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### **SYMPOSIUM: PUBLIC LAW AND THE NEW POPULISM**

Vladislava Stoyanova

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

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# **Populism, Exceptionality and the Right of Migrants to Family Life**

## **under the European Convention on Human Rights**

Dr. Vladislava Stoyanova\*

### **Abstract:**

The populist turn in national and international politics includes one common question across countries: curbing immigration and limiting the rights of migrants. In the light of these restrictive tendencies, the questions that this paper seeks to address are: whether and how the European Convention on Human Rights (ECHR), as interpreted by the European Court of Human Rights (ECtHR), can be a point of resistance against populism? How has the ECtHR responded to the nationalist dimension of the populist turn when adjudicating cases implicating the rights of migrants (with focus on the right to family life)? How has the Court managed to maintain its standing in the sensitive area of migration? I acknowledge that the Court has offered a space where the state has to advance reasoned arguments to justify disruptions of family life in pursuit of immigration control objectives. At the same time, however, I also demonstrate that this space does not reflect the rigor of scrutiny as we generally know it in human rights law (i.e. the proportionality reasoning with its distinctive subtests). The Court acts with restraint; it sides with the sovereign and, therefore, any populist attacks (e.g. robbing ‘the people’ of their sovereignty) against the Court are unsubstantiated. I also air a note of caution for the Court itself. More specifically, in its restraint to exercise resistance against the sovereign, the Court is dangerously getting close to utilizing populist tools (e.g. assuming that there is a necessary conflict between the right of the individual migrant and the interests of the host community; not requiring the state to clearly articulate its aims beyond general and abstract invocation of immigration control prerogatives; not subjecting the aim pursued by the state to any rational or factual scrutiny; representing the rights of migrants as an exception by applying the ‘most

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exceptional circumstances' test). Finally, I explain the 'procedural turn' taken by the Court when adjudicating the right to family life of migrants. While I acknowledge that this is a useful tool for the Court to maintain its standing in the sensitive area of migration, I also indicate the dangers that might emerge from its application.

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

## 1. Introduction

In its report entitled *Populism – How Strong are the Europe’s checks and balances?*,<sup>2</sup> the Secretary General of the Council of Europe (CoE), Thorbjørn Jagland, identifies denigration of international institutions, including the European Court of Human Rights, as one of the features of the populist and illiberal swerve. As the Secretary General clarifies, one of the central charges of populism is that ‘international organizations, courts and treaties rob “the people” of their sovereignty.’<sup>3</sup> In the definition of populism advanced by his report, it is also explained that populism presents ‘the people’ as ‘a single, monolithic entity with one coherent view.’ Jagland also adds that ‘[b]y claiming exclusive moral authority to act on their [the people’s] behalf, populism seeks to delegitimize all other opposition and courses of action.’<sup>4</sup> In this context, populism exploits public anxieties over migration and creates the image of the ‘other’ i.e. the migrant that has to be confronted. Another central feature of populism identified in the CoE report is spread of misinformation (also labelled as ‘fake news’), invocation of unsubstantiated facts and the related advancement of simplistic solutions to complex social problems. Migrants are more vulnerable to the consequences of such

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<sup>1</sup> Dissenting Opinion of Judge Martens, approved by Judge Russo, in *Gül v. Switzerland*, Application No. 23218/94, 19 February 1996, para. 15.

<sup>2</sup> *State of Democracy, Human Rights and the Rule of Law. Populism How Strong are Europe’s Checks and Balances?* Report by the Secretary General of the CoE of Europe (2017) (*hereinafter* the CoE Populism Report).

<sup>3</sup> *Ibid* 4.

<sup>4</sup> *Ibid* 6.

invocations and oversimplifications since, in general, the populist turn in national and international politics includes one common question across countries and jurisdictions: curbing immigration and restricting the rights of migrants.

The Secretary General is adamant '[t]hat pluralism, inclusive debate and the protection of minority interests against aggressive majoritarianism are essential for maintaining stable societies and democratic security.'<sup>5</sup> As a response to populism, Jagland proposes *inter alia* 'to manage migration and diversity in ways which foster respect, *while* guaranteeing social rights for all citizens [emphasis added].' He also recommends a recommitment to the European Convention on Human Rights.<sup>6</sup>

What follows is that one of the solutions proposed against populism is strengthening the role of courts, including international courts, which in the European context implies placing a renewed trust in the European Court of Human Rights (ECtHR). Another proposed solution that has to be also emphasized is the renewed emphasis on socio-economic rights. What is of particular importance here is that the commitment to socio-economic rights is placed in opposition to 'migration management'. The central message seems to be that there is a tension between promoting and ensuring socio-economic rights of the population at large, on the one hand, and ensuring the rights to migrants, on the other.<sup>7</sup>

In light of the above distinguished features of populism and the counter-measures invoked in the context of CoE, the question that this article seeks to address is how the European Convention on Human Rights (ECHR or the Convention), as interpreted by the European Court of Human Rights (ECtHR), can be used as a point of resistance against populism. More specifically, how has the ECtHR responded to the nationalist dimension of the populist turn when adjudicating cases implicating the rights of migrants? Since as an institution, the Court has been generally under a great

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<sup>5</sup> Ibid 6.

<sup>6</sup> Ibid 5.

<sup>7</sup> For a similar suggestion see P Alston, 'The Populist Challenge to Human Rights' 9 *Journal of Human Rights Practice* (2017) 1, 6.

strain and an object of attacks,<sup>8</sup> a related question is how the Court has managed to maintain its standing in the sensitive area of migration? In particular, how has the Court responded to the above-mentioned tension between the rights of migrants and the rights of the host population?

I will answer these questions by looking into the technical details of the Court's argumentation, the analytical steps that it follows and the tests that it applies. In this sense, my review is technical in its nature.<sup>9</sup> In terms of methodology, it draws upon the Thomas Spijkerboer's strategies for critical lawyers in the field of immigration law: identifying inconsistencies in the legal reasoning, exposing choices (i.e. when the 'legal reasoning allows for more than one legitimate outcome') and exposing background rules.<sup>10</sup> The application of these strategies will emerge with better clarity in the forthcoming analysis. An additional clarification as to the methodology applied is due. My objective is not to survey all relevant judgments, but to focus on the basic structure of enquiry followed by the Court.

When discussing the rights of migrants and the dangers posed by populism, it is first important to put things in perspective. With or without populism, the rights of migrants have been a weak point of international human rights law.<sup>11</sup> The ECtHR in particular has been struggling to navigate a course between a progressive position (less space for state sovereignty and more protection for individual rights) and state-oriented position (not challenging states' restrictive practices in the area of migration).<sup>12</sup> Accordingly, there has been a continuing tension between statism (state sovereignty as fundamental and conclusive in immigration matters) and cosmopolitanism (protection of

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<sup>8</sup> A Follesdal, 'Much Ado about Nothing? International Juridical Review of Human Rights in Well-Functioning Democracies' in A Follesdal, J Schaffer and G Ulfstein (eds) *The Legitimacy of International Human Rights Regimes* (Cambridge University Press, 2014) 272, 276.

<sup>9</sup> For further elaboration see T Spijkerboer, 'Analyzing European Case-Law on Migration. Options for Critical Lawyers' in L Azoulay and K de Vries (eds), *EU Migration Law: Legal Complexities and Political Rationales* (Oxford University Press, 2014) 189.

<sup>10</sup> T Spijkerboer, 'Analyzing European Case-Law on Migration. Options for Critical Lawyers' 189, 199.

<sup>11</sup> G Noll, 'Why Human Rights Fail Undocumented Migrants?' 12 *European Journal of Migration and Law* (2010) 241; S Benhabib, *The Rights of Others: Aliens, Residents, and Citizens* (Cambridge University Press, 2004); A Kesby, *The Right to Have Rights: Citizenship, Humanity and International Law* (Oxford University Press, 2012).

<sup>12</sup> T Spijkerboer, 'Structural Instability: Strasbourg Case Law on Children's Family Reunion' 11 *European Journal of Migration and Law* (2009) 271.

the rights of all human beings, including migrants, as the fundamental starting point). Against the background of this instability, one can expect that populism is conducive to tipping the balance in favor of statism.

