UiO : Faculty of Law
University of Oslo

Reconceptualising "Private Life" of Long-Term Settled Migrants: An Evaluative Analysis of ECtHR Article 8 Jurisprudence

Candidate number: 9002

Submission deadline: 31.01.2021

Number of words: 19989

Table of contents

1 Introduction

1.1 Introductory remarks

The influx of migration to Europe has been on the rise throughout the last decade, sparking intensified discussions pertaining to immigration control. The "migration crisis" in 2015 and 2016, in particular, has led some European states to adopt hard-line approaches to immigration, in turn sparking internal division within the two main European organisations, the European Union (EU) and the Council of Europe (CoE).[1] Intra-regional tensions such as these highlight the importance of legally binding international and regional human rights instruments, which have the capacity to clarify the scope of States' obligations vis-á-vis migrants within their territory. The European Convention of Human Rights (ECHR or "the Convention") constitutes the core instrument in this regard within the European context.[2]

Neither the ECHR, nor any other international human rights instrument, guarantee a right to freely choose one's country of residence.[3] Rather, the fundamental principle of national sovereignty dictates that States are entitled to control the entry and stay of foreigners within their territory.[4]

Nonetheless, States Parties to the ECHR must conform with Convention standards in exercising immigration control.[5] Article 8 of the Convention constitutes one such standard. The provision affords, inter alia, a right to respect for one's private life to everyone within the jurisdiction of the ECHR Member States.[6] The right, at its core, entails that a State Party to the Convention may not interfere in any aspect of a resident's private life sphere, unless it can demonstrate that there exists a "pressing social need" which necessitates the undertaking of the interference.[7]

[1] Greenhill (2016) pp. 317-320
[2] Thym (2014) p. 106
[3] see e.g: Üner v. the Netherlands (2006) § 54
[4] ibid; Moustaquim v. Belgium (1991) § 43
[5] Thym (2008) p. 87; Boultif v. Switzerland (2001) § 46
[6] ECHR Article 8(1)
[7] Berrehab v. the Netherlands (1988) § 28

In its jurisprudence, the European Court of Human Rights (ECtHR or "the Court") has established that "the totality of social ties" of a settled migrant with his host state falls within the scope of "private life" cf. Article 8.[8] Recognising that the strength of a migrant's ties with his host country is dependent, to a great degree, on the length of his residence there,[9] the Court has established that a long-term settled migrant (LTSM hereafter) may not be expelled from his country of residence unless "very serious reasons" necessitate such a measure.[10] In line with the Court's principle of subsidiarity, it is first and foremost up to the individual Contracting Parties to the Convention to decide what such "very serious reasons" may be. In conducting this assessment, States Parties are granted a "certain margin of appreciation".[11]

Cases concerning LTSMs expose tangible tensions between the principle of national sovereignty and the aim and purpose of the ECHR - to guarantee fundamental human rights to everyone within the jurisdiction of its Member States.[12]

On the one hand, the Court's recognition of the protection of long-term residence as being an end in itself poses a direct challenge to States' sovereign right to immigration control.[13] At the same time, the Court has consistently reaffirmed that States Parties to the Convention have the power to expel criminally convicted foreign residents from their territory, including those who have spent all of their life there, without such a decision necessarily breaching the migrant's right to respect for their private life cf. Article 8.[14] This affirmation raises questions concerning the universality of the rights enshrined in Article 8, since it challenges the fundamental premise that "All human beings are born free and equal in dignity and rights" which flows from Article 1 of the Universal Declaration of Human Rights (UDHR).[15] This, in turn, raises the question of whether the "private life" protection afforded to LTSMs lives up to the doctrine that ECHR protection must be "practical and effective".[16]

---

[8] Üner § 59

[9] Ibid., § 58

[10] Maslov v. Austria (2008) § 75

[11] see e.g. Slivenko v. Latvia (2003) §113; Maslov § 76

[12] Thym (2008) p. 87; ECHR Preamble

[13] Thym (2014) p. 107; Warren (2016) p. 131

[14] see e.g. Üner § 54

[15] UDHR Article 1

[16] See e.g. Kutic v. Croatia (2002) § 25; Ashingdane v. United Kingdom (1985) § 57

These considerations illustrate that striking a "fair balance" between ensuring individual rights while simultaneously respecting States' legitimate interests in exercising border control,[17] is a particularly delicate exercise in cases concerning expulsion of LTSMs.

The current contribution will explore this dilemma, seeking to identify the protective potential of "private life" cf. Article 8 in cases concerning expulsion of LTSMs, both de lege lata and de lege ferenda.

With regards to de lege lata, the thesis will provide an analysis of recent ECtHR jurisprudence in "private life" cases concerning expulsion of LTSMs (Chapter 3). The findings from this analysis will form the basis for a de lege ferenda discussion, which will explore how the Court could develop its jurisprudence through employment of its own interpretive mechanisms (Chapter 4).

Underpinning the chosen topic is the question of how wide the margin of appreciation granted to ECHR Member States can be before the "private life" protection enjoyed by LTSMs becomes illusory. Adding fuel to this question is a recently concluded reform process, commonly referred to as the Interlaken process, one of the objectives of which has been to strengthen the principle of subsidiarity and the margin of appreciation in the jurisprudence of the ECtHR.[18] The judgements analysed in this thesis are of recent date and may, as such, have the capacity to reveal - or foreshadow some of the impacts of the reforms.

1.2 Research question and objectives

The overarching research question explored in this contribution is "what is the protective potential of the right to respect for private life under Article 8 of the ECHR in cases concerning the expulsion of LTSMs?"

This research question can be interpreted in two ways. In the first sense, the question relates to de lege lata; that is to say, it seeks to identify the existing protective scope of the "private life"

[17] see e.g. Maslov §76

[18] Donald & Leach (2018)

limb of Article 8. In the second sense, the question relates to de lege ferenda; in other words, it seeks to identify whether the "private life" limb of Article 8 holds unfulfilled protective potential.

Based on these overall aims, two main objectives, and corresponding sub-objectives, have been set:

1) To identify the existing protective scope of "private life" cf. Article 8 in cases concerning expulsion of LTSMs through analysis of recent ECtHR jurisprudence.

    ii) To identify key developments and trends in recent case law.

2) To place the findings from the analysis of recent judgements into perspective, by considering how the Court could rely on its long-established interpretive mechanisms in order to evolve its jurisprudence.

    ii) To contextualise developments in recent jurisprudence in terms of the Interlaken reforms.

1.3 Methodology and Methods

1.3.1 Research methodology

The research objectives outlined above contain separate elements, which require different methodological approaches. The first objective and its corresponding sub-objective contain a descriptive element. The second objective and sub-objective contain an evaluative element. The descriptive element necessitates doctrinal legal analysis of ECtHR "private life" jurisprudence in cases concerning LTSMs facing expulsion. The evaluative element requires that the findings from the doctrinal analysis are reviewed and contextualised. This element is best approached from an interdisciplinary perspective. Based on these considerations, two research methodologies have been chosen. These will be outlined below.

1.3.1.1 Doctrinal legal research

Doctrinal legal analysis focuses on primary sources of law such as conventions and treaties, as well as jurisprudence,[19] aiming to "find and understand the legal norm that is expressed in writing in a legal text."[20] Doctrinal research is typically considered a positivist approach, looking at the law itself as opposed to questioning what it should be.[21]

A central component of this thesis is analysis of ECtHR jurisprudence. For this purpose, doctrinal legal research is a natural choice of methodology. However, doctrinal research can only go so far, as it is premised by the presumption that there is no need to go beyond primary sources of law and complimentary jurisprudence.[22] A purely doctrinal approach will thus not be a suitable avenue to pursue in the quest to arrive at fruitful assessments of the Court's approach to "private life" in LTSM cases. Therefore, it is necessary to complement the doctrinal approach with an evaluative approach.

1.3.1.2 An evaluative methodology

Whereas doctrinal research stems from within the discipline of law, the evaluative methodology is rooted in social sciences.[23] Adopting an interdisciplinary research approach by incorporating this methodology is a suitable choice for this thesis since it allows for "testing whether rules work in practice" and "whether a certain harmonisation proposal could work, taking into account … important divergences in the legal systems concerned."[24] Furthermore, the evaluative approach enables the tackling of "whys" that can arise as a result of the findings from doctrinal analysis, and provides an opportunity to set out assessments, critiques, and possible solutions.[25] Through this exercise, some conclusions can be drawn regarding how the ECtHR's application and interpretation of the "private life" provision under Article 8 in cases concerning LTSMs could evolve. The evaluative approach further allows for the incorporation

[19] Margaria (2019) p. 84; Walker (2017) p. 308

[20] Scheinin (2017) p.19

[21] Landman (2006) p. 149

[22] ibid.

[23] For a comprehensive review of the methodology, see e.g. Patton (2002)

[24] Van Hoecke (2011) preface

[25] ibid.

of a political perspective into the thesis, which the sub-objective relating to the Interlaken process requires.

This thesis draws inspiration from the evaluative approach employed in the work *Diversity and European Human Rights*, edited by Eva Brems. In this work, the authors attempt to rewrite key judgements of the ECtHR, drawing on recent case-law and the wider framework of international human rights, in order to bring the cases reviewed "up to date".[26] This thesis will adopt a similar approach, employing the Court's own interpretive mechanisms in order to identify which legal avenues could be relied on in order to propel "private life" jurisprudence concerning expulsion of LTSMs forwards.

1.3.2 Methods

1.3.2.1 Type of research and data

The research conducted for the purposes of this thesis will be qualitative. The doctrinal aspect of the research entails that the primary data to be analysed will be ECtHR judgements. The evaluative methodology employed to tackle the second objective and sub-objective of this thesis requires a broader approach to use of sources. Chapter 4 will, as previously mentioned, largely draw on the ECtHR's interpretive mechanisms. Therefore, jurisprudence, reports, guides, and articles, revealing the Court's conceptualisation and application of these mechanisms, will be essential sources. Legal literature will be a second important source for the purposes of the evaluative aspect of this thesis. Where appropriate, socio-legal literature will be referenced. Lastly, relevant international and regional law and jurisprudence, as well as domestic laws, will constitute central sources for the research conducted.

1.3.2.2 Sampling of cases for analysis

The choices made about the sampling of cases for analysis are based on a number of considerations. The first consideration relates to the status of existing knowledge. In order to secure relevancy and originality, the thesis will only offer in-depth analysis of case-law which has not been covered, or has only been covered to a very limited extent, in existing research. Necessarily, this entails that recent jurisprudence needs to be prioritised. Other judgements will

[26] Brems (2013) pp. 1-15

be referenced and discussed due to the comparative value they can add, to ensure that the thesis provides an understanding of how Strasbourg's jurisprudence concerning LTSMs has developed, and which important shifts have taken place.

The second factor influencing the choices made about the sampling of cases relates to quality considerations. Given the limited number of words allowed, offering an in-depth analysis of a high number of cases will not be possible. Rather, a balance must be struck between quantity and quality. Therefore, the cases for analysis have been selected based on a delimited set of criteria. This is to secure that the findings, though being based on a relatively narrow set of data, offer a comprehensive understanding of what the ECtHR's praxis is in a specific type of cases. The criteria are as follows:

- The applicant's right to respect for private life cf. Article 8 must constitute a central, if not the only, aspect of the Court's assessment in the judgements.[27]
- The cases must concern settled migrants, that is to say, migrants who have resided in their host states legally.
- The applicants must have arrived in their host states at the age of 18 or below.
- The applicants must be "long-term" residents, that is to say, they must have spent a major part of their lives in their host states.
- The judgements must be available in English.

A filtering of cases based on these criteria has led to the identification of six judgements appropriate for in-depth analysis.[28] The facts of these cases are similar, and as such, they render themselves particularly useful for comparative analysis.

[27] Two of the selected judgements also concern the applicants' right to respect for their family life cf. Article 8

[28] Azerkane v. the Netherlands (2020); Levakovic v. Denmark (2018); Palanci v. Switzerland (2014); Zakharchuk v. Russia (2019); Külekci v. Austria (2017); Ndidi v. United Kingdom (2017)

2 Establishing the framework for analysis

2.1 Introductory remarks

The current chapter provides the framework for the analysis conducted for the purposes of this thesis. The first section will outline the Interlaken reforms from a political perspective, and consider how these reforms may inform the reading of the recent ECtHR judgements analysed in Chapter 3.

The doctrine of subsidiarity and the margin of appreciation mechanism will be explained more thoroughly in the subsequent section of this chapter, which will provide the legal framework for analysis, outlining the ECtHR's interpretive principles and mechanisms, the private life provision contained in Article 8 ECHR, as well as how this provision is applied in cases concerning expulsion of LTSMs.

2.2 The political context framing the analysis - the Interlaken reforms

A new Member State-driven reform process, commonly referred to as the Interlaken process, has been underway during the last decade, culminating in the Copenhagen Declaration in 2018.[29] Scholars have argued that this reform process, in contrast to previous reforms, can be described as a form of "political backlash".[30]

The process has been characterised by its pursuit of two aims: 1) to enhance the efficiency of the Court by reducing its caseload, and 2) to ensure that the Court pursues a strengthened emphasis on the principle of subsidiarity and the closely related margin of appreciation mechanism in its jurisprudence.[31]

2.2.1 From Interlaken to Copenhagen

The signing of the Copenhagen Declaration (2018) by the 47 Contracting States to the ECHR was the culmination of a series of five inter-governmental conferences, beginning in Interlaken (2010) and Izmir (2011) and ending in Copenhagen in 2018. While the first conferences focused

[29] Glas (2020) pp. 121-122; Madsen (2020) pp. 732-733; Christoffersen & Madsen (2013)
[30] Madsen (2020) pp. 732-735
[31] Letsas (2013) p. 107

mainly on how the ECtHR's caseload could be reduced, the Court's understanding and application of the principle of subsidiarity constituted the focal point of the subsequent conferences, starting with the Brighton Conference in April of 2012.[32]

The political atmosphere surrounding this discussion was, according to scholars writing on the subject, to a great extent characterised by certain Member States' frustration with the Court's jurisprudence in cases concerning expulsion of criminally convicted foreigners.[33] Especially Denmark, where immigration has long been a hotly debated political issue, has been described as waging a "crusade" for reform of the Court.[34] Fuelling this debate further was a Danish Supreme Court judgement in 2016, where the court found the deportation of a criminally convicted Croatian national to be disproportionate based on the ECtHR's criteria.[35] In addition, the frustration of the United Kingdom was evoked by the ECtHR's judgement in Othman (Abu Qatada) v. United Kingdom (2012), where the Court ruled that the deportation of a foreign criminal to Jordan would breach his right to fair trial under Article 6 of the ECHR.[36] Following this judgement, the Brighton Conference was organised under British Chairmanship, leading to the adoption of Protocol 15 to the Convention, which incorporates the principle of subsidiarity and the margin of appreciation mechanism into the Preamble of the ECHR.[37] The Protocol has not yet entered into force, Italy being the only Member State that has not yet ratified it.[38]

Under Danish Chairmanship, the Copenhagen Conference was held in April of 2018, resulting in the adoption of the Copenhagen Declaration.

[32] Donald & Leach (2018)
[33] ibid.; Glas (2020) p. 125
[34] Hartmann (2017)
[35] ibid.; Case no. 258/2015 (2016)
[36] Othman (Abu Qatada) v. United Kingdom (2012); Donald & Leach (2018)
[37] ECHR Protocol 15 Article 1; Donald & Leach (2018)
[38] CoE Portal "Chart of signatures and ratifications of Treaty 213" (status per 24.01.2021)

2.2.2 Reading recent ECtHR jurisprudence in light of Interlaken

The Copenhagen Declaration sets out the vision for the ECtHR's future as agreed on by the Member States during the Copenhagen Conference, including how the subsidiarity principle and the margin of appreciation are to influence the Court's jurisprudence going forward.

At the outset, the Declaration mentions that "The States Parties have underlined the need to secure an effective, focused and balanced Convention system, where they effectively implement the Convention at national level".[39] Paragraph 4 goes on to acknowledge that the Interlaken process has led to "important results", there among "improving the efficiency of the Court and strengthening subsidiarity".[40] Against this backdrop, the Conference "welcomes the further development of subsidiarity and the doctrine of the margin of appreciation" in the jurisprudence of the ECtHR,[41] and notes that Protocol 15, upon entry into force, can "be expected to have important and significant effects on the Convention system".[42]

So, how can the Interlaken reforms inform the reading of recent ECtHR jurisprudence concerning expulsion of LTSMs? First and foremost, the text of the Copenhagen Declaration clearly conveys that subsidiarity is to be a focal point of the Court moving forward. One could thus expect to see traces of this emphasis on subsidiarity in recent ECtHR Article 8 jurisprudence, especially, perhaps, given that discontent with the ECtHR's case-law on immigration issues was one of the driving forces behind the reforms.

