

## Between facts and norms: Testing compliance with Article 8 ECHR in immigration cases

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### Abstract

The European Court of Human Rights plays a subsidiary role in the protection of the rights and freedoms set forth in the Convention. To enable national authorities to perform their primary role, it is important that the Court offers sufficient guidance on the interpretation of the Convention. It has already been argued that the case law of the Court on the right to respect for family life in immigration cases, lacks consistency in terms of procedural and substantive protection. The inconsistency in the case law is mostly the case in the admission and regularisation case law. This manifests itself in specific issues including the determination of whether an interference has occurred as well as the court's determination of the best interests of the child. Consequently, the case law difficult to apply by national authorities which leads to widely diverging practices by the Contracting Parties. The objective of this article is to outline the differences and inconsistencies in the different forms of immigration cases and the corresponding compliance tests of the Court. The article aims to offer a solution that would enable both the Court and the Contracting Parties to differentiate the level of protection that is offered by Article 8 in immigration cases, while providing sufficient guidance to national decision-making authorities and judiciaries so that they can efficiently and effectively exercise the primary role they play in the protection of the right to respect for family life in immigration cases.

### Keywords

Immigration, family life, human rights, proportionality, best interests of the child

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## Introduction

Considering the subsidiary role the European Court of Human Rights ('the Court' or 'ECtHR') plays in the protection of human rights in Europe, it is essential that the different administrative and judicial bodies in the contracting parties have sufficient guidance in the interpretation of the rights laid down in the European Convention on Human Rights ('the Convention' or 'ECHR').<sup>1</sup> With respect to Article 8, the Court does not apply a consistent approach in determining whether contracting parties have complied with the Convention.<sup>2</sup> The contracting parties have a 'certain' margin of appreciation, but it is often unclear what the precise boundaries of this margin are.<sup>3</sup>

However, one aspect is similar in all immigration cases in which the Court tested whether the contracting party complied with the right to respect for private and family life. The Court in each and every case emphasises that as a matter of international law, States are free to determine which foreign nationals are allowed to enter and reside, but are limited in this sovereign competence by the Convention.<sup>4</sup> This has been characterised as the 'statist assumption', which the Court makes in adjudicating immigration cases under Article 8 ECHR.<sup>5</sup> In immigration cases concerning the right to respect for private and family life, States are granted a certain margin of appreciation, which depends on the strength of the residence status of the applicant. Settled immigrants with a right of residence enjoy a higher level of protection than foreign nationals seeking entry or requesting to regularise their irregular migration status.<sup>6</sup>

The differentiation in the level of protection granted under Article 8 ECHR is reflected in the manner in which the Court tests whether the Contracting Party has complied with its obligations under this provision.<sup>7</sup> In this article, the tests used by the Court are categorised as follows.

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1. In the Preamble of Article 1, Protocol 15, the subsidiary role the Court plays in the protection of the rights set forth in the Convention is made explicit. The newly included Preamble reads: 'Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention'. See also Mark Klaassen, *The Right to Family Unification: Between Migration Control and Human Rights* (Meijers Instituut 2015), available via <https://openaccess.leidenuniv.nl/handle/1887/36049>.
  2. Thomas Spijkerboer, 'Structural Instability: Strasbourg Case Law on Children's Family Reunion' (2009) 11 *European Journal of Migration and Law* 271.
  3. In her discussion of the scope of the margin of appreciation, Gerards places the formulation 'certain margin of appreciation' in a middle category on the level of scrutiny applied by the Court, between a 'narrow margin' and a 'wide margin', indicating a 'type of intermediate scrutiny'. See Janneke Gerards, 'The Margin of Appreciation Doctrine, the Very Weighty Reasons Test and Grounds of Discrimination' in Marco Balboni (ed.), *The principle of discrimination and the European Convention of Human Rights* (Editoriale Scientifica 2018).
  4. The origin of this formulation can be traced back to the seminal *Abdulaziz* ruling. See *Abdulaziz, Cabales and Balkandali v United Kingdom* (1985) 7 EHRR 471. See for an analysis also Marie-Bénédicte Dembour, *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint* (OUP 2015).
  5. Cathryn Costello, *The Human Rights of Migrants and Refugees in European Law* (OUP 2015) 12.
  6. This is criticized by Thym, who argued in 2008 that it was expected that the Court would clarify the interaction between the Convention and national and European immigration laws. See Daniel Thym, 'Respect for Private and Family Life under Article 8 ECHR in Immigration Cases: A Human Right to Regularize Illegal Stay?' (2008) 57 *International and Comparative Law Quarterly* 87.
  7. See Klaassen (n 1) For an explanation of the differentiation used by the Court, Eva Hilbrink, *Adjudicating the Public Interest in Immigration Law: A Systematic Analysis of Strasbourg and Luxembourg Case Law on Legal Restrictions to Immigration and Free Movement* (Vrij Universiteit Amsterdam 2017).

First, the Court holds that when a State seeks to terminate the lawful residence of a settled immigrant, this amounts to an interference in the right to respect for family life, for which a justification test is provided in Article 8(2) ECHR.<sup>8</sup> The question which is addressed by the Court in such cases is whether the state is under a negative obligation to refrain from interfering with the right to respect for private or family life.

Second, when the Court holds that there has not been an interference with the right to respect for family life, the question is posed whether the State is under the positive obligation to allow for the entry and residence of the foreign national under consideration. The reasoning behind this is that when a State has not yet allowed the entry of residence of a foreign national, in denying entry and residence the State does not interfere in the right to respect for private and family life, because it has never allowed private and family life to be established within the territory of the state.

Third, in some cases it is difficult to make a sharp distinction between negative and positive obligations.<sup>9</sup> This is the case in situations which de facto concern the termination of residence on the territory of the state, but the State never granted the right of entry residence in the first place. In such cases, the Court often remarks in its case law that it is not necessary to make a sharp distinction between negative and positive obligations, because a fair balance must be struck between the competing interests involved.<sup>10</sup>

As is analysed below, the different legal tests used by the Court to determine State compliance with Article 8 ECHR correspond with different levels of protection. The different tests applied by the Court and the fact that the Court is not consistent with the test it uses, creates legal uncertainty for both Contracting Parties and individuals.<sup>11</sup>

In order to find a solution to this problem, this paper addresses how the Court could achieve a clearer and more consistent test to determine compliance with article 8 ECHR in immigration cases, without making it impossible to differentiate between various types of immigration cases, such as admission, regularisation and termination of residence. To achieve this, first the different types of obligations and the corresponding tests used by the Court are analysed. Next, the domestic policy and case law in the Netherlands and in the UK concerning Article 8 ECHR in immigration cases is investigated in order to determine how the various compliance tests used by the Court are implemented at the domestic level. Finally, a proposal to the Court is formulated to use a single test to determine compliance with Article 8, making use of guiding principles that offer sufficient flexibility in distinguishing different types of immigration cases.

The article does not intend to offer a comprehensive overview of the case law of the Court and the domestic case law in the Netherlands and the UK. The cases that are discussed in this paper are considered relevant in demonstrating how the Court or the domestic authorities and judiciaries interpret and develop the test to determine compliance with Article 8, which is the main subject of this article.<sup>12</sup>

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8. For a comparison of the different justification tests in the Convention see, Yutaka Arai, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia, 2002).

9. The Court has often acknowledged this in its jurisprudence. See for instance the reasoning of the Court in *Rodrigues da Silva and Hoogkamer v Netherlands* (2007) 44 EHRR 34.

