

# The Right to Family Life and Immigration Enforcement: How States Legally Justify Family Separation In: Canada · United States · United Kingdom · Australia ECHR · ICCPR · UNCRC, 2026

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## ABSTRACT

Immigration enforcement decisions do not affect individuals alone. Every deportation, detention, or refusal of status also affects spouses, children, and extended family members who depend on the person being removed. When a state enforces immigration law, it at the same time makes a decision about whether a family will remain together or be separated. It is on this note that the present review paper examines the legal tension between the state's authority to control immigration and the internationally protected right to family life. That right is recognised under Article 8 of the European Convention on Human Rights (ECHR), Articles 17 and 23 of the International Covenant on Civil and Political Rights (ICCPR), Article 16 of the Universal Declaration of Human Rights, and Article 3 of the United Nations Convention on the Rights of the Child (UNCRC). Using a comparative approach, the paper analyses how four major common-law jurisdictions: Canada, the United States, the United Kingdom, and Australia address family separation in immigration enforcement. The analysis draws on legislation, leading case law, tribunal practice, and recent enforcement data. It shows that while all four states formally acknowledge the importance of family life, each system contains structural weaknesses that allow family separation to occur extensively. The paper argues that family separation is not just a policy side-effect of immigration enforcement but a legal consequence that must be justified under international human rights law. It concludes that existing frameworks often fall short of their stated commitments, especially where children are involved.

**Keywords:** Family separation; immigration enforcement; right to family life; Article 8 ECHR; ICCPR Articles 17 and 23; best interests of the child; UNCRC Article 3; proportionality; humanitarian discretion.

## INTRODUCTION

Immigration law is often described as a system that regulates borders, entry, and legal status. In practice, immigration enforcement regularly functions as a form of family regulation. Every decision to detain, remove, or refuse a non-citizen does more than resolve an administrative question about legal status. It determines whether families remain together or are forcibly separated, sometimes permanently. When a state enforces immigration law, it is also deciding the fate of spouses, children, and dependants whose lives are connected to the individual subject to enforcement.

This reality is not incidental. Deportation orders usually remove parents from their children, separate spouses across national borders, and disrupt long-established family relationships. These effects are not limited to newly arrived migrants. Many of the individuals affected by immigration enforcement have lived for years, in the state that seeks to remove them. Their children may be citizens, their partners may hold lawful status, and their social, educational, and economic lives may be well-established in the host country (American Immigration Council, 2024; UCLA Law, 2024).

Despite these consequences, immigration enforcement is conceptualized in legal and political discourse as a

matter concerning individuals rather than families. Legal systems often treat family separation as an unfortunate but acceptable side effect of immigration control, rather than as a serious interference with fundamental human rights. This framework covers the fact that international human rights law recognises the family as a protected social unit and imposes legal limits on when and how states may interfere with family life (International Covenant on Civil and Political Rights [ICCPR], 1966; Universal Declaration of Human Rights [UDHR], 1948).

The tension between immigration enforcement and the right to family life has become more visible in recent years. In the United States, the “zero-tolerance” policy implemented between 2017 and 2018 resulted in the separation of more than 5,000 children from their parents at the southern border. As of 2024, thousands of those families had still not been reunified, highlighting the long-term and often irreversible effects of enforcement decisions (ACLU, 2024; UCLA Law, 2024). In the United Kingdom, tens of thousands of appeals have succeeded on the basis that deportation or removal would disproportionately interfere with family life under Article 8 of the European Convention on Human Rights (House of Commons Library, 2025). In Canada, the primary legal mechanism intended to prevent unjust family separation, the Humanitarian and Compassionate framework has been undermined by processing delays so severe that relief often arrives years after the harm has already occurred (IRCC, 2025).

These examples demonstrate that family separation is not an exceptional outcome reserved for extreme cases. It is a standard of modern immigration enforcement across liberal democratic states. Yet the legal treatment of family life varies between jurisdictions. Some systems, such as the United Kingdom’s, clearly require courts to balance the public interest in immigration control against the private interests of affected families. Others, most notably the United States, lack a comprehensive statutory framework that requires decision-makers to assess whether removal is proportionate in light of its impact on children and family unity.

Additionally, this article examines how four major common-law jurisdictions: Canada, the United States, the United Kingdom, and Australia address this tension between state sovereignty and family life. These jurisdictions are instructive because they share similar legal traditions yet have adopted different approaches to incorporating international human rights rules into domestic immigration law. All four are parties to major international instruments that protect family life, including the ICCPR and the United Nations Convention on the Rights of the Child (UNCRC), yet their domestic implementation of these obligations varies in scope, structure, and effectiveness.

Furthermore, the central argument of this paper is that family separation should not be treated as a collateral or incidental consequence of immigration enforcement. Instead, it must be understood as a legal interference with a protected human right. International law does not prohibit immigration control, but it does require that enforcement measures that interfere with family life be lawful, necessary, and proportionate. Where children are affected, their best interests must be treated as a primary consideration, not a procedural formality (UNCRC, 1989).

