Populism, Exceptionality and the Right of Migrants to Family Life Under the European Convention on Human Rights

Stoyanova, Vladislava

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POPULISM, EXCEPTIONALITY, AND THE RIGHT TO FAMILY LIFE OF MIGRANTS UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Vladislava Stoyanova*

The recent populist turn in national and international politics poses a threat to the rights of migrants. In this context, the key question that this article addresses is whether and how the European Convention on Human Rights (ECHR), as interpreted by the European Court of Human Rights (ECtHR), can be a point of resistance against populism. More specifically, how might the ECtHR respond to the anti-migration dimension of the populist politics when adjudicating cases implicating the rights of migrants (with a focus on the right to family life)? In this article, I acknowledge that the Court, through its adjudicative function, has created a space where the state has to advance reasoned arguments to justify disruptions of family life in pursuit of immigration control objectives. At the same time, however, I also demonstrate that this space does not reflect the usual rigor of scrutiny conducted by the Court in cases that do not concern immigration policies (i.e. the proportionality reasoning with its distinctive subtests is applied with serious aberrations). The Court acts with restraint when called upon to uphold the rights of migrants; it sides with the sovereign states and, therefore, any populist attacks against the Court are unsubstantiated. I would like to also inject a note of caution for the Court itself about how it reasons. More specifically, in its restraint to exercise resistance against the sovereign states' entitlements in the area of migration, the Court is getting dangerously close to utilizing populist tools. Finally, I explain the 'procedural turn' taken by the Court when adjudicating the right to family life of migrants. While I acknowledge that this is a useful tool for the Court to maintain its standing in the sensitive area of migration, I also indicate the dangers that might emerge from its application. In particular, controversial decisions are left to be taken at the national level and the Court will be reluctant to examine them unless the quality of the national decision-making process is suspect.

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* Ragnar Söderberg Associate Senior Lecturer, Faculty of Law, Lund University, Sweden. This article is part of a larger project on positive obligations under the ECHR. Funding by the Ragnar Söderbergs Foundation is gratefully acknowledged. Email: vladislava.stoyanova@gmail.com and vladislava.stoyanova@jur.lu.se.

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> [...] the European Court of Human Rights has to ensure, in particular, that State interests do not crush those of an individual, especially in situations where political pressure – such as the growing dislike of immigrants in most member States – may inspire State authorities to harsh decisions.[1]

I. INTRODUCTION: POPULISM AS A SOURCE OF CONCERN AND THE SOLUTIONS ADVANCED WITHIN THE COUNCIL OF EUROPE

In the 2017 report on populism, the Secretary General of the Council of Europe (CoE), Thorbjørn Jagland, identified the denigration of international institutions, including the European Court of Human Rights (ECtHR), as

[1] Dissenting Opinion of Judge Martens, approved by Judge Russo, in *Gül v Switzerland* (1996) 22 EHRR 93, para 15.

one of the main features of the populist and illiberal swerve.[2] As the Secretary General clarified, a central charge of populism is that 'international organizations, courts and treaties rob "the people" of their sovereignty'.[3] Jagland explained that '[b]y claiming exclusive moral authority to act on their [the people's] behalf, populism seeks to delegitimize all other opposition and courses of action'.[4] Populism presents 'the people' as 'a single, monolithic entity with one coherent view'.[5] In this context, populism exploits public anxieties over migration and creates the image of the 'other', i.e. the migrant that has to be confronted. Other central features of populism identified by the CoE report are the spread of misinformation (also labelled 'fake news'), the invocation of unsubstantiated facts, and the related advancement of simplistic solutions to complex social problems.

Migrants are vulnerable to the consequences of such invocations and oversimplifications since, in general, the populist turn in national and international politics is expressed through one common trend across countries and jurisdictions: curbing immigration and restricting the rights of migrants.[6] Migrants are thus excluded from 'the pure people' that populists claim to *exclusively* represent.[7] In this way, the populist turn paves the way to

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[2] Report by the Secretary General of the Council of Europe, 'State of Democracy, Human Rights and the Rule of Law. Populism How Strong are Europe's Checks and Balances?' (2017) ('CoE Populism Report').

[3] Ibid 4. The definition of populism can raise controversies. Jan Werner Müller has captured one common core for describing populism: 'a particular moralistic imagination of politics, a way of perceiving the political world that set a morally pure and unified – but [...] ultimately fictional – people against elites who are deemed corrupt or in some other way morally inferior', Jan Werner Müller, *What is Populism?* (University of Pennsylvania Press 2016) 19-20.

[4] CoE Populism Report (n 2) 6.

[5] Ibid.

[6] Speech by the CoE Secretary General, Understanding Populism and Defending Europe's Democracies, 27 January 2017 <www.coe.int/en/web/secretary-general/speeches/-/asset_publisher/gFMvl0SKOUrv/content/understanding-populism-and-defending-europe-s-democracies-the-council-of-europe-in-2017?inheritRedirect=false> accessed 26 February 2018.

[7] Cas Mudde, 'Populism: An Ideational Approach' in Cristobal Rovira Kaltwasser et al (eds), *The Oxford Handbook of Populism* (Oxford University Press 2017) 28, 34. The exclusion of migrants can be also related to the fact that populism understands 'the people' as 'a homogenous community with shared collective identity'. Stefan

more restrictive migration policies whose compliance with human rights law might be questionable.

In his report, the Secretary General is adamant '[t]hat pluralism, inclusive debate and the protection of minority interests against aggressive majoritarianism are essential for maintaining stable societies and democratic security'.[8] As a response to populism, Jagland proposes, *inter alia,* 'to manage migration and diversity in ways which foster respect, *while* guaranteeing social rights for all citizens'.[9] He also recommends to reiterate our commitment to the European Convention on Human Rights (ECHR or the Convention).[10]

One of the proposed solutions against populism is strengthening the role of courts, including international courts, which in the European context implies placing a renewed trust in the ECtHR. Another recommended solution is the renewed emphasis on socio-economic rights. Most importantly, the commitment to socio-economic rights is presented as being in tension with 'migration management'. A central message in the Secretary General's report seems to be that there is a conflict between promoting and ensuring socio-economic rights of the population at large, on the one hand, and ensuring the rights of migrants, on the other.[11]

In light of the above features of populism and the counter-measures invoked by the CoE, the question this article seeks to address is to what extent the ECHR, as interpreted by the ECtHR, is and can be used as a point of resistance against populism. More specifically, how has the ECtHR responded to the exclusionary, nationalist, anti-migrant dimension of

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Rummens, 'Populism as a Threat to Liberal Democracy' in Cristobal Rovira Kaltwasser et al (eds), *The Oxford Handbook of Populism* (Oxford University Press 2017) 555. The same argument has been also made in Paul Taggart, 'Populism in Western Europe' in Cristobal Rovira Kaltwasser et al (eds), *The Oxford Handbook of Populism* (Oxford University Press 2017) 249, 251. See also Jürgen Bast and Liav Orgad, 'Constitutional Identity in the Age of Global Migration' (2017) 19(7) German Law Journal 1587.

8 CoE Populism Report (n 2) 6.

9 Ibid (emphasis added).

10 Ibid 5.

11 For a similar suggestion see Philip Alston, 'The Populist Challenge to Human Rights' (2017) 9 Journal of Human Rights Practice 1, 6.

populist politics when adjudicating cases implicating the rights of migrants?[12] Since, as an institution, the Court has generally been under a great strain and an object of attacks,[13] a related question is how the Court has managed to maintain its standing as an international adjudicative body in the sensitive area of migration. In particular, how has the Court responded to the above-mentioned tension between the rights of migrants and the rights of the host population?

I will answer these questions by looking into the details of the Court's argumentation, the analytical steps that it follows, and the tests that it applies. In this sense, my review is technical in nature.[14] In terms of

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[12] The concepts of populism and nationalism might be difficult to disentangle. For a useful analysis here, see Benjamin de Cleen, 'Populism and Nationalism' in Kaltwasser et al (eds) *The Oxford Handbook of Populism* (Oxford University Press 2017), 343. De Cleen explains that nationalism is 'structured around 'the nation'' and through 'an in/out (member/non-member) opposition'. In contrast, populism is 'structured around a down/up antagonism between "the people" as a large powerless group and "the elite" as a small and illegitimately powerful group, with populist claiming to represent "the people"'. Although populism and nationalism should not be conflated, de Cleen observes that 'populist politics operate within a national context' and 'revolve around the identity, interests, and sovereignty of the nation'. 'The people' invoked by populists are defined on the level of the nation-state and are 'pitted *against* migrants and other national(ist) outgroups'. Mudde has also explained that one of the central claims of populism is that 'the elite' has furthered the rights of immigrants to the disadvantage of 'the people'. See Cas Mudde, *Populist Radical Right Parties in Europe* (Cambridge University Press 2007). Therefore, in the context of the populist arguments against 'the elite', 'the nationalist distinction between the nation and its outsiders serves as the main explanatory framework', De Cleen (p 351). De Cleen also adds that 'the populist signifiers "the people" and "the elite" acquire meaning through their articulation with nationalism. The people-as-underdog becomes equated with the nation, and "the elite" is opposed to the nation and its interests'.

[13] Andreas Follesdal, 'Much Ado about Nothing? International Juridical Review of Human Rights in Well-Functioning Democracies' in Andreas Follesdal, Johan Schaffer and Geir Ulfstein (eds) *The Legitimacy of International Human Rights Regimes* (Cambridge University Press 2014) 272, 276.

[14] For further elaboration see Thomas Spijkerboer, 'Analyzing European Case-Law on Migration. Options for Critical Lawyers' in Loïc Azoulai and Karin de Vries (eds), *EU Migration Law: Legal Complexities and Political Rationales* (Oxford University Press 2014) 189.

methodology, my review draws on Spijkerboer's strategies for critical lawyers in the field of immigration law: identifying inconsistencies in the legal reasoning, exposing choices (i.e. when the 'legal reasoning allows for more than one legitimate outcome'), and revealing background rules.[15] The application of these strategies will emerge with more clarity in the forthcoming analysis. Besides, my objective is not to survey all relevant judgments (this is unmanageable for the scope of this article), but to focus on the basic structure of enquiry followed by the Court. For this purpose, I have selected judgments that reflect the general principles applied consistently by the Court in its case law. The selected judgments are thus representative of how the Court generally reasons in this area of human rights law.

