FACULTY OF LAW
Lund University

Jakob Martna

Between Self-Determination, Consistency and Rights Protection

Process-Based Review in Expulsion Cases under Article 8 of the European Convention on Human Rights

JAMM07 Master Thesis

International Human Rights Law
30 higher education credits

Supervisor: Vladislava Stoyanova

Term: Spring 2023

Contents

Summary

This thesis examines the practice of the European Court of Human Rights to decide expulsion cases implicating migrants with criminal record under Article 8 of the European Convention on Human Rights by use of process-based review. It departs from the premise that such expulsions do not violate absolute rights but constitute interferences with a qualified right, which allows for infringements necessary in a democratic society. Process-based review is a way for the European Court of Human Rights to decide whether interferences in qualified rights meet this requirement, focusing on the quality of the domestic decision-making process which preceded the contentious measure. This type of review has been consolidated in expulsion cases implicating migrants with criminal record through the *Üner*-criteria, which domestic courts must consider in their decisions, but to which they may attribute different relative weight within their margin of appreciation.

Descriptively, this thesis examines how process-based review has been used in all 21 such cases decided during the period 1 January 2018–31 December 2022. By looking qualitatively at the reasoning of the European Court of Human Rights this thesis identifies ten cases where positive inferences were drawn from the high quality of the national process, supporting the finding that there was no violation, five cases where negative inferences were drawn from shortcomings in the national process, supporting the finding that there was a violation, and six cases where, for different reasons, no important inferences were drawn from the quality of the domestic process.

Normatively, this thesis discusses the examined cases from the three values of political self-determination, protection of the rights-claimant, and consistency. It finds that the way process-based review has been employed can be justified from the perspective of political self-determination, because the criteria allow for considerations of social trust, and because process-based review encourages democratic iteration of European human rights law. Similarly, the practice can be justified from the perspective of protecting the rights-claimant, because it respects the moral core of the rights, aims to ensure that relevant and individualised reasons are given also when no moral imperative prohibits expulsion, and gives non-citizens a possibility for indirect political influence. However, this thesis identifies issues with consistency. It finds that process-based review should be applied with more foreseeability regarding when and how much substantive concerns are part of the assessment. Furthermore, the inconsistent application between States giving more leniency to the courts of the United Kingdom must be remedied.

Sammanfattning

Den här uppsatsen undersöker Europadomstolens praxis gällande utvisningar av personer som har begått brott, som hävdar att deras utvisning strider mot Artikel 8 av Europakonventionen. Uppsatsen undersöker hur domstolen har använt sig av den nationella beslutsprocessens kvalitet som ett argument för att komma fram till sin slutsats i sådana fall. Uppsatsen utgår från premissen att utvisningar som berör Artikel 8 inte kränker en absolut rättighet, utan kan tillåtas om de är nödvändiga i ett demokratiskt samhälle. Att fokusera på den nationella processens kvalitet är ett sätt för domstolen att avgöra när ett ingripande i en rättighet som skyddas av Artikel 8 uppfyller detta krav. För utvisning av personer som har begått brott har den här typen av granskning implementerats genom de tio *Üner*-kriterierna, som nationella domstolar måste ta hänsyn till i bedömningar av utvisningsärenden, men som de tillåts ge olika värde inom en nationell bedömningsmarginal.

Uppsatsen undersöker deskriptivt hur det processrelaterade argumentet har använts i alla 21 fall av den nämnda sorten under perioden 1 januari 2018–31 december 2022. Genom att kvalitativt studera rättsfallen identifierar uppsatsen tio fall där Europadomstolen drog positiva slutsatser, som talade emot att det hade skett en kränkning av Europakonventionen, från den nationella processens kvalitet. I fem fall drogs negativa slutsatser, som talade för att det hade skett en kränkning av konventionen, på grund av brister i den nationella processen. I sex fall drog domstolen inga viktiga slutsatser från den nationella processens kvalitet.

Uppsatsen diskuterar sedan de analyserade rättsfallen normativt utifrån de tre värdena politiskt självbestämmande, skydd för individen och förutsägbarhet. Uppsatsen hävdar att användningen av det process-relaterade argumentet kan rättfärdigas från perspektivet politiskt självbestämmande, eftersom det har tillåtit hänsyn till social tillit och uppmuntrat medlemsstaternas folk att utveckla konventionens regler som sina egna. Uppsatsen finner också att domstolens användning av argumentet kan rättfärdigas från det individuella perspektivet, eftersom domstolen tar hänsyn till rättigheternas moraliska kärna, säkerställer att tillräckliga skäl ges för livsavgörande beslut under alla omständigheter, samt ger icke-medborgare en möjlighet till indirekt politiskt inflytande. Uppsatsen identifierar dock två problem relaterade till förutsägbarhet. Europadomstolen bör i sin granskning vara mer konsekvent gällande när och hur mycket materiella hänsyn är en del av bedömningen. Uppsatsen pekar också på att Storbritanniens domstolar ges större eftergifter än andra staters. Denna tendens kan inte rättfärdigas och måste upphöra.

Preface

> I imagined it infinite, no longer composed of octagonal kiosks and returning paths, but of rivers and provinces and kingdoms… I thought of a labyrinth of labyrinths, of one sinuous spreading labyrinth that would encompass the past and the future and in some way involve the stars.
>
> Borges, *The Garden of Forking Paths* (1941).

The bifurcations of supranational legal rights and democratic self-determination are, rightfully, labyrinthine. In this thesis I have attempted to navigate this maze in a sensible way. Whether I have succeeded in this is for the reader to decide, should you ever make it to the end.

The writing process involved some crumbling brick walls and strange mirages, conjured up on a late Friday afternoon when the sky had not been seen for hours. For help in steering clear of these, I am indebted to August, Hampus, and Matin, and above all, to my supervisor Vladislava Stoyanova.

Like a true Borgesian puzzle, the close of this labyrinth has been evident from the start. It is the summer with you, Kajsa. And it begins now, as I write these final words and put on the song *Sleep the Clock Around* by Belle and Sebastian, before walking out into the morning sun to meet you for breakfast. Thank you, for your support writing this thesis, and for everything else.

Malmö, 6 June 2023
Jakob Martna

Abbreviations

ECHR	European Convention on Human Rights
The Convention	European Convention on Human Rights
ECtHR	European Court of Human Rights
The Court	European Court of Human Rights
Member States	States who are members of the Council of Europe and thereby parties to the Convention

CHAPTER 1

Introduction

1.1 Background

As of the 1 of January 2022 there were 37.5 million non-nationals living in the European Union countries.[1] Adding the rest of the Council of Europe States, this figure is higher.[2] Following the Russian invasion of Ukraine on the 24 of February 2022, eight million Ukrainian refugees have added to this number of resident non-nationals in Europe.[3]

The group of non-nationals is diverse. A large part of it consists of refugees, whose rights are protected under the 1951 Refugee Convention, and persons who risk death, torture, or inhuman or degrading treatment or punishment in their home countries and for that reason must be allowed residence by way of Articles 2 and 3 of the European Convention on Human Rights (ECHR, or the Convention).[4] The protection for the latter group is absolute and allows for no considerations of public interests or the conduct of the persons concerned.[5]

---

[1] Eurostat, 'Migrant Population: 23.8 Million Non-EU Citizens Living in the EU on 1 January 2022' (March 2023) <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Migration_and_migrant_population_statistics&stable=1#Migrant_population:_23.8_million_non-EU_citizens_living_in_the_EU_on_1_January_2022> accessed 2 May 2023. Two-thirds of these were non-EU citizens, and one third EU-citizens living in another Member State.

[2] The Republic of Türkiye, for example, hosts around five million non-nationals, see International Organization for Migration, 'DTM Turkey — Migrant Presence Monitoring - Situation Report' (March 2023) <https://dtm.iom.int/reports/turkey-migrant-presence-monitoring-situation-report-march-2023?close=true> accessed 2 May 2023.

[3] UNHCR, 'Operational Data Portal: Ukraine Refugee Situation' (25 April 2023) <https://data.unhcr.org/en/situations/ukraine> accessed 2 May 2023.

[4] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 150; European Convention on Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) ETS 5 (ECHR). The latter group may also qualify for subsequent protection status in the EU, see Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L 337/9, Arts 2(f) and 15.

[5] *Saadi v Italy* [GC] App No 37201/06, Judgement of 28 February 2008, paras 138–140. The ECtHR in these cases examines complaints under Article 2 and 3 together, *F G v Sweden* [GC] App No 43611/11, Judgement of 23 March 2016, para 110.

Then there are those resident non-nationals who do not face similar risks in their home countries, but for other weighty reasons desire to stay in a particular European State. These reasons may include work, family or friends, or an overall better prospect in quality of life than would be offered in their country of nationality. They may have been born in the host State or arrived there at a very young age and consider the country as their home, without being citizens. These non-nationals may be exemplary members of the community, but they may also commit serious crimes which prompts the host State to expulse them.

In European human rights law, these expulsions do not bear on the absolute principle of *non-refoulment* enshrined in Articles 2 and 3 of the ECHR. They do not immediately devalue the core of the human person and violate her dignity, as it would to send someone back into a warzone; they are not necessarily contrary to the individual's *moral* human rights.[6] Instead, they are regulated by the qualified right to respect for private and family life of Article 8, because the expulsion will either separate the individual from his or her family, or in any case sever the strong ties the individual has developed to the place of residence, which forms part of his or her private life.[7] Article 8 reads:

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

This right is qualified in that there are permissible limitations to it, as acknowledged in the second part of the provision, where other societal interests are allowed to prevail over the individual's protection. In this way, Article 8 of the ECHR finds its foundations in the idea of rights as politically

---

[6] Robert Spano, 'The Future of the European Court of Human Rights—Subsidiarity, Process-Based Review and the Rule of Law' (2018) 18 Human Rights Law Review 473, 483. There are different views of the philosophical foundations of human rights and the relationship between moral human rights and human rights law. This thesis does not adopt the 'mirroring-view' that moral and human rights need to fully overlap, see Allen Buchanan, 'Why International Legal Human Rights?' in Rowan Cruft and others (eds), *Philosophical Foundations of Human Rights* (Oxford University Press 2015). There may however be parts of Article 8 which *are* moral imperatives in themselves, see Ch. 4, Section 3.2.

[7] *Üner v the Netherlands* [GC] App No 46410/99, Judgement of 18 October 2006, para 59.

agreed upon limits on democratic decision-making which are not fixed and absolute moral imperatives, but subject to continuous interpretation and re-evaluation.[8] The interpretation of these limits must be decided in final by the judicial body tasked with adjudicating claims under the Convention: the European Court of Human Rights (ECtHR, or the Court).

The first choice of action to decide such a question is to look at the rules of treaty interpretation in the 1969 Vienna Convention on the Law of Treaties, which, although not applicable to treaties adopted before its entry into force, represents customary international law which applies to the interpretation of the Convention.[9] The general rule of interpretation in Article 31 thus provides that a treaty provision should be interpreted in accordance with the ordinary meaning of its terms in their context and in the light of the treaty's object and purpose.[10] In some cases, recourse to the rules of treaty interpretation can help the Court decide a contentious case, because the object and purpose of the ECHR unequivocally points to an answer.[11] In other situations the rules of treaty interpretation are of limited guidance, or may prove overinclusive and allow for an inflation of Convention protection at the discretion of the Court.[12] In these cases, the Court is in need of developing additional principles, or 'judicial tools', to decide whether a State measure goes against the Convention, not the least to alleviate concerns from Member States that the Court is unfettered in its intrusions into national sovereignty.[13]

Process-based review is one such tool which has recently become prominent in the Court's case law.[14] Process-based review, in short, is the practice of looking at the quality of the national decision-making process leading up to a contended measure as a factor to determine its compliance with the Convention.[15] With process-based review, the important thing is not primarily *what* has been decided, it is *how* the decision was reached. Process-based review asks questions such as: were all relevant factors assessed, and was the

---

[8] Spano 'The Future of the European Court of Human Rights' (n 6) 483–84.
[9] Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331, Art. 4; *Golder v the United Kingdom* [Plenary] App No 4451/70, Judgement of 21 February 1975, para 29.
[10] 1969 Vienna Convention on the Law of Treaties (n 9), art 31(1).
[11] Such as in *Golder* (n 9) discussed in George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press 2007) 61–65.
[12] Kanstantsin Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (Cambridge University Press 2015) 1; Geir Ulfstein, 'Interpretation of the ECHR in Light of the Vienna Convention on the Law of Treaties' (2020) 24 The International Journal of Human Rights 917, 920.
[13] Ulfstein (n 12) 922.
[14] Notably, following the decision in *Animal Defenders International v the United Kingdom* [GC] App No 48876/08, Judgement of 22 April 2013. Another example is that of 'European Consensus', see in this regard Dzehtsiarou (n 12).
[15] The concept of process-based review is explained in detail in Chapter 2.

decision individualised enough? Stated bluntly, the same legislative, judicial or administrative decision by a State can be a violation in one case and not in the other, depending on how well it was motivated by the decision-maker.[16] For example, process-based review can take the form of a list of criteria which domestic courts must consider in their decisions, but to which they may attribute different weights at their own (limited) discretion. As will be further explored in Chapter 2, this is the approach which has been adopted for expulsion cases implicating migrants with criminal record under Article 8 of the ECHR.

The use of process-based review in European human rights cases is a novel idea and, in many ways, an untested idea in normative terms. While scholars have begun discussing its merits, there is much work left to do to explain how it functions and discuss whether this way of adjudicating human rights cases is desirable.[17] Its proponents, such as the former President of the Court Robert Spano, hold that process-based is a way to make the ECtHR more grounded, to avoid reaching a critical mass of distrust and perceived lack of legitimacy from those sceptic of the Strasbourg system.[18] Others have raised concerns that this would be at the cost of the substantive protection we expect of international human rights, or that it would lead to issues with consistency.[19]

These notions preface this thesis. If process-based review would prove capable of handling controversial questions such as the expulsion of settled migrants in a consistent way, which can be justified to both the rights-claimant who wishes to stay, and the political community who wishes to expulse, this would speak in favour of its use. Indeed, the strain between the public sovereignty of nation-states and the interests of individuals has been of central concern in philosophical writing on migration, such as that of David Miller and Seyla Benhabib.[20] Subjecting empirical examples of how process-based review has been used to these theories can inform the discussion of its merits. It is from this basis that this thesis proceeds.

---

[16] It is important for the reader to understand this term already from the start, since it is the main study object of this thesis. Process-based review is a complicated concept to grasp, and those unfamiliar with supranational or constitutional adjudication may wish to consult Ch. 2, Section 2 before proceeding.

[17] Important strands of the academic discussion of process-based review are highlighted in Ch. 2, Section 4.

[18] Spano 'The Future of the European Court of Human Rights' (n 6) 486.

[19] See Ch. 2, Section 4.2.

[20] Notably, David Miller, *Strangers in Our Midst: The Political Philosophy of Immigration* (Harvard University Press 2016); Seyla Benhabib, *The Rights of Others: Aliens, Residents, and Citizens* (Cambridge University Press 2004).

1.2 Purpose and research questions

The purpose of this thesis is to further the understanding of process-based review as a judicial tool for deciding human rights cases. To fulfil this purpose, this thesis looks at a legal issue where process-based review has been clearly consolidated as part of the decision-making process: expulsion cases under Article 8 implicating migrants with criminal record. This thesis looks at the totality of such cases decided during the period 2018–2022 as an empirical study object. This allows drawing descriptive and normative conclusions of how process-based review has been applied by the Court in an area of law where this type of review has reached a mature stage.*

To perform this study, the thesis will answer the following research questions:

R1: What role did the quality of the national decision-making process play in the ECtHR's reasoning in expulsion cases implicating migrants with criminal record under Article 8 of the ECHR during the period 2018–2022?

a. When did process-quality lead to positive inferences?
b. When did process-quality lead to negative inferences?
c. When did process-quality not lead to any important inferences?

R2: From which perspectives can the practice of process-based review in expulsion cases be normatively justified?

a. Can it be justified from the perspective of political self-determination?
b. Can it be justified from the perspective of protection of the rights-claimant?
c. Can it be justified from the perspective of consistency in application?

1.3 Methodology

1.3.1 Descriptive methodology

The first part of this thesis, which consists of Chapter 2, is legal-doctrinal in the classic sense.[21] By looking at the emergence of process-based review in the ECtHR's case law in general, and how it has been consolidated as a way to decide expulsion cases under Article 8, this chapter approaches the law

* The only other ECHR issue where process-based review has been equally well consolidated as in cases concerning expulsion of migrants with criminal record is when the right to respect for private life comes into conflict with freedom of expression; see in this regard *von Hannover v. Germany (No 2)* [GC] App Nos 40660/08 60641/08, Judgement of 7 February 2012.

[21] See, in general, Jan M Smits, 'What is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research' in Rob van Gestel and others (eds), *Rethinking Legal Scholarship: A Transatlantic Dialogue* (Cambridge University Press 2017).

from an internal perspective.[22] Chapter 2 uses case law and legal scholarship to systemise process-based review into a coherent concept, and shows how this concept has been converted to legal rules applicable to the precise legal problem of expulsion under Article 8.[23]

In this chapter the authoritative material is case law from the ECtHR and doctrinal work. The case law used can be described as *selected cases of major importance*. These cases are those which included major additions to the previous law, and which have been most widely cited by subsequent rulings, as well as in doctrinal work. Additionally, legal scholarship is used to give context to the case law. This material, while limited, adequately serves the aims of the first part of the study which is to give the framework for the more detailed examination in the next two parts of the study.

The second part of this thesis continues the exposition and systematisation of the use of process-based review in expulsion cases under Article 8 in a much more focused way. The research done in Chapter 3 can be described as *qualitative empirical legal research*.[24] Using a clearly defined set of documents as source material – the selected cases – the chapter attempts to capture and categorise a social phenomenon – process-based review in expulsion cases under Article 8 – through study of this material.[25] By looking at *all* cases which fit the requisite parameters, this part of the study gives a full view of process-based review as it has been applied in Article 8 cases on expulsion during the past five years, with all its incongruencies. The research is qualitative because it takes reasoning in each case on its own merits, rather than to ask the same questions for all the cases.[26] In this way, the research can show the range and variation in the phenomenon of process-based review in expulsion cases under Article 8.[27] This approach allows for a nuanced philosophical discussion in the third part of this thesis.

The relevant ECtHR cases were selected based on the two following criteria: (a) that the legal issue was, in full or in part, whether the applicant's expulsion due to a criminal conviction had violated or would violate Article 8 of the ECHR and (b) that the case was decided by the ECtHR during the period 1 January 2018–31 December 2022.

---

[22] ibid 5.
[23] cf. ibid 6.
[24] cf. Lisa Webley, 'Qualitative Approaches to Empirical Legal Research' in Peter Cane and Herbert M Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press 2010) 927. Webley, while focusing on how this methodology can be applied to material which does not consist of primary legal sources, highlights points which are equally relevant for empirically inclined case law studies, as the one in this thesis.
[25] ibid 928.
[26] ibid 933.
[27] ibid.

As a first step to find the relevant cases a search was conducted in the HUDOC database on the 17 February 2023. The initial search had the following parameters:

- Document collection: Judgements, Grand Chamber' AND 'Chamber'
- Filters: Language, 'English' AND 'French'
- Keywords: '(Art. 8) Expulsion'
- More Filters: Date, '1 January 2018–31 December 2022'

This search resulted in 38 hits. All the cases were found to be duplicates with entries in both French and English. There were accordingly 19 cases to be studied, following this initial search.

