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THE BEST INTERESTS OF THE CHILD IN THE CASE LAW OF THE EUROPEAN COURTS: EXPERIENCE FOR EU MEMBER STATES AND CANDIDATE COUNTRIES[1]

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Abstract. The protection of the rights of the child is a universal, global issue in the modern world. In a democratic society, a certain minimum standard of children's rights protection must be warrantied and ensured regardless of national specificities. A number of international mechanisms have been created by the United Nations, the Council of Europe, and the European Union. The EU Member States jointly respect the universal values of human dignity, freedom, equality, solidarity, and democracy as adopted in the Charter of Fundamental Rights of the EU. An integral part of this standard is being developed through the relevant EU legal acts and caselaw. They form part of the general principles of EU law and should also be considered binding in the acceding countries. The role of the European Court of Human Rights, as well as the Court of Justice of the European Union, is essential in the interpretation of child rights in Europe and in raising the standard for their protection. The purpose of this article is a comparative study of the practice of two European courts on child rights, as well as the child rights protection system in Lithuania, a Member State of the European Union, and Georgia, a potential candidate country. This research provides conclusions as to what similar and different approaches exist in the two European courts and what is important for Georgia when approaching these standards in the process of European integration.

Keywords: Child Rights, European Law, European Court of Human Rights, Court of Justice of the European Union, Best Interests, Georgia, Lithuania

Introduction

Protecting the best interests of the child is an important principle of international (United Nations Convention on the Rights of the Child, 1989) and European law (Charter of Fundamental Rights of the European Union, 2000). The European Union (EU) promotes the observance of this principle both in the Member States of the EU and in its neighboring countries in the process of European integration. In this context, Article 78 of the Constitution of Georgia (1995) is important, which defines the duty of the state institutions of Georgia to implement integration into the EU. First of all, in the process of legal integration, it is important to share the practice of European courts in order to bring the national legal system closer to EU law. Georgia has implemented important legislative reforms in this direction. The second chapter of the Constitution of Georgia is devoted to basic human rights, where it is mentioned in the second paragraph of Article 30 that the rights of mothers and children are protected by law. According to this, the State recognizes its positive obligation in undertaking the necessary measures to create mechanisms to protect the rights of the child. This is further coupled with the obligations Georgia has under the international acts it has acceded to, including UN Convention on the Rights of the Child (hereinafter – the UNCRC), ratified by Georgia in 1994. Based on this, the Parliament of Georgia adopted the Juvenile Justice Code (2015) and the Child Rights Code (2019). The goals of both normative acts were to prioritize the best interests of the child, protecting their dignity, safety, life, and health, and realizing their education, development, and other interests. In this regard, it is important to mention the specific ways in which these 2 codes envisioned ensuring that the best interests of children are achieved. First of all, the Child Rights Code gives priority to the best interests of the child in Article 5 (Giving priority to the best interests of the child): "The child has the right to have his or her best interests given priority in any decision concerning him or her..." This wording is consistent with Article 1 and Article 3 of the UNCRC (1989). It is also important to mention Article 5, part 4 of the Child Rights Code

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(2019), which stipulates that "when defining a legal norm, the definition that corresponds to the best interests of the child should be used."

On the other hand, the Juvenile Justice Code of Georgia (2015) defines that its purpose is to: protect the best interests of minors; re-socialize and rehabilitate minors who are in conflict with the law; protect the rights of minor victims and witnesses; prevent the secondary victimization of minor victims and minor witnesses and avoid the re-victimization of minor victims; and prevent new crimes and protect public order in the process of administration of justice. The Juvenile Justice Code provides for the protection of the best interests of the child based on principles such as: the priority of the best interests of minors; the prohibition of discrimination; the right of minors to harmonious development; proportionality; the priority of applying the most lenient remedies and alternative measures; detention as a last resort; the participation of minors in juvenile justice procedure; the inadmissibility of delays in the juvenile justice procedure; the previous convictions of a minor; the protection of the privacy of minors; an individual approach to minors; and the procedural rights of minors.

After the above-mentioned legislative changes, the legal mechanisms for the protection of children's rights are still in the process of implementation. Today, when the Europeanization of law is actively underway in Georgia, as well as the research of related issues, the use of European judicial practice is very important when considering a broad interpretation of Article 78 of the Constitution of Georgia. The court's interpretations create a legal basis for Georgia's correct convergence with European standards. In Georgia, discussions on the European standards in the field of human rights are mainly based on decisions of the European Court of Human Rights (hereinafter – ECtHR). This is understandable because Georgia is a contracting party to the European Convention on Human Rights (hereinafter – the ECHR), and the jurisdiction of the ECtHR extends to Georgia. According to Article 4 of the Constitution of Georgia (1995), an international treaty of Georgia shall take precedence over domestic normative acts unless it comes into conflict with the Constitution or the Constitutional Agreement of Georgia. On the rights of the child in Georgia, the judgments of the ECtHR are mainly used in cases, and the national courts ensure the enforcement of these judgments. Following the recommendations of the European Commission in 2022 (Directorate-General for Neighborhood and Enlargement Negotiations, 2022), on October 18, 2023, the Parliament of Georgia amended 11 laws, including the legislation of civil, administrative, general courts and the Constitutional Court, and determined the practical application of the decisions of the ECtHR. For example, according to the change in the law of the Constitutional Court, when determining the issue of disputed importance, the Constitutional Court can also take into account the definitions given in the decisions of the ECtHR on similar legal issues (Organic law of Georgia, 2023). Along with this, there are already decisions of the ECtHR on the previously submitted complaints of Georgia (*N.Ts. v. Georgia*, 2016; *G.S. v. Georgia*, 2015).

