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Determining the Extent of Procedural Safeguards in Expulsion Proceedings

A Study of the Scope and Compatibility of the Guarantees Set Out in Article 1 of Protocol No. 7 ECHR

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Contents

Summary

It is the sovereign prerogative of the state to regulate the presence of aliens within its territory. This right, however, is not without limits. Article 1 of Protocol No. 7 to the European Convention on Human Rights ensures procedural safeguards relating to the expulsion of aliens. These safeguards must be considered in expulsion proceedings by those Member States having ratified the protocol.

Up until recently, little guidance on how to interpret the article was to be sought in the case-law of the European Court of Human Rights. However, in October of 2020, the Grand Chamber of the Court delivered its first judgment in which it found a violation of the article. The case, *Muhammad and Muhammad v. Romania*, has been described as groundbreaking and is the first case where the court deals with the provision substantively. This thesis aims to better understand the guarantees set out in Article 1 of Protocol No. 7 to the Convention, focusing on how these procedural rights relate to the idea of state sovereignty and the procedural safety of the individual. Moreover, the current interpretation of the article is analyzed in relation to how it fits into the broader Convention system. As a basis for the examination, critical legal positivism is used.

To summarize the findings of the thesis, the court establishes a new method of legal problem solving in *Muhammad and Muhammad v. Romania* that should be followed when determining whether the procedural safeguards of the article have been violated or not. In the end, a fair balance between state sovereignty and individual protection of the alien subject to expulsion is required. However, different views on what constitutes a fair balance make the issue a very complex one. Using critical legal positivism, one is also to remember that the majority's judgment in the case does not reflect any "truth" when it comes to how the provision is to be understood.

Sammanfattning

Det är statens suveräna rätt att reglera utlänningars närvaro inom dess territorium. Denna rätt är däremot inte utan begränsningar. Artikel 1 i protokoll nr. 7 till Europeiska konventionen om skydd för de mänskliga rättigheterna säkerställer rättssäkerhetsgarantier i samband med utvisningen av utlänningar. Dessa rättssäkerhetsgarantier måste tillgodoses vid utvisningsförfarandet i de medlemsstater som har ratificerat protokollet.

Fram till nyligen fanns det inte mycket vägledning att söka i Europeiska domstolen för de mänskliga rättigheternas rättspraxis avseende tolkning av artikeln. I oktober 2020 avkunnade däremot domstolens stora avdelning sin första dom där man fann att artikeln hade överträtts. Fallet, *Muhammad och Muhammad v. Rumänien*, har beskrivits som banbrytande då det utgör det första fall där domstolen handskas med bestämmelsen i betydande omfattning. Denna uppsats syftar till att bättre förstå de garantier som anges i artikel 1 i protokoll nr. 7 till konventionen, med fokus satt på hur garantierna relaterar till idén om statssuveränitet samt individens rättssäkerhet. Därutöver analyseras den nuvarande tolkningen av bestämmelsen i förhållande till hur den platsar i konventionssystemet som helhet. Som underlag för granskningen används kritisk rättspositivism.

För att sammanfatta resultatet av uppsatsen så etablerar domstolen en ny metod för juridisk problemlösning i *Muhammad och Muhammad v. Rumänien* som ska användas för att avgöra om rättssäkerhetsgarantierna i artikeln har överträtts eller ej. I slutändan krävs det att en rättvis balans uppnås mellan statssuveräniteten och utlänningens individuella skydd. Olika synsätt på vad som utgör en rättvis balans gör emellertid frågan mycket komplex. Med kritisk rättspositivism som grund måste man även komma ihåg att majoritetens domskäl inte återspeglar någon ”sanning” när det kommer till hur bestämmelsen ska förstås.

Preface

Genom inlämnandet av denna uppsats avslutas fem år vid juridiska fakulteten i Lund. Det är med viss sorg som studentlivet och allt det för med sig läggs bakom mig men jag har haft några otroliga år som jag framförallt vill tacka Max, Frida, Olivia, Pelle, Miriam, Ludvig och Elin för. Jag vill även tacka Viola och Jesper för att ha peppat mig genom alla dessa år och för all hjälp med att ro denna uppsats i hamn. Utan våra torsdagsträffar hade både jag och uppsatsen varit i ett helt annat skick!

Detsamma gäller min fantastiska familj – både i och utanför Sverige – som hjälpt mig med korrekturläsning och gett synpunkter på arbetet. Men som framför allt har funnits där för mig genom hela utbildningen och alltid utgjort den trygga famn jag kan falla tillbaka på.

Sist vill jag även tacka Eduardo Gill-Pedro för nyttiga synpunkter och förslag, samt ihärdig uppmuntran under arbetets gång.

Lund, maj 2021

Abbreviations

dec.	decision
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
Explanatory Report	Explanatory Report to the Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms
GC	Grand Chamber
ICCPR	International Covenant on Civil and Political Rights
Refugee Convention	Geneva Convention relating to the Status of Refugees
UDHR	Universal Declaration of Human Rights
UNCAT	United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
VCLT	Vienna Convention on the Law of Treaties

1 Introduction

1.1 Background

> "Someone must have been telling tales about Josef K. for one morning, without having done anything wrong, he was arrested."[1]

Kafka's renowned opening paragraph of *The Trial* recounts the terrifying experience of a successful bank officer as he one morning is arrested without explanation. The novel depicts Josef K.'s path through an absurd and labyrinth-like legal system where he has to defend himself against a charge about which he has no information. Not knowing what one is accused of might seem like a fictional creation in modern-day Europe. However, the quote above might very well serve as an analogy in cases regarding the expulsion of aliens on national security grounds.

In 2012, Romania expelled two Pakistani students after they had been declared "undesired persons" on the basis of national security reasons. During the expulsion proceedings, neither one of the students had received any information about the actual grounds for their expulsion or why they had been summoned for a hearing in the first place. The Romanian national courts explained that the "secret" level of classification of the documents in the file only allowed for the judge to consult the information. Hence, the lawyers of the students were likewise not able to access the contents of the case file, even though they were to represent them in court.[2] The case was later brought to the European Court of Human Rights (ECtHR or the Court) and came to be the first case in which the Grand Chamber (GC) found that the procedural rights under Article 1 of Protocol No. 7 to the European Convention on Human Rights (ECHR or the Convention) had been infringed.

[1] Kafka (2009) pg. 5.
[2] *Muhammad and Muhammad v. Romania* [GC], No. 80982/12, ECHR 2020-10, paras. 21–33.

The case presented above, *Muhammad and Muhammad v. Romania*, has been described as a landmark case as it demonstrates a systemic problem where aliens are kept from receiving information regarding the reasons and evidence for expulsion.[3] There are several explanations as to why information is classified by states in situations like the one above. First, states may decide not to share information that threatens to reveal methods of attaining information in highly sensitive matters, e.g., the information is kept hidden due to national security reasons. This is why information regarding terrorist investigations or organized crimes often is classified in expulsion proceedings.[4] Moreover, information may be kept secret in order to protect sources or to safeguard international relations between countries from which the relevant sources stem.[5]

Without question, it is difficult for a person to challenge a decision based on grounds or sources that remain hidden, just like Josef K. experiences in *The Trial*. Apart from being kept in the dark about the reasons underlying the expulsion decision, several other questions relating to procedural safeguards and the person's level of protection against arbitrariness arise. Previously, the level of protection provided by the ECHR system has been low and existing case-law scarce. Nonetheless, as international migration and national security threats, such as terrorism, have moved to the top of the international agenda over the last couple of decades, the case-law of the ECtHR in this field has somewhat increased.[6] It has, however, proven difficult to determine the extent of the procedural safeguards in such cases due to the fact that strong opposing interests have to be balanced against each other. Moreover, the issues arising are highly controversial and politically salient among the Member States of the Council of Europe. This thesis will look further into the scope of those procedural safeguards that are established by the ECHR and relate to expulsion of aliens.

[3] Helsinki Foundation for Human Rights (2020) pg. 33; Lambert (2008) pg. 51.
[4] Reneman (2014) pg. 294.
[5] Ibid pg. 295.
[6] Adamson (2006) pg. 165.

1.2 Purpose and Research Questions

The purpose of the essay is to understand the guarantees set out in Article 1 of Protocol No. 7 ECHR, focusing on how these procedural rights relate to the idea of state sovereignty and the procedural safety of the individual, and analyze how the current interpretation fits into the broader ECHR system. To achieve this purpose, the following research questions will be addressed:

- *What is the scope of the procedural safeguards set out in Article 1 of Protocol No. 7 to the ECHR and how are the interests of the state and the individual counterbalanced in the case-law of the Court?*
- *How does the current interpretation correspond with the normative principles underlying the broader ECHR system?*

1.3 Method and Material

In order to answer the research questions and fulfill the purpose of the thesis, the rights enshrined in Article 1 of Protocol No. 7 will have to be analyzed and understood in relation to interests of state sovereignty and protection of aliens. Moreover, the underlying principles and structure of the broader ECHR system will have to be set out as the current interpretation of the provision will be analyzed against this background. This will be done by using Finnish professor Kaarlo Tuori's critical version of legal positivism.

The underlying structures and interests of the law are in critical legal positivism seen as the product of conscious human action and Tuori's methodological approach enables both deconstruction as well as reconstruction of the law to answer the research questions of the thesis.[7] Moreover, it will be possible to critically examine the current legal system and the interpretation of Article 1 of Protocol No. 7 by relying on a method of critical legal positivism. This is the case because Tuori allows for the law to be criticized and understood

[7] See for example Tuori (2002) pg. xi.

by relying on yardsticks derived from the law itself. The following passages will describe this methodology further.

Tuori presents a concept where he builds on previous contributions of legal sociologists and the theory of legal positivism, i.e., a philosophy of law where the law is seen as a social construction created by humans. His ideas are further developed in his scholarly treatise *Critical Legal Positivism* which has established a new approach to modern legal scholarship accredited the same name as the title of the treatise.[8]

In the abstract, Tuori briefly describes the focus of the thesis and his understanding of the law where "the normative and practical faces of law" is seen "as a multilayered phenomenon within which there is an important role for critical legal dogmatics in furthering law's self-understanding and coherence".[9] As he expands on legal positivism, the law is seen as built on conscious human action open to the influence of morals and where "explicit decisions play an integral role in legal change".[10] Critical legal positivism sees ethical values and moral norms as having become part of the deep structure of the law as well as the legal culture over time.[11] This is understood to be the case as the legal order itself is seen as engaged with questions of ethics and morality.[12] According to Tuori, this can especially be observed when looking at the core of the principles intrinsic to a legal system.[13] It is also stressed that legal principles are not to be made equal to moral ones and that "the moral acceptability of a principle does not prove it to be a part of the legal order".[14]

The multilayered nature of the normative and practical faces of law is further specified by Tuori as a system consisting of three levels of the law – the

[8] Tuori (2002).
[9] Ibid. Abstract.
[10] Ibid. pgs. xi, 304.
[11] Ibid.
[12] Ibid.
[13] Ibid.
[14] Ibid.

surface level, the legal culture, and the deep structure.[15] *The surface level* is described as fast-changing and visible.[16] It consists of regulations and the practice of the courts as published in law reports, i.e., the normative legal material that is central to the more formal dogmatic approach to the law.[17] Tuori adds two sub-surface levels which constitute the fundament of the surface level, but also impose limitations on it.[18] Beneath the surface level, there is the level Tuori refers to as *the legal culture*, which contains methods of legal problem solving created by the jurists in court as well as the community of legal experts creating an elite and professional legal culture.[19] Like the surface level, the legal culture comes to influence the practice of the courts as a cultural system upheld by legal professionals.[20] It is also this level of the law that contributes to the internal rationality and coherence of the law by ensuring predictable application in individual cases and by making connections to previous case-law. Lastly, there is *the deep structure* of the law where the pace of change is the slowest, even though change still is possible (contrary to what is presumed in the natural law tradition).[21]

The deep structure is linked to the most fundamental normative principles and the common core of legal cultures.[22] It is the layer upon which the legitimacy of the law rests and is by Tuori, as he builds on Weber, seen as detached from conceptions of politics and religion that instead come to affect the law in the other two layers.[23] Moreover, the deep structure of the law is not limited to one national legal order, but, rather, reflects broader normative commitments that can be found in several states.[24] For example, when looking at the ECHR, it becomes noticeable how the Member States share certain commitments as

[15] Ibid. pg. 147.
[16] Ibid.
[17] Ibid.
[18] Ibid.
[19] Ibid. pgs. 161–166.
[20] Ibid. pg. 165.
[21] Ibid. pg. 192.
[22] Ibid. pgs. 171, 184.
[23] Ibid. pgs. 183–191.
[24] Ibid. pg. 184.

they are parties to the Convention, even though the legal cultures of the respective states differ. The deep structure of modern law is, in part, defined by Tuori as a layer where fundamental values of human rights are regarded as general normative ideas and where conceptions of the rule of law and rationality are seen as paramount.[25] In this respect, Tuori's approach can be particularly helpful when examining a legal instrument like the ECHR as the law can be understood by placing it in this sub-surface context. Moreover, critical legal positivism enables a more extensive study of the law based on its different levels, something that also makes it possible to study the legal culture and the historical background of the norms.

Perceiving law as a multilayered phenomenon allows for the law to be criticized and understood in a non-arbitrary and inter-subjective manner based on the law itself.[26] It should be noted, however, that what is of importance from Tuori's perspective is neither how many layers of the law a scholar identifies nor what elements are found to be situated at each level.[27] Instead, he states, what matters is that the law is seen as something more than its visible surface.[28] Critical legal positivism does, moreover, fully acknowledge the normative character of legal science and how human action comes to impact both the law itself as well as its effects and results.[29] At the same time, the approach does take into account the inevitable social theoretical commitments that are built into normative legal science and aims to submit its criticism, not only to the object of critique, but also to the trends adopted by the scholar personally.[30] Hence, it is important to remember, as Tuori states, that "legal science not only studies norms but also produces statements requiring normative justification"[31] and that "the reconstruction of the deep structure of contemporary law inevitably involves a participant's position and an accompanying performative attitude".[32]

[25] Ibid. pg. 165.
[26] Ibid. pg. xi.
[27] Ibid. pg. 154.
[28] Ibid.
[29] Ibid. pg. 313.
[30] Ibid. pg. 313.
[31] Ibid. pg. 293.
[32] Ibid. pg. 190.

This thesis will begin with looking at the surface level of the law where the current law and the interpretation of it is presented.[33] However, at the same time, underlying normative principles, as well as the ECtHR's method of legal problem solving and interpretation in *Muhammad and Muhammad v. Romania*, will be presented so that the different levels of the law can be made visible by using critical legal positivism. This will enable a critical examination in the last chapter of the thesis where the current interpretation is put in relation to the sub-surface levels of the law. The normative yardsticks used as a basis for the examination will be derived from the purposes and underlying structures of the ECHR system as presented in Chapter 2 and will, moreover, consist of the underlying interests of state sovereignty and the pursuit of a due process for individuals in expulsion proceedings.

In order to construct the underlying principles and interests of the ECHR, as well as Article 1 of Protocol No. 7, the thesis will rely on sources of law, e.g., legislation, preparatory work, case-law of the Strasbourg Court, and doctrine.[34] The case-law of the ECtHR will constitute a major part of the thesis as it demonstrates how Article 1 of Protocol No. 7 currently is, and formerly has been, interpreted. Regarding *Muhammad and Muhammad v. Romania*, the thesis will look further at how the Court engages with reconstruction of the law and how the sub-surface levels of the legal order are brought to light in the process.[35] Sources of the Council of Europe will, moreover, be of importance to clarify the legal culture of the law and how the provision is interpreted. The perspective used will thus take the form of what Tuori describes as internal criticism (criticism *in* the law) as it will be written

[33] See above. The interpretation of the law is a process that involves all layers of the law. However, here it is the interpretation of the court "as published in law reports" that is intended, i.e., belonging to the surface level of the law.
[34] A broadly accepted definition of the sources of international law can be found in Article 38 of the Statute of the International Court of Justice.
[35] This process of reconstruction that takes place when the court decides hard cases is further described in Tuori (2002) pg. 195 and will also, briefly, be mentioned below (pg. 24 of this thesis). Tuori also emphasizes how judges come to employ their knowledge of the legal culture and the law's deep structure even in routine cases.

from a legal scientific standpoint and not from a position outside the law.[36] Internal criticism "draws for its yardsticks upon the normative principles sedimented into the sub-surface layers of the law" according to Tuori.[37] Moreover, the law itself will be the object of examination, something Tuori describes as criticism *of* the law (distinguished from criticism *by* the law).[38]

It should also be pointed out that this thesis aims to carry out a critical examination of the provision in order to deepen the understanding of it by placing it in a sub-surface context. The purpose of the thesis is, in other words, not to direct criticism at the article like the commonplace definition of "criticism" could cause one to believe. Rather, as stated above, Tuori's approach is used as a way to better understand the guarantees set out in the article and to fulfill the purpose of the thesis.

The explanatory report has been afforded a section of the thesis since it constitutes a central source for interpreting the article and is recurrent in the case-law of the Court. Moreover, the chapter presenting the case of *Muhammad and Muhammad v. Romania*, as well as previous cases on the provision, will largely be built on the Guide to Article 1 of Protocol No. 7 to the European Convention on Human Rights.[39] The reason for this is that the guide is one of the main sources of the Council of Europe and that it constitutes a manifestation of what the Council of Europe has considered especially important in the case-law of the Court. Moreover, as this material constitutes two of the main sources of the Council of Europe, and as they serve as guidelines for the national implementation of the Member States, they can be the subject of criticism based on critical legal positivism.

Legal scholarship will be relied upon to the extent it has been referred to in the case-law of the Court or in the material of the Council of Europe. Moreover, doctrine and scholarly articles have been used to the extent they

[36] Tuori (2002) pg. 307.
[37] Ibid.
[38] Ibid.
[39] Guide to Article 1 of Protocol No. 7 of the European Convention on Human Rights.

can be helpful to understand the legal culture or provide useful descriptions of the position of aliens and state sovereignty within the ECHR system.

1.4 Limitations

Provisions relating to expulsion proceedings can be found in several human rights treaties. As discussed below, the relevant provisions of the ECHR are largely based on the Universal Declaration of Human Rights (UDHR). Moreover, Article 1 of Protocol No. 7 is modeled on Article 13 of the International Covenant on Civil and Political Rights (ICCPR). These legal instruments will be examined only to the extent they are of importance to interpret Article 1 of Protocol No. 7 and the related case-law on the matter.

Principally, there are four coexistent, and often overlapping, legal instruments that govern the international protection of aliens and asylum seekers in Europe. These are:

- the law of the European Union (EU),
- the 1951 Geneva Convention relating to the Status of Refugees (the Refugee Convention) and the 1967 Protocol thereto,
- the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), and
- the ECHR and the Protocols thereto.[40]

Many individuals fall outside the sphere of protection offered by EU law, the Refugee Convention or UNCAT, yet remain protected by the ECHR.[41] In part, this is a reason for why the thesis will focus on the ECHR and the procedural guarantees provided for within the Convention system. Other legal instruments will only be mentioned if they are relevant for interpreting Article 1 of Protocol No. 7 or for understanding its place within the broader ECHR system.

[40] Mole (2007) pg. 9.
[41] Ibid. pg. 10.

In general terms, three types of protection relating to expulsion can be set out – procedural protection, substantive protection, and protection relating to the different methods of expulsion used.[42] Article 1 of Protocol No. 7 to the ECHR contains one substantive safeguard as it states that an expulsion shall be pursued by a decision reached in accordance with the domestic law of the state concerned. Apart from this requirement, the rest of the article deals with procedural rights. Any substantive rights that may be the focus of the actual proceedings or rights relating to the method of expulsion will not be discussed, other than in the context of what level of protection the alien is afforded in the ECHR system as a whole.[43] However, it should be noted that difficulties arise when different rights are to be distinguished from one another in a strict sense, as there might be situations where one concept is used in order to define the other.[44]

Expulsion is sometimes referred to by using other terms such as "deportation", "removal" and so forth. In this essay, however, it is the type of expulsion specified in Article 1 of Protocol No. 7[45] that is envisaged when any term is used, unless otherwise explicitly stated.