The above argument finds support in the report from a High-Level Expert Symposium held in Kokkedal in Denmark in November 2017. Here, it was noted that the ECtHR's application of the subsidiarity principle had changed significantly since the adoption of Protocol 15, in that the Court "exercises restraint in light of various factors," including "the domestic assessment of evidence and facts as well as the various European and international standards of protection."[43] Specifically, the Court's judgement in Ndidi v. United Kingdom, which will be discussed at length in Chapter 3, was mentioned as evidencing this development.[44]

[39] Copenhagen Declaration § 3
[40] ibid., § 4
[41] ibid., § 31.
[42] ibid., § 65
[43] "2019 and Beyond" Report (2017) p. 20
[44] ibid.

In light of the above, it is reasonable to expect that the impacts of the Interlaken process will be traceable, to an extent, in the ECtHR jurisprudence subject to analysis in the subsequent chapter, and that, as such, the findings from the analysis can, at least in part, be understood in light of these political developments.

2.3 The legal framework for analysis

This section will begin by outlining the object and purpose of the ECHR, before considering the interpretive principles and mechanisms guiding the jurisprudence of the Court. Finally, the section will introduce Article 8 ECHR, conceptualising "private life" and describing how the provision is applied in LTSM cases.

2.3.1 The object and purpose of the ECHR

The object and purpose of the ECHR form the backdrop of the general principles and interpretive mechanisms developed by the Court in its jurisprudence. Guidance as to what the object and purpose of the Convention is can be found in its Preamble, cf. the Vienna Convention on the Law of Treaties (VCLT) Article 31(2).[45]

The Preamble of the ECHR iterates the aim of the CoE, namely the "achievement of greater unity between its members," and states that "one of the methods by which that aim is to be pursued is the maintenance and further realisation of Human Rights and Fundamental Freedoms".[46] Further, the Preamble establishes that the Member States' "common heritage of political traditions, ideals, freedom and the rule of law" underpin the Convention.[47]

Within this context, reference should also be made to Article 1 ECHR, which provides that enjoyment of Convention protection is to be secured for "everyone" within the jurisdiction of the Contracting Parties,[48] reinforcing the universal nature of the rights enshrined in the instrument.

[45] VCLT Article 31(2); Golder v. United Kingdom (1975) § 34
[46] ECHR Preamble
[47] ibid.
[48] ECHR Article 1

2.3.2 The interpretive principles of the ECtHR

2.3.2.1 The principle of subsidiarity

The principle of subsidiarity is a long-standing doctrine of the ECtHR. In essence, it regulates the role of the Court vis-á-vis the Convention's Contracting Parties. The principle's rationale consists of a negative and a positive dimension.[49] The negative dimension entails that the Court should not delegate to itself the responsibilities that domestic authorities are better set to carry out in a more efficient and appropriate manner.[50] The positive dimension of the principle is illustrated by the Court's finding that violations of Convention guarantees have taken place. In essence, the Court is jurisdictionally responsible for effective protection of ECHR guarantees and, as such, it "has the duty to act when the relevant national institution cannot successfully attain its goals or when the issue at stake cuts across domestic lines."[51]

2.3.2.2 The Convention as a "living instrument"

In Tyrer v. United Kingdom (1978), the Court stated that the Convention is a "living instrument" which "must be interpreted in the light of present-day conditions".[52] This has since become doctrine and has greatly contributed to propelling the development of jurisprudence forward. The principle entails that the Court, in interpreting the Convention, will rarely rely on what the drafters intended specific rights to encompass.[53] Rather, it looks to present-day standards in the Contracting States as well as general developments in international law.[54]

2.3.2.3 Convention protection should be "practical and effective"

Another fundamental interpretive principle of the Court is that the ECHR is "intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective."[55] This protective principle entails, inter alia, that limitations to Convention rights, such as those set

[49] See e.g. Endo (1994) pp. 553 & 640–642; Vila (2017) pp. 393–413
[50] Vila (2017), p. 403
[51] ibid.
[52] Tyrer v. United Kingdom (1978) § 31
[53] Letsas (2007) p. 65
[54] Ibid; Tyrer § 31
[55] Kutic § 25; Ashingdane § 57

forth in Article 8(2), are to be interpreted restrictively, echoing the ECHRs object and purpose of maintaining and realising fundamental human rights.[56] In other words, there are "limits to the limits",[57] entailing that an exception or limitation to a right may "under no circumstances … render the right ineffective".[58] As such, limitations to rights may not be interpreted in any such way as to effectively impair the essence of Convention guarantees.[59]

2.3.3 The interpretive mechanisms of the ECtHR

2.3.3.1 Evolutive interpretation

The evolutive (or dynamic) interpretation mechanism constitutes a tool providing the Court "with the necessary degree of flexibility" to secure the enforcement of ECHR guarantees.[60] The mechanism allows the Court to depart from previous jurisprudence, for reasons such as developments in technology,[61] societal changes,[62] or legal developments.[63] Further, the mechanism allows the Court to "diverge from the strict interpretation of the Convention provisions."[64] In this vein, provisions such as Article 8 have been interpreted as encompassing sub-rights "which are distinct but stem from the same basic idea" as those rights expressly set forth in the provisions.[65]

2.3.3.2 European consensus and margin of appreciation

The margin of appreciation mechanism flows from the principle of subsidiarity and has, like the latter principle, been a focal point of the Interlaken process.[66] The employment of the doctrine is perhaps most prominent in connection with Articles 8-11, all of which contain limitation

---

[56] ECHR Preamble

[57] Van Drooghenbroeck & Rizcallah (2019) pp. 906-912

[58] Regner v. Czech Republic (2017) partly dissenting opinion by judge Serghides § 50

[59] Van Drooghenbroeck & Rizcallah (2019) pp. 906-912

[60] Dzehtsiarou (2011) p. 1731

[61] E.g. developments in medical technology, as considered in S.H. and others v. Austria (2011), see specifically § 69; Goodwin v. United Kingdom (2002), see specifically § 81

[62] Cossey v. the United Kingdom (1990) § 35

[63] Micallef v. Malta (2009) §§ 78-82

[64] Popovic (2013) p. 56

[65] Golder § 28

[66] Letsas (2013) p. 107

clauses which necessitate the undertaking of proportionality assessments.[67] The mechanism entails that States Parties to the ECHR are granted a "room for manoeuvre" in conducting these proportionality assessments.[68] The rationale underlying this is that the ECtHR's authority to decide on the proportionality of a given interference in an individual's rights should be limited "in those cases where domestic authorities can be trusted to provide sufficient protection of human rights."[69]

In which cases national authorities are considered better placed than the Court to conduct proportionality assessments depends on the level of European consensus that is found to exist regarding the issue at hand. The European consensus mechanism constitutes the counterpart to the margin of appreciation doctrine, and is rooted in the "living instrument" principle, whereby the ECtHR, in its interpretation, must "have regard to the changing conditions in Contracting States and respond, for example, to any emerging consensus as to the standards to be achieved."[70] Accordingly, in cases raising unique questions of interpretation, the Court will examine the situation in the States Parties to the ECHR.[71] Such cases could be, inter alia, those concerning "legal and/or factual situations in a respondent State that cannot be compared with any other country due to historical or other particular reasons."[72]

Where no consensus is found, ECHR States Parties are granted a wider margin of appreciation, which in turn stagnates the development of the Court's jurisprudence.[73] Existing consensus, on the other hand, reduces the margin of appreciation afforded to States Parties, and in turn propels the interpretation of the Convention forwards.[74] The examination of whether a consensus on a particular issue exists usually bases itself on domestic law and practice, as well as relevant international law.[75] It is important to specify that this is not a black and white exercise. If there

[67] Follesdal (2017) p. 364
[68] Greer (2000) p. 5
[69] Follesdal (2017) p. 363
[70] Glor v. Switzerland (2009) § 75
[71] Dzehtsiarou (2015) p. 21
[72] ibid., p. 22
[73] Dzehtsiarou (2011) p. 1731
[74] Ibid.
[75] Demir and Baykaya v. Turkey (2008) § 76

are “some elements of consensus”, this provides justification for reducing the margin of appreciation.[76]

2.3.3.3 Autonomous concepts

The autonomous concepts mechanism allows the Court to attribute an independent meaning to ECHR concepts, so that it is not bound by how such concepts are understood by States Parties to the Convention.[77] Two features of the mechanism should be mentioned. First, coming into fruition through judge-made law, “autonomous concepts mostly escape clear-cut definition”.[78] In other words, the meaning of these concepts can only be understood by reading ECtHR case-law: the text of a provision subject to autonomous interpretation will, by itself, offer little guidance as to the meaning of the concept.[79] Second, autonomous concepts are “susceptible to evolution”.[80] In other words, an autonomous meaning once assigned to a Convention concept can change over time, through jurisprudence.[81]

2.3.4 Article 8 of the ECHR

Article 8(1) of the ECHR provides that “Everyone has the right to respect for his private and family life, his home and his correspondence.”[82] The rights enshrined in Article 8(1) are, however, not absolute. A Contracting State may interfere in an individual’s Article 8(1) rights if such an interference can be justified by reference to the conditions set out in Article 8(2).[83] These conditions entail that an interference in an individual’s rights will not be justified unless the State Party can demonstrate that it is a) “in accordance with the law”, b) that it is “necessary in a democratic society”, and c) that it is made in pursuit of one or more of the legitimate aims listed.[84]

---

[76] Gomez-Arostegui (2005) p. 159; R.R. v. Poland (2011) § 186

[77] Greer (2000) pp. 18-19

[78] Popovic (2013) p. 53

[79] ibid.

[80] ibid.

[81] ibid.

[82] ECHR Article 8(1)

[83] ECtHR (2020a) p.7

[84] Ibid; ECHR Article 8(2)

2.3.4.1 "Private life" within the meaning of Article 8

The text of Article 8 ECHR does not offer guidance as to which personal interests fall within the scope of "private life". The ECtHR has consistently described "private life" as being a broad concept, "not susceptible to exhaustive definition."[85] However, on a case-by-case basis, the Court has gradually clarified what the "private life" sphere encompasses. The Court has found that the sphere encompasses, inter alia, an individual's physical and moral integrity,[86] her cultural and/or ethnic identity,[87] personality and relationships,[88] as well as personal autonomy and self-determination.[89] Furthermore, the Court has held that "private life" can be interpreted as "a zone of interaction of a person with others, even in a public context".[90]

2.3.5 "Private life" in cases concerning expulsion of LTSMs

In cases concerning settled migrants, the Court has consistently held that the "private life" limb of Article 8 "protects the right to establish and develop relationships with other human beings and the outside world",[91] and that the "private life" sphere "can sometimes embrace aspects of an individual's social identity".[92] In light of this, the Court has established that "the totality of social ties between settled migrants and the community in which they are living constitute part of the concept of 'private life' within the meaning of Article 8."[93]

Whereas the Court has emphasised that not all migrants have established "family life" within the meaning of Article 8 in their host state,[94] it readily accepts that all migrants have established a "private life" there.[95] As such, in cases concerning LTSMs, expulsion is always found to constitute an interference in the applicant's "private life".[96]

---

[85] See e.g. Pretty v. United Kingdom (2002) § 61, P.G and J.H v. United Kingdom (2001) § 56
[86] X and Y v. the Netherlands (1985) § 22
[87] Chapman v. United Kingdom (2001) § 73
[88] Mikulic v. Croatia (2002) § 54
[89] Pretty § 61
[90] von Hannover v. Germany (2004) § 50
[91] Pretty § 61; Üner § 59
[92] Üner § 59
[93] ibid.
[94] Ibid; Maslov § 63
[95] Maslov § 63
[96] ECtHR (2020a) p. 63

Whether the Court will focus on the "private life" limb of Article 8 rather than the "family life" limb, depends "on the circumstances of the particular case".[97] The Court has, however, clarified that family bonds falling outside of the "nuclear family" are usually considered under the heading of "private life" as opposed to "family life", unless the applicant can demonstrate that there exists an added dependency between herself and the family member(s) in question.[98] An exception is made in cases concerning young adults who have yet to establish a family.[99] In such cases, the Court has accepted that applicants' relationships with adult family members may constitute "family life" within the meaning of Article 8.[100]

The ECtHR has emphasised that "regard is to be had to the special situation of aliens who have spent most, if not all, of their childhood in the host country, were brought up there and received their education there."[101] In light of this, the Court has established that "very serious reasons are required to justify expulsion" of this group of migrants.[102] The Court has qualified this further by clarifying that "there may be little room for justifying the expulsion of a settled migrant" whose criminal offences were a) committed when the applicant was a juvenile, and b) of a non-violent nature.[103] The "very serious reasons" compliance test differs from that employed in cases concerning irregular migrants, where a Contracting State's decision to refuse a residence permit and/or to expel will only constitute a breach of the applicant's Article 8 rights in "exceptional circumstances".[104]

[97] Maslov § 63
[98] see e.g. Slivenko § 97
[99] Maslov § 62
[100] Ibid.
[101] Ibid § 74; Üner § 58
[102] Maslov § 75
[103] See e.g. Külekci § 41
[104] See e.g. Rodrigues da Silva & Hoogkamer v. Netherlands (2006) § 39

2.3.5.1 The Article 8(2) assessment in cases concerning expulsion of LTSMs

In every case concerning a migrant, the Court begins its assessment by emphasising that the State, in virtue of its sovereignty, "is entitled, as a matter of international law … to control the entry of aliens into its territory and their residence there".[105] Additionally, the Court has consistently held that Contracting States are entitled to expel criminally convicted migrants, as long as such a decision is proportionate and made "in accordance with the law" cf. Article 8(2).[106] Further, States Parties enjoy a "certain margin of appreciation" in matters relating to immigration control.[107]

In cases concerning migrants, the Court rarely finds that a decision to terminate a residence permit, and/or expel, has not been made "in accordance with the law" cf. Article 8(2).[108] In the assessment of the legitimate aim criterion, the Court usually accepts that the interference in the applicant's private and/or family life was carried out in pursuit of the "prevention of disorder or crime" or "public safety" in cases where the applicant has been convicted of criminal offences.[109] In other cases, especially those concerning irregular migrants, the Court accepts that States Parties aim to preserve the "economic well-being of the country" by securing immigration control.[110] The question that then remains for the Court to examine is whether the interference in question is "necessary in a democratic society" cf. Article 8(2).

2.3.5.2 "Necessary in a democratic society" - the Üner and Maslov criteria

The relevant criteria to be considered in the assessment of whether the expulsion of a settled migrant is "necessary in a democratic society" were first introduced in Boultif v. Switzerland (2001), and later enriched in Üner v. the Netherlands (2006). In the case of Maslov v. Austria (2008), the Court summarised the criteria as follows;

- "the nature and seriousness of the offence committed";
- "the length of the applicant's stay" in the host state;
- "the time elapsed since the offence was committed and the applicant's conduct during that period";

[105] Palanci § 49; Boujlifa v. France (1997) § 42;

[106] see e.g. Üner § 54; Palanci § 49

[107] Slivenko § 113; Maslov § 76

[108] Klaassen (2019) pp. 160-161

[109] Ibid; ECHR Article 8(2)

[110] Klaassen (2019) p. 161; ECHR Article 8(2)

- "the solidity of social, cultural and family ties with the host country and with the country of destination",[111] and, finally;
- "the duration of (the) exclusion order".[112]

These criteria form the basis of the Court's proportionality assessments in "private life" cases concerning LTSMs facing expulsion. If the Court finds that the applicant has established a "family life" within the meaning of Article 8 in their host state, additional criteria apply.[113] Since this thesis focuses on the "private life" limb of Article 8, the "family life" criteria will not be subject to further discussion.

Using the *Üner*/*Maslov* criteria as its basis, the Court, in its proportionality assessments, ascertains "whether the impugned measures struck a fair balance between the relevant interests" which are, on the one hand, the applicant's individual rights, and on the other, the State Party's interests in enforcing the measure.[114]

It should be mentioned that both *Üner* and *Maslov* were Grand Chamber cases. The referral of *Üner* was accepted by the Grand Chamber because the case presented an opportunity to clarify the proportionality criteria.[115] The reason for the referral of *Maslov* is less clear. However, according to Article 43(2) ECHR, a request for referral of a case shall be accepted by the Grand Chamber if the case raises "a serious question affecting the interpretation or application of the Convention" or "a serious issue of general importance".[116] The *Maslov* case must, as such, have been considered to fulfil at least one of these criteria.