However, after Georgia signed an association agreement with the EU, the goal of the country became to join the EU, hence the decisions of the Court of Justice of the European Union (hereinafter – CJEU) gained special importance. The practice of the CJEU in Georgia has not been thoroughly studied, nor are Court decisions available in the Georgian language. As for research, there are publications that mainly present small excerpts of Court decisions on the main principles of the EU or about economic freedom (Gelashvili & Kamarauli, 2010) or personal data protection (IDFI, 2022), less so about children's rights. The European Convention on the Rights of the Child was also developed and published in Georgian – both the 2015 edition and the 2022 edition (European Union Agency for Fundamental Rights and Council of Europe, 2021, 2022) are available. Thus, the present article will contribute to developing the existing knowledge in the field of child rights protection in Georgia.

It is important for Georgia, on the one hand, to introduce European law and European standards, and on the other hand, to share the experience of the Member States of the EU. From this point of view, this research explores the experience of an EU Member State – Lithuania, which, after the restoration of independence, had to go down the same road, implementing the same reforms in the field of protection of children's rights that Georgia is implementing today. Thus, this article presents a comparative analysis of the child rights protection systems of Lithuania and Georgia, which is important for Georgia. The following paragraphs of the article will be devoted to the discussion of the practice of the CJEU, and also the ECtHR in the field of children's rights, as ECtHR case law is part of EU law (ECtHR, n.d.).

Thus, the main objective of this article is a comparative study of the practice of two European courts on child rights, as well as the child rights protection system in Lithuania, a Member State of the EU, and Georgia, a candidate country. The main questions of the research are: What standards are established by the European courts for the protection of the best interests of the child? How are they implemented by the Member States? What should EU candidate countries do to move closer towards these standards? Various methods are used in this research, such as case studies, an analysis of legislative acts, a comparative legal analysis, and quantitative and qualitative research methods. This research provides conclusions as to what similar and different approaches exist in the two European courts and what is important for Georgia when approaching these standards in the process of European integration.

1. Children's Rights in European Law

Children's rights in European law are comprised of the primary sources of law established by the EU on the one hand and the Council of Europe on the other – treaties, conventions, secondary legislation, and court decisions. Together, they form the basis of European law on the rights of the child. An important source of children's rights in Europe is also the UNCRC (1989), which states in its first Article that "a child means every human being below the age of eighteen years" and which is used as a standard for the protection of the concept and rights of the child in Europe.

From the perspective of the development of child rights law in Georgia, it should be noted that there is no single formal definition of the concept of a "child" in EU law, treaties, legislation, or jurisprudence. In EU legal documents, a child is mainly defined as a person below 18 years of age. The EU legislation in the field of free movement of EU citizens and their family members defines children as "direct descendants who are under the age of 21 or are dependent" (Directive 2004/38/EC). In other areas, such as labor rights, the definition of a child is related to their age. This definition is also used in the field of social security, immigration, and education. In these contexts, the definition of the UNCRC is generally adopted (European Union Agency of Fundamental Rights, 2010, pp. 6–7).

As for the law of the Council of Europe, the ECHR does not contain a definition of a child, but its Article 1 obliges states to secure rights under the Convention to "everyone" within their jurisdiction, which also includes children. Article 14 of the ECHR guarantees the enjoyment of the rights set out in the Convention "without discrimination on any ground," including grounds of age (*Schwizgebel v. Switzerland*, 2010). In its jurisprudence, the ECtHR has accepted the UNCRC definition of a child, endorsing the "below the age of 18 years" notion (*Güveç v. Turkey*, 2009; *Çoşelav v. Turkey*, 2012).

It was known that for a long time that the EU did not have a valid universal document in the field of human rights. The introduction of the Charter of Fundamental Rights of the European Union (hereinafter – the Charter) in 2000 and the entry into force of the Treaty of Lisbon in 2009 created new instruments for the protection of children's rights in the EU. The Charter includes detailed guidelines on the rights of the child, including: the recognition of children's right to receive free compulsory education (Article 14 (2)), the prohibition of discrimination on the grounds of age (Article 21); the prohibition of any child work and exploitative labor of young people (Article 32); the right to such protection and care as is necessary for their well-being (Article 24 (1)); the right to express their views freely and to have their views taken into consideration in accordance with their age and maturity (Article 24 (1)); the right to have their best interests taken as a primary consideration in all actions relating to them (Article 24 (2)); the right to maintain on a regular basis a personal relationship and direct contact with both parents, unless that is contrary to their interests (Article 24 (3)); and the right to private and family life (Article 7).

The Treaty of Lisbon (2007) announced the "protection of the rights of the child" as a general stated objective of the EU (Article 3 (3) of the Treaty on EU). The Treaty on the Functioning of the European Union (2012; hereinafter – the TFEU) also contains a special reference to the rights of the child regarding combating sexual exploitation and human trafficking (Article 79 (2) (d) and Article 83 (1)). In addition, norms on the rights of the child are contained in the directives of the EU – for example, the Directive on combating child sexual abuse, child sexual exploitation and child pornography (Directive 2011/93/EU); the Directive on preventing and combating trafficking in human beings and protecting its victims (Directive 2011/36/EU, 2011); the Directive establishing minimum standards on the rights, support and protection of victims of crime (Directive 2012/29/EU); and the

Directive establishing procedural safeguards for children who are suspects or accused persons in criminal proceedings (Directive 2016/800/EU).