Therefore, by positioning family separation at the centre of immigration decision-making, rather than at its margins, this paper reframes immigration enforcement as an issue of both administrative law and human rights law. It argues that the true cost of enforcement policies cannot be measured solely in removal statistics or border apprehensions, but must also be assessed in terms of the families disrupted, the children harmed, and the long-term social consequences of legally sanctioned separation.

## **How International Law Protects Family Life**

International human rights law recognizes the family as a fundamental part of society and places clear limits on how states may interfere with family relationships. Although states retain the sovereign right to control their borders and regulate immigration, this power is not unlimited. International law requires that immigration enforcement be exercised in a way that respects human dignity, protects family unity, and avoids unnecessary harm.

The protection of family life is firmly established in the earliest human rights instruments. The Universal Declaration of Human Rights describes the family as the “natural and fundamental group unit of society” and

affirms its right to protection by both society and the state (UDHR, 1948, art. 16). While the UDHR itself is not legally binding, it has had a deep influence on the development of binding international treaties and is widely regarded as reflecting customary international law.

This protection was given binding legal force in the International Covenant on Civil and Political Rights. Article 17 of the ICCPR prohibits unlawful interference with family life, while Article 23 clearly recognizes the family as a unit deserving protection (ICCPR, 1966). Together, these provisions require states to ensure that government actions, including immigration decisions, do not unjustifiably disrupt family relationships. Importantly, the Human Rights Committee, which monitors compliance with the ICCPR, has clarified that interference with family life must be lawful, necessary, and proportionate to a legitimate aim. Immigration control alone does not automatically justify family separation (Human Rights Committee, 2003).

Conversely, children receive additional and enhanced protection under international law. The United Nations Convention on the Rights of the Child emphasizes that children should not be separated from their parents against their will except where such separation is necessary for the child's best interests (UNCRC, 1989, art. 9). The Convention further requires that, in all actions concerning children, their best interests must be a primary consideration (UNCRC, 1989, art. 3). This obligation applies directly to immigration enforcement decisions that affect children, including deportation, detention, and refusal of legal status to parents or caregivers.

On top of that, international human rights bodies have consistently emphasized that the best interests of the child must be assessed in a meaningful way. This means that states cannot rely on general policy objectives or administrative efficiency to justify separating families. Instead, authorities must consider the specific circumstances of each child, including emotional ties, dependency, stability, and long-term well-being (Committee on the Rights of the Child, 2013). Where removal of a parent would cause serious harm to a child, international law requires states to provide strong and compelling reasons to justify such.

Going further, regional human rights systems have strengthened these principles. In Europe, the right to respect for family life under Article 8 of the European Convention on Human Rights has been interpreted to require a careful balancing of state interests against the impact of removal on family members. Courts have repeatedly held that deportation decisions must take into account factors such as the length of stay, the strength of family ties, the best interests of children, and the ratio of removal (Council of Europe, 2022). Although not all states are subject to the same regional systems, these interpretations show a broader international consensus on the limits of immigration enforcement.

Collectively, international human rights law does not prohibit states from enforcing immigration rules. However, it clearly rejects the idea that family separation is a neutral or incidental result. Instead, it treats separation as a serious interference with a protected right that requires legal justification. Where enforcement measures disrupt family life, states must demonstrate that such interference is lawful, necessary, and proportionate, and that less harmful alternatives have been properly considered.

This legal framework challenges immigration systems that prioritize removal and border control without adequately accounting for family unity. It also exposes a gap between international legal standards and domestic immigration practices in many countries. While states formally accept international obligations to protect family life, the implementation of these laws in immigration decision-making often remains inconsistent, limited, or largely symbolic.

### **How U.S. Immigration Law Separates Families Without Clear Legal Safeguards**

The United States operates one of the most powerful immigration enforcement systems in the world, yet it lacks a clear legal framework that treats family life as a protected right in immigration decision-making. While U.S. immigration law recognizes certain family relationships for visa sponsorship purposes, it does not provide a general right to family unity when enforcement actions such as detention or deportation are carried out. As a result, family separation is not treated as a rights violation but as a lawful consequence of enforcing immigration rules.

Unlike many other representative democracies, the United States has not incorporated international human rights protections for family life into its domestic immigration law. Although the U.S. has approved the International Covenant on Civil and Political Rights, it did so with reservations that limit the treaty's direct effect in domestic courts. It has also failed to confirm the United Nations Convention on the Rights of the Child, making it one of the few countries in the world not formally bound by international standards requiring the best interests of children to be a primary consideration (ICCPR, 1966; UNCRC, 1989).

As a result, U.S. immigration law focuses mainly on legal status, criminal history, and enforcement priorities, rather than on the impact of removal on families. Immigration judges are generally not required to assess whether deportation would unduly interfere with family life. Relief mechanisms such as cancellation of removal are narrow, difficult to obtain, and available only to limited categories of non-citizens. Even where children are U.S. citizens, their interests do not create an enforceable right for their parents to remain in the country (Motomura, 2014).