10. See, for instance, *Gül v Switzerland* (1996) 22 EHRR 93, para 38; *Tuquabo-Tekle v Netherlands* (2010) EHRR 1454, para 42.

11. Cf Hilbrink (n 7). In her dissertation, Hilbrink makes a classification of the different elements referred to by the Court in its reasoning.

12. In my dissertation I offer a more comprehensive analysis of the case law. See Klaassen (n 1).

## Different obligations, different compliance tests

### *Negative obligations when terminating the residence of settled foreign nationals*

In case of the expulsion of a settled immigrant, the case law of the Court contains rather clear guidelines on how to determine whether the termination of lawful residence would lead to a violation of Article 8. The test to determine whether the expulsion of a foreign national would violate Article 8 is laid down in Article 8(2) ECHR. This provision provides for a detailed test with different concrete steps to be followed.

The first of these steps is to determine whether there is ‘family life’.<sup>13</sup> The Court uses a wide definition of the family, in which spouses, registered and unmarried partners and children<sup>14</sup> are included, even in situations when the marriage is dissolved or where one of the parents no longer physically lives together with the child.<sup>15</sup> For family members outside the nuclear family, for example family members in the ascending line, adult children and siblings and family members of the third degree and more, the Court generally holds that there should be more- than- normal emotional ties for family life to be assumed.<sup>16</sup>

The second step includes the determination of whether there is an interference with the right to respect for family life. This is the step where the differentiation is made between negative, positive and hybrid obligations, which are discussed below. An interference is generally found when a foreign national has settled in a country, meaning that the foreign national must have a valid right to reside in the host state. Terminating the right to reside of a settled foreign national constitutes an interference with the right to respect for family life. The third step focuses on the question on whether the interference with the right to respect for family life is in accordance with the law. In cases concerning immigration decisions, this step of the justification test rarely creates problems.<sup>17</sup>

Fourth, for an interference to be justified, it must have a legitimate aim. Within the text of Article 8(2), five legitimate aims are listed. The interference should be ‘in the interests of national security, public safety or the economic wellbeing of the country’, made ‘for the prevention of disorder or crime’ must be necessary for ‘the protection of health or morals’ or should be necessary ‘for the protection of the rights and freedoms of others.’ This is an exhaustive list.<sup>18</sup> In most immigration cases, finding a legitimate aim for the interference is not difficult.<sup>19</sup> The Court does not strictly scrutinise the Contracting Parties on this point. In the case of an expulsion after a

13. Article 8 ECHR also respects the right to private life. In immigration cases, the protection of private life can, in specific cases, be more relevant than the protection of family life. For example, in *Butt v Norway*, the question was whether three Afghani nationals, who had lived in Norway without a residence permit and whose parents had died, could remain in Norway. In that case, the Court concluded that the private life of the individuals was at stake. See *Butt v Norway* App no 47017/09 (ECHR, 4 December 2012).

14. See *Al-Nashif v Bulgaria* (2003) 36 EHRR 37 para 112.

15. See *Berrehab v Netherlands* (1988) 11 EHRR 322.

16. See for instance *Senchishak v Finland* App no 5049/12 (ECHR, 18 November 2014). For further analysis, see Heli Askola, ‘(No) Migrating for Family Care in Later Life: *Senchishak v Finland*, Older Parents and Family Reunification’ (2016) 18 *European Journal of Migration and Law* 351.

17. cf *Madah and others v Bulgaria* App no 45237/08 (ECHR, 10 May 2012).

18. See for instance Claire Ovey and Robin White, *The European Convention on Human Rights* (4th edn, OUP 2006) 226.

19. More often, it is the relationship between the legitimate aim and the measure of excluding an immigrant that is extensively discussed by the Court. See for instance *Kiyutin v Russia* (2011) 53 EHRR 26 in which the Court held that the respondent state did not adduce compelling and objective arguments that the aim of the protection of public health could be attained by refusing the applicant a residence permit (para 72).

conviction for a serious crime, the Court accepts that the legitimate aim of the measure lies in the prevention of crime. In any other case, in which there is no apparent public order element, the Court accepts that States pursue an immigration policy for the economic well-being of the country.

The fifth and final step in the justification test is that the interference should be necessary in a democratic society. The Court accepts that an interference is necessary when the measure is proportionate to the legitimate aim pursued. This involves an assessment of the harm the measure would cause for the applicant in relation to the aim pursued by the State (proportionality) and the question whether this aim could be reached by a less far-reaching measure (subsidiarity). Instead of making this assessment again in these terms in all individual cases, the Court developed certain guidelines in its own case law. In *Boultif v. Switzerland* – one of the landmark cases concerning expulsion of a criminal conviction – the Court held that the following elements should be considered:

- the nature and seriousness of the offence committed by the applicant;
- the duration of the applicant’s stay in the host state;
- the time elapsed since the commission of the offence and the applicant’s conduct during that period;
- the nationalities of the various persons concerned;
- the family situation, such as the length of the marriage and whether the spouse knew about the offence during the period that family life was established;
- the age of possible children; and
- the seriousness of the difficulties which the spouse would encounter in the applicant’s country of origin.<sup>20</sup>

In later case law, the best interests and well-being of the applicant’s children and the seriousness of the difficulties they would face if they were to be deported to the country of origin of the applicant and the solidity of social, cultural and family ties in the host country and in the country of origin were added to this list.<sup>21</sup> Furthermore, it was established that if the applicant who committed an offence is a minor, the age of the applicant should be a factor in applying these criteria.<sup>22</sup> In the latter case, the Court has held that ‘very serious reasons’ are required to justify such an interference.

Taken together, these criteria form a solid test to determine whether the interference in the right to respect for family life of a settled foreign national whose established lawful residence is terminated is justified under Article 8(2).

Notwithstanding the clarity of the justification test and the existence of guiding principles, the Contracting Parties are still occasionally held to violate the right to respect for private and family life in such cases. The reason for this lies in the different application of the guiding principles in a particular case. In assessing these criteria, the Court may come to a different conclusion than the domestic courts. For example, in *A.A.*, a young man was to be expelled from the UK after having been convicted, as a minor, for participating in the gang rape of a minor girl.<sup>23</sup> The Court concluded that the expulsion of the applicant would violate his rights under Article 8, placing

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20. *Boultif v Switzerland* (2000) 22 EHRR 50.

21. *Üner v Netherlands* (2007) 45 EHRR 14.

22. *Maslov v Austria* (2008) 47 EHRR 20.

23. *A.A. v United Kingdom* App no 8000/08 (ECHR, 20 September 2011).

more emphasis on the fact that the applicant did not reoffend after he served his sentence and that the British authorities only sought his expulsion five years after he was released. This element, which was given decisive importance by the Court, was deemed less important by the domestic authorities, for which the seriousness of the offence was decisive.<sup>24</sup>

### *Positive obligations in admission cases*

In cases concerning the entry of a foreign national for the purpose of exercising the right to family life, the Court holds that there is no interference with the right to respect for family life.<sup>25</sup> This is based on the assertion that by refusing entry, a State is not interfering in established family life. This distinction made by the Court is, however, somewhat artificial. On this logic, why would it not be an interference in family life if a State refuses a married couple to live together? It would certainly be considered a grave interference if the right to live together would be denied to spouses with the same nationality within one national jurisdiction. Why does this not apply in cases concerning spouses who have different nationalities? The Court bases this distinction on the sovereign right of States to control immigration. It holds that the refusal of entry does not constitute an interference with the right to respect for family life, but that instead it must be ascertained whether the State is under a positive obligation to allow for the entry and residence of a foreign national based on the right to respect for family life. As the Court assumes that there is no interference with the right to respect for family life, the justification test of article 8(2) is not triggered. Instead, the Court uses a different test. In *Gül v Switzerland*, it held that:

In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the state enjoys a certain margin of appreciation.<sup>26</sup>

There is only a very limited number of cases in the entire body of case law of the Court that can be characterised as pure admission cases. The reason for this is that often when Article 8 is invoked, the foreign national is already in the host State. This can be because the applicant entered without proper authorisation or because he overstayed a short-term visa. It is acknowledged by the Court that in such cases, the positive and negative obligations ‘do not lend themselves to precise definition.’<sup>27</sup> The compliance test used in this type of cases, which are labelled as ‘hybrid obligations’ in this contribution, is analysed below in section 2.3.