In fact, populism can be assessed as a symptom of the difficulties inherent in some of the unresolved tensions within the dominant tradition of liberal constitutionalism, such as the tension between the interests of the individual and the collective. Populism can be seen as ‘a product of and response to a stress that is intrinsic to the modern constitutional condition.’<sup>13</sup> Although we might be unsympathetic to this response, ‘our preoccupation with that response betrays a wider concern with the underlying tension in question, and an awareness that populism exposes modern constitutional method to searching questions to which there are no easy answers.’<sup>14</sup> These answers appear to be even more difficult when the individual standing on one side of the equation happen to be a migrant. Importantly, this instability and difficulty is not only ideological in its nature, but it also pervades the applicable legal standards that I will describe below. The uncertainty at the level of technical legal argumentations employed in the judgments is one of the major concerns in this article.

The rights of migrants have entered the ECHR through various channels, which in itself is an indication of the progressive role of the Court in this area. More specifically, the provisions of the Convention that have become sites for contestation between migrants’ rights and states’ migration control interests are Article 3 (torture, inhuman and degrading treatment) that incorporates an implied prohibition on *refoulement*,<sup>15</sup> Article 8 (private and family life),<sup>16</sup> Article 5(1)(f) (immigration detention),<sup>17</sup> Article 4 (slavery, servitude and forced labour),<sup>18</sup> and Article 4 from

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<sup>13</sup> N Walker, ‘Populism and Constitutional Tension’ *International Journal of Constitutional Law* (forthcoming).

<sup>14</sup> N Walker, ‘Populism and Constitutional Tension’ *International Journal of Constitutional Law* (forthcoming).

<sup>15</sup> *Hirsi Jamaa and Others v. Italy*, [GC] Application No. 27765/09, 23 January 2012.

<sup>16</sup> See further below.

<sup>17</sup> C Costello, *The Human Rights of Migrants and Refugees in European Law* (Oxford University Press, 2016) 279.

<sup>18</sup> *Chowdury and Others v. Greece*, Application No. 21884/15, 30 March 2017. See V Stoyanova, *Human Trafficking and Slavery Reconsidered. Conceptual Limits and States’ Positive Obligations in European Law* (Cambridge University Press, 2017).



Protocol No. 4 to the Convention (collective expulsion of migrants).<sup>19</sup> All of these provisions raise complex questions as to the standards applied and the structure of the legal reasoning followed. To make the analysis manageable and to engage with the above-posted questions in a sufficiently detailed way, I would like to focus on the right of migrants to family life as protected by Article 8 of the ECHR.

The reasons for this choice are of various nature. First, the right to family life is a qualified right that prompts a proportionality analysis. Within the framework of this analysis, states' interests have to be identified and opposed to the individual interests. This is essential for present purposes since it offers us a clear picture of how the confrontation of these interests plays out in the structure of the technical reasoning deployed by the Court. Second, since Article 8 has produced a rich judicial output in areas unrelated to the rights of migrants, it is possible to compare the structure of reasoning and the analysis in cases where migration is not an issue. This will allow me to have a critical comparative lens through which to view the applicability of Article 8 to migrants. Third, the right of migrants to family life has been shaped by a unique judicial tool used by the Court: the test of exceptionality. Fourth, very often, the migrant cases under Article 8 involve individuals who in practical terms are part of the fabric of the host society and, in this sense, it could be argued that their deportation raises serious moral issues.<sup>20</sup> Fifth, more often than not, the interests of formal members (i.e. citizens) of the host country are affected by the exclusion and deportation of their migrant family members, which not only exacerbates the moral issues, but it also influences the technical legal argumentation. Finally, the right to family life takes us away from emergency types of situations (e.g. max influx of migrants), where it might be easier to argue that the sway of states' migration interests should be given more priority. Article 8 thus helps us to analyze how normally the rights of migrants are adjudicated. In this sense, no exceptional circumstances could be invoked and no crisis arguments could be utilized for more restrictive approaches.

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<sup>19</sup> *N.D. and N.T. v. Spain*, Application No.8675/15 and 8697/15, 3 October 2017.

<sup>20</sup> Here I draw from Bosniak. L. Bosniak, *The Citizen and the Alien. Dilemmas of Contemporary Membership* (Princeton University Press, 2006)

To respond to the posted questions, I will take the following steps. First, I will briefly describe the classic proportionality analysis for adjudicating qualified rights (Section 2). Second, while acknowledging the specificities of the ECHR, I will juxtapose the classic proportionality model with the Article 8 reasoning in the migration cases. I will point out the divergences and the additional layers of restrictiveness added by the Court (Section 3). Finally, I will discuss the utilization of a tool, i.e. procedural review, that the Court has used to avoid engagement with politically sensitive issues. While acknowledging its benefits, I will also highlight the risk ensuing from this tool (Section 4). The central argument that emerges is that the Court is very restrained and any populist attacks against it are unsubstantiated. The Court sides with the sovereign. Not only this, but I also air a note of caution for the Court itself. In its restraint to exercise resistance against the sovereign, it is dangerously getting close to utilizing populist tools.

## **2. Proportionality: the Core of Human Rights Law**

Article 8 of the ECHR stipulates that

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

This provision has a bifurcated structure that channels the analysis into two steps: whether the definitional threshold has been triggered through an interference with the applicant's family life (a threshold that is usually passed) and whether this interference can be justified. The second question prompts a proportionality analysis. In their

influential works, Alexy,<sup>21</sup> Barak<sup>22</sup> and more recently Möller<sup>23</sup> have developed a theoretical model of the steps that need to be incorporated in this analysis. More specifically, this model prompts an enquiry into four questions in the context of Article 8 of the ECHR. First, for what purpose has the right been limited (national security, public safety, economic well-being of the country etc.)? Second, is there a rational connection between the purpose and the means used for restricting the right (the test of suitability)? Third, are there any less intrusive means that would achieve the same end (the less restrictive means test)?

The less restrictive means test merits some further elaboration. It presupposes a comparison of different suitable means and an evaluation as to which is less restrictive from the perspective of the right.<sup>24</sup> The rationale behind the less restrictive means test is to prevent unnecessary restrictions when the general interests (as outlined in the limitation clause of Article 8(2) ECHR) can be equally well protected through other means. Although a means can be effective in terms of satisfying competing rights or public interests, it might be too intrusive given the availability of other less intrusive means.<sup>25</sup> There is thus a variety of means to protect public interests and the test presupposes choosing a less restrictive (more protective) one from the perspective of the right affected. The test imposes no requirement that the *least* intrusive or best possible option must be chosen.<sup>26</sup> As Hickman explains, the test only applies where ‘there are alternative means available that better advance the objective of the law or decision in

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<sup>21</sup> R Alexy, *A Theory of Constitutional Rights* (OUP, 2010); R Alexy, ‘Constitutional Rights, Balancing and Rationality’ 16(2) *Ratio Juris* (2003) 131.

<sup>22</sup> A Barak, *Proportionality. Constitutional Rights and their Limitations* (Cambridge University Press, 2012).

<sup>23</sup> K Möller, *The Global Model of Constitutional Rights* (Oxford University Press, 2012).

<sup>24</sup> J Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (2009) 114; A Sweet and J Mathews, ‘Proportionality Balancing and Global Constitutionalism’ 47 *Columbia Journal of Transnational Law* (2008-2009) 72, 95; Mattian Kumm, ‘Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice’ 3(2) *International Journal of Constitutional Law* (2004) 574, 580; E Brems and L Lavrysen, “Don’t Use a Sledgehammer to Crack a Nut”: Less Restrictive Means in the Case Law of the European Court of Human Rights’ 15 *Human Rights Law Review* (2015) 139, 142.

<sup>25</sup> T Gunn, ‘Deconstructing Proportionality in Limitation Analysis’ 19 *Emory International Law Review* (2005) 465, 495.

<sup>26</sup> T Hickman, ‘Proportionality: Comparative Law Lessons’ 12(1) *Judicial Review* (2007) 31, 42; S Choudhry, ‘So What is the Real Legacy of *Oakes*? Two Decades of Proportionality Analysis under the Canadian Charter’s Section 1’ 34 *Supreme Court Review* (2006) 501, 507.

question, or where it will achieve the objectives equally as well.’<sup>27</sup> In other words, no alternative would exist unless it is considered as effective as the means already adopted.<sup>28</sup> This relates to the lurking danger that the least drastic means test could be an assault against the state’s purpose since the existing alternatives might be so impractical as not to afford the state any choice but to abandon its purpose.<sup>29</sup> In addition, decisions concerning alternatives and their effectiveness are taken from the perspective of a particular applicant in the particular case; the alternatives, however, can have wide-ranging repercussions for other individuals and in this sense be multidimensional since a multitude of interests might be affected.<sup>30</sup> The search for alternatives requires choices well-suited to the interests of multitude of parties, and not merely a choice most solicitous of the rights of the individuals in the particular case that is adjudicated.

