The European Court of Human Rights and non-citizens' right to migrate

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This thesis discusses the case law of the European Court of Human Rights on the rights of non-citizens to migrate and reside within the territories of the member states of the Council of Europe, and the states' right to detain migrants and asylum seekers in the name of migration control. The cases discussed date primarily from November 1998 to April 2010. However, this thesis draws only partially on juridical research even though the research material consists of a Court's judgments. The study is not juridical, but the main emphasis of analysis is on the argumentation of the Court and its judges more generally, i.e. their views on the rights of migrants, refugees and asylum seekers to cross frontiers, and on the states' rights to detain asylum seekers and immigrants. The problematic is based on the juxtaposition of the rights of individuals and states: how does the Court balance on one hand the individuals' right to seek asylum and enjoy their family life, and on the other hand the states' sovereign right to control their frontiers and territory and protect their nationals from crimes nad threats. The thesis may thus be placed within the wider field of migration studies.

The research interest in the primary actor, the Court, derives from its role as a regional and supranational actor. The Court's position enables it to influence the states' policies and decisions concerning immigration and residence rights, and the rules and conditions of detention. The European Convention of Human Rights applies in principle to everyone within the states' jurisdiction, irrespective e.g. of an individual's nationality. However, in practice non-nationals are not completely equal with citizens. The Court e.g. confirms the states' right to control immigration.

Although the European Court of Human Rights does not generally acknowledge a right to immigrate, its decisions and judgments have influence in particular in individual cases. A particularly central role in the Court's argumentation is played by security concerns of states, and the individuals' right to family life. On the other hand the Court has also taken a strong stance to confirm the prohibition of torture and inhuman treatment, irrespective of how dangerous the persons seeking asylum might be. In practice a state may not disrespect certain rights e.g. by invoking fight against terrorism, and family is such a sacred institution that it may override a person's criminal behaviour. Second-generation immigrants on the other hand are still not equal to citizens. Yet, the formulation of the Convention rights enable the Court to continue to develop its interpretations.

Keywords: aliens, case law, European Convention of Human Rights, European Court of Human Rights, human rights, nationality, migration, asylum.

1 Introduction

It has been observed that the free movement of persons has not been welcomed with same eagerness as the free movement of goods and capital, which globalisation and increasing international trade have brought about.[1] However, the factual trends in world population, persistent unemployment, poverty, economic insecurity, armed conflicts, abuses of human rights, and other problems in developing countries combined with the increasing need for workers in developed nations hint at nothing but continuing growth of the migration flows.[2]

Under traditional international customary law states have been free to control the entry and residence of aliens. But this freedom does not mean that states may arbitrarily decide who they may allow on their territory and who to expel, deport or deny entry; instead, new limiting norms have been introduced under contemporary international law to restrict this freedom.[3] Migration is a highly politicised issue - "*by* migrants, *against migrants,* and *on behalf of* migrants."[4] In spite of international migration management being one of the hot topics of migration field, as states are increasingly trying to find more efficient ways to manage the international migration flows, the development of delegating any powers from governments to supranational institutions has been slow. But how do non-political actors who have no own nationalist interest approach this issue? The European Court of Human Rights has come to have a certain influence in the European states' immigration decisions through its judgments. And, unlike within the EU, the states do not have same power to influence the Court's decisions.

On European level it can be concluded from the case-law of the European Court of Human Rights that the Court "*has been able to control states' freedom in the area of immigration, residence, and integration of aliens through a generous application of the principle of proportionality and a liberal interpretation of provisions*" of the European Convention of Human Rights.[5] So, what is a human rights' point of view to the movement of persons? How does a human rights tribunal perceive and "regulate" the movement of persons, in particular the right to immigrate?

[1] Weissbrodt 2008, 1; ILO 2010, 13. In comparison to economic indicators such as world exports, the growth of migration flows has remained small.
[2] Weissbrodt 2008, 1; Penninx 2006, 9.
[3] Lambert 2007, 15,17.
[4] Koopmans et al 2005, 3.
[5] Lambert 2007, 22; Thym 2008, 87.

This introduction begins by briefly describing the primary actor of interest in this thesis – the European Court of Human Rights – to enable the reader to have a general idea of the Court's origins, its position in the international field, and how it works. Chapter 1.2 briefly introduces the central concepts, and the last chapter elaborates on the research material, questions, method, and the structure of this thesis.

1.1 The European Convention and Court of Human Rights

The Convention for the Protection of Human Rights and Fundamental Freedoms, better known as the European Convention of Human Rights (1950 Convention or ECHR), was adopted by the Council of Europe in 1950 (the Council or CoE). Its creation was inextricably bound to the development of human rights thinking in the international sphere in the aftermath of the Second World War. Already at its first session the Consultative Assembly of the CoE stated the need for a collective guarantee of human rights and decided to take the first steps towards collective enforcement of certain rights stated in the Universal Declaration on Human Rights (Universal Declaration).[6] What was new and revolutionary about this Convention was the detailed formulation of rights, the possibilities of limitations, and particularly the binding nature of the treaty and the creation of a supervisory mechanism.[7] In comparison to the to the United Nations' (UN) instruments, the 1950 Convention contains mostly civil and political rights; it includes many similar rights as the 1966 International Covenant on Civil and Political Rights (ICCPR). The economic, social, and cultural rights are primarily protected under the European Social Charter, which corresponds to the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR)[8].

Protecting human rights has become possibly the most important and most visible role of the CoE. Not only is protection of human rights included among its primary objectives, but a state cannot join the Council without having ratified the Convention, which

[6] Not included in the 1950 Convention were for example Articles 7 (Equality of everyone before the law), 13 (Freedom of movement and the right to leave any country), 14 (Right to seek and enjoy asylum), 15 (Right to nationality) and 17 (Right to take part in the government). Van Dijk et al. 2006, 2-8; see also Mole 2000, 6.
[7] The Council of Europe was created only a year before, on 5 May 1949, in the same post Second World War wave which saw the creation of other human rights treaties, too. The ECHR entered into force on 3 September 1953. However, due to the rapid preparations before adoption many issues were left unsolved. Therefore the Convention is complemented by several Protocols, which complete and amend the original Convention. The Protocols must be separately ratified by the States Parties. This means, that not all additional rights included in the Protocols apply in all States. Van Dijk et al. 2006, 2-8; Pellonpää 2005, 10-12. On the exceptional nature of the Strasbourg Court in comparison to supervision of other international treaties, see e.g. Goodwin-Gill and McAdam 2007, 298-296.
[8] See e.g. <http://www.coe.int/T/DGHL/Monitoring/SocialCharter/> (last accessed 2.6.2010)

simultaneously is only open for ratification to the Council members. In practice this means that the ratification of the Convention and joining the Council are interdependent processes.

Year 1998 was a turning point for the ECHR. On 1 November 1998 the Protocol No. 11 which reformed the Court system entered into force. Before this reform there was no obligation for the Council members to accede to the Convention, and individual complaints against states were only possible if the state in question had recognised the Court's jurisdiction. Besides these issues the Protocol also renewed the monitoring system by replacing the separate Committee and Court by one permanent, full time court. The European Court of Human Rights (the Court or Strasbourg Court) is the monitoring body of the Convention and one of the principal bodies of the Council.[9]

Enabling individual complaints was an important reform, which serves as the basis for monitoring the compliance of the treaty. This is the first major difference to traditional international law, under which only states may defend the rights of individuals. (See Chapter 1.2 below) It is also the most important from a human rights aspect because it permits even non-nationals to take their cases to the Court. Inter-state complaints are also possible, but they continue to be rare.[10] In fact, even the system of state complaints differs from traditional international law where the state itself or one of its nationals has to be an injured party. Another difference to the traditional international law is that the 1950 Convention allows *actio popularis*, that is, for any state to complain about an alleged violation of the "*public order of Europe*"[11]. This reflects the objective character of the Convention, described by the Court in the following words:

> "Unlike international treaties of the classic kind, the Convention comprises more than mere reciprocal engagements between contracting States. It creates, over and above a network of mutual, bilateral undertakings [and] objective obligations […]."[12]

However, in practice these complaints are very rare, and to avoid political repercussions states are more likely to act in their own interest. This fact further underlines the significance of individual complaints,[13] the number of which has constantly grown. Indeed,

[9] The Court is divided into Committees, Chambers and the Grand Chamber, as well as Sections which are balanced in geographical and gender terms, and represent different legal systems of Member States. One judge is elected from each Member State. Van Dijk et al. 2006, 41; Pellonpää 2005, 2-3,10-12.
[10] Before resorting to the Strasbourg Court an individual must first exhaust all national remedies. Pellonpää 2005, 10-11,112-114; Lambert 2007, 14-15; Van Dijk et al. 2006, 47.
[11] For diplomatic protection in traditional international law see e.g. Pisillo Mazzeschi 2009.
[12] *Ireland v. the United Kingdom* (18.1.1978, 5310/71) para. 239.
[13] Van Dijk et al. 2006, 47; Pellonpää 2005, 111.

the growth has caused a "case-load crisis", which was first attempted to be solved by the Protocol No. 11, and thereafter with Protocol No. 14.[14]

The Convention is directly applicable at national level, and it has been incorporated into the national legislations of the contracting states. Until today the Convention has been ratified by 47 states. (See Appendix 1) The judgments made by the Court are legally binding, and their execution is supervised by the Committee of Ministers. The Court may order interim measures on states while it continues its examination of a case, e.g. prohibit removal of an individual to a country where he or she might be at risk of death or torture. But, these measures are ordered only in cases of extreme urgency. The vast majority of these temporary interventions into state actions concern deportation and extradition cases, i.e., the Court forbade states to expel applicants before it had made its decision. Since 2005 these measures have been legally binding.[15]

1.2 Migrant groups and migration law – definitions

This chapter briefly introduces the central terminology used in this thesis. It also gives a general idea of the migratory movements to facilitate the reader to compare the image given by the Court's case-law to "the big picture". Non-nationals are not a unified group; it ranges from permanently or less permanently settled migrant workers to refugees, tourists, students and diplomats. Although the term 'non-nationals' is often used in this thesis, it here covers only the groups discussed in below. This is a solution made for the sake of simplicity.

The vast majority of migrants are looking for employment or are engaged in economic activities. Of all international *migrants migrant workers and their families* form 90%, while only 7 to 8% consist of refugees and asylum seekers. The migration flows have changed in both gender terms and size during the past decades. Today women represent almost a half of all migrant population, and unlike before most of them have now migrated on their own,

[14] Protocol No. 11 aimed at enhancing the accessibility and visibility of the Court, and at reinforcing the judicial character of the control system. While Protocol No. 11 was a partial solution, more radical reforms are introduced under the Protocol No. 14, which entered into force on 1 June 2010. The "caseload crisis" is illustrated by the numbers of applications: in 2005 the Court received 82,100 applications and made nearly a thousand judgments, which is ten-fold to the U.S. Supreme Court's judgments. A major reason for the excessive caseload in the Court is that 90% of the applications are declared inadmissible. Protocol No. 14 primarily enforces the filtering system of the clearly inadmissible and repetitive cases. Goldhaber 2007, 7; CoE: Protocol No. 14 Factsheet, 2010.

[15] <http://www.echr.coe.int/echr/en/header/applicants/interim+measures/general+presentation> (last accessed 9.6.2010); Lambert 2007, 14,53; European Court of Human Rights: the ECHR in 50 questions 2010, 10,12; van Dijk et al. 2006, 113; Pellonpää 2005, 171-172.

not just to follow their husbands. Also the number of international migrants has more than doubled since 1985, and in Europe the increase of migration flows has been even steeper. In 1985, 23 million people living in Europe were born outside their country of residence. In 2010 the number is deemed to reach 70 million, which is one third of the global migrant population. All in all, since 1988 net migration has contributed more to the growth of the population of many European states than natural growth. [16]

The concepts of *refugee* and *asylum seeker* are easily confused in popular context even though they are legally distinct. The phrase 'asylum seeker' is not used or defined in any single major treaty,[17] but the famous 'refugee' definition is found in the 1951 UN Convention relating to the Status of Refugees, also referred to as the Geneva Convention. According to this definition, the term 'refugee' shall apply to any person who, owing to a *"well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country"*.[18]

An asylum seeker also finds himself outside the territory of the country of his nationality, in search for international protection. The difference is that he has not yet been granted a refugee status, but has only claimed for a need of protection. Further criteria for defining 'asylum seeker' are set in national legislations, determining e.g. whether the individual must have made a formal application for protection and at which stage of the flight such application should have been made. An asylum seeker may be granted refugee status or complementary protection.[19] In fact national procedural conditions, especially time limits, are one example which has been the object of the Court's examination and scrutiny. In case the claim for asylum is rejected on substantial grounds and the person has entered the country without appropriate documents he will most likely be treated as an irregular immigrant. When discussing the Court's case law it is important to recognise this

[16] ILO 2010, 1-2. Currently the number of persons living outside their country of origin is estimated at 214 millions, which represents 3.1 % of the world's population. The number of refugees is believed to be 16.3 million in year 2010, of which 1.6 million are hosted by European countries. Among the Member States there is large variation in the proportion of immigrant population, from 0,1% in Romania to 43% in Luxembourg. Heikkilä 2010, 706-708; Weissbrodt 2008, 1; Penninx 2006, 7; Papademetriou 2005.
[17] Weissbrodt 2008, 111.
[18] 1951 UN Convention relating to the Status of Refugees, Article I, A1(2). Determination of whether an individual qualifies as a refugee is done through individual assessment. However, of the 8.4 million refugees identified by the UNHCR in 2005, 64% were granted protection in group determination process. Only 24 % were recognised as a refugee through individual recognition processes. The numbers illustrate the large scale of influxes today. Weissbrodt 2008, 119.
[19] 'Complementary protection' refers to States' protection obligations outside the Geneva Convention. In practice this can mean granting asylee status to a person, humanitarian leave to remain, or some form of informal, *ad hoc*, or temporary protection. Goodwin-Gill and McAdam 2007, 285; Weissbrodt 2008, 111.

difference, because the majority of persons who seek protection are not recognised as refugees under the Geneva Convention.

The terms *irregular, undocumented, unauthorised* and *illegal immigrant* are usually used in literature as synonyms. In the Court's vocabulary persons are generally not categorised directly but rather referred to through expressions such as "*entered illegally*" or "*with the help of a smuggler*". *Irregular* immigrant is usually opted for in order to not create an idea of "criminalising" those migrants who enter a country undocumented or exceed their visa limit, but in practice these terms are often used interchangeably. This form of migration is the fastest rising single form of migration flows during the past ten years.[20]

It is important to be aware of the colourfulness of the group. Irregular immigrants can be classified into four categories. In the first category are those who enter a country unauthorised or undocumented, i.e., nationals of one country who enter another clandestinely and escape border controls. An increasing number of these immigrants are smuggled or trafficked. This is partly a consequence of enforced border controls, which has created a need for a specialised market[21]. The second category consists of those who manage to enter a country with false documentation, for example with a false identity. Persons seeking asylum on a false basis are part of this group. The third group entails persons who exceed the time limit of their visa or residence permit. Thus these persons may have entered the country legally but become irregular immigrants when the authorised stay is over. The last group consists of persons who violate the terms of their visa. Most common is to accept work when the visa does not include a working permit. Besides the variety of ways to become "illegal", another problem in defining the concept stems from the absence of a common definition. Each member state in the EU has a different definition of what constitutes an unauthorised presence. A general characteristic in European countries is to define legal entry and presence through specific categories, and in the absence of definition for irregular immigrant illegality in practice means not belonging to any of the categories of legal presence. To this category we can also include smuggled and trafficked persons, due to the fact that they cross borders in an unregulated manner or with false documentation.[22]

[20] According to Rigo, from a juridical point of view no one can be illegal; any person may only be "*partially*" legal. Rigo 2009, 70-75; Papademetriou 2005; Cholewinski 2004, 160.
[21] See e.g. Hammarberg 2006.
[22] The difference between these two concepts is that the former means the act of clandestinely helping migrants to cross the borders to enter a country, while the latter refers to trade in human persons. It should be noted, that asylum seekers often rely on smugglers' "services" to manage to reach their destination. Another important remark is to be made with trafficked persons, who are victims of striking violations of their human rights, and in need of protection. In general context, for example in the media and political rhetoric smuggled

Finally, it is important to recall with all these categories that classifying a person in any group is not as easy as it may appear at first sight.[23] The fluidity of these theoretical groups in fact becomes visible in this thesis. An irregular migrant can become an asylum seeker if he claims international protection, and vice versa. A smuggled person is vulnerable to become victim of trafficking when he or she reaches the destination or during travel. This framework is thus only a guiding one, and these examples of blurring distinctions, equally visible in case law of the Court, demonstrate the difficulties that policies and attempted resolutions also face.

The terminology for *removal* of a person to another country varies according to the situation. Both *deportation* and *expulsion* are used of removal of persons who are ordered to leave the territory of a state. *Non-refoulement* has become a "foundation stone" of international protection: this principle prescribes broadly that no one should be returned to any country where he or she is likely to face persecution, other ill-treatment or torture. *Refoulement* is thus to be distinguished from expulsion or deportation whereby a lawfully (or unlawfully) resident alien may be required to leave a state, or be forcibly removed. *Extradition* refers to removal of persons who are suspected or have been sentenced of a crime.[24]

1.3 Research questions, sources, and method

Migration is often seen as a human right, but the only obligation states have accepted is to admit their own nationals. In other words there is a right to emigrate but not to immigrate. (See Chapter 2.1 below) There are numerous cases brought to the Court by migrants, asylum seekers, and refugees[25]. The majority of cases involve their rights to arrive or reside in the country of destination. This problematic of the right to migrate is the main focus and basis for the construction of this thesis. The Council of Europe has already published

persons are perceived to be criminals, while those trafficked are victims. However, the distinction between trafficking and smuggling is difficult to implement in practice, and there rarely are "pure" cases of one or the other. Papademetriou 2005; Mitsilegas 2004, 3; Bhabha 2005.

[23] An enlightening example of the flexibility between these categories can be illustrated in the case of immigrants from Sierra Leone in Spain. In 2001 hundreds of irregular immigrants began to claim for legalisation of their situation in public at the same time as the economy also was in need of work force. One of the major groups was undocumented immigrants from Sierra Leone, which had been immersed in civil war since 1991. Due to the conflict, these people were not able to obtain documents with which to prove their origin, in which case they would be permitted to claim for asylum based on humanitarian reasons. Cambio16, 27.8.2001 Nº1.551, p.10-13.

[24] Goodwin-Gill and McAdam 2007, 201; Lambert 2007, 44.

[25] Because of lack of cases concerning other groups which would have also been of special interest, namely smuggled persons and victims of trafficking, these groups are left in a marginal role. Smuggling of migrants is mentioned in few cases when the applicant has at some time resorted to a smuggler's services.

studies on which rights pertain to non-nationals[26]. There are extensive studies, which analyse the Strasbourg case law and depart from specific rights, and which include observations on the applicability of those rights in cases of non-nationals[27].

A few studies must be mentioned as the most central sources of reference in this thesis. A valuable and overarching source has been Weissbrodt's *The Human Rights of Non-Citizens,* which gives a concise overview from the international law perspective. More specifically the rights of non-citizens in the European context are dealt with by Lambert in *The position of aliens in relation to the European Convention of Human Rights.* On the international protection regime I have most often turned to *The Refugee in International Law* by Goodwin-Gill and McAdam, which not only offers valuable analysis on the international sphere and refugees, but also the developments of protection systems on regional levels, including comparison between different supranational actors. *Theory and Practice of the European Convention of Human Rights* by van Dijk et al. offers detailed information on how the Court works and how its case law has developed. Finally, *Irregular Migration and Human Rights: Theoretical, European and International Perspectives* includes numerous articles on the problematic of irregular migration, thus the various authors are regularly referred to.

In this thesis the construction is primarily based on the main dilemma, 'right to migrate'. Within each chapter, however, the construction necessarily derives from the ECHR articles for the simple reason that the Court bases its arguments on them. The most commonly invoked articles in context of removal or permission to entry are article 2 (Right to life), article 3 (Prohibition of torture and inhuman or degrading treatment), article 5 (Right to liberty and security), and article 8 (Right to respect for private and family life). (See Appendix 2) The perspective in this thesis derives from the movement of persons. It is generally acknowledged that the Court is able to control the freedom of states, but how is the right to migrate, or absence of it, manifested in the judges' opinions?

The constant weighing of the right to movement across borders reflects on one hand a controversy between states' sovereign right to control their territory, and on the other hand the freedom of movement and the privacy of individual migrants. Because states' right to deny immigration and expel non-nationals inevitably involves enforcing restrictions, it is also natural to ask where the limits to the enforcement of control are. This is further

[26] See e.g. Mole 2000; Lambert 2007,
[27] See e.g. Van Dijk et. al. 2006; Pellonpää 2005.

confirmed in the fact that in cases involving entry or deportation, the right to liberty is often invoked at the same time.

This thesis is carried out following the traditions of contemporary history, but it may also be placed within the wider field of migration studies. It must be emphasised that even though this thesis draws on the area of international law, the purpose is not to conduct a juridical study. The terminology used is based on the terms and vocabulary used in the 1950 Convention and by the Court, but its use does not strictly follow the juridical use, namely because a juridical analysis is not the focus of this thesis. Instead the main foci are the arguments and valuations in the Court's judgments.

The main research question is how the European Court of Human Rights perceives the right to immigrate and the right of non-nationals to reside in their new home country. Related questions are how the Court regulates the movement of persons, and whom the right to immigrate or reside pertains to. In other words, when does the Court intervene in states' decisions on expulsion or denial of entry? What arguments does the Court use when it protects a non-national from removal or defending his or her right to entry? Equally, whose right to immigrate is the Court willing to deny? For instance, when do security concerns override an individual's interest? Finally, when looking at the attempt to find a balance between a state's and an individual's rights, what does the Court allow the states to do in order to control their borders? To what extent is the restriction of liberty acceptable? The Court's balancing between the rights of individuals on one hand, and the rights of states on the other remains as the underlying idea.

The primary material consists of decisions and judgments of the Court, the majority dating between November 1998 and April 2010. Because the Court builds its reasoning on its prior judgments, earlier cases are included insofar as they are relevant to understanding the Court's stand today.[28] The major factor for this limitation is that only since 1 November 1998 all residents, even those temporarily on the territory of every contracting state, have been able to file complaints, which sets all countries on an equal line. The majority of judgments have also been delivered since the 1998 reform.[29] In addition, the entry into force of Protocol No. 11 reformed the structure of the Court into a one, permanent, full-time

[28] Decisions concern only the admissibility of a case; judgments are only delivered after a case has been declared admissible and its merits examined. If a judgment finds a violation, it binds the State concerned. Resulting actions may be for example amendments to legislation or individual measures.

[29] Since the reform there has been a considerable increase in the Court's caseload. More than 90% of the Court's judgments have been delivered between 1998 and 2008. <http://www.echr.coe.int/ECHR/EN/Header/Press/Events/Meetings+and+Official +visits/Event_Popup_10ans_EN.htm> (last accessed 3.6.2010)

organ. Earlier judgments may be referred to occasionally as the Court frequently comments on its earlier judgments when making arguments in new, similar cases. Due to the large amount of relevant cases only a few are chosen to closer scrutiny to be explained in the text and emphasis will be put on cases of importance levels 1 and 2.[30]

In the Court's case-law the groups of migrants are not explicitly defined, but the persons may only be categorised through their acts. This affects particularly the search process in the data-base. On the other hand, not classifying the cases according to any theoretical group as such does reflect the reality and the fact that a single migrant may pertain to various groups, either simultaneously or at different times. It reflects more the reality, not migration theories.

The selection of cases into discussion was guided both by variety and by some similarity to support findings of comparable results in similar cases. Not all cases' backgrounds are discussed in great detail, but resembling stories to be found in other cases are mentioned in the footnotes. The structure of the judgments and decisions follows a certain structure, the details of which vary according to the complexity of each case. (See Appendix 3) Following the explanation of procedures are "*The Facts*", which describe the circumstances of the case and relevant law, practice, and materials. The main source for the judges' arguments is found in the section thereafter, "*The Law*", in which the judges finally investigate the alleged violations article by article. At the end comes the Court's judgment. Within each judgment or decision the main source for analysis is thus found in "*The Law*" section, because domestic legislation is not relevant when the primary interest is the Court's point of view. However, the circumstances of the case do give an overall picture of the story of the person(s) in question, on which the Court ultimately builds its views and arguments.

[30] The collection of cases is divided into three levels: 1 of high importance, 2 of medium importance, and 3 of low importance. Level 1 –cases make a significant contribution to the development, clarification or modification of the case-law, and level 2 do not make significant contributions but neither merely apply the existing case-law. Level 3 – cases consist of those applying existing case-law, friendly settlements and cases struck out of list. HUDOC User Guide, p. 9.

2 Hospitality to spare

Legislating on who is allowed on a state's territory remains a legitimate and sovereign right of each state, and it is also recognised as such by the Strasbourg Court. Each state's only obligation is to admit its own nationals. In other words, there is a right to emigrate but not to immigrate. States have not only refused an obligation to grant entry to immigrants, but neither have they accepted an obligation to grant asylum to refugees in any given case. Benhabib calls this "*a series of internal contradictions between universal human rights and territorial sovereignty*", which are built into the logical of international law documents.[31] This is correct, because migration is often seen as a human right. Migration as a human right is protected in the ECHR,[32] the ICCPR,[33] the Universal Declaration,[34] and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (International Migration Convention)[35].

Ultimately what is of interest in the context of this thesis is that although the Court does not deny the states' sovereignty on immigration issues, it has also enforced contrary judgments on states' decisions, namely based on the rights of individuals. This is the focus of this chapter. Already under international law the doctrine of non-discrimination has come to limit the freedom of states in how they deal with aliens: no one may be returned to territories where his life is threatened,[36] mass expulsion of aliens is prohibited,[37] and individuals are now allowed to directly invoke the law in certain international tribunals. The 1950 Convention was the first to add grounds of national or social origin to the list of prohibited grounds of discrimination; traditional international law only prohibits discrimination on basis of race, sex, language, and religion, which allowed states to make distinctions based on alienage or nationality.[38] Since the 1980s significant developments may be found in the Court's case law, and today the Convention undeniably protects non-

[31] Goodwin-Gill and McAdam 2007, 149; Benhabib 2004, 11. When a person has a right (right-holder), there is someone else who has a duty to respect, protect and fulfil that right (duty-bearer).
[32] Protocol No. 4 to the ECHR, Article 2(2): "*Everyone shall be free to leave any country, including their own*."
[33] International Covenant on Civil and Political Rights, article 12: "*Everyone shall be free to leave any country, including his own*."
[34] Universal Declaration on Human Rights, article 13: "*Everyone has the right to leave any country, including his own, and to return to his country*."
[35] International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, article 8: "*Migrant workers and members of their families shall be free to leave any State, including their State of origin*."
[36] Convention relating to the Status of Refugees, article 3; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 3(1).
[37] E.g. article 22 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; article 4 of Protocol No. 4 ECHR.
[38] Lambert 2007, 19-21.

nationals from expulsion for reasons of protection as well as family and integration in their new home country. The Court has even extended its interpretation on the right to family and private life to the extent that an irregular immigrant may be granted a right to regularize his or her stay.[39]

Chapter 2.1, which elaborates on the rights of non-citizens in more general terms, leads us into the evaluation of the Court's argumentation in more specified areas. The attention is first centred on argumentation deriving from article 3, i.e. protection of individuals from harm and maltreatment. Chapters 2.3 and 2.4 are both connected to article 8, but 'the right to family life' is discussed separately from 'the right to private life'.

2.1 Rights of non-citizens under international law and the ECHR

The 1950 Convention applies in principle to everyone within the states' jurisdiction. *Everyone* did not, however, always include immigrants. Still in the 1970 and the 1980s there was debate of whether certain rights applied in cases of non-nationals. But today even the Committee of Ministers and the Parliamentary Assembly of the CoE affirm that the ECHR can be applied to non-nationals, even to irregular immigrants, despite the fact that it does not *directly* address them[40]. In reality only a few provisions of the Convention apply to citizens or to lawfully resident immigrants only. All the other provisions protect citizens and aliens irrespective of their residence status. Hence, the meaning of 'everyone' suggests that in theory there are no limitations as to nationality, and it is not even necessary to reside within the state territory. What is of relevance is the physical presence in the territory, but jurisdiction also extends to the frontier and sometimes outside the national territory.[41]

Nevertheless, there remain some reservations to the Convention rights, and the contracting states still retain various discretionary powers. Article 14 (prohibition of discrimination) does not require absolute equality in treatment in every situation, which means that non-discrimination is not guaranteed in *absolute* terms even in the ECHR. The rights may be classified into *absolute*, *qualified* and *limited* rights depending on to what extent they may

[39] Thym 2008, 87.
[40] CoE: Parliamentary Assembly, Resolution 1509 (2006) Human rights of irregular immigrants.
[41] Groenendijk 2004, xix; Van Dijk et al 2006, 13; Pellonpää 2005, 13-15; Goodwin-Gill and McAdam 2007, 244-257. E.g. embassies and consulates represent the jurisdiction of one State on the territory of another. Also, in case Al-Saadoon and Mufdhi v. the United *Kingdom* (2.3.2010, 61498/08) the Court ruled that the transfer of detainees to Iraqi authorities would constitute violation of Article 3. The detainees had not sought asylum nor had they been on the British territory, but because they had been actively brought within the UK's jurisdiction during the war in Iraq, the UK had a duty to provide them 'diplomatic asylum'.

be derogated. States may e.g. impose restrictions on the political activities of aliens and detain them in order to prevent unlawful entry. In other words, different treatment is allowed in some situations but only if an explicit provision in the ECHR allows it.[42] As to immigration, the Court as a rule reconfirms each state's right under international law to control the entry and residence of aliens and to deport aliens convicted of criminal offences[43].

Lambert justly points out that in reality the classical separation between aliens and nationals still remains, which means that those who do not count as nationals continue to be in a vulnerable position under the Convention.

> "This is particularly true concerning their political and residence rights. Thus, aliens are denied political rights irrespective of their length of residence in a country and certain other rights and freedoms of aliens may be limited on a number of grounds (e.g., family life, freedom of association). Safeguards against the expulsion of aliens are only procedural and may be overridden, even if they are lawfully present in a country."[44]

Although the Protocol No. 12 widens the scope of the non-discrimination clause, the majority of contracting states have not ratified it. Furthermore, in cases where discrimination is possible it is limited, namely by requirements of proportionality and objective justification.[45] Some of the legitimate aims for expelling an immigrant, which are listed under article 8 ECHR, include maintaining public order and safety, protection of health or morals, and prevention of disorder and crime[46].