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24. *ibid.*

25. This approach was originally adopted by the Court in cases not related to immigration. For instance, in *Marckx v Belgium*, the Court held that ‘it [Article 8] does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective “respect” for family life’. In testing whether the state fails to respect a positive obligation, the Court states that it is possible to find a violation of Article 8, even though there has not been a justification test under Article 8(2). See *Marckx v Belgium* (1979) 2 EHRR 330 para 31. See for further analysis, A.M. Connelly, ‘Problems of Interpretation of Article 8 of the European Convention on Human Rights’ (1986) 35 *International and Comparative Law Quarterly* 567.

26. *Gül v Switzerland* (1996) 22 EHRR 93 para 38. In his dissenting opinion., Judge Martens criticized the difference in tests and proposed and applied essentially the justification test of Article 8(2), arguing that ‘[t]he present doctrine notably implies that the distinction between the two types of obligation has no bearing on either the burden of proof or the standards for assessing whether a fair balance has been struck’.

27. *Osman v Denmark* App no 38058/09 (ECHR 14 June 2011) para 53.

The central criterion used by the Court to determine whether the State is under a positive obligation to allow for entry and residence for the purpose of exercising the right to family life is whether family life is possible in the country of origin of the foreign national.<sup>28</sup> This is based on the presumption that, as States have the sovereign right to control immigration, they have a wide margin of appreciation in these matters and that no right to choose the country of residence can be derived from Article 8.<sup>29</sup> However, in a few cases the Court still came to the conclusion that a state is under a positive obligation to allow for the entry and residence of a foreign national.

In *Sen* and *Tuquabo Tekle*, the Court, in determining whether a positive obligation to admit exists, asked whether the settling of the child in the host State is *the most adequate means* to develop family life with its parents.<sup>30</sup> In answering this question, the Court examined three elements: the age of the children involved, their situation in the country of origin and the extent to which they are dependent on their parents.<sup>31</sup> In both cases, in which the foreign national child concerned was still in the country of origin, the Court unanimously found that the refusal of entry was in violation of Article 8. However, the path followed in coming to this conclusion in these two cases is very different. In *Sen*, the Court held that it could not be expected from the parents and the minor siblings of the Turkish child who had remained in Turkey with his grandparents that they would have to give up their residence in the Netherlands in order to exercise the right to respect for family life with their child or sibling in Turkey. The fact that the entire family including minor children were settled in the Netherlands already was sufficient reason for the Court to accept that it would be unreasonable to expect them to go back to Turkey to exercise their right to family life. In *Tuquabo-Tekle*, the Court considered that the mother of a minor child had chosen to leave her daughter behind in her country of origin when she herself moved and was awarded international protection in Norway first and, later, in the Netherlands. However, considering the particularly difficult circumstances the applicant was facing in her country of origin – she was around 16 years old, an age in which her grandparents withdrew her from school and could arrange her marriage – the Court ruled that this constituted exceptional circumstances under which the Netherlands were under a positive obligation to allow for the entry and residence of the girl.

In *Gül* and *Ahmut*, the Court reached the opposite conclusion. In *Gül*, the Court used the test whether the residence in Switzerland is *'the only way'* to exercise the right to respect for family life as a criterion to determine whether the host State is under the positive obligation to allow for entry and residence of the applicant.<sup>32</sup> In *Ahmut*, the Court did not look at this criterion, but instead asked whether the father would be able to continue to have family life with his son remaining in the country of origin in the same way as they did before.<sup>33</sup>

This inconsistency in the case law is caused by the fact that the Court is struggling to deal with the role of the human right to respect for family life in the context of immigration control, which is

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28. The reliance of the Court on the possibility to exercise the right to respect for family life 'elsewhere', in another country, traces back to early admissibility decisions. See Klaassen (n 1) 43. For a discussion on the development of the early admissibility decisions of the Commission leading to judgments in *Abdulaziz, Cabales and Balkandali v United Kingdom* (1985) 7 EHRR 471, see Hugo Storey, 'The Right to Family Life and Immigration Case Law at Strassbourg' [1990] 39 International and Comparative Law Quarterly 328.

29. See the discussion of the role of the sovereign right to control immigration, Spijkerboer (n 2).

30. *Sen v Netherlands* (2003) 36 EHRR 81; *Tuquabo-Tekle v Netherlands* App no 60665/00 (ECHR 1 December 2005).

31. *ibid.*

32. *Gül v Switzerland* (1996) 22 EHRR 93.

33. *Ahmut v Netherlands* (1996) 24 EHRR 62.



seen as part of State sovereignty. An essential difference, which can explain the different outcomes, but which is not acknowledged in the cases itself, is the moment in time in which the Court deals with the cases. In *Sen and Tuquabo-Tekle*, the applicants were still in their country of origin. They did not enter and reside in breach of immigration law, but awaited the outcome of the proceedings. In *Gül* and *Ahmut*, the applicants already entered the host State, thereby confronting the host State with their presence and not awaiting the outcome of the procedure.<sup>34</sup> Considering that in subsequent case law – discussed below in section 2.3 – the Court strongly emphasises that the applicant presents the State with a *fait accompli* with their established family life during unlawful residence, this can (partly) explain why the Court, with only the smallest majority possible, came to the conclusion in *Gül* and *Ahmut* that a refusal of residence would not lead to a violation of Article 8.

### Hybrid obligations

The Court acknowledges in the positive obligation cases above that the boundaries between positive and negative obligations do not lend themselves to precise definition.<sup>35</sup> Also, the Court often states that it is not necessary to choose between both obligations, because in both contexts a fair balance must be struck between the competing interests involved.<sup>36</sup> However, the Court is not consistent in the test it uses to determine whether there is a violation of Article 8 in cases in which the applicant is already residing in the host State, developing family life there, but not in possession of a valid right of residence. This type of cases, labelled as ‘hybrid obligation cases’ because they cannot be considered purely positive obligation cases as the applicant has already entered and lived in the host state, are discussed in this section. This residence in the host State can either concern residence without a valid residence permit, or lawful residence in the past which was voluntarily disrupted by leaving the country.

The possibility to exercise family life in the country of origin is often a decisive factor in the balancing of interests by the Court.<sup>37</sup> However, the Court does not always make this explicit, and rarely finds a violation in a situation where there are no insurmountable obstacles to exercise family life in the country of origin. The test used by the Court to determine whether there has been a violation of Article 8 in hybrid obligation cases, is however less consistent. Below, essentially three different types of tests are discussed.

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34. Van Walsum argues that the Dutch authorities had established that the family bond between the parents and the child had ceased to exist because the parent(s) had left their child behind in the country of origin. The Court did not follow this approach and stated that it cannot be assumed that parents who leave their children behind have irrevocably decided to leave their children behind permanently. See Sarah van Walsum, ‘Against All Odds: How Single and Divorced Migrant Mothers were Eventually able to Claim their Right to Respect for Family Life (2009) 11 European Journal of Migration and Law 295, 308.