In addition to the legislation regarding the rights of the child, a significant document was passed in 2021 – the EU Strategy on the Rights of the Child, where the European Commission defined priorities in the following areas: child participation in political and democratic life, socio-economic inclusion, health and education, combating violence against children and ensuring child protection, child-friendly justice, digital and information society, and the global dimension. In this strategy, the European commission invites Member States to: establish, improve and provide adequate resources for new and existing mechanisms of child participation at the local, regional and national levels, including through the council of Europe's child participation self-assessment tool; increase awareness and knowledge of the rights of the child, including for professionals working with and for children, through awareness campaigns and training activities; strengthen education on citizenship, equality and participation in democratic processes in school curricula at the local, regional, national and EU levels; and support schools in their efforts to engage pupils in the school's daily life and decision-making (European Commission, 2021). The European Strategy for a Better Internet for Children (European Commission, 2023) includes the digital rights of the child. As we know, the EU does not have legislative powers in all areas. Currently, the EU can legislate on child rights in areas such as: consumer protection (Directive 2011/83/EU); asylum and migration (Regulation (EU) 2021/2303); cooperation in civil and criminal matters (Regulation (EU) No 1215/2012); and data protection (Regulation (EU) 2016/679).

Unlike the EU, one of the founding mandates of the Council of Europe is the protection of human rights. For this reason, the Council of Europe has adopted as one of its key treaties – the ECHR (1950) – which has been ratified by all Member States of the Council of Europe and contains special instructions regarding children's rights (for example: Article 5, paragraph 1, subparagraph d; Article 6, paragraph 1; Article 2 of the Additional Protocol; Article 8, which defines the right to respect for private and family life; Article 3, which prohibits torture, inhuman or degrading treatment or punishment; all of which can be deemed to equally apply towards children, as well). In addition to the ECHR, the European Social Charter (ESC) is noteworthy within the framework of the Council of Europe and contains special records on children's rights (for example, Article 7 establishes the obligation to protect children from exploitation, Article 17 on the care, support and education of children, protection from violence and exploitation). In this context, the treaties of the Council of Europe should be also mentioned, which regulate many issues related to children's rights: the Convention on the Protection of Children against Sexual, Exploitation and Sexual Abuse (2007); the Convention on the Exercise of Children's Rights (1996), the Convention on the Legal Status of Children Born out of Wedlock (1975), the Convention on the Adoption of Children, revised in 2008; the Convention on Contact concerning Children (2003); and the Convention on Preventing and Combating Violence against Women and Domestic Violence (the Istanbul Convention; 2011). The EU is not a part of these Conventions, but most of them (except the European Convention on the Exercise of Children's Rights) have been ratified by Georgia. They form part of the general principles of EU law, and from this perspective are significant for the protection of child rights in Georgia.

It is impossible to talk about the European law of children's rights without mentioning the UNCRC (1989). The EU is not a state party to the UNCRC, although the EU relies on "general principles of European Union law," and the decisions of the CJEU confirm that it interprets this international convention in such a way that EU law derives from international human rights law. An amendment to the EU Charter of Human Rights was prepared based on the international convention, and Article 24 of the Charter refers to the best interests of the child and other principles.

Thus, the UNCRC is an important source of European law on children's rights, as the Member States of the Council of Europe and the EU are also parties to the UNCRC. That is why this Convention indirectly imposes legal obligations on European states in the field of children's rights.

2. The Role of European Courts in Protecting the Rights of the Child

Both national and international courts play an important role in protecting children's rights in Europe. In this case, it is interesting for us to consider the role of the European courts – the CJEU and the ECtHR. These courts have different jurisdictions and different historical experiences in the field of child rights protection.

2.1. The Court of Justice of the European Union

The CJEU ensures that the principles of law are respected in the interpretation and application of the EU Treaties (Decree of the Government of Georgia, 2020). These decisions have a very important practical purpose, as EU treaties and existing legislation may not always fully convey the content of legal norms. The main aspects of the activity of the CJEU are the so-called "filling up of deficiencies," "creative jurisprudence" and defining measures to ensure their effectiveness (Decree of the Government of Georgia, 2020). CJEU decisions have an important role in the Member States, and the implementation of EU directives, regulations and other legal acts is determined to some extent by these decisions. Decisions interpret the specific provisions of legal acts, verifying the correct implementation of EU legislation in national legislation by Member States. Decisions of the CJEU are binding and are considered sources of EU law (Decree of the Government of Georgia, 2020).

At the same time, it should be noted that European judges use the ECHR in the interpretation of human rights, helping to deepen integration processes (Scheeck, 2005). Since the early 1970s, the CJEU has borrowed the rights guaranteed under the ECHR to protect fundamental rights and (hence) its own role (Scheeck, 2005). Today, the CJEU is seen as the guardian of European integration (Boin & Schmidt, 2021). The CJEU has a clear mission to develop Europe, and the Court is committed to the ideal of "permanent close association" and has shown itself to be the guardian of the Treaties (Boin & Schmidt, 2021). The Court acts in the resolution of disputes in the process of crises and European integration (Azoulai & Dehousse, 2012), and plays an important role in the process of democratization in the EU (Wincott, 1994). The Court directs Member States to protect the best interests of the child (Klaassen & Rodrigues, 2017), and has introduced strong procedural safeguards in the field of child protection (Fenton-Glynn, 2021). The Court has considered a number of cases related to the rights of the child.

