scandinavia-2020.pdf](https://www.udi.no/globalassets/global/european-migration-network_i/emn-norway-papers/emn-occasional-paper-temporary-asylum-and-cessation-of-refugee-status-in-scandinavia-2020.pdf); see also May-Len Skilbrei, *Taking on the Categories, Terms and Worldviews of the Powerful: The Pitfalls of Trying to Be Relevant*, 28 IDENTITIES 561, 568 (2020) (describing the pressure placed on academia within Norway to use the term “enforced returns” instead of deportation to mollify the immigration authorities).

original decision, which granted refugee status to a person.<sup>7</sup> The policy affects decisions that have become final, meaning that they cannot be reexamined by a judicial body.<sup>8</sup> In effect, cancellation entirely invalidates refugee statuses, despite the original decision. In response to this policy, the UN High Commissioner for Refugees commissioned a report on cancellation, which mandates that the EU prohibit the investigation of old asylum applications based on nationality. The report states that the EU and its Member States may revisit a refugee’s application only when “there is a clear incentive to do so … [but] [a] review of cases based solely on nationality, religion, or political opinion is not considered appropriate.”<sup>9</sup>

Nevertheless, the policy of revocation and deportation gained strength throughout Europe and the Nordic region. In 2019, the Norwegian Directorate of Immigration (UDI) was instructed by the Ministry of Justice to examine 150 asylum cases from Eritrea to find grounds for revocation of legal status based on alleged participation in events supporting the Eritrean government.<sup>10</sup> Norway deported fifty-six people to Ethiopia and 140 to

<sup>7</sup> Sibylle Kapferer, *Cancellation of Refugee Status*, LEGAL & PROT. POL’Y RSCH. SERIES ¶¶ 1-8 (2003).

<sup>8</sup> *Id.* at ¶ 3.

<sup>9</sup> *Id.* at ¶ 99.

<sup>10</sup> Instruks om å gjennomgå asylsaker fra Eritrea og vurdere tilbakekall av oppholdstillatelse dersom det foreligger opplysninger om at en flyktning har fått opphold i Norge på uriktig grunnlag mv [Instructions to review asylum cases from Eritrea and consider revoking a residence permit if there is information that a refugee has been granted residence in Norway on incorrect grounds, etc.] (2019) GI-04/2019 (Nor.).

Somalia, which confirmed a systematic investigation based on select nationalities.<sup>11</sup> These revocations also raised the question of whether the policy is a disguise for the collective expulsion of certain nationals through a pre-determined administrative practice.<sup>12</sup>

Furthermore, the Norwegian Ministry of Justice's 2020 Award Letter to the Norwegian Directorate of Immigration (UDI) confirmed this policy, in which the Ministry noted that the UDI's purpose is to pursue revocation of legal resident status as a way to keep the nation free from crime and prevent the continued stay of illegal residents.<sup>13</sup> Moreover, the overall goal of the UDI in 2020 was a forty percent increase in revocation of status decisions from the previous year.<sup>14</sup> These revocations were made under

<sup>11</sup> *The Police Immigration Unit Report on Deportations in 2019 and 2020*, <https://www.politiet.no/globalassets/04-aktuelt-tall-og-fakta/uttransporteringer/arsstatistikker-2012-19/uttransporteringer-2019.pdf>; Police Immigration Unit, *Monthly statistics December, 2020: Forced Returns from Norway*, [https://www.politiet.no/globalassets/04-aktuelt-tall-og-fakta/uttransporteringer/engelsk/yearly-figures-2012-20/forced-returns-from-norway-in-2020.pdf?\\_t\\_id=TEhKXp-2fH-4Op1Yep56\\_QQ%3d%3d&\\_t\\_uuid=vW9IuWXWSVf-F1UEZ1utJg&\\_t\\_q=forced+returns+december+2020&\\_t\\_tags=language%3aen%2csiteid%3ab78013b9-3a34-4dad-8a4f-cc70168f7f39%2andquerymatch&\\_t\\_hit.id=Politiet\\_Web\\_Models\\_Media\\_GenericMedia/\\_b9275c6a-44a4-49ec-bd36-d014f0363663&\\_t\\_hit.pos=3](https://www.politiet.no/globalassets/04-aktuelt-tall-og-fakta/uttransporteringer/engelsk/yearly-figures-2012-20/forced-returns-from-norway-in-2020.pdf?_t_id=TEhKXp-2fH-4Op1Yep56_QQ%3d%3d&_t_uuid=vW9IuWXWSVf-F1UEZ1utJg&_t_q=forced+returns+december+2020&_t_tags=language%3aen%2csiteid%3ab78013b9-3a34-4dad-8a4f-cc70168f7f39%2andquerymatch&_t_hit.id=Politiet_Web_Models_Media_GenericMedia/_b9275c6a-44a4-49ec-bd36-d014f0363663&_t_hit.pos=3), (Nor.).

<sup>12</sup> *Georgia v. Russia (I)*, no. 13255/07, (Eur. Ct. H.R. Jul. 3, 2014), <https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-145546&filename=001-145546.pdf> (finding a violation of Article 4 of Protocol 4 of the European Convention on Human Rights occurred and collective expulsion of aliens is prohibited, addressing the expulsion of Georgian nationals).

<sup>13</sup> Norwegian Ministry of Justice, *2020 Award Letter to the Norwegian Directorate of Immigration* 9–10 (Dec. 18, 2020), <https://www.regjeringen.no/contentassets/c7a-16faa2e014a6ca48990e162c23778/tildelingsbrev-udi-2021-av-18.12.201431798.pdf> (“It is a prerequisite for controlled and sustainable immigration that as few people as possible stay illegally in Norway. Detecting cases where a temporary or permanent residence permit has been granted on the wrong basis, and considering the revocation of these permits, are important tools for achieving the goal.”) (Nor.).

<sup>14</sup> ÅRSAPPOR, UTLENDINGSDIREKTORATET 37 [ANNUAL REPORT, THE NORWEGIAN DIRECTORATE OF IMMIGRATION] (2020), [https://www.udi.no/globalassets/global/aarsrapporter\\_i/arsrapport-2020.pdf](https://www.udi.no/globalassets/global/aarsrapporter_i/arsrapport-2020.pdf) (Nor.).

Section 63 of the Immigration Act and based on cases where the applicant attained a protection status.<sup>15</sup> The officials noted that the purpose of the process was to uphold the validity of the asylum system. More specifically, the UDI aimed to make decisions in 560 cases in 2020, and it nearly achieved the goal with 524 decisions.<sup>16</sup> The immigration authorities' prioritization of revocation and deportation policies raises the issue of accountability for human rights violations. The push for a more efficient immigration system raises the risk that the application of exclusionary policies to people who have resided in EU and Nordic countries for over five years may be perceived as a means to rid the countries of ethnic, religious, and/or national minorities.”