Finally, the fourth step in the proportionality analysis is the so-called test of proportionality *stricto sensu* that implies direct balancing between interests. The guiding principle here is as follows: the greater the detriment to the right, the greater must be the importance of satisfying the state’s objective.<sup>31</sup> This last step can be distinguished from the less restrictive means test in the following way: ‘a measure may be the least intrusive means to achieve a certain end, and yet even the least intrusive measure may be too high a price to pay in terms of the interference with other legally recognized interests.’<sup>32</sup>

It has to be immediately made clear that the ECtHR does not strictly follow the four-step model. However, the model can be partially reconstructed in the actual practice of the Court. In particular, to determine whether an interference is justified under Article 8(2), the Court examines whether the interference is ‘necessary in a

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<sup>27</sup> T Hickman, ‘Proportionality: Comparative Law Lessons’ 12(1) *Judicial Review* (2007) 31, 51.

<sup>28</sup> Gratuitous interferences with individual rights will not be tolerated; if the means advanced by the state can be less onerous with no sacrifice of the ends pursued by the state, the less onerous means must be deployed. A Barak, *Proportionality. Constitutional Rights and their Limitations* (Cambridge University Press, 2012) 321.

<sup>29</sup> R Bastress, ‘The Less Restrictive Alternative in Constitutional Adjudication: An Analysis, a Justification, and Some Criteria’ 27 *Vanderbilt Law Review* (1974) 971, 1020.

<sup>30</sup> Alexy 309.

<sup>31</sup> R Alexy, 102

<sup>32</sup> R Alexy, xxxi.

democratic society' for one of the legitimate aims specified in Article 8(2).<sup>33</sup> This question prompts an examination as to

whether there existed a *pressing social need for the measure in question* and, in particular, whether the interference was proportionate to the legitimate aim pursued, regard being to the fair balance which has to be struck between the relevant competing interests in respect of which the State enjoys a margin of appreciation.<sup>34</sup>

The Court has also added that it must decide whether 'the reasons given by the national authorities to justify it [an interference] are 'relevant' and sufficient'.<sup>35</sup> If a measure does not substantially contribute to the achievement of a certain goal, the reasons for introducing it will probably not be 'relevant and sufficient'.<sup>36</sup> In sum, the test of suitability and the final stage of balancing, as analytical steps from the theoretical model, can be reconstructed in the practice of the Court. In contrast, the Court does not consistently apply the less restrictive means test.<sup>37</sup> It rather applies proportionality analysis in a holistic, general and compressed way, looking at all the events and factors together.<sup>38</sup>

Despite the clear diverges between the theoretical model and the practice of the Court, the analytical steps incorporated in the model provide a helpful lens through which to view the work of the ECtHR. The theoretical model provides an important

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<sup>33</sup> *A., B. and C. v. Ireland* [GC], Application No.25579/05, 16 December 2010, para.218. I will not discuss 'in accordance with the law' requirement. For a reference to these standards in a judgment addressing Article 8 and migrants, see for example, *Krasniqi v. Austria*, Application No. 41697/12, 25 April 2017, para.46.

<sup>34</sup> *A., B. and C. v. Ireland* [GC], para.229.

<sup>35</sup> *Sunday Times v. the United Kingdom*, Application No 6538/74, para.62; *Handyside v. United Kingdom*, Application No. 5493/72, para.48-50; *Nada v. Switzerland* [GC], Application No. 10593/08, 12 September 2012, para. 181.

<sup>36</sup> J Gerards, 'How to Improve the Necessity Test of the European Court of Human Rights' 11(2) *International Journal of Constitutional Law* (2013) 466, 467.

<sup>37</sup> E Brems and L Lavrysen, "'Don't' Use a Sledgehammer to Crack a Nut": Less Restrictive Means in the Case Law of the European Court of Human Rights' 15 *Human Rights Law Review* (2015) 139, 144; E Brems, 'Human Rights: Minimum and Maximum Perspectives' 9(3) *Human Rights Law Review* (2009) 349, 363. For a judgment where the Court considered the availability of less restrictive means see *Nada v. Switzerland* [GC], App.no.10593/08, 12 September 2012, para.183.

<sup>38</sup> A Mowbray, 'A Study of the Principle of Fair Balance in the Jurisprudence of the European Court of Human Rights' 10 *Human Rights Law Review* (2010) 289, 315-6.

yardstick for analytical correctness against which the practice of the Court can be juxtaposed. The proportionality model developed by Alexy, Barak and Möller ‘shed[s] light on human and constitutional rights practice more generally,’<sup>39</sup> including on the ECHR rights.<sup>40</sup>

Finally, it is important to observe that although the theoretical model has been tailored to scrutinizing interferences by the state (i.e. violation of negative obligations), it has been also adapted for the purposes of examining state omissions (i.e. failure to fulfill positive obligations).<sup>41</sup> This is important because Article 8 of the ECHR also triggers positive obligations and, as it will become clear below, the Court frames certain types of migration cases as cases invoking positive, rather than negative, obligations.

### **3. Proportionality under Article 8 ECHR in the Migration Cases**

The judgments under Article 8 concerning migrants involve different scenarios.<sup>42</sup> In what follows I will focus on cases involving migrants who try to prevent their removal when they are already on the territory of the host state where they have a family. Prior to examining how the proportionality model described above is reflected in these cases, the binary between positive and negative obligations demands some further elucidation.

#### **3.1. The Positive versus Negative Obligations Dichotomy**

Does the Court examine the migrant cases under Article 8 from the perspective of negative or positive obligations? Does the particular perspective adopted make any difference? In *Jeunesse v. the Netherlands*, the Grand Chamber clarified that in relation to persons with formal residence in the host country that is subsequently withdrawn, the

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<sup>39</sup> M Kumm, ‘Political liberalism and the structure of rights: on the place and limits of the proportionality requirement’ in G Pavlakos (ed.), *Law, Rights and Discourse – The Legal Philosophy of Robert Alexy* (Hart Publishing, 2007) 136.

<sup>40</sup> S Greer, ‘Balancing and the European Court of Human Rights: a Contribution to the Habermas – Alexy Debate’ 63 *Cambridge Law Journal* (2004) 412, 433.

<sup>41</sup> R Alexy, 288; A Barak, *Proportionality. Constitutional Rights and their Limitations* (CUP, 2012) 429-434; K Möller, *The Global Model of Constitutional Rights* (Oxford University Press, 2012) 179.

<sup>42</sup> I will not discuss cases that concern migrants who have committed criminal offences and where the state invokes protection of national security or public order as the legitimate aims pursued with their expulsion. See *Boultif v. Switzerland*, Application No. 54273/00, 2 August 2001; *Üner v. the Netherlands* [GC] Application No. 46410/99, 18 October 2006.

case will be reviewed as a negative obligation case. In such cases, the Court will examine whether the interference (i.e. withdrawal of the residence permit) is justified under Article 8(2).<sup>43</sup> These cases are distinguished from cases where a migrant is present (even for a long period of time) in the host country but his/her presence has never been officially authorized.<sup>44</sup> In the latter type of circumstances, the Court examines whether the host state authorities were under a positive obligations pursuant to Article 8 to allow the person to stay in this way enabling the person to exercise family life. The existence of such an obligation depends on whether ‘a fair balance’ can be struck between the competing interests of the individual and the community as a whole.<sup>45</sup> In sum, the formal migration status of the person is used as the benchmark to determine how the case will be approached: as one of interference where state actions have to be scrutinized from the perspective of proportionality analysis or as one where it needs to be determined whether a positive obligation should be imposed on the state *in the first place*.<sup>46</sup>

It can be remarked that the specific framing of the case, as involving positive or negative obligations, is mere rhetoric that has no impact on the substantive reasoning. Indeed, on some occasions, the Court refuses to specify the lens through which it will examine the case.<sup>47</sup> In addition, the Court has also used as the standard assertion that

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

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<sup>43</sup> *Jeunesse v. the Netherlands* [GC] Application No 12738/10, 3 October 2014, para.104.