To respond to the questions posed above, I will take the following steps. First, I will introduce pertinent analytical distinctions that allow me to suggest differences between anti-migration populist attacks, on the one hand, and other types of critique against the Court, on the other. Many of the latter have their origins in the tensions and weaknesses that generally characterize the application of human rights law to migrants and feed the populist turn (Section II). The tension between states' migration control prerogatives and migrants' interests finds a very concrete manifestation in the Court's approach to the right to family life under Article 8 of the ECHR, which, as I explain in Section III, is one of the main reasons to focus on the latter provision. As the text of Article 8 suggests, this tension ought to be resolved through the application of a proportionality test. I will then briefly describe the classic proportionality analysis for adjudicating qualified rights, such as the right to family life (Section IV). While acknowledging the specificities of the ECHR, I will juxtapose the classic proportionality model with the Article 8 reasoning in migration cases. I will point out the divergences and the additional layers of restrictiveness added by the Court (Sections V and VI). Finally, I will discuss the tool of procedural review, which the Court has used to avoid engagement with politically sensitive issues. While acknowledging its benefits, I will also highlight the risk of using this tool (Section VII).

The central argument that emerges is that the Court is very restrained when it adjudicates the right to family life of migrants, and any populist attacks

[15] Spijkerboer (n 14) 199.

against it are unsubstantiated. The Court sides with the sovereign states' migration control prerogatives. I also inject a note of caution for the Court itself about how it reasons. In its restraint to exercise resistance against the sovereign, it is getting dangerously close to utilizing populist tools. More specifically, these tools have the following manifestations: they assume that there necessarily is a conflict between the rights of migrants and the interests of the host community; they do not require the state to articulate its aims beyond a general and abstract invocation of immigration control prerogatives; they do not subject the aim pursued by the state to any rational or factual scrutiny; and, they represent the rights of migrants as an exception by applying the 'most exceptional circumstances' test. Each one of these aspects will be elaborated below.

II. Contextualizing and Distinguishing

When discussing the rights of migrants and the dangers posed by populism, it is important to first put things in perspective by contextualizing the anti-migration dimension of the populist turn within the broader human rights framework, and its weaknesses in addressing the rights of migrants. More specifically, with or without populism, the rights of migrants have been a weak point of international human rights law.[16] The ECtHR, in particular, has been struggling to navigate a course between a progressive position (less space for state sovereignty and more protection for individual rights) and state-oriented position (not challenging states' restrictive practices in the area of migration).[17] Accordingly, there has been a continuing tension between statism (state sovereignty as fundamental and conclusive in immigration matters) and cosmopolitanism (protection of the rights of all human beings, including migrants, as the fundamental starting point). Against the background of this instability, one can expect populism to be

[16] Gregor Noll, 'Why Human Rights Fail Undocumented Migrants?' (2010) 12 European Journal of Migration and Law 241; Seyla Benhabib, *The Rights of Others: Aliens, Residents, and Citizens* (Cambridge University Press 2004); Alison Kesby, *The Right to Have Rights: Citizenship, Humanity and International Law* (Oxford University Press 2012).

[17] Thomas Spijkerboer, 'Structural Instability: Strasbourg Case Law on Children's Family Reunion' (2009) 11 European Journal of Migration and Law 271.

conducive to tipping the balance in favor of statism.[18] In this context, it has to be acknowledged that populism is part of the European socio-political environment, in which the Court is embedded;[19] this environment influences the ECtHR. Although the Court has a broad power in relation to the interpretation of the ECHR and has historically maintained a strong institutional standing,[20] it cannot be viewed as an institution that is isolated from political forces.[21] Therefore, we should not be dismissive of populist attacks. In fact, they should be a reason for concern and we should try to seriously address them in a reasoned manner. The CoE, within whose institutional structure the Court occupies a prominent place, has accordingly identified 'responding to the populist threat' as one of the three priorities of the organization.[22]

At this junction, it should be clarified that the Court has also been an object of critique from other quarters, in terms of the stringency of its review and the degree of appreciation it should leave to states in the area of human rights protection.[23] The question that emerges is how this critique can be distinguished from any attacks that might be characterized as populist. A

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[18] Blokker explains that as opposed to liberal constitutionalism that emphasizes 'court-centric rights-based constitutionalism', populism emphasizes community interests: 'the collectivity comes prior to the individual, and, hence, an unmediated endorsement of individualistic and universalistic human rights is viewed with suspicion'. Paul Blokker, 'Populist Constitutionalism' (*Verfassungsblog*, 4 May 2017) <https://verfassungsblog.de/populist-constitutionalism/> accessed 16 March 2018.

[19] Jonas Christoffersen and Mikael Rask Madsen, 'Introduction', *The European Court of Human Rights between Law and Politics* (Oxford University Press 2011) 1, 5.

[20] Jean-Paul Costa, 'On the Legitimacy of the European Court of Human Rights' (2011) 7 European Constitutional Law Review 173, 176.

[21] Mikael Rask Madsen, 'The European Court of Human Rights and the Politics of International Law' in Wayne Sandholtz and Christopher Whytock (eds), *Research Handbook on the Politics of International Law* (Edward Elgar Publishing 2017) 227, 265. Madsen explains how the Court seeks the approval of its constituencies (ie, the state parties) and how the Court might be 'currently going through a transformative moment in the interface of law and politics'.

[22] Budget and Priorities of the Council of Europe for the Biennium 2018-2019, Parliamentary Assembly Opinion 294 (2017), para 4.1.

[23] See Richard Bellamy, 'The Democratic Legitimacy of International Human Rights Convention: Political Constitutionalism and the European Convention on Human Rights' (2015) 25(4) European Journal of International Law 1019.

proper engagement with this analytical distinction requires a short foray into the relationship between populism and liberal constitutionalism. As Müller explains, the latter is inherently pluralistic. Liberal constitutionalism is 'pluralism-preserving and rights-guaranteeing'.[24] In contrast, populists are 'necessary anti-pluralist', since they make the claim that only they 'properly represent the authentic, proper, and morally pure people'.[25] This 'exclusive moral representation of the real and authentic people'[26] also implies a delegitimization of any opposition and alternative views,[27] including views about human rights.

In this context, the reasons why international courts, such as the ECtHR, are objects of populist attacks crystallize further;[28] namely, as an institution embedded in liberal constitutionalism, the Court is a space for open contestations about the meaning of human rights and the scope of the corresponding obligations.[29] Various actors try to influence this space by, for example, proposing modifications as to the stringency of the Court's review, the power and structure of the Court's legal reasoning.[30] This has been an on-

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[24] Jan Werner Müller, 'Populism and Constitutionalism' in Kaltwasser et al (n 7) 591, 592.

[25] Ibid 594.

[26] Ibid.

[27] In Rummens' view, 'the tendency of populist to delegitimize their opponents is underappreciated as both a defining taint of populism and a core aspect of the threat populism poses to democracy'. Rummens (n 7) 563.

[28] See Müller (n 24) 599 where he clarifies that 'populist are not generally "against institutions."' He adds that '[p]opulists are only against specific institutions – namely those which, in their view, fail to produce the morally (as opposed to empirically) correct political outcomes'.

[29] The ECtHR can be perceived as having a constitutional status in Europe. See Steven Greer and Luzius Wildhaber, 'Revising the Debate about "Constitutionalizing" the European Court of Human Rights' (2012) 12(4) Human Rights Law Review 655. At the same time, the Court also has an 'international law identity'. See Stephanie Hennette-Vauchez, 'Constitutional v International? When Unified Reformatory Rationales Mismatches the Plural Path of Legitimacy of the ECHR Law' in Jonas Christoffersen and Mikael Rask Madsen (eds) *The European Court of Human Rights between Law and Politics* (Oxford University Press 2011) 145.

[30] An example of such an attempt is the Brighton Declaration. See Mikael Rask Madsen, 'Rebalancing European Human Rights: Has the Brighton Declaration Engendered a New Deal on Human Rights in Europe?' (2017) Journal of International

going process of contestation and uncertainty. This form of critique, however, needs to be distinguished from populist attacks that make *categorical* claims about the meaning of human rights and delegitimize the institution of the Court *as such*.[31] At the same time, it should also be acknowledged that the different forms of critique can be entangled and can mutually reinforce each other.[32]

This interrelationship of the different forms of critique is highlighted in the argument advanced by both Walker and Rummens, that populism is a symptom of the difficulties inherent in some of the unresolved tensions within the dominant tradition of liberal constitutionalism, such as the tension between the interests of the individual and the collective.[33] Populism can be seen as 'a product of and response to a stress that is intrinsic to the modern constitutional condition'.[34] Although we might be unsympathetic to this response, 'our preoccupation with that response betrays a wider concern with the underlying tension in question, and an awareness that populism exposes modern constitutional method to searching questions to which there are no easy answers'.[35] These answers appear to be even more difficult when the individual standing on one side of the equation happens to be a migrant. Liberal constitutionalism, in particular, has been struggling with the question of how to accommodate migrants, who are not formally members of the host

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Dispute Settlement 1. In terms of scholarship, see, for example, Eva Brems (ed) *Diversity and European Human Rights. Rewriting Judgments of the ECHR* (Cambridge University Press 2013) where reasoning that is alterative to the one adopted by the Court is proposed.

[31] See Müller (n 24) 602: '[a]nyone can criticize existing procedures, fault them for moral blind spots, and propose criteria and means for further inclusion'. This type of criticism is inherent in a democratic society. A problem emerges when 'the critic and only the critic can *counterfactually* speak for "the people"' (emphasis added).

[32] See, for example, Barbara Oomen, 'A Serious Case of Strasbourg-Bashing? An Evaluation of the Debates on the Legitimacy of the European Court of Human Rights in the Netherlands' (2016) 20(3) International Journal of Human Rights 407, 416, who takes account of the correlation between the critique against the Court and the rise of populism.

[33] Neil Walker, 'Populism and Constitutional Tension' *International Journal of Constitutional Law* (forthcoming); Rummens (n 7).

[34] Walker (n 33); Rummens (n 7) 565.

[35] Walker (n 33).

community (i.e. the nation state),[36] without forsaking its liberal values.[37] Importantly, this instability and difficulty is not only ideological in its nature, but it also pervades the applicable legal standards, i.e. the weakness of the human rights framework in protecting the rights of migrants, as already mentioned in the beginning of this section and as I will describe in detail below in the context of the right to family life. The uncertainty at the level of technical legal argumentations employed in the judgments regarding family life is one of the major concerns in this article.

III. The Right to Family Life as a Site of Contestation

The rights of migrants have entered the ECHR through various channels, which in itself is an indication of the progressive role of the Court in this area. More specifically, the provisions of the Convention that have become sites of contestation of migrants' rights and states' migration control interests are: Article 3 (prohibition of torture, inhuman and degrading treatment) that incorporates an implied prohibition on *refoulement*;[38] Article 4 (prohibition of slavery, servitude and forced labor);[39] Article 5(1) (introducing safeguards in the context of immigration detention);[40] Article 8 (protection of private and

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[36] Gregor Noll, *Negotiating Asylum. The EU Acquis, Extraterritorial Protection and the Common Market of Deflection* (Martinus Nijhoff Publishers 2000) 489. Noll explains that '[t]he effectiveness of the state as a guarantor of rights and freedoms presupposes the idea of a bounded community. Thus, immigration control is a means to secure not only the interests, but also the human rights of citizens and denizens'. At the same time, however, imposition of immigration control and restrictions upon the rights of migrants can lead to severe human suffering (e.g. separating children from parents).