This legal structure has enabled widespread and routine family separation. Deportations regularly remove parents from U.S.-citizen children, forcing families into impossible choices between separation and exile. Several studies have revealed that children affected by parental deportation experience emotional distress, economic hardship, educational disruption, and long-term developmental harm (American Immigration Council, 2024; Brabeck et al., 2014). Despite this evidence, U.S. law largely treats these results as collateral consequences rather than as legally relevant harms.

The absence of a rights-based framework became visible during the implementation of the “zero-tolerance” policy between 2017 and 2018. Under this policy, parents crossing the U.S.–Mexico border were criminally prosecuted for unlawful entry, while their children were placed in separate custody. More than 5,000 children were separated from their parents, often without adequate tracking or reunification plans. Years later, many families remained separated, highlighting the lasting damage caused by enforcement decisions made without regard for family unity (ACLU, 2024; UCLA School of Law, 2024).

Although the policy was officially ended, its underlying legal logic remains intact. U.S. courts have generally deferred to the executive branch on immigration enforcement, emphasizing the federal government's broad authority over immigration matters. This doctrine of deference has made it difficult to challenge family separation on constitutional grounds. While the U.S. Constitution protects certain aspects of family life, courts have repeatedly held that non-citizens do not have a constitutional right to remain in the country for the sake of their families (*Kleindienst v. Mandel*, 1972; *Kerry v. Din*, 2015). Administrative decision making exists within the system, such as prosecutorial discretion and deferred action programs, but these mechanisms are unstable and politically contingent. They do not create enforceable rights and can be expanded or withdrawn by future administrations. As a result, family unity in the United States often depends on policy choices rather than legal guarantees, leaving families vulnerable to sudden shifts in enforcement priorities (García Hernández, 2019).

Practically, this means that the United States treats family separation as a legitimate outcome of immigration enforcement rather than as a harm that must be justified or minimized. There is no general requirement that decision-makers assess proportionality, consider less intrusive alternatives, or place the best interests of children at the center of removal decisions. This approach stands in marked difference to international human rights standards and to the practices of other common-law jurisdictions examined in this paper.

The U.S. experience demonstrates how the absence of a rights-based framework allows immigration enforcement to operate with little regard for family life. It also illustrates the limits of relying on discretion and policy reforms alone. Without clear legal obligations to protect family unity, family separation remains a structural feature of the U.S. immigration system rather than an exceptional or unlawful outcome.

### **When Humanitarian Protection in Canada Comes Too Late for Families**

Canada is often seen as adopting a more compassionate approach to immigration enforcement than many other countries. Unlike the United States, Canadian immigration law formally recognizes that enforcement decisions can cause serious hardship, including family separation. The main legal tool designed to address this problem is

the Humanitarian and Compassionate (H&C) framework, which allows decision-makers to grant relief where strict application of immigration law would result in disproportionate hardship. This framework provides an important safeguard for family unity. However, it frequently fails because help comes too late.

Under Canadian law, individuals facing removal may apply for permanent residence on humanitarian and compassionate grounds. Decision-makers are required to consider factors such as the applicant's establishment in Canada, family relationships, the best interests of affected children, and the hardship that removal would cause (Immigration and Refugees Protection Act [IRPA], 2001). Courts have repeatedly affirmed that the best interests of children must be given serious and meaningful consideration in H&C decisions (Baker v. Canada, 1999).

Despite this legal recognition, the H&C process is slow, discretionary, and procedurally weak. Hence, applications often take several years to be processed, during which time families may remain separated or live under constant threat of removal. In many cases, parents are deported before their H&C applications are decided, leaving children behind in Canada or forcing them to relocate to countries they may not know. When relief is eventually granted, it often comes after the family has already suffered profound separation, emotional harm, and financial instability (Immigration, Refugees and Citizenship Canada [IRCC], 2025).

The problem is not that Canadian law ignores family life entirely, but that it treats family unity as an exception rather than a major principle. Humanitarian relief is elective, meaning that even strong family ties and significant hardship do not guarantee protection from removal. There is no automatic right to remain in Canada simply because a person has Canadian citizen children or long-established family relationships. As a result, families must rely on the goodwill of decision-makers rather than enforceable legal rights.

However, delays within the H&C system further weaken its protective function. Processing backlogs have grown steadily in recent years, leaving applicants waiting years for decisions while enforcement actions continue. During this period, families often experience sustained uncertainty, limited employment opportunities, and lack of access to social services. Children may grow up without one or both parents present, even though the legal system formally acknowledges that their best interest matter (IRCC, 2025; Canadian Council for Refugees, 2023).

On the other hand, Canadian courts have recognized these shortcomings but have been reluctant to impose strict limits on enforcement while H&C applications are pending. Although courts can intervene where decision-makers fail to properly consider children's interests, they generally defer to administrative discretion and do not prevent removals solely because family separation will occur. This judicial restraint means that legal recognition of family life does not consistently turn into effective protection on the ground (Rehaag, 2012).