## II. NON-DISCRIMINATION PROHIBITS A SYSTEMATIC REVIEW OF REVOCATION ON THE BASIS OF NATIONALITY

This section will analyze how Norway's systemic review of cases for revocation of legal status based on nationality risks violating the principle of non-discrimination. Non-discrimination is a fundamental principle of human rights law that includes the prohibition of discrimination of a person because of their national origin.<sup>17</sup> Article 14 of the European Convention on Human Rights (ECHR) guarantees

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> U.N. Human Rights Comm., General Comments Adopted by the Human Rights Committee Under Article 40, Paragraph 4 of the International Covenant on Civil and Political Rights: General Comment No. 18, Non-Discrimination, U.N. Doc. CCPR/C/21/Rev.1/Add.1 (Nov. 10, 1989) [hereinafter HRC].

this principle to those individuals within states that are members of the Council of Europe.<sup>18</sup> The protection of the principle of non-discrimination can be combined with the right to equality before the law and equal protection of the law to provide more protection in the context of administrative processing.<sup>19</sup> Article 2 of the International Covenant on Civil and Political Rights (ICCPR) and Article 2 of the UN Convention on the Rights of the Child (CRC) also guarantee protection from discrimination.<sup>20</sup> In particular, General Comment No. 15 of the ICCPR, entitled Position of Aliens Under the Covenant, calls for the recognition of the applicability of the Covenant to cases involving non-discrimination and protection of family life.<sup>21</sup> Further, the Preamble and Article 3 of the 1951 Convention on the Status of Refugees also recognize the principle of non-discrimination.<sup>22</sup> Leading scholars characterize non-discrimination as the coherent rationale of the 1951 Convention.<sup>23</sup> However, some still suggest that the ECtHR may be reluctant to scrutinize the State's justification for interference with family life in the context of

deportation cases and may fail to address the discriminatory impact of the rule's application.<sup>24</sup>

There is a need to reincorporate a review of the relevance of discrimination based on nationality in revocation and deportation cases. The position that the Norwegian revocation/deportation policy does not violate the ECHR's non-discrimination principle in the ECHR is questionable because the systematic review of the Ethiopian, Eritrean, and Somali cases was based on the national origin of the parties and not on individual security risks identified by specific intelligence information.<sup>25</sup> The UN Committee on the Elimination of Racial Discrimination (CERD) issued a General Recommendation on Discrimination against Non-Citizens stating that States are obligated to ensure that their immigration policies do not have the effect of discriminating against persons because of their national origin.<sup>26</sup> As a result, states should ensure that their deportation and removal laws do not discriminate in purpose or effect based on national origin and that immigrants have equal access to effective remedies and are protected from collective expulsion.<sup>27</sup> In its Recommendation, CERD mandates that non-citizens, especially long-term residents, should be able to stay in the State if deportation will disproportionately interfere with their right to family life.<sup>28</sup>

<sup>18</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14 art. 14, Nov. 4, 1950, E.T.S. 5; see generally 2012 O.J. (326/02) 21; Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Securing Certain Rights and Freedoms Other than those Already Included in the Convention and in the First Protocol thereto art. 5, opened for signature Sep. 16, 1963, 46 E.T.S. 4; *Protocol 12 to the European Convention on Human Rights and Fundamental Freedoms on the Prohibition of Discrimination*, Nov. 4, 2000, E.T.S. 177; G.A. Res. 2106 art. 2, (Dec. 21, 1965).

<sup>19</sup> See HRC, *supra* note 17.

<sup>20</sup> International Covenant on Civil and Political Rights art. 2, Dec. 16, 1966, 999 U.N.T.S. 171, 173; UN General Assembly, G.A. Res. 217 (III) A, *Universal Declaration of Human Rights* art. 2, 7, (Dec. 10, 1948); G.A. Res. 44/25, Convention on the Rights of the Child, Nov. 20, 1989, 1557 U.N.T.S. 3.

<sup>21</sup> U.N. Human Rights Comm., *CCPR General Comment No. 15: The Position of Aliens Under the Covenant* ¶ 5 (Apr. 11, 1986).

<sup>22</sup> Convention Relating to the Status of Refugees art. 3, July 28, 1951, 189 U.N.T.S. 137, 156.

<sup>23</sup> David Cantor, *Non-Discrimination as a Rationale of the Refugee Convention* (June 10, 2021) (paper presented on panel at Refugee Law Initiative 5th Annual Conference, University of London) (unpublished manuscript) (on file with author).

<sup>24</sup> CATHRYN COSTELLO, *THE HUMAN RIGHTS OF MIGRANTS AND REFUGEES IN EUROPEAN LAW* 129–30 (2015) (noting that “The ECtHR tends to assume that States pursue a legitimate aim when refusing admission or deporting...migration control per se is assumed to amount to a legitimate aim...When the State is not required to articulate the aim of its actions clearly, the proportionality assessment is weakened. One of the difficulties is that deportation is sometimes viewed as the inevitable requirement for immigration laws to be meaningful . . .”).

<sup>25</sup> See Sibylle Kapferer, *Cancellation of Refugee Status*, *LEGAL & PROT. POL'Y RSCH. SERIES* ¶ 99 (2003) (citing the EU Commission's working document on the relationship between safeguarding internal security and complying with international protection obligations and instruments).

<sup>26</sup> U.N. Comm. on the Elimination of Racial Discrimination, General Recommendation No XXX on Discrimination Against Non-Citizens, U.N. Doc. CERD/C/64/Misc.11/rev.3, at ¶ 10 (2004).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

Immigration and international human rights law scholars warn that immigration measures targeting particular nationalities are often grounded in unsubstantiated security concerns and disguise religious and/or racial discrimination.<sup>29</sup> The measures may be characterized as administrative extensions of ethnic profiling based on national origin.<sup>30</sup> The overly broad mandate renders the legitimacy of the review's aim questionable, as it may not meet the criteria of "objective and reasonable justification."<sup>31</sup> Scholars also note the exclusionary aspects of transnational immigration law that call for "reflection of the legitimacy of a legal system in which discrimination on the basis of nationality, race, class, and gender plays a central role."<sup>32</sup> The revocation policy can be compared to the practice of requiring visas from nationals from many African, South Asian, and East Asian countries, thereby limiting the entry of nationals from these states.<sup>33</sup>

State governments have increasingly implemented exclusionary visa policies and consider them legitimate despite their use in pursuing discriminatory goals.<sup>34</sup> Article 1 of the International Convention on Racial Discrimination permits state

<sup>29</sup> Tally Kritzman-Amir & Jaya Ramji-Nogales, *Nationality Bans*, 2019 UNIV. ILL. L. REV. 563, 602 (2019).

<sup>30</sup> See UN Human Rights Committee, *Concluding Observations of the Human Rights Committee to Finland*, paras. 16, 17 U.N. Doc. CCPR/C/FIN/CO/7 (2021) (criticizing Finland for failing to remedy this problem among law enforcement); *see also* cited by Tendayi Achiume, *Race, Refugees, and International Law*, in OXFORD HANDBOOK OF INTERNATIONAL REFUGEE LAW (Catherine Costello, Michelle Foster, & Jane McAdam eds., 2021); *R (European Roma Rights Centre) v. Immigration Officer at Prague Airport* [2004] UKHL 55, U.K.: House of Lords (J. Comm.) (Dec. 9, 2004) (U.K.).

<sup>31</sup> Dinah Shelton, *Prohibited Discrimination in International Law*, THE DIVERSITY OF INTERNATIONAL LAW: ESSAYS IN HONOUR OF PROFESSOR LALLIOPI K. KOUFA, 261, 271 (Aristotle Constantides & Nikos Zaikos eds., 2009).

<sup>32</sup> Thomas Spijkerboer, *The Global Mobility Infrastructure: Reconceptualising the Externalisation of Migration Control*, 20 EUR. J. MIGRATION & L. 452, 469 (2018).