35. *Osman v Denmark* (n 27). See also the admissibility decision *Ismail Ebbrahim and Serhan Ebrahim v Netherlands* App no 59186/00 (ECHR 18 March 2003). Outside the immigration context, the Court maintains that the distinction between negative and positive obligations does not lend itself to precise definition. See for instance *Evans v United Kingdom* (2007) 43 EHRR 21.

36. The Court’s use of the fair balance test and the assertion that in testing compliance with both positive and negative obligations the applicable principles are similar, is not unique to immigration cases. See *Powell and Rayner v United Kingdom* (1990) 12 EHRR 335. For further analysis see, Jean-François Akandji-Kombe, ‘Positive obligations under the European Convention on Human Rights: A Guide to the implementation of the European Convention on Human Rights’ (2007) Human rights handbooks No 7 1, 17-18.

37. *Gül v Switzerland* (1996) 22 EHRR 93, para 42.



*The exceptional circumstances test.* In *Rodrigues da Silva & Hoogkamer*, the Court developed a test to determine whether a foreign national, who remained in the host State without a right of residence for some time, should be allowed to remain there based on Article 8.<sup>38</sup> The case concerned a Brazilian national who sought to remain in the Netherlands with her minor Dutch daughter after the relationship with her Dutch partner had ended. The first applicant in *Rodrigues da Silva & Hoogkamer* never held a residence permit in the Netherlands. The premise underpinning this test is that where the persons involved were aware of the fact that the right of residence was precarious while developing family ties, a violation of Article 8 ECHR is only found ‘in the most exceptional circumstances’.<sup>39</sup> Factors used to determine whether this is the case are:

1. the extent to which family life is effectively ruptured;
2. the extent of the family ties in the host state;
3. whether there are insurmountable obstacles to the family living in the country of origin of one or more of them;
4. whether there are factors of immigration control, such as a history of breaches of immigration law;
5. whether considerations of public order are applicable; and
6. whether family life was created at a time when the persons involved were aware of the fact that the immigration status of one of them was precarious.<sup>40</sup>

This transforms the question of whether there is a violation of Article 8 ECHR to a question of whether the circumstances can be characterised as exceptional. Only where exceptional circumstances apply, is the State under the obligation to allow for residence. However, when looking at the manner in which the Court weighs these different considerations in the case itself, there are no further references to the exceptionality of the case. This is problematic considering the subsidiary role the Court plays in the protection of Article 8 ECHR in family-related immigration cases, it is unclear what test should be used. Should it be determined whether a case is exceptional? Or should these criteria be applied? The Court does not offer sufficient guidance on this.

*The best interests of the child as ‘overriding almost anything test’.* In *Nunez*, the Court deviated from the ‘exceptional circumstances test’.<sup>41</sup> The first limb of the test is the same as in *Rodrigues da Silva & Hoogkamer*. The Court stated that if the applicant and the family members were aware of the precarious immigration status of the applicant, a violation is only found in exceptional circumstances. Considering the aggravated character of the breaches of immigration law – the applicant had entered with a false identity and used this to obtain a residence permit – the Court held that this weighs heavily in the balance of the proportionality test.<sup>42</sup> However, the Court separately considered whether particular regard to the best interests of the applicant’s children would lead to a

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38. See *Rodrigues da Silva & Hoogkamer v Netherlands* (n 9). De Hart traces this approach back to *Abdulaziz, Cabales and Balkandali v United Kingdom* (n 4), in which the Court discussed the element whether the spouses had substantiated obstacles to exercise family life in the country of origin. See Betty de Hart, ‘Love Thy Neighbour: Family Reunification and the Rights of Insiders’ (2009) 11 *European Journal of Migration and Law* 235, 331.

39. The same formulation is used in *Ahmut v Netherlands* (n 33).

40. *Rodrigues da Silva & Hoogkamer v Netherlands* (n 9) para 39.

41. *Nunez v Norway* (2014) 58 EHRR 7209.

42. *ibid* para 73.

violation of Article 8.<sup>43</sup> This puts the best interests of the children in a special position in comparison to other considerations. It is the children's interests that override all other considerations. On the facts of the case, the applicant lost custody over her children, which was awarded to the father, with whom the applicant no longer had a relationship. The fact that the immigration procedure took a long time meant that the children had been in a situation of insecurity regarding whether her mother would be allowed to remain in Norway. Based on the best interests of the child, the Court concluded in the end that her expulsion would violate Article 8.

The manner in which the Court positioned the best interests of the child in the *Nunez* case – in which it made an explicit reference to Article 3(1) UN Convention on the Rights of the Child – is problematic considering that it may create the incentive to have children in order to resolve an insecure immigration status.<sup>44</sup> On the other hand, one may argue that taking the rights of children seriously requires that other considerations, such as the maintenance of effective immigration control, should be trumped in certain circumstances.<sup>45</sup>

In *Antwi*, the Court again applied the same test as it did in *Nunez*.<sup>46</sup> The facts of the case are very similar. The case again concerned a person who entered Norway with a false identity and established and strengthened family life while he was aware that his immigration status was based on fraud. The Court, however, comes to the opposite conclusion. The Court found that the breaches of immigration law weighed heavy in the balance when assessing the proportionality of the expulsion of the applicant. After that, it is assessed whether the best interests of the children would nonetheless warrant finding a violation of Article 8. Here, the Court held that the child in *Antwi* was not in a situation similar to the children in the *Nunez* case.<sup>47</sup> The Court concluded that even though they would undergo a certain amount of hardship if they were to join their father in his country of origin, admitting that this would not be beneficial to the child, the child did not undergo as much stress due to the disruptions of his family life as was the case in *Nunez*.<sup>48</sup> Accordingly, the Court found that the expulsion of the applicant would not lead to a violation of Article 8. The judgment in *Antwi* was criticised by the dissenting judges, who argued that

admitting that the impugned measure was 'clearly not' in – i.e. against – the best interests of the third applicant, while at the same time affirming that such interests have been duly taken into account seems to pay lip service to a guiding human rights principle.<sup>49</sup>

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43. *ibid* para 78.

44. Dissenting judges Mijovic and De Gaetano acknowledge this point, when they argue that '[w]e are particularly concerned that this case will send the wrong signal, namely that persons who are illegally in a country can somehow contrive to have their residence "legitimised" through the expedient of marriage and of having children'. *Nunez v Norway* n 41 Dissenting opinion of Judges Mijovic and De Gaetano, para 1.

45. See, for instance, Ciara Smyth, 'The Best Interests of the Child in the Expulsion and First-entry Jurisprudence of the European Court of Human Rights: How Principled is the Court's Use of the Principle?' (2015) 17 *European Journal of Migration and Law* 70.

46. *iraga v Swedentzerlandy held this in the admissibility decision in IAA v United Kingdomchildren, whereas in Nunez the applicant Antwi v Norway* (2012) ECHR 259.

47. There are two other striking differences between the *Antwi* and the *Nunez* case. In *Antwi*, the applicant is the father of the children, whereas in *Nunez* the applicant is the mother. See on this, Betty de Hart, 'Superdads: Migrant Fathers' Right to Family Life before the European Court of Human Rights' (2015) 18 *Man and Masculinities* 448. Another important difference is that in *Nunez* the parents were separated, making it difficult to expect the former partner to join the family in the country of origin, whereas in *Antwi* the family was still intact.

48. *Antwi v Norway* (n 46) para 101.