In the Strasbourg case law one can easily discover certain kinds of situations which involve the Court's "intervention" in the states' right to control their borders and residence on their territory. As mentioned above, the categories of non-nationals not only vary significantly but the individuals' histories visible in the judgments also represent the fluidity of those categories. In other words, they highlight the difficulty in defining any person simply as an asylum seeker or an irregular immigrant. We may sum up the variety of reasons why the Court decides in favour of the individual on questions of expulsion or extradition roughly into two categories. Firstly, a significant proportion of these cases relates to protection from

[42] Lambert 2007, 19-21,27,41.
[43] The reminder of State sovereignty in immigration issues is a settled section in the Court's judgments and decisions, which the judges automatically repeat each time they enter into evaluating the case in handling. See e.g. *Said v. the Netherlands* (5.7.2005, 2345/02) para. 46, *Hilal v. the United Kingdom* (6.3.2001, 45276/99) para. 59, *Abdolkhani and Karimnia v. Turkey* (22.9.2009, 30471/08)
[44] Lambert 2007, 83. Debate on the political and residence rights of aliens, see e.g. Benhabib 2004; Rigo 2009.
[45] Lambert 2007, 22,83. Proportionality means balancing an individual's rights with the aim that the State attempts to pursue.
[46] ECHR Article 8(2).

death, torture and inhuman or degrading treatment or punishment, which are prohibited under articles 2 and 3 of the Convention[47]. These cases include both refugees already recognised by the UN High Commissioner for Refugees (UNHCR), asylum seekers, and persons who have been sentenced or suspected of a crime (thus including cases of extradition). Secondly, an individual may also invoke article 8 of the Convention, which protects everyone's right to private and family life.[48] This group comprises legal immigrants and second generation immigrants who for various reasons are facing expulsion, and cases of family-reunion. In theory at least the Convention may also provide protection on grounds of health reasons, but such decisions are very rare (see Chapter 3.3).

In the territories of the CoE member states, the 1950 Convention offers valuable protection for refugees and asylum seekers as an additional instrument to other international treaties, such as the 1951 Geneva Convention and its 1967 Protocol, or the 1984 UN Convention against Torture (1984 CAT). At the time of drafting of the ECHR the Geneva Convention was thought to cover the need on the right to seek and enjoy asylum, which is why the right to asylum still remains outside the ambit of the ECHR and its protocols. However, in recent years article 3 in particular has become an important safeguard in asylum cases. Yet, even though there is no explicit mentioning of asylum in the ECHR, the Court has interpreted the principle of *non-refoulement* to be implied. Deporting any person to a territory where he or she could face a risk of torture or of inhuman or degrading treatment, either mental or physical, would violate the spirit of the Convention.[49]

Article 33(1) of the Geneva Convention prohibits *refoulement* of a refugee "*in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion*". Whereas article 33(2) contains limitations as to who is protected from *refoulement,*[50] the 1950 Convention knows no such limits. The Court has underlined that no

[47] Similar and additional protection is also covered in article 1 of the 1951 Refugee Convention and article 3 of the UN Convention against Torture. Articles 3 and 4 of the Protocol No. 4, and article 1 in Protocol No. 7 offer additional protection in context of admission, asylum expulsion and extradition of non-nationals, but not all contracting tates have signed nor ratified them. Consequently, non-nationals can benefit of their protection only in a number of countries. In 2009, 190 cases concerned prohibition of inhuman or degrading treatment. In total articles 2 and 3 amounted to 9% of found violations between 1959 and the end of 2009. The most violated rights are article 6 (length of proceedings) and article 1 of Protocol No. 1 (protection of property, 62%). Found violations of article 5 amount to almost 11%. 50 years of activity: European Court of Human Rights 2010, 6,15; Table of Violations 2009.

[48] Between 1959 and the end of year 2009, the Court found 652 violations of article 8. In 2009 the number was 121. 50 years of activity: European Court of Human Rights 2010, 6,15; Table of Violations 2009.

[49] Mole 2000, 5,9; Lambert 2007, 11; Van Dijk et al. 2006, 433.

[50] Article 33 does not protect a refugee "*whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country*".

matter how dangerous the behaviour of a person, it cannot be weighed against the ill-treatment mentioned in article 3[51]. It has been argued that the Geneva Convention has increasingly become a tool which is invoked to exclude certain persons from protection, who the Convention was designed to protect. This point further adds to the special status of the 1950 Convention in European protection instruments. In addition, even indirect removal of a person to an intermediary country does not remove the responsibility of the expelling state.[52]

Article 3 ECHR and article 33 of the Geneva Convention are thus overlapping, and the Court has generally relied on UNHCR's previous decisions concerning refugee status of applicants[53]. On the contrary, due to the wider scope of protection under article 3, being entitled to protection under article 3 of the Convention does not mean that one would qualify as a Convention Refugee. It must be added that *non-refoulement* has become such norm of *jus cogens*[54] which not only covers refugees, but every person who may be subjected to death or torture. The international refugee protection system has undergone numerous changes since the establishment of UNHCR when the refugee problem was perceived to be only temporary, and the number of persons who have been granted complementary protection has increased.[55]

Although article 3 remains the most easily detected within the Strasbourg case law, cases concerning the right to private and family life are impossible to leave unnoticed. Originally the Commission and the Court held article 8 applicable in cases of aliens who want to join their spouses already lawfully residing in the territory of one of the contracting states. Afterwards its application was extended so that also minors could join their parents. The Court declares the sanctity of marriage and family in clear words, confirming that since the birth of a child there exist constitutive family ties between the child and his or her parents, which may only be broken by later events in exceptional circumstances. According to Lambert, article 8 ECHR "*imposes serious limitations*" on the states' sovereignty in questions of immigration. The Court maintains that governments may not arbitrarily invoke e.g. national security in order to expel aliens. Legality of an expulsion "*does not merely*

[51] See e.g. *Abdolkhani and Karimnia v. Turkey* (22.0.2009, 30471/08) paras 72,88.
[52] *Hilal v. The United Kingdom* (6.3.2001, 45276/99) paras 59-60; *Saadi v. Italy* (28.2.2008, 37201/06) para. 127 ; Mole 2000, 5; van Dijk et al. 2006, 427.
[53] See e.g. *Jabari v. Turkey* (11.7.2000, 40035/98) paras 40-41; *Abdolkhani and Karimnia v. Turkey* (22.9.2009, 30471/08) paras 75-87.
[54] A non-derogable norm. Lambert 2007, 16-18,34; Goodwin-Gill 2007, 201.
[55] The original mandate for UNHCR was only three years. Goodwin-Gill and McAdams 2007, 20; Van Dijk et al. 2006, 428,434-436,438-439.

dictate that the interference should have a basis in domestic law, but also relates to the quality [own emphasis] of that law, requiring it to be compatible with the rule of law"[56].

Yet, unlike article 3, article 8 provides only qualified protection. Expelling a non-citizen is possible if it is done "*in accordance with the law*", "*for a legitimate aim*", and if "*measures are proportionate to the end*". In all cases concerning removal of a non-national, the balancing between a state's and an individual's rights and interest is done from a perspective of whether the removal is "*necessary in a democratic society".* Such necessity may derive from a limited number of interests: *"the interests of national security, public safety or the economic well-being of the country", "the prevention of disorder or crime", "the protection of health or morals"* or "*the protection of the rights and freedoms of others"*.[57] As long as the state invokes one of these aims the Court does not go into an examination of whether such aim in fact was to be achieved but generally accepts the reason without burying itself into that particular question. In most cases the object of the judges' disagreement with the states is found on the issue of proportionality[58]. In practice the concrete aims are thus rather vague, due to the nearly all-encompassing nature of the limiting criteria.

Although the migrants' position remains uncertain, Blake compares the Court's power to the situation in the US and the international sphere positively:

> "[In the US] even minor penal infringements lead to the automatic deportation of the offender without regard to the period of residence or social consequences for the family. The US Constitution offers no human rights guidance in these cases, and the case law of the Inter-American Commission of Human Rights has not even considered that family life was engaged in these circumstances. The Human Rights Committee under the International Covenant on Civil and Political Rights has not developed a comparable jurisprudence."[59]

Blake represents the value given to family and private life in Europe as a uniquely European approach. In the European context it is also worthy of adding the observation made by Avci that "*the gradual transfer of asylum policies to the supranational level, the EU, has unfortunately not resulted in progressive or innovative policies but rather a settlement for the lowest common denominator*"[60]. This makes the role of the Strasbourg Court even more consequential: even if the EU only settles for minimum requirements, it

[56] *C.G. and others v. Bulgaria* (24.4.2008, 1365/07); *Al-Nashif v. Bulgaria* (20.6.2002, 50963/99) paras 127-129.
[57] ECHR, Article 8(2); *Sen v. the Netherlands* (21.12.2001, 31465/96) para.28; Lambert 2007, 64-65.
[58] The Court found e.g. in its judgment on *Bolat v. Russia* (5.10.2006, 14139/03) that the authorities had not acted in accordance with the law, and in *Liu v. Russia* (6.12.2007, 42086/05) it discussed the question of 'quality of law', that is, accessibility and formulation.
[59] Blake 2004, 442-443.
[60] Avci 1999, 206. See also Goodwin-Gill and McAdam 2007, 60-63,396-403,412-414,537-539.

does not liberate the member states from their responsibilities to which they have committed through the ECHR.

2.2 In need of protection

Although the 1950 Convention evidently may be invoked by a larger number of people than the 1951 Geneva Convention, the Court has stated that "*mere possibility of ill-treatment on account of an unsettled situation in the receiving country*" is alone not enough to grant a person the right to entry and enjoy asylum. In fact, despite the wider protection of ECHR, Goodwin-Gill and McAdam do not give unconditional exaltation to the Strasbourg Court but recall that it applies a narrow interpretation of maltreatment under article 3, and that it has not entirely succeeded in winning support to its interpretations among domestic courts and authorities.[61] So, who do the judges then want to protect, why, and from what? We know that articles 2 and 3 protect individuals from arbitrary death or torture but how does this affect the possibilities of non-nationals to arrive to Europe when the Court has its say?

To reiterate, article 3 states that "*No one shall be subjected to torture or to inhuman or degrading treatment or punishment*". In addition, article 2 secures the right to life: "*No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law*". These are such absolute rights that every migrant or asylum seeker can be allowed to enter a state or remain there through their protection. But if "*mere possibility*" or "*human rights abuses in general*" are not sufficient to protect a person, in what kind of situations does the Court want to offer individuals asylum?

Treatment in the country of origin

A landmark case concerning article 3 in cases of expulsion and extradition was *Soering* in 1989. Two years later in its *Cruz Varas* judgment the Court applied the Soering-principles for the first time in a case concerning a refused asylum seeker. Although in the Cruz Varas judgment the judges did not find a violation of article 3, they nonetheless took as their point of departure that the principles set out in cases concerning extradition were also to be applied in cases of expulsion.[62] As was mentioned above, the Court's case-law confirms a

[61] *Soldatenko v. Ukraine* (23.10.2008, 2440/07) para. 67; Goodwin-Gill and McAdam 2007, 310-323,345-353.
[62] Van Dijk et al. 2006, 429; Mole 2000, 11; *Cruz Varas v. Sweden* (20.3.1991, 15576/89) para. 70.

state's interest cannot be negotiated with a person's inhuman suffering, no matter how dangerous the behaviour of this individual may be.

Soering, a German national, was pending extradition to the US in a British prison, because he had murdered the parents of his girlfriend in Virginia. What became problematic when the US asked that he and his girlfriend be extradited was that the UK had abolished death penalty. In fact, article 2 allows capital punishment[63] but article 3 was invoked instead; what became the crucial question was the "*death row phenomenon*" and whether it could amount to inhuman treatment. In its earlier case law the Court had taken time to define inhuman or degrading treatment: a treatment was described as inhuman if "*it was premeditated, was applied for hours at a stretch*" and "*caused, if not actual bodily injury, at least intense physical and mental suffering*", and degrading if it was "*such as to arouse in [its] victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance*".[64] The Court has thus created "*a certain qualification […] formulated in absolute terms"* which serve as a tool of evaluation, when abstract norms must be applied to concrete cases. Due to the detail and number of relevant characteristics which are taken into consideration, defining whether a treatment in an individual case reaches "*the minimum level of severity"* depends on the characteristics of each situation.[65]

In reality Mr. Soering had never even been on trial in the US, so whether he would face death sentence was not certain. Yet in its evaluation the Court found it likely. This was the first case where the Court came to consider whether article 3 could apply "*outside the jurisdiction of the extraditing State as a result of treatment or punishment administered in the receiving State*". The judges came to conclude that even though the UK had "*no power over the practices and arrangements of the Virginia authorities*", this could not relieve it from its responsibility under the 1951 Convention "*for all and any foreseeable consequences of extradition suffered outside their jurisdiction*". The judges did not claim that the US system was arbitrary or unreasonable, but in its view it was "*the very long period of time spent on death row in such extreme conditions, with the ever present and mounting anguish of awaiting execution of the death penalty, and […] the personal circumstances of the applicant, especially his age and mental state at the time of the*

[63] "*Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law*."
[64] *Soering v. the United Kingdom* (7.7.1989, 14038/88) para. 100. The Court referred to an earlier judgment on *Ireland v. the United Kingdom* (18.1.1978, 5310/71)
[65] Van Dijk et al. 2006, 413-114.

offence" which together amounted to a treatment which would not be acceptable in the light of article 3.[66]

Although ECHR literally permits capital punishment, the Court re-confirmed that it "*is a living instrument which […] must be interpreted in the light of present-day conditions*". As one of the elements in this interpretation it named to be the standards of policy in the member states: in 1989 capital punishment was already de facto non-existent. Therefore it has been predicted that the Court may eventually qualify capital punishment as inhuman treatment in future[67]. The reasoning given in the judgment on Soering included making the Convention's safeguards "*practical and effective*" and maintaining its interpretations in line with "*the general spirit of the Convention, an instrument designed to maintain and promote the ideals and values of a democratic society*". The absoluteness of article 3 was considered to entail such fundamental values of democratic societies, which make up the CoE that even "*in time of war or other national emergency*" was its limitation prohibited. Already in this decision the judges pronounced their opinion that it would be contrary to the objectives of the Convention if a state would knowingly "*surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed*".[68]

Extradition of prisoner continues to be discussed in Strasbourg. Mr. *Ryabikin's* and Mr. *Soldatenko's* cases serve as recent examples of how the judges continue to apply the wide scope of protection. More precisely the cases enlighten the Court's views on prison conditions, which were also at issue in the case of Soering. Both Ryabikin and Soldatenko were awaiting extradition to Turkmenistan; the former in hiding in Russia, and the latter in detention in Ukraine.[69] Mr. Ryabikin had in fact originally sought refugee status in Russia, but because the Russian authorities did not find evidence on persecution in Turkmenistan they denied him asylum. The Court took a wider perspective to threat of inhuman treatment than the Russian authorities. Because of lack of evidence of guarantees by Turkmen authorities not to subject the applicant to ill-treatment, the judges did not find it sufficient

[66] *Soering v. the United Kingdom* (7.7.1989, 14038/88) paras 11-15,81,85-86,99,110-111.
[67] Van Dijk et al. 2006, 413-114.
[68] *Soering v. the United Kingdom* (7.7.1989, 14038/88) paras 87-88,102.
[69] Even temporally the cases are close; Mr. Soldatenko's case was discussed only four months later than that of Mr. Ryabikin. Mr. Ryabikin was a Turkmen national but of Russian ethnic origin. He had owned a construction company in Turkmenistan. The reason he had to flee was that he had taken to the Court a case of two officials of a ministry for demanding bribes, which had resulted in threats from the law-enforcement bodies to drop the case. After he fled Turkmenistan, the officials opened a criminal case against him, confiscated his property and later asked Russia to extradite him. Soldatenko had fled Turkmenistan after he was ordered to be arrested on grounds of having assaulted two individuals. He went to live in Ukraine where he was found 7 years later.

that the Russian government had merely investigated the possibility of *persecution* in Turkmenistan. What made the situation even more suspicious were the reports on lack of possibilities for international observers to verify the human rights situations in Turkmen prisons. The same issue was raised under Soldatenko judgment; the judges centred their attention on the prison conditions. It found sources on basis of which it described the conditions "*extremely poor"*" The reports contained information on very poor prison conditions, including overcrowding, poor nutrition and untreated diseases, denial of medical assistance, use of force and torture against criminal suspects to obtain confession, non-investigation by national authorities of the allegations. The Court was left even more worried over the situation in Turkmenistan because "*accurate information [...] is scarce and difficult to verify, in view of the exceptionally restrictive nature of the prevailing political regime*".[70]

In its Ryabikin judgment the Court held that he would likely face "*a heavy prison sentence of eight to fifteen years*", which combined to the described prison conditions, "*incommunicado detention and the vulnerable situation of minorities*" would breach article 3.[71] On the other hand in the Soldatenko judgment a few months later the judges already stated that "*there is no evidence in the available materials that the criminal suspects of non-Turkmen origin are treated differently from the ethnic Turkmens*". Despite this difference they in any case came to the same conclusion of prohibiting extradition. The reason this time, however, was that "*any criminal suspect held in custody counter a serious risk of being subjected to torture or inhuman or degrading treatment both to extract confessions and to punish for being a criminal*". Moreover, the Court agreed with Mr. Soldatenko's fears that even though he was wanted for a relatively minor offence, "*the mere fact of being detained as a criminal suspect in such a situation provides sufficient grounds for fear that he will be at serious risk of being subjected to treatment contrary to Article 3*".[72]

Another aspect in cases of extradition which ought not to be ignored is the Court's opinion of the "*diplomatic assurances*", with which the governments asking for extradition attempt to secure the removal of their wanted prisoner. The diplomatic assurances' objective is to ensure that the extradited person will not be subjected to torture or degrading treatment. The Court has stated that not any kind of assurance may be accepted as reliable, and that diplomatic assurances "*are not in themselves sufficient to ensure adequate protection*

[70] *Ryabikin v. Russia* (19.6.2008, 8320/04) paras 116-118,120-122.
[71] *Ryabikin v. Russia* (19.6.2008, 8320/04) paras 121-122.
[72] *Soldatenko v. Ukraine* (23.10.2008, 2440/07) paras 34-37,72-73.

against the risk of ill-treatment where reliable sources have reported practices resorted to or tolerated by the authorities". In both Soldatenko and Saadi judgments the Court dismissed the assurances on these grounds. In its judgment on Soldatenko it stated specifically that the person who had given such assurances had not been established to be "*empowered to provide such assurances on behalf of the State*" and moreover, "*given the lack of an effective system of torture prevention, it would be difficult to see whether such assurances would have been respected*". In the case of Saadi the judges pointed out that the assurances were in fact not assurances at all, but that the Tunisian authorities had only stated their acceptance to receive Mr. Saadi and later confirmed that Tunisia had acceded to relevant human rights conventions. But to the judges ratifying a convention does not equal to adequate protection, especially when the authorities have been reported to tolerate, let alone resort to practices of torture. [73] To sum up, governments may not blindly rely on assurances by third states that the extradited persons will be safe from inhuman treatment; in cases where appeals against extradition have reached the Court, it has taken time to examine their "*practical application*".

Asylum

Essentially both immigration and asylum are governed in first hand by national legislation. Complementing the states' reluctance to give away their powers in questions of immigration, they have not accepted an obligation to grant asylum either: there exists only a right to *seek* asylum. However, the international human rights law limits the states' rights in this field, most importantly by prohibition of *refoulement*. (See Chapters 1.2 and 2.1) Nearly all countries are party to at least one international agreement that prohibits *refoulement*. Therefore, as Weissbrodt points out, "*it is generally much easier to gain protection from non-refoulement than […] as an asylee*" because the list of conditions for fulfilling the criteria which qualifies an asylee is exhaustive, and states have much more discretion as to how they implement the right to asylum than there is for implementing the right of *non-refoulement.*[74] This is particularly true in the case of the CoE members because as was clarified above, the 1950 Convention offers a wide scope of protection. The Court may also enforce its judgments on the contracting parties, which is something that the UNHCR is not able to do.

[73] *Ryabikin v. Russia* (19.6.2008, 8320/04) para 132; see also e.g. *Soldatenko v. Ukraine* (23.10.2008, 2440/07) para 73; *Saadi v. Italy* (28.2.2008, 37201/06) paras 147-148.
[74] Goodwin-Gill and McAdam 2007, 149; Weissbrodt 2008, 134-136.

Because of protection from *refoulement* a state's immigration or alien law becomes irrelevant when a refugee or any person claims asylum in good faith, even if they have entered the country illegally or travelled on false documents. When interpreted from the ECHR's aspect, the prohibition of *refoulement* derives from the extraterritorial effect of the Convention's provision: in similar terms as governments are not allowed to subject anyone under their jurisdiction to torture or inhuman treatment, neither are they able to escape the responsibility by deporting a person to a territory where this could happen. In other words, a contracting party can be held responsible for treatment which counts as violation of the Convention, even if it happens outside the territory of that state.[75]

An issue which we already touched upon in the case of Soering is capital punishment. Although the Convention does not in principle prohibit death penalty, almost all contracting parties have ratified Protocols No. 6 which abolishes death penalty, and No. 13 whose first article declares that "*The death penalty shall be abolished*". Yet, a risk of death penalty is still not in itself a sufficient ground to prohibit removal. It is the manner and circumstances in which the penalty is carried out, which may constitute inhuman or degrading torture.[76] In the judgment on *Shamayev and others* the Court elaborates on this, stating that even if a state has not ratified Protocol No. 6 and may in principle use capital punishment, it does not mean that it is acceptable in any situation.

> "The manner in which it is imposed or executed, the personal circumstances of the condemned person and a disproportionality to the gravity of the crime committed, as well as the conditions of detention while awaiting execution, are examples of factors capable of bringing the treatment or punishment received by the condemned person within the proscription under Article 3. […] The Court has also found that […] the youth of the person concerned is a circumstance which is liable, with others, to put in question the compatibility with Article 3 of measures connected with a death sentence."[77]

As the judges pointed out already in 1989, it still accepts the attitudes in the contracting states to influence its evaluation on what is acceptable under article 3 of the Convention.[78]

Bader and Kanbor feared expulsion from Sweden to Syria where Mr. Bader had been sentenced to death *in absentia* for murder, after he had already fled to Sweden. Whereas the Swedish government contended with "*probability*" of re-trial, the Court placed emphasis on the fact that death sentence for serious crimes occurred in Syria, even if capital punishments

[75] Goodwin-Gill and McAdam 2007, 264-265; Lambert 2007, 10; Pellonpää 2005, 16.
[76] Van Dijk et al. 2006, 430-432. The Court described the territory of contracting parties to the ECHR to have become a "*zone free of capital punishment*" in particular because all members have signed the convention, and only Russia and Monaco have not ratified it.
[77] *Shamayev and others v. Georgia and Russia* (12.4.2005, 36378/02) para. 333.
[78] Ibid.

were not necessarily common. It recalled that in any case a death sentence following an unfair trial could not be allowed by the Convention, because without a fair trial it would count as arbitrary deprivation of life. In addition to violating article 2, returning him would violate article 3 as well. The Court expressed its concern that "*executions are carried out without any public scrutiny or accountability*" which would inevitable cause Mr. Bader "*significant degree of human anguish and fear*". Neither he nor his family would know "*when, where and how the execution would be carried out*". The Swedish authorities had tried to obtain a guarantee from Syria that Mr. Bader would be granted a retrial, but the Court held the report vague and unconvincing.[79]

Credibility of individual accounts

The conditions of detention or treatment in the country of origin are not the only issue in which the Court is interested. Because human rights abuses in general are not a ground for granting protection, the Court evaluates a person's individual account. For instance many situations require the asylum seeker to assert that he or she belongs to a particular group and is therefore threatened[80]. This means that the credibility of an individual is questioned (or verified) through the details and consistency of his story, mirrored with general accounts. This does not mean that a person must be able to produce full-proof documentary to convince the judges; they consider what might be reasonably expected of a person. In fact, the details of personal stories and the applicants' credibility is often the focus of disagreement in the final outcome of those decisions in which the Court comes to a different conclusion than a domestic court.[81] In his concurring opinion in the case *Said*, Judge Thomassen pointed out that the facts can often only be partially, if at all, established, but that this should not always be held against the applicant due the difficulty of obtaining material proof. Simultaneously he recognised the necessity of not undermining humanitarian law by allowing persons "*who have fabricated the reasons for their flight*" to benefit of asylum[82]. The Court has also emphasised that

> "[…] the assessment of whether there is a real risk must be made on the basis of all relevant factors which may increase the risk of ill-treatment. In its view, due regard should also be given to the possibility that a number of individual factors may not, when considered separately, constitute a real risk; but when taken cumulatively and

[79] *Bader and Kanbor v. Sweden* (8.11.2005, 13284/04) paras 42-47.
[80] For discussion on what is meant by 'particular group' see e.g. Goodwin-Gill and McAdams 2007, 73-86.
[81] *Said v. the Netherlands* (5.7.2005, 2345/02) para. 51; *Saadi v. Italy* (28.2.2008, 37201/06) para. 128; *Hilal v. the United Kingdom* (6.3.2001, 45276/99); *NA. v. the United Kingdom* (17.7.2008, 25904/07); *N. v. Finland* (26.7.2005, 38885/02); *Abdolkhani and Karimnia v. Turkey* (22.9.2009, 30471/08)
[82] *Said v. the Netherlands* (5.7.2005, 2345/02) Concurring opinion of Judge Thomassen.

> when considered in a situation of general violence and heightened security, the same factors may give rise to a real risk."[83]

In cases where the core of disagreement relates to the evaluation of facts and credibility, it is hard to make further generalisations on the Court's argumentation, precisely because the judges stress the relativity of these assessments. The assessment ultimately depends "*on all circumstances of the case*".

Removing a person may also be prohibited because of possibility of chain *refoulement*. The reasoning behind this is that in context of chain *refoulement* the expelling state would be a "*crucial link in the chain of events*" which leads to torture or inhuman treatment.[84] Probably the most famous case concerning chain *refoulement* is the decision on *T.I.*, an asylum seeker from Sri Lanka who had arrived in the UK through Germany, which had previously rejected his asylum application and ordered him to be deported back to Sri Lanka. Although the Court declared the application inadmissible and thus allowed T.I.'s removal to Germany, the reasoning implied that *if* Germany had *not* guaranteed the examination of T.I.'s situation and claims, the removal would not have been allowed. The Court placed primary importance and a heavy burden of responsibility on the expelling state:

> "[…] the indirect removal in this case to an intermediary country, which is also a Contracting State, does not affect the responsibility of the United Kingdom to ensure that the applicant is not, as a result of its decision to expel, exposed to treatment contrary to Article 3 of the Convention. Nor can the United Kingdom rely automatically in that context on the arrangements made in the Dublin Convention concerning the attribution of responsibility between European countries for deciding asylum claims. Where States establish international organisations, [or respectively] international agreements, to pursue co-operation in certain fields of activities, there may be implications for the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention if Contracting States were thereby absolved from their responsibility under the Convention […]."[85]

In its statement the Court thus also commented on the Dublin Convention, not neglecting the fears voiced by the UNHCR that despite those possibly worthy objectives of the Dublin Convention, "*its effectiveness may be undermined in practice by the differing approaches adopted by Contracting States to the scope of protection offered*". While German approach to state responsibility was strictly limiting, the Strasbourg judges placed importance on the medical reports and photographs of scars which T.I. brought before them, as well as further clarifications to the situation in Sri Lanka, and in particular torture and ill-treatment used both by the LTTE and government forces. The judges pointed out that they had "*not heard*

[83] *NA. v. the United Kingdom* (17.7.2008, 25904/07) para. 130.
[84] Van Dijk et al. 2006, 429-430; Goodwin-Gill and McAdam 2007, 252-253,400.
[85] *T.I. v. the United Kingdom* (Decision 7.3.2000, 43844/98)

substantial arguments from either the United Kingdom or German Governments as to the merits of the asylum claim" but that the material that T.I. had provided made the situation seem worrisome. Ultimately the Court stated that its job is not to monitor how states fulfil their obligations under the Geneva Convention but concentrated on the "*procedural safeguards*" aspect. Due to various reasons it came to a conclusion that there was no real risk that Germany would expel T.I. to Sri Lanka.[86]

Additional argumentation may be found in a case where Turkey wanted to return two Iranian PMOI members, *Abdolkhani and Karimnia* to Iraq, from where the two men had left when a refugee camp in which they were living was closed down. The Court however found "*a strong possibility*" that persons affiliated with PMOI would be removed from Iraq to Iran. The judges reminded that "*the indirect removal of an alien to an intermediary country does not affect the responsibility of the expelling Contracting State to ensure that he or she is not, as a result of its decision to expel, exposed to treatment contrary to Article 3 of the Convention"*.[87]

The judges relied on UNHCR's reports, which confirmed expulsions of ex-PMOI members from Turkey to Northern Iraq where they were arrested and detained by Iraqi security forces and later went missing. UNCHR feared that Iraq had deported them to Iran. The Court found those concerns reasonable, based primarily on the fact that Iraq is not a party to the Geneva Convention which prohibits refoulement. Additional sources reported on random executions of PMOI members in Iran, and on removals of PMOI members from Turkey directly to Iran where they had been executed. Besides the announcements on executions, the Court named both the "lack *of reliable public information concerning such a large group of persons,*" and the fact that UNHCR had not had access to returned PMOI members in Iran as alarming.[88]

The scope of the Geneva Convention consists only of the responsibility of state actors, and several European countries do not grant asylum for reasons of persecution by non-state agents. In spite of this the judges have come to assert a wider view in cases of expulsion:

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[86] *T.I. v. the United Kingdom* (Decision 7.3.2000, 43844/98) T.I. had been detained by the security forces as a suspected member of the LTTE and tortured. The Court noted that Germany had not questioned the credibility of Mr. T.I. although one of the Courts had claimed his story to be a "*completely fabricated tissue of lies*". It had refused asylum because according to the German approach in questions of state responsibility, "*difficulties from the LTTE could not form the basis of political persecution nor could isolated excesses by soldiers*".

[87] *Abdolkhani and Karimnia v. Turkey* (22.9.2009, 30471/08) para. 88.

[88] *Abdolkhani and Karimnia v. Turkey* (22.9.2009, 30471/08) paras 81-89. See also *Tehrani and others v. Turkey* (13.4.2010, 32940/08; 41626/08; 43616/08) for another judgment concerning Iranian PMOI members fearing deportation to Iraq or Iran.

the contracting state may be held responsible regardless of whether the treatment in the country of destination is inflicted by state or non-state actors, and regardless of whether the country of destination is a party to the Convention.[89] This position is confirmed for instance in the Court's judgment in case of *N.*, where it found that he was threatened by dissidents seeking revenge on former President's associates[90].