<sup>33</sup> *Who Needs and Who Doesn't Need a Schengen Visa to Travel to the EU?*, SCHENGEN VISA INFO, <https://www.schengenvisainfo.com/who-needs-schengen-visa/>.

<sup>34</sup> Maarten den Heijer, *Visas and Non-Discrimination*, 20 EUR. J. MIGRATION & L. 470, 472 (2018).

instituted restrictions between citizens and non-citizens.<sup>35</sup> One may also consider the Trump Administration's travel ban policy which barred access to persons from countries with a significant Muslim population.<sup>36</sup> First, it included Syria, Sudan, Somalia, Yemen, Libya, Iran, and Iraq and later added Nigeria, Myanmar, Eritrea, Kyrgyzstan, and Tanzania.<sup>37</sup> The Biden administration immediately revoked these bans, declaring them discriminatory and inconsistent with American values of freedom and tolerance.<sup>38</sup>

Moreover, given that the systematic review could be extended back in time without a set time limit, there is a risk that the revocation of status may be a disproportional measure given its impact on the refugee and their family and their community ties within the host state. Unlike Norway, Germany set a four-to-five-year time limit for applying a test of revocation.<sup>39</sup> Refugees who have resided in host countries for over five years may start families and have children whose best interests become relevant to the analysis of the revocation cases. The Norwegian revocation policy measures should be subject to review to ensure that it is amended to achieve two goals. First, to terminate any procedures that target persons from specific nationalities. Second, to bring Norway's immigration practice in line with non-discrimination standards and other human rights, such as the principle of non-intervention with family life and the best interest of the child principle. The standard for the best

<sup>35</sup> International Convention on the Elimination of All Forms of Racial Discrimination art. 1, Dec. 21, 1965, 660 U.N.T.S. 195.

<sup>36</sup> Exec. Order No. 13769, 82 Fed. Reg. 8977 (2017); *see also* Eunice Lee, *Non-Discrimination in Refugee and Asylum Law*, 31 GEO. IMMIGR. L. J. 459, 460 (2017).

<sup>37</sup> *Id.*

<sup>38</sup> Kristen E. Eichensehr, *Biden Administration Reverses Trump Administration Policies on Immigration and Asylum*, 115 AM. J. INT'L L. 340, 341 (2021) (citing Proclamation 10.141).

<sup>39</sup> Germany Country Report: Cessation and Review of Protection Status, *Informationsverbund Asyl und Migration*, Sec. 73(2a), (2020), <https://asylumineurope.org/reports/country/germany/content-international-protection/status-and-residence/cessation-and-review-protection-status/>.

interests of the child is addressed in Article 3(1) of the CRC. It states that: “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.”<sup>40</sup>

The principle of the best interest of the child includes the child’s well-being, the child’s wishes, the need for a safe environment, family and close relationships, and the child’s development and identity needs.<sup>41</sup> There is a need to shift the orientation of immigration law towards balancing security concerns with human rights. It is necessary to consider the impact of revocation on the rights to family life and the best interests of the child, because its policies impact families with children. The right to and respect for one’s family life is recognized by Article 8 of the ECHR, Article 16 of the CRC, Article 23 of the ICCPR, and Article 10 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), ensuring that “the family is the natural and fundamental unit of society that has the right to the protection of society and the state.”<sup>42</sup>

A study conducted by Norwegian scholars called for the use of a proportionality assessment in deportation and revocation cases in Norway.<sup>43</sup> They

<sup>40</sup> Convention on the Rights of the Child art. 3 ¶ 1, Nov. 20, 1989, 1557 U.N.T.S. 3.

<sup>41</sup> U.N. High Commissioner for Refugees, UNHCR GUIDE-LINES ON DETERMINING THE BEST INTERESTS OF THE CHILD 17 (2008).

<sup>42</sup> Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, E.T.S. 5 (Nov. 4, 1950); Convention on the Rights of the Child art. 16, Nov. 20, 1989, 1557 U.N.T.S. 3; International Covenant on Civil and Political Rights art. 23, Dec. 16, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights art. 10, Dec. 16, 1966, 993 U.N.T.S. 3.

<sup>43</sup> JAN-PAUL BREKKE ET AL., TILBAKEKALL: RETTSIKKERHET OG KONTROLL VED TILBAKEKALL AV TILLATELSEER ETTER SØKNAD OM BESKYTTELSE [REVOCATION: LEGAL CERTAINTY AND CONTROL UPON REVOCATION OF PERMITS UPON APPLICATION ON PROTECTION] 52 (2018), [https://www.udi.no/globalassets/global/forskning-fou\\_i/beskyttelse/tilbakekall---rettssikkerhet-og-kontroll.pdf](https://www.udi.no/globalassets/global/forskning-fou_i/beskyttelse/tilbakekall---rettssikkerhet-og-kontroll.pdf).

indicated concerns that the Norwegian immigration authorities conducted weak proportionality assessments.<sup>44</sup> A proportionality assessment weighs the state’s interest in upholding migration control against its impact on the rights of the person or child subject to expulsion. The relevant assessment factors should include: the nature and seriousness of the offense and how much time has elapsed since it was committed; the length of time the person has been in the country, and the solidity of their social, cultural, and family ties with the host country versus the solidity of the same ties with the country of destination; their bond with their spouse; and their bond and primary caregiving role in relation to the children (considering the children’s ages, best interests, and well-being). Moreover, the study conclusively recommended that the Norwegian Immigration Authorities study the impact of the revocation of the parents’ status on the best interests of the child standard within Article 104 of the Norwegian Constitution and Article 3 of the CRC.<sup>45</sup>

In 2019, the Norwegian Board of Immigration Appeals (UNE) sought to legitimize the revocation policy by seeking approval of the Norwegian Supreme Court in a case involving a woman from Djibouti who is married to a Norwegian citizen and is the mother of four minor children.<sup>46</sup> The case is significant because the Court applied a contestational analysis that upheld the national government’s policy on immigration control through revocation and deportation.<sup>47</sup> The next section demonstrates how the court applies a restrictive contestational technique to invalidate recognition of violations of family life and the best interests of the child.

<sup>44</sup> *Id.* at 56.

<sup>45</sup> *Id.* at 63.

<sup>46</sup> Judgment HR 2019 2286 A, no. 19-083349SIV-HRET (Dec. 9, 2019) (Nor.).

<sup>47</sup> Greenberg, *supra* note 3, at 519 (describing the use of “[c]ounter-pedagogical techniques applied by “state actors to use international human rights courts to shore up the exercise of state power, even when courts find states in violation of human rights law . . . They use the formal limits of legal categories, evidence, admissibility criteria, and doctrine to innovate practices that are beyond the reach of court jurisdiction.”

### III. NON-RECOGNITION OF VIOLATION OF FAMILY LIFE AND THE BEST INTERESTS OF THE CHILD: AN EXAMINATION OF CASE HR 2019 2286

This part will present an overview of the case, discuss the interpretation of the proportionality test, and analyze the application of a restrictive contestational approach by the Norwegian Supreme Court to disqualify the best interests of the child and the right to family life.