Compared to international human rights standards, Canada's approach remains incomplete. International law requires that interference with family life be proportionate and that less harmful alternatives be considered before separation occurs. In Canada, however, proportionality is often assessed only after enforcement has already caused harm. The system allows families to be separated first and considered later, undermining the very purpose of humanitarian relief.

As a result, Canada presents a contradiction. On paper, it acknowledges family life as an important legal interest and incorporates international human rights language into its immigration framework. In reality, structural delays, broad discretion, and weak procedural safeguards mean that family separation remains a routine outcome. Humanitarian relief exists, but it too often arrives only after families have already paid a heavy price.

Canada's experience demonstrates that recognizing family life in law is not enough. Without timely decision-making, enforceable standards, and meaningful limits on removal, humanitarian frameworks risk becoming symbolic rather than protective. Family unity is acknowledged, but not consistently preserved.

### **Balancing Family Life and Immigration Control in the United Kingdom**

Among common-law jurisdictions, the United Kingdom has developed one of the most structured legal approaches to addressing family life in immigration enforcement. Unlike systems that treat family separation as

a secondary concern, UK immigration law requires decision-makers and courts to explicitly consider whether removal or deportation would unjustifiably interfere with the right to family life. This obligation is based on Article 8 of the European Convention on Human Rights, which protects the right to respect for private and family life.

Article 8 does not create an absolute right to remain in the country. Instead, it requires a balancing exercise. The state may interfere with family life where the interference is lawful, pursues a legitimate aim such as immigration control and is proportionate to that aim (European Convention on Human Rights, 1950). However, the government must show that separating a family is necessary and justified, not just convenient.

Additionally, UK courts have developed a clear framework for applying this balance. When assessing whether removal breaches Article 8, decision-makers must consider factors such as the length of the individual's residence in the UK, the strength of family relationships, the presence of children, the best interests of those children, and the seriousness of any immigration or criminal history. Importantly, these factors must be weighed together rather than assessed in isolation (*Razgar v. Secretary of State for the Home Department*, 2004).

The protection of children plays a central role in this analysis. UK law, informed by international obligations under the United Nations Convention on the Rights of the Child, requires that the best interests of the child be treated as a primary consideration in immigration decisions. Courts have repeatedly emphasized that children are not responsible for their parents' immigration status and should not be punished for it (*ZH (Tanzania) v. Secretary of State for the Home Department*, 2011).

To give clearer guidance to decision-makers, the UK Parliament incorporated Article 8 considerations directly into domestic immigration law through the Immigration Rules. These rules outline specific circumstances in which family life will outweigh the public interest in removal, especially where children are involved or where removal would cause "unjustifiably harsh" consequences (Home Office, 2024). This codification was intended to improve consistency and reduce arbitrary decision-making.

In practice, this structured approach has had a measurable impact. Thousands of immigration appeals in the UK succeed every year on Article 8 grounds, most especially in cases involving families with children. Courts regularly overturn removal decisions where the government fails to properly assess proportionality or gives insufficient weight to family life (House of Commons Library, 2025). This demonstrates that family separation is treated as a significant harm rather than a mere administrative result.

However, the UK system is not without limitations. In recent years, legislation and policy have emphasized the "public interest" in immigration control, especially in deportation cases involving criminal convictions. Statutory provisions now instruct courts to give substantial weight to removal in such cases, thereby making it harder for families to succeed even where separation will be severe (Nationality, Immigration and Asylum Act, 2002, as amended). Critics argue that this shift risks turning proportionality into a formal exercise rather than a genuinely protective one.

Furthermore, delays and procedural obstacles also undermine the effectiveness of Article 8 protection. Families often endure long periods of uncertainty while appeals are pending, and access to legal representation has become limited following withdrawal of legal aid. As a result, the right to family life may exist in law but be difficult to enforce in practice, especially for vulnerable families.

Despite these challenges, the UK approach remains distinctive. Unlike jurisdictions that rely primarily on humanitarian exceptions, the United Kingdom treats family life as a right that must be balanced against state interests through a transparent legal test. This does not guarantee protection in every case, but it ensures that family separation is not automatic or invisible.

It is based on these facts, the UK model demonstrates that immigration enforcement and human rights protection are not mutually exclusive. Therefore, by requiring structured, reasoned justification for family separation, Article 8 imposes real legal limits on state power. At the same time, the increasing restriction of this balancing

exercise highlights how fragile rights protection can be when political pressure shifts toward enforcement over family unity.

### **How Broad Discretion in Australia Leaves Families Exposed**

Australia's immigration system is often described as one of the toughest among constitutional democracies. While Australian law formally acknowledges family relationships and humanitarian concerns, it does not provide consistent legal protections against family separation. Instead, protection of family life largely depends on executive discretion. This means that families may be kept together or separated based more on policy choices than on enforceable rights.

At the center of Australia's immigration framework is the Migration Act 1958, which gives the federal government exclusive powers to detain and remove non-citizens. Mandatory immigration detention is a defining feature of the system. Individuals who do not hold a valid visa are subject to detention, often for prolonged periods, regardless of family ties or the presence of children (Migration Act 1958 (Cth)). Detention frequently separates parents from children or places entire families, including minors, in closed or semi-closed facilities.