For reasons of space, reference is only made to the most pertinent case-law of the ECtHR regarding expulsion of aliens in order to properly answer the research questions of this thesis. This selection has primarily been made based on the Guide to Article 1 of Protocol No. 7 to the European Convention on Human Rights[46], something that will be described in greater detail beneath Chapter 4. Moreover, the essay naturally only considers judgments of the ECtHR up to the spring of 2021.

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[42] OHCHR (2006) pg. 1.
[43] See more under Chapter 2.
[44] E.g., procedural rights can be defined as a shield for ensuring substantive fairness. See for example *Muhammad and Muhammad v. Romania* [GC], No. 80982/12, ECHR 2020-10, Concurring Opinion of Judge Serghides, para. 14.
[45] See Section 3.3.1.
[46] Guide to Article 1 of Protocol No. 7 of the European Convention on Human Rights; see more about why this guide is to be used as a basis for the case-law presentation under Section 1.3 above.

The thesis does not involve itself with issues of state responsibility in cases where there has been a violation of Article 1 of Protocol No. 7. National legal systems and practices of the Member States of the Council of Europe will, moreover, not be dealt with in any greater detail.

1.5 Current Research Situation

Article 1 of Protocol No. 7 has been mentioned in many books on the ECHR.[47] However, the article has mostly been described very briefly without much analysis and often by relying on the explanatory report as the only means for describing its content. There are considerably fewer works dealing with the existing case-law on the matter, or the implementation of the provision in practice.

Still, it is an area of international, as well as national, law that is of great significance. In particular, the issues dealt with in this thesis are of great importance due to increased migration and human rights violations committed by governments in the fight against terrorism. Moreover, it is also an area open to major abuse or neglect on behalf of states that are unwilling to give up part of their sovereignty and limit their possibility to expel.

After September 11, 2001, the position of aliens was re-examined by the Council of Europe as the fight against terrorism came into conflict with many human rights standards.[48] Since then, issues relating to migration and national security have received an increased amount of attention from legal scholars. As will be described in Section 2.6, Article 3 ECHR contains the most developed prohibition on *refoulement* in international law and most asylum cases of the ECtHR have also dealt with this article.[49] This is reflected in

[47] E.g., Harris, O'Boyle, Bates & Buckley (2018) pgs. 957–959; Danelius (2015) pgs. 637–639; Grabenwarter (2014a) pgs. 424–427.
[48] *The position of aliens in relation to the European Convention on Human Rights* by Lambert (2008) was, for example, published against this background.
[49] Reneman (2014) pg. 54.

academia, as Article 3 is the most discussed provision of the Convention when it comes to examining the protection of aliens under the ECHR. The subject area of this thesis has, contrarily, remained a relatively neglected field of research. In part, this could be explained by the scarce number of cases on the provision and little clarification by the ECtHR.

Wojnowska-Radzińska published a book in 2015 titled *The Right of an Alien to be Protected against Arbitrary Expulsion in International Law*. In her work, she mentions that she felt it was necessary to analyze the question of arbitrary expulsion of aliens in international law from a human rights perspective as there, at the time, existed no monographs dealing with the international case-law and up-to-date problems regarding the subject.[50] The book aims to fill this gap and attempts to define the content and scope of legal instruments containing rights for aliens to be protected against arbitrary expulsions, such as the ECHR and ICCPR.[51]

Last year, in the fall of 2020, the Grand Chamber of the ECtHR released its judgment on Article 1 of Protocol No. 7 in *Muhammad and Muhammad v. Romania*.[52] This is, so far, the first and only judgment on the article by the Grand Chamber. It resulted in a lengthy and detailed examination of the provision in which several principles for determining the extent of the procedural safeguards were laid down. This court case has, however, seemingly been discussed only in one scholarly article published by the *Strasbourg Observers*.[53] Seeing that the issue has not yet been duly examined in academia, the thesis aims to bridge this gap and contribute to a further understanding of Article 1 of Protocol No. 7.

[50] Wojnowska-Radzińska (2015) pg. ix.
[51] Ibid. pg. 41.
[52] *Muhammad and Muhammad v. Romania* [GC], No. 80982/12, ECHR 2020-10.
[53] See further Aarrass (2020).

1.6 Outline

Ensuing this introductory segment, the thesis is divided into the following chapters.

Chapter 2 presents the legal framework and sets the scene for the following chapters. At the end of the chapter, the Convention is presented in greater detail with regard to state sovereignty and the position of aliens at a more general system level.

Chapter 3 focuses on the rights of the individual explicitly guaranteed by Article 1 of Protocol No. 7 and when they apply based on the official documents of the Council of Europe. The chapter, moreover, introduces the underlying ideas behind the article and why such a provision was deemed necessary in the first place. At the end of the chapter, the interests of the sovereign state are dealt with once again, but this time especially focusing on the limits of state power and the interests of the state in expulsion proceedings. It is also in this third chapter that the implementation of the Member States in practice is brought up.[54]

Chapter 4 extensively addresses *Muhammad and Muhammad v. Romania* as it is the latest GC case on the provision and, thus far, the only case where a violation of the article has been found by the GC. Previous case-law of the ECtHR on the article is also presented by using the guide as a framework, as well as the most recent case *Hassine v. Romania*. In addition, case-law on other provisions of the ECHR will be presented in Section 4.5.4 to the extent it has been deemed relevant for the purpose and research questions of this thesis.

Chapter 5 contains the findings and the analysis of the essay. Here, the current interpretation of the ECtHR will be evaluated in light of the principles and

[54] Belgium and Sweden have made declarations regarding Article 1 of Protocol No. 7. Switzerland has made a reservation. See more beneath Section 3.5.

structures identified in the previous chapters. The current interpretation will also be examined as part of the broader ECHR system. Some aspects of *Muhammad and Muhammad v. Romania* that remain unclear will also be pointed out.

Lastly, *Chapter 6* presents the concluding remarks of the thesis.

2 The ECHR System as the Legal Framework

2.1 General

The ECHR guarantees political and civil rights, substantially derived from the UDHR.[55] It was adopted in 1950 as a post-war attempt to unite the countries of Europe and entered into force in 1953.[56] The Convention has been seen as revolutionary in many ways, primarily for being one of the first times that states gave up part of their sovereignty for the purpose of securing fundamental human rights for every individual within their jurisdiction.[57] Moreover, the Member States granted individuals the right to bring claims to an international court, which in turn could give legally binding judgments.[58] As one of the first treaties ensuring human rights, the ECHR has also had a great significance for the development of international human rights law by developing key concepts and serving as inspiration for other legal instruments with similar purposes.[59] The enforcement mechanisms established by the Convention system have, moreover, been described by Harris et al. as "unrivalled in their effectiveness and achievements".[60]

Apart from having contributed to areas of international law, the national law of the Member States has been greatly impacted by adhering to the Convention. Moreover, human rights law has to a large extent been harmonized in Europe owing to the existence of the ECHR. Individuals, claiming violations of their human rights, have also been able to turn to an international court

[55] Rainey, Wicks & Ovey (2021) pg. 7.
[56] Harris, O'Boyle, Bates & Buckley (2018) pg. 5.
[57] See more regarding state sovereignty in relation to the ECHR below Section 2.5.
[58] Harris, O'Boyle, Bates & Buckley (2018) pg. 35.
[59] Ibid.
[60] Ibid. pg. 36.

when national courts have been unable to provide remedy. Hence, the protection of human rights has been furthered both on a national level and a regional level since the Convention came into force.[61]

For the Member States of the Council of Europe, the rights enshrined in the Convention and the additional protocols[62] are applicable to every person within the jurisdiction of the Member States and apply irrespective of the nationality or legal status of these persons.[63] Today, the Council of Europe consists of 47 Member States. In addition, five states have been granted observer status.[64] Once a state decides to join the Council, it also has to accede to the ECHR and thereby become part of an extensive legal framework and judicial system for the protection of human rights.[65]

When a state is to ratify the ECHR or one of its additional protocols, reservations can be made in accordance with Article 57 of the Convention. This can, however, only be done in relation to a specific provision and insofar as there is any law of the Member State in force that is not in conformity with the particular provision of the Convention. Reservations of a more general nature cannot, therefore, be accepted. In addition, these reservations must always be made at the time of depositing the instrument of ratification.[66]

It should be noted that the purpose of the Convention was not to concede reciprocal rights and obligations between states in order for them to pursue their own national interests, but, rather, to realize the wishes of the Council of Europe.[67] However, the European Commission of Human Rights has expressed that the Convention seeks to "establish a common public order of the free democracies of Europe with the object of safeguarding their common heritage of political traditions, ideals, freedom and the rule of law" and that

[61] Harris, O'Boyle, Bates & Buckley (2018) pgs. 36–37.
[62] For those Member States who have ratified these.
[63] Article 1 ECHR.
[64] Canada, Japan, Mexico, the Holy See and the U.S.
[65] Rainey, Wicks & Ovey (2021) pg. 7.
[66] See Article 57 of the ECHR.
[67] Harris, O'Boyle, Bates & Buckley (2018) pg. 5.

states are able to hold each other accountable for breaches of the ECHR in order to fulfill this aim.[68] The ECHR, hence, functions as a "constitutional instrument of European public order", but does at the same time play a subsidiary role in relation to national authorities.[69] This is something that will be described in greater detail below.

2.2 Purposes of the Convention

Unlike international treaties that operate in order to give effect to the majoritarian will of a state, the aim of human rights treaties such as the ECHR is rather to protect individuals against the state itself.[70] In the preamble of the ECHR, it is stated that the Convention aims at "securing the universal and effective recognition and observance of the rights therein declared".[71] The ECtHR has stated that the primary purpose of the system established by the ECHR is to provide individual relief, yet that it also aims to "determine issues on public-policy grounds in the common interest, thereby raising the general standards of protection of human rights and extending human rights jurisprudence throughout the community of the Convention States".[72]

Initially, the ECHR worked within a purely international framework. However, over the span of time, the relationship between the ECHR, national constitutional law, and EU law has been strengthened. Today, fundamental human rights enshrined in instruments such as the ECHR form a vital part of the constitutional law in many national legal orders in Europe.[73] What previously was treated purely as a matter within the state's domestic jurisdiction has been brought within an international system of protection.[74] Therefore,

[68] *Austria v. Italy* (dec.), No. 788/60, ECHR 1961-01, pg. 18. See also Article 33 ECHR.
[69] Ibid. pg. 7.
[70] Letsas (2007) pg. 72.
[71] Preamble of the ECHR.
[72] See among others *Konstantin Markin v. Russia* [GC], No. 30078/06, ECHR 2012-03, para. 89.
[73] Rainey, Wicks & Ovey (2021) pg. 65.
[74] Ibid.

part of the substantive constitutional law of the Member States of the Council of Europe has been outsourced to the subsidiary framework of the ECHR.[75]

In the landmark case *Loizidou v. Turkey* (Preliminary Objections), reference was made to the ECHR as "a constitutional instrument of European public order".[76] As described by Grabenwarter, the ECHR system then comes to function as a type of European constitution of human rights. The ECtHR can, moreover, be seen as a type of European constitutional court for human rights, particularly after adopting Protocol No. 11 and considering that the existing case-law already spans across half a century.[77]

2.3 Means of Interpretation

A comprehension of the Strasbourg Court's means of interpretation is necessary in order to understand its judgments.[78] Since the ECHR is an international treaty, interpretation of the instrument is largely governed by the Vienna Convention on the Law of Treaties (VCLT). The VCLT is deemed to represent customary international law and is to be used when interpreting the ECHR according to the case-law of the ECtHR.[79]

Primarily, it is Articles 31 to 33 of the VCLT that are relevant when interpreting international treaties of this kind. Article 31 sets out the general rule for interpretation in the first paragraph where it is stated that a treaty is to be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". Article 32 deals with supplementary means of interpretation and states that recourse may be had to other means of interpretation such as the circumstances of the conclusion of the treaty or the preparatory works

[75] Grabenwarter (2014b) pgs. 101–102.
[76] *Loizidou v. Turkey* (Preliminary Objections) [GC], No. 15318/89, ECHR 1995-03, para. 75.
[77] Grabenwarter (2014b) pgs. 101–102.
[78] Rainey, Wicks & Ovey (2021) pg. 64.
[79] See for example *Golder v. United Kingdom*, No. 4451/70, ECHR 1975-02, para. 29.

thereto.[80] Although, one should stress that caution is required when relying on the preparatory work of the ECHR as the Convention repeatedly has been regarded as a living instrument by the ECtHR, requiring a dynamic interpretation of its provision.[81]

The Strasbourg Court has, in its judgment *Saadi v. United Kingdom*, stated the following regarding the interpretation of the Convention:

> The Court must have regard to the fact that the context of the provision is a treaty for the effective protection of individual human rights and that the Convention must be read as a whole, and interpreted in such a way as to promote internal consistency and harmony between its various provisions […]. The Court must also take into account any relevant rules and principles of international law applicable in relations between the Contracting Parties […]. Recourse may also be had to supplementary means of interpretation, including the preparatory works to the Convention, either to confirm a meaning determined in accordance with the above steps, or to establish the meaning where it would otherwise be ambiguous, obscure or manifestly absurd or unreasonable.[82]

Rainey, Wicks, and Ovey note that an examination of the ECtHR's case-law shows that the context, serving as a basis for the interpretation of a term, can vary significantly. Sometimes, it is stated, the context might be comprised of other provisions and terms defined within the ECHR system, perhaps also including the preamble to the Convention and preparatory works. Other times, a narrower context consisting solely of the paragraphs of the same article is considered by the ECtHR. Defining the context is then often made dependent on the object and purpose of the article in question.[83]

[80] Regarding Article 1 of Protocol No. 7, the explanatory report presented in Section 3.3 constitutes the preparatory work of the protocol and will hence be given prominence to in the thesis.
[81] Rainey, Wicks & Ovey (2021) pg. 66.
[82] *Saadi v. United Kingdom* [GC], No. 13229/03, ECHR 2008-01, para. 62.
[83] Rainey, Wicks & Ovey (2021) pg. 71.

Underlying principles of the ECHR that are of relevance when interpreting the instrument, other than the already described principle of subsidiarity, are the concept of a democratic society as a fundamental feature of the European public order, the rule of law, and the principle of proportionality in cases where interferences are permitted.[84] Moreover, the principle of effectiveness, i.e., ensuring the effective protection of human rights, has to be taken into consideration and will be a recurring theme in this thesis.[85] In the case-law of the ECtHR, it has been stated that the ECHR is to be interpreted as to make the rights enshrined in the Convention practical and effective, not theoretical and illusory.[86] This principle, as well as those mentioned above, are some of the key normative principles that Tuori describes as sedimented into the sub-surface layers of the law.[87] A further aspect primarily derived from the principle of subsidiarity is "the margin of appreciation". This concept will be further described in Section 2.5.1.

2.4 The Role of the ECtHR

Even though the VCLT does not mention the case-law of the Court as a means of interpretation, it is important to note that case-law is crucial for interpreting the ECHR.[88] It should moreover be noted that the judgments of the ECtHR are binding according to the first paragraph of Article 46 ECHR. Consequently, the Member States undertake to abide by the outcome when a case, to which the state was a party, has been decided.

The decisions and judgments not only serve to decide the cases before a court but, further, to safeguard, develop and elucidate the rules instituted by the ECHR.[89] This is, for example, done by establishing autonomous concepts,

[84] Leach (2011) pgs. 93–95.
[85] Mole (2007) pg. 61.
[86] See for example *Matthew v. United Kingdom* [GC], No. 24833/94, ECHR 1999-02, para, 34.
[87] Tuori (2002) pg. 307.
[88] Case-law is, however, recognized as a secondary source of international law according to Article 38 of the Statute of the International Court of Justice.
[89] Guide to Article 1 of Protocol No. 7 of the European Convention on Human Rights, pg. 4.

i.e., so that the national definition of the same concept will not be decisive for the determination of the ECtHR, and by interpreting the Convention as a "living instrument".[90] Thereby, the ECtHR contributes to the Member States' observance of their engagements in cases where national remedies have not proven effective.[91] The protection provided by the ECHR organs is therefore subsidiary as the primary responsibility for implementing the rights and political freedoms enshrined in the Convention rests with the Member States. In spite of this subsidiary role, the Convention organs have still played a critical role in the protection of human rights and for ensuring enforcement in practice.[92]

According to the first paragraph of Article 32 ECHR, the role of the ECtHR is to interpret and apply the Convention and it was for this purpose the court-based system was implemented. In Article 19 it is, moreover, stated that the ECtHR is entrusted with the task of ensuring the observance of the ECHR. After adopting Protocol No. 11, the Strasbourg Court has become a full-time institution with a compulsory jurisdiction for the Member States of the Council of Europe.[93] All individuals now have direct access to the Court and the Member States undertake not to hinder this right.[94] Inter-state cases are possible to bring before the ECtHR but continue to be rare.[95]

As mentioned above, the ECtHR can be regarded as a European constitutional court for human rights.[96] Using Tuori's theory, the judgments of the ECtHR are not part of the deep structure, but rather, as mentioned above, belong to the surface level of the law.[97] When deciding hard cases, a reconstruction of the deeper layers is often attempted by the judges so that the underlying principles can be brought to the surface. The ECtHR can, in addition, be seen as

[90] Leach (2011) pg. 96–97. For further examples and an elaboration on the examples given in the text above, see Chapter 6 of Leach's book.
[91] See for example *Ireland v. the United Kingdom*, No. 5310/71, ECHR 1978-01, para. 154.
[92] Lambert (2008) pgs. 9–10.
[93] Article 19 and 32 of the ECHR respectively.
[94] Article 34 ECHR.
[95] Article 33 ECHR; Lambert (2008) pg. 10.
[96] See Section 2.2 above.
[97] Tuori (2002) pg. 147.

a forum where questions relating to what belongs in the deep structure can be debated outside of a domestic setting. As a result, political pressures impacting the surface level and legal cultural assumptions of the judges can be left behind to a larger degree.[98] The elaboration of the judges on the deeper structure of the law does, in most cases, get sedimented into the deep structure in what Tuori describes as "a recursive process".[99]

2.5 The Notion of State Sovereignty in Relation to the ECHR

Sovereignty is a legal concept that has been constructed and deconstructed ever since the notion of a state came into existence. Today, the modern notion of state sovereignty is often said to comprise three main components: (1) international legal sovereignty; (2) Westphalian sovereignty, and (3) domestic sovereignty.[100]

International legal sovereignty refers to the recognition of a state by the international community. Where such recognition is present, the state is awarded the right to enter into contracts or treaties with other states recognized by the international community. Moreover, it is possible for the state to become a member of international organizations.[101]

Westphalian sovereignty (sometimes also referred to as "traditional sovereignty") is a concept derived from the Peace of Westphalia and relates to the autonomy of the state. Such sovereignty entails that the state in question has exclusive sovereignty over its territory, meaning that interference in domestic affairs is prohibited and that the borders of the state are inviolable.[102]

[98] Ibid pg. 154.
[99] Ibid pg. 215.
[100] Fioretos (2017) pg. 41.
[101] Ibid.
[102] Ibid.