The 19 cases were studied in brief to ensure compliance with the criterion (a). The cases of *Moustahi v. France (2020)* and *Ghoumid and Others s. France (2020)* were excluded from the study in this process.[28] *Moustahi* concerned expulsion under Article 3 of the ECHR, and Article 8 was invoked as a ground for a different claim, for this reason it did not satisfy criterion (a). In *Ghoumid and Others*, the issue was if the deprival of the applicants' French nationality was in violation of Article 8, and one argument to this end was that it could potentially allow for their future expulsion. However, the Court proceeded on the basis that no such order had yet been issued, and the question was therefore only one of 'loss of an element of their identity'.[29] For this reason, neither this case satisfied criterion (a). The case of *Alleleh and Others v. Norway (2022)* was also excluded from the study in this step.[30] The applicant in the case was expulsed because her stay was based on false information to immigration authorities, and not because of a criminal conviction. The case therefore did not satisfy criterion (a). Finally, the case of *Usmanov v. Russia (2020)* was excluded from the study for the same reasons, because the applicant in that case was expulsed for allegedly constituting a risk to national security, and not because of a criminal conviction.[31]

As a second step to find relevant cases, the case law-references in the 15 remaining cases were studied. This resulted in the addition of six more cases which satisfied both criteria (a) and (b): *Saber and Boughassal v. Spain (2018), Narjis v. Italy (2019), Makdoudi v. Belgium (2020), K. A. v.*

[28] *Moustahi v France* App No 9347/14, Judgement of 25 June 2020; *Ghoumid and Others v France* App Nos 52273/16, 52285/16, 52290/16, 52294/16, 52302/16, Judgement of 25 June 2020.
[29] *Ghoumid and Others* (n 28) paras 49–50.
[30] *Alleleh and Others v Norway* App No 569/20, Judgement of 23 June 2022.
[31] *Usmanov v Russia* App No 43936/18, Judgement of 22 December 2020.

Switzerland (2020), Veljkovic-Jukic v. Switzerland (2020) and *Unuane v. United Kingdom (2020).*

As a third step, recent scholarly writing focusing on expulsion under Article 8 of the ECHR was studied in search of cases which satisfied the criteria (a) and (b). No further cases were found in this step. The total number of cases was therefore 21. The full list of cases analysed in the case law study is adduced as a supplement at the end of the thesis.

1.3.2 Normative methodology

The third part of this thesis takes a step away from the descriptive findings of the previous chapters and asks if the identified practice of process-based review in expulsion cases under Article 8 is acceptable. This question requires looking beyond the primary authoritative sources themselves (the case law) and adopting an external normative approach.[32] This approach considers the arguments behind rules and uses the existing case law as empirical material for how conflicting normative positions can be reconciled.[33] In this way, the existing law can be seen as a test of whether a particular idea has worked out in a desirable fashion.[34]

This type of evaluation requires a normative framework. Following Smits, this thesis adopts the view that the relevant normative framework is the internal morality of a jurisdiction, or in other words, the prevailing normative views within the system.[35] The specific legal system – in this thesis, the Council of Europe – with its stated goals, is the measuring stick for which arguments should be adopted.[36] When it comes to balancing rights against each other, or as in this thesis against the public interest, the normative method consists of identifying relevant arguments on both sides and deciding, from the outlook of the specific normative framework, which ones should prevail.[37]

In a broader sense, there seems to be no hope in reaching consensus on a definite moral view from which good law can be unequivocally deduced, as shown by centuries of philosophical and legal debate of almost all controversial issues. Nevertheless, normative argument is unavoidable in legal systems, not the least because of the impulse to justify the demands we,

---

[32] Jan M Smits, 'Redefining Normative Legal Science: Towards an Argumentative Discipline' in Fons Coomans and others (eds), *Methods of Human Rights Research* (Intersentia 2009) 50.
[33] ibid 51–52.
[34] cf. ibid 52.
[35] ibid 53. See also Lon Fuller, *The Morality of Law: Revised Edition* (Yale University Press 1969) 33.
[36] Smits 'Redefining Normative Legal Science' (n 32) 54.
[37] ibid 57.

through law, put on each other.[38] This dilemma requires a rethinking of what normative reasoning means, in that it is not an 'enclosed, deductive, self-evident system, but a form of practical reason or a means of living in the world'.[39] Normative argumentation does not have to resolve all its controversial premises for it to be meaningful in concrete cases.[40] Instead, one of the values of practical reasoning is precisely that it can handle plural, incommensurable values – such as the self-determination of an enclosed polity on the one hand, and the interests of non-nationals to residence, on the other hand – by qualitatively distinguishing between different kinds of human interests.[41] The academic can help in this by characterising the interests at stake in a dispute, moving back and forth between the general and the concrete, that is, between the normative framework and the positive law.[42]

The normative part of this thesis proceeds in this way. It characterises the values at stake in expulsion cases in three broad categories: the self-determination of the host State, the protection of the rights-claimant, and the general interest in consistent application. The thesis then goes into depth on these issues, asking questions such as why self-determination is valuable, which of the rights-claimant's interests are more acute, and whether equality before the law is desirable also when the subjects are States, to allow for a nuanced view of how these plural values can be reconciled in concrete cases.

The values of self-determination and protection of the rights-claimant are approached from the theories of the political theorist David Miller and the philosopher Seyla Benhabib.[43] This choice is motivated by their different, but related views on the relationship between public sovereignty and the rights of non-nationals.

David Miller seeks to establish a theory of migration based on weak moral cosmopolitanism – the moral standing of human beings requiring protection of moral human rights, as well as serious reason giving in other situations – and political self-determination, which requires a certain latitude in permissible decision-making to allow for social democratic societies based

---

[38] Joseph William Singer, 'Normative Methods for Lawyers' (2008) 56 UCLA Law Review 899, 928–29.
[39] ibid 929–30. Singer bases this belief on Charles Taylor, *Sources of the Self: The Making of the Modern Identity* (Cambridge University Press 1992).
[40] Singer (n 38) 931; Taylor (n 39) 7.
[41] Singer (n 38) 944–45.
[42] ibid 945. In this sense, the normative argument about law works through the process of reflective equilibrium, cf. John Rawls, *A Theory of Justice* (Harvard University Press 1971).
[43] Notably Miller (n 20); Benhabib *The Rights of Others* (n 20).

on collective goals and social justice.[44] Seyla Benhabib, on her part, aims to articulate a vision of just political membership which entails a regime of porous borders which simultaneously protects the value of democratic self-governance and respects inalienable rights, regardless of nationality.[45] By including both of these theories, this thesis aims to present a desirable breadth of the arguments on both sides for and against the expulsions of settled migrants – while keeping within the normative framework of the Council of Europe, which, as will be seen in the next section, requires concern for both subsidiarity and effective protection of rights.

The value of consistent application is approached primarily through the work of Joseph Raz.[46] Among many writers on foreseeability and the rule of law, Raz's work is chosen because of its limitedness: by not allowing foreseeability to become conflated with other concerns such as democracy and human rights, it provides a clear and succinct ideal which can be tested separately from the two previous, clearly interlinked values of self-determination and protection of the individual.[47]

Ultimately, the normative part of this thesis should be understood as one way of thinking of process-based review in expulsion cases under Article 8 among many possible ones. This way is, arguably, the most persuasive one, given the normative framework of the Council of Europe. The reader may disagree with this (although she should not) without it taking away from the value of the study. Legal science is not about arriving at finite knowledge, but an ongoing discussion of which arguments are the best ones, a process which requires constant reimagination and reappraisal of different views.[48] By providing one such refined view, this study contributes its part to the ever-ongoing justificatory conversation of, in this case, European human rights law.

1.4 Delimitations

This thesis looks at the use of process-based review to decide expulsion cases under Article 8 during the period 2018–2022 as an empirical example of how the tool of process-based review can be applied. This choice of study material

[44] Miller (n 20) 153–54. Miller's theory also builds on the values of fairness and the idea of an integrated society (p. 155–156), but they are left out in this thesis, for reasons of time and space.
[45] Benhabib *The Rights of Others* (n 20) 3.
[46] Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford University Press 1979).
[47] ibid 210–11.
[48] Smits 'Redefining Normative Legal Science' (n 32) 55.

involves a delimitation in content as well as a delimitation to a particular period.

The delimitation in content is required to maintain stringency in the subsequent normative discussion. The issue of expulsion is qualitatively different from questions of admissions into the territory, such as that of family reunification; in the former, but not the latter case, the person in question has developed important ties to the host country. The question of expulsion is also different from the question of conferring nationality because a key aspect of the latter is that it concerns political membership, rather than mere residence (economic and social membership). To avoid this multiplication of normative concerns, the case study was limited accordingly. Similarly, the choice to only examine expulsions based on criminal convictions was made to allow for comparisons between cases applying the same legal standards.[49]

For reasons of time and space, a delimitation to a certain period was also necessary. The more recent the cases, the more they can be presumed to represent a refined and deliberate application of process-based review which is configured with the present normative framework of the Council of Europe.[50] This motivated this thesis' focus on recent cases. The choice to limit the study to cases from 2018 is in a sense arbitrary; while the cases lose relevance over time, the cases decided in 2018 are not obviously better attuned to the present framework than those decided in 2017. The delimitation to 2018 and onwards is primarily motivated by the need to constrain the study to the scope of a master's thesis. Nevertheless, to make up for this potential shortcoming, important cases from previous years are referenced, where appropriate.

The normative discussion is limited to focusing on the three aspects of political self-determination, the rights-claimants' interests, and consistent application. The first two values are chosen because they coincide with the core principles underlying the Convention system: the effective protection of rights and subsidiarity.[51] The importance of effective protection of rights follows from the preamble of the Convention, calling for the maintenance and

[49] The reader who wants to learn how process-based review has been applied in an expulsion case not related to criminal records should consult, in particular, *Alleleh and Others* (n 30), where the Court drew positive inferences from the qualitative domestic process.

[50] Notably regarding the increased focus on subsidiarity following the Interlaken process reforming the Court, which culminated in the adoption of Protocol 15 to the Convention; see further Chapter 2.

[51] Janneke Gerards, *General Principles of the European Convention on Human Rights* (Cambridge University Press 2019) s 1.2.

further realisation of individual rights and freedoms.[52] The same fundamental purpose of the ECHR has been pronounced in the plenary *Soering* case:

> [T]he object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective.[53]

Similarly, the principle of subsidiarity is enshrined in the preamble to the Convention following the entry into force of Protocol No. 15 to the Convention on 1 August 2021:

> [T]he High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto […] they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention.[54]

This principle is central to the Court's reasoning about rights and allows a flexibility for States to regulate matters according to national views and national legal and constitutional traditions.[55] In this way, it embodies the idea of political self-determination.

The third normative value, that of consistency, is chosen because it is inherent to the medium of law.[56] All law wants to steer behaviour, but it can only do this effectively if it is clear what the legal consequences of action X, rather than action Y are. Like any legal rule, process-based review must therefore be evaluated from this standpoint.

1.5 Previous research

The academic discussion of process-based review as a way of judicial reasoning gained notable traction in 1980, following the publication of John Hart Ely's *Democracy and Distrust,* outlining a political process theory of American constitutional interpretation.[57] The work was the most cited book

---

[52] ECHR, preamble.
[53] *Soering v the United Kingdom [Plenary], App No 14038/88, Judgement of 7 July 1989* para 87; see also Gerards *General Principles* (n 51) 4.
[54] ECHR, preamble.
[55] Gerards *General Principles* (n 51) 6.
[56] That such concerns are an essential value for *evaluating* law does not mean that they are essential to the *existence* of law, see Raz (n 46) 223.
[57] John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press 1980).

of American legal scholarship during the period 1978–2000.[58] Ely proposed a model of constitutional review where the role of judges was to strike down on systemic biases in legislative decision-making, but leave those legislative outputs which were the result of a properly functioning political system untouched.[59] This approach has been fiercely debated in American constitutional law and is so still today.[60]

The use of process-based review by the ECtHR has notably been studied by Ittai Bar-Siman-Tov,[61] Eva Brems,[62] Patricia Popelier,[63] and Janneke Gerards.[64] These scholars have identified the recent turn by the ECtHR towards focusing on process, and have outlined their own respective visions for the proper use of this approach.[65] Eva Brems, for example, considers that process-based review should be 'substance-flavoured' and that the Court should not use it to draw positive inferences that no right was violated.[66]

Most thoroughly, Leonie M. Huijbers has studied process-based review in her 2019 doctoral dissertation *Process-based Fundamental Rights Review: Practice, Concept and Theory*.[67] Based on the work by the above scholars, the American constitutional debate, and studies of other jurisdictions, Huijbers in her dissertation showed how process-based review has been applied in fundamental rights cases, gave a comprehensive definition of the method, and discussed arguments for and against the practice.[68]

---

[58] Fred R Shapiro, 'The Most-Cited Legal Books Published Since 1978' (2000) 29 Journal of Legal Studies 397.
[59] See, for an overview, Michael J Klarman, 'The Puzzling Resistance to Political Process Theory' (1991) 77 Virginia Law Review 747.
[60] See, for an overview of the debate ibid 772–88; for a recent example, see Jane Schacter, 'Ely at the Altar: Political Process Theory through the Lens of the Marriage Debate' (2011) 109 Michigan Law Review 1363.
[61] Ittai Bar-Siman-Tov, 'Semiprocedural Judicial Review' (2012) 6 Legisprudence 271.
[62] Eva Brems, 'Procedural Protection: An Examination of Procedural Safeguards Read into Substantive Convention Rights' in Eva Brems and Janneke Gerards (eds), *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (Cambridge University Press 2014).
[63] Patricia Popelier, 'The Court as Regulatory Watchdog: The Procedural Approach in the Case-Law of the European Court of Human Rights' in P Popelier and others (eds), *The Role of Constitutional Courts in Multilevel Governance* (Intersentia 2013).
[64] Janneke Gerards, 'Procedural Review by the ECtHR: A Typology' in Janneke Gerards and Eva Brems (eds), *Procedural review in European fundamental rights cases* (Cambridge University Press 2017).
[65] For an overview, see Janneke Gerards and Eva Brems (eds), *Procedural Review in European Fundamental Rights Cases* (Cambridge University Press 2017).
[66] Eva Brems, 'The "Logics" of Procedural-Type Review by the European Court of Human Rights' in Janneke Gerards and Eva Brems (eds), *Procedural review in European fundamental rights cases* (Cambridge University Press 2017) 39.
[67] Leonie M Huijbers, *Process-Based Fundamental Rights Review: Practice, Concept, and Theory* (Intersentia 2019).
[68] ibid 12.

The ECtHR's case law on expulsion cases under Article 8 has been studied by Cathryn Costello as part of her important 2015 work *The Human Rights of Migrants and Refugees in European Law*.[69] While a few scholarly articles have been written since then on the application of Article 8 in expulsion cases, as far as known, there is yet no comprehensive study of the totality of the Court's case law during this period.[70]

The normative issues concerning migration have been widely discussed in political philosophy. Seminal work includes that of Michael Walzer,[71] Joseph Carens,[72] and David Miller.[73] A comprehensive overview of this work is available in the online Stanford Encyclopaedia of Philosophy, written by Professor Christopher Heath Wellman.[74]

This thesis contributes to the above research in the following ways:

- It furthers the descriptive study of process-based review by looking at cases which have not been discussed in the present literature.
- It furthers the descriptive study of the law on expulsion under Article 8 of the ECHR by looking at cases which have not been discussed in the present literature.
- It applies a normative framework with a basis in political philosophy to these findings, contributing to the debate on the merits of process-based review as a tool to decide fundamental rights cases.

1.6 Structure

The study proceeds in three steps. First, in Chapter 2, the necessary background is given. The chapter sets the stage by explaining the concept of process-based review and its primary rationale in Section 1. It then proceeds to show how this concept has been consolidated into rules for deciding

---

[69] Cathryn Costello, *The Human Rights of Migrants and Refugees in European Law* (Oxford University Press 2015) ch 4.
[70] The most general study as of yet is Mark Klaassen, 'Between Facts and Norms: Testing Compliance with Article 8 ECHR in Immigration Cases' (2019) 37 Netherlands Quarterly of Human Rights 157; more narrowly, on the case law as way to challenge the notion of citizenship, Daniel Thym, 'Residence as De Facto Citizenship? Protection of Long-Term Residence under Article 8 ECHR' [2014]; on the conception of family applied in such cases, Alan Desmond, 'The Private Life of Family Matters: Curtailing Human Rights Protection for Migrants under Article 8 of the ECHR?' (2018) 29 Eur J Int Law 261.
[71] Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (Basic Books 1983).
[72] Joseph H Carens, *The Ethics of Immigration* (Oxford University Press 2013).
[73] Miller (n 20).
[74] Christopher Heath Wellman, 'Immigration', *The Stanford Encyclopedia of Philosophy* (Fall 2022 Edition) <https://plato.stanford.edu/archives/fall2022/entries/immigration/> accessed 23 May 2023.

expulsion cases implicating migrants with criminal record under Article 8 of the ECHR in Section 2. In these first two sections, the reader learns the legal and conceptual framework applied in this thesis and understands the benefits of using process-based review. Section 3 of Chapter 2 discusses selected criticism directed against process-based review and its application to expulsion cases under Article 8. This section shows that there are reasonable fears connected to the practice, and not only benefits. The motivation for identifying these fears is that they point to specific concerns, related to the protection of the rights-claimant and consistency, which then help guide the descriptive and normative study conducted in the following chapters.

The second part of this thesis consists of Chapter 3: the descriptive study of how the ECtHR has used process-based review in expulsion cases implicating migrants with criminal record under Article 8. This chapter, which forms a substantive part of this thesis, analyses all relevant cases during the period 2018–2022 with focus on arguments relating to the national judicial process. In this chapter, the cases are divided into three sections based on the role process quality played in the Court's assessment, corresponding to the sub questions a-c of research question 1:

a. When did process-quality lead to positive inferences?
b. When did process-quality lead to negative inferences?
c. When did process-quality not lead to any important inferences?

Each one of these sections presents the cases and the Court's reasoning and then summarises the findings in a short resumé.

The third part of the study takes place in Chapter 4. This chapter looks at the descriptive findings of Chapter 3 and puts them into the context of the three values of political self-determination, protection of the rights-claimant and consistency, to examine whether the identified practice can be justified from each one of these points of view. Sections 1–3 of this chapter are devoted to one value each, and within these sections, two different aspects of each value are discussed. Thus, Section 1 first discusses whether the cases studied have allowed sufficient room for meaningful self-determination, and second, shows how process-based review can be a way to invigorate political self-determination. Section 2 proceeds to discuss the moral human rights of non-nationals and their claim to proper reason giving, as well as how process-based review can give non-nationals an indirect political voice. Finally, Section 3 discusses whether process-based review has been applied in a consistent manner as regards the degree of scrutiny, and whether it has been applied consistently between different States.

The concluding Chapter 5 summarises the findings of the study. It also broadens the view and discusses what the findings can say about process-based review in general.

CHAPTER 2

Foundations

2.1 Introduction

To lay the important groundwork for the rest of this thesis, the first section of this chapter explains the concept of process-based review as it has been developed in the Court's case law. It does this by departing from the writing of the former President of the Court Robert Spano, one of the most prominent advocates of the concept, and the ruling in *Animal Defenders International v. the United Kingdom* [GC], which is one of the leading cases where process-based reasoning has been employed. The chapter further clarifies the concept with two other illustrative examples of its use in the cases of *Lambert and Others v. France* [GC] and *Correia de Matos v. Portugal* [GC].