49. *Antwi v Norway* n 46 Dissenting opinion of Judge Sicilianos, joined by Judge Lazarova Trajkovska, para 7.

A nuanced version of the compliance test which is, to a large extent, based on the best interests of the child concept was followed by the Court in *El Ghatet v Switzerland*.<sup>50</sup> That case concerned the family reunification of the son of an Egyptian man who got a residence permit in Switzerland to live with his Swiss wife. He successfully applied for the family reunion of his son, who joined him in Switzerland. However, after less than two years, his son returned to Egypt because he did not have a good relationship with his stepmother and had trouble in school. After the divorce of the applicant and his Swiss wife, a renewed application for family reunion for the son was made. This application was however rejected by the Swiss authorities. This case did not concern the regularisation of an irregular residence situation, but rather the readmission of the son to Switzerland based on his family ties with his father. This distinguishes the case from *Nunez* and *Antwi*. As the case concerns admission, the Court states that the adequate test to be used is the determination of whether allowing the entry and residence of the son is the most adequate means for him to develop family life with his father; whether there are insurmountable obstacles or major impediments to the return of the father to Egypt. In formulating this test, the Court referred to its own formulation in *Tuquabo-Tekle*. The Court continued to refer to its case law stating that in 'in all decisions concerning children, their best interests must be paramount'.<sup>51</sup> The Court emphasised that the best interests of the child should not be regarded as a 'trump card', generating a right of residence in all cases involving children,<sup>52</sup> but emphasised that 'the domestic courts must place the best interests of the child at the heart of their considerations and attach crucial weight to it'.<sup>53</sup> In applying this to the facts of the case, the Court finds that no clear conclusion can be drawn on whether the applicant's interests in family reunion outweigh the public interests of the host state. However, the Court still finds a violation on the basis of the assertion that the Swiss court of highest instance did not place the best interests of the child sufficiently at the centre of its balancing exercise and its reasoning.<sup>54</sup>

*The 'what makes this case special' test.* A different test largely based on the particular facts of the case was followed by the Grand Chamber in *Jeunesse*.<sup>55</sup> The applicant in that case was a woman with Surinamese nationality who lived in the Netherlands with her Dutch national husband and three Dutch national minor children. The applicant had overstayed her short-term entry visa in 1996 and never left since. All children were born in the Netherlands while their mother did not have a valid residence permit. When the Court comes to its judgment in 2014, the applicant had lived in the Netherlands irregularly for over eighteen years. Considering the fact that the applicant never had a lawful right of residence in the Netherlands, the Court concluded that it must ascertain whether the Netherlands was under the positive obligation to allow for the residence of the applicant.<sup>56</sup> The Court suggests a test in which the same elements should be considered as were listed in *Rodrigues da Silva and Hoogkamer*.<sup>57</sup> The Court continues by stating that another important consideration is that:

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50. *El Ghatet v Switzerland* (2016) ECHR 963.

51. *ibid* para 46.

52. The Court has previously held this in the admissibility decision in *IAA v United Kingdom* (2016) 6 EHRR SE19.

53. *El Ghatet v Switzerland* (n 50) para 46.

54. *ibid* para 53.

55. *Jeunesse v Netherlands* (2014) ECHR 1309.

56. *ibid* para 105.

57. *ibid* para 107.

family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host State would from the outset be precarious.<sup>58</sup>

The Court concluded that if this is the case, a violation of Article 8 ECHR is only found in exceptional circumstances.<sup>59</sup> Instead of applying the *Rodrigues da Silva & Hoogkamer*-criteria, the Court employs yet another test to determine Article 8 compliance. The Court identifies four elements which makes the case exceptional, based on which it comes to the conclusion that Article 8 would be violated if the applicant would not be allowed to continue residence in the Netherlands.

The Court 'first and foremost' takes into account that the applicant's husband and children are all Dutch nationals and have the right to enjoy their family life in the Netherlands. In this context, the Court notes that the applicant held Dutch nationality at birth, and only lost this when Suriname gained independence from the Netherlands. The Court finds it relevant that the applicant did not lose her Dutch nationality by her own choice. According to the Court, the position of the applicant in this case must be differentiated from the position of foreign nationals who never held Dutch nationality.

A second consideration for the Court was the fact that the applicant has been in the Netherlands for more than sixteen years and does not have a criminal record. Even though her residence in the Netherlands was never based on a residence permit, the Court considers that her presence in the Netherlands was tolerated by the Dutch authorities. The long presence of the applicant in the Netherlands, which according to the Court is partly caused by the fact that the Netherlands had not tried to remove her, enabled the applicant to develop strong family, social and cultural ties in the Netherlands.

Third, considering the relatively young age of the children and the common background of the applicant and her husband, the Court observed that it appears that there are no insurmountable obstacles for exercising family life in Suriname. The Court did pay attention, however, to the 'certain degree of hardship' that the family would experience were they to be relocated to Suriname. Strikingly, this criterion has not been used in any other immigration cases concerning the right to respect for family life before the Court.

Fourth, the Court holds that the best interests of the child must be taken into account. In this context the Court has stated that:

noting that the applicant takes care of the children on a daily basis, it is obvious that their interests are best served by not disrupting their present circumstances by a forced relocation of their mother from the Netherlands to Suriname or by a rupturing of their relationship with her as a result of future separation.<sup>60</sup>

The Court considered that the applicant is the primary caregiver for her children and that her husband has a full-time job that involves shift-work. Scrutinizing the Dutch immigration proceedings, the Court held that there was some attention for the interests of the child in the assessment of insurmountable obstacles for the family to exercise the right to respect for family life in Suriname, but that the Netherlands fell short of what was required of them in this regard. The Court expressed

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58. *ibid* para 108.

59. *ibid* para 109.

60. *ibid* para 119.

that it is not convinced that actual evidence on what is in the children's best interests was assessed by the domestic authorities.<sup>61</sup>

Based on these four elements the Court considered the case to be exceptional and held that the Netherlands has not struck a fair balance between the competing interests involved in this case. It is however not clear how much weight was afforded by the Court to each of these elements and how they should be compared to the interests of the state in pursuing an immigration policy.

*The interference test of Article 8(2).* In admissibility decisions, the Court sometimes still uses the Article 8(2) justification of interference test, and also does so in cases concerning an alleged positive or hybrid obligation. An example of this is the admissibility decision in *Biraga*.<sup>62</sup> That case concerned a rejected asylum-seeker who sought to regularise her residence status based on her marriage with a foreign national with a valid residence permit with whom she also had a child. The Court stated that it did not find it necessary to determine whether there was an interference with the right to respect for family life or whether the State failed to comply with a positive obligation because in both contexts the State must strike a fair balance between the competing interests involved. However, after this assessment the Court proceeded to discuss whether the interference – which it did not find – was justified in a democratic society. The Court concluded that it cannot be held that the authorities did not strike a fair balance between the interests of the applicant and the state. This admissibility decision illustrates that using the interference test of Article 8(2) does not mean that using this test necessarily raises the level of protection offered by Article 8.

### *Interim conclusion*

The analysis of the case law above shows that the Court is not consistent in the manner in which it tests compliance with Article 8 ECHR. The Court is most consistent in its assessment of negative obligation cases in which the lawful residence of settled migrants is terminated. In cases involving the entry of a foreign national in a host state, which has been referred to as positive obligation cases, the Court tests in some cases whether the residence in the host State of the family is the 'most adequate way' to develop family life, while in other cases it requires that residence in the host State is the 'only way' in which family life can be developed. In cases in which the distinction between negative and positive obligations are blurred because of either irregular residence or voluntary departure and readmission, the Court follows different tests and it is unclear why it does so.