Lastly, domestic sovereignty means that states can direct, control, and regulate internal activities within the territory. Hence, the concept refers to the effective level of control that the authority structures of the state hold within its borders.[103]

Admittedly, sovereignty is one of the most important attributes of a state as it creates the foundation for its authority. Derived from this notion is, moreover, the democratic tradition of popular sovereignty, i.e., that the majority's will is what gives the state its authority.[104] With the emergence of international organizations and international treaties it did, however, become possible for states to delegate part of their sovereign power and become subject to the rules of an organization or the provisions of a treaty. Moreover, state sovereignty was further affected by the evolution of human rights after the Second World War and the establishment of monitoring bodies to ensure compliance over the following decades.[105]

There are different ways the relationship between human rights and state sovereignty can be understood. Bernhardt states that "every effective protection of individual freedoms restricts state sovereignty" and stresses that the purpose of the Convention is to protect individuals against the misuse of state power.[106] Besson, on the other hand, focuses less on human rights and state sovereignty as two opposing interests, but rather on the claim of sovereignty of the state being predicated on it respecting human rights within its territory.[107] Even though human rights can be perceived as constraints on the self-determination of a state, she states, they have to "be recognized legally through inclusive and deliberative processes" in order to be democratically legitimate.[108] Therefore, the interdependence between sovereignty and human

[103] Ibid.
[104] Letsas (2007) pg. 73.
[105] Wojnowska-Radzińska (2015) pg. 112.
[106] Bernhardt (1999) pg. 12.
[107] Besson (2011) pg. 28.
[108] Ibid.

rights is highlighted and Besson further underlines that state sovereignty is complemented, not replaced, by international human rights law.[109]

Koskenniemi describes the relationship in a similar manner as he states that "by establishing and consenting to human rights limitations on their own sovereignty, states actually define, delimit, and contain those rights, thereby domesticating their use and affirming the authority of the state as the source from which such rights spring".[110] From Tuori's perspective, this could be seen as the legitimacy of the legal order and the claim of sovereignty being dependent on respecting the normative principles of the deep structure.[111] In his own words, Tuori states that "surface-level legal material, such as an individual statute, is normatively legitimate if and only if it can be justified through the principles of the sub-surface layers".[112]

In the following, it will become clear that scholars often tend to commit to what Besson describes as "the so-called political conception of human rights that explain human rights *qua* external limitations on state sovereignty"[113] and this thesis will also, to a large extent, focus on cases where tension between human rights and state sovereignty has arisen.[114] In these situations of conflict, human rights will protect individual rights from being overridden by interests relating to the collective.[115] By relying on this approach, human rights are perceived as external limitations on state sovereignty, similar to what Bernhardt states.[116] However, it is important to remember the interdependence of the two, as the relationship raises issues of profound theoretical importance.[117] In the end, human rights regimes are only able to offer protection for individuals against state abuse to the extent they can rely on national

[109] Ibid. pg. 30.
[110] Koskenniemi (1991) pg. 406.
[111] Tuori (2002) pg. 245.
[112] Ibid.
[113] Besson (2011) pg. 20.
[114] Wojnowska-Radzińska (2015) pg. 112.
[115] McHarg (1999) pg. 672.
[116] Bernhardt (1999) pg. 12.
[117] Wojnowska-Radzińska (2015) pg. 112.

guarantees and by the sovereign state recognizing the rights enshrined therein.[118]

In cases where the interests of the state and the protection of human rights cannot both be fully catered for, the judges of the Strasbourg Court will have to try to reconcile the two so that the rights and freedoms of the ECHR remain practical and effective, not theoretical and illusory.[119] Thereby, the judges set limits for the exercise of the sovereign state's legitimate power. Usually, this is done by relying on the margin of appreciation and the principle of proportionality. Dembour and Kelly describe how many legal theorists argue over whether this method of balancing competing interests against each other is adequate for making judgments in human rights cases.[120] However, by looking at the practice of constitutional courts as well as the ECtHR, it becomes clear that these types of considerations are fundamental for ensuring that human rights are not traded away for other social gains and public interests of the state.[121] Tuori also describes this issue of fundamental rights not being absolute, however, he points out that human rights cannot be treated merely as another interest to balance against external factors of a policy nature.[122] Instead, one must remember that limitations of fundamental rights never may touch upon the core of the right.[123]

2.5.1 The Margin of Appreciation

The doctrine of the margin of appreciation is a central principle in the ECHR system and has already, in brief, been introduced above as an aspect derived from the principle of subsidiarity. In essence, the doctrine refers to the maneuverability granted by the Strasbourg institutions to the national authorities of the Member States as they apply and fulfill the rights established in the

[118] Besson (2011) pg. 29.
[119] Mole (2007) pg. 61.
[120] Dembour & Kelly (2011) pg. 107.
[121] Ibid.
[122] Tuori (2006) pg. 49.
[123] Ibid pgs. 49–50.

ECHR.[124] The term is not to be found in the Convention text itself. Nevertheless, the ECtHR has adopted the doctrine in over 700 judgments and in a great number of decisions.[125] Once Protocol No. 15 has entered into force in 2021, an explicit referral to the margin of appreciation will be made in the preamble of the ECHR.[126]

In other words, the margin of appreciation creates a leeway for the Member States of the Council of Europe when applying the rules of the ECHR as domestic circumstances and legal traditions are taken into account. However, this will all take place under the supervision of the ECtHR, which must ensure that the essence of the rights is not neglected when the Convention is applied at a national level. By interpreting the Convention rights in this more flexible manner, the intention is to facilitate the striking of a balance between individual rights and the interests of the Member States.[127]

One judge of the ECtHR has described the legal doctrine as being "at the heart of virtually all major cases which come before the Court, whether the judgments refer explicitly to it or not".[128] Despite this, many legal scholars and commentators show concern over the need for a coherent and uniform application of the margin of appreciation.[129] In its case-law, the Court has instead used and interpreted the doctrine very vaguely which has created confusion surrounding its scope and applicability. For example, the margin of appreciation has been used to signal that the conduct of a state is reviewable, but justifiable in the present case owing to the limited right the doctrine grants Member States to derogate from the rights established by the Convention. Other times, the doctrine has instead constituted the basis for the Court to find that the conduct of the state instead falls outside the purview of the Convention organs and their competence. Focusing on the latter, the margin of appreciation doctrine is, therefore, not used as a ground for justification,

[124] Greer (2000) pg. 5.
[125] Rainey, Wicks & Ovey (2021) pg. 82.
[126] Ibid.
[127] Danelius (2015) pg. 56.
[128] Macdonald (1987) pg. 208.
[129] Letsas (2007) pg. 80.

but rather as a way to define the scope of the reviewal system set up by the ECHR. In addition, the question of whether the doctrine pervades the entire Convention, or only certain provisions, remains.[130]

In general, the application of the margin of appreciation varies depending on the circumstances of the specific case and the interests at stake.[131] For example, in *Evans v. United Kingdom*, the state was afforded a wide margin of appreciation owing to the absence of a European consensus with regard to the regulation of IVF treatment. Also, the moral and ethical issues surrounding the subject matter of the case, as well as recent and potential developments in science and medicine, gave reason for a wider margin in the present case.[132] A wide margin of appreciation has also been given Member States in cases involving public emergency[133], national security[134], and the legislative implementation of social and economic policies.[135]

On the other hand, Member States are afforded a significantly narrower margin of appreciation in cases relating to intimate aspects of private life under Article 8 ECHR[136], cases where ethical or racial discrimination is implied[137], or when a limitation of a right can be justified in order to protect the authority of the judiciary.[138] Moreover, in *Dickson v. United Kingdom*, a case which dealt with a request for artificial insemination in prison, the ECtHR held that "where a particularly important facet of an individual's existence or identity is at stake (such as the choice to become a genetic parent), the margin of appreciation accorded to a State will in general be restricted".[139]

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[130] Cameron (2000) pg. 28.
[131] *Evans v. United Kingdom*, No. 6339/05, ECHR 2006-03, para. 59.
[132] Ibid., para. 62.
[133] See for example *Brannigan and McBride v. the United Kingdom*, No. 14553/89; 14554/89, ECHR 1993-05.
[134] See for example *Klass et al. v. Germany*, No. 5029/71, ECHR 1978-09.
[135] See for example *Hatton v. United Kingdom* [GC], No. 36022/97, ECHR 2003-07.
[136] See for example *Dudgeon v. United Kingdom* (Just Satisfaction), No. 7525/76, ECHR 1983-02.
[137] See for example *D.H. et al. v. Czech Republic* [GC], No. 57325/00, ECHR 2007-11.
[138] See for example *Sunday Times v. United Kingdom*, No. 6538/74, ECHR 1980-11.
[139] *Dickson v. United Kingdom* [GC], No. 44362/04, ECHR 2007-12, para. 78.

2.6 The Position of Aliens in Relation to the ECHR

Prior to the end of the Second World War, there was little, if any, regulation concerning aliens under international law, as discrimination and mistreatment of this group were still commonplace.[140] When the ECHR came into force about a decade later, it was intended to ensure legal regional recognition of the most fundamental human rights and political freedoms in Europe, drawing on the inspiration of the UDHR.[141] However, the Convention did not function as an asylum instrument and did not include any right to asylum or any right of residence for aliens.[142]

Through the ECtHR's interpretation of the Convention, rights relating to the removal of aliens from the territory of a Member State have gradually emerged over the years and significantly so over the last two decades.[143] States have, moreover, obtained a number of positive obligations in the context of protecting aliens. From Tuori's perspective, the normative principles relating to the states' treatment of aliens have arguably become more firmly sedimented into the sub-surface levels of the law. Focusing only on expulsion, it is notably the rights set out in Article 3 (the prohibition of inhuman and degrading treatment) and Article 8 (the right to respect for private and family life) together with the right to an effective remedy before a national authority in Article 13 ECHR that are of relevance.[144]

Article 13 of the Convention provides for procedural rights as well and states that "everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity". This article grants effective protection in cases where the applicant

[140] Larkin (1992) pg. 3.
[141] Mole (2007) pg. 12.
[142] McAdam (2007) pg. 136.
[143] Lambert (2008) pg. 5.
[144] Explanatory Report to the Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, para. 6.

has not been able to obtain relief at a domestic level and can only be applied together with other provisions of the ECHR.[145] In other words, an applicant must be able to prove that at least one provision, other than Article 13, has been violated to find a breach of the right to an effective remedy.

Article 3 ECHR contains the most developed prohibition on *refoulement* in international law and when the ECtHR has considered asylum issues, most cases have been regarding the interpretation of Article 3.[146] Article 8 is often invoked in cases where bringing the entire family to the receiving country is particularly difficult since close ties have been established in the expelling country.[147]

Apart from the articles mentioned, other Convention articles might be of importance in the context of the thesis, as expulsions cover a broad sphere of state action.[148] For example, processing of applications for asylum may raise questions relating to risks upon return under Article 2 (the right to life) and Article 4 (the prohibition of slavery and forced labor).[149] Article 5 (the right to liberty and security) may also be possible to invoke in cases where the alien is deprived of his or her liberty pending expulsion.[150]

Other articles relating to more general rights and freedoms (e.g., Article 9–11, Article 4 of Protocol No. 7) and prohibitions on discrimination (e.g., Article 14 and Article 1 of Protocol No. 12) could be of relevance. However, Article 16 ECHR states that "nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens". Article 16 likewise applies regarding the rights under Article 1 of Protocol No. 12.[151]

[145] Wojnowska-Radzińska (2015) pg. 143.
[146] Reneman (2014) pg. 54. See also Section 1.5 above.
[147] Gomien, Harris & Zwaak (1996) pg. 363.
[148] Ibid.
[149] Mole (2007) pg. 21.
[150] Cameron (2000) pg. 428.
[151] Lambert (2008) pg. 9.

It should be noted that Article 4 of Protocol No. 4 contains a prohibition on collective expulsion of aliens. Moreover, a Member State of the Council of Europe undertakes not to expel its own nationals in accordance with the prohibition enshrined in Article 3 of the same protocol.[152]

The preceding paragraphs of this section of the thesis describe substantive rights that any alien within the territory of a Member State to the Council of Europe may invoke to challenge his or her expulsion. Procedural protection afforded by the ECHR, however, is a more complicated issue.[153] Article 6 ECHR contains the right to a fair trial and case-law on this matter is extensive as the article frequently is subject to interpretation of the ECtHR. Article 5 paragraph 4 affords certain procedural protection for detainees or aliens facing deportation or extradition, yet does not provide procedural protection regarding the actual expulsion proceeding.

The articles now mentioned, and the pertinent case-law thereto, will be described in Chapter 4 to the extent it is of importance to answer the research questions of the thesis.

[152] Mole (2007) pg. 21.
[153] Gomien, Harris & Zwaak (1996) pg. 364.

3 Article 1 of Protocol No. 7 – Expulsion Only to Follow Due Process

3.1 Ensuring Procedural Safeguards in Expulsion Proceedings

Despite the specific situations discussed above in Section 2.6, there were previously no general provisions relating to expulsion of aliens in the ECHR. Over the years, it became apparent that aliens had been harmed by the inadequate or, rather, the absence of procedural safeguards in the ECHR.[154] The question of due process in expulsion proceedings was given priority as the potentially detrimental effects of an expulsion were emphasized. For example, expulsion of an alien can, and in most cases will, have severe consequences for the person's economic and personal welfare.[155] This is the case even though a removal from a state's territory would not, per se, give rise to any substantive human rights considerations under the ECHR, e.g., in relation to Article 3 or 8.[156] In addition, expulsion proceedings are sometimes preceded by a person being declared an "undesired person" or denounced as a terrorist. Such a declaration will inevitably have serious repercussions for the individual. Thus, a decision to expel an alien must not be based on inaccurate information or on vindictive allegations.[157]

Moreover, legislators recognized the need for aliens to feel protected against arbitrary expulsions and to avoid feelings of uncertainty while legally residing in the territory of a Member State.[158] The alien had to be granted certain rights and it is today common knowledge within international human rights law that states wishing to expel lawfully resident aliens must fulfill a number

[154] Gomien, Harris & Zwaak (1996) pg. 364.
[155] Rainey, Wicks & Ovey (2021) pg. 282.
[156] Ibid.
[157] Cameron (2000) pg. 432.
[158] Ibid.

of fundamental procedural requirements before doing so.[159] In order for the rights to be practical and effective, not theoretical and illusory, as the ECHR requires, establishing procedural safeguards within the ECHR system was necessary.[160]

The identified lacuna was partially filled by Article 1 of Protocol No. 7 to the Convention.[161] In the article, procedural safeguards for aliens are guaranteed in cases where the alien faces expulsion, yet lawfully resides in the territory of the state.[162] The minimum rights set out are of a procedural character and do not provide any substantive protection[163], apart from the requirement that an expulsion has to be "in pursuance of a decision reached in accordance with law".[164] The aim of Article 1 of Protocol No. 7 is rather to secure due process in expulsion proceedings and preclude arbitrary decisions to expel an alien.[165]

As will be described further below, the provision was modeled on Article 13 ICCPR. In part, this was due to wishes to implement central provisions of the ICCPR in the ECHR to avoid clashes between the two instruments and to bring procedural safeguards in expulsion proceedings within the purview of the ECHR system.[166]

3.2 The Wording of the Provision

Article 1 of Protocol No. 7 provides the following:

1. An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed:

[159] Wojnowska-Radzińska (2015) pg. 114.
[160] Mole (2007) pg. 61.
[161] The protocol was opened for signature in November 1984 by the Member States of the Council of Europe and entered into force four years later on November 1, 1988.
[162] Rainey, Wicks & Ovey (2021) pgs. 7, 308.
[163] I.e., relating to the grounds of why expulsion is to take place in the first hand.
[164] See Section 1.4 above.
[165] Rainey, Wicks & Ovey (2021) pg. 644.
[166] Explanatory Report to the Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, para. 7.

(a) to submit reasons against his expulsion,
(b) to have his case reviewed, and
(c) to be represented for these purposes before the competent authority or a person or persons designated by that authority.

2. An alien may be expelled before the exercise of his rights under paragraph 1(a), (b) and (c) of this Article, when such expulsion is necessary in the interests of public order or is grounded on reasons of national security.

As laid out in the article, the provision is limited to those within the national territory of the state.[167] One of its primary requirements is that the decision to expel must be reached in accordance with the law of the Member State. Moreover, in the list (a) to (c), certain procedural minimum guarantees are explicitly stated. The alien shall, during some stage of the proceedings, be allowed to submit reasons against the expulsion, which makes it possible for the alien to respond to the evidence presented against him or her. In addition, once a decision of expulsion has been reached, the alien should be presented with the possibility to have his or her case reviewed. Lastly, the alien is granted a right to be represented during the proceedings. Apart from this, there is no further regulation regarding how the proceedings in cases of expulsion are to be arranged.[168]

The second paragraph of the article states an exception to the main requirements laid out in cases where certain qualifying conditions are satisfied. Expulsion can take place before the review procedure in cases where such an expedited process is seen as required on the basis of public order or national security interests. Consequently, the general rule derived from the article is that an expulsion should be preceded by a final decision on the matter.[169]

The provision was modeled on Article 13 ICCPR after the Parliamentary Assembly of the Council of Europe had recommended the Committee of Minis-

[167] Rainey, Wicks & Ovey (2021) pg. 8.
[168] Danelius (2015) pg. 638.
[169] Ibid.

ters to imbed as many of the substantive provisions of the ICCPR as possible.[170] Preparations for creating a new draft protocol were initiated in order to follow the recommendation and make the international instruments better harmonize with one another.[171] Article 13 ICCPR is, unmistakably, part of its own legal system which contains important differences from the ECHR. Moreover, as can be seen when comparing the two texts, Article 1 of Protocol No. 7 is phrased in a different manner from Article 13 ICCPR. Unlike Article 13 ICCPR, Article 1 of Protocol No. 7 also regulates the circumstances in which an expulsion can be executed before the alien has been able to exercise his or her rights.[172] Seeing, however, that Article 13 ICCPR is commonly referred to by the ECtHR, the provision is worth highlighting in full:[173]

> An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

What the different rights in Article 1 of Protocol No. 7 entail will be further examined below based on the official documents of the Council of Europe and the case-law of the Strasbourg Court. It is also based on these sources that key terms of the provision will be defined. For the sake of convenience, the rights in paragraph 1 will hereafter be referred to as the alien's "procedural rights".

The term *alien* is not explicitly defined but will in the following be understood as "a natural person who is not a national of the State in which he is present"

[170] Explanatory Report to the Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, para. 1.
[171] Ibid., paras. 1–2.
[172] It is also noteworthy that Article 13 ICCPR can be seen as more favorable for aliens considering that only one ground for revoking procedural guarantees is brought up and that the reasons of national security presented, moreover, have to be compelling.
[173] See for example *Muhammad and Muhammad v. Romania* [GC], No. 80982/12, ECHR 2020-10, para. 74.

as defined in international law doctrine.[174] This means that an alien can be both a person belonging to a foreign country, or a stateless person, i.e., without citizenship, since the differentiating criteria set up is that of nationality.

3.3 The Explanatory Report of the Council of Europe

As Protocol No. 7 was drawn up by the responsible committee of the Council of Europe, a commentary to the protocol was created to illustrate the purposes of the different provisions of the protocol.[175] This commentary was named "Explanatory Report to the Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms" and will in the following simply be referred to as "the explanatory report".