It follows from Article 43(2) ECHR that Grand Chamber judgements are necessarily of special significance. Importantly, in accordance with Article 30 ECHR, the Chamber can "relinquish jurisdiction in favour of the Grand Chamber" if it, in resolving a case, may depart from previous case-law.[117] In such cases, Grand Chamber judgements authoritatively "settle the interpretation

[111] Maslov § 71
[112] ibid § 98
[113] see e.g: Üner § 57, where the "family life" criteria are enumerated.
[114] Maslov § 76
[115] ECtHR (2011) p. 8
[116] ECHR Article 43(2)
[117] Ibid., Article 30

to be pursued".[118] Such judgements can set important precedents for subsequent jurisprudence. This should be kept in mind when reading the analysis of recent ECtHR cases offered in the next chapter, none of which are Grand Chamber judgements.

[118] ECtHR (2011) p. 6

3 De lege lata "private life" protection for LTSMs facing expulsion

3.1 Introductory remarks

This chapter provides an analysis of six ECtHR Article 8 judgements, selected based on the criteria set out in section 1.3.2.2. The chapter seeks to identify de lege lata of "private life" protection afforded to LTSMs facing expulsion. It will do so by first providing an outline of the cases selected for analysis (section 3.2), and subsequently presenting the main findings from the analysis conducted (section 3.3). Finally, an interim conclusion based on the findings will be provided.

3.2 The judgements selected for analysis

3.2.1 Külekci v. Austria (2017)

The applicant in *Külekci*, a Turkish national, had lived in Austria all of his life, with the exception of six years spent in Turkey between the ages of two and eight.[119] He had his whole family in Austria, except his mother who resided in Turkey, but from whom he was estranged. He alleged he was "fully integrated into Austrian society" and had no ties with Turkey.[120] The grounds for expulsion of the applicant were criminal offences he had committed at the ages of 14 and 15, which included aggravated violent robbery, for which he was convicted at the age of 16.[121] He was released from prison at the age of 17, having served half of his sentence, due to good conduct.[122]

The Court unanimously found that Austrian authorities had not violated the applicant's right to respect for private and family life cf. Article 8.[123] The Court accepted that he had "very strong family ties in Austria",[124] recognising that he had spent the majority of his life there, had received most of his education there, and spoke the language fluently.[125] The Court acknowledged

[119] Külekci §§ 5-6
[120] ibid., §§ 26-27
[121] ibid., §§ 7-10
[122] ibid., § 14
[123] ibid., §§ 52-53
[124] ibid., § 49
[125] ibid.

that the applicant had not reoffended following his second conviction,[126] but finally concluded that the violent nature of his offences justified his expulsion.[127]

3.2.2 Zakharchuk v. Russia (2019)

The applicant in *Zakharchuk* was born in Leningrad in 1980 to a Russian mother and a Polish father. His parents chose Polish nationality for him.[128] He had lived in Russia the majority of his life, and had held gainful employment there,[129] until he was deported in 2011 at the age of 31.[130] The grounds for his expulsion was that he, at the age of 24, had assaulted a shop-owner together with two friends, all inebriated, after a disagreement.[131] He was sentenced to six years imprisonment, and was released in 2010, seven months before the sentence was completed.[132] Russian authorities subsequently expelled the applicant, issuing an eight-year re-entry ban, on the grounds of maintaining public order.[133]

The ECtHR, by four votes to three, found that Russian authorities' decision to expel the applicant did not breach his right to private and family life under Article 8, holding that they had examined his case sufficiently thoroughly.[134] The Court acknowledged that the applicant appeared to be "fully integrated into Russian society", noting that he had spent the majority of his life in Russia, had received his education there, and had established a career there.[135] Nevertheless, the Court held that the "very serious nature" of the applicant's criminal offence outweighed the considerations weighing in his favour.[136] The Court noted that the eight-year re-entry ban was indeed an "extreme measure", nevertheless concluding that the long duration of the ban

[126] Külekci., § 48
[127] ibid., §§ 52-53
[128] Zakharchuk § 6
[129] ibid., § 10
[130] ibid., §§ 18 & 25
[131] ibid., § 12
[132] ibid., §§ 12-13
[133] ibid., §§ 16-23
[134] ibid., §§ 63-64
[135] ibid. § 59
[136] ibid., § 61

was not disproportionate, since domestic authorities, before imposing it, had conducted a sufficient assessment of the applicant's circumstances.[137]

Three of the judges dissented. They held that the majority had too readily accepted the State Party's argument that the applicant posed a threat to public safety,[138] arguing that domestic authorities' examination of his case was "insufficient and unconvincing".[139] The judges found the applicant's interests to outweigh the factors mitigating in favour of expulsion, holding, inter alia, that had his conduct following his conviction been afforded more weight, this would have tipped the balance heavily in his favour.[140]

3.2.3 Azerkane v. the Netherlands (2020)

The applicant in *Azerkane*, a Moroccan national, was born in the Netherlands in 1993. He received his education there, and his family members all held Dutch citizenship.[141] The applicant committed a series of offences while still a minor, including theft and domestic violence. After reaching the age of majority, he was convicted of further offences, including armed robbery and possession of weapons.[142] In 2013, Dutch authorities withdrew the applicant's residence permit, and subsequently issued an expulsion order with a 10-year re-entry ban.[143] The applicant alleged that he had no ties with his country of nationality, and that he would not be able to adjust to a life there due to a mild intellectual disability.[144]

The ECtHR unanimously found that the expulsion of the applicant had not violated his right to private and family life under Article 8.[145] The Court accepted that the applicant no doubt had "strong ties with the Netherlands", observing that he had lived there since birth, had received

[137] Zakharchuk. § 62
[138] ibid., dissenting opinion §§ 1-2 & 6
[139] ibid., § 1
[140] ibid., § 6
[141] Azerkane §§ 1 & 4
[142] ibid., §§ 6-12
[143] ibid., § 13
[144] ibid., § 52
[145] ibid., § 85

his education there, and had his close family members there.[146] Further, the Court acknowledged that the applicant had "limited" ties with his country of nationality.[147] Nevertheless, it held that the seriousness of the offences he had committed outweighed the considerations mitigating in favour of finding a violation of Article 8 in the case.[148] Regarding the applicant's conduct following his final conviction (armed robbery), the Court held that his "conduct during that period carries less weight than the serious nature of his criminal offence."[149] Finally, the Court considered that the 10-year re-entry ban imposed by domestic authorities would indeed have "far-reaching consequences",[150] accepting, however, that the long duration of the ban was justified in light of the serious character of the applicant's criminal convictions.[151]

3.2.4 Palanci v. Switzerland (2014)

The applicant in *Palanci* was a Turkish national, born in 1971. He arrived in Switzerland in 1989 and lodged an application for asylum, which was denied in 1993.[152] He subsequently married a woman who held a residence permit in Switzerland, and was thus able to re-enter the country a year later. The couple had three daughters together, born in 1995, 1997, and 2000.[153]

Between 1995 and 2005, the applicant was convicted of a series of minor offences, such as failing to pay maintenance,[154] falsification of a signature, and working without an appropriate permit,[155] as well as for one serious count of domestic violence against his wife.[156] The couple had separated twice, but had subsequently reunited.[157] The applicant had, through the years, accumulated significant debt, which he had been unable to pay back.[158] In 2005, Swiss immigration authorities decided not to renew his residence permit, and ordered the applicant to leave

[146] Azerkane. § 79
[147] ibid., § 81
[148] ibid., § 83
[149] ibid., § 75
[150] ibid., § 83
[151] ibid.
[152] Palanci §§ 7-9
[153] Ibid.
[154] ibid., § 17-18
[155] ibid., § 10
[156] ibid., § 12
[157] ibid., §§ 11 & 14, §§ 16 & 19-22
[158] ibid., § 13-15

the country for an indeterminate period of time, citing his failure to repay debt and to pay maintenance.[159] The applicant left Switzerland in accordance with his expulsion order in 2008.[160]

The Respondent State argued that the expulsion of the applicant pursued the legitimate aim of public order.[161] The applicant argued that he had "close social ties with Switzerland" in light of his 18-year long residence there. He spoke the language fluently, and had established a family life there.[162]

The ECtHR unanimously found that there had been no violation of Article 8 in the case. In its assessment, the Court found that the applicant undoubtedly had "strong ties" with Switzerland,[163] although he also appeared to have "some social and cultural - including linguistic - ties in addition to family ties" with Turkey.[164] The Court acknowledged that the applicant's offences were of a non-serious character, with the exception of the one count of domestic violence.[165] However, the Court also took into account the significant debts he had accumulated, as well as the fact that his behaviour in financial matters had only improved after he was informed of his imminent expulsion in 2004, agreeing, finally, with Swiss authorities "that the applicant's behaviour had been a threat to public order."[166]

3.2.5 Levakovic v. Denmark (2018)

The applicant in *Levakovic*, a Croatian national, had arrived in Denmark as an infant in 1987, and had subsequently spent all of his life there.[167] Following a series of convictions of criminal offences (including several counts of robbery and theft), most of which were committed while the applicant was still a minor, he was expelled and issued a permanent re-entry ban by Danish

[159] Palanci., § 23
[160] ibid., § 27
[161] ibid., § 44
[162] ibid., § 39
[163] ibid., § 59
[164] ibid., § 60
[165] ibid., § 57
[166] ibid., § 58
[167] Levakovic § 7

authorities in 2012.[168] The applicant was subsequently convicted of violence against another prison inmate, and was finally expelled from Denmark in 2017 after the sentence had been completed.[169]

The applicant argued that he only had ties with Denmark, having lived there almost his entire life, and having 80 family members in addition to his girlfriend there.[170] He alleged that he was as fully integrated into Danish society as Danish nationals convicted of criminal offences.[171] In addition, he had, in domestic proceedings, alleged that he suffered from emotional stress, as well as ADHD, and that he had endured three cannabis-induced psychoses in the course of a few years.[172]

The ECtHR unanimously found that the expulsion of the applicant did not constitute a violation of his Article 8 rights, holding that that the expulsion measure "was supported by relevant and sufficient reasons".[173] The Court accepted that the applicant had no ties with his country of nationality.[174] However, beyond this, the criterion relating to the totality of the applicant's ties with Denmark vis-á-vis Croatia was dealt with to a limited extent by the ECtHR. The Court did, however, consider "it of importance" that domestic authorities had found the applicant to be "very poorly integrated into Danish society" in light of his having "demonstrated a lack of will to comply with Danish law".[175]

3.2.6 Ndidi v. United Kingdom (2017)

The applicant in *Ndidi* was a Nigerian national born in 1987. He entered the UK on a six-month visa with his family in 1988, which they subsequently overstayed.[176] In 1999, the applicant and his family were granted exceptional leave to remain.[177] Between 2003 and 2004, the applicant

[168] Levakovic., §§ 8-19
[169] ibid., § 23-24
[170] Ibid., § 30
[171] Ibid.
[172] ibid., § 17
[173] ibid., § 45
[174] ibid., § 42
[175] ibid., § 44
[176] Ndidi §§ 2 & 5
[177] ibid., § 8

was convicted of, inter alia, burglary and robbery.[178] After reaching the age of majority, he was convicted on grounds of supply of Class A drugs in 2008, and was sentenced to seven years in prison[179]. On appeal, he was sentenced to one year of detention in an institution for young offenders.[180] In 2010, a deportation order, with an infinite re-entry ban, was issued for the applicant.[181] He appealed, submitting evidence that "he had developed Adolescent Conduct Disorder", and that a number of positive factors, including his relationships with his family members, and a wish to improve, lessened the risk of his reoffending.[182] The First-tier Tribunal (IAC) found the appeal to be successful. This decision was, however, repealed by the Upper Tribunal in 2011, which held that his long history of criminal conduct weighed heavily in favour of expulsion.[183]

In 2012, the applicant submitted to the Secretary of State that he and his British girlfriend had had a son in October that same year. In January 2013, the Secretary of State decided not to revoke his expulsion,[184] and this decision was upheld following appeal. The applicant subsequently submitted documents indicating that he had made positive progress, and that "the risk of re-offending and of harm to the public was very low".[185] The First-tier Tribunal dismissed his appeal in September 2013.[186] In 2015, the applicant and his girlfriend split, though he retained contact with his son every second week on Saturdays.[187]

The ECtHR was, by six votes to one, satisfied that domestic authorities had conducted a sufficiently balanced examination of the applicant's case.[188] The Court accepted that the deportation of the applicant would constitute an interference in his "private life" and "family life".[189] It recognised that the applicant had strong ties with his host state, and limited ties with his country

[178] Ndidi., §§ 10-14
[179] Ibid., §§ 17-19
[180] ibid.
[181] ibid., § 21
[182] ibid., § 23
[183] ibid., § 31
[184] ibid., § 34
[185] ibid., § 38
[186] Ibid., § 39
[187] ibid., § 48
[188] ibid., § 82
[189] ibid., § 74

of nationality.[190] Nevertheless, the seriousness of his offences, the Court accepted, justified his expulsion. Accordingly, there had been no violation of his Article 8 rights.[191]

3.3 Findings from the analysis

3.3.1 Striking a "fair balance" - the relative weight afforded to the proportionality criteria

This section will examine the relative weight afforded by the ECtHR to the various *Üner/Maslov* criteria in recent LTSM cases, focusing, in particular, on the balance struck between the "seriousness of the offence" criterion vis-á-vis those factors which may mitigate in favour of the applicants.

At the outset, it should be noted that the Court, in all of the cases selected for analysis, concluded that the applicants' Article 8 rights had not been violated. It is therefore clear that the Court found the proportionality criterion relating to the seriousness of the applicant's offence(s) to outweigh the remaining criteria in each case. This may, arguably, not be striking in itself, considering that the applicants in most of the cases did indeed commit offences which must be characterised as serious. However, the Court's reasoning in some of the judgements stands out, for various reasons. These judgements will be discussed more in-depth in this section.

Narrowing down first on the case of Külekci v. Austria, the Court's reasoning notably departed from that employed in *Maslov*, despite the facts of the cases resembling greatly. The applicant in *Maslov* had committed a series of non-violent, though serious, offences at the ages of 14 and 15.[192] He had, however, lived in Austria since the age of six, and had his family there.[193] The Court held that "the decisive feature of the … case" was "the young age at which the applicant committed the offences and, with one exception, their non-violent nature".[194] The Court further

[190] Ndidi § 81
[191] ibid.
[192] Maslov §§ 12-16
[193] ibid., §§ 10-11
[194] ibid., § 81

payed particular attention to the principle of the best interest of the child, noting that this "includes an obligation to facilitate his or her reintegration", citing Article 40 of the Convention on the Rights of the Child (CRC).[195] The Court proceeded to state that reintegration "will not be achieved by severing family or social ties through expulsion, which must remain a means of last resort in the case of a juvenile offender."[196] Accordingly, the Court found that there had been a violation of the applicant's Article 8 rights.[197]

As previously described, the Court, in *Külekci*, found the applicant to have very strong links with Austria, referencing his family ties, the long duration of his stay, the education he had received there, and his mastering of the language.[198] With regards to the criterion relating to the applicant's behaviour following the commission of the final offence, the Court noted that the applicant had demonstrated good conduct following his last conviction.[199]

Significantly, the Court departed from *Maslov* in its application of the best interest of the child principle. The Court reiterated its argument from *Maslov* relating to the obligation of States to facilitate the rehabilitation of juvenile offenders,[200] however, the principle was not applied in the proportionality assessment.

As such, in *Külekci*, the criteria weighing in favour of finding a violation of the applicant's Article 8 rights were not afforded significant weight, the criterion relating to the seriousness of his offences taking precedence, despite his young age at the time of the convictions, and the good behaviour he had demonstrated afterwards.

What differentiates the facts in *Külekci* from the facts in *Maslov* is the nature of the offences committed. Whilst in the latter case, the Court emphasised that the applicant's offences were, mostly, of a non-violent nature, the same did not ring true in *Külekci*. As such, the judgement in *Külekci* established that, where the offences forming the grounds for expulsion are of a "violent" character, this would constitute a factor that is to be afforded significant weight in the

[195] Maslov., § 83
[196] ibid, § 83
[197] ibid., § 101
[198] Külekci § 49
[199] ibid., § 48
[200] ibid., § 41

proportionality assessment, even when the applicant was a minor when the offences were committed. The principle of the best interests of the child cf. Article 3 of the CRC will thus not in itself factor heavily in the balance, if the offences committed can be characterised as violent.