<sup>44</sup> *Jeunesse v. the Netherlands* [GC], para.105. See also *Ahmut v. the Netherlands* 28 November 1996, para.63; *Butt v. Norway*, Application No. 47017/09, 4 December 2012, para.78.

<sup>45</sup> *Jeunesse v. the Netherlands* [GC], para.106.

<sup>46</sup> ‘[...] in the context of positive obligations, the margin of appreciation might already come into play at the stage of determining the existence of the obligation, whilst in the context of negative obligations it only plays a role, if at all, at the stage of determining whether a breach of the obligation is justified.’ Dissenting Opinion of Judge Martens in *Gül v. Switzerland*, Application No. 23218/94, 19 February 1996, para.8.

<sup>47</sup> *Nunez v. Norway*, para.69; *Arvelo Aponte v. the Netherlands*, Application No. 28770/05, 3 November 2011, para.35.

had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole.<sup>48</sup>

Despite this assertion, the case law generally suggests that when the case is framed as involving positive obligations, the Court is less scrutinizing and the judicial review is less structured.<sup>49</sup> The reasoning in the positive obligation cases seems to be more fluid. In contrast, when the case is casted as a negative obligation case, the expectation is that higher scrutiny will be exercised.

It needs to be also added that the framing of the case has a communicative purpose – the Court is assuring states that Article 8 of the ECHR does not *per se* trigger obligations in relation to migrants who do not have the right to stay on their territory. This is equally valid for individuals who are only temporary allowed to stay (e.g. applicants for international protection) and whose status is uncertain.<sup>50</sup> This is even more vehemently expressed in the assertion consistently repeated by the Court that ‘Article 8 does not entail a general obligation for a State to respect immigrants’ choice of the country of their residence and to authorise family reunion in its territory.’<sup>51</sup>

Not only can this assertion be seriously challenged from the perspective of human rights law (see further below), but in the migration cases under Article 8 the drawing of the distinction between positive and negative obligations is a device that distorts reality. In particular, the applicants try to resist expulsion since this measure will result in disruption of family life. The act of expulsion itself is a clear action attributable to the state irrespective of the formal migration status of the person. When the case is framed as a positive obligation case, the Court simply negates this reality.

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

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<sup>48</sup> *Jeunesse v. the Netherlands* [GC], para.106.

<sup>49</sup> L. Lavrysen, *Human Rights in a Positive State. Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights* (Intersentia, 2016) 213.

<sup>50</sup> *A.S. v. Switzerland*, Application No. 39350/13, 3 June 2015, para.44-9.

<sup>51</sup> *Nunez v. Norway*, para.70; *Jeunesse v. the Netherlands* [GC], para.107.



[...], the Court reiterates that a State is entitled, as a matter of well-established international law and subject to its treaty obligations, to control the entry of aliens into its territory and their residence there.<sup>52</sup>

The Court introduced this precept in *Absulaziz, Cabales and Balkandali v. the United Kingdom*, the first judgment addressing the rights of migrants under Article 8. In the subsequent cases, it did refer to this principle as one of the factors in the balancing analysis.<sup>53</sup> In the more recent judgments, it has been the starting point that explains not only the legitimate aim pursued by the expulsion measure (see Section 3.2 below), but it also shapes the rest of the analysis. In particular, if migrants' right to family life were to be applied as the right to family life is applied generally by the Court, then the starting assumption will be a very different one. The starting point would be that family members can make choices as to where to reside and this freedom can be limited only in so far as it permitted by Article 8(2).<sup>54</sup> The less restrictive means test will then prompt the decision-maker to search for alternatives that are less intrusive for the applicant. Admittedly, in the migration context, it might well be the case that there is no such alternative that can equally well protect general interests (i.e. the only effective measure is expulsion). However, if the theoretical model were to be followed, it is important that this unavailability of an acceptable less restrictive alternative is made obvious in the reasoning concerning the *specific* person. As I will explain in Section 3.3 below, this is something that the Court avoids doing.

Going back to the dichotomy between positive and negative obligations and the weaker scrutiny in the context of the former, it is important to clarify that when cases are conceptualized as implicating positive obligations, the starting point in the reasoning is that family life can be ensured through various means.<sup>55</sup> Allowing the person to stay is one alternative. Another alternative is moving the whole family to another country or maintaining family life from distance. The latter two alternatives are not simply placed on an equal footing, but they are given priority (see Section 3.5

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<sup>52</sup> *Nunez v. Norway*, para.66.

<sup>53</sup> See, for example, *Berisha v. Switzerland*, Application No. 948/12, 30 July 2013, para.49.

<sup>54</sup> M Dembour, *When Humans Become Migrants. Study of the European Court of Human Rights with an Inter-American Counterpart* (Oxford University Press, 2015) 103

<sup>55</sup> Theoretically, this relates to the alternative and disjunctive structure of positive rights. See Alexy.

below). Respectively, if there is a possibility for the family to move to another country, it is likely that no violation will be found. Disturbingly, the alternative of moving to another country needs to be only theoretically possible since it is not truly subjected to any close scrutiny as to the practical difficulties.<sup>56</sup> The assessment of the alternative by the Court is thus often ‘reality-disconnected.’<sup>57</sup> The option of moving to another country might imply severe costs for the individual; however, since ‘Article 8 does not guarantee a right to choose the most suitable place to develop family life’<sup>58</sup>, an alternative that is *less protective* for the individual is accepted. This is at clear variance with the model described in Section 2, where I showed that human rights law demands a search for an alternative that is less intrusive and more protective for the individual.

As I also alluded in Section 2, the more protective alternative test raises many questions and it is generally not consistently applied by the Court. Still, it constitutes an important signpost of human rights law reasoning that in the migration cases has been not only ignored but in fact reversed. In the following sections, the aberrations in the reasoning in the migration cases will be further highlighted.

### **3.2. The Legitimate Aim Assumed**

What is the legitimate aim that the state pursues when it decides to remove a migrant who has a family in the host state? Exercise of effective immigration control is not among the objectives explicitly enumerated in Article 8(1). However, there are powerful arguments that this is an objective that states can self-evidently pursue.<sup>59</sup> The state is thus generally not required to clearly articulate its aims beyond general and abstract invocation of immigration control prerogatives.

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<sup>56</sup> C Draghici, *The Legitimacy of Family Rights in Strasbourg Case Law: ‘Living Instrument’ or Extinguished Sovereignty?* (Hart Publishing, 2016).

<sup>57</sup> Dissent by Judge Kovler in *Omoregie v. Norway*, Application No. 265/07, 31 July 2008. See also *Useinov v. the Netherlands*, Application No. 61292/00, (dec) 11 April 2006, where the Court invoked the standard of ‘virtually impossible’. In this way, the Court has alluded that any contacts between the applicant and his children after his deportation will have to be ‘virtually impossible’ so that the deportation could be averted.

<sup>58</sup> *Ahmut v. the Netherlands*, Application No. 21702/93, 28 November 1996, para.71.

<sup>59</sup> The inherent right of state to control immigration.

In some instances, however, a more concretely framed aim can be identified in the reasoning. An example to this effect is *Nunez v. Norway*, a case about a migrant woman who obtained a residence permit under false identity and whose expulsion would have implied separation from her two young daughters. The Court stated that '[...] the possibility for the authorities to react with expulsion would constitute an important means of *general deterrence* against gross and repeated violation of the Immigration Act [emphasis added].'<sup>60</sup> General deterrence against breaches of immigration legislation has thus been accepted as a legitimate aim. As a response to the Nunez's argument that she has not committed any serious offences, the Court clarified that:

In the Court's view, a scheme of implementation of national immigration law which, as here, is based on administrative sanctions in the form of expulsion does not as such raise an issue of failure to comply with Article 8 of the Convention. Against this background, the applicant's argument to the effect that the public interest in an expulsion would be preponderant only in instances where the person concerned has been convicted of a criminal offence, be or serious or not, must be rejected.<sup>61</sup>

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

it would be contrary to the public interest to renew the permit, regard being had to the fact that Mr. Berrehab had been allowed to remain in the Netherlands for

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<sup>60</sup> *Nunez v. Norway*, para.71; *Antwi and Others v. Norway*, Application No. 26940/10, 14 February 2012, para.90; *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, Application No. 13178/03, 12 October 2006, para.79.