Subsequently, Section 2 explains how process-based review has been incorporated into the law on expulsions under Article 8 with reference to the leading cases of *Boultif v. Switzerland*, *Üner v. the Netherlands* [GC] and *Maslov v. Austria* [GC]. In this section, it is shown how the ECtHR came to adopt the ten *Üner*-criteria which domestic courts must consider when they decide on expulsion, but which they may attribute different weight to within their margin of appreciation.

Section 3 discusses selected criticism directed against process-based review in general, and the form it has taken in expulsion cases under Article 8. It thereby identifies important points to be revisited at a later stage in this thesis.

2.2 The concept of process-based review

In a 2014 article the Icelandic judge Robert Spano, president-to-be of the European Court of Human Rights, took up the strong criticism posed by several British senior judges that the Court should not second-guess domestic policy choices and judicial rulings in the national application of human rights,[75] and that the Court has strayed too far in its interpretation of the Convention, especially regarding Article 8 on the right to respect for private

[75] In particular, Lord Hoffman, 'The Universality of Human Rights' (Judicial Studies Board Annual Lecture, 19 March 2009).

and family life.[76] In response to this criticism, Spano noted that Protocol 15 to the Convention adopted the previous year explicitly added references to the concepts of subsidiarity and margin of appreciation which gave the Court an incentive to adopt a more robust and coherent concept of when it should defer to national authorities.[77] He dubbed the next phase of the Court's development as the 'age of subsidiarity', which would focus on empowering the Member States to protect human rights in their own context, acknowledging that there may be different proper answers to human rights issues, despite similar facts.[78]

Spano held that that role of an international court in its decision on whether a human rights violation had occurred at the national level was one of degree, between on one hand a complete reassessment of the issue by the supranational court, and on the other hand a complete deference to the domestic decision-maker.[79] The reasoning in *Animal Defenders International v. the United Kingdom* [GC], Spano claimed, showed how a implementation of the principle of subsidiarity could work in practice:

> *Animal Defenders*, as well as others, thus stand for the important proposition that when examining whether and to what extent the Court should grant a Member State a margin of appreciation, as to the latter's assessment of the necessity and proportionality of a restriction on human rights, the quality of decision-making, both at the legislative stage and before the courts, is crucial and may ultimately be decisive in borderline cases.[80]

In *Animal Defenders*, the applicant claimed that a United Kingdom ban on political advertising on radio and television violated its right to freedom of expression under Article 10 of the ECHR. To decide if this was the case the Court held that they would primarily look at the quality of the national processes which led to the adoption of prohibition, and not make a substantive review of the impact for the particular applicant.[81] In doing so, the Court found that the parliamentary and judicial bodies had conducted their own proportionality analyses and found that the measure was a justified infringement of the right.[82] The Court attached 'considerable weight' to these legislative and judicial deliberations, and ultimately found that the ban was

---

[76] Robert Spano, 'Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity' (2014) 14 Human Rights Law Review 487, 489.
[77] ibid 491.
[78] ibid.
[79] ibid 494.
[80] ibid 498; *Animal Defenders International* (n 14).
[81] *Animal Defenders International* (n 14) paras 109–113.
[82] ibid para 115.

not contrary to Article 10.[83] Spano posited that the approach taken in *Animal Defenders* was a qualitative, democracy-enhancing approach to subsidiarity and the margin of appreciation, which allowed the Court to examine based on objective factors if deferral was motivated in a particular case.[84]

Animal Defenders and Spano's impactful article saw increased scholarly attention given to the use of domestic decision-making quality as a tool to decide international human rights cases.[85] The practice has been called 'procedural rationality review',[86] 'procedural review',[87] 'the procedural turn',[88] and 'semi-procedural review'.[89] Most recently, Leonie Huijbers in her doctoral dissertation used the term 'process-based review' to denote the concept.[90] Huijbers defines process-based review in relation to fundamental rights cases as:

> Process-based fundamental rights review concerns judicial reasoning that assesses public authorities' decision-making processes in light of procedural fundamental rights standards.[91]

For the ECtHR context, process-based review concerns the practice of an international court to focus on the quality of the domestic processes that have led to a contested measure or situation, concerning administrative and legislative processes as well as procedures before domestic courts.[92] This approach has been prominent in a great deal of judgements by the ECtHR, before, and even more so after, the ruling in *Animal Defenders*.[93] Further illustrative examples:

In *Lambert and Others v. France* [GC], the Court had to decide if the French medical authorities' decision to revoke life-sustaining measures of a

---

[83] ibid para 116.
[84] Spano 'Universality or Diversity of Human Rights' (n 76) 499.
[85] Of course, the academic discussion was by then already ongoing, see Popelier 'The Court as Regulatory Watchdog' (n 63); Bar-Siman-Tov (n 61).
[86] Patricia Popelier and Catherine Van De Heyning, 'Subsidiarity Post-Brighton: Procedural Rationality as Answer?' (2017) 30 Leiden Journal of International Law 5.
[87] Gerards and Brems (n 65).
[88] Oddný Mjöll Arnardóttir, 'The "Procedural Turn" under the European Convention on Human Rights and Presumptions of Convention Compliance' (2017) 15 Int J Const Law 9.
[89] Bar-Siman-Tov (n 61).
[90] Huijbers (n 67).
[91] ibid 100.
[92] Another oft-cited definition is that procedural review concerns the practice of an international court to focus on the quality of the domestic processes that led to a contested measure or situation, concerning administrative and legislative processes as well as procedures before domestic courts, see Brems 'The "Logics" of Procedural-Type Review' (n 66) 17.
[93] For a 2017 overview, see Gerards 'Procedural Review by the ECtHR: A Typology' (n 64).

chronically vegetative patient was a violation of either Article 2 (the right to life), Article 3 (prohibition of torture) or Article 8 (the right to respect for private and family life) of the ECHR.[94] The Court found that the decision-making procedure by the doctor responsible for the care had exceeded the requirements laid down by the law, and he had given very detailed reasons for his decision.[95] This meticulous decision-making process, although the applicant family members disagreed with the outcome, supported the finding that there was no violation of the Convention.[96]

Similarly, the ECtHR in *Correia de Matos v. Portugal* [GC] concerning self-representation in criminal procedure, attached 'considerable weight' to the legislative and judicial reviews of the impugned Portuguese legislation, praising the Portuguese courts for giving 'very thorough reasons why they considered the relatively strict rule of mandatory legal representation constitutional and necessary both in the accused's and the public interest'.[97]

In these and many other cases, the Court has refrained from taking a firm stance and saying that the infringement of a qualified right is substantively justified under the Convention.[98] Rather, they have deferred to the position taken by the national decision-maker by reason of the *qualitative process* which preceded it.

Importantly, the process-based review by the ECtHR goes both ways: if the domestic decision-making is of high quality, the Court can draw positive inferences from this and find that the impugned measure was not in violation of the ECHR. If there are shortcomings of the domestic process, the Court can instead draw negative inferences from this to support a finding that there has been a violation.[99]

As seen above, process-based review can relate to different types of decision-making processes at the national level, from parliamentary review of general measures to concrete applications of legislation by a judiciary (or even a doctor) in a particular case. In this thesis, the focus is on the latter type of review. As will be explored in the next section, this is how the ECtHR has chosen to implement the principle of subsidiarity in adjudicating expulsion cases under Article 8.

---

[94] *Lambert and Others v France* [GC] App No 46043/14, Judgment of 5 June 2015.
[95] ibid para 166.
[96] ibid para 168.
[97] *Correia de Matos v Portugal* [GC] App No 56402/12, Judgement of 4 April 2018, para 150.
[98] Qualified rights are those which explicitly or implicitly permit for limitations, see Spano 'The Future of the European Court of Human Rights' (n 6) 483.
[99] Such as in *Hirst (No 2) v the United Kingdom* [GC] App No 74025/01, Judgement of 6 October 2005.

2.3 The consolidation of process-based review in expulsion law

The 2001 case of *Boultif v. Switzerland* concerned the expulsion of an Algerian national from Switzerland.[100] The applicant had resided in the country for six years when the migration authorities following his conviction for robbery and damage to property refused to renew his residence permit, thereby obliging him to leave the country.

The applicant complained before the ECtHR that his right to respect for family life was violated due to his expulsion, since he had been separated from his wife.[101] The Court held that the expulsion interfered with the applicant's rights under Article 8, and therefore had to meet the requirements of justified infringements to that right, in particular the standard of 'necessary in a democratic society'.[102]

In this regard, the Court held that States had the well-established right to control entry and residence of aliens to maintain public order, but that such decisions had to strike a fair balance between the individual's right to respect for family life and the public interest in maintaining order.[103] The Court broke new ground by establishing general criteria for how this assessment should be made:

> In assessing the relevant criteria in such a case, the Court will consider the nature and seriousness of the offence committed by the applicant; the duration of the applicant's stay in the country from which he is going to be expelled; the time which has elapsed since the commission of the offence and the applicant's conduct during that period; the nationalities of the various persons concerned; the applicant's family situation, such as the length of the marriage; other factors revealing whether the couple lead a real and genuine family life; whether the spouse knew about the offence at the time when he or she entered into a family relationship; and whether there are children in the marriage and, if so, their age. Not least, the Court will also consider the seriousness of the difficulties which the spouse would be likely to encounter in the applicant's country of origin.[104]

---

[100] *Boultif v Switzerland* App No 54273/00, Judgement of 2 August 2001.
[101] ibid para 31.
[102] ibid paras 40–41.
[103] ibid paras 46–47.
[104] ibid para 48.

The seriousness of the offence committed was to be considered in a forward-looking manner, where circumstances such as exemplary conduct after conviction spoke against a threat to public order.[105] In the case at hand, such considerations coupled with the practically non-existent possibilities for family life outside of Switzerland led the Court to find that the expulsion was a violation of Article 8.[106]

In the case of *Üner v. The Netherlands* [GC], decided in 2006, the Court revisited the task of establishing general criteria for deciding whether the expulsion of a settled migrant for serious crimes was proportionate under Article 8 of the ECHR.[107] The case concerned the expulsion of a Turkish national from the Netherlands where he had been residing since the age of twelve and had founded a family, following his conviction for assault and manslaughter at the age of 24.

The Court again reaffirmed that States have a right to control the entry and residence of aliens within its territory, but that this may interfere with the rights guaranteed under Article 8 and must in such cases be in accordance with the law and necessary in a democratic society.[108]

To decide if the expulsion was to be considered necessary in a democratic society, the Court reiterated the criteria established in *Boultif* and added a further two:

> – the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled; and
>
> – the solidity of social, cultural and family ties with the host country and with the country of destination.[109]

Furthermore, the Court held that it was appropriate to use the criteria now established in all cases relating to expulsion of settled migrants following a criminal conviction, no matter if they had a family or not.[110] Since the notion of private life under Article 8 included the totality of social ties between settled migrants and their resident community, an expulsion of a settled migrant would always interfere with the right to respect for private life.[111]

---

[105] ibid para 51.
[106] ibid para 55.
[107] *Üner* (n 7).
[108] ibid para 54.
[109] ibid para 58.
[110] ibid para 59.
[111] ibid.

Whether it was appropriate to focus on the aspect of private or family life was to be decided based on the circumstances of the particular case.[112]

In the case at hand, the Court chose to focus on the aspect of family life and found that the seriousness of the crime outweighed the difficulties which the family would experience.[113] There was therefore no violation of Article 8.

The further refinement of the criteria came two years after *Üner* with the judgement in *Maslov v. Austria* [GC] in 2008.[114] *Maslov* concerned a Bulgarian national who came to Austria at the age of six, grew up and attended school there. At the age of 17, following a series of convictions for aggravated burglary and other offences, the applicant was issued with a ten-year exclusion order by the Austrian authorities.[115]

The Court looked at the right to respect for both private and family life, since the applicant still lived with his parents at the time the order became final.[116] The Court reiterated the criteria from *Boultif* and *Üner* and added that they were meant to facilitate the proper application of Article 8 by domestic courts in expulsion cases and that the weight of the respective criteria could vary in different cases with different circumstances.[117] It also added that, when no family life was at stake, the relevant criteria are the nature and seriousness of the offence, the length of the applicant's stay, the time elapsed and conduct after the offence, and the ties with both countries.[118]

Furthermore, in assessing the nature and seriousness of the offences, it should be taken into account whether they were committed as a juvenile or as an adult.[119] For a settled migrant who has lawfully spent all or the major part of his or her childhood in the host country, very serious reasons were required for the expulsion to be proportionate.[120] Finally, the Court held that States enjoy a certain margin of appreciation in their decisions, and that this margin goes hand in hand with European supervision, 'embracing both the legislation and the decisions applying it, even those given by an independent court'.[121]

In the case at hand, the Court found that the offences were acts of juvenile delinquency which were of an overwhelmingly non-violent nature.[122] Weighed against the length of his lawful stay, strong ties to Austria and lack

---

[112] ibid.
[113] ibid para 64. Three judges disagreed with this assessment.
[114] *Maslov v Austria* [GC] App No 1638/03, Judgement of 23 June 2008.
[115] ibid para 17.
[116] ibid para 62.
[117] ibid para 70.
[118] ibid para 71.
[119] ibid para 72.
[120] ibid para 74.
[121] ibid para 76.
[122] ibid para 81.

of ties to Bulgaria, the exclusion measure was not considered proportionate to the aim of preventing disorder or crime, and the Court therefore found a violation of Article 8.[123]

With the findings in *Maslov* that the criteria should be understood as a way to facilitate the application of Article 8 by domestic courts in expulsion cases, that the weight of the respective criteria could vary in different cases with different circumstances, and that the European supervision should embrace the reasons given by domestic courts, process-based review had begun to be incorporated as a way to decide such cases.[124] The ECtHR review could now focus on analysing whether the national courts had considered all the criteria and controlling for arbitrariness, instead of going into extensive substantive review.[125] This approached was further confirmed in the 2017 decisions of *Hamsevic v. Denmark* and *Alam v. Denmark*, both presided over by Robert Spano himself.[126] In the case of *Ndidi v. the United Kingdom* decided the same year, the Court spelled out the approach in full: when the domestic court has thoroughly assessed the applicants' personal circumstances, carefully balanced the competing interests and taken into account the criteria set out in the Court's case law, and reached conclusions which are not arbitrary of unreasonable, the Court declines to substitute its own view for that of the domestic courts.[127] In this way, process-based review was consolidated as a way to decide expulsion cases under Article 8.

The findings in the above cases still hold today. The proportionality of an expulsion order for a settled migrant is to be determined using the eight criteria from *Boultif* and the two added ones from *Üner*. These criteria, henceforth referred to as the *Üner*-criteria, are the following:

- [1] the nature and seriousness of the offence committed by the applicant;
- [2] the length of the applicant's stay in the country from which he or she is to be expelled;
- [3] the time elapsed since the offence was committed and the applicant's conduct during that period;
- [4] the nationalities of the various persons concerned;

[123] ibid para 100. One judge disagreed with this finding.
[124] Angelika Nussberger, 'Procedural Review by the ECHR: View from the Court' in Eva Brems and Janneke Gerards (eds), *Procedural Review in European Fundamental Rights Cases* (Cambridge University Press 2017) 174.
[125] ibid.
[126] *Hamsevic v Denmark (dec)* App No 25748/15, Decision of 16 May 2017, para 43; *Alam v Denmark (dec)* App No 33809/15, Decision of 6 June 2017, para 35.
[127] *Ndidi v. the United Kingdom* App No 41215/14, Judgement of 14 September 2017, para 76.

- [5] the applicant's family situation, such as the length of the marriage, and other factors expressing the effectiveness of a couple's family life;
- [6] whether the spouse knew about the offence at the time when he or she entered into a family relationship;
- [7] whether there are children of the marriage, and if so, their age;
- [8] the seriousness of the difficulties which the spouse is likely to encounter in the country to which the applicant is to be expelled.
- [9] the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled; and
- [10] the solidity of social, cultural and family ties with the host country and with the country of destination.

Following *Üner* it must be decided in each case if the applicant enjoys family life in the host country, or only private life. Following *Maslov*, for a young adult who has not yet founded a family of his own, the relevant criteria are:

- [1] the nature and seriousness of the offence committed by the applicant;
- [2] the length of the applicant's stay in the country from which he or she is to be expelled;
- [3] the time elapsed since the offence was committed and the applicant's conduct during that period; and
- [10] the solidity of social, cultural and family ties with the host country and with the country of destination.

The weight to be attached to the respective criteria will vary according to the circumstances of each case (*Maslov*). Furthermore, very serious reasons are required for the expulsion of a person who has spent all or the majority of his or her childhood in the host country (*Maslov*). Finally, when domestic courts have considered the *Üner*-criteria properly, the ECtHR may decline to do a full substantive review itself and instead only control for arbitrariness: thus, using the tool of process-based review to decide whether the outcome is within the State's margin of appreciation.

2.4 Criticism of process-based review

2.4.1 Criticism related to consistency

Several issues have been raised with the Court's use of process-based review, relating to the Court's institutional position, its desirable functions, and its

key capacities.[128] For the purposes of this thesis, the criticism against process-based review which focuses on the values of consistency and protection of the rights-claimant will be paid particular attention. The first line of criticism is discussed in this subsection, and the second in the next subsection of this chapter.