In children's rights cases, the CJEU mainly deals with preliminary appeals (Article 267 of the TFEU). Under this procedure, a national court or tribunal applies to the CJEU for clarification of the primary (e.g., Treaties) or secondary (e.g., decisions and legislation) EU sources used by the national court or tribunal in the current case. However, unlike the ECtHR, the CJEU is relatively limited in considering cases related to children's rights. Until now, the CJEU has made decisions related to the rights of the child mainly in relation to the issues of citizenship and free movement in the EU. These are areas where the EU has historically had competences. The Court delivers judgments concerning children's rights in various areas, such as free movement, EU citizenship, migration, foster care, habitual residency, family life and non-discrimination. The case law of the CJEU is based on the interpretation of Articles 20 and 21 of the TFEU to ensure the rights of free movement and residence to a child. Thus, the decisions of the CJEU are important not only for legal interpretation but are often considered to have a political impact in the EU and Member States (Blauberger & Schmidt, 2017). The mentioned issues will soon be relevant for Georgia as well, and the country's legal system should be properly prepared.

The CJEU relied on the UNCRC in establishing its practice on the best interests of the child to determine how EU law should be interpreted – for example, in the *Dynamic Medien Vertriebs GmbH v. Avides Media AG* (2008) case in which the Court referred to Article 17 and Article 3 (1) of the UNCRC on the best interests of the child. In other cases, the Court has also developed general children's rights principles based on the UNCRC provisions (the child's best interests, the right to be heard) (Jose*ba Andoni Aguirre Zarraga v. Simone Pelz*, 2010). As the Court noted regarding the application of the UNCRC, such international instruments are among those concerning the protection of human rights which it takes account in applying the general principles of Community law (*European Parliament v. Council of the European Union*, 2006, para. 37; *Dynamic Medien Vertriebs GmbH v. Avides Media AG*, 2008). After the adoption of the Charter of Fundamental Rights of the European Union, the Court refers to its articles on children's rights, but relies on the UNCRC and gives their provisions the same meaning.

The case in which the Court first considered EU citizens' right to move and reside, contained in Articles 20 and 21 TFEU, was *Zambrano*, which represented "the genuine enjoyment of the substance of one's EU citizenship rights" (*Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEm)*, 2011, para. 45). Below are depicted some of the most relevant CJEU decisions where the Court developed the child's best interests. The first family reunification cases which mentioned the child's best interests were *O and S v. Maahanmuuttovirasto and Maahanmuuttovirasto v. L* (2012). These cases concerned two female third-country nationals residing in Finland. The main issue in this case was whether EU citizenship provisions preclude a Member State from refusing to

grant a residence permit to a third-country national based on family reunification, where he wished to live with his third-country national spouse and his child, and where the wife was legally resident in the host Member State and was the mother of the child, an EU citizen, from a previous marriage. The Court found that there was no legal, financial, or emotional relationship between the minor EU citizens and the third-country national for whom the right of residence was sought (para. 56). Accordingly, the Court found that Article 20 of the TFEU did not exclude the possibility for Member States to refuse to grant a residence permit to a third-country national in the situation at hand (para. 58). The Court followed the opinion of the advocate general, delivered on 27 September 2012 (1). The Court concluded that the national court was obliged to "make a balanced and reasonable assessment of all the interests in play, taking particular account of the interests of the children concerned" (*O and S v. Maahanmuuttovirasto and Maahanmuuttovirasto v. L*, 2012, para. 81).

The second case where the Court considered the principle of the best interests of child was *Alfredo Rendon Marin and C.S.*, where the Court stated that Article 20 TFEU has to take into account the child's best interests, recognized in Art. 24(2) of the Charter (2000). The case concerned the question whether Article 20 TFEU precludes a Member State from expelling from its territory a third-country national due to their criminal record, where the third-country national is the parent and the primary carer of a child who is an EU citizen. In this case, the Court found that, unlike O., S. & L., the situations in *Rendon Marin and C.S.* were within Article 20 TFEU, which automatically implies the application of the Charter (*Alfredo Rendón Marín v. Administración del Estado*, 2016).

The next case on the best interests of child was *Chavez-Vilchez and Others.* In this case, the Court reiterated the importance of interpreting Article 20 TFEU considering the existence of a dependency between an EU citizen child and a third-country national parent, which implies the principle of the best interests of the child. The question raised by the national courts in the case was whether third-country national mothers could obtain a right of residence under Article 20 TFEU, on the basis of which they could receive social assistance or child benefits under Dutch law (*Chávez-Vílchez and Others v. Raad van bestuur van de Sociale verzekeringsbank and Others*, 2017). In the same case, the Court explained that the right of residence of the EU citizen child in the EU could be violated even if the child was theoretically not forced to leave the EU, since only one parent was entitled to stay. According to the Court, this could happen in a situation where the child would be practically forced to leave the EU due to the child's legal, financial and/or emotional dependence on the third-country national parent.

The best interests of child were considered by the Court in *K.A. and Others v. Belgische Staat*, which concerned seven third-country nationals who were subject to an order to leave Belgium based on national legislation implementing the Return Directive 2018/115 Transport, which lays down common standards and procedures for Member States to return illegally resident third-country nationals. The judgement of the CJEU followed the advocate general's opinion (*K.A. and Others v Belgische Staat*, 2018), and the Court found it incompatible with Art. 20 TFEU. At the same time, according to the Court, in cases where an EU citizen is an adult, dependency is conceivable "only in exceptional circumstances," where the separation of an EU citizen and the third-country national family member is not possible (para. 76). In addition, the Court explained that the relationship of dependency "must be based on consideration, in the best interests of the child, of all the specific circumstances, including the age of the child, the child's physical and emotional development, the extent of his emotional ties to each of his parents, and the risks which separation from the third-country national parent might entail for that child's equilibrium."