In addition, Australian law does allow decision-makers to consider humanitarian factors, including family unity. The main mechanism for this is ministerial discretion, which permits the Minister for Immigration to intervene in individual cases on compassionate or public interest grounds. However, this power is personal, non-compellable, and not subject to meaningful judicial review. Therefore, individuals have no legal right to request or receive ministerial intervention, even where removal would clearly separate families (Australian Law Reform Commission, 2021).

As a result, family life is treated as a factor that may be considered, not a right that must be protected. There is no general requirement that immigration authorities assess whether removal is proportionate in light of its impact on spouses or children. Nor is there a legal rule to treat the best interests of the child as a primary consideration across all immigration decisions, despite Australia being a party to the United Nations Convention on the Rights of the Child (UNCRC, 1989).

On top of that, Australian courts have acknowledged the importance of family life and children's interests, but their ability to provide protection is limited. Judicial review in immigration matters is confined to questions of judicial error, not the justifications of decisions. Courts cannot substitute their own assessment of fairness or proportionality for that of the executive, even where family separation will cause serious harm (Plaintiff S10/2011 v. Minister for Immigration and Citizenship, 2012).

This legal structure has enabled family separation. Parents may be detained or removed while their children remain in Australia, or entire families may be held in detention for longer periods. Research has consistently shown that immigration detention has severe psychological effects on children, including anxiety, depression, developmental regression, and long-term trauma (Australian Human Rights Commission, 2014). Despite this evidence, mandatory detention remains a major feature of Australia's compliance framework.

Australia's approach stands in clear tension with international human rights standards. International law permits immigration control, but it requires that interference with family life be justified, proportionate, and subject to reliable protections. However, in Australia, proportionality is largely absent from immigration decision-making, and family separation is often treated as an acceptable by-product of strict border enforcement.

The reliance on discretion rather than rights also creates inconsistency. Some families receive protection through ministerial intervention, while others in nearly identical circumstances are removed. This unpredictable situation undermines the rule of law and places families in a position of extreme vulnerability, dependent on political goals rather than legal guarantees.

Therefore, Australia's system illustrates the limits of discretionary humanitarianism. While compassion is acknowledged in principle, it is not embedded in enforceable legal standards. Without clear obligations to protect

family life, immigration enforcement continues to operate in ways that regularly separate families, more often without meaningful review or solution.

In this sense, Australia represents a model where state power over migration is at its strongest and human rights protections are at their weakest. Hence, family unity is recognized rhetorically, but structurally subordinated to deterrence, detention, and removal.

### **What the Comparison Reveals**

A comparison of immigration enforcement practices in the United States, Canada, the United Kingdom, and Australia reveals a shared pattern: all four states formally recognize the importance of family life, yet none consistently prevent family separation in practice. The major differences lie not in whether family unity is acknowledged, but in how and when it is considered, and whether it is protected as a right or treated as a matter of discretion.

Across all four jurisdictions, immigration enforcement often results in the separation of families. Parents are removed from children, spouses are divided across borders, and long-established family units are disrupted. These outcomes are not rare or exceptional; they are routine features of enforcement systems designed primarily around control, deterrence, and removal rather than human rights protection (American Immigration Council, 2024; Australian Human Rights Commission, 2014).

The United States represents the weakest model of protection. Family life has no independent legal status in immigration decision-making, and children's interests do not create enforceable rights for parents. However, international human rights regulations are absent from domestic law, thus leaving family unity dependent on streamlined forms of relief or unstable policy discretion. As a result, family separation is treated as legally irrelevant, even when the harm is severe and long-lasting (Motomura, 2014; ACLU, 2024).

On the other hand, Canada offers a more aligned framework on paper, especially through the Humanitarian and Compassionate process and judicial recognition of children's best interests. However, the flexible nature of relief and persistent bottlenecks mean that protection often arrives only after harm has already occurred. Family unity is acknowledged, but it is not treated as a limiting factor on enforcement. Instead, families are frequently separated first and assessed later (IRCC, 2025; *Baker v. Canada*, 1999).

The United Kingdom stands out for its structured legal approach. Through Article 8 of the European Convention on Human Rights, UK law requires decision-makers to explicitly balance the public interest in immigration control against the impact of removal on family life. This proportionality framework has led to meaningful protection in many cases, especially those involving children. However, recent legislative changes and policy shifts have limited the scope of this balancing exercise, especially in cases involving criminal convictions, reducing its protective strength (House of Commons Library, 2025; *ZH (Tanzania)*, 2011).

Meanwhile, Australia occupies a different position. While humanitarian concerns and family relationships are recognized rhetorically, protection depends almost entirely on executive discretion. Mandatory detention, limited judicial review, and the absence of enforceable proportionality requirements mean that family separation is common and difficult to challenge. The system prioritizes deterrence and executive control over consistent rights protection, thereby placing Australia at risk with its international human rights commitments (Australian Law Reform Commission, 2021; UNCRC, 1989).