Terrorism v. respect of human rights

Since the Soering judgment the judges have been able to continue to limit the liberties of states and reverse individual decisions made by national authorities by relying on article 3. The last clear stance to be explained in this chapter is found in the judgment on *Saadi*. The Court insists that the absoluteness of prohibition of torture and inhuman or degrading treatment implies today that a state's interest, such as national security or public order, may never outweigh the security of an individual, no matter how dangerous the behaviour of this individual may be, even though the state in principle invokes to such legitimate reasons to expel a non-national.[91]

The case of *Saadi* is particularly interesting because it made the judges take a clear position against the hunt after terrorists and defend individuals' rights against states' interests. The position that the judges took in his case was held and confirmed a year later, when removal of *Daoudi* was prohibited.[92] Mr. Saadi had held a residence permit in Italy for family reasons. In 2002 he became a suspect in investigations on international terrorism and was arrested.[93] The case came to the Strasbourg Court because Saadi was to be deported to Tunisia but where he feared torture. In general context these happenings took place shortly after 9/11 and before the war in Iraq. The Grand Chamber hearing took place some years

[89] Mole 2000, 14; Goodwin-Gill and McAdam 2007, 98-100; Van Dijk et al. 2006, 429-30. Even if a person is expelled from State B to State C where there exists a risk of torture, State A may still be held responsible as the initatior of the chain, even if State B is party to the Convention. See Coleman 2009 for how long in the chain of expulsions the expelling country may be considered responsible.
[90] *N. v. Finland* (26.7.2005, 38885/02)
[91] *Saadi v. Italy* (28.2.2008, 37201/06) para. 127; *Daoudi v. France* (3.12.2009, 19576/08) para. 64; *Abdolkhani and Karimnia v. Turkey* (22.9.2009, 30471/08) para. 91.
[92] *Daoudi v. France* (3.12.2009, 19576/08) Mr. Daoudi was a second-generation immigrant of Algerian origin. He had obtained French nationality but his citizenship was removed when he was sentenced to prison and thereafter to unlimited exclusion from the French territory. He allegededly had contacts to Al-Qaïda and had planned a suicide attack against the US embassy in Paris.
[93] The charges against Saadi included e.g. falsification of documents to aid illegal entry to Italy and developing the ideological doctrine of a group, which was planning attacks with explosives in Italy. There was proof which confirmed his contacts to organisations which were part of "*Islamic fundamentalist circles*" which were "*hostile to 'infidels"*". It was never confirmed where or when the attack was planned to take place and the used rhetoric recorded through his telephone calls, such as references to "*martyrdom*" of his brother who allegedly had died in a suicide bombing, "*training camps in Afghanistan*" and "*jihad*" did not suffice to proof the case either.

later in July 2007, but the position that the judges had to take in the juxtaposition of fighting terrorism and the respect for human rights cannot be said to have been outdated even then.

The Court's comments may be seen as a response to the general ambience of suspicion against non-nationals, which became explicit even within the UN Security Council. In its resolution on September 28th 2001 the Security Council pointed a finger at asylum seekers and called for all States to "*Take appropriate measures […] for the purpose of ensuring that the asylum-seeker has not planned, facilitated or participated in the commission of terrorist acts*" and to "*Ensure […] that refugee status is not abused by the perpetrators, organizers or facilitators of terrorist acts, and that claims of political motivation are not recognized as grounds for refusing requests for the extradition of alleged terrorists*"[94].

The Court explicitly gives some support to the states' concerns by admitting that they "*face immense difficulties in modern times in protecting their communities from terrorist violence […]. It cannot therefore underestimate the scale of the danger of terrorism today and the threat it present to the community*". But, directly thereafter it discredited any prospect of questioning the absolute nature of article 3 for this cause. The judges firmly concluded that "*the conduct of the person concerned, however undesirable or dangerous, cannot be taken into account*". In fact, the UK had made use of its possibility to intervene in the case and tried to promote an approach which would weigh the dangerousness of the individual against state security and that a "*higher standard of proof*" ought to be required. The arguments used by the UK included that the absoluteness of article 3, as insisted by the Court, "*did not reflect a universally recognised moral imperative and was in contradiction with the intentions of the original signatories of the Convention*".[95] This attempt was firstly dismissed by the Court and still more elaborately resisted by Judges Myjer and Zagrebelsky in their concurring opinion. They recalled that even though states should fight terrorism because it is their duty to secure a safe life to their citizens, they cannot do it at all costs, especially not by resorting to "*methods which undermine the very values they seek to protect*". By this statement they refer to a dual threat posed by terrorism on human rights:

[94] UN Security Council Resolution 1373 (2001) 28.9.2001. paras 3(f-g) Goodwin-Gill and McAdam have raised concern over these kinds of accusations. They raise the question of where to draw line between political acts and protests, and "terror", in order not to undermine the protection of those legitimately in need of protection, because after all, political acts may be "*criminalised*" and "*counter-terrorism*" is often used to consolidate political power. Goodwin-Gill and McAdam 2007, 191-197.
[95] *Saadi v. Italy* (28.2.2008, 37201/06) paras 117-122,137-138.

"*a direct threat posed by acts of terrorism and an indirect threat because anti-terror measures themselves risk violating human rights*".[96]

As to the UK's proposition of a "*higher standard of proof*", the judges dismissed it by stating that the Court already "*applies rigorous criteria and exercises close scrutiny when assessing the existence of a real risk of ill-treatment*".[97] This may be interpreted as a stance that in any case the judges examine the cases brought before them so carefully that they do not consider any further effort to be possibly needed. In other words, no matter how harmless a person is his case is not overlooked but studied as carefully as any, which also supports the statements made by academics that the Strasbourg judges apply narrow criteria under article 3.

What convinced the judges of the awaiting torture in Tunisia, were the reports by Amnesty International, Human Rights Watch, and other organisations which the Court describes to have "*authority and reputation*". This is in fact a common resort in the judges' tools to assess the situation in the country of origin, used in all cases concerning expulsion or deportation. In this particular case the reports contained consistent indications of acts of torture of persons suspected of terrorism, which were not investigated by the Tunisian authorities. Also, Mr. Saadi had been sentenced in Tunisia, even though himself absent from the trial, for membership of a terrorist organisation. These combined to other details left the judges convinced of "*substantial grounds*" for believing that deporting Mr. Saadi to Tunisia would expose him to torture.[98]

The Convention clearly offers valuable additional safeguard for persons who are not able to invoke the Geneva Convention due to its limited scope and its exclusionary clauses. A simple answer to the question of whom the judges want to protect, is *everyone*. When discussing article 3 the judges make no difference whatsoever as to personal attributes of an individual, whether an asylum seeker or a convicted criminal. The judges have adopted a firm position to protect persons from inhuman treatment, even opposing generalised arguments of fighting against terrorism and international crime. Consequently the Court may indeed function as a valuable counterforce against the politicised decisions and

[96] *Saadi v. Italy* (28.2.2008, 37201/06) para. 138, Concurring opinion of Judge Myjer, joined by Judge Zagrebelsky.
[97] *Saadi v. Italy* (28.2.2008, 37201/06) para. 142. Despite the firmness of the Court in its decision, Buchinger and Steinkellner have found that Italy continues to remove people convicted of terrorism to countries in which they are likely to face torture. Buchinger and Steinkellner 2009, 17.
[98] *Saadi v. Italy* (28.2.2008, 37201/06) paras 124-149.

increased security aspects within the European Union, which strongly influences not only its member states, but increasingly the neighbouring countries as well.

In spite of being firm in protecting each individual from treatment which would be contrary to article 3, it does not oblige the states to draw back from rigorous scrutiny of the grounds of the individuals' claims. Yet again, once the judges are convinced of a real threat, they do not pull back. The fight against terrorism is not discussed only in context of extradition and expulsion. The discourse which emphasises security will be further discussed in Chapter 5.

2.3 Family values dispel criminal behaviour

Besides protection from maltreatment the Convention also protects family and private life. Some of the persons whose cases we discuss in this chapter have also been sentenced of crimes, but unlike in the chapter above they were not able to appeal to inhuman treatment in the country where they would be expelled. Instead, for the sake of family ties and private life the Court decided that their expulsion would not be in harmony with the Convention. Since 1988 when the Court for the first time applied article 8 to offer relief to an immigrant who feared deportation, which would cause separation of him from his family, migrants have regularly invoked their right to family. In the early case of *Berrehab* the Court concluded that deporting Mr. Berrehab would be a disproportionate measure and violate the right to family ties between the father and his daughter[99].

"Family" and early case law

According to Thym the Court focuses "*on the existence of substantive family life in real terms*". Indeed, the Court stated already in its Berrehab judgment that formal marriage is not required in order to have a right to maintain that family life[100]. From a general perspective the Court thus does contribute to perception of and legal rights to more "*vulnerable groups*", such as illegitimate children, recognition of non-married couples, and rights of homosexuals. It has also been noted that the judges have distanced themselves from a pure ideal of nuclear family and may accept as family life e.g. ties between grandparents and grandchildren.[101] On the other hand, in the cases concerning non-nationals it is hard to find arguments in which the judges favour ties between grandparents and grandchildren to enable migration; grandparents living in the country of origin however is

[99] Lambert 2007, 64; *Berrehab v. the Netherlands* (21.6.1988, 10730/84) paras 27-29.
[100] *Berrehab v. the Netherlands* (21.6.1988, 10730/84) para. 21.
[101] Thym 2008, 89; Van Dijk et al. 2006, 846-851.

enough to count as social ties[102]. The judges also insist that relationships between adults, for instance a grown up person and his aged parents, do not necessarily benefit of the same protection under article 8 as under-aged children and their parents, or spouses. In relationships between adults there must exist a relationship of dependency and more than mere usual bonds of affection.[103]

To commence their evaluation on whether expelling Mr. Berrehab was necessary, the judges reminded that they had already established in previous case law that "'*necessity' implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued*". They also already set the course, which they would not deviate from, i.e., to not "*pass judgments*" on domestic immigration and residence policies as such. The Court placed emphasis on the circumstances of Mr. Berrehab's case; he was not seeking admission but had been lawfully living in the Netherlands for several years, had a home and a job, and "*against whom the Government did not claim to have any complaint*". Most importantly his wife was Dutch, and they had a daughter, even if the marriage ended in divorce before the baby was born. After divorce Mr. Berrehab was denied an independent residence permit, which threatened to break his ties to his daughter. Without largely elaborating on its reasoning but clearly based on the strong ties and lack of any criminal offences, the majority of judges found that withdrawing the residence permit would lead to an unnecessary break up of the family.[104]

The dissenting Judge Thór Vilhjálmsson, however, held that the Netherlands policy was sufficiently detailed, and that the existence of those provisions was "*made in the light of experience*", and pursued a legitimate aim. In his opinion

> "the problem of immigration and residence of foreigners is a very important issue and there is no doubt that restrictions are unavoidable. Generally speaking, in this field the Government must have a wide margin of appreciation when formulating their policy and the necessary legal rules." [105]

Contrary to the majority's view, which has been held ever since, Judge Thór Vilhjálmsson argued that once the applicants did not live in the same home and the parents were not married they did not have sufficient family life, which would protect them from states' action, which, after all, in his opinion had legitimate aims.[106]

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[102] See e.g. *Ahmut v. the Netherlands* (28.11.1996, 21702/93)
[103] *Mokrani v France* (15.7.2003, 52206/99); *Al-Nashif v. Bulgaria* (20.6.2002, 50963/99); *A.W. Khan* (12.1.2010, 47486/06)
[104] *Berrehab v. the Netherlands* (21.6.1988, 10730/84) paras 27-29.
[105] *Berrehab v. the Netherlands* (21.6.1988, 10730/84) Dissenting opinion of Judge Thór Vilhjálmsson.
[106] Ibid.

Only a few years later the Court was able to continue on the course it had taken. The ensuing cases involved criminal activities, and the judges did not dispute that preventing disorder and crime was at stake. Indeed, some judges still insisted that the Convention does not set any limits under article 8 to deport immigrants who have been sentenced of crimes. On the other hand, one judge declared that not only does expulsion of a man who has lived all his life in France violate his right to private and family life, but amounts to "*inhuman treatment*".[107]

In 1991 seven judges out of nine found that deporting Mr. *Moustaquim* violated his right to family. Mr. Moustaquim was a Moroccan national but had arrived in Belgium when he was not yet two years old. A year later the Court again prohibited a deportation; this time that of Mr. *Beldjoudi*, who would have been separated from his wife. Mr. Beldjoudi in fact did not consider himself a second-generation immigrant; he was born in France, but the family had lost their French nationality because they had not made a declaration in due time after Algeria became independent. In other words, he *had been a French national* when Algeria still pertained to France. Both men did have an impressive criminal record, ranging from assault to theft and possession of weapons, and their families had settled in France and Belgium; some family members even had already obtained citizenship.[108]

The two cases are similar yet different. The judges felt that Mr. Moustaquim's case included "*a number of special features*": he had committed the crimes when he was adolescent and during a relatively short period of time, and most importantly, the expulsion order was not declared until four years after his last offence. They declared his family life to have been "*seriously disrupted*" because all of his close family had "*for a long while*" been living in Belgium, and he himself had not yet reached the age of two when he arrived in Belgium. The Court considered Mr. Beldjoudi's list of crimes to be "*much worse than that of Mr Moustaquim*". Beldjoudi on the other hand was married to a French woman for more than twenty years and the couple had always lived in France. Although Mr. Moustaquim had lost his French nationality, the judges pointed out that "*It should not be*

[107] Whereas the Netherlands had argued that denying Mr. Berrehab a residence permit was done to prevent disorder, the judges rejected their argument and held that the aim was more for the country's economic well-being because of attempts to regulate labour market. *Beldjoudi v. France* (26.3.1992, 12083/86) Dissenting opinions of Judge Pettiti and Judge Valticos and Separate opinion of Judge de Meyer; *Moustaquim v. Belgium* (18.2.1991, 12313/86) Dissenting opinion of Judges Bindschedler-Robert and Valticos.

[108] *Beldjoudi v. France* (26.3.1992, 12083/86) paras 65-79; *Moustaquim v. Belgium* (18.2.1991, 12313/86) paras. 44-46. Moustaquim had been "*charged with 147 offences, including 87 offences of aggravated theft, 39 offences of attempted aggravated theft and 5 robberies*", and he had been deported for more than five years before the exclusion order was cancelled. Beldjoudi's sentenced amounted to over ten years in prison. During a period of over fifteen years he had committed serious offences, from assault to aggravated theft and possession of weapons.

forgotten, however, that he was a minor at the time and unable to make a declaration personally", not to mention that "*he manifested the wish to recover French nationality*" and "*he was declared by the French military authorities to be fit for national service*". The judges also pointed out the absence of any ties he could have to Algeria apart from his nationality: "*he has spent his whole life - over forty years - in France, was educated in French and appears to not know Arabic*". The judges also concluded that the husband's expulsion could "*imperil the unity or even the very existence of the marriage*" because Mrs. Beldjoudi would be required to settle in Algeria; not only did she not know Arabic, but the judges also feared that to "*be uprooted like this could cause her great difficulty in adapting, and there might be real practical or even legal obstacles*".[109]

The judges often remind that although article 8 does not contain an "*absolute protection against expulsion for any category of aliens*", they nevertheless respect "*the special situation of aliens who have spent most, if not all, their childhood in the host country, were brought up there and received their education there*". They from time to time refer to recommendations made by the Parliamentary Assembly or the Committee of Ministers of the CoE[110]. The Assembly has e.g. expressed its concern over the states' right to expel long-term immigrants for reasons of public order, not only after they have been convicted but also for simply being accused in criminal proceedings, and reminds that

> "legal immigrants who have been living for many years in their host country, some of whom were born or brought up there, have integrated into their host society and are no longer humanly or sociologically foreigners. This is particularly the case of second-generation immigrants, for whom their parents' country is often unknown territory."[111]

The political bodies of the CoE thus reflect the readiness to extend the humane perspectives, but the recommendations and declarations do not oblige the domestic authorities to act. Neither do the judges dispute that second generation immigrants ought only to be expelled on very serious reasons.[112] Thym calls this the "*hidden agenda*" revealed by academicians, namely that the judges aimed "*to expand the legal safeguards of Article 8 ECHR beyond the realms of family life with the intention of effectively protecting the long-term residence status of second-generation immigrants*". Yet, the Court, who would be able to enforce its views upon states, has not dared to go as far as the

[109] *Beldjoudi v. France* (26.3.1992, 12083/86) paras 65-79.
[110] The Parliamentary Assembly is formed by members of national parliaments, who meet four times a year. The assembly is described as "Greater Europe's democratic conscience". The Council of Ministers is the CoE's decision making body, which comprises of the Foreign Ministers of the CoE's member states or diplomatic representatives in Strasbourg. It is both a monitoring body, and a forum where national approaches are combined. <http://assembly.coe.int/Communication/Brochure/Bro01-e.pdf>; <http://www.coe.int/t/cm/aboutCM_en.asp> (last accessed 16.11.2010)
[111] CoE: Parliamentary Assembly, Recommendation 1504 (2001) Non-expulsion of long-term immigrants.
[112] *Maslov v. Austria* (23.6.2008, 1638/03) paras 74-75.

Parliamentary Assembly, which has stated that "*Under no circumstances should expulsion be applied to people born or brought up in the host country or to under-age children*"[113]. On the contrary, as will be seen in Chapter 3, the Court does accept the contracting states' harsh decisions in particular against migrants with criminal records. Judges Baka, Wilhaber and Lorenzen observed already in 2001 that although the majority of cases concerning expulsion involved second-generation immigrants, in which the main obstacle in the way of deportation was the length of time that those immigrants had spent in the expelling country, "*in a considerable proportion of the cases*" the Court still did not find a violation of their rights[114].

When an immigrant is being expelled, the state most often wants to send him or her away for reasons of national security. In most cases this means that the immigrant has broken the law. The states have a legitimate right to secure the public safety and order in society, but how does the Court balance this with each person's right to family and private life? The most central argumentation used by the judges is evidently based around the crimes committed on one hand, and the family on the other. More precisely, the type of crimes is a real factor; i.e. the Court does not accept expulsion on grounds of any breach of law whatsoever. As to family, particular emphasis is placed on children. This is not only seen in how the judges evaluate the ages of children of the migrant to be expelled, e.g. if they are already integrated in their home country or might adapt to a new one. The Court is also more compassionate towards juvenile delinquency. So, even if the Court usually agrees that the national authority's decision has been made in accordance with the law and with a legitimate aim, it places the crucial attention of its investigation into determining whether those measures have been "*proportionate"* and "*necessary"*. In other words, what counts in the end is "*striking a fair balance*" between the interests of an individual's right to respect for his or her private and family life, and on the other hand, the state interests to prevention and disorder of crime[115].

Criminals, too, have a right to family

Although the Court has not unconditionally accepted the comparison of second-generation immigrants to nationals in terms of their right to residence, it has significantly expanded the interpretation of non-nationals' right to family. This means that non-nationals may appeal

[113] Thym 2008, 91; CoE: Parliamentary Assembly, Recommendation 1504 (2001) Non-expulsion of long-term immigrants, para. 7.
[114] *Boultif v. Switzerland* (2.8.2001, 54273/00) Concurring opinion of Judges Baka, Wildhaber and Lorenzen.
[115] See e.g. *Jakupovic v. Austria* (6.2.2003, 36757/97) paras 19-26.

to family reasons even if they are not second generation or long term immigrants. An important case contributing to interpretation of right to family under threat of expulsion is *Boultif*, who gave his name to the criteria that judges have since 2001 applied in cases concerning expulsion of a legal immigrant. Later the Court has come to emphasise the "*strictest use*" of the *Boultif-criteria* in cases of second generation and long-term immigrants, provided that they have started a family.[116] Even if an expelled person has ended his or her relationship, a child may count as such a significant factor that the Court finds expulsion as a disproportionate solution in comparison to objectives of public security or order.

Mr Boultif was an immigrant of Algerian origin who had married a Swiss national shortly after his arrival in Switzerland on a tourist visa, whereby he obtained a residence permit. However, only a year later he was convicted of unlawful possession of weapons and thereafter of violent robbery, which caused him a prison sentence and a refusal of renewing his residence permit. For the first time the judges decided to explicate what they called "*the previously thin case law*" concerning cases where separation of spouses represented an obstacle. Thus, they developed a set of criteria, which consists of guiding principles to help evaluate whether a removal of a person satisfies the requirement of "*necessary in a democratic society*":

1) *the nature and seriousness of the offence committed by the applicant;*
2) *the length of the applicant's stay in the country from which he or she is to be expelled;*
3) *the time elapsed since the offence was committed and the applicant's conduct during that period;*
4) *the nationalities of the various persons concerned;*
5) *the applicant's family situation, such as the length of the marriage, and other factors expressing the effectiveness of a couple's family life;*
6) *whether the spouse knew about the offence at the time when he or she entered into a family relationship;*
7) *whether there are children of the marriage, and if so, their age; and*

[116] *Mokrani v. France* (15.7.2003, 52206/99) para. 31. The Council of Ministers recommends as definition of long-term immigrants: "*a) has resided lawfully and habitually for a period of at least five years and for a maximum of ten years on its territory otherwise than exclusively as a student throughout that period; or b) has been authorised to reside on its territory permanently or for a period of at least five years; or c) is a family member whose residence on the territory of the member state has been authorised for a maximum period of five years for the purpose of family reunification with a national of the member state or an alien*." CoE, Recommendation Rec(2000)15 Concerning the Security of Long-Term Migrants.

8) *the seriousness of the difficulties which the spouse is likely to encounter in the applicant's country of origin.*[117]

Due to the number of criteria it is easy to realize that the contemplation of facts in each case is not straightforward. In any event this "*test*" has been in frequent and systematic use in all similar cases since 2001. The judges' conclusion turned out to be in favour of Mr. Boultif. They emphasised the fact that since committing his offences in 1994 Mr. Boultif had shown exemplary conduct in prison, been given early release, had not committed new crimes, and was engaged in employment. Therefore they rejected any doubts that he could still constitute such danger to public security, which would justify a separation of a family in circumstances where the family could not reasonably be expected to establish family life elsewhere.[118]

Family ties of short term immigrants may be considered be so strong that they outweigh even serious crimes, e.g. involvement in drugs. Mr. *Sezen* had received his residence permit on family grounds but lost it when he was caught in possession of large quantities of heroin, about 52 kg to be exact. At the time of the offence he was temporarily separated from his spouse. The Court expressed its concern that none of the Netherlands authorities appeared "*to have paid any attention to the possible effects which the refusal of continued residence would have on [Mr. Sezen's] family life*". They evinced particular concern over the children and reproached the domestic authorities for not paying sufficient attention to their situation: "*Had this matter been addressed in the course of the domestic proceedings, the authorities would have been aware of the fact that the children speak Dutch and Kurdish, but not Turkish*". Moreover, the judges emphasised that Mr. Sezen's wife was a second-generation immigrant and had no family left in Turkey. The most disturbing detail in the case they found to be the readiness of the Netherlands authorities to immediately assume a break-off of all family ties when the couple separated but for a few months. They did not divorce but moved back together and even conceived a baby during that time. The judges responded to the Netherlands' suggestion of possible occasional visitations: "*the present case does not concern a divorced father with an access arrangement, but a functioning family unit where the parents and children are living together*".[119]

[117] *Boultif v. Switzerland* (2.8.2001, 54273/00) para. 48.
[118] *Boultif v. Switzerland* (2.8.2001, 54273/00) paras 6-14,40-56.
[119] *Sezen v. Netherlands* (31.1.2006, 50252/99) paras 10,40-49. Not all judges were that understanding of Mr. Sezen's family ties. Judge Thomassen was joined by Judge Jungwiert in his dissenting opinion, which placed more weight on the seriousness of the drug offence and the fact that his activities were discovered when he had held the residence permit for only one year. For the two judges there were "*no insurmountable obstacles*" for his family to follow him to Turkey: his wife was of Turkish origin and the children of 2 and 8 years still of adaptable age. (Dissenting opinion of Judge Thomassen, joined by Judge Jungwiert) See also *Amrollahi v.*

When the judges evaluate the type of crimes that the immigrant threatened to be expelled has committed, they repeatedly show the strictest attitude towards crimes involving drugs or violence. The cases of Boultif, Sezen and Amrollahi illustrate the significance of a will to protect children, but youth is also protected in cases where the expelled person himself is still under-aged[120]. This may have a vital effect in cases which involve short-term immigrants.

The Convention describes two grounds of exceptionality: "*if the case raises a serious question affecting the interpretation or application of the Convention (...) or a serious issue of general importance*". In such singular situations the cases are referred to the Grand Chamber.[121] One such case was *Maslov,* in which the Grand Chamber specified how a situation of a young immigrant who has not yet founded a family ought to be evaluated.[122] It listed four grounds of assessment: "*the nature and seriousness of the offence committed by the applicant; the length of the applicant's stay in the country from which he or she is to be expelled; the time elapsed since the offence was committed and the applicant's conduct during that period; [and] the solidity of social, cultural and family ties with the host country and with the country of destination*". Lastly it emphasised that whether the crimes were committed as adolescent or adult may also be of importance, because "*where offences committed by a minor underlie exclusion order regard must be had to the best interests of the child*". This came to determine the judges' conclusion.

Maslov had lived in Austria since he was six years old. After turning fourteen he ended up in a gang and was convicted of extortion, assault, and other crimes. Those cost him the unlimited residence permit he had received; it changed into a ten-year exclusion order. But, the non-violent nature of his crimes added to his youth as a mitigating aspect in Strasbourg. Although the judges referred to earlier judgments which had accepted expulsion of adolescents because of "*very serious violent offences*", their view was clearly conveyed:

Denmark (11.7.2002, 56811/00) Mr. Amrollahi was charged with drug trafficking, but his relationship with his wife and children amounted to such effective ties that the lack of other ties in Denmark was not significant to the judges.

[120] The judges have also referred both to EU legislation and to the UN Convention on the Rights of the Child.

[121] Articles 30 and 43 ECHR.

[122] Maslov judgment was preceded some years earlier by the case of *Jakupovic*, who arrived in Austria at age of 11. The Court accentuated his young age at the age of expulsion order (16 years), that he had not retained ties in his home country, and that he had practically all his family relations in Austria since his father had been reported missing at the end of the armed conflict. The judges did not approve of expelling a sixteen-year-old alone to Bosnia-Herzegovina which was only recovering from a civil war, because of only minor crimes. *Jakupovic v. Austria* (6.2.2003, 36757/97) See also *Yilmaz v. Germany* (17.4.2003, 52853/99); *Mokrani v. France* (15.7.2003, 52206/99); *Radovanovic v. Austria* (22.4.2004, 42703/98); *Yildiz v. Austria* (31.10.2002, 37295/97)

"*the Court sees little room for justifying an expulsion of a settled migrant on account of mostly non-violent offences committed when a minor*".

Besides assessing the case in hearing the Grand Chamber judges also returned to the relevance of Boultif criteria. They explained its ultimate meaning to be to "*help evaluate the extent to which the applicant can be expected to cause disorder or to engage in criminal activities*". This derives from the argumentation which is accepted to explain the necessity of expulsion, namely that of *prevention* of crime or disorder. The judges' considerations of possible tendency of re-offence were a partial factor which made the majority conclude that Austria had violated Maslov's right to family life by expelling him to Bulgaria. The Court rejected the Austrian authorities' claim that a person's conduct after receiving expulsion order was not relevant, but argued that "*the fact that a significant period of good conduct elapses between […] offences and the deportation of the person concerned necessarily has a certain impact on the assessment of the risk which that person poses to society*". It did, however, point out that his conduct since the offences "*carries less weight as compared to the other criteria, in particular the fact that the applicant committed mostly non-violent offences when a minor*". In its conclusion the Court considered that it was Austria's "*duty to facilitate [Maslov's] reintegration into society*", and with a view to his mostly non-violent crimes, the length of time he had lived there with all his family and social and linguistic ties in Austria, even an exclusion order of limited duration was not justified by crime prevention.[123]

Expulsion on administrative grounds

So far we have discussed cases in which the Court has not accepted an expulsion of a non-national to protect a country from crime. But immigrants may face expulsion based on other grounds as well, ranging from simple unauthorised stay to end of a marriage which originally was the reason to grant the residence permit. .

Mr. *Ciliz* had no criminal records but his residence and work permits were withdrawn when his marriage, on basis of which the permit was granted, ended. The aim of such measure was "*preservation of the economic well-being of the country*". The Court did not disagree with the acceptability of the aim. Instead, the central issue became Mr. Ciliz's son. The judges professed that relationship between a parent and a child "*is not terminated by reason of the fact that the parents separate or divorce as a result of which the child ceases to live*

[123] *Maslov v. Austria* (23.6.2008, 1638/03) paras 10-14,68-100.

with one of its parents". Mr. Ciliz had not had a close relationship with his son immediately after the divorce, but the Court gave value to his efforts to re-establish that relationship later; he for instance tried to resolve the access to his son various times through the courts. Mr. Ciliz had not been convicted of any criminal offences and due to formalities he had not been given a possibility to prove his relationship with his child. The judges emphasised that respect to right of family life is not merely a question of non-interference but it may also require a positive obligation to ensure the proceedings, which could guarantee the realisation of family life. The point of disagreement became the judicial processes in the Netherlands:[124]

> "the authorities not only prejudged the outcome of the proceedings relating to the question of access by expelling the applicant when they did, but, and more importantly, they denied the applicant all possibility of any meaningful further involvement in those proceedings for which his availability for trial meetings in particular was obviously of essential importance. […] The authorities, through their failure to coordinate the various proceedings touching on the applicant's family rights, have not, therefore, acted in a manner which has enabled family ties to be developed."[125]

Another significant development in the Court's views is seen in the case of *Şen.* A decade after the Court had found that expelling a non-national could violate his or her right to private life it now came to a decision that the right to family life may also oblige a state to allow family members to immigrate.[126] Mr. and Mrs. Şen had left their oldest daughter in Turkey when Mrs. Şen followed her husband to the Netherlands, where he had resided since the age of twelve. When trying to have their daughter to join them six years later, the permission was denied. The Court concluded the decision to violate the applicants' right to family.. In these circumstances the judges restated that family ties are not "*absolute and exclusive*" but can vary according to social circumstances. Contrary to the Dutch government they neither accepted the possibility of the family to move to Turkey, because the spouses already had installed in the new country, and their two younger children had been born there. On the other hand, one of the judges questioned the final reasoning in the judgment, which was based on the difficulties of only the youngest children to settle in Turkey. In fact, Judge Türmen enforces the right of a child to be with his parents by stating that if parents have succeeded in establishing a life in a new country, it would be unreasonable to force them to make a choice between abandoning their new stable life to be with a child, or to abandon their children.[127]

[124] *Ciliz v. the Netherlands* (11.7.2000, 29192/95) paras 8-24,33,40,59-72.
[125] *Ciliz v. the Netherlands* (11.7.2000, 29192/95) para. 71.
[126] Thym 2008, 87.
[127] *Şen v. The Netherlands* (21.12.2001, 31465/96) paras 33-40, Concurring opinion of Judge Türmen. See also *Tuquabo-Tekle and others v. The Netherlands* (1.12.2005, 60665/00) a case of a mother and father who had already gained Netherlands nationality and wanted to seek family reunification to Mrs. Tuquabo-Tekle's

Another case in which the Court required more from a state is that of *Rodrigues da Silva and Hoogkamer*. It is the first judgment in which the Court decided to legalise an irregular immigrant's stay. Before explaining the Court's reasoning a few words ought to be said on regularisation, which is a common yet exceptional practice among European states. To be remembered is that none of the international conventions oblige regularisation, and there is no attempt on EU level to reach common rules on the issue; all programmes have been individual countries' responsibility. The category of irregular migration is often emphasised to be merely a by-product of laws which control migration. In reality regularisation is a practical option used in many countries. It means offering irregular immigrants a legal status in the territory on certain conditions. Regularisation programmes have served as governments' tool for reining (or trying to rein) in the informal economy and controlling the illegal employment of workers. The arguments used for and against these programmes vary from social, economical and political to informational.[128]

Regularising unauthorised stay is thus nothing extraordinary in many European countries. What was novel however was the decision made by the Court, and its declaration that "*the authorities may be considered to have indulged in excessive formalism*". In general the judges look carefully if the persons were aware of the uncertain residence or migration status when they were forming their relationship. If they find a positive answer, only "*in the most exceptional circumstances*" do the judges think that they would be a violation of their right to family. The case of Ms. Rodrigues da Silva reached the threshold. She had always resided in the Netherlands illegally; when she filed the application to the Court she had lived in the Netherlands for 5 years, and by the time the Court made its decision the time elapsed was already twelve years. She had not even attempted to regularise her stay until three years after her arrival, i.e. a year after she had a child with a Dutch national. There was nothing in the circumstances of Ms. Rodrigues da Silva which would tie her to the Netherlands. She had only moved there at the age of 22 and had no legal right to remain there. Although the relationship with her partner broke up, and the girl stayed with her father who was given parental authority, it was primarily for the benefit of the child that the Court considered that expulsion would violate article 8.