The inconsistency in testing compliance with Article 8 is a problem for the legal certainty for applicants and states alike. Considering that the Court merely has a subsidiary role in the protection of the rights laid down in the ECHR, it is problematic that the Contracting Parties are given insufficient guidance on how to test compliance with Article 8 in cases involving the right to respect for family life and immigration.

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61. Jacobsen argues that the consideration that the best interests of the child must be a paramount consideration means that it must overrule all other interests, suggesting that the best interests of the child was the decisive element for the Court. See Anette Faye Jacobsen, 'Children's Rights in the European Court of Human Rights – An Emerging Power Structure' (2016) 24 *International Journal of Children's Rights* 160.

62. *Biraga v Sweden* (2012) ECHR 785.

## Implementation of Article 8 ECHR in domestic immigration law

### *The Netherlands*

In the Netherlands, the immigration regulation relevant for this contribution consists of the Foreign Nationals Act ('Vreemdelingenwet'), the Foreign Nationals Decree ('Vreemdelingenbesluit'), the Foreign Nationals Circulars ('Vreemdelingencirculaire') and a specific document with guidance for case workers ('Werkinstructie').<sup>63</sup>

Article 8 ECHR plays an important role in Dutch family reunification law. In the Foreigners Decree, a regulation that further implements the Foreigners Act, there are a number of explicit references to Article 8 ECHR.<sup>64</sup> Especially the provision based on which it shall be determined whether a residence permit can be revoked after a criminal conviction, the Foreigners Decree explicitly states that a residence permit cannot be revoked if this would lead to a violation of Article 8 ECHR.<sup>65</sup> Besides those explicit references, Article 8 ECHR is also relevant in the context of hardship clauses which gives the authorities the possibility to grant a residence permit even though the conditions are not met.

The role that Article 8 ECHR plays in Dutch family reunification law is further illustrated by the amendment of the Foreigners Decree that limited family reunification to the core family in 2012.<sup>66</sup> Before that amendment, the Netherlands allowed for family reunification of family members in the ascending line if the family members were above the age of sixty-five and no other family members were present in the country of origin; and adult children if it would be unreasonable for the adult family member to remain in the country of origin. The memorandum to the amendment states that family reunification of family members outside the core family will only be allowed if a refusal would be in violation of Article 8 ECHR.<sup>67</sup> Interestingly, the third country national parents of children holding Dutch nationality are not included in the concept of core family members.<sup>68</sup> As a result of this, family reunification of third country national parents is only possible based on Article 8 ECHR.<sup>69</sup>

A striking observation that can be made from the guidelines for caseworkers is that the question whether there has been an interference in the right to respect for family life is not positioned as an

63. These guidelines used to be internal instructions to caseworkers of the Dutch Immigration Service, however after the ruling of the Court in *Jeunesse*, the guidelines were published on the website of the Immigration Service. See Werkinstructie 2015/4, Richtlijnen voor de toepassing van artikel 8 EVRM, available via [https://ind.nl/Documents/WI\\_2015-4.pdf](https://ind.nl/Documents/WI_2015-4.pdf).

64. Article 8 ECHR is mentioned as a ground for exemption from the provisional entry visa requirement (Article 3.71(2)(f) Foreigners Decree), as a reason not to reject an application for the prolongation of a residence permit (Article 3.86 and 3.89d Foreigners Decree) and as a reason not to repeal a residence permit (Article 3.91e Foreigners Decree).

65. Article 3.86 Foreigners Decree, lays down that a residence may be revoked after a criminal conviction. In para 17 of that provision it is stated that a residence permit is not refused in case this would lead to a violation of Article 8 ECHR.

66. Decree of 27 March 2012 to the amendment of the Foreign Nationals Decree 200, the Decree modern migration policy and the Decree integration (tightening requirements for family migration), Stb. 2012, 148. See <https://zoek.officielebekendmakingen.nl/stb-2012-148.html>.

67. *ibid.*

68. See Article 3.15 Foreigners Decree.

69. The *Ruiz Zambrano* ruling of the Court of Justice of the European Union and all the subsequent case law plays an important role in Dutch family migration law. Case C-34/09 *Ruiz Zambrano* [2011] ECR I-01177. See Mark Klaassen & Peter Rodrigues, 'The Best Interests of the Child in EU Family Reunification Law: A Plea for More Guidance on the Role of Article 24(2) Charter' (2017) 19 *European Journal of Migration and Law* 191.

integral part of the structure of the Article 8 assessment, but rather as a substantive criterion to be taken into account in the balancing of interests.<sup>70</sup> This can partly be explained by the emphasis within the case law of the Court on the irrelevance of making a sharp distinction between the negative obligation not to expel and the positive obligation to admit. This, however, leads to a lack of attention for the structure of the Article 8 test, which leads to a lack of clarity in the level of protection.

Another striking example of confusion in the case worker guidance document is the treatment of the best interests of the child as an element in the balancing of interests. Unlike the other substantive criteria, a complete chapter in the guidance document is devoted to the best interests of the child. Several scenario positions are sketched and instructions are provided for each of those scenarios on what the role of the best interests of the child is. After that, two separate elements are discussed which are often invoked in establishing strong bonds between a minor applicant and the Netherlands. The first of these elements is medical and psychological circumstances creating a special bond between the applicant child and the Netherlands. Case workers are advised to be critical about the possibilities to get the required care in the country of origin. The second element is the age of the child and the duration of the child's residence in the Netherlands. Case workers are instructed to take the language that the parents speak with the child at home into account and the extent to which the child has social contacts outside the cultural background of the parent.

In the appeals procedure, the Council of State has established that the courts should practice restraint in scrutinizing the Article 8 ECHR assessment of the administration.<sup>71</sup> According to the Council of State, it is the role of the courts to determine whether the administration has taken all relevant elements into account and whether, based on this, it could have reasonably come to the negative decision.<sup>72</sup>

In cases of negative obligations concerning the expulsion of a settled migrant, the national practice follows the guiding principles as offered by the Court. There have not been many violations of Article 8 ECHR found by the Court in such cases. The motivation that drives the Council of States' decisions is not always transparent. In a case concerning the expulsion of a foreign national who had been living in the Netherlands for over twenty years before his residence permit was revoked after a series of criminal convictions, the Council of State discussed the family life the applicant has with his minor daughters, including the fact that he has strong bonds with the Netherlands because of the duration of his residence, does not live with his children and mostly communicates with them by telephone, and the nature and seriousness of the committed offenses.<sup>73</sup> Based on this, the Council of State rules that the administration has properly reasoned its negative decision. It is unclear from the ruling in what manner the other guiding principles, especially relating to the circumstances of the children, were taken into account in the balancing of interests. Often, the Council of State limits its reasoning to the assertion that the administration was not wrong in the assessment that the interference in the

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70. See Werkinstructie 2015/4 (n 63).

71. Thomas Spijkerboer, *De Nederlandse Rechter in het Vreemdelingenrecht* (SDU 2014) 335.

72. See for instance, Council of State 16 June 2011, 201010430/1/V1. In her discussion of the case, Van Walsum argues that even though the Council of State calls for judicial restraint in scrutinizing the immigration decision, the Council of State does not practice this itself and questions whether this approach is in line with the case law of the ECtHR. See Sarah van Walsum, 'Mauro mag niet blijven' (2011) *Asiel- en Migrantenrecht* 420.