Important to note is that the text does not provide an authoritative interpretation of the provisions of the protocol. However, as explained in the report, the instrument "might be of such a nature as to facilitate the understanding of the provisions contained therein".[176]

The explanatory report begins by stating that an alien lawfully in the territory of a Member State of the Council of Europe already benefits from certain guarantees established by the ECHR, as stressed above under section 2.6.[177] Having taken these rights into account, i.e., particularly Article 3 (prohibition of torture) and 8 (right to respect for private and family life) in connection with Article 13 of the ECHR (right to an effective remedy), Article 1 of Protocol No. 7 was added in order to establish minimum procedural guarantees in expulsion proceedings.[178] Moreover, another purpose for adding the relevant provision was to bring such procedural protection within

[174] Wojnowska-Radzińska (2015) pgs. 1–2.
[175] This segment has been structured based on the official list of keywords for the article, see "HUDOC: List of Keywords Article by Article", pg. 21.
[176] Explanatory Report to the Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, para. II.
[177] Ibid., para. 6.
[178] Ibid.

the purview of the ECHR system and enable protection in cases not covered by other international legal instruments as previously described under Section 3.1.[179]

It is also stated in the explanatory report that an expulsion decision does "not involve a determination of his civil rights and obligations or of any criminal charge against him" falling within the scope of Article 6 of the ECHR. For that reason, Article 1 of Protocol No. 7 does not affect the interpretation of Article 6 as established above.[180]

3.3.1 Paragraph 1 of the Provision

The term *expulsion* is used in a generic sense according to the explanatory report and refers to "any measure compelling the departure of an alien from the territory".[181] In addition, it is stated in paragraph 10 of the explanatory report that cases of extradition, e.g., removal of aliens for the purpose of prosecution or execution of sentences abroad, fall outside of the scope of Article 1 of Protocol No. 7.[182] In this context, the term is seen as an autonomous concept encompassing different types of removal of an alien from the territory of a state. It is of no importance how the removal is referred to under national law.[183] In addition, *refoulement* of aliens who have entered the country unlawfully does not fall within the scope of the provision, unless their position has been regularized subsequently.[184]

First, the procedural rights are only applicable in cases where an alien is lawfully resident in the territory of a Member State who has ratified the protocol

[179] Ibid.
[180] Ibid.
[181] Ibid., para. 10.
[182] Ibid., para. 10.
[183] Danelius (2015) pg. 638.
[184] Explanatory Report to the Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, para. 10. It should also be noted that the absolute prohibition of torture in Article 3 ECHR applies in cases where expulsion is imminent and there exist well-founded grounds showing that the alien will be the subject of measures violating the article in the receiving state.

and not made any reservations regarding the relevant article.[185] The term *lawfully resident* hence excludes applicability in cases where an alien is denied entry at an airport, border station, or any other point of entry.[186] In these cases, there are no provisions of the ECHR which seek to ensure the alien any type of procedural rights before being expelled from the territory of the state.[187]

Moreover, an alien is not considered being *resident* whilst he or she awaits a decision on a request for a residence permit, or in cases where the alien only has been admitted to the territory for the purpose of transit or for a non-residential purpose during a limited period of time.[188]

The term *lawfully* refers to the requirements that must be fulfilled by the alien for his or her presence in the territory to be considered lawful according to domestic law.[189] For that reason, the rights of Article 1 of Protocol No. 7 do not apply to situations where an alien has been allowed entry under certain conditions and these have not been met. These conditions may for example concern limits in time or cases where aliens have been granted permission to remain on the territory of the state for a short stay after the period of legal residency has been exceeded.[190]

Second, the first paragraph of the article states that an expulsion only may take place *in pursuance of a decision reached in accordance with law*. Here, the term "law" refers to domestic law of the Member State of the Council of Europe. This means that cases where domestic law provides no legal basis for expulsion are in conflict with the provision.[191] Moreover, the decision must "be taken by the competent authority in accordance with the provisions of

[185] See more regarding reservations and declaration below, Section 3.5.
[186] Explanatory Report to the Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, para. 9.
[187] Danelius (2015) pg. 638.
[188] Explanatory Report to the Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, para. 9.
[189] Ibid.
[190] Danelius (2015) pg. 638.
[191] Rainey, Wicks & Ovey (2021) pg. 644.

substantive law and with the relevant procedural rules" according to paragraph 11 of the explanatory report.[192]

In the first paragraph of Article 1 of Protocol No. 7 to the ECHR, three separate sub-paragraphs clearly set out three distinguished rights that are to be ensured in the expulsion proceeding.[193] First, it is stated that the alien shall be allowed *to submit reasons against his or her expulsion*. In the explanatory report, it is stated that the conditions underlying the exercise of this right are to be determined in domestic legislation. Moreover, by presenting the right in a clearly defined sub-paragraph, the intention has been to indicate that the right in question can be exercised by the alien before review of the expulsion decision comes into question.[194]

Thereafter, the second right guarantees that the alien shall be allowed *to have his or her case reviewed*. It does not follow from this right that the review is to be a two-stage procedure held by at least two different authorities. Rather, the right simply entails "that the competent authority should review the case in the light of the reasons against expulsion submitted by the person concerned".[195] How the review process is to be structured is left to domestic law to decide. This part of the provision does, moreover, not deal with the possibility of appeal after a review of the expulsion decision, even though this is a possibility in some Member States of the Council of Europe. Hence, it is not required that the alien is permitted to remain in the territory of the state forthcoming a conclusion in the appealed expulsion decision after it already has been reviewed.[196]

According to the last subparagraph (c), the alien shall be allowed *to be represented for these purposes before the competent authority or a person or persons designated by that authority*. Similar to subparagraph (b), the form of

[192] Explanatory Report to the Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, para. 11.
[193] Ibid., para. 12.
[194] Ibid., para. 13.1.
[195] Ibid., para. 13.2.
[196] Ibid.

the review is left to be determined by domestic law.[197] A Member State might, for example, in its domestic law decide to implement various procedures with separate authorities in charge for different categories of cases, without this being in conflict with the ECHR.[198] In the explanatory report it is also stated that competent authority can be either a judicial or administrative body. In addition, an authority that is to review an expulsion decision does not have to be the authority in charge of the final decision regarding the pending expulsion. This means that it would not be inconsistent with the requirements of the article to have a court do the review in accordance with sub-paragraph (b) and thereafter have the same court make a recommendation regarding the pending expulsion to an administrative authority with whom the final decision rests.[199]

Regarding the term "represented", it is stated in paragraph 14 of the explanatory report that the article does not entail a right for the alien or the legal representative to be physically present when the case is considered. There is no requirement for the process to include an oral hearing. A fully written procedure will therefore fulfill the requirement set out in sub-paragraph (c).[200]

3.3.2 Paragraph 2 of the Provision

The rights set out in the first paragraph of Article 1 of Protocol No. 7 are, as a general rule, to be exercised before the alien is expelled. However, the second paragraph of the article deals with expulsion before these procedural rights have been enjoyed by the alien. According to the explanatory report, the principle of proportionality, as it has been defined in the case-law of the ECtHR, is to be applied when the exception is invoked, and it does not matter if the invocation has been made based on reasons of public order or national security.[201]

[197] Ibid., para. 13.3.
[198] Given that the guarantees enshrined in the article otherwise have been respected.
[199] Explanatory Report to the Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, para. 13.3.
[200] Ibid., para. 14.
[201] Ibid., para. 15.

When it comes to expedited expulsion on the basis of public order, a necessity requirement is set forth in the explanatory report that does not exist when reasons of national security are invoked.[202] Namely, a Member State which relies on the exception of public order when expelling an alien before he or she has exercised the rights set out in paragraph 1 of Article 1 to Protocol No. 7 must "be able to show that this exceptional measure was necessary in the particular case or category of cases".[203] Conversely, if the expulsion is based on grounds of national security, this does in itself suffice as a necessary measure as no necessity requirement is set up.[204] As a consequence, the state has a greater margin of discretion when deciding whether an expulsion should take place before a final decision has been reached in cases where the fundamental interest of national security is put at stake.[205]

Lastly, it is stated in the explanatory report that the alien in question should always be allowed to exercise the rights enshrined in the first paragraph of the article after his or her expedited expulsion. This applies to all expedited expulsions, regardless of whether they have taken place on the basis of national security or public order.[206]

3.4 Criticism of the Article

The article and its reach have been criticized in legal doctrine. Cholewinski and Lambert, for example, argue that a weakness with the provision is the lack of substantive protection, apart from the prerequisite that an expulsion must be in pursuance of a decision reached in accordance with law.[207] By no means does Article 1 of Protocol No. 7 say anything else about the grounds of expulsion nor concerns itself with anything that comes close to a right of

[202] Danelius (2015) pg. 638.
[203] Explanatory Report to the Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, para. 15.
[204] Ibid.
[205] Danelius (2015) pg. 638.
[206] Explanatory Report to the Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, para. 15.
[207] Cholewinski (1997) pgs. 398–399.

residence for the alien. As described above, expulsion could possibly still constitute a breach of another substantive provision of the ECHR, but the relevant article for this thesis would not apply in those cases.[208]

In addition, Article 1 of Protocol No. 7 does not apply to all aliens as the requirement of lawful residence is set up.[209] Moreover, what constitutes lawful residence is determined by the domestic law of the different Member States. Due to this, irregular migrants will often fall outside of the scope of the protection afforded by the article.[210]

The fact that the competent authority reviewing the case does not have to be an independent organ, or have power of decision, is something that also has been met with criticism from legal scholars.[211] Likewise, the very existence of the second paragraph limiting the right for an alien to exercise his or her rights before expulsion under certain circumstances has been seen as a too extensive measure.[212] Apart from limitations in scope, the inadequate ratification of the protocol has also raised concerns within the legal community and will now be described below.[213]

3.5 Aims and Interests of the State Relating to the Expulsion of Aliens

The right to decide who legally resides in one's territory is a politically sensitive topic intrinsically tied to the sovereignty of states. Hence, many Member States of the Council of Europe have been reluctant to ratify provisions limiting this right. Article 1 of Protocol No. 7 does not involve itself with the substantive grounds for the expulsion as mentioned above, i.e., the sovereign right of the state to expel aliens is not infringed directly.[214] Still,

[208] Lambert (2008) pg. 23.
[209] Ibid.
[210] See more beneath Section 3.3.
[211] Lambert (2008) pg. 23.
[212] Ibid.
[213] Ibid. pgs. 23–24.
[214] Van Dijk (1999) pg. 293.

demanding that certain requirements are fulfilled in expulsion proceedings is something that by many states is seen as an impediment to exercising their right to expel non-nationals and safeguarding themselves against undesirable aliens residing within their territory. Hence, sovereignty is, nonetheless, limited for those states having ratified Protocol No. 7 to the Convention as regards the procedural treatment of aliens.[215]

By ratifying Protocol No. 7, the possibility for expulsion without prior procedure is removed and the state's ability to employ expedited procedures is restricted to a high degree. Moreover, many people have a hostile view of a system enabling international judges in the ECtHR to decide cases on controversial matters affecting national authorities and inhabitants.[216] In part, this can explain why some states have decided to not sign or ratify Protocol 7, and why other states have made reservations or declarations in relation to Article 1 of the protocol. However, the fact that many states have decided not to ratify this provision does not preclude the possibility for an expulsion of an alien to be in conflict with other articles in the Convention.[217]

As of May 2021, Protocol No. 7 has been ratified by 44 of the 47 Council of Europe Member States.[218] The United Kingdom has neither signed nor ratified the protocol.[219] Germany and the Netherlands, on the other hand, signed the protocol, but the signatures were never followed by subsequent ratification.[220] In particular, it is controversial issues of migration and national

[215] Lambert (2008) pg. 51.
[216] Letsas (2004) pg. 279.
[217] E.g., in cases where the deportation or expulsion would lead to the alien facing a real risk of being tortured (Article 3) or being killed (Article 2).
[218] As at May 2021, the following states have ratified the protocol: Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Lichtenstein, Lithuania, Luxembourg, Malta, Monaco, Montenegro, North Macedonia, Norway, Poland, Portugal, Republic of Moldova, Romania, Russian Federation, San Marino, Serbia, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey and Ukraine.
[219] Council of Europe, "Chart of signatures and ratifications of Treaty 117 - Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms."
[220] Ibid.

security that have generated reluctance to ratify the protocol in some Member States, such as the United Kingdom.[221]

Moreover, Belgium and Sweden have made declarations regarding Article 1 of Protocol No. 7.[222] Belgium, in its declaration, states that the words "resident" and "lawfully" used in the article should be understood in the way provided for in paragraph 9 of the explanatory report (further discussed in Section 3.3).[223] The declaration made by Sweden entails that, pursuant to Section 70 of the Swedish Aliens Act (1980:376), an alien granted the right to appeal against an expulsion order may make a declaration of acceptance in which this right to appeal is renounced. Such a declaration cannot be revoked. In cases where the alien has appealed and thereafter renounces this right according to above, the appeal shall be withdrawn.[224]

Switzerland has made a reservation with respect to expulsions on the grounds of internal or external security in pursuance of a decision reached by the Federal Council in accordance with the Swiss Constitution. In these cases, the alien shall not enjoy the procedural rights listed in the first paragraph of Article 1, not even after the expulsion has been executed.[225]

One of the most central interests that is cherished by states in relation to procedural safeguards in expulsion proceedings is that of national security, i.e., something that also the reservation of Switzerland concerns itself with. Expulsions of lawful residents falling within the scope of Article 1 of Protocol No. 7 are in many cases a way for the state to expel terrorist suspects and other undesired people when a successful prosecution is seen as unlikely.[226] In these types of efforts, national secret intelligence services play an important part, as does the exchange of information between state authorities

[221] Rainey, Wicks & Ovey (2021) pgs. 8, 626.
[222] Council of Europe, "Reservations and Declarations for Treaty No.117 - Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms."
[223] Ibid.
[224] Ibid.
[225] Ibid.
[226] Human Rights Watch (2007) pg. 20.

across the globe.[227] Several reasons for why certain information may be classified by states were mentioned in the introduction to this thesis. Primarily, these reasons relate to the interest of the state not to reveal secret intelligence sources and methods.[228] Other examples that were presented related to wishes of protecting sources and the international relations of the state as future information exchanges otherwise could be jeopardized.[229]

It should be noted that the smaller the national security agency, the more dependent it will be on cooperation with larger agencies and thereby, it will be less inclined to reveal information diminishing its chances of successful cooperation.[230] Security agencies might, moreover, conceal sources in order to make it possible to punish a certain alien without sufficient justification or in order to hide its limited resources out of embarrassment.[231] Nonetheless, it is unmistakable that effective surveillance and intelligence gathering lie at the heart of terrorism prevention and the state's desire to protect its territory and its inhabitants.[232]

After the September 11 attacks, Western societies underwent a change and aliens began to be perceived in a different manner compared to before. This perception lead to aliens being treated with increased distrust and impartiality, something that in turn has caused more expulsions to take place without ensuring human and civil rights on behalf of protecting what is perceived as the security of the state.[233] As a consequence, the climate post-9/11 has led to fundamental human rights norms being sidelined and questions of state sovereignty have instead entered the spotlight.[234] It is thereby possible to identify a tension between the right of a state to expel aliens suspected of terrorist activity and the obligation for the state to respect fundamental human

[227] Ibid. pg. 28.
[228] Cameron (2000) pg. 433.
[229] Reneman (2014) pg. 294.
[230] Cameron (2000) pg. 432.
[231] Ibid. pgs. 432–433.
[232] Human Rights Watch (2007) pg. 28.
[233] Wojnowska-Radzińska (2015) pg. ix.
[234] Ibid. pgs. ix–x.

rights.[235] By setting up this opposition, it should, however, be noted that national security in itself is a vague concept.[236] Some scholars, for example, argue that security should be regarded as a fundamental human right in itself.[237]

Apart from widespread changes after the September 11 attacks that impacted the debate on state sovereignty and national security, increased migration has also brought issues of sovereignty and expulsion to the top of the international agenda in recent years. Migrants have to a large extent been identified as a vulnerable group in need of extra protection in international human rights law.[238] Moreover, governments have realized that multilateral cooperation and engagement is necessary in terms of regulating mass migration.[239] With regard to the expulsion of aliens, this previously purely domestic issue has increasingly come to be regulated by universal and regional systems of human rights law.[240] As a consequence, states that become parties to international human rights conventions lose some of their sovereign power and do no longer have absolute discretion in terms of immigration policy.[241] The same applies for expulsion proceedings where states, now obliged to respect both international standards and national law, enjoy a limited freedom with regard to arbitrary expulsions.[242]

Foregoing the adoption of Article 13 ICCPR, i.e., the model for Article 1 of Protocol No. 7, lengthy debates were held. Focus was, in the debates, put on the extent of protection granted to aliens in relation to the sovereignty of the state, as it was proven difficult to balance the different aspects of expulsion.[243] It was decided that states not already providing aliens with a possibility of

[235] Ibid. pg. 109.
[236] The reader is referred to scholarly sources focusing on how public order and national security can be defined as reasons of space do not allow for the subject to be dealt with substantively in this thesis. See for example Cameron (2000).
[237] See for example Mertus (2009) pgs. 164 ff.
[238] Wojnowska-Radzińska (2015) pg. ix.
[239] OHCHR (2012) pg. 2.
[240] Wojnowska-Radzińska (2015) pg. ix.
[241] Ibid. pg. 41.
[242] Ibid. pg. 37.
[243] Ibid. pg. 33.

appeal in expulsion decisions were to implement such legislation.[244] As a result, Article 13 ICCPR was drafted in order to realize this intention.[245] It is important to note that, at the time the article was being drafted, the majority of the involved states agreed that the article should strike a fair balance between the two conflicting interests.[246] The states were, nevertheless, unable to agree on an exhaustive list regarding substantive grounds allowing for expulsion. Therefore, the article came, just like Article 1 of Protocol No. 7, not to include any explicit substantive rights, apart from the expulsion having to be in pursuance of a decision reached in accordance with law. Emphasis was instead placed on procedural safeguards and a fair procedure as the main tool to combat arbitrary expulsions.[247]

Today, the migration debate is still largely focused on issues of entry and stay of aliens as an inherent right of state sovereignty. In popular discourse, the connection between immigration and sovereignty becomes even clearer as a rhetoric describing migration as a "threat" or even an "invasion" has been adopted. This view can easily be linked back to ideas of Westphalian sovereignty describing the state's borders as inviolable, even though this type of sovereignty originally only concerned itself with relationships between states and not the interests of individuals.[248]

Even though many states agree with the idea that arbitrary expulsions are undesirable, the level of protection aliens should be afforded remains unclear. Some states have made demands for a more precise definition or have been hesitant to sign any instruments regulating the right before clarifications are made. So far, however, these requests have had little impact on international conventions.[249] The ECtHR's efforts of interpreting Article 1 of Protocol No. 7 and defining the scope of the provision will now be presented in the following chapter.

[244] Ibid. pg. 34.
[245] Ibid.
[246] Ibid.
[247] Ibid.
[248] Dembour & Kelly (2011) pg. 107.
[249] Wojnowska-Radzińska (2015) pg. xiii.

4 The Current Interpretation in Muhammad and Muhammad v. Romania

4.1 Facts of the Case

Up until very recently, none of the complaints regarding Article 1 of Protocol No. 7 that were submitted to the ECtHR had been successful and some scholars have claimed that the article includes serious weaknesses due to the lack of violations found.[250] However, with the Grand Chamber finding a violation in *Muhammad and Muhammad v. Romania* in 2020, the state of play has arguably changed.

The applicants of the case, Pakistani nationals Muhammad and Muhammad, had entered Romania on student-visas in 2009 and 2012 respectively.[251] In December 2012, the Romanian Intelligence Service placed an inquiry at the office of the public prosecutor at the Bucharest Court of Appeal relating to whether the applicants were to be considered as "undesirable persons" for a period of fifteen years. In connection with this inquiry, the Romanian Intelligence Service handed over classified documents that were to serve as a basis for the assessment.[252] As the secret information provided that there were "serious indications that the applicants intended to engage in activities capable of endangering national security", Muhammad and Muhammad were summoned to appear in court the following day.[253] No documents accompanied the summonses of the applicants.[254]

[250] See for example Lambert (2008) pg. 23 and Cholewinski (1997) pgs. 398–399. This criticism is further elaborated on in Section 3.4 above.
[251] *Muhammad and Muhammad v. Romania* [GC], No. 80982/12, ECHR 2020-10, paras. 8–10.
[252] Ibid., para. 11.
[253] Ibid., paras. 12, 15.
[254] Ibid., para. 15.