Neither the government nor the Court denied that it was in the best interests of the child to stay in the Netherlands: she had been equally raised up by her mother and her father's grandparents. The government's argument that Ms. Rodrigues da Silva could not be granted

first daughter who had been left in Eritrea when she fled the war.

[128] Levinson 2005; Kostapoulou 2004, 42; Düvell 2006, 24.

residence permit because of the economic well-being of the country was dismissed by the judges as "*excessive formalism*". Although they confirmed that persons illegally resident in member states do not in general "*have any entitlement to expect that a right of residence will be conferred upon them*", her lawful residence would have been possible based on her relationship with Mr. Hoogkamer.[129]

The situation of expelled persons is not considered in isolation: spouse and children influence the decision equally. The Court does not generally expect second-generation immigrants and children who have no knowledge of the language and culture of their parents' country of origin to be able to start a new life there. It respects a "*functioning family unit where the parents and children are living together*". The Court emphasises specifically that this right is protected by article 8 and that "*to split up a family is an interference of a very serious order*". The decision is consequently made for the sake of the family: if the circumstances of the spouse, children, and the expelled person were different, the result could likely lead to expulsion. The cases of Boultif and Rodrigues da Silva, whose only ties to the expelling country were family, support this interpretation.

The Convention strongly protects the human aspect of aliens' life as opposed to national interests of government, even if national security is at issue. The governments do not only have negative obligation not to interfere in family lives of immigrants, but in certain circumstances the Court requires also positive actions in order to secure the realization of a right to enjoy family life. The strongest favouring factors combined are under-aged children, not only if they are born in the expelling country, but also if they were left behind in a country to which the parents cannot be obliged to return. Yet, the Court has stated that even if an immigrant was integrated in the society his situation is never equal to that of national when faced by the State's power to control its territory. Accordingly, there is vast case-law concerning opposite decisions. These will be discussed in the next chapter.

2.4 Integration and social ties

Both family and private life are protected by article 8 of the Convention, but the Court seems to give more value to family ties. This is why the question of private life, which more often than not means integration of second-generation and long-term immigrants, is discussed here in its own chapter. The question of citizenship and integration are

[129] *Rodrigues da Silva and Hoogkamer v. the Netherlands* (31.1.2006, 50435/99) paras 38-44.

inseparable in the context of long-term and second-generation immigrants. As long as immigrants are not naturalized, i.e. do not have citizenship, they remain non-nationals and therefore susceptible to expulsion. Whether an individual wants a citizenship is not a black-and-white scenario and today many also have dual nationality. Obviously there is also great variation among the European countries as to who may acquire nationality and on what grounds.

Avci has compared the situation of Western Europe to "*traditional immigration countries*", whereby he offers one explanation to the situation of long-term immigrants without nationality. According to Avci in traditional immigration countries the presumption has been that the immigrants will eventually be naturalised, whereas in Western Europe the attitudes have been more ambiguous. For instance, until the late 1990s Germany did not recognise itself as an immigration country, even though it had for decades been one of the main destinations for immigrants coming to Europe. Despite recognising the needs of immigrants he has found "*considerable amount of variation between and within countries*". Yet, to the individual immigrant, obtaining citizenship "*provides the formal closure to the immigration process and symbolises the end of a struggle for the immigrant*". Among other changes in the attitudes against migrants in the 1970s and 1980s was thus that those who had been welcomed as guests unexpectedly decided to stay. [130]

On the other hand, it has also been argued that many migrants were not ready to renounce their nationality of origin because of its both instrumental and symbolic value. This might make the previously bright line between aliens and citizens shadowy; even when migrants settle in their new home country permanently many inevitably maintain strong ties to their country of origin, even if those ties were only emotional. In traditional international law there existed a consensus that a naturalised immigrant must give up his or her old nationality, but this exigency was gradually given up by a growing number of countries. Simultaneously countries of emigration accepted that their nationals receive a second nationality. In practice naturalisation seems to have more importance to migrants coming from low-income countries; the share of naturalised immigrants from high-income countries is lower than that from poorer countries. One explanation that has been offered is that migrants coming from poor countries often have unlikely prospects of return, in particular when they are refugees and their families.[131]

[130] Avci 1999, 207; Prümm and Alscher, 2007, 74; Koopmans et al. 2005, 1. With 'traditional immigration countries' we may understand e.g. USA, Canada and Australia.
[131] Bauböck et al. 2006, 65; SOPEMI 2010, 163.

In Avci's analysis the question of integration is revealed through the aspect of citizenship. He explains the differences between national systems for acquiring nationality. Sweden for example sees citizenship as a step towards integration, whereas in Germany it is "*a reward for total integration*". In practice naturalisation is limited by different requirements, e.g. mastering the local language or proving self-sufficiency. The ideological differences may be seen as reflected in the naturalisation statistics. Whereas in Sweden over 80% of immigrants are naturalised, in Luxemburg the percentage is approximately 13%. Another way of trying to solve the problem of long-term immigrants has been to grant a varied set of rights. This ranking has been criticised by many, including Avci himself: "*Concepts of integration with limited rights such as quasi-citizenship are contradictory in themselves. Integration is not possible without equal rights. Equal rights are the prerequisites to full integration*."[132] The Committee of Ministers, which is also responsible for surveillance and implementation of the Court's decisions in the member states is also in favour of naturalisation and secure residence status: "*security of residence of long-term immigrants is not only vital to their integration but also to social stability in the member state*s".[133] Yet, in our context the ultimate determining point is that without nationality the immigrants are effectively treated as non-nationals.

In the early cases when the Court was still moulding its position relative to expulsion of long-term and second-generation immigrants some judges already tried to advance the idea that such measure amount to a breach of *private* life. Judge Martens took a wider approach to the issue of expulsion by pointing out that

> "In a Europe where a second generation of immigrants is already raising children (and where violent xenophobia is increasing to an alarming extent) it is high time to ask ourselves whether this ban should not apply equally to aliens who were born and bred in a member State or who have otherwise, by virtue of long residence, become fully integrated there (and, conversely, become completely segregated from their country of origin)."[134]

To him "*mere nationality does not constitute an objective and reasonable justification for the existence of a difference as regards the admissibility of expelling someone from what […] may be called his 'own country'*". The opinion of Judge Martens on the final judgment was that in failing to secure the position of second-generation immigrants, it consequently failed to "*introduce a measure of legal certainty*". He stated what others have continued to remind ever since: not all integrated aliens are married but they all have private life and a

[132] Avci 1999, 208-209; SOPEMI 2010, 159-165; Koopmans et al. 2005. A link has indeed been observed between immigrants' acquisition to nationality and integration, but the factors to this link are not known.
[133] CoE: Recommendation Rec(2000)15 Concerning the Security of Long-Term Migrants.
[134] *Beldjoudi v. France* (26.3.1992, 12083/86) Concurring opinion of Judge Martens, para. 2.

whole personal history in the country which wants to expel them. He further explained his viewpoint:

> "The same idea presumably underlies the aforementioned ban on the expulsion of nationals: when speaking of nationals, one almost always thinks primarily of those whose links with a given country are particularly close and manifold because they have been born and bred there […], in a family which has lived there for generations […]; it was clearly felt to be unacceptable that, by compelling such persons to leave, never to return, a State should be entitled to sever those ties irrevocably. To sum up: I think that expulsion, especially […] to a country where living conditions are markedly different from those in the expelling country and where the deportee, as a stranger to the land, its culture and its inhabitants, runs the risk of having to live in almost total social isolation, constitutes interference with his right to respect for his private life."[135]

So, not always are there children to save a person from expulsion. This is most likely in cases of second-generation immigrants who have only reached adulthood. The case of *Maslov* repeats the characteristics of favourable situations against deportation, and enlightens the wide understanding of "*family life*". Maslov was deported from Austria to Bulgaria at the age of 19. The Court paid special attention to the fact that he had been a minor when the expulsion order was imposed, and he was still living with his parents even when the exclusion order became final. The judges observed that

> "not all settled migrants, no matter how long they have been residing in the country from which they are to be expelled, necessarily enjoy 'family life' there within the meaning of Article 8. However, as Article 8 also protects the right to establish and develop relationships with other human beings and the outside world and can sometimes embrace aspects of an individual's social identity, it must be accepted that the totality of social ties between settled migrants and the community in which they are living constitutes part of the concept of 'private life' within the meaning of Article 9. Regardless of the existence or otherwise of a 'family life', the expulsion of a settled migrant therefore constitutes an interference with his or her right to respect for private life. It will depend on the circumstances of particular case whether it is appropriate for the Court to focus on the 'family life' rather than the 'private life'."[136]

The judges applied a partial "*Boultif-criteria*" [137] because Maslov was a young adult who had not yet founded his own family. In this case the Court found there to be interference with both private and family life. Due to the young age of the applicant and the non-violent nature of his crimes coupled with his principally social, cultural, and family ties in Austria and the absence of ties with his country of origin, the Court found that his expulsion violate both his right to family and private life. According to Thym this limited use of criteria

[135] *Beldjoudi v. France* (26.3.1992, 12083/86) Concurring opinion of Judge Martens, paras 1-3; Separate opinion of Judge Meyer.
[136] *Maslov v. Austria* (23.6.2008, 1638/03) para. 63. Maslov arrived in Austria at the age of six with his parents. The boy committed a series of crimes, e.g. aggravated gang burglary, extortion, and assault, since he turned 14. After serving an 18-months' prison sentence, he still continued in the criminal path. After the second term in prison his unlimited settlement permit was changed into a ten-year exclusion order.
[137] 1) nature and seriousness of the offence, 2) length of stay, 3) time elapsed since the offence was committed and the applicant's conduct during that period, and 4) solidity of social, cultural and family ties with the host country and with the country of destination.

effectively extends the degree of protection in practice. He also ponders whether the Boultif criteria might be but "*a starting point for a complex jurisprudence which Court has only started to develop*".[138]

The strength of ties that a second-generation immigrant has to his new home country is proven also in case of *A.W. Khan,* in which the Court came to rely on right to private life as grounds for allowing the applicant to stay in the UK. The meaning of "*private life*" covers a wide range of aspects in a way, which allows significant possibilities for discretion based on individual situations. Relying on similar argumentation as in its *Maslov* judgment the Court prohibited Khan's deportation. Although he did not succeed in invoking family ties the judges considered "*the length of time that the applicant has been in the United Kingdom and his very young age at the time of his entry, the lack of any continuing ties to Pakistan, the strength of his ties with the United Kingdom, and the fact that the applicant has not re-offended following his release from prison*" and decided that his deportation would not be proportionate to the aim of "*public good*".[139]

Article 8 has been said to entail the rights under which the position of aliens may have the most possibilities to be developed, in particular for young immigrants have not yet established a family, having solid cultural and social ties in the new home country may still protect a person's right to stay. Even irregular migrants who can barely invoke any legal ties to their country of residence may benefit of the protection of article 8. This is possible because the values it encapsulates leave more room for interpreting facts and emphasising the big picture than what article 3 allows. As Blake sums up: "*The law of humanity is thus progressive and incremental, not technical or static*"[140].

The question of integration, granting political rights to immigrants and granting citizenship are issues which are capable of opening up heated debates, not only in domestic politics and public arenas but also within the Court itself. Whereas the situations discussed in this chapter reveal the readiness of the judges to recognise the humane side of those migrants who have personal, social, and cultural ties to their home country, even when the formal link is missing, the next chapter reveals another side of the coin. All in all it may be concluded that non-nationals' emotional ties are not insignificant to the judges, in particular when the possible victim is under-aged or was a minor when committing the crimes which cost him the right of residence.

[138] *Maslov v. Austria* (23.6.2008, 1638/03) paras 71,96-100;.Thym 2008, 94.
[139] *A.W. Khan v. the United Kingdom* (12.1.2010, 47486/06) paras 13-16,31-35,40-51.
[140] Blake 2004, 438,451.

3 The unwelcome

Although the Strasbourg Court often favours the migrants' right to enjoy their family and settled life in their new home country, its role is not only to promote the individual migrants' rights. As we know by now from the numerous statements made by the judges, they hold onto the intrinsic right of states to control their territory. Besides deportation, the measures to combat unauthorised migration include also sanctions for employers of illegal workers. Although development to the same direction may be witnessed in most countries, even in Europe EU has not been able to harmonise the measures. Domestic perceptions have a strong influence on the implemented policies. The overall trend has been described as demand-led, in other words, selection of immigrants.[141]

This chapter mirrors the previous one but from a contrary perspective; i.e. where non-nationals are not granted a right to immigrate or stay in their country of residence. It begins by elaborating on the judges' support to the traditional idea that a state does have the ultimate control over its borders and territory. The second part looks at situations where the Court accepts expulsion of long-term and second generation immigrants, i.e. cases in which it finds states' measures of control more urgent than preserving the individual's family or private life. From the point of view of expulsion we move on to the aspect of entry in Chapter 3.3, which looks at asylum and the need of protection from another angle than in Chapter 2, namely what claims the Court deems unacceptable for protection, and who is not considered to be threatened by inhuman treatment. Lastly, even though family reunification is a common reason for immigration and not contested neither by governments nor by the Court, the last part of this chapter discusses the rule to which the cases discussed above ought to be seen as an exception; family is not an automatic ticket to entry.

3.1 States' privilege to control the territory

European states' response to the growing factual numbers of migrants has been to attempt to strengthen the control over their territories. The end to the easy immigration for unskilled workers from third countries is generally dated to the 1970s' economic crisis, and even today the entries into Europe are primarily based on permits of limited duration, even if they are renewable[142]. The new restrictions beginning in the 1970s were an attempt to

[141] SOPEMI 2008, 101,119.
[142] SOPEMI 2006, 116.

reduce the growing immigration flows, but in practice they remained literally as attempts. There are various approaches to explain the growing will to control frontiers, but the most commonly found arguments are economic and security reasons. Many authors argue that since the 1970s migrants not only became unwanted, but also they began to be represented as a threat to the interest of nation-state and later as a threat to national identity.[143] In fact, Buchinger and Steinkellner assert that instead of economic reasons, the main grounds for negative attitudes today are nationalist and cultural concerns. It has also been argued that the reason why the governments continue such strict attitudes towards migration, is that controlling their own territory remains one of the rare areas where they still can demonstrate their capacities of control, when they are losing economic powers to the global actors and uncontrollable forces. Immigration and territorial sovereignty may thus be set in the context of even broader discussion on the position of nation-state in the era of globalisation.[144] These arguments easily support the general notions that immigration and asylum are such politically sensitive issues, and why governments are reluctant to give over any power to supranational institutions, unless they hope to benefit from transnational control.

Although the Strasbourg Court's power to limit states' actions in the area of residence and immigration rights is unquestionable, the non-nationals' precarious situation is confirmed by the Court's statement that "*even if a non-national holds a very strong residence status and has attained a high degree of integration, his or her position cannot be equated with that of a national when it comes to the above-mentioned power of the Contracting States to expel aliens*." The Court has never fundamentally contested this right or deviated from its underlying conviction. Instead, it constantly consolidates this ground by entering into each consideration concerning non-nationals' immigration and residence rights by reiterating that "*it is for the Contracting States to maintain public order, in particular by exercising their right, as a matter of well-established international law and subject to their treaty obligations, to control the entry and residence of aliens*".[145]

The Court, for instance, bluntly accepted refusal of residence permit to a failed asylum seeker who had a child with a Netherlands national. The government stated that refusal was

[143] See e.g. Avci 1999, 199; Kaya 2009, 8-10. In fact, Kaya goes even further in claiming that before the 1990s 'security' was usually defined in political and military terms, whereas today the definition has widened to cover new issues, including migration. According to him, the "security problems" caused by migration arise when coupled with "problems such as unemployment, violence, crime, insecurity, drug trafficking and human smuggling".
[144] Buchinger and Steinkellner 2009, 5; Koopmans et al. 2005, 4.
[145] *Üner v. the Netherlands* (18.10.2006, 46410/99) para. 56; *Baghli v. France* (30.11.1999, 34374/97) para. 45.

necessary "*in view of the demographic and employment situation obtaining in the Netherlands (the economic well-being of the country), the prevention of polygamy (the protection of morals) and establishing the identity of prospective immigrants (public safety)*". The judges reminded that the relationship had been precarious from the outset because at no state was Mr. Solomon's request for asylum been accepted. Because his family life was developed after the authorities' refusals of any permission to stay, he could not have expected to be able to continue living with his family.[146]

When an individual's appeal to his right to family or private life under article 8 is contested, the arguments used in favour of removal or denying admission largely reflect reasons opposing those discussed in the previous chapter. The motives against the right to stay and enter thus include strong ties with the country of origin, having left the home country at an adult age, mastering its local language, having family there, and the possibility of family to follow the removed person. Article 8 is truly a qualified right: it does not as a rule offer protection from deportation. Other commonly invoked articles, 2 and 3, on the other hand are absolute and cannot be negotiated on such grounds as dangerousness of the individual or his family ties in the country of origin, but they only offer protection if the individual is able to demonstrate the strong possibility of risk of harm or persecution.

The Convention is a living instrument, adjusted by the judges' interpretations. As was observed above, the status of non-nationals today is not the same as it was still forty years ago. The interpretations of the Convention however do not necessarily automatically lead to widening the individuals' rights. Van Dijk suggests that despite the hopes of a narrower margin of appreciation for national courts after the case of Beldjoudi, the case-law has not unequivocally applied the same strict attitudes against expulsion.[147] In their dissenting opinion in judgment on Baghli in 1999, Judges Costa and Tulkens commented on the Court's case-law between 1996 and 1998, and gave their observation that it "*has moved towards a greater severity: in the vast majority of cases between 1996 and 1998 concerning aliens who had been deported or on whom an exclusion order had been imposed the Court found no violation of Article 8, albeit often on a split decision*".[148]

On the other hand, ten years later Thym's evaluation of the developments is much more positive. According to him the current case-law has widened the rights of migrants to their new home territory, extending to irregular migrants' right to be granted a permission to

[146] *Solomon v. the Netherlands* (5.9.2000, 44328/98)
[147] Van Dijk 1999, 310-311.
[148] *Baghli v. France* (30.11.1999, 34374/97) Joint dissenting opinion of Judges Costa and Tulkens.

stay. He also observes a new development, which has "*considerably extended the protective scope of Article 8*"; to independently consider "*private life*" of long-term immigrants without a necessity of having established a family.[149] Based on the cases studied the judges indeed do give importance to the private life aspect, but they still seem to give more value to family: it is considerably easier to find judgments which accept expulsion of a long-term immigrant who has a spouse or children than it is to find a prohibition expulsion of a bachelor immigrant. But, the dissenting opinions in various judgments reveal more humane voices within the Court. In particular article 8 leaves wide room for differences of opinion and valuation.

Because the Convention is silent on the issue of migration, van Dijk's observation on the implications of judges' stands is particularly true. The Court's judgments are the only source contributing to this issue. Van Dijk also points out another side affecting the Court's work. The judges cannot make radical innovations and force new interpretations upon the states, which still are protective over their sovereignty over immigration issues.[150] This point finds support in the study of Buchinger and Steinkellner, which revealed that the governments more readily make legislative change in other areas, but very reluctantly so in areas which concern the entry, stay, and deportation of non-nationals. For instance, the only judgment which forced France to change is legislation was that of Beldjoudi in 1992; other cases have only resulted in removal of expulsion order in each individual case. On the other hand, even though the judgments did not result in expanding non-nationals' immigration and residence rights in Greece, its legislation did see improvements to at least enable a fairer process of trial. Essentially the Court's judgments then do have some influence, as Buchinger and Steinkellner evaluate their implementation to be "*more or less satisfactory*".[151]

The Court confirmed already in its Soering judgment that "*its function is not to pass judgment on [the state's] immigration and residence policy as such*", but it must only examine the specific complaints and even those "*solely from the point of view of immigration and residence*".[152] Even if the Court has not been able to produce as much legislative changes in questions of asylum and immigration as in other areas, it has

[149] Thym 2008, 87.
[150] Van Dijk 1999, 311. The European countries' persistency of maintaining immigration law within the hands of national governments is reflected also in the EU policy development. Papagianni 2006, xix-xxiv.
[151] Buchinger and Steinkellner 2009, 17-18. The research project compared the implementation of the Court's judgments in Austria, Bulgaria, France, Germany, Greece, Italy and the United Kingdom.
[152] *Berrehab v. the Netherlands* (21.6.1988, 10730/84) para. 29. On the other hand, Boeles has recently observed that the Court has begun to place national legislations under stricter scrutiny and allowed itself more leverage of interpretation of protection levels of domestic legislations. Boeles 2008, 105.

succeeded in influencing the ways of interpreting national legislation among the domestic courts. The domestic authorities may avoid future convictions by interpreting national legislations in a more Convention-friendly way. Another practice is found in Germany: to avoid anticipatory judgments for future or legislative changes, it tends to prefer friendly settlements, which offer a solution for each individual case. On the other hand, it has also been observed that as a result of attempts to interpret the Strasbourg case law, German administrative courts began to grant residence rights to irregular immigrants[153].

Some academics claim that the judges give too much space for interpretation of the exceptions to ECHR articles and advocate a stronger rights perspective.[154] But as we have observed in the previous chapter, each case depends largely on the details and the particular situation in each case. How does the Court then manifest the absence of right to immigrate? Where does it on one hand draw the line between individual's right to family and protection, and on the other hand the states' sovereign control over its territory?

3.2 Removal of long-term immigrants – a double punishment?

This chapter discusses the cases in which the Court has accepted interference in the applicants' family or private life. Each of these persons committed a crime, similarly to those whose stories were discussed above in Chapter 2. Another common aspect with most second-generation immigrants discussed here is that since they were born or had arrived at a very young age with their parents, their whole family lived in the country from which they were to be expelled; some siblings had even already obtained citizenship. Besides family ties, second-generation immigrants have received their schooling in the same country and often built their career. How do the judges then argue differently in these cases which at the outset seem similar to those discussed above?

It was already mentioned that the Court does not deny expulsion of an alien who is convicted of criminal offences for aims of maintaining public security and order. The situations discussed in previous chapters, in which article 8 saved immigrants from expulsion, may at least to some extent be seen as an exception to this rule. Although the Court adheres to the Council Recommendation on the non-expulsion of long-term immigrants, it consolidates the approach that long-term immigrants' "*absolute right not to*

[153] Buchinger and Steinkellner 2009, 19-22; Thym 2008, 89.
[154] Greer 1997, 7-8.

be expelled cannot, however, be derived from Article 8 of the Convention".[155] In general it may be concluded that the more serious the crime or the more repetitive the criminal behaviour, the more likely an immigrant will be removed, regardless of his level of integration.

What seems to weigh the most heavily against a non-national individual faced by deportation is the nature of the crimes he or she has committed. This supports the general statements made by the judges that long-term immigrants may only be expelled on very heavy reasons. The types of crimes that the judges disapprove of the most involve drugs and violence. Another way for judges to evaluate the seriousness of a crime draws from the practice of states. In other words, the judges consider the length and type of sentence that was originally imposed against the immigrant. Particularly some judges' comments suggest that if a domestic court ordered only a light sentence, it implies that expulsion is not necessarily required. On the other hand, the case of *Joseph Grant* proves that the mere amount of crimes may justify deportation. In case of Mr. Grant, who had left Jamaica at the age of 14 to join his mother in the UK, the judges could not "*ignore either the sheer number of offences of which the applicant has been convicted, or the time span during which the offences occurred*". Due to his impressive criminal record, even though it was non-violent and was caused by Mr. Grant's drug addiction, the judges held it to be more serious because he had not "*addressed this underlying problem*".[156]

Long-term immigrants' shaky right to residence

Although the Parliamentary Assembly has urged the member states to guarantee long-term immigrants a right to not be expelled under any circumstances,[157] the Court has not gone so far. In its *Üner*-judgment it reminds that some member states indeed have already legislated on the issue, prohibiting expulsion of long-term immigrants on the basis of criminal record. Others have even gone so far as to legalise children of irregular migrants[158]. Yet the judges continue to reassert that such obligation is not found in the 1950 Convention. The Court thus does not promote any exceeding obligations on States, but asserts that in its opinion a non-nationals' position is not equal with that of a national. The Üner judgment is notable

[155] *Üner v. the Netherlands* (18.10.2006, 46410/99) paras 54-55.
[156] *Joseph Grant v. the United Kingdom* (8.1.2009, 10606/07) paras 1-10,38-44. His mother and two brothers continued to live in the UK and he had no remaining relatives in Jamaica. He had children with different UK nationals and even a grandson. He was convicted 32 times for 52 offences, including "*driving offences, assaulting a police officer, assault occasioning actual bodily harm, criminal damage, possession of an offensive weapon, possession and supply of controlled drugs and theft*".
[157] CoE: Parliamentary Assembly, Recommendation 1504 (2001) Non-expulsion of long-term immigrants.
[158] Público 10.9.2010 "*Governo vai continuar a legalizar crianças em situação irregular no país*"

because since 1988 the issue of expulsion of long term immigrants had not been under debate in the Grand Chamber, yet during almost two decades it often caused division among the judges[159].

Before jumping to the 2006-judgment on Üner I explain briefly two among the more important cases which precede it. *Baghli* and *Benhebba* were both second-generation immigrants from Algeria and expelled from France. Mr. Baghli was sentenced of drug trafficking to fifteen months in prison and imposed an exclusion order of ten years. He had lived in France for 27 years with an interruption of a two-year period, when he performed his military service in Algeria. It seems that this detail, performing military service in the country of origin and never showing a desire to become French citizen even though entitled to so, made the Court concur with the French government's opinion. They saw this as evidence of Mr. Baghli having preserved ties with Algeria, which went "*beyond mere nationality*". This was coupled with the central place in the Court's arguments on the seriousness of his drug offence. The Court's stance against drug-related crimes is clearly expressed in the wording it uses: "*In view of the devastating effects of drugs on people's lives, the Court understands why the authorities show great firmness with regard to those who actively contribute to the spread of this scourge*[160]."

The judges regarded that Mr. Baghli had not only breached public order by spreading this scourge but also undermined protection of the health of others. Notably lacking on the other hand are arguments, which would favour his integration in France. Conversely, the judges point out that he "*is single and has no children, has not shown that he has close ties with either his parents or his brothers and sisters living in France*" and that his relationship with his girlfriend began when the exclusion was already imposed.[161] To the Court his ties to Algeria were thus sufficiently strong that separating him from his family, to which his ties in any case were not close, was not disproportionate in order to maintain public security.

Despite the firmness of the final Baghli-judgment, Judges Costa and Tulkens left their dissenting opinion. Based on interpretations made by the two judges and by van Dijk, the Court had a period of "*severity*" halfway through the 1990s. In this case the two judges already leaned towards giving weight to the aspect of private, if not family life. They

[159] *Üner v. the Netherlands* (46410/99) 18.10.2006, Joint dissenting opinion of Judges Costa, Zupančič and Türmen, paras 1-3.
[160] *Baghli v. France* (30.11.1999, 34374/97) para. 48.
[161] *Baghli v. France* (30.11.1999, 34374/97) paras 9-12,41-49. All of Baghli's siblings are French nationals. Mr. Baghli had served his military service in Algeria but had commenced a steady relationship with a French national since his return. His partner died of AIDS.

referred to the case of *Mehemi* from two years before, in which the Court found a violation of article 8 in a similar situation, when an immigrant was expelled because of his drug offences. The points of disagreement were firstly that Mr. Baghli's sentences were "*unusually minor*" and he had no other criminal record. They particularly compared his three-month imprisonment to the ten-year exclusion order, and stated that "*it seems to us to be sufficiently long to ruin the life of a man who was 29 years' old when the order was executed, and disproportionate to the offence and the main penalty imposed*". To Costa and Tulkens Mr. Baghli was "*virtually a French national*". Their unambiguous stance is not left unclear:

> "Was it necessary to multiply the prison sentence by ten when determining the length of lawful banishment to which exclusion orders are tantamount? We do not think so, since that is something which, in a democratic society, is not *necessary*. As exclusion orders can be made solely in respect of people who are in law aliens, they should only be imposed with caution and for very good reason on people who have spent practically their entire life in the host country, especially where the order is far lengthier (and may have more serious consequences) than the main sentence. Those conditions do not appear to have been complied with in this instance." [162]

Benhebba is another problematic case involving a single immigrant in which the judges did not reach consensus. Between the judgments on Baghli and Benhebba the Court had however developed the famous Boultif-criteria, of which it came to apply a partial version in cases of bachelor immigrants; half of the complete criteria contemplate details related specifically to spouse and children. Yet, without a wife or offspring Mr. Benhebba did not succeed in invoking only private life to protect him from expulsion. Following the three-set Boultif-criteria the Court based its argumentation on weighing the gravity of his crimes to his social ties in France. During a period of eight years he had been imprisoned for robberies and drug offences during more than six years. Although he had no ties to Algeria other than his nationality, and all his family resided in France, the Court claimed that relationships between adults do not enjoy a particular protection under article 8. Together with the limited time of expulsion that is ten years, the Court explained to put special emphasis on the type of crime. Therefore by five votes to two the majority of the judges accepted the exclusion order to be a legitimate measure against the gravity of Mr. Benhebba's crimes.

But, two dissenting judges, Cabral Barreto and Kūris disagreed on the question of private versus family life. According to them the fact that Mr. Benhebba had no ties whatsoever to Algeria other than his nationality was decisive, and expelling him did interfere with his private if not family life. They considered that an expulsion order of ten years would

[162] *Baghli v. France* (30.11.1999, 34374/97) Joint dissenting opinion of Judges Costa and Tulkens.

radically cut his social relations in France, and expressed their concern that there was no certainty of Mr. Benhebba being able to obtain a visa to return to France when his exclusion period would be over.[163] From these two dissenting opinions we may thus detect wording and argumentation a lot more direct than what the majority tends to express in the official judgments, leading to the direction which the Court moved in the years after. They bring to life the point made by van Dijk that the Convention law on immigration and residence rights is above all a creation by the judges[164].