Moving on to *Zakharchuk*, the Court, as previously described, found several factors to be present which spoke in favour of finding a violation of the applicant's right to respect for private life cf. Article 8, including, inter alia, that he was "fully integrated" into his host state, had established a career there, and had shown good behaviour following the commission of his offence.[201] Nevertheless, the Court finally found his offence to be of a sufficiently serious nature to justify his expulsion.[202]

The dissenting judges - judges Lemmens, Pinto de Albuquerque, and Elósegui - argued that there were not sufficient grounds to conclude that the applicant posed a threat to public safety.[203] In particular, the judges took issue with Russian authorities' characterisation of the applicant's criminal offence as "premeditated" and a "group attack", arguing that "such statements do not reflect a careful and nuanced assessment of the nature of the offence".[204]

The judges further held that the applicant's good conduct during the seven years following the commission of the offence, should have been attributed more weight by domestic authorities, and the majority of the ECtHR, because this factor could indicate that he did not in fact pose a threat to public safety.[205]

The *Zakharchuk* judgement, like *Külekci*, demonstrates that very strong factors weighing in favour of the applicant may be highlighted in the course of the proportionality assessment, although these factors ultimately give way to the "seriousness of the offence" criterion.

What particularly stands out in *Zakharchuk*, is the fact that the applicant only committed one offence, in contrast to what was the case in, inter alia, *Azerkane* and *Levakovic*.[206] Furthermore,

[201] Zakharchuk § 59
[202] ibid., § 61
[203] ibid., dissenting opinion §§ 1-2, § 6
[204] ibid., § 4
[205] ibid., § 6
[206] see sections 3.2.3 & 3.2.5

as suggested by the dissenting judges, the seriousness of his offence was, perhaps, exaggerated by domestic authorities.[207] What is nevertheless made clear by the judgement in *Zakharchuk* is that one violent offence, such as a "bar-brawl" in this particular case, constitutes a serious enough reason to justify expulsion of a LTSM whose strong ties with his host state are not in dispute.

This conclusion stands in contrast with certain older ECtHR judgements. In Boultif v. Switzerland (2001), for example, the applicant had, like Mr Zakharchuk, been convicted of attacking a man. Additionally, he was convicted of robbery and unlawful possession of weapons.[208] Unlike the applicant in *Zakharchuk*, he had entered his host state after reaching the age of majority.[209] The Court found that his removal from Switzerland would breach his right to family life cf. Article 8. Crucially, the Court was not convinced that the applicant constituted a threat to public safety, citing his good behaviour following the commission of the offences as an important mitigating factor.[210] The latter consideration would appear to be equally applicable in *Zakharchuk*. In this respect, *Zakharchuk* seems to depart from previous jurisprudence.

Another case demonstrating the strong impact of the "seriousness of the offence" criterion vis-a-vis the remaining proportionality criteria is that of Azerkane v. the Netherlands (2020). It should here be recalled that the Court found the applicant to have "strong ties" with his host state,[211] where he had been born, as well as limited ties with his country of nationality.[212] Further, the Court explicitly made clear that the applicant's good conduct following his final conviction "carries less weight" than the offences he had committed.[213]

The Court's reasoning in *Azerkane* was, as such, consistent with that employed in *Külekci* and *Zakharchuk*, demonstrating that the *Üner* and *Maslov* criteria set up to ensure that the interests of a LTSM are taken duly into account in the proportionality assessment, were once again

[207] Zakharchuk, dissenting opinion § 4
[208] Boultif v. Switzerland (2001) §§ 8-9
[209] ibid.
[210] ibid., § 51
[211] Azerkane § 79
[212] ibid., § 81
[213] ibid., § 75

treated as subsidiary to the criterion relating to the seriousness of his criminal offences, despite the Court's finding that the applicant undoubtedly had strong ties with his host state.

The judgement in *Levakovic* may, to some degree, explain why the Court, in the above-mentioned cases, accepted that the "seriousness of the offence" criterion should outweigh the other *Üner* and *Maslov* criteria. In *Levakovic*, the Court noted that it, in its jurisprudence, "has not qualified the relative weight to be accorded to each criteria … as this analysis is, in the first place, for the national authorities subject to European supervision."[214] This statement has not appeared in preceding Article 8 cases concerning the expulsion of migrants. It is certainly rooted in the subsidiarity principle and is, as such, in line with established ECtHR doctrines of interpretation. Nevertheless, it could be deduced that domestic authorities are, in principle, free to adopt the view that the criterion relating to a migrant's ties with his host state is to be considered as subordinate to the criterion relating to the seriousness of the offence(s) committed. Allowing Member States such a wide room for manoeuvre arguably facilitates a diminution of "private life" protection for LTSMs facing expulsion. This prompts the question of whether the Court's statement in *Levakovic* effectively contradicts the "practical and effective" doctrine, in turn undermining the aim and purpose of the ECHR – to maintain and realise fundamental human rights protection.[215]

The impact of the subsidiarity principle in the cases analysed will be discussed further in section 3.3.4. Therefore, it suffices to here conclude that the above discussion illustrates an emerging trend wherein the fact of a LTSM's having committed a serious offence is consistently given priority over the remaining proportionality criteria, which may weigh in his favour. In this connection, it should be noted that judges Costa, Zupancic and Türmen, in their dissenting opinion in *Üner*, expressed the concern that the Court was developing an approach "which gives priority to one criterion, relating to the offence, and treats the others as secondary or marginal".[216] Based on the findings from recent jurisprudence presented above, the judges' concerns appear to have been justified.

[214] Levakovic § 41

[215] ECHR Preamble

[216] Üner, dissenting opinion § 16

3.3.2 Integration as an indicator of the intensity of a LTSMs private life

A further development in recent ECtHR jurisprudence in LTSM cases is the introduction of "lacking integration" as a factor weighing in favour of the expulsion of the applicant.

Returning to *Külekci*, and recalling that the ECtHR acknowledged the applicant's strong ties with his host state, it is notable that the Court thereafter turned to state that the Mr Külekci "did not submit any other information to substantiate his integration in Austria".[217] Furthermore, the Court noted that the applicant did not seem to have been "economically integrated" in Austria, referring to the fact that he had not been able to find work between completing his sentence and being issued the final exclusion order.[218]

It appears as though the Court here adopted an approach where the level of the applicant's integration into his host state is considered a relevant indicator of the strength of the private life he has established in that country. In factoring in integration as a relevant indicator, the Court appears to set up a higher evidentiary requirement than previously, in that it seems as though the burden is here placed on the applicant to prove that his integration into Austrian society goes beyond such "normal ties" that can be expected to exist as a result of lengthy stay, family ties, and mastering of the host country's language. The added criterion of "economic integration" factored in by the Court in its reasoning is perhaps especially confounding, given that the applicant was still a minor when he was released from prison and, having served a sentence for a serious offence, did not have such prerequisites as can be expected to be necessary in order to quickly find gainful employment. This argument may also apply when considering the Court's reasoning in *Zakharchuk*, where it noted that "the applicant failed to find employment or justify the lack thereof" in between his release from prison and his deportation, despite being ordered to do so by domestic authorities.[219] In contrast to *Külekci*, however, the Court did not view Mr Zakharchuk's failure to find employment as an indicator of his level of integration.

The Court's treatment of integration as a barometer of the applicant's social ties is, it could be posited, problematic. In considering integration as being somehow synonymous with "private life", one is arguably judging the value of an individual's private life in their host state, which

[217] Külekci § 49

[218] ibid.

[219] Zakharchuk § 61

seems incompatible with the ordinary meaning of "respect for … his private life" cf. Article 8(1),[220] and departs considerably from the notion that "private life" includes a right to personality, identity,[221] self-determination and autonomy.[222]

What may be deduced from the Court's judgement in *Külekci,* is that when the juvenile offences committed by a migrant are of a violent nature, the applicant must be able to demonstrate a significant level of integration in his host state, as well as very limited ties with the country to which he is expelled, in order to tip the balance between competing interests in his favour.

The "integration factor" is also present in *Levakovic*. It should here be recalled that the Court, in *Levakovic,* considered "it of importance" that domestic authorities had found the applicant to be "very poorly integrated into Danish society" because he had "primarily lived a life of crime and consistently demonstrated a lack of will to comply with Danish law".[223]

The Court's reasoning regarding the applicant's "weakened" ties with Denmark is especially confounding, given that the Court also accepted that he had no ties with his country of origin.[224] The natural conclusion flowing from the latter fact is that the applicant, in reality, had no ties with any other country than Denmark, where he had lived his entire life. As such, the totality of his social and cultural ties were entirely linked to Denmark, which in itself should be taken to mean that his links to his host state were, indeed, very strong. This conclusion finds support in the joint concurring opinion of judges Bank and Lemmens in the case, where the judges noted that "the applicant's identity has been formed in Denmark",[225] and that, as such, the fact of him being a national of Croatia was a pure formality - not an experienced, and in any way meaningful, reality.[226]

[220] ECHR Article 8(1)
[221] Mikulic § 54
[222] Pretty § 61
[223] Levakovic § 44
[224] ibid., § 42
[225] ibid., concurring opinion § 2
[226] ibid., § 4

It is further notable that the Court, in *Levakovic*, departs from the approach of considering the applicant's ties with his host state as a separate criterion from that concerning his criminal history, instead seemingly accepting that the latter can indicate that the intensity of the applicant's private life in Denmark was, somehow, weakened. Such an approach is, it could be posited, problematic, given that the same argumentation could be employed in virtually all cases concerning expulsion of criminally convicted LTSMs. Thus, if this approach were to be routinely applied in future cases, this would entail that applicants will have little chance of proving that their "private life" in their host state is of sufficient strength or value to render their expulsion disproportionate.

3.3.3 A strict interpretation of the limitations contained in Article 8(2)?

As described in Chapter 2, limitations to Convention rights are to be interpreted restrictively, to ensure that the rights offer "practical and effective" protection.[227]

A particularly interesting case to consider in this connection is that of Palanci v. Switzerland. An element of the case which distinguishes it from the other cases analysed, is that the offences committed by the applicant were of a far less serious nature than those forming the grounds for expulsion in, inter alia, *Azerkane* and *Külekci*.[228] Nevertheless, the Court, in *Palanci*, found no violation of the applicant's Article 8 rights.

In *Palanci*, the Court accepted that securing "public order" constituted a legitimate aim within the meaning of Article 8(2), finding that Swiss authorities were justified in holding that "the applicant's behaviour had been a threat to public order."[229]

It may be posited that the Court's failure to justify why lack of financial diligence and failure to repay debt constitutes a threat to public order, is unfortunate. In accepting that minor crimes form legitimate grounds for the expulsion of a settled migrant who has spent close to two decades in the expelling state, the great majority of this period with lawful residence, the Court

[227] see e.g. Kutic § 25; Ashingdane § 57

[228] see sections 3.2.1 & 3.2.3

[229] Palanci § 58

undoubtedly interpreted the legitimate aims listed in Article 8(2) more widely than previously.[230] A comparable case in this regard is that of Keles v. Germany,[231] where the Court, in determining the outcome of the case, did not find the fact of the applicant's having repeatedly committed traffic offences to be an influential factor.[232]

On the other hand, the Court's assessment of the seriousness of the applicant's crimes in *Palanci* may not necessarily have implications for other LTSM cases, given that he had not spent most of his childhood/youth in his host country, unlike the applicants in, inter alia *Külekci*, *Zakarchuk* and *Ndidi*. As such, the offences committed by Mr Palanci would not necessarily have been sufficiently serious to justify his expulsion, had he arrived in Switzerland as a child.

However, as was highlighted by judges Raymond, Sajó and Spano in their joint concurring opinion in the case; the pursuit of "public order" is not one of the legitimate aims listed in Article 8(2) which could justify an interference in an individual's Article 8(1) rights.[233] The listed legitimate aims of "public safety" and "the prevention of disorder or crime" cf. Article 8(2),[234] in their autonomous meaning, can hardly be said to encompass lack of financial diligence and other minor crimes.[235] It may thus be regrettable that the Court accepted that the applicant's crimes, which were in the judgement portrayed as being of a non-serious nature, constituted a threat to public order, without qualifying the meaning of "public order" and its relation to Article 8(2), since this dilutes the meaning of the legitimate aims listed in the provision - opening up space to add new interests to an exhaustive list.

The simple solution available to the Court, as noted in the concurring opinion, would have been to consider the interference in the applicant's Article 8 rights as justified in the interests of "the economic well-being of the country", which *is* one of the legitimate aims listed in Article 8(2).[236]

---

[230] Milios (2018) pp. 428-429
[231] ibid; Collinson (2020) p. 351
[232] Keles v. Germany (2005) §§ 6-16, § 59
[233] Palanci., concurring opinion § 4
[234] ECHR Article 8(2)
[235] Palanci.,concurring opinion § 5
[236] ibid., § 6; ECHR Article 8(2)

The outcome of *Palanci* did not necessarily rest on the correct application of Article 8(2).[237] This does, however, not mean that the Court's interpretation of the legitimate aims in the case should not be subjected to scrutiny, since there are grounds to question whether this interpretation was in accordance with the "practical and effective" doctrine. A widening of the scope of the legitimate aims in Article 8(2) is a serious development which, given the precedence ECtHR judgements can set for future jurisprudence and domestic decision-making, could have an impact on the protective scope of Article 8 in expulsion cases.

3.3.4 The impact of the subsidiarity principle in recent ECtHR jurisprudence

The Court's restraint in questioning the relative weight afforded to the proportionality criteria by domestic authorities was discussed in section 3.3.1. This, in itself, indicates that the Court has gradually implemented a stronger focus on subsidiarity, in line with the aims of the Interlaken process.

There are, however, further aspects of the Court's reasoning in recent cases which may, arguably, reveal the effects of Interlaken more tangibly. The *Ndidi* judgement was, as previously mentioned, cited as evidence of the Court's "new" approach to subsidiarity during the "2019 and Beyond" Conference in 2017.[238] In addition, the Court's judgement in, inter alia,[239] *Levakovic* stands out for its application of the subsidiarity principle.

Overall, both *Ndidi* and *Levakovic* indicate a trend towards stricter adherence to the subsidiarity principle than what has been the case in previous judgements. This manifests in the Court's reluctance, in these cases, to conduct new proportionality assessments - instead restricting its assessment to whether domestic authorities conducted a sufficiently thorough examination.

Interestingly, in *Ndidi*, the ECtHR directly addressed this new approach. Here, the Court stated that it, in Article 8 cases, will generally only replace domestic decision-making bodies' views for its own "where there are shown to be strong reasons for doing so", provided that the national

[237] Palanci., concurring opinion §§ 1-2

[238] "2019 and Beyond" Report (2017) p. 20

[239] See also Assem Hassan Ali v. Denmark (2018), Alam v. Denmark (2017), Hamesevic v. Denmark (2017)

authorities "have carefully examined the facts, applying the relevant human rights standards consistently with the Convention and its case-law, and adequately balanced the applicant's personal interests against the more general public interest in the case".[240]

This argumentation stems from Von Hannover v. Germany (mutatis mutandis),[241] and has not been employed in Article 8 cases concerning expulsion of migrants prior to *Ndidi*. Interestingly, the Court proceeded to note that "there has been no change in the applicant's circumstances since the date of the last domestic decision" which could give the Court "strong reasons to substitute its own assessment of proportionality for that of the domestic authorities",[242] adding that, "In fact, following the last domestic decision, the applicant's relationship with his partner has ended, and his contact with his son has been restricted".[243] The Court did not offer guidance as to which circumstances arising after the final domestic decision that could constitute the "strong reasons" necessary for it to conduct the proportionality assessment afresh.

This line of argumentation was repeated by the Court in *Levakovic*, where it stated that "although opinions may differ on the outcome of a judgement", serious reasons are required for the Court "to substitute its view for that of the domestic courts" where these have conducted an assessment in conformity with the criteria set out in ECtHR jurisprudence.[244] The Court, yet again, did not proceed to offer any guidance as to what such strong reasons would be.

Returning to the particular circumstances in *Ndidi*, it should be noted that the Court, in other cases, has in fact considered the split between the expelled migrant and their partner with whom they have children, to constitute a key factor in the proportionality assessment. In Nunez v. Norway (2011), the Court argued that the expulsion of the applicant, who was a mother of two, would not be in accordance with the principle of the best interest of the child, especially in virtue of them already having experienced stress in connection with their parents' split.[245]

---

[240] Ndidi § 76

[241] Ibid; von Hannover v. Germany (2012) § 107

[242] Ndidi § 81

[243] ibid.