Despite these differences, several common themes emerge. First, family life is rarely treated as a primary consideration at the enforcement stage. In most systems, it is addressed only after removal proceedings are underway or after harm has already occurred. Second, children's rights are inconsistently protected. Although all four states are parties to the International Covenant on Civil and Political Rights, and all except the United States have ratified the Convention on the Rights of the Child, domestic implementation remains uneven and often symbolic (ICCPR, 1966; UNCRC, 1989).



Third, discretion plays an immense role. Whether through prosecutorial discretion in the United States, humanitarian relief in Canada, ministerial intervention in Australia, or judicial balancing in the United Kingdom, outcomes often depend on decision-makers rather than enforceable legal standards. This leads to inconsistency, unpredictability, and unequal treatment of similarly situated families.

As a whole, these findings show that family separation is not a policy failure limited to one jurisdiction. It is a structural feature of modern immigration enforcement systems. While legal frameworks differ, the underlying problem is the same: immigration control is prioritized over family unity, and human rights protections are applied too late, too narrowly, or not at all.

This comparative analysis is a testament of the gap between international human rights law and domestic immigration practice. International standards clearly require that interference with family life be lawful, necessary, and proportionate, and that the best interests of children be a primary consideration. Yet across all four jurisdictions, these principles are reduced by enforcement-driven legal structures that treat family separation as an acceptable cost of migration control rather than as a serious legal harm.

### **Why the Best Interests of the Child Must Be Considered, But Are Not Always Decisive**

One of the most important principles in international and domestic immigration law is that the “best interests of the child” must be considered in all decisions that affect children. However, this principle is often misunderstood. It does not mean that children automatically get to remain in a country or that their interests always override immigration control. Instead, it means that decision-makers are legally required to seriously consider how their decisions will affect children before taking action (United Nations Convention on the Rights of the Child [UNCRC], 1989).

The law requires states to stop and think carefully about the child before making a decision that could separate them from a parent or caregiver. This responsibilities applies in all immigration systems examined in this paper, but the strength and practical effect of the duty vary significantly between countries.

Conversely, the UNCRC is the central international instrument governing this principle. Article 3 states that in all actions concerning children, their best interests must be a “primary consideration” (UNCRC, 1989). This wording is important. It means children’s interests must be taken seriously and given substantial attention, but they are not automatically decisive in every case. States are still allowed to consider other factors, such as immigration control, criminality, or national security, but they must explain clearly why those interests outweigh the harm to the child.

Additionally, international guidance has clarified that this obligation is not a simple box-ticking exercise. Decision-makers are expected to carry out a real, individualized assessment of the child’s situation. This includes the child’s age, emotional attachment to parents, level of dependency, education, health, and the likely impact of separation or relocation (Committee on the Rights of the Child, 2013). A general statement that “the child’s interests were considered” is not enough. The reasoning must show how those interests were understood and weighed.

It is important to note that different countries apply this principle in different ways. In Canada, the best interests of the child are clearly written into immigration law through the Humanitarian and Compassionate (H&C) framework. The Supreme Court has confirmed that decision-makers must meaningfully consider children’s circumstances and view them from the child’s perspective rather than a purely administrative one (Baker v. Canada, 1999; Kanthasamy v. Canada, 2015). However, even in Canada, this duty does not guarantee protection. It guides decision-making but does not always prevent removal.

For instance, in the United Kingdom, the best interests of the child are treated as a “major consideration” under domestic law, especially through section 55 of the Borders, Citizenship and Immigration Act 2009. Courts have repeatedly stressed that children should not be treated as extensions of their parents’ immigration status (ZH (Tanzania) v. Secretary of State for the Home Department, 2011). However, UK law still allows the state to

override children's interests if the public interest in immigration control is considered strong enough, especially in deportation cases.

In the United States, the situation is more limited. Although courts recognize that family unity is important, there is no general legal requirement to treat the best interests of the child as a controlling or primary factor in immigration enforcement decisions. Children's interests may be considered in certain forms of discretionary relief, but they do not create an enforceable right for parents to remain in the country (Motomura, 2014). This means that in most cases, children are directly affected by enforcement decisions without their interests shaping the outcome in a meaningful legal way.

On the contrary, in Australia, the best interests of the child are recognized in policy and international commitments, but they are not consistently treated as a binding legal requirement in enforcement decisions. Instead, they are one factor among many in non-mandatory decision-making processes, especially under ministerial directions. Courts have limited ability to intervene unless a clear legal error is shown, which reduces the practical strength of the protection (Australian Law Reform Commission, 2021).

Across all four jurisdictions, a clear pattern emerges. The best interests of the child are widely recognized in law, but they are not absolute. They function as a balancing factor rather than a guarantee of protection. This means that even when children will clearly suffer from separation, the law may still allow removal if other interests such as immigration control or public safety are considered more important.

This creates a gap between principle and practice. On paper, international law places children at the center of decision-making. In reality, immigration systems often treat their interests as one consideration among many, rather than as a decisive constraint. The result is that children's rights are acknowledged, but not always protected in a way that prevents harm.