The procedural turn has been criticised for its lack of foreseeability and uniformity in the resulting case law, because two States could adopt the same measure and one would be acceptable and the other not, by fact of the quality of the process through which they were decided.[129] Too much focus on process-quality, it is argued, and the Court retreats from its role of providing stable and coherent case law which domestic courts can apply.[130]

This line of criticism to some extent misses the point that process-based review is designed precisely *to allow for* domestic contextualisation of the Convention. Furthermore, the rationale of process-based review is that there are already general principles for the interpretation of almost all Convention provisions firmly established in the Court's case law.[131] Today, the cases before the Court rarely concern novel issues of interpretation, but rather how a well-established principle should be applied in a singular case of alleged violation.[132] As has been shown in Section 3 of this chapter, this is the approach taken to expulsion cases under Article 8, with the clearly established *Üner*-criteria. In these cases, process-based review may result in increased discretion for the domestic judge deciding on a case, but it makes it very clear for him or her *how* that decision should be reached.[133]

The Court's approach to expulsion cases under Article 8 has been similarly criticised for not explaining how the balancing between the different criteria takes place in practice, thereby rendering it highly casuistic.[134] As in the general discussion of process-based review, the counterargument is that the criteria *are* a solid and clear test for the justification of expulsion measures.[135] The possibility of attributing different weight to the criteria in individual cases is not to be seen as a shortcoming, but, rather, allows for a desirable

---

[128] For a comprehensive discussion of the critique on these three points, see Huijbers (n 67) chs 7–9.
[129] Peter Cumper and Tom Lewis, 'Blanket Bans, Subsidiarity, and the Procedural Turn of the European Court of Human Rights' (2019) 68 International & Comparative Law Quarterly 611, 628.
[130] ibid 631.
[131] Spano 'The Future of the European Court of Human Rights' (n 6) 476.
[132] ibid.
[133] Nussberger (n 124) 170.
[134] Marie-Bénédicte Dembour, *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint* (Oxford University Press 2015) 194.
[135] Klaassen (n 70) 161.

differentiation of the level of protection.[136] The list of criteria may also allow the Court to strengthen foreseeability of its judgments for a recurring problem with a high degree of 'subjectivity factor' in the assessment of all relevant factors.[137]

The Court's application of process-based review has also been criticised for being inconsistent, in that the Court may focus strongly on the quality of domestic process in one case and not at all in a similar case.[138] While divergences between different rights issues may be acceptable because they warrant different degrees of scrutiny, inconsistent application for the same types of cases cannot be accepted. This would radically decrease foreseeability for both the rights-claimant and the State party.[139] Furthermore, since process-based review and subsidiarity more generally is about recognising the self-determination of a political community, discrepancies in application would be at odds with the equality of the Member States and by extension that of their constituents.[140] The normative discussion in Chapter 4 will therefore pay particular attention to this point, in relation to the findings of the empirical study in Chapter 3.[141]

2.4.2 Criticism related to protection of the rights-claimant

When the Court frames its rulings in process-based terms, critics believe that there is a risk that domestic authorities will increasingly 'tick the boxes' of a qualitative deliberation, while in practice not caring for the real interests of those concerned.[142] This fear, that domestic authorities would say that they have considered all relevant criteria and balanced the interests at stake, without actually having done so, is often termed 'procedural window-dressing'.[143] The adjudication of the *Üner*-criteria has been met with this type of scepticism, holding that the seriousness of the crimes committed may often be decisive and has motivated expulsion of long settled individuals.[144]

The risk of procedural rights window-dressing is difficult to escape in full. The ECtHR cannot go inside the mind of a domestic judge to know how she reasoned when faced with a case. As with questions of facts in its judgements, the Court must, to a certain extent, place trust in the domestic authorities, because it is unable to monitor every case from start to finish. In this respect,

[136] ibid 176.
[137] Nussberger (n 124) 174.
[138] Cumper and Lewis (n 129) 631–32.
[139] Huijbers (n 67) 192.
[140] Ulfstein (n 12) 925.
[141] See Ch. 4, Section 3.
[142] Huijbers (n 67) 269–70.
[143] ibid 269.
[144] Costello (n 69) 116.

one argument *for* process-based review is that it incentivises national judges to engage forcefully with the substantive principles of the Convention, also against their own governments.[145] When such engagement is done faithfully at the national level in impartial and independent courts, the ECtHR has strong reasons to believe that the result is a reasonable attunement to the domestic, democratically grounded legal order.[146]

Supporters of process-based review hold that the risk for window-dressing is further minimised because the Court retains the final word on whether the domestic decision is within the bounds of reasonableness, and dishonest balancing will easily be recognised as such.[147] Similarly, the fear that the assessment of *Üner*-criteria would be used only as a facade to mask blanket expulsions, it is argued, is assuaged by the Court controlling for arbitrariness in its decisions.[148]

This thesis proceeds on the basis that it is difficult to say if a national court has stated its reasons sincerely or not. Therefore, window-dressing will be discussed only to a limited extent. Instead, the fear that process-based review allows national authorities to encroach too much on the protection of the individual will be looked at primarily in terms of protection of the core of rights.[149]

Another criticism which has been raised against focus on 'good process' is that it risks giving undue leniency to well-reasoned majority views, emptying fundamental rights of their use as protection of minority rights.[150] Some interests may be excluded altogether or persistently overrun even in the most honest and reasonable of deliberations. Laura Henderson convincingly argues that process-based review cannot escape the substantive question of who's interests have been voiced in the domestic procedures.[151] At every moment when a court refers to a 'people' as the source of its authority, she holds, it is reconstituting the boundaries of the political community who's interests it represent.[152] For Henderson this is an ungrounded exclusion of all those who

---

[145] Spano 'The Future of the European Court of Human Rights' (n 6) 487, 493.
[146] ibid 488.
[147] ibid.
[148] Nussberger (n 124) 174.
[149] See Ch. 4, Section 3.2.
[150] Nussberger (n 124) 167; Cumper and Lewis (n 129) 636.
[151] Laura M Henderson, 'Internalizing Contestation in Process-Based Judicial Review' (2019) 20 German Law Journal 1167, 1173.
[152] ibid 1176. See also, Seyla Benhabib, 'Democratic Exclusions and Democratic Iterations: Dilemmas of `Just Membership' and Prospects of Cosmopolitan Federalism' (2007) 6 European Journal of Political Theory 445, 448 discussed in Ch. 4, Section 3.3.

are not considered to belong to that people, which would have to be substantively motivated.[153]

To give full value to the rationale of process-based review, Henderson proposes that courts should be fora of contestation where definition of 'the people' remains open to alternative formulations.[154] Process-based review can accomplish this by explicitly focusing on which interests have been included in the domestic decision-making and which legitimate interests have been left out.[155] Furthermore, a court performing procedural review may itself actively take account of the arguments from those not able to participate in previous decision-making, thereby directly giving them a voice on matters concerning them.[156]

This point of criticism applies most strongly to the area of law discussed in this thesis, since those faced by expulsion are non-nationals with no political voice in the domestic context. For this reason, the two subsequent parts of the study will consider whether the applicants were able to make use of process-based review to gain indirect political influence.

Criticism has also been raised against the content of the *Üner*-criteria. The criteria support a 'family life elsewhere' approach, requiring a spouse to demonstrate that she would be faced with difficulties in the receiving country, otherwise the Court is ready to accept that the couple must relocate.[157] A further criticism is that the criteria effectively punish migrants for retaining ties with their home countries, since it makes them easier to deport.[158] Additionally, there seems to be a reluctance by the Court to engage explicitly with both the aspects of private and family life, which may lead to decreased protection for the cases in between those with their own nuclear family and the severed, non-reliant adults.[159]

These content-wise issues with the *Üner*-criteria relate both to the acknowledgment of non-citizen's interests in general terms and the possibility for the applicant to influence what the Court looks at in his or her case. Like the aforementioned points, these will be revisited in the following two chapters.

In broader terms, the multifactor approach in the *Üner* and *Maslov* case law has been criticised for accepting migration control as an end in itself, rather than questioning the rationale of different State policies practiced in the

[153] Henderson (n 151) 1176.
[154] ibid 1177–79.
[155] ibid 1179.
[156] ibid 1180.
[157] Costello (n 69) 115.
[158] ibid 128.
[159] Desmond (n 70) 277.

area.[160] However, the acceptance of migration control as a legitimate aim is not done because the Court itself considers borders valuable, rather, it is done because the citizens of the respective countries do so, and their self-determination is to be acknowledged within limitations. The core or absolute rights such as the right to life of Article 2 and the prohibition of torture of Article 3 are pre-political, solely about individual substantive justice and should not be subject to democratic interpretation, but the right to respect for private and family life of Article 8 rightfully allows for politically decided restrictions which are 'necessary in a democratic society'.[161] As Spano writes, 'the Convention explicitly and textually infuses political and policy-based considerations into the overall assessment of the existence of qualified rights in a particular case'.[162] In deciding issues under such rights the question is not whether the Court should allow for domestic contextualisation and communal concern but how much and on what terms.

The strain between individual and collective concerns is, as the reader will now be aware of, a key theme in this thesis. It will be explored further in Chapter 4 in relation to the findings of the empirical study, with particular focus on whether the Court has allowed States to limit the core of rights in individual cases to encourage embedding of the rights – the answer being in the negative. First, however, it is in place to take stock of what has been established thus far.

2.5 Outlook

This chapter has established process-based review as the practice employed by the ECtHR to look at the quality of the domestic decision-making process as a factor to determine compliance with the Convention. In expulsion cases under Article 8 of the ECHR, this approach has been adopted by way of a list of criteria which the national courts have to consider when they decide whether a settled migrant is allowed to stay in a country following a criminal conviction: the ten *Üner*-criteria. When a national court has considered all the relevant criteria the domestic process has been of *high quality*, which speaks against finding a violation of the Convention. Conversely, if a national court has failed to apply the criteria, there have been *shortcomings of the domestic process*, which speaks for finding a violation of the Convention.

The fundamental rationale for process-based review is that it is a way to implement the principle of subsidiarity in practice. It is crucial to examine whether it can deliver on this promise and give domestic authorities the room

[160] Costello (n 69) 130.
[161] Spano 'The Future of the European Court of Human Rights' (n 6) 483.
[162] ibid.

to differentiate their decisions based on relevant concerns – otherwise the concept would be a hammer which fails to hit its nail. This will be explored in the first section of Chapter 4.

As Section 4 of this chapter has shown there is also relevant criticism against the use of process-based review. Protection-related concerns have been directed against process-based review in general, and against its specific application to expulsion cases under Article 8 by way of the *Üner*-criteria. And while the criticism against unclear standards is misguided for expulsion cases under Article 8, where the *Üner*-criteria very clearly shows how the assessment should be made, there is a relevant risk for inconsistent application of the procedural standards by the ECtHR itself, which must be monitored.

This thesis now proceeds to its second part, which will study how the ECtHR has applied process-based review in all its cases concerning expulsions under Article 8 during the period 2018–2022. In this empirical study, particular attention will be given to the relevant points of criticism discussed in this chapter.

CHAPTER 3

Case law study

3.1 Introduction

In this second part of the thesis, all cases from the period 2018–2022 concerning expulsion under Article 8 of the ECHR are studied. This part of the thesis answers the following research question:

> R1: What role did the quality of the national decision-making process play in the ECtHR's reasoning in expulsion cases implicating migrants with criminal record under Article 8 of the ECHR during the period 2018–2022?
>
> a. When did process-quality lead to positive inferences?
> b. When did process-quality lead to negative inferences?
> c. When did process-quality not lead to any important inferences?

The 21 cases are divided into three categories. The first category are those cases which answer question 1a, where the domestic process was of high quality, which led to positive inferences supporting the finding of no violation. The second category are those cases which answer question 1b, where there were shortcomings of the domestic process, which led to negative inferences supporting the finding of a violation. The third category are those cases which answer question 1c: where there were shortcomings of the domestic process without this leading to negative inferences supporting the finding of a violation, where the quality of the domestic process was uncertain, and the one case where the ECtHR did not even attempt to apply process-based review. Apart from answering the above research question, this chapter also presents relevant empirical material for the normative discussion in Chapter 4.

3.2 Positive inferences

3.2.1 From Levakovic to Avci: diligent application of the Üner-criteria

In ten of the analysed cases the Court found that the domestic decision-making procedure was of high quality which led it to draw positive inferences which spoke against finding a violation of Article 8. All these cases were strict applications of the *Maslov* and *Üner* case law, concerning expulsion of migrants for committing serious crimes. These cases will be analysed in this subsection. In the next subsection, the findings are summarised in a short resumé.

In the first of the analysed cases, that of *Levakovic v. Denmark (2018)*, a Croatian national who had lived his entire life in Denmark was faced with a deportation order for several accounts of robbery and arms-related offences.[163] The Court reiterated that the proportionality of the expulsion should be assessed based on the *Üner*-criteria, and that the State had a certain margin of appreciation, but that this margin went hand in hand with European supervision.[164] With reference to *Maslov*, the reasons for expulsion of settled migrant produced by the national authorities nonetheless had to be very serious.[165] The Court also pointed out, with reference to *Maslov*, that it had not qualified the relative weight to be afforded to the criteria in an individual assessment, this was to be decided in first place by the national authorities.[166]

In deciding the case the ECtHR held that the Danish courts' legal point of departure notably included the criteria established in ECtHR case law.[167] The ECtHR referred to the domestic courts' decision as a thorough assessment of the applicant's personal circumstances which carefully balanced the competing interests and explicitly took into account the criteria from the ECtHR case law, including the requirement of 'very serious reasons' for expulsion.[168] The reasons adduced by the national courts were considered relevant, in particular regarding the *Üner*-criteria [1] the nature and seriousness of the crime, which was violent, and [10] the ties with Denmark, where the applicant had 'primarily lived a life of crime'.[169] The Court concluded that the expulsion was proportionate, and that there was no violation of Article 8.

---

[163] *Levakovic v Denmark* App No 7841/14, Judgement of 23 October 2018.
[164] ibid para 38.
[165] ibid para 41.
[166] ibid.
[167] ibid para 40.
[168] ibid para 42.
[169] ibid para 44.

The ECtHR framed its decision in almost identical terms in *Khan v. Denmark (2021)*, concerning the expulsion of the leader of a criminal gang for threatening a police officer.[170] Since Danish courts took Article 8 and Court's case law as legal point of departure, thoroughly examined each criterion and were fully aware that very serious reasons were required to justify expulsion, the Court held that its role was to examine whether such very serious reasons had been adequately adduced.[171]

The Court stated that it had not set a minimum requirement for which crimes could motivate expulsion and reiterated that the relative weight of the different *Üner*-criteria should be decided in first place by national authorities.[172] In this regard, the Court observed that the crime of threatening a police officer was explicitly listed in the domestic legislation as motivating expulsion, 'and accordingly was considered sufficiently serious by the legislator to justify expulsion'.[173] The Court further held that the relative weight of the different criteria could change over time.[174]

Taken together, the reasons for the expulsion were considered relevant and sufficient and, as in *Levakovic*, the explicit and thorough assessment by the domestic court of Convention law was not to be second-guessed.[175] There was therefore no violation of Article 8.

The simultaneously decided *Munir Johana (2021)* mirrored the reasoning of *Khan* on the above points.[176] As in *Khan* the Danish courts were found to have adduced relevant and sufficient grounds for the applicant's expulsion and had not given disproportionate weight to the offence committed, when seen together with the applicant's criminal history.[177]

Beyond the Danish context the case of *Narjis v. Italy (2019)* concerned a Moroccan national expulsed from Italy due to multiple serious convictions for robbery and arms offences.[178] The Court held that, since the domestic courts had given a well-motivated decision with no signs of arbitrariness, considering all the relevant *Üner*-criteria, there was no reason for the ECtHR to substitute its own view for that of the domestic courts.[179] The Court accordingly found that there had been no violation of Article 8.[180]

---

[170] *Khan v Denmark* App No 26957/19, Judgement of 12 January 2021.
[171] ibid para 63.
[172] ibid para 67.
[173] ibid para 74.
[174] ibid para 75.
[175] ibid para 81.
[176] *Munir Johana v Denmark* App No 56803/18, Judgement of 12 January 2021.
[177] ibid para 65.
[178] *Narjis v Italy* App No 57433/15, Judgement of 14 February 2019.
[179] ibid paras 49–51.
[180] ibid para 52.

In *K.A. v. Switzerland (2020)* a national of Kosovo was expulsed for seven years from Switzerland, where his wife and son lived, following a conviction for drug trafficking.[181] The Court applied the *Üner*-criteria and noted, regarding the strength of his ties to Switzerland, that the applicant did not have a close relationship with his family.[182] The Court also noted the time-limited ban on re-entry and the possibility for requesting temporary suspension of his exclusion to visit his close ones.[183] Overall, the Court considered that the domestic authorities had conducted a sufficient review of the expulsion measure which did not appear arbitrary of unreasonable, and it was therefore not in place to second-guess this conclusion.[184] There was therefore no violation of Article 8.

In the case of *Veljkovic-Jukic (2020)* a Croatian woman convicted of drug trafficking was expulsed from Switzerland where she had lived for 19 years since the age of fifteen and had three children born in 2007, 2008 and 2012.[185] The national court had considered that the integration of the whole family into one of the destination countries of Bosnia and Herzegovina, Croatia or Serbia, was not impossible, because the parents had ties to those countries and the children were still of an adaptable age.[186] The ECtHR agreed with this assessment and held that the domestic authorities had also correctly taken into account the other *Üner*-criteria.[187] This supported the finding that there was no violation of Article 8. Two judges disagreed with this finding, arguing that the domestic authorities had not given appropriate weight to the ties with Switzerland, and had underestimated the trouble of relocating to one of the suggested countries.[188]

The case of *M.M. v. Switzerland (2020)* concerned process-based review of the *Üner*-criteria [1], [2], [3] and [10], since the applicant was a settled migrant without a family of his own.[189] In *M.M.* the applicant was a Spanish national born in Switzerland who was expulsed for five years following convictions for sexual offences against a child and drug use.[190] The Court found that the domestic courts were justified in considering the applicant's

---

[181] *K A v Switzerland* App No 62130/15, Judgement of 7 July 2020.
[182] ibid para 50.
[183] ibid para 52.
[184] ibid.
[185] *Veljkovic-Jukic v Switzerland* App No 59534/14, Judgement of 21 July 2020.
[186] ibid para 55.
[187] ibid paras 52, 54–56.
[188] *Veljkovic-Jukic* (n 185). *Opinion Dissidente Commun aux Juges Felici et Guerra Martins*.
[189] As in *Maslov*, discussed in Ch. 2, Section 3.
[190] *MM v Switzerland* App No 59006/18, Judgement of 8 December 2020.

crime as particularly serious since it concerned an important legal interest and it was a recidivist offence.[191]

The Court underlined that the applicant had made the same arguments before the ECtHR as in the domestic proceedings, rather than to point at issues which had been overlooked by the domestic authorities and which could have motivated other conclusions.[192] Similarly, the Swiss courts had considered the applicant's ties to Switzerland as limited, and since the applicant did not put forward any real argument against this before the ECtHR, the position of the domestic courts was accepted.[193] The Court concluded that the domestic courts had made a serious assessment of the personal situation of the applicant and the interests at stake, and therefore had produced the very serious reasons needed to justify his expulsion.[194] This supported the finding that there was no violation of Article 8.

The case of *Z. v. Switzerland (2020)* concerned another Swiss-born Spanish national who was expulsed following a conviction for sexual offences against a child.[195] The Court assessed the case under both the aspects of private life and of family life, applying the *Üner*-criteria in full.[196]

Contrary to the argument by the applicant, the Court found that the domestic court had correctly considered the crimes as very serious.[197] The ECtHR also agreed with the domestic court's position that there was a real risk for relapse which would not have to be accepted for legal interests as important as the sexual integrity of minors.[198] Similarly, the Court endorsed the domestic court's view that the relationship between the applicant and his son did not sufficiently constitute a family life and that the ties to Switzerland were evidently strong, but that the applicant also had ties to Spain.[199]

The Court concluded that the domestic authorities had reviewed all factors in detail and had drawn conclusions that appeared neither arbitrary nor manifestly unreasonable.[200] This supported the conclusion that the State had not attributed excessive weight to its own interests and that the expulsion was justified and did not constitute a violation of Article 8.[201]

---

[191] ibid paras 58–60.
[192] ibid para 63.
[193] ibid para 66.
[194] ibid para 69.
[195] *Z v Switzerland* App No 6325/15, Judgement of 22 December 2020.
[196] ibid para 63.
[197] ibid para 65.
[198] ibid para 68.
[199] ibid paras 71–73.
[200] ibid para 74.
[201] ibid.

The case of *D and Others v. Romania (2020)* concerned the expulsion of an Iraqi national for having smuggled members of the terrorist organisation Al-Qaeda in Iraq to Romania.[202] At the time of the expulsion order the man had resided in Romania for more than 20 years.[203] He had three children with Romanian nationalities who were in the care of his Romanian ex-wife.[204] They, together with their mother, were also applicants in the case.