[37] Bast and Orgad (n 7) 1587, where the authors ask '[h]ow can liberal states, or a supranational Union formed by such states, welcome immigrants and treat refugees as future denizens without fundamentally changing their constitutional identity, forsaking their liberal tradition, or slipping into populist nationalism?'

[38] *Hirsi Jamaa and Others v Italy* (2012) 55 EHRR 21.

[39] See Vladislava Stoyanova, *Human Trafficking and Slavery Reconsidered. Conceptual Limits and States' Positive Obligations in European Law* (Cambridge University Press 2017); Vladislava Stoyanova, 'Sweet Taste with Bitter Roots. Forced Labour and *Chowdury and Others v Greece*' (2018) 1 European Human Rights Law Review 67.

[40] Cathryn Costello, *The Human Rights of Migrants and Refugees in European Law* (Oxford University Press 2016) 279.

family life), and Article 4 of Protocol No. 4 to the Convention (prohibition of collective expulsion of migrants).[41]

These provisions raise complex questions about the standards applied and the structure of the legal reasoning followed. To make the analysis manageable and to engage with the questions posed in the introduction in a sufficiently detailed way, I will focus on the right to family life of migrants as protected by Article 8 ECHR. While the significant rise of the populist agenda in Europe is usually associated with the mass influx of asylum-seekers during the period of 2015 and 2016,[42] this agenda has had a much wider scope than simply limiting the ingress of foreigners, who might seek asylum or employment.[43] Limiting the right to family life of migrants has also been a key target of populism.[44]

I choose to focus on Article 8 ECHR for a number of reasons. First, the right to family life is a qualified right that prompts a proportionality analysis. Within the framework of this analysis, state interests have to be identified and weighed up against the interests of the individual. This offers us a clear picture of how the confrontation of these interests plays out in the structure

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[41] *N.D. and N.T. v Spain* App nos 8675/15 and 8697/15 (ECtHR, 3 October 2017).

[42] CoE Populism Report (n 2) 107. See also Nations in Transit 2017, The False Promise of Populism (Freedom House 2017). For an analysis of this influx see, Dimitris Skleparis, 'European Governments' Responses to the "Refugee Crisis"' (2017) 41 Southeastern Europe 276; Tanja Börzel and Thomas Risse, 'From the Euro to the Schengen Crisis: European Integration Theories, Politicization, and Identity Politics' (2017) 25(1) Journal of European Public Policy 83; Vladislava Stoyanova and Eleni Karageorgiou (eds), *The New Asylum and Transit Countries in Europe During and in the Aftermath of the 2015/2016 Crisis* (Brill, forthcoming) .

[43] See generally, CoE Populism Report (n 2).

[44] See Pontus Odmalm, 'Concluding Remarks' in Pontus Odmalm and Eve Hepburn (eds), *The European Mainstream and the Populist Radical Right* (Routledge 2017) 153, 155 (his analysis of populist radical right parties reveals that 'parties are more likely to adopt restrictive positions on family reunification than on asylum and labour migration'). Rebecca Partos also suggests that the failure of mainstream parties to 'set out policies on family reunification may well have been a strategic miscalculation, which enabled UKIP [UK Independence Party] to portray the mainstream as ignoring the concern of the public'. Rebecca Partos, 'The European Mainstream and the Populist Radical Rights. The British Case' in Pontus Odmalm and Eve Hepburn (eds), *The European Mainstream and the Populist Radical Right* (Routledge 2017) 28, 36.

of the Court's technical reasoning. In this way, the above-mentioned tension between the interests of the individual and the collective that, as Walker and Rummens have explained, liberal constitutionalism has been struggling to resolve, finds a very concrete manifestation.[45] In other words, this tension materializes in very tangible terms within the framework of the proportionality test under Article 8, where the interests of the particular migrant are balanced against the state interests.[46]

Second, since Article 8 has produced a rich judicial output in areas unrelated to the rights of migrants, it is possible to compare the structure of reasoning and the analysis in cases where migration is not an issue. This allows me to have a critical comparative lens through which to view the applicability of Article 8 to migrants.

Third, the right to family life of migrants has been shaped by a unique judicial tool used by the Court: the test of exceptionality that is used in favor of the state in the substantive reasoning of the Court. This test, which leads to guaranteeing protection only in exceptional circumstances, has not received sufficient scholarly attention so far. This article addresses this gap.[47]

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[45] Walker (n 33); Rummens (n 7).

[46] Arguably, under Article 3, Article 4, Article 5(1)(f) and Article 4, Protocol 4 of the ECHR, no balancing between migrants' interests and state interests is allowed in the Court reasoning. For arguments about covert balancing in the context of Article 3 of the ECHR, see Vladislava Stoyanova, 'How Exceptional Must "Very Exceptional" Be? *Non-refoulement*, Socio-Economic Deprivation, and *Paposhvili v Belgium*' (2017) 29(4) International Journal of Refugee Law 1. For arguments about balancing in the context of Article 4 of the ECHR, see Stoyanova, *Human Trafficking and Slavery Reconsidered* (n 39) 279-285. For how the Court has rejected to scrutinize the proportionality of immigration detention under Article 5(1)(f), see Cathryn Costello, 'Immigration Detention: The Grounds Beneath Our Feet' (2015) 68(1) Current Legal Problems 143.

[47] The application of such a test is not limited to the right to family life of migrants. The Court has also invoked it in cases where migrants try to resist their deportation under Article 3 ECHR to continue to receive medical assistance in the returning state. See Stoyanova, 'How Exceptional Must "Very Exceptional" Be?' (n 46). The invocation of exceptional circumstances as a test in the Court's case law is not limited to the area of migration either. This test has been used in the Court's substantive reasoning in other areas. In these areas, however, the test operates in favor of the individual applicant and thus places the state in a weaker position. See, for example, *Frobrich v*

Fourth, migrant cases under Article 8 very often involve individuals who, in practical terms, are part of the fabric of the host society and, in this sense, it could be argued that their deportation raises serious moral issues.[48] Here, the values underpinning liberal constitutionalism as discussed in Section II seem to be under a great challenge. Concretely, the cases on Article 8 often involve migrants, who are well-integrated into the host society and have children that might even be nationals of the host state. Accordingly, these individuals are already inside the bounded community and, as Bosniak has argued, the fact of being a co-resident is a privilege and a reason for greater solidarity.[49] This is also reflected in the standards employed by the Court, since the extent of the migrant's ties and integration in the host society is a relevant consideration in its reasoning (see Section VI.5 below).

Fifth, more often than not, the interests of formal members (i.e. citizens) of the host country are affected by the exclusion and deportation of their migrant family members, which not only exacerbates the moral issues, but also influences the technical legal argumentation. In light of these clarifications, it should be noted that the judgments on Article 8 concerning migrants involve different scenarios.[50] In this article, I will focus only on cases involving migrants, who try to prevent their removal when they are already in the territory of the host state where they have a family.

Finally, the right to family life takes us away from emergency type of situations (e.g., a mass influx of migrants), where it might be easier to argue

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Germany App no 23621/11 (ECtHR, 16 March 2017), para 34 (Article 6(1) ECHR 'entails an entitlement to an "oral hearing" unless there are exceptional circumstances that justify dispensing with such a hearing') and *Musila v Poland* (2001) 31 EHRR 29, para 44 (Article 5(4) requires speedy review of detention by a court and 'one year, eight month and eight days, will be incompatible with the notion of speediness [...] unless there are exceptional grounds to justify it').

[48] Here I draw from Linda Bosniak, *The Citizen and the Alien. Dilemmas of Contemporary Membership* (Princeton University Press 2006). See also Stoyanova, *Human Trafficking and Slavery Reconsidered* (n 39) 433.

[49] Bosniak (n 48) 135.

[50] I will not discuss cases that concern migrants who have committed criminal offences, and where the state invokes protection of national security or public order as the legitimate aims pursued with their expulsion. See, for example, *Üner v the Netherlands* (2007) 45 EHRR 14.

that the sway of the states' migration interests should be prioritized. Article 8 thus helps us to analyze how the rights of migrants are adjudicated normally. In this sense, no exceptional circumstances can be invoked, and no crisis arguments can be used for more restrictive approaches.[51]

IV. Proportionality: The Core of Human Rights Law

Article 8 of the ECHR stipulates that,

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

This provision has a bifurcated structure that channels the analysis into two steps: (1) whether the definitional threshold has been triggered through an interference with the applicant's family life (a threshold that is usually passed); and (2) whether this interference can be justified. The second question prompts a proportionality analysis. In their influential works, Alexy,[52] Barak,[53] and more recently Möller,[54] have developed a theoretical model of the steps that need to be incorporated in this analysis. More specifically, this model prompts an enquiry of four questions in the context of Article 8. First, for what purpose has the right been limited (national security, public safety, economic well-being of the country, etc.)? Second, is

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[51] Emergency situations like a mass influx of migrants could be used as a justification for the imposition of more intrusive restrictions upon the rights of migrants. See, for example, James Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press 2005) 421 and 705. The judgments discussed below do not concern emergency situations.

[52] Robert Alexy, *A Theory of Constitutional Rights* (Oxford University Press 2010); Robert Alexy, 'Constitutional Rights, Balancing and Rationality' (2003) 16(2) Ratio Juris 131.

[53] Aharon Barak, *Proportionality. Constitutional Rights and their Limitations* (Cambridge University Press 2012).

[54] Kai Möller, *The Global Model of Constitutional Rights* (Oxford University Press 2012).

there a rational connection between the purpose and the means used for restricting the right (the test of suitability)? Third, are there any less intrusive means that would achieve the same end (the less-restrictive-means test)? Fourth, is there a proportional relation between the benefits gained by fulfilling the purpose and the harm caused to the right from achieving that purpose?[55]

The less-restrictive-means test merits some further elaboration. It presupposes a comparison of different suitable means and an evaluation as to which is less restrictive.[56] The rationale behind the less-restrictive-means test is to prevent unnecessary restrictions when the general interests (as outlined in the limitation clause of Article 8(2) ECHR) can be equally well protected through other means. Although a means can be effective in terms of satisfying competing rights or public interests, it might be too intrusive given the availability of other less intrusive means.[57] There is thus a variety of means to protect public interests and the test presupposes choosing a less restrictive (more protective) one from the perspective of the right affected.