#### *A. Case Background<sup>48</sup>*

A is a citizen of Djibouti; she applied for asylum in Norway in 2001 and presented false documents and false testimony indicating that she came from Somalia.<sup>49</sup> In 2002, A met a Norwegian man, B.<sup>50</sup> The following year, A's application was rejected by the UDI and the UNE, and A married B in 2004.<sup>51</sup> A applied for a residence permit based on her marriage to B but continued to give incorrect information.<sup>52</sup> A was granted a residence permit. Between 2005-2013 A and B had four children who are Norwegian citizens.<sup>53</sup> The children were six, ten, ten, and fourteen years old at the time of the case. In 2007, A became a Norwegian citizen.<sup>54</sup> In 2014, the police investigated old cases of Somali immigrants to identify grounds for revocation, and they invited A for an interview. During the interview, she did not recant any of the information she provided when she came to Norway.<sup>55</sup> A admitted her true identity and country of origin when the UDI sent her a notice of revocation of Norwegian citizenship and deportation. In 2015, the UDI revoked A's Norwegian

citizenship and issued an order of deportation with a two-year re-entry ban.<sup>56</sup> In 2016, UNE rejected her complaint and upheld the revocation order and a two-year entry ban because she provided false information, a serious breach of the immigration law.<sup>57</sup> In 2017, the Oslo District Court found that A's spouse and the couple's four children did not have independent standing to bring an action to block A's deportation.<sup>58</sup> In 2019, the Borgarting Court of Appeals declared the deportation order invalid, and the State appealed to the Norwegian Supreme Court.<sup>59</sup> It is noteworthy that the NGO, Save the Children, was not allowed to participate in the trial as an interested party and that the Court did not give any grounds for the rejection.<sup>60</sup> A filed the appeal based on the claim that the deportation order violated Articles 3 and 8 of the CRC, contradictory to the child's best interest.

#### *B. The Proportionality Test*

To determine whether the deportation is disproportionate to the interest of A's four children, it is important to understand the best interests of the child standard. Section 70 of the Norwegian Immigration Act presents the best interests of the child as a fundamental consideration:

An alien cannot be deported if, in view of the seriousness of the relationship and the alien's connection to the realm, it will be a disproportionate measure towards the alien himself or the immediate family members. In cases that affect children, the child's best interests must be a fundamental consideration.<sup>61</sup>

<sup>48</sup> "A" and "B" are used as pseudonyms throughout this section for the purpose of retaining privacy for the parties involved and to remain in accordance with the language used throughout the Judgement.

<sup>49</sup> Judgment HR 2019 2286 A, no. 19-083349SIV-HRET ¶¶ 3-4 (Dec. 9, 2019) (Nor.).

<sup>50</sup> *Id.* at ¶ 5.

<sup>51</sup> *Id.* at ¶ 4.

<sup>52</sup> *Id.* at ¶ 5.

<sup>53</sup> *Id.* at ¶ 6.

<sup>54</sup> *Id.* at ¶ 7.

<sup>55</sup> *Id.* at ¶ 8.

<sup>56</sup> *Id.* at ¶ 10.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at ¶ 14.

<sup>59</sup> *Id.* at ¶¶ 15-17.

<sup>60</sup> See Lov Om Mekling Og Rettergang i Sivile Tvister [Act on Mediation and Trial in Civil Disputes] § 15-7 (2005) (Nor.).

<sup>61</sup> Norwegian Immigration Act § 70 (2008) (Nor.) (on the entry of foreign nationals into the kingdom of Norway and their stay in the realm).

Further, Article 102 of the Norwegian Constitution states that “each person has the right to respect for his private and family life” and that “[s]tate authorities should ensure the protection of personal integrity.”<sup>62</sup> Deportation cases require discussion of the effect on family life and the integrity of the family. Additionally, Article 104 of the Constitution sets out a thorough structure for the protection of the child’s substantive and procedural rights:

Children are entitled to respect for their human dignity. They have the right to be heard in matters concerning themselves, and their opinion shall be given weight in accordance with their age and development. In actions and decisions that affect children, the best interests of the child shall be a fundamental consideration. Children have the right to protection of their personal integrity. The state authorities shall facilitate the conditions for the child’s development, including ensuring that the child receives the necessary financial, social and health security, preferably in his or her own family.<sup>63</sup>

The Norwegian Supreme Court failed to mention that the courts did not give the children an opportunity to speak, nor did it analyze the need to guarantee children the right to healthy development and security within their families. In immigration cases, there is often a lack of assessment of the child’s best interests and there is a need to specifically assess their vulnerability.<sup>64</sup> Nevertheless, the Court identified the issue of disproportionality of the deportation order in relation to the children as the central question, stating that:

The decision on deportation has been made pursuant to the Immigration Act § 66 first paragraph letter a. According to this provision, an alien without a residence permit may be deported, among other things, when he has provided materially incorrect or manifestly misleading information in a case under the Act. A’s conditions undoubtedly fall under this. It is also not disputed. The question is whether the deportation is disproportionate to A’s four children. As mentioned, it has not been claimed that the decision is disproportionate to A herself or her spouse.<sup>65</sup>

The State argued that deportation with a two-year entry ban was not a disproportionate measure.<sup>66</sup> The Court found that the societal interest in maintaining an effective immigration system outweighed the considerations of the family and children in the matter of deportation.<sup>67</sup> The Norwegian Immigration Appeals Board claimed that the family was not subjected to “an unusual burden” and that there were no “exceptional circumstances” to stop the revocation.<sup>68</sup> The lawyer representing the family, Arild Humlen, argued that the family had a justified expectation of staying together in Norway and called for the use of alternative measures.<sup>69</sup> He argued that the “unusually large burden” threshold narrows the scope of assessments and results in overlooked relevant factors. He called for consideration of using the alternative of in-country incarceration.<sup>70</sup> Humlen’s second argument was that the expulsion was disproportionate to the best interest of the children as it constituted an “unusually high burden” and that there were “exceptional circumstances” given the vulnerability of the young children.<sup>71</sup> The State argued that the threshold of “unusually

<sup>62</sup> KONGERIKET NORGE GRUNNLOV [GRUNNLOVEN] [The Constitution of the Kingdom of Norway] art. 102 (Nor.).

<sup>63</sup> *Id.* at art. 104.

<sup>64</sup> Ana Beduschi, *Vulnerability on Trial: Protection of Migrant Children’s Rights in the Jurisprudence of Human Rights Courts*, 36 BOS. UNIV. INT’L L. J. 55, 74 (2018).

<sup>65</sup> Judgment HR 2019 2286 A at ¶¶ 35–36.

<sup>66</sup> *Id.* at ¶ 21.