### **Why Proportionality Sits at the Heart of Immigration Decisions**

Across all modern immigration systems, one legal idea appears again and again when courts and decision-makers deal with family separation: proportionality. In simple terms, proportionality asks a basic question, is it really justified to separate this family in order to achieve the government's immigration goals? It is the legal tool used to balance state power against human impact, especially where children and long-term family relationships are involved.

Proportionality does not mean that immigration control is unlawful or should not be enforced. States clearly have the right to regulate borders, decide who can stay, and remove individuals who do not meet legal requirements. However, international human rights law requires that these actions must not go further than necessary. In other words, even if a state has a legitimate reason to act, it must still choose the least harmful option when family life is affected (European Convention on Human Rights [ECHR], 1950; ICCPR, 1966).

Practically, proportionality requires decision-makers to answer three important questions. First, is the removal necessary, or could the state achieve its goal in a less harmful way, such as allowing the person to remain under conditions or applying alternative enforcement measures? Second, is the harm to the family too much, compared to the benefit to the state, especially where children are involved? Third, has enough weight been given to family life as a real and lived relationship, rather than treating it as a secondary or emotional concern (Council of Europe, 2022).

For example, in the United Kingdom, proportionality is a formal legal requirement under Article 8 of the European Convention on Human Rights. Courts must directly weigh the public interest in immigration control against the impact of removal on private and family life. This structured balancing process makes proportionality a central part of every Article 8 case. Even where the state has strong reasons to remove a person, courts must still ask whether doing so would be disproportionate, despite the harm caused to their family (*Razgar v. Secretary of State for the Home Department*, 2004; House of Commons Library, 2025).

Whereas, in Canada, proportionality is not always described in the same formal way, but it appears through the “fairness” and “comprehensive review” approach used in humanitarian and compassionate decisions. Courts require officers to consider all relevant factors, including family separation and children’s interests, and to make decisions that are not very harsh in the circumstances (*Kanthasamy v. Canada*, 2015). However, because this process is elective, proportionality is applied unevenly and does not always prevent removal before harm occurs.

On the contrary, in the United States, proportionality is largely missing as a legal requirement in immigration enforcement. While some forms of relief such as cancellation of removal require proof of extreme hardship, there is no general obligation for immigration judges to balance the impact of removal on family life against the government’s interest in enforcement. As a result, decisions can be legally valid even where they result in serious family separation, because the law does not require a structured proportionality analysis in most cases (Motomura, 2014).

In Australia, proportionality is also limited and largely rooted in administrative discretion rather than enforceable legal standards. Decision-makers may consider family ties and the presence of children, but these considerations are part of a wider “character test” and ministerial direction reform. Courts generally cannot overturn decisions simply because they appear disproportionate; they can only intervene where legal error is shown. This reduces proportionality to a policy consideration rather than a binding safeguard (Australian Law Reform Commission, 2021).

When viewed together, these systems show that proportionality is widely recognized in principle but unevenly applied in practice. The United Kingdom comes closest to making it a strict legal requirement. Canada applies it indirectly through humanitarian discretion. The United States largely excludes it from enforcement decisions. Australia relies on it in policy guidance but not as a strong judicial control.

The consequence of these differences is significant. Where proportionality is strong and enforceable, family separation must be justified in detail and can be overturned if the harm is too severe. Where it is weak or absent, family separation becomes easier to impose, even when the human cost is high. This leads to very different results for families in similar situations across different countries.

Ultimately, proportionality is the legal principle that determines whether immigration enforcement remains within human rights limits or crosses into unjustified family harm. It is the mechanism that turns abstract rights into real protection or, when weakened, allows those rights to exist in theory but not in practice.

## CONCLUSION

Immigration enforcement is often discussed in technical terms, visas, removals, detention, and border control. These terms can make the process sound administrative and neutral, as if it only affects individuals who fall outside legal rules. But in reality, immigration decisions rarely affect only one person. They almost always affect families.

Behind every deportation order, visa refusal, or detention decision, there are usually spouses, children, parents, and dependants whose lives are directly shaped by the net-result. A parent being removed from a country is not just a ruling; it is a child losing daily care and emotional stability. A spouse being denied entry is not just an administrative refusal; it is a family being forced to live apart across borders. These are not indirect consequences, they are direct and foreseeable results of enforcement decisions (UCLA Law, 2024; American Immigration Council, 2024).

Moreso, international human rights law already recognises this reality. The International Covenant on Civil and Political Rights protects family life from arbitrary interference, and the Convention on the Rights of the Child requires that children’s best interests be treated as important consideration in all decisions affecting them (ICCPR, 1966; UNCRC, 1989). The European Convention on Human Rights goes further by requiring states to justify any interference with family life as necessary and proportionate (ECHR, 1950). These instruments do not prohibit immigration control, but they do set clear limits on how far states can go when enforcement affects families.