The test imposes no requirement that the *least* intrusive or best possible option must be chosen.[58] As Hickman explains, the test only applies where 'there are alternative means available that better advance the objective of the law or decision in question, or where it will achieve the objectives equally as

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[55] Barak (n 53) 340.

[56] Jonas Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (Martinus Nijhoff Publishers 2009) 114; Alec Stone Sweet and Jud Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008-2009) 47 Columbia Journal of Transnational Law 72, 95; Mattias Kumm, 'Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice' (2004) 3(2) International Journal of Constitutional Law 574, 580; Eva Brems and Laurens Lavrysen, '"Don't Use a Sledgehammer to Crack a Nut": Less Restrictive Means in the Case Law of the European Court of Human Rights' (2015) 15 Human Rights Law Review 139, 142.

[57] Jeremy T Gunn, 'Deconstructing Proportionality in Limitation Analysis' (2005) 19 Emory International Law Review 465, 495.

[58] Tom Hickman, 'Proportionality: Comparative Law Lessons' (2007) 12(1) Judicial Review 31, 42; Sujit Choudhry, 'So What is the Real Legacy of *Oakes*? Two Decades of Proportionality Analysis under the Canadian Charter's Section 1' (2006) 34 Supreme Court Review 501, 507.

well'.[59] In other words, no alternative would be acceptable unless it is considered as effective as the means already adopted.[60] This relates to the lurking danger that the least-intrusive-means test could be an assault against the state's purpose, since the existing alternatives might be so impractical as not to afford the state any choice but to abandon its purpose.[61] In addition, decisions concerning alternatives and their effectiveness are taken from the perspective of a particular applicant in a particular case; the alternatives, however, can have wide-ranging repercussions for other individuals and, in this sense, be multidimensional since a myriad of interests might be affected.[62] The search for alternatives requires choices that are well-suited to the interests of a multitude of parties, and cannot merely be the most solicitous choice for the rights of the individuals in a particular case.

Finally, the fourth step in the proportionality analysis is the so-called test of proportionality *stricto sensu* that implies direct balancing between interests. The guiding principle here is: the greater the detriment to the right, the greater the importance of satisfying the state's objective must be.[63] This last step can be distinguished from the less-restrictive-means test as follows: 'a measure may be the least intrusive means to achieve a certain end, and yet even the least intrusive measure may be too high a price to pay in terms of the interference with other legally recognized interests'.[64]

The ECtHR does not strictly follow this four-step model. However, the model can be partially reconstructed in the practice of the Court. To determine whether an interference with family and private life is justified under Article 8(2) in cases not implicating migrants, the Court examines whether the interference is 'necessary in a democratic society' for one of the

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[59] Hickman (n 58) 51.

[60] Gratuitous interferences with individual rights will not be tolerated; if the means advanced by the state can be less onerous with no sacrifice of the ends pursued by the state, the less onerous means must be deployed. Barak (n 53) 321.

[61] Robert Bastress, 'The Less Restrictive Alternative in Constitutional Adjudication: An Analysis, a Justification, and Some Criteria' (1974) 27 Vanderbilt Law Review 971, 1020.

[62] Alexy (n 52) 309.

[63] Alexy (n 52) 102.

[64] Ibid xxxi.

legitimate aims specified in Article 8(2).[65] This question prompts an examination as to,

> whether there existed a *pressing social need for the measure in question* and, in particular, whether the interference was proportionate to the legitimate aim pursued, regard being to the fair balance which has to be struck between the relevant competing interests in respect of which the State enjoys a margin of appreciation.[66]

The Court has added that it must decide whether 'the reasons given by the national authorities to justify [the interference] are "relevant and sufficient"'.[67] If a measure does not substantially contribute to the achievement of a certain goal, the reasons for introducing it will probably not be 'relevant and sufficient'.[68] In sum, the test of suitability and the final stage of balancing, as analytical steps from the theoretical model, can be reconstructed in the practice of the Court.

In contrast, the Court does not *consistently* apply the less-restrictive-means test.[69] Rather, it applies proportionality analyses in a holistic, general, and

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[65] *A., B. and C. v Ireland* (2011) 53 EHRR 13, para 218 (The third applicant alleged that the failure of the state to implement legislation introducing a procedure by which she could have established whether she qualified for a lawful abortion, was in violation of Article 8. The Court found in her favour). I will not discuss 'in accordance with the law' requirement. For a reference to these standards in a judgment addressing Article 8 and migrants, see for example, *Krasniqi v Austria* App no 41697/12 (ECtHR, 25 April 2017), para 46.

[66] *A., B. and C. v Ireland* (n 65), para 229; *Yordanova and Others v Bulgaria* App no 25446/06 (ECtHR, 24 April 2012), para 123 (The applicants, who were a Roma community, alleged that the decision of the state to remove them from their homes was in violation of Article 8. The Court found in their favour).

[67] *Nada v Switzerland* (2013) 56 EHRR 18, para 181; *S and Marper v United Kingdom* (2009) 48 EHRR 50, para 101 (The applicants complained that the continued retention of their fingerprints and DNA profiles was in violation of Article 8. The Court found in their favor); *Coster v United Kingdom* (2001) 33 EHRR 20, para 104 (The applicants complained that the planning and enforcement measures taken against them in respect of their occupation of their land in their caravans violated Article 8. The Court found no violation).

[68] Janneke Gerards, 'How to Improve the Necessity Test of the European Court of Human Rights' (2013) 11(2) International Journal of Constitutional Law 466, 467.

[69] Brems and Lavrysen (n 56) 144; Eva Brems, 'Human Rights: Minimum and Maximum Perspectives' (2009) 9(3) Human Rights Law Review 349, 363.

compressed way, looking at all the events and factors together.[70] Still, judgments (not dealing with the rights of migrants) can be identified, where the Court's enquiry includes an assessment as to whether there are alternative measures that cause less damage to the individual interests. For example, in *Nada v Switzerland*, where the restrictions on the applicant's freedom of movement were found not to have struck a fair balance between his right under Article 8 and the state's legitimate aim of crime prevention, the Court highlighted that,

> for a measure to be regarded as a proportionate and as necessary in a democratic society, the possibility of recourse to an *alternative measure* that would cause less damage to the fundamental right in issue whilst fulfilling the same aim must be ruled out.[71]

Similarly, in *Yordanova and Others v Bulgaria*, where the eviction of a Roma community from their home was found to be a disproportionate measure in violation of Article 8, the Court observed that,

> in the absence of proof that *alternative methods* of dealing with these risks [sanitary and health-related risk posed by the conditions under which the Roma community lived] have been studied seriously by the relevant authorities, the Government assertion that the applicants' removal is the appropriate solution is weakened and cannot in itself serve to justify the removal order.[72]

Despite the clear divergences between the theoretical model and the practice of the Court, the analytical steps incorporated in the model provide a helpful lens through which to view the work of the ECtHR. The theoretical model is an important yardstick for analytical correctness against which the practice of the Court can be juxtaposed. The proportionality model developed by

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[70] Alistair Mowbray, 'A Study of the Principle of Fair Balance in the Jurisprudence of the European Court of Human Rights' (2010) 10 Human Rights Law Review 289, 315-6.

[71] *Nada v Switzerland* (n 67), para 183 (emphasis added).

[72] *Yordanova and Others v Bulgaria* (n 66), para 124 (emphasis added).

Alexy, Barak, and Möller 'shed[s] light on human and constitutional rights practice more generally,'[73] including the ECHR rights.[74]

Finally, although the theoretical model has been tailored to scrutinize interferences by the state (i.e. violation of negative obligations), it has also been adapted for the purposes of examining state omissions (i.e. failure to fulfill positive obligations).[75] This is important because Article 8 ECHR also triggers positive obligations and, as it will become clear below, the Court frames certain types of migration cases as cases invoking positive, rather than negative, obligations. Accordingly, prior to examining how the proportionality model is reflected in these cases, the binary between positive and negative obligations demands some further elucidation.

V. THE POSITIVE VERSUS NEGATIVE OBLIGATIONS DICHOTOMY

Does the Court examine the migrant cases under Article 8 from the perspective of negative or positive obligations? And does the particular perspective adopted make any difference? In *Jeunesse v the Netherlands*, the Grand Chamber of the ECtHR clarified that, in relation to persons with formal residence permits in the host country that have subsequently been withdrawn, cases will be reviewed as negative obligation cases. In such cases, the Court will examine whether the interference (i.e. withdrawal of the residence permit) is justified under Article 8(2).[76] These cases are distinguished from cases where a migrant is present (even for a long period of time) in the host country, but his or her presence has never officially been authorized.[77] In the latter type of circumstances, the Court examines whether the host state authorities were under positive obligations pursuant to Article 8 to allow the person to stay, and thus enabling the person to

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[73] Mattias Kumm, 'Political liberalism and the structure of rights: on the place and limits of the proportionality requirement' in George Pavlakos (ed), *Law, Rights and Discourse – The Legal Philosophy of Robert Alexy* (Hart Publishing 2007) 136.

[74] Steven Greer, 'Balancing and the European Court of Human Rights: a Contribution to the Habermas – Alexy Debate' (2004) 63 Cambridge Law Journal 412, 433.

[75] Alexy (n 52) 288; Barak (n 53) 429-434; Möller (n 54) 179.

[76] *Jeunesse v the Netherlands* (2015) 60 EHRR 17, para 104.

[77] Ibid, para 105. See also *Ahmut v the Netherlands* (1997) 24 EHRR 62, para 63; *Butt v Norway* App no 47017/09 (ECtHR, 4 December 2012), para 78.

exercise his or her right to family life. The existence of such an obligation depends on whether 'a fair balance' can be struck between the competing interests of the individual and the community as a whole.[78] In sum, the formal migration status of the person is used as the benchmark to determine how the case will be approached: as one of interference where state actions have to be scrutinized from the perspective of proportionality analysis, or one where it needs to be determined whether a positive obligation should be imposed on the state *in the first place*.[79]

It can be remarked that the specific framing of a case, as involving positive or negative obligations, is mere rhetoric that has no impact on the substantive reasoning. Indeed, on some occasions, the Court has refused to specify the lens through which it will examine a case.[80] In addition, the Court has used as a standard assertion that,

> the boundaries between the State's positive and negative obligations under this provision [Article 8] do not lend themselves to precise definition. The applicable principles are, nonetheless, the same. In both context 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.[81]

Despite this assertion, the case law generally suggests that when the case is framed as involving positive obligations, the Court is less scrutinizing, and the judicial review is less structured.[82] The reasoning in the positive obligation cases seems to be more fluid. In contrast, when the case is casted as a negative obligation case, the expectation is that higher scrutiny will be exercised.