We finally arrive to the judgment on *Üner*. As said above the issue of expelling long-term immigrants had often been debated in the Court, and in 2006 it finally came under scrutiny of the Grand Chamber. Mr. Üner had moved to the Netherlands from Turkey with his family at the age of 12. He lost his permanent residence permit and was imposed a ten-year exclusion order for man-slaughter and assault. Although the Court again recognised that there would inevitably be interference with his private life, it decided due to undefined "*particular issues at stake*" to focus on the "*family*" life. It now came to apply two additional points to its original Boultif-criteria, which clearly contribute to the consideration from the point of view of the individual, especially if he or she has not started a family of their own:

1) *"the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled; and*
2) *the solidity of social, cultural and family ties with the host country and with the country of destination."*[165]

The Grand Chamber paid attention to the shortness of time that Mr. Üner had lived together with his partner and son and that he never lived with his second son.[166] One must remember that the judges do not require formal co-habitation to exist as a proof of de facto family ties, but that it may influence the Court's opinions. Also one of the reasons why it was acceptable to expel Mr. Joseph Grant was that he never cohabited with his children, and as he did not live with his youngest daughter, their relationship would not be affected as seriously as if they did share a home[167].

[163] *Benhebba v. France* (10.7.2003, 53441/99) paras 29-38.
[164] Van Dijk 1999, 310-311.
[165] *Üner v. the Netherlands* (18.10.2006, 46410/99) para. 58.
[166] *Üner v. the Netherlands* (18.10.2006, 46410/99) paras 12-29,54-67. Mr. Üner was in a relationship with a Dutch national, and they had two children. Before the assault he had earlier committed minor violent offences as well. After the enforcement of his exclusion order, he returned but was convicted for residing in the Netherlands illegally. Later he was also discovered to be working in an illegal cannabis plantation.
[167] *Joseph Grant v. the United Kingdom* (8.1.2009, 10606/07) paras 38-44.

Because Mr. Üner lived the first twelve years of his life in Turkey, the Court argued that it would be impossible to no longer have any social or cultural ties to there. In discussion on the "*best interest of children*" the judges stated that children of 6 and 1.5 years old are of an adaptable age. In other words, they would be able to resettle in a new environment. It should be pointed out, however that once again the decision was not unanimous. Apart from agreeing with the seriousness of the offence, Judges Costa, Zupančič and Türmen came to a different conclusion based on the following points. Firstly, Mr. Üner had lived in the Netherlands for 17 years, which ought to have seriously weighed in favour against his expulsion. Secondly, the expulsion order was imposed almost five years later, during which time he had not shown disturbing behaviour in prison. Thirdly, his partner and children were Netherlands' nationals, had no ties to Turkey, and their relationship was strong and stable. By applying the same Boultif-criteria the three judges thus came to a different conclusion. In their view more reasons favoured a violation of article 8 than justified his expulsion. The major point of disagreement was but one aspect of the test: seriousness of the crime. More specifically, Judges Costa, Zupančič and Türmen argued that the others had placed more emphasis on this particular criterion than the complete criteria.[168]

The Grand Chamber asserted three guiding principles in its approach: the state sovereignty in controlling immigration; the absence of any guarantee in the ECHR which would grant an alien a right to immigrate or reside in a contracting state; and that the state sovereignty still remains limited by requirements of law, proportionality, legitimate aim and pressing social need. The judges added that these principles apply "*regardless of whether an alien entered the host country as an adult or at a very young age, or was perhaps even born there*".[169] This may be interpreted to support the argument made by Judges Costa, Zupančič and Türmen that the Court tends to place more emphasis on the seriousness of the crime. Consequently, if the Court considers a crime sufficiently serious, not even second-generation immigrants are safe from expulsion. Conversely, the last of the principles together with irrelevance of an immigrant's length of stay may also be interpreted that short-term immigrants are equally entitled to protection of their family lives.

It certainly seems that in many cases the existence of family is what saves an immigrant from expulsion. This supports the remark made by Thym that the Court "*never formally renounced the linkage to family life, despite the recurring calls of separate opinions to grant autonomous protection to the personal bond of the foreigners with the receiving*

[168] *Üner v. the Netherlands* (46410/99) 18.10.2006, Joint dissenting opinion of Judges Costa, Zupančič and Türmen, paras 1-18.
[169] *Üner v. the Netherlands* (18.10.2006, 46410/99) paras 54-55.

country independent of the existence of family life". He also argues that "*the long-term residence status now enjoys autonomous human rights protection independent of the family situation and the existence of formal bonds with siblings and parents*".[170] This may be true to some extent but in the light of the case-law the Court certainly does not easily interpret private life alone to entitle a non-national a right to stay. Such findings by the Court have been exceptional: adolescent second-generation immigrants and stateless Eastern European ex-USSR citizens.

Expulsion – a punishment?

A first question often raised in context of expulsion of second-generation and long-term immigrants pertains to integration. Particular attention has been called to observe the difference between young immigrants on one hand and the native-born children of foreign-born parents on the other. Internationally there is no commonly recognised term to refer to the latter group, but "*second-generation immigrants*" is often used. This term has, however, been criticised because it presupposes that those individuals who have grown up in the host country's cultural environment and educated there, retain "'*inheritance' of immigrant characteristics"* even though they may be "*indistinguishable from other native-born persons".*[171]

The second issue is a practice of first sentencing an immigrant to prison and afterwards imposing an expulsion order, which is often referred to with the French term "*la double peine*". Judge Costa expressed his view on this practice already in 2000 by declaring that exclusion orders "*constitute an ancillary penalty*" and when added to a prison sentence they do amount to double punishment, at least "*in the humane sense of the term*". [172] Not only is it easy to find academic critique against expulsions of second-generation immigrants, but other CoE institutions have also taken part in the discussion. The Parliamentary Assembly has called the practice of expulsion of long-term immigrants sentenced of crimes as "*discriminatory because the state cannot use this procedure against its own nationals who have committed the same breach of the law*".[173]

[170] Thym 2008, 91,93. He bases this argumentation on the judgment *Slivenko v. Latvia* (9.10.2003, 48321/99) which involved a family who was deported from Russia. The family was ex-USSR citizens, but had not obtained a new citizenship. See also *Shevanova v. Latvia* (15.6.2006, 58822/00) and *Kaftailova v. Latvia* (22.6.2006, 59643/00)
[171] SOPEMI 2007, 77.
[172] *Maaouia v. France* (5.10.2000, 39652/98) Concurring opinion of Judge Costa.
[173] CoE: Parliamentary Assembly Committee on Migration, Refugees and Demography Report. Doc.8986. Non-expulsion of long-term immigrants. para. I(3).

More importantly, whereas the Court's official view remains that exclusion is not a "*penal*" punishment, some of the judges already share the stricter view. Judge Costa has been joined in his opinions that exclusion ought to be "*classified as part of criminal law*".[174] Judges Zupančič and Türmen concurred with Costa and gave their support to the approach that at least those foreign nationals who have been residing legally in a country "*should be granted the same fair treatment and a legal status as close as possible to that accorded to nationals*". Drawing support from comments made both on the EU and the CoE levels they emphasised the necessity to "*restrict the* penalty *of expulsion to particularly serious offences affecting State security and to give particular consideration to the interests and well-being of children*". They define this question of principle to be "*that of 'double punishment'*".

Not only do Judges Costa, Zupančič and Türmen define expulsion as punishment, but they also describe it as discriminatory because it is a "*punishment imposed on a foreign national in addition to what would have been imposed on a national for the same offence*".[175] To the judges expulsion is to be considered as punitive, not preventive because

> "a measure of this kind, which can shatter a life or lives – even where, as in this case, it is valid, at least in theory, for only ten years (quite a long time, incidentally) – constitutes as severe a penalty as a term of imprisonment, if not more severe. This is true even where the prison sentence is longer but is not accompanied by an exclusion order or expulsion."[176]

Yet the official position of the Court has remained the same since its judgment on *Moustaquim* in 1991, when it rejected the claims of "*double peine*" being discriminatory. Mr. Moustaquim tried to invoke article 14 against his deportation order, pleading that he was discriminated as a Moroccan citizens against Belgian and EU nationals. In Belgium juvenile delinquents of Belgian nationality, nor citizens of other EU member states, could be deported on the basis of criminal conviction. The Court did not concede this as discrimination but argued that those born in a country have a right to remain there, and that EU citizens belong "*to a special legal order*".[177] The Court responded to the criticisms by reasserting that in its opinion a decision to revoke a residence permit or to impose an exclusion order is not punitive but preventive administrative measure.

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[174] *Maaouia v. France* (5.10.2000, 39652/98) Concurring opinion of Judge Costa.
[175] *Üner v. the Netherlands* (18.10.2006, 46410/99) Joint dissenting opinion of Judges Costa, Zupančič and Türmen paras 5-7.
[176] *Üner v. the Netherlands* (18.10.2006, 46410/99) Joint dissenting opinion of Judges Costa, Zupančič and Türmen, para. 17.
[177] Van Dijk 1999, 305-306; *Moustaquim v. Belgium* (18.2.1991, 12313/86) paras 48-49. The Court does not offer any explanation to what is a "special legal order". Even though the Court did not find any proof of discrimination, it did conclude the case in favour of Mr. Moustaquim and held that there had been a breach of his right to family life.

As seen in the cases above, sometimes the Court's argumentation in favour of accepting expulsion is based on the point that the exclusion order is not permanent. Boeles commented on one of his analysis on the Strasbourg case-law in a more neutral way that the only "*real determining factor is the nature and gravity of the offences committed*" and that

> "the majority of the Court seems to consider it an extreme benevolence with regard to a foreign criminal that a prohibition of residence in the country where his family lives or where he was born for a term is limited to "only" ten years. The judgment in the case of Maslov, according to which even an entry ban limited to ten tears was disproportionate, was only supported by a meagre majority."[178]

Although van Dijk confirms that the Court's position is in line with international law today, critical questions have been pointed at why the former country of origin should be held accountable. Both Goldhaber and van Dijk refer to a member of the earlier Commission, Schermers, who in the early 1990s questioned why the country, which had brought up the individual (and the criminal behaviour) was not held responsible. According to van Dijk, Schermers invoked international relations and raised his astonishment of why a state ought to take care of integrating a person whose only tie to that state is his nationality, and who has never lived there. In the opinions of both commentators the receiving state automatically accepts responsibility over the immigrants it welcomes on its territory. A further critique made by van Dijk is that if the purpose of expulsion is to prevent future disorder and crime, it most likely has the opposite effect in the receiving country of the expelled person.[179]

Security is clearly the most commonly used argument for the states to expel immigrants, and consequently common for the Court as well. The main thing that interests the judges if the individual is to be expelled is the nature of the crime. Even if the crimes themselves are not individually considered extremely serious, continuing criminal behaviour and sheer number of offences may amount to a reason for expulsion. Another point that has become evident is that the judges value children and youth to such extent that they may outweigh the crimes committed. In addition, even though the Court has not agreed to equal long-term immigrants to nationals, it has raised the bar of expelling integrated immigrants in general, in particular when children are involved. Despite the ambient in this chapter one ought to recall judgments such Rodrigues da Silva and Hoogkamer, which leave open the possibility of family ties to outweigh the immigration status of even irregular immigrants. Although such decisions are in the minority, the case law enables similar future interpretations.

[178] Boeles 2008, 111.
[179] Goldhaber 2007, 55-57; Van Dijk 1999, 305-306, 310-311.

3.3 General hardship not enough to grant entry

According to the UNHCR Europe is the primary destination for individual asylum seekers. In 2008 it was also the only major region in which the number of positive decisions decreased, although the number of positive decisions still remained the highest.[180] It is not uncommon to hear talk about "*asylum crisis*" in Europe[181]. Boswell traces the origin of this crisis back to the 1980s when a part of the earlier labour flows was redirected to asylum channels. The increase in asylum applications was at his highest in the early 1990s. The crisis thus followed from the strains on the capacities of the asylum systems, which had to handle large numbers of applications to separate "*genuine applications*" from those without sufficient grounds.[182] As we know the Convention does not explicitly grant a right to asylum but it may be implicitly derived from certain articles, most commonly article 3. But on what grounds do the Strasbourg judges reject asylum claims?

General risk and hardship

If an individual does not succeed in convincing the judges that there are substantial grounds for believing that his life would be threatened, the Court does not find any need for protection. To the Court, "*general risk*" is not the same as "*real risk*". The judges do not require that persecutors be public officials, unlike under the Geneva Convention, but they do expect that the authorities are unable to provide appropriate protection. For instance Mr. *Ammari* and Mr. *Tomic* both feared to return to their home countries, and in neither case did the Court deny general hardship and situations of conflicts to exist in their countries of origin. Mr. Ammari had fled Algeria because of alleged persecution by both GIA (Groupe Islamique Armé) and the police. The judges admitted the general difficulties and violence in Algeria;

> "In the violence between Government troops and Islamic insurgents, which started in 1992, more than 100,000 people have reportedly lost their lives. […] Still, the violence continues; according to human rights organisations, 100-200 people are killed every month in the context of the armed conflict and the human rights situation remains generally poor. […] according to the U.S Department of State Country Reports on Human Rights Practices 2001, the police at times resort to torture when interrogating

[180] In 2008 Europe received 333,000 asylum claims. 79,000 applications received a positive decision. But the figures includes repeated applications; South Africa leads the statistics of new-asylum seekers with 207,000 new asylum applications in 2008, which amounts to one quarter of the global total. UNHCR 2009, 16,17.
[181] Even the Court recognised the difficulties that states have with "*an increasing flow of asylum-seekers*" and "*in the reception of asylum-seekers at most large European airports and in the processing of their applications*". *Amuur v. France* (25.6.1996, 19776/92) para. 41.
[182] SOPEMI 2009, 107; Boswell 2000, 541-542.

persons, including those suspected of being involved with, or having sympathies for, armed insurgency groups."[183]

This was however not sufficient to amount to real risk. The judges concluded firstly that Mr. Ammari had not submitted any evidence to prove personal threats or arrests, and secondly that if he had been involved in any activities of GIA his marginal position did not seem to be of any interest to the organisation or the government. They also considered that the "*Law on Civil Harmony*" would offer him immunity from prosecution.[184]

Mr. Tomic's case resembles that of Mr. Ammari because he feared return to Croatia firstly due to his past military service in a Serb paramilitary group. But, he also invoked "*open and severe discrimination against Serbs in several areas, affecting housing, employment, freedom of movement and the administration of justice and including harassment, intimidation and occasional violence*". The judges did not find evidence on any "*endemic targeting of Serbs*" even though it mentioned reports of "*incidents of violence*" which had occurred. More interesting, however, is the Court's stance on the second question, namely that of discrimination. It recalled that a Croatian tribunal had confirmed the problems of discrimination against the Serb minority, the main problems involving the returning refugees' rights to repossess properties, and obtaining pensions and jobs due to unclear validity of documents from the time of the conflict. The judges did not overlook the point that the government had managed to help the situation and that "*further improvements could be expected*". Mr. Tomic failed to specify any hardship which he would face on return, so the Court stated that it was not persuaded that "*the general hardship and difficulty of the situation facing those in a war-affected region […] reaches the level of minimum severity required*". In this context it commented on its decision in the case of *Cyprus v. Turkey*[185], in which it had found a violation based on discrimination. The Court emphasised that in the Cyprus-case, the minority in northern Cyprus had faced "*very severe restrictions which curtailed the exercise of basic freedoms (inter alia, movement, family and private life, freedom of religion) such that the conditions under which that population was condemned to live were debasing and violated the very notion of respect for the human dignity of its members*".[186]

[183] *Ammari v. Sweden* (Decision 22.10.2002, 60959/00)
[184] *Ammari v. Sweden* (Decision 22.10.2002, 60959/00) Ammari allegedly had intended to file his request for asylum in Sweden, but was caught by the police for having assaulted another immigrant before his application was lodged. In addition to conviction for assault, he was also convicted of using a false document. His asylum application was unsuccessful, partly because he had lost credibility for lying about his identity and for not claiming asylum until being caught by the police, which was two weeks after his arrival.
[185] *Cyprus v. Turkey* (10.5.2001, 25781/94)
[186] *Tomic v. the United Kingdom* (Decision 14.10.2003, 17837/03) In its judgment on Cyprus v. Turkey the Court had found discriminatory treatment of the enclaved minority in northern Cyprus, but it underlined the very different circumstances, in which the minority faced very severe restrictions.

What further made the judges doubt serious discrimination was that Croatia is a contracting party to the 1950 Convention, and thereby has "*undertaken to secure the fundamental rights guaranteed under its provisions*". However, within the OECD among the most important source countries of asylum seekers have been CoE members: Serbia and Montenegro, Russia and Turkey. Acceding to the Convention does thus not in all cases mean unquestioned devotion to securing those fundamental rights. Therefore detailed individual assessments of claims for asylum are often emphasised, and automatic applications of arrangement such as the Dublin Convention criticised.[187]

In purely domestic cases the judges have found violations based on discriminatory treatment of homosexuals, but among those few cases concerning asylum all applications have so far been declared inadmissible[188]. Among these cases, judgment on *F.* is classified to be of most importance. Mr. F. sought asylum in the UK for fear of being persecuted in Iran on grounds of being homosexual. Similar to the cases of Ammari and Tomic was that the Court did not find any evidence that Mr. F. would be in danger of being executed or punished, and that "*the applicant's account was lacking in credibility and untruthful*". The Court based its conclusions on reports, which did not indicate "*active prosecution by the authorities*" of persons involved in homosexual relationships, but admitted that "*the general situation in Iran does not foster the protection of human rights and that homosexuals may be vulnerable to abuse*". But, it also expressed its opinion that "*Islamic law is more concerned with public immorality and not what goes on in the privacy of the home*". Unfortunately the judges did not greatly elaborate on the issue of to what extent the issue of homosexuality is related to moral integrity, which is protected by article 8. It did confirm that in a contracting state to the ECHR, banning homosexual adult consensual relations does violate article 8, but also immediately added that article 8 is not absolute like articles 2 and 3. The conclusion was thus that "*On a purely pragmatic basis, it cannot be required that an expelling Contracting State only return an alien to a country which is in full and effective enforcement of all the rights and freedoms set out in the Convention*".[189] Does this mean then that a person cannot be granted asylum based on his sexual orientation? Not necessarily, because the judges have decided on inadmissibility *not* because they accept banning homosexuality, but because no one has been able to convince them that they really are under a risk of torture or execution.

[187] SOPEMI 2007, 55-56; Goodwin-Gill and McAdam 2007.
[188] See e.g. *I.I.N. v. the Netherlands* (Decision 9.12.2004, 2035/04)
[189] *F v. the United Kingdom* (Decision 22.6.2004, 17341/03) See also *Collins and Akaziebie* (Decision 8.3.2007, 23944/05) concerning female genital mutilation. The Court did not contest the inhumanity of the practice itself, but concluded that the applicants had not shown "*real and concrete"* risk.

In addition to only a speculated risk of inhuman treatment, past experiences of torture or inhuman treatment are not sufficient to amount to a right to asylum. Often an individual's past suffering is not contested but uncertainty about future becomes the focus. Examples of such cases are *Venkadajalasarma* and *Liton*. Venkadajalasarma was a Tamil asylum seeker whose experiences of torture were neither disputed by the Court, nor by the Dutch government. The judges based their arguments firstly on the observation that there was no evidence that the authorities had known of Mr. Venkadajalasarma's activities in the LTTE. But, because they considered that there was no more danger from part of the authorities his right to asylum was denied. The Court accepted the fact that the situation in Sri Lanka continued unstable, but gave more importance to the peace efforts and generally improved situation in Sri Lanka.[190]

Similar argumentation is given in the case of Liton. The judges again did not question the existence of human rights violations in Bangladesh, nor the possibility that Mr. Liton might have been a victim. The reasons why they did not fear him to be in danger any more was that the ruling party who supposedly was responsible for the violations was no longer in power, and the applicant had not been politically active during some years. In addition, the judges did not believe that a member of only local level would produce any particular interest against him and the documents he provided to prove his story were claimed to be falsified.[191]

Non-political reasons for hardship

One of the particular aspects of the ECHR, when compared to the 1951 Geneva Convention, is that besides persecution from public authorities or military groups, inhuman treatment may arise from "*factors which cannot engage either directly or indirectly the responsibility of the public authorities of that country, or which, taken alone, do not in themselves infringe the standards of that Article*". Although the judges state their awareness of article 3 being the most commonly applied in contexts where the risk emanates from "*intentionally inflicted acts by public authorities or non-State bodies in the receiving country*", they retain the possibility of applying it to other types of cases as well. Heijer confirms that other articles are possible relevant; the judges have "*retained the flexibility to consider violations of provisions other than Article 3",* but in practice it has not found reasons seriously enough to actually prohibit removal of an individual. He has in fact

[190] *Venkadajalasarma v. the Netherlands* (17.2.2004, 58510/00) paras 61-69.
[191] *Liton v. Sweden* (Decision 12.10.2004, 28320/03)

argued that when other articles than 2 or 3 are in question, "'*foreign' cases are subject to a special regime".* In other words, he argues that the "*extraterritoriality*" of other provisions is not yet established, as is the prohibition of torture or inhuman or degrading treatment.[192]

In practice article 3 is increasingly invoked in cases involving an individual's mental or physical health, but succeeding in this appeal is rare. In 1995 the Court prevented the expulsion of Mr. *Nasri*, a national of Algeria. But his situation was not at all usual: he had lived in France with his family since he was five, and he was deaf and dumb since birth. Another famous case concerns Mr. *D*. whose expulsion was prevented in 1997 for exceptional reasons of his health: he was in the final stages of AIDS. The precept is therefore that non-citizens cannot count on medical or other forms of assistance in the host state if they are facing expulsion.[193]

Arcila Henao and *Amegnigan* illustrate the discussion on health as a factor against expulsion. Mr. Arcila Henao was twice arrested in the Netherlands for drug smuggling. The second time he was discovered to have HIV, which is when he claimed that sending him back to Colombia would be inhuman treatment. Mr. Amegnigan from Togo originally sought asylum in the Netherlands on grounds of ill-treatment in prison. The Court found both claims manifestly unfounded because the men were not in the final stages of the disease, and both had at least two members of their family in their home countries where also treatment, although not free, was available. The judges concluded that circumstances in the country of origin, even if less favourable than those possible to enjoy in the contracting party, "*cannot be regarded as decisive from the point of view of Article 3*".[194]

In its judgment on case *N*. the judges finally summed up the previous case-law on medical cases and firmly confirmed the "*high threshold*" set in the rare case of Mr. D. Case N. is also of interest because of its controversy; it was directed to the Grand Chamber and decided on split vote. The dissenting judges, Tulkens, Bonello and Spielmann criticise the majority's conclusions and make contrary interpretations of the earlier case law. The judges highlight three distinguishing details; family, stage of disease and the availability of treatment in the country of origin. According to the Court the situation of Mr. D was exceptional because he had no family in St. Kitts able to provide him even basic care such

[192] Heijer 2008, 277-285.
[193] *Amegnigan v. the Netherlands* (Decision 25.11.2004, 25629/04); *Nasri v. France* (13.7.1995, 19465/92); *Arcila Henao v. The Netherlands* (24.6.2003, 13669/03); Van Dijk et al. 2006, 430,440.
[194] *Amegnigan v. the Netherlands* (Decision 25.11.2004, 25629/04)

as food or shelter, he could not be guaranteed any medical care, and he was in his final stages of AIDS.[195]

For the majority of judges the fact that the life expectancy of Ms. N. would be significantly reduced did not amount to treatment contrary to article 3, because her children and other family members lived in Uganda. They also expressed an opinion that the high threshold should be maintained, because otherwise it could lead to a tendency of offering protection from harm of "*naturally occurring illness and the lack of adequate resources to deal with it in the receiving country*". The dissenting judges see this reasoning as a setback from the earlier openings, which recognised other types of threat than only those by governments and other authorities. The high threshold thus requires that a person literally does not have a long life-expectation left and that he would be virtually left without any social or medical support if removed. The majority justifies choosing the high threshold –approach by claiming that the Convention is "*essentially directed at the protection of civil and political rights*". However, the dissenting judges disagree with this reasoning and remind of an earlier judgment in which the Court stated that "*Whilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature*", and that cases concerning article 3 are not social nor economic, but ultimately civil rights.[196]

Another point of controversy in the judgment as compared to earlier case-law, to which the dissenting judges allude, touches the balancing between a state's interest and an individual's fundamental rights. They argue that there is inconsistency in the reasoning of the majority where they claim that article 3 is a question of balance between those two. As we remember from Chapter 2, the Court declared some months earlier in the *Saadi* judgment that protection under article 3 cannot be negotiated no matter how dangerous the individual may be to the society. judgment on N. in this sense indeed seems to take a step back. But, as seen in the cases above, general hardship in the country of origin is not sufficient a reason to be granted asylum. The same reasoning is therefore followed by the judges' majority when they state simply that there exist differences between countries in areas of health care, economy and so on. An idea that they do not support is that article 3 would "*place an obligation on the Contracting State to alleviate such disparities […] through the provision*

[195] *N. v. the United Kingdom* (27.5.2008, 26565/05) Joint dissenting opinion of Judges Tulkens, Bonnello and Spielmann.
[196] *N. v. the United Kingdom* (27.5.2008, 26565/05) paras 37-44, Joint dissenting opinion of Judges Tulkens, Bonnello and Spielmann.

of free and unlimited health care to all aliens without a right to stay within its jurisdiction".[197]

Besides various cases of HIV, psychological issues are also raised, even if with little success. Mr. Bensaid suffered from schizophrenia and arrived in the UK on a tourist visa and later obtained an indefinite leave to remain based on marriage, which later turned out to be a "*mariage blanc*". He appealed against the expulsion order on basis of his mental illness, which the judges recognised as very serious; he was nearly put in compulsory treatment in a mental hospital and he had considerable symptoms. However, due to successful medication his state had improved significantly. The Court argued largely in the same ways as concerning cases of HIV. In assessing the situation it noted that the medication Mr. Bensaid needed was not available to him for free, unless he was detained in an institution. Neither had he any social insurance. Ultimately this meant, however that the drug *was* available; on payment or if admitted as an inpatient. As in the case of N., the Court considered that the likeliness of deterioration in his condition if returned to Algeria did not reach the high threshold of article 3. Instead, because his illness was long term and required constant management, the judges stated that he faced the risk of relapse even if he stayed in the UK. Yet in the end they named this possibility to be "*to a large extent speculative*".[198]

More elaborate argumentation is found in the separate opinion left by Judge Bratza who was supported by Judges Costa and Greve. The three judges did vote with the majority but in their words "*with considerable hesitation*". A doctor's opinion had been that it was "*highly likely*" that deporting Mr. Bensaid to Algeria would trigger the symptoms, and that without help "*there would be a great risk that his deterioration would be very great and he would be at risk of acting in obedience to his hallucinations telling him to harm himself or others*". To Judge Bratza the availability of treatment in Algeria was the major question, because of the price of medication, distance to the hospital, and the security situation in the region. He concluded that even though he did not find a violation of article 3, "*on the evidence before the Court, there exist […] powerful and compelling humanitarian considerations in the present case which would justify and merit reconsideration by the national authorities of the decision to remove the applicant to Algeria*".[199]

[197] Ibid.
[198] *Bensaid v. the United Kingdom* (6.2.2001, 44599/98) paras 36-39.
[199] Ibid.

Although the judges insist on the absoluteness of prohibition of torture and maltreatment, this firmness does not embrace all possible situations. The judges do require a considerable amount of evidence and probability in order for them to discard the domestic authorities' decisions on asylum. In addition, in spite of the cautious steps towards including aspects of "*private life*" and health issues to coincide with inhuman or degrading treatment, there still is a long way to go before non-nationals may reasonably expect it to grant them the judges' sympathies.

As to possible breaches of other articles, den Heijer's pondering of whether the belief that only articles 2 and 3 are relevant in the context of *refoulement* has turned itself into a "*self-fulfilling prophecy*" is not at all unfounded. The judges do not deny the importance of other rights, e.g. the right to sexual determination or enjoyment of health, but it is extremely cautious in pushing any radical obligations on states.

3.4 Family cannot be created through immigration

Family reunification has become a significant source of immigration flows since the end of guest-worker programs and easy labour immigration. When European shut down the guest-worker programs after the 1970s' economic crisis, many immigrants surprised their host countries and chose not to return to their countries of origin. The economic crisis also brought about a change to the earlier flows, which were easily traced back to economic conditions and analysed through the classical theory of push and pull factors. Despite a collapse in the need of labour force, the temporary guests not only decided to stay, but also brought their families to join them. Since the 1970s immigration for family reasons surpassed labour migration, and migration flows have no longer been as sensitive to economic changes. At the end of the 1990s Avci estimated family reunification to explain nearly 30% of total immigration to Western Europe, or even 80 to 90% if one did not include asylum seekers.[200]

Yet, family-based migration is not completely detached from economical considerations because family members naturally add to the labour force, but also because the welfare states fear an excessive burden on their social welfare systems.[201] The admission of family

[200] Avci 1999, 202-203. For instance in France the numbers of migration flows reached their peak in 1968, when the total of over 250,000 of which 32% consisted of family-reunion. Already five years later the total number had dropped down to less than 68,000 but the proportion of family-reunification leapt to 77%. Since the year 2000, the proportion of family-reunification has varied between 50% and 80%. SOPEMI 2009, 47.
[201] Avci 1999, 203-204.

members however depends on domestic requirements, such as sufficient income of the already settled family member. These conditions, which require the already settled immigrants to show independent and lasting income which "*provide for the basic costs of subsistence*" are accepted by the Court.[202]

If an immigrant is denied permission to enter for reasons of family reunification he may invoke article 8 ECHR. However, as seen in the analysis above and confirmed by the judges' statements in their judgments, article 8 is not absolute. It seems that if long-term immigrants have difficulties in refuting their expulsion it is even more difficult to find the Court's positive decision to allow family reunification: the Court consistently maintains that its primary purpose is not to allow immigration but to protect individuals from "*arbitrary"* acts by the authorities, which would intervene in individual's family life. The Court has stated that "*where immigration is concerned, Article 8 cannot be considered to impose on a State a general obligation to respect immigrants' choice of the country of their matrimonial residence and to authorise family reunion in its territory*"[203].

Instead of a general obligation the two aspects, which affect a State's obligation to permit family members to reunite with already settled migrants, are as usual the particular circumstances of the persons, and the state's general interest.[204] The problem of finding judges' arguments which would favour the automatic right to family reunification is related to the difficulty in finding judgments which would find a violation of article 8, when a right to immigrate is in question. On the contrary, it is easy to find dismissed applications which the Court declares "*manifestly unfounded*" and are classified to have little legal interest. Because numerous decisions declare the inadmissibility of applications which seek family reunification, I discuss some typical cases which demonstrate the Court's approach.