Despite these legal protections, the comparative analysis in this paper shows a consistent gap between law in principle and law in practice. In the United States, family separation can occur without a structured legal requirement to assess proportionality. In Canada, protections exist but are often delayed by long processing times. In the United Kingdom, proportionality is embedded in law but is increasingly shaped by political pressure. In Australia, family considerations are present but depend heavily on executive discretion rather than enforceable rights.

What emerges from this comparison is a shared structural problem: immigration systems are designed primarily around control, not family protection. As a result, family unity is often treated as something secondary, something that may be considered after enforcement decisions are made, rather than a central factor that shapes those decisions from the beginning.

This approach creates a moral and legal tension. On paper, modern legal systems recognize that families matter. In practice, however, enforcement systems frequently treat family separation as an acceptable cost of immigration control. The harm to children, spouses, and long-term partners is acknowledged but not always decisive.

Consequently, reframing this issue is important. Family separation should not be understood as an unfortunate by-product of immigration enforcement. It should be recognized as a serious legal consequence that engages fundamental human rights. Once this is accepted, immigration law cannot be seen only as a system of border regulation. It must also be understood as a system that has the power to preserve or destroy family life.

Therefore, the central message of this review paper is simple: families are not side effects of immigration enforcement, they are its most affected subjects. Any legal system that takes human rights seriously must ensure that decisions about migration are not made in isolation from the people most impacted by them.

A rights-based immigration system does not require open borders or the removal of state authority. It requires something more basic: that when states enforce immigration laws, they do so in a way that is transparent, justified, and genuinely respectful of family life. Where separation is unavoidable, it must be clearly necessary, carefully justified, and proportionate to a legitimate aim, not an automatic or unintended outcome of enforcement machinery.

Furthermore, until that balance is consistently achieved, the gap between legal principle and lived reality will remain, and families will continue to bear the hidden cost of immigration enforcement.

## REFERENCES

1. American Civil Liberties Union. (2024). Family separation: A timeline. <https://www.aclu.org>
2. American Immigration Council. (2024). Family separation and immigration enforcement. <https://www.americanimmigrationcouncil.org>
3. American Immigration Council. (2024). The impact of deportation on American families. <https://www.americanimmigrationcouncil.org>
4. Australian Human Rights Commission. (2014). The forgotten children: National inquiry into children in immigration detention. <https://humanrights.gov.au>
5. Australian Law Reform Commission. (2021). Judicial review of administrative action (ALRC Report No. 142). <https://www.alrc.gov.au>
6. Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817.
7. Brabeck, K., Lykes, M. B., and Hunter, C. (2014). The psychosocial impact of detention and deportation on U.S. migrant children and families. *American Journal of Orthopsychiatry*, 84(5), 496–505. <https://doi.org/10.1037/ort0000011>
8. Canadian Council for Refugees. (2023). H&C applications and family separation in Canada. <https://ccrweb.ca>
9. Committee on the Rights of the Child. (2013). General comment No. 14: The right of the child to have his or her best interests taken as a primary consideration (Art. 3, para. 1) (CRC/C/GC/14). United Nations.

10. Council of Europe. (2022). Guide on Article 8 of the European Convention on Human Rights: Right to respect for private and family life. <https://www.echr.coe.int>
11. European Convention on Human Rights, Nov. 4, 1950, 213 U.N.T.S. 221.
12. García Hernández, C. C. (2019). Migrating to prison: America's obsession with locking up immigrants. The New Press.
13. Home Office. (2024). Family life (as a partner or parent), private life and exceptional circumstances. UK Government. <https://www.gov.uk>
14. House of Commons Library. (2025). Immigration and the European Convention on Human Rights (CBP-10376). UK Parliament. <https://commonslibrary.parliament.uk>
15. Immigration and Refugees Protection Act, S.C. 2001, c. 27 (Canada).
16. Immigration, Refugees and Citizenship Canada. (2025). Humanitarian and compassionate considerations: Program delivery instructions. Government of Canada. <https://www.canada.ca>
17. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.
18. Kanthasamy v. Canada (Citizenship and Immigration), 2015 SCC 61.
19. Kerry v. Din, 576 U.S. 86 (2015).
20. Kleindienst v. Mandel, 408 U.S. 753 (1972).
21. Migration Act 1958 (Cth) (Australia).
22. Motomura, H. (2014). Immigration outside the law. Oxford University Press.
23. Nationality, Immigration and Asylum Act 2002 (UK), as amended.
24. Plaintiff S10/2011 v. Minister for Immigration and Citizenship [2012] HCA 31.
25. Razgar v. Secretary of State for the Home Department, [2004] UKHL 27.
26. Rehaag, S. (2012). Judicial review of refugee determinations: The luck of the draw? Queen's Law Journal, 38(1), 1–58.
27. UCLA School of Law, Center for Immigration Law and Policy. (2024). Cruel indifference: Family separation at the U.S.–Mexico border. <https://law.ucla.edu>
28. United Nations Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.
29. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 (1948).
30. ZH (Tanzania) v. Secretary of State for the Home Department, [2011] UKSC 4.