To conclude, based on the cases considered above, the case law of the CJEU on the rights of the child is important for the candidate countries of the EU, including Georgia, from the point of view of the integration of their legal systems with the law of the EU. These cases represent significant fundamental principles that should be widely studied and used in the future to protect children's rights at the national level in Georgia.

2.2. The European Court of Human Rights

As mentioned above, the ECtHR makes decisions in cases about children's rights on the basis of the ECHR. The Court mainly issues decisions based on individual complaints submitted in accordance with the requirements of Articles 34 and 35 of the ECHR (1950) after all recourse to national measures has been made. The jurisdiction of the ECtHR extends to the application and interpretation of the ECHR and its Additional Protocols. Therefore, the scope and practice of the ECtHR in relation to child rights is wider than that of the CJEU. If we look at the case

law, we can see that the ECtHR has reviewed many cases on the grounds of violation of the right to respect for private and family life protected by Article 8 of the Convention. However, in practice there are cases that extend beyond child rights – for example, regarding the prohibition of torture (*Aksoy v. Turkey*, 1996, para. 64), degrading or inhuman treatment and punishment (*Bouyid v. Belgium* [GC], 2015, para. 81) or the right to a fair trial (*V. v. the United Kingdom* [GC], 1999, paras. 85–86).

2.2.1. The Case Law of the ECtHR on Child Rights

The case law of the ECtHR regarding the rights of the child is based on Article 1 (obligation to respect human rights) of the ECHR: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in ... this Convention." The best interests of the child appear as a fundamental *interpretative legal principle* which work as a tool for the interpretation of a legal provision (Takács, 2022). The ECtHR deals mainly with complaints regarding the best interests of the child in relation to violations of Article 8 of the ECHR on the right to respect for private and family life. Compulsory childhood vaccination, family reunification rights, the right to know one's origins and actions to establish a legal, parent-child relationship, and the protection of property have all been addressed (Protocol 1 to the European Convention, 1952).

One such case was *Chbihi Loudoudi and Others v. Belgium* (2014). This case concerned the procedure for the adoption by the applicants in Belgium of their Moroccan niece and the refusal of the Belgian authorities to approve the adoption, to the detriment of the best interests of the child. The Court held that there had been no violation of Article 8 (right to respect for private and family life) of the ECHR concerning the refusal to grant the adoption, and no violation of Article 8 concerning the child's residence status. It found in particular that the refusal to grant adoption was based on a law which sought to ensure, in accordance with the Hague Convention of 29 May 1993 on the Protection of Children and Co-operation in Respect of Intercountry Adoption, that international adoptions took place in the best interests of the child and with respect for the child's private and family life, and that the Belgian authorities could legitimately consider that such a refusal was in the child's best interests by ensuring the maintaining of a single parent-child relationship in both Morocco and Belgium (i.e., the legal parent-child relationship with the genetic parents; *Chbihi Loudoudi and Others v. Belgium*, 2014).

In the practice of the ECtHR, the question of the interpretation of the best interests of the child is also found in the cases concerning children born as a result of surrogacy treatment. Two such cases where the Court explained the best interests of the child were *Mennesson and Others v. France* and *Labassee v. France*. These cases concerned the refusal to grant legal recognition in France to parent-child relationships that had been legally established in the United States between children born as a result of surrogacy treatment and the couples who had had the treatment. The applicants complained in particular of the fact that, to the detriment of the children's best interests, they were unable to obtain recognition in France of parent-child relationships that had been legally established abroad. The Court held that there had been no violation of Article 8 of the ECHR concerning the applicants' right to respect their family life and their private life. The Court observed that the French authorities, despite being aware that the children had been recognized in the United States as the children of Mr and Mrs Mennesson and Mr and Mrs Labassee, had nevertheless denied them that status under French law. It considered that this contradiction undermined the children's identity within French society (*Mennesson v. France*, 2014; *Labassee v. France*, 2014).

The Court considered the best interests of the child in the case of *A.L. v. France* (2022), which concerned the compatibility with the right to respect for private life of the domestic courts' refusal to legally establish the applicant's paternity *vis-à-vis* his biological son – who had been born in the framework of a gestational surrogacy contract in France – after the surrogate mother had entrusted the child to a third couple. The applicant submitted that the dismissal of his application to establish his paternity in respect of his biological son amounted to a disproportionate interference with his right to respect for his private life, lacking any legal basis. The Court held that there had been a violation of Article 8 of the ECHR, on account of the French State's failure to honor its duty of exceptional diligence in the circumstances of the case.

The ECtHR considered the best interests of the child in the case of children born as a result of surrogacy treatment in *D.B. and Others v. Switzerland* (2022), which concerned a same-sex couple who were registered partners and had entered a gestational surrogacy contract in the United States under which the third applicant had been born.

The applicants complained that the Swiss authorities had refused to recognize the parent-child relationship established by a US court between the intended father (the first applicant) and the child born through surrogacy (the third applicant). The Court held that there had been a violation of Article 8 (right to respect for private life) of the ECHR in respect of the applicant child and no violation of Article 8 (right to respect for family life) in respect of the intended father and the genetic father (*D.B. and Others v. Switzerland*, 2022).

The Court has also considered the issue of the best interests of the child in connection with compulsory childhood vaccination. For example, the case of *Vavřička and Others v. Czech Republic* (2021) concerned the Czech legislation on compulsory vaccination and its consequences for the applicants, who refused to comply with it. The applicants all alleged that the various consequences for them of non-compliance with the statutory duty of vaccination had been incompatible with their right to respect for their private lives. The Court held that there had been no violation of Article 8 (right to respect private life) of the ECHR in the present case. The Court concluded that the impugned measures could be regarded as being "necessary in a democratic society." The judgment emphasized that in all decisions concerning children, their best interests must be of paramount importance (*Vavricka and Others v. Czech Republic*, 2021).