<sup>67</sup> *Id.* at ¶ 22.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at ¶ 28.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at ¶¶ 26–27, 30.

large burden” is the appropriate standard when considering the interests of the children, and it considered deportation and a two-year re-entry ban to be a proportionate measure in these types of cases.<sup>72</sup>

### *C. Restrictive Contestational Analysis of the Best Interests of the Child and the Right to Family Life*

The Norwegian Supreme Court appeared to support the “efficiency” interest of the immigration authorities when it upheld the use of deportation to signal to others the consequences of violating immigration law.<sup>73</sup> The Court cited the aims of the immigration system set by the Ministry of Justice within the proposal for the reform of the Norwegian Immigration Law, stating that:

The Ministry believes that it is important to be able to react with deportation in the event of repeated and/or gross violations of the Immigration Act.... Illegal entry, stay/work without the necessary permission or giving incorrect information violates this relationship of trust and makes it difficult for the authorities to enforce Norwegian immigration policy. It can undermine respect for the regulations and seem unfair to all those who obey the law, if gross or repeated violations of the Immigration Act cannot have consequences.<sup>74</sup>

The Court further cited the Ministry of Justice’s reiterated aim of maintaining immigration control through framing deportation as both a preventive and reactive immigration policy.<sup>75</sup> Without giving

any analytical justification, the Court concluded that deportation does not violate Article 8 of the ECHR, the right to family life; instead, the Court cited the ECtHR as legitimizing such measure by recognizing the use of deportation as a legitimate remedy in *Kaplan v. Norway* in 2014.<sup>76</sup> The Court adopted a technique of distinguishing the case from the scope of application of the right, thereby enabling it to excuse its non-recognition of the limiting application of human rights.<sup>77</sup> The Norwegian Supreme Court explained that there are factual differences between the two cases decided by the ECtHR, stating that while there was a violation of Article 8 in *Nunez* and *Kaplan*, these decisions did not apply to the Norwegian Supreme Court case since the ECtHR “assessed the specific circumstantial facts differently from the [Norway].”<sup>78</sup>

The Norwegian Supreme Court cited the ECtHR’s call for a holistic assessment in deportation cases focusing on “the particular circumstances of the person involved and general interest.”<sup>79</sup> Factors to be considered include: the extent to which the family may be ruptured, the family’s ties to the state they have settled in, and whether there are major obstacles standing in the way of the family returning to and living in their country of origin.<sup>80</sup> These considerations must also be weighed against societal interests, such as effective immigration control.<sup>81</sup>

<sup>72</sup> *Id.* at ¶ 22.

<sup>73</sup> *Id.* at ¶ 49.

<sup>74</sup> *Id.* (citing Om lov om utlendingers adgang til riket og deres opphold her (utlendingsloven) [About the law on foreigners’ access to the realm and their stay here], 289 Ot.prp.nr. 75 (2006–2007) (Nor.)).

<sup>75</sup> *Id.* at ¶ 50.

<sup>76</sup> Norges Høyesterett [Supreme Court of Norway], April 8, 2019, HR 2019 2286 no. 19-083349SIV-HRET ¶ 54 (citing *Kaplan v. Norway*, App. No. 32504/11, Eur. Ct. H.R. (2014)).

<sup>77</sup> On resistance by national courts, see generally Mikael Rask Madsen et al., *Backlash Against International Courts: Explaining The Forms and Patterns off Resistance to International Courts*, 14 INT’L J. L. IN CONTEXT 197 (2018); Anthea Roberts, *Comparative International Law? The Role of National Courts in Creating and Enforcing International Law*, 60 INT’L & COMPAR. L. Q. 57 (2011).

<sup>78</sup> *Id.* at ¶ 55.

<sup>79</sup> *Jeunesse v. the Netherlands*, App. No. 12738/10 ¶ 107 (Eur. Ct. H.R. (2014)).

<sup>80</sup> *Id.*

<sup>81</sup> Judgment HR 2019 2286 A at ¶¶ 67-68.

Further, the Court mentioned that the Parliament is considering amendment of penalties.<sup>82</sup> The brief rumination within the Court's dicta indicates

that it was concerned about the consequences of using deportation. Nevertheless, the Norwegian Supreme Court noted that the penalties related to revocation and the economic, social, and emotional consequences of deportation were not disproportionate to the best interests of the child. The Court noted that:

If a deportation decision going to have an impact on children, it is necessary to carry out a thorough, concrete[,] and real individual assessment of the child's interests. Considerations of the best interests of the child should be fundamental and weigh heavily but are not necessarily decisive on their own. A starting point for this assessment is that where serious violations of the Immigration Act lead to the basis for residence falling away, deportation will generally only be disproportionate to the children if it entails unusually heavy or extraordinary burdens upon them. Interventions in family life that do not go beyond what must be assumed to be a general consequence of an expulsion decision—financially, socially and emotionally—are not in themselves sufficient for the intervention to be considered disproportionate.”<sup>83</sup>

In *Nunez v. Norway*, the ECtHR set forth the need to analyze the specific elements relating to the deportation of a mother in order to assess whether the state was able to strike a fair balance between its public interest in ensuring effective immigration control, and the applicant's need to remain in Norway and maintain contact with her children for the children's best interests. The ECtHR also found that States gave insufficient weight to the best interest

of the child due to several reasons: the child's “long lasting and close bonds to their mother, the decision in custody proceedings, the disruption and stress that the child had already experienced, and the long period that elapsed before the immigration authorities took their decision to order the applicant's expulsion.”<sup>84</sup>

Dr. Mark Klaassen of the Institute for Immigration Law describes the criteria used by the ECtHR regarding the violation of Article 8(2), which includes the assessment of harsh effects of the deportation upon the best interest of the child and the family's social, cultural, and family ties.<sup>85</sup> He explains that the ECtHR's test places decisive weight on the principle of the best interest of the child, including the extent that the mother's deportation effectively destroys the family life.<sup>86</sup> The Norwegian Supreme Court, on the other hand, indicated that respect for family life is insufficient to block deportation if the person was not a legal resident in the country. The Court further noted that “if the foreigner from the outset does not have a legal basis for residence in the country, a subsequent establishment of a family life does not in itself provide protection against deportation” according to the ECtHR.<sup>87</sup>

In contrast, Klaassen argues that the immigration authorities' reasoning that the refusal of residence for a foreign citizen cannot interfere with her right to respect for family life since she was never given the right to residence in the first place is not convincing.<sup>88</sup> This reasoning relates exclusively to

<sup>82</sup> *Nunez v. Norway*, App. No. 55597/09 ¶ 84 (Eur. Ct. H.R. 2011), <http://hudoc.echr.coe.int/eng?i=001-105415>.

<sup>83</sup> See generally Mark Klaassen, *Between Facts and Norms: Testing Compliance with Article 8 ECHR in Immigration Cases*, 37 NETH. Q. HUM. RTS. 157 (2019) (discussing the ECtHR's criteria for violations of Article 8(2) in deportation cases).

<sup>84</sup> *Id.* at 165-66.

<sup>85</sup> Judgment HR 2019 2286 A, no. 19-083349SIV-HRET ¶¶ 85-88 (Dec. 9, 2019) (Nor.); (first citing *Jeunesse v. the Netherlands*, App. No. 12738/10 ¶ 103 (Eur. Ct. H.R. (2014)), then citing *Antwi and Others v. Norway*, App. No. 26940/10 ¶ 93 (Eur. Ct. H.R. 2012)).

<sup>86</sup> Klaassen, *supra* note 83, at 175.

<sup>82</sup> *Id.* at ¶ 103.