A hearing took place in the first-instance proceedings before the Romanian Court of Appeal where the applicants were allowed to apprise themselves of the application through the use of an interpreter.[255] The application stated that information had been forwarded to the Court of Appeal that gave strong indications that the applicant had planned to carry out activities that could endanger national security.[256] The applicants, however, expressed that they did not understand why they had been summoned based on the application in which references only had been made to applicable legal provisions of Romanian law.[257] In reply, the Court of Appeal upheld that the documents in the file remained classified and that only the judge could consult them.[258] The applicants, moreover, submitted requests for legal assistance, something the court rejected as such a request would have had to be made before the opening of the proceedings.[259]

The judgment of the Court of Appeal declared the applicants undesirable in Romania for a fifteen-year period and ordered their expulsion.[260] According to the reasoning of the court, "a measure declaring aliens undesirable pursues a legitimate aim, namely the prevention of serious acts that are capable of endangering the national security of the Romanian state".[261] The day after the court hearing, the Romanian Intelligence Service issued a press release in which more detailed information about the case was disclosed. It stated, among other things, that Muhammad and Muhammad had participated in "activities conducted in preparation for a terrorist attack on Romanian soil, during the period of the end-of-year festivities, by an extremist entity ideologically affiliated to al-Qaeda".[262]

[255] Ibid., para. 20.
[256] Ibid.
[257] Ibid., para. 21.
[258] Ibid.
[259] Ibid., paras. 25–26.
[260] Ibid., paras. 27–28.
[261] Ibid., para. 28.
[262] Ibid., para. 30.

The applicants appealed to the Romanian High Court. In the meantime, they had both retained lawyers.[263] However, these lawyers did not have access to the classified documents as they did not hold so-called ORNISS certificates. In Romania, lawyers can request these types of certificates that provide them with access to classified documents for four years.[264] This is done through a lengthy procedure where the lawyer also has to sign a confidentiality agreement for it to be issued.[265]

In the appeal proceedings the applicants pointed out that, in the press release issued the day after the first hearing, the accusations against them had been set out even though they previously had not been provided with the same information.[266] The High Court dismissed the appeal and stated that "it could be seen from the classified documents available to it that the court below had rightly taken account of the existence of indications that the applicants had intended to engage in activities capable of endangering national security".[267] It was also noted by the High Court that Article 1 of Protocol No. 7 to the ECHR was applicable to the present case but that the procedural safeguards had been ensured as both the Court of Appeal and the High Court had been able to examine the validity of the existence of the classified grounds.[268]

After both applicants had been deported from Romanian territory they turned to the ECtHR and complained that their deportation to Pakistan had taken place in breach of their rights under Article 1 of Protocol No. 7 and Article 13 ECHR.[269] In particular, they claimed that they had not been notified of the grounds for their expulsion and that they had not been granted access to the documents of the case file.[270] The Romanian government, in turn, contested

[263] Ibid., para. 32.
[264] Ibid., paras. 54–55.
[265] Ibid.
[266] Ibid., para. 34.
[267] Ibid., para. 42.
[268] Ibid., paras. 44–45.
[269] Ibid., paras. 3, 88.
[270] Ibid., para. 88.

the claims of the applicants and stated that they had received sufficient information to prepare their defense.[271]

4.2 The Court's Assessment

4.2.1 Starting Point of the Court

The ECtHR found it appropriate to examine the case merely under Article 1 of Protocol No. 7 to the ECHR and began with noting that, in the vast majority of the Member States of the Council of Europe, national legislation limits "the right of access to classified documents and confidential information that have been submitted in support of an expulsion on national security grounds, including in the course of the judicial proceedings".[272]

Moreover, the Court pointed out that one of the general principles derived from the case-law of the Court is that the Member States have the right to control the entry, residence, and expulsion of aliens.[273] The procedural rights implemented are only of a "minimum" character, as stated in the explanatory report.[274] In addition, it was emphasized that the ECHR does not ensure aliens any right to enter or reside in the territory of a particular state.[275] Expulsion proceedings are, moreover, of an administrative nature and the Court stressed that they "do not pertain to the determination of a civil right or obligation, or of a criminal charge for the purpose of Article 6 § 1".[276]

4.2.2 Lawfully Resident

As the case was to be examined under Article 1 of Protocol No. 7, the ECtHR began with finding the applicants "lawfully resident" in Romania at the time

[271] Ibid., paras. 89, 109.
[272] Ibid., paras. 131, 139.
[273] Ibid., para. 114.
[274] Ibid., para. 117.
[275] Ibid., para. 114.
[276] Ibid., para. 115 where reference also is made to *Maaouia v. France* [GC], No. 39652/98, ECHR 2000-10, para 38.

the expulsion proceedings were initiated as they had obtained student visas.[277] Consequently, Article 1 of Protocol No. 7 was applicable to the present case.[278]

4.2.3 In Accordance with Law

The first basic safeguard set out in Article 1 of Protocol No. 7 is that an alien may be expelled only "in pursuance of a decision reached in accordance with law".[279] The ECtHR referred to old case-law stating that the phrase is defined in a very similar manner throughout the Convention and the additional protocols thereto.[280] This means that not only the mere existence of a legal ground for expulsion in national law is sufficient, but that the law is accessible, foreseeable, and "afford[s] a measure of protection against arbitrary interference by the public authorities with the Convention rights".[281] These requirements were derived by the Court from the rule of law, i.e., a principle inherent in all the provisions that are part of the ECHR system.[282]

In the present case, the expulsion proceeding had taken place in accordance with Romanian national law and the ECtHR did not go further into the examination of these criteria.[283] The Romanian courts also argued that the limitations of the procedural rights imposed had been required by the law.[284]

[277] Ibid., para. 91 where reference is made to *Georgia v. Russia (I)* [GC], No. 13255/07, ECHR 2014-07, para 228.
[278] Ibid.
[279] Ibid., paras. 117–118.
[280] Ibid., para. 118 where reference is made to *C.G. et al. v. Bulgaria*, No. 1365/07, ECHR 2008-04, para. 73.
[281] Ibid. where reference is made to *Baltaji v. Bulgaria*, No. 12919/04, ECHR 2011-07, para 55 and *Lupsa v. Romania*, No. 10337/04, ECHR 2006-06, para 55.
[282] Ibid. See also Section 2.3 above.
[283] Ibid., para. 158.
[284] Ibid.

4.2.4 Specific Procedural Safeguards of the Article

In addition to examining the quality of the domestic law as described above, the Court also tried the case in relation to the three specific procedural safeguards set out in the article. In this respect, the ECtHR reiterated that the Convention requires that its provisions are understood and applied to "render its requirements practical and effective, not theoretical and illusory".[285]

In the present case, the two applicants had relied on their right to be informed of the reasons for their expulsion and the right to access the documents of the case file. These rights are not expressly stated in the provision and the Court did therefore go on to determine to what extent these rights could be regarded as falling within the scope of the article.[286] It was stated that the alien has a right to submit reasons against his or her expulsion in Article 1 paragraph 1 (a) of Protocol No. 7. According to the Court, "an alien cannot meaningfully challenge the authorities' allegations to the effect that national security is at stake, or reasonably submit reasons against his expulsion without being aware of the relevant factual elements which have led the domestic authorities to believe that the alien represents a threat to national security".[287] Therefore, the Court stated that such information is of great importance in order to ensure that the right enshrined in Article 1 paragraph 1 (a) of Protocol No. 7 can be exercised effectively.

Paying regard to the foregoing, the ECtHR held that Article 1 of Protocol No. 7 in principle requires that aliens are informed of the relevant factual elements of the case and that they are "given access to the content of the documents and the information in the case file on which those authorities relied when deciding on their expulsion".[288] However, the right to be informed of these relevant factual elements and the right of access to the contents of the case

[285] Ibid., para. 122.
[286] Ibid., para. 125.
[287] Ibid., para. 126.
[288] Ibid., para. 129.

file are not of an absolute character.[289] Here, the Court stated that "administrative expulsion proceedings may also be characterised by the presence of competing interests – such as national security, the need to protect witnesses at risk of reprisals or the requisite secrecy of police investigation methods – which must be weighed in the balance against the rights of the alien".[290] Of great importance is also that the ECtHR granted Member States a certain margin of appreciation with respect to such assessments.[291]

Limitations to the rights must not impair the very essence of the rights enshrined in Article 1 of Protocol No. 7 and the alien must always be protected against arbitrary action and be able to challenge his or her expulsion in an effective way.[292] At the same time, Member States will have to ensure their obligations under Articles 2, 3, and 5 of the Convention as they undertake to protect the people within their territory by taking measures to combat terrorism and other serious crimes.[293]

In order to determine the extent of the procedural rights and if any limitations could be accepted in the present case, the ECtHR set up a system to be used in its approach. This method of legal problem solving is to a large extent built on the case-law of the Court under Articles 5 and 6 of the Convention.[294] First, the Court examines whether and to what extent the rights asserted by the Pakistani nationals were protected by Article 1 of Protocol No. 7. Thereafter, the Court considers permissible limitations to the alien's procedural rights and later, what criteria are to be considered when determining the compatibility of a limitation of these rights. When examining the latter, the Court is to look at whether the limitations have been "found to be duly justified by the competent independent authority in the light of the particular circumstances of the case".[295] Then the Court will move on to see whether the difficulties

[289] Ibid., para. 130.
[290] Ibid.
[291] Ibid.
[292] Ibid., para. 133.
[293] Ibid.
[294] Ibid., paras. 134–135.
[295] Ibid., para. 133.

arising for the alien as a result of the limitations "were sufficiently compensated for by counterbalancing factors" so that the very essence of the relevant rights is preserved.[296] As a result, limitations will, in the eyes of the ECtHR, have to be tried both in relation to whether they have been duly justified and whether sufficient counterbalancing measures have been applied.[297]

Duly justified

In accordance with the method of legal problem solving of the Court that has been presented above, there are many criteria that are to be used when examining the facts of the case. Account shall be taken to the circumstances of the specific case and also to the proceedings as a whole.[298] When looking further into whether the limitations of the procedural rights have been duly justified, the ECtHR stated that "in accordance with the principle of subsidiarity, it falls primarily on the national authorities to assess whether limitations on an alien's procedural rights are needed in a given case and are duly justified".[299] Therefore, it is only the decision-making procedure of the national authorities that constitutes the subject of the ECtHR's assessment and the Court is especially to rely on principles of necessity and safeguards against arbitrariness that are intrinsic to a democratic society governed by the rule of law.[300]

Consequently, the first criterion that the ECtHR is to apply when examining whether the limitation is duly justified is whether it has been the subject of scrutiny by "an authority, judicial or not, which is independent from the executive body seeking to impose the limitation".[301] As part of the ECtHR's examination, the scope of the remit and the possibility for the authority to review the need for keeping documents classified are taken into consideration.[302] In cases where documents remain classified, the ECtHR will

[296] Ibid., paras. 133, 137.
[297] Ibid., para. 144.
[298] Ibid., para. 138.
[299] Ibid., para. 139.
[300] Ibid.
[301] Ibid., paras. 140–141.
[302] Ibid., para. 141.

determine if the national authority has duly identified the competing interests and balanced them against one another.[303] An authority that has failed in its examination of the limitation, however, is not sufficient for violating Article 1 of Protocol No. 7.[304] In those cases, the ECtHR must turn to see whether any counterbalancing factors are present in the case that mitigate the limitations of the procedural rights so that the very essence still is preserved.[305] "The less stringent the examination, the stricter the Court's scrutiny of the counterbalancing factors will have to be".[306]

In the present case, the Romanian courts found that national law required them to refrain from informing Muhammad and Muhammad about the facts and grounds of the case.[307] The applicants did not have any other possibility to access the information as the information remained classified and as their legal representatives did not hold ORNISS certificates.[308] When determining whether these limitations were duly justified, the ECtHR followed the method of legal problem solving set out above. It noted, initially, that domestic law did not allow for Romanian courts to examine whether the evidence in the file had to remain classified in order to preserve national security. It was, moreover, not apparent that the courts had carried out any examination relating to the need for limitations of Muhammad and Muhammad's procedural rights.[309] The Court also emphasized the fact that the press release, issued the day after the hearing, contained more detailed information about the case than what Muhammad and Muhammad had been provided with, contradicts the need for such strict limitations.[310] As the ECtHR did not find Romanian courts to have examined the need to limit the procedural rights of the applicants thoroughly, it moved on to exercise strict scrutiny with regards to counterbalancing factors.[311] The Court did also take into consideration that

[303] Ibid., para. 143.
[304] Ibid., para. 144.
[305] Ibid.
[306] Ibid., para. 145.
[307] Ibid., para. 158.
[308] Ibid., paras. 159–161.
[309] Ibid., paras. 162–163.
[310] Ibid., para. 164.
[311] Ibid., para. 165.

the limitations in the present case were significant.[312] This, and the Court's approach for its examination, will be described in greater detail below.

Counterbalancing factors

The ECtHR presented two guiding principles that are to be used when determining the need for counterbalancing factors in a specific case. First, it was stated that "the more the information available to the alien is limited, the more safeguards will be important in order to counterbalance the limitation of his or her procedural rights".[313] In addition, "where the circumstances of a case reveal particularly significant repercussions for the alien's situation, the counterbalancing safeguards must be strengthened accordingly".[314] It was also added that the scrutiny of counterbalancing by the ECtHR will be more strict in cases where there has not been a duly examination of the limitations by the national authority.[315]

Regarding types of counterbalancing measures and their scope, the Court found that there is no European consensus.[316] Accordingly, the measures applied can vary with reference to different domestic legislations and procedures as a certain margin of appreciation is afforded Member States also in this respect.[317] The ECtHR did, however, list a number of factors, non-exhaustively, that are to be taken into account when examining whether the procedural rights can be exercised in an effective manner.[318] These factors are listed in the following:

- The relevance of the information disclosed to the alien as to the grounds for his or her expulsion and the access provided to the content of the documents relied upon.

[312] Ibid.
[313] Ibid., para. 146.
[314] Ibid.
[315] Ibid., para. 145.
[316] Ibid., para. 148.
[317] Ibid., paras. 148–149.
[318] Ibid., para. 150.

- Disclosure to the alien of information as to the conduct of the proceedings and the domestic mechanisms in place to counterbalance the limitation of his or her rights.
- Whether the alien was represented.
- Whether an independent authority was involved in the proceedings.[319]

Regarding information to be provided to aliens, the ECtHR stated that it shall look at the circumstances of each case and whether the aliens have been informed about the substance of the accusations against him or her to the fullest possible extent whilst maintaining confidentiality.[320] Like mentioned above, whether an independent authority has examined the information and determined whether it can be declassified or not is also a factor of importance that is to be considered.[321]

When it comes to whether the alien was represented, it is expressly stated in Article 1 paragraph 1 (c) of Protocol No. 7 that aliens shall be allowed to be "represented before the competent authority or persons designated by that authority".[322] This constitutes a significant counterbalancing factor, but the rights enjoyed by the representative should also be taken into consideration when determining if the alien has been able to exercise his or her rights effectively.[323]

Article 1 paragraph 1 (a) and (b) of Protocol No. 7 affords the alien the right to "submit reasons against his expulsion" and to "have his case reviewed". When determining whether these provisions have been fulfilled the nature and degree of scrutiny of the expulsion measure, the authority or authorities

[319] See subheadings *Muhammad and Muhammad v. Romania* [GC], No. 80982/12, ECHR 2020-10, paras. 151–157.
[320] *Muhammad and Muhammad v. Romania* [GC], No. 80982/12, ECHR 2020-10, para. 151.
[321] Ibid., para. 152.
[322] Ibid., para. 154.
[323] Ibid., para. 155.

involved, and whether the alien was effectively able to challenge the allegations against him or her, are factors that are considered.[324] Moreover, it is of importance whether the authority effectively could examine the grounds of the case and, if so, duly exercised this power (e.g., looking at whether the authority was able to verify the authenticity of the claims and had access to the totality of the file).[325] The ECtHR did, however, emphasize that Article 1 of Protocol No. 7 does not require that all factors have to be fulfilled, but rather that the expulsion proceeding has to be examined as a whole.[326]

In the present case concerning the two expelled Pakistani nationals, some counterbalancing factors had been upheld according to the government of Romania. For example, the applicants had received some information about the accusations against them and been notified of the initiated proceedings through an interpreter.[327] They had also been informed that they were entitled to legal representatives with ORNISS certificates. In addition, the Romanian government claimed that impartial and independent courts had conducted the proceedings.[328]

The ECtHR, however, emphasized that only the applicable legal provisions had been provided to the applicants and no mention had been made of the alleged conduct itself.[329] This did not suffice and was not regarded as adequate information as to the factual reasons for the expulsion.[330] The applicants did, moreover, not receive any additional information after appealing to the High Court even though the press release had been issued in between.[331] The court also added that "a press release cannot be regarded as a valid source of information" as it neither included in the case file nor could be established as being the basis for initiating the proceedings.[332] Moreover, a press release

[324] Ibid., para. 156.
[325] Ibid.
[326] Ibid., para. 157.
[327] Ibid., paras. 166–167.
[328] Ibid., para. 167.
[329] Ibid., para. 168.
[330] Ibid.
[331] Ibid., paras. 170–171.
[332] Ibid., paras. 171–172.

was not to be regarded, according to the Court, as an appropriate means of providing applicants with the necessary information of their case.[333] In sum, the ECtHR found that Muhammad and Muhammad had not been informed about the allegations against them in order to exercise their rights effectively.[334] As no information had been provided, this could not be seen as a counterbalancing factor to the limitations as the Romanian government had argued.[335]

The ECtHR found that the applicants were notified of the proceedings and provided with interpreters.[336] However, the applicants were not informed about the possibility to request lawyers and at what point of the proceedings this request was to be made.[337] They did also not receive information about the significance of an ORNISS certificate.[338] This failure to give the applicants information about the conduct of Romanian expulsion proceedings and afford them an effective possibility of obtaining representation came to deprive Muhammad and Muhammad of the procedural safeguards they were entitled to according to the ECtHR.[339]

Lastly, the ECtHR turned to the question of whether the expulsion decision was subject to independent scrutiny. It began with stating that the proceedings in the present case were of a judicial nature and that the High Court is the highest judicial authority in Romania.[340] In a case like this, where neither their applicants nor their lawyers are able to rely on specific evidence or information of the case, comprehensive scrutiny is required by the national courts.[341] However, nothing in the case file suggests that the Romanian courts in fact had carried out any verification of the classified information relating

[333] Ibid., para. 174.
[334] Ibid., para. 175.
[335] Ibid., para. 177.
[336] Ibid., para. 179.
[337] Ibid., para. 180.
[338] Ibid., para. 181.
[339] Ibid., paras. 182, 187.
[340] Ibid., para. 193.
[341] Ibid., para. 194.

to the veracity and credibility of the facts constituting the basis for the case.[342] Therefore, the independent judicial authority was a weighty safeguard in the case but did not suffice in itself to compensate for the limitations of the aliens' procedural rights as the degree of scrutiny had been cursory.[343]

The Court concluded by reiterating that far-reaching limitations had been implemented regarding the applicants' right to be informed of the factual elements underlying the decision and the right to access the contents of the case file in the present case. There was, moreover, no evidence suggesting that the need for limitations had been examined and identified as duly justified.[344] As a result, high demands are placed on counterbalancing factors and the ECtHR is to exercise strict scrutiny of the measures put in place.[345] Muhammad and Muhammad had received little information of the accusations against them, of the key stages of the proceedings, and of the possibility to access the classified information through a lawyer holding an ORNISS certificate.[346] The counterbalancing measures that were present did little to ensure that the applicants were able to exercise their rights in an effective manner and did therefore not suffice.[347] On the basis of the foregoing, the Court found a violation of Article 1 of Protocol No. 7 by fourteen votes to three.[348]