The case, as regards Article 8, concerned the question of whether the expulsion was a violation of the right to respect for private and family life of any of the five applicants in the family.[205] The applicants claimed that the domestic courts had not taken into account the *Üner*-criteria in the assessment of the first applicant's expulsion.[206]

The Court held that the applicant had only given general and non-individualised arguments before the domestic courts concerning his family life in Romania and the fact that his children did not wish to move to Iraq, but that these arguments had nonetheless been taken into account, together with the other relevant criteria.[207] The Court underlined that the applicant had not clarified important factual circumstances relevant to his arguments either before the domestic courts or before the ECtHR, which had made the assessment by the domestic courts more difficult.[208] After also partly conducting its own substantive assessment, the Court concluded that the domestic courts had struck a fair balance between the interests at stake and found the claim under Article 8 manifestly ill-founded.[209]

Lastly in the string of cases drawing positive inferences from correct application of the *Üner* and *Maslov* case law was *Avci v. Denmark (2021)*, decided almost a year after *Khan* and *Munir Johana*.[210] Evidently inspired by the focus on procedure in those cases, the applicant in *Avci* – a man born in Denmark and expulsed permanently to Turkey, following a conviction for a serious drug offence – claimed that the domestic courts had failed to take into account that he did not have a significant criminal past, the lack of a previous suspended expulsion order, and the ties to both countries in their balancing exercise.[211] However, the domestic courts did explicitly refer to all of these aspects, which the majority of the ECtHR also highlighted, only it ultimately

---

[202] *D and Others v Romania* App No 75953/16, Judgement of 14 January 2020.
[203] ibid paras 7–10.
[204] ibid para 8.
[205] The case also concerned the prohibition on *non-refoulment* under Articles 2 and 3 of the ECHR.
[206] *D and Others* (n 202) para 81.
[207] ibid para 89.
[208] ibid para 90.
[209] ibid paras 91–94.
[210] *Avci v Denmark* App No 40240/19, Judgement of 30 November 2021.
[211] ibid para 25.

deemed that they did not counterweigh the threat to society posed by the applicant.[212] As in the previously analysed cases, the Court did not hold that there were strong enough reasons to overrule the balancing conducted by the national courts.[213] There was therefore no violation of Article 8.

A minority of judges disagreed with the approach adopted. They held that the facts of the case were very similar to cases where the Court had found a violation of Article 8, notably that of *Abdi*, which will be discussed in Section 3 of this chapter.[214] Additionally, they believed that the domestic courts had not really balanced the interests at stake but had only stated that the decision would not for certain be a disproportionate sanction, which did not meet the standard required of the assessment.[215]

3.2.2 Resumé

In all the above cases the Court deferred to the State party because of the quality of the domestic process by which the domestic courts had reached their conclusion to expulse the applicants. The research question 1a asked in this section was:

> When did process-quality lead to positive inferences?

This question has the following answer:

> Process-quality led to positive inferences which supported the finding that there was no violation of Article 8, in the ten cases of *Levakovic v. Denmark*, *Khan v. Denmark*, *Munir Johana v. Denmark*, *Narjis v. Italy*, *K. A. v. Switzerland*, *Veljkovic-Jukic v. Switzerland*, *M.M. v. Switzerland*, *Z v. Switzerland*, *D and Others v. Romania* and *Avci v. Denmark*.

This was the case when the domestic court's legal point of departure included the criteria established in ECtHR case law and explicitly referred to them (*Levakovic, Khan).* Furthermore, to earn deference, domestic courts must show that they were aware that very serious reasons are required to justify expulsion of persons who have grown up in a country (*Levakovic, Khan).* Explicit choices made by the domestic legislator can support the proportionality of a domestic court's assessment, as in the case of *Khan* regarding the specific listing of the crime in the domestic legislation. Similarly, special legal interests such as the sexual integrity of minors can modify the requirements on the domestic court's assessment in that no risk

---

[212] ibid paras 30–37.
[213] ibid para 38.
[214] *Avci* (n 210). Joint Dissenting Opinion of Judges Pejchal, Ranzoni and Yüksel, paras 6-9.
[215] ibid para 13.

for recidivism need to be accetepted (*M.M, Z*). There must be no signs of arbitrariness in the domestic decision (*Narjis, K.A.*), but the applicant's failure to put forward individualised arguments or substantiate factual circumstances may limit the requirements put on the domestic procedure (*M.M, D and Others*).

Additionally, important points to be revisited in Chapter 4 emerged from the ten cases. The Court refined its application of the *Üner*-criteria in that that the relative weight to be afforded to the criteria was not given in advance, but should be decided in first place by the national authorities (*Levakovic, Khan, Munir Johana)*; that where was no minimum requirement for which crimes could motivate expulsion (*Khan, Munir Johana*) and that the relative weight of the different criteria could change over time (*Khan*). These clarifications broadened the future range of domestic assessments which could be accepted.

Of course, even properly raising all relevant issues may not help the applicant, as the cases of *Z* and *Avci* show, since those points may in the end be outweighed by other reasons. The dissenting view in *Avci* further points to the criticism of unclear standards and window-dressing raised against process-based review. The view that *Avci* diverged in outcome from similar cases may well be true, but, as discussed in Chapter 2, this contextualisation is one of the key points of process-based review and the criticism is therefore misguided. However, the suggestion that the domestic judges had not really balanced the interests at stake exemplifies the unavoidable risk of window-dressing when the ECtHR focuses on the domestic process and the aspect of inter-court trust to which it is connected. As discussed in Chapter 2, it is difficult to say how the domestic court in *Avci* came to their conclusion, and the case will therefore not be treated as a situation of procedural window-dressing.

3.3 Negative inferences

3.3.1 From Saber and Boughassal to Savran: failures in applying the *Üner*-criteria

In five of the analysed cases the Court identified shortcomings of the national process which led it to draw negative inferences that in turn supported the conclusion that there was a violation of Article 8. This was based on the domestic courts' failure to properly apply the *Üner*-criteria. These cases are analysed in this subsection, and subsequently summarised in a short resumé.

In *Saber and Boughassal v. Spain (2018),* concerning two Moroccan nationals expulsed due to drug trafficking, the Court found a process-based violation of Article 8.[216] Since the Spanish courts had not considered in the applicants' concrete cases the seriousness of the crimes they had committed or the other *Üner*-criteria, but automatically applied a rule that intentional crimes with a sentence of more than one year would always result in expulsion, they failed to properly balance the interests at stake and the proportionality of the measure could not be established.[217] The argument of the Spanish Government that the adequate balancing had been done by the legislator in adopting the legislation was not accepted by the ECtHR.[218] In a concurrent opinion, Judge Keller underlined that there had been good possibilities for the domestic courts to substantiate their decision with due regard for ECtHR case law, but since they had not done so it was correct to find a process-based violation.[219]

In *I.M. v. Switzerland (2019)* the Swiss authorities had ordered the expulsion of a Kosovo national following a conviction for rape.[220] The applicant lived in an apartment with two of his adult children and had recently fathered new twins with his ex-wife.[221] The applicant had medical issues for which he had received handicap pensions and which, according to his doctors, made him dependent on the care of his family.[222]

In assessing the case, the Court chose to look at the impact on both the private life and the family life of the applicant. The Court considered that this was necessary to guarantee the effective protection of the Convention rights, even though the applicant had not admitted to the fathering of the twins in the initial domestic procedure.[223] Additionally, the Court held that the applicant also had family life with his adult children.[224]

The Court then looked at whether the domestic courts had adequately applied the *Üner*-criteria to the applicant's case. In doing this the Court found several shortcomings, including the lack of consideration for the applicant's handicap which spoke against recidivism, the ties to both countries and the family life the applicant enjoyed with his children.[225] Because of these shortcomings, the Court could not properly supervise the national decision, and stated that while

---

[216] *Saber and Boughassal v Spain* App Nos 76550/13 and 45938/14, Judgement of 18 December 2018.
[217] ibid paras 50–51.
[218] ibid para 48.
[219] *Saber and Boughassal* (n 216). Concurring Opinion of Judge Keller.
[220] *IM v Switzerland* App No 23887/16, Judgement of 9 March 2019.
[221] ibid para 29.
[222] ibid paras 30–34.
[223] ibid para 61.
[224] ibid para 62.
[225] ibid para 76.

it could potentially otherwise have accepted the decision, it was now obliged to find a violation.[226] As in *Saber and Boughassal*, Judge Keller in her separate opinion underlined the process-based nature of the finding.[227]

This outcome was mirrored in *Makdoudi v. Belgium (2020)*.[228] Since the domestic authorities had not considered the applicant's personal or family situation but simply written his claims off as unfounded, they had failed to balance the interests at stake properly.[229] Therefore, the Court concluded that there was a violation of Article 8, adding that if the domestic authorities had conducted a proper assessment of all relevant criteria the result could well have been within the State's margin of appreciation.[230]

Additionally, the Danish cases of *Abdi (2021)* and *Savran* [GC] *(2021)* also resulted in the Court finding a violation because of shortcomings in the domestic process. In these cases, the domestic courts had attempted to apply the *Üner*-criteria, but the ECtHR found that this had been done in a wrongful manner.

Abdi concerned the permanent expulsion of a Somalian national for possession of a loaded arm in a public place.[231] The applicant had lived in Denmark since age four and had no ties to Somalia, but also had a criminal history as a minor.[232] The applicant claimed that the domestic courts had failed to take into account, among other things, that he did not have a significant criminal past and that he had never been issued with a conditional expulsion order.[233]

The Court applied the *Üner*-criteria focusing only on the aspect of private life.[234] As in *Munir Johana* and *Khan*, discussed in Section 2 of this chapter, the Court acknowledged that the Danish courts took Article 8 and Court's case law as legal point of departure, thoroughly examined each criterion and were fully aware that very serious reasons were required to justify expulsion.[235] However, the Danish High Court had considered the fact that the applicant had been convicted as a minor for serious crimes as an argument for expulsion.[236] The ECtHR did not consider these convictions relevant.[237]

---

[226] ibid paras 77–78.
[227] *IM* (n 220). Concurring Opinion of Judge Keller.
[228] *Makdoudi v Belgium* App No 12848/15, Judgement of 18 February 2020.
[229] ibid paras 93–94.
[230] ibid paras 97–98.
[231] *Abdi v Denmark* App No 41643/19, Judgement of 14 September 2021.
[232] ibid paras 5–6.
[233] ibid para 27.
[234] ibid paras 29–31.
[235] ibid para 32.
[236] ibid paras 34, 11.
[237] ibid paras 40, 42; cf. *Maslov* (n 114) para 72.

Similarly, the lack of previous conditional expulsion order was not considered by national authorities, the ECtHR by contrast held this to matter in the proportionality assessment.[238] The Court partially conducted its own proportionality assessment and found that given all the circumstances of the case the permanent expulsion was disproportionate.[239] It therefore found a violation of Article 8.

The 2021 case of *Savran* [GC] concerned the permanent expulsion of a Turkish national for assault with highly aggravating circumstances.[240] The applicant suffered from schizophrenia and had close ties to his extended family living in Denmark, where he had been living since the age of six.[241]

The applicant claimed that domestic courts had overlooked his dependence on his family in their assessment and that the permanent ban on re-entry in particular had breached Article 8.[242] The Danish State disagreed with this and argued that the domestic courts had explicitly considered all relevant criteria of the ECtHR case law, furthermore, they argued that the domestic court had not been allowed to give a time-limited ban for re-entry under the applicable legislation.[243]

The Court referred to the *Üner*-criteria for the requirements of the proportionality assessment, and to 'a certain margin of appreciation in assessing the need for an interference, but that it goes hand in hand with European supervision', where particular focus would be placed on the reasoning of the domestic courts.[244] There had been on one hand the original criminal procedure in 2009 against the applicant, when the expulsion order became final, and on the other hand the revocation proceedings ending in 2015. Since a significant time had passed between these, the Court held that the proportionality of the applicant's expulsion had to be considered anew by the domestic courts in the revocation proceedings, taking into account any relevant change in circumstances.[245] It was the quality of the revocation procedure that was therefore subject of the Court's review.[246]

The Court went on to find that the domestic courts had duly taken account of the applicant's health in the revocation proceedings, this, however, was only one of the relevant aspects in the assessment.[247] The fact that the applicant's

[238] ibid para 41.
[239] ibid para 44.
[240] *Savran v Denmark* [GC] App No 57467/15, Judgement of 7 December 2021.
[241] ibid paras 11, 34.
[242] ibid para 153.
[243] ibid paras 160–161, 164–166.
[244] ibid paras 181–189.
[245] ibid para 190.
[246] ibid.
[247] ibid para 192.

criminal culpability had been excluded in the criminal proceedings due to mental illness had not been adequately considered in the balancing act, neither had his progress of declining aggressive behaviour, nor his ties to Denmark or the length of the re-entry ban.[248] For these reasons the ECtHR held that the domestic court had failed to duly take into account and to properly balance the interests at stake, and found a violation of Article 8.[249]

In a partly dissenting opinion six of the 17 judges disagreed with the finding of a violation of Article 8.[250] They argued that the review by the ECtHR should not have been of all relevant criteria since those were duly assessed by the domestic courts in the original expulsion proceedings, instead the European supervision should have been limited to the health issue which was, under domestic law, the only relevant aspect to consider in the revocation procedure.[251] Similarly, they believed that the aspect of the seriousness of the crime, also regarding criminal culpability, had become *res judicata* and should therefore not have been revisited in the revocation proceedings.[252] In the dissenting view, the judgment provided limited guidance to domestic courts, and had required them to go beyond the confines of the domestic law.[253]

3.3.2 Resumé

The cases above show that when the domestic decisions on expulsion are not well motivated the ECtHR is prepared to go against them and favour the applicants' claims to stay in a country. The research question 1b asked in this section was:

> When did process-quality lead to negative inferences?

This question has the following answer:

> Process-quality led to negative inferences which supported the finding that there was a violation of Article 8, in the five cases of *Saber and Boughassal v. Spain, I.M v. Switzerland, Makdoudi v. Belgium, Abdi v. Denmark* and *Savran v. Denmark* [GC].

This conclusion was reached when the domestic courts had ordered expulsion automatically for crimes of a certain gravity in *Saber and Boughassal*. Furthermore, a court may have failed to properly balance by omitting

---

[248] ibid paras 193–196, 197, 198–200, respectively.
[249] ibid para 201.
[250] *Savran* (n 240). Joint Partly Dissenting Opinion of Judges Kjølbro, Dedov, Lubarda, Harutyunyan, Kucsko-Stadlmayer and Poláčková.
[251] ibid paras 23–25.
[252] ibid para 27, 33.
[253] ibid para 50.

important aspects in its assessment, such as in *I.M.* and *Makdoudi*. The domestic courts may also have applied the criteria in a wrongful manner, as in *Abdi* concerning the relevancy of previous offences, and in *Savran* [GC] concerning the lack of criminal culpability due to mental illness. From *Savran* [GC] it also emerges that a new, all-encompassing balancing must be done if a significant amount of time has passed from the original expulsion procedure and the case is revisited at a later stage in revocation proceedings.

As in the group of cases discussed in the previous section, the Court again let its procedural review be influenced by the applicants' claims, but in positive terms, going so far as to review domestic legislation, thereby allowing the applicant to challenge the law in his or her country of residence. Such a challenge was successful in *Savran* [GC]. Regarding the scope of the revocation proceedings in general and the length of the deportation in particular, the consequence of the applicant's litigation was that domestic judges were required to go beyond the domestic legislation, as highlighted by the dissenting judges.

The cases also exemplify how the Court can be flexible in its review to guarantee a minimum effective protection of rights. This move was made explicit in *I.M.* when the Court choose to include the aspect of family life in its assessment, despite the applicant not having admitted to being the father of his children in the domestic proceedings. Similarly, in *Savran* [GC], the Court's choice to focus only on the 2015 revocation proceedings and not the original 2009 expulsion decision gave it more room to find a process-based violation, since most factors had been assessed in the original process (as also argued by the dissenting judges).

3.4 Divergent cases

3.4.1 Introductory note

In the 15 cases discussed in the previous sections the quality of the domestic process was an argument for non-violation when the process was of high quality, or an argument for finding a violation when there were shortcomings in that process. In the six remaining cases from the period 2018–2022 the quality of the domestic process was in different ways not important for the outcome. Shortcomings in the domestic process did not lead to negative inferences in the cases of *Unuane v. the United Kingdom* and *Otite v. the United Kingdom*, analysed in the first subsection below. In the cases of *Assem Hassan Ali v. Denmark*, *Zakharchuck v. Russia*, and *Pormes v. the Netherlands*, the Court identified deficiencies in the domestic process but despite this stated that they had been of sufficient quality. These judgements will be analysed in the second subsection below.

Finally, in the case of *Azerkane v. the Netherlands (2020)*, the Court did not review the domestic process. This case will be briefly discussed in the third subsection below.

3.4.2 Unuane and Otite: shortcomings of domestic process without negative inferences

In *Unuane v. the United Kingdom (2020)* the issue was two-fold, because the applicant complained that the national legislation on expulsion precluded a thorough proportionality assessment, and that an adequate assessment in any event had not been made in his case.[254] On the first point the Court disagreed with the applicant's claim, since domestic precedents had held that the wording of the United Kingdom Immigration Rules provided scope for all relevant factors to be taken into account, and lower courts had been encouraged to do so.[255]

However, as regards the balancing conducted in the applicant's case, the Court agreed with the applicant that it had not been sufficient. The domestic court had merely noted that it could not allow the appeal because the applicant had not established 'very compelling circumstances' over and above the parental relationship with his children, rather than to conduct a case-specific balancing exercise as required by the Convention case law.[256] This lack of domestic balancing, the Court held, required it to rule itself on whether the expulsion measure was reconcilable with Article 8.[257] After conducting its own balancing of all the relevant criteria, the Court found that the best interests of the applicant's sick child outweighed the seriousness of the offence he had committed and that the expulsion was therefore disproportionate and in violation of Article 8.[258]

In *Otite v. the United Kingdom (2022)* a Nigerian national had been expulsed following a conviction for fraud which had cost the victims 'well over £100,000 if not several hundred thousand pounds'.[259] He had arrived in the United Kingdom in 2003 at the age of 31 and was the father of three children with British nationality.[260]

---

[254] *Unuane v the United Kingdom* App No 80343/17, Judgement of 24 February 2021, para 77.
[255] ibid paras 80–83.
[256] ibid para 84.
[257] ibid para 85.
[258] ibid paras 89–90.
[259] *Otite v the United Kingdom* App No 18339/19, Judgement of 27 September 2022, para 9.
[260] ibid paras 5–6.

The Court referred to the *Üner*-criteria for assessing whether the expulsion was necessary in a democratic society.[261] As in *Unuane* the Court found that the domestic legislation did not preclude adequate balancing, rather, the existence of such had to be considered on a case-by-case basis.[262] However, in the case at hand the domestic courts had only considered the relevant criteria indirectly, if at all, and no reference had been made to ECtHR case law.[263] The Court stated in plain terms that the domestic courts 'did not conduct the balancing exercise as required by Article 8' and that it was therefore called on to give its own substantive ruling on whether the expulsion was reconcilable with Article 8.[264] In doing the balancing itself the Court found that the expulsion was proportionate, and that the State had not violated Article 8.[265]

3.4.3 Assem Hassan Ali, Zakharchuk and Pormes: questionable quality of the domestic processes

In *Assem Hassan Ali v. Denmark (2018)* the Court identified certain deficiencies in the domestic process, without drawing any negative inferences from this.[266] The case concerned a Palestinian national expulsed to Jordan for drug trafficking. He had several young children in Denmark, one of whom with mental disability, but the applicant had arrived in Denmark at the age of 20 and was not integrated in Danish society.[267]

The domestic courts had not expressly considered whether the separation of the applicant from his wife and children could outweigh the seriousness of his crime, but the Court drew no negative inferences from this.[268] Similarly, the domestic courts 'did not as such comment' on the Statements from the mothers of the applicant's children that the children would 'break down' and be very negatively impacted by the applicant's deportation.[269] This was not considered an issue for the ECtHR, since the other material was strong enough to counterweigh the claim either way.[270] Despite these apparent shortcomings, the Court considered that the Danish courts had carefully balanced the competing interests at stake and explicitly taken the relevant criteria into account, including the applicant's family situation, and that the reasons given were relevant and sufficient and the measure proportionate,

[261] ibid paras 36–37, 40, 42.
[262] ibid para 43.
[263] ibid para 45.
[264] ibid.
[265] ibid paras 46–56.
[266] *Assem Hassan Ali v Denmark* App No 25593/14, Judgement of 23 October 2018.
[267] ibid paras 5–6, 49.
[268] ibid para 52.
[269] ibid para 60.
[270] ibid para 61.

having regard to the gravity of the offence.[271] The Court found that there was no violation of Article 8.