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[78] *Jeunesse v the Netherlands* (n 76), para 106.

[79] '[...] in the context of positive obligations, the margin of appreciation might already come into play at the stage of determining the existence of the obligation, whilst in the context of negative obligations it only plays a role, if at all, at the stage of determining whether a breach of the obligation is justified'. Dissenting Opinion of Judge Martens in *Gül v Switzerland* (n 1), para 8.

[80] *Nunez v Norway* (2014) 58 EHRR 17, para 69; *Arvelo Aponte v the Netherlands* App no 28770/05 (ECtHR, 3 November 2011), para 35.

[81] *Jeunesse v the Netherlands* (n 76) para 106.

[82] Laurens Lavrysen, *Human Rights in a Positive State. Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights* (Intersentia 2016) 213.

The framing of the case, moreover, has a communicative purpose – the Court assures states that Article 8 ECHR does not *per se* trigger obligations in relation to migrants, who do not have the right to stay on their territory. This is equally valid for individuals who are only temporarily allowed to stay (e.g. applicants for international protection) and whose status is uncertain.[83] This is even more vehemently expressed in the assertion consistently repeated by the Court that 'Article 8 does not entail a general obligation for a State to respect immigrants' choice of the country of their residence and to authorise family reunion in its territory'.[84]

In the migration cases on Article 8, the distinction between positive and negative obligations is a device that distorts reality. In these cases, the applicants try to resist expulsion since this measure would result in the disruption of their family life. The act of expulsion itself is a clear action attributable to the state irrespective of the formal migration status of the person. When the case is framed as a positive obligation case, the Court simply negates this reality.

This negation is intimately related with the starting point in the reasoning of the Court:

> the Court reiterates that a State is entitled, as a matter of well-established international law and subject to its treaty obligations, to control the entry of aliens into its territory and their residence there.[85]

The Court introduced this precept in *Abdulaziz, Cabales and Balkandali v United Kingdom*, the first judgment addressing the rights of migrants under Article 8.[86] In the subsequent cases, it referred to this principle of state entitlement as one of the factors in the balancing analysis.[87] In more recent judgments,[88] the principle has been the starting point that not only explains the legitimate aim pursued by the expulsion measure (see Section VI.1 below), but also shapes the rest of the Court's analysis. In particular, if the

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[83] *A.S. v Switzerland* App no 39350/13 (ECtHR, 3 June 2015), paras 44-49.

[84] *Nunez v Norway* (n 80), para 70; *Jeunesse v the Netherlands* (n 76), para 107.

[85] *Nunez v Norway* (n 80), para 66.

[86] *Abdulaziz, Cabales and Balkandali v the United Kingdom* (1985) 7 EHRR 471 .

[87] See, for example, *Berisha v Switzerland* App no 948/12 (ECtHR, 30 July 2013), para 49.

[88] *Nunez v Norway* (n 80), para 6 (emphasis added); See also, *Antwi and Others v Norway* App no 26940/10 (ECtHR, 14 February 2012), para 88.

right to family life of migrants were to be applied in the same way as the right to family life is generally applied by the Court, then the starting assumption would be a very different one. It would be that family members can make choices about where to reside, and this freedom could only be limited in so far as it permitted by Article 8(2).[89] The less-restrictive-means test would then prompt the decision-maker to search for alternatives that are less intrusive for the applicant. Admittedly, in the migration context, it might well be the case that there is no such alternative that can protect general interests equally as well (i.e. the only effective measure is expulsion). However, if the theoretical model were to be followed, it would be important that this unavailability of an acceptable less restrictive alternative would be made obvious in the reasoning concerning the *specific* person. As I will explain in section VI.2 below, the Court avoids this type of reasoning.

Returning to the dichotomy between positive and negative obligations and the weaker scrutiny in the context of the former, when cases are conceptualized as implicating positive obligations, the starting point in the reasoning is that family life can be ensured through various means.[90] Allowing the person to stay is one alternative. Another is moving the whole family to another country, or maintaining the family life from a distance. These latter two alternatives are not simply placed on an equal footing, but they are given priority (see section VI.4 below). If there is a possibility for the family to move to another country, it is likely that no violation is found. Disturbingly, the alternative possibility of moving to another country needs to only be possible in theory, and its practical difficulties are not closely scrutinized.[91] The assessment of the alternative by the Court is thus often 'reality-disconnected'.[92] The option of moving to another country might imply severe

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[89] Marie-Benedicte Dembour, *When Humans Become Migrants. Study of the European Court of Human Rights with an Inter-American Counterpart* (Oxford University Press 2015) 103.

[90] Theoretically, this relates to the alternative and disjunctive structure of positive rights. See Alexy (n 52).

[91] Carmen Draghici, *The Legitimacy of Family Rights in Strasbourg Case Law: 'Living Instrument' or Extinguished Sovereignty?* (Hart Publishing 2016).

[92] Dissent by Judge Kovler in *Omoregie v Norway* App no 265/07 (ECtHR, 31 July 2008). See also *Useinov v the Netherlands* App no 61292/00 (ECtHR, 11 April 2006), where the Court invoked the standard of 'virtually impossible'. In this way, the Court has

costs for the individual; however, since 'Article 8 does not guarantee a right to choose the most suitable place to develop family life',[93] an alternative that is *less protective* for the individual is accepted. This is in clear contrast with the model described in section IV above, where I have shown that human rights law demands a search for an alternative that is less intrusive and more protective for the individual.

As I alluded to in section IV, the more-protective-alternative test raises many questions, and is not consistently applied by the Court. Still, it constitutes an important signpost of human rights law reasoning, that has been not only ignored, but in fact reversed in migration cases. In the following sections, the aberrations in the reasoning in migration cases will be further highlighted.

VI. Proportionality under Article 8 ECHR in Migration Cases

1. The Assumed Legitimate Aim

What is the legitimate aim that the state pursues when it decides to remove a migrant, who has family in the host state? Exercise of effective immigration control is not among the objectives explicitly enumerated in Article 8(1). However, there are powerful arguments that this is an objective that states can self-evidently pursue.[94] The state is thus generally not required to clearly articulate its aims beyond a general and abstract invocation of immigration control prerogatives.

In some instances, however, a more concrete aim can be identified in the reasoning. An example here is *Nunez v Norway*, a case about a migrant woman, who obtained a residence permit under a false identity and whose expulsion would have implied the separation from her two young daughters. The Court stated that 'the possibility for the authorities to react with expulsion would constitute an important means of *general deterrence* against

alluded that any contacts between the applicant and his children after his deportation will have to be 'virtually impossible' so that the deportation could be averted.

[93] *Ahmut v the Netherlands* (n 77), para 71.

[94] The inherent right of the state to control immigration.

gross and repeated violation of the Immigration Act'.[95] General deterrence against breaches of immigration legislation has thus been accepted as a legitimate aim. As a response to Nunez's argument that she had not committed any serious offences, the Court clarified that:

> In the Court's view, a scheme of implementation of national immigration law which, as here, is based on administrative sanctions in the form of expulsion does not as such raise an issue of failure to comply with Article 8 of the Convention. Against this background, the applicant's argument to the effect that the public interest is an expulsion would be preponderant only in instances where the person concerned has been convicted of a criminal offence, be or serious or not, must be rejected.[96]

Berrehab v the Netherlands is illustrative of how the economic well-being of the country can be used as a legitimate aim. The applicant was a Moroccan national, whose daughter and former wife were Dutch. His application for renewal of a residence permit was refused since,

> it would be contrary to the public interest to renew the permit, regard being had to the fact that Mr. Berrehab had been allowed to remain in the Netherlands for the sole purpose of living with his Dutch wife, which condition was no longer fulfilled on account of the divorce.[97]

The Dutch government very generally invoked 'public order' as a justification. The Court itself reformulated the objective pursued in the following way:

> the legitimate aim pursued was the preservation of the country's economic well-being within the meaning of paragraph 1 of Article 8 [...], the Government were in fact concerned, because of the population density, to regulate the labour market.[98]

In sum, beyond the few judgments where the legitimate aim pursued is more clearly identified, a general invocation of immigration control prerogatives will suffice. This certainly has an impact on how the subsequent analytical

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[95] *Nunez v Norway* (n 80), para 71 (emphasis added); See also, *Antwi and Others v Norway* (n 88), para 90; *Mubilanzila Mayeka and Kaniki Mitunga v Belgium* (2008) 46 EHRR 23, para 79.

[96] *Nunez v Norway* (n 80), para 71; see also *Omoregie v Norway* (n 92), para 67.

[97] *Berrehab v the Netherlands* (1989) 11 EHRR 322, para 10.

[98] *Berrehab v the Netherlands* (n 97), para 26

steps in the reasoning are applied. More concretely, the proportionality analysis is sapped of its rigor because a very abstract aim is accepted, which makes it difficult to meaningfully scrutinize whether and how the concrete measure (i.e. expulsion of the concrete person) is suitable. The source of this difficulty is that any measure can be suitable for achieving the abstract objective. As I will show below, the Court has avoided this difficulty by simply not applying the suitability test.

2. The Suitability Ignored

In no way does the Court scrutinize whether there is a rational connection between the measure (i.e. deportation of a family member) and the state objectives (economic well-being of the country or general deterrence against breaches of immigration law). The objective pursued by the state is taken for granted. It is a factor that is not challenged and is not subjected to any rational or factual scrutiny. The national interest in controlling migration is uniform, stable, and inflexible. It is impermeable and irresistible to any factual assessment. No rational connections between the measure and the purpose are scrutinized.[99] Immigration control is a goal in itself.

The state is not expected to furnish any evidence that the deportation of, for example, Mr. Berrehab (who was employed and supported himself and his child) contributes to the preservation of the economic well-being of the Netherlands. Accordingly, no legal justification is required. Moreover, it is not even expected from the state to justify the rational connection between the measure and the objective. The state is therefore relieved from advancing any specific justification for its action, besides the general and abstract objective of migration control. The state is also not required from explaining whether there are any individual reasons that justify the expulsion of this person.

The state's interest in the Court's reasoning is invariable. In this context, it means that no specific weight and value is attached to it. Consequently, the economic well-being of the country can be the objective pursued by the state

[99] See Eva Hilbrik, 'The Proportionality Principle: Two European Perspectives. How Serving the Community Interest Ends up to be in the Individual's Best Interest' (Working paper, 2010) <http://dare.ubvu.vu.nl//handle/1871/15826> accessed 26 February 2018.

with the expulsion of an unemployed migrant, or an economically active migrant, who provides for himself or herself and his or her family. The contribution of the migrant to the labor market seems to be irrelevant since, pursuant to the reasoning deployed, his or her deportation serves the objective of preserving the national economic well-being in any case. Whether the migrant receives social benefits and thus poses a risk of undermining the financial balance of the social security system, is also not pertinent. The existing economic situation in the host country and the unemployment rate do not figure in the analysis as they are accepted to be invariables.