4.3 Concurring Opinions

Four concurring opinions were annexed to the judgment and these will be described in brief. In the joint concurring opinion of Judges Nußberger, Lemmens, and Koskelo, they argue that the specific procedural safeguards set out in Article 1 of Protocol No. 7 cannot be replaced with an "overall fairness assessment", comparable to Article 6 ECHR, as this would be contrary to the

[342] Ibid., para. 198.
[343] Ibid., para. 201.
[344] Ibid., para. 203.
[345] Ibid.
[346] Ibid., para. 204.
[347] Ibid.
[348] Ibid., paras. 2, 204. For the dissenting opinion see Section 4.4.

specificity of the procedural safeguards in Article 1 of Protocol No. 7.[349] In general, a transposition of the rights developed in the case-law regarding Article 6 ECHR to the present case was, according to them, not justified.[350] Moreover, it is held that limitations should not have been permitted in the case as there already is an explicit list of provided exceptions in the second paragraph of Article 1 of Protocol No. 7.[351] Considering the structure of the article, other exceptions should not be allowed.[352]

In the concurring opinion of Judge Pinto de Albuquerque, joined by Judge Elósegui, it is argued that the majority fails to identify the essence of the procedural rights in Article 1 of Protocol No. 7 and that the proportionality test is confused with examining the essence of the right.[353] Here Judge Pinto de Albuquerque sees two different methodological approaches of the ECtHR – the utilitarian approach and the essentialist approach.[354] When using a utilitarian approach, the Court balances the rights and interests relevant for the case, often assessing whether the contested state measure is proportionate.[355] If found to be proportionate, then the essence of the right is also found to not have been impaired.[356] This approach was, according to Pinto de Albuquerque, used in *Muhammad and Muhammad v. Romania* and he criticizes it as it leads to there being no valid explanation of what constitutes the essence of the right.[357]

Moreover, access to factual elements is seen as essential by the majority, but still not as part of the essence of the right.[358] This statement is contradictory and causes confusion according to Pinto de Albuquerque.[359] The examination

[349] *Muhammad and Muhammad v. Romania* [GC], No. 80982/12, ECHR 2020-10, joint concurring opinion of Judges Nußberger, Lemmens, and Koskelo, para. 1.
[350] Ibid., para. 8.
[351] Ibid., para. 4.
[352] Ibid.
[353] *Muhammad and Muhammad v. Romania* [GC], No. 80982/12, ECHR 2020-10, concurring opinion of Judge Pinto de Albuquerque, joined by Judge Elósegui, para. 1.
[354] Ibid., para. 8.
[355] Ibid., paras. 8–9.
[356] Ibid.
[357] Ibid., para. 13.
[358] Ibid., para. 14.
[359] Ibid.

of the essence of the right also overlaps with the examination of counterbalancing factors since the Court uses this utilitarian approach.[360] Instead, he argues, the question of proportionality, as well as principles like the margin of appreciation, only become relevant after it has been established that the essence of the right has remained unaffected.[361] To depart from the essentialist approach in this manner, and instead rely on the utilitarian one, the substance of the Convention rights face the risk of becoming eviscerated and gives Member States the opportunity to impose and justify limitations that in practice would affect the essence.[362] Like in the previous concurring opinion, Pinto de Albuquerque also sees using a doctrine created under Article 6 in the present case as unjustified.[363]

Judge Serghides does, in his concurring opinion, disagree with the majority's judgment to the extent the rights of Article 1 of Protocol No. 7 are not regarded as absolute, hence allowing for limitations. He, moreover, disagrees with the complicated method of legal problem solving set out by the Court as it "surely [would] not have been intended by the drafters of the provision when dealing with the minimum procedural safeguards of lawfully resident aliens".[364] The established method of legal problem solving is also not seen as compatible with the letter and the object of the article and does, moreover, undermine the effective protection of the right as is not seen as absolute.[365] By interpreting the provision as a whole and by the provision containing no other express or implied limitations apart from the second paragraph, the rights of Article 1 paragraph 1 of Protocol No. 7 are absolute in his opinion.[366]

In the last concurring opinion of Judge Elósegui it is stated that "the judgment could have been improved by making a clearer distinction between the test as

[360] Ibid., para. 16.
[361] Ibid., para. 17.
[362] Ibid., para. 22.
[363] Ibid., paras. 21–23.
[364] *Muhammad and Muhammad v. Romania* [GC], No. 80982/12, ECHR 2020-10, concurring opinion of Judge Serghides, para. 4.
[365] Ibid.
[366] Ibid., paras. 9–13.

to the essence of a right and the proportionality test (assessment of the counterbalancing factors)".[367] Focus is also placed on the danger of using terrorism prevention as an excuse for violating the essence of fundamental rights since Muhammad and Muhammad were not informed of the accusations against them due to their links to terrorist activities.[368]

4.4 Dissenting Opinion

In addition to the concurring opinions that are accounted for above, Judges Yudkivska, Motoc, and Paczolay have attached a dissenting opinion as they believe the majority's judgment departs from previous case-law and that it fails to take into account the possibility for Romanian lawyers to access classified information through an ORNISS certificate.[369] Moreover, the main objection to the majority's judgment relates to the relationship between Article 1 of Protocol No. 7 and Article 6 ECHR as the dissenting judges claim that a higher degree of protection is afforded under the first provision.[370] This is seen as paradoxical as the procedural safeguards set out in Article 1 of Protocol No. 7 are meant to be of a minimum character.[371] The rights afforded to the alien under Article 1 of Protocol No. 7, it is argued, should therefore be less extensive than those enshrined in Article 6.[372]

As a basis for their argumentation, the judges rely on another GC judgment in *Regner v. Czech Republic*.[373] The case concerned the right to a fair hearing enshrined in Article 6 of the Convention and the ECtHR had to determine whether the essence of the applicant's rights under the article had been impaired.[374] Here, the ECtHR considered the proceedings as a whole and had to

[367] *Muhammad and Muhammad v. Romania* [GC], No. 80982/12, ECHR 2020-10, concurring opinion of Judge Elósegui, para. 1.
[368] Ibid., paras. 2–3.
[369] *Muhammad and Muhammad v. Romania* [GC], No. 80982/12, ECHR 2020-10, joint dissenting opinion of Judges Yudkivska, Motoc, and Paczolay, pg. 103.
[370] Ibid.
[371] Ibid.
[372] Ibid., pg. 104.
[373] *Regner v. Czech Republic* [GC], No. 35289/11, ECHR 2017-09.
[374] *Muhammad and Muhammad v. Romania* [GC], No. 80982/12, ECHR 2020-10, joint dissenting opinion of Judges Yudkivska, Motoc, and Paczolay, pg. 103.

"ascertain whether the limitations on the principles of adversarial proceedings and equality of arms, as applicable in civil procedure, had been sufficiently counterbalanced by other procedural safeguards".[375] *Regner v. Czech Republic* presents many similarities to *Muhammad and Muhammad v. Romania* as both cases concern classified documents underlying the decisions which neither the applicants nor their lawyers were able to access.[376] Only the domestic courts were able to access the entire content of the case files in both cases.[377]

The method of legal problem solving developed by the Court in *Muhammad and Muhammad v. Romania* is built on previous case-law regarding Articles 5 and 6 ECHR.[378] Article 6 ECHR requires, in principle, the right for the individual to be informed of all accusations against him or her, as well as full access to the case file and the information contained therein.[379] As stated in *Muhammad and Muhammad v. Romania,* Article 1 of Protocol No. 7 instead secures "that the aliens concerned be informed of the relevant factual elements which have led the competent domestic authorities to consider that they represent a threat to national security and that they be given access to the content of the documents and the information in the case file on which those authorities relied when deciding on their expulsion".[380] At a closer examination, however, the dissenting judges argue that "the enumeration of the criteria to be considered when analysing the compatibility of the limitations in the present case seems to be based on a transposition of those that were adopted by the Court in *Regner* and even to extend the Contracting States' obligations in the present field".[381]

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[375] *Muhammad and Muhammad v. Romania* [GC], No. 80982/12, ECHR 2020-10, joint dissenting opinion of Judges Yudkivska, Motoc, and Paczolay, pg. 103; *Regner v. Czech Republic* [GC], No. 35289/11, ECHR 2017-09, para 161.
[376] *Muhammad and Muhammad v. Romania* [GC], No. 80982/12, ECHR 2020-10, joint dissenting opinion of Judges Yudkivska, Motoc, and Paczolay, pg. 104.
[377] Ibid.
[378] Ibid., pg. 105.
[379] Ibid., pg. 104 where reference is made to para. 129 of the majority's judgment.
[380] Ibid.
[381] Ibid., pg. 105.

For example, the dissenting judges state that the requirement of limitations having to be duly justified is a requirement that is missing in *Regner v. Czech Republic*.[382] Instead, the ECtHR did in that case find it sufficient that national courts determine whether classification is justified and order declassification if it is not.[383] With the current interpretation in *Muhammad and Muhammad v. Romania*, the dissenting judges argue, a system is set up where the ECtHR first examines whether an independent authority has reviewed the need for classifying the information and, second, whether the examination has weighed the interests so that the limitations can be seen as duly justified.[384] This last requirement would then go beyond what follows from *Regner*.[385]

The dissenting judges also take issue with the counterbalancing factors relating to the relevance of disclosed information. In *Regner v. Czech Republic* it was sufficient to provide information "at the very least summarily".[386] In *Muhammad and Muhammad v. Romania* this phrase has been omitted, causing the dissenting judges to believe that Article 1 of Protocol No. 7 once would go beyond Article 6 also in this regard.[387] Such an interpretation would not correspond to what the forefathers of the Convention intended and does, moreover, lack a European consensus.[388]

The dissenting judges do, in other words, believe that the majority's interpretation is too far-reaching in relation to the previous case-law of the ECtHR.[389] Emphasis is also placed on that the lawyers, instead of the Court, should have informed the applicants about the possibility for them to retain legal representatives with ORNISS certificates. Such a safeguard would then effectively compensate for the limitation as a counterbalancing measure.[390] This leads the dissenting judges to conclude that the majority has either departed from

[382] Ibid.
[383] Ibid.
[384] Ibid., pgs. 105–106.
[385] Ibid., pg. 106.
[386] Ibid.
[387] Ibid.
[388] Ibid., pg. 107.
[389] Ibid.
[390] Ibid.

recent case-law or sought to indirectly "circumvent the findings that it made in that judgment".[391]

4.5 Key Cases of the ECtHR in Relation to Muhammad and Muhammad v. Romania

4.5.1 Cases on Article 1 Paragraph 1 of Protocol No. 7

Previous to *Muhammad and Muhammad v. Romania*, the ECtHR has passed judgment on several cases concerning Article 1 of Protocol No. 7.[392] Moreover, there has so far been one case subsequent to *Muhammad and Muhammad v. Romania* that was delivered in March 2021 and will be presented in Section 4.5.3 below.[393] Apart from these presented cases, it is important to note that it is fairly common that complaints regarding violations of Article 1 to Protocol No. 7 are attached to complaints of violations of other articles of the Convention.[394] However, it is commonplace for the ECtHR to find that there is no substance of the complaint or that the case rather will be tried under a different provision than Article 1 of Protocol No. 7.[395]

As a frame for the disposition, the Guide to Article 1 of Protocol No. 7 of the European Convention on Human Rights[396] will be used.[397] This document is part of the case-law guides published by the ECtHR in order to inform legal practitioners about the most fundamental cases of the Court and can therefore constitute an appropriate basis for the following presentation.[398] The selection

[391] Ibid., pg. 108.
[392] An overview of the most important cases and their outcome can be found in Supplement A to the thesis.
[393] *Hassine v. Romania,* No. 36328//13, ECHR 2021-03.
[394] Rainey, Wicks & Ovey (2021) pg. 645.
[395] Ibid.
[396] Guide to Article 1 of Protocol No. 7 of the European Convention on Human Rights.
[397] See more about the reasons for using the guide as a frame for presenting previous case-law beneath Section 1.3.
[398] Guide to Article 1 of Protocol No. 7 of the European Convention on Human Rights, pg. 4.

of cases cited in the guide has been made from leading, major and recent judgments and decisions of the ECtHR.[399] Moreover, as the guide was published in December 2020, relevant precedents and key concepts are presented as they were up until 31 October 2020.[400] Nevertheless, there will, without doubt, be further developments in the case-law concerning procedural safeguards in expulsion proceedings arising from the practices and policies of some Member States.[401]

The guide begins with looking further into the conditions of applicability.[402] First, it is stated that the term "residence" should be interpreted as indicated by the explanatory report and this has been confirmed in subsequent case-law of the Court.[403] In *Nolan and K. v. Russia*, the concept "residence" has been further clarified and the ECtHR stated that the term goes beyond physical presence on the territory and instead depends "on the existence of sufficient and continuous links with a specific place".[404] By establishing a requirement of physical presence the intent has rather been to exclude aliens that have not been admitted to the territory or who only have been admitted for non-residential purposes.[405] Second, "lawfully" is to be understood as residence that complies with the conditions set up by domestic law of the Member State concerned.[406] For example, aliens having no valid residence permit or having expired temporary are not to be considered "lawfully resident".[407] In *Bolat v. Russia*, an applicant was found to be "lawfully resident" at the time of the

[399] Ibid.
[400] Ibid.
[401] Rainey, Wicks & Ovey (2021) pg. 645.
[402] Guide to Article 1 of Protocol No. 7 of the European Convention on Human Rights, pg. 7, para. 13.
[403] *Yildirim v. Romania* (dec.), No. 21186/02, ECHR 2007-09, pg. 8; *S.C. v. Romania*, No. 9356/11, ECHR 2015-02, para. 83.
[404] *Nolan and K. v. Russia*, No. 2512/04, ECHR 2009-02, para. 110.
[405] Guide to Article 1 of Protocol No. 7 of the European Convention on Human Rights, pg. 7, para. 16.
[406] *Sultani v. France*, No. 45223/05, ECHR 2007-09, para. 88; *Bolat v. Russia*, No. 14139/03, ECHR 2006-10, para. 76
[407] See for example *Sejdovic and Sulejmanovic v. Italy* (dec.), No. 57575/00, ECHR 2002-03; *Sulejmanovic and Sultanovic v. Italy* (dec.), 2002), No. 57574/00, ECHR 2002-03.

expulsion, even though the competent national authority had annulled his residence permit, since the implementation of the annulment had been suspended pending reviewal of its lawfulness.[408]

Regarding the term "expulsion", barring an alien, lawfully resident in a Member State, from returning to the territory of the state following his or her next trip abroad amounts to an expulsion.[409] In the decision of *Yildirim v. Romania*, the ECtHR instead found that an applicant not having resided in Romania and having been barred from entering the state had not been the subject of an expulsion.[410]

In *Ljatifi v. the former Yugoslav Republic of Macedonia*, expulsion had been ordered but not implemented. The Court examined the practical consequences of the ordered expulsion, even though it had not taken place, and found that it "had the effect of terminating the legal basis for the applicant's lawful residence in the respondent State and had also contained an order compelling her to leave it within the specified time-limit".[411] Moreover, the order had neither been revoked nor was subject to any formal requirements with the result that the alien risked being expelled at any time.[412] Article 1 of Protocol No. 7 was, due to the circumstances cited above, applicable in the present case.[413]

The requirement that an expulsion has to be pursuant of "a decision reached in accordance with law" has in *Bolat v. Russia* been confirmed as being in accordance with the domestic law of the Member State.[414] As mentioned in *Muhammad and Muhammad v. Romania*, it is also noted in previous case-law that not only the existence of a legal basis is set up as a requirement, but that

[408] *Bolat v. Russia*, No. 14139/03, ECHR 2006-10, para. 78.
[409] *Nolan and K. v. Russia*, No. 2512/04, ECHR 2009-02, para. 112.
[410] *Yildirim v. Romania* (dec.), No. 21186/02, ECHR 2007-09, pg. 8.
[411] *Ljatifi v. the former Yugoslav Republic of Macedonia*, No. 19017/16, ECHR 2018-05, para. 22.
[412] Ibid., paras. 21–23.
[413] Ibid., para. 23.
[414] *Bolat v. Russia*, No. 14139/03, ECHR 2006-10, para. 81.

also the quality of the law has to be examined based on principles derived from the rule of law.[415]

In this regard, it is stated that the law "must be accessible and foreseeable and must also afford a measure of protection against arbitrary interference by the public authorities with the Convention rights".[416] No exceptions to this requirement are permissible.[417] It should be noted, however, that the Court, in *Ljatifi v. the former Yugoslav Republic of Macedonia*, has stated that not all conducts that may prompt an expulsion in order to defend national security have to be expressly listed in a legal provision in order for the law to fulfill the requirement of foreseeability.[418] The condition of foreseeability has not been fulfilled, however, in cases where the applicant has not been notified of the orders against them in a timely manner or when the applicants have not had the slightest indication of what they have been accused of.[419] Here, the approach of the ECtHR sometimes differs.[420] In some cases, only the quality of the law is examined and in other cases, the Court moves on to compliance with the procedural safeguards enlisted in the article.[421]

As regards the three specific procedural safeguards enumerated in the article, the Court has, according to the guide, taken different circumstances into account, sometimes by looking at a specific safeguard listed in the article and sometimes by making an overall assessment.[422] The right for the alien "to submit reasons against his expulsion" stated in paragraph 1 (a) of the

[415] *Ahmed v. Romania,* No. 34621/03, ECHR 2010-07, para. 52; *Kaya v. Romania*, No. 33970/05, ECHR 2006-10, para. 55; *Lupsa v. Romania*, No. 10337/04, ECHR 2006-06, para. 55.
[416] Ibid.
[417] *Sharma v. Latvia*, No. 28026/05, ECHR 2016-03, para. 80; *Bolat v. Russia*, No. 14139/03, ECHR 2006-10, para. 81.
[418] *Ljatifi v. the former Yugoslav Republic of Macedonia*, No. 19017/16, ECHR 2018-05, para. 35.
[419] *Kaya v. Romania*, No. 33970/05, ECHR 2006-10, para. 57; *Lupsa v. Romania*, No. 10337/04, ECHR 2006-06, para. 57.
[420] Guide to Article 1 of Protocol No. 7 of the European Convention on Human Rights, pg. 10, para. 32.
[421] *Lupsa v. Romania*, No. 10337/04, ECHR 2006-06, paras. 58–60; *C.G. et al. v. Bulgaria*, No. 1365/07, ECHR 2008-04, paras 74; *Geleri v. Romania*, No. 33118/05, ECHR 2011-05, paras. 46–47.
[422] Guide to Article 1 of Protocol No. 7 of the European Convention on Human Rights, pg. 12, para. 41.

provision and the right "to have his case reviewed" in paragraph 1 (b) have particularly often been examined together.[423]

In *Lupsa v. Romania* the alien had not received "the slightest indication of the offence of which he was suspected" and the public prosecutor's office did not send him the order initiating the proceedings.[424] The alien had also not been able to successfully adjourn the case as the requests made had been rejected by the Court. Due to this, the lawyer of the alien was unable to study the order and prepare his defense.[425] In *Baltaji v. Bulgaria* the applicant had also been unable to ascertain the factual reasons for his expulsion and the Court had, moreover, rejected an appeal against the expulsion so that no independent or impartial authority had examined the case on its merits.[426] In several cases, the ECtHR found the review by the domestic courts to have been a mere formality such that "the applicant was not genuinely able to have his case examined in the light of reasons militating against his deportation", something that conflicts with the principle of effectiveness.[427]