In the practice of the ECtHR, the best interests of the child were discussed in relation to family reunification rights. Such was the case in *Berisha v. Switzerland* (2013), which concerned the Swiss authorities' refusal to grant residence permits to the applicants' three children, who were born in Kosovo and entered Switzerland illegally, and the authorities' decision to expel the children to Kosovo. The Court held that there had been no violation of Article 8 (right to respect of family life) of the ECHR, considering in particular that the applicants were living in Switzerland because of their conscious decision to settle there rather than in Kosovo, and that their three children had not lived in Switzerland for long enough to have completely lost their ties with their country of birth, where they grew up and were educated for many years. The Court concluded that the Swiss authorities had not overstepped their margin of appreciation under Article 8 of the ECHR in refusing to grant residence permits to their children (*Berisha v. Switzerland*, 2013). The same issue, in connection with the best interests of the child, was also considered by the Court in 2014 in *Sami Mugenzi v. France*, *Tanda-Muzinga v. France*, and *Senigo Longue and Others v. France*, concerning the difficulties in granting refugee status or lawfully residing in France when obtaining visas for children so that families could be reunited. The Court held that there had been a violation of Article 8 of the ECHR in the latter case (ECtHR, 2014).

Parental authority, child custody and access rights are some of the most important issues in the practice of the ECtHR. The Court considered these issues in the context of the best interests of the child in, for example, *N.Ts. v. Georgia* which concerned proceedings for the return of three young boys – who had been living with their maternal family since their mother's death – to their father. The first applicant claimed that the national authorities had failed to thoroughly assess the best interests of her nephews and that the proceedings had been procedurally flawed. The Court held that there had been a violation of Article 8 (right to respect for private and family life) of the ECHR. The Court found that the boys had not been adequately represented before the domestic courts. Moreover, the courts had made an inadequate assessment of the boys' best interests, which did not take their emotional state of mind into consideration (*N.Ts. v. Georgia,* 2016).

The best interests of the child are considered by the Court in cases that are related to the right to know one's origins and actions to establish a legal parent-child relationship. For example, the case of *Mandet v. France* (2016) concerned the quashing of the formal recognition of paternity made by the mother's husband at the request of the child's biological father. The applicants – the mother, her husband and the child – complained about the quashing of the recognition of paternity and about the annulation of the child's legitimation. The Court held that there had been no violation of Article 8 (right to respect for private and family life) of the ECHR. The Court said that the child's best interests had been duly placed at the heart of their considerations. The Court had found that, although the child considered that his mother's husband was his father, his interests lay primarily in knowing the truth about his origins (*Mandet v. France*, 2016). The Court also considered the best interests of the child in relation to the same issue in *Paparrigopoulos v. Greece* (2022), which concerned proceedings for the judicial determination of the paternity of the applicant's daughter. The applicant claimed that domestic law had not afforded him the opportunity to acknowledge paternity voluntarily and that this had had the consequence of limiting his parental responsibility in respect of his daughter. The Court held that there had been a violation of Article 14 (prohibition of discrimination) read in conjunction with Article 8 (right to respect for private and family life) of the ECHR,

finding that there was no reasonable relationship of proportionality between the preclusion of the applicant's exercise of parental responsibility and the aim pursued, which had been to protect the best interests of a child born out of wedlock **(***Paparrigopoulos v. Greece*, 2022). The Court also held that there had been a violation of Article 8 (right to respect for private and family life) of the ECHR in the present case (*Paparrigopoulos v. Greece*, 2022).

The Court also linked the best interests of the child to the protection of property (Article 1 of Protocol No. 1) in the case of *S.L. and J.L. v. Croatia*, which concerned a deal to swap a seaside villa for a less valuable flat. In this case, the Court considered whether the state took the best interests of the children into account in accepting the property swap. Additionally, it raised the question of whether compliance with the constitutional obligation of the state to protect children was ensured. The Court held that in the applicants' case there had been a violation of Article 1 (protection of property) of Protocol 1 to the ECHR, as the domestic authorities had failed to take the necessary measures to safeguard the proprietary interests of the children in the real estate swap agreement or to give them a reasonable opportunity to effectively challenge the agreement (*S.L. and J.L. v. Croatia*, 2015).

3. The Child Rights Protection Systems in Lithuania and Georgia

International and European experience has had a significant impact on the development of the child rights protection system at the national level in different countries, in Europe and beyond. For the purposes of our article, a comparative analysis of the protection of children's rights in Lithuania and Georgia shall be made. Given that the purpose of this study is the issue of the protection of children's rights in Georgia and the impact of European law on it, the experience of Lithuania is more important than that of Georgia. Lithuania joined the EU in 2004, and Georgia is currently a candidate country for EU membership and may follow the path that was already implemented in Lithuania, including the introduction of European standards at the level of national legislation and institutional arrangements. That is why we took the experience of Lithuania for comparative analysis.

3.1. The Child Rights Protection System in Lithuania

Article 73 of the Constitution of the Republic of Lithuania (1992) declares that the complaints of citizens about abuse of authority or bureaucratic intransigence by state and municipal officials (with the exception of judges) shall be examined by the Seimas Ombudsman, who shall have the right to submit a proposal before a court for dismissing the guilty officials from office. In order to ensure the provisions and obligations enshrined in the Constitution of the Republic of Lithuania and other laws and international agreements, other laws of the Republic of Lithuania were prepared and adopted by the Parliament (Seimas). The main purpose of these laws is to create legal preconditions which would ensure the implementation of the UNCRC and other child rights-related legal acts in Lithuania, and to monitor the activities of organizations and individuals that may violate the rights and legitimate interests of the child (Office of the Ombudsperson for Child's rights, 2023).