[244] Levakovic §45

[245] Nunez v. Norway (2011) § 81

Likewise, in Udeh v. Switzerland (2013), the Court attached significant weight to the fact that the ex-partner of Mr Udeh could not be expected to relocate to his country of nationality with their children, in virtue of them being divorced,[246] and found that the expulsion of the applicant would constitute a violation of his Article 8 rights.[247] As such, it is evident that the split between the expellee and their partner, where children are involved, has constituted a central factor in the proportionality assessment in earlier cases, and it could thus be argued that this factor should be considered a "strong reason" for the Court to conduct the proportionality assessment afresh.

Turning now to the *Üner*/*Maslov* criterion relating to the length of time passed since the applicant committed his crime(s), and his conduct during this time. As noted by judge Turkovic in his dissenting opinion in *Ndidi*, "The majority completely disregarded the fact that a considerable period of time (10 years) has elapsed since the offence was committed" and that the applicant had a) not reoffended in this period, and b) had shown a will to rehabilitate.[248] Judge Turkovic highlights this as a change in circumstance since the final domestic decision that should have constituted a strong reason for the ECtHR to substitute its assessment for that of domestic courts.[249]

A ramification of adopting an approach which significantly limits the ECtHR's possibility to take new circumstances into account in cases where the applicant has not yet been deported, may, arguably, be that the burden of proof imposed on the applicant is heightened, as appears to have been the case in *Ndidi*. As judge Turkovic argues, "It seems that the applicant is required to demonstrate some 'exceptional' change in his or her circumstances post-dating the last decision of the domestic authorities in order for the Court even to engage in the assessment of proportionality."[250]

[246] Udeh v. Switzerland (2013) §§ 52-54
[247] ibid., § 55
[248] Ndidi., dissenting opinion § 3
[249] ibid., §§ 3-4
[250] ibid., § 4

In light of this, one may question whether the approach adopted by the ECtHR in this case is fundamentally at odds with the principle that the burden of proof is on the State Party to demonstrate that there exist "very serious reasons" which justify the expulsion of a LTSM.[251]

In this connection, it should be pointed out that the ECtHR, in *Azerkane*, pursued a different approach. In paragraph 76 of the judgement, the Court noted that its task is "to examine the compatibility with the Convention of the applicant's actual removal and not the final removal order",[252] and that, since the applicant had not yet been removed from the Netherlands, the proportionality assessment "is to be conducted at the time of the proceedings before the Court".[253] Therefore, the Court reasoned, the applicant's conduct following the final domestic decision to revoke his permit and expel him constituted a factor to be taken into account in the Court's assessment.[254] Subsequently, the Court found "it of considerable relevance" that the applicant had committed further offences following the final domestic decision.[255]

As such, while the Court, in *Ndidi*, did not find the applicant's good conduct following the last domestic decision to be of considerable importance, it did find Mr. Azerkane's "bad" conduct following the final decision to be of central relevance. Why one and the same criterion should be considered relevant when it weighs in favour of the Contracting State, but not when it weighs in favour of the applicant, is arguably difficult to reconcile. Perhaps the answer lies in the Interlaken process, although it is not clear how this differential approach could be explained in terms of an increased emphasis on subsidiarity. After all, the diverging reasoning employed in *Ndidi* vis-a-vis *Azkerane* reveals an inconsistency in the Court's approach, and such inconsistencies may make it more difficult for domestic authorities to understand the law.[256] As one of the core aspects of the subsidiarity principle is that States Parties should "efficiently and effectively exercise their primary role" in enforcing ECHR protection within their jurisdiction,[257] clear and coherent guidance from the Court on how Convention is to be interpreted and applied

[251] With regards to the burden of proof, see e.g. Piechowicz v. Poland (2012) § 212
[252] Azerkane § 76
[253] ibid.
[254] Azerkane, § 76
[255] ibid., § 77.
[256] Klaassen (2019) p. 158
[257] ibid.

is of great importance.[258] As such, the different approaches pursued in *Ndidi* vis-a-vis *Azerkane*, arguably, do not contribute to strengthening the subsidiarity principle - rather on the contrary.

It remains to be seen whether the Court will repeat its line of argumentation from *Azerkane* in future judgements. As of yet, the Court's treatment of the subsidiarity principle in *Ndidi* and *Levakovic* appears to be more cemented. Evidence of this can be found in, inter alia, two admissibility decisions in Article 8 cases concerning LTSMs from 2017 - Hamesevic v. Denmark and Alam v. Denmark. In these two cases, the Court refused to substitute its view for that of national decision-making bodies, since they, in the Court's view, had conducted thorough assessments. Therefore, the Court finally declared the applications inadmissible.[259]

The developments described above indicate a shift in the ECtHR's approach in Article 8 cases concerning LTSMs, entailing an increasingly explicit emphasis on subsidiarity. These overall findings may be a product of the Interlaken reform process and the adoption of Protocol 15. In any case, the trend towards stricter adherence to the subsidiary principle in LTSM cases identified above could foreshadow the impact Protocol 15 will have on ECtHR jurisprudence upon entry into force.

If so, one may question whether the "private life" protection afforded to LTSMs facing expulsion is gradually becoming more "illusory" than "practical and effective".[260] For one, if the Court continues to employ this "new" approach, this would appear to entail that a criminally convicted LTSM bringing his expulsion case before the ECtHR has little chance of successfully arguing that the outcome of domestic proceedings was not a result of an adequately balanced proportionality assessment. Further, it will likely also bear with it the repercussion that cases such as those analysed in this thesis will increasingly be declared inadmissible by the Court,[261] rendering LTSMs' chances of challenging domestic decisions void.

[258] Klaassen (2015) p. 81
[259] Hamsevic §§ 46-47; Alam § 35
[260] see e.g. Kutic § 25
[261] Desmond (2018) p. 277

3.3.5 Interim conclusions - de lege lata

Based on the findings from the analysis of recent ECtHR jurisprudence presented above, it may be concluded that the protective scope of "private life" under Article 8 is limited in cases concerning expulsion of LTSMs. If the applicant has committed an offence of a serious nature, the "private life" provision cannot shield him against expulsion. Rather, the offence in itself constitutes the "very serious reasons" required to justify the measure.

Furthermore, there are grounds to conclude that the "private life" protection enjoyed by LTSMs facing expulsion is gradually becoming weaker. Some recent judgements clearly depart from previous jurisprudence. This is in itself notable, given that none of the analysed judgements were by the Grand Chamber.[262]

In the judgements analysed, the *Üner*/*Maslov* criterion relating to the seriousness of the applicant's offence(s) has consistently been given priority over the criteria weighing in the applicants' favour. The Court has, in several of the cases, acknowledged the good behaviour of the applicants in the time following their criminal acts, nevertheless finding that this factor could not be afforded significant weight. It is therefore evident that the criterion has played a lesser role in the Court's recent jurisprudence.

The introduction of the "integration factor" (*Külekci* and *Levakovic*) imposes an evidentiary requirement on the applicant to demonstrate that his level of integration into his host state goes beyond the "normal" indicators of education, social networks, and language. Additionally, recent judgements display an added emphasis on the subsidiarity principle, which may be a result of the Interlaken process. The Court's proportionality assessments have become increasingly restrained, in turn signalling a widening of the margin of appreciation. This prompts the question of whether a continuation of this approach in the Court's Article 8 jurisprudence concerning LTSMs could effectively contradict the "practical and effective" doctrine.

[262] See ECHR Articles 30 & 43(2); a case may be referred to, and accepted, by the Grand Chamber if the Chamber's resolution of it departs from previous jurisprudence.

This latter question is further spurred by the Court's interpretation of the legitimate aims listed in Article 8(2) in *Palanci*, which appears to be at odds with the principle that limitations to ECHR provisions are to be interpreted restrictively.[263]

In light of the above findings, seen in conjunction with one another, the overarching conclusion reached is that the "private life" limb of Article 8 offers limited protection against expulsion for LTSMs who have a criminal history, and further, that the protection granted to this group appears to be weakening.

[263] Regner, partly dissenting opinion by judge Serghides § 50

4 How could the protective scope of "private life" cf. Article 8 ECHR be enhanced? A de lege ferenda analysis

4.1 Introductory remarks

The previous chapter provided an examination of recent ECtHR Article 8 case-law regarding the expulsion of LTSMs, finding that the protective scope of "private life" in these cases is limited – and that there are grounds for concluding that it is, in fact, decreasing.

The current chapter will provide a de lege ferenda perspective, considering some paths towards enhanced protection that the ECtHR could follow down, if willing.

The approach pursued in this chapter is, as noted in section 1.3.1.2, influenced by a contribution edited by Brems, in which various scholars practiced a "rewriting concept" in order to improve "the way the Court addresses the specific concerns of members of non-dominant groups". [264] The authors here sought to identify technical solutions to resolve complications arising from different ECtHR judgements, building on the Court's own lines of reasoning.[265]

This chapter will attempt to show how the Court could propel its case-law in LTSM cases forwards by resorting to its own interpretive mechanisms. It will begin by considering whether the Court could rely on the evolutive interpretation mechanism in order to nuance its understanding of nationality. Next, the chapter will review whether there exists a European consensus, which could allow the Court to restrict the margin of appreciation granted to ECHR States Parties in expulsion cases. Subsequently, the chapter will consider whether autonomous interpretation of concepts contained in other Convention provisions than Article 8 could constitute the key to unlock unfulfilled protection for LTSMs against expulsion. The chapter will then conclude by offering some final reflections.

[264] Brems (2013) pp. 1 & 2

[265] ibid., pp. 2 & 6

4.2 Evolutive interpretation

Scholars writing from a socio-legal perspective have argued that the meaning attributed to citizenship has undergone such a change throughout the last decades that the citizen versus non-citizen divide can no longer be viewed as a legitimate basis for differentiating between rights.[266] They reference increased transnational mobility resulting from globalisation as an important factor, which has led to a decoupling between the previously intertwined notions of citizenship and belonging.[267]

Against this backdrop, it is arguably somewhat surprising that the view of citizenship has not undergone any substantial evolution in ECtHR jurisprudence since the 1980s. The Convention is, after all, a "living instrument".[268]

In what follows, perspectives on nationality and long-term residence status advanced by the International Court of Justice (ICJ) as well as by judges of the ECtHR, will be outlined. The common feature of these perspectives is that they promote the view that an individual's real ties with a State should determine what obligations the State has towards the individual, setting aside the idea that formal citizenship status should in itself be determinative in this regard.

The section will begin by outlining the "genuine link" approach offered by the ICJ in the case of Nottebohm (Liechtenstein v. Guatemala) decided on in 1955. Following this, it will proceed to examine how versions of the "genuine link" criterion have been advanced by ECtHR judges throughout the years.

4.2.1 How could the ECtHR discard the citizen versus non-citizen distinction?

4.2.1.1 Nottebohm - effective nationality

The *Nottebohm* case is significant since it constitutes one of the few examples of decisions ruling on States' nationality practices.[269]

[266] see e.g. Nash (2009); Baumgärtel (2020); Noll (2010); Bosniak (2006)
[267] Macklin (2018) pp. 492 - 497; Spiro, P. J. (2014) pp. 281–300
[268] Tyrer § 31
[269] Spiro (2019) p. 1

The applicant, Friedrich Nottebohm, was born in Germany in 1881, but moved to Guatemala in 1905. He did not naturalise there, despite lengthy residence.[270] In 1939, he naturalised in Lichtenstein, although never having lived there.[271] In 1943, after having declared war on Germany, Guatemalan authorities detained the applicant, holding that he was an enemy alien, and refusing to consider his citizenship of Lichtenstein as legitimate.[272] Guatemala argued that the applicant had obtained this citizenship through fraud.[273]

Lichtenstein, on the other hand, being a neutral state during the Second World War, argued that it was wrongful of Guatemalan authorities to detain and expropriate the applicant, since he was a Liechtenstein national.[274]

The majority of the ICJ held that the applicant's acquisition of Lichtenstein citizenship had no legal effect.[275] In its assessment, the ICJ conceptualised citizenship as follows:

> "According to the practice of States, to arbitral and judicial decisions and to the opinions of writers, nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties."[276]

Based on this definition, the ICJ found that the applicant had no substantial connection with Liechtenstein, and that his acquisition of citizenship there "was lacking in the genuineness requisite to an act of such importance."[277]

The "genuine link" approach employed by the ICJ in *Nottebohm* thus builds on the idea that citizenship status should not, in itself, be determinative of which obligations a State has vis-a-vis its citizens.

---

[270] Nottebohm (Liechtenstein v. Guatemala) (1995) p. 13
[271] ibid., pp. 13 & 15
[272] ibid., pp. 18 & 25
[273] ibid., pp. 9-13
[274] ibid., pp. 6-9 & 18
[275] ibid., p. 26
[276] ibid., p. 23
[277] ibid., p. 26

Theorists argue that "genuine link" theory makes "little sense" in today's world.[278] They cite increased acceptance of dual nationality as a "fact of globalisation",[279] as well as the development of an international human rights regime, arguing that this regime has replaced the paradigm that "interstate rights flow from the status of the individual" with the paradigm that "individual rights flow not from status, but from personhood."[280]

The critics nevertheless appear to agree with the ICJ on one central point, namely that citizenship status should, in this era of globalisation, be considered a mere legal fact: it does not signify a real and genuine bond between the individual and a State. Therefore, notwithstanding the flaws that the judgement may have, its approach may still hold relevance for the topic of LTSMs and the rights to which they should be entitled.

4.2.1.2 "Genuine link" theory in ECtHR jurisprudence

As was explored in the former chapter, the ECtHR, in expulsion cases, examines the applicant's ties with his host state vis-á-vis his country of origin. Although, as has been shown, the finding of strong ties with the host state has not been a decisive factor for the Court in recent years, the incorporation of the criterion into the proportionality assessment does, in itself, illustrate that the Court, in principle, views the "genuine link" factor as valuable.

More radical approaches have, however, been proposed by various ECtHR judges in dissenting and concurring opinions throughout the years. A recent example stems from the joint concurring opinion of judges Bank and Lemmens in *Levakovic*. The judges here noted that, "In general, nationality is the illustration of the existence of a strong tie with the State conferring it", and proceeded to cite the ICJs argumentation from *Nottebohm*.[281] The judges further noted that the description of nationality offered in *Nottebohm* "obviously … does not fit the present applicant's situation."[282]

[278] Spiro (2019) p. 17
[279] ibid.
[280] Macklin (2018) p. 496
[281] Levakovic, concurring opinion § 4
[282] ibid.

The "genuine link" concept has also appeared in various shapes and forms in the Court's earlier judgements. Already in 1992, the Commission, in its report on Beldjoudi v. France, noted that the applicant's Algerian nationality "though a legal reality, in no way reflects the real situation in human rights terms."[283] Further, Judge de Meyer argued that deportation of the applicant, who had resided in France for over 40 years, constituted inhuman treatment.[284]

Four years later, in his dissenting opinion in Boughanemi v. France (1996), Judge Martens argued that "integrated aliens", meaning "aliens who have lived all, or practically all their lives within a state" should be protected against expulsion in virtue of their ties with their host states.[285]

Similarly, judges Costa and Tulkens, in their dissenting opinion in Baghli v. France (1999) argued that the applicant was "virtually a French national",[286] and that he, in light of this, should not be deportable.

In Boujlifa v. France (1997), judges Baka and Van Dijk disagreed with the majority's finding that deportation of the applicant would not violate Article 8, arguing that the fact that he had lived most of his life in France should entail that "he … enjoy treatment from the French authorities not significantly less favourable than would be accorded to France's own nationals."[287] Similarly, the dissenting judges in *Üner* argued that settled migrants "should be granted the same fair treatment and a legal status as close as possible to that accorded to nationals."[288]

Although these various versions of the "genuine link" approach reflect only the views of a minority of ECtHR judges, the dissenting and concurring opinions nevertheless provide valuable insight into the discourse between the judges, revealing aspects of law which have played into the analysis of the Court.[289] The fact that "genuine link" argumentation is employed in

[283] Beldjoudi v. France (1992) § 64
[284] ibid., concurring opinion by Judge de Meyer
[285] Bougheanemi v. France (1996) dissenting opinion by Judge Martens § 7
[286] Baghli v. France (1999) joint dissenting opinion
[287] Boujlifa, joint dissenting opinion
[288] Üner, joint dissenting opinion § 5
[289] Farahat (2015) p. 315

these opinions shows that this approach is taken seriously, even though the majority has ultimately found other considerations to be more relevant.[290] As such, adopting a "genuine link" approach could to be a feasible option for the Court to pursue in order to enhance "private life" protection against expulsion for LTSMs.