Yet, we cannot forget the fact that next to asylum family reunification is factually the most common ground to allow immigration. What the Court's arguments reveal is that despite respect for everyone's right to private life the judges' do not go so far as to allow any member of a family, in any given case to be allowed to join another family member. Even under international law there does not exist a recognised right to family reunification of adult children or siblings, parents or grandparents, or other relatives[205]. In the Court's own words, article 8 "*does not guarantee a right as such to choose the most suitable place to*

[202] See e.g. *Konstatinov v. the Netherlands* (26.4.2007, 16351/03) para. 50.
[203] *Chandra and others v. the Netherlands* (Decision 13.5.2003, 53102/99
[204] *Chandra and others v. the Netherlands* (Decision 13.5.2003, 53102/99); *Z. and T. v. the United Kingdom* (Decision 28.2.2006, 27034/05)
[205] SOPEMI 2006, 118.

develop family life"[206]. One part of the judges' attention is aimed at whether the family may be expected to return to their country of origin and maintain family life there. Contrary to cases involving article 3, hindering facts do not need to be threat of persecution, but for instance integration in the society of the new country of residence. As in all cases, ages of children are of particular interest. Grown up family members on the other hand ought to be able to prove that there exists an unexceptional bond of dependency.

Does immigration maintain or create family life?

The case of *Gül* was decided already in 1996 but it is regularly referred to in later judgments. By seven votes to two, "*acknowledging that the Gül family's situation is very difficult from the human point of view*", the majority decided that Mr. Gül's right to family had not been violated when Switzerland denied his son a permission to join his father. Mr. Gül had left Turkey when his son was only three months old. Four years later the child's mother left him also, to receive medical treatment in Switzerland after a serious accident. Finally three years later, when the couple received a residence permit on humanitarian grounds, Mr. Gül began to apply for family reunification with his son. The couple also had a younger daughter who was born in Switzerland, but who due to the state of health of Mrs. Gül lived in another family. Despite the distance the judges considered that family ties continued to exist because Mr. Gül had been able to visit his son various times. The Court emphasised that the case did not only involve question of right to family, but also of immigration.

This is the stance that the Court has maintained ever since, and it still uses same wording in similar cases relating to immigration and family life. The Court defined as the main question to be, whether allowing immigration is the only way to develop family life. This continues to be the bottom line for its deliberation: it finds little or no support to impose obligation on a State to enable family members to immigrate, if it may reasonably be expected that the family could life in their former home country. The major reason that could have prevented the couple's return to Turkey was that Mr. Gül had applied for a status of political refugee. The judges shared the Swiss authorities' view that the fact that he had visited Turkey afterwards showed that he was no longer in fear of persecution. Mrs. Gül, on the other hand had received a residence permit in Switzerland to receive treatment she needed after her accident, but it seemed possible to continue her treatment in Turkey. Although the couple were residing in Switzerland legally they did not have permanent

[206] *Magoke v. Sweden* (Decision 14.6.2005, 12611/03)

residence permits. Above all, the Swiss law did not permit family reunion for those who hold temporary residence permit on humanitarian grounds. Ultimately the Court admitted that the couple's return to Turkey would "*not be easy*" because they had already lived in Switzerland for a number of years, but what weighed more heavily in their evaluation was that there were "*strictly speaking, no obstacles preventing them from developing family life in Turkey*". One particular factor was that their son's cultural and linguistic ties were in Turkey were he had always lived. The case of Gül was compared to that of Berrehab (see Chapter 2) in which the daughter had been born in the Netherlands and had Netherlands nationality.[207]

The dissenting judges held that how Mr. Gül had come to Switzerland was not important; to them the relevant point was that he had lived there for seven years, during which he had almost constantly been employed. According to Judge Martens it may be generally held true that after three to five years, "*immigrants become rooted in the country of settlement*". He specified this statement by adding that during such time immigrants "*have formed new social ties there and have definitively begun to adapt themselves to their new homeland*", in other words, become integrated. Judge Martens also explicitly states to assess the humaneness of the choice to which he gave more importance than to "*the formal status of their permit*". He finally gave four additional reasons for his differing conclusion. Firstly, not only did the question rise between Mr. and Mrs. Gül renouncing either their son or their position in Switzerland, but also of renouncing their daughter who was settled in Switzerland and most likely would have to remain there. Secondly, the state of health of Mrs. Gül to be so grave that he doubted availability of care in Turkey. Thirdly, the Turkish authorities had not arrested Mr. Gül immediately on arrival was not a sign of permanent loss of interest from behalf of the authorities. The final reason he gave was the softest: "*the applicant and his wife deserve compassion: whilst his wife had been suffering from epilepsy since 1982 and had a terrible accident in 1987, the applicant himself became disabled in 1990*".[208]

Judge Martens seems to be the only judge to have explicitly spoken out in such detail on the issue, and most of all to show literally such compassionate attitude. He also seems to require less time than majorities in many cases which approve of expulsion of second-generation immigrants who have lived in their de facto home country since their infancy.

[207] *Gül v. Switzerland* (19.02.1996, 23218/94) paras 28-43.
[208] *Gül v. Switzerland* (19.02.1996, 23218/94) Dissenting opinion of Judge Martens, approved by Judge Russo.

A partly resembling case, which came to the Court less than a year later but produced a finding of no violation on a smallest difference of five votes to four, was that of *Ahmut*. Mr. Salah Ahmut who had double nationality of both Morocco and the Netherlands wanted residence permits to his son Souffiane and daughter Souad when their mother died in an accident, and Ahmut was left as the sole legal guardian. Ahmut's eldest son remained in Morocco, but two other sons lived and studied in the Netherlands. Souad was considered to be of age in which she no longer needed care, but the 9-year-old Souffiane had also lived all his life in Morocco, apart from the period of less than two years after his mother died, which he spent in the Netherlands. The majority of judges used similar argumentation as in the case of Gül, namely Souffiane's strong cultural and linguistic ties to his country of origin. He also had his brother, sister, grandmother and uncles still living in Morocco. The judges considered that the separation was "*the result of Salah Ahmut's conscious decision to settle in the Netherlands*", and although he had Netherlands nationality, he had not lost that of Morocco. Therefore the judges found no obstacle against him moving to Morocco. Because Ahmut had arranged a place in a boarding school in Morocco the judges did not deem it necessary to consider if other relatives could take care of him. Thus the five judges came to the conclusion that even though Salah Ahmut "*would prefer to maintain and intensify his family links*" in the Netherlands, in his case article 8 offered no such obligation to the State.[209]

Firstly Judge Valticos who left his dissenting opinion, stated that

> "Few human rights are as important as a father's right to have his son by him, to guide him, to supervise his education and training and to help him choose and begin a career and as it were to prepare the projection of his own life into the future by contributing to a happy and productive life for his child. Similarly, few rights are as important as an adolescent son's right to live with his father and to take advantage of the atmosphere of affection as well as of the father's help and advice."

He interpreted the separation of father and son to be a result of "*the vicissitudes of the father's marriage*", but the interest of Salah Ahmut in his son's life was proved both by financial support and by receiving him in the Netherlands. To him the most crucial factor was that Ahmut was Netherlands national:

> "in any country, a national is entitled to have his son join him, even if the son does not have the same nationality. How does it come about that in the present case this right was refused him? I cannot think that it is because the Dutch father was called "Ahmut". However, the suspicion of discrimination must inevitably lurk in people's minds."[210]

[209] *Ahmut v. the Netherlands* (28.11.1996, 21702/93) paras 69-73.
[210] *Ahmut v. the Netherlands* (28.11.1996, 21702/93) Dissenting opinion of Judge Valticos.

Judge Martens received support to his dissenting views from Judge Lohmus. They expressed their fear that the Court was beginning to show "*a growing tendency to relax control, if not an increasing preparedness to condone harsh decisions, in the field of immigration*". They show similar reasoning as Judge Valticos who expressed his opinion that the Court ought to have followed the principle of equality and applied "*the same standards as it would apply to those whose Netherlands nationality is irreproachable*". To him it was irrelevant that the Netherlands had allowed Ahmut to retain his former nationality. In fact, he did not find any grounds which would justify the result of the five judges' reasoning.[211]

The final dissenting voice came from Judge Morenilla who added his human concerns to the other three dissenting judges' opinions.

> "To deny a father and son their right to be together when the son is at an age at which he needs his father's care and guidance, particularly since his mother has died, and to deny a national of the Netherlands the right to have his son begin an education in the adopted country of which he is a national according to the law, is in my opinion contrary not only to the European Convention of Human Rights but also to 'cogent reasons of a humanitarian nature'." [212]

Although the dissenting voices in the Ahmut judgment reveal very humane attitudes by the judges' minority, the underlying determination of being stricter in situations of immigration than expulsion of settled immigrants continues.

Importance of immigration status

Besides the consistent stance of the majority which, to such degree that it provokes many judges among the Court itself, maintains the firm state control over the immigration and residence permit issues, we may discern other general lines of argumentation in the latter decisions and judgments. Firstly, even though the Court found the case of Rodrigues da Silva and Hoogkamer in favour of the illegally resident mother, in general it is suspicious against conscious decisions by immigrants to form relationships if they are in an uncertain situation, notably if they already are aware of an issued expulsion order. Secondly, the ages of children and the parents' reasons for leaving the children behind play a role.

Although the decision of *Chandra and others* declared the appeal inadmissible, the admissibility decision was not unanimous, and the case is rated to be of high importance.

[211] *Ahmut v. the Netherlands* (28.11.1996, 21702/93) Dissenting opinion of Judge Martens, joined by Judge Lohmus
[212] *Ahmut v. the Netherlands* (28.11.1996, 21702/93) Dissenting opinion of Judge Morenilla

Again a parent left his children behind and obtained new nationality through marriage. Despite the mother's new nationality, the Court did not find it reasonable to oblige the Netherlands to permit family reunion of four Indonesian nationals with their mother. When Mrs. Chandra left her children they were aged between 7 and 12, and by the time she started seeking entry to her children, of whom she had obtained custody after divorce, the oldest had already turned 17. In addition, the mother had already separated from her partner who had been reluctant to receive her four children, when the children finally arrived on short stay visas. The government did not approve of family reunion because it claimed that close family ties had already been severed, and the mother did not have sufficient income; they could easily settle in any other country. The family claimed it was impossible to return to Indonesia because of Ms. Chandra's psychological situation; she had problems with her abusive ex-husband and a police officer. But, the Court did not find this claim credible. Her residence permit was based solely on her new marriage, and did not include children. When the decision on family reunification became final the older two children were already legally adults. As to the younger ones, in the Court's words children of age 15 and 13 are "*not as much in need of care as younger children*". In addition the judges used same reasoning as in its earlier judgments: the children had grown up in Indonesia with their father and therefore developed strong cultural and linguistic ties in their country of origin. Moreover, it was never questioned that they could not continue living with their father.[213]

While in the Gül judgment, the majority of judges considered that a 7-year-old boy was already attached to the linguistic and cultural environment of his home country, three years later they stated that children aged 7 and 4 were of such adaptable age that they could be removed from the United Kingdom to Nigeria, even though they were born in the UK and had its nationality. In the decision on *Ajayi and others* the judges held other factors were more serious, in particular the mother's immigration status. Explicit weight was given to whether the marriage "*was contracted at a time when the parties were aware that the immigration status of one of them was such that the persistence of the marriage within the host state would from the outset be precarious*". The judges have stated that in such cases "*the case the removal of the non-national family member would be incompatible with article 8 only in exceptional circumstances*".[214] What seriously harmed the position of Ms. B. was that upon her original arrival in the UK she had already violated the terms of her limited permission to stay, namely by taking up paid employment. After the deportation order she yet married a British national. The Court argued that "*the fact that the [Ms. B's*

[213] *Chandra and others v. the Netherlands* (Decision 13.5.2003, 53102/99) See also e.g. *Magoke v. Sweden* (Decision 14.6.2005, 12611/03) and *Ramos Andrade v. the Netherlands* (Decision 6.7.2004, 53675/00)
[214] *Darren Omoregie v. Norway* (31.7.2008, 265/07) para. 57; *A.W. Khan* (12.1.2010, 47486/06) para. 32.

husband] was a British citizen, the applicants cannot claim that this gave [Ms. B.] any right overriding the deportation order already issued. Similarly, the first and fourth applicants [Ms. B's children] were born at a time when [Ms. B's] applications to obtain leave to remain were still pending and she could claim no right of residence". Neither the husband's nor the children's nationality could override Ms. B's violation of immigration authorities, when the judges found no "*insurmountable obstacles in the way of the family living in the country of origin*".[215]

As was discussed in earlier judgments, the judges thus do not look favourably at individuals' attempts to disrespect the state's immigration authority. In the decision on Chandra and others, too, the judges asserted that "*the applicants were not entitled to expect that, by confronting the Netherlands authorities with their presence in the country as a fait accompli, any right of residence would be conferred on them*".[216] The children had not applied for a residence visa prior to their departure from Indonesia, but had only arrived on a tourist visa. Van Dijk formulates this into a question of whether the situation of separation was caused by the applicants or the state.[217] Indeed, the Court constantly spells out that when it is discussing the right to family life under article 8, crucial difference is between the negative and positive obligations of the States, namely if the State is required to refrain from action, or do something, even though these boundaries "*do not lend themselves to precise definition*".[218] It seems, however, that in order for the Court to require something more from a State, the rupture of family life must be caused by the State, and not be a result of an individual's decision. Therefore starting a relationship, let alone contracting a marriage, if the persons in question are aware of a signed deportation order or even pending decision, facilitate the judges to confirm states' right to immigration control.

Even Mr. *Darren Omoregie,* who had a Norwegian wife and a child, was not permitted to stay. He originally arrived with no identity document and applied for asylum. Shortly after he met a Norwegian woman and they started cohabiting a few months later. His asylum application was rejected, but while an appeal was pending he received a temporary work permit, and the couple got engaged. The Court maintained its strict stance and confirmed that temporary residence permit does not mean lawful residence. Moreover, a rejection of his asylum request ended his temporary work permit and meant an obligation to leave the country. However, Mr. Darren Omoregie "*opted to evade his duty to leave and stayed in*

[215] *Ajayi and others v. the United Kingdom* (Decision 22.6.1999, 27663/95) See also *Darren Omoregie v. Norway* (31.7.2008, 265/07) para. 57.
[216] *Chandra and others v. the Netherlands* (Decision 13.5.2003, 53102/99);
[217] Van Dijk 1999, 297.
[218] *Gül v. Switzerland* (19.02.1996, 23218/94) para. 38.

Norway unlawfully". His subsequent application for family reunification was also rejected. Despite refusals and an exclusion order the couple got married.

The Court did not question the genuineness of the marriage, especially because the couple gave birth to a child. However, it underlined that from the beginning the future of the relationship was precarious due to the evident uncertainties of Mr. Darren Omoregie's situation and failed asylum applications: "*at no stage prior to their marriage […] could [the applicants] have reasonably held any expectation that he would be granted leave to remain in Norway*". Therefore it considered "*that the first and second applicants, by confronting the Norwegian authorities with the first applicant's presence in the country as a fait accompli, were [not] entitled to expect that any right of residence would be conferred upon him*". Before his arrival Darren Omoregie had no ties to Norway, and even after his marriage the judges described those ties to be weak. He had lived all his life in Nigeria, where he also had had his education and where his brothers still lived. The child was of an adaptable age, and the wife could follow her husband to Nigeria. Although she would face "*some difficulties and inconveniences*" those obstacles were not insurmountable to the judges. Ultimately, his exclusion order was not unlimited but limited to five years.[219]

As was discussed above, the Court does not perceive of exclusion order as punishment. In the judgment on Darren Omoregie this is confirmed when the judges state that "*the decision prohibiting [Mr. Darren Omoregie's] re-entry for five years was imposed as an administrative sanction*". The purpose of this type of administrative sanction was defined to be to "*ensure that resilient immigrants do not undermine the effective implementation of rules on immigration control* ". The judges declared their satisfaction with the Norwegian decision that "*the domestic authorities struck a fair balance between the personal interests of the applicants on the one hand and the public interest in ensuring an effective implementation of immigration control on the other hand*".[220]

Stricter and more straightforward argumentation may be read in the concurring opinion of Judge Jebens who gave special emphasis to the fact that Mr. Darren Omoregie was never granted lawful residence in Norway, but instead repeatedly ordered to leave. Judge Jebens states directly that "*The Convention does not guarantee the right of a foreign national to enter or reside in a particular country*". Although he agrees with the majority that there was no violation of article 8, he goes even further by stating that there was not even any

[219] *Darren Omoregie v. Norway* (31.7.2008, 265/07) paras 54-67. See also *Konstatinov v. the Netherlands* (26.4.2007, 16351/03)
[220] *Darren Omoregie v. Norway* (31.7.2008, 265/07) paras 67-68.

interference in the applicants' right to "*respect*" for family life, because that family life was established during Darren Omoregie's unlawful residence.[221]

Although one of the judges voiced a more critical tone than the majority, there were also two judges who voted against the majority. Judges Malinverni and Kovler questioned the others' reasoning primarily on two grounds. Contrarily to Judge Jebens views, for Judges Kovler and Malinverni the marriage and the child of Mr. Darren Omoregie existed de facto. They referred to a comment made by a Norwegian Court that because of an error made by authorities when accepting the marriage, even if the groom was officially not entitled to contract a marriage due to lack of residence permit, the couple believed that he now had a right to stay and consequently apply for a right to reside and work. To Judges Malinverni and Kovler the decision to stay after marriage was thus not a conscious act to defy the authorities, but a misunderstanding. Judge Malinverni even added that "*in several member States of the Council of Europe, marriage in itself entitles a foreign national to reside in the State of which his or her spouse is a national*". Secondly, the applicant had not committed any crimes like in the majority of expulsion cases under the Court's examination, but his only offence was against the Immigration Act. Whereas the majority stated that the Mr. Omoregie could visit his wife and child in Norway, the two dissenting judges held this option to be "*highly unrealistic*".[222]

Whereas the Court calls splitting up a family " *an interference of a very serious order*", the unity of family comes to a different light if the individuals contributed to the separation in the first place. In other words, if a parent leaves his or her children behind to pursue a new relationship, or if a family was created while being aware of the insecure future together, the judges' sentiments towards the protection of such bonds are significantly more reserved.

Although family reunification commonly enables persons to immigrate, the Court rarely attempts to step on the governments' toes in questions relating to family based migration. What is strikingly clear is that the judges do not in the slightest try to deny the governments their sovereign right to control their territory. While family is respect, and specific attention given to children in particular, they are not absolute safeguards in the context of immigration and residence rights. If individuals are suspected of trying to bypass national entry regulations, the Court 's attitude remains cautious.

[221] *Darren Omoregie v. Norway* (31.7.2008, 265/07) Concurring opinion of Judge Jebens.
[222] *Darren Omoregie v. Norway* (31.7.2008, 265/07) Dissenting opinion of Judge Malinverni joined by Judge Kovler

4 Enforcing control over aliens

Because the Court's task is to balance the rights of individuals with the state's legitimate power to control its territory, it is appropriate to ask what the Court considers acceptable in the name of security. It is not exceptional to place asylum seekers in detention centres with undocumented immigrants. The Strasbourg Court confirms that while the general rule that everyone has a right to liberty is protected by article 5, the sub-paragraph 5(1)(f) provides an exception to that rule; in immigration context the states have a right to limit the liberty of aliens[223]. The case law concerning detention is no rarer than that relating specifically to migration or residence rights, and the Court often finds a violation of individual's right to liberty. Numerous judgments in fact reveal that in detaining migrants the domestic laws or authorities' decisions are often too unclear to be acceptable under the Convention's standards.

Although the doors were closed to guest worker migrants for economic reasons, today the restrictions have a strongly security-bound ideology behind them. This is not the least contested by the argumentation used both by the Court and the governments in debates on the justifiability of detention of non-nationals. The measures of detention in Strasbourg are largely debated on two grounds; firstly, whether the deprivation of liberty was "*lawful*" in the first place, and secondly whether the conditions or length of detention were acceptable. All in all, enforcement measures against foreigners are no longer an exception but rather a rule[224].

To what extent is the restriction of liberty acceptable in the views of the Court? Because the state's right to deny immigration and expel non-nationals inevitably involves enforcing the restriction, it is also natural to ask, where the limits to the practice of control are. This is further confirmed in the fact that in cases involving entry or deportation, the right to liberty is often invoked at the same time. As in the chapters above, the constant balancing between individual's and state's rights continues. But, when we are dealing with detention, it seems that the states have even wider authorities. I will first discuss enforcement of migration control in more general terms. Chapter 4.2 discusses the "*lawfulness*" of detention. The length and conditions of detentions are the key issue in the last chapter.

[223] *Saadi v. the United Kingdom* (29.1.2008, 13229/03) para. 64.
[224] Hailbronner 2007, 159.

4.1 Argumentation on border control

As the movement across borders began to be subjected to stricter regulations, immigration became increasingly criminalised. Penninx points out that "*tougher regulations by definition led to more illegality and irregularity, creating opportunities for new actors like smugglers and traffickers*".[225] Especially after September 2001 one cannot neglect the fears caused by international terrorism, which have criminalised not only migrants but also refugees. As we remember from Chapter 2.2, even the UN Security Council urged states to make sure that asylum seekers have not "*planned, facilitated or participated in commission of terrorist acts*". Kaya refers to this process as "*securitisation*": shifting from protection of the state to protecting the society, which legitimises the discourse of protection from any kind of "*evil*"[226]. The most visible thread of argumentation in the Strasbourg case law is security. In this chapter I seek to elucidate the background and theoretical explanations to the centrality of safety and control.

In situations concerning detained persons, both nationals and non-nationals, articles 3 and 5 are most commonly at issue. Although the Court has confirmed that liberty is a fundamental human right, ultimately it becomes a question of balancing of interest between public security and the rights of an individual. A specific purpose of article 5 is to protect individuals from arbitrary detention, but unlike article 3, it is not non-derogable. In cases concerning detention the Court assesses the difference between deprivation and restriction of liberty, the difference of which may be e.g. the type, duration, effects, and manner of implementation. The Convention allows exceptions to the rule, but the list of such grounds is exhaustive and it must be interpreted narrowly. The existing safeguards for individuals include that detention must be lawful and in conformity with provisions of national and international law, and that there exists a right to have lawfulness reviewed by a Court. In particular these safeguards must be guaranteed to asylum seekers.[227]

In fact, Blake points out that in the original version of the ECHR, the only reference to aliens besides non-discrimination and restriction of political activity is found in article 5(f), which states that "*No one shall be deprived of his liberty*". But this right of aliens is limited on six conditions: a person may be detained or arrested without trial to prevent an

[225] Penninx 2006, 10; Avci 1999, 204; Bigo 2004.
[226] Kaya 2009, 8.
[227] Article 5 ECHR; Van Dijk et al. 2006, 419,457-458,481.

unauthorised entry into the country or if he or she is to be deported or extradited.[228] In the *Saadi v. the United Kingdom* judgment the majority of the judges argued that because it is the states' right to "*control equally an alien's entry into and residence in their country*" it would "*be artificial*" to evaluate the justifiability of detention differently in cases concerning deportation and those where a person is only arriving to the country[229].

There has been a shift away from the emphasis on economical explanations. While controlling the labour market has been a common argument and for instance the Netherlands, due to its already dense population, sometimes defends its decisions of withdrawal of residence permits on basis of the need to secure its labour market.[230] Legal options for immigrants are therefore scarce, which is reflected in the numbers of irregular migrants and the attempts to use asylum as a gate onto the European territory. Many governments have created programmes to encourage immigration of skilled professionals, but the quotas for unskilled migrants are not sufficient to accommodate all flows. Avci's reading is that one of the most important consequences of the change in migration flows since the 1973 oil crisis has been that European states ever increasingly have perceived *all* migratory movements to be ultimately driven by economic motives. He sees this as the reason for blurring of various migrant categories both in public and among politicians, and as the explanation for debate on "*economic refugees*". Avci also argues that despite the transformation of types of flows the European states began to tighten the existing policies and concentrate on control instead of adapting the approach with the changing flows.[231]

There remains a strong image of refugees of "*living standards*" who only migrate to profit the social security systems in the wealthy West without being refugees in the original sense.[232] Obviously the reduced possibilities for unskilled workers to enter the Western labour market through legal ways are one reason for this abuse of the asylum system, and simultaneously they benefit the expansion of trafficking and smuggling networks.[233] It ought not to be overlooked that the political and economical objectives are not always entirely compatible. The shaping of migration policies is increasingly influenced by public

[228] Article 5 ECHR; Blake 2004, 432.
[229] *Saadi v. the United Kingdom* (29.1.2008, 13229/03) para. 73.
[230] See e.g. *Ciliz v. the Netherlands* (11.7.2000, 29192/95)
[231] Avci 1999, 201; SOPEMI 2008, 105-106.
[232] Mitsilegas 2004, 29-31. From a political perspective he further argues, that nationalist policies are based largely on political and media discourses, which create the impression that the country is in danger of being invaded by large numbers of migrants, who have no right to be in the territory. This attitude shows itself in reluctance to let asylum seekers even realize their rights but arriving on territory.
[233] Boswell and Crisp 2004, 1,4,11. The writers also underline the negative effect of selective immigrant policies: welcoming only qualified workers leads to brain drain in the countries of origin, which only further upsets the development in the source countries.

opinion, but while politicians try to dam up the unwanted and unskilled migrant flows, the employers are keen to exploit the cheap workforce. In particular during economically hard times the foreign labour force is seen as a threat; it is often perceived of as creating unfair competition in the labour market. The question of irregular migration only illustrates this; studies have shown in some countries that employers actually prefer workers without residence permits because they are less able to negotiate better wages of working conditions.[234] The economic reality may thus undermine the efforts of guardians of law and order and politicians.

Motivation of entry

The discussion above leads us to the general confusion between asylum seekers and irregular immigrants. The issue is visible also in the Court's case law and even provokes dissenting opinions among the judges. Weissbrodt sees the historical developments to this blur to originate from the 1980s. When Western countries could not reduce immigrant flows through the family reunion channel they targeted asylum seekers, who were new arrivals with temporary or 'pending' status. Hence the goal became to limit both the numbers of asylum seekers, and the costs of receiving them and processing their claims.[235] Secondly, as was mentioned already in Chapter 2.2. the states have never accepted an obligation to grant asylum; there exists only a right to *seek* asylum. Goodwin-Gill and McAdam look at the issue from the perspective of states' attempt to prevent asylum seekers from even reaching their territories where they have to right to file their claims. Avci as well considers the confusion of asylum and economic motives to be the reason why European states have made access to asylum procedures more difficult. Evidence of this are, only to mention few examples: carrier sanctions on airlines if they transport passengers without valid documents, stricter visa requirements, and concepts such as "*safe countries of origin*".[236]

In the name of security and border control, irregular immigrants and those seeking asylum in good faith thus risk of being confused[237]. Yet most governments do not dispute that bona

[234] Levinson 2005; Doomernik and Jandl 2008, 19; Bigo 2004, 81-83; SOPEMI 2010, 116.
[235] Weissbrodt 2008, 113.
[236] Goodwin-Gill and McAdam 2007, 149,206-208; Avci 1999, 206; van der Klaauw 2004; Rigo 2009, 214.
[237] An enlightening example of the black and white –perception of these issues is the announcement made by the Finnish border guards that "*those who attempt to come to Finland illegally would become victims of human trafficking or commit crimes*". Available at: <http://yle.fi/uutiset/kotimaa/2010/03/rajavartiolaitos_esti_yli_3_000_laitonta_maahantuloa_1535257.html> (Last accessed 1.11.2010)

fide asylum seekers ought not be deprived of their liberty.[238] In many of the stories of asylum seekers that we have discussed in the chapters above, we have seen the fact that entering a country illegally is close to a rule rather than an exception[239]. A requirement confirmed in article 31 of the Geneva Convention is however that refugees or asylum seekers who enter a country illegally may not be penalised. Yet, this requirement is limited to those coming directly from a territory where their life or freedom was threatened. To bypass this obligation and prevent what in the EU is called "*asylum shopping*" many governments have applied so called "*safe third country policies*" and principles of "*country of first asylum*". The objective is that an asylum seeker's application can be left without inspection if he has passed through another 'safe country' where he could have lodged a claim, or that he may be returned to a country of transit if it is considered safe. This has become a common practice particularly in Europe[240]. An undisputed fact is that asylum seekers and refugees often come from countries in which it is impossible to obtain a legal visa, which in practice forces the persons in flight to recourse to illegal routes[241]. For instance the EU's list of nationalities, which require a visa includes practically all major refugee-sending countries. Due to difficulties to leave one's country it is also understandable that many have to search for help from smugglers, as expensive and dangerous as it may become.[242] Neither can it be expected that the persons in flight would in all cases be able to arrange direct travel to their desired destination. In international law it is recognised that some degree of preference is allowed for those fleeing persecution, to choose their destination.

A noteworthy observation is made by Düvell who points out that the concept "*illegal aliens*" did not exist before the 1920s, and in Europe its use was scarce until the World War II. This befits the observations that immigration regulations became stronger only since the 1970s. For instance, irregular work became illegal in France only in 1972 and in the UK "*clandestine entry did not lead to illegal status*" until in 1968. Until the 1960s and 1970s the use of the concept of 'illegal aliens' was, according to Düvell, "*limited to some exceptional instances*". It only entered into wider use and public culture as new

[238] Hailbronner 2007, 160.
[239] See e.g. cases of NA, S.D., Jabari, Abdolkhani and Karimnia, Said, Darren Omoregie and others, Collins and Akaziebie.
[240] Returning asylum seekers to certain Southern European countries is not unproblematic. For instance the Strasbourg Court has had to decide on cases involving application of the Dublin Regulations. In addition, the UNHCR advised in 2008 that EU member states refrain from returning asylum seekers to Greece, because of the reception procedures in Athens for those who had been returned under the Dublin Convention. See *K.R.S. v. the United Kingdom* (2.12.2008, 32733/08); Goodwin-Gill and McAdam 2007, 392-393.
[241] See e.g. Boswell and Crisp 2004, 1.
[242] Boswell and Crisp 2004, 13. They point out, that contrary to the western view of smuggler as dangerous criminals, for migrants and refugees they may even represent legitimate, life-saving functions.

technologies, legislations and restrictions were developed.[243] In other words, the new regulations not only led to the increase of illegal flows, but in a way marked the apparition of perceiving unregulated flows as illegal.

Another observation we should make is the obscurity of *illegality*. Various authors emphasise the complicated hierarchies of categories of non-nationals and the fact that an individual easily traverses from one category to another not only during his stay in one country, but during his entire life. Düvell illustrates the essentially political and ideological character of illegality by describing, how the constant redefining of who constitutes an "*undesired alien*" in the UK has come to include new groups. This has led to the increase of "illegal *entrants*" by ten-fold between 1970 and 1980 only.[244]

Whereas traditionally depriving an individual has been used primarily as punishment, today detention of foreigners is often seen as preventive[245]. The Court has stated that "*Where individuals were lawfully at large in a country, the authorities might detain only if a 'reasonable balance' was struck between the requirements of society and the individual's freedom*". But, as to detention of "*potential immigrants*", regardless of whether they are asylum seekers or not, their position is different:

> "until a State has 'authorised' entry to the country, any entry is 'unauthorised' and the detention of a person who wishes to effect entry and who needs but does not yet have authorisation to do so, can be, without any distortion of language, to "prevent his effecting an unauthorised entry". [The Grand Chamber] does not accept that, as soon as an asylum seeker has surrendered himself to the immigration authorities, he is seeking to effect an "authorised" entry […]."[246]

This may be seen to be compatible with the Geneva Convention which refers to "*refugees lawfully in the territory"*. From this phrase a generally accepted recognition has been derived that movements of asylum seekers may be restricted[247]. Yet, the majority's argumentation was confronted with critique by the dissenting judges:

> "as regards the *purpose of detention* [emphasis in the original text], in stating that 'since the purpose of the deprivation of liberty was to enable the authorities quickly and efficiently to determine the applicant's claim to asylum, his detention was closely connected to the purpose of preventing unauthorised entry' […] the Court does not hesitate to go a step further and assimilate all asylum seekers to potential illegal immigrants."[248]

[243] Düvell 2006, 24.
[244] Düvell 2006, 26.
[245] Hailbronner 2007, 159-160.
[246] *Saadi v. the United Kingdom* (29.1.2008, 13229/03) para. 65.
[247] Hailbronner 2007, 162.
[248] *Saadi v. the United Kingdom* (29.1.2008, 13229/03) Joint partly dissenting opinion of Judges Rozakis, Tulkens, Kovler, Hajiyev, Spielmann and Hirvelä.