<sup>61</sup> *Nunez v. Norway*, para. 71; see also *Darren Omoregie and Others v. Norway*, Application No 265/07, 31 July 2008, para.67.

the sole purpose of living with his Dutch wife, which condition was no longer fulfilled on account of the divorce.<sup>62</sup>

The Dutch government invoked in a very general fashion ‘public order’ as a justification. The Court itself reformulated the objective pursued in the following way:

[...] the legitimate aim pursued was the preservation of the country’s economic well-being within the meaning of paragraph 1 of Article 8 [...] the Government were in fact concerned, because of the population density, to regulate the labour market.<sup>63</sup>

In sum, beyond the few judgments where the legitimate aim pursued is more clearly identified, a general invocation of immigration control prerogatives will suffice. This certainly has an impact on how the subsequent analytical steps in the reasoning are applied. More concretely, the proportionality analysis is sapped of its rigour because a very abstract aim is accepted, which makes it difficult to meaningfully scrutinize whether and how the concrete measure (i.e. expulsion of the concrete person) is suitable. The source of this difficulty is that any measure can be suitable for achieving the abstract objective. As I will show below, the Court has avoided this difficulty by simply not applying the suitability test.

### **3.3. The Suitability Ignored**

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

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<sup>62</sup> *Berrehab v. the Netherlands*, Application No. 10730, 21 June 1988, para.10.

<sup>63</sup> *Ibid* para.26

between the measure and the purpose are scrutinised.<sup>64</sup> Immigration control is a goal in itself.

The state is not expected for furnish any factual record that indeed the deportation of, for example, Mr. Berrehab, who was employed and supported himself and his child, is contributory to the preservation of the economic well-being of the Netherlands. Accordingly, no legal justification that holds in the particular case is required. Moreover, it is not even expected from the state to come forward and to explain the rational connection between the measure and the objective. The state is therefore relieved from advancing any specific justification for its action, besides the general and abstract objective of migration control. The state is relieved from answering the question whether there are any particular individual reasons that justify the expulsion of this particular person.

The state's interest in the Court's reasoning is invariable. Consequently, the economic well-being of the country can the objective pursued by the state with the expulsion of an unemployed migrant and with the expulsion of an economically active migrant who provides for himself/herself and his/her family. The contribution of the migrant to the labour market seems to be irrelevant since, pursuant to the reasoning deployed, his/her deportation serves the objective of preserving the national economic well-being in any case. Whether the migrant is a receiver of social benefits and thus a risk of undermining the financial balance of the social security system, is also not pertinent. The existing economic situation in the host country and the unemployment rate do not figure in the analysis since they are accepted to be invariables.

Since the objective of the state and the rational connection between the means used and this objective are not susceptible to factual assessment, the resolution of the case depends on the individual circumstances of the migrant. Therefore, the burden is entirely shifted to the migrant who must demonstrate some individual distinguishing features that could tip the balance in his/her favour. As opposed to the state that does

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<sup>64</sup> See E Hilbrik, *The Proportionality Principle: Two European Perspectives. How Serving the Community Interest Ends up to be in the Individual's Best Interest* (Working paper, 2010).

not have to furnish anything close to factual justifications for its actions, the individual must demonstrate the specificities of his/her case.

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

At this junction, it has to be acknowledged that if a test of suitability were to be seriously applied, this will raise many intricate issues. It needs to be assessed 'how much' a state measure needs to contribute to the aim to pass as suitable and 'how certain' the empirical facts underpinning the suitability assessment must be.<sup>65</sup> Such level of scrutiny might be remotely feasible in practical terms. It can be also objected that such an assessment is not part of the functions of the Court and it is not within its capacity. Alexy's solution to these problems is setting a low threshold for passing the suitability stage, and deferring final answers to the balancing stage.<sup>66</sup> Pursuant to the theoretical mode, at this stage, the degree of certainty required that a measure achieves certain objectives depends on the severity of the harm that the measure causes to the individual. The more severe the harm caused, the more reliable must be the underlying empirical evidence. In the Court's reasoning in the migration cases under Article 8, the severity of the harm inflicted is indeed part of the calculus (see Section 3.5); however, this is in no way placed in proportionate relation with the reliability of the empirical evidence substantiating the aim pursued with the expulsion.

The problem that I try to underscore here is that not even a low empirical certainty threshold is applied in the Court's reasoning in the migration cases. The Court does not even require that the national authorities themselves engage with some form of

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<sup>65</sup> As to the question how certain the suitability assessment must be, Alexy has suggested that 'legislators may rely on uncertain but not "evidently false" claims'. R Alexy, 'Formal Principles: Some Replies to Critics' 12 *International Journal of Constitutional Law* (2014) 520-22.

<sup>66</sup> Alexy, 395.

empirical enquiry.<sup>67</sup> This should give us a pause given the existence of empirical data that contradicts the assertions that removals unequivocally serve the economic well-being of the country or act as a general deterrence.<sup>68</sup>

It can be asserted that the goal of removing a migrant in the exercise of effective immigration control is legitimate since for the state to secure the interests and the well-being of its citizens and denizens, a bounded community is necessary. In particular, the effectiveness of the state as a guarantor of rights and freedoms for its citizens and lawful residents presupposes the idea of a bounded community.<sup>69</sup> This seems to be also the reasoning endorsed in the CoE Secretary General report quoted in the beginning of this article where the right of migrants and the social rights of citizens are placed in opposition to each other. The interests of the particular migrant at risk of deportation can be thus placed diametrically opposite to the cluster of individual interests.

Such an opposition and rigid division between the migrant and the members of the bounded community, however, can be also challenged depending on the particular circumstances. Two pertinent examples come to mind. First, it is hardly in the community's interest to have children growing without one parent since he or she has been deported. This kind of damage to the community interest, however, is not at all part of the legal analysis. True, the best interest of the child principle provides a legal path for acknowledging any damage to the children (see Section 3.5). Nevertheless, it needs to be also considered that when children grow without one of the parents, this has wider societal implications.

A second pertinent example that illustrates that the rigid opposition between the migrant's interest and the community's interests might be hard to sustain, relates to the phenomenon of aging population. More specifically, given the aging of the host

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<sup>67</sup> When the objective pursued by the State with the expulsion is preservation of public safety and order, the ECtHR requires that the national authorities evaluate the extent to which the particular migrant actually endangers public safety and order. *Alim v. Russia*, Application No. 39417/07, 27 September 2011, para.96.

<sup>68</sup> F Jaumotte, K Koloskova and S Sazena, *Impact of Migration on Income Levels in Advanced Economies* (International Monetary Fund, 2016).

<sup>69</sup> G Noll, *Negotiating Asylum. The EU Acquis, Extraterritorial Protection and the Common Market of Deflection* (Brill, 2000).

population, it might not be in the community interests to deport young, well-integrated and productive migrants.<sup>70</sup>

In sum, the position of the state tends to be endorsed by the Court in a blanket way and not subjected to any form of scrutiny. The rational connection between the aims and the means is simply assumed. This can be especially disturbing when the values professed by the state are problematic and the good faith of the state to comply with its international obligations is questionable. Given that these are precisely the problems that characterize populist policies, the Court might not be equipped to resist because of the wholesale and blanket acceptance of the state position. In the light of the Court's unwillingness to engage in any empirical assessment, the Court accepts the state's position that expulsion is the only means for immigration laws to be meaningful.<sup>71</sup> Within this frame, expulsion is the objective pursued and the means used. When these two collide into each other, the proportionality analysis, as a procedural tool (even the more flexible version followed by the Court) for structuring the human rights law reasoning, is undermined. In addition, the judgments appear to reproduce the very same feature that characterize populism: absence of reasoned policies.<sup>72</sup>

Finally, it has to be acknowledged that there is one situation where the Court has challenged the state's position that the expulsion serves the purposes of immigration control. This situation reveals itself when the state has for a long time tolerated the irregular presence of a migrant. Where the state itself has failed to effectively apply its own immigration laws, then the Court is willing to question whether indeed the expulsion serves any immigration control objectives.<sup>73</sup> For example, in *Nunez v. Norway*,<sup>74</sup> *Kaplan and Others v. Norway*,<sup>75</sup> *Antwi v. Norway*<sup>76</sup> and *Jeuness v. the*

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<sup>70</sup> Is Migration Good for Economy? (Organisation for Economic Cooperation and Development, 2014); Why Europe Needs More Migrants?, The Economist, <https://www.economist.com/blogs/graphicdetail/2017/07/daily-chart-6>.