Since the objective of the state and the rational connection between the means used and this objective are not susceptible to factual assessment, the resolution of the case depends on the individual circumstances of the migrant. Therefore, the burden is shifted entirely on to the migrant, who must demonstrate some individual distinguishing features that could tip the balance in his or her favor. As opposed to the state that does not have to furnish anything close to factual justifications for its actions, the individual must demonstrate the specificities of his or her case.

The wider implication of this is that the significance of the judgment is limited to the particular applicant and does not extend more broadly. Each case is different because the individual circumstances of each applicant are different. From the perspective of the respondent state, even if a violation of Article 8 is found, the message to the state is that the circumstances of one individual were exceptional, and more general, structural changes are not necessary.

It should be acknowledged that if a test of suitability were to be seriously applied, it would raise many intricate issues. It would need to be assessed to what extent state measures would need to contribute to the aim to pass as suitable, and how certain the empirical facts underpinning the suitability assessment would have to be.[100] Such level of scrutiny might only be remotely feasible in practical terms. It can be also objected that such an assessment is

[100]As to the question how certain the suitability assessment must be, Alexy has suggested that 'legislators may rely on uncertain but not "evidently false" claims'. Robert Alexy, 'Formal Principles: Some Replies to Critics' (2014) 12 International Journal of Constitutional Law 520-22.

not within the Court's capacity. Alexy's solution to these problems is setting a low threshold for passing the suitability stage and deferring final answers to the balancing stage.[101] Pursuant to the theoretical model, at this stage, the degree of certainty required that a measure achieves certain objectives depends on the severity of the harm caused to the individual. The more severe the harm caused, the more reliable the underlying empirical evidence must be. In the Court's reasoning in the migration cases under Article 8, the severity of the harm inflicted is indeed part of the calculus (see section VI.5); however, this is in no way placed in proportionate relation with the reliability of the empirical evidence substantiating the aim pursued with the expulsion.

The problem that I underscore here is that not even a low empirical certainty threshold is applied in the Court's reasoning in the migration cases. The Court does not require the national authorities to engage in any form of empirical enquiry.[102] This should make us pause given the existence of empirical data that contradicts the assertions that removals unequivocally serve the economic well-being of the country or act as a deterrence.[103]

The goal of removing a migrant in the exercise of effective immigration control is legitimate since for the state to secure the interests and the well-being of its citizens and denizens, a bounded community is necessary. In particular, the effectiveness of the state as a guarantor of rights and freedoms for its citizens and lawful residents presupposes the idea of a bounded community.[104] This seems to also be the reasoning endorsed in the report of the CoE's Secretary General quoted at the beginning of this article, where the right of migrants and the social rights of citizens are placed in opposition to each other. The interests of the migrant at risk of deportation can thus be placed diametrically opposite to the cluster of individual interests.

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[101] Alexy (n 52) 395.

[102] When the objective pursued by the State with the expulsion is preservation of public safety and order, the ECtHR requires that the national authorities evaluate the extent to which the particular migrant actually endangers public safety and order. *Alim v Russia* App no 39417/07 (ECtHR, 27 September 2011), para 96.

[103] Florence Jaumotte, Ksenia Koloskova and Sweta Sazena, *Impact of Migration on Income Levels in Advanced Economies* (International Monetary Fund 2016).

[104] Noll (n 36).

Such an opposition and rigid division between the migrant and the members of the bounded community, however, can be challenged depending on the particular circumstances. Two pertinent examples come to mind. First, it is hardly in the community's interest to have children growing up without a parent because he or she has been deported. This kind of damage to the community interest, however, is not at all part of the legal analysis. It is true that the best interests of the child principle provides a legal path for acknowledging any damage to the children (see section VI.5). Nevertheless, it needs to also be considered that when children grow up without one of their parents, this has wider societal implications.

A second pertinent example that illustrates that the rigid opposition between the migrant's interests and the community's interests might be hard to sustain, relates to the phenomenon of aging populations. More specifically, given the aging of the host population, it might not be in the community's interest to deport young, well-integrated, and productive migrants.[105]

In sum, the position of the state tends to be endorsed by the Court in a blanket manner and is not subjected to any form of scrutiny. The rational connection between the aims and the means is simply assumed. This can be especially disturbing when the values professed by the state are controversial, and the good faith of the state to comply with its international obligations is questionable. Given that these are precisely the problems that characterize populist policies, the Court might not be equipped to resist because of the wholesale and blanket acceptance of the state position. In the light of the Court's unwillingness to engage in any empirical assessment, the Court thus accepts the state's position that expulsions are the only means for immigration laws to be meaningful.[106] Expulsions here are the objective pursued and the means used. When these two collide, the proportionality analysis, as a procedural tool (even the more flexible version followed by the

[105] OECD Migration Policy Debates, 'Is Migration Good for Economy?' (2014) <www.oecd.org/migration/OECD%20Migration%20Policy%20Debates%20Numero%22.pdf?TSPD_101_R0=fd61111f38e5e348b40d2113e44d420cy060000000000000046084cc0ffff0000000000000000000000000005a944331002e18351f> accessed 26 Feburary 2018; The Data Team, 'Why Europe Needs More Migrants?', The Economist (12 July 2017) <www.economist.com/blogs/graphicdetail/2017/07/daily-chart-6> accessed 26 February 2018.

[106] See also Costello (n 40) 127.

Court) for structuring the human rights law reasoning, is undermined. In addition, the judgments appear to reproduce the very same feature that characterizes populism: absence of reasoned policies.[107]

Finally, it should be specified that there is one situation where the Court has challenged the state's position that expulsion measures serve the purposes of immigration control: when the state has tolerated the irregular presence of a migrant for a long time. Where the state has failed to effectively apply its own immigration laws, the Court is willing to question whether the expulsion measure serves any immigration control objectives.[108] For example, in *Nunez v Norway*,[109] *Kaplan and Others v Norway*,[110] *Antwi v Norway*[111] and *Jeunesse v the Netherlands*,[112] the delay by the state in acting to remove the migrant weighed in favor of finding a violation of Article 8. In particular, the Court has held that in case of such a delay, it is not persuaded that 'the impugned measures [the expulsion] to any appreciable degree fulfilled the interest of swiftness and efficiency of immigration control that was the intended purpose of such administrative measures'.[113]

3. The Inverted Less-Intrusive-Means Test

As mentioned above, the Court does not search for more protective alternatives in the migration cases; in fact, a less protective and more intrusive alternative (maintaining family life by relocation to another country or from distance) is easily accepted and in fact given preference to. Not only does the Court never engage with an assessment of whether there are alternatives that are less damaging from the perspective of the individual and more protective of the right to family life of migrants, but it has incorporated a test in its reasoning that has entirely reversed the logic of the classic

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[107] Cesare Pinelli, 'The Populist Challenge to Constitutional Democracy' (2011) 7(5) European Constitutional Law Review 5, 8.

[108] See Partly Dissenting Opinion of Judge Pejchal in *Paposhvili v Belgium* App no 41738/10 (ECtHR, 17 April 2014).

[109] *Nunez v Norway* (n 80), para 82.

[110] *Kaplan and Others v Norway* App no 32504/11 (ECtHR, 24 July 2014), paras 95-6.

[111] *Antwi v Norway* (n 88), para 102.

[112] *Jeunesse v the Netherlands* (n 76).

[113] *Jeunesse v the Netherlands* (n 76); *Nunez v Norway* (n 80), para 82; *Kaplan and Others v Norway* (n 110), paras 95-6; *Antwi v Norway* (n 88), para 102.

proportionality analysis. This is the 'insurmountable obstacles' test that prompts the Court to enquire 'whether there are insurmountable obstacles in the way of the family living in the country of origin of the alien concerned'.[114] This alternative measure (moving the whole family to a different country) is clearly more intrusive and less protective from the perspective of the individual. At the level of the theoretical model, the existence of a more intrusive and less protective measure cannot be part of the analysis, which signals not simply a departure, but also a reversal of the classic proportionality reasoning.

Reassuringly, the 'insurmountable obstacles' test is not conclusive. It is just one element in the balancing exercise, and can be counter-balanced by other considerations (these will be further explained in Section V below). Disquietingly, however, the weight attached to the test, in comparison with other relevant factors in the balancing exercise, is clouded with uncertainty.

Prior to engaging with the 'fair balance' test, it is important to highlight that the Court has imposed an additional standard in its assessment of the right of family life of migrants under Article 8, which is also symptomatic of the inversion of the classic proportionality test. The standard has been framed as the 'exceptional circumstances' test.

4. The Protection of the Right as the Exception

The Court has held that,

> the extent of a State's obligations [...] will vary according to the particular circumstances of the persons involved and the general interest. [...] important consideration will also be whether 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. The Court has previously held that where this is the case it is likely only to be in *the most exceptional circumstances* that the removal of the non-national family member will constitute a violation of Article 8.[115]

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[114] *Jeunesse v the Netherlands* (n 76), para 107; *Arvelo Aponte v the Netherlands* (n 80), para 60.

[115] See *Rodrigues da Silva and Hoogskamer v the Netherlands* (2007) 44 EHRR 34, para 39; *Jeunesse v the Netherlands* (n 76), para 108 (emphasis added).

Rodrigues da Silva and Hoogskamer is the first judgment in which the Court referred to 'the most exceptional circumstances' test. This standard has been repeated in subsequent judgments.[116] In later judgments, the Court has softened the standard to 'exceptional circumstances'.[117] This change in language has never been explained by the Court. It is difficult to answer whether the change from 'the most exceptional circumstances' to 'exceptional circumstances' signifies a change as to the standard of review.

The 'exceptional circumstances' test is triggered when the individual had been aware of the precariousness of his or her migration status, which implies that he or she had also been aware that the family life might not persist on the territory of the host state. The Court has never come forward with any explicit explanation to justify this standard that places an additional burden on the applicant and practically renders the protection of the right to family life the exception. Given the conditions under which the test is triggered (i.e. undocumented migration status), it can be assumed that state interests in exercising effective migration control that presupposes removal of those without the right to stay, justifies the 'exceptional circumstances' standard. Accordingly, the state's aim is given prominence not only in the first stages of the Court's reasoning, which initially weakens the individual's position versus that of the state (see sections VI.1, VI.2 and VI.3 above), but the aim of exercising effective migration control is reintroduced at later points in the Court's reasoning. This reintroduction again works to the disadvantage of the individual.