In *Nolan and K. v. Russia*, a violation of Article 1 of Protocol No. 7 was found to be the case when a decision to expel the applicant was not communicated to him for a time-period of over three months.[428] This would be in breach of the law having to be foreseeable and, moreover, it deprived the applicant of his right to submit reasons against his expulsion and have his case reviewed with the participation of a counsel.[429]

In a more recent case, *Ljatifi v. the former Yugoslav Republic of Macedonia*, the Court summarily described the applicable principles when examining the compatibility of Article 1 paragraph 1 (a) and (b) in relation to an expulsion

[423] Ibid., pg. 12, para. 42.
[424] *Lupsa v. Romania*, No. 10337/04, ECHR 2006-06, para. 59.
[425] Ibid.
[426] *Baltaji v. Bulgaria*, No. 12919/04, ECHR 2011-07, paras. 57–58.
[427] See for quote *C.G. et al. v. Bulgaria*, No. 1365/07, ECHR 2008-04, para. 74. Other examples can be found in *Kaushal et al. v. Bulgaria*, No. 1537/08, ECHR 2010-09, para 49; *Takush v. Greece*, No. 2853/09, ECHR 2012-01, paras. 60–63.
[428] *Nolan and K. v. Russia*, No. 2512/04, ECHR 2009-02, para. 115.
[429] Ibid.

that took place based on national security grounds. This section of the case was, moreover, referenced and used as a basis for the Court's assessment in *Muhammad and Muhammad v. Romania*[430] and is stated in the following:

> "35. In so far as the impugned order was based on national security considerations, the Court has held that the requirement of foreseeability does not go so far as to compel States to enact legal provisions listing in detail all conduct that may prompt a decision to expel an individual on national security grounds. However, even where national security is at stake, the concepts of lawfulness and the rule of law in a democratic society require that deportation measures affecting fundamental human rights be subject to some form of adversarial proceedings before an independent authority or a court competent to effectively scrutinise the reasons for them and review the relevant evidence, if need be with appropriate procedural limitations on the use of classified information. The individual must be able to challenge the executive's assertion that national security is at stake. While the executive's assessment of what poses a threat to national security will naturally be of significant weight, the independent authority or court must be able to react in cases where the invocation of this concept has no reasonable basis in the facts or reveals an interpretation of "national security" that is unlawful or contrary to common sense and arbitrary (see *C.G. and Others,* cited above, § 40)."[431]

In previous case-law of the Court, where the applicants had not been informed of the specific accusations against them but instead only knew that there were indications of them having engaged in activities endangering national security, the ECtHR has stated that an independent body or tribunal should be informed of the grounds and receive access to the relevant evidence of the case.[432] However, prior to *Muhammad and Muhammad v. Romania*, the

[430] *Muhammad and Muhammad v. Romania* [GC], No. 80982/12, ECHR 2020-10, para. 121.
[431] *Ljatifi v. the former Yugoslav Republic of Macedonia*, No. 19017/16, ECHR 2018-05, para. 35.
[432] See especially *Lupsa v. Romania*, No. 10337/04, ECHR 2006-06, para. 10; *Kaushal et al. v. Bulgaria*, No. 1537/08, ECHR 2010-09, para 6; *Baltaji v. Bulgaria*, No. 12919/04, ECHR 2011-07, para 9; *Ljatifi v. the former Yugoslav Republic of Macedonia*, No. 19017/16, ECHR 2018-05, para. 7.

ECtHR had not addressed the question of whether it is necessary to disclose information to the alien regarding the specific accusations on which the expulsion has been based.[433] In *Lupsa v. Romania,* the ECtHR did state, however, that Article 1 of Protocol No. 7 gives the alien the right to be notified of the accusations against him or her.[434] The Court has, moreover, found a breach of the procedural safeguards of the article in cases where the alien has not been provided with any information relating to the grounds of the case.[435] It has also noted that appropriate limitations regarding the use of classified information can be instituted, even though it has not gone further into the extent of the possible limitations or whether the alien, generally, is given a right of access to the documents of the case file.[436]

Regarding the right to be represented before a competent authority, the explanatory report does not mention anything about the nature of the representation.[437] Aliens have been represented before non-judicial authorities in several cases and the competent authority may, as stated before, be either administrative or judicial.[438] In *Baltaji v. Bulgaria*, an appeal that had been made to the Interior Minister of the respondent State was not accepted as "the minister, who was the institutionally higher authority in relation to the authority which had issued the impugned order, could not be regarded as an independent and impartial organ".[439]

[433] *Muhammad and Muhammad v. Romania* [GC], No. 80982/12, ECHR 2020-10, para. 127.
[434] *Lupsa v. Romania*, No. 10337/04, ECHR 2006-06, para. 59.
[435] See for example *Lupsa v. Romania*, No. 10337/04, ECHR 2006-06, paras. 40, 56; *Kaushal et al. v. Bulgaria*, No. 1537/08, ECHR 2010-09, paras. 30, 48; *Baltaji v. Bulgaria*, No. 12919/04, ECHR 2011-07, para 58; *Ljatifi v. the former Yugoslav Republic of Macedonia*, No. 19017/16, ECHR 2018-05, paras. 36–39.
[436] *Ljatifi v. the former Yugoslav Republic of Macedonia*, No. 19017/16, ECHR 2018-05, para. 35.
[437] Guide to Article 1 of Protocol No. 7 of the European Convention on Human Rights, pg. 17, para. 60.
[438] See for example *Sharma v. Latvia*, No. 28026/05, ECHR 2016-03; *Baltaji v. Bulgaria*, No. 12919/04, ECHR 2011-07.
[439] *Baltaji v. Bulgaria*, No. 12919/04, ECHR 2011-07, para. 58.

4.5.2 Cases on Article 1 Paragraph 2 of Protocol No. 7

Muhammad and Muhammad v. Romania does not concern itself with the second paragraph of the article, something that was criticized in some of the concurring opinions attached to the case.[440] As stated in the section regarding the explanatory report above, paragraph 2 allows for an exception to the alien's right to exercise the rights established under the first paragraph in cases where it is necessary in the interest of public order or for national security reasons.[441] This has been confirmed in e.g., *C.G. et al. v. Bulgaria* where the Court also stated that the principle of proportionality must be taken into account when the exception is applied.[442] In this case, the Court found that there had been no grounds for an expedited expulsion even though the review procedure had taken place after the expulsion.[443] Therefore, Bulgaria was found to have breached the relevant provision.[444]

If an alien is expelled before exercising his or her rights in the first paragraph on the basis of public order, it must also be shown that the exceptional measure was necessary, something that does not apply when the state instead relies on national security grounds for justifying the expedited expulsion.[445] Subsequent case-law has, however, confirmed that the alien nonetheless is entitled to exercise the rights under the first paragraph after he or she has been expelled.[446]

The terms "public order" and "national security" are often understood as being some of the most vague and ambiguous wordings in international

[440] See Section 4.3 above.
[441] Explanatory Report to the Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, para. 15.
[442] *C.G. et al. v. Bulgaria*, No. 1365/07, ECHR 2008-04, paras. 77–78.
[443] Ibid., para. 80.
[444] Danelius (2015) pg. 638.
[445] Guide to Article 1 of Protocol No. 7 of the European Convention on Human Rights, pg. 17, para. 60; Explanatory Report to the Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, para. 15.
[446] *Lupsa v. Romania*, No. 10337/04, ECHR 2006-06, para. 53; *Kaya v. Romania*, No. 33970/05, ECHR 2006-10, para. 53.

law.[447] As a result, various interpretations exist, and the concepts may constitute a source of abuse from public administrative bodies wanting to expel "undesirable" aliens.[448] This has also been observed by the Court in *C.G. et al. v. Bulgaria*, where it expressed its view that the domestic courts in the case had allowed the notion of "national security" to be stretched beyond its natural meaning.[449]

There have been few cases on the second paragraph of the article. In *Nolan and K. v. Russia*, the Court found that no material or evidence had been submitted to convince the Court that interests relating to national security or public order were endangered.[450] Therefore there had been a breach of Article 1 of Protocol No. 7.[451] The same was the case in *C.G. et al. v. Bulgaria* but the Court also added that, in addition to the government of the Member State not having presented any arguments relating to public order or national security interests being at stake, there was no indication suggesting that expelling the alien before he had challenged the measure had been "truly necessary".[452] In *Takush v. Greece*, "merely indicating that the applicant was dangerous for public order and security, without relying on the slightest argument in support of that assertion, cannot be justified by the provisions of paragraph 2 of Article 1 of Protocol No. 7".[453] There was also found to have been a violation of the article in *Ljatifi v. the former Yugoslav Republic of Macedonia*. In this case, no indication of the facts underlying the assessment of the national authority claiming a risk for national security had been made.[454] Still, the assessment of the national authority was accepted by the competent reviewing authority.[455]

[447] Wojnowska-Radzińska (2015) pg. 137.
[448] Wojnowska-Radzińska (2015) pg. 137.
[449] *C.G. et al. v. Bulgaria*, No. 1365/07, ECHR 2008-04, para. 43.
[450] *Nolan and K. v. Russia*, No. 2512/04, ECHR 2009-02, para. 115.
[451] Ibid.
[452] *C.G. et al. v. Bulgaria*, No. 1365/07, ECHR 2008-04, para. 80.
[453] *Takush v. Greece*, No. 2853/09, ECHR 2012-01, para. 63.
[454] *Ljatifi v. the former Yugoslav Republic of Macedonia*, No. 19017/16, ECHR 2018-05, paras. 36–38.
[455] Ibid.

4.5.3 Hassine v. Romania

In the most recent case, *Hassine v. Romania,* the methodology established in *Muhammad and Muhammad v. Romania* is used in order to determine whether there has been a violation of Article 1 of Protocol No. 7.[456] Once applied to the circumstances of the case, it became clear that there has been a violation of the article.[457] In the case, the applicant could not access the documents of the case as these were classified and neither could the legal representative, as an ORNISS certificate had not been issued.[458] This constituted a substantial limitation to the procedural rights of the applicant according to the ECtHR.[459] Like in *Muhammad and Muhammad v. Romania*, the Court found that national courts had not examined the need to impose such strict limitations as has been done in the present case.[460] As the limitations, therefore, could not be seen as duly justified, the Court came to exercise strict scrutiny with regards to counterbalancing factors.[461]

Reference had been made to applicable Romanian law in conjunction with the applicant being summoned.[462] Apart from this, the applicant and the representatives of the applicant had received no additional information.[463] Moreover, the applicant was neither provided with any relevant information concerning the conduct of the proceedings nor the possibility of requesting a lawyer with an ORNISS certificate.[464] As a result, even though the proceedings had been of a judicial nature and decided on by high judicial authorities in Romania, the applicant had not been able to exercise the rights enshrined in Article 1 of Protocol No. 7 effectively.[465]

[456] *Hassine v. Romania*, No. 36328//13, ECHR 2021-03, paras. 50–68.
[457] Ibid., para. 69.
[458] Ibid., para. 55.
[459] Ibid., para. 56.
[460] Ibid., para. 57.
[461] Ibid. Compare to *Muhammad and Muhammad v. Romania* [GC], No. 80982/12, ECHR 2020-10, para. 165.
[462] Ibid., para. 58.
[463] Ibid.
[464] Ibid., para. 61.
[465] Ibid., paras. 64, 68.

4.5.4 Relevant Cases on Other Provisions of the ECHR

As stressed in *Muhammad and Muhammad v. Romania* and the explanatory report, Article 6 ECHR concerning the right to a fair trial is not applicable to expulsion proceedings.[466] In *Maaouia v. France*, the ECtHR found that Article 1 of Protocol No. 7 consisted of specific safeguards that explicitly related to the expulsion of aliens and that these safeguards had been created in order to fill a gap in the ECHR system.[467] According to the Court, this showed that "the States were aware that Article 6 § 1 did not apply to procedures for the expulsion of aliens and wished to take special measures in that sphere".[468] Thus, what was stated in the explanatory report was confirmed and the Court declared that a decision to deport a person does not constitute a determination of a criminal charge or of the person's civil rights or obligations.[469] "Civil rights and obligations" were, by the ECtHR, interpreted as autonomous concepts and it was stressed that the provisions of the Conventions had to be interpreted in the light of the broader ECHR system.[470] The initiation of expulsion proceedings is rather seen as being of an administrative nature and as an act of public authorities governed by public law.[471] Article 6 ECHR is, as a result, not applicable to expulsion proceedings and is to be distinguished from the safeguards enshrined in Article 1 of Protocol No. 7.[472]

One could note, however, that the judgment in *Maaouia v. France* has not been completely uncontroversial. In fact, the judgment has been met with criticism in doctrine.[473] Judge Loucaides, joined by Traja, did in his dissenting opinion, criticize the ECtHR's reluctance to interpret the determination of a

[466] *Muhammad and Muhammad v. Romania* [GC], No. 80982/12, ECHR 2020-10, para. 115 where reference also is made to *Maaouia v. France* [GC], No. 39652/98, ECHR 2000-10, para 38; Explanatory Report to the Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, para. 6.
[467] Guide to Article 1 of Protocol No. 7 of the European Convention on Human Rights, pg. 6, para. 10.
[468] *Maaouia v. France* [GC], No. 39652/98, ECHR 2000-10, para. 36.
[469] Ibid., paras. 36–40.
[470] Rainey, Wicks & Ovey (2021) pg. 70.
[471] Mole (2007) pg. 67.
[472] *Maaouia v. France* [GC], No. 39652/98, ECHR 2000-10, paras. 36–40.
[473] See for example Wojnowska-Radzińska (2015) pg. 130.

person's civil rights and obligations in a liberal way.[474] Article 6 paragraph 1 should instead be given the broadest possible meaning in the light of the object and purpose of the ECHR and in accordance with the principle of good faith.[475] Consequently, the relationship between Article 6 and Article 1 of Protocol No. 7 ECHR is, according to Loucaides and Traja, to be understood in such a manner that the protection offered by Article 1 of Protocol No. 7 becomes supplementary to the judicial guarantees established by Article 6.[476]

Apart from discussing the relationship to Article 6 ECHR, the guide references *Lupsa v. Romania* and *Baltaji v. Bulgaria* where the ECtHR stated that the specific guarantees enshrined in Article 1 of Protocol No. 7 complements the protection afforded by e.g., Articles 3 and 8 in conjunction with Article 13 ECHR.[477] The articles are therefore to be tried separately, but if one article is found to have been violated, one cannot rule out that a violation could have taken place regarding any of the other provisions of the Convention as well.[478]

In *Lupsa v. Romania*, for example, the ECtHR found that both Article 1 of Protocol No. 7 and Article 8 in conjunction with Article 13 ECHR had been violated.[479] Here, the Court stated that "since the applicant had indisputably integrated into Romanian society and had a genuine family life, the Court considers that his deportation and exclusion from Romanian territory put an end to that integration and radically disrupted his private and family life in a way which could not be remedied by the regular visits from his girlfriend and their child".[480] Consequently, the Court found a violation of Article 8 as there had been a violation of the applicant's right to private and family life.[481] At the same time, the applicant had not been informed of the

[474] *Maaouia v. France* [GC], No. 39652/98, ECHR 2000-10, dissenting opinion of Judge Loucaides joined by Judge Traja, pg. 18.
[475] Ibid., pg. 22.
[476] Ibid., pg. 23.
[477] Guide to Article 1 of Protocol No. 7 of the European Convention on Human Rights, pg 6, para. 11; *Lupsa v. Romania*, No. 10337/04, ECHR 2006-06, para. 51; *Baltaji v. Bulgaria*, No. 12919/04, ECHR 2011-07, para. 54.
[478] Ibid.
[479] *Lupsa v. Romania*, No. 10337/04, ECHR 2006-06, para. 61.
[480] Ibid., para. 27.
[481] Ibid.

reasons for the expulsion.[482] The Court stated that, irrespective of the protection afforded to the alien under Articles 3 and 8 in conjunction with Article 13 ECHR, aliens also benefit from the specific procedural guarantees enshrined in Article 1 of Protocol No. 7 in the event of expulsion.[483]

[482] Ibid., para. 50.
[483] Ibid., para. 51.

5 Findings and Analysis

In the previous chapters, the procedural protection afforded to aliens in Article 1 of Protocol No. 7 and the Court's interpretation of the article have been presented. The aim of this thesis is to better understand this article by looking at the scope of the procedural safeguards and by placing the current interpretation into the context of the broader ECHR system using critical legal positivism. As established in the introductory chapters of this thesis, little research has been done on the article in academia. Moreover, judges of the ECtHR have, in their separate opinions, argued that several interpretative inconsistencies have arisen within the broader ECHR system. On that account, it has become clear that there are various ways to understand the article and that the understanding largely is based on the judge or the scholar's own perspective of the broader ECHR system and the purpose of the provision as a part of this system.

With *Muhammad and Muhammad v. Romania*, it has arguably become clearer how the article is to be interpreted and applied in practice as a new method of legal problem solving is established by the ECtHR. Whether there has been a violation of the article is, to put it in a nutshell, determined by first examining whether and to what extent the alien has been protected by Article 1 of Protocol No. 7. Thereafter, permissible limitations to the alien's procedural rights are considered. If the Court finds limitations to be allowed, it will move on to see if this limitation has been considered "duly justified" by the competent independent authority in the Member State and if the limitation has been sufficiently compensated for by counterbalancing factors. If the first criterium of "duly justified" is not met, extra strict scrutiny will be exercised by the Court of the counterbalancing factors put in place.

The scope will, in other words, have to be defined in several steps. First, one would have to see whether Article 1 of Protocol No. 7 encompasses the right

claimed by the alien. In *Muhammad and Muhammad v. Romania*, it is interesting that the Pakistani students did not rely on any of the explicit rights afforded by the provision. Instead, they relied on their right to be informed of the factual elements underlying the decision and their right to access the contents of the case file. The ECtHR found that these rights are not of an absolute character but that they, in principle, are to be ensured so that the alien is able to meaningfully challenge the authorities' allegations. Still, as the rights are not absolute, limitations are permitted.

It becomes clear from the separate opinions that considering the rights asserted by the applicants as absolute has caused discord and confusion. As mentioned above, Judge Serghides does, for example, dissent to the majority's judgment to the extent the rights of Article 1 of Protocol No. 7 are not regarded as absolute. The Court did not explicitly touch upon how the right to be informed and the right to access the information relate to the list of procedural safeguards in the first paragraph of the provision. One can, however, see that they play a vital role for how the procedural rights come to be exercised in practice and, hence, constitute a basis for determining whether the alien can exercise these rights in an effective manner. Still, the exact content of the different safeguards remains unclear. The Court does instead adopt a method of legal problem solving where the essence of the rights in question constitutes the focus of the assessment. This will be further elaborated on below.

Following the Court's method of legal problem solving set out above, after determining what rights are covered by the provision, one would move on to see whether limitations to the rights, if any, are permissible. These limitations can be quite far-reaching, but the Court will, in the following steps, examine whether they are duly justified and sufficiently counterbalanced. The basis for this examination will be whether the essence of Article 1 of Protocol No. 7 has been affected. If it has, then there has been a violation of the article and the limitations are not permissible in the present case.

It seems, moreover, as if the criteria "duly justified" and "sufficiently counterbalanced" are not of a cumulative nature. In *Muhammad and Muhammad v. Romania* as well as in *Hassine v. Romania*, the Court moved on to exercise extra strict scrutiny as regards counterbalancing factors when the limitations could not be seen as duly justified by the national authorities. As this is interesting in terms of state sovereignty and the subsidiary role of the ECtHR, it will be elaborated on below.