<sup>71</sup> See also C Costello, *The Human Rights of Migrants and Refugees in European Law* (Oxford University Press, 2016) 127.

<sup>72</sup> C Pinelli, 'The Populist Challenge to Constitutional Democracy' 7(5) *European Constitutional Law Review* (2011) 5, 8.

<sup>73</sup> See Partly Dissenting Opinion of Judge Pejchal in *Paposhvili v. Belgium*, Chamber judgment.

<sup>74</sup> *Nunez v. Norway*, para.82.

<sup>75</sup> *Kaplan and Others v. Norway*, Application No.32504/11, 24 July 2014, para.95-6.

<sup>76</sup> *Antwi v. Norway*, para.102.



*Netherlands*,<sup>77</sup> the delay by the state in acting to remove the migrant weighted in favour of finding a violation of Article 8. In particular, the Court has held that in case of such a delay, it is not persuaded that ‘the impugned measures [the expulsion] to any appreciable degree fulfilled the interest of swiftness and efficiency of immigration control that was the intended purpose of such administrative measures.’

### **3.4. The Less Intrusive Means Test Inverted**

As already mentioned in Section 3.1 above, the Court does not search for more protective alternatives in the migration cases; in fact, a less protective and more intrusive alternative (maintaining family life by relocation to another country or from distance) is not only easily accepted, but is also given preference. Not only does the Court never engage with an assessment whether there are alternatives that are less damaging from the perspective of the individual and more protective for the right to family life of migrants, but the Court has incorporated a test in its reasoning that has entirely reversed the logic of the classic proportionality analysis. This is the ‘insurmountable obstacles’ test that prompts the Court to enquire ‘whether there are insurmountable obstacles in the way of the family living in the country of origin of the alien concerned.’<sup>78</sup> This alternative measure (moving the whole family to a different country) is clearly more intrusive and less protective from the perspective of the individual. At the level of the theoretical model, the existence of a more intrusive and less protective measures cannot be part of the analysis, which signals not simply a departure, but also a reversal of the classic proportionality reasoning.

Reassuringly, the ‘insurmountable obstacles’ test is not a conclusive test. It is just one element in the balancing exercise, which means that it can be counterbalanced by other considerations (see Section 3.5 below). Disquietingly, however, the weight attached to the test, in comparison with other relevant factors in the balancing exercise, is clouded with uncertainty.

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<sup>77</sup> *Jeunesse v. the Netherlands* [GC], Application No. 12738/10, 3 October 2014.

<sup>78</sup> *Jeunesse v. the Netherlands*, para.107; *Arvelo Aponte v. the Netherlands*, Application No. 28770/05, 3 November 2011, para.60.

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

### 3.5. The Right as the Exception

The Court has held that

[...] the extent of a State’s obligations [...] will vary according to the particular circumstances of the persons involved and the general interest. [...] important consideration will also be whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host State would from the outset be precarious. The Court has previously held that where this is the case it is likely only to be in *the most exceptional circumstances* that the removal of the non-national family member will constitute a violation of Article 8 [emphasis added].<sup>79</sup>

*Rodrigues da Silva and Hoogskamer* is the first judgment where the Court referred to ‘the most exceptional circumstances’ test. This standard has been repeated in subsequent judgments.<sup>80</sup> In later judgments, the Court has softened the standard to only ‘exceptional circumstances’.<sup>81</sup> This change in language has never been explained by the Court. It is difficult to answer whether the change from ‘the most exceptional circumstances’ to only ‘exceptional circumstances’ signifies a change as to the standard of review.

The ‘exceptional circumstances’ test is triggered when the person has been aware of the precariousness of his/her migration status, which implies that he/she has been also aware that family life might not persist on the territory of the host state. The Court

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<sup>79</sup> See, for example, *Rodrigues da Silva and Hoogskamer v. the Netherlands*, Application No. 50435/99, 31 January 2006, para.39; *Jeunesse v. the Netherlands*, Application No. 12738/10, 3 October 2014, para.108.

<sup>80</sup> *Arvelo Aponte v. the Netherlands*, Application No. 28770/05, 3 November 2011, para.55.

<sup>81</sup> *Jeunesse v. the Netherlands*, para.108.

has never come forward with any explicit explanation to justify this standard that places an additional burden on the applicant and that practically renders the right to family life the exception. Given the conditions under which the test is triggered (i.e. undocumented migration status), it can be assumed that states' interests in exercising effective migration control that presupposes removal of those without the right to stay, justifies the 'exceptional circumstances' standard. Accordingly, the state's aim is given prominence not only in the first stages of the Court's reasoning, which initially weakens the individual's position versus that of the state (Sections 3.2, 3.3 and 3.4 above), but the aim of exercising effective migration control is reintroduced at additional points in the Court's reasoning. This reintroduction works again to the disadvantage of the individual.

Here it needs to be also emphasized that it is this very state that ultimately produces the conditions when the 'exceptional circumstances' standard can be triggered since the host state creates precarious migration statuses<sup>82</sup> or imposes conditions that make migrants susceptible to falling into illegality.<sup>83</sup> In certain circumstances, it intentionally creates precariousness to keep migrants in volatile and uncertain situations.<sup>84</sup> During this timeframe of precariousness, migrants form connections with the host community, have families and children.<sup>85</sup> Pursuant to the Court's reasoning, however, these will be protected under Article 8 of the ECHR only in 'exceptional circumstances.'

This is also evident from the way the Court has framed its task in the examination of the cases. For example, in *Jeunesse v. the Netherlands*, its task was to 'examine whether in the applicant's case there are any exceptional circumstances which warrant a

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<sup>82</sup> C Dauvergne, *Making People Illegal. What Globalization Means for Migration and Law*, (Cambridge University Press, 2008).

<sup>83</sup> This danger emerges from the factual circumstances of *Rodrigues da Silva and Hoogskamer v. the Netherlands*, para.9: the applicant could have applied for a residence permit to reside with her partner in the Netherlands, but owing to the unavailability of documents concerning her partner income, she never made the application.

<sup>84</sup> A pertinent example is the extension of temporary and contingent residence permits to migrant women for the purpose of family unification or family formation. See V Stoyanova, 'A Stark Choice: Domestic Violence or Deportation? The Immigration Status of Victims of Domestic Violence under the Istanbul Convention' *European Journal of Migration and Law* (forthcoming).

<sup>85</sup> See, for example, *Paposhvili v. Belgium*, Application No.41738/10, 17 April 2014, para.149, where the applicant lived in the country for fifteen years without being in possession of a valid residence permit.

finding that the Netherlands authorities failed to strike a fair balance in denying the applicant residence in the Netherlands.’<sup>86</sup> Jeunesse was a Surinamese woman who entered the Netherlands on a tourist visa that she overstayed. Her requests for residence permits were rejected, while in the meantime she got married and had three kids, all of them Dutch nationals. By the time her case was decided by the ECtHR, she had resided 16 years in the Netherlands. Although the Court did find exceptional circumstances that warranted the finding of a violation of Article 8,<sup>87</sup> the above quotation suggests that a fair balance is in principle struck by denying residence permits in such cases. Within this logic, only exceptional circumstances will disrupt this balance and, consequently, result in a violation of the right to family life.

The ‘exceptional circumstances’ test can be linked with another principle that the Court has introduced in its reasoning in the migration cases: ‘persons who, without complying with the regulations in force, confront the authorities of a Contracting State with their presence in the country as a *fait accompli* do not, in general, have any entitlement to expect that a right of residence will be conferred upon them.’<sup>88</sup> The *fait accompli* argument implies that migrants cannot benefit from their own irregular presence in the country. This is in response to the generally held expectation that migrants engage in strategic behavior to circumvent the national immigration legislation. To limit the possibilities for such circumventions and to ensure that migrants do not benefit from breaches of immigration control rules, the Court has invoked the ‘exceptional circumstances’ test.

### **3.5. Balancing**

Since the first steps in the review conducted by the Court do not play any restraining role, the only possibility for the applicant to sway the judgment to his/her favor is offered at the final review stage of balancing. The Court has identified certain factors of relevance for the balancing between the migrant’s interest and the general

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<sup>86</sup> *Jeunesse v. the Netherlands*, para.114.

<sup>87</sup> She lost her Dutch nationality when Suriname became independent; her presence was tolerated for a considerable period of time by the Dutch authorities; she has three children who did not have any links to Suriname; she was the main care-taker and homemaker.