4.3 European consensus - time to check the temperature?

A long time has passed since the ECtHR has taken the temperature on States Parties' laws and practice with regards to expulsion of LTSMs. In *Üner*, the Court the Court remarked that a number of ECHR States Parties had enacted laws or policy prohibiting expulsion of LTSMs on grounds of criminal convictions, certainly if they were born in - or arrived early to the host state.[291] Nevertheless, the Court found that "an absolute right not to be expelled cannot … be derived from Article 8".[292]

The Court's lack of examination of European consensus on expulsion practices in recent years may arguably be justified, based on the politically turbulent debates surrounding migration we have witnessed. On the other hand, one should not entirely rule out that the Court could, if willing, arrive at certain findings which could prevent a further regression of case-law concerning expulsion of LTSMs. This section will highlight certain developments, which suggest that there may be grounds to reduce the margin of appreciation.

4.3.1 Enhanced protection of long-term residents in EU law and domestic legislation

Since the Grand Chamber decision in *Üner,* several ECHR States have taken steps to enhance the protection of LTSMs in national legislation.[293]

In part, these domestic developments result from the adoption of Directive 2003/109,[294] following which most EU Member States have, at least to some degree, implemented the Directive's

[290] Farahat (2015) p. 315
[291] Üner § 55
[292] ibid.
[293] Dembour (2015) pp. 188-199
[294] EU Council Directive 2003/109/EC

provisions in domestic legislation.[295] The Directive allows third-country nationals (TNCs) who have resided legally in their host states for five years to apply for long-term residence status, following which they benefit from the Directive's guarantees.[296]

Recital 12 of the Directive's Preamble emphasises that long-term residents should have effective rights and obligations on par with those enjoyed by EU citizens.[297] Further, Recital 16 states that "long-term residents should enjoy reinforced protection against expulsion."[298]

A TNC who is a long-term resident according to the Directive may be expelled, but "solely where he/she constitutes an actual and sufficiently serious threat to public policy or public security."[299] Article 12(2) further specifies that an expulsion decision "shall not be founded on economic considerations."[300] Lastly, Article 12(3) lays down the criteria to be taken into account before an expulsion decision is made, which, in essence, reiterate the ECtHR's *Boultif* and *Üner* criteria.[301] Per 2019, Article 12 has been implemented correctly by most Member States.[302]

It may be argued that the Directive does not offer stronger protection against expulsion than Article 8 ECHR, particularly in light of the proportionality criteria to be taken into account before an expulsion is issued being alike. The relative scope of Article 12 of the Directive vis-á-vis Article 8 ECHR in expulsion matters is yet to be clarified by the Court of Justice of the European Union (CJEU) or the ECtHR.

It does nevertheless appear as though the legitimate grounds for expulsion listed in Article 12 of the Directive are stricter than those allowed by the ECtHR. Given that expulsion shall not be issued for economic reasons cf. Article 12(2), it is doubtful that the expulsion of the applicant in *Palanci*, for example, would have been in line with the Directive, if it were applicable.

---

[295] European Commission (2019); Note: Denmark, the United Kingdom and Ireland have opted out.
[296] Directive 2003/109/EC, Article 4
[297] ibid., Recital 12
[298] ibid., Recital 16
[299] ibid., Article 12(1)
[300] ibid., Article 12(2)
[301] ibid., Article 12(3)
[302] European Commission (2019) p.6

More generally, the mere fact that 15 EU Member States have recognised that TNCs should enjoy special protection against expulsion after five years of legal residence is, arguably, significant in itself. [303] Five years does, after all, set a relatively low threshold for enhanced protection to be granted.

Further, besides providing human rights guarantees, the Directive "establishes statutory guarantees for long-term residents including in situations where the ECHR would not offer protection".[304] A LTSM who has been granted a permit based on the Directive therefore benefits from an "extended legislative safety net".[305]

In light of the above, scholars agree that Directive 2003/109 has, without doubt, strengthened the protection of third-country national LTSMs in Europe, by constituting a "formal entrenchment of the rights of long-term immigrants",[306] and establishing "a uniform pan-European set of principles".[307] Due to this, some have posited that the Directive could, feasibly, be expected to affect the ECtHR's proportionality assessments and tighten the margin of appreciation, at least in cases where the Respondent State is bound by it.[308]

Besides transposing the Directive into their domestic regulations, several European states, including EEA states, have additional laws in place granting special protection to LTSMs, and to second-generation migrants in particular.

For example, in France, several categories of settled migrants are protected against expulsion by law, including migrants who arrived before the age of 12 and migrants who have resided in the country for 20 years or more.[309] Similarly, in Sweden, a criminally convicted migrant who arrived in the country before the age of 15, and has resided there for a minimum of five years

[303] Arcarazo (2011) pp. 77-81
[304] Thym (2014) p. 128
[305] ibid.
[306] Ronen (2012) p. 289
[307] Thym (2008) p. 110
[308] ibid., p. 111; Ronen (2012) p. 289; Thym (2014) p. 127
[309] French Code of Entry and Residence of Foreigners, Article L. 511-4

prior to the conviction, cannot be expelled.[310] In both Norway and Iceland, migrants born within the territory of the State are shielded from expulsion.[311]

Crucially, however, lack of provisions expressly prohibiting the expulsion of second-generation migrants in other countries does not necessarily entail that such migrants may there be expelled. This will be elaborated on below.

4.3.2 A trend towards liberal naturalisation laws

There is widespread agreement in literature that there has been a general trend towards liberalisation of naturalisation laws in Europe throughout the last few decades.[312]

In reading the ECtHR's judgements discussed in the previous chapter, one may wonder why none of the applicants had naturalised in their host states, given their lengthy residence there. Inevitably, the answer to this question lies in the fact that States Parties' nationality laws differ significantly from one another. Interestingly, however, the national legislations of several Member States provide relatively easy access to naturalisation for LTSMs, especially for second-generation migrants.[313]

For example, in France, Belgium, and Portugal, one may apply for naturalisation following five years of uninterrupted legal residence. [314] Further, children born to foreign parents in France automatically obtain citizenship upon turning 18, provided that they have resided in the country for at least five years after the age of 11.[315] Similarly, in Italy, children born in the country to foreign parents may acquire citizenship if they have resided continuously in the country from birth to reaching the age of adulthood.[316]

---

[310] Swedish Foreigners Act, Chapter 8 § 12

[311] Norwegian Immigration Act, Article 69; Icelandic Foreign Nationals Act, Article 102

[312] Sredanovic & Stadlmair (2018) p.2

[313] Paparusso (2019) p. 4

[314] French Civil Code, Article 21-17; Belgian Nationality Act, Article 12bis §1, No. 2; Portuguese Nationality Law, Article 6 § 1

[315] French Civil Code, Article 21-7

[316] Italian Citizenship Act, Article 4

In Germany, a child born on German soil to foreign parents is granted citizenship by birth, provided that one parent has either legally resided in Germany for eight years, or has been granted a permanent residence permit. [317] Similar provisions apply in the United Kingdom.[318]

Following a recent amendment, children born in Portugal to foreign parents can obtain citizenship, provided that one parent has resided in the country for one year, legally or illegally.[319] Similarly, children born to foreign parents in Spain can obtain citizenship after one year of residence.[320]

These examples, though non-exhaustive, illustrate that citizenship is, in fact, relatively accessible to LTSMs, especially to second-generation migrants, in many European states.

4.3.3 Conclusion - time to set a benchmark?

The combination of liberal naturalisation laws in several ECHR States Parties, as well as the implementation of specific provisions prohibiting the expulsion of second-generation migrants in domestic laws, suggests that many ECHR Member States agree that second-generation migrants, especially those born on the territory of the host state, should be shielded from expulsion. As such, it may be argued that sufficient consensus exists for the Court to establish that the expulsion of a LTSM born on the soil of their host state can never be justified. Setting such a benchmark would restrict the margin of appreciation and would undeniably constitute a significant shift in the Court's jurisprudence, which would, overall, lead to an enhancement of protection against expulsion for LTSMs.

[317] German Nationality Act, Section 4 § 3

[318] British Nationality Act Chapter 61 Article 1(b)

[319] Portuguese Nationality Law, Article 1F

[320] Spanish Civil Code, Article 22 § 2(a)

4.4 Autonomous concepts - could the key to unlock unfulfilled protection lie in other Convention provisions?

This final section of Chapter 4 will turn to consider whether autonomous interpretation of other Convention provisions than Article 8 could unveil unfulfilled potential for protection against expulsion for LTSMs.

Three alternatives will be proposed. First, the section will consider the Human Rights Committee's (HRC's) interpretation of "his own country" under Article 12(4) of the International Covenant on Civil and Political Rights (ICCPR), considering how the ECHR could adopt a similar approach. Second, it will examine whether Article 6(1) of the ECHR could be applicable to expulsion proceedings. Lastly, the section examine whether the ECtHR could reconceptualise expulsion following a criminal conviction as a form of double jeopardy cf. Article 4 of Protocol 7 to the Convention.

4.4.1 The HRC's interpretation of "his own country" cf. Article 12(4) ICCPR

Article 12(4) of the ICCPR provides that "no one shall be arbitrarily denied the right to enter his own country."[321] The wording "his own country" has given rise to the question of whether the provision can apply to foreign residents as well as citizens. In two cases, both concerning the expulsion of LTSMs following criminal convictions, the HRC has explored this question.[322] In Warsame v. Canada, the Committee found that Canada was indeed the applicant's "own country", due to the strength of his ties with the State, his family ties there, his mastering of the language, as well as "the duration of his stay in the country and the lack of any other ties than at best formal nationality with Somalia".[323] The HRC has also in its General Comment on Article 12 affirmed that the phrase "own country" can apply to individuals who do not hold formal citizenship status.[324]

Scholars have argued that the HRC's approach illustrates that the "normative argument to be made in favour of disaggregating the rights associated with citizenship … and extending it to

[321] ICCPR Article 12(4)

[322] Nystrom v. Australia (2011); Warsame v. Canada (2011)

[323] Warsame § 8.5

[324] HRC (1999) § 20

noncitizens", at least to LTSMs, has found a stronghold in international law and, as such, holds real legal legitimacy. [325]

The ratione personae in Article 12(4) does differ from the corresponding provision in the ECHR, namely Article 3 of Protocol 4 to the Convention, which prohibits the expulsion of nationals,[326] and further provides that "No one shall be deprived of the right to enter the territory of the State of which he is a national".[327] Nevertheless, the HRC's liberal interpretation, it could be argued, does raise the question as to whether the ECtHR could interpret Article 3 of Protocol 4 as encompassing "more than formal technical nationality", and as such assign an autonomous meaning to the term "national".[328] Several scholars have argued that this would indeed be viable.[329]

4.4.2 The applicability of Article 6(1) to immigration matters

Article 6(1) of the ECHR provides, inter alia, that "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."[330]

In the landmark ruling of Maaouia v. France (2000), the Court found that immigration proceedings do not fall under the scope of Article 6(1), since measures such as expulsion should be regarded as "administrative" rather than "civil" or "criminal".[331] Since expulsion is characterised as administrative, the expellee cannot invoke a right to be heard by an impartial judge or to have access to legal counsel.[332]

[325] Macklin (2018) p. 496
[326] ECHR Protocol 4 Article 3(1)
[327] Ibid., Article 3(2)
[328] Ersbøll (2007) p. 255
[329] ibid.; Harris, O'Boyle & Warbrick (1995), p. 563; Mole (2001), p. 142
[330] ECHR Article 6(1)
[331] Maaouia v. France (2000) §§ 38-40
[332] Dembour (2015) pp. 23-24; Franko (2019) pp. 74-75

Some commentators have argued that *Maaouia* should be overturned.[333] They reference the dissenting opinion in the case by judges Loucaides and Traja, as well as the general development in the interpretation of Article 6 that has taken place, wherein the scope of the provision has been extended to encompass matters not ordinarily falling under the private law sphere.[334]

Returning to *Maaouia*, the majority held that Article 6 ECHR must be interpreted in the light of the Convention system as a whole and found that, since Article 1 of Protocol 7 contains procedural guarantees specifically applicable to expulsion proceedings, the Contracting States would, in adopting this protocol, have intended expulsion measures to fall outside of the scope of Article 6(1).[335]

The dissenting judges, on the other hand, referencing Article 31 VCLT, argued that the term "civil" should be interpreted in light of the object and purpose of Article 6, which they held to be the following: "to ensure, through judicial guarantees, a fair administration of justice to any person in the assertion or determination of his legal rights or obligations."[336] The judges argued that the term "civil" should be interpreted as meaning "non-criminal", and that, as such, "civil" was intended to cover all legal rights of non-criminal character.[337]

In light of this, the judges held that it would be absurd to conclude that the safeguards provided for in Article 6(1) should not apply to "all legal rights and obligations", including those of an administrative character, "where an independent judicial control is especially required for the protection of individuals against the powerful authorities of the State."[338]

The judgement was cast two decades ago and, during this period, we have witnessed a gradual broadening of the scope of the terms "civil rights and obligations" to encompass matters not ordinarily falling under the private law sphere.[339] As such, some argue that *Maaouia* is ripe to

---

[333] Ersbøll (2007) p. 265; Dembour (2015) pp. 23-24

[334] Ersbøll (2007) p. 265; Dembour (2015) pp. 23-24

[335] Maaouia § 37

[336] ibid., joint dissenting opinion

[337] ibid.

[338] ibid.

[339] Ersbøll (2007) p. 265; see, e.g: Vilho Eskelinen and others v. Finland (2007)

be overturned, and that expulsion proceedings should be considered to fall under the scope of Article 6(1) ECHR.[340]

As the Court has already emphasised that it interprets the term "civil" autonomously,[341] this would certainly constitute a viable avenue that the Court could pursue in order to strengthen procedural safeguards where expulsion is concerned.

4.4.3 Expulsion as double punishment under Article 4 of Protocol 7 to the ECHR?

Expulsion undoubtedly constitutes a far-reaching measure with potentially severe ramifications for the affected individual.[342] This is exacerbated by the fact that the re-entry bans issued are often of lengthy or even permanent duration. Expulsion has, in light of the above, been described as "a disproportionally harsh and unforgiving form of state punishment that expels individuals who have already served their sentence".[343]

Against this backdrop, some have argued that the ECtHR should rely on the autonomy of Convention concepts in order to reconceptualise expulsion as double punishment, where such a measure is issued following a criminal conviction for which the expellee has already served their punishment.[344] Double punishment is prohibited by Article 4 of Protocol 7 to the ECHR, which provides that "No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State".[345]

The majority of the ECtHR has, on several occasions, rejected this argument, iterating that expulsion measures "are to be seen as preventive rather than punitive in nature",[346] and that, as such, they cannot be characterised as punishment.

---

[340] Dembour (2015) pp. 223-224
[341] ECtHR (2020b) para. 1
[342] Drotbohm & Hasselberg (2015) p. 557; Fekete & Webber (2009) pp. 2–17
[343] Drotbohm & Hasselberg (2015) p. 557
[344] Dembour (2015) pp. 189-190
[345] ECHR Protocol 7 Article 4
[346] See Maaouia § 38; Üner § 56

Nevertheless, the argument has found some resonance with ECtHR judges. This can be traced through dissenting and concurring opinions. For instance, in *Boujlifa*, the dissenting judges argued that the applicant, upon receiving his expulsion order, "had served the terms of imprisonment to which he had been sentenced and which may be assumed to have been proportionate to the seriousness of the crimes committed by him."[347] The judges here appear to imply that expulsion, being directly linked with previously committed criminal offence(s), imputes on the individual in question an additional sanction, which would be disproportionate given that he has already received and served his punishment.

Similarly, the dissenting judges in *Üner* did not agree with the majority's finding that the expulsion of the applicant should not be viewed as "punitive in nature."[348] The judges specified that their objection to the majority's conclusion rested on "the discriminatory punishment imposed on a foreign national in addition to what would have been imposed on a national for the same offence".[349] It is not clear whether the judges were of the opinion that the applicant's expulsion would be contrary to Article 4 of Protocol 7. Nevertheless, they did adopt the firm stance that the expulsion of Mr Üner did impose on him an additional punishment for crimes he had already payed his dues for, noting, inter alia, that the measure, with its corresponding 10-year re-entry ban, "constitutes as severe a penalty as a term of imprisonment, if not more severe."[350] As such, the judges clearly advanced the view that expulsion of a LTSM following a criminal conviction should be viewed as contrary to Convention guarantees, either in virtue of imposing on the migrant a discriminatory penalty in addition to that which a national would be subject to, or in virtue of constituting double punishment within the meaning of Article 4 of Protocol 7.

In light of the above, it is evident that ECtHR judges have, on several occasions, demonstrated that the legal argument pertaining to expulsion constituting a form of double-punishment cannot be rejected as entirely baseless, and that it would, in principle, be within the Court's realm of opportunity to adopt such a position.