The legal basis for protection of children's rights in Lithuania are the Constitution of Lithuania, the UNCRC, and the ECHR. The Constitution of Lithuania (1992) protects family, parenthood, and children (Articles 26, 38, 39). In addition, international treaties are part of Lithuanian legal system. The UNCRC should be implemented directly by the decision-makers as it is referred to in Article 4 of the Convention. In addition, the case law of the CJEU on the rights of the child has been an important source for the protection of child rights in Lithuania. For example, the Constitutional Court of Lithuania applied case law on child rights (Ruling of the Constitutional Court of Lithuania, 2019), and the Court has also used the case law of the CJEU as a source for the interpretation of law (Decision of the Constitutional Court of Lithuania, 2017).

An important act of child rights in Lithuania is the Law on Fundamentals of the Protection of the Rights of the Child (1996). According to Article 4, parents, other representatives of the child according to the law, state and municipal institutions and establishments, non-governmental organizations, and other natural and legal persons must follow the best interests of the child. Article 58 of the law defines Institutions for Protection of Rights of the Child and Organization of Their Activity. In Lithuania, the protection of the rights of the child is ensured by three types of institutions: the state and its institutions; municipal institutions; and public organizations, whose activity is linked to protection of the rights of the child. State and municipal institutions shall encourage and support voluntary activity by public organizations and by traditional and state-recognized religious communities in the

sphere of the protection of the rights of the child. In addition, state and municipal institutions shall establish and fund institutions (services) for the protection of the rights of the child and organize their activity.

In Lithuania, state institutions have a significant role in the protection of children's rights, but Article 61 of the law introduces the public protection of the rights of the child. Public protection of the rights of the child shall be implemented through the cooperation of public organizations with state and municipal institutions while observing the provisions of this Law as well as of other legal acts which regulate the protection of the rights of the child. In this context, it is important to note that councils for the protection of the rights of the child of municipal communities shall function under the municipal councils in Lithuania. These councils shall, within the scope of their competence, present proposals to municipal institutions concerning the formation of a policy of and a strategy for the protection of the rights of the child of the municipal communities as well as the setting of their priorities concerning the preparation and implementation of the measures designed to protect the rights of the child and to prevent violations of the rights of the child. Thus, the councils of municipal communities have significant powers to protect the rights of the child at the local level over the full territory of the state (Law of the Republic of Lithuania, 1996).

Lithuania has a special state institution – the Ombudsman For Children (hereinafter – the Ombudsman). This institution shall, within the scope of its competence, be responsible for the control and supervision of the enforcement of the laws and other legal acts regulating the protection of the rights of the child (Law on the Ombudsman For Children, 2000). According to the law, the Ombudsman shall base their activities on the principles of lawfulness, impartiality, publicity, priority of the rights of the child and their legal interests, and independence in adopting decisions. The Ombudsman has significant powers for protecting the rights of children in the country. The Ombudsman shall: examine the complaints of natural and legal persons against the rights, actions or omissions of state and municipal institutions or organizations and their officers; control how the provisions of the Constitution of the Republic of Lithuania, the conventions ratified by the Seimas, the laws of the Republic of Lithuania, and other legal acts regulating the protection of the rights of the child and their lawful interests are implemented; supervise and control the activities of institutions related to the protection of the rights of the child and their legal interests due to which the rights of the child or their lawful interests are or may be violated; provide information through the mass media to the public about the protection of the rights of the child and their legal interests in the Republic of Lithuania; and implement other powers for the protection of child rights in Lithuania. The Ombudsman must submit to the Seimas an annual written report on the activity of their institution for the previous calendar year (Law on the Ombudsman For Children, 2000).

3.2. The Child Rights Protection System in Georgia

The basis of the child rights protection system in Georgia is the Constitution of Georgia. Article 30 of the Constitution, granting the "right to marriage, rights of mothers and children," specifies that "the rights of mothers and children are protected by law" (Constitution of Georgia, 1995). Article 5 of the Constitution on the "Social State" also establishes that "the state takes care of the development of sports, the establishment of a healthy lifestyle, the physical education of children and young people and their involvement in sports." In addition, the adoption of the Code of Children's Rights of Georgia (2019) was one of the most important steps in the legislation of Georgia which contributed to the wellbeing of children, childcare and their legal protection. On the basis of the Code, the manual comments of the Code of Children's Rights were prepared and published, which are some of the most important publications in Georgian scientific literature.

Article 10 of the Code of Children's Rights (2019) states that every child has the right to quality and inclusive education and equal access, and the state ensures equal access to the inclusive education system for all children. Chapter 5 of the Code is entirely devoted to the child's right to education and equal access to it. The state ensures equal access to quality early, preschool, general, professional, and higher education for all children by implementing an inclusive system of education and harmonizing the country's educational system with the international educational space. It is also important that Georgia, years later, adopted the Law of Georgia "On Early and Preschool Education and Education" (2016), approved the State Standards of Early and Preschool Education and the Child Care Standards, Article 8 of which (Standard No. 8) enshrines the child's right to education (Resolution of the Government of Georgia, 2017). By the resolution of the Government of Georgia, an

interdepartmental commission working on the implementation of the UNCRC and working on children's rights issues was also established (Resolution of the Government of Georgia, 2016).