<sup>83</sup> *Id.* at ¶ 107.

circumstances surrounding immigration status and not to family life itself<sup>89</sup>

However, others believe that European Convention Law “has no bearing on the way state immigration laws force many families to live in a state of dislocation.”<sup>90</sup> There is often pressure to “move the whole family to a place that the family would not have considered particularly suitable, were it not for the restrictions they experienced under immigration laws.”<sup>91</sup> The ECtHR does not list immigration control as a legitimate measure of interference in the right to respect for family life.<sup>92</sup> Hence, Klaassen proposes new guidelines in which the State must clearly define the legitimate goal of violating the right to respect for family life and why the violation is necessary to achieve this goal.<sup>93</sup> In comparison, the IACtHR issued an advisory opinion that set forth that:

In situations in which the child has a right to the nationality of the country from which one or both of her or his parents may be expelled, or the child complies with the legal conditions to reside there on a permanent basis, States may not expel one or both parents for administrative immigration offenses, as the child's right to family life is sacrificed in an unreasonable or excessive manner.<sup>94</sup>

<sup>89</sup> *Id.* (“Although there may never have been a right to reside in the past, the refusal to live together in the host state can constitute a ‘colossal interference’ with the right to respect for family life.”) (quoting *Quila v. Sec. State for the Home Dep’t*, (2011) UKSC 45, [32], [43] (appeal taken from Eng.)).

<sup>90</sup> MARIE-BÉNÉDICTE DEMBOUR, WHEN HUMANS BECOME MIGRANTS: STUDY OF THE EUROPEAN COURT OF HUMAN RIGHTS WITH AN INTER-AMERICAN COUNTERPOINT 97 (2015).

<sup>91</sup> *Id.*

<sup>92</sup> European Convention on Human Rights, art. 8 ¶ 2, Nov. 4, 1950, Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, November 4, 1950, ETS 5.

<sup>93</sup> Klaassen, *supra* note 83, at 176.

<sup>94</sup> *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*, Advisory Opinion OC-21/14, Inter-Am. Ct. H.R. (ser. A) No. 21, p. 112 (Aug. 19, 2014).

In the present case, most of the Norwegian Supreme Court’s conclusion places high importance on the State’s interest in ensuring respect for the law. The Court held that because A repeatedly provided false information about her identity, country of origin, and the need for asylum she is considered to have engaged in serious violations of immigration law that disqualify her from having a legitimate expectation to stay in Norway and enjoy a protected family life.<sup>95</sup> This decision focuses on the mother’s fraudulent acts, and it does not place the children at the center of its analysis. The UN Committee on the Protection of the Rights of All Migrant Workers (CMW) and the Committee on the Rights of the Child (CRC) issued a Joint General Comment stating that the best interest of the child assessment should be done by actors independent of the immigration authorities.<sup>96</sup> They also stressed that general migration control considerations could not override the best interest of the child standards.<sup>97</sup> Furthermore, Article 9 of the CRC underscores the primacy of the best interest of the child considerations in the context of separation of children from their parents. The CRC states that:

States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and

<sup>95</sup> Judgment HR 2019 2286 A, no. 19-083349SIV-HRET ¶¶ 113-17 (Dec. 9, 2019) (Nor.).

<sup>96</sup> U.N. Comm. on the Prot. of the Rights of All Migrant Workers & Members of Their Families & U.N. Comm. on the Rights of the Child, *Joint General Comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the General Principles Regarding the Human Rights of Children in the Context of International Migration*, U.N. Doc. CMW/C/GC/3-CRC/C/GC/22 ¶ 32(c) (Nov. 16, 2017) [hereinafter Joint General Comment No. 3 (2017)]; see JASON M. POBJOY, *THE CHILD IN INTERNATIONAL REFUGEE LAW* 74, 236 (Cambridge 2017) (citing the U.N. Comm. on the Rights of the Child, General Comment No. 6 (2005): *Treatment of Unaccompanied and Separated Children Outside Their Country of Origin*, U.N. Doc. CRC/GC/2005/6 (Sept. 1, 2005)).

<sup>97</sup> Joint General Comment No. 3 (2017), *supra* note 92, at ¶ 33.

procedures, that such separation is necessary for the best interests of the child.<sup>98</sup>

The Norwegian Supreme Court gave a contradictory assessment of the vulnerability of children and characterizes the consequences of deportation as not amounting to exceptional harm. The Court noted that:

[T]he children are normally developed and mainly well-functioning. Prior to the deportation case, they have not been exposed to a break-up with any of the parents or exposed to other particularly stressful circumstances. However, the Court of Appeal assumes that the twins D and E were ‘somewhat vulnerable’, in slightly different ways. But the development seems to be positive, and I understand the Court of Appeal so that at least part of this is due to the uncertainty and unrest that naturally follows from the deportation case. It is further assumed that especially the three youngest children will be “strongly emotionally affected” if the mother is expelled. But there is no information that this goes beyond what must be expected in such a situation.<sup>99</sup>

Hence, the Norwegian Supreme Court utilized a contestational technique that seeks to define the case as not reaching the scope of application of human rights.<sup>100</sup> The Supreme Court acknowledged that the strong relationship between the mother and the children signal that there is a special bond that should be weighed against the revocation order:

The Court of Appeal assumes that the children are more strongly attached to the mother than the father. She has been responsible for a large part of the daily care of the children, which among other things seems to be related to the fact that the spouse works a lot and comes home late. The children have always lived with both parents.<sup>101</sup>

In the *Nunez* case, an exceptional circumstances factor was the children’s long-standing and close ties to their mother, but the Norwegian Supreme Court did not discuss this.<sup>102</sup> Nor did the Court discuss the possibility that the father might have to work more to repay the €300.00 fine set by the Norwegian Department of Welfare for the benefits paid to A.<sup>103</sup> The Court concluded that the children’s father was a stable caregiver.<sup>104</sup> However, there was no discussion of how their father may potentially lose financial, psychological, or emotional stability after their mother’s expulsion. Nor is there a discussion of the impact of the deportation upon the father’s emotional well-being. The Norwegian Supreme Court gave another adversarial evaluation that acknowledged increased pressure on the father after deportation but described it as normal, thereby indicating that it did not meet the threshold needed to stop the revocation.<sup>105</sup>

<sup>98</sup> Convention on the Rights of the Child art. 9, *opened for signature* Nov. 20, 1989, 1557 U.N.T.S. 3.

<sup>99</sup> Judgment HR 2019 2286 A, no. 19-083349SIV-HRET ¶ 121 (Dec. 9, 2019) (Nor.).

<sup>100</sup> Greenberg, *supra* note 3, at 518-36.

<sup>101</sup> Judgment HR 2019 2286 A, no. 19-083349SIV-HRET ¶ 122 (Dec. 9, 2019) (Nor.).

<sup>102</sup> *Nunez v. Norway*, App. No. 55597/09 ¶ 84 (Eur. Ct. H.R. 2011), <http://hudoc.echr.coe.int/eng?i=001-105415>.

<sup>103</sup> Kari Yppestol Arntzen & Christina Cantero, *NAV krever at utvist firebarnsmor betaler tilbake nærmere 300.000 kroner*, NRK (Jan. 8, 2020), <https://www.nrk.no/sorlandet/nav-krever-at-utvist-firebarnsmor-betaler-tilbake-naermere-300.000-kroner-1.14851039> [Nav Demands that the Expelled Mother of Four Pay Back Almost 300,000 Kroner].

<sup>104</sup> Judgment HR 2019 2286 A, no. 19-083349SIV-HRET ¶ 123 (Dec. 9, 2019) (Nor.).

<sup>105</sup> *Id.* (“[t]he task of caring for the children’s father will be significant in the two years the entry ban lasts. It may also lead to changed finances for the family. But neither can this be characterized as unusual or extraordinary.”).