The judges emphasised that Mr. Saadi "*did not enter or attempt to enter the country unlawfully*" but had claimed for asylum, and more importantly that "*it is not permissible to detain refugees on the sole ground that they have made a claim for asylum*". [249] Hailbronner yet reminds that the Court held it justified to make general assumptions of necessity to prevent unlawful entry, because in any case the domestic authorities are required to take individual circumstances into account. This balancing test thus offers sufficient safeguard, despite presumptions and suspiciousness against motivation for entry.[250]

The Grand Chamber judgment on *Saadi v. the United Kingdom* was the first time that the judges had to decide on what is a 'lawful' detention of a person trying to enter the state territory. The outcome of this judgment was however not unanimous. Judges Rozakis, Tulkens, Kovler, Hajiyev, Spielmann and Hirvelä left their dissenting opinion, touching the article 5(1). The six judges emphasised that Mr. Saadi came to the UK as an asylum seeker and held that the case concerned "*the increasingly worrying situation regarding [asylum seekers'] detention*". They point out that usually the idea of permitting detention of non-nationals under article 5 is to prevent illegal immigration, whereas Mr. Saadi was fleeing persecution. Concern is raised over the fact that "*The majority attach no importance to this fact, assimilating the situation of asylum seekers to that of ordinary immigrants*". The dissenting judges in fact take an entirely contrary view to the status of persons who have claimed asylum. According to them other international conventions recognise asylum seekers as "ipso facto *lawfully within the territory*".[251] What this means is that they see the ECHR's protection to differ (in a negative way) from that offered by other international instruments. The majority's view on the other hand suggests that they at least to some extent share the domestic authorities' suspicions of abuse of asylum procedures.

The reason why the dissenting judges pay particular attention to this legality versus illegality is that Mr. Saadi in fact *was* given temporary permission to stay, which means that he in point of fact was *not* illegally in the territory. They argued that the majority

> "does not hesitate to treat completely without distinction all categories of non-nationals in all situations – illegal immigrants, persons liable to be deported and those who have committed offences – including them without qualification under the general heading of immigration control. […] More fundamentally, not just in the context of asylum but also in other situations involving deprivation of liberty, to maintain that detention is in the interests of the person concerned appears to us an exceedingly dangerous stance to adopt. Furthermore, to contend in the present case that detention is in the interests not merely of the asylum seekers themselves "but of

[249] Ibid.
[250] Hailbronner 2007, 168-169.
[251] *Saadi v. the United Kingdom* (29.1.2008, 13229/03) Joint partly dissenting opinion of Judges Rozakis, Tulkens, Kovler, Hajiyev, Spielmann and Hirvelä.

> those increasingly in the queue" is equally unacceptable. In no circumstances can the end justify the means; no person, no human being may be used as a means towards an end."[252]

To the dissenting judges Mr. Saadi's detention aimed therefore at "*a purely bureaucratic and administrative goal, unrelated to any need to prevent his unauthorised entry into the country*"[253]. Their fear is that asylum seekers "*could be detained at any time during examination of their application*". In practice the variation between state practices is significant, as usual. Whereas some countries detain asylum seekers almost exclusively only in cases where they are to be removed, some EU member states' legislation enable detention of asylum seekers at different stages of the asylum procedures and for a varied set of reasons.[254]

They explicitly criticise the lack of "*value or higher interest*" which would justify the differing treatment of asylum seekers' right to liberty. Instead they argue that alternatives to detention ought to be discussed. Their interpretation of the Saadi judgment is that the ECHR is moving towards a lower level of protection than what is offered by other international instruments:

> "Ultimately, are we now also to accept that Article 5 of the Convention, which has played a major role in ensuring controls of arbitrary detention, should afford a lower level of protection as regards asylum and immigration which, in social and human terms, are the most crucial issues facing us in the years to come? Is it a crime to be a foreigner? We do not think so."[255]

The dissenting judges' comments may be set in the context of concern over the trend of limiting both the numbers of asylum seekers, and the costs of receiving them and processing their claims. This obviously has effect on realization of asylum seekers' rights. These measures not only make reaching status determination process more insecure, but they also influence the conditions in which these persons wait for the decision on their destiny: to reduce the costs of reception conditions, welfare benefits have been reduced, access to labour market has been denied, and so on. Also a number of reforms to legal procedures and standards have been introduced to limit the numbers of those who are granted refugee status, such as accelerated procedures, wider use of "*temporary protection*" and return to so-called safe third countries of origin or transit. Stricter visa requirements

[252] Ibid.
[253] The judges refer among other instruments to Article 18 of the European Council Directive 2005/85/EC which provides that "*Member States shall not hold a person in detention for the sole reason that he/she is an applicant for asylum*".
[254] *Saadi v. the United Kingdom* (29.1.2008, 13229/03) Joint partly dissenting opinion of Judges Rozakis, Tulkens, Kovler, Hajiyev, Spielmann and Hirvelä; Hailbronner 2007, 163.
[255] *Saadi v. the United Kingdom* (29.1.2008, 13229/03) Joint partly dissenting opinion of Judges Rozakis, Tulkens, Kovler, Hajiyev, Spielmann and Hirvelä.

and stricter procedures in particular have been seen as a factor to a decline in asylum applications.[256]

Taken the above-mentioned into account, it is not surprising that the Court most often comes to decide on cases which are related to security issues. Therefore, as interesting as it would be to uncover the Court's views on economical grounds opposing migration, the argumentation is primarily security related. In the image reflected by the Strasbourg case law, securitising and controlling migration movements becomes only increasingly legitimised. This is enforced both by non-existent questioning of the states' power to limit the physical liberty of non-nationals at larger freedom than its own nationals, but also in the explicit logic it uses.

4.2 Detention for the sake of migration control – a generally accepted measure

Although the Strasbourg judges have described detention as such a serious measure that *"it is justified only as a last resort*", this exceptionality does not apply when a state wants to control its borders[257]. This chapter discusses how the Court draws a line between unacceptable detention, and when it is considerer "*lawful*". In its *Ismoilov and others* judgment the Court specified that the provisions of the Russian law were "*neither precise nor foreseeable in their application and did not meet the 'quality-of-law' requirement*". In other words, because the Russian legislation lacked "*clear legal provisions"* it could not protect individuals from arbitrary detention.[258]. As was emphasised above, the Court does not try to deprive the states of their right to control their territories through detention of non-nationals. However, it often finds a breach of an immigrant's right to liberty based on the lawfulness of detention.

Thomas Hammarberg, the Council of Europe Commissioner for Human Rights, has expressed his concern that immigrants who have breached immigration laws should not be treated as criminals. He has reported that the rights of individuals to liberty are not always respected.

> "In fact, there is a wide gap between reality and the agreed human rights norms for migrants, even in Europe. One problem is detention. The UN Special Rapporteur on human rights for migrants has reported on arbitrary detention decisions, prolonged

[256] Boswell and Crisp 2004, 21; Weissbrodt 2008, 132; SOPEMI 2007, 55.
[257] *Saadi v. the United Kingdom* (29.1.2008, 13229/03) paras 70-72.
[258] *Ismoilov and others v. Russia* (24.4.2008, 2947/06) paras 138,140.

> detention periods, detention even of children and trafficking victims, overcrowding and unhealthy conditions, and limited opportunities to complain about abuse."[259]

The most common arguments used in Europe for necessity of detention are illegal entry, checking identity, reluctance to cooperate with authorities, filing an asylum application after having received an order to leave or filing a follow-up application, manifestly unfounded claims, and danger of absconding. The UNHCR offers a more limited list of accepted grounds,[260] whereas the ECHR allows depriving non-nationals of their liberty "*with a view to deportation*", or "*to prevent his effecting an unauthorised entry into the country*"[261]. In practice the states have a very wide margin of discretion, but the judges have specified that detention is only possible while deportation proceedings are in progress[262]. Whereas other measures against non-nationals, such as expulsion, may only be done if strictly necessary, article 5(f) does not entail such imperative. In other words, it is not necessary to suspect that an individual would commit an offence or flee to have him detained[263].

Yet, even when taking such a strict stance as in its *Saadi* judgment, which was described above, the bottom line in the Court's valuing is that 'the overall purpose of Article 5' may not be forgotten, in other words, *arbitrary* deprivation of anyone's liberty is not acceptable. When the Court has defined what it considers as 'arbitrary' it has firstly named that there may not be an "*element of bad faith or deception on the part of the authorities*". In addition there must be some relationship between the grounds of permitted deprivation of liberty relied on and the place and conditions of detention".[264]

Although the Grand Chamber did not hold Mr. Saadi's one-week-detention as excessive, in its judgment on *Amuur* it found a violation when Somali asylum seekers were held at an airport in France for 20 days. Yet the crucial question was not the length of detention in itself: the judges found that the French legislation did not entail sufficient safeguards in situations concerning detention of asylum seekers. The Court defined that retaining persons at the airport does restrict liberty, but is not comparable to 'detention':

> "Such confinement, accompanied by suitable safeguards for the persons concerned, is acceptable only in order to enable States to prevent unlawful immigration while complying with their international obligations [...] States' legitimate concern to foil the

[259] Hammarberg 2006; 2008.
[260] Hailbronner 2007, 164-168; UNHCR, Detention of Refugees and Asylum Seekers, 13 October 1986, No. 44 (XXXVII)
[261] Article 5(1)(f) ECHR.
[262] See e.g. *Chahal v. the United Kingdom* (15.11.1996, 22414/93) paras 112-113.
[263] Van Dijk et al. 2006, 481.
[264] *Saadi v. the United Kingdom* (29.1.2008, 13229/03) paras 66,69.

> increasingly frequent attempts to circumvent immigration restrictions must not deprive asylum-seekers of the protection afforded by these conventions. […] Such holding should not be prolonged excessively, otherwise there would be a risk of it turning a mere restriction on […] into a deprivation of liberty. In that connection account should be taken of the fact that the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country."[265]

The judges pointed out that the Amuur family "*were placed under strict and constant police surveillance and had no legal and social assistance - particularly with a view to completing the formalities relating to an application for political refugee status*". It was with significant delay when a humanitarian association managed to contact the family. More specifically, what lacked were for instance procedures and time-limits to offer security to those seeking asylum.[266]

In general, holding migrants in airport "*waiting zones*" after arrival for instance to check their asylum claims, is accepted. In fact, some states use such practice exclusively in cases where asylum application is made on arrival at an airport or an international border. The aim is to be immediately able to return rejected asylum seekers to their countries of origin.[267] Although the detention is allowed as such, it is not acceptable in all manners. To illustrate, the *Shamsa,* brothers were held in detention a month after the "expiry date" of their detention order, but the Court found that even if the persons were waiting deportation, they could not be held indeterminately when there was no basis for such prolongation in the law[268]. The judges have confirmed that the exact number of days is not necessarily the decisive factor, although it is relevant, when determining whether the detention breached an individual's right to liberty[269].

Another aspect to safeguards for the individual's rights it that the Court has declared it to be unlawful to mislead individuals in order to facilitate their detention in order to carry out their removal[270]. The *Čonka* family were Slovak nationals of Roma origin, and they had sought asylum in Belgium. One of the injustices to which they were seeking remedy in Strasbourg, was the manner of their arrest: "*they had been lured into a trap as they had been induced into believing that their attendance at the police station was necessary to*

[265] *Amuur v. France* (25.6.1996, 19776/92) paras 43-44.
[266] Ibid.
[267] Hailbronner 2007, 160.
[268] *Shamsa v. Poland* (27.11.2003, 45355/99 ; 45357/99) paras 11-15,44-47,51-59.
[269] *Merie v. the Netherlands* (20.9.2007, 664/05); *Ryabikin v. Russia* (19.6.2008, 8320/04) para 132.
[270] Van Dijk et al. 2006, 481.

complete their asylum applications when, from the outset, the sole intention of the authorities had been to deprive them of their liberty."[271]

The Court referred to the invitation sent by the authorities, which asked the family to arrive to the police station to "*enable the file concerning their application for asylum to be completed*". Instead of completing the asylum application, the family was however announced of their expulsion order, and taken to a closed transit centre. Whereas the Belgian government described the wording "*unfortunate*", the judges held that it may be efficient to use "*stratagems*" to undermine criminal activities, to "*seek to gain the trust of asylum-seekers*" in such ways is not acceptable. They claimed that no matter how 'unfortunate' the wording was, "*it was chosen deliberately in order to secure the compliance of the largest possible number of recipients*". The Court equates this kind of situation to the narrow interpretation of exceptions under article 5:

> "[…] that requirement must also be reflected in the reliability of communications such as those sent to the applicants, irrespective of whether the recipients are lawfully present in the country or not. It follows that, even as regards overstayers, a conscious decision by the authorities to facilitate or improve the effectiveness of a planned operation for the expulsion of aliens by misleading them about the purpose of a notice so as to make it easier to deprive them of their liberty is not compatible with Article 5." [272]

The misleading wording was not the only problem that the judges pointed their fingers at. They reminded that "*The Convention is intended to guarantee rights that are not theoretical or illusory, but practical and effective*". The Belgian authorities failed in 'practical' effectiveness for example in printing the information on the available remedies "*in tiny characters and in a language they did not understand*", offering only one interpreter to a large number of Roma families at the police station, and not offering any interpreter to the detention centre. The Court named as the decisive factor that the applicants' lawyer was not informed of the family's situation until so late that he could not have the case taken to be heard, until after the day of expulsion. [273]

In the name of fight against terrorism?

A general concern has been how governments discriminate against non-nationals in the name of national security and fight against international and crime against terrorism. In the judgment on *A. and others* the Grand Chamber straight out rejected the UK's argument that individual's right to liberty could be balance against a State's security interest. It confirmed

[271] *Čonka v. Belgium* (5.2.2002, 51564/99) para. 36.
[272] *Čonka v. Belgium* (5.2.2002, 51564/99) para. 42.
[273] *Čonka v. Belgium* (5.2.2002, 51564/99) paras 40-46.

that the exceptions listed under article 5 may only be narrowly interpreted. The case concerned eleven non-nationals who were detained awaiting deportation, under an "*Anti-Terrorism Crime and Security Act*", which the UK passed after 9/11. Sixteen persons altogether were detained under the act, including the eleven applicants included. The case differs from *Amuur* and *Saadi* because it centres on the limits of war against terrorism.

> "The Court is acutely conscious of the difficulties faced by States in protecting their populations from terrorist violence. This makes it all the more important to stress that Article 3 enshrines one of the most fundamental values of democratic societies. […] Article 3 makes no provision for exceptions and no derogation from it is permissible […] Even in the most difficult of circumstances, such as the fight against terrorism, and irrespective of the conduct of the person concerned, the Convention prohibits in absolute terms torture and inhuman or degrading treatment and punishment."[274]

Article 15 of the ECHR allows limiting the liberty of individuals e.g. when there is a "*public emergency threatening the life of the nation*", but the judges had declared already a year earlier that

> "Unlike most of the substantive clauses of the Convention […] Article 3 makes no provision for exception and no derogation from it is permissible under Article 15, even in the even of a public emergency threatening the life of the nation […]. As the prohibition of torture and of inhuman or degrading treatment or punishment is absolute, irrespective of the victim's conduct […], the nature of the offence allegedly committed by the applicant is therefore irrelevant."[275]

In the Court's opinion it is not in a position to know what is best for a nation, so it leaves a wide margin of appreciation for domestic authorities to decide on what may threaten the nation[276]. But, the measures taken must be "*strictly required*" and there are limitations to the margin of interpretation: "*an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed*" and that "*the emergency should be actual or imminent; that it should affect the whole nation to the extent that the continuance of the organised life of the community was threatened; and that the crisis or danger should be exceptional*".[277]

One of the British government's arguments was that "*the State could better respond to the terrorist threat if it were able to detain its most serious source, namely non-nationals*". The

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[274] *A. and others v. the United Kingdom* (19.2.2009, 3455/05) para 126.
[275] *Saadi v. Italy* (28.2.2008, 37201/06) para. 127. Article 15(1) ECHR : "*In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measure*s".
[276] The judges found it striking that the UK was the only European state that had reacted in such way to the threat of al'Qaeda whereas other states did not deem it necessary although they were equally concerned. Nevertheless it ended only noting, that each state does what it seems fit.
[277] *A. and others v. the United Kingdom* (19.2.2009, 3455/05) para. 176.

longest period that some of the applicants were detained was three years and three months. The reason for the prolonging of their detention was that although UK wanted to deport the applicants, it was unable to find a state who would receive them, and where they would not face torture or inhuman treatment. The judges paid particular attention to the fact that the applicants had been detained "*for the time being*", until deportation. They held that what this meant in practice to the applicants, was that they had no knowledge of "*when, if ever, they would be released*", which "*caused or exacerbated serious mental health problems in each of them*". This was particularly relevant, because the Court found no evidence that there was "*any realistic prospect of their being expelled without this giving rise to a real risk of ill-treatment*". For this and several more detailed and procedural reasons the Court did not find it sufficient that UK kept the deportation possibility "*under active review*"; it did not amount to "*action*".[278]

The Court explained itself by emphasising that it must take into account this "*great anxiety and distress*" that it believed the applicants went through. However, it did not go into examining the conditions of detention, because the applicants "*did not attempt to make use of these remedies [available to all prisoners, such as medical treatment]*". Instead it relied on domestic argumentations to determine its decision and concurred with the House of Lords:

> "The choice by the Government and Parliament of an immigration measure to address what was essentially a security issue had the result of failing adequately to address the problem, while imposing a disproportionate and discriminatory burden of indefinite detention on one group of suspected terrorists. […] there was no significant difference in the potential adverse impact of detention without charge on a national or on a non-national who in practice could not leave the country because of fear of torture abroad."[279]

The outcome was that the judges found the treatment and measures to have been disproportionate by discriminating "*unjustifiably between nationals and non-nationals*".[280]

In practice the European states' approaches to detention are varied, and the EU directives allow detention vaguely "*when it proves necessary". But, it may be argued that under the ECHR it may be easier to find "arbitrary" detention than a breach of "proportionality"*.[281] Although the Court, too, gives states a very wide margin of appreciation when it comes to detaining non-nationals in order to control their cross-border movements, it holds its ground that there must always be certain safeguards that the individuals can rely and recourse to.

[278] *A. and others v. the United Kingdom* (19.2.2009, 3455/05) paras 12-13,126-133,166-171,189.
[279] *A. and others v. the United Kingdom* (19.2.2009, 3455/05) para. 186.
[280] *A. and others v. the United Kingdom* (19.2.2009, 3455/05) paras 129-133,182-190.
[281] Hailbronner 2007, 165.

"*Lawfulness*" is susceptible to considerable debate, in which human rights academics are not the only ones which opt for a more specialised consideration of the rights of individual migrants, in particular when they are already fleeing persecution and inhuman treatment. Whether the dissenting voices within the Court will gain more ground is impossible to say, but so far there is no ambiance of withdrawing from the security centred discussion.

4.3 Restricted conditions and length of detention

Although detention in itself as a legitimate tool to control immigration is not contested by the judges, their acceptance is not unconditional. In addition to the problems of lawfulness described above, the judges also confirm that the *conditions and length* of detention may amount to a breach of article 3; they must compatible with the detained person's human dignity. This is the underlying theme in this chapter. The Court applies similar characteristics as it does in the evaluation of persecution in general, of what amounts to inhuman treatment: "*The assessment […] depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim*".[282]

The physical conditions and the length of detention are often interrelated. In various cases immigrants are held in spaces which are suitable as temporary accommodation of a few days, but which become degrading once the detention is prolonged. In Europe the maximum length of detention varies from two weeks in Sweden to six months in the Netherlands, eight months in Belgium, and absence of specific maximum period in the UK.[283]

One of the earliest cases concerning detention was *Chahal.* Mr. Chahal had spent The Court did not find the time Mr. Chahal had spent six years in prison when his case came to the Grand Chamber. He was of Indian origin and suspected of terrorism, but because he claimed asylum he could not be removed to India. The Court decided by majority that the length of his detention was not excessive, because of "*the detailed and careful consideration required for the applicant's request for political asylum*"; they claimed it to be for the interests of both him and the general public that the decision was not taken "*hastily*". The result was not unanimous, but several dissenting voices were left, the main point of disagreement being the duration of Mr. Chahal's detention. Judge de Meyer, who

[282] *A. and others v. the United Kingdom* (19.2.2009, 3455/05) para. 127; *Charahili v. Turkey* (13.4.2010, 46605/07 para. 75; *Dougoz v. Greece* (6.3.2001, 40907/98) paras 46,54.
[283] Hailbronner 2007, 165.

was supported by Judges Gölcüklü and Makarczyk described six years' detention in this case to be "*clearly excessive*", and Judges Martens and Palm's were not satisfied with the guarantees against arbitrariness, which ought to have secured Mr. Chahal from a six years' detention. Judge Pettiti referred to a judgment which the Court had made some months earlier, where it had found that France had violated the rules of administrative detention by holding Amuur detained for "*approximately twenty days without access to lawyers or any effective judicial review*". He emphasised that if there are difficulties in expelling persons who have been denied political refugee status, "*the person must be placed in administrative detention and not held in an ordinary prison under a prison regime*". True, Mr. Chahal had not been convicted of any crime. Judge Pettiti claimed bluntly that

> "It is almost perverse of the majority to argue, as it does, that since it was the applicant who sought a review, his detention was justified if the proceedings became protracted. Were this reasoning to be transposed, an accused who applied for release from custody pending trial would be told that his detention was justified by the fact that he had made an application that necessitated proceedings".[284]

To none of these judges mere "*pending decision*" is thus not an acceptable ground for prolonged detention. Judge Pettiti drew support from UNCHR when he reminded that "*The asylum-seeker can be held in [an appropriate] place only under the conditions and for the maximum duration provided for by law. […] It is only in cases where persons who have been refused asylum commit an offence (for instance, by returning illegally) that they may be detained in prison*". His conclusion was that Mr. Chahal's situation could be compared to an indefinite sentence, and regarded that "*he is being treated more severely than a criminal sentenced to a term of imprisonment in that the authorities have clearly refused to seek a means of expelling him to a third country. [...] Administrative detention under the Geneva Convention cannot be extended beyond a reasonable - brief - period necessary for arranging deportation*".[285]

In numerous cases the Court has found a violation in situations, where persons, often asylum seekers, are held in detention for excessive periods in conditions which are suitable but for few days' temporary detention. Mr. *Charahili* complained that he was held in the basement of a police station for nearly twenty months in poor conditions. The Court concurred with various reports that the facilities were meant to hold persons for a maximum of four days. Referring to the European Committee for the Prevention of Torture which has

[284] *Chahal v. the United Kingdom* (15.11.1996, 22414/93) Partly dissenting opinion of Judge Pettiti.
[285] *Chahal v. the United Kingdom* (15.11.1996, 22414/93) paras 115-117; Partly concurring, partly dissenting opinion of Judge de Meyer; Joint partly dissenting opinion of Judges Gölcüklü and Makarczyk; Partly dissenting opinion of Judge Pettiti.

emphasised that detention in ordinary police station facilities "*should be kept to the absolute minimum*".[286]

The conditions in the detention centres where Mr. *Dougoz* was held for several months were described in more detail: "*he was confined in an overcrowded and dirty cell with insufficient sanitary and sleeping facilities, scarce hot water, no fresh air or natural daylight and no yard in which to exercise. It was even impossible for him to read a book because his cell was so overcrowded*".[287] The ECHR is not in fact the only setter of minimum standards. The EU member states are required under the directive on reception conditions to guarantee minimum standards of conditions for detained asylum seekers. Even though the directive sets only minimum conditions and leaves room for national interpretations, broadly it is of importance namely because by setting the minimum standards it obligates the States whose reception conditions have lacked behind to improve the situation .[288]

The Court referred to its earlier observations when it had found "*overcrowding and inadequate facilities for heating, sanitation, sleeping arrangements, food, recreation and contact with the outside world*" to cumulatively amount to inhuman treatment. In the circumstances of Mr. Dougoz the judges placed most emphasis on the "*overcrowding and absence of sleeping facilities, combined with the inordinate length of the period during which he was detained in such conditions*". Similar conditions were described by the Court in its judgment on *S.D.* as "*unacceptable*" and "*degrading*".[289]

Adding to the Court's valuing of physical conditions of detention, the Court held in its *Tabesh* judgment that even if brushing aside the problems of hygiene and promiscuity, the (Greek) regulations concerning leisure and eating possibilities alone contradicted with article 3 of the Convention. The lack of possibilities to enjoy of open air, let alone do any physical exercise was the particular reason which the Court held that would cause feelings of isolation with negative consequences, both mental and physical, amongst the inhabitants. The Court also expressed "*serious doubts*" of the diet in the detention centres, more precisely of the possibility to maintain a diet which would satisfy the minimum alimentary

[286] *Charahili v. Turkey* (13.4.2010, 46605/07) paras 68,76-78. Mr. Charahili was a Tunisian national who was arrested in Turkey as a suspect of being a member of Al-Qaeda. He was later recognised as a UNHCR refugee, because he was threatened in Tunisia for being a member of an illegal organization.
[287] *Dougoz v. Greece* (6.3.2001, 40907/98) para. 45. Mr. Dougoz was a Syrian national who had been recognised as a UNHCR refugee, but was also convicted of crimes. He was held in detention while awaiting expulsion from Greece.
[288] The Reception Conditions Directive Factsheet. The Directive applies only to third country nationals and stateless persons, thus leaving possible asylum seekers who are citizens of the EU outside the scope.
[289] *Dougoz v. Greece* (6.3.2001, 40907/98) paras 46-48; *S.D. v. Greece* (11.6.2009, 53541/07) paras 41,47-54.

needs with less than 6€ per day. Were the length of detention to be limited that would not in itself raise a problem, but the judges argued that domestic authorities must arrange "*a well-balanced*" diet if they wish to detain persons in closed centres for more than a few days.[290]

Feelings of isolation also came up in the case of *Riad and Idiab*, who on the other hand had not been subjected to such extreme conditions as the persons mentioned above. The Palestinian refugees fled Lebanon but due to lack of necessary visas were refused entry and taken to a transit centre near the airport. The Court did not find it acceptable that the individuals had been left in the transit centre for more than ten days without any juridical or social assistance, any means of subsistence, accommodation and communication. The judges claimed that when a state deprives persons of their liberty, it ought to make sure that everything in the detention measures and conditions respects human dignity. The responsibility of initiative thus remains on the state; it is not for the detained persons to *seek* aid for their needs. Again the question was not the conditions in itself, but the fact that the zone could only hold persons for short durations. The isolation, lack of access or contacts to outside or to do any physical exercise, and the lack of dining possibilities together are seen to contribute to "*feeling of solitude*" which further amounts to degrading treatment.[291]

The Court declared it "*totally unacceptable*" that anyone could be held in such conditions, in absolute negligence of basic needs. In the Riad and Idiab judgment the judges did not go so far as to accuse the centre of intentional humiliation, but they maintained that the applicants must have had felt "great mental suffering" and caused "*sentiments of humiliation and degradation*", which the mere possibility of receive three meals per day did not change. The Court stated that the applicants' humiliation was even worsened by removing them to yet another centre before releasing them. The judges stopped their evaluation already at this point, stating that it was no longer necessary to discuss "the brutalities and insults" from the part of the police because the reports did not reveal anything on the issue.[292]

Special needs of children

The most explicit wording against the states' measures the Court reveals in context of detaining a child. Also EU's Reception Directive sets the child's best interest as the primary

[290] *Tabesh v. Greece* (26.11.2009, 8256/07) paras 38-44.
[291] *Riad and Idiab v. Belgium* (42.1.2008, 29787/03 ; 29810/03) paras 81,102-104.
[292] *Riad and Idiab v. Belgium* (42.1.2008, 29787/03 ; 29810/03) paras 106-111.

consideration, even though there do not exist special provisions on detention of minors.[293] Kaniki Mitunga was five years old when she was detained for nearly two months in a closed centre, which was used to detain (adult) illegal immigrants while they were pending removal. The judges centred their attention on the fact that a five-year old child, who was not accompanied by her parents, was held in same conditions as adults. Even the Belgium authorities did not deny that the place was 'not adapted' to needs of children.

> "A five-year-old child is quite clearly dependent on adults and has no ability to look after itself so that, when separated from its parents and left to its own devices, it will be totally disoriented. […] The fact that the second applicant received legal assistance, had daily telephone contact with her mother or uncle and that staff and residents at the centre did their best for her cannot be regarded as sufficient to meet all her needs as a five-year-old child."[294]

The Court requires effective protection "*particularly to children and other vulnerable members of society*". It found Kaniki Mitunga to have been "*in an extremely vulnerable situation*", because she was alone, a child, and "*an illegal immigrant in a foreign land"*. Particular concern was raised over "*the serious psychological effects*" and "*considerable distress*" the detention must have had on the child. The judges emphasised that the absoluteness of article 3 "*is the decisive factor and it takes precedence over considerations relating to the second applicant's status as an illegal immigrant*". The Belgian authorities had informed the mother of her daughter's situation and appointed a lawyer to assist the child with contacts to embassies, but the Court defined these measures as "*far from sufficient"*, and concluded that "*the second applicant's detention in such conditions demonstrated a lack of humanity to such a degree that it amounted to inhuman treatment*".[295]

The Court recently solidified its stance taken in the Mubilanzila Mayeka and Kaniki Mitunga judgment, with a difference of taking yet a step further to protect children. Ms. *Aina Muskhadzhiyeva* and her four children fled Russia to seek for asylum in Belgium. The family were Russian nationals of Chechen origin, and they were held in a detention centre for over a month. The judges pointed as the major difference in their situation to be that the children were not separated from their mother. Yet, they went on to emphasise that even that does not suffice to relieve the authorities from their *obligation to protect children*. They mentioned specifically that at least two of the children were able to be aware of and

[293] Hailbronner 2007, 170; European Council Directive 2003/9/EC, 27.1.2003.
[294] *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium* (12.10.2006, 13178/03) para. 52. The reason why the child ended up alone in the detention centre was that her mother, who had received refugee status in Canada, asked her brother who was living in the Netherlands to collect the child from the DRC and care for her until she could join her mother in Canada. At arrival in Belgium, the brother did not have documentary to proof his relationship to the child, so she was refused to enter Belgium and taken into detention.
[295] *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium* (12.10.2006, 13178/03) paras 42,50-59.

comprehend their environment, which in the centre in question was "*misfit to receive children*". Only adding to the problems was the mental state of health of the children, which worsened during the detention. Instead of merely relying on the 1950 Convention the judges explicitly recalled also the UN Convention on the Rights of the Child. The Court did not find it necessary to go into details of describing the conditions in the centre, but simply found that in those conditions the young age of the children, the length of detention combined to their health were sufficient to amount to a breach of article 3.[296]

In both cases the Court also paid attention to the question of whether a parent qualifies as a "victim" of the ill-treatment of his or her child' Ms. Mubilanzila Mayeka had not been deprived of liberty herself, but when evaluating the Belgian authorities' conduct towards her the judges admitted that she 'suffered deep distress and anxiety as a result of her daughter's detention. The authorities conduct' could also be described as lack of it: "*the only action the Belgian authorities took was to inform her that her daughter had been detained and to provide her with a telephone number where she could be reached*". On the contrary, Ms. Muskhadzhiyeva's anxiety over her children did not amount to inhuman or degrading treatment, because she was able to be with her children. In the judges' this eased her concerns.[297]

For parents the possibility to be with their children is thus considered to significantly ease their anxieties. However, when it comes to children, irrespective of whether or not they have the security of their parent's company, the judges hold them to be so vulnerable that they need special treatment in any case. Due to the detailed and complex examination of what constitutes degrading or inhuman treatment it is not possible to give an exhaustive answer to where is the line of unacceptable conditions of detention.