<sup>88</sup> *Rodrigues da Silva and Hoogskamer v. the Netherlands*, para.43.

interest.<sup>89</sup> Some of these factors that have been consolidated in the case law were already mentioned in my analysis above: the insurmountable obstacles test and the exceptional circumstances test. Since these two tests are not treated by the Court as separate and conclusive, they are also included in the balancing exercise in combination with other factors.

One of them is ‘the extent to which family life will be effectively ruptured’. This rupture reveals the severity of the harm caused with the expulsion measure. The possibility for relocating the whole family is of importance here since if such a possibility is available the family life will not be ruptured. This explains why a migrant parent is more likely to succeed in having a favorable judgment to remain to maintain contacts with his/her children when the couple has separated. In case of separation, the other parent cannot be expected to follow him/her to the country of intended removal.<sup>90</sup> The severity of the harm caused with the expulsion can be also related to another factor used by the Court: ‘the extent of the migrant’s ties in the host country’. The more substantial the extent of these ties is, the more harm their disruption causes.

The Court also considers ‘whether there are factors of immigration control (for example history of breaches of immigration law) or consideration of public order weighing in favor of exclusion.’<sup>91</sup> This factor reintroduces states’ aim to maintain effective immigration control, which dominates the previous stages of the reasoning.

A factor that often transpires to be decisive is the best interests of the child. The Court has, however, warned that ‘[w]hile alone they cannot be decisive, such interests certainly must be afforded significant weight.’<sup>92</sup> Children are certainly not a trump card since in many cases the immigration control aim of the state supersedes their interests.<sup>93</sup> In relation to children, the Court has also clarified that

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<sup>89</sup> *Jeunesse v. the Netherlands*, paras.107-9.

<sup>90</sup> *Udeh v. Switzerland*, Application No. 12020/09, 16 April 2013, para.52. *Arvelo Aponte v. the Netherlands*, para.60.

<sup>91</sup> *Jeunesse v. the Netherlands* [GC], para. 107.

<sup>92</sup> *Jeunesse v. the Netherlands* [GC], para. 109.

<sup>93</sup> *Omorie v. Norway*, para.66, where the Court observed that the child could adopt if she were to move to Nigeria with the parents; *Antwi v. Norway*, para.101.

Weighty immigration policy considerations [...] militate in favour of identifying children with the conduct of their parents, failing which there would be a great risk that the parents exploit the situation of their children in order to secure a residence permit for themselves and their children.<sup>94</sup>

This principle is yet another manifestation of how immigration control concerns shape the analysis under Article 8. It implies that in circumstances where children have spent long and important parts of their lives in the host country at the time when their and their parents' migration statuses were precarious, they can be still deported although this is clearly not in their best interest.<sup>95</sup> Such deportations could be averted only in 'exceptional circumstances'. *Butt v. Norway* is illustrative. The applicants were a sister and a brother, born in Pakistan and residing in Norway since ages of ten and eleven respectively. They went to school in Norway and at the time of the ECtHR's judgment were still in the country. In 1995, they received residence permits upon their mother's application that was based on false information that she provided to the national authorities. Since the children were identified with the illegal conduct of their mother, their overall presence in Norway was regarded as precarious despite the absence of any fault on their part. As a consequence, the Court applied the 'exceptional circumstances' test that, as already mentioned, raises the bar very high for finding a violation of Article 8.<sup>96</sup>

#### **4. The Procedural Twist**

In its analysis, the Court uses the above-mentioned factors to build a 'net' of arguments that taken as a whole buttress the outcome. It does not follow a strict structure and it is not clear how much weight each factor has. This argumentative style has given bases for the critique that the way the Court conducts balancing between

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<sup>94</sup> *Butt v. Norway*, Application No. 47017/09, 4 December 2012, para.79; *Kaplan and Others v. Norway*, para.86.

<sup>95</sup> *Kaplan and Others v. Norway*, para.86.

<sup>96</sup> *Butt v. Norway*, Application No.47017/09, 4 December 2012, para.79. In the subsequent paragraph in the judgment (para.80), the Court added that 'the need to identify children with the conduct of their parents could not always be a decisive factor.'

competing interests is erratic and arbitrary.<sup>97</sup> This creates the impression that the Court can always reframe the factual substratum of the case to fit into certain outcome, distinguish the case from previous cases so that no violation is found or highlight some exceptional features of the case that warrant the finding of a violation. This is not that surprising given the awareness of the severe consequences for the human lives involved, on the one hand, and the politically sensitive issues that the cases raise, on the other. An additional layer of sophistication is added with the doctrine of subsidiarity. It has been the standard assertion by the Court that in the striking of a fair balance, between the interest of the individual and of the community, 'the State enjoys a certain margin of appreciation.'<sup>98</sup> The implication from this is the presumption that the national authorities have the primary legitimacy, knowledge and expertise to carry out the delicate balancing of competing interests.<sup>99</sup>

An approach that can mitigate the political sensitivity and, at the same time, respond to concerns as to the subsidiary role of the Court, is proceduralising the issue. The Court has generally manifested a tendency to attach value to the quality of the decision-making process at national level in hard cases with a high degree of sensitivity.<sup>100</sup> Two aspects of the Court's 'procedural turn' can be observed:<sup>101</sup> (1) relying on the quality of national decision-making in the review of the justifications for interferences with Convention rights and (2) setting positive obligations of a procedural nature. Both of them can be observed in the migration cases under Article 8.

As to the first aspect, the Court takes into account whether the domestic process included an assessment and weighting of the relevant factors raised by the particular case. The extension of such procedural protection at national level is an argument that

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<sup>97</sup> T Spijkerboer, 'Structural Instability: Strasbourg Case Law on Children's Family Reunion' 11 *European Journal of Migration and Law* (2009) 271, 280; 'National administrations and national courts are unable to predict whether expulsion of an integrated alien will be found acceptable or not. The majority's case-by-case approach is a lottery for national authorities and a source of embarrassment for the Court.' Dissenting Opinion of Judge Martnes in *Boughanemi v. France*, Application No.22070/93, 24 April 1996, para.4.

<sup>98</sup> *Nunez v. Norway*, para.68.

<sup>99</sup> P Popelier and C Heyning, 'Subsidiarity Post-Brighton: Procedural Rationality as Answer?' 30 *Leiden Journal of International Law* (2017) 5, 9.

<sup>100</sup> J Gerards, 'Procedural Review by the ECtHR: A Typology' in J Gerards and E Brems (eds), *Procedural Review in European Fundamental Rights Cases* (CUP, 2017) 127, 146.

<sup>101</sup> J Gerards, 'Procedural Review by the ECtHR: A Typology' 127, 129.

the Court has used to support its own reasoning in favor of no violation.<sup>102</sup> In alternative, when the national authorities failed to give consideration to a relevant factor, the Court can draw negative inferences from this, which can support the finding of a violation of Article 8. This can be widely observed in the case law in relation to the application of the best interests of the child principle that might not have been considered in the national expulsion proceedings.<sup>103</sup>

The second aspect of the ‘procedural turn’ implies the imposition of a separate obligation upon the national authorities to balance the competing interests within a national procedure that takes into account the relevant factors as developed in the case law of the Court (these factors were explained in Section 3 above). If such a balancing has been done at national level, the Court could refrain from engaging in substantive review given its subsidiarity role.<sup>104</sup> In this sense, the Court abstains from questioning and overruling the proportionality analysis conducted at national level by the responsible national authority.

The relatively recent judgment of *Paposhvili v. Belgium* illustrates this second approach. The applicant complained *inter alia* that his removal would result in his separation from his family. When his case was reviewed by the Chamber of the Court, a substantive balancing analysis was conducted based on the general principles established in the case law. No exceptional circumstances were found and the Chamber concluded that the removal of Mr. Paposhvili would not be a disproportionate measure in breach of Article 8.<sup>105</sup> As opposed to the Chamber that did the balancing exercise on

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<sup>102</sup> See, for example, *Khan v. Germany*, Application No. 38030/12, 23 April 2015, para.55; *Palanci v. Switzerland*, Application No. 2607/08, 25 March 2014, para.63.

<sup>103</sup> *M.P.E.V. and Others v. Switzerland*, Application No.3910/13, 8 July 2014, para. 57-58: ‘The Court puts emphasis on the fact that the Federal Administrative Court, when considering the first applicant’s case, did not make any reference to the child’s best interest’.