It is the host state that ultimately produces the conditions of when the 'exceptional circumstances' standard can be triggered, since this very state creates precarious migration statuses,[118] or imposes conditions that make migrants susceptible to falling into illegality.[119] In certain circumstances, the

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[116] *Arvelo Aponte v the Netherlands* (n 80), para 55.

[117] *Jeunesse v the Netherlands* (n 76), para 108.

[118] Catherine Dauvergnes, *Making People Illegal. What Globalization Means for Migration and Law* (Cambridge University Press 2008).

[119] This danger emerges from the factual circumstances of *Rodrigues da Silva and Hoogskamer v the Netherlands* (n 115), para 9: the applicant could have applied for a residence permit to reside with her partner in the Netherlands, but owing to the unavailability of documents concerning her partner income, she never made the application.

host state intentionally creates precariousness to keep migrants in volatile and uncertain situations.[120] During this timeframe of precariousness, migrants form connections with the host community, have families and children.[121] Pursuant to the Court's reasoning, however, these will only be protected under Article 8 ECHR in 'exceptional circumstances'.

This is also evident from the way the Court has framed its task in the examination of the migration cases under Article 8. For example, in *Jeunesse v the Netherlands,* the Court examined whether 'there are any exceptional circumstances which warrant a finding that the Netherlands authorities failed to strike a fair balance in denying the applicant residence in the Netherlands'.[122] Jeunesse was a Surinamese woman, who entered the Netherlands with a tourist visa that she then overstayed. Her requests for residence permits were rejected, while in the meantime she got married and had three children, all Dutch nationals. By the time her case was decided by the ECtHR, she had resided in the Netherlands for sixteen years. Although the Court found exceptional circumstances that amounted to a violation of Article 8,[123] the above quotation suggests that a fair balance is in principle struck by denying residence permits in such cases. Within this logic, only exceptional circumstances will disrupt this balance and, consequently, result in a violation of the right to family life.

The 'exceptional circumstances' test can be linked with another principle that the Court has introduced in its reasoning in the migration cases: 'persons who, without complying with the regulations in force, confront the

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[120] A pertinent example is the extension of temporary and contingent residence permits to migrant women for the purpose of family unification or family formation. See Vladislava Stoyanova, 'A Stark Choice: Domestic Violence or Deportation? The Immigration Status of Victims of Domestic Violence under the Istanbul Convention' (2018) 20 European Journal of Migration and Law 52.

[121] See, for example, *Paposhvili v Belgium* App no 41738/10 (ECtHR, 13 December 2016), para 149, where the applicant lived in the country for fifteen years without being in possession of a valid residence permit.

[122] *Jeunesse v the Netherlands* (n 76), para 114.

[123] She lost her Dutch nationality when Suriname became independent; her presence was tolerated for a considerable period of time by the Dutch authorities; she had three children who did not have any links to Suriname; she was the main care-taker of the children and the homemaker.

authorities of a Contracting State with their presence in the country as a *fait accompli* do not, in general, have any entitlement to expect that a right of residence will be conferred upon them'.[124] The *fait accompli* argument implies that migrants cannot benefit from their own irregular presence in the country. This is in response to the generally held expectation that migrants engage in strategic behavior to circumvent the national immigration legislation. To limit the possibilities for such circumventions and to ensure that migrants do not benefit from breaches of immigration control rules, the Court has invoked the 'exceptional circumstances' test.

5. *Balancing*

Since the first steps in the review conducted by the Court do not play any restraining role, the only possibility for the applicant to sway the judgment in his or her favor is offered at the final review stage of balancing. The Court has identified certain factors of relevance for the balancing of the migrant's interest and the general interest.[125] Some of these factors that have been consolidated in the case law have already been mentioned in my analysis above: the 'insurmountable obstacles' test and the 'exceptional circumstances' test. Since these two tests are not treated as separate and conclusive by the Court, they are also included in combination with other factors in the final balancing exercise.

One of these other factors is 'the extent to which family life will be effectively ruptured'.[126] This rupture reveals the severity of the harm caused with the expulsion measure. The possibility for relocating the whole family is of importance here since, if such a possibility is available, the family life will not be ruptured. This explains why a migrant parent is more likely to succeed in having a favorable judgment to be able to maintain contacts with his or her children when the couple has separated. In case of separation, the other parent cannot be expected to follow him or her to the country of intended removal.[127] The severity of the harm caused with the expulsion can be also

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[124] *Rodrigues da Silva and Hoogskamer v the Netherlands* (n 115), para 43.

[125] *Jeunesse v the Netherlands* (n 76), paras 107-109.

[126] *Nunez v Norway* (n 80), para 70.

[127] *Udeh v Switzerland* App no 12020/09 (ECtHR, 16 April 2013), para 52. *Arvelo Aponte v the Netherlands* (n 80), para 60.

related to another factor used by the Court: 'the extent of the migrant's ties in the host country'.[128] The more substantial the extent of these ties is, the more harm their disruption causes.

The Court furthermore considers 'whether there are factors of immigration control (for example history of breaches of immigration law) or consideration of public order weighing in favor of exclusion'.[129] This factor reintroduces the states' aim to maintain effective immigration control, which dominates the previous stages of the reasoning.

A factor that often transpires to be decisive is the best interests of the child. The Court has, however, warned that '[w]hile alone they cannot be decisive, such interests certainly must be afforded significant weight'.[130] Children are certainly not a trump card since in many cases the immigration control aim of the state supersedes their interests.[131] In relation to children, the Court has clarified that,

> Weighty immigration policy considerations [...] militate in favour of identifying children with the conduct of their parents, failing which there would be a great risk that the parents exploit the situation of their children in order to secure a residence permit for themselves and their children.[132]

This principle is yet another manifestation of how immigration control concerns shape the analysis under Article 8. It implies that in circumstances where children have spent long and important parts of their lives in the host country, at the time when their parents' and their own migration statuses were precarious, they can be still deported even if this is clearly not in their best interest.[133] Such deportations can only be prevented in 'exceptional circumstances'. *Butt v Norway* is illustrative. The applicants were a sister and a brother, born in Pakistan and residing in Norway since the ages of ten and eleven, respectively. They went to school in Norway and, at the time of the

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[128] *Nunez v Norway* (n 80), para 70.

[129] *Jeunesse v the Netherlands* (n 76), para 107.

[130] Ibid, para 109.

[131] *Omoregie v Norway* (n 92), para 66, where the Court observed that the child could adopt if she were to move to Nigeria with the parents; *Antwi v Norway* (n 88), para 101.

[132] *Butt v Norway* (n 77), para 79; *Kaplan and Others v Norway* (n 110), para 86.

[133] *Kaplan and Others v Norway* (n 110), para 86.

ECtHR's judgment, were still in the country. In 1995, they received residence permits upon their mother's application that was based on false information provided to the national authorities. Since the children were identified with the illegal conduct of their mother, their presence in Norway was regarded as precarious despite the absence of any fault on their part. Consequently, the Court applied the 'exceptional circumstances' test that, as mentioned, raises the bar very high for finding a violation of Article 8.[134]

VII. The Procedural Twist

In its analysis, the Court uses the above-mentioned factors to build a 'net' of arguments that, taken as a whole, buttress the outcome. The Court does not follow a strict structure in its argumentation, and it is unclear how much weight each factor has. This argumentative style has been criticized, particularly for the erratic and arbitrary way in which the Court balances competing interests.[135] This way of balancing creates the impression that the Court can always reframe the factual substratum of a case to fit into a certain outcome, to distinguish a case from previous cases to find no violation, or to highlight some exceptional features that warrant the finding of a violation. This unpredictability is not very surprising given the awareness of the severe consequences for the human lives involved, on the one hand, and the politically sensitive issues that the cases raise, on the other. More specifically, the deportation of a family member might lead to the destruction of a family and cause the lives of the involved family members to be gravely impacted. At the same time, as suggested already in the introduction to this article, the rights of migrants, including the circumstances under which they can remain on the territories of host states, are at the epicenter of political debates.

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[134] *Butt v Norway* (n 77), para 79. In the subsequent paragraph in the judgment (para 80), the Court added that 'the need to identify children with the conduct of their parents could not always be a decisive factor'.

[135] Spijkerboer (n 17) 280; 'National administrations and national courts are unable to predict whether expulsion of an integrated alien will be found acceptable or not. The majority's case-by-case approach is a lottery for national authorities and a source of embarrassment for the Court.' Dissenting Opinion of Judge Martnes in *Boughanemi v France* (1996) 22 EHRR 228, para 4.

A further layer of sophistication to the political sensitivity of the issue is added with the doctrine of subsidiarity. The standard assertion made by the Court is that, in striking a fair balance between the interests of the individual and of the community, 'the State enjoys a certain margin of appreciation'.[136] The implied presumption is that national authorities have the primary legitimacy, knowledge, and expertise to carry out the delicate balancing of competing interests.[137] An approach that can mitigate the political sensitivity and, at the same time, respond to concerns about the subsidiary role of the Court, is to proceduralize the issue. The Court has manifested a tendency to attach value to the quality of the decision-making process at the national level in hard, politically sensitive cases.[138] Two aspects of the Court's 'procedural turn' can be observed:[139] (1) relying on the quality of national decision-making in the review of the justifications for interferences with Convention rights; and (2) setting positive obligations of a procedural nature. Both aspects can be seen in the migration cases on Article 8.

As to the first aspect – the Court's reliance on the quality of the national review process – the Court considers whether the domestic process has included an assessment and weighing up of the relevant factors raised by the particular case. The Court uses evidence of such procedural protection at the national level as an argument to support its own reasoning in favor of finding no violation.[140] Alternatively, when national authorities fail to consider a relevant factor, the Court might draw negative inferences from this, which supports the finding of a violation of Article 8. This can be widely observed in the case law, especially in relation to the application of the best interests of the child principle, which might not have been considered in the national

[136] *Nunez v Norway* (n 80), para 68.

[137] Patricia Popelier and Catherine van de Heyning, 'Subsidiarity Post-Brighton: Procedural Rationality as Answer?' (2017) 30 Leiden Journal of International Law 5, 9.

[138] Janneke Gerards, 'Procedural Review by the ECtHR: A Typology' in Janneke Gerards and Eva Brems (eds), *Procedural Review in European Fundamental Rights Cases* (Cambridge University Press 2017) 127, 146.

[139] Ibid 129.

[140] See, for example, *Khan v Germany* App no 38030/12 (ECtHR, 23 April 2015), para 55; *Palanci v Switzerland*, App no 2607/08 (ECtHR, 25 March 2014), para 63.

proceedings.[141] This first aspect of the 'procedural turn' implies that the availability of procedural guarantees at the national level influences the stringency with which the Court conducts the proportionality analysis at international law level. When the national procedural protection is robust, the Court will be more lenient towards the state and thus more likely to find no violation.