The Norwegian Supreme Court concluded that the children would live in an established and safe community. However, it failed to discuss the potential impact on the community after the expulsion of the mother. Also, the local community may distrust state institutions when they hear the news of the separation of a mother from her children by the state; this may create polarization between the society and the state.<sup>106</sup> Without explaining the difference, the Norwegian Supreme Court concluded that the children, in this case, were not exposed to “disruption and stress” like the children in *Nunez*.<sup>107</sup> However, the Court contradicted its previous statement on the effect of the deportation. Here, the Court cited the ECtHR to indicate that it is aware of its jurisprudence, but it distinguished the facts in the instant case, thereby avoiding the requirement to abide by the judgment. This distinction gave the illusion that the Court was abiding by the jurisprudence despite its contradictory decision. The Norwegian Supreme Court suggested that the children take holidays in Djibouti and speak to their mother via telephone and social media.<sup>108</sup>

Nevertheless, the Court invited the immigration authorities to reverse their decision according to Section 71(2) of the Norwegian Immigration Act if the children experience psychological problems due to the expulsion of their mother.<sup>109</sup> In upholding the deportation order, the Court stated: “I cannot see that the children will be subjected to an unusually large burden, or the existence of extraordinary circumstances that would indicate that expulsion of A for two years would be a disproportionate measure in relation to the children.”<sup>110</sup>

<sup>106</sup> See Jan-Paul Brekke et al., *Losing the Right to Stay: Revocation of Refugee Permits in Norway*, 34 J. REFUGEE STUD. (2020), <https://doi.org/10.1093/jrs/feaa006.1637> (2021) (discussing the negative impact of revocation and deportation upon the local community).<https://doi.org/10.1093/jrs/feaa006>.

<sup>107</sup> Judgment HR 2019 2286 A, no. 19-083349SIV-HRET ¶ 124 (Dec. 9, 2019) (Nor.).

<sup>108</sup> *Id.* at ¶ 125.

<sup>109</sup> *Id.* at ¶ 126.

<sup>110</sup> *Id.* at ¶ 127.

The Norwegian Supreme Court’s decision can be characterized as misinterpreting the best interests of the child standard in the context of deportation because it failed to recognize the particular vulnerability of young children.<sup>111</sup> A holistic assessment of this case should include an analysis of the extent to which deportation potentially interferes with or affects the child’s family or private life. For example, the father may have to take a new job to pay the fines due to the Norwegian Welfare Department (NAV), and as a result, he may have increased levels of stress. This stress could affect his mood and may lead to a deterioration of his relationship with his children and work colleagues. Additionally, the 14-year-old child might have to undertake a supplementary “mother” role for his younger siblings. The deportation of his mother could lead to alienation from Norwegian identity, lost trust in the Norwegian authorities, poor school performance, exposure to aggressive behavior or communication, low self-esteem, or (in the worst case) possible recruitment to a violent, radicalized, or criminal environment.<sup>112</sup> Moreover, it would also be important to analyze the potential mental anguish the mother would suffer upon forcible separation from her children, given her right to family relations.<sup>113</sup> The widely recognized consequences of separating parents from their children were not explored in this Norwegian Supreme Court decision, indicating a lack of a holistic, human rights-based

<sup>111</sup> See *Nunez v. Norway*, App. No. 55597/09, ¶ 18 (June 28, 2011), [https://www.menschenrechte.ac.at/orig/11\\_3/Nunez.pdf](https://www.menschenrechte.ac.at/orig/11_3/Nunez.pdf).

<sup>112</sup> See generally NORWEGIAN INSTITUTE OF PUBLIC HEALTH, EFFEKT AV POLITIETS FOREBYGGENDE TILTAK RETTET MOT RADIKALISERING OG SEKSUALLOVBRUDD BLANT UNGDOM: EN SYSTEMATISK OVERSIKT [EFFECT OF PREVENTION WORK BY THE POLICE TARGETING RADICALISATION AND SEXUAL OFFENCES AMONG YOUTH: A SYSTEMATIC REVIEW] (2021).

<sup>113</sup> Convention on the Elimination of All Forms of Discrimination Against Women art. 16(d), Dec. 18, 1979, 1249 U.N.T.S. 13 (codifying that women and men have “the same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount”).

evaluation of all relevant elements affecting children and their families.<sup>114</sup>

This case illuminated the challenges faced by NGOs regarding the policy of family status revocation and deportation. In 2020, the Norwegian Organization of Asylum Seekers (NOAS) published a report that revealed a real risk of extended separation of children from parents beyond the two years set by the law because of the practical difficulties faced by the deported parent in returning and/or the children in visiting the country of origin.<sup>115</sup> The UN High Commissioner for Refugees (UNHCR) is in favor of states providing humanitarian status to persons who have a canceled/revoked legal status.<sup>116</sup> Nevertheless, the current political climate supports the evolution of “crimmigration” policies, which criminalizes asylum seekers for their unlawful entry into the EU and Nordic countries and increases the use of deportation techniques within these countries

has facilitated the maintenance of the “return turn” within the Nordic Region and Europe.<sup>117</sup>

#### IV. CONCLUSION

As’s case confirms the consequences of revocation and deportation while underscoring the judiciary’s position, which pursued a restrictive contestational approach that failed to recognize the violations of family life and the best interests of the children.<sup>118</sup> Judge Cançado Trindade of the International Court of Justice suggested that states that pursue immigration policies that do not abide by human rights may be characterized as acting arbitrarily.<sup>119</sup> There is a clear need to change the systematic review of older asylum cases based on national origin to a streamlined approach based on individual security risk assessment to avoid violating the principle of non-discrimination. Additionally, a possible consequence of the systematic revocation

<sup>114</sup> See Regina Day Langhout et al., *Statement on the Effects of Deportation and Forced Separation on Immigrants, their Families, and Communities*, 62 AM. J. CMTY. RSCH. 3, 5 (2018) (noting the negative psychosocial effects that deportation has on individuals and their families); see also BARNEOMBUDET, BARN MED UTVISTE FORELDRE [THE OMBUDSMAN FOR CHILDREN WITH DEPORTED PARENTS] (2012), [https://www.barneombudet.no/uploads/documents/Publikasjoner/Fagrapporter/Barn\\_med\\_utviste\\_foreldre\\_es.pdf](https://www.barneombudet.no/uploads/documents/Publikasjoner/Fagrapporter/Barn_med_utviste_foreldre_es.pdf).

<sup>115</sup> BARNETS BESTE I UTVISNINGSSAKER, NORSK ORGANISJON FOR ASYLSØKERE [THE BEST INTEREST OF THE CHILD IN DEPORTATION CASES, THE NORWEGIAN ORGANIZATION FOR ASYLUM SEEKERS] (2020), [https://www.noas.no/wp-content/uploads/2020/03/NOAS\\_Barnets-bestе\\_rapport\\_WEB.pdf](https://www.noas.no/wp-content/uploads/2020/03/NOAS_Barnets-bestе_rapport_WEB.pdf) (Nor.).

<sup>116</sup> Kapferer, *supra* note 6, at 14.