[347] Boujlifa, joint dissenting opinion
[348] Üner, joint dissenting opinion § 17
[349] ibid.
[350] ibid.

4.5 Final de lege ferenda reflections

This chapter has described various ways in which the Court could rely on its interpretive mechanisms in order to propel its jurisprudence in cases concerning LTSMs forwards. Whether the Court will actually make use of any of these options, is a different matter. After all, as the Interlaken process has demonstrated, the ECtHR may be subjected to criticism by ECHR States Parties if these consider that its jurisprudence has gone "too far".[351] Perhaps, therefore, as a final step in the de lege ferenda discussion, one should consider whether there exists a less "radical" route towards enhancement of "private life" protection against expulsion for LTSMs.

As illustrated in previous sections of this chapter, the views of ECtHR judges have often been divided. Throughout the years, a minority of judges have, in various ways, emphasised the severity of expulsion as a measure, and pushed for stricter Article 8(2) assessments. Expulsion is undoubtedly one of the most severe sanctions available within immigration law, and, as such, its effects on the individual expellee should, arguably, not be underestimated.[352]

In this connection, it could be posited that the severity of the measure is illustrated by the prohibition of expulsion of nationals cf. Article 3(1) of Protocol 4 to the ECHR, in that it is inherent in this prohibition that a State's use of this measure against its own citizens could not in any sense be considered proportionate. If one accepts that LTSMs may have just as intense ties with their host states as citizens of those states do, the intuitive conclusion would be that expulsion of this group should be regarded as an equally, or nearly equally, harsh measure as if it were employed against citizens.

Taking the above consideration into account could have an impact on the Court's proportionality assessments. By underscoring the severity of expulsion as a sanction, the Court could signal to ECHR States Parties that the measure should be employed only as a means of last resort.

The *Üner*/*Maslov* criterion relating to the length of time elapsed between the criminal act and the expulsion, and the migrant's conduct in this period, is perhaps especially central in this connection. If this criterion was highlighted as being of core importance in the proportionality

[351] Madsen (2020) pp. 729-736
[352] Dembour (2015) pp. 162-165

assessment, and was in turn afforded significantly more weight, this would certainly tighten States Parties' scope of action with regards to expulsion of criminally convicted LTSMs. Recalling that the burden of proof is on the Respondent State to show that the expulsion of a LTSM is necessary in a democratic society,[353] time passed and good behaviour on the side of the applicant are important factors, which can indicate that the applicant does not pose such a threat to public safety or order that his expulsion is necessary.[354]

Playing into this is also States' obligation to facilitate the reintegration into society of convicted criminals after a completed sentence. In *Maslov*, the Grand Chamber emphasised the importance of rehabilitating and reintegrating juvenile offenders into society.[355] Arguably, this emphasis on rehabilitation and reintegration should also be applied in cases concerning adults, at the very least young adults, so that expulsion does indeed constitute a measure of last resort where other measures have failed. The importance of rehabilitation of convicts is recognised in legally binding international human rights conventions,[356] and in UN norms and standards.[357] It is hardly a contentious argument that expulsion will rarely serve purposes of rehabilitation. If the Court introduced this consideration into its proportionality assessments, States Parties would be required to show that other measures have been unsuccessful in order to prove that the expulsion of a LTSM is "necessary in a democratic society" cf. Article 8(2).

Finally, the Court could consider more closely the proportionality of the chosen measure of expulsion vis-a-vis the overarching aim justifying the use of this measure. This approach is not foreign to the Court. In *Nunez*, for example, the Court considered that the applicant's expulsion did not, "to any appreciable degree", fulfil "the interests of swiftness and efficiency of immigration control that was the intended purpose of such administrative measures".[358] Such a line of reasoning would, perhaps, be especially applicable in LTSM cases where considerable time has passed since the applicant committed his last offence, and where he has shown good conduct during that period. In this vein, the Court, in *Boultif*, acceded that the applicant's criminal past could suggest that he, in future, could pose a threat to public order, concluding, however, that

[353] see e.g. Piechowicz § 212

[354] In Zakharchuk, the dissenting judges argued along similar lines, see the dissenting opinion §§ 4-6

[355] Maslov § 83

[356] see e.g. ICCPR Article 10(3)

[357] See e.g UN Standard Minimum Rules for the Treatment of Prisoners, Rule 4

[358] Nunez § 82

"such fears are mitigated by the particular circumstances of the present case", referring to Mr Boultif's good behaviour during the six years that had passed since his last offence was committed.[359]

To summarise, a slightly more flexible interpretation of the *Üner*/*Maslov* criteria could enable the Court to underscore that expulsion should be a measure of last resort. While this option would not have the same impact as the employment of the other alternatives proposed in this chapter, it could nevertheless serve to tighten the margin of appreciation afforded to ECHR Member States in "private life" cases concerning expulsion of LTSMs.

The overall conclusion of this chapter remains that there does exist a real and substantial potential for the Court to develop its jurisprudence in cases concerning expulsion of LTSM. All of the options proposed are viable routes the Court could pursue in order to strengthen protection against expulsion for this group. Importantly, they illustrate that the Court has a plethora of well-established tools that it could resort to besides subsidiarity and the margin of appreciation. As such, it is well within the Court's realm of opportunity to reverse the previously identified trend towards decreased "private life" protection against expulsion in LTSM cases.

[359] Boultif § 51

5 Conclusion

This thesis has pursued two aims. First, it has sought to identify the de lege lata scope of "private life" cf. Article 8 ECHR in cases concerning expulsion of LTSMs, through conducting doctrinal analysis of recent ECtHR jurisprudence. Second, the thesis has aimed to contextualise the findings from the doctrinal analysis, both in terms of the Interlaken process, and through a de lege ferenda discussion.

The findings from the doctrinal analysis, as presented in Chapter 3, reveal that the protective scope of "private life" in cases concerning LTSMs facing expulsion is limited – and further, that it appears to be weakening. The Court is gradually displaying a stricter adherence to the principle of subsidiarity and the margin of appreciation in these cases, in line with the objectives of the Interlaken reforms as codified in the Copenhagen Declaration. The Court's "new approach" is characterised by its unwillingness to conduct fresh proportionality assessments and to evaluate the outcomes of domestic proceedings, where national authorities have taken the relevant *Üner* and *Maslov* criteria into account. The Court has further clarified that it is up to domestic authorities to decide what the relative weight afforded to the various proportionality criteria should be,[360] the result being that those factors mitigating in the applicant's favour are consistently treated as subordinate to the criterion relating to the seriousness of his offence(s). Additionally, the introduction of the "integration factor" appears to make it even more difficult for LTSM applicants to tip the balance between competing interests in their favour.

Chapter 4 of this thesis argued that the "trend" towards decreased protection could be reversed. The Court has a rich set of interpretive tools, which it could employ in order to strengthen protection against expulsion for LTSMs. The evolutive interpretation doctrine can enable the Court to nuance its approach to the citizen versus non-citizen distinction, by implementing a version of "genuine link" theory into its reasoning. Further, a thorough examination of the legal situation in the ECHR Member States may reveal sufficient consensus for the Court to finally accept that expulsion of a LTSM born within the territory of his host state can never be justified. Besides these pathways, the protection against expulsion for LTSMs could be enhanced through autonomous interpretation of the term "national" in Article 3 of Protocol 4, the concept "civil" in Article 6(1), and/or "double punishment" within the meaning of Article 4 of Protocol 7.

[360] Levakovic § 41

Finally, even if unwilling to pursue any of the above-mentioned options, the Court could strengthen the protective scope of "private life" in LTSM cases by interpreting the *Üner*/*Maslov* criteria in a more flexible manner, so as to reconceptualise expulsion as a means of last resort.

It remains to be seen exactly how Protocol 15, upon entry into force, will affect the ECtHR's case-law. The recent "private life" jurisprudence analysed in this thesis does however suggest that the political pressures from ECHR Member States, as manifested in the Interlaken reforms, have succeeded in constraining the Court. The fact that the Court has adapted to its political environment may, one the one hand, be positive, if it can serve to ensure that it retains legitimacy in the eyes of its Member States.[361] On the other hand, this adaptability may have serious consequences for the Convention system as a whole, if strengthening subsidiarity effectively reduces the "practical and effective" doctrine to a mere rhetorical device - as appears to be the direction in which "private life" jurisprudence concerning expulsion of LTSMs is headed.

Against this backdrop, a sobering endnote may be that subsidiarity is a two-sided coin. Protocol 15 does not dictate how the subsidiarity principle and the margin of appreciation mechanism are to be applied by the ECtHR. It remains the task of the Court to act when ECHR Member States fail to provide adequate Convention protection within their jurisdiction.[362] Strengthening subsidiarity does thus not hinder the Court in taking on a more active role, when this is necessary in order to protect the object and purpose of the Convention. This thesis contends that the Court may sooner rather than later have to make use of this possibility in its Article 8 jurisprudence concerning expulsion of LTSMs, in order to secure that the protection offered to this group by the "private life" provision is not rendered entirely illusory.

[361] Bates (2016) p. 276
[362] Vila (2017), p. 403

6 Bibliography

6.1 International legislation

Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR), as amended by Protocols Nos. 11 and 14, 04.11.1950
- Protocol No. 15 amending the Convention on the Protection of Human Rights and Fundamental Freedoms, 24.06.2013

United Nations General Assembly, *Universal Declaration of Human Rights* (UDHR), 10.12.1948

United Nations General Assembly, *Vienna Convention on the Law of Treaties* (VCLT), 23.05.1969

United Nations General Assembly, *International Covenant on Civil and Political Rights* (ICCPR), 16.12.1966

United Nations General Assembly, *Convention on the Rights of the Child* (CRC), 20.11.1989

European Union: Council of the European Union, *Council Directive 2003/109/EC of 25 November 2003 Concerning the Status of Third-Country Nationals Who are Long-Term Residents*, 23.01.2004

6.2 International standards, declarations, and documents

Council of Europe: Committee of Ministers, High-Level Conference on the Future of the European Court of Human Rights (Interlaken: February 19th, 2010) “Interlaken Declaration”, 19.02.2010

Council of Europe: Committee of Ministers, High-Level Conference on the Future of the European Court of Human Rights (Izmir: April 26-27th 2011) “Izmir Declaration”, 27.04.2011

Council of Europe: Committee of Ministers, High-Level Conference on the Future of the European Court of Human Rights (Brighton: April 19-20th 2012) “Brighton Declaration”, 07.05.2012

Council of Europe: Committee of Ministers, High-Level Conference on the Future of the European Court of Human Rights (Brussels: March 26-27th 2015) “Brussels Declaration”, 28.03.2015

Council of Europe: Committee of Ministers, High-Level Conference on the Future of the European Court of Human Rights (Copenhagen: April 11-13th 2018) “Copenhagen Declaration”, 13.04.2018

United Nations General Assembly, “Standard Minimum Rules for the Treatment of Prisoners” (“Mandela Rules”) 30.08.1955

United Nations Human Rights Committee, “General Comment No. 27: Article 12 (Freedom of Movement)” 02.11.1999

6.3 Domestic legislation

France: *Code of Entry and Residence of Foreigners and of the Right of Asylum* ("Code de l'entrée et du séjour des étrangers et du droit d’asile”) 22.02.2005, available at: https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006070158/, accessed: 10.01.2021

France: *Civil Code* (“Code civil”) 21.03.1804, available at: https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006070721, accessed: 10.01.2021

Norway: *Immigration Act* (“Lov om utlendingers adgang til riket og deres opphold her”) 15.05.2008, available at: https://lovdata.no/dokument/NL/lov/2008-05-15-35, accessed: 15.12.2020

Iceland: *Foreign Nationals Act* 80/2016 (“Lög um útlendinga í enskri þýðingu”) 16.06.2016, available at: https://www.government.is/library/04-Legislation/Foreign%20Nationals%20Act.pdf (english translation), accessed: 01.01.2021

Sweden: *Immigration Act* 2005:716 (“Utlänningslag”) 29.09.2005, available at: https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/utlanningslag-2005716_sfs-2005-716, accessed: 24.01.2021

Germany: *Nationality Act* (“Staatsangehörigkeitsgesetz”) 22.07.1913, available at: https://www.gesetze-im-internet.de/stag/BJNR005830913.html, accessed: 02.01.2021

United Kingdom: *Nationality Act* (“British Nationality Act”) 30.10.1981, available at: https://www.legislation.gov.uk/ukpga/1981/61, accessed: 02.01.2021

Italy: *Citizenship Law* No. 91 (“Nuouve norme sulla cittadinanza”) 05.02.1992, available at: https://www.legislationline.org/download/id/6558/file/Italy_citizenship_act_1992_am2009_en.pdf (english translation), accessed: 10.01.2021

Belgium: *Code of Belgian Nationality* (“Code de la nationalite belge”/“Wetboek van de Belgische nationaliteit”) 28.06.1984, available at: https://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&cn=1984062835&table_name=wet, accessed: 10.01.2021

Portugal: *Nationality Law* (“Lei da Nacionalidade”) 03.10.1981, available at: http://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=614&tabela=leis, accessed: 02.01.2021

Spain: *Civil Code* (“Código Civil”) 24.07.1889, available at: https://www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=5a8ad42e4, accessed: 02.01.2021

6.4 Jurisprudence

European Court of Human Rights:

Pormes v. the Netherlands, Application no. 25402/14, Council of Europe: European Court of Human Rights (Fourth Section) 28.07.2020

Azerkane v. the Netherlands, Application no. 3138/16, Council of Europe: European Court of Human Rights (Fourth Section) 02.05.2020

Zacharchuk v. Russia., Application no. 2967/12, Council of Europe: European Court of Human Rights (Third Section) 17.12.2019

Levakovic v. Denmark, Application no. 7841/14, Council of Europe: European Court of Human Rights (Second Section) 23.10.2018

Assem Hassan Ali v. Denmark, Application no. 25593/14, Council of Europe: European Court of Human Rights (Second Section) 23.10.2018

Regner v. Czech Republic, Application no. 35289/11, Council of Europe: European Court of Human Rights (Grand Chamber) 19.09.2017

Ndidi v. United Kingdom, Application no. 41215/14, Council of Europe: European Court of Human Rights (First Section) 14.09.2017

Külekci v. Austria, Application no. 30441/09, Council of Europe: European Court of Human Rights (Fifth Section) 01.07.2017

Alam v. Denmark, Application no. 33809/15, Council of Europe: European Court of Human Rights (Second Section) 29.06.2017

Hamesevic v. Denmark, Application no. 25748/15, Council of Europe: European Court of Human Rights (Second Section) 16.05.2017

Palanci v. Switzerland, Application no. 2607/08, Council of Europe: European Court of Human Rights (Second Section) 25.04.2014

Udeh v. Switzerland, Application no. 12020/09, Council of Europe: European Court of Human Rights (Second Section) 16.04.2013

Piechowicz v. Poland, Application no. 20081/07, Council of Europe: European Court of Human Rights (Fourth Section) 17.04.2012

Balogun v. United Kingdom, Application no. 60286/09, Council of Europe: European Court of Human Rights (Fourth Section) 10.04.2012

Von Hannover v. Germany (no. 2), Application no. 40660/08 and 60641/08, Council of Europe: European Court of Human Rights (Grand Chamber) 07.02.2012

Othman (Abu Qatada) v. United Kingdom, Application no. 8139/09, Council of Europe: European Court of Human Rights (Fourth Section) 17.01.2012

S.H. and others v. Austria, Application no.57813/00, Council of Europe: European Court of Human Rights (Grand Chamber) 03.11.2011

Nunez v. Norway, Application no. 55597/09, Council of Europe: European Court of Human Rights (Fourth Section) 28.06.2011

R.R. v. Poland, Application no. 27617/04, Council of Europe: European Court of Human Rights (Fourth Section) 26.05.2011

Micallef v. Malta, Application no. 17056/06, Council of Europe: European Court of Human Rights (Grand Chamber) 15.10.2009

Glor v. Switzerland, Application no. 13444/04, Council of Europe: European Court of Human Rights (First Section) 30.04.2009

Demir and Baykaya v. Turkey, Application no. 34503/97, Council of Europe: European Court of Human Rights (Grand Chamber) 12.11.2008

Maslov v. Austria, Application no. 1628/03, Council of Europe: European Court of Human Rights (Grand Chamber) 23.07.2008

Vilho Eskelinen and Others v. Finland, Application no. 63235/00, Council of Europe: European Court of Human Rights (Grand Chamber) 19.04.2007

Üner v. the Netherlands, Application no. 46410/99, Council of Europe: European Court of Human Rights (Grand Chamber) 18.10.2006