The second aspect of the 'procedural turn' is about the imposition of an obligation upon the national authorities to balance the competing interests within the national procedure that takes into account the relevant factors as developed in the ECtHR case law (see the factors explained in Section VI above). If such a balancing has been done at national level, the Court can refrain from engaging in substantive review given its subsidiary role.[142] In this sense, the Court abstains from questioning and overruling the proportionality analysis conducted at national level by the responsible authority.

The relatively recent judgment of *Paposhvili v Belgium* illustrates this second approach. The applicant complained, *inter alia*, that his removal would result in his separation from his family. When his case was reviewed by the Chamber of the Court, a substantive balancing analysis was conducted based on the general principles established in the case law. No exceptional circumstances were found, and the Chamber concluded that Mr. Paposhvili's removal of would not be a disproportionate measure in breach of Article 8.[143] As opposed to the Chamber that did the balancing exercise on its own,[144] the Grand Chamber avoided the substantive balancing and proceduralized the issue:

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[141] *M.P.E.V. and Others v Switzerland* App no 3910/13 (ECtHR, 8 July 2014), paras 57-58: 'The Court puts emphasis on the fact that the Federal Administrative Court, when considering the first applicant's case, did not make any reference to the child's best interest'.

[142] Oddny Mjöll Arnardottir, 'The "procedural turn" under the European Convention on Human Rights and Presumptions of Convention Compliance' (2017) 15(1) International Journal of Constitutional Law 9.

[143] *Paposhvili v Belgium* (n 121), paras 145-55.

[144] See Concurring Opinion of Judge Lemmens to *Paposhvili v Belgium* (n 121), para 4.

> it is not for the Court to conduct an assessment, from the perspective of Article 8 of the Convention, of the impact of removal on the applicant's family life in the light of his state of health. In that connection the Court considers that this task not only falls to the domestic authorities, which are competent in the matter, but also constitutes a procedural obligation with which they must comply in order to ensure the effectiveness of the right to respect for family life. As the Court as observed above (see paragraph 184), the machinery of complaint to the Court is subsidiary to national systems safeguarding human rights.[145]

The Grand Chamber added that the Belgium authorities,

> would have been required, in order to comply with Article 8, to examine [...] whether, in the light of the applicant's specific situation at the time of removal [references omitted], the family could reasonably have been expected to follow him to Georgia or, if not, whether observance of the applicant's right to respect for his family life required that he be granted leave to remain in Belgium for the time he had left to live.[146]

The Grand Chamber concluded that had the applicant been removed without the national authorities having made an assessment of the relevant factors, there would have been a violation of Article 8.[147]

From the perspective of the rights of migrants, the explicit turn to proceduralization of the Grand Chamber in *Paposhvili v Belgium* has its advantages and disadvantages. An advantage is that, if no substantive balancing has been done at the national level, the Court can directly find a violation of Article 8. Such a finding is not very problematic from the perspective of the Court's subsidiary role since ultimately the national authorities have to do the balancing. A disadvantage is that the migrant's fate remains undetermined, because the balancing at the national level might not turn up in his or her favor.

The greatest danger emerging from the procedural approach endorsed by the Grand Chamber manifests itself in circumstances when national authorities

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[145] *Paposhvili v Belgium* (n 121), para 224. For an analysis of a similar reasoning under Article 3 of the ECHR, see Stoyanova, 'How Exceptional Must "Very Exceptional" Be?' (n 46).

[146] *Paposhvili v Belgium* (n 121), para 225.

[147] Practically, this did not make a difference for this particular applicant and his family, since he passed away before the ECtHR Grand Chamber delivered its judgment.

have done the balancing, but their assessment is ultimately incorrect. If the Court draws positive substantive inferences simply from good national procedural practices, but does not engage in a substantive review of the balancing processes, human rights protection at the international level could be undermined. When procedural review is used to replace or bar substantive review at the international level, there is a risk that substantive rights protection is weakened.[148] This could constitute a further diminishment of the rigor of review that adds to the weaknesses identified in Section VI. It also signals a reluctance by the Court to deal with difficult and controversial issues, and its preference to push the resolution of these issues to the national level.

The preference of the procedural review, furthermore, should be viewed with great degree of caution, as the procedural protection at national level in immigration proceedings is generally more limited in comparison with other proceedings.[149] Therefore, strong reliance on national procedures that are innately weakened due to the absence of robust guarantees is problematic.

At the same time, the 'procedural turn' could also incentivize national authorities to boost their efforts to provide for better regulation and evidence-based decision-making.[150] This trust in the national authorities, however, could be controversial when these authorities themselves are not willing to fulfill their international obligations, or are likely to waive the standards due to populist pressure by making *pro forma* procedural assessments. Therefore, placing the burden on national authorities to adopt unpopular decisions (preventing deportation due to possible disruption of family life) might once again lead to diminishment of substantive human rights protection.

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[148] Eva Brems, 'The 'Logics' of Procedural-Type Review by the European Court of Human Rights' in Gerards and Brems (n 138) 17, 21-2.

[149] As the Court determined in *Maaouia v France* (2001) 33 EHRR 42, para 40, Article 6 (the right to fair trial) does not apply to deportation proceedings. Comparative protection is, however, afforded by Article 13 (the right to effective remedy).

[150] Janneke Gerards and Eva Brems, 'Procedural Review in European Fundamental Rights Cases: Introduction' in Gerards and Brems (n 138) 1, 13.

The turn towards proceduralization is relatively new; it is still in need of development and it raises disagreements among judges.[151] Some judges at the Court clearly favor a review that involves an assessment of the procedure followed at the national level, without engaging with substantive balancing under Article 8.[152] *Paposhvili v Belgium* was unanimously adopted and no judge objected to the reasoning, which suggests that the Court will eschew substantive balancing.[153] It remains to be seen whether *Paposhvili* laid the basis for a reversal of the Court's long-standing practice of conducting its own balancing.

VIII. Conclusion

Returning to the CoE Secretary Report on populism and the proposed remedy therein of strengthening the role of the ECtHR, it needs to first be acknowledged that in the context of the rights of migrants (which is one of the main targets of populism), the Court has played an important role. The Court has offered a space where reasoned arguments can be advanced as to whether disruption of family life in pursuit of immigration control can be justified. This is a space where state actions are an object of scrutiny. At the same time, however, the space is very limited, which makes it difficult to expect the Court to offer a strong resistance against national populist policies. It is also difficult to expect the Court to resist restrictive trends. The Court is prepared to condone harsh decisions against migrants and, in this sense, any populist critique against the Court itself and its reasoning is out of

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[151] Thomas Kleinlein, 'Consensus and Contestability. The ECtHR and the Combined Potential of European Consensus and Procedural Rationality Control' (2017) 28(3) European Journal of International Law 871.

[152] This could be positive for the applicant. See Joint Dissenting Opinion of Judges Ziemele, Tsotsoria and Pardalos in *Arvelo Aponte v the Netherlands* (n 80). It could be also negative for the applicant see Joint Dissenting Opinion of Judges Villiger, Mahoney and Silvis in *Jeunesse v the Netherlands* (n 76). Marc Bossuyt, 'Judges on Thin Ice: The European Court of Human Rights and the Treatment of Asylum Seekers' (2010) 3 Inter-American and European Human Rights Journal 3, 48 (arguing that the Court should limit its role to procedural review).

[153] It can be argued that the Grand Chamber's approach in *Paposhvili v Belgium* (n 121) will be restricted to Article 8 cases where migrants try to avoid expulsion due to disruption of family life combined with deterioration of their health.

touch with the actual practice of this institution. This is essential for responding to any populist attacks against the ECtHR.

Despite the laudable space offered to examine state actions on immigration matters, I showed that the Court does not apply its usual scrutiny in such cases. One of the main objectives of this article was precisely to demonstrate the aberrations in the technical legal reasoning in the migration cases under Article 8 ECHR. The proportionality model with its subtests was used as the benchmark to highlight these aberrations and expose the lenient position of the Court regarding state decisions on cases concerning the family life of migrants.

Four anomalies have been discussed. First, the Court does not question the rational connection between a measure (i.e. expulsion of a family member) and the aim that the state pursues. The connection is not subjected to any rational or factual scrutiny. Rather, immigration control is the objective in itself; the rational and factual relation between the expulsion of a *particular* person and some of the legitimate objectives indicated in Article 8(2) is simply assumed. With this assumption and the implied premise that the rights of migrants and the rights of others are necessary in opposition, the Court is getting close to utilizing populist tools. After all, some of the tools that populism resorts to are precisely unreasoned policies based on uncorroborated facts, which are buttressed by the supposition that there is an inevitable conflict between 'us' and 'them'.

Second, the less-intrusive-means test has been inverted to the effect that a less protective and more intrusive alternative (maintaining family life by relocation to another country or from distance) is not only easily accepted, but also preferred. Third, the Court has introduced a test, i.e. the 'exceptional circumstances' test, that has rendered the protection of the right of migrants to enjoy family life the exception, rather than the starting point.

Lastly, since the interests of the state in exercising immigration control by expulsions are invariable, the outcome of the balancing exercise is entirely contingent on the individual circumstances of the particular migrant. In the adjudication of migrant cases, the ECtHR assumes that, in principle, the right balance is struck at the national level, and that only some specific features of the individual circumstances could disrupt that balance. When

considering these individual circumstances, the Court has usefully identified relevant factors to consider; however, since different weight can be attached to different factors in different cases, and since it is not entirely clear how the different factors relate to each other, the outcome of specific cases is unpredictable. This, combined with the above-discussed weakening of the proportionality analysis, leads to the impression that opposite outcomes are legally possible and, ultimately, that political pressures can influence the outcome in the cases before the ECtHR.

To avert the impression that the Court entirely bows to political pressure and to maintain its standing as a guardian of human rights in the difficult area of migration, the Court can proceduralize the issue. Under this approach, the quality of the national decision-making process is key for the ECtHR to decide whether an expulsion measure violates Article 8. Despite its advantages, in its extreme form, this approach might mean that the Court abdicates from carrying out a substantive balancing of conflicting interests and, instead, leaves this difficult and controversial task to the national authorities. This would be another manifestation of the extreme caution with which the Court treads in the field of migration, since it would wait to see how the principles that it has developed so far are applied at the national level. At the national level, however, unpopular decisions in favor of migrants' rights might be difficult to take, due to the political environment that might be hostile towards migrants. More cases can, therefore, be expected, where despite the observance of procedural guarantees (that are in any case weakened in the field of migration) and the due consideration of the relevant factors (that are in any case moldable and susceptible to opposite outcomes), the national decision-making process reaches incorrect conclusions. This needs to be taken note of by the ECtHR judges in the current uncertainty at the level of the Court, as to when and how the procedural approach is to be applied and developed.