<sup>117</sup> KATJA FRANKO, *THE CRIMMIGRANT OTHER: MIGRATION AND PENAL POWER* (2019); see also Thomas McDonnell & Vanessa H. Merton, *Enter at Your Own Risk: Criminalizing Asylum Seekers*, 51 COLUMBIA HUM. RTS. L. REV. 1, 5-6 (2019); Nancy Bazilchuk, *Non-citizens punished by deportation: Norwegian police use deportation and punishment interchangeably to avoid spending resources on foreigners in prisons*, SCIENCE NORWAY (Jan. 28, 2015), <https://sciencenorway.no/crime-forskingno-immigration-policy/non-citizens-punished-by-deportation/1413426> (Indeed, although the UNCHR uses the term cancellation for cases involving misrepresentation, revocation implies application of the exclusion clauses however the Norwegian immigration authorities apply revocation to misrepresentation cases as well); see e.g., Jessica Schultz, *The End of Protection? Cessation and the ‘Return Turn’ in Refugee Law*, EU IMMIGRATION & ASYLUM L. POL’Y (Jan. 31, 2020), <https://eumigrationlawblog.eu/the-end-of-protection-cessation-and-the-return-turn-in-refugee-law/>; see also Vanessa Barker & Peter Scharff Smith, *This is Denmark: Prison Islands and the Detention of Immigrants*, 61 BRIT. J. OF CRIMINOLOGY 1540, 1553 (2021) (observing that the “extended use of penal institutions and penal harms to contain and remove unwanted populations. What happens to unwanted migrants—detention, isolation and removal—is not part of a separate system, a parallel track; it is part and parcel of the welfare state.”).

<sup>118</sup> On the potential for a positive role of the judiciary in migration, See Mauro Zamboni, *Swedish Legislation & the Migration Crisis*, 7 THEORY & PRAC. OF LEGIS. 101, 125-29 (2019).

<sup>119</sup> Application of the CERD Convention (Qatar v. U.A.E.), Order, 2018 I.C.J. 438, ¶ 31 (July 23) (separate opinion by Cançado Trindade, J.).

and deportation policy is the alienation of the immigrant communities within Norway and the potential increased risk of radicalization within this community, thereby raising the security risk.<sup>120</sup> Scholars have found that alienation could create a crisis of belonging.<sup>121</sup> Judicial analysis should be grounded in the human principles confirming the dignity of both foreign and Norwegian family members and re-opening the door to a holistic interpretation of international law at the national level.<sup>122</sup> Norway and other Nordic countries with similar deportation and revocation models should adopt a human rights-based approach to revocation and deportation that would balance the State's interest in maintaining efficiency within migration and the interests of long-term resident refugees to enjoy access to justice when the State is reviewing their precarious status.

<sup>120</sup> The deregulation policy has profound impact in decoupling the individuals from their community and adding to feelings of xenophobia and exclusion. See Brekke et al., *supra* note 91, at 1646.

<sup>121</sup> Bridget Anderson et al., *Citizenship, Deportation and the Boundaries of Belonging*, 15 CITIZENSHIP STUD. 547, 561 (2011).

<sup>122</sup> The risk of renewed separation of families is likely to continue, resulting in prolonging of Norway as a deportation leader within Europe. See Franko, *supra* note 113, at 87 (on Norway's increase of assignment of police to implement deportation and expanded use of detention); Sindre Bangstad, *Norway: The Forced Deportation Machine*, PUB. ANTHROPOLOGIST J. BLOG (June 27, 2019), <https://publicanthropologist.cmi.no/2019/06/27/norway-the-forced-deportation-machine/>; JEG HAR IKKE GJØRT NOE GALT, NORSK ORGANISASJON FOR ASYLSØKERE (2017), <https://flykning.net/media/barn-og-foreldres-opplevelse-av-tvangsretur.pdf> [I Have Not Done Anything Wrong, Norwegian Organization for Asylum Seekers].

# SOCIAL SERVICES AND MUTUAL AID IN TIMES OF COVID-19 AND BEYOND: A BRIEF CRITIQUE

by Dana Neacsu\*

May 19, 2021, marked a crucial point in the United States' fight against the COVID-19 pandemic: sixty percent of U.S. adults had been vaccinated.<sup>1</sup> Since then, Americans have witnessed the beginning of the end of the COVID-19 pandemic, but its long-term effects are here to stay. Ironically, some are unexpectedly welcome. Among the lasting positive changes is an augmented sense of individual involvement in community well-being. This multifaceted phenomenon has given rise to #BLM

allyship<sup>2</sup> and heightened interest in mutual aid networks.<sup>3</sup> In the legal realm, it has manifested with law students, their educators, lawyers, and the American Bar Association (ABA) proposing new educational standards: law schools ought to build a curriculum centered on social justice, equity, diversity, and inclusion rather than the traditional fixation of “thinking like a lawyer” law programs.<sup>4</sup>

On a larger, political, social, and legal plan, calling for social justice is a call for sustainable democratic capitalism.<sup>5</sup> And a democracy is as vibrant as its welfare system is.<sup>6</sup> Calling out social services for being unsatisfactory and inadequate is not and cannot be tantamount to suggesting that the answer was their cancelation.<sup>7</sup> On the contrary, a

<sup>2</sup> See, e.g., Dana Neacsu, *George Floyd Protests and Black Lives Matter Roundtable (Pt. II)*, ARK REPUBLIC (June 14, 2020), <https://www.arkrepublic.com/2020/06/14/ark-republic-round-table-pt-2/>.

<sup>3</sup> See, e.g., Andy Newman, *Able to Save 8 Tons of Food in a Single Day: Here Come the Food Rescuers*, N.Y. TIMES (May 27, 2021), <https://www.nytimes.com/2021/05/21/nyregion/food-rescue-new-york-covid.html> (noting that an army of volunteers in New York tried to make the best of an inherently wasteful grocery system).

<sup>4</sup> Proposed Changes to Standards 205 and 206, 303 and 508, and 507, May 7, 2021, ABA, [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/council\\_reports\\_and\\_resolutions/may21/21-may-standards-committee-memo-proposed-changes-with-appendix.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/may21/21-may-standards-committee-memo-proposed-changes-with-appendix.pdf); see also April M. Barton, *Teaching Lawyers to Think like Leaders: The Next Big Shift in Legal Education* 73 BAYLOR L. REV. 115, 117 (2021) (for Duquesne University Dean April M. Barton's teaching philosophy of leading with empathy: “Lawyers are taught to advocate, to persuade, to analyze, to parse, to spot issues, even to convince others that they are right. *These skills, while admirable, do not always align with good leadership; in fact, if not balanced with emotional intelligence, self-awareness, and social awareness, these skills can defy good leadership.*” (emphasis added)).

<sup>5</sup> In the introductory chapter of an upcoming co-authored book on SUSTAINABLE CAPITALISM: CONTRADICTION IN TERMS OR ESSENTIAL WORK FOR THE ANTHROPOCENE (INARA SCOTT, ed.), I develop my ideas about how a functional relationship between a vibrant democracy and capitalism might save capitalism from a Kρόνος (Krónos)-like future.

<sup>6</sup> Dana Neacsu, *A Brief Critique of the Emaciated State and Its Reliance on Non-Governmental Organizations to Provide Social Services*, 9 N.Y. CITY L. REV. 405–35 (2006).

<sup>7</sup> *Id.*

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<sup>1</sup> Christina Maxouris & Holly Yan, *About 60% Of American Adults Have Had At Least One Dose Of Covid-19 Vaccine, Including More People of Color*, CNN (May 19, 2021), <https://www.cnn.com/2021/05/18/health/us-coronavirus-tuesday/index.html>.