When evaluating the conditions of detention the judges actually may go in great detail into the issue. In their argumentation, a variety of details relevant to humane surroundings are taken into account, ranging from hygiene to physical exercise and the type of diet. The question of conditions is not detached from the length of detention. Persons may be held in a rather ascetic environment for a short length of time, but the judges do not find it acceptable to prolong such situations above the strictly minimum, especially when the

[296] *Mukhadzhiyeva and others v. Belgium* (19.1.2010, 41442/07) paras 6-8,56-63. The children were aged between seven months and seven years. The children had psychological psychosomatic symptoms.
[297] *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium* (12.10.2006, 13178/03) para. 62; *Mukhadzhiyeva and others v. Belgium* (19.1.2010, 41442/07) paras 64-66.

individuals have not even been convicted of crimes, but are detained for mere administrative measures.

Ultimately, when assessing the conditions of detention the Court pays considerable attention to the psychological effects of the situation. Even when discussing the physical surroundings the judges relate the physical conditions to the effects felt on individual, human level, including distress, humiliation, feeling of anxiety and isolation.

5 Conclusion

Although no state has recognised a right to immigrate, a right to emigrate may be found in numerous international agreements. The European Court of Human Rights does not have the powers to modify national immigration laws, and it does not deny the domestic authorities' right to control access to national territories. On the contrary, each judgment which concerns migration issues enforces the Court's stance on the importance of state sovereignty. Yet it cannot be denied that the Court has been able to influence the domestic immigration and residence decisions. This is the consequence of its entitlement to evaluate whether the national authorities have interpreted their own legislation accordingly with the Convention rights.[298] Even though the states tend to prefer individual settlements instead of changing their domestic legislation, they have also sought to avoid conflicting situations with the Court both through recourse to friendly settlements and by applying the values pronounced by the Strasbourg judges in the domestic jurisdictions automatically during the domestic proceedings. Therefore, even if the Strasbourg influence is not straightforward, the contracting states evidently are not oblivious to the judges' sentiments in Strasbourg.

In European context the Court's influence may also be compared to another powerful and better known actor, namely the European Union. Although the EU member states constitute only a part of the contracting states of ECHR, the EU does have effects on its bordering states, which have acceded to the 1950 Convention. The Convention thus has importance even in the union's "*buffer zone*" and the prospective future member states of the Union. Indeed, due to the partial overlapping of the EU's European Court of Justice (ECJ) and the Council of Europe's Court in Strasbourg, a sort of division of functions has evolved among the two courts. Whereas the ECJ is more important economically and from the point of view of federal regulation, it has largely left the Strasbourg Court to define "*European values and identity*".[299] It has also been observed that in the EU the legally binding instruments of the post-Amsterdam era contain very little human rights context: most measures are concerned with preventing illegal immigration and assisting the member states in expulsion of illegal immigrants.[300] The human rights content was more pronounced only in the early legislative attempts of the 1970s, whereas today there are only scant

[298] Lambert 2007, 14; European Court of Human Rights: Questions and Answers.
[299] Coleman 2009; Goldhaber 2007, 3.
[300] Attempts to increase possibilities of removal go even beyond customary international law, namely as attempts to obligate third states to readmit persons of any nationality, with the sole reason of transit migration or temporary sojourn. Coleman 2009.

references to the Geneva Convention and few other central human rights instruments.[301] Despite the alleged lack of human rights content the member states are thus not liberated of taking the individuals' rights into account. Even if the community legislation lacks provisions, the governments still must answer to the Strasbourg Court if there seems to be a breach of one of the Convention rights. The Court's role may thus be seen as a human rights counterpart of a kind to the EU. Respectively the lack of human rights content in the EU instruments, e.g. in readmission agreements, has been defended by arguing that even if the agreements and directives offer only minimum standards, international human rights agreements and the 1950 Conventions still apply, whereby within the Union the human rights are secured[302].

An ongoing adjustment remains: how to draw a line between an individual's rights and state sovereignty? This concerns particularly the entry and residence rights of immigrants who want to join their family already residing in a new country, or who have ties to their new home country, e.g. through family, work or cultural attachment. These persons' residence and immigration rights are constantly weighed against the right of a state to select its immigrants and to ensure public security and order. The discussion concerning individuals in need of protection on the other hand is different in its argumentation. Because of absoluteness of article 3, if an individual is accepted to be in need of protection, independently of whether he is a convicted criminal who fears inhuman treatment in a foreign prison, or a *bona fide* refugee, he cannot be removed to face torture or inhuman or degrading treatment. If there exists a real probability of torture or inhuman treatment, *everyone* irrespective of a state's interest has the Court's support. Because this point of departure is not generally denied even by the governments, the most insecurity seems to be caused by fact finding and determination of credibility of stories and accounts on situations in the countries of destination. Protecting individuals has made the Court participate in the debate on the fight against terrorism, and strictly defend the non-negotiable nature of human rights.

On the basis of the Court's case law it may be concluded that it influences the domestic decisions concerning non-nationals' movements mainly in the sphere of international protection. When persons flee persecution but do not come within the Geneva definition of refugee, they still have a possibility to find shelter in Europe on the basis of the 1950 Convention, presuming that they are able to convince the judges of the *reality* and

[301] Cholewinsky 2004, 163,169-171. However, at least in theory the accession of EU into the ECHR became possible when Protocol No. 14 entered into force the 1 July 2010. CoE: Protocol No. 14 Factsheet.
[302] Coleman 2009.

probability of their fears coming true. The Court may analyse the personal situation into very detailed aspects. The principal points of disagreement both within the Court and between the Court and governments in fact often derive from particular details and interpretation of the situation in the countries of origin. This confirms in particular what Goodwin-Gill and McAdams have construed of states' attitudes to refugee protection: the sanctity of the institution is not questioned, but the facts and motives are[303]. In the European context, when it comes to other issues, the general lines of values are also rather compatible between the domestic authorities and the Court. Evidently in many issues the national representatives in the Parliamentary Assembly and the Council of Ministers of the CoE have gone considerably further than the Court in their willingness to protect the rights of immigrants and non-nationals, but it may easily be questioned whether they would be willing to make those recommendations into binding instruments. On the other hand, some dissenting voices within the Court also hint at gradual spreading of ever stricter defence of individuals' rights. Another characteristic of the dissenting opinions is that within them the judges are able to express themselves more explicitly and straightforwardly. If one does not go into evaluation the implicit values of terms such as security or democracy, the Court's judgments in general apply a very neutral language and do not often show emotion or explicitly value-laden vocabulary.

Although the ECHR neither explicitly secures a right to asylum, nor sets an obligation on states to grant asylum to individuals, the Strasbourg case law confirms the importance of the implicit obligation not to expose any person to torture or inhuman or degrading treatment or punishment. In addition, as the Convention is often referred to as a living instrument the case law may yet evolve, e.g. in particular in interpreting cases involving capital punishment. Because the Convention lacks many explicit rights, the possibility of finding them implied under other rights further leaves open possibilities for future developments.

Besides the influence in cases concerning protection of asylum seekers and refugees, no less important are the Court's powers in cases involving the right to family and private life. Indeed, it has been argued that due to the living nature of the Convention and most importantly the nature of rights protected under article 8, the non-nationals' right to private and family life may entail the most prospects for future developments of the Court's interpretations. This is not the least contested by the developments that may be witnessed

[303] Goodwin-Gill and McAdam 2007, 149.

during the past decades, which have seen the Strasbourg judges grant family members a right to immigrate, and even an irregular immigrant a right to receive a residence permit.

Grant has made a notable observation that the reigning status of refugee protection in the migration field is one of the reasons why migrants' rights "*have remained on the margins of the international human rights agenda*".[304] This is particularly startling when one remembers that refugees and asylum seekers represent only 7 to 8 % of all international migrant population. The Strasbourg case law seems to support this statement. Among the cases concerning non-nationals, in particular when focusing attention on the right to reside and immigrate in the territories of the CoE, articles 2 and 3 are the most commonly at issue. Besides articles 2, 3, and 8 which were discussed in this thesis, other rights may be found as well, but besides the procedural safeguards protected under article 6, other articles are significantly rarer to encounter. On the other hand, the nature of cases which are discussed in the Court are not a result of mere Court selection, but naturally also depend on the individuals who decide to make an appeal to the Court, and on the situations which have been able to be resolved under domestic courts.

Despite the changes that seem even radical if compared to the climate of attitudes in the seventies, the steps that the Court has taken in protection of non-nationals' other rights than protection from maltreatment under article 3 have been rather cautious. The significant rulings it has made find a counterbalance in the judges' argumentation, which consistently and firmly reinforce the states' sovereignty in migration issues. Whereas a decision on whether an individual is in need of protection may depend on the smallest detail of the characteristics of the case, similarly the situation of an individual who fears that his or her family ties may be severed because of expulsion is commonly subjected to careful and detailed scrutiny. In cases concerning the right to family or private life the credibility of a particular history is not so much in question. Instead, other circumstances such as the age of the person in question, a persons criminal behaviour or criminal past on one hand, and his ties to the new home country, be it family or length of stay are crucial when the Court is a drawing a balance between an individual's and a state's rights. Whereas any person may be offered protection under article 3, the "*dangerousness*" of an individual may override his or her right to maintain family or private life. If the judges consider the crimes serious enough an individual must have very strong, preferably family who cannot follow the expelled person to any other country, strong ties in his country of residence to be able to remain there.

[304] Grant 2005.

Non-nationals' right to family seems to be better established than their right to private life, i.e. personal and cultural ties in the host country independently from consideration of spouse or children. Yet the debate even within the Court on the protection of long-term and in particular second generation immigrants continues. It may be asked whether the alleged poor integration of certain second generation immigrants is at least partly a result of certain attitudes in the host countries in general. A SOPEMI report showed that educational and employment gaps remain between nationals and second-generation and young immigrants in many countries. When social networks are an important factor in finding employment and integrating into society, lack of both knowledge and networks combined with possible immigration do not create optimal surroundings for successful integration.[305] As we remember, even some judges have questioned why a host country which has originally agreed to receive an immigrant ought not to be held responsible for him or her even during difficult times.

A reason for why in most cases the ultimate interest is in the details of each situation, even on personal characteristics and travel logs of individuals, may be the fact that the judges do not question the major ground of argumentation which is used to favour removal measures, that is the calls for security, public good and morality. The governments invoke health, morals, road safety and protection from terrorism to expel non-nationals, and the judges generally accept that such aims are acceptable under the Convention without actually investigating the meaning and correspondence of such argumentations to reality. For instance, the governments have used lack of integration as one of the reasons for justifying expulsion, but instead of commenting on how they actually perceive a *lack* of integration. Instead of finding straight comments of how a lack of integration is manifested to the judges, such stances are more likely to be found in contrary comments. For instance constant employment means integration into the domestic labour market, and holding a passport of the former country of origin may be a sign of ties to that country.

The centrality and visibility of security related argumentation in the Court's case law may firstly be explained by the fact that it is the argument most commonly employed by governments. The Court must necessarily answer to the arguments presented both by the state and by the individuals in question. A partial explanation may also be the complexity of weighing state security to individuals' rights in general. Domestic systems have settled procedures to deal with e.g. family reunification, but more abstract questions involving

[305] SOPEMI 2007, 78-84.

"*threats to nations*" may be more difficult to solve at national level, especially when the authorities' interest is juxtaposed with those of one individual. Unless the evaluation goes into questioning the grounds of "*necessity"* which most commonly derives from security, the major lines of the Court's argumentation therefore will likely not see major changes.
As to the rights of irregular immigrants, who in general have difficulties in invoking any rights due to being illegally present in the territory of a state, the Court's case law so far does not give a strong basis for those without residence permits to have their position legalised by the Court. Even though human rights pertain to irregular immigrants as they pertain to any person, in fear of being removed they are not likely to pursue their rights in public. In addition, if deported it is ever more difficult to find juridical remedies to violations of one's rights. Indeed, the Court constantly reconfirms the sovereignty of states in immigration issues. On the contrary, regularisation programmes are completely in the hands of national governments, and thus easier approached.

To detain non-nationals in the name of immigration control, the states are allowed a wide margin of appreciation by the Court. By carefully writing procedures and conditions of detention into domestic legislations, and ensuring that the detention conditions are human, the governments seem to be able to detain asylum seekers and potential immigrants even during long periods. Therefore finding breaches of article 5 in the form of arbitrary detention is more likely than finding judges' conclusions on failure in the test of proportionality. In the name of security and controlling possible illegal entries, the states have wide possibilities to limit the liberty of non-nationals. The same applies in situations of expulsion.

Whereas persons in need of protection have strong claims for shelter under article 3, in the context of detention asylum seekers are liable to be perceived of as potential immigrants, probably abusing the asylum systems. The Court does strongly oblige the states to more efficiently separate asylum seekers from potential irregular immigrant, but allows detention measures while the applications and identity checks are dealt with. The physical conditions of detention on the other hand are subject to a detailed investigation. The physical surroundings in the detention facilities does not have to be unruly harsh for the judges to find the environment to cause "*feelings of isolation", "sentiments of humiliation and degradation"* or *"distress"*. The judges thus generally present detention in itself as a legitimate measure, but when individuals are deprived of their liberty they must still be treated with respect.

What was underlined by the judges in its Soering judgment of 1988 on the "*interpretation of the Convention in the light of conditions today*" still holds true and leaves open the future development of the interpretation of the Convention rights. It ought not to be taken for granted that the change inevitably leads to a steady widening of how we understand the rights of non-nationals, in particular as the governments are not openly interested in surrendering their sovereignty in immigration issues. Yet, the voices of the judges are not unanimous, and especially the residence rights of long-term and second generation immigrants have invoked heated and critical argumentation within the Court.

Although the case law of the European Court of Human Rights evidently does not entirely correspond to the reality of immigration flows and their characteristics, it reflects some images of the realities and historical tendencies. The cases involving Maghreb nationals in France or the Turks in Germany and the Netherlands are very common, and possibly the difference between the number of cases brought by second-generation immigrants against Sweden and Germany may be explained by the differences in possibilities to obtain citizenship in those countries. The pre-1970s Swedish labour migration policy opted for permanent immigration, which treated the foreign labour force as future citizens explains, whereas Germany relied for a long time on guest-workers; Germany did not "*modernize*" its closed *jus sanguinis* citizenship policy until 2000, which left a significant part of population with foreign background without citizenship rights. There have been speculations of possibility of generations who were born and lived in Germany without obtaining citizenship.[306]

The Strasbourg case law is not only a fruitful source to enlighten a regional supranational actor's views on the right to migrate, and the residence rights of non-nationals. Equally interesting for research would be the governments' arguments to justify their sometimes harsh measures against individuals, and their attempts to stretch and bend the principles already established by the Court. Goodwin-Gill and McAdam as a matter of fact admit that they were sceptic of the abilities of the Strasbourg Court to impact the states' treatment of non-nationals. However, the authors have changed their minds and now avow that the Court has had a considerable impact, especially in protection of refugees by expanding the scope of *non-refoulement* beyond the Geneva Convention's understanding. By closer comparison of the Court's stances against the governments' argumentations the image of the debate on migration issues would be more extensive and consequently more enlightening.

[306] Westin 2006; Bartram 2005.

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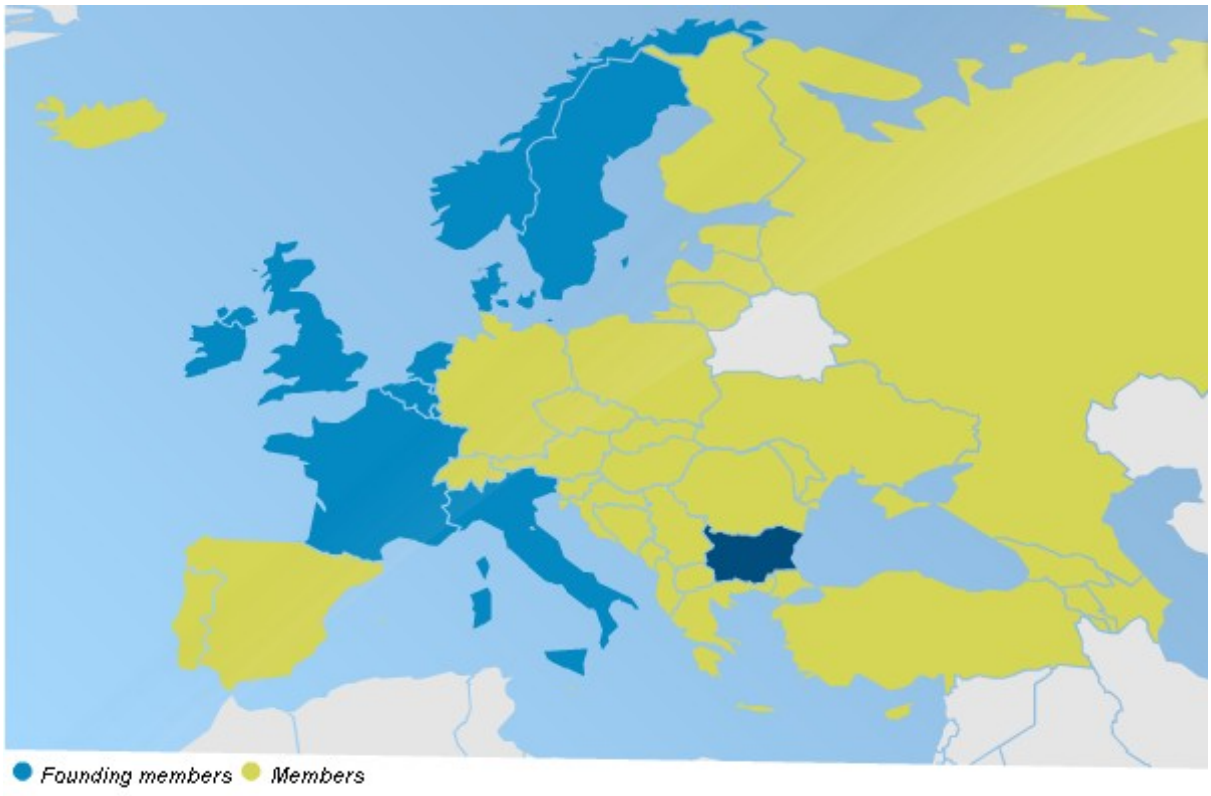
Appendix 1. Map of the Council of Europe



Source: <http://www.coe.int/aboutcoe/index.asp?page=47pays1europe>

The contracting states to the European Convention of Human Rights are:
Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Monaco, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Russia, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, The former Yugoslav Republic of Macedonia, Turkey, Ukraine and United Kingdom.

Appendix 2. Selected articles of the European Convention of Human Rights

Article 2 . Right to life

1) Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2) Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
   a) in defence of any person from unlawful violence;
   b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
   c) in action lawfully taken for the purpose of quelling a riot or insurrection.

Article 3 . Prohibition of torture

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 5 . Right to liberty and security

1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
   a) a the lawful detention of a person after conviction by a competent court;
   b) b the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
   c) c the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
   d) d the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
   e) e the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
   f) f the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2) Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3) Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4) Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5) Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

Article 8. Respect for family and private life

1) Everyone has the right to respect for his private and family life, his home and his correspondence.

2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health

Article 14. Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Article 15. Derogation in time of emergency

1) In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

2) No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.

3) Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

Article 30. Relinquishment of jurisdiction to the Grand Chamber

Where a case pending before a Chamber raises a serious question affecting the interpretation of the Convention or the protocols thereto, or where the resolution of a question before the Chamber might have a result inconsistent with a judgment previously delivered by the Court, the Chamber may, at any time before it has rendered its judgment, relinquish jurisdiction in favour of the Grand Chamber, unless one of the parties to the case objects.

Article 43. Referral to the Grand Chamber

1) Within a period of three months from the date of the judgment of the Chamber, any party to the case may, in exceptional cases, request that the case be referred to the Grand Chamber.

2) A panel of five judges of the Grand Chamber shall accept the request if the case raises a serious question affecting the interpretation or application of the Convention or the protocols thereto, or a serious issue of general importance.

Appendix 3. Example of the Court's judgment

THIRD SECTION
CASE OF JAKUPOVIC v. AUSTRIA
(Application no. 36757/97)
JUDGMENT
STRASBOURG
6 February 2003

[…]

PROCEDURE

[…]

THE FACTS

8. The applicant was born in 1979 and lived at the time of the events in Vöcklabruck (Austria). He presently lives in Banova Jaruga (Croatia).

9. In February 1991 the applicant arrived in Austria together with his brother, born in 1985, and joined his mother who had already been living and working there. Subsequently his mother remarried. The applicant's family now consists of his mother, his stepfather, his brother and two half sisters, born in 1993 and 1995.

[…]

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

18. The applicant complains that the residence prohibition imposed on him violated his right to respect for his private and family life. He relies on Article 8 of the Convention which reads as far as relevant as follows:

"1. Everyone has the right to respect for his private and family life....

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society ... for the prevention of disorder or crime...."

19. The applicant submits that the residence prohibition imposed on him constitutes a disproportionate measure as the offences of which he was convicted were merely minor acts of juvenile delinquency, and the Austrian authorities did not sufficiently consider his private and family situation. The applicant further submits that before his deportation in April 1997 he had developed strong ties with Austria. He had lived with his mother and siblings and had a close relation with them, whilst he no longer had contacts with his father. He last met him in 1988 and since then his father was reported missing after the armed conflict in Bosnia and Herzegovina. The applicant also submits that he has a fiancée in Austria, Mrs A.S., who has given birth to his son (April 1998).

20. The Government accept that the residence prohibition interfered with the applicant's right to respect for his private and family life. However, the measure at issue was justified under paragraph 2 of Article 8, being in accordance with the law – the relevant provisions of the Aliens Act – and having pursued the legitimate aim of the prevention of disorder or crime. The Government further contend that measure was necessary in a democratic society within the meaning of Article 8 § 2 of the Convention and that the Austrian authorities have

not overstepped their margin of appreciation.

21. The Government submit that the applicant's convictions justified the residence prohibition. In 1995, after having been in Austria for four years, he was convicted of burglary and in 1996 he was again convicted for this offence. Furthermore, in 1995 a prohibition on the possession of arms was issued against the applicant, after he had attacked several persons with an electroshock device. Considering these serious breaches of public order, the Austrian authorities could reasonably conclude that the applicant's further stay would run counter to the public interest. As regards the applicant's private and family life, the Government submit that the applicant had only come to live with his mother in Austria at the age of eleven and is able to speak the language of his native country. He can therefore reasonably be expected to find there a job, similar to the one he had in Austria.

22. The Court notes that it was common ground between the parties that the residence prohibition constituted an interference with the applicant's right to respect for his private and family life, as guaranteed by Article 8 § 1 of the Convention. Furthermore, there was no dispute that the interference was in accordance with the law and pursued a legitimate aim, namely the prevention of disorder or crime, within the meaning of Article 8 § 2. The Court endorses this assessment.

23. The dispute in the case relates to the question whether the interference was "necessary in a democratic society".

24. The Court recalls that no right of an alien to enter or to reside in a particular country is as such guaranteed by the Convention. Nevertheless, the expulsion of a person from a country where close members of his family are living may amount to an infringement of the right to respect for family life guaranteed by Article 8 § 1 of the Convention (Moustaquim v. Belgium judgment of 18 February 1991, Series A no. 193, p. 18, § 36).

25. It is for the Contracting States to maintain public order, in particular by exercising their right, as a matter of well-established international law and subject to their treaty obligations, to control the entry and residence of aliens. To that end they have the power to deport aliens convicted of criminal offences. However, their decisions in this field must, in so far as they may interfere with a right protected under paragraph 1 of Article 8, be necessary in a democratic society, that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued (see the Dalia v. France judgment of 19 February 1998, *Reports of Judgments and Decisions* 1998-I, p. 91, § 52; the Mehemi v. France judgment of 26 September 1997, Reports 1997-VI, p. 1971, § 34; *Boultif v. Switzerland*, no. 54273/00, § 46, 2 November 2001).

26. Accordingly, the Court's task consists in ascertaining whether the refusal to renew the applicant's residence permit in the circumstances struck a fair balance between the relevant interests, namely the applicant's right to respect for his private and family life, on the one hand, and the prevention of disorder and crime, on the other.

27. The Court notes that the Austrian authorities imposed a ten year residence prohibition on the ground that the applicant had been convicted twice between 1995 and 1996 to suspended imprisonment sentences of ten weeks and five months for burglary. The Austrian authorities found that in view of this criminal record a residence prohibition was necessary in the public interest and that the applicant's private interests in staying in Austria did not outweigh the public interest.

28. The Court observes that at the time of the expulsion the applicant had not been in Austria for a long time – just four years. Furthermore his situation was not comparable to that of a second generation immigrant, as he had arrived in Austria at the age of eleven, had previously attended school in his country of origin and must therefore have been well acquainted with its language and culture. However, the residence prohibition seriously upset his private and family life: he had arrived in Austria with his brother to join his mother and the new family she had founded there and has apparently no close relatives in Bosnia. The applicant's father remained in Bosnia, a fact which is emphasised by the Government, but the applicant points out that he last saw his father in 1988 and the father

has been reported missing since the end of the armed conflict in that country.

29. Thus, the Court considers that very weighty reasons have to be put forward to justify the expulsion of a young person (16 years old), alone, to a country which has recently experienced a period of armed conflict with all its adverse effects on living conditions and with no evidence of close relatives living there.

30. The Government rely in this respect on the applicant's criminal record. The Court finds that this record, which is the essential element of justification for the expulsion, must be examined very carefully. It consists of two convictions for burglary. The Court cannot find that these convictions – even taking into account a further set of criminal proceedings which were discontinued after the victim had been compensated by the applicant – for which the Austrian courts had only imposed conditional sentences of imprisonment can be considered particularly serious as these offences did not involve elements of violence. The only element which may indicate any tendency of the applicant towards violent behaviour was a prohibition to possess arms issued in May 1995. Although the seriousness of such a measure should not be underestimated, it cannot be compared to a conviction for an act of violence, and there is no indication that such charges have ever been brought against the applicant.

31. However, the Court does not consider the applicant's relation to Mrs A.S. a weighty element to be taken into account when balancing the interests at issue, because the applicant has not argued that he had entered into this relationship before September 1995, when the residence prohibition was issued against him and after this time he must have been aware that his further stay in Austria was unlawful.

32. Taking all the above elements into account, the Court finds that by imposing the residence prohibition in the particular circumstances of the case, the Austrian authorities have overstepped their margin of appreciation under Article 8 as the reasons in support of the necessity of the residence prohibition are not sufficiently weighty. The Court is therefore of the opinion that the interference was not proportionate to the aim pursued.

33. There has accordingly been a breach of Article 8 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

34. Article 41 of the Convention provides:

"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Non-pecuniary damage

[…]

B. Order to the respondent State

[…]

C. Costs and expenses

39. The applicant claimed 13,669.22 EUR for costs and expenses incurred in the domestic court proceedings.

40. The Government did not comment on the applicant's claim.

41. The Court recalls that, according to its case-law, it has to consider whether the costs and expenses were actually and necessarily incurred in order to prevent or obtain redress for the matter found to constitute a violation of the Convention and were reasonable as to quantum (see, for instance, Bladet Tromsø and Stensaas v. Norway [GC], no. 21980/93, ECHR 1999-III, § 80). The Court considers that these conditions are only met as regards the costs incurred in the proceedings on the residence prohibition, which the applicant puts at 4,220.98 EUR. Consequently the Court awards this sum.

42. The applicant further claims 3,715.11 EUR for costs incurred in the Convention proceedings.

43. The Government did not comment on the applicant's claim.

44. The Court finds this claim reasonable, and consequently allows it in full.

D. Default interest

[…]

FOR THESE REASONS, THE COURT

1. *Holds* by four votes to three that there has been a violation of Article 8 of the Convention;
2. *Holds* unanimously that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant;
3. *Holds* unanimously
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, 7,936.09 EUR (seven thousand nine hundred thirty six euros and nine cents) in respect of costs and expenses;
   (b) that simple interest at an annual rate equal to the marginal lending rate of the European Central Bank plus three percentage points shall be payable from the expiry of the above-mentioned three months until settlement;
4. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 6 February 2003, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Vincent Berger Georg Ress
Registrar President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the joint dissenting opinion of Mr Caflisch, Mr Kūris and Mr Ress is annexed to this judgment.

JOINT DISSENTING OPINION OF JUDGES CAFLISCH, KŪRIS AND RESS

We do not share the views of the majority in this case. It is true, on the one hand, that the measure directed at the applicant is a harsh one, as the centre of his family life has been localised in Austria and as ten years is a long period for a residence prohibition. On the other hand, the applicant lived in Austria for a relatively short time (six years). It is not as if he had spent all his life there. He speaks the language of his country of destination and presumably could, from the moment of his expulsion onwards, build a new existence in that country. The presence of an Austrian fiancée and of a son born out of this relationship seem to be subsequent to the relevant facts. All these circumstances relativise a measure which, otherwise, could have been viewed as disproportionate, account being taken, especially, of the applicant's relatively young age.

The decisive element, however, appears to be that, shortly after having been convicted for a second series of offences, in 1995 (judgement, § 11), and a consecutive ten-year residence prohibition (ibid., § 1), the applicant committed a new series of burglaries for which he was, again, convicted (ibid., § 13). This is evidence of the applicant's callousness and of the contempt in which he held the laws and institutions of his host country, and also of the danger he presented to that country. To us, these elements should override any doubts one might otherwise have had regarding the proportionality of the measure. Accordingly, we see no violation of Article 8.