73. Council of State, 27 November 2014, ECLI: NL: RVS:2014:4366.



right to respect for family life was justified.<sup>74</sup> In cases in which the Council of State takes it upon itself to scrutinise whether the administration has conducted a proper balancing of interests, it is striking that the Council of State does not systematically refer to the structure of the Article 8 test and the different elements that should be considered. For instance, in a recent judgment concerning the withdrawal of a residence permit because of the termination of the family ties between a foreign national and her partner, but in which the applicant maintained family ties with other family members, the Council of State does not make clear what role the elements that the applicant does not pose a risk to public order and is financially independent from the State plays in the balancing of interests.<sup>75</sup>

Another case concerns the readmission of a mother and her minor daughter from Iraq who had lived in the Netherlands for a long time before returning to Iraq in 2011.<sup>76</sup> Their application to come back to the Netherlands, where four sisters had remained, was rejected. In this case, the administration argued that in the event of admission when there is no termination of lawful residence and when the admission requirements are not complied with, in principle the interests of the State in pursuing an immigration policy are decisive in the balancing exercise. This can only be different in exceptional circumstances. The Council of State ruled that the administration should have included the lawful residence of the minor daughter from her birth in 1999 until the departure in 2011 and all the bonds with the Netherlands that she had meanwhile developed, in the balancing of interests and ordered the administration to make a new decision.<sup>77</sup>

Article 8 ECHR plays an important role in Dutch immigration law in the sense that the legislator has chosen to pursue a restrictive immigration policy in which the level of protection of Article 8 in some occasions, becomes the benchmark for the determination of a right of residence. In doing so, the legislator exposes the administration to fluctuation in the Court's caselaw. With each ruling of the Court, the question rises as to what extent this should influence the interpretation of the right to respect for family life in the Dutch legal order. This is illustrated by the fact that both the policy guidelines and the case worker guidance document are subject to frequent changes. In both instruments, the formulations used by the Court in its judgments are clearly visible. In the policy guidelines, the question whether there has been an interference with the right to respect for family life is used as a factor in the balancing of interests, which is not reflected in the case law of the Court. It is submitted that the abandonment of the interference as a tool to determine the structure of the compliance test is an attempt of the Dutch authorities to deal with the different tests used by the Court.

### *United Kingdom*

In the UK, the layered structure of immigration law is reflected in the Immigration Act 1971, the Immigration Rules and several forms of secondary regulations such as the Immigration Directorate Instructions (IDIs). The IDIs function as a guidance code on the interpretation of the Immigration Rules. The ECHR is implemented in the UK through the Human Rights Act 1998 (HRA).

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74. See, for instance, Council of State, 17 November 2010, ECLI: NL: RVS:2010: BO5978. For an overview of the case law of the Council of State, see Spijkerboer (n 71) 103.

75. Council of State, 3 august 2017, ECLI: NL: RVS:2017:2050.

76. Council of State, 25 May 2016, ECLI: NL: RVS:2016:1543.

77. *ibid* para 4.4.

In an attempt to limit judicial review in Article 8 cases, the UK government amended the Immigration Rules in 2012. In the Statement of Intent, published by the Home Office in the procedure amending the Immigration Rules, it was stated that:

The new rules will fully reflect the factors which can weigh for or against an Art 8 claim. They will set proportionate requirements that reflect, as a matter of public policy, the Government's and Parliament's view of how individual rights to respect for private or family life should be qualified in the public interest to safeguard the economic well-being of the UK by controlling immigration and to protect the public from foreign criminals.<sup>78</sup>

The amendment included the assessment of proportionality in the Immigration Rules, steering the judiciary to exercise more judicial constraint in testing compliance with Article 8 ECHR. The premise underlying the amendment was that if the Immigration Rules are proportionate, decisions taken in accordance with the Immigration Rules must be proportionate as well. In the case law that developed after the amendment of the Immigration Rules, it was held that the two-phase test, meaning first testing whether the applicant qualifies under the Immigration Rules and afterwards whether the applicant qualifies under Article 8 ECHR, would be maintained.<sup>79</sup>

The judiciary has played an active role in the development of Article 8 ECHR in the UK. On the role and intensity of judicial review, the House of Lords has established that:

the task of the appellate immigration authority, on an appeal on a Convention ground against a decision of the primary official decision-maker refusing leave to enter or remain in this country, is to decide whether the challenged decision is unlawful as incompatible with a Convention right or compatible and so lawful. It is not a secondary, reviewing, function dependent on establishing that the primary decision-maker misdirected himself or acted irrationally or was guilty of procedural impropriety. The appellate immigration authority must decide for itself whether the impugned decision is lawful and, if not, but only if not, reverse it.<sup>80</sup>

Based on this, the judiciary has developed its jurisprudence, especially with regard to the structure of the test. For the purpose of this contribution, it is interesting how the concept of interference with the right to respect for family life is defined. In *AG*, the Court of Appeal held that:

It follows, in our judgment, that while an interference with private or family life must be real if it is to engage art. 8(1), the threshold of engagement (the "minimum level") is not a specially high one. Once the article is engaged, the focus moves, as Lord Bingham's remaining questions indicate, to the process of justification under art. 8(2). It is this which, in all cases which engage article 8(1), will determine whether there has been a breach of the article.<sup>81</sup>

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78. Home Office, Statement of Intent: Family Migration (2012) available via <https://www.gov.uk/government/publications/family-migration-statement-of-intent>.

79. See *MF (Article 8 – new rules) Nigeria* [2012] UKUT 00393 (IAC).

80. *Huang v. SSHD* (2007) UKHL 11 para 11.

81. *AG (Eritrea) v SSHD* (2007) EWCA CIV 801.

This approach of the Court of Appeal was later followed in other judgments.<sup>82</sup> In *Bibi and Quila*, the Supreme Court ruled on the compatibility of the twenty-one years age requirement for family reunion.<sup>83</sup> The case concerned two separate cases in which the applicants did not meet the age requirement, which had recently been increased from 18 to 21 years in order to prevent forced marriages. Even though the facts in *Bibi* and in *Quila* are similar, there are some important nuances for the question whether there has been an interference in the right to respect for family life. *Bibi* concerns an application for family reunion of a Pakistani national to another Pakistani national settled in the UK. Both spouses are below the minimum age at the moment of lodging the application. The application was submitted when the spouse was in Pakistan. In *Quila*, a Chilean national applied for residence in the UK with his British spouse. As the applicant in *Quila* already resided in the UK with his parents, the application was made in the country itself. After their application was rejected, the couple moved to Chile together. The Supreme Court considered whether there had been an interference with the right to respect for family life. It considered case law of the Court to conclude that there is no ‘clear and consistent jurisprudence’ on this issue.<sup>84</sup> Based on the finding that the Court had found an interference to exist in *Tuquabo-Tekle*, the Supreme Court held that the relevant question in the case at hand was whether the interference with the right to respect for family life was justified.<sup>85</sup> The Supreme Court then set out the legal framework for ruling whether an interference is justified, based on its earlier *Huang* ruling, in which four questions were outlined:

- a) is the legislative objective sufficiently important to justify limiting a fundamental right?;
- b) are the measures which have been designed to meet it rationally connected to it?;
- c) are they no more than are necessary to accomplish it?; and
- d) do they strike a fair balance between the rights of the individual and the interests of the community?<sup>86</sup>

Based on these questions, the Supreme Court concluded that the increase of the age requirement to twenty-one years goes further than necessary, as the number of unforced marriages which are affected by the measure ‘vastly exceeds’ the number of forced marriages it deters.<sup>87</sup>

The notion of interference was again extensively discussed in the *MM* ruling of the Supreme Court on the compatibility of the income requirement with Article 8 ECHR. In this case, the Supreme Court referred to *Jeunesse v Netherlands* to conclude that the Court did not find it necessary to determine the proportionality of an immigration decision using the justification of an interference test based on Article 8(2). It however refers to its own case law and observes that there was ‘no objection to [their] employing this useful analytic tool’.<sup>88</sup> Invoking the interference test, the Supreme Court concluded that the income requirement was different from the age requirement, in that the objective of the age requirement was combatting forced marriage, while the

82. See Eric Fripp et al, *The Law and Practice of Expulsion and Exclusion from the United Kingdom: Deportation, Removal, Exclusion and Deprivation of Citizenship* (Hart 2015) 149.