The new method the Court uses for its legal problem solving and how it comes to define the scope of Article 1 of Protocol No. 7 have now been set out above. In general, as regards the scope, it is clear from the wording of the provision that the procedural safeguards are not very far-reaching in their application. They, moreover, intend to function as minimum rights. State sovereignty has to a large degree been accounted for, even though some Member States still have been reluctant to ratify the article without making any declarations or reservations. As became clear in *Muhammad and Muhammad v. Romania*, however, a lengthy examination of the classified information has to take place in the Member States, which comes to limit state sovereignty on behalf of preventing arbitrary expulsion. An independent authority would need to, first, review the need for classifying the information and, second, to see whether the previous examination has weighed the interests so that the limitations can be seen as duly justified. If limitations are put into place, counterbalancing measures will also have to be taken. This serves as a good example of how Member States come to delegate part of their sovereign power and become subject to the rules of the ECHR.

Article 1 of Protocol No. 7 does not regulate the grounds for expulsion in any way and the state prerogative of exercising power in expulsion proceedings is therefore restricted in a very limited way. This has also been the subject of critique, as stated in Section 3.4. One could argue, however, that a change has begun to occur in the legal culture relating to how the law is to be interpreted as the article has been criticized for not affording enough protection to aliens. In other words, the debate that has arisen points toward the alien not receiving

any substantive protection under Article 1 of Protocol No. 7 as a value that is not completely sedimented into the legal culture.

Similarly, one could claim that a small shift could be noticed as the Court, in *Muhammad and Muhammad v. Romania*, states that the guarantees also should comprise some substantive review. This would then limit state sovereignty on behalf of greater protection for the alien. As quoted in Section 4.2.4, the Court stated that "an alien cannot meaningfully challenge the authorities' allegations to the effect that national security is at stake, or reasonably submit reasons against his expulsion without being aware of the relevant factual elements which have led the domestic authorities to believe that the alien represents a threat to national security".[484] By this important passage, the Court gives substantive meaning to the otherwise fully procedural rights enshrined in the first paragraph of the article. In other words, it is no longer sufficient to have a proceeding where the procedural safeguards merely are formally provided for. Instead, the underlying reasons for the expulsion cannot remain entirely unaddressed as was the case in *Muhammad and Muhammad v. Romania*. In this respect, it seems as if greater security for the individual in expulsion proceedings has been prioritized and this will now be further elaborated on in the light of critical legal positivism.

Using Tuori's approach, a shift in favor of the alien's interest of a due process could have become visible in the surface level of the law, i.e., in the case-law as published in law reports. The ECtHR has, as described in Section 2.4, functioned as a forum where questions relating to what belongs in the deep structure can be debated outside of a domestic setting. Moreover, the new method of problem solving adopted by the Court, and the way the Court engages with reconstruction of the law, might, in turn, get sedimented into the sub-surface layers of the law.[485] The ECtHR has, in other words, operated in the legal culture by producing and reproducing the legal order. Still, one

[484] This passage is quoted in Section 4.2.4. See reference made to *Muhammad and Muhammad v. Romania* [GC], No. 80982/12, ECHR 2020-10, para. 126.
[485] See more beneath Section 2.4 where the "recursive process" of the ECtHR is further explained.

would have to remember the many separate opinions attached to the judgment and that a change in the deep structure of the law would be a too extensive claim to make in this respect.

From a broader and more historical perspective, it is especially interesting to look at rights relating to aliens as this group previously was afforded little protection. A change in the deep structure has occurred in this regard as ensuring human rights for all humans, including aliens, is seen as a fundamental value today. For example, the fact that it was deemed necessary to fill a gap in the Convention system by implementing Article 1 of Protocol No. 7 shows how the sub-surface layers of the law have changed over time. These changes in the sub-surface layers have, as a result, led to visible changes in the surface layers of the law, e.g., with a new protocol having been added to the ECHR.

Based on what has been stated above, the different interests of the state and the individual has been weighed in a way that could lead one to believe that the alien's interest of a due process has been given priority on behalf of national security. However, one should not forget the complex method of legal problem solving that the Court sets out. As many different factors are to be considered, decreased predictability might be the result on behalf of greater flexibility in the interpretation of the Court. At the same time, as argued by several judges in the lengthy concurring opinions, allowing limitations to the procedural rights can also be seen as the judges prioritizing the interests of the state. To provide one example, Judge Pinto de Albuquerque and Judge Elósegui do, as quoted in Section 4.3 above, stress that the Court is deprived of its role of setting an effective limit on state interference as it chooses not to define what constitutes the essence of Article 1 of Protocol No. 7. As a result, it will be easier for Member States to preserve their political interests in expulsion proceedings due to no clear definition having been provided by the ECtHR. This has, in other words, led to no definition of the essence of the right becoming visible in the surface level of the law through the publishing of the Court's judgment.

In this respect, it should also be noted that the Member States retain a wide margin of appreciation. This is a principle that is very well established in the sub-surface layers of the ECHR system and, as has been mentioned in the chapters above, a wide margin of appreciation is generally afforded states in cases where competing interests must be balanced against each other. In addition, the Court decides to afford states a margin of appreciation in *Muhammad and Muhammad v. Romania* when it comes to deciding what counterbalancing measures can be put into place as the procedural rights have been limited.

When the Court attempts to strike a fair balance between the interests of the state and the right of the individual to be protected against arbitrary expulsion, the method of problem solving established by the ECtHR also comes to take other normative principles into account. Using Tuori's terminology, jurists operating in the legal culture find a way to resolve conflict between different interests by relying on principles that can be found in the deep structure of the law. Once again, the exact nature and content of the article will depend on how it is interpreted by the Court in a specific context. In this respect, the normative principles underpinning the law, some of which have been referred to as interpretative principles in Section 2.3, will guide the ECtHR in its assessment as it engages in the process of reconstructing the law where the sub-surface levels of the legal order are brought to light.

Primarily, it is the principle of effectiveness[486] that lies at the core of the Court's reasoning in *Muhammad and Muhammad v. Romania* and of the ECtHR's method that is to be used when examining alleged violations of the provision. This normative principle is part of the deep structure of the law together with the fundamental values of human rights as described in Section 1.3 above. The primary reason for this principle being regarded as firmly sedimented into both the legal culture and the deep structure of the law is that it largely is predicated on the legitimacy of the law. In other words, without

[486] For what this principle further entails, see Section 2.3.

the law being efficient and without being able to ensure fundamental human rights in practice, there would be little reason to establish a legal order for ensuring the protection of human rights in the first place.

In *Muhammad and Muhammad v. Romania*, limitations are allowed in terms of the right to be informed of the factual elements underlying the decision and the right to access the contents of the case file. Any limitations will, however, be strictly examined by the Court so that the alien still is able to exercise his or her rights in an effective manner. Briefly speaking, the alien must always be protected against arbitrary or unreasonably discretionary action from the expelling state by being able to effectively challenge the expulsion decision.

It is here that the principle comes to form the basis for the examination and, in effect, defines the actual scope of Article 1 of Protocol No. 7. In practice, as can be derived from the case, it seems as if an alien threatened with expulsion, will have to be informed of the relevant factual elements of the case and receive access to the case file as a general rule. Moreover, if limitations are placed on these rights, then counterbalancing factors should, at the very least, consist of the alien being provided with a legal representative who could access the classified information when the alien is left in the dark. Still, the exact scope remains unclear.

The ECtHR comes to cite previous case-law in *Muhammad and Muhammad* where the concepts of lawfulness and the rule of law in a democratic society, i.e., other principles of the deep structure, were used as a basis for the Court's examination. Here, it was stated, as can be seen above, that expulsions affecting fundamental rights must be subject to some form of adversarial proceedings before an independent authority or a court competent to effectively scrutinize and review the grounds. As the Court found to be the case in *Muhammad and Muhammad v. Romania*, procedural limitations were also allowed for in this case as long as the alien would be able to challenge the executive's assertion that national security is at stake. As these principles are

firmly sedimented in the deep structure of the ECHR, they will still be central for assessments made by the Court on Article 1 of Protocol No. 7.

In addition, the rule of law was used as a basis for the requirement that an expulsion has to be "in pursuance of a decision reached in accordance with law" in *Muhammad and Muhammad v. Romania*. The rule of law further comes to impose requirements on the law having to be accessible, foreseeable, and afford a measure of protection against arbitrary interference by the public authorities with the Convention rights. This was reiterated in the case but is something that pervades the entire Convention system.

Using Besson's approach, the concepts of lawfulness and the rule of law in a democratic society are also of great importance when analyzing the interpretation of the Court.[487] Above, state sovereignty and individual protection have been presented in an antagonistic manner. Besson, however, argues that the deep structure containing ideas of a democratic society and legitimacy could be seen as those normative principles that give the state its sovereign right. In other words, the relationship could have been presented in a different manner where the two are predicated on one another, something that also would lead to the levels of the law being interpreted in another way. This thesis will, however, not go further into this theory in this final chapter.

Hassine v. Romania is, so far, the only case after *Muhammad and Muhammad v. Romania* where the method of legal problem solving laid out in the latter case has been applied to other circumstances. However, due to small differences between the two cases, little additional guidance is to be sought from *Hassine v. Romania*. What becomes apparent, however, is that no clear distinction between the specific rights enlisted in the first paragraph of the article (a) to (c) is laid out. Rather, it seems as the Court uses "whether the alien was represented" and "whether an independent authority was involved in the ex-

[487] Besson's view on the relationship between state sovereignty and human rights has been presented beneath Section 2.5 above.

pulsion proceedings" as its criteria when examining if there have been sufficient counterbalancing measures taken. That the Court, in previous case-law, sometimes has chosen to examine the quality of the law on its own and sometimes has moved on to a more comprehensive assessment of the article in its entirety complicates things even further. The substantive requirement "in accordance with the law" is, moreover, not the subject of the dispute in *Muhammad and Muhammad v. Romania*. Therefore, it remains unclear how the Court will take this requirement into consideration in future judgments.

Now, the principle of effectiveness has been laid out and some aspects of *Muhammad and Muhammad v. Romania* that remain unclear have been pointed out. Another principle that is central to the case and that has been discussed above is the principle of subsidiarity. This principle is, like the principle of effectiveness, also deeply sedimented to the sub-surface layers of the law and constitutes a cornerstone of the ECHR system. Put in this context, it is very interesting that the ECtHR, as described above, makes an assessment on whether Romanian courts have examined the need to limit procedural rights of the applicant thoroughly, i.e., so that the limitations can be seen as duly justified. As previously stated, the ECtHR plays a subsidiary role in relation to national courts and in the present case, as the ECtHR comes to adjudicate on the judicial examination of a national court, it becomes clear how state sovereignty is limited and how the ECtHR comes to exercise its judicial power in cases where the national courts have done so insufficiently.

Another principle of the deep structure of the law, the proportionality principle, is not explicitly referred to in *Muhammad and Muhammad v. Romania*. However, it has been used as a basis for the Court's examination of the article in previous case law, e.g., *C.G. et al. v. Bulgaria*. Here, judge Pinto de Albuquerque's statement is interesting as he claims that the Court uses a utilitarian approach where it balances the rights and interests relevant for the case, often assessing whether the contested state measure is proportionate. He criticizes this approach as the examination of the essence of the right comes to overlap with the proportionality assessment in the present case. Due to this,

the Court fails to define what constitutes the essence of the right and the procedural safeguards risk becoming eviscerated. He does, instead, suggest an essentialist approach where questions of proportionality first become relevant after the Court has established that the essence of the right has remained unaffected. In this respect, Pinto de Albuquerque raises some important questions as he reconstructs the law and highlights the juxtaposition of those normative principles that are sedimented into the deep structure of the law. One must remember, as becomes clear from this case, that there are many different views on how the deeper principles are to be taken into consideration and how they relate to one another.

To elaborate on this, how the interests of Member States have been accounted for in expulsion proceedings gives us an inclination of how the deeper principles of sovereignty and human rights have been perceived by the judges and applied in the case-law of the Court. In the separate opinions it, moreover, becomes clear how judges, and legal scholars whom they reference, hold vastly different positions on several doctrinal and judicial issues relating to the ECHR.[488] Moreover, depending on how the judgment in *Muhammad and Muhammad v. Romania* is interpreted by scholars personally, different views of the Court become visible due to the normative character of legal science, something that also applies to this essay.

The reasoning presented above may also serve as evidence for legal scholars not being able to have direct access to the principles in the deep structure as all reconstructions are normatively loaded.[489] In the separate opinions of the judges it, hence, becomes clear how the ECtHR allows for different perspectives on what the different normative principles in the sub-surface levels of the law entail. Moreover, the different legal cultures that the judges come

[488] As we have seen above, different judges do, for example, perceive the approach of the court in different ways. They also argue in different ways regarding proportionality assessments, absoluteness of rights and the question of what constitutes the essence of a right. It also becomes clear in the separate opinions how the views of the judges do not only apply to Article 1 of Protocol No. 7, but rather are framed in a more general manner and come to touch upon more general issues relating to the perception of human rights and the Convention.

[489] See how this is described by Tuori in Section 1.3 above.

from also come to influence the way they engage with these normative principles. Here, it is important to note, that the judgment of the majority does not reflect any "truth" when it comes to how the principles and the provision are to be understood. This follows from the interpretative principles of the ECHR system and the role of the ECtHR to develop and elucidate the rules enshrined in the Convention. However, using Tuori's critical legal positivism, the normative influences on the law and its interpretation further adds to this claim of a judgment not comprising any "truth" in this respect.

The dissenting opinion, as well as many of the concurring opinions, touch upon inconsistencies with the current interpretation in *Muhammad and Muhammad v. Romania* once placed in the broader ECHR system. Here, the judges of the ECtHR aim to create coherence within the system and make connections to previous case-law of the Court to ensure a predictable application of the Convention. This can be referred to Tuori's legal culture where the legal problem solving of the jurists in court comes to contribute to the internal rationality of the legal system. The legal culture also comes to function as "the memory of the legal system", thereby making it coherent.

To begin with, it is noted that expulsion proceedings are not criminal proceedings, and that Article 6 ECHR is not applicable. Moreover, the procedural rights in Article 1 of Protocol No. 7 are of a minimum character and seem to be less broad than those safeguards applicable to criminal proceedings. This did, however, not seem to prevent the ECtHR from basing its new established method of legal problem solving on case-law relating to the procedural guarantees provided for by the right to liberty and security (Article 5 ECHR) and the right to a fair trial (Article 6 ECHR). Although it is clear that these articles do not have the same scope as Article 1 of Protocol No. 7, the ECtHR still holds that the case-law can serve as a useful indication for its new method of legal problem solving when limitations to the procedural safeguards are to be assessed. On this basis, the Court looks at the very essence of the rights and whether limitations are duly justified and sufficiently counterbalanced so that the core of the right remains unimpaired.

As argued by some judges, this does cause a contradictory outcome as the rights enshrined in Article 1 of Protocol No. 7 seem to offer a higher level of protection than Article 6 ECHR as a requirement of limitations having to be duly justified is added. This would then be the case even though the former article was only intended to offer minimum procedural safeguards in expulsion proceedings. Looking at the broader systematic structure of the Convention, it is understandable that many judges find issue with the Court's attempt to interpret the article using previous case-law on other provisions of the Convention. The same can be said regarding questions of whether limitations should be permitted at all since the second paragraph of the article already explicitly allows for exceptions.

As mentioned above, Article 13 ECHR does also provide for complementary protection in cases where an article of the Convention, other than Article 1 of Protocol No. 7, has been breached. What is interesting, however, is that the applicants did invoke Article 13 in *Muhammad and Muhammad v. Romania*. The provision was, nonetheless, not addressed by the Court and did not give a reason for why it chose not to try the case under that article as well. One could assume that the article simply was not applicable as it was invoked alone and not in conjunction with any other article of the Convention. However, considering that the principles of the deep structure of the law, e.g., relating to the rule of law and a democratic society, necessitate a coherent and rational legal system, the ECtHR could very well have attempted to clarify this further.

6 Concluding Remarks

In conclusion, procedural rights of aliens are of high importance due to the effects an expulsion has. As aliens have to be protected from arbitrary expulsion, state sovereignty can be perceived as limited on behalf of this increased protection. In *Muhammad and Muhammad v. Romania*, the ECtHR establishes a complex method of legal problem solving in order to allow for a flexible interpretation where the circumstances of the individual case and the different conflicting interests can be accounted for.

In its judgment, the ECtHR engages with reconstruction of the law when the sub-surface levels of the legal order are brought to light in the process. Especially, it is the principle of effectiveness that lies at the heart of the Court's examination but other principles firmly sedimented into the sub-surface levels of the law, e.g., the principle of subsidiarity, the proportionality principle, and the rule of law in a democratic society are also visible. Briefly speaking, limitations to the rights must not impair the very essence of Article 1 of Protocol No. 7. The alien must always be protected against arbitrary action and be able to challenge his or her expulsion in an effective way.

It seems as if the Court's interpretation of Article 1 of Protocol No. 7 is in favor of individual protection of aliens and it has even been argued that the article has been interpreted in a too extensive matter so that it offers a higher level of protection than that provided for in Article 6 ECHR. Still, quite a wide margin of appreciation is left to the state and it is left to the domestic legal system to decide when an alien should be determined "lawfully resident" so that the rights apply.

The different interpretations of the article and the deep-seated discord that appear in *Muhammad and Muhammad v. Romania* demonstrate how determining the scope of Article 1 of Protocol No. 7 will remain a controversial concern even after the GC has issued its judgment. The controversy has,

moreover, led to confusion and lack of coherence, considering the many separate opinions of the case. From Tuori's perspective, the judges operate in the legal culture and ensure a coherent and uniform application of the law. In the present case, however, there are many questions that remain unsolved or unaddressed.

As has been presented in this thesis, the right of an alien to be protected against arbitrary expulsion is dependent on a very interactive relationship with national, European, and international law. In the end, a fair balance between state sovereignty and individual protection of the aliens subject to expulsion is required. However, different views on what constitutes a fair balance based on the normative principles of the law make the issue very complex. Still, many Member States have limited their state sovereignty on behalf of ratifying and signing Protocol No. 7. Without doubt, their recognition and acceptance have improved the legal status of aliens in Europe, thus contributing to the sedimentation of new principles into the different levels of the law. It is also noteworthy that the case-law of the Court on Article 1 of Protocol No. 7 has increased over the last years, giving the system of supervision greater effect.

Supplement A

CASE	VIOLATION OF ART. 1 P7?
AHMED v. ROMANIA	YES (and of art. 5 § 1 ECHR)
BALTAJI v. BULGARIA	YES (and of arts. 8 and 13 ECHR)
BERDZENISHVILI AND OTHERS v. RUSSIA	NO (not lawfully resident + not established that the applicants had been expelled + not sufficiently substantiated complaint)
BOLAT v. RUSSIA	YES (and of art. 2 of Protocol No. 4 ECHR)
C.G. AND OTHERS v. BULGARIA	YES (and of arts. 8 and 13 ECHR)
GEORGIA v. RUSSIA (I) [GC]	NO (not lawfully resident + not sufficiently substantiated complaint)
HASSINE v. ROMANIA	YES
KAYA v. ROMANIA	YES (and of arts. 8 and 13 ECHR)
LJATIFI v. "THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA"	YES (six votes to one)
LUPSA v. ROMANIA	YES (and of arts. 8 and 13 ECHR)
MUHAMMAD AND MUHAMMAD v. ROMANIA [GC]	YES
NOLAN AND K. v. RUSSIA	YES (six votes to one)
NOWAK v. UKRAINE	YES
SHARMA v. LATVIA	YES (and of art. 5 §§ 2 and 4 ECHR)
SHEVELI AND SHENGELAYA v. AZERBAIJAN	YES (and of art. 9 ECHR)
SULTANI v. FRANCE [Extracts]	NO (instead tried under art. 4 of Protocol No. 4 ECHR, also no violation found)
TAKUSH v. GREECE (FR)	YES

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