Rodrigues da Silva & Hoogkamer v Netherlands, Application no. 50435/99, Council of Europe: European Court of Human Rights (Former Section 2) 31.01.2006

Keles v. Germany, Application no. 32231/02, Council of Europe: European Court of Human Rights (Third Section) 27.10.2005

Von Hannover v. Germany, Application no. 59320/00, Council of Europe: European Court of Human Rights (Third Section) 24.06.2004

Slivenko v. Latvia, Application no. 48321/99, Council of Europe: European Court of Human Rights (Grand Chamber) 09.10.2003

Pretty v. United Kingdom, Application no. 2346/02, Council of Europe: European Court of Human Rights (Fourth Section) 29.04.2002

Kutic v. Croatia, Application no. 48778/99, Council of Europe: European Court of Human Rights (First Section) 01.03.2002

Mikulic v. Croatia, Application no. 53176/99, Council of Europe: European Court of Human Rights (First Section) 07.02.2002

P.G and J.H v. United Kingdom, Application no. 44787/98, Council of Europe: European Court of Human Rights (Third Section) 25.09.2001

Boultif v. Switzerland, Application no. 54273/00, Council of Europe: European Court of Human Rights (Second Section) 02.08.2001

Chapman v. United Kingdom, Application no. 27238/95, Council of Europe: European Court of Human Rights (Grand Chamber) 18.01.2001

Maaouia v. France, Application no. 39652/98, Council of Europe: European Court of Human Rights (Grand Chamber) 05.10.2000

Baghli v. France, Application no. 34374/97, Council of Europe: European Court of Human Rights (Third Section) 30.11.1999

Boujlifa v. France, Application no. 122/1996/741/940, Council of Europe: European Court of Human Rights (Chamber) 02.10.1997

Boughanemi v. France, Application no. 22070/93, Council of Europe: European Court of Human Rights (Chamber) 24.04.1996

Goodwin v. United Kingdom, Application no. 17488/90, Council of Europe: European Court of Human Rights (Grand Chamber) 27.03.1996

Beldjoudi v. France, Application no. 12083/86, Council of Europe: European Court of Human Rights (Chamber) 26.03.1992

Moustaquim v. Belgium, Application no. 12313/86, Council of Europe: European Court of Human Rights (Chamber) 18.02.1991

Cossey v. the United Kingdom, Application no. 10843/84, Council of Europe: European Court of Human Rights (Plenary) 27.09.1990

Berrehab v. the Netherlands, Application no. 10730/84, Council of Europe: European Court of Human Rights (Chamber) 21.06.1988

Ashingdane v. United Kingdom, Application no. 8225/78, Council of Europe: European Court of Human Rights (Chamber) 28.05.1985

X and Y v. the Netherlands, Application no. 8978/80, Council of Europe: European Court of Human Rights (Chamber) 26.03.1985

Tyrer v. United Kingdom, Application no. 5856/72, Council of Europe: European Court of Human Rights (Chamber) 15.03.1978

Golder v. United Kingdom, Application no. 4451/70, Council of Europe: European Court of Human Rights (Chamber) 21.02.1975

Other jurisprudence:

The Public Prosecutor v. T, Case no. 258/2015, Danish Supreme Court 12.05.2016

Warsame v. Canda, Communication no. 1959/2010, UN Human Rights Committee 01.09.2011

Nystrom v. Australia, Communication no. 1557/2007, UN Human Rights Committee 18.07.2011

Nottebohm (Liechtenstein v. Guatemala) Second Phase, International Court of Justice 06.04.1955. Judgement available at: https://www.icj-cij.org/public/files/case-related/18/018-19550406-JUD-01-00-EN.pdf

6.5 Books and book chapters

Arcarazo, A. D. (2011) *Long-Term Residence Status as a Subsidiary Form of Eu Citizenship: An Analysis of Directive 2003/109*, BRILL

Brems, E. (2013) *Diversity and European Human Rights: Rewriting Judgements of the ECHR*, Cambridge University Press

Bosniak, L. (2006) *The citizen and the alien: Dilemmas of contemporary membership*, Princeton University Press

Burbergs, M. (2014) "How the right to respect for private and family life, home and correspondence became the nursery in which new rights are born", in: Brems, E., & Gerards, J. (eds) *Shaping Rights in the ECHR*, Cambridge University Press, pp. 315-329

Christoffersen, J. & Madsen, M.R (2013) *The European Court of Human Rights between Law and Politics,* 2nd ed, Oxford University Press, pp.230–249

Dembour, M. (2015) *When Humans Become Migrants*, Oxford University Press

Dzehtsiarou, K. (2015) "The concept of European consensus", in: *European Consensus and the Legitimacy of the European Court of Human Rights*, Cambridge University Press, pp. 9-37

Ersbøll, E. (2007) "The Right to a Nationality and the European Convention on Human Rights", in: Lagouette, S., Sano, H.O & Smith, P.S (eds) *Human Rights in Turmoil: International Studies in Human Rights* Vol 92, Martinus Nijhoff Publishers, pp. 249-270

Franko, K. (2019) *The Crimmigrant Other (Key Ideas in Criminology*), Routledge Talor & Francis Group

Greer, S. (2000) "The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human rights", in: *Human Rights Files* No. 17, Council of Europe Publishing

Harris, D., Warbrick, C., & O 'Boyle, M. (1995) *Law of the European Convention on Human Rights,* Butterworths

Klaassen, M. (2015) *The right to family unification: Between migration control and human rights* (Doctoral Thesis), Leiden University

Landman, T. (2006) *Studying Human Right*s, Routledge Talor & Francis Group

Letsas, G. (2007) *A Theory of Interpretation of the European Convention on Human Rights,* Oxford University Press

Letsas, G. (2013) "The ECHR as a living instrument: its meaning and legitimacy" in: Føllesdal, A., Peters, B., & Ulfstein, G. (eds) *Constituting Europe,* Cambridge University Press, pp. 106–141

Madsen, M.R. (2019) "Resistance to the European Court of Human Rights: The Institutional and Sociological Consequences of Principled Resistance", in: Breuer, M. (ed) *Principled Resistance to ECtHR Judgements - A New Paradigm?,* Springer Berlin Heidelberg, pp. 35–52

Margaria, A. (2019) "Going beyond judgements: Exploring the Jurisprudence of the European Court of Human Rights", in Deplano, R. (ed) *Pluralising International Legal Scholarship: The Promise and Perils of Non-Doctrinal Research Methods,* Edward Elgar Publishing, pp. 84-103

Patton, M. (2002) *Qualitative research & evaluation methods,* 3rd ed, Sage Publications

Plender, R. (2015) *Issues in International Migration Law,* BRILL

Popović, D. (2013) *European human rights law - a manual: An introduction to the Strasbourg Court and its jurisprudence,* Eleven International Publishing

Scheinin, M. (2017) "The art and science of interpretation in human rights law", in: Deplano, R., (ed) *Research Methods in Human Rights,* Edward Elgar Publishing. pp. 17-37

Stumpf, J. P. (2013) "The Process is the Punishment in Crimmigration Law", in: Franko, K., & Bosworth, M. (eds) *The Borders of Punishment: Migration, Citizenship, and Social Exclusion,* Oxford University Press, pp. 58-75

Spiro, P. J. (2014) "Citizenship, nationality, and statelessness", in: Chetail, V., & Bauloz, C. (ed) *Research Handbook on International Law and Migration,* Edward Elgar Publishing, pp. 281-300

Thym, D. (2014) "Residence as De Facto Citizenship? Protection of Long-term Residence under Article 8 ECHR", in: Rubio-Marin, R. (ed) *Human Rights and Immigration,* Oxford University Press, pp. 106-144

Van Hoecke, M. (2011) *Methodologies of legal research : Which kind of method for what kind of discipline?* Hart Publishing

Walker, S. (2017) “Challenges of human rights measurement”, in: Andreassen, B., Sano, H.O., & Mclnerney-Lankford, S. (eds) *Research Methods in Human Rights,* Edward Elgar Publishing, pp. 306-332.

6.6 Articles

Bates, E. (2016) “Activism and Self-Restraint: the Margin of Appreciation’s Strasbourg Career … Its ‘Coming of Age’?”, in: *Human Rights Law Journal*, 36(7-12), pp. 261-276

Baumgärtel, M. (2020) “Facing the Challenge of Migratory Vulnerability in the European Court of Human Rights”, in: *Netherlands Quarterly of Human Rights,* 38(1), pp. 12-29

Cholewinski, R. (1994) “Strasbourg's ‘Hidden Agenda’? The Protection of Second-Generation Migrants from Expulsion under Article 8 of the European Convention on Human Rights”, in: *Netherlands Quarterly of Human Rights,* 12(3), pp. 287-306

Collinson, J. (2020) “Reconstructing the European Court of Human Rights ’Article 8 Jurisprudence in Deportation Cases: The Family’s Right and the Public Interest”, in: *Human Rights Law Review*, 20(2), pp. 333-360

Da Lomba, S. (2017) “Vulnerability and the Right to Respect for Private Life as an Autonomous Source of Protection against Expulsion under Article 8 ECHR”, in: *Laws*, 6(4): 32

Desmond, A. (2018) “The Private Life of Family Matters: Curtailing Human Rights Protection for Migrants under Article 8 of the ECHR?” in: *European Journal of International Law*, 29(1), pp. 261-279

Drotbohm, Heike, & Hasselberg, Ines. (2015) “Deportation, Anxiety, Justice: New Ethnographic Perspectives”, in: *Journal of Ethnic and Migration Studies*, 41(4), pp. 551-562

Dzehtsiarou, K. (2011) “European Consensus and the Evolutive Interpretation of the European Convention on Human Rights”, in: *German Law Journal*, 12(10), pp. 1730-1745

Endo, K. (1994) “The Principle of Subsidiarity: From Johannes Althusius to Jacques Delors”, in: *Hokkaido Law Review*, 44(6), pp. 640–642

Farahat, A. (2015) “Enhancing Constitutional Justice by Using External References: The European Court of Human Rights’ Reasoning on the Protection against Expulsion”, in: *Leiden Journal of International Law*, 28(2), pp. 303-322

Fekete, L., & F. Webber (2009) “Foreign Nationals, Enemy Penology and the Criminal Justice System.” in: *IRR European Race Bulletin*, 69, pp. 2–17

Follesdal, A. (2017) “Exporting the margin of appreciation: Lessons for the Inter-American Court of Human Rights”, in: *International Journal of Constitutional Law*, 15(2), 359-371

Glas, L.R. (2020) “From Interlaken to Copenhagen: What Has Become of the Proposals Aiming to Reform the Functioning of the European Court of Human Rights?” in: *Human Rights Law Review*, 20(1), pp. 121-151

Gomez-Arostegui, H. T. (2005) “Defining private life under the European Convention on Human Rights by referring to reasonable expectations”, in: *California Western International Law Journal*, 35(2), pp. 153-202

Greenhill, K. M. (2016) “Open Arms Behind Barred Doors: Fear, Hypocrisy and Policy Schizophrenia in the European Migration Crisis”, in: *European Law Journal : Review of European Law in Context*, 22(3), pp. 317–332

Klaassen, M. (2019) “Between facts and norms: Testing compliance with Article 8 ECHR in immigration cases”, in: *Netherlands Quarterly of Human Rights*, 37(2), pp. 157-177

Macklin, A. (2018) “Is it time to retire Nottebohm?” in: *Symposium on Framing Global Migration Law*, Part 3, AJIL unbound Vol 111, pp. 492 - 497

Madsen, M. R. (2020) “Two-level politics and the backlash against international courts: Evidence from the politicisation of the European court of human rights”, in: *British Journal of Politics & International Relations*, 22(4), pp. 728 - 738

Markowitz, P. L. (2008) “Straddling the civil-criminal divide: A bifurcated approach to understanding the nature of immigration removal proceedings”, in: *Harvard Civil Rights-civil Liberties Law Review*, 43(2), pp. 289-351

Milios, G. (2018) “The Immigrants' and Refugees' Right to 'Family Life': How Relevant are the Principles Applied by the European Court of Human Rights?” in: *International Journal on Minority and Group Rights*, 25(3), pp. 401-430

Moreham, N.A. (2014) “The Right to Respect for Private Life in the European Convention on Human Rights: A Re-Examination”, in: *European Human Rights Law Review*, 44, pp. 44-70

Nash, K. (2009) “Between Citizenship and Human Rights”, in: *Sociology* (Oxford), 43(6), pp. 1067-1083

Noll, G. (2010) “Why Human Rights Fail to Protect Undocumented Migrants”, in: *European Journal of Migration and Law*, 12, pp. 241–272

Ronen, Y. (2012) “The ties that bind: Family and private life as bars to the deportation of immigrants”, in: *International Journal of Law in Context*, 8(2), pp. 283-296

Spiro, P.J. (2019) “Nottebohm and ‘Genuine Link’: Anatomy of a Jurisprudential Illusion”, *Investment Migration Working Papers* 2019/1

Sredanovic, D, & Stadlmair, J. (2018) “Introduction: Trends towards particularism in European citizenship policies”, in: *Journal of Contemporary European Studies*, 26(1), pp. 1-11

Thym, D. (2008) “Respect for private and family life under Article 8 ECHR in immigration Cases: A Human Right to Regularize Illegal Stay?” in: *The International and Comparative Law Quarterly*, 57(1), pp. 87–112

Van Drooghenbroeck, S., & Rizcallah, C. (2019) “The ECHR and the Essence of Fundamental Rights: Searching for Sugar in Hot Milk?” in: *German Law Journal*, 20(6), pp. 906-912

Vila, M. I. (2017) “Subsidiarity, margin of appreciation and international adjudication within a cooperative conception of human rights”, in: *International Journal of Constitutional Law*, 15(2), pp. 393-413

Warren, R. (2016) “Private life in the balance: constructing the precarious migrant”, in: *Journal of Immigration Asylum and Nationality Law*, 30(2), pp. 124-141

6.7 Other sources

Council of Europe: “Explanatory Report to Protocol No. 15” , available at: www.echr.coe.in/ocument/rotocol_15_explanatory_report_ENG.pdf., Accessed 12.12.2020

Council of Europe: “Chart of signatures and ratifications of Treaty 213”, status as of 19.01.2021, available at: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/213/signatures, accessed: 24.01.2021

Council of Europe (2017) Report from High-Level Expert Conference “2019 and Beyond: Taking Stock and Moving Forward from the Interlaken Process” (Kokkedal 22-24th November 2017), available at: https://www.ft.dk/samling/20171/almdel/reu/bilag/118/1838949.pdf, accessed: 10.12.2020

European Court of Human Rights (2020a) “Guide on Article 8 of the European Convention on Human Rights: Right to respect for private and family life, home and correspondence”, available at: https://www.echr.coe.int/documents/guide_art_8_eng.pdf, accessed: 01.01.2021

European Court of Human Rights (2020b) “Guide on Article 6 of the European Convention on Human Rights: Right to a fair trial (civil limb)”, available at: https://www.echr.coe.int/documents/guide_art_6_eng.pdf, accessed: 04.01.2021

European Court of Human Rights (2011) “The general practice followed by the panel of the Grand Chamber when deciding on requests for referral in accordance with Article 43 of the Convention”, available at: https://www.echr.coe.int/Documents/Note_GC_ENG.pdf, accessed: 24.01.2021

European Union: European Commission (2019) “Report from the Commission to the European Parliament and the Council on the implementation of Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents”, available at: http://www.europeanmigrationlaw.eu/documents/COM(2019)161-LongTermResidents.PDF, accessed: 15.12.2020

Donald, A., & Leach, P. (2018). "A Wolf in Sheep's Clothing: Why the Draft Copenhagen Declaration Must be Rewritten", In: *EJIL:Talk! Blog of the European Journal of International Law*., available at: https://www.ejiltalk.org/a-wolf-in-sheeps-clothing-why-the-draft-copenhagen-declaration-must-be-rewritten/, accessed: 18.01.2021.

Hartmann, J. (2017) "A Danish Crusade for the Reform of the European Court of Human Rights", In: *EJIL:Talk! Blog of the European Journal of International Law*, available at: https://www.ejiltalk.org/a-danish-crusade-for-the-reform-of-the-european-court-of-human-rights/, accessed 18.01.2021

Mole, N. (2001) "Multiple Nationality and the European Convention on Human Rights in Europe", in the report on the 2nd European conference on nationality: *Challenges to national and international law on nationality at the beginning at the new millennium* (Strasbourg: 8-th October 2001), available at: https://www.unhcr.org/43f43fba11.pdf, accessed: 07.01.2021