<sup>104</sup> Oddny Mjöll Arnardottir, ‘The “procedural turn” under the European Convention on Human Rights and Presumptions of Convention Compliance’ 15(1) *International Journal of Constitutional Law* (2017) 9.

<sup>105</sup> *Paposhvili v. Belgium*, Application No. 41738/10, 17 April 2014, para.145-55.



its own,<sup>106</sup> the Grand Chamber avoided the substantive balancing and proceduralized the issue:

[...] it is not for the Court to conduct an assessment, from the perspective of Article 8 of the Convention, of the impact of removal on the applicant's family life in the light of his state of health. In that connection the Court considers that this task not only falls to the domestic authorities, which are competent in the matter, but also constitutes a procedural obligation with which they must comply in order to ensure the effectiveness of the right to respect for family life. As the Court as observed above (see paragraph 184), the machinery of complaint to the Court is subsidiary to national systems safeguarding human rights.<sup>107</sup>

The Grand Chamber added that the Belgium authorities

[...] would have been required, in order to comply with Article 8, to examine [...] whether, in the light of the applicant's specific situation at the time of removal [references omitted], the family could reasonably have been expected to follow him to Georgia or, if not, whether observance of the applicant's right to respect for his family life required that he be granted leave to remain in Belgium for the time he had left to live.<sup>108</sup>

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

From the perspective of the rights of migrants, the explicit turn to proceduralisation that the Grand Chamber took in *Paposhvili v. Belgium* has advantages and disadvantages. An advantage is that if no substantive balancing has been done at national level, the Court can directly find a violation of Article 8. Such a

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<sup>106</sup> See Concurring Opinion of Judge Lemmens to *Paposhvili v. Belgium* [GC], Application No. 41738/10, 13 December 2016, para.4.

<sup>107</sup> *Paposhvili v. Belgium* [GC], para.224. For an analysis of a similar reasoning under Article 3 of the ECHR, see V Stoyanova, 'How Exceptional must "Very Exceptional Be". Non-refoulement, Socio-Economic Deprivation and *Paposhvili v. Belgium*' *International Journal of Refugee Law* (forthcoming).

<sup>108</sup> *Paposhvili v. Belgium* [GC], para.225.

finding cannot be viewed as that problematic from the perspective of the Court's subsidiary role since ultimately the national authorities have to do the balancing. A disadvantage here is that the migrant's fate remains undetermined because the balancing at national level might eventually turn up not in his/her favor.

The greatest danger emerging from the procedural approach endorsed by the Grand Chamber manifests itself in circumstances when the national authorities have done the balancing and their assessment might be ultimately incorrect. If the Court easily draws positive substantive inferences from good national procedural practice and does not engage itself with substantive review by balancing competing interests, human rights protection at international level can be undermined. When procedural review is used to replace or bar substantive review at international level, there is a risk that substantive right protection will be weakened.<sup>109</sup> This could constitute a further diminishment of the rigor of review that adds to the weaknesses identified in Section 3. It also signals reluctance by the Court to deal with difficult and controversial issues and its preference to push the resolution of these issues to the national level.

There are additional arguments that further support the position that procedural review should be viewed with great degree of caution. Procedural protection at national level in immigration proceedings is in general more limited.<sup>110</sup> Therefore, total reliance on national procedures that are innately weakened due to the absence of robust guarantees appears to be problematic.

At the same time, it has to be also acknowledged that the 'procedural turn' could incentivize national authorities to boost their efforts to provide for better regulation and evidence-based decision-making.<sup>111</sup> This trust in the national authorities, however, can be controversial when these authorities themselves are not willing to fulfill their

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<sup>109</sup> E Brems, 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) 17, 21-2.

<sup>110</sup> As the Court has determined in *Maaouia v. France*, [GC] Application No. 39652/98, 5 October 2000, para.40, Article 6 (the right to fair trial) does not apply to deportation proceedings. Comparative protection is, however, afforded by Article 13 (the right to effective remedy).

<sup>111</sup> J Gerards and E Brems, 'Procedural Review in European Fundamental Rights Cases: Introduction' in J Gerards and E Brems (eds), *Procedural Review in European Fundamental Rights Cases* (Cambridge University Press, 2017) 1, 13.

international obligations or are likely to waive the standards due to populist pressure by making *pro forma* procedural assessments. Therefore, placing the burden on the national authorities to adopt unpopular decisions (preventing deportation due to possible disruption of family life) might lead to diminishment of substantive human rights protection.

The turn towards proceduralisation is something relatively new; it is still in need of development and it does raise controversies among judges.<sup>112</sup> Some of judges at the Court clearly favor a review that involves an assessment of the procedure followed at national level without engaging with substantive balancing under Article 8.<sup>113</sup> *Paposhvili v. Belgium* was anonymously adopted and no judge objected to the reasoning that suggests that the Court will eschew substantive balancing.<sup>114</sup> It remains to be seen whether *Paposhvili* announces a reversal of the Court's practice of conducting its own balancing.

## 5. Conclusion

Going back to the CoE Secretary Report on populism and the proposed remedy therein of strengthening the role of the ECtHR, it needs to be first acknowledged that in the context of the rights of migrants (one of the main targets of populism) the Court has had an important role. The Court has offered a space where reasoned arguments can be advanced as to whether disruption of family life in pursued of immigration control can be justified. This is a space where state actions can be an object of scrutiny. At the same time, however, the space is very limited, which makes it difficult to expect from the Court to offer a strong resistance against states professing populist policies. It is difficult to expect from the Court to resist restrictive trends. The Court is prepared to condone

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<sup>112</sup> T Kleinlein, 'Consensus and Contestability. The ECtHR and the Combined Potential of European Consensus and Procedural Rationality Control' *European Journal of International Law* (forthcoming).

<sup>113</sup> This could be positive for the applicant. See Joint Dissenting Opinion of Judges Ziemele, Tsotsoria and Pardalos in *Arvelo Aponte v. the Netherlands*. It could be also negative for the applicant see Joint Dissenting Opinion of Judges Villiger, Mahoney and Silvis in *Jeunesse v. the Netherlands*. M Bossuyt, 'Judges on Thin Ice: The European Court of Human Rights and the Treatment of Asylum Seekers' 3 *Inter-American and European Human Rights Journal* (2010) 3, 48 (arguing that the Court should limit its role to procedural review).

<sup>114</sup> It can be argued that the Grand Chamber's approach in *Paposhvili v. Belgium* will be restricted to Article 8 cases where migrants try to avoid expulsion due to disruption of family life combined with deterioration of their health.

harsh decisions against migrants and in this sense any populist critique against the Court itself and its reasoning is out of touch with the actual practice of this institution. This is of importance for responding to any populist attacks against the ECtHR.

The space of reasoned arguments does not reflect the rigor of scrutiny as we generally know it in human rights law. One of the main objectives of this article was precisely to show the aberrations in the technical legal reasoning in the migration cases under Article 8. The proportionality model with its subtests was used as the benchmark for highlighting the aberrations and showing the lenient position of the Court. Four anomalies have been discussed. First, the Court does not question the rational connection between the measure (i.e. expulsion of a family member) and the aim that the state pursues. The connection is not subjected to any rational or factual scrutiny. Rather immigration control is the objective in itself; the rational and factual relation between the expulsion of the *particular* person and some of the legitimate objectives indicated in Article 8(2) is simply assumed. With this assumption and the implied premise that the rights of migrants and the rights of others are necessary in opposition, the Court is getting close to utilising populist tools. After all, some of the tools that populism resorts to are precisely unreasoned policies based on uncorroborated facts, which are buttressed by the supposition that there is an inevitable conflict between ‘us’ and ‘them’.

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

Fourth, since the interests of the state in exercising immigration control by expulsions are invariable, the outcome of the balancing exercise is entirely contingent on the individual circumstances of the particular migrant. The adjudication of the migrant cases is underpinned by the assumption that in principle the right balance has

been struck in case of expulsion and only some specific features of the individual could disrupt the balance. When considering the individual circumstances, the Court has identified relevant factors, which is useful; however, since different weight can be attached to different factors in different cases and since it is not entirely clear how the different factors relate to each other, the outcome of the case is unpredictable. This combined with the above discussed weakening of the proportionality analysis leads to the impression that opposite outcomes are legally possible and ultimately political pressures can influence the conclusion.

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