In the field of the protection of children's rights, the documents of international law on the protection of children's rights are actively used in Georgia, where all the necessary conditions for the perfect, happy and free life of a person are clearly defined. The Universal Declaration of Human Rights of the UN (1948) is particularly noteworthy – due to its universal character, the state is obliged to ensure the realization of the rights affirmed in the Declaration in citizens' lives. Another important document is the ECHR, adopted on November 4, 1950, which was the first act to give binding force to the rights provided by the Universal Declaration of Human Rights. The UNCRC and the Convention on the Rights of Persons with Disabilities of December 13, 2006, are also applicable for Georgia. In Georgia, the practice of the ECtHR on the rights of the child plays an important role in the protection of the rights of the child by courts, public defenders and human rights organizations. Among these judgments cited, in particular, are: *Timishev v. Russia* (13 December 2005); *Folgero and Others v. Norway* (29 June 2007 [GC]); Hass*an and Aylem Zengin v. Turkey* (9 October 2007); *Ali v. the United Kingdom* (11 January 2011); Ka*tani and Others v. Republic of Moldova and Russia* (18 October 2012 (Grand Chamber)); *Mansur Yalcin and Others v. Turkey* (16 September 2014); *Memlika v. Greece* (6 October 2015); and *Papageorgiou v. Greece* (31 October 2019) (ECtHR, 2023).

An important institution for the protection of children's rights in Georgia is the Public Defender of Georgia. According to Article 3^2 of the Law of Georgia "On the Public Defender" (Organic Law of Georgia, 1996), the Public Defender of Georgia supervises the protection of children's rights and the implementation of child support programs in accordance with the Code of Children's Rights. According to Article 14^2 of the Law, the Public Defender of Georgia is obliged to reveal violations on their own initiative or on the basis of the appeal of another person in the cases defined by the Code of Children's Rights. In the cases determined by the Code of Children's Rights, the Ombudsman issues appropriate recommendations when the activities of the state government body, the relevant body of the municipality and the legal entity of private law are found to be non-compliant with the legislation of Georgia (Organic Law of Georgia, 1996).

The Department of Children's Rights operates in the Office of the Public Defender of Georgia, which has been operating since 2001. The statute of the Department of Children's Rights stipulates that the activities of the Department are based on the principles of the UNCRC. The main tasks of the department are: monitoring the implementation of the UNCRC, the implementation of existing national and other international acts in terms of the protection of the rights of the child; monitoring children's institutions and preparing relevant reports; identifying, studying and responding to individual cases of child rights violations; considering citizens' statements and complaints about the alleged violation of children's rights; preparing recommendations and proposals for legislative and administrative bodies; and implementing educational activities to popularize the basic rights and freedoms of the child and raise the civil awareness of society in this field. Regarding the rights of the child, any person or minor can apply to the Office of the Public Defender. The department prepares special reports and recommendations regarding the rights of children.

Currently, Georgia is not a Member State of the EU, but the country has concluded an association agreement and Children's rights are part of the Georgia-EU Association Agenda (2014), where attention is focused on: appropriate measures to protect children and strengthen legal cooperation; protecting children from all forms of violence; strengthening the role of the public defender in working on children's issues; the practical implementation of child protection conventions; and ensuring the right to education (2017–2020 Association Agreement, n.d.). Although the Association Agreement does not directly provide for the obligation to bring European legislation closer to the practice of EU judicial law, since the Court explains and specifies the meaning of specific provisions, it is recommended to study this practice so that the national legislation can be developed in accordance with it (Decree of the Government of Georgia, 2020). The proof of this is that in the EU questionnaire which was submitted to Georgia in the process of granting EU candidate status, one paragraph refers to the rights of the child (Questionnaire, Part I, 2022). The second part of the questionnaire, which consisted of 2,300 questions, also has 54 items on the rights of the child (Questionnaire, Part II, 2022). In the coming years, Georgia should ensure the compatibility of Georgian legislation with EU legislation in the field of children's rights. In order to achieve this goal, it is important to share the practice of the CJEU, which is the competent institution in the interpretation of child rights standards, when developing national legislation.

Conclusions

Protecting the best interests of the child is a universal principle recognized by the UNCRC and other international instruments. The UNCRC and the interpretations based on it are an important source for various countries, including EU Member States, candidate countries, and EU neighboring countries.

Various international courts have a special role in protecting the rights of the child and ensuring the best interests of the child – including, first of all, the ECtHR, as well as the CJEU. The jurisdictions of these courts and their scope in the field of the protection of the best interests of the child are different; however, their activities create effective mechanisms for the protection of the best interests of the child.

Regarding the child rights protection system in Lithuania and Georgia, it can be said that in both cases the country's constitution, special laws (code) on child rights, the UNCRC, the ECHR, and the precedents of the ECtHR represent important legal bases for the protection of children's rights and decisions in the field of child rights. A unique characteristic of Lithuania is that, unlike in Georgia, there is a special institution for this purpose – the Office of the Ombudsperson for Child's Rights.

Sharing the jurisprudence of the EU Member States with the candidate countries is important, since joining the EU will be a significant challenge. From this point of view, an important role can be played by dialogue between the courts, which has recently become relevant globally. However, it can be said that dialogue between the judges of EU member and candidate countries is weak, which should be intensified so that candidate countries have thorough knowledge of the case law of the CJEU.

Courts in Georgia do not directly apply the decisions of the CJEU to the rights of the child, although this has been applied by the courts of Lithuania. For example, the Constitutional Court has used the case law of the CJEU as a source of interpretation of Lithuanian law in cases related to child rights and the court. On the other hand, in the process of granting EU candidate status to Georgia, considering the recommendations of the European Commission, the use of the decisions of the ECtHR was introduced in the legislation when making decisions on cases.

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