The case of *Zakharchuk v. Russia (2019)* concerned the expulsion of a Polish national who had lived entire his entire life in Russia due to a conviction for assault.[272] The applicant claimed that the examination of his appeals had been formalistic without regard to the relevant criteria and that the domestic courts had ignored his arguments.[273]

To decide whether the expulsion was necessary in a democratic society the Court partially conducted its own substantive review, finding that the applicant did have ties to Poland, and that his crime was of a very serious nature.[274] Since the domestic courts had noted the applicant's length of residence, his integration into society and his ties to Poland, the majority believed that there had been a thorough examination of the applicant's appeal, weighing up all the relevant factors.[275] There was therefore in the majority's view no violation of Article 8.

Three of the seven judges disagreed with this finding and argued that the domestic courts' reasoning was insufficient, and the expulsion was rather ordered automatically.[276] In their view several of relevant criteria were not or only inadequately addressed; for example that the applicant's release on parole spoke for him being rehabilitated and no longer constituting a threat to society, that his ties to Russia were particularly strong, and that the trips he had made to Poland did not establish relevant ties to that country.[277] In their view the Court should have found a violation of Article 8 due to the general and formalistic approach of the domestic assessment, as had been done in *Saber and Boughassal*.[278]

Finally, *Pormes v. the Netherlands (2020)* concerned an Indonesian national who had lived in the Netherlands since age four without a permit of residence, who was not aware of the irregularity of status.[279] He was later denied a residence permit at adult age because of repeated crimes and deported to Indonesia. *Pormes* was a hybrid case between a negative obligation not to deport a settled migrant and a positive obligation to admit a non-national,

---

[271] ibid para 63.
[272] *Zakharchuk v Russia* App No 2967/12, Judgement of 17 December 2019.
[273] ibid paras 40–41.
[274] ibid para 61.
[275] ibid paras 62–63.
[276] *Zakharchuk* (n 272). Joint Dissenting Opinion of Judges Lemmens, Pinto de Albuquerque and Elósegui paras 1–2.
[277] ibid paras 6–9.
[278] ibid paras 10–11.
[279] *Pormes v the Netherlands* App No 25402/14, Judgement of 28 July 2020.

since in practice it concerned the termination of long-time residence in the State, but the State did not grant the right of residence in the first place.[280]

The applicant in *Pormes* could not be considered as a settled migrant due to the irregularity of his status, so the *Üner* and *Maslov* case law requiring 'very serious reasons' for expulsion did not apply.[281] Despite this, since he had not been aware of the unlawfulness of his stay, the Court did not require 'exceptional circumstances' for it to find a violation, as it normally did for cases of irregular residents.[282] Rather the case was to be assessed 'from a neutral starting point, taking into account the specific circumstances of the applicant's case'.[283]

In performing this assessment, the Court to a large extent conducted its own substantive proportionality analysis. It considered the applicant's strong ties to the Netherlands, his weak ties to Indonesia and the fact that he could not be reproached for the unlawful character of his stay as factors weighing in his favour.[284] Conversely, the fact that the applicant knowingly committed several of his crimes of indecent assault after becoming aware of his precarious residence status could not be overlooked, and the Court also considered the seriousness of the crimes committed and the fact that the applicant could manage in Indonesia as supporting the proportionality of denying him residence.[285]

Additionally, the Court considered that the domestic decision-making bodies had specific regard to the State's obligations under Article 8 and conducted a balancing exercise weighing relevant factors.[286] The majority of the Court thus found that there was no violation of Article 8.

Two of the seven judges disagreed with the majority's finding. To them there were important shortcomings in the national assessment since what balancing they did was based on the wrong starting point that the applicant should be treated as someone who had been aware of his irregular status.[287] In the dissenting view, the domestic courts also failed to consider certain relevant criteria of the Court's case law, such as the time elapsed after the offence and the applicant's conduct during that period.[288] Taken together, the dissenting view considered that there were ample shortcomings to find first and foremost

[280] cf. Klaassen (n 70) 159.
[281] *Pormes* (n 279) para 59.
[282] ibid para 60.
[283] ibid para 61.
[284] ibid paras 62–64.
[285] ibid paras 65–67.
[286] ibid para 68.
[287] *Pormes* (n 279). Dissenting Opinion of Judge Ranzoni Joined by Judge Ravarani para 9.
[288] ibid paras 13–17.

a process-based violation of Article 8, as in the cases of *I.M.* and *Makdoudi*.[289] When the majority instead largely conducted their own balancing exercise, the dissent claimed that they made similar mistakes as the domestic courts, omitting a proper assessment which would have resulted in the finding of a substantive violation.[290]

3.4.4 Azerkane: no review of domestic process

The case of *Azerkane v. the Netherlands (2020)* concerned a Moroccan national who was faced with an expulsion order following his conviction for armed robbery.[291] The ECtHR referred to the *Üner*-criteria as the basis on which to decide the case, and to a certain margin of appreciation which went hand in hand with European supervision.[292] But the Court then performed its own substantive review of the different criteria, with only very brief references to the domestic process.[293] The Court concluded that the persistent and serious nature of the applicant's offending made the balance struck by the national authorities proportionate, and there was therefore no violation of Article 8.[294]

The Court did not say explicitly why it did not focus on the domestic process, as it usually would. The answer may however appear in the statement that the ECtHR found it 'of considerable relevance' that the applicant committed further serious offences after the domestic process had been concluded.[295] This aspect would not have fitted in a process-based review, since the domestic courts could not possibly have taken it into account. Process-based review may therefore have been abandoned seemingly in whole, in favour of substantive review, to allow this aspect to weigh heavily in the Court's assessment.

3.4.5 Resumé

The research question 1c asked in this section was:

> When did process-quality not lead to important inferences?

This question has the answer:

> Process quality did not lead to important inferences in the cases of *Unuane v. the United Kingdom* and *Otite v. the United Kingdom*. In

[289] ibid paras 19–21, 24.
[290] ibid paras 23–24.
[291] *Azerkane v the Netherlands* App No 3138/16, Judgement of 2 June 2020.
[292] ibid para 72.
[293] ibid paras 73–84. In paras 74 and 80 the Court referred to the domestic process in passing.
[294] ibid paras 84–85.
[295] ibid para 77.

the cases of *Assem Hassan Ali v. Denmark, Zakharchuk v. Russia* and *Pormes v. the Netherlands* the quality of the domestic review was debatable. In the case of *Azerkane v. the Netherlands*, the Court did not review the domestic process.

The case of *Otite* stands out in that *despite* obvious shortcomings of the domestic process which did not include any regard for the ECtHR case law, *no violation* of Article 8 was found – in direct contrast to the judgements of *Saber and Boughassal*, *I.M.*, and *Makdoudi* where 'pure' process-based violations were found on that basis. Instead, the Court only took the lack of balancing at national level as a reason to conduct its own proportionality analysis. This was also the approach in *Unuane*, where the substantive weighing however turned out to the applicant's favour. The fact that both cases concerned the United Kingdom unavoidably raises the question of whether the United Kingdom is given more leniency than other States. This issue will be revisited in Section 3 of Chapter 4 below.

The case of *Assam Hassan Ali* shows that the requirements of a qualitative process are difficult to pin down, and that certain elements may after all be overlooked without this being enough to lead to negative inferences. While not as evident as in *Otite*, it appears that the ECtHR partly refrained from finding a process-based violation because it considered the expulsion was substantively motivated.

Zakharchuk, for its part, appears to have been a case of procedural window-dressing, as also underlined by the dissenting judges. The domestic courts merely noted some of the relevant aspects of applicant's case, but this was enough for the majority to find that there had been a serious weighing of interests. It seems likely that the majority knowingly accepted superficial balancing as better than none, because the case concerned Russia, where domestic courts often do not even attempt to apply the Convention case law.[296] Such a pragmatic approach to process-based review may well be preferable concerning authoritarian States, because it would encourage domestic courts to strike down – at least – on egregious human rights violations. This issue, however, is beyond the scope of this thesis and will not be explored further.

The same allegation of window-dressing could be raised for *Pormes*, as was done by the dissenting view. However, *Pormes* is complicated by the fact that the ECtHR broke new ground by assessing the situation from a 'neutral

[296] See, for example, *Usmanov* (n 31). In the case, which was exempted from this study because the expulsion was not motivated by reference to the applicant's criminal record, the Court found a process-based violation because the domestic court completely disregarded the need for balancing.

starting point'. The domestic courts could hardly have anticipated this, and the case can therefore be seen as a situation where the requirements on the domestic process necessarily had to be lowered to make room for this new development of the law.

Finally, *Azerkane* suggests that when the decisive factual circumstance is something which has happened after the domestic proceedings are concluded, the ECtHR may abandon process-based review and conduct its own wholly substantive review to take this fact into account.

3.5 Summary

This second part of the thesis set out to answer the research question:

> What role did the quality of the national decision-making process play in the ECtHR's reasoning in expulsion cases implicating migrants with criminal record under Article 8 of the ECHR during the period 2018–2022?

The answer to this question is, first, that in the 21 cases analysed, only the one case of *Azerkane* did not include a review by the Court of the domestic decision-making process.

Second, in the other cases, the quality of the national decision-making process played the following roles in the Court's assessment:

Table 1: **The role of process-based review in the analysed cases**

	HIGH QUALITY OF DECISION-MAKING	**LOW QUALITY OF DECISION-MAKING**
INFERENCE MADE	Positive inference. 10 cases.	Negative inference. 5 cases.
NO INFERENCE MADE	No positive inference. 0 cases.	No negative inference. 2 cases.

The column to the left represents the cases where the domestic courts typically took the ECtHR's case law as their starting point, were aware that very serious were required to expulse people born in the host State, and showed no signs of arbitrariness in their decisions.[297] In all such cases, the

[297] See Section 2.2 of this chapter.

ECtHR made positive inferences from this which supported the finding that the outcome did not violate Article 8, as highlighted in the top left cell. The cell to the bottom left accordingly includes zero cases. The column to the right represents those cases where the domestic courts typically disregarded the need for balancing, ordered expulsion automatically for crimes of a certain gravity, omitted important aspects in their assessment, or applied the *Üner*-criteria in a wrongful manner.[298] In all except two of those cases, the Court made inferences from these shortcomings which supported the finding that there had been a violation of Article 8. But in the two cases of *Unuane* and *Otite*, represented in the bottom right cell, no such inferences were made, instead the Court only took the lack of appropriate balancing as a reason to perform its own independent substantial review.

For the three cases of *Assem Hassan Ali, Zakharchuk* and *Pormes*, the domestic process was of questionable quality. Neither in those cases, therefore, can it be said that it led to important inferences. Because of the debatable quality of the domestic process in these cases, they are not included in Table 1 above.

The thesis now proceeds with its third and final part, where the practice of process-based review will be examined normatively. In this discussion, the various points of interests noted throughout this chapter will be revisited.

[298] See Section 3.2 of this chapter.

CHAPTER 4

Normative evaluation

4.1 Introduction

The previous chapter investigated how the ECtHR has used process-based review in expulsion cases under Article 8 during the past five years. The present chapter, which constitutes the final part of this thesis, takes the examples provided by the same 21 cases and returns to the normative question asked in the beginning of the thesis, and further outlined with reference to the criticism discussed in Chapter 2 – of whether this type of judicial review has worked out well, given the normative framework of the Council of Europe, or not. In doing so, this chapter answers the following research question:

Section 2 of this chapter investigates the extent to which process-based review has respected and furthered meaningful political self-determination of the Member States, which, as shown in Chapter 2, is its fundamental rationale. Section 3 departs from the criticism directed against process-based review in general and concerning expulsion cases under Article 8 and discusses risks to the protection of the rights-claimant. Section 4 looks at the consistency of the Court's practice in relation to the principle of foreseeability.

4.2 Respect for self-determination

4.2.1 Introductory note

The fundamental rationale for process-based review, as shown in Chapter 2, is that it is a way to concretise the principle of subsidiarity. The principle of subsidiarity, for its part, is about the Court acknowledging that Member States may articulate their own answers to human rights issues tuned to the particularities of their own society.[299]

Why is this localisation valuable? One part of the answer is that it respects political self-determination: that a political community, through its *own* institutions, sets its *own* rules for what happens in its *own* society. This point was expressed by Lord Hoffmann in his criticism of the ECtHR:

[299] Spano, 'Universality or Diversity of Human Rights' (n 76) 491.

> We remain an independent nation with its own legal system, evolved over centuries of constitutional struggle and pragmatic change. I do not suggest that the United Kingdom's legal system is perfect but I do argue that detailed decisions about how it could be improved should be made in London, either by our democratic institutions or by judicial bodies which, like the Supreme Court of the United States, are integral with our own society and respected as such.[300]

Seen as an expression of brute nationalism, this way of reasoning is difficult to accept in cases concerning immigration. But there are good reasons for deferral to political self-determination, also when it comes to migration issues, such as for the question of expulsion. This section answers the research question 2a:

> Can the practice of process-based review in expulsion cases be justified from the perspective of political self-determination?

To do this it must be studied whether the Court, in its practice of process-based review, has allowed sufficient room for the aspects of self-determination which are most relevant for migration policy. This is done in the first subsection below. In the subsection which follows, an argument is presented for how process-based review also invigorates the ideal of popular sovereignty by encouraging political communities to appropriate European human rights law as their own.

4.2.2 Process-based review giving room for meaningful self-determination

Following the political theorist David Miller, self-determination is when a group, which is cohesive enough that it can be attributed certain aims and values – such as a political community wishing to build a welfare state – is able to order its activities and shape its surroundings in light of these common aims and values.[301] As Miller further notes, the value of political self-determination appears not the least in considering historical movements for liberation, such as the fight against colonialism, where achieving political autonomy was the most important thing of all.[302]

The most important rationale for self-determination concerning expulsion measures is that such policies can serve to mitigate the decrease in institutional and interpersonal trust which may follow from changes in the

[300] Lord Hoffman (n 75) para 39.
[301] Miller (n 20) 69.
[302] ibid.

composition of a populace.[303] Many would object that such reduced trust is due to simple prejudice. While that may be true, it does not make it an irrelevant concern. Decreased trust in a society shifts focus away from providing public goods beneficial to all, towards self-interested bargaining, where suspicious groups fight for goods that only their members can enjoy.[304] Such group-concerns risk displacing general considerations of social justice, such as economic redistribution.[305] It is important that States retain the possibility of making policy choices which can limit this decrease in trust.

In quantitative terms, the Court in almost half of the cases analysed deferred to the State party. At face value, therefore, it seems to show awareness of States' legitimate interest in self-determination. Similarly, the refinements of the law that there was no minimum requirement for which crimes could motivate expulsion, and that the relative weight of the different criteria could change over time, broadened the range of domestic assessment which could be accepted.[306]

The risk to a society's interpersonal and institutional trust is acknowledged in multiple ways by the Court. At the general level, the fact that crime is a legitimate reason for expulsion from the host society serves to weaken the potential of racist narratives that migration is equal to imported criminality, since the 'bad' migrants can be effectively excluded.

Similarly, the way the Court has understood the *Üner*-criterion [1] the nature and seriousness of the offence committed by the applicant can allow for considerations relating to social trust. The finding in *Khan* and *Munir Johana* that that there was no minimum requirement for which crimes could motivate expulsion gives the domestic authorities leeway to act against crimes who may be particularly hurtful to social cohesion.

The example of *Khan* illustrates this clearly: the applicant, who was the leader of a criminal gang, could be deported despite being convicted of a non-violent offence because the Court adopted a flexible approach to the criterion of the nature and seriousness of the offence, also having regard to explicit legislative choices by the Danish legislator.[307] And in the two cases of *M.M.* and *Z*, the Court accepted that domestic authorities did not want to accept any risk for recidivism when it came to sexual offences against a child. As these examples show, there is ample room for domestic authorities to differentiate their decisions to protect social unity by incorporating such concerns in the *Üner*-criterion [1]. Process-based review as it has played out in the expulsion cases

[303] cf. ibid 64.
[304] ibid.
[305] ibid.
[306] See the Resumé in Section 2 of Chapter 3.
[307] See Ch. 3, Section 2.

under Article 8, therefore, does not interfere excessively with this important rationale in migration control.

4.2.3 Process-based review invigorating self-determination through democratic iteration

Self-determination, as discussed above, centrally concerns the possibility of a political community to take a wide range of decisions to further its own long-time goals. However, self-determination additionally regards the ways in which such decisions are reached, in that people must be viewed not only as subjects but also as authors of the law in their respective society.[308]

For international human rights law this poses a problem because the rights are given from outside, rather than adopted by citizens in public political deliberation.[309] To solve this problem, Seyla Benhabib has proposed the concept of *democratic iterations* to show how rights and principles can be appropriated by a people as their own:

> By *democratic iterations* I mean complex processes of public argument, deliberation, and exchange through which universalist rights claims and principles are contested and contextualized, invoked and revoked, posited and positioned, throughout legal and political institutions, as well as in the associations of civil society.[310]

A democratic people, through iterative acts of reappropriation and reinterpretation of universalist norms, can consider itself also as the author of those norms, and not merely as limited by them.[311] For such genuine processes of adaption to happen it is important that the different ideas of meaning are effectively voiced in interpretative contexts – such as courts – and not assumed as static.[312] To this end, legal manoeuvring should allow for cultural-political conflict and societal learning through this conflict.[313]

This type of iterative process can be seen in the way the Court has employed process-based review during the period 2018–2022. For example, the

---

[308] Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (William Rehg tr, MIT Press 1998) 120.
[309] The original signing of the Convention, decided on by States' elected officials, hardly involved a sufficient degree of popular choice given that it brought immense changes of a constitutional nature, cf. Allen Buchanan and Russell Powell, 'Constitutional Democracy and the Rule of International Law: Are They Compatible?' (2008) 16 Journal of Political Philosophy 326, 345–46.
[310] Benhabib *The Rights of Others* (n 20) 179.
[311] ibid 181.
[312] ibid 191–92.
[313] ibid 197.

applicants often argue that they share common features with the nationals of the host State and should therefore be treated equally. This forces the host society to articulate *how* it considers them as different, and in this process, to investigate its conception of the collective 'self' in self-determination.

This was the case in *Pormes*, where the applicant had grown up unaware of the irregularity of his residence and argued that he had spent his childhood in the Netherlands just as any other Dutch child.[314] The government for its part argued that the irregularity of the applicant's residence meant that his removal was only prohibited in exceptional circumstances.[315] This latter approach was denied by the ECtHR holding that the case should be assessed from a neutral starting point. By explicitly rejecting the prevalent Dutch view of such irregular residence, the Court instigated the domestic context to rethink its dichotomous view of migration status. Importantly, the Court did not impose its own view of the matter, instead it gave the domestic context a new vocabulary (the 'neutral starting-point') which is better attuned to the reality of second-generation irregular migration. Through the tool of process-based review, the Court then proceeded to give the domestic context wide room to develop this new notion in public deliberation.