83. *R (on the application of Quila and another) v SSHD* (2011) UKSC 45. See for analysis, Yvonne Tew, ‘And They Call it Puppy Love: Young Love, Forced Marriage and Immigration Rules’ (2012) 71 *The Cambridge Law Journal* 18.

84. *ibid* para 43.

85. *ibid*.

86. *ibid* para 45.

87. *ibid* para 58.

88. *R (on the application of MM (Lebanon) v SSHD* (2017) UKSC 10 para 44.

explicit objective of the income requirement is to reduce immigration. The Supreme Court does hold that there is not sufficient attention to the best interests of children and does indicate aspects in the instructions which require revision, but maintains the income requirement as such.<sup>89</sup>

Similarly, in the *Ali & Bibi* ruling, the Supreme Court held that the obligation to comply with an English language requirement amounts to an interference with the right to respect for family life.<sup>90</sup> Lady Hale discussed the extent to which there is an interference with the right to respect for family life, taking the question whether there is an interference into the balancing of interests itself.

In the UK, Article 8 ECHR plays an important role in family reunion law and the judiciary takes an active part in that, despite the attempts of the legislator to limit the scrutiny of the judiciary. What is striking in the case law is that the judiciary uses a more inclusive interference concept compared to the ECtHR. Where the Court does not find an interference in positive obligation cases and is hesitant in assuming an interference in hybrid obligation cases, the judiciary in the UK does not find it problematic to assume an interference with the right to respect for family life. The *MM* and *Ali & Bibi* judgments of the UK Supreme Court illustrate that finding an interference in no way means that the immigration decision is necessarily in violation of Article 8.

## A proposal

The distinction that is made between the different types of immigration cases and the corresponding ‘tests’ leads to legal uncertainty for both contracting parties and individuals. In order to remedy this, the Court could be consistent in the test it uses in all immigration cases. This is possible without losing the required flexibility to take the different factors in the balancing of interests into account. Instead of using the justification test of Article 8(2) only in case of the termination of lawful residence, this test is suitable for all immigration cases. The reasoning that the refusal of a right to residence to an illegally residing foreign national cannot interfere with his right to respect for family life because he was never granted a right of residence in the first place is not convincing, as it relates solely to circumstances concerning the immigration status and not to family life itself. As Lord Wilson put it in *Bibi & Quila*, even though there might never have been a right of residence in the past, the refusal to live together in the host state can amount to a ‘colossal interference’ with the right to respect for family life. This, Lord Wilson argues, makes the distinction between positive and negative obligations elusive.<sup>91</sup> As the element of an interference in the right to respect for family life and the immigration status of the applicant are not logically related, it would be wise to abandon this manner in which different immigration cases are differentiated from each other.

Easily assuming that there is an interference in the right to respect for family life in immigration cases would not be at odds with several other elements in the Article 8(2) justification test. Within the body of case law, there is rarely a discussion of the question whether the interference pursues a legitimate aim. In the context of immigration law, it is often assumed that this is the case. For instance, in the case of the termination of lawful residence after a criminal conviction, the Court regularly assumes that this interference is made in order to prevent disorder and crimes. In cases relating to the non-compliance with immigration conditions, the Court even assumes that

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89. *ibid* paras 109-110.

90. *R (on the application of Ali) and R (on the application of Bibi) v SSHD* (2015)UKSC 68.

91. Lord Wilson in (2011) UKSC 45, paras 32 and 43.

immigration control is a legitimate aim to make an interference with the right to respect for family life, even though this is not listed in the legitimate aims states in Article 8(2).

Instead of differentiating between the tests to be used in various types of immigration situations, it would lead to a more consistent case law if the Court would use one single test and clearly lay down the elements that must be considered in the form of guiding principles. This allows for a differentiation in the level of protection, while the test for compliance with Article 8 would be clearer, giving more guidance to national decision-making authorities and judiciaries. How could such a test look like?

To begin with, considering the structure of Article 8 ECHR itself, it would be logical to use the Article 8(2) justification test in every immigration case. In each case, a balancing of competing interests needs to take place. In order to balance interests, it is necessary to create an overview of the different elements that should be considered, for both the individual interest to exercise family life and the state interests to control immigration. The State must clearly define what the legitimate aim in interfering in the right to respect for family life is, and why making an interference in the right to respect for family life is necessary to attain that aim. On the side of the applicant, many different individual circumstances must be considered. For many of the relevant elements, inspiration could be found in the guiding principles from the *Boultif* and *Üner* cases. However, as these guiding principles were formulated in public order cases, additional guiding principles should be formulated. These additional guiding principles could be:

1. the immigration status history of the applicant;
2. whether the applicant has a record of breaches of immigration law and, if so, the nature of these breaches; and
3. whether it can be expected from the family members to exercise the right to respect for family life in the country of origin of the applicant, or, where appropriate, a third country.

Depending on the weight afforded to each of the different elements, a decision on the justification of the interference can be made. As it is apparent from the current case law that the Court seeks to make a differentiation on the level of protection that is afforded in different types of immigration cases – for example, admission and termination of lawful residence – this differentiation can be made using the weight afforded to each of the guiding principles.

## Conclusion

The manner in which the Court tests compliance with Article 8 ECHR in immigration cases has often been criticised on different grounds.<sup>92</sup> The aim of this article is neither to contribute to this body of criticism nor to look for an explanation behind the diverging approaches by the Court.<sup>93</sup> Instead, the aim of this article is to outline the differences and inconsistencies in the different forms of immigration cases and the corresponding compliance tests of the Court and to offer a solution that would enable both the Court and the Contracting Parties to differentiate in the level of protection that is offered by Article 8 in immigration cases, while providing sufficient guidance to national decision making authorities and judiciaries so that these can efficiently and effectively

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92. Spijkerboer (n 2); Smyth (n 45).

93. See for such analysis, Hilbrink (n 7).

exercise the primary role they play in the protection of the right to respect for family law in immigration cases.

The case law of the Court was analysed and the tests used by the Court in different types of immigration cases were identified and discussed. In positive obligation cases, the Court tests whether the contracting party should allow for entry and residence of a foreign national who was not admitted before using the 'fair balance test'. In negative obligation cases, the assessment of the Court determines whether the immigration decision that interferes with the settled family life of a foreign national is justified using the test of Article 8(2). In cases in which it is difficult to make a distinction between both types of obligations – in this contribution referred to as 'hybrid obligation cases', the Court uses different types of compliance tests.

It is proposed to the Court to use a single test and identify guiding principles on how to differentiate the level of protection in the various types of immigration cases. If such approach would be adopted, the Court would offer a more structured legal framework to national decision makers and judiciaries than it currently does. It then could take a more distant role in the observance of the compliance with Article 8 in immigration cases, as it would have to assess whether the contracting parties have followed the guiding principles properly. In this manner, the Court would give the contracting parties the tools required to take their primary role in the protection of Article 8 ECHR.

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