In this way, the Court employed process-based review to invigorate the ideal of popular sovereignty in the Netherlands, reminding the Dutch legislator as well as its courts and administrative agencies that belonging is never binary.[316] Compared to the alternative of simply proclaiming that the applicant should or should not be given residence for certain substantive reasons, process-based review enabled a further deliberative process to take place. In this way, process-based review can help to further meaningful self-determination in European countries.

4.3 Protection of the rights-claimant

4.3.1 Introductory note

As discussed in Chapter 2, much of the criticism against process-based review concerns the alleged lack of protection for the rights-claimants. This fear is highly relevant for migration-related issues such as expulsion, since anti-migration narratives often seek to curtail the rights of foreigners in the extreme.

This section answers the research question:

---

[314] *Pormes* (n 279) para 40.
[315] ibid para 43.
[316] cf. Henderson (n 151), discussed in Ch. 2, Section 4.2.

Can the practice of process-based review in expulsion cases be justified from the perspective of protection of the rights-claimant?

To do this, one must first note which of the rights-claimants' interests must always be respected. Human beings share certain basic needs which are the minimum required for decent lives at all – needs which correspond to moral human rights.[317] For the practice of process-based review to be acceptable the ECtHR must not take it so far as to let States encroach on these core aspects of rights in their decisions on expulsion.[318] Similarly, even if such decisions do not devolve into this kind of rightlessness, the equal moral value of humans requires serious consideration and reason-giving for the expulsions, which under all circumstances interfere with weighty interests of those concerned.[319] These issues will be explored in the first subsection below.

Additionally, the rights-claimants have an interest themselves in influencing the domestic rules on expulsion, for their own material case, and for the sake of their friends and family who may eventually find themselves in similar circumstances. The extent to which such influence can be achieved through the practice of process-based review will be explored in the second subsection below.

4.3.2 Process-based review protecting the core of rights and protecting against arbitrariness

Following the approach of David Miller, this thesis adopts the view that moral human rights are those which must be observed to allow a decent human life under all circumstances, contrary to what is best described as citizenship rights, which are those pre-political rights which ensure a decent life under the specific conditions of a particular society.[320] To identify conditions for a decent human life anywhere we may look to what the human form of life has in common through different cultures and different times, and find that it involves things such as work, play, family relations, and cultural and religious activities.[321] Moral human rights can therefore be defined as those rights which ensure the minimum preconditions for leading this human life.[322]

---

[317] Miller (n 20) 32. Human needs is one way to provide foundations for moral human rights. For a comprehensive work on different proposed foundations, see Rowan Cruft and others (eds), *Philosophical Foundations of Human Rights* (Oxford University Press 2015).
[318] 'Core' is here understood as the part of a *legal* fundamental right which *is* a moral imperative, or a *moral* right, see Martin Scheinin, 'Core Rights and Obligations' in Dinah Shelton (ed), *The Oxford handbook of international human rights law* (Oxford University Press 2013) 532–36.
[319] Miller (n 20) 37.
[320] ibid 31.
[321] ibid 32.
[322] ibid.

For the purposes of this thesis the needs at stake are the exercise of private and family life. The practice of process-based review in expulsion cases thus cannot go so far as to prevent a minimum of meaningful family relations or autonomous private life.

The way in which the Court has employed process-based review in the cases studied in this thesis appears to satisfy these minimum requirements. For the cases which concern the right to family life, the Court goes to great lengths to ensure that expulsion does not lead to a definite rupture of meaningful family relations. The first avenue for this is to consider the feasibility of the whole family relocating together with the applicant. Such regards are incorporated in the *Üner*-criteria [8] and [9] regarding the seriousness of the difficulties which the spouse, and any children, are likely to encounter in the receiving country.

Thus, in the example of *Unuane*, the applicant's spouse and children could not be expected to follow him to Nigeria in the case of expulsion, and one of the children required particularly acute parental support due to his medical condition.[323] The Court held that in these circumstances, the seriousness of the crime committed by the applicant was not capable of outweighing the best interests of the children so as to justify expulsion.[324] Expulsion would have disregarded the acute need for family support, since family life necessarily had to take place in the United Kingdom, and such a conclusion was outside the bounds of reasonableness. While the Court should in first place have found a violation by drawing negative inferences due to shortcomings of the domestic process – which it notably did not, as discussed further in Section 3 of this chapter – the substantive assessment conducted in place of this nevertheless shows the absolute value attached to minimum family life.

Similarly, the Court in *I.M.* adopted a flexible approach to the bounds of the process-based review to also include the aspect of family life, even though the domestic court had been unable to consider it, since the applicant had initially not admitted to his parenthood. The Court took family life into its assessment, explicitly, because anything else would go against the effective protection of the right to family life.[325]

Additionally, in the case of *Savran* [GC], the Court in its assessment stressed that the applicant had been 'left without any realistic prospects of entering, let alone returning to, Denmark', given the permanency of the re-entry ban.[326] The lack of possibilities under domestic law to make an individualised

[323] *Unuane* (n 254) paras 18, 89.
[324] ibid para 89.
[325] *IM* (n 220) 61.
[326] *Savran* (n 240) para 200.

assessment of the duration of this ban was one of the most important shortcomings identified by the ECtHR in the case, since it was very intrusive to the applicant who had strong ties to Denmark.[327] The way the ECtHR applied process-based review in the case points towards a minimum protection of also the right to private life, and the 'totality of social ties between the settled migrants and their resident community' which is what the right to private life protects in expulsion cases, since it was the absolute nature of the severance of ties to Denmark which the ECtHR took the most issue with.[328] While the core of the right to private life in these terms is certainly limited, the Court nevertheless seems to be guided by such considerations in its decisions.[329]

The rights-claimants also have weighty interests above and beyond these minimum needs. The notion of family life-elsewhere, while not obstructing the possibility for family relations, makes it more difficult to deepen them as much as desirable, and dislocation may involve considerable costs for the individual, in the immediate sense, and in the sense of diminished future prospects for quality of life. Because of this, the host society must, as a matter of justice, show that it takes the issue of expulsion seriously and give legitimate reasons for its decision, anything else would be an unacceptable arbitrariness.[330]

For reasons to be legitimate for a decision on expulsion, they must be relevant to the benefit which is at stake, namely, for the question of allowing residence the mutually beneficial cooperation which forms the bedrock of modern welfare states.[331] Furthermore, the reasons must be sufficiently individualised, by only referring to a general rationale of immigration control, a State does not show adequate respect for the human person, since the individual is thereby ascribed characteristics simply by belonging to a certain group.[332]

One of the key arguments for process-based review is precisely that it does require States to give good reasons for their decisions, also when they do not touch on the core of rights. Those of the *Üner*-criteria which often militate against the applicant are clearly linked to societal cooperation. Most obviously this is the case for the criterion [1] the nature and seriousness of the offence, but also the criteria [3] the time elapsed since the offence was

---

[327] ibid paras 198–201.
[328] cf. *Üner* (n 7) para 59.
[329] The extent to which the right to private life contains an inviolable core is limited, because that core by definition requires full respect in even the most difficult circumstances and cannot come into conflict with the core of other rights, see Scheinin (n 318) 539.
[330] Miller (n 20) 37. See also Singer (n 38) 950.
[331] Miller (n 20) 103–04.
[332] ibid 105.

committed and the applicant's conduct during that period, and [10] the ties to both countries. If a rights-claimant is expulsed because he has committed a violent offence, is a recidivist and lacks substantive ties to the host society, he may surely find it unjust, but he cannot claim that those considerations are not relevant and that his case has not been taken seriously.

These requirements for relevant and individualised reasons are upheld in the practice of process-based review. In all the five cases where the Court struck down on the domestic decision-making process this was partly due to lack of proper individualisation. Automatic expulsion is unacceptable for the Court, even when the State argues that the balancing has been conducted in advance by the legislator for serious crimes, as was the situation in *Saber and Boughassal*. Process-based review thus clearly, in its very essence, aims to ensure that the individuals concerned are shown respect by having their claims taken seriously. The cases of *Unuane* and *Otite*, however, raise concerns on this point, in addition to those related to consistency which will be discussed below in Section 3 of this chapter. Because the Court in those cases did not draw negative inferences from the lack of domestic balancing to find a process-based violation, it took away some of the incentive for national courts to sufficiently motivate and individualise their decisions and thereby show respect for the individuals concerned.[333]

4.3.3 Process-based review giving non-citizens an indirect political voice

Idealised accounts of democratic rule often spend a great deal of time on finding the proper balance between popular sovereignty and pre-political fundamental rights – indeed, this is also a general thread throughout this thesis. As Seyla Benhabib notes, an important question related to this is to decide who is to do the self-determination:

> This paradox of democratic legitimacy has a corollary which has been little noted: every act of self-legislation is also an act of self-constitution. 'We, the people,' who agree to bind ourselves by these laws, are also defining ourselves as a 'we' in the very act of self-legislation.[334]

For many, the answer would be that it is the citizens of a State who are doing the self-determination, and that the interests of non-citizens are to be

[333] Harriet Ní Chinnéide, 'Otite v the United Kingdom: What about the Incentivising Function of Process-Based Review?' (*Strasbourg Observers*, 27 January 2023) <https://strasbourgobservers.com/2023/01/27/emotite-v-the-united-kingdom-what-about-the-incentivising-function-of-process-based-review-em/> accessed 19 May 2023.
[334] Benhabib (n 20) 45.

acknowledged through national or international non-political rights regimes. Indeed, the logic of democratic representation requires this type of demarcation, it is far too difficult to represent an undefined group such as 'all-affected interests' in a non-authoritarian way.[335] An important question, albeit beyond the scope of this thesis, is therefore how political membership through citizenship is allocated.[336] But even accepting that citizenship is the most important avenue for political self-determination, there is an injustice in having groups of people present for a long time in a State's territory, and subject to its laws, without any possibility of influencing them.[337] In place of naturalisation, it is desirable that long-term residents in a territory have indirect ways to influence the rules which govern their lives, not the least because they are at a heightened risk for exploitation due to the precariousness of their status.

The judicialisation of fundamental rights in general, and process-based review in particular, gives non-citizens an indirect political voice in the societies where they live but do not vote. Process-based review requires that domestic courts take an active role in weighing different interests and have a certain discretion in doing this. Because non-citizens have access to courts but not to legislatures, increased judicialisation gives them an avenue for political influence which they would otherwise have lacked. Thus, in *Savran*, the ECtHR required domestic courts in their future rulings to go beyond the domestic legislation regarding the scope of the revocation proceedings and the length of the deportation order. This *de facto* change of the law was an indirect consequence of the applicant's litigation. Importantly, because the ECtHR judgement was formulated in process-based terms, the impact of the judgement may be more widespread than if it had been purely substantial – because it concerns all future cases of expulsion, rather than only those with the same factual circumstances as in the applicant's case. This aspect, too, supports the view that process-based review can be justified from the perspective of protecting the rights-claimant.

4.4 Consistent application

4.4.1 Introductory note

The two previous sections of this chapter have discussed the practice of process-based review from the perspective of political self-determination on

---

[335] Benhabib 'Democratic Exclusions and Democratic Iterations' (n 152) 448.
[336] As observed by Hannah Arendt already in 1951, not belonging to a community is one of the most acute forms of injustice, Hannah Arendt, *The Origins of Totalitarianism* (Schocken Books 1951).
[337] Miller (n 20) 102; Walzer (n 71) 52–63.

one hand, and from the perspective of the rights-claimant on the other hand. While these two values pull in different directions, this thesis has argued that the ECtHR has applied its doctrinal tool in a way which gives fair value to both aspects, thereby delivering on the promise of subsidiarity in the Strasbourg system, without losing sight of effective protection of rights.

In this final section, the practice of process-based review will be analysed from a third perspective, focusing on the aspect of consistency in its application. This section answers the research question 2c:

> Can the practice of process-based review in expulsion cases be justified from the perspective of consistency in application?

The first subsection below discusses the lack of predictability in the degree of scrutiny. The second subsection discusses whether process-based review is consistently applied between States. Unfortunately, important shortcomings on both of these points become apparent when analysing the practice of process-based review in expulsion cases during the period 2018–2022.

4.4.2 Process-based review lacking foreseeability

As Joseph Raz notes it is fundamental to any law that it can guide the behaviour of its subjects, only then can it be effectively obeyed.[338] From this action-guiding idea requirements for clarity and stability of law can be derived. If subjects are to know how to act, the rules steering their behaviour must be understandable and there for them to act upon.[339] Similarly, long-term planning by the subjects requires a certain degree of stability in the rules.[340] These concerns for clarity and stability in legal rules make up the principle of foreseeability, which is of central importance for evaluating any legislative act.

The same concern should guide courts in their law-making capacity, since their precedents should be able to effectively guide behaviour of other courts and actors.[341] For this reason, it is desirable that the ECtHR within its wide mandate has stable and clear principles for how it adjudicates European human rights law. This applies to the use of process-based review, which,

[338] Raz (n 46) 214.
[339] ibid.
[340] ibid 215.
[341] cf. ibid 197.

unless applied consistently, makes it difficult for national authorities to adapt their own legislation and judicial practice accordingly.[342]

Unfortunately, the practice of process-based review analysed in this thesis shows certain deficiencies in this regard. While the quality of the domestic process played an important role in most of the cases, the Court in some cases looked *only* at the quality of the domestic process, while in others it did its own substantive review in parallel with the process-based one. The cases of *Saber and Boughassal, I.M* and *Makdoudi* are clear examples of the former approach, where it was underlined that the Court did not have any issue with the substantive outcome, but only with how it was reached. As an example of the latter, in *Abdi* the Court framed its reasoning in both process-based and in substantive terms, finding that taken together, all the circumstances of the case made the applicant's expulsion disproportionate.[343] Similarly, *Assem Hassan Ali* did not make clear whether the domestic process was of high or low quality and the finding of no-violation seems to have been substantially motivated, albeit cloaked in process-based terms.

Such an obfuscating approach sends unclear signals to the domestic courts who are to implement the ECtHR judgements. Danish courts may rightfully ask whether the identified shortcomings of the domestic process in *Abdi* were strong deficiencies which *must* be remedied in future processes, or whether the ECtHR was making comments in passing, not imposing strict standards of review. To ensure that its judgements are correctly implemented it is desirable that the Court is open with what type of violation it has found and explicit in what it requires of the domestic process.

4.4.3 Process-based review inconsistently applied between States

Domestically, equality before the law is often thought of as a key element of justice. This ideal does not obviously translate to the supranational realm, because States have no intrinsic value in themselves, and their equal treatment should only be valued insofar as it furthers the liberty, well-being, and dignity of human individuals.[344] In this regard, the danger of inconsistent application of process-based review by the ECtHR is that individuals in one State have more trouble vindicating their rights-claims than individuals in another State,

[342] Mattias Kumm, 'International Law in National Courts: The International Rule of Law and the Limits of the Internationalist Model' (2003–04) 44 Va J Int'l L 19, 25; Gerards 'Procedural Review by the ECtHR: A Typology' (n 64) 159.
[343] *Abdi* (n 231) 44.
[344] Jeremy Waldron, 'Are Sovereigns Entitled to the Benefit of the International Rule of Law?' (2011) 22 European Journal of International Law 315, 337–42.

or conversely, that the political self-determination of one community is valued less than that of another.

It is notable that the Court employed the concept of process-based review in the two British cases of *Unuane* and *Otite* differently than in all the other cases during the period 2018–2022. In the two British cases, the Court identified clear shortcomings of the domestic process, but the conclusion the ECtHR drew from this was merely that it was called on the conduct its own substantive review. This is in stark contrast to the approach adopted in the cases of *Saber and Boughassal*, *I.M* and *Makdoudi*, where shortcomings of the domestic process were decisive for finding a violation, and of *Abdi*, where the shortcomings were one of the aspects which made the expulsion disproportionate. The United Kingdom was – twice – given more leniency than Spain, Switzerland, Belgium, and Denmark had been given. Through this uneven treatment it appears that the self-determination of the British weigh heavier than that of these countries. There is no acceptable reason for this since the five States are all equally well-functioning democracies. The ECtHR must apply process-based review evenly between States which are relevantly alike, otherwise it does not value the public autonomy of those States' citizens to the same extent.

4.5 Summary

This final part of the thesis set out to normatively discuss the use of process-based review in expulsion cases under Article 8 in the period 2018–2022. It did so with reference to the three values of political self-determination, protection of the rights-claimant and consistency in application – the two first values derived from the stated purposes of the Council of Europe, and the third from the legal form and its action-guiding function.[345]

The research question asked in this part was:

> From which perspectives can the practice of process-based review in expulsion cases be normatively justified?

This question has the answer:

> Process-based review in expulsion cases can be justified from the perspective of political self-determination, because it allows room for the national decision-maker to differentiate decisions with reference to institutional and interpersonal trust, which is the most important rationale for expulsions of migrants with criminal record. Process-

[345] See Ch. 1, Section 3.

based review can also invigorate popular sovereignty through the process of democratic iteration.

Process-based review in expulsion cases can be justified from the perspective of protection of the rights-claimant, because the Court is mindful of cases where the core of the right to private and family life is at stake and adopts a flexible approach to the scope of process-based review in such cases. Furthermore, process-based review requires that domestic courts give individualised reasons that are relevant to societal cooperation, thereby protecting the dignity of the rights-claimants. It also gives non-citizens an extended possibility for political influence, compared to substantive review.

There are, however, issues of consistency which must be remedied in the Court's practice. Process-based review must be applied with more clarity and foreseeability of when and how much substantive concerns are part of the assessment. Notably, there is also a worrisome tendency that the United Kingdom is given more leniency than other States which cannot be justified.

These findings conclude the substantive parts of this thesis. The next and final chapter recapitulates the work done in this thesis and makes some further comments on this thesis's contributions to the discussion of process-based review in general.

CHAPTER 5

Conclusion

5.1 Recapitulation

This thesis served the purpose of furthering the understanding of process-based review as a judicial tool for deciding human rights cases. To fulfil this purpose, this thesis looked at ECtHR expulsion cases implicating migrants with criminal record under Article 8 of the ECHR during the period 2018–2022 as an empirical study object. For this legal issue, process-based review was clearly consolidated as part of the Court's decision-making process. Studying how process-based review had been applied in these cases, therefore, could add to an informed discussion of its merits.

To perform this study, this thesis has asked the following research questions:

R1: What role did the quality of the national decision-making process play in the ECtHR's reasoning in expulsion cases implicating migrants with criminal record under Article 8 of the ECHR during the period 2018–2022?

a. When did process-quality lead to positive inferences?
b. When did process-quality lead to negative inferences?
c. When did process-quality not lead to any important inferences?

R2: From which perspectives can the practice of process-based review in expulsion cases be normatively justified?

a. Can it be justified from the perspective of political self-determination?
b. Can it be justified from the perspective of protection of the rights-claimant?
c. Can it be justified from the perspective of consistency in application?

The first part of this thesis explained the concept of process-based review as the practice where the ECtHR takes the quality of the domestic decision-making process – in this work, the judicial process leading up to an expulsion decision – as factor to determine if there has been a violation of the Convention. Regarding expulsion cases under Article 8 of the ECHR, this type of review has been formalised by way of the ten *Üner*-criteria which the ECtHR requires that national courts apply when a person is expulsed for committing a crime. The first part of this thesis also discussed the criticism which has been raised against this practice, to further outline the subsequent normative part of the thesis.

The second part of this thesis studied all expulsion cases under Article 8 decided by the ECtHR during the period 1 January 2018–31 December 2022, with focus on the way the quality of the domestic process influenced the Court's decision. This part of the thesis found the following answers to question 1 above:

> Process-quality led to positive inferences which supported the finding that there was no violation of Article 8, in the ten cases of *Levakovic v. Denmark, Khan v. Denmark, Munir Johana v. Denmark, Narjis v. Italy, K. A. v. Switzerland, Veljkovic-Jukic v. Switzerland, M.M. v. Switzerland, Z v. Switzerland, D and Others v. Romania* and *Avci v. Denmark.*
>
> Process-quality led to negative inferences which supported the finding that there was a violation of Article 8, in the five cases of *Saber and Boughassal v. Spain, I.M v. Switzerland, Makdoudi v. Belgium, Abdi v. Denmark* and *Savran v. Denmark* [GC].
>
> Process quality did not lead to important inferences in the cases of *Unuane v. the United Kingdom* and *Otite v. the United Kingdom*. In the cases of *Assem Hassan Ali v. Denmark, Zakharchuk v. Russia,* and *Pormes v. the Netherlands,* the quality of the domestic review was debatable. In the case of *Azerkane v. the Netherlands,* the Court did not review the domestic process.

The third part of this thesis discussed the findings in the same cases from the normative framework provided by the three values of political self-determination, protection for the rights-claimant and consistency. This final step argued that the answer to the research question 2 above was:

> Process-based review can be justified from the perspective of political self-determination, because it allows room for the national decision-maker to differentiate decisions with reference to institutional and interpersonal trust, which is the most important rationale for expulsions of migrants with criminal record. Process-based review can also invigorate popular sovereignty through the process of democratic iteration.
>
> Process-based review can be justified from the perspective of protection of the rights-claimant, because the Court is mindful of cases where the core of the right to private and family life is at stake and adopts a flexible approach to the scope of process-based review in such cases. Furthermore, process-based review requires that domestic courts give individualised reasons that are relevant to societal cooperation, thereby protecting the dignity of the rights-claimants. It

also gives non-citizens an extended possibility for political influence, compared to substantive review.

There are, however, issues of consistency which must be remedied in the Court's practice. Process-based review must be applied with more clarity and foreseeability of when and how much substantive concerns are part of the assessment. Notably, there is also a worrisome tendency that the United Kingdom is given more leniency than other States which cannot be justified.

In short, what the reader should take away from this thesis is that process-based review has been an important part of the Court's assessment in most of the expulsion cases decided during the period. Most often, this was in the form of positive inferences, where the domestic court's diligent application of the *Üner*-criteria supported the finding that there was no violation of Article 8. But process-based review in some cases also worked in the inverse sense, in that shortcomings of the domestic process supported the finding that there was a violation of Article 8. Furthermore, the tool of process-based review was applied in a way which can be justified both from the perspective of political self-determination, and from the perspective of protecting the rights-claimant. This thesis, importantly, identified issues with consistency in the studied practice, regarding the scope of the process-based review, and most notably in that it did not lead to negative inferences in two cases concerning the United Kingdom.

5.2 Further outlook

This thesis has showed that process-based review has been used in almost all expulsion cases under Article 8 during the past five years, and that it was an important argument for the outcome in most of the cases. This indicates that the Court itself considers the tool useful. Further, as reviewed externally, the idea appears to have worked out in a desirable fashion in the example of expulsion cases under Article 8. By giving ample room for political self-determination while always maintaining a degree of protection for the rights-claimant, the approach has allowed the Court to adjudicate cases with due regard to the fundamental principles of effective protection of rights and subsidiarity underlying the Convention system.

The issues with consistency this thesis has identified requires the Court to calibrate its application of process-based review. The best way to do this is to clearly and openly adopt the approach forwarded by Robert Spano, where the Court first and primarily looks at the quality of the domestic review, and as a

second, explicit step controls whether the outcome is within the bounds of reasonableness, in particular, relating to the protection of the core of rights.[346]

In the first step, the Court should be explicit in whether the domestic process was of acceptable quality or not, to clearly indicate to the domestic judiciaries of how they should act in future cases. This approach would resolve the ambiguity which currently becomes the result of cases such as *Abdi* and *Assem Hassan Ali*. Furthermore, when the Court finds relevant shortcomings in the domestic process, it should directly find a violation on this basis, as in the cases of *Saber and Boughassal, I.M.* and *Makdoudi*. This is crucial to maintain the incentivising function of process-based review, and to ensure respect for the human individual who is entitled to serious and individualised reasons in life-changing decisions. Of course, this should apply to the judiciary of the United Kingdom as well, and future cases in the vein of *Unuane* and *Otite* should result in the finding of a process-based violation.

These adjustments should not be difficult to make. Overall, therefore, the findings in this thesis speak for the continued use of process-based review to adjudicate European human rights cases. It has worked well for the contentious issue of expulsion under Article 8, where the values of self-determination and protection of non-nationals pull heavily in opposing directions. This suggests that it could be successfully applied to other recurrent issues which concern a Convention right, where no clear answer of whether a violation has taken place can be reached by normal interpretative means.

[346] See Ch. 2, Section 2 of this thesis, with references.

Supplement: Article 8 expulsion cases 2018–2022

Cases included in the empirical study

Name	App. no.	Date decided	Finding	Process-based review
Otite v. the United Kingdom	18339/19	27/09/2022	No violation	No important inference
Savran v. Denmark [GC]	57467/15	07/12/2021	Violation	Negative inference
Avci v. Denmark	40240/19	30/11/2021	No violation	Positive inference
Abdi v. Denmark	41643/19	14/09/2021	Violation	Negative inference
Munir Johana v. Denmark	56803/18	12/01/2021	No violation	Positive inference
Khan v. Denmark	26957/19	12/01/2021	No violation	Positive inference
Z. v. Switzerland	6325/15	22/12/2020	No violation	Positive inference
M. M. v. Switzerland	59006/18	08/12/2020	No violation	Positive inference
Pormes v. the Netherlands	25402/14	28/07/2020	No violation	No important inference
Azerkane v. the Netherlands	3138/16	02/06/2020	No violation	No important inference
D. and Others. v. Romania	75953/16	14/01/2020	Claim inadmissible	Positive inference
Zakharchuk v. Russia	2967/12	17/12/2019	No violation	No important inference
I.M. v. Switzerland	23887/16	09/04/2019	Violation	Negative inference

Levakovic v. Denmark	7841/14	23/10/2018	No violation	Positive inference
Assem Hassan Ali v. Denmark	25593/14	23/10/2018	No violation	No important inference
Saber and Boughassal v. Spain	76550/13 ; 45938/14	18/12/2018	Violation	Negative inference
Narjis v. Italy	57433/15	14/02/2019	No violation	Positive inference
Makdoudi v. Belgium	12848/15	18/02/2020	Violation	Negative inference
K. A. v. Switzerland	62130/15	07/07/2020	No violation	Positive inference
Veljkovic-Jukic v. Switzerland	59534/14	21/07/2020	No violation	Positive inference
Unuane v. the United Kingdom	80343/17	24/02/2021	Violation	No important inference

All cases can be found in the HUDOC Database: https://hudoc.echr.coe.int

Cases exempted from the empirical study

Name	App. no.	Date decided	Finding	Reason for exemption
Alleleh and Others v. Norway	569/20	23/06/2022	No violation	Expulsion for giving false information to immigration authorities
Usmanov v. Russia	43936/18	22/12/2020	Violation	Expulsion for allegedly posing a threat to national security
Ghoumid and Others v. France	52273/16 52285/16 52290/16 52294/16 52302/16	25/06/2020	No violation	Expulsion not part of ECtHR assessment
Moustahi v. France	9347/14	25/06/2020	Violation	Article 8 claim did not concern expulsion

All cases can be found in the HUDOC Database: https://hudoc.echr.coe.int

List of sources

Articles and monographs

Arnardóttir OM, 'The "Procedural Turn" under the European Convention on Human Rights and Presumptions of Convention Compliance' (2017) 15 Int J Const Law 9.

Bar-Siman-Tov I, 'Semiprocedural Judicial Review' (2012) 6 Legisprudence 271.

Benhabib S, *The Rights of Others: Aliens, Residents, and Citizens* (Cambridge University Press 2004).

—— 'Democratic Exclusions and Democratic Iterations: Dilemmas of `Just Membership' and Prospects of Cosmopolitan Federalism' (2007) 6 European Journal of Political Theory 445.

Brems E, 'Procedural Protection: An Examination of Procedural Safeguards Read into Substantive Convention Rights' in E Brems and J Gerards (eds), *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (Cambridge University Press 2014).

—— 'The "Logics" of Procedural-Type Review by the European Court of Human Rights' in J Gerards and E Brems (eds), *Procedural Review in European Fundamental Rights Cases* (Cambridge University Press 2017).

Buchanan A, 'Why International Legal Human Rights?' in R Cruft, M Renzo, and SM Liao (eds), *Philosophical Foundations of Human Rights* (Oxford University Press 2015).

—— and Powell R, 'Constitutional Democracy and the Rule of International Law: Are They Compatible?' (2008) 16 Journal of Political Philosophy 326.

Carens JH, *The Ethics of Immigration* (Oxford University Press 2013).

Costello C, *The Human Rights of Migrants and Refugees in European Law* (Oxford University Press 2015).

Cumper P and Lewis T, 'Blanket Bans, Subsidiarity, and the Procedural Turn of the European Court of Human Rights' (2019) 68 International & Comparative Law Quarterly 611.

Dembour M-B, *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint* (Oxford University Press 2015).

Desmond A, 'The Private Life of Family Matters: Curtailing Human Rights Protection for Migrants under Article 8 of the ECHR?' (2018) 29 Eur J Int Law 261.

Dzehtsiarou K, *European Consensus and the Legitimacy of the European Court of Human Rights.* (Cambridge University Press 2015).

Ely JH, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press 1980).

Fuller L, *The Morality of Law: Revised Edition* (Yale University Press 1969).

Gerards J, 'Procedural Review by the ECtHR: A Typology' in J Gerards and E Brems (eds), *Procedural Review in European Fundamental Rights Cases* (Cambridge University Press 2017).

—— *General Principles of the European Convention on Human Rights* (Cambridge University Press 2019).

—— and Brems E (eds), *Procedural Review in European Fundamental Rights Cases* (Cambridge University Press 2017).

Habermas J, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (William Rehg tr, MIT Press 1998).

Henderson LM, 'Internalizing Contestation in Process-Based Judicial Review' (2019) 20 German Law Journal 1167.

Lord Hoffman, 'The Universality of Human Rights', Judicial Studies Board Annual Lecture, 19 March 2009.

Huijbers LM, *Process-Based Fundamental Rights Review: Practice, Concept, and Theory* (Intersentia 2019).

Klaassen M, 'Between Facts and Norms: Testing Compliance with Article 8 ECHR in Immigration Cases' (2019) 37 Netherlands Quarterly of Human Rights 157.

Klarman MJ, 'The Puzzling Resistance to Political Process Theory' (1991) 77 Virginia Law Review 747.

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

Miller D, *Strangers in Our Midst: The Political Philosophy of Immigration* (Harvard University Press 2016).

Nussberger A, ‘Procedural Review by the ECHR: View from the Court’ in E Brems and J Gerards (eds), *Procedural Review in European Fundamental Rights Cases* (Cambridge University Press 2017).

Popelier P, ‘The Court as Regulatory Watchdog: The Procedural Approach in the Case-Law of the European Court of Human Rights’ in P Popelier, A Mazmanyan, and W Vandenbruwaene (eds), *The Role of Constitutional Courts in Multilevel Governance* (Intersentia 2013).

—— and Heyning CVD, ‘Subsidiarity Post-Brighton: Procedural Rationality as Answer?’ (2017) 30 Leiden Journal of International Law 5.

R Cruft, M Renzo, and SM Liao (eds), *Philosophical Foundations of Human Rights* (Oxford University Press 2015).

Rawls J, *A Theory of Justice* (Harvard University Press 1971).

Raz J, *The Authority of Law: Essays on Law and Morality* (Oxford University Press 1979).

Schacter J, ‘Ely at the Altar: Political Process Theory through the Lens of the Marriage Debate’ (2011) 109 Michigan Law Review 1363.

Scheinin M, ‘Core Rights and Obligations’ in D Shelton (ed), *The Oxford Handbook of International Human Rights Law* (Oxford University Press 2013).

Shapiro FR, ‘The Most-Cited Legal Books Published Since 1978’ (2000) 29 Journal of Legal Studies 397.

Singer JW, ‘Normative Methods for Lawyers’ (2008) 56 UCLA Law Review 899.

Smits JM, ‘Redefining Normative Legal Science: Towards an Argumentative Discipline’ in F Coomans, F Grünfeld, and MT Kamminga (eds), *Methods of Human Rights Research* (Intersentia 2009).

——, ‘What is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research’ in R van Gestel, H-W Micklitz, and E Rubin (eds), *Rethinking Legal Scholarship: A Transatlantic Dialogue* (Cambridge University Press 2017).

Spano R, ‘The Future of the European Court of Human Rights—Subsidiarity, Process-Based Review and the Rule of Law’ (2018) 18 Human Rights Law Review 473.

——, ‘Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity’ (2014) 14 Human Rights Law Review 487.

Taylor C, *Sources of the Self: The Making of the Modern Identity* (Cambridge University Press 1992).

Thym D, 'Residence as De Facto Citizenship? Protection of Long-Term Residence under Article 8 ECHR' [2014].

Ulfstein G, 'Interpretation of the ECHR in Light of the Vienna Convention on the Law of Treaties' (2020) 24 The International Journal of Human Rights 917.

Waldron J, 'Are Sovereigns Entitled to the Benefit of the International Rule of Law?' (2011) 22 European Journal of International Law 315

Walzer M, *Spheres of Justice: A Defense of Pluralism and Equality* (Basic Books 1983).

Webley L, 'Qualitative Approaches to Empirical Legal Research' in P Cane and HM Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press 2010).

Websites and blogs

Eurostat, 'Migrant Population: 23.8 Million Non-EU Citizens Living in the EU on 1 January 2022' (March 2023) <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Migration_and_migrant_population_statistics&stable=1#Migrant_population:_23.8_million_non-EU_citizens_living_in_the_EU_on_1_January_2022> accessed 2 May 2023.

International Organization for Migration, 'DTM Turkey — Migrant Presence Monitoring - Situation Report' (March 2023) <https://dtm.iom.int/reports/turkey-migrant-presence-monitoring-situation-report-march-2023?close=true> accessed 2 May 2023.

UNHCR, 'Operational Data Portal: Ukraine Refugee Situation' (25 April 2023) <https://data.unhcr.org/en/situations/ukraine> accessed 2 May 2023.

Ní Chinnéide H, 'Otite v the United Kingdom: What about the Incentivising Function of Process-Based Review?' (*Strasbourg Observers*, 27 January 2023) <https://strasbourgobservers.com/2023/01/27/emotite-v-the-united-kingdom-what-about-the-incentivising-function-of-process-based-review-em/> accessed 19 May 2023.

Wellman CH, 'Immigration', *The Stanford Encyclopedia of Philosophy* (Fall 2022 Edition)

<https://plato.stanford.edu/archives/fall2022/entries/immigration/> accessed 23 May 2023.

Judicial decisions

All cases referenced in this thesis, and listed below, are judgements by the European Court of Human Rights.

Abdi v Denmark, App No 41643/19, Judgement of 14 September 2021.

Alam v Denmark (dec), App No 33809/15, Decision of 6 June 2017.

Alleleh and Others v Norway, App No 569/20, Judgement of 23 June 2022.

Animal Defenders International v the United Kingdom [GC], App No 48876/08, Judgement of 22 April 2013.

Assem Hassan Ali v Denmark, App No 25593/14, Judgement of 23 October 2018.

Avci v Denmark, App No 40240/19, Judgement of 30 November 2021.

Azerkane v the Netherlands, App No 3138/16, Judgement of 2 June 2020.

Boultif v Switzerland, App No 54273/00, Judgement of 2 August 2001.

Correia de Matos v Portugal [GC], App No 56402/12, Judgement of 4 April 2018.

D and Others v Romania, App No 75953/16, Judgement of 14 January 2020.

F G v Sweden [GC], App No 43611/11, Judgement of 23 March 2016.

Ghoumid and Others v France, App Nos 52273/16, 52285/16, 52290/16, 52294/16, 52302/16, Judgement of 25 June 2020.

Golder v the United Kingdom [Plenary], App No 4451/70, Judgement of 21 February 1975.

von Hannover v. Germany (No 2) [GC], App Nos 40660/08 60641/08, Judgement of 7 February 2012

Hamsevic v Denmark (dec), App No 25748/15, Decision of 16 May 2017.

Hirst (No 2) v the United Kingdom [GC], App No 74025/01, Judgement of 6 October 2005.

IM v Switzerland, App No 23887/16, Judgement of 9 March 2019.

K A v Switzerland, App No 62130/15, Judgement of 7 July 2020.

Khan v Denmark, App No 26957/19, Judgement of 12 January 2021.

Lambert and Others v France [GC], App No 46043/14, Judgment of 5 June 2015.

Levakovic v Denmark, App No 7841/14, Judgement of 23 October 2018.

Makdoudi v Belgium, App No 12848/15, Judgement of 18 February 2020.

Maslov v Austria [GC], App No 1638/03, Judgement of 23 June 2008.

MM v Switzerland, App No 59006/18, Judgement of 8 December 2020.

Moustahi v France, App No 9347/14, Judgement of 25 June 2020.

Munir Johana v Denmark, App No 56803/18, Judgement of 12 January 2021.

Narjis v Italy, App No 57433/15, Judgement of 14 February 2019.

Ndidi v. the United Kingdom App No 41215/14, Judgement of 14 September 2017.

Otite v the United Kingdom, App No 18339/19, Judgement of 27 September 2022.

Pormes v the Netherlands, App No 25402/14, Judgement of 28 July 2020.

Saadi v Italy [GC], App No 37201/06, Judgement of 28 February 2008.

Saber and Boughassal v Spain, App Nos 76550/13 and 45938/14, Judgement of 18 December 2018.

Savran v Denmark [GC], App No 57467/15, Judgement of 7 December 2021.

Soering v the United Kingdom [Plenary], App No 14038/88, Judgement of 7 July 1989.

Üner v the Netherlands [GC], App No 46410/99, Judgement of 18 October 2006.

Unuane v the United Kingdom, App No 80343/17, Judgement of 24 February 2021.

Usmanov v Russia, App No 43936/18, Judgement of 22 December 2020.

Veljkovic-Jukic v Switzerland, App No 59534/14, Judgement of 21 July 2020.

Z v Switzerland, App No 6325/15, Judgement of 22 December 2020.

Zakharchuk v Russia, App No 2967/12, Judgement of 17 December 2019.

Legal instruments

Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 150.

Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L 337/9.

European Convention on Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) ETS 5.

Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

The preface quote by Jorge Luis Borges was taken from p. 23 of the 2007 edition of *Labyrinths: Selected Stories and Other Writing* (New Directions Books, originally published 1962) edited by Donald A. Yates and James E. Irby. The short story *The Garden of Forking Paths* was translated by Donald A. Yates, and appeared originally in 1941 as *El jardín de senderos que se bifurcan*.